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The New Major Questions Doctrine

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THE NEW MAJOR QUESTIONS DOCTRINE

DANIEL T. DEACON* & LEAH M. LITMAN†

This article critically analyzes significant recent developments in the major questions doctrine. It highlights important shifts in what role the *majorness* of an agency policy plays in statutory interpretation, as well as changes in *how the Court determines* whether an agency policy is major. After the Supreme Court’s October 2021 term, the “new” major questions doctrine operates as a clear statement rule that directs courts not to discern the plain meaning of a statute using the normal tools of statutory interpretation, but to require explicit and specific congressional authorization for certain agency policies. Even broadly worded, otherwise unambiguous statutes do not appear good enough when it comes to policies the Court deems “major.”

At the same time, the Court has increasingly relied on three new indicia of “majorness” to determine whether an agency rule is major. These include the political significance of or political controversy surrounding an agency policy; the novelty of a policy—i.e., the fact that the agency had never announced a similar policy before; and other, theoretically possible agency policies that might be supported by the agency’s broader statutory rationale.

Understanding how the major questions doctrine operates today is important not only to bring a modicum of clarity to a doctrine often described as radically indeterminate. Unpacking the new major questions doctrine also provides a way to interrogate and evaluate the new major questions doctrine on its own purportedly formalist terms and to assess how the doctrine relates to previously understood institutional and political pathologies. The Court’s new approach allows political parties and political movements more broadly to effectively amend otherwise broad regulatory statutes outside of the formal legislative process by generating controversy surrounding an agency policy. The new major questions doctrine provides additional mechanisms for polarization by judicially solidifying polarization into the courts’ interpretation of statutes. It supplies an additional means for minority rule in a constitutional system that already skews toward minority rule. And it operates as a powerful deregulatory tool that limits or substantially nullifies congressional delegations to agencies in the circumstances where delegations are more likely to be used, and more likely to be effective.

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INTRODUCTION

Stymieing agency efforts to address issues from climate change to the COVID-19 pandemic,¹ the major questions doctrine has emerged as a powerful weapon wielded against the administrative state.² The doctrine's roots extend as far back as

¹ See *West Virginia v. Env'tl Protection Agency*, __ S. Ct. __, 2022 WL 2347278 (June 30, 2022) (invoking major questions doctrine to invalidate EPA regulation designed to curb emissions from greenhouse gasses); *Nat'l Federation of Indep. Bus. v. Dep't of Labor*, 142 S. Ct. 661 (2022) (invoking major questions doctrine to invalidate OSHA regulation designed to address COVID-19).

² See, e.g., Alison Gocke, *Chevron's Next Chapter: A Fig Leaf for the Nondelegation Doctrine*, 55 U.C. DAVIS L. REV. 955, 994 (2022) ("The legal fictions underlying the major questions doctrine (specifically, the 'major questions doctrine as *Chevron* step zero test') and Chief Justice Roberts' jurisdictional exception are poised to become the Court's new nondelegation tests."); Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 1938 (2017) (arguing that the Court's earlier major questions arrogated power to courts and away from administrative agencies).

1994 and arguably before.³ But its shape has morphed significantly over time.⁴ Most recently, the Supreme Court’s October 2021 term saw the doctrine become stronger, more powerful. At the same time, the Court more fully articulated its vision of when the doctrine applies. And at least one thing has become crystal clear: the major questions doctrine has become an important—perhaps the most important—constraint on agency power, particularly when it comes to some of the most pressing problems of our time.

This article critically analyzes significant recent developments in the major questions doctrine. It highlights important shifts in *what role* the majorness of an agency policy plays in statutory interpretation, as well as changes in *how the Court determines* whether an agency policy is major. The major questions doctrine originally operated to shed light on the meaning of a statute.⁵ When an agency promulgated a policy that was dramatic or unexpected, the broader context of the statute, consulted in conjunction with common sense, might indicate that Congress did not intend to license that policy.⁶ In such form, the major questions doctrine (a phrase the Court did not use until last term) was one tool of statutory interpretation among equals. It supplied one piece of evidence—alongside tools such as ordinary meaning, statutory history, and the semantic canons—about the meaning of statutory language read in its overall context.

But it has become something quite different. First, in *King v. Burwell*, the Court used the doctrine as a reason why courts should determine the meaning of statutory language without deference to the agency’s views.⁷ And now, after the October 2021 term, the “new” major questions doctrine operates as a clear statement rule.⁸ It directs courts not to discern the plain meaning of a statute using the normal tools of statutory interpretation, but instead to require explicit and specific congressional authorization for certain agency policies.⁹ Even broadly worded, otherwise unambiguous statutes do not appear good enough when it comes to policies the Court deems “major.”

³ See Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777, 787 (2017) (“Though it had precursors, the majorness inquiry first crystallized in *FDA v. Brown & Williamson Tobacco Corp.* [(1994)].”).

⁴ E.g., Cass R. Sunstein, *There Are Two “Major Questions” Doctrines*, 73 ADMIN. L. REV. 475, 480-82 (2021) (arguing that the Court has deployed two different formulations of the doctrine).

⁵ See Coenen & Davis, *supra* note 3, at 788-91 (describing doctrinal origins and operation).

⁶ See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000); In a slightly different form, the doctrine operated to inform the courts’ analysis of whether the agency’s interpretation was a reasonable one. See *Utility Air Regulatory Group v. Env’tl Protection Agency*, 573 U.S. 302 (2014).

⁷ 576 U.S. 473 (2015).

⁸ See *West Virginia*, 2022 WL 2347278, at *24 (Gorsuch, J., concurring) (describing the Court’s articulation of the major questions doctrine as a clear statement rule); *id.* at *38 (Kagan, J., dissenting) (describing the major questions doctrine as a “get-out-of-text-free card[]”).

⁹ See *id.* at *38 (Kagan, J., dissenting).

At the same time, the Court has increasingly relied on three indicia of “major-ness,” in addition to the costs imposed by the agency policy, to determine whether an agency rule is major. First, the Court has indicated that politically significant or controversial policies are more likely to be major and thus require clear authorization.¹⁰ Second, the Court has signaled that the novelty of a policy—i.e., the fact that the agency had never announced a similar policy before—is a reason to conclude that the policy is a major one.¹¹ Finally, the Court has considered the “major-ness” of other, theoretically possible agency policies not actually before the Court but that might be supported by the agency’s broader rationale in determining whether the agency’s current claim of interpretive authority is major.¹² Again, none of these considerations are reliable proxies or indicators for statutory meaning. But together, they operate as a powerful deregulatory tool and exacerbate several institutional and political pathologies in the constitutional system.¹³

This new major questions doctrine was most clearly on display in the Supreme Court’s end-of-term blockbuster decision in *West Virginia v. EPA*.¹⁴ There, the Court invoked the major questions doctrine to invalidate an EPA regulation that required coal-fired power plants to adopt so-called “generation-shifting” methods in order to shift production to cleaner sources of electricity.¹⁵ The case was the first time the Court actually used the phrase “major questions doctrine,” and it represents the full emergence of the doctrine as a clear-statement rule.¹⁶ The consequence is that “major” agency policies now require “clear congressional authorization.”¹⁷ And the Court made clear that even broadly worded, general grants of

¹⁰ See *NFIB*, 142 S. Ct. at 665 (quoting *Alabama Ass’n of Realtors v. Dep’t of Health & Human Servs.*, 141 S. Ct. 2485, 2489 (2021)); *West Virginia*, 2022 WL 2347278, at *22 (Gorsuch, J., concurring) (explaining that an issue may be major where “certain States were considering” the issue or “when Congress and state legislatures were engaged in robust debates”); *id.* at *16 (majority op.).

¹¹ See *West Virginia*, 2022 WL 2347278, at *13-14 (invoking novelty of the regulation as an indicia of major-ness); *NFIB*, 142 S. Ct. at 666 (“This ‘lack of historical precedent,’ coupled with the breadth of authority that the Secretary now claims, is a ‘telling indication’ that the mandate extends beyond the agency’s legitimate reach.” (quoting *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477, 505 (2010) (internal quotation marks omitted))).

¹² See *Alabama Ass’n of Realtors*, 141 S. Ct. at 2489 (using implications of agency’s theory of authority as indicia of major-ness).

¹³ Cf. *West Virginia*, 2022 WL 2347278, at *38 (Kagan, J., dissenting) (“Today, one of those broader goals makes itself clear: Prevent agencies from doing important work, even though that is what Congress directed. That anti-administrative-state stance shows up in the majority opinion, and it suffuses the concurrence.”); Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 17-28 (2017).

¹⁴ 2022 WL 2347278.

¹⁵ See *id.*; *Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units*, 80 Fed. Reg. 64510-01, 64728 (Oct. 23, 2015).

¹⁶ *West Virginia*, 2022 WL 2347278, at *13. Justice Gorsuch labeled the doctrine as a clear statement rule in his concurrence. See *id.* at *18 (Gorsuch, J., concurring).

¹⁷ See *id.* at *17.

authority are not enough to supply such authorization. Indeed, the Court conceded that “generation shifting” methods “can be described as a ‘system,’” the relevant language in the statute.¹⁸ Much more important to the Court was the policy’s perceived majorness and the fact that it lacked specific congressional approval.

West Virginia also displayed the Court’s new indicia of majorness—the criteria used to assess whether the doctrine applies. The Court made clear that the “political significance” of a rule is evidence of majorness,¹⁹ and it pointed to political disagreement over whether to adopt generation-shifting programs.²⁰ The concurrence, which agreed with the Court’s application of the major questions doctrine, underscored that the agency’s rule was major because “certain States were considering” the issue and “Congress and state legislatures were engaged in robust debates.”²¹ The Court also invoked the novelty of the agency’s regulatory approach in finding it to be a major one,²² and it considered the possible future implications of the agency’s theory of its statutory authority.²³

Understanding how the major questions doctrine operates today is important not only to bring a modicum of clarity to a doctrine often described as radically indeterminate.²⁴ Unpacking the new major questions doctrine also provides a way to interrogate and evaluate the new major questions doctrine on its own purportedly formalist terms and to assess how it relates to previously understood institutional and political pathologies. And we will suggest that, judged in this manner, the doctrine does quite poorly.

This article makes three principal contributions. The first is descriptive and synthetic: The article offers the first account of how the new major questions doctrine

¹⁸ *Id.*

¹⁹ *Id.* at *11 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-60 (2000)).

²⁰ *Id.* at *16 (“‘The importance of the issue,’ along with the fact that the same basic scheme EPA adopted ‘has been the subject of an earnest and profound debate across the country, ... makes the oblique form of the claimed delegation all the more suspect.’” (quoting *Gonzales v. Oregon*, 546 U.S. 243, 267-68 (2006))).

²¹ *Id.* at *22 (Gorsuch, J., concurring).

²² *See id.* at *13-14.

²³ *See id.* at *15 (“[T]his argument does not so much *limit* the breadth of the Government’s claimed authority as *reveal* it.”).

²⁴ *See, e.g.*, Heinzerling, *supra* note 2, at 1938-84, 1986-90 (describing uncertainty in the major questions doctrine); Gocke, *supra* note 2, at 1003 (describing the major questions doctrine as “illusory”); Coenen & Davis, *supra* note 3, at 809-10 (describing lack of clarity in the major questions doctrine); Jonas J. Mast, *Major Questions About the Major Questions Doctrine*, 68 ADMIN. L. REV. 445, 448 (2016) (“More is unclear than clear about the bounds of the major questions doctrine at this stage.”); Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19, 45 (2010) (describing a related interpretive principle as “haphazard”); Natasha Brunstein & Richard L. Revesz, *Mangling the Major Questions Doctrine*, 74 ADMIN. L. REV. 217, 218 (2022) (“What constitutes a major question is as unclear today as it was when Justice Breyer wrote those words in 1986.”); Nathan Richardson, *Antideference*, __ VA. L. REV. ONLINE __ (forthcoming 2022), manuscript at p. 17 (“The most significant and longstanding critique of the major questions doctrine is that its boundaries are unclear, unpredictable, and maybe arbitrary.”).

operates in light of the Supreme Court’s decisions from October term 2021. It shows how the new major questions doctrine functions as a clear statement rule that flips the normal *Chevron* analysis on its head: Instead of deferring to reasonable agency interpretations of ambiguous statutes, the new major questions doctrine holds that even broad, otherwise unambiguous delegations of authority are not enough to support “major” agency policies. The article also excavates the considerations that trigger the application of the major questions doctrine. It shows that the new major questions doctrine places focus on political disagreement about the policy in question, considers whether the agency’s policy represents a novel regulatory approach, and invites courts to conjecture about the potential parade of horrors that may result from the agency’s claim of interpretive authority.

The article’s second contribution is analytic: Identifying how the Court assesses majorness makes it easier to evaluate the new major questions doctrine and to critically assess its likely consequences. Specifically, we suggest that the Court’s new approach allows political parties—or political movements more broadly—to effectively amend otherwise broad regulatory statutes by generating controversy surrounding an agency policy. In other words, if a policy is sufficiently “controversial” due to political resistance, the major questions doctrine operates to effectively narrow the scope of agencies’ authority outside the normal legislative process. This dynamic undermines the purported purpose of the doctrine, which is to channel policy disputes into legislatures.

The third contribution is more broadly conceptual and normative: Unpacking the new major questions doctrine identifies points of connection between the doctrine and previously identified pathologies of the American constitutional system. The new major questions doctrine provides additional mechanisms for polarization—indeed, it judicially solidifies polarization into the courts’ interpretation of statutes.²⁵ And it supplies an additional means for minority rule in a constitutional system that already skews toward minority rule. In these respects and others, the new major questions doctrine exacerbates several important institutional and political pathologies.

Now is an especially important time to unpack and assess the major questions doctrine. In the wake of the Supreme Court’s decision in *Dobbs v. Jackson Women’s Health Organization* overruling *Roe v. Wade*,²⁶ the federal government is reportedly considering and undertaking some administrative responses to secure access to abortion, particularly medication abortion.²⁷ Possible responses include regulatory

²⁵ Cf. Coenen & Davis, *supra* note 3, at 831 (arguing that lower courts application of the version of the major questions doctrine articulated in *King v. Burwell* raised “concerns about major political dysfunction and institutional breakdowns”).

²⁶ ___ S. Ct. ___, 2022 WL 2276808 (June 24, 2022), overruling *Roe v. Wade*, 410 U.S. 113 (1973).

²⁷ See Shira Stein, Fiona Rutherford, and Celine Castronuovo, *White House Touts Abortion Pill as Answer to Roe Reversal But FDA Rules Limit Use*, Bloomberg (June 30, 2022), <https://www.bloomberg.com/news/articles/2022-06-30/white-house-touts-abortion-pill-as-answer-to-roe-reversal-but-fda-rules-limit-use>; Dan Diamond & Rachel Roubin, *Biden official vows action on abortion following ‘despicable’ ruling*, Washington Post (June 28, 2022), <https://www.washingtonpost.com/health/2022/06/28/abortion-access-becerra/>.

action by the Food and Drug Administration,²⁸ and declarations of public health emergencies under the Public Readiness and Emergency Preparedness Act.²⁹ Both responses rely on statutory delegations to agencies.³⁰ These agency responses may be evaluated under the major questions doctrine, making it important to understand what the doctrine is and how it might be applied.³¹

The article proceeds in four Parts. Part I provides a brief overview of different judicial constraints on administrative agencies' authority to interpret and implement federal statutes. Part II provides a synthesis of the new major questions doctrine, focusing on three recent cases, two from the Supreme Court's most recent term and the third from August 2021. Part III then critically evaluates the new major questions doctrine. It argues that the new major questions doctrine undermines the purported formalist basis for the doctrine and exacerbates known pathologies of the constitutional system. The doctrine also effectively hobbles congressional delegations in situations where the benefits of delegation are most clear. This complicates claims that the major questions doctrine may actually work to protect the *Chevron* framework and the administrative state.³² We conclude by illustrating how the new major questions doctrine undermines not only the effectiveness of delegation, but also erodes the conceptual, theoretical justifications for the administrative state.

I. JUDICIAL CONSTRAINTS ON ADMINISTRATIVE AUTHORITY

This Part identifies three doctrinal mechanisms that may limit the authority of federal administrative agencies. Part I.A discusses two limitations that constrain the agency's power to interpret and implement statutes as a matter of statutory interpretation; Part I.B discusses a third limitation—constitutional in form—that would

²⁸ See U.S. Food & Drug Administration, *Mifeprex (mifepristone) Information*, <https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/mifeprex-mifepristone-information>; Risk Evaluation and Mitigation Strategy (REMS) Single Shared System for Mifepristone 200MG, U.S. FOOD & DRUG ADMIN., https://www.accessdata.fda.gov/drugsatfda_docs/remis/Mifepristone_2019_04_11_REMS_Document.pdf.

²⁹ 42 U.S.C. § 247-6d.

³⁰ U.S. GOV'T ACCOUNTABILITY OFF., GAO-08-751, APPROVAL AND OVERSIGHT OF THE DRUG MIFEPREX 5 (2008), <https://www.gao.gov/assets/280/279424.pdf>; Memorandum entitled NDA 20-687 Mifeprex (mifepristone) Population Council, at 1 (Sept. 28, 2000), <http://wayback.archive-it.org/7993/20170113112743/http://www.fda.gov/downloads/Drugs/DrugSafety/Postmarket-DrugSafetyInformationforPatientsandProviders/ucm111366.pdf>; 21 U.S.C. § 355-1(a)(1), (f)(2); 21 U.S.C. § 355(b)(1), (d); 42 U.S.C. § 247-6d.

³¹ Complaint, *Texas v. Becerra*, No. 5:22-cv-00185, Dkt No. 1 (July 14, 2022), <https://www.justsecurity.org/wp-content/uploads/2022/07/Texas-Complaint.pdf> (complaint challenging Department of Health and Human Services Secretary Becerra's post-*Dobbs* guidance on major questions grounds).

³² See, e.g., Nathan Richardson, *Keeping Big Cases From Making Bad Law: The Resurgent Major Questions Doctrine*, 49 CONN. L. REV. 355 (2016).

constrain Congress’s ability to authorize agencies to interpret and implement statutes.

A. Limitations on Chevron: Statutory Interpretation as Constraint on Agencies

The Court has used tools and rules about statutory interpretation to limit agencies’ authority to interpret and implement statutes. These limitations largely relate to the “*Chevron*” framework. Under that framework, courts are generally supposed to defer to administrative agencies’ reasonable interpretations of ambiguous statutory provisions they administer.³³ The formal doctrinal articulation of the *Chevron* framework has two steps.³⁴ The first asks “whether Congress has directly spoken to the precise question at issue.”³⁵ If Congress has directly spoken to the issue, courts follow Congress’s directives. If, however, the statute is ambiguous, courts proceed to the second step, at which point they are supposed to defer to the agency’s interpretation of the statute so long as the agency’s interpretation is a “permissible” or reasonable one.”³⁶

More recently, the *Chevron* framework has fallen out of favor with the Court’s Republican-appointed Justices.³⁷ The Court has accordingly relied on two doctrinal approaches to statutory interpretation that operate to limit *Chevron*, but without formally overruling it.

One method of constraining *Chevron* is by embracing a kind of interpretive hegemony—the Court insists that, when deployed properly, the Court’s methods of statutory interpretation resolve statutory ambiguity and that a statutory provision has a single meaning, sometimes without even citing *Chevron* or relying on its framework.³⁸ Thus, the Court simply declines to conclude that the statute is ambiguous or that Congress has not spoken to the precise question and resolves the interpretive question itself rather than allowing an agency to do so. Although sometimes the Court’s interpretation of the statute may be the same as an agency’s, this method of interpretation still reduces agencies’ interpretive authority because it permits

³³ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

³⁴ Scholars have argued that there are three steps to *Chevron*, including a “Step Zero,” which asks some variation of the question of whether Congress intended to delegate interpretive authority over a given issue to an agency. Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006). Some of the early major questions cases were sometimes understood to fit within this threshold inquiry. Cass R. Sunstein, *There Are Two “Major Questions” Doctrines*, 73 ADMIN. L. REV. 475, 480-82 (2021). Matthew Stephenson and Adrian Vermeule argued that *Chevron* has only one step – asking whether the agency’s interpretation of the statute is reasonable. Matthew Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597 (2009).

³⁵ *Chevron*, 467 U.S. at 842.

³⁶ *Id.* at 843.

³⁷ *E.g.*, *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

³⁸ *See, e.g.*, *American Hospital Association v. Becerra*, 142 S. Ct. 1896 (2022) (maintaining that the Court was “employing the traditional tools of statutory interpretation” to determine whether to uphold the agency’s interpretation of the statute).

agencies to arrive only at a single interpretation of the statute. It does not allow agencies to choose among competing reasonable interpretations.

Taken at face value, there's nothing particularly odd about courts finding statutes to be unambiguous—it's a possibility whenever the *Chevron* framework is deployed. What's more striking is the frequency with which the Supreme Court in particular has found statutes to have only a single, unambiguous meaning in recent terms. In several cases, the Court concluded that Congress had directly spoken to the precise question in ways that ran counter to the agency's interpretation of the statute. In *Encino Motorcars, LLC v. Navarro*, for example, the Court interpreted the Fair Labor Standards Act and held that service advisors at car dealerships were not “salesm[e]n, partsm[e]n, or mechanic[s] primarily engaged in selling or servicing automobiles” under the FLSA, and therefore the agency could not interpret the statute to cover the service advisers. (If the statute did cover service advisers, they would have been entitled to overtime compensation.³⁹) Similarly, in *Esquivel-Quintana v. Sessions*, the Court interpreted the Immigration and Nationality Act to conclude that the California offense of “unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator” did not qualify as “sexual abuse of a minor” under the Immigration and Nationality Act as the Bureau of Immigration Appeals had concluded. As a result, a conviction under the California statute therefore did not make noncitizens eligible for deportation and removal.⁴⁰ In both of these cases, the Court deployed the tools it uses to interpret statutes to conclude that a statute was not ambiguous and foreclosed the agency's contrary interpretation of the statute.

But the Court has also used a similar tactic even when it agrees with an agency's interpretation of a statute. Here, rather than concluding that the agency's interpretation is a permissible, reasonable construction of an ambiguous provision, the Court instead interprets the statute itself as effectively requiring the agency's view. Thus, in *Becerra v. Empire Health Foundation*, the Court concluded that individuals who were eligible for Medicare, but who did not necessarily have all or part of their hospital stays covered by Medicare, counted for purposes of determining a hospital's eligibility for a disproportionate share adjustment under Medicare.⁴¹ The Department of Health and Human Services had taken that view, but rather than deferring to DHHS's interpretation of the statute, the Court stated simply that the regulation “correctly construes the statutory language.”⁴² That phrasing is curious because, under *Chevron*, the agency's interpretation would not have to be correct; in order to be upheld, it would just have to be reasonable. Thus, what the Court appeared to be saying—without really saying it—was that the statute was unambiguously in the agency's favor.

In this first set of cases, no matter whether they reject or uphold an agency's interpretation of a statute, courts do not explicitly take the interpretive issues outside of the *Chevron* framework. Rather, the cases purport to interpret the statutes without disavowing or rejecting the applicability of the *Chevron* framework. The

³⁹ 138 S. Ct. 1134 (2018).

⁴⁰ 137 S. Ct. 1562 (2017).

⁴¹ ___ S. Ct. ___, 2022 WL 2276810 (June 24, 2022).

⁴² *Id.* at *6.

second way of constraining agencies' authority to interpret and implement statutes more expressly modifies the normal *Chevron* framework. In these cases, the Court has suggested either that the issue should not be analyzed using the *Chevron* framework because Congress did not authorize agencies to resolve a major issue,⁴³ or that the *Chevron* analysis operates differently because of the agency policy is a major one. In this respect, these cases operate somewhat in tension with the *Chevron* framework, rather than being ordinary applications of it.⁴⁴

These cases have come to be known as the major questions doctrine. Though it has roots in earlier cases such as *AT&T v. MCI* and *Benzene*, the major questions inquiry was clearly incorporated into the *Chevron* framework in *FDA v. Brown & Williamson Tobacco Corp.*⁴⁵ There, the Court concluded that “Congress has directly spoken to the question” of whether the Food and Drug Administration had the authority to regulate tobacco products under the Food, Drug, and Cosmetic Act. The Court held that the FDA did not have that authority; as part of that analysis, the Court explained that the Court’s analysis at step one of *Chevron* was “shaped, at least in some measure, by the nature of the question presented,” which the Court described as whether the FDA had the authority “to ban cigarettes and smokeless tobacco,” the sale of which constituted a major sector of the American economy.⁴⁶ Notably, the Court made these statements only after seeming to conclude that the statute unambiguously foreclosed on other grounds. And the reasons it gave for its skepticism still sounded in congressional intent: In the Court’s view, the FDCA’s context read in conjunction with other statutes passed by Congress and perhaps a dose of common sense, revealed that Congress did not really intend to authorize something as “major” as the banning of tobacco productions, which the Court took to be the consequence of the FDA’s position.⁴⁷

Subsequently, in *Utility Air Regulatory Group v. EPA*, the Court also seemed to articulate the major questions doctrine in something resembling traditional *Chevron* terms. In that case, the Court evaluated EPA’s conclusion that various greenhouse gases were “air pollutants” for purposes of two Clean Air Act programs and that major stationary sources of greenhouse gas therefore had to comply with those programs’ requirements.⁴⁸ After finding that the statute was ambiguous in the relevant respect, the Court concluded that the agency’s interpretation was “unreasonable”—seemingly at Step Two of *Chevron*—because it “would bring about an enormous and transformative expansion in EPA’s regulatory authority without clear

⁴³ This thread reflected, in part, the intentionalist strand of “*Chevron* step Zero,” which asked whether Congress had delegated to an agency the authority to act with the force of law. See *United States v. Mead Corp.*, 553 U.S. 218, 226-27 (2001); Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 836-37 (2001); Sunstein, *Step Zero*, *supra* note 34, at 187.

⁴⁴ See Coenen & Davis, *supra* note 3, at 787-90, 791-96.

⁴⁵ As other scholars have noted, there were precursors including *MCI Telecomms Corp. v. AT&T*, 512 U.S. 218 (1994), and *Benzene*. See Coenen & Davis, *supra* note 3, at 787.

⁴⁶ *Brown & Williamson*, 529 U.S. at 120, 159-60.

⁴⁷ See *id.*

⁴⁸ 573 U.S. 302 (2014).

congressional authorization” and have significant implications on “the national economy.”⁴⁹

Whereas the Court in *Brown & Williamson* and *Utility Air Regulatory Group* seemed to resolve matters within the *Chevron* framework, in *King v. Burwell* the Court appeared to alter the doctrine so that it operated to take questions wholly outside *Chevron*. In that case, the Court addressed the Internal Revenue Service’s position that it was authorized to issue tax credits to individuals who had purchased health insurance on federally run health insurance exchanges. Early in its opinion, the Court concluded that the IRS’s interpretation was not entitled to *Chevron* deference. Issuing tax credits would involve “billions of dollars in spending each year and affect[] the price of health insurance for millions of people.”⁵⁰ Moreover, in the Court’s view, the IRS was not particularly expert on the matter.⁵¹ On those grounds, the Court announced that it would not defer to the IRS’s view and would undertake the statutory interpretation analysis *de novo*. Applying *de novo* review, the Court found that the statute was ambiguous regarding the availability of tax credits on federal exchanges but that statutory purpose favored their availability.⁵² The Court thus authorized the expenditure of the very same billions of dollars in expenditures that had been the grounds for denying the agency deference. The major questions doctrine did not factor into the Court’s own, independent analysis.

Brown & Williamson, *UARG*, and *King* differ from each other in certain respects, but they also share important similarities. Most importantly, none of those cases purported to conclude that a statute unambiguously granting the agency the authority in question in fact required something more. In *Brown & Williamson*, the Court had seemed to conclude that the statute unambiguously foreclosed the agency’s interpretation prior to turning to the major questions doctrine. *UARG* found the statute neither unambiguously commanded nor precluded the agency’s interpretation before concluding that it was nevertheless unreasonable. And in *King*, the Court ultimately *accepted* the agency’s interpretation (albeit without granting the agency deference) after finding that the statute was ambiguous and turning to purpose. That similarity serves to highlight one major difference between how the major questions doctrine has been deployed in the past and how it looks coming out of October term 2021. But before turning back to the major questions doctrine, it’s necessary to briefly discuss one further limit on agencies’ authority.

B. Non-Delegation: Constitutional Law as Constraint

Another tool the Court might use to constrain agencies’ authority to interpret and implement statutes is the nondelegation doctrine. While the nondelegation doctrine has only been used in two cases that were decided in a single year, the doctrine

⁴⁹ *Id.* at 322-24.

⁵⁰ *King*, 135 S. Ct. at 2489.

⁵¹ *Id.*

⁵² *Id.* at 2496.

has found a receptive and interested audience among several Justices on the current Supreme Court.⁵³

Under the nondelegation doctrine, Congress may not delegate its legislative power. But for almost 150 years after the founding, the federal courts did not invalidate statutes on the ground that they delegated too much authority to establish rules or regulations.⁵⁴ Then, in 1935, the Court invalidated two federal statutes on nondelegation grounds.⁵⁵ In *Panama Reining Co. v. Ryan*, the Court held that a provision of the National Industrial Recovery Act unconstitutionally delegated authority to the President to prohibit the transportation of oils taken above established quotas.⁵⁶ And in *A.L.A. Schechter Poultry Corp. v. United States*, the Court held unconstitutional another provision in the National Industrial Recovery Act authorizing the President to approve “codes of fair competition” proposed by certain trade associations.⁵⁷

Since those cases, the Court has not invalidated any statute on the ground that it delegates too much power to other entities. The Court has instead used a deferential test to determine whether a delegation is excessive: Congress need only provide an intelligible principle to guide the agency’s discretion, and most statutory guidance will count. Indeed, the Court has found that merely directing agencies to regulate in the public interest or to adopt standards requisite to protect the public health suffice as intelligible principles.⁵⁸

The Justices’ renewed interest in policing congressional delegations to agencies became evident in *Gundy v. United States*.⁵⁹ *Gundy* rejected a nondelegation challenge to a provision of the Sex Offender Registration and Notification Act that authorized the Attorney General to apply the requirements of the Act to persons convicted of sex offenses before SORNA was enacted. Writing for a plurality of four Justices, Justice Kagan applied the intelligible principle standard and also defended it.⁶⁰ In dissent, Justice Gorsuch indicated he would have overruled the intelligible principle standard and placed greater limits on Congress’s ability to delegate issues to agencies.⁶¹ In that conclusion Gorsuch was joined by Justice Thomas and Chief Justice Roberts.⁶² Justice Alito voted to reject the nondelegation challenge in *Gundy*, but he expressed an openness to revisiting the intelligible principle standard in a future case when doing so would not result in an evenly divided Court (the Court

⁵³ Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 278-79 (2021).

⁵⁴ Mortenson & Bagley, *supra* note 53, at 282-83; Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379, 422-24 (2017).

⁵⁵ The Court expressed nondelegation concerns about another statute that it invalidated on commerce clause grounds. *Carter v. Carter Coal*, 298 U.S. 238, 311-12 (1996).

⁵⁶ 293 U.S. 388, 430 (1935).

⁵⁷ 295 U.S. 495, 541-42 (1935).

⁵⁸ *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 473-76 (2001).

⁵⁹ 139 S. Ct. 2116 (2019).

⁶⁰ *Id.* at 2123, 2129-30 (opinion of Kagan, J.).

⁶¹ *Id.* at 2136 (Gorsuch, J., dissenting).

⁶² *Id.*

heard oral argument in the case before Justice Kavanaugh was confirmed).⁶³ Subsequently, in a statement regarding a denial of certiorari in another case, Justice Kavanaugh indicated an openness to reviving the nondelegation doctrine.⁶⁴

Whereas the statutory interpretation cases conclude that Congress *has not* authorized an agency to interpret or implement a statute in a particular way, the nondelegation doctrine maintains that Congress sometimes *cannot* invest agencies with power. In particular, Congress cannot invest agencies with authority without supplying them with adequate limits on their discretion. Just what those limits are may well change in the coming years.

II. A NEW CONSTRAINT: THE NEW MAJOR QUESTIONS DOCTRINE

This Part unpacks the three most recent cases in which the Court has used the major questions doctrine, all from the October term 2021 or the summer before. It shows how the Court appears to be using the major questions doctrine not as one tool among many to interpret a statute, but rather as rule that alters the very enterprise of statutory interpretation. It also highlights how the Court assesses whether a policy is major. Part II.A unpacks the cases; Part II.B synthesizes and compares them to previous major questions cases and other ways of constraining agencies' interpretive authority.

A. The Evolving Major Questions Doctrine

This Part discusses the evolution of the major questions doctrine over October term 2021. That evolution was precipitated by a challenge to the Center for Disease Control's eviction moratorium, and it continued on through challenges to the Occupational Safety and Health Administration's test-or-vaccine policy and the Environmental Protection Agency's authority to tackle climate change under the Clean Air Act.

1. CDC Eviction Moratorium

The Court's refashioning of the major questions doctrine began with a case challenging the Center for Disease Control's moratorium on evictions—a policy created as a response to the coronavirus pandemic.⁶⁵ The Public Health Service Act authorizes the Surgeon General, with the approval of the Secretary of Health and Human Services:

to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or

⁶³ *Id.* at 2131 (Alito, J., concurring in the judgment).

⁶⁴ *Paul v. United States*, 140 S. Ct. 342 (2019) (Kavanaugh, J., respecting the denial of certiorari).

⁶⁵ *Alabama Association of Realtors v. Dep't of Health & Human Servs.*, 141 S. Ct. 2485 (2021).

possession. For purposes of carrying out and enforcing such regulations, the Surgeon General may provide for such 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 his judgment may be necessary.⁶⁶

In the challenge, the six Justices appointed by Republican presidents all (apparently) concluded that the Public Health Service Act did not authorize the CDC to establish an eviction moratorium on evictions in high-transmission areas as the pandemic entered into one of its spikes.⁶⁷ In the section discussing the merits of the challenge, the Court started with a single paragraph asserting that the “broad authority” granted to the CDC in the statute’s first sentence was narrowed by the statute’s second sentence, which listed particular measures the CDC could take to control diseases.⁶⁸ That paragraph contains the extent of the Court’s interpretation of the statute without reference to the major questions doctrine.

After acknowledging the statutory text, the Court framed the next several paragraphs around its articulation of the major questions doctrine, seemingly as something like an alternative basis for the Court’s holding. The Court declared that “[e]ven if the text were ambiguous,” “the sheer scope of the CDC’s claimed authority ... would counsel against the Government’s interpretation.” That is because, the Court explained, the Court “expect[s] Congress to speak clearly when authorizing an agency to exercise powers of ‘vast economic and political significance.’”⁶⁹

The Court then spent paragraph after paragraph explaining why it believed the eviction moratorium compromised various constitutional values, apparently to explain why the issue or rule in the case was major.⁷⁰ The Court explained that the “‘vast economic ... significance’” of the moratorium stemmed in part from the “‘financial burden[s] on landlords.’”⁷¹ But the Court also pointed to the potentially dramatic future consequences that may occur if the agency’s assertion of authority was upheld. The Court claimed that, under the Government’s interpretation, “It is

⁶⁶ 42 U.S.C. 264(a).

⁶⁷ The decision was a per curiam opinion issued on the shadow docket and the only three Justices noting their dissents were Justices Breyer, Sotomayor, and Kagan.

⁶⁸ 2021 WL 3783142, at *3.

⁶⁹ *Alabama Ass’n of Realtors v. Dep’t of Health & Human Servs.*, 141 S. Ct. 2485, 2489 (2021).

⁷⁰ In balancing the equities in the case, the Court asserted that “preventing [landlords] from evicting tenants who breach their leases intrudes on one of the most fundamental elements of property ownership—the right to exclude.” *Id.* The Court also claimed that the moratorium implicated values of federalism and intruded on states’ authority, since the states primarily regulate “the landlord-tenant relationship.” *Id.* The Court explained that “Our precedents require Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property.” *Id.* (quoting *United States Forest Serv. v. Compasture River Preservation Ass’n*, 140 S. Ct. 1837, 1850 (2020)).

⁷¹ *Id.*

hard to see what measures this interpretation would place outside the CDC's reach," since "the Government has identified no limit in § 361(a) beyond the requirement that the CDC deem a measure 'necessary.'"⁷² The Court also relied on the novelty of the moratorium as an indication of its majorness: The Court noted that the moratorium was "unprecedented," even though there has not been a similar pandemic since 1944, when the statute was enacted.⁷³

In some ways, the eviction moratorium case was in line with major questions cases that came before. For one, the Court claimed that the text leaned against the agency even absent invocation of the major questions doctrine. But part of what is notable about the opinion was the relative space given to ostensibly interpretive tools—reading the grant of authority to the CDC in light of the statute's specific examples of measures the agency could take—versus the Court's reasons for concluding the rule was major, such as the novelty of the regulation and the breadth of the Government's theory of agency authority. The former modes of analysis speak to the meaning of the text; the latter, by contrast, may not—they instead provide substantive reasons why the Court should avoid interpreting the text in a particular way. And the relative airtime given to the latter compared to the former suggested that the Court's proffered reasons for skepticism of the agency's regulation had considerable sway in the outcome.

2. *Vaccine Cases*

The major questions doctrine appeared to be an even more significant driver of the Supreme Court's decision regarding the Occupational Safety and Health Administration's emergency temporary standard issued in response to the COVID-19 pandemic. The standard required indoor workplaces with more than 100 employees to adopt a testing and masking regimen, or, alternatively, establish a vaccination requirement.⁷⁴ The Court stayed the OSHA regulation, and both the per curiam majority opinion and Justice Gorsuch's concurrence relied heavily on the idea that the rule represented a major policy requiring particularly clear authorization. Of note, one of the main reasons that the opinions treated the policy as major was because it was politically controversial nature.

Enacted in 1970, the Occupational Safety and Health Act "authoriz[ed] the Secretary of Labor to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce."⁷⁵ Congress stated that one of the statute's objectives was to "develop[] innovative methods, techniques, and approaches for dealing with occupational safety and health problems"⁷⁶; another was to "achiev[e] safe and healthful working conditions."⁷⁷ To that end, the Act author-

⁷² *Id.*

⁷³ *Id.* at *4.

⁷⁴ *Nat'l Fed. Of Indep. Bus. v. Dep't of Labor, Occupational Safety & Health Admin*, 142 S. Ct. 661 (2022).

⁷⁵ 29 U.S.C. § 651(b)(3).

⁷⁶ 29 U.S.C. § 651(b)(5).

⁷⁷ 29 U.S.C. § 651(b)(2), (b)(1).

izes the Secretary of Labor to “promulgate[]” “occupational safety or health standard[s],”⁷⁸ meaning a standard that is “reasonably necessary or appropriate to provide safe or healthful employment and places of employment.”⁷⁹

While occupational safety or health standards generally must go through the ordinary regulatory process, including notice and comment, the OSH Act also authorized the agency to issue “an emergency temporary standard to take immediate effect” if the Secretary “determines (A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger.”⁸⁰ In response to the coronavirus pandemic, OSHA issued an emergency temporary standard requiring employers with at least 100 employees to require that employees working indoors at a workplace with at least 100 employees either (1) be vaccinated against COVID-19 or (2) take a weekly COVID-19 test and wear a mask at work.⁸¹

The per curiam majority opinion in *NFIB v. DOL* concluded that OSHA’s rule was not authorized under the statute’s general grant of regulatory authority.⁸² For the first time in the doctrine’s history, the Court framed its entire analysis of the statute around the major questions doctrine. In the opening paragraph of the section beginning that analysis, the Court declared that OSHA’s rule was “no ‘everyday exercise of federal power,’” but rather “a significant encroachment into the lives—and health—of a vast number of employees.”⁸³ And, picking up on language from the CDC case, the Court described the consequence of that determination: “We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance.”⁸⁴ The Court declared that there was “little doubt” that OSHA’s rule “qualifies as an exercise of such authority.”⁸⁵

Unlike the eviction moratorium case, where the Court introduced the major questions analysis as an alternative basis after seeming to conclude that the statute unambiguously foreclosed the agency’s interpretation, the Court made clear from the outset that it was applying a particular approach to interpreting the OSH Act because the Court had concluded that OSHA’s rule was of “political significance” and therefore a major question. That conclusion drove the standard the Court applied to interpreting the statute: Because the rule was major, the Court explained, “[t]he question . . . is whether the Act plainly authorizes the Secretary’s mandate.”⁸⁶

⁷⁸ 29 U.S.C. § 655(a).

⁷⁹ 29 U.S.C. § 652(8).

⁸⁰ 29 U.S.C. § 655(c)(1).

⁸¹ 86 Fed. Reg. 61551-61553.

⁸² The majority did not limit its conclusion to the agency’s statutory authority to promulgate emergency temporary standards. *NFIB*, 2022 WL 120952, at *4 n.1.

⁸³ *NFIB*, 142 S. Ct. at 665 (quoting *In re MCP No. 165*, 20 F.4th at 272 (Sutton, C.J., dissenting)).

⁸⁴ *Id.* (quoting *Alabama Assn. of Realtors v. Department of Health and Human Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam)).

⁸⁵ *Id.*

⁸⁶ *Id.*

The Court’s subsequent statutory analysis was mostly contained in a single paragraph that consisted of three short sentences of analysis, much of which relied on italicization and emphasis. The Court substantiated its conclusion that the OSH Act empowered the Secretary “to set *workplace* safety standards, not broad public health measures,”⁸⁷ by citing two provisions in the Act, one of which referred to “occupational safety and health standards,” and the other to “employees.”⁸⁸ (The Court italicized the word “occupational” in “occupational safety and health standards” to make the point.⁸⁹) The Court confirmed this conclusion by gesturing toward provisions in the Act that “speak to hazards that employees face at work.”⁹⁰ (One provision refers to “working conditions,”⁹¹ another to “work situations,”⁹² and another to “workplace or environment where work is performed.”⁹³)

The problem, however, is that no one, including the majority, could reasonably contest that COVID-19 exists in the workplace, or that COVID-19 can pose a danger in the workplace.⁹⁴ The outcome of the case therefore hinged on the Court’s further conclusion that OSHA could address only those dangers that are *unique to* or *particular to* the workplace, relative to other places that a person might go. The majority stated that OSHA could not regulate COVID-19 in the workplace generally because COVID-19 was not a danger unique to the workplace as such: The majority explained that “COVID-19 can and does spread at home, in schools, during sporting events, and everywhere else that people gather”; it was accordingly a “hazard[] of daily life” and “day-to-day danger.”⁹⁵

So the majority’s observations that the statute requires OSHA to address dangers in the “workplace” or “occupational” dangers did not, standing alone, justify the majority’s interpretation of the statute, even on the Court’s own terms. Instead, the majority concluded that OSHA could regulate only those dangers that are unique to the workplace, or where a risk arises from something particular to the workplace. But those modifiers—unique, only, primarily, particularly—are not contained in the statute. And that appears to be where the major questions doctrine did some work for the majority. In particular, the major questions doctrine allowed the Court to move from the claim that the OSH Act allows OSHA to regulate dangers in the workplace to a related but distinct conclusion that the OSH Act allows OSHA to regulate only those dangers that are unique to the workplace, or somehow uniquely tied to the workplace—even in the absence of statutory language pointing in that

⁸⁷ *Id.* (emphasis in original).

⁸⁸ *Id.* (citing 29 U.S.C. 655(b), 655(c)(1)). *See also id.* (citing 652(8), 654(a)(2), 655(b)-(c)).

⁸⁹ *Id.* (citing 29 U.S.C. 655(b)).

⁹⁰ *Id.*

⁹¹ 29 U.S.C. 653(b)(1)

⁹² 29 U.S.C. 651(a).

⁹³ 29 U.S.C. 657(a)(1).

⁹⁴ *NFIB*, 2022 WL 120952, at *3.

⁹⁵ *NFIB*, 2022 WL 120952, at *3; *see also id.* at *4 (suggesting OSHA could regulate “where the virus poses a special danger because of the particular features of an employee’s job or workplace” where “the danger present in such workplaces differs in both degree and kind from the everyday risk of contracting COVID-19 that all face”).

direction. Although Congress had not explicitly limited OSHA’s authority in that respect, Congress also had not specifically granted OSHA authority to regulate hazards that appear in the workplace but also in other contexts like it, including through measures such as vaccine mandates. And because under the new major questions doctrine the onus is on Congress to explicitly grant authority in its particulars, the doctrine thus operated to terminate the agency’s authority.

The rest of the per curiam opinion’s analysis of the statutory question focused even less on the language in the statute and more on the value-laden interpretive tools that the Court had deployed in the CDC case in order to justify the application of the major questions doctrine. For example, similar to the CDC case, the OSHA opinion noted that OSHA “has never before adopted a broad public health regulation of this kind,”⁹⁶ never mind that there had not been a pandemic of this kind during OSHA’s existence. In doing so, the Court invoked cases suggesting that the novelty of a federal statute is a sign that the statute is unconstitutional, declaring that the “lack of historical precedent” is a “telling indication” that OSHA’s rule “extends beyond the agency’s legitimate reach.”⁹⁷

The majority’s interpretive analysis is also notable for what it does not contain. It has no discussion of the ordinary meaning of the OSH Act provisions under which the agency had acted. Nor are there any dictionary definitions of the statutory terms or phrases the Court focused on.

Justice Gorsuch, joined by Justice Thomas and Justice Alito, wrote a separate concurrence that focused even less on ordinary textualist tools of statutory interpretation to determine whether the OSHA rule was authorized by statute.⁹⁸ First, Justice Gorsuch pointed to Congress’s more recent inaction, and specifically Congress’s failure to enact a vaccination (or testing and masking) requirement while Congress was passing legislation related to COVID-19. He described that as evidence that Congress, in the OSH Act, did not authorize OSHA to enact a vaccination (or testing and masking) requirement.⁹⁹ But the conclusion does not follow from the premise—Congress’s inaction on a vaccine requirement might instead suggest that Congress thought that matter was for the agency to decide. More broadly, subsequent legislative inaction is a deeply atextualist method of statutory interpretation.¹⁰⁰ There are many reasons why Congresses might not act other than failure to support a vaccination requirement. And even if Congress’s inaction did demonstrate that subsequent a subsequent Congress did not support a vaccination requirement, that would not provide particularly good evidence about what an earlier Congress had enacted and authorized the agency to do in the OSH Act. Relatedly, Justice Gorsuch relied on a subsequent resolution of one house of Congress

⁹⁶ *NFIB*, 2022 WL 120952, at *4.

⁹⁷ *NFIB*, 2022 WL 120952, at *4 (quoting *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477, 505 (2010)).

⁹⁸ Cf. Anita Krishnakumar, *Some Bright Thoughts on Gorsuch’s Opinion in NFIB v. OSHA*, Election Law Blog (Jan. 15, 2022), <https://electionlawblog.org/?p=126944> (describing “how stunningly Justice Gorsuch’s concurring opinion (and for that matter, the per curiam opinion) was”).

⁹⁹ *NFIB*, 2022 WL 120952, at *6 (Gorsuch, J., concurring).

¹⁰⁰ See Anita S. Krishnakumar, *Statutory History*, 108 VA. L. REV. 263, 271 (2022).

(the Senate), which had disapproved of OSHA's rule. That too is a form of subsequent legislative history, and it was also adopted by only one chamber of Congress and not signed into law by the President.¹⁰¹

Justice Gorsuch's concurrence also wielded the major questions doctrine in a similar way to how the per curiam opinion relied on the doctrine. It too framed its analysis of the statute around the rule that Congress must "speak clearly" if it wishes to assign to an executive agency decisions "of vast economic and political significance."¹⁰² In addition to the preceding analysis, Justice Gorsuch noted that the OSH Act "was not adopted in response to the pandemic," and that "OSHA arguably is not even the agency most associated with public regulation."¹⁰³ And Justice Gorsuch, like the majority, relied on OSHA's regulatory history, arguing that OSHA had previously adopted "only comparatively modest rules addressing dangers uniquely prevalent inside the workplace, like asbestos and rare chemicals,"¹⁰⁴ which suggested it lacked the power to enact more far-reaching rules.

3. *Climate Cases*

The major questions doctrine emerged in even more realized form in *West Virginia v. Environmental Protection Agency*.¹⁰⁵ The procedural posture and precise challenge at issue in the case are complicated: the Supreme Court was reviewing a D.C. Circuit decision that had vacated two Trump administration rules, one rescinding the Obama Administration's Clean Power Plan, and the second imposing equipment upgrades and operating practices on coal-firing plants.¹⁰⁶ Those rules were promulgated based on the EPA's interpretation of its authority under the Clean Air Act.¹⁰⁷

The Clean Air Act's complicated regulatory scheme authorizes the EPA to establish performance standards for new stationary sources in Section 111. For sources that "cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public welfare," the agency must promulgate "federal standards of performance for new sources."¹⁰⁸ A standard of performance "reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy

¹⁰¹ John Manning has argued that textualist should generally limit the interpretation of statutes to language that made it through the bicameralism and presentment requirements. See John F. Manning, *Textualism As a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 702-31 (1997).

¹⁰² *NFIB*, 2022 WL 120952, at *6 (Gorsuch, J., concurring) (quoting *Alabama Assn. of Realtors v. Dep't of Health & Human Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam)).

¹⁰³ *NFIB*, 2022 WL 120952, at *6 (Gorsuch, J., concurring).

¹⁰⁴ *NFIB*, 2022 WL 120952, at *6 (Gorsuch, J., concurring).

¹⁰⁵ 2022 WL 2347278 (June 30, 2022).

¹⁰⁶ *Id.* at *9.

¹⁰⁷ *Id.*

¹⁰⁸ 42 U.S.C. § 7411(b)(1)(A), 7411(b)(1)(B).

requirements) the [EPA] Administrator determines has been adequately demonstrated.”¹⁰⁹ After the EPA establishes new source standards, it must then address existing sources if they are not regulated under the CAA’s other programs.¹¹⁰

In October 2015, the EPA announced the Clean Power Plan, which consisted of rules for new power plants as well as existing ones. For the existing power plants, the Clean Power Plan included three kinds of requirements—one required practices that would burn coal more efficiently; the other two were “generating shifting” requirements that required some transition to methods of electricity production that emit less carbon dioxide.¹¹¹ The Supreme Court stayed the Clean Power Plan before it went into effect and before a court of appeals decided the lawfulness of the rule;¹¹² the court of appeals later dismissed the pending case against the Clean Power Plan when the Trump administration announced that it was engaged in a new rulemaking to replace it.¹¹³ The two Trump administration rules, one rescinding the Clean Power Plan and the other replacing it, were justified in part on the agency’s view that the Clean Air Act did not authorize it to adopt generation shifting requirements that would require energy producers to use or adopt other methods of energy production to comply with the rules. The U.S. Court of Appeals for the D.C. Circuit vacated the rules on the ground that the agency’s legal premise that it lacked the authority to adopt generation shifting requirements was incorrect.¹¹⁴ The Supreme Court granted certiorari to review that judgment. After rejecting arguments that the challenges to the Clean Power Plan, which had never gone into effect, were nonjusticiable, the Court addressed the arguments about the agency’s statutory authority.

Once again, as in the OSHA case, the Court began its analysis of the agency’s authority under the statutes by framing the entire case around the major questions doctrine. The Court explained that while “[i]n the ordinary case,” the “nature of the question presented” “has no great effect on the appropriate analysis,” in “extraordinary cases,” the Court uses “a different approach.”¹¹⁵ In those extraordinary cases, the Court explained “the ‘history and the breadth of the authority that [the agency] has asserted,’ and the ‘economic and political significance’ of that assertion, provide a ‘reason to hesitate before concluding that Congress’ meant to confer such authority.”¹¹⁶

The Court acknowledged that, in prior major questions cases, the “regulatory assertions had a colorable textual basis.”¹¹⁷ But, the Court declared, it “presume[s]

¹⁰⁹ *Id.* § 7411(b)(1)(A).

¹¹⁰ *Id.* § 7411(d)(1); 80 Fed. Reg. 64711.

¹¹¹ 80 Fed. Reg. 64512, 64662, 64727-64728, 64731-32.

¹¹² *West Virginia v. EPA*, 577 U.S. 1126 (2016).

¹¹³ *West Virginia*, 2022 WL 2347278, at *9.

¹¹⁴ *American Lung Ass’n v. EPA*, 985 F.3d 914 (D.C. Cir. 2021).

¹¹⁵ *West Virginia*, 2022 WL 2347278, at *11.

¹¹⁶ *West Virginia*, 2022 WL 2347278, at *11.

¹¹⁷ *Id.* at *12.

that ‘Congress intends to make major policy decisions itself, not leave those decisions to agencies.’”¹¹⁸ And so, “in certain extraordinary cases,” “something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to ‘clear congressional authorization’ for the power it claims.”¹¹⁹

The majority then proceeded to explain why “this is a major questions case.”¹²⁰ The Court declared that the provision authorizing the agency to regulate existing power plants not already regulated under other EPA programs was an “ancillary provision.”¹²¹ The Court explained that the agency’s assertion of authority “allowed it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself.”¹²² The Court also, once again, relied on the seeming novelty of the agency’s assertion of authority, claiming that prior to 2015, the EPA had only regulated sources by reducing the sources’ pollution, rather than requiring sources to transition to other methods of energy production.¹²³ After characterizing the EPA’s regulatory approach as “unprecedented,” the Court highlighted possible implications of the EPA’s regulatory approach: It explained that if the EPA could require generation shifting, “it could go further, perhaps forcing coal plants to ‘shift’ away virtually all of their generation.”¹²⁴ And the Court characterized it as “surprising” that Congress would have assigned to the EPA the task of “balancing the many vital considerations of national policy implicated in deciding how Americans will get their energy.”¹²⁵

After ticking off all of these reasons for why the agency’s rule was major, the Court declared that “precedent counsels skepticism toward EPA’s claim” that the statutory provision authorizes it to adopt “a generation shifting approach.”¹²⁶ Rather, “the Government must—under the major questions doctrine—point to “clear congressional authorization” to regulate in that manner.”¹²⁷

Having framed the inquiry this way, the Court concluded the statute did not provide such clear authorization. The Court characterized the word “system” as “an empty vessel” and a “vague statutory grant ... not close to the sort of clear authorization required.”¹²⁸ And that was that.

¹¹⁸ *Id.* at *12 (quoting *United States Telecom Ass’n v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc)).

¹¹⁹ *Id.* at *13.

¹²⁰ *Id.* at *13.

¹²¹ *Id.*

¹²² *Id.*; *id.* at *16 (“Congress, however, has consistently rejected proposals to amend the Clean Air Act to create such a program.”).

¹²³ *Id.* at *13-14.

¹²⁴ *Id.* at *15.

¹²⁵ *Id.* at *16, *15.

¹²⁶ *Id.* at *17.

¹²⁷ *Id.*

¹²⁸ *Id.*

Justice Gorsuch concurred, joined by Justice Alito. He characterized the major questions doctrine as a “clear-statement rule[]” that “operates to protect foundational constitutional guarantees,”¹²⁹ and specifically the “separation of powers.”¹³⁰ The major questions doctrine, he wrote, makes sure that Congress resolves major issues through legislation.¹³¹ He explained that “[b]y effectively requiring a broad consensus to pass legislation, the Constitution sought to ensure that any new laws would enjoy wide social acceptance, profit from input by an array of different perspectives during their consideration, and thanks to all this prove stable over time.”¹³² Agency rules, by contrast, “[r]ather than embody a wide social consensus and input from minority voices,” “would more often bear the support only of the party currently in power.”¹³³

Justice Gorsuch also elaborated on what constitutes a major policy. He started by indicating that the doctrine applies “when an agency claims the power to resolve a matter of great ‘political significance’ or end an ‘earnest and profound debate across the country.’”¹³⁴ Writing of the OSHA case in particular, Justice Gorsuch elaborated that the “agency sought to mandate COVID–19 vaccines nationwide for most workers at a time when Congress and state legislatures were engaged in robust debates over vaccine mandates.”¹³⁵ And “when Congress has ‘considered and rejected’ bills authorizing something akin to the agency’s proposed course of action[,] [t]hat too may be a sign that an agency is attempting to ‘work [a]round’ the legislative process to resolve for itself a question of great political significance.”¹³⁶

Applying these principles to the EPA’s claim of authority to adopt generation-shifting requirements, Justice Gorsuch explained, made for “a relatively easy case” because “[w]hether these plants should be allowed to operate is a question on which people today may disagree.”¹³⁷ “Congress has debated the matter frequently” and had declined “to adopt legislation similar to the Clean Power Plan.”¹³⁸

B. *The New Major Questions Doctrine*

This section draws out some similarities and differences between the three recent major questions cases and previous cases in which the Court has invoked the doctrine. While the next Part interrogates and evaluates the new major questions doc-

¹²⁹ *Id.* at *18 (Gorsuch, J., concurring).

¹³⁰ *Id.* at *19, *21 (“Much as constitutional rules about retroactive legislation and sovereign immunity have their corollary clear-statement rules, Article I’s Vesting Clause has its own: the major questions doctrine.”).

¹³¹ *Id.*

¹³² *Id.* at *20.

¹³³ *Id.*

¹³⁴ *Id.* at *22.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at *23.

¹³⁸ *Id.*

trine, this Part seeks to better understand how it works as a mode of statutory interpretation—in part by comparing the doctrine to the previous tools the Court has used, or might use, to constrain agencies’ interpretive authority.

As Justice Gorsuch has stated, the core features of the new major questions doctrine resemble a clear statement rule rather than a method of resolving statutory ambiguity in the traditional sense. Previous major questions cases used the perceived majorness of the issue the agency was resolving in one of three ways. One was as one tool of statutory interpretation to confirm an interpretation of a statute that the Court had already arrived at using other tools of statutory interpretation. Thus, in *Brown & Williamson*, the Court worked through its interpretation of the provision of federal law before also observing that the significance and novelty of the agency’s assertion of authority also supported its interpretation.¹³⁹ In *UARG*, the Court used the majorness of the agency’s regulation as an indicia of unreasonableness—something the *Chevron* framework turns to only if there is statutory ambiguity.¹⁴⁰ And in *King v. Burwell*, the Court concluded that it was for it to decide the statutory question, found the statute ambiguous, and ultimately affirmed the agency’s interpretation.¹⁴¹

In the new major questions cases, by contrast, the majorness of an issue frames—and alters—the entire enterprise of statutory interpretation. Rather than being one factor to consider within the *Chevron* framework or a reason to consider the case without using *Chevron* but also without putting a thumb on the scale either way, the new major questions doctrine flips the entire analysis. The structure of the opinions partially conveys this shift: Whereas *NFIB* and *West Virginia* began their sections on statutory interpretation with an introduction to the major questions doctrine and the standard it established for proving the agency had authority, *Brown & Williamson* concluded its analysis of the statute with an observation about the majorness of the agency’s rule. In *West Virginia* in particular, the Court organized its entire analysis around the interpretive rule it had announced.¹⁴² Indeed, as Justice Kagan noted in dissent in the *West Virginia* case, it was “not until page 28 of a 31-page opinion that [the Court] beg[an] to seriously discuss the meaning” of the statutory provision the agency had relied on.¹⁴³

These structural differences in the opinion confirm what the rest of the opinions make plain: In the new major questions cases, the major question doctrine alters the degree of certainty and clarity that is required to uphold an agency’s exercise of statutory authority. Thus, rather than resolving an ambiguity or even placing a thumb on the scale as the Court attempts to discern the meaning of a statute, the new major questions doctrine functions as a kind of carve out to an agency’s authority. Congress must clearly and explicitly authorize the particular agency action at issue. If Congress has not done so, that is the end of the matter. Understood in that way, the new major questions doctrine fundamentally reshapes the interpretive enterprise. *West Virginia* reflects this new function of the major questions doctrine:

¹³⁹ See 529 U.S. at 160.

¹⁴⁰ See 573 U.S. at 321.

¹⁴¹ See 576 U.S. at 485-86.

¹⁴² See *West Virginia*, 2022 WL 2347278.

¹⁴³ *West Virginia*, 2022 WL 2347278, at *32 (Kagan, J., dissenting).

The opinion formulated the major questions doctrine as a clear statement rule that required “clear congressional authorization” for the agency’s regulation.¹⁴⁴ The major question of a rule is not one tool among interpretive equals; it is something that alters the very question the Court is asking in statutory interpretation cases. And that is how lower courts have understood the Court’s new major questions cases.¹⁴⁵

The question remains, however: how clear, exactly, must Congress be? The Court has remained somewhat cagey about the answer to this question. There are two possibilities. First, the Court might simply be saying that an ambiguous statute will not be construed to authorize a “major” policy but that an unambiguous statute (in the normal sense) would suffice. This framing is still dramatic, as it would deny the agency authority even where the statute is ambiguous but the “best” interpretation still supports the agency. Second, the Court might be saying that, when it comes to major questions, even a broadly worded, *otherwise unambiguous* statute is not enough. We believe that this second formulation is more faithful to the cases, and to *West Virginia* in particular. That belief is partly rooted in the paucity of the Court’s “ordinary” statutory analysis after finding a question to be major. Resolving whether a statute is ambiguous or unambiguous can be an extensive enterprise, requiring consultation of the full range of interpretive tools. But especially in *West Virginia*, the Court gives no indication that such a wide-ranging analysis is required under the major questions doctrine. The Court did not consult any dictionaries or linguistic canons to assess the statute’s meaning. Rather, the Court seems to give a “quick look” at the statute to ascertain whether the particular agency action at issue has been explicitly authorized. That is requiring something more than that the statute be unambiguous in the normal sense. It is requiring that the authorization jump off the page. Indeed, the Court even acknowledged that the EPA’s generation-shifting requirements “can be described as a ‘system,’” which is what the statute authorized the agency to establish.¹⁴⁶ What the statute lacked was a clear reference to generation shifting itself.

Nor would such strength be unheard of for a doctrine referred to as a clear statement rule. Indeed, examining other clear statement rules helps to shed light on how the new major questions doctrine differs from previous applications of it. Under an analogous “federalism” clear-statement rule, Congress must clearly specify whether a law applies to state governments.¹⁴⁷ Although (again) the Court has been cagey about just how clear Congress must be to satisfy the federalism clear-statement rule, Professors Eskridge and Frickey have identified the canon as a “super-

¹⁴⁴ *See id.* at *17.

¹⁴⁵ *Brnonich v. Biden*, No. CV-21-01-01568-PHX, 2022 WL 252396 (D. Ariz. Jan. 27, 2022) (invoking clear statement version of major questions doctrine to invalidate federal contractor vaccine requirement); *Feds for Medical Freedom v. Biden*, No. 21-cv-356, 2022 WL 188329 (S.D. Tex. Jan. 21, 2022) (same to invalidate federal employee vaccine requirement), rev’d on other grounds by No. 22-40043, 2022 WL 1043909 (5th Cir. Apr. 7, 2022); *Louisiana v. Biden*, No. 21-CV-01074, 2022 WL 438313 (W.D. La. Feb. 11, 2022) (same for executive order requiring calculation of carbon costs)

¹⁴⁶ *Id.*

¹⁴⁷ *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

strong clear statement rule” that can be rebutted “only through unambiguous statutory text *targeted at the specific problem*.”¹⁴⁸ Thus, if a federal statute requires employers to pay a minimum wage, but the statute does not clearly specify that “employers” include state and local government employers, the minimum wage requirement would not apply to state and local governments, even though “employer” would in ordinary language unambiguously include both public and private employers. That clear statement rule thus changes the entire enterprise of statutory interpretation: the question is not what the best interpretation of the statute is or even whether it is unambiguous in the normal sense. The question is instead whether the statute speaks with particular clarity. That is why Justice Kagan, in dissent, described the “major questions doctrine” as a “get-out-of-text-free card[].”¹⁴⁹

This version of the major questions doctrine differs from how the Court has previously used statutory interpretation to constrain agencies’ authority, including in the prior major questions cases. When the Court decides whether an agency’s interpretation is correct, rather than expressly analyzing the issue under the *Chevron* framework, the Court is engaged in an exercise of statutory interpretation and a search for the ordinary meaning of the statutory provision in question. Alternatively, the major questions doctrine might factor into *Chevron* by functioning as one mark against an agency’s interpretation of a statute, similar to *Brown & Williamson* or *UARG*.¹⁵⁰ Or the majorness of the question might mean that courts, rather than agencies, should decide what the statute means. But in all of these examples, the Court is still trying to interpret what Congress said and what it meant to say.¹⁵¹

That is not true of the new major questions clear statement rule. Strong clear statement rules can generate errors about what Congress said and what it meant.

¹⁴⁸ William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules As Constitutional Lawmaking*, 45 VAND. L. REV. 593, 611 (1992).

¹⁴⁹ *Id.* at *38 (Kagan, J., dissenting).

¹⁵⁰ See, e.g., *Loving v. IRS*, 742 F.3d 1013, 1014, 1016, 1020-21 (D.C. Cir. 2014) (invoking major questions doctrine after deploying other tools of statutory interpretation); *NRDC v. Abraham*, 355 F.3d 179, 199 (2d Cir. 2004) (applying doctrine to support conclusion based on plain language); *Merck & Co. v. HHS*, 962 F.3d 531, 540 (D.C. Cir. 2020) (applying doctrine as fourth and final indicator of unreasonableness under *Chevron* Step Two); *New Mexico v. Dep’t of Interior*, 854 F.3d 1207, 1224-27 (10th Cir. 2017) (applying doctrine only after determining that “the text of the IGRA is explicit”).

¹⁵¹ This is how lower courts understood the major questions doctrine before the three most recent cases discussed in the article—as requiring a court to determine whether a provision is ambiguous, and also as requiring a court to apply ordinary rules of statutory interpretation to discern the meaning of an ambiguous provision governing a major question. See, e.g., *ClearCorrect Operating, LLC v. Int’l Trade Comm’n*, 801 F.3d 1283 (Fed. Cir. 2015) (concluding provision was not ambiguous, invoking *King v. Burwell*); *Cutbill v. Blinken*, 990 F.3d 272 (2d Cir. 2021) (same); *Texas v. United States*, 809 F.3d 134 (5th Cir. 2016), *aff’d by equally divided Court*, 579 U.S. 547 (same); *Vullo v. Office of Comptroller of Currency*, 378 F. Supp. 3d 271 (S.D.N.Y. 2019) (same), *rev’d and remanded sub nom. Lacewell v. Off. Of Comptroller of Currency*, 999 F.3d 130 (2d Cir. 2021); *Chamber of Commerce v. Dep’t of Labor*, 885 F.3d 360 (5th Cir. 2018) (same and alternatively holding the interpretation unreasonable); *In re Gateway Radiology Consultants, P.A.*, 983 F.3d 1239 (11th Cir. 2020) (invoking *King* for the proposition that courts rather than agencies would resolve statutory ambiguity).

Take the *Gregory* clear statement rule: Before the Court announced the clear statement rule in that case, a Congress that required all employers to pay a minimum wage used a word that would normally include state and local employees, and that's probably what Congress meant to do. But under the clear statement rule, the fact that interpreting the words that Congress used leads to one answer is not enough.¹⁵² A clear statement rule requires something else.

For this reason, the new major questions doctrine is less rooted in text and is less formalist than its prior incarnations. A considerable amount of scholarship has identified the less formalist features of the major questions doctrine as applied prior to 2021.¹⁵³ Although the “old” major questions doctrine was more closely tied to normal statutory interpretation in the ways described above, it was always partly inspired by underlying substantive (and arguably constitutional) values that are unique to a particular context—statutes empowering administrative agencies—as opposed to trans-substantive tools that assist in identifying the semantic meaning of statutory language.¹⁵⁴ As such, it required courts to draw on values that cannot be straightforwardly derived from any given piece of text. And indeed, in any of its various iterations, the major questions doctrine asks courts to consider, alongside the ordinary meaning, context, and structure of a statute, the consequences of an interpretation and whether those consequences cohere with certain precepts of our system of separated powers.¹⁵⁵

But the most recent iteration of the major questions doctrine has only expanded the anti-formalist elements of the doctrine.¹⁵⁶ The major questions doctrine is now more fully realized as a “substantive” canon of interpretation—“principles and presumptions that judges have created to protect important background norms from the Constitution, common-law practices, or policies related to particular subject

¹⁵² See, e.g., Richard D. Friedman & Julian Davis Mortenson, *CONSTITUTIONAL LAW: AN INTEGRATED APPROACH* 505-06 (Foundation Press 2021)/

¹⁵³ E.g., Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19, 20-23 (2010); Beau J. Baumann, *Americana Administrative Law*, 111 GEO. L. J. __ (2023), at 1-4; Natasha Brunstein & Richard L. Revesz, *Mangling the Major Questions Doctrine*, 74 ADMIN. L. REV. 318 (2022); Blake Emerson, *Administrative Answers to Major Questions: On The Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2034-39 (2018).

¹⁵⁴ Anita Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825, 827 (2017).

¹⁵⁵ See Beau J. Baumann, *Americana Administrative Law*, 111 GEO. L. J. __ (forthcoming 2023), at 4 (“[T]he major questions doctrine is not really meant to capture some descriptive claim on how Congress ‘speaks’ through statutory text.”); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 316 (2000); Loshin & Nielsen, *supra* note 154, at 63 (“The notion that Congress ‘does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions’ is premised more in normative aspiration than legislative reality and is startlingly out of sync with the Court’s modern approach to statutory language.”); Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2043-45 (2018).

¹⁵⁶ See Cass R. Sunstein, *There Are Two ‘Major Questions’ Doctrines*, 73 ADMIN. L. REV. 475, 477-78 (2021) (noting that there could be two ways of understanding the major questions doctrine).

areas”—not keyed to the meaning of the statute but rather to broader values,¹⁵⁷ Substantive canons differ from semantic canons that focus on the text or rules of grammar to interpret language no matter the subject area or design of the statute.¹⁵⁸

Another indication that the major questions doctrine has moved even farther away from a focus on the meaning of enacted text is the time horizon over which the courts now assess whether an issue is major. Typically, textualism focuses on the meaning that the words of a statute would have had at the time the statute was enacted.¹⁵⁹ Were the major questions doctrine a textualist tool, one would think that courts would assess whether the Congress that enacted the statute would have understood the policy in question to be a major one (and thus requiring special authorization) at the time of the statute’s passage.¹⁶⁰

Yet that is not how recent courts have applied the major questions doctrine. Courts instead mostly seem to care whether members of the public *today* would view the agency’s policy as a major one. In that form, the major question doctrine shares some similarities with subsequent legislative history: it asks what subsequent legislatures or the broader, intertemporal public think about the agency’s approach. This marks a subtle shift from prior forms of the doctrine. Compare, for example, *King v. Burwell*, which concluded that Congress had not assigned to the Internal Revenue Service the authority to decide whether to offer tax credits for federally created exchanges.¹⁶¹ *King* focused on the significance of the issue in the context of the statutory scheme of which it was a part—i.e., evidence that was contemporaneous to the statute’s enactment.¹⁶² *King*, of course, was decided not too long after the passage of the relevant statute. But that was not true of *Utility Air Regulatory Group v. EPA*, which similarly determined that the agency’s assertion of authority in that case would “render the statute ‘unrecognizable to the Congress that designed it.’”¹⁶³ In both cases, therefore, the Court purported to render its “majorness” determination by reference to the public (or the Congress) that existed at the time the statute was passed.

The approach in those cases differs from that seen in *Alabama Association of Realtors*, which interpreted the CDC’s authority under the 1944 Public Health Service

¹⁵⁷ Anita S. Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825, 833 (2017).

¹⁵⁸ *Id.* at 833-34.

¹⁵⁹ *E.g.*, *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020) (“We must determine the ordinary public meaning of Title VII’s command To do so, we orient ourselves to the time of the statute’s adoption.”).

¹⁶⁰ Even in its origins, *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), considered some post-enactment history. *See id.* at 150-60. But the major questions analysis appeared to turn more on the political history of cigarettes and their “portion of the American economy” dating back to the statute’s enactment. *Id.* at 159-60. *Gonzales v. Oregon*, 546 U.S. 243 (2006), similarly relied on the political history of physician-assisted suicide that predated and was contemporaneous to the Controlled Substances Act. *See id.* at 267-68.

¹⁶¹ 576 U.S. 473 (2015)

¹⁶² *See id.* at 485-86.

¹⁶³ 573 U.S. 302, 324 (2014).

Act.¹⁶⁴ In that case, the Court focused on how and why the agency’s asserted authority was major from the perspective of the present day. The monetary costs of the order and the number of people potentially shielded from eviction by the order were of course expressed in present-day terms.¹⁶⁵ But the Court’s parade of horrors was also devoid of any historical grounding. For example, the Court expressed disbelief that the statutory authorization would allow the agency to mandate “free grocery delivery” or “free computers.”¹⁶⁶ Perhaps those applications—or whatever their historical analogues might be—would prove startling to 1914 Americans. But the Court gives no reason, apart from its members’ own presently grounded intuitions, for concluding that they would be.

The other recent agency case involving COVID, *National Federation of Independent Business v. Department of Labor*, reasoned similarly. There, the Court interpreted the Occupational Safety and Health Administration’s authority under the 1970 OSH Act.¹⁶⁷ There too, the Court relied on the present-day numbers of persons subject to OSHA’s rule. But more strikingly, the Court simply asserted that a vaccine mandate is “a significant encroachment into the lives—and health—of a vast number of employees.”¹⁶⁸ That judgment barely hides the fact that it is grounded in the public debates of the present. To be clear, we have no idea whether, in 1970, a vaccine mandate (let alone a vaccine-or-testing mandate, as OSHA’s rule was) would have been viewed to be as severe of an encroachment on liberty as some view it to be today. But the Court gave no indication that it cared to know.

One might seek to shore up the formalist bona fides of the new major questions doctrine by describing it as a method of enforcing a revived nondelegation doctrine.¹⁶⁹ But despite some Justices’ efforts at equating the major-question-doctrine-as-clear-statement rule with the values underlying the nondelegation doctrine,¹⁷⁰ the clear statement rule, at least as it has been articulated thus far, operates differently than the nondelegation doctrine (either the current version or a revived one). Under current precedents, Congress may constitutionally delegate authority to agencies if it supplies them with an “intelligible principle” to guide their discretion, and most any criteria, even broad, vague ones, suffice as intelligible principles.¹⁷¹ Some Justices would revive the nondelegation doctrine to place greater constraints on Congress that would require Congress to “make[] the policy decisions when regulating

¹⁶⁴ 141 S. Ct. 2485 (2021).

¹⁶⁵ 141 S. Ct. at 2489.

¹⁶⁶ *Id.*

¹⁶⁷ 142 S. Ct. 661 (2022).

¹⁶⁸ *See id.* at 665 (“This is no ‘everyday exercise of federal power.’ It is instead a significant encroachment into the lives—and health—of a vast number of employees.” (quoting *In re MCP No. 165*, 20 F.4th at 272 (Sutton, C.J., dissenting)).

¹⁶⁹ *See* Gocke, *supra* note 2 (describing the major questions doctrine in these terms, but not defending it). One response might be that the nondelegation doctrine itself is not well-grounded in constitutional text and history, but we can put that to the side for now.

¹⁷⁰ *E.g.*, *West Virginia*, 2022 WL 2347278, at *21-22 (Gorsuch, J., concurring); *NFIB*, 142 S. Ct. at 667 (Gorsuch, J., concurring).

¹⁷¹ *Mortenson & Bagley*, *supra* note 53, at 282-83; *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 473-76 (2001).

private conduct,” and only allow Congress to rely on “another branch to ‘fill up the details.’”¹⁷²

In the major questions cases to date, the doctrine requires Congress only to clearly specify a particular mode or method of regulation.¹⁷³ Congress may still be able to provide vague terms for when an agency may adopt that mode or method of regulation. For example, in the vaccine cases, Congress might have said that “the agency can impose a vaccine requirement for all workers when it concludes it would be necessary to avoid grave danger.” That provision would seem to satisfy the Court’s new major questions cases with respect to whether OSHA could adopt a vaccination requirement for everyone in the workplace, satisfying the major questions rule. But that provision would still allow an agency to impose obligations on third parties based on an agency’s determination, rather than Congress’s, and so it wouldn’t satisfy proponents of a reinvented nondelegation doctrine.¹⁷⁴

Nor does the major questions doctrine really enforce a revived nondelegation doctrine by avoiding a constitutional issue. Under the constitutional avoidance canon, which also can operate as a super-strong clear-statement rule, the courts are instructed to avoid interpretations of statutes that would raise a constitutional issue.¹⁷⁵ Applied in the agency context, one way to think about constitutional avoidance is as follows: If the statute had clearly and explicitly said what the agency is interpreting the statute to mean, would that require the court to resolve a constitutional question? If yes, constitutional avoidance applies and provides a reason to reject the agency’s interpretation. The major questions doctrine, however, doesn’t avoid any nondelegation issues that would not also be posed by the statute considered without reference to the agency interpretation under review. Let’s return to the vaccine mandate example. Assume for sake of argument that there’s no dispute that the statute granting OSHA power to promulgate emergency standards if it makes certain findings violates the nondelegation doctrine. (It actually does not matter if you agree or not.) OSHA interprets the statute to provide it with the authority to mandate vaccines. Then ask the question above: Had Congress explicitly granted such authority—say by including “and this power extends to mandating vaccines” in the statute—would that raise a nondelegation problem? Not any more so than the underlying statute under current doctrine, and not any less than the underlying statute under a revived nondelegation doctrine.

Thus, the major questions doctrine, again at least as articulated thus far, does not itself prohibit agencies from exercising delegated authority under open-ended guidelines. It just requires Congress to specifically list potentially major things an agency might do pursuant to those open-ended guidelines. As the next Part dis-

¹⁷² *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting).

¹⁷³ See *supra* Part II.A.

¹⁷⁴ *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting) (urging the Court to overrule the intelligible principle standard, which allow agencies to impose requirements on third parties based on broadly defined criteria).

¹⁷⁵ See Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2115-18 (2015) (explaining constitutional avoidance doctrine).

cusses, that is still a significant practical limit on agencies' authority: The clear-statement rule increases the obstacles to delegation (in particular, it makes them more difficult to carry out and therefore less likely to be used effectively). But the new major questions doctrine does not avoid constitutional issues with broad or open-ended delegations to agencies. As the closing section of *West Virginia* said: "A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body."¹⁷⁶

* * *

With these developments laid out, it is interesting to note that the major questions doctrine has come to share important parallels with the absurdity doctrine.¹⁷⁷ Under the absurdity doctrine, if an interpretation of a statute would "lead[] to an absurd result," the statute "must be so construed as to avoid the absurdity."¹⁷⁸ John Manning has argued forcefully that the Court's version of the absurdity doctrine rests on an explicit form of purposivism—specifically, under the absurdity doctrine, the absurdity of an interpretation (a value judgment made by judges) provides evidence that the interpretation is contrary to Congress's intentions.¹⁷⁹ Manning has also argued that there are strong *formalist* objections to the absurdity doctrine, and that statutory interpretation formalists should want to use the doctrine rarely, and only upon very clear showings of absurdity.¹⁸⁰

Today, the major questions doctrine also seems to rest on a similar kind of purposivism—specifically, the perceived majorness or significance of an agency's use of the statute supplies evidence that the agency's use of the statute is contrary to Congress's intentions.¹⁸¹ As a descriptive claim about what Congress's intentions are, that statement is contestable, at least in some of the applications in which the Court has invoked it.¹⁸² While the next section provides a more normative analysis of the new major questions doctrine, here it is simply notable that the major questions appears to be even more vulnerable to Manning's formalist critique of the absurdity doctrine because it is deployed more often, and based on weaker evidence.

Most significantly, the major questions doctrine turns on a dramatically lower threshold for establishing the relevant "absurdity" (or perceived oddity) than the traditional absurdity doctrine does. In traditional absurdity cases, the standard

¹⁷⁶ 2022 WL 234728, at *18.

¹⁷⁷ See John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387 (2003).

¹⁷⁸ *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459-60 (1892).

¹⁷⁹ Manning, *Absurdity*, supra note 177, at 2485-86.

¹⁸⁰ *Id.*

¹⁸¹ See sources cited supra note TK (anti-formalist MQD).

¹⁸² See Abbe Gluck & Lisa Schultz Bressman, *Inside Statutory Interpretation*, 66 STAN. L. REV. 725, 799 (2014) (using survey to show that some version of the major questions doctrine might be consistent with congressional intentions). *But see* Ryan D. Doerfler, *Who Cares How Congress Really Works?*, 66 DUKE L.J. 979 (2017) (questioning whether statutory interpretation principles must align with congressional expectations).

courts use is that the absurdity must be “absolutely clear.”¹⁸³ Moreover, the relevant absurdity is supposed to be somewhat objective, in the sense that it should be clear to most everyone.¹⁸⁴ Yet the Court requires nothing approximating that degree of certainty regarding the perceived oddity of an agency’s interpretation or application of a statute. Rather, in the context of the major questions doctrine, the Court seems to be willing to reject an agency’s interpretation or application of a statute based only on its conclusion that the agency’s application is major in the eyes of the Court, or in the eyes of some participants in the political process, not by reference to some unmistakable true absurdity.¹⁸⁵ In the OSHA vaccine case, the Court declared that “[t]here can be little doubt that OSHA’s mandate qualifies” as major given the Court’s description of the policy as “a significant encroachment into the lives—and health—of a vast number of employees.”¹⁸⁶ That is also how Chief Justice Roberts articulated his understanding of the threshold for invoking the major questions doctrine:

[J]ust thinking back on *Alabama Realtors* or the OSHA vaccine case, I don’t know how you would read those as not starting with the idea that this – however you want to phrase it, this is kind of surprising that the CDC is, you know, regulating evictions and all that and then look to see if there’s something in there, I guess, that suggests, well, however surprised, you know, that’s – that’s still what – we think that type of regulation was – was appropriate.¹⁸⁷

Another way to think about the relationship between the major questions doctrine and the absurdity doctrine is the following: If the consequences of the agency’s interpretation or application of the statute were truly absurd—and if that absurdity were absolutely clear to most every reasonable person—then the absurdity doctrine would have constrained the agency’s interpretation of the statute. But because that standard was (obviously) not satisfied in the major questions cases, the major questions doctrine supplied the vehicle to constrain the agency’s authority. And the ma-

¹⁸³ *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 82 (1994) (Scalia, J., dissenting); Manning, *Absurdity*, *supra* note 177, at 2459 n. 265; Ryan D. Doerfler, *The Scrivener’s Error*, 110 Nw. U. L. Rev. 811 (2016).

¹⁸⁴ *See* *Pub. Citizen v. U.S. Dep’t of Just.*, 491 U.S. 440, 470–71 (1989) (Kennedy, J., concurring) (“[The absurdity canon] remains a legitimate tool of the Judiciary, however, only as long as the Court acts with self-discipline by limiting the exception to situations where the result of applying the plain language would be, in a genuine sense, absurd, i.e., where it is quite impossible that Congress could have intended the result, and where the alleged absurdity is so clear as to be obvious to most anyone.”).

¹⁸⁵ *See, e.g., NFIB v. DOL*, 142 S. Ct. at 666 (describing OSHA’s policy as “a broad public health regulation”); *Alabama Ass’n of Realtors*, 141 S. Ct. at 2489 (describing CDC’s eviction moratorium as “of ‘vast economic and political significance’” and accordingly invoking the major questions doctrine).

¹⁸⁶ *NFIB*, 142 S. Ct. at 665.

¹⁸⁷ Transcript of Oral Argument in *West Virginia v. EPA*, at 83–84, https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/20-1530_p8k0.pdf.

major questions doctrine apparently allowed the Justices to rely on the mere assessment that the agency’s interpretation or application of the statute was “surprising” (to the Justices in the majority) and therefore required a more explicit authorization from Congress. That is a dramatic expansion of a doctrine that rests on the kind of purposivism that Manning identified in the absurdity doctrine and criticized on formalist grounds. It allows the Court to resort to purposivism based on a lower threshold, and in a greater set of cases.

III. ASSESSING THE NEW MAJOR QUESTIONS DOCTRINE

This Part offers an initial, critical assessment of the recent developments in the major questions doctrine. It focuses on the increasing and outsized importance that certain evidence has taken on with respect to assessing whether a rule is major—in particular, the perceived political significance of a rule, as well as the extent to which a rule differs from previous rules that the agency has adopted. This Part shows how these indicia of majorness exacerbate institutional and political pathologies, undermine the ostensible premises of the major questions doctrine, and generate a doctrine that is likely to undermine delegations in the circumstances in which they are more likely to be used and more likely to be effective.

Part III.A focuses on the pathologies created by the Court’s attention to the political significance of an agency rule. It shows how, in politically polarized times, this aspect of the major questions doctrine allows political parties and movements to make an issue “major” through generating controversy, and that this effectively generates exceptions, outside of the formal lawmaking process, to otherwise broad statutory grants of authority to agencies. Part III.A unpacks the pathologies that the new major questions doctrine creates, including how it exacerbates the constitutional system’s skew toward minority rule, and shows how this dynamic undermines the purported formalist bases for the major questions doctrine.¹⁸⁸ It also shows how this version of the major questions doctrine results in a doctrine that is transparently and inescapably linked to political judgments.

Part III.B focuses on the pathologies created by the Court’s attention to regulatory novelty and the implications of the agency’s theory of statutory authority. It shows how this approach to majorness effectively nullifies an agency’s ability to exercise delegated authority in the set of cases where Congress would have reason to rely on delegations to agencies and where such delegations would be effective. It also raises concerns about how this version of the major questions doctrine presents an appearance of faux minimalism, which may result in fewer checks on the Court’s authority to reach more politically infused judgments.

¹⁸⁸ See, e.g., Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L.J. 346 (2016) (illustrating how separation of powers doctrines vacillates between rules and standards); Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 U. CHI. L. REV. 1819, 1839 (2016) (“This is the moment, to put it provocatively, when the theory begins to cannibalize itself.”).

A. Politics, Partisanship, and Minority Rule

This Part unpacks the implications of the Court’s willingness to declare an agency policy major—and thus to require it be supported by clear congressional authorization—based on whether the rule is politically controversial. This aspect of the new major questions doctrine effectively allows political parties to unmake and amend laws by polarizing an issue and making it “major.” As the political process unfolds, the Court can seize on political, ideological opposition to an agency policy to create a statutory exception that effectively forbids the agency from pursuing the policy. This doctrinal structure may enable and embolden a political party to use politicking rather than the legislative process to constrain agency authority. But a political party or movement need not consciously adopt such a strategy for that result to occur. The application of the new major questions doctrine has that effect anytime it is triggered by the perceived present-day controversy surrounding an issue. And this anti-formalist mechanism of altering statutes is at odds with the formalist understanding of the separation of powers that purportedly undergirds the doctrine.

Further, the focus on whether an agency rule is politically controversial exacerbates several pathologies of the constitutional system. The new major questions doctrine further injects politics and ideology into a doctrine that was already susceptible to such influence. And it further exacerbates the constitutional system’s skew toward minority rule.

1. Political Significance and Majorness

Both the Supreme Court and the lower courts’ recent application of the major questions doctrine suggest that a policy can be major, and accordingly require explicit congressional authorization, where an issue is politically significant. Consider the Supreme Court’s decision staying the Occupational Safety and Health Administration’s emergency temporary standard requiring employers with more than 100 employees to impose a test-and-mask rule for unvaccinated workers, or require vaccination.¹⁸⁹ Quoting from the Court’s prior decision invalidating the CDC’s eviction moratorium, the Court declared that “[w]e expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance.”¹⁹⁰

A good part of the Court’s analysis traded in characterizations of vaccines that sounded in policy objections to vaccination requirements that had been raised in the political process. The Court also presented the statements in ways that channeled talking points that were contingent products of present-day political arguments and political contestation. For example, favorably quoting Chief Judge Sutton on the U.S. Court of Appeals for the Sixth Circuit, the Court declared that

¹⁸⁹ *Nat’l Fed. Of Indep. Bus. v. Dep’t of Labor*, (Jan. 13, 2022). The rule was limited to employees working indoors in close proximity with others. It also contained medical and religious exemptions. 86 Fed. Reg. 61402 (2021).

¹⁹⁰ *NFIB v. OSHA*, p. 6 (quoting *Alabama Ass’n of Realtors v. Dep’t of Health and Human Servs.*, 594 U.S. ___ (2021)(per curiam) (slip op. at 6).

vaccines were “no ‘everyday exercise of federal power.’”¹⁹¹ The Court described vaccines as “a significant encroachment into the lives—and health” of employees.¹⁹² Only when the Court went on to consider the equities in the case did the Court note possible compliance costs with the OSHA standard.¹⁹³ Previously, in the CDC eviction moratorium case, the Court had explicitly noted that “the issues at stake” with the moratorium “are not merely financial,” in explaining why the case involved a major question that required explicit congressional authorization.¹⁹⁴

The lower court opinions in cases about the OSHA rule used similar language that sounded in a similar register in order to explain the political significance of the OSHA rule. The U.S. Court of Appeals for the Fifth Circuit decision staying the OSHA rule described it as a “sweeping pronouncement[] on matters of public health” that “affect[ed]” people “in the profoundest of ways.”¹⁹⁵ The Fifth Circuit opinion explicitly noted that the standard “purports to definitively resolve one of today’s most hotly debated political issues” as a reason why the case involved a major question.¹⁹⁶ Judge Larsen’s dissenting opinion in the Sixth Circuit’s OSHA case, which would have stayed the OSHA rule, reasoned similarly. In characterizing the significance of what OSHA did, Judge Larsen noted that “A vaccine may not be taken off when the workday ends; and its effects, unlike this rule, will not expire in six months.”¹⁹⁷

The oral arguments at the Supreme Court echoed language that sounded in the register of policy objections to vaccine requirements or characterizations that reflected contingent present-day political arguments. Justice Alito observed that the OSHA vaccination rule “affects employees all the time.”¹⁹⁸ Justice Alito also pointed to the “risks” of vaccination and the possibility that some people “will suffer adverse consequences.”¹⁹⁹ Justice Gorsuch made similar points during the oral argument in *Biden v. Missouri*, the challenge to the Center for Medicare and

¹⁹¹ *NFIB*, p. 5 (quoting *In re MCP No. 165*, 20 F. 4th at 272 (Sutton, C.J., dissenting)).

¹⁹² *NFIB*, p. 5. Again quoting favorably from Chief Judge Sutton’s opinion, the Court observed that “[a] vaccination, after all, ‘cannot be undone at the end of the workday.’” *NFIB*, p. 5 (quoting *In re MCP No. 165*, 20 F. 4th at 274 (Sutton, C.J., dissenting)).

¹⁹³ *NFIB*, p. 8. The Court stated, despite the standard for granting stays, that it was “not our role to weigh such tradeoffs,” a hasty observation consistent with the Court’s hasty dispatching of the law on remedies in emergency applications. *See* Testimony of Stephen I. Vladeck, <https://www.judiciary.senate.gov/download/stephen-vladeck-929-testimony> (Sept. 29, 2021).

¹⁹⁴ *Alabama Ass’n of Realtors*, 141 S. Ct. at 2489.

¹⁹⁵ *BST Holdings LLC v. OSHA*, 2021 U.S. App. LEXIS 33698, at *8 (5th Cir. Nov. 12, 2021).

¹⁹⁶ *BST Holdings*, 2021 U.S. App. LEXIS 33698, at *20.

¹⁹⁷ *In re MCP No. 165*, 2021 U.S. App. LEXIS 37349, at *85 (Larsen, J., dissenting). Chief Judge Sutton likewise characterized vaccines as “a medical procedure that cannot be removed at the end of the shift.” *MCP No. 165*, 2021 U.S. App. LEXIS 37024, at *8 (Sutton, C.J., dissenting); *see also id.* at *21-22.

¹⁹⁸ Transcript of Oral Argument at p. 103, *NFIB*, 142 S. Ct. 661 (2022).

¹⁹⁹ Transcript of Oral Argument at p. 105-06, *NFIB*, 142 S. Ct. 661 (2022). *See also id.* at p. 107 (“There is a risk, right?”).

Medicaid Services' vaccination requirement for workers at federal healthcare facilities.²⁰⁰

The specific language that courts used to explain the political significance of vaccine policies channeled policy objections to vaccine requirements that were raised in the political process or reflected contingent products of those political arguments. At a conference with anti-vaccine activists, for example, President Donald Trump's son Eric Trump attacked the COVID-19 vaccine in these terms: "Do you want to be left alone or not?"²⁰¹ President Trump himself posed a challenge to vaccination requirements in these terms: "[We] have our freedoms."²⁰² Commentators asked how "effective" and "necessary" the vaccine was.²⁰³ And people expressed some of the concern about vaccines as a desire to "be[] able to control something."²⁰⁴

The reasoning in *West Virginia* also seemed to point to the existence of present policy objections to EPA generation-shifting requirements in order to explain the political significance of the rule. The Court explained that "the fact that the same basic scheme EPA adopted 'has been the subject of an earnest and profound debate across the country'" indicated that the EPA's rule was major.²⁰⁵ And in his concurrence explaining when an issue was so politically significant it would be major, Justice Gorsuch noted points at which "certain States were considering" the issues involved and times "when Congress and state legislatures were engaged in robust debates" over them.²⁰⁶

This analysis differs from how previous major questions cases had analyzed whether an issue as major. Most of the earlier cases purported to identify major questions based on whether an agency rule was economically significant and would result in substantial compliance costs. In the *Benzene* case, sometimes identified as the ur-source of the doctrine, Justice Stevens' plurality opinion concluded that OSHA lacked the authority to prohibit concentrations of benzene of one part per million parts of air, and impose medical testing requirements on workplaces that contain 0.5 parts per million parts of air.²⁰⁷ The Court described the benzene standard as "an expensive way of providing some additional protection for a relatively small number of employees," noting that OSHA had estimated the standard would "require capital investments ... of approximately \$266 million, first-year operating

²⁰⁰ Transcript of Oral Argument at p. 40, *Biden v. Missouri*, 142 S. Ct. 647 (2022).

²⁰¹ Geoff Brumfield, *Inside the growing alliance between anti-vaccine activists and pro-Trump Republicans*, NPR (Dec. 6, 2021), <https://www.npr.org/2021/12/06/1057344561/anti-vaccine-activists-political-conference-trump-republicans>.

²⁰² Yamiche Alexander, *Why 41 percent of Republicans don't plan to get the COVID vaccine*, PBS (Mar. 19, 2021), <https://www.pbs.org/newshour/show/why-41-percent-of-republicans-dont-plan-to-get-the-covid-vaccine>.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *West Virginia*, 2022 WL 2347278, at *16 (quoting *Gonzales*, 546 U.S. at 267-68).

²⁰⁶ *West Virginia*, 2022 WL 2347278, at *22 (Gorsuch, J., concurring).

²⁰⁷ *Indus. Union Dep't, AFL-CIO v. API*, 448 U.S. 607 (1980).

costs ... of \$187 million to \$205 million and recurring annual costs of approximately \$34 million.”²⁰⁸ Similarly, in *Utility Air Regulatory Group*, when the Court invalidated EPA’s emission standards for greenhouse gases from certain stationary sources for purposes of the relevant programs, the Court construed the agency’s statutory authority in light of the economic costs from the agency action.²⁰⁹ The Court described the “calamitous consequences” from the EPA’s interpretation of the statute—“annual administrative costs would swell from \$12 million to over \$1.5 billion; and decade-long delays in issuing permits would become common, causing construction projects to grind to a halt nationwide.”²¹⁰ And in *FDA v. Brown & Williamson Tobacco Corp.*, when the Supreme Court first articulated the major question doctrine to support its conclusion that the FDA lacked the statutory authority to regulate tobacco, the Court similarly focused on the economic and regulatory compliance costs of interpreting the agency’s statutory authority a particular way.²¹¹ The Court characterized the issue as whether the agency had “jurisdiction to regulate an industry constituting a significant portion of the American economy,” including by outright prohibiting cigarettes and smokeless tobacco.²¹²

We do not mean to champion the use of compliance costs in assessing the majorness of an agency policy. But they at least provide a somewhat more objective measure than the more overtly values-based criteria on display in the more recent cases. Indeed, in those cases, the federal courts’ sense that vaccines were politically controversial, and therefore a major question, partially reflected a sustained campaign to politicize COVID-19 vaccines. Former President Trump consistently downplayed the threat posed by the virus, likening it to the flu, branding it a hoax, and accusing Democrats of politicizing it,²¹³ and other Republican leaders and commentators followed suit.²¹⁴ They suggested that the immune system can fight

²⁰⁸ 448 U.S. at 628-29.

²⁰⁹ 573 U.S. 302 (2014).

²¹⁰ 573 U.S. at 321.

²¹¹ 529 U.S. 120 (2000).

²¹² 529 U.S. at 159.

²¹³ Bolsen & Palm, *supra* note TK, at 83; *see also* Tamara Keith, *Timeline: What Trump Has Said and Done About the Coronavirus*, NPR (Apr. 21, 2020), <https://www.npr.org/2020/04/21/837348551/timeline-what-trump-has-said-and-done-about-the-coronavirus> (comparing Trump’s statements about the virus in the early months of the pandemic to his administration’s).

²¹⁴ *See, e.g.*, Laurie Kellman, *Iowa Sen. Joni Ernst Suggests COVID-19 Numbers Are Inflated by Health Care Providers for Profit*, CHICAGO TRIBUNE (Sept. 2, 2020), <https://www.chicagotribune.com/coronavirus/ct-nw-joni-ernst-coronavirus-numbers-fake-20200902-xlyd-fywwzzckvkclce3gcc54ws4-story.html> (statement of Republican Senator Joni Ernst) (“These health care providers and others are reimbursed at a higher rate if COVID is tied to it, so what do you think they’re doing?”); Oliver Darcy, *Fox Business Parts Ways with Trish Regan, Host Who Dismissed Coronavirus as ‘Impeachment Scam’*, CNN BUSINESS (Mar. 27, 2020), <https://www.cnn.com/2020/03/27/media/trish-regan-fox-news/index.html> (discussing conservative news host Trish Regan’s statements that the “liberal media” was using COVID-19 to “demonize and destroy” Trump to hurt his chances of reelection).

off the virus without the vaccine,²¹⁵ and that the vaccine contributes to—rather than prevents—the contraction of, and death by, COVID-19.²¹⁶ Republican commentators have analogized vaccine mandates to behavior attributed to Nazis during World War II,²¹⁷ and conservative states have banned vaccine mandates altogether.²¹⁸ The COVID-19 vaccination rate of a given geographical location is effectively a proxy for the party affiliation of its voters.²¹⁹

2. *Anti-Formalism: Political Significance and Separation of Powers*

This section spells out how the Court’s attention to whether an agency rule is politically controversial allows ideological opponents of particular policies to effectively unmake portions of a statute delegating authority to an agency. It draws out how this doctrinal feature undermines one of the doctrine’s formalist justifica-

²¹⁵ See Bill Glauber, *Republican U.S. Sen. Ron Johnson Uses God in One of Multiple Attempts at Sowing Doubt Over the Efficacy of the COVID-19 Vaccines*, MILWAUKEE JOURNAL SENTINEL (Jan. 7, 2022), <https://www.jsonline.com/story/news/2022/01/07/wisconsin-sen-ron-johnson-again-questions-proven-success-vaccines/9129753002/> (statement of Republican Senator Ron Johnson) (“Why do we think that we can create something better than God in terms of combating disease? Why do we assume that the body’s natural immune system isn’t the marvel that it really is?”).

²¹⁶ See, e.g., Gerrard Kaonga, *Tucker Carlson Suggests Vaccinated More Likely to Get COVID*, NEWSWEEK (Jan. 6, 2022), <https://www.newsweek.com/tucker-carlson-fox-news-coronavirus-vaccine-covid-19-1666199> (statement of Tucker Carlson) (“[I]t seems like the shot makes it more likely that you are going to get COVID . . .”); William Vaillancourt, *Charlie Kirk Suggests COVID Vaccines Are to Blame for America’s High Death Rate*, THE DAILY BEAST (Feb. 8, 2022), <https://www.thedailybeast.com/charlie-kirk-goes-on-tucker-carlson-to-suggest-covid-vaccines-are-to-blame-for-high-death-rates?ref=scroll>.

²¹⁷ Yelena Dzhanova, *Tucker Carlson Relates COVID-19 Vaccine Mandates to Nazi Experiments on Human Subjects in Concentration Camps*, BUSINESS INSIDER (Jan. 22, 2022), <https://www.businessinsider.com/tucker-carlson-compares-vaccine-mandates-to-nazi-medical-experiments-2022-1>; see also Hsu and Tracy, *supra* note TK (stating that Former Pennsylvania State Representative Sam Rohrer compared the promotion of the COVID-19 vaccine to Nazi tactics).

²¹⁸ See *State Efforts to Ban or Enforce COVID-19 Vaccine Mandates and Passports*, NATIONAL ACADEMY FOR STATE HEALTH POLICY (Feb. 23, 2022), <https://www.nashp.org/state-lawmakers-submit-bills-to-ban-employer-vaccine-mandates/>.

²¹⁹ See Geoff Brumfiel, Emily Kwong, & Rebecca Ramirez, *What’s Driving the Political Divide Over Vaccinations*, NPR (Dec. 9, 2021), <https://www.npr.org/2021/12/08/1062476574/whats-driving-the-political-divide-over-vaccinations> (finding that counties that largely voted for Trump have had mortality rates nearly three times that of counties that voted for Biden, which “appears to be driven by a partisan divide in vaccination rates.”); see also Don Albrecht, *Vaccination, Politics, and COVID-19 Impacts*, BMC PUBLIC HEALTH (Jan. 14, 2022), <https://doi.org/10.1186/s12889-021-12432-x> (stating that, “[b]ecause [Republican leaders] have downplayed the virus and failed to encourage vaccination, Republican leaning counties have failed to implement safety measures, failed to get a high proportion of residents vaccinated, and as a consequence suffered higher COVID-19 case and death rates.”).

tions—namely, that the doctrine ensures issues are resolved in the legislative process, rather than outside of it. And it highlights the anti-formalist features of the doctrine by comparing and contrasting it to de facto delegations that the Court has invalidated, and to academic theories about the authority to effectively unmake laws or render them without force or effect.

The “politically controversial” element of the Court’s major question doctrine is decidedly anti-formalist despite the doctrine’s purportedly formalist justifications. In particular, the doctrine seems to allow a motivated political party to functionally amend a statute through political opposition rather than through the legislative process, despite the doctrine’s claimed focus on returning issues to the legislative process. In his concurrence in the OSHA case, for example, Justice Gorsuch wrote that “[t]he major questions doctrine ... ensures that the national government’s power to make the laws that govern us remains where Article I of the Constitution says it belongs—with the people’s elected representatives.”²²⁰

Consider, by way of contrast, the Supreme Court’s decisions in *Immigration and Naturalization Services v. Chadha*²²¹ and *Clinton v. City of New York*,²²² both of which invalidated actions that the Court described as amending laws outside of the ordinary legislative process.²²³ In *Chadha*, the Court struck down the so-called legislative veto, a mechanism by which one House of Congress could overrule the INS’s immigration determination about a particular individual.²²⁴ (In brief, an immigration judge had decided to suspend Mr. Chadha’s deportation and adjust his status to that of a lawful permanent resident.²²⁵ The House of Representatives, acting pursuant to the statutory provision authorizing legislative vetoes, then passed a resolution opposing the suspension of Chadha’s deportation and vetoing it.²²⁶) The Court held unconstitutional the statutory provision authorizing one House of Congress to alter the Attorney General’s immigration determination, reasoning “that the legislative power of the Federal Government [must] be exercised in accord with a single, finely wrought and exhaustively considered, procedure”—bicameralism and presentment.²²⁷ The legislative veto impermissibly allowed an exercise of the legislative power—altering the rights and duties of persons outside the legislative branch—outside of that process.²²⁸ *Clinton v. City of New York* reasoned similarly

²²⁰ *NFIB*, 142 S. Ct. at 668 (Gorsuch, J., concurring).

²²¹ 462 U.S. 919 (1983).

²²² 524 U.S. 417 (1998).

²²³ To be sure, these conclusions are debatable, particularly in *Clinton*; our point is only to highlight that it is a general proposition that laws cannot be amended except for through the legislative process of bicameralism and presentment. See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2366 (2001) (explaining the weaknesses of the bicameralism and presentment analysis); Daniel T. Deacon, *Administrative Forbearance*, 125 YALE L.J. 1548, 1561-62 (2016).

²²⁴ 462 U.S. 919.

²²⁵ *Chadha*, 462 U.S. at 923-24.

²²⁶ *Id.* at 926-27. The resolution applied to several other individuals as well.

²²⁷ 462 U.S. at 951.

²²⁸ 462 U.S. at 957.

when it invalidated the Line Item Veto Act, a federal law that authorized the President to “cancel” certain spending items after they were signed into law.²²⁹ The Court stated that “[i]n both legal and practical effect, the President has amended two Acts of Congress by repealing a portion of each.”²³⁰

Triggering the major questions doctrine by reference to the political controversy surrounding a policy allows political opponents of that policy “in both legal and practical effect,” to amend an Act of Congress by essentially “repealing a portion” of an agency’s authority.²³¹ Take the OSHA vaccine case; the statute there authorized the Secretary of Labor to promulgate “any occupational safety or health standard.”²³² The Court concluded that the agency’s vaccination policy was a major question that couldn’t be promulgated under that broad, general grant of authority, but instead needed to be “plainly authorize[d]” by statute because of the politicized nature of vaccines, and because they were deemed a “significant encroachment” and OSHA’s action “no ‘everyday exercise of federal power.’”²³³ The political controversy around vaccines meant the Court was *not* merely asking whether a vaccination policy fell within the statute’s broad grant of authority according to its term; it instead altered the inquiry to ratchet up the required statutory specificity and clarity, effectively creating a carveout from a broad statutory provision.

Yet the Court insists that the principal justification for the major questions doctrine is that it channels issues into the legislative process—forcing Congress to decide them—rather than allowing those issues to be decided elsewhere. In Justice Gorsuch’s concurrence in the OSHA case, for example, he explained that “the major questions doctrine . . . ensures that the national government’s power to make the laws . . . remains where Article I of the Constitution says it belongs”—namely, the legislature, which acts through bicameralism and presentment.²³⁴ “There are some ‘important subjects, which must be entirely regulated by the legislature itself.’”²³⁵ And yet the Court’s willingness to designate issues as major because they are subject to political contestation seems to allow issues to be resolved outside the legislature, rather than within it.²³⁶

In some respects, this element of the major questions doctrine functions like a kind of delegation to future political parties and people to amend a statute outside

²²⁹ 524 U.S. 417, 436 (1998).

²³⁰ *Id.* at 438.

²³¹ *Clinton*, 524 U.S. at 438. See Daniel T. Deacon, *Administrative Forbearance*, 125 YALE L.J. 1548, 1557-68 (2016) (urging narrow reading of *Clinton* and illustrating why the decision has hallmarks of non-delegation analysis).

²³² 29 U.S.C. 655(b).

²³³ *Nat’l Federation of Indep Business v. DOL*, 142 S. Ct. at 665.

²³⁴ *NFIB*, slip op. at 4 (Gorsuch, J., concurring); *id.* (explaining that the major questions doctrine, like the nondelegation doctrine, is “designed to protect the separation of powers and ensure that any new laws governing the lives of Americans are subject to the robust democratic processes the Constitution demands”).

²³⁵ *NFIB*, slip op. at 6 (Gorsuch, J., concurring) (quoting *Wayman v. Southard*, 10 Wheat. 1, 43 (1825)).

²³⁶ See *West Virginia*, 2022 WL 2347278, at *22 (Gorsuch, J., concurring) (arguing that an issue can be major when “state legislatures were engaged in a robust debate” over it).

of the formal legislative process.²³⁷ The doctrine allows political parties and people, well after a statute was enacted, to create the conditions such that an agency policy is deemed “major,” and therefore cannot be enacted under a broad grant of authority that otherwise would authorize it. In other words, the doctrine empowers later-in-time entities to carve out statutory exceptions by creating political controversy around what an agency has done, and thus require explicit congressional authorization for an agency’s policy.

To further draw out the anti-formalist elements of the doctrine, it’s useful to compare the major questions doctrine to other doctrines and theories about executive power when it comes to statutes. Consider questions about the executive branch’s authority to decline to enforce federal statutes based on the President’s enforcement discretion,²³⁸ or the doctrine of desuetude, a common law doctrine that authorizes courts to abrogate long-unenforced criminal statutes.²³⁹ These theories and doctrines envision that the executive branch has the power to effectively unmake laws—sometimes to the point where future executive officers may not be able to reinvigorate statutes absent legislative authorization. The reasons why the executive branch might have this kind of authority were explained by then-Judge Antonin Scalia, who framed the issue this way:

Does what I have said mean that, so long as no minority interests are affected, “important legislative purposes, heralded in the halls of Congress, [can be] lost or misdirected in the vast hallways of the federal bureaucracy?” Of course it does—and a good thing, too. Where no peculiar harm to particular individuals or minorities is in question, lots of once-heralded programs ought to get lost or misdirected, in vast hallways or elsewhere. Yesterday’s herald is today’s bore—although we judges, in the seclusion of chambers, may not be au courant enough to realize it.²⁴⁰

In other words, Presidents and subordinate executive officials will decline to enforce laws that no longer command majority support.²⁴¹ Judge Scalia, in the lecture, justified lodging “[t]he ability to lose or misdirect laws” in the President as “one of

²³⁷ See *supra* text accompanying notes TK (explaining how the Court assesses political significance in terms of the present day).

²³⁸ See, e.g., Cristina M. Rodríguez & Adam B. Cox, *The President and Immigration Law*, 119 YALE L.J. 458 (2009).

²³⁹ Note, *Desuetude*, 119 HARV. L. REV. 2209, 2209 (2006); Leah M. Litman, *Taking Care of Federal Law*, 101 VA. L. REV. 1289, 1342 (2015).

²⁴⁰ Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 897 (1983).

²⁴¹ Scalia, *supra* note 240, at 897-97; Heather Elliot, *The Functions of Standing*, 61 STAN. L. REV. 459, 489 (2008). See also Alexander M. Bickel, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 151-52 (2d ed. 1986) (suggesting laws do not retain their authority over time, may no longer reflect current will, but may not be repealed because they lose visibility).

the prime engines of social change.”²⁴² The lecture pointed to the example of how “Sunday blue laws ... were widely unenforced long before they were widely repealed—and had the first not been possible the second might never have occurred.”²⁴³

Whatever one might think about the President’s power to use enforcement discretion to better approximate the public’s views and public support for various laws, the new major questions doctrine represents a further extension of an anti-formalist approach to legislation. For one thing, executive enforcement discretion can often be more formalized than the rough and tumble politicking that may generate the kind of controversy that would make a given issue a major question under the Court’s doctrine. The executive branch is able to craft enforcement memoranda laying out enforcement policies and the reasons behind them; some statutes even delegate to agencies the power to forbear from enforcing certain statutory provisions.²⁴⁴ When the executive branch creates formal memoranda or exercises delegated authority under a statute, there is a concrete and specific manifestation of political sentiment regarding a federal statute made by an entity (the executive branch) who is accountable to the people, rather than some loose approximation based on an informal survey of state and federal politics and political messaging and intuition made by judges.

Additionally, the major questions doctrine inverts the institutional structure behind the models of legal change supporting doctrines such as desuetude. Then-judge Scalia specifically drew a contrast between the *executive branch’s* assessment of a given statute and *courts’* assessment of a statute, suggesting that the executive branch was in a better position to know about the public’s views or support for a given statute than “judges, in the seclusion of chambers, [who] may not be as courageous enough to realize.”²⁴⁵ The major questions doctrine, by contrast, imagines that courts are able to detect that a matter is so politically controversial that it requires clear congressional authorization when an administrative agency within the executive branch has decided the policy is a good one. The doctrine thus empowers courts to veto an agency’s policy on the ground that it is so politically controversial it cannot be read as being authorized by the statute. Yet as then-Judge Scalia and others have recognized, there are several reasons to think that the executive branch, at least relative to courts, is generally in a better position to assess the political controversy around a given policy and whether the policy is nevertheless best pursued in spite of that controversy.²⁴⁶ The executive branch is subject to reelection; and it is in their interest to pursue policies for which there is a popular mandate.²⁴⁷ The same is not true for the federal courts.

²⁴² Scalia, *supra*, note 240, at 897.

²⁴³ *Id.*

²⁴⁴ See Deacon, *Forbearance*, *supra* note 231, at 1589.

²⁴⁵ Scalia, *supra* note 240, at 897.

²⁴⁶ See *id.*; see also Deacon, *Forbearance*, *supra* note 231, at 1569-74.

²⁴⁷ See Deacon, *Forbearance*, *supra* note 231, at 1569-74, 1588-89; Litman, *Taking Care*, *supra* note 239, at 1344-51.

3. Politicization

The Court's major question doctrine is also politicized in the sense that invites courts to rely on politically and ideologically infused judgments. Triggering application of the doctrine based on whether a given policy is politically controversial is uniquely susceptible to the kind of reasoning that ideologically aligns Justices' articulated views with the political party that appointed them. After all, the doctrine turns on courts' assessment about whether a particular policy is politically controversial. It would not be particularly surprising for a judge's assessment about what is politically controversial or politically significant to align with their own worldview, which these days is often closely aligned with that of the political party that appointed them.

That seems to have played out in the recent major questions cases. Compare the cases in which the Court has applied the major questions doctrine and the cases in which the Court has not applied the doctrine. The Republican appointees on the Court identified the Center for Disease Control's moratorium on evictions during the coronavirus pandemic as a major question because of its perceived political significance. The reasons given for why the eviction moratorium was a politically significant major question sounded in concerns reflecting the ideology and professed political philosophy of the Republican Party.²⁴⁸ Polling indicated that over half of Democrats supported the CDC's eviction moratorium, while just 15% of Republican voters did.²⁴⁹ The same dynamics played out in the case challenging OSHA's rule governing workplaces. There, the Court's reasons about the apparent significance of COVID-19 vaccines tracked conservative commentators questioning the necessity of the COVID-19 vaccine.²⁵⁰ And there too, polling indicated that a majority of Americans and a majority of Democrats supported a vaccine mandate, whereas less than half of Republicans supported a general vaccine requirement and only 35% supported a vaccine requirement for large companies.²⁵¹ The same polling disparities existed with respect to the Clean Power Plan.²⁵² If these cases are any indication, courts' assessment regarding what issues are politically significant is likely to track rather closely with the views of the political party that appointed them—perhaps more so, or at least as much, than in other areas of law.

Now consider the agency matters that the Court has *not* identified as major questions. In *Little Sisters of the Poor v. Pennsylvania*, the then five Republican-appointed

²⁴⁸ See Leah M. Litman, "Hey Stephen", 120 MICH. L. REV. 1109, 1114-15 (2022) (book review).

²⁴⁹ Claire Williams, *About 1 in 2 Voters Support New Eviction Moratorium, but They're Uneasy About the CDC's Authority to Issue It*, Morning Consult (Aug. 11, 2021), <https://morningconsult.com/2021/08/11/cdc-eviction-ban-poll/>.

²⁵⁰ See *supra* Part III.A.1.

²⁵¹ Christian Gall, *Most Americans continue to support vaccine mandates – and want more*, Northwestern Now (Oct 13, 2021), <https://news.northwestern.edu/stories/2021/10/survey-shows-most-americans-continue-to-support-vaccine-mandatesand-want-more/>.

²⁵² Barry G. Rabe, Sarah B. Mills, Christopher Borick, *Public support for regulation of power plant emissions under the Clean Power Plan*, Issues in Energy and Environmental Policy (Jan. 2015), at p. 3, <https://closup.umich.edu/sites/closup/files/uploads/ieep-nsee-2015-clean-power-plan.pdf>.

Justices on the Court upheld the Trump administration’s statutory authority to create exemptions from regulations that required employer health insurance policies to cover certain forms of health care.²⁵³ All of those five Justices have signed onto opinions invoking the major questions doctrine, but in this case they joined an opinion reasoning that the Affordable Care Act gave the Health Resources & Services Administration “broad discretion” “to create the religious and moral exemptions.”²⁵⁴ The case involved an agency’s effort to exempt employers from covering certain forms of contraception. That issue, and specifically the existence of exemptions from health insurance coverage for contraception, is an issue of national political significance insofar as it’s politically controversial; it is also economically significant as well.²⁵⁵ Yet that concern was nowhere evident in the Court’s opinion; the Court did not require the statute to speak with the degree of specificity required in the OSHA or CDC cases. Rather, it sufficed that the statute contained a “broad” grant of authority to the agency, the very kind of authority that was not sufficient in the OSHA or the CDC or the EPA cases.

Or take two examples involving Presidential authority. In *Hamdi v. Rumsfeld*, a majority of the Court concluded that the Authorization of Use of Military Force Act gave the President the authority to detain American citizens.²⁵⁶ Nowhere did the Act specifically mention the detention of American citizens.²⁵⁷ And there was considerable political controversy surrounding the Bush administration’s detention policies.²⁵⁸ And yet the Court was willing to read the statute as a capacious grant of authority to the President, again because of its broad wording. The Court did not require Congress to specifically authorize such a politically significant action. Or take *Trump v. Hawaii*, a challenge to then President Trump’s policy of excluding persons from several Muslim majority countries from entering the United States.²⁵⁹ That policy was certainly politically controversial, and there were widespread protests against it and many of President Trump’s immigration policies. Yet there too, the Court did not even seem to perceive that question as significant; it certainly did not allow the significance of that question to affect the Court’s analysis of the statute. Rather, the Court again rested on the fact that the statute in question “grants

²⁵³ 140 S. Ct. 2367 (2020). Justice Breyer and Justice Kagan concurred in a separate opinion.

²⁵⁴ 140 S. Ct. at 2381.

²⁵⁵ See, e.g., *New York v. Dep’t of Health & Human Servs.*, 414 F. Supp. 3d 475 (S.D.N.Y. 2019) (invoking major questions doctrine to construe exemption authority).

²⁵⁶ 542 U.S. 507 (2004).

²⁵⁷ *Id.* at 510 (the act authorized the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks” or “harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons”).

²⁵⁸ *How 9/11 Radically Expanded the Power of the US Government*, Time (Sept 11, 2021), <https://time.com/6096903/september-11-legal-history/>.

²⁵⁹ 138 S. Ct. 2392 (2018).

the president broad discretion to suspend the entry” of noncitizens into the United States.²⁶⁰ Again, statutory specificity was not required.

There are other examples, but the point remains: Judges may be more inclined to perceive issues or policies as politically significant if the policies are opposed by the political party that appointed the judge. That is not to say that judges are intentionally adopting the views of the party that appointed them. Rather, this tendency simply reflects the fact that a judge’s worldview, as well as their assessments of the political significance of a given policy, are more likely to align with the political party that appointed them than with the political party that did not.²⁶¹ And so the currently articulated version of the major questions doctrine seems to facilitate that kind of ideological, political judging.

4. *Minority Rule*

The focus on whether an agency rule is politically controversial exacerbates other pathologies in the constitutional system as well. In particular, the new major questions doctrine provides an additional mechanism for the constitutional system’s skew toward minority rule.

The constitutional system’s mechanisms for minority rule are, by this point, well documented. Sandy Levinson has long argued that the Senate’s apportionment scheme facilitates minority rule;²⁶² this was also understood at the Founding.²⁶³ The Electoral College’s winner take all system, which awards all of a state’s votes in the Electoral College to the presidential candidate who won the popular vote in a state, similarly allows a minority of national voters to select a President.²⁶⁴ More recently, scholars have pointed out how subconstitutional mechanisms such as the filibuster, which requires a supermajority of votes in the Senate, provide other mechanisms allowing political minorities to govern.²⁶⁵

The Supreme Court itself facilitates a kind of minority rule. The countermajoritarian design of the Court, which is insulated from formal political feedback mechanisms like elections, enables a kind of minority rule.²⁶⁶ And more recently, the Supreme Court’s decisions have facilitated minority rule in the legislative process.

²⁶⁰ *Trump v. Hawaii*, 138 S. Ct. at 2407.

²⁶¹ See Litman, *Hey Stephen*, *supra* note 248, at 1114.

²⁶² Sanford Levinson, *FRAMED: AMERICA’S 51 CONSTITUTION AND THE CRISIS OF GOVERNANCE* 148–51 (2012); Sanford Levinson, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG* 6, 25-140 (2006).

²⁶³ See James Madison, Notes on the Constitutional Convention (July 14, 1787), in 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 9 (Max Farrand ed., 1911) (describing the Senate as allowing “the minority [to] negative the will of the majority”).

²⁶⁴ Jonathan Gould & David Pozen, Structural Biases in Structural Constitutional Law, ___ *NYU L. REV.* ___, at 44, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3797051

²⁶⁵ *Id.* at 91-97.

²⁶⁶ See Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 *YALE L.J.* 153 (2002).

In particular, the Supreme Court’s partisan gerrymandering decision,²⁶⁷ as well as the Court’s decisions on federal voting rights protections,²⁶⁸ have increased the likelihood that a political party that loses the statewide popular vote could retain control of a state legislature. (Partisan gerrymandering allows a political party to draw districts in ways that make it easier for them to retain power and harder for the opposing party to obtain power.²⁶⁹ Vote dilution and voting preconditions that burden some groups more than others are other mechanisms that make it easier for parties to obtain political power to an extent that outpaces the share of votes they receive.²⁷⁰) At a minimum, the decisions enable a party to obtain legislative seats that outpace the percentage of the popular vote the party secured.

The new major questions doctrine’s focus on political significance provides an additional mechanism for minority rule.²⁷¹ That’s not only because, as explained above, the doctrine allows courts to point to minority political party opposition and political controversy over an agency’s policy to require clear statutory authorization for the policy.²⁷² It’s also because of some of the particular indicia the Court uses as evidence of political significance. Consider some of the reasoning in *West Virginia v. EPA* about why the Court treated the EPA’s generation-shifting rules as a major policy.²⁷³ The Court focused on subsequent legislative history, and specifically Congress’s failure to enact generation-shifting requirements, to assess whether the EPA’s rule was major. The Court noted that the EPA had adopted “a regulatory program that Congress had conspicuously and repeatedly declined to enact itself”²⁷⁴: Congress “has consistently rejected proposals to amend the Clean Air Act to create” a cap-and-trade scheme, one kind of generation shifting requirement, as

²⁶⁷ *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019); Nicholas Stephanopoulos, *The Anti-Carolene Court*, 2019 SUP. CT. REV. 111, 179.

²⁶⁸ *Brnovich v. Democratic Nat’l Committee*, 141 S. Ct. 2321 (2021); *Shelby County v. Holder*, 570 U.S. 529 (2013).

²⁶⁹ Stephanopoulos, *Anti-Carolene*, *supra* note 267, at 179.

²⁷⁰ For example, the federal courts granted three stays of decisions finding vote dilution reduced the number of majority-minority districts in the House by 3; in most of these states, the maps created a number of majority-minority districts that represented about half of the minority’s demographic representation in the states. *See Merrill v. Milligan*, 142 S. Ct. 879 (2022); *Ardoin v. Robinson*, 2022 WL 2312680 (June 28, 2022) (mem.); *Alpha Phi Alpha Fraternity Inc v. Raffensperger*, Case No. 1:21-cv-05337-SCJ, Dkt. 134 (N. D. Ga. Feb. 28, 2022). (Black Alabamians represented almost 28% of the state, but could elect the candidate of their choice in 11% of the state’s districts. *Caster v. Merrill*, Case No. 2:21-cv-01536, Dkt. 101 (N.D. Ala. Jan. 24, 2022)).

²⁷¹ While this reasoning has taken on increased relevance in the latest major questions cases, the Court had also noted in *Brown & Williamson* that “Congress considered and rejected several proposals to give the FDA the authority to regulate tobacco” when it instead adopted other federal legislation regarding tobacco. *Brown & Williamson*, 529 U.S. at 147-48.

²⁷² *See supra* TAN TK-TK.

²⁷³ 2022 WL 2347278.

²⁷⁴ 2022 WL 2347278, at * 13.

well as “similar measures, such as a carbon tax.”²⁷⁵ Justice Gorsuch’s concurrence in *West Virginia* similarly emphasized that “Congress has debated the matter frequently” and has “declined’ to adopt legislation similar to the Clean Power Plan.”²⁷⁶ This kind of reasoning—that Congress had considered, but declined to adopt legislation codifying an agency’s regulatory program—appeared in the OSHA case,²⁷⁷ as well as the CDC eviction case.²⁷⁸

The Court’s reliance on Congress’s rejection of legislation embodying certain policies to prevent agencies from promulgating those same policies may allow the political party not in power to constrain the power of the party that is. A party that controls the House, but not the Senate or the White House, can withhold consent to a bill and therefore make it more likely a policy is deemed “major.” Even a political party that controls zero branches can similarly block policies through the filibuster. Refusing to go along with legislation that overlaps with an agency’s delegated authority will also restrict future administration’s statutory authority, even if those future administrations enjoy widespread public support.

This turns the minority checks built into the system into a power held by a minority to effectively amend statutes. Typically, the Senate filibuster allows a political minority to prevent new legislation from being enacted. That is a kind of minority rule—it allows a political minority to thwart the agenda of the party in power in the Senate. But the major questions doctrine allows the Senate filibuster to effectively amend existing legislation—it allows a political minority to alter the scope of an agency’s authority under a statute simply by refusing to enact a statute that overlaps with the authority the agency has under an existing statute, either according to the “best” interpretation of that statute and potentially even when the statute is unambiguous.

The Court’s other indicia of political significance also facilitate minority rule. For example, some Justices treat debate in the states as evidence of political significance. In his concurrence in *West Virginia*, Justice Gorsuch argued that the Court had previously concluded vaccine requirements were politically significant because “state legislatures were engaged in robust debates” about them.²⁷⁹ Many such state legislatures are themselves the product of severe partisan gerrymandering.²⁸⁰ But even

²⁷⁵ *Id.* at *16.

²⁷⁶ *Id.* at *23 (Gorsuch, J., concurring).

²⁷⁷ See *NFIB*, 142 S. Ct. at 666 (describing “the most noteworthy action concerning the vaccine mandate by either House of Congress” as “a majority vote of the Senate disapproving the regulation on December 8, 2021”); *id.* at 667-68 (Gorsuch, J., concurring) (“Congress has chosen not to afford OSHA—or any federal agency—the authority to issue a vaccine mandate. Indeed, a majority of the Senate even voted to disapprove OSHA’s regulation.”).

²⁷⁸ *Alabama Ass’n of Realtors*, 141 S. Ct. at 2486-87 (when summarizing the regulatory history, the Court noted that Congress “did not renew” its initial “120-day eviction moratorium” for certain properties).

²⁷⁹ 2022 WL 2347278, at *22 (Gorsuch, J., concurring).

²⁸⁰ See Miriam Seifter, *Counter-majoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1762-67 (2021)

assuming state legislatures are representative of the people within those states, looking to political controversy in state legislatures (or local legislatures?) in order to require clear congressional authorization for a given policy may be deeply undemocratic. How much state opposition does it take to block federal policy? The Justices do not say, but neither do they give any indication that it must be enough to form a national majority.

The new major questions doctrine enables minority rule in other ways as well. The *West Virginia* case in particular highlights how the doctrine might allow special interests groups to come in and generate political controversy about an agency's statutory authority and nullify the legislative wins that a political majority was able to secure in the legislative process. The Clean Air Act, the statute at issue in *West Virginia*, is a supposed rarity under theories of political economy that maintain that it is easier for smaller, organized interests to coordinate and overcome collective action programs and secure wins in the political process than it is for broad, diffuse coalitions (that may represent larger numbers of people) to do so.²⁸¹ The unambiguously broad CAA represented a political process win for the public interest given that the statute is supposed to benefit a broad, diffuse group.²⁸² The new major questions doctrine effectively allows special interest groups to later neuter such achievements.²⁸³ By generating political controversy surrounding an issue already settled by the political process, special interests groups effectively negate pieces of a statute. This mechanism seems precisely backwards: It provides a 5,000-pound weight on the interpretive scale in favor of special interests groups that are at a comparative advantage in the political process and that can be deployed after those groups have already lost through normal channels.²⁸⁴ That too facilitates a kind of minority rule.²⁸⁵

²⁸¹ Mancur Olson, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 10-11 (1965); Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371, 373-85, 395 (1983). See Lisa Heinzerling & Frank Ackerman, *Law and Economics for a Warming World*, 1 HARV. L. & POLY' REV. 331, 356 (2007) ("Academic theory now almost dismisses the possibility that public policy and expenditures represent the public interest.").

²⁸² See Brunstein & Revesz, *supra* note 24, at 255-62; Heinzerling & Ackerman, *supra* note 281, at 341 ("The effect of these arguments is . . . to encourage the Court to turn away from plain language in the Clean Air Act authorizing the EPA to regulate all harmful air pollutants.").

²⁸³ See Heinzerling & Ackerman, *supra* note 281, at 341; Litman, *Taking Care*, *supra* note 239, at 1344-51.

²⁸⁴ Cf. Stephanopoulos, *Anti-Carolene Court*, *supra* note 267 (cataloguing other instances where the Court seems to use a reverse political process theory that affords greater protection to groups more easily able to protect their interests in the political process).

²⁸⁵ An analogy to constitutional theory may help to underscore the point. In order to explain and analyze constitutional precedent, Dick Fallon developed the concept of the "superprecedent," which refers to the category of cases that the Supreme Court should never overrule. Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Har- tian Positivist Jurisprudence*, 86 N.C. L. REV. 1107 (2008). Several Justices have invoked the

B. Novelty, Democracy, and the Regulatory State

This Part unpacks the implications of the Court’s willingness to declare an agency policy major—and therefore require clear congressional authorization for it—based on the policy being a “novel” one. It shows how this approach to majorness effectively nullifies an agency’s ability to exercise delegated authority in cases where Congress would have had the most reason to rely on delegation to an agency, and also where such delegation would likely be most effective. It argues that this aspect of the new major questions doctrine leads to the appearance of minimalism and makes the doctrine appear less significant and less consequential than it actually is when, in fact, a focus on regulatory novelty turns the major questions doctrine into a deregulatory cudgel that will do much of the work, and a more selective and politically targeted form of the work, that a revived nondelegation doctrine would do.

1. Novelty, Regulatory Authority, and Majorness

Increasingly, the perceived novelty of an agency’s policy, as well as the scope and potential future implications of the agency’s broader theory of statutory authority, have become indicia of a rule’s majorness. Both of these doctrinal trends also mirror parallel developments in constitutional law.

a. Regulatory Anti-Novelty

concept at their confirmation hearings. *See, e.g.*, Brian Naylor, *Barrett Says She Does Not Consider Roe v. Wade ‘Super-Precedent,’* NPR (Oct. 13, 2020), <https://www.npr.org/sections/live-amy-coney-barrett-supreme-court-confirmation/2020/10/13/923355142/barrett-says-abortion-rights-decision-not-a-super-precedent>; C-SPAN, *Judge Gorsuch Says He Won’t Call Roe v. Wade a “Super Precedent,”* C_SPAN (March 21, 2017), <https://www.c-span.org/video/?c4662290/judge-gorsuch-call-roe-v-wade-super-precedent>. Whether a Supreme Court decision qualifies as a superprecedent, and thus should not be overruled, Fallon explained, turns in part on whether the decision “deals with matters that no longer occasion broad, ongoing, unstable contestation in American law and politics.” Fallon, *supra*, at 1149. In her confirmation hearings, Justice Barrett explained that whether a case qualified as a superprecedent depended on whether “calls to overrule it have [] ceased.” Naylor, *supra*. This feature of stare decisis turns on the political landscape. It makes the inquiry about respect for precedent turn whether the public and political actors have accepted a decision of the Supreme Court: If they have accepted it, then the decision is safe. If they have not, then the decision can be overruled. This doctrinal or theoretical structure, then, seems to create an incentive for judges, political parties, and members of the public to never accept and to continually contest Supreme Court decisions with which they disagree; at a minimum, it judicially solidifies political opposition to precedent into a judicial mechanism for less respect for that precedent. The major questions doctrine is almost the inverse of this aspect of the superprecedent concept. If the public and political actors have *not* accepted the agency’s decision, then the decision must be explicitly authorized by statute. But if they have accepted the agency’s decision – or at least if they have not mounted a sustained campaign against it – then the agency’s decision may not have to be explicitly authorized by statute.

The Court's major question cases have increasingly relied on an anti-novelty principle that was first fleshed out in the Court's constitutional law cases. In constitutional federalism and separation of powers cases, the Court has reasoned repeatedly that legislative novelty—the fact that a federal statute is novel in some respects—is a sign that the statute is unconstitutional.²⁸⁶ The Court's now standard formulation of the constitutional anti-novelty principle is that “the most telling indication of [a] severe constitutional problem with [a statute] is the lack of historical precedent.”²⁸⁷

A parallel skepticism of regulatory novelty is now firmly part of the major questions doctrine. In the major questions cases, of course, novelty is used to interpret a statute, rather than the Constitution: The novelty of an agency's regulatory approach is an indication that the policy is major and therefore likely not authorized by statute. Similar to the origins of the constitutional anti-novelty rhetoric, the regulatory anti-novelty rhetoric began with the passing observation, in *FDA v. Brown & Williamson*, that the agency had asserted a new and different authority to regulate the tobacco industry.²⁸⁸ The Court noted that the agency's assertion of authority to regulate tobacco was “[c]ontrary to its representations to Congress since 1914.”²⁸⁹

Since *Brown & Williamson*, the novelty of an agency's regulation has increasingly featured in the Court's major question cases and has also taken on additional significance. It has now hardened into a central principle guiding the application of the doctrine. When the Court concluded that the CDC lacked the authority to impose a moratorium on evictions, for example, the Court concluded its analysis of the merits with this observation: “This claim of expansive authority under 361(a) is unprecedented. Since that provision's enactment in 1944, no regulation premised on it has even begun to approach the size or scope of the eviction moratorium.”²⁹⁰

Subsequently, in the OSHA vaccine-and-testing case, the Court articulated the anti-novelty principle even more strongly, and explicitly incorporated the Court's constitutional anti-novelty line of cases. The Court reasoned:

It is telling that OSHA, in its half century of existence, 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. This ‘lack of historical precedent,’ coupled with the breadth of authority that the Secretary now claims, is a ‘telling indication’ that the mandate extends beyond the agency's legitimate reach. *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477, 505 (2010).

²⁸⁶ See generally Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407 (2017).

²⁸⁷ *Free Enter. Fund v. Pub. Co Accounting Oversight Bd.*, 561 U.S. 477, 505 (2010).

²⁸⁸ On the origins of constitutional antinovelty see Litman, *supra* note 286, at 1410, 1415-16.

²⁸⁹ 529 U.S. at 159.

²⁹⁰ *Alabama Ass'n of Realtors*, 141 S. Ct. at 2489.

Finally, in *West Virginia*, the Court similarly relied on the purported regulatory novelty of the EPA's generation shifting requirements as an indication that the agency had adopted a major rule.²⁹¹

b. Scope and Implications of Authority

The Court's major question cases have also incorporated another element of constitutional jurisprudence into their assessment of whether a rule is major. The more recent major questions cases ask not just whether an agency's rule is major, but also whether the scope and implications of the theory that justifies the agency's rule could lead to other potentially major policies not currently before the Court.

This aspect of the major questions doctrine resembles an interpretive method that the Court has come to use in constitutional law cases that examine the scope of Congress's powers, often under the commerce clause.²⁹² There, in order to analyze whether a particular statute falls within the scope of Congress's powers, the Court asks what other statutes Congress might be able to enact were it able to enact the one that it did enact, and that is before the Court. If the answer to that question includes hypothetically possible, but practically unlikely, far-reaching exercises of federal authority, that is a mark against the federal statute. And if the theory justifying the federal statute would or could justify something akin to plenary congressional authority, that is a reason to invalidate the statute as exceeding Congress's powers.²⁹³ Thus, in *United States v. Lopez*, the Court concluded that Congress lacked the authority under the Commerce Clause to prohibit gun possession in schools in part because if the Court "were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate."²⁹⁴ Similarly, in *National Federation of Independent Business v. Sebelius*, all of the Justices who concluded that Congress lacked the authority to enact the minimum-coverage requirement under the Commerce Clause relied on the idea that, were the minimum-coverage requirement constitutional, then Congress could regulate near anything.²⁹⁵

This kind of analysis now appears to be a part of the major questions doctrine. The Court entertains hypotheticals about what the agency *might* do if its current regulation were authorized by statute. And if some of those hypothetical policies that an agency might have the statutory authority to enact strike the Court as odd

²⁹¹ See 2022 WL 2347278, at *13-14.

²⁹² See, e.g., Richard Primus, *The Limits of Enumeration*, 124 YALE L.J. 576, 591-92 (2014) (describing mode of analysis).

²⁹³ Primus, *Limits of Enumeration*, supra note 292, at 591.

²⁹⁴ 514 U.S. 549, 564 (1995).

²⁹⁵ See 567 U.S. at 553 (opinion of Roberts, C.J.) ("[T]he Government's logic would justify a mandatory purchase to solve almost any problem."); *id.* at 655 (Scalia et al. dissenting) ("The Government was invited, at oral argument, to suggest what federal controls over private conduct ... could *not* be justified It was unable to name any. As we said at the outset, whereas the precise scope of the Commerce Clause and the Necessary and Proper Clause is uncertain, the proposition that the Federal Government cannot do everything is a fundamental precept.").

or themselves major, then that becomes a reason to conclude that the current policy presents a major question that needs to be explicitly authorized by statute.

Earlier iterations of the major question doctrine focused on whether the particular policy that an agency had adopted qualified as major. Thus, *FDA v. Brown & Williamson Tobacco Corporation* analyzed “the nature of” the FDA’s “assert[ing] jurisdiction to regulate . . . tobacco products,”²⁹⁶ i.e., what it had done in the particular case, and *King v. Burwell* focused on the specific question the agency had addressed in that case—whether tax credits were available on health care exchanges established by the federal government.²⁹⁷

The particular policy or particular rule that an agency has adopted remain part of how the major questions doctrine operates today. But the more recent major questions cases have added another inquiry. This inquiry involves an assessment of what an agency could theoretically do in the future if a court were to conclude that the agency’s existing policy was authorized by statute. That is, rather than assessing whether the particular policy that the agency has adopted is major, the Court now assesses whether any conceivable policy that the agency might have the authority to adopt would be major. That inquiry sweeps in unlikely-to-materialize, but theoretically possible, policies that seem to have an aura of majorness and are more likely to code as politically significant. Take *Alabama Association of Realtors*, which examined the CDC’s moratorium on evictions in certain places.²⁹⁸ In addition to assessing whether the agency policy at issue in the case, a moratorium on evictions, was major, the Court incorporated into its major questions analysis the possibility that the CDC would be able to “mandate free grocery delivery to the homes of the sick or vulnerable”; “require[] manufacturers to provide free computers to enable people to work from home”; or “order telecommunications companies to provide free high-speed Internet service to facilitate remote work.”²⁹⁹ It was that “claim of expansive authority” that the Court subjected to an inquiry into majorness.³⁰⁰ Likewise, in *West Virginia v. EPA*, the Court evaluated the majorness of the EPA’s rule by asking what else the agency could do under its theory of statutory authority.³⁰¹

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²⁹⁶ 529 U.S. at 159.

²⁹⁷ 576 U.S. at 485-86.

²⁹⁸ 141 S. Ct. 2485.

²⁹⁹ 141 S. Ct. at 2489.

³⁰⁰ See *id.* See also *Nat’l Federation of Indep. Business v. Dept of Labor*, 142 S. Ct. at 665 (“Permitting OSHA to regulate the hazards of daily life—simply because most Americans have jobs and face those same risks while on the clock—would significantly expand OSHA’s regulatory authority without clear congressional authorization.”).

³⁰¹ 2022 WL 2347278, at *15 (“[O]n this view of EPA’s authority, it could go further, perhaps forcing coal plants to ‘shift’ away virtually all of their generation—i.e., to cease making power altogether.”).

Before assessing the implications of these indicia of majorness, it is worth pausing over the fact that these indicia, like the political significance indicia of majorness, also have at most a tangential relationship to discerning statutory meaning.³⁰² The regulatory antinovely principle's relationship to statutory text becomes apparent by analyzing how the justifications supposedly underlying the constitutional anti-novely principle apply (or not) to the parallel regulatory version of the antinovely principle.

One justification for the constitutional antinovely principle is that the novelty of a federal statute is an indication that prior Congresses “believed” that they lacked the constitutional power to enact the statute.³⁰³ But many of the reasons why novelty is not a reliable indication that prior Congresses thought that a statute was unconstitutional also demonstrate why novelty is likewise not a reliable indication that previous agencies thought a regulation exceeded the agency's authority under a statute. For one, while the procedures that constrain agency policymaking are not as cumbersome as the procedures that constrain Congress's power to make laws, the constraints on agencies are still substantial and limit what an agency might do.³⁰⁴ So the difficulty of adopting rules is a reason why an agency might not exercise the full scope of its statutory authority within a few years following the statute's enactment.

Further, one of the most important limits on agencies' authority is grounded in the Administrative Procedure Act: agencies can only pursue policies that are supported by reasoned decisionmaking, which includes demonstrating that there is a rational connection between the facts on the ground and the decision made.³⁰⁵ Therefore, the facts and social context that exist in the real world must provide support for an agency's policy apart from whether the formal language in the statute might allow it.³⁰⁶ And that evidentiary-based limit supplies an important reason that might explain regulatory novelty—changes at the societal level.³⁰⁷ Relevant changes might include a subsequent regulation that requires the agency to make adjustments, or a judicial decision that altered the regulatory or statutory landscape.³⁰⁸ Say, for example, that an agency with overlapping jurisdiction adopted a new regulation that requires an agency to recalibrate its existing regulatory approach; or that

³⁰² On why the major questions doctrine itself, even earlier iterations of it, did not supply a sensible account of statutory interpretation, see Emerson, *supra* note 153, at 2049-59, 2073-87, and Heinzerling, *Power Canons*, *supra* note 2, at 1947, 1957-60, 1966-69, 1986-90.

³⁰³ See *Printz*, 521 U.S. at 907-908 (“[T]he numerousness of these statutes, contrasted with the utter lack of statutes imposing obligations on the States' executive (notwithstanding the attractiveness of that course to Congress), suggests an assumed absence of such power.”); *Alden v. Maine*, 527 U.S. 706, 744 (1999) (“[E]arly Congresses did not believe they had the power to authorize private suits against the States in their own courts.”).

³⁰⁴ Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 360-64 (2019).

³⁰⁵ See 5 U.S.C. § 706(2)(A), (E); *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm*, 463 U.S. 29 (1983).

³⁰⁶ See *id.*

³⁰⁷ Litman, *supra* note 286, at 1437.

³⁰⁸ Litman, *supra* note 286, at 1435.

a judicial decision has foreclosed one regulatory approach but opened up new ones. An agency may shift gears in light of those developments. Or there might have been some changes in markets or society more broadly that alter the field in which an agency is regulating,³⁰⁹ like when a novel pandemic shuts down entire sectors of the market. That might explain why, for example, the OSHA had never previously adopted a vaccination requirement, or why the CDC had never previously concluded that a moratorium on evictions would restrict the spread of disease. Or we might develop new knowledge about, say, the harm caused by cigarettes and their intended effects.³¹⁰ Alternatively, an agency's priorities or its assessment of the costs and benefits or political landscape might have shifted.³¹¹ That arguably occurred in *West Virginia*: despite claims that the Clean Power Plan's metrics were unattainable without substantial economic consequences, the power industry achieved the metrics before the target dates.³¹² Having seen that, the agency sought to adapt its views going forward.³¹³ That too might cause an agency to pursue a new regulatory approach.

This is not an exhaustive list of all of the circumstances or scenarios that might lead to regulatory novelty; it does, however, underscore that there are myriad reasons why an agency might not adopt a particular regulation aside from the agency thinking that it lacks the statutory authority to do so—reasons why regulatory novelty does not signal an agency's (or anyone's) views about the meaning of a statute. Indeed, the federal government argued that OSHA adopted the vaccination policy only after it had concluded that the measures adopted to date by employers were not effective in controlling the spread of COVID-19.³¹⁴ So the fact that the agency took a new course in response to a developing problem could just reflect an agency's response to changed circumstances and new information; it is not a reliable proxy for an agency's view that it lacked certain kinds of authority under a statute.

The other justifications for the constitutional antinovely principle similarly underscore why regulatory antinovely is not a reliable proxy for statutory meaning. A second justification for the constitutional antinovely principle is that novelty might be evidence of actual unconstitutionality.³¹⁵ But there is no reason why regulatory novelty would be evidence about the actual meaning of a statute, particularly when a delegation is framed in unambiguously broad and capacious terms that Congress expected an agency to apply to changing circumstances.³¹⁶ A third justification for

³⁰⁹ Litman, *supra* note 286, at 1438.

³¹⁰ See *Brown & Williamson*, 529 U.S. at 120.

³¹¹ Litman, *supra* note 286, at 1443.

³¹² See *West Virginia*, 2022 WL 2347278, at *28 (Kagan, J., dissenting) (“The ensuing years, though, proved the Plan's moderation. Market forces alone caused the power industry to meet the Plan's nationwide emissions target—through exactly the kinds of generation shifting the Plan contemplated.”).

³¹³ See *id.*

³¹⁴ Brief of Federal Government Respondents, *West Virginia*, 2022 WL 2347278, at pp. 2-3; 61 Fed. Reg. at 61, 430, 61, 444, 61, 409, 61,411-61, 417, 61.

³¹⁵ Litman, *supra* note 286, at 1454.

³¹⁶ See Heinzerling, *Power Canons*, *supra* note 2, at 1938.

the constitutional antinovelty principle is that the novelty of a federal statute supplies a second-best principle to constrain Congress's powers given that the Court's cases have allowed Congress more constitutional powers than Congress actually possesses.³¹⁷ But this argument also doesn't map onto cases involving statutory interpretation where there isn't a similar body of judicial precedent that the Court might be trying to rein in. What the Court is limiting is the statute itself, and there isn't a good reason to think that regulatory novelty is a reliable indicator of statutory meaning.

2. Nullify Effective Delegations

What the increasing importance of both regulatory novelty and the broader future implications of the agency's asserted statutory authority does do is limit the effectiveness of congressional delegations to agencies. In particular, by limiting an agency's authority to familiar contexts, the Court undermines the reasons why Congress might delegate to an agency in the first place. As a result, this aspect of the major questions doctrine hobbles delegations in circumstances in which Congress is most likely to rely on a delegatory approach, and in circumstances where delegations are most likely to be an effective governance strategy. And it means that the major questions doctrine is increasingly performing the work that a revived non-delegation doctrine would do—nullifying delegations where Congress has reason to rely on them.

Consider two standard justifications for delegations to agencies: expertise and flexibility. One justification for broad delegations to agencies is the expertise and information that agencies bring to bear on particular questions.³¹⁸ Administrative agencies usually have large professional staffs with specialized training and experience with particular regulatory issues.³¹⁹ In contrast, Congress has a far smaller, more generalist group of workers.³²⁰ Thus, the argument goes, “to the extent we want policies made by persons who know what they are doing, it is better that policymaking be centered in the administrative agencies rather than in Congress.”³²¹ Agency expertise comes in a variety of forms. Agency officials are often professionals in their respective fields, and so they contribute their pre-existing knowledge and training to the task of creating and implementing policy. For example, the CDC relies on epidemiologists to evaluate the reliability of public-health studies,³²² and

³¹⁷ Litman, *supra* note 286, at 1479.

³¹⁸ E.g., Daniel T. Deacon, *Administrative Forbearance*, 125 YALE L.J. 1548, 1582 (2016); Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 127 (2005).

³¹⁹ Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2151–52 (2004).

³²⁰ *Id.* at 2151.

³²¹ *Id.*

³²² Sidney A. Shapiro, *The Failure to Understand Expertise in Administrative Law: The Problem and the Consequences*, 50 WAKE FOREST L. REV. 1097, 1108 (2015).

multiple agencies rely on trained economists to generate credible cost-benefit assessments.³²³ However, agencies also benefit from expertise that is acquired from exposure and experience. Agency staff “will come to know deeply the web of laws that they are delegated to administer or those that intersect with their turf, plus subsequent implementing regulations, guidance documents, and court decisions.”³²⁴ And, “as repeat players in frequent political contact with congressional committees, the public, and more directly implicated stakeholders, agencies will come to know how various regulatory choices work or could be improved.”³²⁵

A related justification for delegation rests on agencies’ flexibility. Thanks in part to how rulemaking procedures work, agencies are relatively well-positioned to adapt and revise policies to meet changing circumstances and new information.³²⁶ That flexibility can be invaluable in the face of unpredictable situations like the COVID-19 pandemic. Regulatory flexibility allows agencies to develop policies through trial-and-error experimentation;³²⁷ agencies can also implement innovative new policies in the face of uncertainty and use data about the resulting feedback to formulate more effective policies in the future.³²⁸ In contrast, Congress works with several institutional features that make flexible adaptations more difficult. The legislative process makes it difficult to enact federal statutes.³²⁹ Proposed legislation must pass through countless “vetogates,” including the bicameralism and presentment requirements, internal roadblocks within each congressional chamber, and the need for supermajorities to overcome Senate filibusters.³³⁰ As a result, Congress cannot move as quickly or as efficiently as agencies can; updating or revisiting prior legislation imposes enormous practical costs.

The power of the “expertise” and “flexibility” justifications for delegations to agencies have led some to claim that delegation is a practical necessity in light of the scale of modern government.³³¹ The Supreme Court has noted that “Congress simply cannot do its job absent an ability to delegate power under broad general directives.”³³² As Justice Kagan later wrote, if relatively open-ended delegations to

³²³ *Id.* at 1109.

³²⁴ William W. Buzbee, *The Tethered President: Consistency and Contingency in Administrative Law*, 98 B.U. L. REV. 1357, 1367 (2018).

³²⁵ *Id.*

³²⁶ *E.g.*, Deacon, *supra* note 231, at 1585; Stephenson, *supra* note TK, at 139; 453 Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 453 (2008).

³²⁷ Deacon, *supra* note 231, at 1585–86; *see also* Stephenson, *supra* note TK, at 140.

³²⁸ *See* Yair Listokin, *Learning Through Policy Variation*, 118 YALE L.J. 480, 483–84 (1989); *see also* Zachary Gubler, *Experimental Rules*, 55 B.C. L. REV. 129 (2014).

³²⁹ *E.g.*, William N. Eskridge, Jr., *Vetogates, Chevron, Preemption*, 83 NOTRE DAME L. REV. 1441, 1441 (2008).

³³⁰ *Id.* at 1444–48.

³³¹ *E.g.*, Merrill, *supra* note TK, at 2155 (“[B]road delegation is necessary if government is to realize the ambitious agenda it has set for itself.”).

³³² *Mistretta v. United States*, 488 U.S. 361, 372 (1989).

agencies are not permissible, “then most of Government is unconstitutional—dependent as Congress is on the need to give discretion to executive officials to implement its programs.”³³³

Part of what is striking about the new major questions cases is that the justifications for delegations to agencies—the reasons why Congress might rely on delegations to agencies—now overlap with the reasons the Court has identified to be skeptical of an agency’s authority. As a result, the Court’s major questions doctrine undermines the very bases for delegation, turning the reasons why Congress might rely on delegations to agencies into reasons to narrowly construe and limit the reach of the delegations in the circumstances in which the delegations are likely to be used and likely to be needed for effective governance.

Take the expertise rationale for delegations. The premise of the expertise rationale is that Congress is not likely to know how or when or in what context a particular goal might be achieved. When Congress operates under those conditions, the thinking goes, it may rely on a delegatory approach and delegate authority to an agency. Yet the major questions doctrine requires Congress to anticipate many of the means that an agency might use to pursue a particular goal. The fact that Congress did not anticipate and spell out a particular method of regulation is no longer a reason why Congress might use a broad delegation to an agency; it is now a reason why a delegation may not be put toward a particular use.

Or consider the flexibility rationale for delegations to agencies. The premise behind this rationale is that there may be unanticipated problems or crises or just factual developments that arise that may require adaptation along the way. Here too, when Congress legislates in a field where this might be true, it may rely on a delegatory approach. Yet here too, the major questions doctrine requires Congress to anticipate and spell out the circumstances that might precipitate an agency action, as well as the possible responses that an agency might adopt. This too inverts the reasons why Congress might rely on and might need to rely on delegations into the bases for restricting the delegations.

Nor may it work for Congress to attempt *ex ante* to specify a wide range of different approaches that an agency might take in a given area, hoping that one of them will bear future fruit. For one, due to its lack of expertise Congress may guess wrong and fail to include the measure that would actually prove effective. And there are also costs to over-specification. Using the *expressio unius* canon, courts might find that policies other than those specified are impliedly prohibited.³³⁴ Or, using the canons *noscitur a sociis* and *ejusdem generis*, courts may limit agencies to adopting policies similar to those specified, even when Congress has included a catch-all phrase.³³⁵ In other words, there are good reasons for Congress to rely on broad, general terms such as it did in section 111(d) of the Clean Air Act. Applying the major questions doctrine when Congress does so puts Congress in a very difficult position.

Understood in this way, the Court’s major questions doctrine seems to undermine the bases for delegation—not in a formal, constitutional sense by preventing

³³³ Gundy v. United States, 139 S. Ct. 2116, 2130 (2019) (Kagan, J., plurality opinion).

³³⁴ See generally NLRB v. SW Gen., Inc., 137 S. Ct. 929, 940 (2017).

³³⁵ See Yates v. United States, 574 U.S. 528, 543, 135 S. Ct. 1074, 1085 (2015).

Congress from using delegations—but in a practical sense that makes it difficult to realize the full benefits of delegation. These dynamics were on display in the Court’s major questions cases. Consider the OSHA testing-or-vaccination policy that the Court invalidated by relying on the major questions doctrine.³³⁶ There, the Court claimed that it was “telling that OSHA, in its half century of existence, has never before adopted a broad public health regulation of this kind.”³³⁷ But since the Occupational Safety and Health Act had been enacted in 1970, the agency had not faced a pandemic similar to COVID-19. The regulatory novelty was a product of the flexibility that delegations typically afford agencies to adapt to changed circumstances.³³⁸ The possibility that changed factual circumstances might call for new, prompt action was traditionally a justification for delegation, and may have been why Congress relied on a delegatory approach in this context. Yet the Court treated it as a reason to be skeptical of an agency’s exercise of its delegated authority.

These dynamics were also on display in *West Virginia*. There, the EPA promulgated a rule, the Clean Power Plan, that adopted some generation shifting requirements for coal and natural gas fired power plants. These requirements, the agency explained, were needed “[c]onsidering the direction that the power sector has been taking and the changes that it is undergoing.”³³⁹ The agency also explained that generation shifting was possible because of “advancements and innovation in power sector technologies.”³⁴⁰ So the EPA’s knowledge about the changing circumstances in the technologically complicated power sector purportedly supplied the occasion for a new regulatory approach; the fact that pollution and air quality are topics that are scientifically complex and rapidly evolving may also be reasons why Congress relied on a delegatory approach. Yet the Court treated the new regulatory approach as an indicia of majorness, even though it may have been the very reason why Congress relied on a delegation in the first place.

3. *Deregulatory Faux Minimalism*

This section explains how the new major questions doctrine gives rise to an air of faux minimalism when in reality, the doctrine operates as a powerful deregulatory weapon that may accomplish some of the goals of a revived nondelegation doctrine, but in a more tailored and politically selective way.

Because the major questions doctrine rests on a rule of statutory interpretation, the decisions invoking the major questions doctrine sometimes end being described as minimalist. For example, after the Court’s decision in the OSHA case, Professor Daniel Farber wrote that, in light of the decisions, “[i]t looks like the moderates,” by which he meant Chief Justice Roberts, Justice Kavanaugh, and Justice Barrett,

³³⁶ 142 S. Ct. 661 (2022).

³³⁷ *Id.* at 666.

³³⁸ See, e.g., Litman, *supra* note 286, at 1437-48 (noting that legislative novelty is often in response to precipitating changes); Deacon, *supra* note 231.

³³⁹ 80 Fed. Reg. 64595. See also 80 Fed. Reg. 64694 (“Today, the electricity sector is undergoing a period of intense change.”).

³⁴⁰ 80 Fed. Reg. 64696.

“aren’t game for a massive attack on regulatory power.”³⁴¹ And Professor Aaron Tang proposed that OSHA could require high quality masking and testing, even if it could not require vaccines.³⁴² And indeed, in some respects the major questions decisions are minimalist, at least relative to other alternative bases for the decisions, because the decisions formally hold out the possibility that Congress may amend the statute to authorize the relevant agency action.³⁴³

But in practice and effect, the Court’s application of the major questions doctrine may not be particularly minimalist. Consider how the doctrine works with respect to statutes already in existence. When Congress drafted the many statutes that delegate authority to administrative agencies, it did so without thinking that it had to specify every possible major form of regulation that an agency might undertake. And so the statutes may be written in relatively clear or even unambiguous, but also capacious and general, terms—rather than in a way that authorize particular policies that might code to later courts as major. Even if Congress could, *ex ante*, predict what forms of regulation might later be identified as major, Congress did not draft most of the important federal regulatory statutes currently in existence with knowledge of the presumption that it had to authorize certain forms of regulation explicitly, rather than by speaking in broad terms.

Similar problems could also arise with respect to statutes that Congress sought to enact today, even against the backdrop of the new major questions doctrine. Even if Congress sought to draft a statute that delegated authority to an administrative agency, while knowing that the current Court requires “major” agency initiatives to be explicitly authorized, it is unrealistic and unlikely that Congress could, at the time of drafting, both foresee and spell out every possible form of regulation that would be perceived as major at some point in the future, much less specify every possible form of regulation that an agency might pursue to advance its mandate. And as Part III.B.2 explained, the very reason why Congress might rely on a delegatory approach is that Congress might not know and might not be able to anticipate how an agency could leverage its expertise to respond to changing circumstances and advance a particular policy goal.

The difficulty of amending statutes also makes these decisions more practically significant than they might seem. It is a vast understatement to say that passing legislation is difficult.³⁴⁴ The hypothetical possibility that Congress could amend a statute to authorize a particular agency action will, in most cases, remain just that—a hypothetical, not a reality. And that’s true even if or when an agency action was authorized by a capacious, but general, grant of authority in a statute and even if or when that agency action enjoys majority popular support.

³⁴¹ Daniel Farber, *Today’s Vaccine Cases: Implications for Climate Change Regulation*, Legal Planet (Jan. 13, 2022), available at <https://legal-planet.org/2022/01/13/todays-vaccine-cases-implications-for-climate-change-regulation/>.

³⁴² Aaron Tang, *Here’s how Biden can fix the Supreme Court’s terrible mistake in the vax or mask case*, L.A. Times (Jan. 15, 2022), <https://www.latimes.com/opinion/story/2022-01-15/supreme-court-osha-vaccination-mandate-joe-biden>.

³⁴³ *Cf.* Part I.B (describing nondelegation doctrine).

³⁴⁴ *See supra* TAN TK-TK.

Given the “prevailing political geography of the United States,” moreover, the Court’s major question doctrine provides a comparative advantage to the Republican Party’s likely levers of political power relative to those of the Democratic Party.³⁴⁵ As Jonathan Gould and David Pozen have written, “a host of longstanding structural arrangements” make it easier for the Republican Party to obtain political power in the United State Congress.³⁴⁶ The apportionment scheme of the Senate, which skews representation toward less diverse and smaller states, as well as state legislatures’ power to draw gerrymandered districts for federal Congressional seats, make it easier for Republicans to hold majorities in both houses of Congress.³⁴⁷ As a result, Democrats find it harder to win political power in Congress, and harder to enact their preferred policies through legislation. That is particularly true given the existence of the filibuster, which in effect requires Democrats to win supermajority control of the Senate, an institution that is structurally stacked against the current Democratic Party, in order to advance policy goals that require legislation.³⁴⁸

This means that the Democratic Party may be more likely to try and effectuate their preferred policies through the executive branch and administrative agencies rather than through legislation. And the major questions doctrine, which limits the executive branch’s power relative to the federal legislature’s and the federal courts, constrains their ability to do so. It accordingly doctrinally reinforces “perceived, and actual, partisan advantage,” no small or minimalist development.³⁴⁹

The major questions doctrine cases are more consequential than they might seem for other reasons as well. The increasing importance of regulatory novelty, together with the Court’s focus on the implications of the agency’s theory of authority, make the major questions doctrine into a powerful deregulatory tool with effects similar to decisions based on the nondelegation doctrine, but under the guise of statutory interpretation. In theory, the decisions allow for Congress to amend a statute so as to authorize a particular agency action. But in practice, that congressional response is unlikely to materialize—and even if it does, it will be hard for Congress to craft effective delegations. For that reason, the major questions decisions have the effect of severely restricting agencies from adopting regulations pursuant to generally worded congressional statutes. That result shares much in common with reinvigorated nondelegation doctrine, even if the two do not overlap completely. Those similarities are further reinforced because, as Part III.B.2 explained, the Court’s reasons for skepticism of an agency’s authority overlap with the reasons why Congress

³⁴⁵ Jonathan Gould & David Pozen, Structural Biases in Structural Constitutional Law, ___ NYU L. Rev. ___, at 44, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3797051.

³⁴⁶ Jonathan Gould & David Pozen, Structural Biases in Structural Constitutional Law, ___ NYU L. Rev. ___, at 44, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3797051.

³⁴⁷ Gould and Pozen also discuss how the Electoral College system for selecting the President does the same, but not to the same extent as Congress. *Id.* at 44.

³⁴⁸ *Id.* at 25-30.

³⁴⁹ *Cf.* Stephanopoulos, *Anti-Carolene Court*, *supra* note 267, at 178.

might rely on delegations. This means the major questions doctrine limits Congress's ability to rely on broad delegations to agencies in the circumstances where Congress may be most likely to do so—namely, to respond to changing circumstances or unforeseen developments using agencies' superior expertise and flexibility.

Moreover, the emphasis on both the regulatory novelty of the agency's policy and the theoretical implications of an agency's claim of statutory authority are well tailored to effect deregulation.³⁵⁰ The regulatory antinovely bent seems to limit an agency to adopting rules that address problems that the agency tackled in the first few years after a statute's enactment; at a minimum it seems to limit an agency to use regulatory means that the agency used in the same early time period. This turns statutory delegations to an agency into "use it or lose it" grants of power: In order to retain the powers granted to it, an agency has to exercise those powers within some ill-defined period of years after a statute's enactment. In particular, it's not clear how many regulations an agency has to adopt before establishing a basis for its regulatory authority. Nor is it clear over what time horizon—that is how soon after a statute's enactment—it has to adopt them.

It is not difficult to see how a "use it or lose it" approach to regulatory authority operates as a deregulatory tool. It will result in agencies losing powers they possess under general and otherwise unambiguous grants of statutory authority. Again consider the Clean Air Act's grant of authority to the EPA to develop the "best system of emission reduction ... adequately demonstrated" "taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements."³⁵¹ As Justice Kagan noted in dissent, "the parties do not dispute that generation shifting is indeed the 'best system'—the most effective and efficient way to reduce power plants' carbon dioxide emissions."³⁵² But the majority concluded that the EPA did not possess the authority to adopt that best system in part because the agency had never tried that regulatory approach until 2015, 45 years after the relevant statute's enactment.³⁵³ An agency's powers thus effectively shrink over time if the agency does not use them to the full extent.

This, too, undermines the effectiveness of delegations, which were supposed to provide agencies with flexibility to adapt to changing circumstances. The regulatory novelty principle limits agencies to relying on the set of methods or the modes of regulation that the agency adopted over some initial time period. Consider how that might work in the context of the EPA. When the Clean Air Act was adopted in the 1970s, the EPA might have focused on one kind of pollution—say, visible pollution causing short-term health effects. But later, the EPA might address other kinds of

³⁵⁰ Cf. Heinzerling, *Power Canons*, *supra* note 2, at 1938 (explaining how the Court's cases "mask a judicial agenda hostile to a robust regulatory state").

³⁵¹ 7411(a)(1)

³⁵² 2022 WL 2347278, at *28 (Kagan, J., dissenting). *See also id.*, at *17 ("As a matter of 'definitional possibilities,' FCC v. AT&T Inc., 562 U.S. 397, 407 (2011), generation shifting can be described as a 'system'—'an aggregation or assemblage of objects united by some form of regular interaction,' Brief for Federal Respondents 31—capable of reducing emissions.").

³⁵³ 2015 WL 2347278, at *13-14.

pollution, perhaps because scientific or technological developments identified other sources of pollution, or because industries and markets have changed, leading to new sources of pollution. The regulatory novelty approach would require the agency to regulate new possible sources of pollution or newly identified pollutants the same way it regulated old ones. That limitations restricts an agency's ability to tailor its regulatory approach to new problems and to leverage its expertise to develop new solutions to address new problems.

The same goes for the Court's focus on the possible implications of the theory of authority underlying an agency's rule. This too makes the Court's major questions doctrine err on the side of deregulation because it allows the Court to consider additional rules that the agency might adopt aside from the one that it did. By expanding the universe of rules or regulations to assess for majorness, this increases the odds that the Court will find that an issue is major and require clear statutory authorization for it.

The major questions doctrine thus seems to embed deregulatory preferences in the Court's methods of statutory interpretation. Indeed, Justice Gorsuch's concurrence in *West Virginia* seemed to specifically link the major questions doctrine to deregulation. He wrote that "with the explosive growth of the administrative state since 1970 the major questions doctrine soon took on special importance."³⁵⁴ During that period "Congress created dozens of new federal administrative agencies" and "[t]oday, Congress issues 'roughly two hundred to four hundred laws' every year, while 'federal administrative agencies adopt something on the order of three thousand to five thousand final rules.'"³⁵⁵ Instead of treating the rise of delegations as evidence of Congress's choice to provide agencies with flexibility and broad authority, this uses the major questions doctrine to push back against Congress's regulatory choices. That is also how then-Judge Kavanaugh described the doctrine: the major questions doctrine "operates as a vital check on expansive and aggressive assertions of executive authority."³⁵⁶ And here too, that accomplishes an important part of what a revived nondelegation doctrine would do.

Unlike a revived nondelegation approach, however, the major questions doctrine provides a more selective, and targeted, deregulatory tool. As Part III.A.3 argued, judges seem more likely to designate a policy as politically significant, and therefore major, when the policy is opposed by the political party that appointed the judge. That means, given the composition of the United States Supreme Court, Democratic administration's agency initiatives are more likely to be deemed major, and therefore more likely to be invalidated, than Republican administration's agency initiatives. The "perceived, and actual, partisan advantage" of the doctrine might suggest that relative importance of the doctrine should be not minimized, even compared to other possible alternatives.³⁵⁷

The appearance of faux minimalism in the Court's major questions doctrine may be of more than academic interest. If the Court's decisions are consistently depicted

³⁵⁴ *West Virginia*, 2022 WL 2347278, at *21 & n.2 (Gorsuch, J., concurring).

³⁵⁵ *West Virginia*, 2022 WL 2347278, at *21 n.2 (Gorsuch, J., concurring).

³⁵⁶ *U.S. Telecom Ass'n*, 855 F.3d at 417 (Kavanaugh, J., dissenting from denial of rehearing en banc).

³⁵⁷ *Cf. Stephanopoulos, Anti-Carolene Court*, *supra* note 267, at 178.

and described as minimalist, or as something fixable, then that may contribute to a lack of attention to the decisions and their effects. To the extent people do not understand or appreciate how the decisions functionally disable administrative agencies in many important respects, that undermines one possible constraint on the Supreme Court and courts more generally—public opinion.

CONCLUSION

The new major questions doctrine is an important development in administrative law and has emerged as a powerful deregulatory tool. We want to close on a broader suggestion: In addition to its failures as catalogued above, the new major questions doctrine may work to undermine important theoretical and conceptual justifications for the administrative state that scholars have recently offered. In other words, while the doctrine is offered as a way to help legitimate the administrative state by requiring clear congressional authorization for certain agency policies, its existence may perversely do the opposite.

Consider three explanations for the legitimacy of the administrative state. One, offered by Professor Daniel Walters, maintains that the administrative state is a salutary form of governance because it channels political contestation and enables political dispute resolution within administrative processes.³⁵⁸ In Walters' telling, what makes administrative agencies legitimate and beneficial is that they provide avenues for continued conflict and contestation.³⁵⁹

The major questions doctrine, however, substantially undermines agencies' ability to act as fora for political disagreements. Instead, under the major question doctrine, when an issue is politically significant, or when there is political controversy surrounding an agency policy, then the issue should *not* be resolved through administrative processes. Instead, it can either be resolved outside of administrative processes through political contestation or in the legislature. By limiting agencies' ability to act as fora for political contestation, the major questions doctrine undermines one of the theoretical benefits for administrative governance.

A second justification is the one offered by Professor Nicholas Bagley. Bagley argued that the legitimacy of the administrative state is derived from its ability to deliver substantively just and beneficial policies that benefit the public.³⁶⁰ Under Bagley's account, what makes administrative agencies legitimate and useful forms of governance is their ability to provide sensible and beneficial policy solutions to problems.³⁶¹

Yet here too, the major questions doctrine undermines agencies' ability to pursue policies that further the agencies' policy goals and concededly address a national problem. Any of the Court's three recent major questions cases illustrate why this

³⁵⁸ Daniel E. Walters, *The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State*, 132 YALE L.J. ___ (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4044675, manuscript at 42-60.

³⁵⁹ *See id.*

³⁶⁰ *See* Bagley, *supra* note 304, at 369-89.

³⁶¹ *See id.*

might be. Of course none of the agencies policies—an eviction moratorium, a testing-and-vaccination policy, or generation-shifting rules—was a perfect solution, and none of them would have completely solved the problems the agencies were tackling. But all of them would have offered real benefits. And the important point is that doesn't matter in the Court's application of the major questions doctrine. It doesn't matter that generation-shifting rules might be the best system for emissions reduction, and it doesn't matter that vaccinate-or-test requirements might reduce the spread and severity of COVID-19 in the workplace. By limiting agencies' ability to adopt effective solutions, the major questions doctrine undermines one of the basis for the legitimacy of administrative governance.

A third and final justification for administrative governance is the one articulated most recently by Professor Jed Stiglitz. Broadly speaking, it maintains that agency governance is legitimate because agency rules must be evidence-based and agencies must give reasons for their decisions. Agencies, unlike Congress, must adopt policies in a manner that is “highly constrained and subject to scrutiny by external reviewers.”³⁶² These procedural requirements exist to create policies that are supported by evidence and shaped by public input.³⁶³

Here too, the major questions doctrine minimizes the importance of agency reason-giving and evidence-based decisionmaking. And here too, the Court's three recent major questions cases illustrate why this is so. What didn't matter in those cases is that the agencies had given reasons and evidentiary support for why generation-shifting rules would reduce air pollution, or had given reasons why a vaccination-and-testing regimen would improve the health of the workforce and the safety of workplace conditions. By minimizing the significance of agency reason-giving and evidence-based decisionmaking, the major questions doctrine undermines one of the basis for the legitimacy of administrative governance.

The major questions doctrine is an important tool in the Court's anti-regulatory arsenal. It not only supplies a judicial weapon against regulations and delegations in circumstances where they are practically needed and effective; it may also undermine the conceptual and theoretical bases for administrative governance. And maybe that's the point.

³⁶² Edward H. Stiglitz, *Delegating for Trust*, 166 U. PA. L. REV. 633, 653 (2018).

³⁶³ *Id.* at 655. See also Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2028, 2087-89 (2018).

