The Past and Future of the Major Questions Doctrine

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In West Virginia v. EPA*, the Supreme Court held that administrative agencies must point to clear congressional authorization when they issue economically or politically significant regulations. This rule, usually called the "major questions doctrine," will be an important part of administrative law for the foreseeable future. And it has the potential to dramatically reduce the power of administrative agencies by preventing them from claiming new powers—unless Congress passes updated laws addressing new problems.*

However, the major questions doctrine has been subject to substantial criticism from academics. Scholars frequently question its legitimacy, claiming that the Court fabricated the doctrine within the past few decades as part of an anti-administrative state agenda. Justice Kagan's dissent in West Virginia *made the same allegation. Others argue that the doctrine is unworkable, particularly because courts will struggle to differentiate between major and nonmajor questions.*

This Article contends that both criticisms are overstated. First, this Article demonstrates that the major questions doctrine has a longer and more robust history than most have appreciated. The doctrine traces back to a general rule against implied delegations first developed in the state courts in the mid-to-late nineteenth century. Building on that general rule, the Supreme Court applied a clear-statement rule similar to the modern major questions doctrine at least as early as 1897. Although the rule has been enforced unevenly ever since, some version of the major questions doctrine has persisted in our law for a long time. It is not an entirely recent innovation, and future assessments of the doctrine's legitimacy should account for that fact.

Second, this Article argues that courts should not struggle to apply the major questions doctrine. In establishing a more specific definition of what constitutes a "major" economic or political question, courts can draw upon substantial bodies of precedent and other sources—including the Executive Branch's own practices. In applying the major questions

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doctrine's clear-statement rule, courts can again lay out more specific markers to ease enforcement, drawing on the Court's precedents.

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I. INTRODUCTION

For about two decades, carbon emissions and climate change have been broadly understood to be major policy challenges.[1] Thus, Congress has often debated legislation empowering the Environmental Protection Agency (EPA) to battle carbon emissions. In particular, Congress tried and failed to pass several bills authorizing the EPA to engage in so-called generation shifting: the practice of forcing a transition from coal and natural-gas plants to cleaner energy

[1] *See, e.g.*, THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, SUMMARY FOR POLICYMAKERS 10 (2001), https://www.ipcc.ch/site/assets/uploads/2018/07/WG1_TAR_SPM.pdf [https://perma.cc/8AB3-MW4E].

sources.[2] Apparently frustrated by the failure of these bills, President Obama promised that "if Congress won't act soon to protect future generations, I will."[3]

And sure enough, he did. In 2015, the EPA promulgated the Clean Power Plan (CPP), which claimed for the EPA the power to close coal and natural-gas plants through generation shifting.[4] The EPA attempted to achieve that goal by setting emission limits these plants could not meet without reducing output or subsidizing clean energy production to offset their emissions—a so-called cap-and-trade program.[5] In support of this regulation, the EPA claimed authority from 42 U.S.C. § 7411.[6] Enacted in 1970, this provision gave the EPA the power to set a "best system of emission reduction" for preexisting power plants.[7] The EPA had only invoked this provision a handful of times,[8] and few seriously contended Congress originally envisioned the statute being used to limit carbon emissions or mandate generation shifting.[9] Still, § 7411 was broadly worded. And the EPA argued that the word "system" had a meaning broad enough to

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[2] *See* Climate Stewardship Act of 2003, S. 139, 108th Cong. (2003); America's Climate Security Act of 2007, S. 2191, 110th Cong. (2007); American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009).

[3] President Barack Obama, State of the Union Address (Feb. 12, 2013), http://www.whitehouse.gov/the-press-office/2013/02/12/remarks-president-state-union-address [https://perma.cc/DZM7-TK6T].

[4] Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662, 64,728–32 (Oct. 23, 2015) (abrogated as outside EPA authority in *West Virginia v. EPA*).

[5] *See id.* at 64,727–28, 64,731–33.

[6] *Id.* at 64,941.

[7] 42 U.S.C. § 7411(a), (b)(1)(A)–(B).

[8] Prior to 2015, the EPA had used § 7411 to justify only six regulations—none of which addressed ubiquitous pollutants like carbon. 79 Fed. Reg. 34,830, 34,844–45 & nn.43–44 (June 18, 2014) (to be codified at 40 C.F.R. pt. 60). And, in 1990, a leading sponsor of the amendments to the Clean Air Act called § 7411 "some obscure, never-used section of the law." *Clean Air Act Amendments of 1987: Hearings on S. 300, S. 321, S. 1351, and S. 1384, Part 2 Before the Subcomm. on Env't Prot. of the S. Comm. on Env't & Pub. Works*, 100th Cong. 13 (1987) (statement of Sen. Durenberger).

[9] The provision was passed and last amended before there was a consensus that carbon was a major contributor to climate change. *See* 42 U.S.C. § 7411 (enacted in 1970); Matthew C. Nisbet & Teresa Myers, *Trends: Twenty Years of Public Opinion About Global Warming*, 71 PUB. OP. Q. 444, 451 (2007) ("[T]he percentage of the public answering that 'most scientists believe that global warming is occurring' increased from 28 percent in 1994 to 46 percent in 1997 to 61 percent in 2001 and then to 65 percent in 2006.") Instead, the Clean Air Act was designed to solve the problem of air pollution. *See, e.g.*, Jonathan H. Adler, West Virginia v. EPA*: Some Answers About Major Questions*, 2022 CATO SUP. CT. REV. 37, 40–41; Shany Winder, *Extraordinary Policymaking Powers of the Executive Branch: A New Approach*, 37 VA. ENV'T L.J. 207, 215–16 (2019) (citing Clean Air Act being used to combat climate change as "the classic example of an 'old statute' because this legislation was not designed to combat climate change" (footnote omitted)); Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 37 (2014).

encompass the CPP.[10] The provision conferred enough power, the Obama Administration claimed, to enable "the single most important step America has ever taken in the fight against global climate change" without Congress having to act.[11] Could the EPA rely on such a vague statute to take such an important step?

In *West Virginia v. EPA*, the Supreme Court said no in a 6–3 opinion by Chief Justice Roberts.[12] Central to the Court's decision was the "major questions doctrine," which posits that administrative agencies must point to "clear congressional authorization" before issuing regulations of "economic and political significance."[13] When an agency tries to implement a major regulation, courts must presume it lacks the power to do so.[14] Broad or vague language cannot overcome that presumption; an agency must instead point to clear and specific permission from Congress.[15] As articulated in *West Virginia*, the doctrine is likely to substantially reduce the power of administrative agencies unless Congress can muster the political will to specifically grant them new powers to solve new problems.[16] Many early commentaries on the decision have recognized as much.[17]

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[10] *See* Brief for the Federal Respondents at 31, West Virginia v. EPA, 142 S. Ct. 2587 (2022) (Nos. 20-1530, 20-1531, 20-1778 & 20-1780).

[11] Andrew Rafferty, *Obama Unveils Ambitious Plan to Combat Climate Change*, NBC NEWS (Aug. 3, 2015), https://www.nbcnews.com/politics/barack-obama/obama-unveils-ambitious-plan-combat-climate-change-n403296 [https://perma.cc/35L8-3MHW].

[12] West Virginia v. EPA, 142 S. Ct. at 2596–97, 2616.

[13] *Id.* at 2609 (first quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014); and then quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000)).

[14] *Id.* at 2614.

[15] *Id.*

[16] *See, e.g.*, Philip A. Wallach, *Will* West Virginia v. EPA *Cripple Regulators? Not If Congress Steps Up*, BROOKINGS (July 1, 2022), https://www.brookings.edu/research/will-west-virginia-v-epa-cripple-regulators-not-if-congress-steps-up/ [https://perma.cc/62Y3-JLF2] ("For those of us who believe that the renewed exertions of our legislators are the only means capable of securing policy legitimacy and stability, the majority's view represents a fitting commitment to Constitutional self-government.").

[17] *See, e.g.*, Daniel E. Walters, *The Major Questions Doctrine at the Boundaries of Interpretive Law*, 109 IOWA L. REV. (forthcoming 2023) (manuscript at 3) (on file with the *Ohio State Law Journal*); Ronald M. Levin, *The Major Questions Doctrine: Unfounded, Unbounded, and Confounded* 54–56 (C. Boyden Gray Ctr. for the Study of the Admin. State, Working Paper No. 22-23, Wash. Univ. in St. Louis Legal Stud., Rsch. Paper No. 22-10-02, 2022) (predicting "at least some curtailment of agencies' powers"); Mila Sohoni, Comment, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 263 (2022) (predicting "momentous consequences"); Christopher J. Walker, *A Congressional Review Act for the Major Questions Doctrine*, 45 HARV. J.L. & PUB. POL'Y (forthcoming 2023) (manuscript at 774) (on file with the *Ohio State Law Journal*) ("The impact of this new major questions doctrine on the field of administrative law will be profound."); Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. (forthcoming 2023) (manuscript at 3) (on file with the *Ohio State Law Journal*) ("[T]he major questions doctrine has become an important—perhaps the most important—constraint on agency power, particularly when it

Even before *West Virginia*, the major questions doctrine had garnered substantial criticism from academics. Many have questioned the doctrine's legitimacy and suggested the Court merely fabricated the doctrine as part of an anti-administrative state agenda.[18] Others have questioned the doctrine's workability—with particularly sharp criticism of the doctrine's requirement that courts differentiate between major and nonmajor questions.[19] Just last year, the Sixth Circuit claimed that the major questions doctrine is "seldom-used" and "hardly a model of clarity."[20] Both problems have been aggravated by the fact that the "major questions doctrine [has been] underdeveloped in both scholarship and case law."[21]

This Article responds to both criticisms, seeking to provide insight into the major questions doctrine. Starting in the past, a better understanding of the doctrine's history helps bolster its legitimacy. Contrary to some scholars' claims, the Court did not invent the doctrine in the past few decades. The clear-statement

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comes to some of the most pressing problems of our time."); Adler, *supra* note 9, at 39 ("tremendously important" decision); Richard L. Revesz, *SCOTUS Ruling in* West Virginia v. EPA *Threatens All Regulation*, BLOOMBERG L. (July 8, 2022), https://news.bloomberglaw.com/environment-and-energy/scotus-ruling-in-west-virginia-v-epa-threatens-all-regulation [https://perma.cc/GZG4-RWFR] (arguing the decision "casts a pall over the nation's regulatory future"); Kimberly Wehle, *The Supreme Court's Extreme Power Grab*, ATLANTIC (July 19, 2022), https://www.theatlantic.com/ideas/archive/2022/07/west-virginia-v-epa-scotus-decision/670556/ [https://perma.cc/2KTS-6F5B]; Lisa Heinzerling, *The Supreme Court Is Making America Ungovernable*, ATLANTIC (July 26, 2022), https://www.theatlantic.com/ideas/archive/2022/07/supreme-court-major-questions-doctrine-congress/670618/ [https://perma.cc/XUL4-8F3G]; Daren Bakst, *Ruling in* West Virginia v. EPA *Scores Win for Representative Government*, HERITAGE FOUND. (July 11, 2022), https://www.heritage.org/courts/commentary/ruling-west-virginia-v-epa-scores-win-representative-government [https://perma.cc/24P3-Q6YU]; Hugh Hewitt, Opinion, *The Court's EPA Ruling Was About Something Much Bigger than One Agency*, WASH. POST (July 3, 2022), https://www.washingtonpost.com/opinions/2022/07/03/supreme-court-epa-decision-meaning/ [https://perma.cc/KWW4-FZN2]; Press Release, White House, Statement by President Joe Biden on Supreme Court Ruling on West Virginia v. EPA (June 30, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/30/statement-by-president-joe-biden-on-supreme-court-ruling-on-west-virginia-v-epa/ [https://perma.cc/4XFB-9MWD] ("The Supreme Court's ruling in *West Virginia vs. EPA* is another devastating decision that aims to take our country backwards.").

[18] *See, e.g.*, Nathan Richardson, *Keeping Big Cases from Making Bad Law: The Resurgent "Major Questions" Doctrine*, 49 CONN. L. REV. 355, 390–409 (2016) (documenting various criticisms); Chad Squitieri, *Who Determines Majorness?*, 44 HARV. J.L. & PUB. POL'Y 463, 480 (2021) (arguing the doctrine is inconsistent with textualism); *see also infra* notes 30–31. *But see* Brian Chen & Samuel Estreicher, *The New Nondelegation*, 102 TEX. L. REV. (forthcoming 2023) (manuscript at 9–14) (on file with the *Ohio State Law Journal*) (defending the doctrine).

[19] *See infra* Part III.A.

[20] *In re* MCP No. 165, 21 F.4th 357, 372 (6th Cir. 2021); *see also* Chamber of Com. v. U.S. Dep't of Lab., 885 F.3d 360, 387–88 (5th Cir. 2018) (recognizing uncertainty over doctrine's status).

[21] Squitieri, *supra* note 18, at 480.

rule applied in *West Virginia* claims roots extending at least into the mid-to-late nineteenth century, when courts demanded clear evidence that legislatures had delegated power to others.[22] The Supreme Court applied this rule in 1897 to check the power of the Interstate Commerce Commission (ICC),[23] often described as the Nation's first modern administrative agency.[24] And while the Court has, at times, preferred to enforce Article I's requirement that Congress create the Nation's laws by other means, like the nondelegation doctrine,[25] some version of the major questions doctrine has persisted in our law ever since.[26] Examined in light of that history, *West Virginia* is properly understood as carrying forward important historical precedents—not as a recent innovation.[27]

Looking to the future, this Article highlights some doctrinal questions left open by *West Virginia* and offers ideas on how to refine the doctrine moving forward. First, courts can lay down more precise markers to differentiate between major and nonmajor questions by looking to the Court's precedents and other sources—like the Executive Branch's own standard for identifying "significant" regulations.[28] Second, courts can consult substantial bodies of caselaw on how to apply the doctrine's clear-statement rule.

II. THE HISTORY OF THE MAJOR QUESTIONS DOCTRINE

The major questions doctrine sits upon an uneasy throne, its legitimacy constantly questioned.[29] Many scholars have argued that the major questions doctrine's clear-statement rule is a recent innovation invented by Justices eager

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[22] *See infra* Part II.A.

[23] ICC v. Cincinnati, New Orleans & Tex. Pac. Ry. Co. (*The Queen and Crescent Case*), 167 U.S. 479, 511 (1897).

[24] *See, e.g.*, BERNARD SCHWARTZ, ADMINISTRATIVE LAW 22 (2d ed. 1984) (describing the ICC as the "archetype of the modern administrative agency").

[25] The nondelegation doctrine posits that a statute is unconstitutional when it delegates too much of Congress's legislative power to another entity. *See, e.g.*, Gundy v. United States, 139 S. Ct. 2116, 2123 (2019). The Court has traditionally applied the nondelegation doctrine by asking if a statute provides the delegee with an "intelligible principle" by which to exercise the granted power. *See id.* Justice Gorsuch has proposed a more detailed doctrinal test. *See id.* at 2135–37 (Gorsuch, J., dissenting).

[26] *See infra* Parts II.B–C.

[27] Michael Ramsey, *An Originalist Defense of the Major Questions Doctrine*, ORIGINALISM BLOG (Aug. 11, 2022), https://originalismblog.typepad.com/the-originalism-blog/2022/08/an-originalist-defense-of-the-major-questions-doctrinemichael-ramsey.html [https://perma.cc/8RRG-JPNL] (pointing to historical practice as a basis to legitimize clear-statement rules).

[28] *See infra* Part III.A.

[29] *See infra* Part II.D.

to weaken the administrative state.[30] Justice Kagan's dissent suggested the same, arguing the Court "magically" conjured the "arrival of the 'major questions doctrine'" as part of an "anti-administrative-state" agenda.[31] Even more sympathetic commentators have admitted "it is not entirely clear where the doctrine comes from," "rais[ing] questions about [its] justification."[32]

But the major questions doctrine is not entirely novel. The doctrine has a history that has largely been overlooked by scholars. That history reveals a doctrinal ancestor: a clear-statement rule in the mid-to-late 1800s to limit delegations of authority to administrative agencies.[33] In fact, courts applied a general rule against *any* implied delegations, with perhaps more stringency in cases deemed to involve major questions.[34] The doctrine was first applied in state courts.[35] But the Supreme Court prominently invoked the doctrine in *ICC v. Cincinnati, New Orleans & Texas Pacific Railway Co.* (*The Queen and Crescent Case*), confronting a major claim to power by the Interstate Commerce Commission.[36] Indeed, history shows the Court has long—if inconsistently—enforced Article I's lawmaking requirements through a clear-statement rule against implied delegations and its doctrinal sibling: the nondelegation doctrine.[37] Rather than being a modern fabrication, *West Virginia* is merely the latest chapter of an old book.

A. *The Original Major Questions Doctrine*

At the time of the Constitution's adoption, a robust conception of the separation of powers was well established in Anglo-American thought.[38] The

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[30] *See, e.g.*, Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 1946 (2017) (claiming major questions clear-statement doctrine applied by Court in 2014 is "normative," "new," and imbued with an "antiregulatory tone").

[31] West Virginia v. EPA, 142 S. Ct. 2587, 2633–34, 2641 (2022) (Kagan, J., dissenting).

[32] Aditya Bamzai, *Judicial Deference and Doctrinal Clarity*, 82 OHIO ST. L.J. 585, 602 (2021).

[33] *See infra* Part II.A.

[34] *See infra* Part II.A.

[35] *See infra* Part II.A.

[36] *See infra* Part II.A.

[37] *See infra* Part II.B. Until recently, relatively few scholars recognized the close relationship between the nondelegation and major questions doctrines. *See* Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475, 489 (2021) [hereinafter Sunstein 2021] ("[T]he strong version of the major questions doctrine is unambiguously connected with the nondelegation doctrine.").

[38] *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES *261 (denouncing sixteenth century Statute of Proclamations, which delegated broad legislative power to the King, as "calculated to introduce the most despotic tyranny"); THE FEDERALIST NO. 51, at 320–25 (James Madison) (Clinton Rossiter ed., 1961); *see also* Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J.L. & PUB. POL'Y 147, 151–53 (2017).

legislative, executive, and judicial powers were understood to be distinct powers, and the framers generally agreed that these powers must be divided among different government officials to preserve liberty.[39]

The Constitution reflected that general consensus. Article I "vested" "all legislative Powers herein granted" in "a Congress of the United States."[40] Believing that excess lawmaking was a threat to liberty, the framers drafted Article I to make it difficult for Congress to pass laws.[41] Before a bill can become law, majorities of both the House of Representatives and the Senate must concur; and either the President must also agree or two thirds of both houses must override his veto.[42] Altogether, Article I's system of bicameralism and presentment "represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure."[43] Influenced by John Locke,[44] there was also general agreement in the 1800s that Congress could not circumvent these rules by transferring its legislative power to other entities.[45]

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[39] *See, e.g.*, THE FEDERALIST NO. 51, *supra* note 38, at 320–21; Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1440–44 (1987).

[40] U.S. CONST. art. I, § 1.

[41] THE FEDERALIST NO. 48, at 309–12 (James Madison) (Clinton Rossiter ed., 1961).; THE FEDERALIST NO. 73, at 441–42 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[42] U.S. CONST. art I, § 7.

[43] Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919, 951 (1983).

[44] *See, e.g.*, JOHN LOCKE, TWO TREATISES OF GOVERNMENT 363 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) ("The power of the Legislative being derived from the People by a positive voluntary Grant and Institution, can be no other, than what that positive Grant conveyed, which being only to make Laws, and not to make Legislators, the Legislative can have no power to transfer their Authority of making Laws, and place it in other hands." (emphasis omitted)); Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490, 1518, n.146 (2021).

[45] *See, e.g.*, Shankland v. Washington, 30 U.S. 390, 395 (1831) (Story, J.) ("[T]he general rule of law is, that a delegated authority cannot be delegated."); Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42–43 (1825) (Marshall, C.J.) ("It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative."); Philip Hamburger, *Delegating or Divesting?*, 115 NW. U. L. REV. ONLINE 88, 91–101 (2020); Wurman, *supra* note 44, at 1518. There is an ongoing debate among scholars about the precise scope of the nondelegation doctrine in the eighteenth and nineteenth centuries. *See generally, e.g.*, Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021). This Article does not extensively opine on that debate, but there seems to have been a substantial consensus among judges in the nineteenth century that Article I imposed at least *some* limits on Congress's ability to transfer its powers. *See, e.g.*, Field v. Clark, 143 U.S. 649, 692 (1892) (describing the rule against delegation as "vital to the integrity and maintenance of the system of government ordained by the Constitution"). In some of the early cases applying the presumption against implied delegations, courts approvingly cited the nondelegation doctrine. *See, e.g.*, Ga. R.R. v. Smith, 70 Ga. 694, 699 (1883) (insisting on a "difference between the power to pass a law and the power to adopt rules and regulations to carry into effect a law already passed").

By contrast, the President was *not* given the power to make laws. The President instead was given the responsibility to see that Congress's laws were "faithfully executed."[46] Beyond that, Article II does recognize the President's modest power to "*recommend* to [Congress's] Consideration such Measures as he shall judge necessary and expedient[.]"[47] Indeed, "[t]he power to recommend legislation, granted to the President, serves only to emphasize that it is his function to recommend and that it is the function of the Congress to legislate."[48]

For the first few decades of the Nation's history, the Constitution's system of lawmaking faced relatively few tests in court. Although the federal government exercised important powers, they were largely confined to particular areas entrusted to it in the Constitution.[49] While Congress did create some administrative agencies, they were relatively few in number and exercised relatively limited powers in regulatory areas seen as uniquely federal.[50] At least as a general matter, "[t]he first generation of the nation's regulatory statutes . . . contain[ed] detailed and limited grants of authority to administrative bodies."[51] And while some early congressional delegations were broader—especially when regulating matters traditionally understood to be within the Executive Branch's purview[52]—the legislature generally kept early agencies on a tight leash when dealing with private rights and individual liberties.[53] In any event, the modern

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[46] U.S. CONST. art. II, § 3.

[47] *Id.* (emphasis added).

[48] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 632 (1952) (Douglas, J., concurring).

[49] *See* Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256, 1259 (2006) [hereinafter Mashaw 2006] ("While there was extensive regulation of health, safety, commerce, and morals in the early Republic, it was most prominent at the state and local level." (footnote omitted)).

[50] Those areas included customs, foreign policy, patents, veterans' affairs, taxation, Indian law, and some aspects of interstate commerce (like steamboat travel). *See, e.g.*, 1 KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 22–23 (6th ed. 2019); Mashaw 2006, *supra* note 49, at 1277–78. Some of the broader delegations to the Executive Branch occurred in areas like foreign policy and Indian affairs, in which the President was understood to have some inherent powers. *See* Wurman, *supra* note 44, at 1543; MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING 328–35 (2020).

[51] Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2255 (2001); *see also* Justin Walker, *The Kavanaugh Court and the* Schechter*-to-*Chevron *Spectrum: How the New Supreme Court Will Make the Administrative State More Democratically Accountable*, 95 IND. L.J. 923, 926 (2020).

[52] *See* MCCONNELL, *supra* note 50, at 328–35.

[53] *See* Jennifer Mascott, *Early Customs Law and Delegation*, 87 GEO. WASH. L. REV. 1388, 1392 (2019) ("[W]hen Congress stepped away from foreign affairs negotiations and other more executive functions like administration of debt repayment, and into areas related to new obligations on private citizens, Congress often legislated with rigorous specificity." (footnotes omitted)); Wurman, *supra* note 44, at 1554; Cass, *supra* note 38, at 157 ("Outside the realm of foreign affairs . . . [Congress] did not authorize the President or the courts or

"appellate" model—by which federal courts review decisions by federal agencies—had not yet taken hold.[54] Jurisdictional limits on the federal courts meant that most challenges to agency actions at the time were brought via a writ of mandamus, which came with a very narrow standard of review.[55] Thus, courts had relatively few opportunities to comment on Article I and its requirements during the 1800s.

Administrative law began to change in the decades following the Civil War as the growth of railroads "drove industrial development."[56] As powerful corporations dominated particular industries—like finance, steel, oil, and tobacco—calls for increased government regulation grew.[57] In this period, federal administrative agencies played a relatively limited role in addressing these problems;[58] instead, it was the state governments that experimented with the most aggressive forms of regulatory oversight between the 1860s and 1880s.[59] The railroads were frequent targets of new administrative agencies; by 1887, around twenty states had established commissions regulating the railroads.[60]

In the ensuing conflicts between state agencies and railroads, courts demanded clear evidence that agencies really had the power to regulate. To be more specific, courts employed a *general* presumption against implied delegations by legislatures.[61] In cases involving both major and mundane stakes, courts

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other governmental officers to adopt rules that broadly regulated behavior of private individuals or entities or that controlled the conduct of other officials outside the branch carrying out the legislated mandate.").

[54] *See* Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362, 1399 (2010) [hereinafter Mashaw 2010].

[55] *See* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 947–48 (2017).

[56] Mashaw 2010, *supra* note 54, at 1369–70.

[57] *Id.* at 1370.

[58] *Id.* at 1374–80.

[59] *See id.* at 1380 ("[B]y comparison with state and local regulation, national regulation was quite limited."); RICHARD D. STONE, THE INTERSTATE COMMERCE COMMISSION AND THE RAILROAD INDUSTRY 4–5 (1991).

[60] *See* ROBERT E. CUSHMAN, THE INDEPENDENT REGULATORY COMMISSIONS 19 (1941). These commissions had varying powers; about ten could set prices for railroads. *See id.* at 26.

[61] Some of the early cases applying the rule against implied delegations involved municipal governments, which courts treated like agencies. In 1858, for example, the Minnesota Supreme Court explained that city governments were agencies deriving their powers "solely from the legislature," and that such powers "cannot be extended by intendment or implication, but must be confined within the express grant of the legislature." City of St. Paul v. Laidler, 2 Minn. 190, 203 (1858); *see also* Ilan Wurman, *The Origins of Substantive Due Process*, 87 U. CHI. L. REV. 815, 826–27 (2020). The Supreme Court recognized this general rule in 1865. *See* Thomson v. Lee County, 70 U.S. 327, 330 (1865) ("[A county or other municipal corporation] acts wholly under a delegated authority, and can exercise no power which is not in express terms, or by fair implication, conferred upon it."). Although there are some differences between administrative agencies and municipal

demanded a clear statement that the legislature intended to delegate the power at issue.[62] By 1891, the rule was well established enough that Sutherland's treatise on statutory interpretation recited it.[63] And Frank Goodnow's early 1905 treatise on American administrative law also recognized that that the power of administrative agencies to issue regulations must be "expressly given."[64]

A good example of the rule's application comes from 1888, when the Oregon Supreme Court considered whether the state legislature had given the Oregon Board of Railroad Commissioners the power to investigate and adjudicate allegations that railroads had overcharged consumers.[65] The court held that the legislature had not, applying the rule against implied delegations.[66] The court claimed that "for a very long time" it had "been considered the safer and better rule, in determining questions of jurisdiction of boards and officers exercising powers delegated to them by the legislature, to hold that their authority must affirmatively appear from the commission under which they claim to act."[67] Not only that, when "creat[ing] a commission and cloth[ing] it

governments, the underlying dynamic seems similar: delegation of power by the legislature to a subordinate government entity. *Cf.* Ilan Wurman, *Importance and Interpretive Questions*, 110 VA. L. REV. (forthcoming 2023) (manuscript at 54 n.293) (on file with the *Ohio State Law Journal*) [hereinafter Wurman 2024] (acknowledging these cases are "relevant" to "make a substantive defense of a similar doctrine as applied to agencies").

[62] For an example of the mundane, the Court of Appeals of New York held in 1877 that a local government could not use the eminent domain power to take a particular railroad's lands. *In re* City of Buffalo, 68 N.Y. 167, 177 (1877). Although the court acknowledged that the "legislature may delegate this power to public officers [and municipal governments]," it articulated the "rule . . . that such delegation of power, must be in express terms, or must arise from a necessary implication." *Id.* at 171. Although Buffalo could point to some general statutory language giving it the eminent domain power, the court deemed that language insufficiently specific, emphasizing that the grant of power needed to specifically reference "this particular place or occasion." *Id.* at 177. A delegation could not, the court continued, "be inferred from a gift of power made in general terms." *Id.* at 175.

[63] *See* J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 68 (1891) ("As the possessor of the law-making power, [the legislature] may confer authority and impose duties upon [the other branches of government] and regulate the exercise of their several functions. It may pass general laws for that purpose, giving them *expressly or by necessary implication* an incidental discretion to employ the proper means to fill up and regulate the details for themselves and subordinates, though the exercise of that discretion be *quasi* legislative." (first emphasis added)); *see also id.* § 390 (rule that "all statutory powers" are "construed strictly").

[64] FRANK J. GOODNOW, THE PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES 326–27 (1905) ("[T]he general rule in this country is that the administrative authorities . . . may issue ordinances only where the power to issue such ordinances has been expressly given to them by the legislature."); *see also id.* at 168–69 (discussing rule of "strict construction" for assessing powers granted by state legislatures to municipal governments).

[65] *See* Bd. of R.R. Comm'rs of Or. v. Or. Ry. & Navigation Co., 19 P. 702, 703 (Or. 1888).

[66] *Id.* at 707–08.

[67] *Id.* at 707.

with important functions," the court held that the state legislature needed to "define and specify the authority given it so clearly that no doubt can reasonably arise in the mind of the public as to its extent."[68] Applying that rule, the court expressed its fear that, under the agency's view, it "would be the most important tribunal in the state," making the court skeptical the "legislature would confer so important a prerogative upon a board of commissioners."[69] The court then concluded the agency lacked a clear statement of authority.[70]

The Supreme Court soon adopted a similar skepticism toward agency delegations as federal law. In 1887, a popular "clamor" against railroad monopolies led Congress to pass the Interstate Commerce Act.[71] The statute required railroads to charge "reasonable and just" rates, and "every unjust and unreasonable charge [was made] unlawful."[72] But Congress did not just leave enforcement of the Act to the courts. Congress also created a five-member administrative agency, the ICC, to enforce the 1887 law.[73] The act also gave the ICC the specific powers to investigate the railroads and hold hearings to determine whether the Act had been violated.[74] In important ways, this agency was unprecedented in American history, and several scholars have deemed it America's first modern administrative agency.[75]

The ICC soon moved to limit the vast power of the railroads. After investigating several railroads and holding hearings, the ICC determined that they were charging "unreasonable and unjust" freight rates.[76] The agency then identified the prices it deemed reasonable and ordered the railroads to charge them.[77] When the railroads refused, the ICC brought an enforcement action in federal court.[78] The ICC had at least some reason for hope. Section 12 of the Interstate Commerce Act, as amended in 1889, gave the ICC the power to

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[68] *Id.* at 708.

[69] *Id.* at 707.

[70] *Id.* at 708.

[71] *See* Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887) (codified as amended in scattered sections of 49 U.S.C.); James W. Ely, Jr., *The Troubled Beginning of the Interstate Commerce Act*, 95 MARQ. L. REV. 1131, 1132 (2012).

[72] *See* Interstate Commerce Act § 1, 24 Stat. at 379.

[73] *Id.* § 11, 24 Stat. at 383.

[74] *Id.* §§ 12, 15, 24 Stat. at 383–84.

[75] *See, e.g.*, LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 439 (2d ed. 1985) ("In hindsight, the development of administrative law seems mostly a contribution of the 20th century. . . . The creation of the Interstate Commerce Commission, in 1887, has been taken to be a kind of genesis."). *But see* Mashaw 2010, *supra* note 54, at 1374–78 (adding nuance to the "conventional historical account" that federal administrative law was born with the passage of the Interstate Commerce Act).

[76] ICC v. Cincinnati, New Orleans & Tex. Pac. Ry. Co. (*The Queen and Crescent Case*), 167 U.S. 479, 481 (1897).

[77] *Id.* at 481–82.

[78] *Id.* at 483.

"execute and enforce the provisions of [the] act."[79] These enforcement powers, the ICC contended, implied the power to say what rates would be just and reasonable moving forward.[80] All this, the railroads countered, was not explicit statutory authorization to set future prices.[81]

The Supreme Court agreed with the railroads.[82] Rather than relying on ordinary statutory interpretation, the Court applied a rule that looks similar to the major questions doctrine applied in *West Virginia*.[83] First, the Court explained that the power at issue was both "legislative" and very important.[84] As to the nature of the power, the Court distinguished between "prescrib[ing] rates which shall be charged in the future," which it deemed a "legislative act," and the "judicial act" of reviewing whether rates charged in the past were just and reasonable.[85] Having established that the power at issue was legislative, the Court repeatedly emphasized the importance of the ICC's claimed power to set railroad freight rates.[86] "The importance of the question [at stake] cannot be overestimated," the Court explained, because "[b]illions of dollars [were] invested in railroad properties" and "[m]illions of passengers, as well as millions of tons of freight, [were] moved each year by the railroad companies[.]"[87] And the power to set rates was "so vast and comprehensive, so largely affecting the rights of carrier and shipper, as well as indirectly all commercial transactions[.]"[88]

Having concluded that the ICC was claiming "a power of supreme delicacy and importance," the Court imposed a heightened statutory burden for the ICC to prove Congress had granted it the power to set carriage rates.[89] Reciting the rule previously applied in state courts, the Court insisted that "[t]he grant of such a power is never to be implied."[90] Rather, such a delegation must be "clear and direct"—"open to no misconstruction."[91] Not only that, the Court continued, Congress was familiar with "the language by which the power [to set railroad

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[79] Act of March 2, 1889, ch. 382, sec. 3, § 12, 25 Stat. 857, 858 (1889); *The Queen and Crescent Case*, 167 U.S. at 500.

[80] *See The Queen and Crescent Case*, 167 U.S. at 500–01.

[81] *Id.* at 501.

[82] *Id.* at 505–06.

[83] *Compare infra* notes 84–95 and accompanying text, *with* West Virginia v. EPA, 142 S. Ct. 2587, 2609–14 (2022).

[84] *The Queen and Crescent Case*, 167 U.S. at 505.

[85] *Id.* at 499.

[86] *Id.* at 500–01.

[87] *Id.* at 494.

[88] *Id.* at 494–95.

[89] *Id.* at 505.

[90] *The Queen and Crescent Case*, 167 U.S. at 494.

[91] *Id.* at 505.

rates] is given" because it had been used in the States, meaning Congress could have easily provided a "definite and exact statement."[92]

The Court then applied its clear-statement rule. The Court began by looking at pertinent state statutes granting state agencies the power to set railroad carriage prices, identifying the specific language in each that gave the power to set prices in the future.[93] Having completed its survey, the Court concluded that the federal Interstate Commerce Act lacked the type of specific language it had identified in the state statutes, meaning authority was "not expressly given."[94] Congress's intent was merely "debatable," the Court reasoned, which meant the ICC could not point to a clear statement of authority to set prices for railroads.[95]

In the following decades, the Court continued to apply a clear-statement rule to narrowly construe legislative delegations to administrative agencies.[96] For

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[92] *Id.* at 495. Some have interpreted *The Queen and Crescent Case* as merely an example of the Court penalizing Congress for failing to follow drafting conventions "that the Court expected it to use when giving the ICC ratemaking power." Walters, *supra* note 17, at 4 n.6 (citing Beau J. Baumann, *Capozzi on the Future of the Major Questions Doctrine*, ADMINWANNABE (Oct. 19, 2022), https://adminwannabe.com/?p=114 [https://perma.cc/PGS8-R879]). I do not see why *The Queen and Crescent Case* should be read as doing *only* that. Certainly, the Court found drafting conventions in the States relevant to whether Congress provided "clear and direct" authority, "open to no misconstruction," to engage in rate-making. *The Queen and Crescent Case*, 167 U.S. at 505. Because "[a]dministrative control over railroads through [agencies] was no new thing," and other legislatures had given the claimed power at issue, the Court found it easier to assess whether Congress had provided a "definite and exact statement." *Id.* at 495. Consistent with the Court's use of drafting precedents, I argue below that courts applying the major questions doctrine can still look to such evidence when determining whether Congress has provided a clear statement of authority. *See infra* Part III.B.

[93] *The Queen and Crescent Case*, 167 U.S at 495–99.

[94] *Id.* at 500.

[95] *Id.* at 494. As with all major questions doctrine holdings, the Court did not hold that Congress *could not* delegate that power to the ICC, but merely that it did not in 1887. For about the following decade, the ICC did not set railroad prices. *See* Ely, *supra* note 71, at 1134. But in 1906, Congress did specifically grant the ICC the power to set railroad prices. *See* Hepburn Act of 1906, ch. 3591, sec. 4, § 15, 34 Stat. 584, 589–90 (1906); Ely, *supra* note 71, at 1134; STONE, *supra* note 59, at 12.

[96] *See* United States v. Eaton, 144 U.S. 677, 688 (1892) (requiring Congress to speak "distinctly" in order to give agency the power to criminalize violations of regulations); United States v. George, 228 U.S. 14, 22 (1913) (demanding "clear legislative basis"); NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 255 (1937) (explaining NLRB must point to some "definite and unmistakable expression" of "legislative intention" before wielding power to compel employers to retain employees discharged for unlawful conduct). The Supreme Court also applied the rule against implied delegations in 1941, rejecting an argument by the Federal Trade Commission that a statute gave it the power to regulate local business practices. *See* FTC v. Bunte Bros., 312 U.S. 349, 355 (1941). "An inroad upon local conditions and local standards *of such far-reaching import* as is involved here ought to await a clearer mandate from Congress." *Id.* at 355 (emphasis added). This case could also be deemed an early example of the federalism canon. Relatedly, Professor Wurman identifies

example, in *Siler v. Louisville & Nashville Railroad Co.*, the Court considered several federal constitutional challenges to a Kentucky statute allegedly giving the state railroad commission the power to set railroad transportation prices for various commodities.[97] The Court declined to reach those federal questions by refusing to interpret the state statute at issue to grant such power.[98] The Court started by emphasizing that the state commission's authority to set transportation prices "upon all railroads" in the State was an "enormous power."[99] The Court believed it would "be [a] matter of surprise to find such power granted to any commission."[100] That meant, the Court continued, that such a "power is not to be taken by implication" and that it "must be conferred in plain language" which is "free from doubt."[101] Not finding such doubt-free language, the Court then interpreted the statute to confer only the more modest power to set rates in a limited set of cases where "extortion [was] found" after an individualized investigation.[102]

In the same period, state courts also applied clear-statement rules to check administrative agencies.[103] For example, in 1909, the Supreme Court of

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the application of a similar rule in *Jackson v. The Archimedes*, 275 U.S. 463 (1928). *See* Wurman 2023, *supra* note 61, at 55. Faced with the question of whether a federal statute barring the payment of advanced wages to sailors applied to foreign vessels in American waters, the Court held that "such a sweeping provision was not specifically made in the statute, and that had Congress so intended, 'a few words would have stated that intention, not leaving *such an important regulation* to be gathered from implication.'" *Jackson*, 275 U.S. at 470 (emphasis added) (quoting Sandberg v. McDonald 248 U.S. 185, 195 (1918)). Although no federal agency was involved in *Jackson*, the intuition that Congress must speak clearly when legislating on important subjects is relevant in the major questions doctrine context.

[97] Siler v. Louisville & Nashville R.R. Co., 213 U.S. 175, 190–91 (1909).

[98] *Id.* at 194. The Court could interpret the statute because it lacked "a construction of the statute by the highest state court of Kentucky." *Id.*

[99] *Id.* at 193.

[100] *Id.*

[101] *Id.* at 194; *see also id.* at 197 ("If the legislature intended to give such an universal and all-prevailing power it is not too much to say that the language used in giving it should be so plain as not to permit of doubt as to the legislative intent.").

[102] *Id.* at 197. Professor Levin argues that the Court's opinions in *The Queen and Crescent Case* and *Siler* are not particularly relevant in assessing the major questions doctrine because they "dealt only with railroad rate regulation" and "said nothing about any broad administrative law principles." Levin, *supra* note 17, at 46 n.248. Although these cases' factual backgrounds dealt with rate regulation, I struggle to see why their logic would not apply when agencies claim other "vast and comprehensive" powers through "mere implication." ICC v. Cincinnati, New Orleans & Tex. Pac. Ry. Co. (*The Queen and Crescent Case*), 167 U.S. 479, 494–95 (1897).

[103] *See, e.g.*, Quinby v. Pub. Serv. Comm'n of State of N. Y. for Second Dist., 119 N.E. 433, 437 (N.Y. 1918) ("In the absence of clear and definite language conferring, without ambiguity, jurisdiction upon the public service commission to increase rates of fare . . . , we should not unnecessarily hold that the Legislature has intended to delegate any of its powers

Mississippi held that the state railroad commission lacked the power to compel trains to stop and unload passengers at railroad intersections—away from stations along their own lines—so that passengers could catch a connecting train.[104] The railroad commission pointed to a statutory provision giving it the power to "hear and determine all complaints made of any time schedule," and another requiring railroads to "stop [its trains] at any depot as the business and public convenience shall require . . . ."[105] The court rejected these arguments by relying on the "universally held" rule that because the "Railroad Commission is a mere administrative or advisory board created to carry out the will of the Legislature . . . before [the agency] can do any act, it must be able to point to its grant of power from the Legislature."[106] Not only that, the court insisted any administrative "power must affirmatively appear, and must be given in clear and express terms, and nothing will be had by inference."[107] The court then briefly examined the provisions and found no "express legislative grant" of power.[108] Showing some sympathy for inconvenienced rail passengers, the court concluded:

> We think that the Railroad Commission should have the authority to require railroad companies to stop their trains at the intersection of another railroad, without regard to whether a regular depot or stopping place is maintained or not, when the public convenience may require it; but this authority must come from the legislative branch of the state government, and not by judicial construction.[109]

Why did courts develop a rule against implied delegations? Part of the motivation was likely a formalist concern rooted in the separation of powers.[110]

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in the matter."); Wallace v. Hughes Elec. Co., 171 N.W. 840, 843 (N.D. 1919) ("The state tax commission was created by legislative enactment. It is elementary that a board so created possesses such powers only as the Legislature has expressly conferred upon it."); N.Y. Cent. R. Co. v. Pub. Serv. Comm'n of Ind., 134 N.E. 282, 284–85 (Ind. 1922); State *ex rel.* Wells v. W. Union Tel. Co., 118 So. 478, 480 (Fla. 1928) ("[T]he decided tendency of modern decisions, in construing statutes defining the powers and duties of administrative boards or commissions, is to hold that the power sought to be exercised must be made to affirmatively appear before it can be legally exercised."); Incorporated Town of Huxley v. Conway, 284 N.W. 136, 137 (Iowa 1939). *See generally* SUTHERLAND, *supra* note 63, § 65 (giving case examples).

[104] *See* Gulf & S.I.R. Co. v. R.R. Comm'n, 49 So. 118, 118 (Miss. 1909).

[105] *Id.* at 119.

[106] *Id.* at 118.

[107] *Id.*

[108] *Id.* at 119.

[109] *Id.*

[110] *See, e.g.*, *The Queen and Crescent Case*, 167 U.S. 479, 501 (1897) (citing favorably counsel's argument that President's constitutional power to enforce laws emanating from Article II does not mean "that the president, by implication, possesses the power to make rates for carriers engaged in interstate commerce").

Disclaimers that agencies are subject to legislative control are found repeatedly in these decisions, regardless of whether the agency won or lost.[111] For example, after the Minnesota Supreme Court found it "perfectly evident" that the legislature *had* delegated the authority to prescribe railroad rates,[112] the court reaffirmed that "[i]t is, of course, one of the settled maxims in constitutional law, that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body."[113] Formalist concerns aside, the supreme courts of Oregon and Mississippi added an explanation rooted in human nature—a very Burkean conception[114]—as a reason for the rule.[115] "There is," the Oregon Supreme Court explained, "too strong a desire in the human heart to exercise authority."[116] That meant, the court continued, that there is "too much of a disposition upon the part of those intrusted with [power] to extend it beyond the design for which, and the scope within which, it was intended it should be exercised, to leave the question of its extent to inference."[117] This insight, it should be noted, is at the heart of the American conception of separation of powers.[118] Finally, Professor Wurman has documented that, in several areas of law—including constitutional interpretation, agency law, and contract law—there was a longstanding instinct that writings should address important subjects with greater clarity.[119] Such expectations would help explain

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[111] *See, e.g.*, *Gulf & S.I.R. Co.*, 49 So. at 118 ("It is universally held that a Railroad Commission is a mere administrative or advisory board created to carry out the will of the Legislature . . . .").

[112] State *ex rel.* R.R. & Warehouse Comm'n v. Chi., Milwaukee & St. Paul Ry. Co., 37 N.W. 782, 784 (Minn. 1888), *rev'd*, 134 U.S. 418 (1890). The court found that "the language of the act [was] so plain on that point that argument [could] add nothing to its force." *Id.* at 785. The court also noted that the state legislature used "entirely new" language, not found in the federal Interstate Commerce Act, to achieve this end. *Id.*

[113] *Id.* at 786–87.

[114] EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE, *in* CONSERVATISM: AN ANTHOLOGY OF SOCIAL AND POLITICAL THOUGHT FROM DAVID HUME TO THE PRESENT 83, 113 (Jerry Z. Muller ed., Princeton University Press 1997).

[115] *Gulf & S.I.R. Co.*, 49 So. at 118–19; Bd. of R.R. Comm'rs of Or. v. Or. Ry. & Navigation Co., 19 Pac. 702, 706 (Or. 1888).

[116] *Bd. of R.R. Comm'rs of Or.*, 19 Pac. at 706.

[117] *See id.* Courts in other States upheld the powers of state railroad commissions where the state legislature had granted clear and specific power. The Minnesota Supreme Court, for example, upheld the state railroad commission's power to set rates, finding that it was "perfectly evident that the expressed intention of the legislature [was] that the rates recommended and published by the commission . . . [be] final and conclusive." *State ex rel. R.R. & Warehouse Comm'n*, 37 N.W. at 784. Indeed, "the language of the act [was] so plain on that point that argument [could] add nothing to its force." *Id.* at 785. The court also noted that the state legislature used "entirely new" language, not found in the federal Interstate Commerce Act, to achieve this end. *Id.*

[118] *See* THE FEDERALIST NO. 51, *supra* note 38, at 322 ("If angels were to govern men, neither external nor internal controls on government would be necessary.").

[119] Wurman 2023, *supra* note 61, at 48–55.

why courts sometimes insisted on clear evidence of legislative intent to delegate.[120]

B. *The Rise and Stagnation of the Nondelegation Doctrine*

The Queen and Crescent Case could have been one of the most important decisions of American administrative law. Touching on one of the most politically sensitive issues of the day, the case gave federal courts a powerful tool to call foul when administrative agencies tried to stretch their authority beyond what Congress had specifically granted.[121] Yet in recent decades, *The Queen and Crescent Case* has received relatively little attention from legal scholars. Most articles discussing the legitimacy of the major questions doctrine don't mention it at all. As Professor Merrill put it, the precedent is "now largely-forgotten."[122] Modern courts also generally neglected this case before Justice Gorsuch highlighted its importance in *West Virginia*.[123]

Why did this happen? Eventually, the Supreme Court's decision in *Chevron* came to be understood as establishing a rule diametrically opposed to the presumption against implied delegations.[124] Under *Chevron*—or at least later cases reinterpreting it[125]—the Court accepts that Congress implicitly intends to delegate agencies the power to interpret unclear language and claim new powers so long as the agency can point to *ambiguous* statutory language.[126] Therefore, scholars may, with some justification, have believed that the rise of *Chevron* deference abrogated (without acknowledging) these older cases.[127] But well before *Chevron*, *The Queen and Crescent Case* and its progeny had declined in prominence. All in all, the relative obscurity of the presumption against implied

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[120] *Id.*

[121] *See* ICC v. Cincinnati, New Orleans & Tex. Pac. Ry. Co. (*The Queen and Crescent Case*), 167 U.S. 479, 511 (1897).

[122] *See* Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 490 (2002); *see also* Sohoni, *supra* note 17, at 308 (calling *The Queen and Crescent Case* "a fossil"). Ironically, then-Professor Elena Kagan was one of the few academics to acknowledge this case in her discussion of the history of administrative delegation. *See* Kagan, *supra* note 51, at 2255 n.18.

[123] West Virginia v. EPA, 142 S. Ct. 2587, 2619 (2022) (Gorsuch, J., concurring); *see infra* notes 126–38 and accompanying text.

[124] *See, e.g.*, Bamzai, *supra* note 32, at 600.

[125] There is evidence that the Court itself did not originally understand *Chevron* to establish a broad rule of deference. *See* Buffington v. McDonough, 143 S. Ct. 14, 18 (2022) (Gorsuch, J., dissenting from denial of certiorari); THOMAS W. MERRILL, THE *CHEVRON* DOCTRINE: ITS RISE AND FALL, AND THE FUTURE OF THE ADMINISTRATIVE STATE 1–4 (2022) (documenting rise of *Chevron* in the 1990s).

[126] *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 843 (1984); United States v. Mead Corp., 533 U.S. 218, 229 (2001) (explaining theory of implicit delegation).

[127] *But see generally* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000) (recognizing modern instantiations of the rule).

delegations is probably best explained by the Court's later preference to enforce Article I's requirements by another doctrine: the nondelegation doctrine.[128]

Throughout the nineteenth century, there was a broad consensus among courts that there were at least *some* limits on Congress's ability to give away its powers to other entities.[129] Although courts sometimes enforced that rule by narrowly construing statutes, clear-statement rules have their limits. As Justice Story explained, courts can adopt a "construction [of a statute], which although not favored by the exact letter, may yet well stand with the general scope of the statute, and give it a constitutional character," but only "if by law it may."[130] In other words, Justice Story recognized that courts could not "twist the text beyond what it will bear."[131] Thus, if a statute undeniably did transfer a particular power, the courts would need a test to assess whether Congress had crossed constitutional lines. To meet that challenge, the Court introduced the so-called intelligible principle rule in *J.W. Hampton, Jr. & Co. v. United States*.[132] Recognizing that Congress could not delegate its "power to make the law" but that it could delegate some "discretion as to its execution,"[133] the Court reasoned that Congress could delegate so long as it established an "intelligible principle" by which agencies are "directed to conform."[134] Congress could empower agencies to make rules consistent with Article I, the Court reasoned, so long as it provided sufficient policy guidance.[135]

The Court subsequently enforced the nondelegation doctrine twice in 1935, when it found constitutional infirmities in two provisions of the same statute. In *Panama Refining Co. v. Ryan*, the Court held that a provision of the National Industrial Recovery Act of 1933 giving the President full discretion to ban the interstate transportation of so-called "hot oil" was unconstitutional because it "establishe[d] no criterion" and "declare[d] no policy" to guide executive discretion.[136] And in *A.L.A. Schechter Poultry Corp. v. United States*, the Court ruled against another provision giving the President discretion to adopt a competition code for the chicken industry.[137] The Court concluded this statute was constitutionally impermissible because it gave the President "unfettered

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[128] *See infra* notes 132–38 and accompanying text.

[129] *See supra* note 45 and accompanying text.

[130] Soc'y for the Propagation of the Gospel v. Wheeler, 22 F. Cas. 756, 769 (Story, Circuit Justice, C.C.D.N.H. 1814) (No. 13,156).

[131] Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 141 (2010).

[132] J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928); Cass, *supra* note 38, at 164–67 (analyzing *J.W. Hampton*).

[133] *J.W. Hampton*, 276 U.S. at 407 (quoting Cincinnati, Wilmington & Zanesville R.R. Co. v. Comm'rs, 1 Ohio St. 77, 88 (1852)).

[134] *Id.* at 409.

[135] *Id.*

[136] Pan. Refin. Co. v. Ryan, 293 U.S. 388, 415, 418 (1935).

[137] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 521–23 (1935).

discretion to make whatever laws he thinks may be needed or advisable" to govern the industry, and such a blank check was "an unconstitutional delegation of legislative power."[138]

But as President Franklin Roosevelt's pro-New Deal Justices came to dominate the Supreme Court,[139] the nondelegation doctrine declined in importance. In the mid-1940s, the Supreme Court upheld what looked like suspiciously broad and open-ended delegations.[140] In the following decades the Court did not decline to enforce any statutes on constitutional nondelegation grounds, though it did read some statutes narrowly to avoid nondelegation problems.[141] Still, it is fair to say that the nondelegation doctrine has played a limited role in our law for the past seventy years.[142]

C. *The Resurgence of the Major Questions Doctrine*

As the nondelegation doctrine lessened in importance in the 1940s, variants of the major questions doctrine reemerged as prominent tools by which the Supreme Court enforced Article I. A good example is *Kent v. Dulles*, which arose when the State Department cited department regulations to deny Kent a passport due to suspected Communist activities.[143] The Court held that the State Department lacked the power to deny Kent a passport, narrowly interpreting the 1952 law in which Congress had forbidden exit or entry without a duly-issued passport.[144] The Court acknowledged that "the power of the Secretary of State over the issuance of passports [was] expressed in broad terms," but the Court concluded that Congress intended for that discretion to be severely constrained by traditional practice.[145] The Court justified its narrow reading of the statute

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[138] *Id.* at 537–38, 542.

[139] *See* 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 26 (1998).

[140] *See, e.g.*, Nat'l Broad. Co. v. United States, 319 U.S. 190, 194, 224 (1943) (upholding statute instructing Federal Communications Commission to act in the "public interest"); Evan J. Criddle, *When Delegation Begets Domination: Due Process of Administrative Lawmaking*, 46 GA. L. REV. 117, 120 nn.4–7 (2011) (listing cases).

[141] *See, e.g.*, Nat'l Cable Television Ass'n v. United States, 415 U.S. 336, 342 (1974) ("[T]he hurdles revealed in [the Court's nondelegation] decisions lead us to read the Act narrowly to avoid constitutional problems.").

[142] *See, e.g.*, Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 328 (2002). More recently, there is evidence of renewed interest in enforcing the nondelegation doctrine at the Supreme Court, at least in cases where the major questions doctrine does not apply. *See* Gundy v. United States, 139 S. Ct. 2116, 2139–40 (2019) (Gorsuch, J., dissenting); *id.* at 2130–31 (Alito, J., concurring in the judgment); Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., respecting the denial of certiorari); *see also* Sohoni, *supra* note 17, at 265–66 ("[A] sufficiently robust major questions doctrine greatly reduces the need to formally revive the nondelegation doctrine.").

[143] Kent v. Dulles, 357 U.S. 116, 117–18 (1958).

[144] *Id.* at 128–29.

[145] *Id.* at 127–29.

through a method that, again, resembles that used by the Court in *West Virginia*.[146] The Court started by emphasizing the importance of passports to the "liberty" to travel.[147] It then explained that only Congress could curtail that liberty, and if "that power is delegated, the standards [provided by Congress to the State Department] must be adequate to pass scrutiny" under the nondelegation doctrine.[148] But rather than apply the nondelegation doctrine, the Court relied on the rule that where "activities . . . , natural and often necessary to the well-being of an American citizen, such as travel, are involved," courts must "construe narrowly all delegated powers that curtail or dilute them."[149]

The Court relied on a variant of the major questions doctrine again in *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, often called *The Benzene Case*. There, the Occupational Safety and Health Administration (OSHA) promulgated a regulation requiring employers to prevent exposure to benzene, a common industrial chemical.[150] In issuing that regulation, OSHA relied on a very broad and open-ended grant of power in the Occupational Safety and Health Act to adopt standards "reasonably necessary or appropriate to provide safe or healthful employment and places of employment."[151] When the Court granted review, many anticipated that the Justices would revitalize the nondelegation doctrine and apply it for the first time since 1945.[152] After all, the law seemed to grant remarkably broad and open-ended powers to OSHA to do, well, whatever it deemed wise. And indeed, Justice Rehnquist voted to strike down the statute on nondelegation grounds.[153]

But a plurality of the Court applied the major questions doctrine instead. In an opinion by Justice Stevens, the Court started by emphasizing the "unprecedented" and sweeping nature of the power OSHA claimed—the ability to issue "pervasive regulation" on American workplaces accompanied by "enormous costs that might produce little, if any, discernable benefit."[154] Having concluded that OSHA was claiming a major power, the Court asserted that OSHA needed to point to a "clear mandate" from Congress.[155] The Court then rejected the government's argument that the statute imposed only the requirement that OSHA consider the feasibility of regulations, explaining that

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[146] *Compare* West Virginia v. EPA, 142 S. Ct. 2587, 2610–14 (2022), *with Kent*, 357 U.S. at 127–29.

[147] *Kent*, 357 U.S. at 125–27.

[148] *See id.* at 129.

[149] *Id.*

[150] Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst. (*The Benzene Case*), 448 U.S. 607, 611, 615–16 (1980).

[151] *Id.* at 611–12 (quoting 29 U.S.C. § 652(8)).

[152] *See* Antonin Scalia, *A Note on the* Benzene Case, REGUL., July–Aug. 1980, at 25, 27.

[153] *The Benzene Case*, 448 U.S. at 675 (Rehnquist, J., concurring in the judgment).

[154] *Id.* at 645 (plurality opinion).

[155] *Id.*

such a statute "might be unconstitutional" under the nondelegation doctrine.[156] That was a problem for OSHA, the Court explained, because "a construction of [a] statute that avoids [such an] open-ended grant [of power] should certainly be favored."[157] The Court then narrowly read the statute to limit OSHA's power by requiring the agency to make a threshold finding that a particular carcinogen imposed a "significant risk of material health impairment."[158]

D. Brown & Williamson *and the Revisionist Major Questions Doctrine*

Most scholars overlook the foregoing history in describing and analyzing the development of the major questions doctrine.[159] Instead, many claim the Supreme Court invented the doctrine in *FDA v. Brown & Williamson Tobacco Corp.* or other recent cases applying *Chevron*.[160] *Brown & Williamson* deserves careful attention for a different reason: it introduced a new, weaker version of the major questions doctrine that caused substantial confusion in the following two decades.

Brown & Williamson arose during a longstanding and vigorous policy debate over whether and how the federal government should regulate cigarettes. Congress had debated the question for years—but it had repeatedly refused to ban smoking.[161] In 1996, however, the Food and Drug Administration (FDA) claimed the power to ban cigarettes.[162] It relied on the Food, Drug, and Cosmetic Act, which gave it substantial powers to regulate "drugs" and "devices."[163] Both terms, the FDA observed, were defined quite broadly and plausibly reached the nicotine in cigarettes.[164] And not only could the FDA point to broad language,

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[156] *Id.* at 646 (first citing A.L.A. Schechter Poultry Corp. v. United States, 295 U.S 495, 539 (1935); and then citing Pan. Refin. Co. v. Ryan, 293 U.S. 388 (1935)).

[157] *Id.*

[158] *Id.* at 639–40.

[159] *See infra* note 177 and accompanying text. The case most likely to garner academic attention was *The Benzene Case*; Cass Sunstein, for example, gave that case considerable attention in a 2021 essay. Sunstein 2021, *supra* note 37, at 484–86 ("*Brown & Williamson* is a linear descendent of an important pre-*Chevron* case that it did not cite: *Industrial Union Petroleum Institute v. American Petroleum Institute*, also known as the *Benzene Case*." (footnote omitted)).

[160] *See infra* note 177 and accompanying text.

[161] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000).

[162] *See* Nicotine in Cigarettes and Smokeless Tobacco Is a Drug and These Products Are Nicotine Delivery Devices Under the Federal Food, Drug, and Cosmetic Act: Jurisdictional Determination, 61 Fed. Reg. 44,619, 44,619–45,318 (Aug. 28, 1996).

[163] *Id.* at 44,629; 21 U.S.C. § 321(g)(1), (h).

[164] The Act defines "drug" to include, in part, "articles (other than food) intended to affect the structure or any function of the body." 21 U.S.C. § 321(g)(1)(C). It defines "device," in part, as "an instrument, apparatus, implement, machine, contrivance, . . . or other similar or related article, including any component, part, or accessory, which is . . . intended to affect the structure or any function of the body." *Id.* § 321(h)(3).

but the agency also claimed that its interpretation of the statute was owed deference by the courts under the Supreme Court's *Chevron* doctrine.[165]

The Supreme Court rejected the FDA's argument in a 5–4 decision.[166] Writing for the Court, Justice O'Connor rejected the FDA's appeal to *Chevron* deference.[167] Citing a law review article by Justice Breyer,[168] the Court reasoned that "there may be reason to hesitate" in applying *Chevron* deference "[i]n extraordinary cases."[169] And, the Court continued, the FDA's claimed authority meant it was "hardly an ordinary case."[170] The Court observed that "tobacco [had] its own unique political history," that Congress had frequently debated tobacco regulation, and that it had in prior legislation "squarely rejected proposals to give the FDA jurisdiction over tobacco."[171] In light of that history, the Court was "confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[172]

Brown & Williamson was significant in the development of the Court's *Chevron* doctrine. When issued, *Chevron* was near the height of its influence, resting on the idea that Congress implicitly delegates the task of interpreting ambiguous statutes to agencies.[173] *Brown & Williamson* checked that rise by rejecting that premise—at least in "extraordinary cases."[174]

But it's also important to identify what *Brown & Williamson* did *not* do. The Court did not demand that Congress clearly and specifically give the FDA the power to regulate and ban cigarettes.[175] Instead, the Court just interpreted the statute itself, without a firm thumb on the scale either in favor of or against the FDA.[176] In that respect, the Court did not extend prior cases like *The Benzene Case*, *Kent*, or *The Queen and Crescent Case*. Indeed, it did not even cite them. That has likely contributed to many scholars ignoring those prior cases and hailing *Brown & Williamson* as the foundation of the major questions doctrine,

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[165] *See* Brief for Petitioners at 16–18, *Brown & Williamson*, 529 U.S. 120 (No. 98-1152).

[166] *Brown & Williamson*, 529 U.S. at 123.

[167] *Id.* at 125–26.

[168] Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986).

[169] *Brown & Willamson*, 529 U.S. at 159.

[170] *Id.*

[171] *Id.* at 159–60.

[172] *Id.* at 160.

[173] *See* MERRILL, *supra* note 125, at 1–2 (documenting rise of *Chevron* in the 1990s).

[174] *See* Sunstein 2021, *supra* note 37, at 481–82.

[175] *See Brown & Williamson*, 529 U.S. at 160–61.

[176] *See id.* at 159; *see also* Sunstein 2021, *supra* note 37, at 482. It is also possible to understand *Brown & Williamson* as just applying the major questions doctrine as part of, and to strengthen, a *Chevron* Step One conclusion that the statute clearly foreclosed the agency's claimed power. *See, e.g.*, Kent Barnett & Christopher J. Walker, *Short-Circuiting the New Major Questions Doctrine*, 70 VAND. L. REV. EN BANC 147, 149–50 (2017).

which they viewed merely as an exception to *Chevron* deference or as part of the *Chevron* analysis.[177]

It is worth emphasizing that this new, revisionist version of the major questions doctrine was substantially weaker than that deployed in older cases.[178] Now embedded within the *Chevron* analysis, the new variant was merely a tool that courts could employ in refusing to defer to agencies. But that is a limited payout. Whereas the traditional clear-statement rule put a serious thumb on the scale *against* the agency's statutory reading, the weaker version required courts to interpret the statute de novo, putting the agency and its opponent on a theoretically equal footing.[179] This version of the doctrine, then, could play only a modest role in checking the power of the administrative state.

In the following two decades, two major questions doctrines existed. On the one hand, the Court sometimes applied the limited variant in declining to give agencies *Chevron* deference.[180] In *Gonzales v. Oregon*, for example, the Court was skeptical about deferring to the Attorney General, who interpreted the Controlled Substances Act to bar physicians from prescribing drugs used in physician-assisted suicide.[181] Considering "[t]he importance of the issue of

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[177] *See, e.g.*, Deacon & Litman, *supra* note 17, at 2–3; Natasha Brunstein & Richard L. Revesz, *Mangling the Major Questions Doctrine*, 74 ADMIN. L. REV. 217, 218, 224 (2022) (claiming the "major questions doctrine did not yet exist" in the mid-1980s); Nathan Richardson, *Deference Is Dead (Long Live* Chevron*)*, 73 RUTGERS U. L. REV. 441, 470 (2021); Kristin E. Hickman, *Nondelegation as Constitutional Symbolism*, 89 GEO. WASH. L. REV. 1079, 1122–24 (2021); David Zaring, *The Government's Economic Response to the COVID Crisis*, 40 REV. BANKING & FIN. L. 315, 405 (2020) ("The doctrine is often thought to have been first articulated in [*Brown & Williamson*]."); Jonathan Skinner-Thompson, *Administrative Law's Extraordinary Cases*, 30 DUKE ENV'T L. & POL'Y F. 293, 295 (2020); Richard L. Revesz, Bostock *and the End of the Climate Change Double Standard*, 46 COLUM. J. ENV'T L. 1, 30 (2020) ("[T]he major questions doctrine . . . is generally traced to a statement in *FDA v. Brown & Williamson Tobacco Corp.*"); Stephanie Hoffer & Christopher J. Walker, *Is the Chief Justice a Tax Lawyer?*, 2015 PEPP. L. REV. 33, 40–41; Richardson, *supra* note 18, at 365–68; Kevin O. Leske, *Major Questions About the "Major Questions" Doctrine*, 5 MICH. J. ENV'T & ADMIN. L. 479, 488 (2016) (rooting the "original major questions doctrine" in *Brown & Williamson* and *MCI*). Others identify the doctrine's origin in a 1994 case, *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218 (1994). *See, e.g.*, Aaron L. Nielson, *The Minor Questions Doctrine*, 169 U. PA. L. REV. 1181, 1193 (2021); Squitieri, *supra* note 18, at 473–74; Nicholas R. Bednar, *The Winter of Discontent: A Circumscribed* Chevron, 45 MITCHELL HAMLINE L. REV. 395, 413 (2019) (claiming the major questions doctrine "finds its earliest roots in *MCI*"); Marla D. Tortorice, *Nondelegation and the Major Questions Doctrine: Displacing Interpretive Power*, 67 BUFF. L. REV. 1075, 1105 (2019); Josh Chafetz, Response, *Gridlock?*, 130 HARV. L. REV. F. 51, 52 (2016).

[178] Sunstein 2021, *supra* note 37, at 482 (calling this variant "relatively weak").

[179] *Id.* at 482–83.

[180] *Id.* at 482; *see* Barnett & Walker, *supra* note 176, at 150 n.14 (observing *Gonzales* applied the doctrine in this way).

[181] Gonzales v. Oregon, 546 U.S. 243, 248–49 (2006).

physician-assisted suicide" and the fact that it had "been the subject of an 'earnest and profound debate' across the country," "the oblique form of the claimed delegation [was] all the more suspect."[182] Another example came in *King v. Burwell*, where the Court declined to give *Chevron* deference to the Department of Health and Human Services' interpretation of the Affordable Care Act (ACA).[183] The question whether healthcare tax credits would be available to those who bought health insurance under the ACA, the Court explained, "[was] a question of deep 'economic and political significance'" because it involved "billions of dollars in spending each year and affect[ed] the price of health insurance for millions of people."[184] But *King* also showcases the weakness of the *Brown & Williamson* variant of the major questions doctrine; after all, the agency still won.[185]

Yet the traditional major questions doctrine persevered. The Court applied the traditional clear-statement rule in *Utility Air Regulatory Group v. EPA*, requiring the EPA identify clear congressional authorization to apply Clean Air Act regulations to certain businesses and homes.[186] In ruling against the EPA, the Court cited *The Benzene Case* for the rule that "Congress [must] speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"[187] Some scholars, perhaps unaware of the longer history of the major questions doctrine, claimed *UARG* introduced a "new, mutant strain of the [major questions doctrine] embraced in *Brown & Williamson*,"[188] and that the Court had defied precedent to fabricate a new tool to weaken the administrative state.[189]

In the following years, the traditional and revisionist major questions doctrines continued to exist side-by-side, applied at different moments by different lower courts.[190] Of particular note, then-Judge Kavanaugh championed the stronger version of the doctrine while serving on the D.C. Circuit,[191] and he

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[182] *Id.* at 267–68 (quoting Washington v. Glucksberg, 521 U.S. 702, 735 (1997)).

[183] King v. Burwell, 576 U.S. 473, 485–86 (2015).

[184] *Id.* (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000))).

[185] *See* Sunstein 2021, *supra* note 37, at 482.

[186] Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014). For some background on the case, see Adler, *supra* note 9, at 8–10.

[187] *Util. Air Regul. Grp.*, 573 U.S. at 324 (quoting *Brown & Williamson*, 529 U.S. at 160) (first citing MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 231 (1994); and then citing *The Benzene Case*, 448 U.S. 607, 645–46 (1980)).

[188] Heinzerling, *supra* note 30, at 1951.

[189] *See, e.g.*, Nathan Richardson, *Antideference: COVID, Climate, and the Rise of the Major Questions Canon*, 108 VA. L. REV. ONLINE 174, 177–78 (2022).

[190] *See* Sunstein 2021, *supra* note 37, at 484–87.

[191] U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 417–18 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc).

quickly reaffirmed that view after joining the Supreme Court.[192] As Cass Sunstein observed in 2021, "the major questions doctrine [had] been understood in two radically different ways—weak and strong—and . . . the two [had] radically different implications."[193] The stage was set for the Supreme Court to make an "exceedingly high" stakes choice between the two versions of the doctrine.[194]

E. *The 2021 Term and* West Virginia v. EPA

The Court resolved the dispute between the traditional and the revisionist major questions doctrines in favor of the former during the 2021 Term. The Court applied the traditional clear-statement rule in three cases, culminating in a landmark decision in *West Virginia*.

1. Alabama Association of Realtors v. HHS

The first case in the trilogy was *Alabama Association of Realtors v. Department of Health and Human Services*, where the Court faced an attempt by the Centers for Disease Control and Prevention (CDC) to impose a nationwide eviction moratorium.[195] The agency relied on a 1944 statute giving it the power "to make and enforce such regulations as . . . are necessary to prevent the introduction, transmission, or spread of communicable diseases," and specifically authorizing it to "provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals . . . , and other measures, as in [its] judgment may be necessary."[196] Although this provision was susceptible to a broad reading, the Court read it narrowly and ruled against the CDC. Without even mentioning *Chevron*, the Court restated the rule that "Congress . . . [must] speak clearly when authorizing an agency to exercise powers of 'vast "economic and political significance."'"[197] And the CDC eviction moratorium fell into that box, the Court explained, because it affected between six and seventeen million tenants and the congressional

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[192] *See* Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., respecting the denial of certiorari) ("In order for an executive or independent agency to exercise regulatory authority over a major policy question of great economic and political importance, Congress must either: (i) expressly and specifically decide the major policy question itself and delegate to the agency the authority to regulate and enforce; or (ii) expressly and specifically delegate to the agency the authority both to decide the major policy question and to regulate and enforce.").

[193] Sunstein 2021, *supra* note 37, at 477.

[194] *Id.* at 478.

[195] Ala. Ass'n of Realtors v. HHS, 141 S. Ct. 2485, 2486 (2021) (per curiam).

[196] *Id.* at 2487 (citing 42 U.S.C. § 264(a)).

[197] *Id.* at 2489 (first quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014); and then quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000)).

emergency rental assistance served as a "reasonable proxy" of its "economic impact": $50 billion.[198]

2. National Federation of Independent Business v. OSHA

The Court next applied the major questions doctrine in *National Federation of Independent Business v. Occupational Safety and Health Administration* (*NFIB v. OSHA*).[199] There, OSHA attempted to impose a COVID-19 vaccine-or-testing regime on most American workplaces.[200] OSHA relied on the Occupational Safety and Health Act, which authorized it to impose "emergency" rules where "'employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful' . . . and . . . the 'emergency standard is necessary to protect employees from such danger.'"[201] The Court rejected OSHA's argument, relying on and opening its analysis with the traditional major questions doctrine's clear-statement rule.[202] The Court commented that the mandate was "no 'everyday exercise of federal power'" because it was "a significant encroachment into the lives—and health—of a vast number of employees."[203] "The question, then, [was] whether the Act plainly authorize[d]" the mandate.[204] Reading the statute narrowly, the Court concluded that OSHA could address only dangers unique to the workplace—and that it could not impose the vaccine mandate because COVID-19 was no more prevalent in workplaces than in other indoor settings.[205]

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[198] *Id.*

[199] Nat'l Fed'n of Indep. Bus. v. OSHA, 142 S. Ct. 661, 665 (2022) (per curiam).

[200] COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61,402, 61,551–54 (Nov. 5, 2021) (to be codified at 29 C.F.R. pts. 1910, 1915, 1917, 1918, 1926, 1928).

[201] *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 663 (quoting Occupational Safety and Health Act, 29 U.S.C. § 655(c)(1) (1970)).

[202] *Id.* at 665–66.

[203] *Id.* at 665 (quoting *In re* MCP No. 165, 20 F.4th 264, 272 (6th Cir. 2021) (Sutton, C.J., dissenting)).

[204] *Id.*

[205] *Id.* at 665–66. Along with *NFIB*, the Court issued a 5–4 opinion in favor of the Biden Administration's COVID-19 vaccine mandate for staff at facilities receiving Medicare and Medicaid funding. *See* Biden v. Missouri, 142 S. Ct. 647, 650 (2022) (per curiam). This opinion fits awkwardly with the Court's other decisions applying the major questions doctrine during the 2021 Term because the majority ignored the dissent's argument that the major questions doctrine applied, *see id.* at 658 (Thomas, J., dissenting), and because the Court did not cite or discuss this case in *West Virginia*. Because the Court did not contest the dissent's claim that the doctrine applied, *Biden v. Missouri* is probably best read as a holding that Congress *did* clearly delegate the authority at issue. *Id.* at 652 ("The rule thus fits neatly within the language of the statute."). In support of that holding, the Court cited "the longstanding practice of Health and Human Services." *Id.* Another potentially relevant factor

While the Court's treatment of the major questions in *NFIB v. OSHA* was brief, Justice Gorsuch—joined by Justices Thomas and Alito—concurred and elaborated on the role the doctrine played in the case.[206] For Justice Gorsuch, the major questions doctrine was important because, like the nondelegation doctrine, "[i]t ensure[d] 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."[207] Otherwise, Congress could potentially "'dash the whole scheme' of our Constitution" by "intentionally delegating its legislative powers to unelected officials."[208] Alternatively, Justice Gorsuch explained, Congress could pass "broadly worded statutes," giving an agency the opportunity to subsequently "exploit some gap, ambiguity, or doubtful expression . . . to assume responsibilities far beyond its initial assignment."[209] The major questions doctrine guarded against that scenario too, Justice Gorsuch continued, serving a vital role in "prevent[ing] 'government by bureaucracy supplanting government by the people.'"[210]

3. *The Finale:* West Virginia v. EPA

In many ways *NFIB v. OSHA* foreshadowed the main administrative-law case of the Term: *West Virginia v. EPA*, which the Court candidly described as a "major questions case."[211]

The dispute in *West Virginia* began in 2015, when the EPA promulgated the Clean Power Plan (CPP), which set emission limits for coal and natural-gas power plants that were designed to force those plants to either reduce their emissions or counterbalance them by subsidizing favored clean-energy plants.[212] To accomplish this, the EPA relied on 42 U.S.C. § 7411, which allows the EPA to determine the "best system of emission reduction" for power plants.[213] And, the

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in the holding was that the regulation of health conditions at medical facilities was arguably within the core of HHS's expertise. *Id.* at 653 ("[T]he Secretary routinely imposes conditions of participation that relate to the qualifications and duties of healthcare workers themselves."). Notably, during oral arguments over the Biden Administration's student debt cancellation plan, Justice Kavanaugh suggested that aspect of the holding in *Missouri* was important. *See* Transcript of Oral Argument at 116–17, Biden v. Nebraska, No. 22-506 (argued Feb. 28, 2023). As discussed below, longstanding agency practice and the fit between the delegated authority and agency expertise are factors the Court has found relevant in assessing whether a clear statement of authority exists. *See infra* Part III.B.

[206] *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 667 (Gorsuch, J., concurring).

[207] *Id.* at 668.

[208] *Id.* at 669 (quoting Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 61 (2015) (Alito, J., concurring)).

[209] *Id.*

[210] *Id.* (quoting Scalia, *supra* note 152, at 25, 27).

[211] West Virginia v. EPA, 142 S. Ct. 2587, 2610 (2022).

[212] *Id.* at 2602–04.

[213] *Id.* at 2601 (citing 42 U.S.C. § 7411(a)(1), (b)(1)).

EPA urged, that phrase could be read broadly enough to give the EPA the power to determine the best "system" for reducing emissions across multiple plants.[214]

The CPP had a winding path to the Court. The D.C. Circuit initially rejected a request to stay the CPP pending appeal.[215] But in a rare move, the Supreme Court stayed implementation of the CPP by a 5–4 vote in 2016.[216] That stay gave the Trump Administration an opportunity to rescind the rule before it ever went into effect.[217] And in 2018, the EPA promulgated a replacement for the CPP: the Affordable Clean Energy (ACE) rule, which—more in line with traditional practice—set emission limits for power plants achievable based solely on the use of existing technologies.[218] In 2021, however, a divided D.C. Circuit brought the CPP out of the grave, holding that its rescission was unlawful.[219] In the process, the court rejected the Trump Administration's argument that the EPA lacked statutory authority to implement the CPP, reasoning that the statute was "broad."[220] The court also specifically rejected the Trump Administration's reliance on the major questions doctrine, suggesting that delegations empowering an agency to apply its core expertise fell outside the doctrine, and concluding that the power to regulate emissions was in the EPA's "wheelhouse."[221] The Supreme Court granted review.

Writing for a 6–3 Court, Chief Justice Roberts roundly rejected both the D.C. Circuit's narrow conception of the major questions doctrine and the EPA's arguments. The Court did not start by engaging in "routine statutory interpretation," but rather opted for a "different approach."[222] The Court then proceeded to discuss the major questions doctrine, which it described as having been previously applied in "all corners of the administrative state."[223] In such cases, a "plausible" or "colorable" statutory argument that an agency has the authority to implement a major policy is insufficient.[224] Instead, the "separation of powers" and a "practical understanding of legislative intent" require an agency

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[214] Brief for Federal Respondents at 31, West Virginia v. EPA, 142 S. Ct. 2587 (No. 20-1530).

[215] West Virginia v. EPA, 142 S. Ct. at 2604.

[216] West Virginia v. EPA, 136 S. Ct. 1000, 1000 (2016).

[217] *See* Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32,520, 32,520 (July 8, 2019) (to be codified at 40 C.F.R. pt. 60).

[218] *Id.* at 32,532–33.

[219] Am. Lung Ass'n v. EPA, 985 F.3d 914, 995. (D.C. Cir. 2021), *rev'd sub. nom.* West Virginia v. EPA, 142 S. Ct. 2587 (2022).

[220] *Id.* at 964.

[221] *Id.* at 959, 964.

[222] West Virginia v. EPA, 142 S. Ct. 2587, 2608–09 (2022).

[223] *Id.* at 2608.

[224] *Id.* at 2609.

to point to "'clear congressional authorization' for the power it claims."[225] The Court also defended itself from sharp attacks by Justice Kagan, chiding her dissent for trying to define the major questions doctrine in an unduly narrow manner.[226] Instead, the Court countered, the major questions doctrine "took hold because it refers to an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted."[227]

The Court next concluded that a major question was at issue in the case, asserting that the CPP "empower[ed] [the EPA] to substantially restructure the American energy market."[228] And while the statute did impose a feasibility constraint on the EPA's ability to determine the "best system of emission reduction," the Court concluded there was "little reason to think Congress assigned" the EPA, "and it alone," the task of "balancing the many vital considerations of national policy implicated in deciding how Americans will get their energy."[229] The question of generation shifting, the Court continued, was also a politically controversial one because Congress had repeatedly considered and rejected legislation that would have given the EPA the power it was now claiming.[230] All in all, the decision whether to promulgate the CPP was one of "such magnitude and consequence" that it must "rest[] with Congress itself, or an agency acting pursuant to a clear delegation from that representative body."[231]

Finally, the Court applied a robust clear-statement rule and held that the EPA lacked clear and specific authorization from Congress to promulgate the CPP.[232] The Court's statutory analysis was succinct.[233] The phrase "best system of emissions reduction" was "vague," effectively an "empty vessel" and thus "not

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[225] *Id.* (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)). Traditionally, the major questions doctrine has been justified and rooted in separation of powers concerns, and the Chief Justice echoed those concerns. *Id.* However, the Chief Justice also alluded to more recent justifications for the doctrine sounding in "legislative intent." *Id.* Arguably tracing back to a law review article by Justice Breyer, this position posits that members of Congress are empirically unlikely to wish to implicitly delegate to agencies the power to resolve important questions. *See* Breyer, *supra* note 168, at 370. There is some empirical evidence supporting this claim. *See* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 1003–06 (2013).

[226] West Virginia v. EPA, 142 S. Ct. at 2609.

[227] *Id.*

[228] *Id.* at 2610.

[229] *Id.* at 2612–14.

[230] *Id.* at 2614.

[231] *Id.* at 2616.

[232] West Virginia v. EPA, 142 S. Ct at 2614.

[233] *See* Adler, *supra* note 9, at 20 ("Chief Justice Roberts' opinion spent little time focused on the intricacies of statutory text.").

close to the sort of clear authorization required by [the Court's] precedents."[234] The Court pointed to other considerations, too, suggesting no clear statement was present.[235] The EPA had historically not interpreted § 111 so broadly.[236] The provision had rarely been used, and never in such an ambitious manner.[237] There was also a mismatch between the EPA's claimed power and its "comparative expertise" because the CPP required it to make judgments about energy policy, a matter arguably within the core expertise of other agencies (like the Federal Energy Regulatory Commission (FERC)).[238]

In an extensive concurrence, Justice Gorsuch celebrated the triumph of the traditional, strong form of the major questions doctrine. In the concurrence's first part, he defended the major questions doctrine's clear-statement rule as a legitimate method to enforce Article I.[239] Citing scholarship by then-Professor Amy Coney Barrett, Justice Gorsuch noted a long historical tradition of courts using clear-statement rules to enforce constitutional guarantees.[240] Citing some of the Court's traditional major questions doctrine precedents—including *The Queen and Crescent Case* and *The Benzene Case*—Justice Gorsuch concluded that the "major questions doctrine works in much the same way [as other constitutional clear-statement rules] to protect the Constitution's separation of powers."[241] It did so, Justice Gorsuch explained, by ensuring Congress follows Article I's arduous requirements for making laws and preventing agencies from "churn[ing] out new laws more or less at whim" based on vague delegations from past legislatures.[242]

In the concurrence's second part, Justice Gorsuch offered doctrinal guidance on how to apply the major questions doctrine going forward. As to what constitutes a major question, Justice Gorsuch identified three independent situations that "trigger[]" the doctrine's application.[243] First, the doctrine applies

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[234] West Virginia v. EPA, 142 S. Ct. at 2614.

[235] *Id.* at 2614–16. In discussing some of these factors, the Court's opinion could be read as treating them as relevant to the distinct issue of whether a "major question" was at issue in the case. Logically, however, these considerations don't seem particularly relevant in assessing whether an agency is trying to claim a "major" power versus a nonmajor power. They seem more relevant in assessing whether Congress has provided a clear statement of authority to an agency. This is how Justice Gorsuch's concurrence seems to have understood the Court's opinion. *See id.* at 2622–24 (Gorsuch, J., concurring).

[236] *Id.* at 2613 (majority opinion).

[237] *Id.* at 2610–11, 2613.

[238] *Id.* at 2612–13 (quoting Kisor v. Wilkie, 139 U.S. 2400, 2417 (2019)); *What FERC Does*, FED. ENERGY REG. COMM'N, https://www.ferc.gov/what-ferc-does [https://perma.cc/9PHB-J5RX] (Aug. 16, 2022).

[239] West Virginia v. EPA, 142 S. Ct. at 2616–18 (Gorsuch, J., concurring).

[240] *Id.* at 2616 (citing Barrett, *supra* note 131, at 169).

[241] *Id.* at 2617, 2619.

[242] *Id.* at 2618.

[243] *Id.* at 2620–22.

when a question of "political significance" is at issue.[244] That is more likely to be the case, Justice Gorsuch elaborated, if there is widespread debate on the question or Congress tried and failed to pass legislation addressing it.[245] Similarly, if an agency seeks to issue a regulation where it is apparent Congress could not have passed an analogous law, that raises the risk that the agency is trying to circumvent Congress.[246] Second, Justice Gorsuch explained that a major question is at issue if the agency is issuing a regulation of substantial economic significance, which can be measured either in terms of the size of the regulated industry or the degree of costs imposed on the regulated.[247] And finally, Justice Gorsuch argued that a major question was at issue when a regulation intruded into areas traditionally regulated by the States.[248] Justice Gorsuch also provided guidance on how to apply the Court's clear-statement rule.[249] Because that part of the opinion should prove especially helpful to lower courts in applying the Court's evolved doctrine moving forward,[250] I will return to it below.[251]

Justice Kagan wrote a heated dissent. In her view, the Court should have just read the statutory text on its own terms—and she criticized the Court and Justice Gorsuch's concurrence for not doing so.[252] Indeed, she accused the Justices in the majority of being textualist "only when being so suits [them]."[253]

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[244] *Id.* at 2620–21 (quoting Nat'l Fed'n of Indep. Bus. v. OSHA, 142 S. Ct. 661, 665 (2022)).

[245] West Virginia v. EPA, 142 S. Ct. at 2620–21 (Gorsuch, J., concurring).

[246] *Id.*

[247] *Id.* at 2621. It's worth noting that other expositions of the doctrine subdivide this trigger into two separate triggers. Justice Kavanaugh, for example, has suggested the doctrine applies *either* when an agency regulates a significant industry *or* when it imposes significant costs on the regulated. *See* U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 417–18 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc). This difference between their two views of the doctrine, however, seems to be just semantics, as Justice Gorsuch's "economic significance" trigger applies in both situations identified by Justice Kavanaugh.

[248] West Virginia v. EPA, 142 S. Ct. at 2621 (Gorsuch, J., concurring). Justice Gorsuch acknowledged that a separate "clear-statement rule—the federalism canon—also applies in these situations." *Id.* In this respect, Justice Gorsuch's treatment of the doctrine resembles that of the Court in *Alabama Association of Realtors*. *See* Ala. Ass'n of Realtors v. HHS, 141 S. Ct. 2485, 2489 (2021) (per curiam).

[249] West Virginia v. EPA, 142 S. Ct. at 2622–24 (Gorsuch, J., concurring).

[250] *See* Walker, *supra* note 17, at 775 ("Justice Gorsuch's separate concurrence may well be the more important opinion for the new doctrine, as it provides a roadmap for further development."). Some early lower court decisions have already referenced the doctrinal guidance provided by Justice Gorsuch's concurrence. *See, e.g.*, Brown v. U.S. Dep't of Edu., No. 4:22-cv-0908-P, 2022 WL 16858525, at *11–12 (N.D. Tex. Nov. 10, 2022); Louisiana v. Becerra, No. 3:21-CV-04370, 2022 WL 4370448, at *10 (W.D. La. Sept. 21, 2022).

[251] *See infra* Part III.B.

[252] *See* West Virginia v. EPA, 142 S. Ct. at 2633–36, 2641 (Kagan, J., dissenting).

[253] *Id.* at 2641.

Not only that, Justice Kagan continued, but the majority "magically" fabricated substantive canons like the major questions doctrine to function as "get-out-of-text-free cards" to advance "broader goals" like "[p]revent[ing] agencies from doing important work."[254] Overlooking pre-*Brown & Williamson* precedents and some subsequent cases, Justice Kagan advanced a particularly narrow version of the doctrine.[255] Under her view, the doctrine would apply only in cases of ambiguity, and even then only when an agency "operated outside the sphere of its expertise, in a way that warped the statutory text or structure."[256] Any stronger version of the doctrine would be inappropriate, Justice Kagan apparently believed, because "'the founding era' . . . 'wasn't concerned about delegation.'"[257] And whatever the framers may have believed, Justice Kagan believed that broad delegations like those in the Clean Air Act were essential to "a modern Nation."[258] In her view, Congress is incapable of legislating to solve current problems because "Members of Congress often don't know enough . . . to regulate sensibly on an issue" and they "can't know enough . . . to keep regulatory schemes working across time."[259] Thus, in Justice Kagan's view, a "rational Congress delegates" and courts should not "get in the way," at least within "extremely broad limits."[260]

4. West Virginia*'s Implications*

There's a lot to unpack from *West Virginia v. EPA*, but a few straightforward takeaways are possible. *First*, the Court resolved preexisting confusion about *what* the major questions doctrine is. There is one version of the major questions doctrine: a clear-statement rule grounded in the "separation of powers."[261] As

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[254] *Id.*

[255] *See id.* at 2633–36 (ignoring, for example, *NFIB v. OSHA*).

[256] *Id.* at 2635; *see also* Transcript of Oral Argument at 58, West Virginia v. EPA, 142 S. Ct. 2587 (2022) (No. 20-1530) (describing "ambiguity" as "the first condition" of applying the doctrine).

[257] West Virginia v. EPA, 142 S. Ct. at 2641–42 (Kagan, J., dissenting) (quoting Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1734 (2002)). Justice Kagan did not acknowledge the large amount of scholarship rebutting her view of the framers' conception of delegation. Noticing that omission, Justice Gorsuch recommended some articles opposed to her position. *See id.* at 2625 n.6 (Gorsuch, J., concurring) (citing eleven sources).

[258] *Id.* at 2643 (Kagan, J., dissenting).

[259] *Id.* at 2642.

[260] *Id.* at 2642–43.

[261] *Id.* at 2609 (majority opinion); *see also id.* at 2620 n.3 (Gorsuch, J., concurring) ("[O]ur precedents have usually applied the doctrine as a clear-statement rule, and the Court today confirms that is the proper way to apply it."); *cf.* Eli Nachmany, *There Are Three Major Questions Doctrines*, YALE J. REGUL. NOTICE & COMMENT (July 16, 2022), https://www.yalejreg.com/nc/three-major-questions-doctrines/ [https://perma.cc/B2TG-G857] (explaining that *West*

even Justice Kagan's dissent recognized, "there is now a two-step inquiry" in which courts assess (1) whether the agency is trying to resolve a major question and (2) whether Congress clearly authorized the agency's action.[262] As Justice Gorsuch explained, this version of the doctrine traces roots back to the 1800s.[263] In other words, *West Virginia* answered the question posed in Professor Sunstein's 2021 article: the Court chose the "strong" version of the major questions doctrine.[264]

Second and relatedly, *West Virginia* shows the continued irrelevance of *Chevron* deference at the Supreme Court.[265] In prior years, the Court would have been fighting over whether the EPA should receive *Chevron* deference for its interpretation of § 7411. Yet the EPA didn't even ask for *Chevron* deference in its briefs.[266] And although Justice Kagan cited *Chevron* in an attempt to narrow the scope of the major questions doctrine, not even she argued that the EPA's interpretation merited deference.[267] In other words, *West Virginia* is yet another prominent example of the Court's repeated and consistent refusal to apply *Chevron* since 2016.[268] Thus, the old idea that the major questions doctrine is just a mere exception to *Chevron* is no longer plausible.[269] Indeed,

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Virginia articulates a canon that "operates as a sub-canon of constitutional avoidance, skirting issues of nondelegation by resolving cases on statutory grounds").

[262] West Virginia v. EPA, 142 S. Ct. at 2634 (Kagan, J., dissenting).

[263] *See id.* at 2619 (Gorsuch, J., concurring).

[264] *See, e.g.*, Deacon & Litman, *supra* note 17, at 4 (arguing *West Virginia* "represents the full emergence of the doctrine as a clear-statement rule"); Sunstein 2021, *supra* note 37, at 477, 483–86.

[265] Mexican Gulf Fishing Co. v. U.S. Dep't of Com., No. 22-30105, 2023 WL 2182268, at *14 (5th Cir. 2023) (Oldham, J., concurring in part) (suggesting Court no longer requires deference); Solar Energy Indus. Ass'n v. FERC, No. 21-1126, 2023 WL 1975079, at *8 (D.C. Cir. 2023) (Walker, J., concurring in part and dissenting in part).

[266] *See* Brief for the Federal Respondents at 38–50, West Virginia v. EPA, 142 S. Ct. 2587 (No. 20-1530) (arguing for a broad interpretation of § 7411's delegation to the EPA without referencing *Chevron* deference).

[267] *See* West Virginia v. EPA, 142 S. Ct. at 2634–35 (Kagan, J., dissenting).

[268] In the 2021 Term, the Court failed to even mention *Chevron* in at least two cases where it would have likely once been applied. *See generally* Am. Hosp. Ass'n v. Becerra, 142 S. Ct. 1896 (2022); Becerra v. Empire Health Found., 142 S. Ct. 2354 (2022). This continues the Court's recent practice of consistently ignoring *Chevron* in cases where it once applied. *See* Richardson, *supra* note 177, at 487–89 (documenting cases). The last time the Court actually granted deference under *Chevron* was in Cuozzo Speed Techs., LLC v. Lee, 136 S. Ct. 2131 (2016). *Id.* If this trend continues, the Court might eventually just clarify that *Chevron* was "long ago abandoned." *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427 (2022); *see also* Jonathan H. Adler, *Will* Chevron *Get the* Lemon *Treatment?*, REASON (July 10, 2022), https://reason.com/volokh/2022/07/10/will-chevron-get-the-lemon-treatment/ [https://perma.cc/KZ29-XK45].

[269] *See, e.g.*, Sohoni, *supra* note 17, at 263–64 (asserting Court "unhitched" major questions doctrine from *Chevron*); Frances Williamson, *Implicit Rejection of* Massachusetts

one can ask whether *Chevron* can survive while *West Virginia* lives; *Chevron* and the major questions doctrine "work entirely at cross-purposes" because "both purport to resolve ambiguity, but they demand diametrically contrary outcomes."[270] If the *Brown & Williamson* variant of the doctrine once served as a limited shield against *Chevron* deference, the traditional variant reembraced in *West Virginia* is a sword challengers can wield against agencies trying to claim new powers.

Third, the Court's decision in *West Virginia* suggests the major questions doctrine applies in a wide variety of cases. As the Court put it, the major questions doctrine has been applied in "all corners of the administrative state."[271] Indeed, one can't help but notice how similar the Court's opinion is on this front to Justice Gorsuch's concurrence. Although Justice Gorsuch organized the doctrine somewhat differently than the Chief Justice did, both opinions found much of the same evidence relevant in their analyses. Both opinions looked to evidence Congress considered and rejected bills similar to the proposed regulation, the fact that climate change is widely debated, comments by the Obama Administration, the CPP's financial effect on consumers, and the importance of the energy sector within the broader economy.[272] Moreover, both opinions explicitly rejected Justice Kagan's proposed narrow version of the doctrine.[273] All this suggests that, going forward, there are six Justices who are willing to identify important agency regulatory innovations as "major" and run them through the clear-statement gauntlet.

Fourth, the Court's decision suggests that the clear-statement test will generally be difficult for agencies to satisfy. Again, there is substantial overlap between what the Chief Justice's majority and Justice Gorsuch's concurrence found relevant. Both opinions denounced reliance on "oblique or elliptical" language or "'gap filler' provisions."[274] Both looked to past agency interpretations of the statute, expressing skepticism that "long-extant" and rarely used provisions provide new power.[275] And both counseled skepticism when there is a mismatch

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v. EPA*: The Prominence of the Major Questions Doctrine in Checks on EPA Power*, HARV. J.L. & PUB. POL'Y PER CURIAM, Summer 2022, at 1, 4.

[270] Bamzai, *supra* note 32, at 600. For a different view, see Nicholas Bednar, Chevron*'s Latest Step*, YALE J. REGUL. NOTICE & COMMENT (July 3, 2022), https://www.yalejreg.com/nc/chevrons-latest-step/ [https://perma.cc/C972-YRX3]. My primary disagreement with Mr. Bednar's doctrinal chart concerns the consequence of a major question being at issue. Clear-statement rules do not call for an application of "plain text." *See infra* Part III.B. Instead, they put a thumb on the scale against the agency. Therefore, if Congress did not clearly authorize an agency action addressing a major question, the agency loses.

[271] West Virginia v. EPA, 142 S. Ct. 2587, 2608 (2022).

[272] *Compare id.* at 2604, 2612–14 (majority opinion), *with id.* at 2620–22 (Gorsuch, J., concurring).

[273] *Compare id.* at 2609 (majority opinion), *with id.* at 2626 (Gorsuch, J., concurring).

[274] *Compare id.* at 2609–10 (majority opinion), *with id.* at 2622 (Gorsuch, J., concurring) (quoting *id.* at 2609–10 (majority opinion)).

[275] *Compare id.* at 2610 (majority opinion), *with id.* at 2623 (Gorsuch, J., concurring).

between an agency's claimed powers and its expertise.[276] Under both opinions, there are numerous trip wires imperiling future agency power grabs.

F. *Assessment*

The foregoing history helps answer the common criticism that the major questions doctrine lacks legitimacy or doctrinal pedigree. Regardless of whether one thinks the rule is normatively good, it is not novel. The clear-statement rule applied in *West Virginia* has roots tracing back to the foundation of the administrative state, both within the States and at the federal level.[277] Even if the nineteenth century version of this doctrine was not called the "major questions doctrine," it bears important similarities to the clear-statement rule applied by the Court during the 2021 Term.[278] That complicates scholarly attacks on the doctrine's legitimacy, which often rest on the mistaken premise that the Court fabricated the doctrine in *Brown & Williamson* and only subsequently transformed it into a clear-statement rule.[279] Future discussions of the doctrine's legitimacy should account for its history and the fact that, since the beginning of the administrative state, jurists have had the instinct that agencies should not be able to claim important new powers in broad and vague delegations of authority.

III. THE FUTURE OF THE MAJOR QUESTIONS DOCTRINE

The second criticism of the major questions doctrine is that it lacks doctrinal clarity and is unworkable.[280] Although *West Virginia* provided substantial clarity to the doctrine, it also left some indeterminacy on two matters for the lower courts. First, courts must develop doctrinal tests to identify what constitutes a "major" question that triggers the doctrine. Second, courts must determine practical and effective ways to apply the doctrine's clear-statement

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[276] *Compare id.* at 2612–13 (majority opinion), *with id.* at 2623 (Gorsuch, J., concurring).

[277] *See supra* Part II.A.

[278] The most significant difference between the modern version of the major questions doctrine and its nineteenth century ancestor is that the latter could logically apply even in cases not involving a "major" question. If anything, then, the nineteenth century ancestor was an even more powerful agency-checking rule than the Court's current doctrine.

[279] *See, e.g.*, Deacon & Litman, *supra* note 17, at 10–11, 13–22 (claiming the *Brown & Williamson* version of the major questions doctrine was the "traditional" approach and that Court invented a "new" version in the 2021 Term). At least some judges and scholars have defended clear-statement rules on the basis of historical usage. *See, e.g.*, Ramsey, *supra* note 27; Barrett, *supra* note 131, at 162–63 ("[I]t is difficult to impeach as illegitimate a practice that has persisted since the early nineteenth century."). I do not claim that the major questions doctrine's historical pedigree definitively makes it legitimate—but merely that it's a relevant consideration.

[280] *See e.g.*, Bamzai, *supra* note 32, at 602; Cass R. Sunstein, *Zombie* Chevron*: A Celebration*, 82 OHIO ST. L.J. 565, 581 (2021); *In re* MCP No. 165, 21 F.4th 357, 372 (6th Cir. 2021); Deacon & Litman, *supra* note 17, at 5.

rule. Ultimately, the workability criticisms of the doctrine are likely overstated. In refining both parts of the doctrine, courts can draw on ample guidance from the Court's precedents, Justice Gorsuch's *West Virginia* concurrence, and other sources.

A. *What Constitutes a Major Question?*

First, courts will have to refine the major questions doctrine to determine precisely when a "major question" is at issue. Defining these categories is probably the most difficult part of the doctrine to apply, and scholars have repeatedly argued that this inquiry is challenging.[281] As an initial note, it's worth recalling that some courts historically did not have to make this distinction because they applied a *general* rule against implied delegations.[282] If the Court does formally discard *Chevron* deference, restoring a general rule against implied delegations—on questions major and minor—would be the most judicially manageable standard to apply.[283]

But history also suggests that courts are capable of crafting doctrine to distinguish between major and nonmajor questions. Jurists dating back to Chief Justice John Marshall have distinguished between "those important subjects, which must be entirely regulated by the legislature itself" and "those of less interest."[284] And some variant of the major questions doctrine has been applied in American courts for at least one hundred and fifty years.[285] Although a general rule against implied delegations reigned for part of that time, courts throughout identified cases featuring questions they deemed important enough

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[281] *See, e.g.*, Deacon & Litman, *supra* note 17, at 5 (noting the doctrine is "often described as radically indeterminate"); Brunstein & Revesz, *supra* note 177, at 218; Squitieri, *supra* note 18, at 465; Bamzai, *supra* note 32, at 602; Sunstein 2021, *supra* note 37, at 487 ("[T]he line between 'major' and 'nonmajor' questions is not exactly obvious."); Winder, *supra* note 9, at 240; Nielson, *supra* note 177, at 1194 (arguing there is "no principled way to determine whether a question is 'major' or not"); Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777, 793–96 (2017); Leske, *supra* note 177, at 480; David Gamage, *Foreword*—King v. Burwell *Symposium: Comments on the Commentaries (and on Some Elephants in the Room)*, 2015 PEPP. L. REV. 1, 5; Kristin E. Hickman, *The (Perhaps) Unintended Consequences of* King v. Burwell, 2015 PEPP. L. REV. 56, 57; Alina Das, *Unshackling Habeas Review:* Chevron *Deference and Statutory Interpretation in Immigration Detention Cases*, 90 N.Y.U. L. REV. 143, 184 (2015); Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19, 22–23 (2010); Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 233 (2006); Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 YALE. L.J. 2580, 2607 (2006).

[282] *See supra* Part II.A.

[283] At least one scholar has thoughtfully criticized the major questions doctrine for not addressing so-called minor questions. *See* Nielson, *supra* note 177, at 1183.

[284] Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825).

[285] *See supra* Part II.A.

to require a showing of clear statutory authority.[286] Even if some "line-drawing" will be required,[287] the Court's precedents and other sources offer substantial guidance on how to draw the lines moving forward. And for borderline calls, courts can adopt a tiebreaking rule against agency authority, consistent with Article I's rule that a government wish is not law until it goes through bicameralism and presentment.[288]

1. *Major Economic Questions*

The Court's precedents make clear there are at least two primary categories of "major" questions: political and economic questions.[289] Let's start with economic questions. In assessing whether an agency's regulation is economically important, the Court has looked at two primary factors: a major shift in regulatory control in an important industry and the costs of the policy on the regulated.[290]

The Court has repeatedly applied the major questions doctrine when agencies have claimed substantial new regulatory powers over important industries or economic areas.[291] Identifying whether the agency is attempting to increase regulatory control is not too difficult. Going all the way back to *The Queen and Crescent Case*, courts have frequently consulted the agency's history of regulation.[292] And precedent also shows that courts should pay attention not just to the power the agency is presently using, but also to the power it is claiming it can use going forward.[293] In *Alabama Association of Realtors*, for example, the Court noted that the CDC's statutory interpretation could hypothetically allow it to "mandate free grocery delivery to the homes of the sick," or compel "telecommunications companies to provide free high-speed Internet service to facilitate remote work."[294]

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[286] *See supra* Part II.A.

[287] Sunstein 2021, *supra* note 37, at 487.

[288] U.S. CONST. art. 1, § 7, cl. 2.

[289] West Virginia v. EPA, 142 S. Ct. 2587, 2608 (2022).

[290] *See, e.g.*, *id.* at 2612.

[291] *See, e.g.*, *id.*; Richardson, *supra* note 18, at 381–82.

[292] *See* ICC v. Cincinnati, New Orleans & Tex. Pac. Ry. Co. (*The Queen and Crescent Case*), 167 U.S. 479, 510 (1897) (undertaking "an examination of the decisions of the commission" to show that it previously disclaimed power at issue); Kent v. Dulles, 357 U.S. 116, 127 (1958) ("[W]hile the power of the Secretary of State over the issuance of passports is expressed in broad terms, it was apparently long exercised quite narrowly."); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000) (looking at FDA's past "representations to Congress since 1914"); Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014); West Virginia v. EPA, 142 S. Ct. at 2610–12.

[293] *See* Deacon & Litman, *supra* note 17, at 51 ("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.").

[294] Ala. Ass'n of Realtors v. HHS, 141 S. Ct. 2485, 2489 (2021) (per curiam).

Identifying whether a relevant industry or economic area is "important" enough is trickier, but here too courts have compiled substantial precedent. Regulating railroads, cigarettes, the housing market, energy production, a significant percentage of homes, or a significant percentage of workplaces all qualified.[295] The Court has, at times, included commentary on the importance of the industry at issue. In *The Queen and Crescent Case*, for example, the Court emphasized the importance of railroads.[296] There was some similar rhetoric about energy production in *West Virginia*.[297] Future litigants can analogize their own industries to ones the Court has assessed.

Next, the Court has suggested that a major question is involved if a regulation imposes substantial costs on the regulated.[298] The Court has measured this factor in at least two ways: aggregate economic impact and diffused costs on the regulated.[299] In both cases, one can query what dollar amount should be sufficient to trigger the major questions doctrine? There is more concrete precedent addressing the aggregate economic impact of a regulation.[300] In *King v. Burwell*, for example, the Court found it significant that "billions of dollars" were at stake in the case.[301] Viewed under the "billions of dollars" standard, two of the Court's 2021 Term cases satisfied that standard.[302]

Alternatively, courts can also look to the Executive Branch's own test for what constitutes an economically significant regulation. Starting in 1994, the Executive Branch recognized a distinction between "significant" regulations

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[295] *See The Queen and Crescent Case*, 167 U.S. at 494; *Brown & Williamson*, 529 U.S. at 159–60 (noting that the FDA claimed the power to "regulate an industry constituting a significant portion of the American economy"); *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489 (housing market); West Virginia v. EPA, 142 S. Ct. at 2596 (energy production); *Util. Air Regul. Grp.*, 573 U.S. at 324; Nat'l Fed'n of Indep. Bus. v. OSHA, 142 S. Ct. 661, 665 (2022).

[296] *The Queen and Crescent Case*, 167 U.S. at 494.

[297] West Virginia v. EPA, 142 S. Ct. at 2612.

[298] *See* Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst. (*The Benzene Case*), 448 U.S. 607, 645 (1980) (citing risk of "impos[ing] enormous costs" on employers); King v. Burwell, 576 U.S. 473, 485–86 (2015); *Ala. Ass'n of Realtors*, 141 S. Ct. at 2486–87.

[299] For examples of the former, see *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489, *and King*, 576 U.S. at 485. For examples of the latter, see West Virginia v. EPA, 142 S. Ct. at 2612 (expressing concern that EPA would impose "exorbitant" energy costs on consumers), *and The Queen and Crescent Case*, 167 U.S. at 494 (noting number of Americans that used railroads). Courts have also considered whether regulations *benefit* a large number of regulated individuals. *See, e.g.*, Texas v. United States, 809 F.3d 134, 181 (5th Cir. 2015) (applying major questions to DAPA and noting that policy "would make 4.3 million [individuals] eligible for lawful presence, employment authorization, and associated benefits").

[300] *King*, 576 U.S. at 485.

[301] *Id.*

[302] West Virginia v. EPA, 142 S. Ct. at 2604 (citing "billions of dollars in compliance costs" and other costs); *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489.

that merited greater scrutiny before implementation and less important regulations.[303] Today, the Office of Information and Regulatory Affairs (OIRA) analyzes regulations under a multi-part test.[304] Most helpfully, OIRA deems a regulation significant if it has an "annual effect on the economy of $100 million or more."[305] Courts should not feel bound by how the Executive Branch differentiates between significant and insignificant regulations, but holding the Executive Branch to its own method of identifying what constitutes a major question seems fair.[306] Further, Congress itself used OIRA's definition of what constitutes a "major rule" and its attendant dollar amount to identify rules subject to potential congressional veto in the Congressional Review Act.[307] Where both of the other branches of the federal government deem a rule with an annual economic impact of $100 million or more to be major, that seems like relevant evidence of what constitutes a major economic question in our system of government.

At first glance, establishing a specific dollar-amount threshold to identify a major question might seem a bit arbitrary. But as Professor Schoenbrod points out, the Court has taken similar steps to enforce other constitutional provisions.[308] For example, the Court deems it to be an unreasonable seizure under the Fourth Amendment if the police hold arrestees for more than forty-eight hours without probable cause.[309] As in other contexts, enforcing the major questions doctrine with a specific numerical threshold would ease judicial enforcement.

Even if courts do not set specific dollar amounts to mark which regulations are economically important, they can still easily analogize to the dollar amounts at issue in past cases. Indeed, this might be the easiest part of the major questions doctrine to enforce.[310] Little surprise, then, that a federal district court recently relied on this aspect of the major questions doctrine to enjoin the Biden

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[303] Exec. Order No. 12,866, § 3(f), 3 C.F.R. 638, 641–42 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 822–27 (2018).

[304] *Id.* § 3(f)(1).

[305] *Id.*

[306] *See* David Schoenbrod, *Consent of the Governed: A Constitutional Norm that the Court Should Substantially Enforce*, 43 HARV. J.L. & PUB. POL'Y 213, 259–60 (2020); Steven G. Calabresi & Gary Lawson, *The Depravity of the 1930s and the Modern Administrative State*, 94 NOTRE DAME L. REV. 821, 856–57 (2018).

[307] 5 U.S.C. § 804(2).

[308] Schoenbrod, *supra* note 306, at 259 n.243 (providing several examples).

[309] *See, e.g.*, County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991) ("Although we hesitate to announce that the Constitution compels a specific time limit, it is important to provide some degree of certainty so that States and counties may establish procedures with confidence that they fall within constitutional bounds.").

[310] *Cf.* Deacon & Litman, *supra* note 17, at 36 (noting that compliance costs "provide a somewhat more objective measure than the more overtly values-based criteria on display in the more recent cases").

Administration's student debt forgiveness program.[311] Another district court relied on a regulation's economic impact to hold that a major economic question was *not* at issue.[312] Moving forward, litigants can strengthen their major questions doctrine arguments if they can gather reliable cost data to show the impact of a regulation. Often, as in *West Virginia* itself, the agency will have conducted an economic impact analysis of its own regulation, and parties can use that.[313] Industry groups can also marshal their own evidence, as they did in *West Virginia*.[314]

Courts can take similar approaches when considering diffused costs on the regulated. In this area, the Court has generally focused on "the number of people affected" by a policy.[315] In *The Queen and Crescent Case*, for example, the Court emphasized that "[m]illions of passengers" used the railroads every year.[316] Similarly, the Court in *King* emphasized how many people buy health insurance.[317] In both cases, each individual consumer would not have been dramatically affected, but modest effects on a large number of people may still mark a major question. Going forward, litigants should try to quantify the number of people affected by a regulation. In *West Virginia*, for example, two of the petitioners provided information on how the CPP would increase energy costs.[318] And the Court itself expressed fear that the EPA could impose "exorbitant" costs on consumers.[319]

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[311] Brown v. U.S. Dep't of Educ., No. 4:22-cv-0908-P, 2022 WL 16858525, at *11 (N.D. Tex. Nov. 10, 2022) ("[C]ourts have generally considered an agency action to be of vast economic significance if it requires 'billions of dollars in spending.'" (quoting King v. Burwell, 576 U.S. 473, 485 (2015))).

[312] Arizona v. Walsh, No. CV-22-00213-PHX-JJT, 2023 WL 120966, at *8 (D. Ariz. Jan. 6, 2023) ("In terms of economic impact, the annual transfer from employers to employees projected here—$1.7 billion . . . —is far less than the $1 trillion [at issue in *West Virginia*], or the $50 billion [at issue in *Alabama Realtors*].").

[313] *See* ENV'T PROT. AGENCY, REGULATORY IMPACT ANALYSIS FOR THE CLEAN POWER PLAN FINAL RULE 22 (Oct. 2015), https://archive.epa.gov/epa/sites/production/files/2015-08/documents/cpp-final-rule-ria.pdf. [https://perma.cc/YB7T-DAVE].

[314] *See* Brief for Petitioners at 20, West Virginia v. EPA, 142 S. Ct. 2587 (2022) (No. 20-1530); Brief of Petitioner Westmoreland Mining Holdings at 14–15, West Virginia v. EPA, 142 S. Ct. 2587 (2022) (No. 20-1778).

[315] *See* U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 422–23 (2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc).

[316] ICC v. Cincinnati, New Orleans & Tex. Pac. Ry. Co. (*The Queen and Crescent Case*), 167 U.S. 479, 494 (1897).

[317] *See* King v. Burwell, 576 U.S. 473, 485 (2015).

[318] *See* Brief for Petitioners at 20, West Virginia v. EPA, 142 S. Ct. 2587 (No. 20-1530); Brief for Petitioner The North American Coal Corporation at 24, West Virginia v. EPA, 142 S. Ct. 2587 (No. 19-1179).

[319] West Virginia v. EPA, 142 S. Ct. at 2612.

2. *Major Political Questions*

Now let's turn to political questions. This part of the doctrine may prove more difficult to implement than the economic component. But again, courts can lay down more specific markers by looking to the Court's precedents.

First, courts can look at whether an issue is particularly controversial and has sparked widespread debate. Admittedly, this inquiry has a "know it when you see it" quality.[320] But some cases won't be close calls.[321] Considering the controversy the subject generated around the country—with potentially scores of people losing their jobs as a result—classifying the COVID-19 vaccine mandate at issue in *NFIB v. OSHA* as "political[ly] significan[t]"[322] seems like a particularly easy call. Perhaps more concretely, as suggested by then-Judge Kavanaugh on the D.C. Circuit, courts could also look to the number of comments submitted during a regulation's notice-and-comment procedures as a rough proxy for the public's interest in debating the issue.[323]

Second and relatedly, courts can look at whether Congress has taken an interest in the issue at hand. The Court has recognized that an issue might be politically significant if Congress has debated the issue or has considered and rejected related legislation.[324] One concrete piece of evidence courts can consult is whether one house of the current Congress has passed a resolution expressing disapproval of the regulation at issue. As Justice Gorsuch observed, this was true in *NFIB v. OSHA*.[325] There, the Senate had passed a resolution expressing disapproval of OSHA's employer vaccine mandate.[326] Of course, the Senate by itself cannot make laws.[327] But a disapproval resolution provides incontrovertible evidence that the current Congress would not make *new law* as the agency proposes, strongly suggesting a politically controversial question is at issue.

Third, courts can look at whether there is divergent state practice on the policy at issue. That was certainly true of the COVID-19 vaccine mandate at

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[320] *See U.S. Telecom Ass'n*, 855 F.3d at 423 (Kavanaugh, J., dissenting from the denial of rehearing en banc).

[321] *See* Sunstein 2021, *supra* note 37, at 487.

[322] Nat'l Fed'n of Indep. Bus. v. OSHA, 142 S. Ct. 661, 665 (2022) (quoting Ala. Ass'n of Realtors v. HHS, 141 S. Ct. 2485, 2489 (2021) (per curiam)).

[323] *See U.S. Telecom Ass'n*, 855 F.3d at 423 (Kavanaugh, J., dissenting from the denial of rehearing en banc) ("[W]hen the issue was before the FCC, the agency received some 4 million comments on the proposed rule.").

[324] *See, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 144 (2000); *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 664–65; West Virginia v. EPA, 142 S. Ct. at 2614; *see also* Transcript of Oral Argument at 35–36, Biden v. Nebraska, No. 22-506 (argued Feb. 28, 2023) (statement by Chief Justice Roberts that Court considers such evidence when applying the major questions doctrine); Deacon & Litman, *supra* note 17, at 46 (recognizing Court's use of this evidence).

[325] *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 668 (Gorsuch, J., concurring).

[326] *Id.*

[327] *See, e.g.*, Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919, 944–59 (1983).

issue in *NFIB v. OSHA*, where Justice Gorsuch observed that "States [had] pursued a variety of measures in response to the [COVID-19] pandemic."[328] Similarly, with respect to the eviction moratorium at issue in *Alabama Association of Realtors*, the States were sharply divided on whether to impose an eviction moratorium.[329] And in *Gonzales*, the States had adopted different approaches to physician-assisted suicide, which likely contributed to the Court's distaste for interrupting an "'earnest and profound debate' across the country."[330] Where States have divided on a policy matter, that is suggestive of a politically important question.

Fourth, courts can look to the Executive Branch's own statements for evidence of attempts to circumvent the legislature. In *West Virginia*, the Court quoted statements by the Obama Administration suggesting it was trying to achieve an "aggressive transformation in the domestic energy industry."[331] Justice Gorsuch's concurrence also quoted President Obama and other members of his Administration suggesting that CPP was adopted only because Congress would not do what they wanted.[332] Similarly, in the net neutrality litigation, then-Judge Kavanaugh found it relevant that "even President Obama publicly weighed in on the net neutrality issue."[333] For then-Judge Kavanaugh, the "President's intervention only underscore[d] the enormous significance of the net neutrality issue."[334]

It is worth pausing to consider the appropriateness of considering these types of evidence. In dissent, Justice Kagan argued courts should not consider things like legislative debates, suggesting it violates the rules of textualism to do so.[335] However, the Court and Justice Gorsuch were not consulting this evidence to "resolve what [the] duly enacted statutory text mean[t]."[336] Instead, they consulted this evidence "only to help resolve the antecedent question whether the agency's challenged action implicate[d] a major question."[337] And in considering such evidence as a means of enforcing Article I, the Court and Justice Gorsuch were operating within a robust tradition of applying constitutional

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[328] *Nat'l Fed'n of Indep. Bus*., 142 S. Ct. at 667 (Gorsuch, J., concurring).

[329] *See, e.g.*, Chrysafis v. Marks, 141 S. Ct. 2482, 2482 (2021) (addressing New York's unique eviction moratorium).

[330] *See* Gonzales v. Oregon, 546 U.S. 243, 267 (2006) (quoting Washington v. Glucksberg, 521 U.S. 702, 735 (1997)).

[331] West Virginia v. EPA, 142 S. Ct. 2587, 2604 (2022) (quoting White House Fact Sheet on Clean Power Plan).

[332] *See id.* at 2621–22 (Gorsuch, J., concurring).

[333] U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 423–24 (2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc).

[334] *Id.*

[335] *See* West Virginia v. EPA, 142 S. Ct. at 2641 (Kagan, J., dissenting).

[336] *Id.* at 2621 n.4 (Gorsuch, J., concurring).

[337] *Id.*

clear-statement rules.[338] Such rules usually have triggering conditions that require courts to consider nontextual evidence.[339] The federalism canon, for example, requires courts to assess whether a matter was traditionally regulated by the States.[340] That inquiry has nothing to do with the meaning of the statute Congress passed. So too in the major questions context, courts can consider nontextual evidence to decide whether a politically significant question is at issue.

3. *A Potential Tiebreaker*

As with the application of most legal tests, applying the major questions doctrine will produce both easy and borderline calls. For the latter category,

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[338] *See* Barrett, *supra* note 131, at 176. Some scholars have criticized the use of substantive canons generally, and the major questions doctrine in particular, on textualist grounds. *See, e.g.*, Mike Rappaport, *Against the Major Questions Doctrine*, ORIGINALISM BLOG (Aug. 15, 2022), https://originalismblog.typepad.com/ the-originalism-blog/2022/08/ against-the-major-questions-doctrinemike-rappaport.html [https://perma.cc/YFA6-3DY9] ("[L]et me state my basic objection to the MQD: It neither enforces the Constitution nor applies ordinary methods of statutory interpretation. Thus, it seems like a made up interpretive method for achieving a change in the law that the majority desires."); Squitieri, *supra* note 18, at 480; John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 404–05 (2010). A full response to these thoughtful arguments is beyond the scope of this Article. But I confess I struggle to see the difference between enforcing the Constitution through clear-statement rules and the other doctrines courts have fabricated to enforce various constitutional provisions—like strict scrutiny for First Amendment claims or the specific historical analogue test for Second Amendment challenges. *See, e.g.*, N.Y. State Rifle & Pistol Ass'n. v. Bruen, 142 S. Ct. 2111, 2132 (2022); Stephanie H. Barclay, *The Historical Origins of Judicial Religious Exemptions*, 96 NOTRE DAME L. REV. 55, 113–14 (2020) (describing historical origins of strict scrutiny test). After all, the Constitution is not always self-enforcing. *See, e.g.*, Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 80–82 (2004) (analyzing use of strict scrutiny to enforce Equal Protection Clause). And if Article III's reference to the "judicial power" gives judges the greater power to refuse to enforce Congress's commands, perhaps it includes the more modest (and less disruptive) power to demand Congress legislate specifically to achieve particular results. *See* Barrett, *supra* note 131, at 169 ("[T]he duty to enforce the Constitution may empower a judge not only to invalidate congressional actions that violate constitutional norms, but also to resist congressional actions that threaten those norms.").

In any event, readers skeptical of substantive canons should consider Professor Wurman's qualified defense of the major questions doctrine as a linguistic canon—instead of a substantive one. *See generally* Wurman 2023, *supra* note 61. Although I think the Court's precedents are best read as applying a substantive canon, Professor Wurman's alternative rationale for the major questions doctrine deserves careful consideration. *See also* Ilya Somin, *A Textualist Defense of the Major Questions Doctrine*, VOLOKH CONSPIRACY (Mar. 1, 2023) (defending the doctrine along similar lines), https://reason.com/volokh/2023/ 03/01/a-textualist-defense-of-the-major-questions-doctrine/ [https://perma.cc/34H6-PA9F].

[339] *See, e.g.*, Scott A. Keller, *How Courts Can Protect State Autonomy from Federal Administrative Encroachment*, 82 S. CAL. L. REV. 45, 83–91 (2008).

[340] *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 460 (1991).

courts should consider erring toward finding a major question is at issue. From a rule-of-law standpoint, at least in this context, false positives seem preferable to false negatives.[341] After all, the legitimate status quo ante is that a government wish is not law until Congress goes through Article I's rigorous process for enacting laws.[342] That is one of the most basic premises of our Constitution. The Framers intended for it to be difficult to make law because they believed excessive lawmaking was one of the greatest threats to liberty.[343] And even in the era of powerful administrative agencies, the Court has long maintained that "an agency literally has no power to act . . . unless and until Congress confers power upon it."[344] Thus, the default should be no new law until Congress acts; not law until Congress can muster the political willpower to overrule the agency. To hold otherwise would be to utterly pervert Article I by making it very difficult to *stop* lawmaking. And it certainly seems odd that something can become and remain law when "a single branch of the Government, the Executive Branch, with a small minority of either House," wishes it so.[345]

In any event, courts should err toward liberty because Congress has the power to amend the law and give agencies clear and specific power to regulate.[346] The Court has often considered it relevant that Congress has the power to act after the Judiciary does. For example, courts are especially hesitant to overrule precedents interpreting statutes, in large part, because Congress has the power to amend the law in response to judicial decisions.[347] The same is not true when the Court interprets the Constitution, which is one reason stare decisis has traditionally been given less weight in that area.[348] In the major questions doctrine context, a similar dynamic exists. If a court finds a major question is at issue and holds Congress did not give an agency clear authority to adopt a regulation, Congress has an easy fix: debate the matter and pass a law.

Such a rule has the added bonus of potentially being "Congress-forcing," promoting democratic accountability by requiring our elected representatives to

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[341] *But see* Nielson, *supra* note 177, at 1220.

[342] *Cf.* Sunstein 2021, *supra* note 37, at 492 ("Before an agency brings the force of government to bear against individuals, it must be because Congress has authorized it to do so.").

[343] THE FEDERALIST NO. 48, *supra* note 41, at 309–12; THE FEDERALIST, NO. 73, *supra* note 41, at 441–42; *see also* Gundy v. United States, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting).

[344] La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986).

[345] 13 ANNALS OF CONG. 498 (1803) (objection of Rep. John Randolph to proposed bill giving President Jefferson power to make regulations for Louisiana Territory).

[346] Sunstein 2021, *supra* note 37, at 492; Neal v. United States, 516 U.S. 284, 296 (1996) ("Congress, not this Court, has the responsibility for revising its statutes. Were we to alter our statutory interpretations from case to case, Congress would have less reason to exercise its responsibility to correct statutes that are thought to be unwise or unfair.").

[347] *See, e.g.*, *Neal*, 516 U.S. at 295–96; Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 317 (2005).

[348] *See, e.g.*, Agostini v. Felton, 521 U.S. 203, 235 (1997).

solve problems rather than pass the buck to administrative agencies.[349] Indeed, that is precisely what the Supreme Court's decision in *The Queen and Crescent Case* forced Congress to do. After the Court held that the ICC lacked the power to set railroad prices, Congress mustered the political will nine years later to give the ICC the power it sought.[350] Whether that was a substantively wise law is beside the point. That was precisely how lawmaking is supposed to work under the Constitution.

B. *What Constitutes a Clear Statement?*

Once a court establishes that a major question is at issue in a case, then it must decide whether Congress clearly and specifically authorized the agency's action.[351] Fewer scholars have criticized this aspect of the major questions doctrine, and with good reason: courts have long and considerable experience applying clear-statement rules.

Once a clear-statement rule applies, the agency must satisfy a heightened statutory burden in proving it has authority to act. Courts have articulated the burden accompanying a clear-statement rule in a variety of ways.[352] Sometimes the Court says it "expect[s] [Congress] to speak with the requisite clarity to place [its] intent beyond dispute."[353] At other times, the Court has suggested a clear-statement rule has the effect of asserting an "implied limitation on otherwise unambiguous general terms of [a] statute."[354] Chief Justice Marshall said that a party on the short end of a clear-statement rule needed to show that "any other possible construction" did not "remain[]."[355] In *West Virginia*, the Court spoke of overcoming "skepticism."[356] But the "paucity" of the Court's interpretive analysis in *West Virginia* suggests the authority must be especially clear—or

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[349] Sunstein 2021, *supra* note 37, at 492.

[350] *See supra* Part II.A.

[351] *See* West Virginia v. EPA, 142 S. Ct. 2587, 2614 (2022).

[352] When providing examples of clear-statement rules, Professor Wurman identifies cases applying the most demanding standards of review. *See* Wurman 2023, *supra* note 61, at 33–34. But those are not the only types of clear-statement rules. As Professors Eskridge and Frickey document, the Court applies clear-statement rules of varying strengths in different contexts. *See* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 638–39 (1992) (distinguishing among "presumptions," "ordinary clear statement rules," and "super-strong clear statement rules"). Although the Court's opinion in *West Virginia* is best read to require a clear-statement rule, reasonable minds can disagree on the strength of that rule.

[353] U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837, 1849 (2020); *cf.* Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (saying authority must be "unmistakably clear").

[354] Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119, 139 (2005) (plurality opinion).

[355] Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

[356] *See* West Virginia v. EPA, 142 S. Ct. at 2614.

"jump off the page."[357] Whatever level of certainty those standards codify, we know that they are greater than 51% because the Court has said that a clear-statement rule is stronger than a mere "interpretative presumption."[358] And even under the weakest versions of clear-statement rules, the statute must be unambiguous.[359] Although ambiguity is a notoriously slippery standard, Justice Kavanaugh has suggested a statute is ambiguous unless the court is sixty-five percent confident in a particular reading.[360] Still, identifying precisely what burden of proof a clear-statement rule imposes is tricky, just as courts and scholars have struggled to identify precisely what the "beyond a reasonable doubt" standard requires in criminal law.[361]

Therefore, it may be easier to lay down negative markers identifying when a clear statement is *not* present. Justice Gorsuch's *West Virginia* concurrence compiled preexisting caselaw to provide several specific situations in which this is true.[362] Of course, a concurrence is not binding authority on lower courts. But there is substantial overlap between the Court's doctrinal exposition and that of Justice Gorsuch, and there is no conflict between the two opinions.[363] And lower courts might find Justice Gorsuch's more concrete framework easier to implement, so I review it in detail.

First, "vague," "broad," "cryptic," or "oblique" language cannot support an agency's claimed authority.[364] Observers of the administrative state, including leading New Dealer James Landis, long suspected that agencies would "never read, at least more than casually, the statutes that [they] translate[] into reality" and "assume[] that they g[ive] [them] power to deal with the broad problems of an industry."[365] That helps explain the Court's cautioning in *West Virginia* that a broad word like "system" should not be used as an "empty vessel" to pour new agency authority into.[366] Similarly, in *Brown & Williamson*, the Court

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[357] Deacon & Litman, *supra* note 17, at 24.

[358] Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108 (1991).

[359] *See, e.g.*, Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 332 (2015); Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 17 (1981) (insisting "Congress speak with a clear voice" and grant authority "unambiguously"). Professors Deacon and Litman believe that the Court's analysis in *West Virginia* requires "something more than that the statute be unambiguous in the normal sense." Deacon & Litman, *supra* note 17, at 24.

[360] Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2137 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)) (criticizing ambiguity standard as unclear but suggesting "65-35 rule" to apply it).

[361] *Cf.* Saul M. Kassin & Lawrence S. Wrightsman, *On the Requirements of Proof: The Timing of Judicial Instruction and Mock Juror Verdicts*, 37 J. PERSONALITY & SOC. PSYCH. 1877, 1884 (1979).

[362] *See* West Virginia v. EPA, 142 S. Ct. 2587, 2622–24 (2022) (Gorsuch, J., concurring).

[363] *See supra* Part II.E.4.

[364] West Virginia v. EPA, 142 S. Ct. at 2622–23 (Gorsuch, J., concurring).

[365] JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 75 (1938).

[366] West Virginia v. EPA, 142 S. Ct. at 2614.

concluded that the broadly defined words "drug" and "device" were too "cryptic" to confer statutory authorization.[367] Conversely, where Congress or state legislatures have previously used particular language to grant agencies the authority at issue, courts can look for that specific language. In *The Queen and Crescent Case*, for example, the Court looked to the specific types of language state legislatures had used to grant railroads price-setting power, and it reasoned that the existence of such state statutes meant Congress was familiar with "the language by which the power [to set railroad rates] is given," enabling the legislature to more easily give a "definite and exact statement."[368] Where such state-law precedents are available, courts can look for similar language in the federal statute at issue.

Relatedly, courts must be wary of broad catch-all provisions. Congress has, at least at times, passed statutes with a variety of specific provisions targeting particular problems alongside "capacious" catch-all provisions meant to empower agencies to resolve unforeseen problems.[369] Several of the Court's major questions cases dealt with such catch-all provisions, usually ones granting agencies express discretion to implement regulations according to their judgment. For example, the statute at issue in *The Benzene Case* gave the Secretary of OSHA the power to implement regulations he judged "reasonably necessary or appropriate to provide safe or healthful employment and places of employment."[370] *NFIB v. OSHA*, recall, dealt with a similarly worded neighboring provision.[371] And in *Alabama Association of Realtors*, the statute gave the agency authority "to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases" and, in providing specific examples of what measures the agency could take, the statute broadly authorized "other measures, as in [the Secretary's] judgment may be necessary."[372] In *West Virginia*, Justice Kagan labeled § 7411 as just such a "catch-all" provision—one promoting "flexibility and discretion."[373] When catch-alls are used by agencies to merely "fill up the

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[367] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 126, 160 (2000).

[368] ICC v. Cincinnati, New Orleans & Tex. Pac. Ry. Co. (*The Queen and Crescent Case*), 167 U.S. 479, 495 (1897).

[369] Massachusetts v. EPA, 549 U.S. 497, 532 (2007); *see also* Deacon & Litman, *supra* note 17, at 58.

[370] Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst. (*The Benzene Case*), 448 U.S. 607, 612 (1980) (quoting 29 U.S.C. § 652(8)).

[371] Nat'l Fed'n of Indep. Bus. v. OSHA, 142 S. Ct. 661, 663 (2022) (discussing 29 U.S.C. § 655(c)(1) and other provisions of the Occupational Safety and Health Act).

[372] Ala. Ass'n of Realtors v. HHS, 141 S. Ct. 2485, 2487 (2021) (per curiam) (quoting 42 U.S.C. § 264(a)).

[373] West Virginia v. EPA, 142 S. Ct. 2587, 2629 (2022) (Kagan, J., dissenting) (referring to 42 U.S.C. § 7411(a)(1)).

details" of complex statutory schemes, I doubt the Court would be troubled.[374] But there is a risk that agencies can try to turn such catch-alls into blank checks to introduce major new policies, thus circumventing Article I's requirements. The *West Virginia* clear-statement rule guards against that risk.

Second, courts can look to "the age and focus of the statute the agency invokes in relation to the problem the agency seeks to address."[375] While acknowledging that old statutes can apply to "new and previously unanticipated situations," Justice Gorsuch endorsed the commonsensical notion that Congress is less likely to clearly authorize an agency action solving a problem Congress could not possibly have anticipated when it passed the relevant statute.[376] As Professors Adler and Walker recently noted, "when decades pass between the enactment of statutes delegating authority to agencies and the exercise of that authority, there is a risk that the delegated authority will be used for purposes or concerns that the enacting Congress never considered."[377] That was true, as Justice Gorsuch's concurrence pointed out, in *NFIB v. OSHA*, where Congress in 1970 almost certainly did not anticipate the COVID-19 pandemic.[378] In such situations, it is unlikely Congress clearly and specifically authorized an agency action it could not have foreseen.

Consider, for example, net neutrality: the Obama Administration's policy imposing common-carrier obligations on Internet service providers (ISPs).[379] The economic implications of net neutrality were "vast," sharply limiting how ISPs could structure their services and affecting the speed of service for all users of the Internet.[380] When promulgating the rule, the Federal Communications Commission (FCC) relied on the Communications Act of 1934, as amended in 1996.[381] Even at the latter date, the Internet's infrastructure was barely developed, and Congress could not possibly have anticipated the problem the agency was trying to solve: the fear that ISPs might "throttle" access for

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[374] Gundy v. United States, 139 S. Ct. 2116, 2139 (2019) (Gorsuch, J., dissenting); *see* Breyer, *supra* note 168, at 370 ("A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving *interstitial matters* to answer themselves in the course of the *statute's daily administration*." (emphasis added)).

[375] West Virginia v. EPA, 142 S. Ct. at 2623 (Gorsuch, J., concurring).

[376] *Id.*

[377] Jonathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 IOWA L. REV. 1931, 1945 (2020).

[378] Nat'l Fed'n of Indep. Bus. v. OSHA, 142 S. Ct. 661, 668 (2022) (explaining that relevant statute "was not adopted in response to the pandemic, but some 50 years ago").

[379] *See* U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 417 (2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc).

[380] *Id.*; *see also* Christopher S. Yoo, *Beyond Network Neutrality*, 19 HARV. J.L. & TECH. 1, 18–19 (2005).

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

particular content producers.[382] Indeed, the content producers deemed most vulnerable to ISPs—streaming services like Netflix—did not even exist yet.[383] It is thus hard to imagine Congress gave the FCC clear and specific authority to solve a problem that did not start garnering debate until about ten years later.[384] Applying the major questions doctrine in a case like this—as then-Judge Kavanaugh proposed—would have ensured that Congress actually wanted net neutrality. Conversely, failing to do so "undermines the democratic legitimacy of regulatory policy" because people are subject to laws that would not be passed by their elected representatives.[385] Going forward, courts can avoid that problem by showing skepticism toward an agency's claim that Congress specifically authorized it to solve a problem the legislature could not plausibly have foreseen.[386]

Third, courts can look at the relevant agency's traditional interpretations of the statute at issue.[387] As Professor Bamzai has documented, there is a tradition of deferring to original, contemporaneous, and consistent interpretations of statutes by agencies charged with enforcing them.[388] For example, in *Biden v. Missouri*, the Court found "the longstanding practice" of HHS relevant in concluding that Congress had authorized the agency to impose a vaccine mandate on healthcare workers.[389] Logically, then, the converse rule should also be true. As the Court explained in *West Virginia*: "[J]ust as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred."[390] Indeed, the Court has repeatedly consulted such evidence—in *The Queen and Crescent Case*, *Brown & Williamson*, *NFIB v. OSHA*, and *West Virginia*.[391]

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[382] *See* Yoo, *supra* note 380, at 2 (noting Congress "largely failed to take the Internet into consideration when enacting the Telecommunications Act of 1996"); *e.g.*, *U.S. Telecom Ass'n.*, 855 F.3d at 393 (Srinivasan, J., concurring in the denial of rehearing en banc) (discussing the effect of proposed common-carrier obligations on "throttling" content).

[383] *See* Adler & Walker, *supra* note 377, at 1941–42.

[384] *See* Yoo, *supra* note 380, at 2.

[385] Adler & Walker, *supra* note 377, at 1940.

[386] This could help resolve an objection made by Professors Adler and Walker to the major questions doctrine—that it fails to pay adequate attention to the time between a delegation and an agency's attempt to regulate. *Id.* at 1949–50.

[387] *See, e.g.*, West Virginia v. EPA, 142 S. Ct. 2587, 2610 (2022); *id.* at 2623 (Gorsuch, J., concurring).

[388] Bamzai, *supra* note 55, at 930; *see also* United States v. Philbrick, 120 U.S. 52, 59 (1887).

[389] *See* Biden v. Missouri, 142 S. Ct. 647, 652–53 (2022) (per curiam).

[390] West Virginia v. EPA, 142 S. Ct. at 2610 (quoting FTC v. Bunte Bros., 312 U.S. 349, 352 (1941)).

[391] *See* ICC v. Cincinnati, New Orleans & Tex. Pac. Ry. Co. (*The Queen and Crescent Case*), 167 U.S. 479, 510 (1897) (undertaking "an examination of the decisions of the

Fourth, courts should show more skepticism when there is a "mismatch" between the agency's core expertise and the authority it is claiming.[392] This idea rests on the notion that Congress is less likely to clearly authorize one agency to solve a problem when another is arguably more qualified to do so. For example, the Court in *West Virginia* identified a mismatch between the EPA's claimed power and its "comparative expertise" because the CPP required it to make judgments about energy policy,[393] a matter arguably within the core expertise of FERC.[394] Similarly, in *Gonzales*, the Court expressed skepticism that Congress would empower the Attorney General to make "quintessentially medical judgments" beyond his "expertise."[395] And notably, during oral arguments over the Biden Administration's student debt plan, the Justices repeatedly questioned whether the Department of Education had the economic expertise to cancel student loans.[396] Of course, what constitutes an agency's core expertise is often in the eye of the beholder. Whereas the D.C. Circuit thought the CPP delegated powers within the EPA's "wheelhouse,"[397] the Court found a mismatch.[398] Going forward, litigants would be wise to point out how other agencies could claim expertise over the subject-matter at issue, just as the *West Virginia* petitioners highlighted the role of FERC in regulating energy production.[399]

IV. CONCLUSION

The major questions doctrine has a longer history than most scholars acknowledge. But that history also shows that the doctrine's enforcement, and the vindication of Article I generally, has been quite uneven. Still, current circumstances seem ideal for the doctrine's continued development and increased prominence. The 2021 Term suggests six Justices are comfortable

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commission" to show that it previously disclaimed power at issue); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000) (looking at FDA's past "representations to Congress since 1914"); Nat'l Fed'n of Indep. Bus. v. OSHA, 142 S. Ct. 661, 666 (2022) ("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."); West Virginia v. EPA, 142 S. Ct. at 2610.

[392] West Virginia v. EPA, 142 S. Ct. at 2623 (Gorsuch, J., concurring).

[393] *Id.* at 2612–13 (majority opinion).

[394] *See supra* note 238 and accompanying text.

[395] Gonzales v. Oregon, 546 U.S. 243, 248, 267 (2006).

[396] *See* Transcript of Oral Argument at 112, 114, 116–17, Biden v. Nebraska, No. 22-506 (argued Feb. 28, 2023) (questions by Justices Sotomayor, Gorsuch, and Kavanaugh).

[397] Am. Lung Ass'n v. EPA, 985 F.3d 914, 959 (D.C. Cir. 2021).

[398] West Virginia v. EPA, 142 S. Ct. at 2612–13 (majority opinion); *id* at 2623 (Gorsuch, J., concurring).

[399] *See* Brief for Petitioners at 24, West Virginia v. EPA, 142 S. Ct. 2587 (No. 20-1530) ("Of course, the federal government already has an energy regulator for some of these concerns: FERC.").

applying the doctrine in a variety of cases. And litigants will undoubtedly press arguments based on the major questions doctrine at an accelerated pace.[400] As this Article goes to press, the Supreme Court is considering whether to apply the major questions doctrine against the Biden Administration's student debt cancellation program, raising the possibility that more doctrinal guidance will soon be available. But both now and after the Court issues a ruling in *Biden v. Nebraska*, much of the action will shift to lower federal courts.[401] Those courts will play an important part in developing the major questions doctrine. If those courts lay down specific doctrinal markers—like those presented in this Article—the major questions doctrine will play a substantial role in enforcing Article I and ensuring that the people's elected representatives make the laws that govern all of us.

[400] Even before *West Virginia*, the major questions doctrine was rapidly becoming more popular with litigants challenging agency actions. *See, e.g.*, Brunstein & Revesz, *supra* note 177, at 219; Erin Webb, *Analysis: Major Questions Doctrine Filings Are Up in a Major Way*, BLOOMBERG L. (Feb. 1, 2022), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-major-questions-doctrine-filings-are-up-in-a-major-way [https://perma.cc/9NGG-VMZ5].

[401] State courts can also contribute, as they have in recent years. *See, e.g.*, *In re* N.Y. Statewide Coal. of Hisp. Chambers of Com. v. N.Y.C. Dep't of Health & Mental Hygiene, 16 N.E.3d 538, 545–47 (N.Y. 2014) (addressing ban by New York City agency on large sugary drinks). Some state legislatures have even been codifying the major questions doctrine by statute. *See* FLA. STAT. § 120.52(8) (2023); IOWA CODE § 17A.23 (2022); WIS. STAT. §§ 227.10(2m), 227.11(2)(a)2 (2023); *see also* Wis. Legislature v. Palm, 942 N.W.2d 900, 917 (Wis. 2020).