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Eric J. Spitler

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I. INTRODUCTION

Since President Ronald Reagan famously declared in his first inaugural address that "government is not the solution to our problem; government is the problem,"[1] it has been the stated goal of many commentators, academics, and politicians, whom some have called "anti-administrativists,"[2] to pare back and limit the power of the "administrative state."[3] The administrative state has been described as "agencies wielding broad discretion through a combination of rulemaking, adjudication, enforcement, and managerial functions."[4] Its critics refer to it as a threat to liberty and a subversion of the constitutional order.[5] The counterargument is that "anti-administrativists fail to recognize that the key administrative state features that they condemn, such as bureaucracy with its internal oversight mechanisms and expert civil service, are essential for the accountable, constrained, and effective exercise of executive power."[6] Citing the numbers of bureaucrats, final rules, and Federal Register pages, the anti-administrativists have warned that "the administrative state is vast, ranging from the most trivial to the most significant matters

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1. Inaugural Address, 1 PUB. PAPERS 1 (Jan. 20, 1981).

2. Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017).

3. REPUBLICAN NAT'L COMM., REPUBLICAN PLATFORM 2016 10 (2016), https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL%5B1%5D-ben_1468872234.pdf [https://perma.cc/D2X2-MBZR] ("We call on Congress to begin reclaiming its constitutional powers from the bureaucratic state . . . .").

4. Metzger, *supra* note 2, at 8.

5. Charles J. Cooper, *Confronting the Administrative State*, NAT'L AFFS., Fall 2015, https://www.nationalaffairs.com/publications/detail/confronting-the-administrative-state [https://perma.cc/99QP-R5JZ].

6. Metzger, *supra* note 2, at 7.

of public and private life."[7] Proposed solutions for this perceived concentration of power have ranged from statutory changes[8] to calls for a constitutional convention to remedy perceived violations of separations of power.[9]

But over the more than four decades since President Reagan's statement, those wishing to roll back the growth of the administrative state have been unable to persuade their fellow citizens to vote for sufficient majorities in Congress or to elect Presidents willing to achieve their goals through the legislative process.[10] Having been unsuccessful through the ballot box, they determined that "the judiciary is the only possible constitutional impediment" to the continued growth of the administrative state.[11] The Supreme Court's decision in *West Virginia v. EPA*[12]—and its elevation of the major questions doctrine as a tool to limit agency actions—is arguably the Court's strongest statement against the administrative state since the New Deal.

The major questions doctrine has profound implications for financial regulation. While Chief Justice Roberts stated that the major questions doctrine should be applied in "extraordinary cases . . . in which the history and the breadth of the authority that [the agency] has asserted, and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority,"[13] it is already clear that the doctrine will be raised in virtually every future case opposing administrative action. As financial regulation and crises inevitably have significant economic and political consequences, the major questions doctrine will have a particular consequence in the financial sector.

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7. Cooper, *supra* note 5.

8. *See, e.g.*, Regulations from the Executive in Need of Scrutiny (REINS) Act, 117th Congress (2021) (requiring Congress to approve any major rule before it could take effect).

9. Cooper, *supra* note 5 (citing U.S. CONST. art. V).

10. Linda Greenhouse, *What in the World Happened to the Supreme Court?*, ATLANTIC (Nov. 14, 2022), https://www.theatlantic.com/ideas/archive/2022/11/supreme-court-dobbs-conservative-majority/672089/ [https://perma.cc/G28W-7HGB] ("There was little that conservatives could do to make their agenda more appealing at the ballot box. That meant getting the Court was not simply the obvious choice; it was the only choice.").

11. Peter J. Wallison, *Decentralization, Deference, and the Administrative State*, NAT'L AFFS., Fall 2016, https://www.nationalaffairs.com/publications/detail/decentralization-deference-and-the-administrative-state [https://perma.cc/S639-CPET].

12. 142 S. Ct. 2587 (2022).

13. *Id.* at 2608.

Yet, for all its initial impact, the *West Virginia* decision also illustrates three potentially fatal flaws in the major questions doctrine that likely will limit its long-term effect. These flaws, which are detailed in this article, include its reliance on a simplistic, narrow approach to interpreting congressional authority;[14] its inability to support, as well as the possibility it could hinder, governmental action to address an existential threat to the nation;[15] and the harm done to the separation of powers by an aggressive application of the doctrine.[16]

In applying the major questions doctrine in *West Virginia*, the Court uses a narrow, simplistic analysis of congressional authorization that ignores meaningful legislative action, beyond the text of the statute, that also expresses congressional intent. This intentionally circumscribed analysis results in a flaw that ultimately could undermine the doctrine. By limiting its focus in applying the major questions doctrine solely to the language of the statutory basis for the administrative action, the Court ensures that the doctrine will satisfy neither opponents nor supporters of the administrative state. When applying the major questions doctrine to long-standing administrative actions based on established statutes, the Court's failure to consider other congressional action, such as subsequent appropriations that fund that same administrative action, will result in outcomes that invalidate administrative actions that multiple Congresses and administrations have used, relied on, funded and supported, sometimes for decades. A doctrine that interprets congressional authorization in such a limited fashion creates the potential for chaos by challenging well-established regulatory norms across the government by raising the prospect that no administrative action is certain until a court has provided a major questions blessing.

Similarly, when applying the major questions doctrine to future congressional authorizations, Congress undoubtedly simply will insert legislative language in response to the doctrine making clear its intentions in authorizing the new program or retroactively curing past statutes. However, opponents of the administrative state are not really seeking better drafted congressional authorization for agency action—they want regulations they oppose invalidated or rolled back. That the

14. *See infra* Part IV.
15. *See infra* Part V.
16. *See infra* Part VI.

major questions doctrine can be avoided or cured through greater care in legislative drafting will frustrate their ambitions and will eventually lead them to abandon this doctrine in favor of creating legal doctrines with a more direct constitutional basis that cannot be undone by legislative action short of constitutional amendment or a change in approach by the Supreme Court.

A second flaw in the major questions doctrine is its impact on the ability of government agencies to respond to significant, even existential, threats to the nation and its citizens. The major questions doctrine targets the actions of the administrative state. However, the missions and congressional authorizations of many agencies, such as the Federal Reserve ("Fed"), the Federal Deposit Insurance Corporation ("FDIC"), and the Centers for Disease Control and Prevention ("CDC") to name a few, are fundamentally based on responding to crises.[17] In a significant future crisis, the public and governing officials are far more likely to turn to these agencies to respond to the crisis than to support a doctrine that prevents them from doing so. By raising doubts about the authority for agencies to act in a crisis or invalidating their actions, the major questions doctrine has the potential to transform crisis into confusion and catastrophe.

The major questions doctrine also requires an impossible level of prescience by both Congress and the agencies about future threats. While Congress and agencies can often discern areas of concern that could threaten the health, safety or finances of the public, it is usually very difficult to know exactly how a potential crisis will be initiated or what responses might be the most suited to the specific problem presented. In 2008, for example, a financial crisis based on newly

17. *See About the Fed*, BD. OF GOVERNORS OF THE FED. RSRV. SYS, https://www.federalreserve.gov/aboutthefed.htm [https://perma.cc/P77V-6XAV] (last visited Feb. 4, 2023) ("The Federal Reserve . . . promotes the stability of the financial system and seeks to minimize and contain systemic risks through active monitoring and engagement in the U.S. and abroad . . . [and] promotes the safety and soundness of individual financial institutions and monitors their impact on the financial system as a whole . . . ."); *What We Do*, FDIC, https://www.fdic.gov/about/what-we-do/index.html [https://www.fdic.gov/about/what-we-do/index.html] (last visited Feb. 4, 2023) ("The mission of the [FDIC] is to maintain stability and public confidence in the nation's financial system."); *Mission, Role, and Pledge*, CDC, https://www.cdc.gov/about/organization/mission.htm [https://perma.cc/5S2G-M994] ("CDC increases the health security of our nation. As the nation's health protection agency, CDC saves lives and protects people from health threats. To accomplish our mission, CDC conducts critical science and provides health information that protects our nation against expensive and dangerous health threats, and responds when these arise.").

designed mortgage securities and triggered by a decline in housing prices not seen in almost a century required innovative responses under long-established, broad grants of statutory authority to respond.[18] The major questions doctrine, with its requirement of highly specific congressional authorization would likely have called into question the validity of many of the key agency actions as they grappled with a financial crisis unlike any in the country's past or that could have been contemplated when the statutory structure was put in place.[19] Additionally, the major questions doctrine implies that the government is powerless in areas of regulation where Congress and the agencies have yet to act, such as the recent events involving cryptocurrency.[20] A doctrine that limits or prohibits the ability of government to respond to an existential national crisis is neither desirable nor sustainable.

The final flaw in the major questions doctrine is its elevation of the courts as the most important body in determining public policy. Judicial intervention that fails to provide clear guidance to policy makers leads to confusion and invites litigation. The result is a judiciary ever more involved in the major political questions of the nation and an accretion of judicial power that upsets the careful balance of powers between co-equal branches of government with a strong tilt to the government's least accountable branch. This heightened policy role by unelected, unaccountable judges undermines public confidence in the judiciary as an unbiased "umpire" of constitutional disputes, as Chief Justice Roberts famously described the judicial role.[21]

The flaws inherent in the major questions doctrine are likely to mean that the doctrine will enjoy a period of primacy in the near-term, but it will ultimately serve as a transitional doctrine for the Court over time rather than joining its pantheon of historic legal doctrines. This article examines the major questions doctrine, its flaws, and its possible

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18. *See infra* Part V.

19. *See infra* Part V.

20. Sam Sutton & Declan Harty, *Washington Watchdogs Outgunned in Crypto's Wild West*, POLITICO (Nov. 20, 2022), https://www.politico.com/news/2022/11/20/washington-watchdogs-crypto-ftx-00069329 [https://perma.cc/P6X4-5WGZ].

21. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearings Before the S. Comm. on the Judiciary*, 109th Cong. (2005) 55–56 ("Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire.").

implications for financial regulation in five parts. Part II examines the major questions doctrine as now enunciated by the United States Supreme Court.[22] Part III discusses important issues that remain unresolved by the Court's articulation of the major questions doctrine.[23] Part IV examines the need to expand the major questions doctrine analysis to include congressional actions, such as appropriations, as a statement of congressional intent and authorization.[24] Part V examines the impact of the major questions doctrine on financial regulation and how it might have been applied to the executive and congressional action in the 2008 financial crisis and the COVID-19 pandemic.[25] Part VI considers the potential consequences of the application of the major questions doctrine for financial regulation.[26]

II. THE MAJOR QUESTIONS DOCTRINE

In *West Virginia v. EPA*, the Supreme Court for the first time formalized and attempted to systematize a doctrine of statutory construction known as the "major questions doctrine."[27] Through a series of cases over the last thirty years regarding the reach of administrative rulemaking prior to *West Virginia*, the Court had laid the groundwork and identified key elements of the major questions doctrine. In cases involving the Federal Communications Commission ("FCC"),[28] the Food and Drug Administration ("FDA"),[29] the Environmental Protection Agency ("EPA"),[30] the Department of Justice ("DOJ")[31] and the Internal Revenue Service ("IRS"),[32] the Court laid

22. See *infra* Part II.
23. See *infra* Part III.
24. See *infra* Part IV.
25. See *infra* Part V.
26. See *infra* Part VI.
27. West Virginia v. EPA, 142 S. Ct. 2587, 2595 (2022).
28. MCI Telecommunications Corp. v. AT&T Co., 512 U.S. 218 (1994) (deciding whether the FCC's decision to make tariff filing optional for all nondominant long-distance carriers is a valid exercise of its modification authority).
29. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) (deciding whether the FDA could regulate tobacco).
30. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001) (whether the EPA could consider the costs of implementation in setting national ambient air quality standards); Util. Air Regul. Grp. v. EPA, 573 U.S. 302 (2014) (deciding whether the EPA could be permitted to determine that its motor-vehicle greenhouse-gas regulations automatically triggered permitting requirements under the Act for stationary sources that emit greenhouse gases).
31. Gonzales v. Oregon, 546 U.S. 243 (2006) (deciding whether the Controlled Substances Act allows the United States Attorney General to prohibit doctors from

out key elements of the major questions doctrine. More recently, the Court used its shadow docket[33] to combine these elements into a more complete framework for the doctrine, using it to invalidate agency actions taken to respond to the COVID-19 pandemic.[34] *West Virginia*, then, is the "crystallization"[35] of the major questions doctrine.

The 6–3 majority in the case applied the major questions doctrine to invalidate an EPA rule, known as the Clean Power Plan ("CPP"),[36] promulgated under Section 111(d)[37] of the Clean Air Act[38] to regulate emissions from existing power plants. In so doing, it increased the judicial scrutiny of regulatory action by administrative agencies, an action Justice Kagan in dissent described as replacing "normal text-in-context statutory interpretation with some tougher-to-satisfy set of rules."[39]

In *West Virginia*, the Court established a two-part test under the major questions doctrine. The first analysis is whether the case poses a major question, one "in which the 'history and breadth of the authority that [the agency] has asserted' and the 'economic and political significance'[40] of the assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority."[41] If the first

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prescribing regulated drugs for use in physician-assisted suicide, notwithstanding a state law permitting the procedure).

32. King v. Burwell, 576 U.S. 473 (2015) (deciding whether the Affordable Care Act's tax credits are available in States that have a Federal Exchange).

33. For context on this phrase as a reference to the Court's "non-merits work" through its "orders list," see generally William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 NYU J.L. & LIBERTY 1 (2015); *see also* Stephen I. Vladeck, *The Supreme Court Is Making New Law In The Shadows*, N.Y. TIMES (April 15, 2021), https://www.nytimes.com/2021/04/15/opinion/supreme-court-religion-orders.html [https://perma.cc/F2XS-DA2X].

34. *See* Ala. Ass'n. of Realtors v. HHS, 141 S. Ct. 2485 (2021) (deciding whether the CDC has authority to establish an eviction moratorium); Nat'l Fed'n of Indep. Bus. v. OSHA, 142 S. Ct. 661 (2022) (deciding whether OSHA can mandate COVID-19 vaccines).

35. 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), *cert. granted before judgment sub nom.* Dep't of Educ. v. Brown, 143 S. Ct. 541 (2022) (mem.).

36. 80 Fed. Reg. 64661, 64703 (Dec. 22, 2015) (proposed codification at 40 C.F.R. pt. 60).

37. 42 U.S.C. § 7411(d).

38. 42 U.S.C. §§7401–7671q.

39. West Virginia v. EPA, 142 S. Ct. 2587, 2595 (2022) (Kagan, J., dissenting).

40. *Cf. Brown*, 2022 WL 16858525, at *11 ("It is unclear what exactly constitutes 'vast economic significance.'").

41. *West Virginia*, 142 S. Ct. at 2608 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000)).

part of the test is satisfied, the doctrine requires that the agency "point to 'clear congressional authorization' for the power it claims,"[42] and that authorization is further defined in the decision as "something more than a merely plausible textual basis for the agency action."[43]

Even members of the majority recognized that the Court's major questions doctrine test was exceedingly vague. With the Court providing only the broad elements of the major questions doctrine in its opinion, Justice Gorsuch in a concurring opinion sought to provide "guidance" for the application of the doctrine.[44] He listed three triggers for invoking the doctrine: (1) "when an agency claims the power to resolve a matter of great 'political significance'";[45] (2) "when it seeks to regulate 'a significant portion of the American economy' or require 'billions of dollars in spending' by private persons or entities;"[46] or (3) "when an agency seeks to 'intrude into an area that is the particular domain of state law.'"[47] After describing the three triggers for invoking the doctrine, Gorsuch then noted that "this list of triggers may not be exclusive,"[48] leaving room for the Court to add others in the future.

Having described at least some of the triggers for the major questions part of the analysis, Justice Gorsuch then detailed what elements define a clear congressional statement authorizing agency action. He stated that in determining whether there is a clear congressional statement authorizing the action courts should examine: (1) the legislative provision relied upon by the agency with a view to its place in the overall statutory scheme;[49] (2) the age and focus of the statute invoked in relation to the problem the agency seeks to address;[50] (3) "the agency's past interpretations of the relevant statute;"[51] or 4) whether "there is a mismatch between an agency's challenged action and its congressionally assigned mission and expertise."[52]

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42. *Id.* at 2609 (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

43. *Id.* at 2609.

44. *Id.* at 2620 (Gorsuch, J., concurring).

45. *Id.* (quoting NFIB v. OSHA, 595 U. S., 661, 665 (2022).

46. *Id.* at 2621 (citations omitted) (quoting *Util. Air*, 573 U.S. at 324; King v. Burwell, 576 U.S. 473, 485 (2015)).

47. *Id.* (quoting Ala. Ass'n. of Realtors v. HHS, 141 S. Ct. 2485, 2489 (2021)).

48. *Id.*

49. *Id.* at 2622 (adding that "oblique or elliptical language will not supply a clear statement").

50. *Id.* at 2623.

51. *Id.*

52. *Id.*

In providing this guidance, Justice Gorsuch described no fewer than seven hurdles that an agency must clear for its action to remain valid under the major questions doctrine.[53] Also, given the context of Justice Gorsuch's comments, it appears that failing to satisfy just one of these elements in each step of the two-part analysis will invoke the doctrine. His guidance attempts to expand the major questions doctrine "as much as he could as a substantial limit on congressional delegations of policymaking discretion to agencies."[54] While only Justice Alito joined this expansive concurrence, the elements identified by Justice Gorsuch provide insight into the likely future application of the doctrine and are already being relied on by lower courts seeking to apply the doctrine.[55]

III. ISSUES RAISED BY THE *WEST VIRGINIA DECISION*

While Justice Gorsuch argued that *West Virginia* is "a relatively easy case for the doctrine's application,"[56] the Court's reasoning in the case raises at least three important issues about what the case means for future agency rulemaking. First, the Court's decision is unclear as to what characterizes extraordinary cases when the doctrine should apply. Second, the Court's decision raises significant questions about the Court's future deference to agency rulemaking. Third, the Court's application of the major questions doctrine in *West Virginia* provides no clear guidance on what type or extent of congressional action is sufficient in the Court's view to constitute clear congressional authorization. This Part considers each of these issues in turn and then discusses actions that are already expanding the application of the major questions doctrine.

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53. Agencies must avoid the three triggers that establish the action as invoking the major questions doctrine or establish one of the four indicia of clear congressional authorization.

54. Kristin E. Hickman, *Thoughts on* West Virginia v. EPA, YALE J. ON REG. (July 5, 2022), https://www.yalejreg.com/nc/thoughts-on-west-virginia-v-epa [https://perma.cc/SS6L-X5X5] ("[I]n applying the major questions doctrine as it did, the Court said that Congress didn't give the EPA the necessary authority to adopt the regulations at issue, not that Congress couldn't give the EPA that authority.").

55. *See* 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) (citing Justice Gorsuch's *West Virginia* concurrence multiple times).

56. *West Virginia*, 142 S. Ct. at 2621 (Gorsuch, J., concurring).

A. What Constitutes an Extraordinary Case that Addresses a Major Question?

In its decision, the Court failed to provide future litigants and courts with actionable guidance on the application of the major questions doctrine.[57] At first glance, the Court's holding that the major questions doctrine applies in certain extraordinary cases[58] would seem to limit the application of the rule to some subset of unique cases of administrative action. The Court's reference to "cases in which the 'history and breadth of the authority . . . asserted'[59] and the 'economic and political significance' of the assertion"[60] seems to restrict the application of the doctrine to a potentially identifiable group of cases beyond some baseline of regular or reasonable rulemaking. However, both the failure to define what constitutes an extraordinary case and the Court's actions in selecting the EPA rulemaking for consideration point to a more expansive application of the doctrine.

Had the Court chosen to do so, it would have been a relatively simple matter to provide more specific definitions for the application of the doctrine. For example, Congress has frequently found ways in statutory language to define precisely how to apply statutory limitations on legislative or executive action.[61] Of course, had the Court chosen to follow the congressional example of providing clear definitions, it would have been readily apparent that it was effectively legislating in the absence of clear statutory language—exactly the conduct the Court decries when performed by the administrative state. Thus, the Court

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57. Jonathan H. Adler, WV v. EPA: *Some Answers about Major Questions (But Not All the Answers We Need)*, FEDERALIST SOC'Y (August 4, 2022), https://fedsoc.org/commentary/fedsoc-blog/wv-v-epa-some-answers-about-major-questions-but-not-all-the-answers-we-need [https://perma.cc/43FF-CQN8] ("By skimping on statutory analysis and front-loading consideration of whether a case presents a major question, the also Court failed to provide much guidance for lower courts.").

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

59. *Id. (*quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000)).

60. *Id.*

61. *See* Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48–71 (codified as amended in scattered sections of 2 U.S.C.) (defining federal intergovernmental mandate as "any provision in legislation, statute, or regulation that relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority"); Congressional Review Act of 1996, 5 U.S.C. §§ 801–05 (defining major rule as any rule that "has resulted in or is likely to result in . . . an annual effect on the economy of $100,000,000 or more").

provided only vague descriptions of when the doctrine should be appropriately applied.[62] The result is that lower courts are now free to develop their own approaches to applying the doctrine.[63]

Aside from the vagueness of the defined parameters for applying the major questions doctrine, the Court's own actions in its consideration of *West Virginia* in the face of the underlying rule's complex history contributes to the confusion about the application of the doctrine. When the EPA first promulgated the CPP rule in 2015, the Court immediately stayed it in an unprecedented action while the rule was still under review by the lower courts.[64] While the proposed rule was stayed, the EPA under the Trump Administration repealed the CPP rule and replaced it with a new proposed regulation known as the Affordable Clean Energy Rule ("ACE").[65] ACE was subsequently challenged and the D.C. Circuit vacated the EPA's repeal of the CPP.[66] After another change in administration, the Biden-era EPA moved to stay the D.C. Circuit's decision to prevent the CPP from going back into effect[67] and informed the court that it did not intend to enforce the CPP but to promulgate a new rule.[68] The result of the combined judicial and agency actions was that the CPP never took effect and no litigant had been harmed. Nevertheless, the Court held that the plaintiffs had standing as the Court of Appeals action harmed the States to the same extent as the original CPP rule by eliminating its repeal.[69]

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62. CONG. RSCH. SERV., LSB10791, SUPREME COURT ADDRESSES MAJOR QUESTIONS DOCTRINE AND EPA'S REGULATION OF GREENHOUSE GAS EMISSIONS (July 12, 2022) 5, https://crsreports.congress.gov/product/pdf/LSB/LSB10791 [https://perma.cc/VW7Q-58Y4 (dark archive)] ("While the majority in *West Virginia* discussed why the CPP raised major questions, it did not provide a clear test for when an agency action presents a major question that would invite closer review. The Supreme Court could refine the doctrine in future cases, but lower courts in the meantime may take differing approaches in how (and how frequently) they apply the major questions doctrine instead of other frameworks for reviewing agency action.").

63. *Id.*

64. Courtney Scobie, *Supreme Court Stays EPA's Clean Power Plan*, ABA PRAC. POINTS (Feb. 27, 2016), https://www.americanbar.org/groups/litigation/committees/environmental-energy/practice/2016/021716-energy-supreme-court-stays-epas-clean-power-plan [https://perma.cc/Z9J3-4JQ9].

65. 84 Fed. Reg. 32520, 32522 (Sept. 6, 2019) (proposed codification at 40 C.F.R. pt. 60).

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

67. West Virginia v. EPA, 142 S. Ct. 2587, 2606 (2022).

68. *Id.*

69. *Id.*

The logical gymnastics necessary for the Court to find that parties were somehow harmed by a rule that had never been litigated or even taken effect illustrate a particularly aggressive action on the part of the Court to invalidate the rule, an approach that some have characterized as the Court effectively offering an advisory opinion.[70] Whether one would consider the EPA's rule extraordinary, the Court's actions in keeping the case alive to serve as the vehicle for it to introduce its new doctrine certainly were.[71] Rather than limiting the application of the major questions doctrine, the Court's actions set an example for other courts to aggressively apply judicial procedures to vacate rules at the earliest opportunity, including as soon as they are promulgated. This approach provides no opportunity for Congress to weigh in on the issue, either confirming its agreement or stating its disagreement with the agency action, before the courts act.

The congressional response in the immediate aftermath of the *West Virginia* decision also foreshadows an aggressive use of the major questions doctrine to address controversial issues—not because a case is extraordinary or because Congress may not have provided clear direction, but as a tool in political battles. For example, weeks after the Court's decision, Senator John Boozman (R-Ark.), the ranking member of the Senate Agriculture Committee wrote to the Secretary of Agriculture requesting information on the Department's intentions to modify or rescind regulatory actions as a result of the *West Virginia* decision.[72] Senator Boozman described the major questions doctrine as precluding "agencies from taking regulatory actions that are politically or economically significant without explicit congressional authorization."[73] He then pointed to a number of Department

70. Thomas W. Merrill, *Major Questions About* West Virginia v. EPA*—and The Future of the* Chevron *Doctrine*, MARQ. LAW. (Fall 2022) 39, https://law.marquette.edu/assets/marquette-lawyers/pdf/marquette-lawyer/2022-fall/2022-fall-p34-47.pdf [https://perma.cc/JTA3-69H4] ("[T]he advisory nature of the opinion decisively shaped the way the Court characterized the major questions doctrine . . . .[T]he Court framed the major questions doctrine as an abstract exercise in political science, detached from the ordinary role of courts as interpreters of controlling legal texts.").

71. *West Virginia*, 142 S. Ct. at 2632 (Kagan, J., dissenting) (noting "the oddity of the Court's declaring a defunct regulation unlawful").

72. Letter of Sen. John Boozman to Sec'y of Agric. Thomas J. Vilsack (July 19, 2022), https://www.boozman.senate.gov/public/_cache/files/0/c/0cc0dccc-d472-45aa-bc57-dd06adc84d72/1108C35C6951DBD0C3696FAF7441294A.07.19.22-epa-letter-to-vilsack.pdf [https://perma.cc/92FG-JFET].

73. *Id.* at 1.

rulemakings that "*arguably* carry substantial economic and political consequences."[74] It is clear that the future of the major questions doctrine will not be limited to extraordinary cases, but as a new weapon to be used in almost every instance of agency rulemaking and as a tool in ongoing political battles.

Interestingly, the Senator recognized that broad application of the major questions doctrine could potentially be used by opponents of any regulation. He first conceded that, "[l]ike previous farm bills, it will likely require the Department to promulgate implementing regulations to accomplish various Congressional policy objectives,"[75] raising the prospect that the very regulatory actions he questioned were consistent with prior congressional direction. Nevertheless, he requested "the Department's cooperation and assistance with developing statutory language that clearly establishes [the Department of Agriculture's] authority to craft and issue implementing regulations."[76] If this request becomes a normal part of the legislative process, either future legislative acts will include boilerplate language of congressional intent designed to neutralize the major questions doctrine or create opportunities for opponents of any agency regulatory action to challenge it.

B. Does Chevron Survive?

In *Chevron v. Natural Resources Defense Council*,[77] the Court held that in analyzing administrative action, a reviewing court must first ask "whether Congress has directly spoken to the precise question at issue."[78] If Congress has clearly expressed its intent, that is the end of the inquiry.[79] But if Congress has not specifically addressed the question, a reviewing court must respect the agency's construction of the statute so long as it is permissible.[80] Courts should defer to the agency's statutory interpretation because "[t]he responsibilities for assessing the wisdom of such policy choices and resolving the struggle

74. *Id.* (emphasis added).
75. *Id.*
76. *Id.*
77. 467 U.S. 837 (1984).
78. *Id.* at 842.
79. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132 (2000).
80. *Id.*

between competing views of the public interest are not judicial ones: [o]ur Constitution vests such responsibilities in the political branches."[81]

In the prior cases that were precursors to the major questions doctrine, the Court's statutory analysis was performed in the context of *Chevron*. In *FDA v. Brown and Williamson Tobacco Corp*.,[82] the Court said, "[b]ecause this case involves an administrative agency's construction of a statute that it administers, our analysis is governed by *Chevron*."[83] In *Utility Air Regulatory Group v. EPA*,[84] the Court said, "[w]e review EPA's interpretations of the Clean Air Act using the standard set forth in *Chevron*."[85] *Chevron* analysis also was a significant aspect of the decision in *Gonzales v. Oregon*[86] where the Court, in addressing the authority of the Attorney General to prohibit doctors from prescribing regulated drugs for use in physician-assisted suicide, stated "[a]n interpretation of an ambiguous statute may also receive substantial deference," "notwithstanding a state law permitting the procedure."[87]

In *West Virginia*, however, the Court does not mention *Chevron* once, and there is a complete absence of any analysis of *Chevron* deference. The question, therefore, is what to infer from the Court's silence about *Chevron* in applying the major questions doctrine in *West Virginia*. Is the major questions doctrine still an analytical tool for evaluating the appropriateness of *Chevron* deference in extraordinary cases in which congressional authorization is in question with regard to particular administrative actions? Or is the doctrine now untethered from its origins and a much more expansive, independent basis for courts to invalidate agency actions? The answer to this question is unclear.[88]

It may be that *West Virginia* represents the same gradualist approach that Chief Justice Roberts advocated in the Court's decision to

81. *Chevron*, 467 U.S. at 866 (internal quotation omitted).
82. 529 U.S. 120 (2000).
83. *Id.* at 132.
84. 573 U.S. 302 (2014).
85. *Id.* at 315.
86. 546 U.S. 243 (2006).
87. *Id.* at 249, 255.
88. Eli Nachmany, *There Are Three Major Questions Doctrines*, YALE J. ON REG. (July 16, 2022), https://www.yalejreg.com/nc/three-major-questions-doctrines [https://perma.cc/3ZBA-J2AN].

overturn abortion precedents[89] being applied to cases about administrative action. As the Chief Justice stated in his *Dobbs* concurrence:

> Following that "fundamental principle of judicial restraint," we should begin with the narrowest basis for disposition, proceeding to consider a broader one only if necessary to resolve the case at hand. It is only where there is no valid narrower ground of decision that we should go on to address a broader issue, such as whether a constitutional decision should be overturned.[90]

By applying the major questions doctrine broadly to invalidate agency actions that it feels lack adequate congressional authorization, the Court avoided overturning *Chevron* directly, as so many conservatives would wish,[91] and yet achieved a result more impactful on the actions of the administrative state. The likely result is that *Chevron* arguably no longer occupies a position of primacy in questions of administrative action, and the case will instead become a quiet backwater of statutory interpretation while issues of the true limits of administrative power are debated under the major questions doctrine.[92]

C. What Constitutes a Clear Statement of Congressional Authorization?

Under the major questions doctrine, a key determinant of the validity of agency action is whether Congress has provided clear authorization for the actions of the agency. Unfortunately, in *West Virginia*, rather than stating what constitutes such clear direction, the Court defined it by what it is not. The Court said that "[e]xtraordinary grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or 'subtle device[s].' . . . Nor does Congress typically use oblique or elliptical language to empower an agency to

89. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

90. *Id.* at 2313 (Roberts, C.J., concurring) (citations omitted).

91. *See, e.g.*, Craig Green, *Deconstructing the Administrative State: Chevron Debates and the Transformation of Constitutional Politics*, 101 B.U. L. REV. 619 (2021).

92. Brown v. U.S. Dep't of Educ., No. 4:22-CV-0908-P, 2022 WL 16858525, at *19 (N.D. Tex. Nov. 10, 2022) ("The most recent example of *Chevron's* fall is the crystallization of the long-developing major-questions doctrine in *West Virginia. v. EPA*.").

make a 'radical or fundamental change' to a statutory scheme."[93] Not only does this description not provide guidance regarding the necessary degree of specificity for congressional authorization to support agency action; as will be shown below, the statement is demonstrably false.

As Justice Gorsuch noted in his concurrence, "lawmaking under our Constitution can be difficult,"[94] and "the framers deliberately sought to make lawmaking difficult by insisting that two houses of Congress must agree to any new law and the President must concur or a legislative supermajority must override his veto."[95] Correspondingly, a vital element of the electoral process is compromise, and a vital tool in achieving legislative compromise is often ambiguous statutory language. In fact, it may be that the more important and controversial the issue before Congress and the President, the more likely that some degree of statutory vagueness will be necessary to achieve a compromise satisfactory to enact the bill into law.[96]

Although the judiciary might prefer the clearest possible language when faced with an issue of statutory interpretation, the legislative process often requires ambiguity:

Ambiguity serves a legislative purpose. When legislators perceive a need to compromise. they can, among other strategies, "obscur[e] the particular meaning of a statute, allowing different legislators to read the obscured provisions the way they wish." Legislative ambiguity reaches its peak when a statute is so elegantly crafted that it credibly supports multiple inconsistent interpretations by legislators and judges. Legislators with opposing views can then claim that they have prevailed in the legislative arena, and, as long as courts continue to issue conflicting interpretations, these competing claims of legislative victory remain credible.

Formal legal doctrine, in contrast, frames legislative ambiguity as a problem to be solved rather than an opportunity to be exploited. Toward that end, judges and scholars have developed an arsenal of

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93. West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022) (citations omitted) (quoting Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001); MCI Telecommunications Corp. v. AT&T Co., 512 U.S. 218, 229 (1994)).

94. *Id.* at 2618 (Gorsuch, J., concurring).

95. *Id.*

96. Donald F. Kettl, *How the Supreme Court's* West Virginia v. EPA *Decision Will Upset the Administrative World*, GOV'T EXEC. (July 18, 2022), https://www.govexec.com/management/2022/07/how-supreme-courts-epa-decision-will-upset-administrative-world/374557/ [https://perma.cc/C72K-JW5P].

interpretive techniques that are designed to extract functional meaning from ambiguous statutory text and conflicting legislative history.[97]

The major questions doctrine at its extreme uses language that was often vital to the achievement of statutory enactment to invalidate and frustrate the implementation of that very legislative action.

Statutory ambiguity also is often a by-product of the legislative process. "When laws run thousands of pages, and when they're often glued together in late-night conclaves near the end of sessions, inconsistencies are inevitable."[98] In any major bill, there will be inartful, vague language and inconsistencies that result from a process that can involve a multitude of players and deadline pressures that prevent more considered drafting.

Congress also often provides authority through broad, general language because of the difficulty of solving highly complex issues and to allow flexibility for unforeseen future events. As Justice Kagan notes in her dissent, "A key reason Congress makes broad delegations . . . is so an agency can respond, appropriately and commensurately, to new and big problems. Congress knows what it doesn't and can't know when it drafts a statute; and Congress therefore gives an expert agency the power to address issues—even significant ones—as and when they arise."[99] Under the major questions doctrine, the Court is wholly at odds with the concept that Congress and the President can choose, legislatively, to empower an agency today to address a predictable, future problem.[100]

As opposed to the Court's view that it would not expect congressional authorization for agency action to be based on vague language, history and a host of other reasons show why congressional

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97. Joseph A. Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design & Interpretation*, 54 STAN. L. REV. 627, 628 (2002) (footnote omitted) (quoting ABNER J. MIKVA & ERIC LANE, LEGISLATIVE PROCESS 779-80 (1997)) .

98. *Id.*

99. West Virginia v. EPA, 142 S. Ct. 2587, 2628 (2022) (Kagan, J., dissenting).

100. Phillip A. Wallach, *Will* West Virginia v. EPA *cripple regulators? Not if Congress Steps Up.*, BROOKINGS INST. (July 1, 2022) https://www.brookings.edu/research/will-west-virginia-v-epa-cripple-regulators-not-if-congress-steps-up [https://perma.cc/2WVF-TKSS] ("One way to understand the MQD is an attempt to combat an interpretive approach that might otherwise amount to 'Congress legislating now the power for an agency to legislate later,' especially in contexts where changing facts on the ground mean that foresight of current circumstances was impossible.").

authorization might not be as direct as the Court would prefer, ultimately requiring judicial analysis of Congress's intent. Yet determining congressional intent is difficult for many reasons. For one, Congress is a collective body made up of 535 individuals with their own goals, incentives, and ideologies. That more than 200 Senators and Members of Congress were amici in *West Virginia* on both sides of the case is testament to the difficulty of ascribing intent. The makeup of Congress also is constantly changing with an election every two years. Is the appropriate intent to be considered that of the Congress of today or the Congress that initially passed the legislation? In the end, the only certainty we have about congressional intent is reflected in an expressed majority vote in favor of or against legislation. All other attempts to ascribe intent are supposition.

As a result of the inherent difficulties in divining congressional intent in vague or general statutory language, some conservative members of the Court have developed an entire school of thought on "textualist" interpretation that relies on the text of the statutory language generally to the exclusion of any professed intentions by the congressional authors or what a judge thinks the words ought to say. As Justice Barrett has described it:

> Textualism, a method of statutory interpretation closely associated with Justice Scalia, insists that judges must construe statutory language consistent with its "ordinary meaning." The law is comprised of words—and textualists emphasize that words mean what they say, not what a judge thinks that they ought to say. For textualists, statutory language is a hard constraint. Fidelity to the law means fidelity to the text as it is written.[101]

In *West Virginia*, however, the Court moves well beyond an effort to interpret existing statutory language to seek to determine congressional intent from the absence of additional statutory language that it would expect to see if Congress truly meant to confer such broad authority on an agency.

The foundation of the major questions doctrine, therefore, is the *absence* of the kind of direct specific language that the Court expects Congress would have included in the statute to authorize the agency's

101. Hon. Amy Coney Barrett, *2019 Sumner Canary Memorial Lecture: Assorted Canards of Contemporary Legal Analysis: Redux*, 70 CASE W. RSRV. L. REV. 855, 856 (2020).

action. The result is a doctrine that engages the judiciary in a Holmesian analysis (Sherlock, not Oliver Wendell) to glean meaning from the absence of expected congressional action—" the dog that did not bark."[102] The inherent difficulties of extrapolating meaning from the absence of congressional action have long been recognized. Justice Frankfurter once wrote that "we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principal."[103] Justice Scalia more recently opined that "we should admit that vindication by congressional inaction is a canard."[104]

The decision in *West Virginia* is replete with comments regarding whether Congress would have "intended" or "meant" to reserve certain matters to itself rather than providing the agency with authority to address the issue as is implied by the actual language of the statute. Yet, none of the discussion serves to shed any real light on what language would need to be added to the statute to be sufficient to satisfy the Court that Congress intended to provide authorization. As one commentator noted, "[t]he problem with this 'strong' articulation of the [major questions doctrine] . . . is that there is no obvious limiting principle; armed with this sort of skepticism, the Court seems poised to make it impossible for Congress to set up a statutory framework capable of responding to developing circumstances, since super-clarity at the time of drafting seems to be required."[105] The Court also essentially ignored that Congress can express its intent not just through its words, but also through its actions.[106]

IV. CONGRESSIONAL ACTION AS A STATEMENT OF INTENT

In *West Virginia*, the Court based its decision primarily on the absence of language evidencing clear congressional intent, illustrating the difficulties of the resulting analysis discussed above.[107] The Court

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102. Sir Arthur Conan Doyle, *Silver Blaze in* THE COMPLETE SHERLOCK HOLMES 335, 349 (1930) ("I had grasped the significance of the silence of the dog, for one true inference invariably suggests others . . . . Obviously, the midnight visitor was someone whom the dog knew well.").

103. Helvering v. Hallock, 309 U.S. 106, 121 (1940).

104. Johnson v. Trans. Agency, Santa Clara Cnty., Cal., 480 U.S. 616, 672 (1987) (Scalia, J., dissenting).

105. Wallach, *supra* note 100.

106. See *infra* Part IV.

107. See *supra* Part III.

also sought to bolster its analysis by expanding its argument beyond the statutory language, or lack thereof, to include congressional action. Like the tribal shaman who seeks to divine the future from the entrails of an animal sacrifice, the majority picks through the remains of the legislative sausage-making process searching for indications of congressional intent. Their analysis illustrates the problems inherent with this approach, as they overstated the importance of some actions and ignored other actions that clearly demonstrated legislative intent but conflicted with the Court's ultimate outcome.

A. The Court's Selective Use of Failed Legislation

To support its contention that Congress could not have intended a broad grant of authority to the EPA under the Clean Air Act, the Court in *West Virginia* pointed to the failure of Congress to enact bills with regulatory schemes similar to the CPP.[108] Much like the difficulty of using the absence of statutory language to infer congressional intent, the Court's effort to use failed legislation to support its argument under the major questions doctrine does not hold up under closer examination, especially as the Court was selective in its analysis.

As a part of its argument, the Court stated that "Congress . . . has consistently *rejected* proposals to amend the Clean Air Act" and provided examples by pointing to Congress's failure to pass specific bills that would have created broad regulatory schemes under the Clean Air Act if they had been enacted.[109] The Court pointed to the Clean Energy Jobs and American Power Act of 2009 ("CEJAPA")[110] as a broad regulatory scheme that Congress rejected. A review of the legislative actions around that bill illustrates the accuracy of Justice Kagan's admonition in dissent that "failed legislation offers a particularly dangerous basis on which to rest an interpretation of an existing law a different and earlier Congress adopted."[111]

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108. West Virginia v. EPA, 142 S. Ct. 2587, 2614 (2022) (citation omitted) ("Finally, we cannot ignore that the regulatory writ EPA newly uncovered conveniently enabled it to enact a program that, long after the dangers posed by greenhouse gas emissions 'had become well known, Congress considered and rejected' multiple times.").

109. *Id.* (emphasis added).

110. S. 1733, 111th Cong. (2009).

111. *West Virginia*, 142 S. Ct. at 2641 (Kagan, J., dissenting).

First, it is unclear why the Court chose to illustrate congressional intent by highlighting the failure of a bill that had been considered six years before the EPA even promulgated its regulation. Three Congresses, each with thousands of unpassed bills, would be elected in the span between the consideration of CEJAPA and the EPA's actions, hardly providing insight into congressional intent.

In addition, the Court's choice of language in describing the legislative activity surrounding CEJAPA suggests that Congress affirmatively voted to reject it, providing a clear statement that Congress did not intend to confer authority of this nature on the agency. In fact, the legislative activity around CEJAPA provides a much more mixed and less compelling record. While it would be accurate to state that the bill was not passed and enacted into law, there was never a full congressional vote to reject the CEJAPA. To the contrary, the only vote involving the bill was an affirmative vote to report it out of the Senate Committee on the Environment and Public Works on February 2, 2010.[112] The bill would later stall in the full Senate, but to characterize the failure of the Senate and House to advance the bill can hardly be extrapolated as a rejection of the legislative approach.

Similarly, the Court pointed to the American Clean Energy and Security Act of 2009[113] as an example of rejected legislation. Considered the same year as CEJAPA, the legislative actions around this bill suffer from the same interpretive shortcomings. The Court's citation to this bill raises the same question about the selection of a bill so distant in time from the agency action. In addition, unlike the CEJAPA, which only saw committee action, the American Clean Energy and Security Act actually passed the House of Representatives on June 26, 2009, by a vote of 219–212.[114] While the Senate did not ultimately take up the bill, the only recorded action is actually a vote in favor of the legislation by the House of Representatives, hardly the rejection the Court characterizes.

Where the Court wrote that it cannot ignore that Congress considered and rejected legislative approaches, Justice Kagan correctly pointed out that "under normal principles of statutory construction, the

112. S. COMM. ON ENV'T & PUB. WORKS, S. REP. NO. 111-121, at 1 (2010).

113. H.R. 2454, 111th Cong. (2009).

114. Roll Call 477, H.R. 2454, 111th Cong. (2009), https://clerk.house.gov/Votes/2009477 [https://perma.cc/F6AA-4T3C].

majority should ignore that fact (just as I should ignore that Congress failed to enact bills barring EPA from implementing the Clean Power Plan)."[115] Justice Kagan's admonition is particularly appropriate in this circumstance. A simple legislative search reveals that in a later Congress than the Court's examples, and contemporaneous with the promulgation of the EPA's rule, Senator Shelley Moore Capito (R-W. Va.) introduced the Affordable Reliable Electricity Now Act of 2015[116] specifically to block the EPA's CPP. The Capito bill was reported out of the Senate Committee on Environment and Public Works on October 29, 2015, but never considered by the full Senate.[117] Under the Court's reasoning, this would constitute an affirmation of the EPA's approach as Congress "rejected" legislation to overturn the agency's action.

Recognizing the dangers inherent in the Court's use of failed legislative action in support of its argument, Justice Gorsuch in a footnote in his *West Virginia* concurrence tried to diminish the import of the majority's reliance on failed legislation. He argued that "the Court has not pointed to failed legislation to resolve what a duly enacted statutory text means, only to help resolve the antecedent question whether the agency's challenged action implicates a major question."[118]

Given that there is failed legislation on both sides of the major question under the Court's consideration, it is clear there is little to be gleaned from continuing this type of analysis, except perhaps as a cautionary tale of its pitfalls. It does not provide the type of direct expressions of congressional intent and authorization that the majority says is essential to avoiding the consequences of the major questions doctrine. But had the Court chosen to dig a bit deeper into legislative action around the Clean Power Program, they would have found two legislative actions that do provide the clear statements of congressional intent the Court claimed it was seeking.

B. Congress's Power of the Purse—Appropriations

Under the U.S. Constitution, one of the strongest powers given to the Congress over the administrative state is the power of the

115. *West Virginia*, 142 S. Ct. at 2641 (Kagan, J., dissenting).
116. S. 1324, 114th Cong. (2015).
117. *See* S. COMM. ON ENV'T & PUB. WORKS, S. REP. NO. 114-159, at 1 (2014).
118. *West Virginia*, 142 S. Ct. at 2621 (Gorsuch, J., concurring).

purse.[119] Article I, Section 9 states "[n]o money shall be drawn from the Treasury, but in Consequence of Appropriations made by law."[120] As the Senate Committee on Governmental Affairs has noted, appropriations are effective precisely because the statutory controls are so direct, unambiguous, and virtually self-enforcing. While agencies are able to bend the more ambiguous language of authorizing legislation to their own purposes, the dollar figures in appropriations bills represent commands which cannot be bent or ignored except at extreme peril to agency officials.[121]

Congress's actions to fund activities of an agency, especially given that appropriations are essential for any agency policy implementation, provide clear information and context about congressional priorities.

In addition, because agency appropriations can be very broad, Congress will frequently use specific statutory provisions, known as riders, to target and prohibit the use of funds to implement agency policy initiatives.[122] In a period of ever-increasing political polarization that makes it extraordinarily difficult to pass authorizing legislation, the appropriations process is becoming an essential policy tool. As Professor Metzger has noted, "[r]ather than amending or repealing substantive authorizations, Congress resorts to appropriations riders and funding denials as its tools of choice to control government policy"[123]

Given its contemporary usage as a policy tool and the clarity and lack of ambiguity inherent in the appropriations language, a review of legislative action in the appropriations context would seem to provide useful input to the analysis determining whether Congress intended to confer authority under the major questions doctrine. In *West Virginia*, however, the Court focuses most of its attention on the language of the authorizing statute. In doing so, the Court exhibits the same simplistic approach to policy interpretation followed by many courts that

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119. Alan L. Feld, *The Shrunken Power of the Purse*, 89 B.U. L. REV. 487 (2009).

120. U.S. CONST. art. I, § 9.

121. S. COMM. ON GOV'T OPERATIONS, 95TH CONG., STUDY ON FEDERAL REGULATION: PREPARED PURSUANT TO S. RES. 71 TO AUTHORIZE A STUDY OF THE PURPOSE AND CURRENT EFFECTIVENESS OF CERTAIN FEDERAL AGENCIES, VOL. II 31 (Comm. Print 1977).

122. Neal E. Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 DUKE L. J., 456, 462–463 (1987).

123. Gillian E. Metzger, *Taking Appropriations Seriously*, 121 COLUM. L. REV. 1075 (2021).

undervalue the importance of the appropriations process in policy implementation.[124]

To its credit, the Court did at least touch on the appropriations process in its *West Virginia* decision as part of its analysis of the application of the major questions doctrine. Yet strangely, it focused on the agency's participation in the process, rather than Congress's actions. In supporting its argument that Congress could not have intended to authorize the EPA to implement the CPP, the Court pointed to language in the EPA's appropriations justification for FY 2016[125] as an admission that the agency lacked the necessary expertise to support the regulatory action and inferred that Congress would not task the agency with doing something outside its realm of expertise without specific direction.[126]

The Court quoted the EPA as saying that "[u]nderstand[ing] and project[ing] system-wide . . . in areas such as electricity transmission, distribution, and storage" requires "technical and policy expertise not traditionally needed in EPA regulatory development."[127] That said, the form of quotation used by the Court reverses the clauses of what the EPA actually said. The EPA quote is more subtle than the Court's rewrite and states:

> The existing power plant rule requires the EPA to look at the emission control strategies that many states and companies are currently employing that are either shifting generation away from higher emitting plants or reducing the need for generation in the first place (through energy efficiency). Evaluating and capturing these strategies requires the agency to tap into technical and policy expertise not traditionally needed in EPA regulatory development (for example, nuclear, wind, solar, hydroelectric, and demand-side energy efficiency), and to understand and project system-wide

124. *Id.*

125. EPA, EPA-190-R-15-001, FISCAL YEAR 2016: JUSTIFICATION OF APPROPRIATION ESTIMATES FOR THE COMMITTEE ON APPROPRIATIONS 213 (2015), https://www.epa.gov/sites/default/files/2015-02/documents/epa_fy_2016_congressional_justification.pdf [https://perma.cc/2ZK5-J8RX].

126. West Virginia v. EPA, 142 S. Ct. 2587, 2612 (2022).

127. *Id.*

> approaches and trends in areas such as electricity transmission, distribution, and storage.[128]

While the EPA is stating that its evaluation of the wide range of state emission control strategies requires the agency to tap into non-traditional expertise, the Court converts this language into an admission that "the agency has no comparative expertise"[129] in making emission policy judgments generally.

Even assuming the Court's editing of the EPA's language does not result in a material alteration in the agency's statement and that the agency is asking Congress to provide resources to provide expertise to implement a regulation it just promulgated, this only triggers the first prong of the major questions doctrine test.[130] The second part of the test requires a clear congressional statement of authorization for the action,[131] and that requires an examination not of what the agency said, but what Congress did.

The EPA's FY 2016 Appropriations Justification cited by the Court is the agency's formal justification to Congress in support of the President's budget request for funding for EPA programs.[132] If the agency is requesting additional resources to enhance its expertise, the relevant fact for the major questions doctrine is not the request, but the congressional response.

Congressional consideration of EPA appropriations for FY 2016 involved considerable debate about recent and pending agency regulatory actions, especially ones related to greenhouse gas emissions.[133] In the Committee Report to accompany H.R. 2822, the House version of the bill providing appropriations for the EPA for FY

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128. EPA, *supra* note 125, at 213.

129. *West Virginia*, 142 S. Ct. at 2613.

130. *Cf. id.* at 2608.

131. *Id.* at 2609.

132. *See* EPA, *supra* note 125, at i–xi (giving overview of annual budget priorities and operational needs).

133. CONG. RSCH. SERV., R44208, ENV'T PROT. AGENCY (EPA): FY2016 APPROPRIATIONS (May 19, 2016), https://crsreports.congress.gov/product/pdf/R/R44208/10 [https://perma.cc/SH5L-GB2T (dark archive)]; *see also* ROBERT ESWORTHY & DAVID M. BEARDEN, CONG. RSCH. SERV., R44208, ENV'T PROT. AGENCY (EPA): FY2016 APPROPRIATIONS (November 12, 2015), https://crsreports.congress.gov/product/pdf/R/R44208/10 [https://perma.cc/K6XH-4ZQM (dark archive)] ("In particular, EPA's Clean Power Plan— identified as a top priority for the agency and a central element of the Administration's climate mitigation agenda— was the focus of much debate.").

2016, the House Appropriations Committee explicitly stated that the bill "does not include funding for EPA's greenhouse gas rules for stationary sources."[134] Similarly, the Senate Appropriations Committee explicitly stated in the Committee report on its version of the bill that the "[c]ommittee has not included the Administration's requests for funding increases and for additional employees related to the Clean Power Plan."[135]

The version of the FY 2016 appropriations bill ultimately enacted into law,[136] however, implemented a major budget agreement negotiated between the Obama Administration and the Republican-controlled Congress[137] that provided funding to implement the operations of the EPA with no riders with restrictions on funding for implementation of the CPP. The failure of Republicans to successfully strike down or delay implementation of the CPP through the appropriations process was recognized as a "Democratic win."[138] By contrast, in the same bill, Congress specifically limited other programs, including prohibiting funding for any rule requiring "mandatory reporting of greenhouse gas emissions from manure management systems"[139] or any rule to "regulate the lead content of ammunition, ammunition components or fishing tackle."[140]

The significant debate about the CPP throughout the appropriations process and the ultimate discarding of the limitations on funding found in the House and Senate committee-passed versions of the bill raises a question about where these significant congressional actions outside the underlying legislative authorization fit into the doctrinal scheme of the major questions doctrine. To just ignore

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134. H.R. COMM. ON APPROPRIATIONS, DEPARTMENT OF THE INTERIOR, ENVIRONMENT AND RELATED AGENCIES APPROPRIATIONS BILL, 2016, H.R. Rep. 114-170 50 (2015).

135. S. COMM. ON APPROPRIATIONS, DEPARTMENT OF THE INTERIOR, ENVIRONMENT AND RELATED AGENCIES APPROPRIATIONS BILL, 2016, S. Rept. 114-70 51 (2015).

136. Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242–3128 (2015).

137. Kelsey Snell & Karoun Demirjian, *Congress Passes Budget Deal & Heads Home For The Year*, WASH. POST (Dec. 18, 2015), https://www.washingtonpost.com/news/powerpost/wp/2015/12/18/house-to-vote-on-spending-bill-that-would-avert-shutdown [https://perma.cc/9LT5-AHNW].

138. Mike DeBonis & Kelsey Snell, *Here's What Made It Into Congress's Big Spending & Tax Bills*, WASH. POST (Dec. 16, 2015), https://www.washingtonpost.com/news/powerpost/wp/2015/12/16/heres-what-made-it-into-congresss-big-tax-and-spending-bills [https://perma.cc/D8UW-TTT6].

139. Pub. L. No. 114-113 § 418, 129 Stat. 2242, 2579 (2015).

140. *Id.* § 420, 129 Stat. at 2579.

appropriations activity—as the Court does in *West Virginia*—is to give greater weight to some types of essential legislative activity, such as authorizations, under the doctrine than the more direct appropriations activities of Congress. Proponents of the CPP would seem to have a credible argument that Congress, by choosing to fund the EPA with full knowledge of the controversy around the CPP and with no limitations on the funding, has effectively ratified the EPA's actions.

Unfortunately for proponents of ratification, the courts have historically tended to marginalize the legislative importance of appropriations actions by Congress.[141] As Professor Metzger notes:

> Forms of doctrinal marginalization that operate to enhance appropriations' practical impact tend to be based on a perception of appropriations as primarily an issue for the political branches or an identification of government funds as especially tied to sovereignty. By contrast, the underlying driver when marginalization limits the practical impact of appropriations is often a normative prioritization of substantive legislation.[142]

While ratification of agency actions by appropriations is not favored,[143] "[i]t is also settled that Congress may manifest its ratification by the appropriation of funds."[144]

The reluctance to determine that an appropriation has ratified an agency action is based on a "general judicial aversion to interpreting appropriation acts as changing substantive law."[145] As one court said:

> [I]t is well recognized that Congress does not normally perform legislative functions—such as ratification—through appropriations bills . . . . This does not mean that Congress cannot effect a ratification through an

141. *See generally* Metzger, *supra* note 123.

142. *Id.* at 1132.

143. U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-464SP, PRINCIPLES OF FED. APPROPRIATIONS L. CH. 2: THE LEGAL FRAMEWORK 2-73 (4th ed. 2016), https://www.gao.gov/assets/2019-11/675709.pdf [https://perma.cc/KKR6-LVPX].

144. *Id.*

145. *Id.*

> appropriations bill, but it does mean that Congress must be especially clear about its intention to do so.[146]

Given how an increasingly partisan Congress has relied on appropriations bills to achieve legislative ends, this judicial viewpoint seems badly dated and may no longer reflect the current state of congressional legislative policymaking.

While perhaps a case can be made that Congress's choice not to prohibit the use of agency funds for implementation of the CPP constitutes a ratification of the agency's policy choice, it arguably is unnecessary for courts to go that far in considering appropriations actions under the major questions doctrine. "[I]f congressional determination of policy is the concern, then action taken by Congress to fund or authorize funding for the agency's policy should be relevant."[147] The congressional action to fund the EPA with the full knowledge of the heated debate surrounding the CPP may not constitute an explicit statutory endorsement of the agency's action, but it clearly undermines the argument that the EPA was acting without any congressional sanction.[148]

If the crux of the major questions doctrine is legislative action to confirm congressional authorization of agency action, the analysis under the doctrine should reach beyond just the original statutory text to encompass all legislative activity relevant to the agency's action. The difficulty of applying this information to the major questions doctrine underscores concerning issues about the doctrine's limitations and legitimacy in achieving its stated purpose. The policy debate about the EPA's activities has spread over several years, undertaken by multiple administrations and Congresses, with proponents and opponents in ascendancy and decline at different times. The Court's choice to ignore the ongoing active debates and look only to the narrow statutory language in the application of its new doctrine has only one result—to make the courts a direct partisan with a finger on the scale in an ongoing policy debate.

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146. *Id.* at 2-74 (citing Thomas v. Network Solutions, Inc., 2 F. Supp. 2d 22, 32 at n.12 (D.D.C. 1998), *aff'd*, 176 F.3d 500 (D.C. Cir. 1999), *cert. denied*, 528 U.S. 1115 (2000)).

147. Metzger, *supra* note 123, at 1107.

148. *Id.* at 1109.

C. The Congressional Review Act—More Evidence of Congressional Intent

Outside of withholding funding for an agency action, the Congressional Review Act ("CRA")[149] is one of Congress's most explicit tools to address regulatory overreach. Following the invalidation of the "legislative veto" by the Supreme Court,[150] Congress passed the CRA as a mechanism for invalidating regulatory actions. Since its enactment, the CRA has been used to invalidate more than 20 rules.[151]

Under the CRA, agencies must submit final rules to Congress and the Government Accountability Office ("GAO") for review.[152] In the case of "major rules," defined as those rules that have an annual effect on the economy of more than $100 million,[153] the rules do not take effect until sixty *legislative* days after the report is submitted.[154] Non-major rules take effect as otherwise provided by law upon submission to Congress.[155]

In the case of "major rules," once the rule is submitted, the rule takes effect on the later of (a) sixty legislative days after submission to Congress, or (b) publication in the Federal Register unless Congress passes and the President signs a joint resolution of disapproval.[156] The joint resolution is considered under expedited procedures and is not subject to the filibuster in the Senate.[157] If the rule was submitted within sixty legislative days of adjournment, the new Congress may consider the resolution of disapproval.[158] If Congress adopts and the President signs a resolution of disapproval, a rule may not be reissued in substantially the same form, and a new rule that is substantially the

149. 5 U.S.C. §§ 801–05.

150. *See* INS v. Chadha, 462 U.S. 919, 956–58 (1983) (holding that a statutory one-house legislative veto procedure violated constitutional requirements of bicameralism and presentment).

151. CONG. RSCH. SERV., R43992, THE CONG. REVIEW ACT (CRA): FREQUENTLY ASKED QUESTIONS (Nov. 12, 2021), https://crsreports.congress.gov/product/pdf/R/R43992 [https://perma.cc/LU5Y-MKAJ (dark archive)].

152. 5 U.S.C. § 801(a)(1).

153. *Id.* § 804(2).

154. *Id.* § 801(a)(3).

155. *Id.* § 801(a)(4).

156. *Id.* § 801(b).

157. *Id.* § 802(d).

158. *Id.* § 801(d).

same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.[159]

In other words, the CRA empowers Congress to act to directly invalidate an agency rulemaking that it considers unauthorized or an overreach of agency authority. Yet because it requires legislative action and the signature of the President (or an override of his veto), it is most effective when the President, House of Representatives, and Senate are controlled by the same political party. It reflects direct legislative action and a clear statement of intent on the proposed regulation.

Shortly after the promulgation of the CPP, Senator Capito introduced a resolution of disapproval under the Congressional Review Act.[160] Senate Joint Resolution 24 was introduced on October 26, 2015, three days after the rule was formalized.[161] The resolution passed the Senate by a vote of 52–46 and the House by a vote of 242–180. It was vetoed by the President on December 18, 2015, and no attempt was made to override the veto.[162]

The legislative history regarding EPA's rulemaking under the CRA demonstrates that a singular focus on the authorizing statute to the exclusion of accompanying legislative action can lead the Court to a judicial decision that is directly contrary to how the political policymaking played out in fact. In this case, the resolution under the CRA specifically targeted the EPA's rule. While majorities in the House and Senate voted to invalidate the rule, supporters of the resolution of disapproval were unable to muster the bipartisan support necessary to enact it. As Justice Gorsuch notes, passing legislation is a difficult enterprise,[163] even with the procedural advantages of the CRA that ensure prompt majority action. The Court's failure to even reference the congressional action to invalidate the regulation and particularly the President's veto of that legislation involving the precise regulation under consideration is puzzling.

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159. *Id.* § 801(b)(2).

160. A Joint Resolution Providing for Congressional Disapproval Under Chapter 8 of Title 5, United States Code, of a Rule Submitted by The Environmental Protection Agency Relating to "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units", S.J. Res. 24, 114th Cong. (2015).

161. *Id.*

162. *See* S.J. Res. 24, 114th Cong., 162 Cong. Rec. 28 (January 11, 2016) (recording veto and President Obama's memorandum of disapproval).

163. West Virginia v. EPA, 142 S. Ct. 2587, 2618 (2022) (Gorsuch, J., concurring).

The Court's failure to incorporate the congressional action under the CRA into its analysis under the major questions doctrine raises important issues. If the resolution had been signed by the President rather than vetoed, the EPA's rule would have been invalidated, and the EPA would have been statutorily prohibited from issuing another substantially similar rule without an intervening act of Congress directly authorizing it. There would have been no question about the result of the legislative action. The contrary legislative result certainly casts doubt on the Court's analysis that the agency promulgated the rule outside of its authority.

In addition, as with appropriations, focusing on only the statutory text ignores a universe of relevant information about Congress's intent and reaction to the agency action. Such a narrow application of the facts to the doctrine is necessary to maintain the fiction that the Court is simply engaging in statutory interpretation rather than taking sides in a political debate. One would hope that future courts applying the major questions doctrine will look at the complete record of congressional activity.[164]

The biggest issue raised by the Court ignoring Congress's actions under the CRA in *West Virginia* concerns the separation of powers. By invalidating the EPA's rule, the Court is handing an outcome to opponents of the regulatory action in Congress that they had failed to achieve through the legislative process. More significantly, the Court's decision effectively nullifies the President's veto of S.J. Res. 24. Presidential vetoes, by definition, frustrate congressional intent, and the existence of one in the case before the Court illustrates that the major questions doctrine must focus on the results of the entire legislative process, not just legislative language, to achieve coherent results.

D. Expansion of the Major Questions Doctrine?

Because the analysis problems of *West Virginia* are ingrained in the decision, lower courts seeking to apply the precedent will absorb and perpetuate the same issues in their subsequent decisions. This is

164. *But see* Brown v. U.S. Dep't of Educ., No. 4:22-CV-0908-P, 2022 WL 16858525 (N.D. Tex. Nov. 10, 2022) (applying an unduly narrow review of legislative intent and action).

already evident in the first significant case to apply the major questions doctrine since *West Virginia* was decided.

In *Brown v. Department of Education*,[165] a federal judge in the Northern District of Texas used the major questions doctrine to vacate the Department of Education's program to provide student loan forgiveness for certain borrowers. The Higher Education Relief Opportunities for Students Act of 2003 ("HEROES Act")[166] provides broad authority for the Secretary of Education to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs . . . as the Secretary deems necessary in connection with a war or other military operation or national emergency."[167] In August 2022, acting under this authority and the existing national emergency designation for COVID-19, the Secretary announced that the Department would provide targeted student debt cancellation to borrowers with loans held by the Department who had incomes below specified levels.[168] Borrowers who received Pell Grants would be eligible for $20,000 in debt cancellation and all others would be eligible for $10,000 in debt cancellation.[169] The plaintiffs in the case were two individuals—one whose loan was commercially held so that they were not eligible for relief, and one who did not receive a Pell Grant who was only eligible for $10,000 in debt cancellation—who claimed violations of the Administrative Procedure Act ("APA")[170] and that the program exceeded the department's authority under the major questions doctrine.[171]

In his decision in *Brown*, Judge Mark Pittman goes to great length at both the beginning and end of his decision to claim that it is not the role of the courts to determine whether the program is good

165. No. 4:22-CV-0908-P, 2022 WL 16858525 (N.D. Tex. Nov. 10, 2022).

166. 20 U.S.C. § 1098aa *et. seq.*

167. 20 U.S.C. § 1098bb(a)(1).

168. *Biden-Harris Administration Announces Final Student Loan Pause Extension Through December 31 & Targeted Debt Cancellation to Smooth Transition to Repayment*, U.S. DEP'T OF EDUC. (Aug. 24, 2022), https://www.ed.gov/news/press-releases/biden-harris-administration-announces-final-student-loan-pause-extension-through-december-31-and-targeted-debt-cancellation-smooth-transition-repayment [https://perma.cc/RT69-X7KH].

169. *Id.*

170. 5 U.S.C. §§ 551–559.

171. Brown v. U.S. Dep't of Educ., No. 4:22-CV-0908-P, 2022 WL 16858525, at *5 (N.D. Tex. Nov. 10, 2022).

public policy—its only role is to interpret the law.[172] However, as in the *West Virginia* case, the judge's reasoning in *Brown* raises real questions about the court's influence on policy results well beyond mere legal interpretation. A brief review of the decision in *Brown* illustrates how the problems identified in the *West Virginia* decision in the hands of an activist conservative judge ultimately direct a policy outcome of national importance.

Taking a cue from the Court's *West Virginia* decision, the judge in *Brown* took an aggressive stance on standing to establish jurisdiction to apply the major questions doctrine. Unlike the *West Virginia* case and its precursor cases, the administrative action in *Brown* did not involve the establishment of a particular regulatory regime or approach. In *Brown*, the regulatory program involved the provision of *benefits* which made it a challenge for the judge to find that the plaintiffs had suffered an injury.[173] Ultimately, the judge established that the plaintiffs had suffered injury in a violation of their procedural rights under the APA in that they had been denied an opportunity to comment on the debt cancellation program.[174] Yet, later in his decision, the judge acknowledged that "because the Program was issued under the HEROES Act, which exempts notice and comment, the Program did not violate the APA's procedural requirements."[175] So the judge established standing to apply the major questions doctrine via the alleged denial of a right to comment that he later acknowledged did not exist.

Having established standing, the judge promptly disposes of any *Chevron* analysis, noting in a footnote that:

> The major-questions doctrine's precise relationship to the *Chevron* framework is unclear, as the Court did not mention *Chevron* in [*West Virginia*]. Defendants stated at the preliminary-injunction hearing that *Chevron* does not apply if the major-questions doctrine applies . . . Nor does either party mention *Chevron* in their briefs. For

172. *Id.* at *1, n.1 ("The Court expresses no opinion on whether the Program constitutes sound or unsound public policy—a consideration inappropriate for the Court to contemplate—as it falls outside the Court's task of merely interpreting the law."); *id.* at *25 ("Whether the Program constitutes good public policy is not the role of this Court to determine.").

173. *Id.* at *11.

174. *Id.* at *13.

175. *Id.* at *18.

> those reasons, the Court reasons that *Chevron* is not applicable here. But even if it were applicable, the major questions doctrine compels the same result—the Secretary lacks "clear congressional authorization" to implement the Program—regardless of how the major-questions doctrine fits into the *Chevron* framework.[176]

Under the judge's reasoning, no *Chevron* analysis is necessary in a case involving the major questions doctrine.

The judge then applied the same flawed, unduly narrow analysis of congressional intent and authorization as the *West Virginia* decision. For example, the judge points to "Congress's extensive consideration of various bills attempting to forgive student loans and failure to pass such bills."[177] However, he fails to note in his decision that Congress also failed to pass several bills that would have prohibited the forgiveness or cancellation of student loan debt.[178] Similarly, the judge in *Brown* cites a Trump Administration opinion and a quote from the Speaker of the House that the Department lacks authority to forgive student loan indebtedness.[179] But, the judge fails to also cite a more contemporaneous Biden Administration opinion that reaches the opposite conclusion and details the severe deficiencies in the prior opinion.[180] As for the legal value of citing the Speaker, the judge acknowledges later in his decision that "the law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself."[181]

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176. *Id.* at *19.

177. *Id.* at *20.

178. *See* Student Loan Accountability Act, S. 4253, 117th Cong. (2022) (prohibiting the Departments of Education, Justice, or the Treasury from taking any action to cancel or forgive the outstanding balances, or portion of balances, of covered loans); Student Loan Accountability Act, H.R. 8006, 117th Cong. (2022) (same); Fairness for Responsible Borrowers Act, H.R. 8496, 117th Cong. (2022) (same).

179. *Brown*, 2022 WL 16858525, at *13.

180. Memo from Lisa Brown, Gen. Couns. Dep't of Educ., to Sec'y Miguel A. Cardona: The Sec'y's Legal Auth. for Debt Cancellation (Aug 23, 2022) https://www2.ed.gov/policy/gen/leg/foia/secretarys-legal-authority-for-debt-cancellation.pdf [https://perma.cc/R7DV-Z66U] ("Having reviewed the [Trump administration] memorandum in consultation with the Office of Legal Counsel, we have determined that although it accurately describes the core features of the HEROES Act, its ultimate conclusions are unsupported and incorrect. As such, it should be rescinded.").

181. *Brown*, 2022 WL 16858525, at *22 (citing Aldridge v. Williams, 44 U.S. (3 How.) 9, 24 (1845)).

While the judge in *Brown* and Justice Gorsuch in *West Virginia* both claim that they are only citing these facts to demonstrate the existence of a political question, the failure to even acknowledge these opposing facts that are counter to the results of these judicial decisions seems calculated to obscure the fact that neither supporters nor opponents of student loan forgiveness have been able to achieve their desired results through the legislative process. More importantly, it leads to the inevitable conclusion that the courts are choosing sides in an ongoing policy debate that is the purview of the Congress and the President.

The judge in *Brown* also seems to expand what is necessary to constitute clear congressional authority. While recognizing that the HEROES Act authorizes the Secretary to waive or modify requirements of the student loan program, the judge states that "[i]f Congress provided *clear* congressional authorization for $400 billion in student loan forgiveness via the HEROES Act, it would have mentioned loan forgiveness".[182] Under the judge's decision, the only waiver or modification of requirements that the Secretary can make are those that are explicitly named. But Congress clearly chose to provide broad flexible authority[183] to the Secretary and the judge's decision effectively eviscerates this provision in the face of clear congressional authorization. This is directly counter to the Supreme Court's direction in one of the few precursor major questions doctrine cases that actually found congressional authorization. In *Massachusetts v. EPA*,[184] the EPA claimed that it was powerless to act under a broad grant of congressional authority absent a more specific direction. The Court held that "[t]here is no reason, much less a compelling reason, to accept EPA's invitation to read ambiguity into a clear statute."[185] The same is true in *Brown*.

The *Brown* case shows that *West Virginia* is just the baseline for the near-term impact of the major questions doctrine. In this single case, the doctrine is extended from regulatory regimes to government

182. *Id.* (emphasis in original).

183. *See* 20 U.S.C. § 1098bb(a)(1) ("Notwithstanding *any* other provision of law . . . the Secretary of Education . . . may waive or modify *any* statutory or regulatory provision applicable to the student financial assistance programs . . . as the Secretary deems necessary.") (emphasis added).

184. 549 U.S. 497 (2007).

185. *Id.* at 531.

benefit programs, *Chevron* is sidelined from most future cases involving administrative action, and the definition of clear congressional authorization is expanded to require a degree of specificity that rarely exists in legislative schemes. These results flow directly from the inherent, unresolved problems imbedded in the *West Virginia* decision.

It will not be a long wait for the Supreme Court to provide its views on the first post-*West Virginia* application of the major questions doctrine. The Court scheduled arguments appealing the judge's ruling in *Brown* just months after it was handed down, without waiting for the Fifth Circuit to weigh in.[186] The Court has requested argument on the issues of standing and whether the Department's plan is statutorily authorized and was adopted in a procedurally proper manner.[187]

V. THE MAJOR QUESTIONS DOCTRINE AND LESSONS FROM PAST FINANCIAL CRISES

In *West Virginia*, the Court applied the major questions doctrine to government actions to address the existential threat posed by climate change. Yet much like the glaciers being impacted by a changing environment, the threat posed by climate change is measured in decades, and its impacts are steadily incremental.[188] This provides the space and time for the Court to debate whether the EPA's claimed authority is adequately supported by the statutory language and the agency's interpretation. Nothing in the Court's decision, however, indicates how the major questions doctrine will apply in circumstances where: immediate government intervention is needed, there is no time to debate the nuances of congressional intent, and even hesitancy to act by government officials can have devastating consequences.

This country has faced two existential financial crises in the span of just over a decade where government agencies played a vital

186. *See* Dep't of Educ. v. Brown, 143 S. Ct. 541 (2022) (mem.). The Court also agreed to hear at the same time a challenge to the student loan relief program by six states in *Biden v. Nebraska*, 143 S. Ct. 477 (2022) (mem.).

187. 143 S. Ct. at 541.

188. D.J. Wuebbles et al., *Executive Summary of* CLIMATE SCIENCE SPECIAL REPORT: FOURTH NATIONAL CLIMATE ASSESSMENT, VOLUME I (2017), https://science2017.globalchange.gov/chapter/executive-summary [https://perma.cc/C8X3-25D3] ("Global climate is projected to continue to change over this century and beyond. The magnitude of climate change beyond the next few decades will depend primarily on the amount of greenhouse (heat-trapping) gases emitted globally.").

role in protecting the financial system from a complete meltdown.[189] Unlike the slow-moving climate crisis, the 2008 financial crisis and the 2020 pandemic-induced financial crisis required government agencies to use general, broad statutory powers to address critical issues that required a response in hours or days rather than decades. In both instances, the tools available to financial regulators were based on broad statutory schemes legislated by past Congresses intent on providing flexible authority to address emergencies. Examining the government's actions and underlying authorities in these crises provides some insight and raises significant concerns about the application of the major questions doctrine in crisis.

In 2008, the country faced its most severe crisis since the Great Depression.[190] Wall Street "had gone from celebrating its most profitable age to finding itself on the brink of an epochal devastation. Trillions of dollars in wealth had vanished and the financial landscape was entirely reconfigured."[191] This near-collapse of the financial system required a government rescue effort with no precedent in modern history. Although "[t]he powers of the government's crisis managers initially proved insufficient to stop the panic,"[192] the response would ultimately involve "an extraordinary barrage of emergency interventions."[193]

To address the rapidly escalating financial emergency facing the country, federal financial regulators took several important actions, but their interpretations and use of three key statutory authorities stood out and proved to be the most significant in responding to the crisis. The Department of the Treasury ("Treasury") used the Exchange Stabilization Fund ("ESF") created in Section 10 of the Gold Reserve

189. Andrew Osterland, *Here Are Key Ways The Coronavirus Crisis Differs From The Great Recession*, CNBC (May 27, 2020), https://www.cnbc.com/2020/05/27/here-are-key-ways-coronavirus-crisis-differs-from-the-great-recession.html [https://perma.cc/HL8H-C33S] ("For the second time in 12 years, the U.S. economy and financial markets are facing an unexpected crisis of uncertain proportions.").

190. BEN S. BERNANKE, TIMOTHY F. GEITHNER, & HENRY M. PAULSON, JR., FIREFIGHTING: THE FINANCIAL CRISIS AND ITS LESSONS 5 (2019) ("In fact, the financial shocks of 2008 were by some measures greater than the shocks before the Great Depression, an so was the initial economic impact.").

191. ANDREW ROSS SORKIN, TOO BIG TO FAIL: THE INSIDE STORY OF HOW WALL STREET AND WASHINGTON FOUGHT TO SAVE THE FINANCIAL SYSTEM AND THEMSELVES 3 (2009).

192. Bernanke et. al., *supra* note 190, at 5.

193. *Id.* at 2.

Act of 1934[194] to stabilize a run on money market mutual funds.[195] The Fed used its authority under Section 13(3) of the Federal Reserve Act of 1913[196] to create new lending facilities to restore liquidity and provide direct assistance to financial firms. The FDIC created a program to guarantee the debt of certain banks and financial firms. It also expanded depository insurance coverage through the use of the systemic risk exception added to the Federal Deposit Insurance Act[197] in 1991 as part of the Federal Deposit Insurance Corporation Improvement Act ("FDICIA"),[198] giving it flexibility from its statutory mandate to resolve failed financial institutions at the least cost to the deposit insurance fund.[199] All of these programs involved novel or unprecedented exercises of agency authority, and it is important to examine how they might have fared under the Court's new major question doctrine. A summary of each program is first provided.

A. Treasury and the Exchange Stabilization Fund

The ESF was established by Section 10(a) of the Gold Reserve Act of 1934.[200] Its original purpose was to stabilize the exchange value of the dollar.[201] Over time, the language and purpose was expanded to authorize short-term loans to foreign countries facing a financial crisis which would be used primarily in Latin America and the Caribbean, including Brazil and Mexico.[202]

In 2008, following the bankruptcy of Lehman Brothers, a money market mutual fund[203] named the Reserve Primary Fund "broke the

194. Pub. L. No. 73-87, § 10, 48 Stat. 337, 341 (1934).

195. *Treasury Announces Temporary Guarantee Program for Money Market Funds*, DEP'T OF TREASURY (September 29, 2008), https://home.treasury.gov/news/press-releases/hp1161 [https://perma.cc/PWS4-S7RU].

196. *See* 12 U.S.C. § 343.

197. *See* 12 U.S.C. § 1811 *et. seq*.

198. Pub. L. No. 102-242, 105 Stat. 2236–2392 (1991) (codified as amended in scattered sections of 12 U.S.C.).

199. *See* 12 U.S.C. § 1823(c)(4)(G).

200. Pub. L. No. 73-87, § 10, 48 Stat. 337, 341 (1934) (codified today at 31 U.S.C. §5302).

201. CONG. RSCH. SERV., IF11474, TREASURY'S EXCHANGE STABILIZATION FUND AND COVID-19 (April 10 2020), https://crsreports.congress.gov/product/pdf/IF/IF11474 [https://perma.cc/K2JE-C5DH (dark archive)] [hereafter TREASURY'S EXCHANGE STABILIZATION FUND].

202. *Id.*

203. A money market mutual fund is a mutual fund that can only invest in high quality, short-term debt securities. They are commonly considered as safe alternatives to

buck,"[204] triggering a run in the industry of more than $250 billion.[205] These funds "provided vital day-to-day liquidity that was the lifeblood of . . . many real economy companies."[206] To stop the run, Treasury announced an optional program to guarantee deposits in participating money market funds.[207] Treasury would finance any losses from this guarantee with assets in the ESF.[208] Treasury announced this program without seeking specific congressional authorization, justifying the program on the grounds that Congress had provided broad discretion to the Secretary to administer the fund and that guaranteeing money market funds would protect the value of the dollar.[209]

B. The Fed and Section 13(3)

Since it was created in 1913, the Fed has regularly exercised its authority[210] to provide credit to depository institutions in both normal and crisis times.[211] But the Fed could not extend credit under its usual authority to many of the firms in need of funding during the 2008 financial crisis, such as Bear Stearns or AIG, because they were not depository institutions. To provide assistance to the many non-depository institutions that were creating havoc during the financial crisis, the Fed turned to its authority under Section 13(3) of the Federal Reserve Act.[212]

At the time of the 2008 crisis, the Fed could extend credit under Section 13(3) to any individual, partnership, or corporation in "unusual and exigent" circumstances.[213]

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bank deposits, although they are not federally insured like bank deposits. CONG. RSCH. SERV., IF11320, MONEY MARKET MUTUAL FUNDS: A FINANCIAL STABILITY CASE STUDY (March 24, 2020), https://crsreports.congress.gov/product/pdf/IF/IF11320 [https://perma.cc/M2P3-ABXC (dark archive)] [hereinafter MONEY MARKET MUTUAL FUNDS].

204. The value of the fund's shares fell below one dollar, meaning that investors could lose money on their investment.

205. MONEY MARKET MUTUAL FUNDS, *supra* note 203.

206. Bernanke et. Al., *supra* note 190, at 76.

207. DEP'T OF TREASURY, *supra* note 195.

208. *Id.*

209. MONEY MARKET MUTUAL FUNDS, *supra* note 203, at 2.

210. *See* 12 U.S.C. § 347(b).

211. FIRST RESPONDERS: INSIDE THE U.S. STRATEGY FOR FIGHTING THE 2007-2009 GLOBAL FINANCIAL CRISIS 148 (Ben S. Bernanke, Timothy F. Geithner & Henry M. Paulson, Jr., eds., 2020).

212. *See* 12 U.S.C § 343 *et seq.*

213. *Id.*

Before 2008, the Fed extended credit using its emergency authority only during the Great Depression. During that period, it made approximately $1.5 million in loans to individuals, partnerships and corporations secured by various types of assets. Among the borrowers were a vegetable farmer and a typewriter manufacturer.[214]

The Fed would ultimately extend credit in 2008 to non-depository institutions totaling hundreds of billions of dollars under this authority.[215] In addition to direct extensions of credit, the Fed used its Section 13(3) authority to establish special purpose vehicles to facilitate lending and to create numerous broad-based lending facilities.[216]

C. The FDIC and the Temporary Liquidity Guarantee Program

Following a number of bank failures in the 1980s and early 1990s, Congress was concerned that the manner in which the FDIC handled the resolution of failed banks had resulted in uninsured depositors and creditors being protected from loss in addition to insured depositors.[217] In 1991, Congress passed FDICIA,[218] which required any failed bank resolution to "be undertaken at the least cost to the deposit insurance fund."[219] However, a provision of the Act known as the "systemic risk exception" ("SRE") allowed the FDIC to elect to protect uninsured depositors and creditors—even at an increased cost to the deposit insurance fund—if there was a determination that a failed bank resolution would otherwise result in systemic risk to the financial system.[220]

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214. FIRST RESPONDERS, *supra* note 211, at 151.

215. *Id.*

216. Facilities created by the Fed included the Primary Dealer Credit Facility ("PDCF"), Term Securities Lending Facility ("TSLF"), Asset-Backed Commercial Paper Money Market Mutual Fund Liquidity Facility ("AMLF"), Single-Tranche Term Repurchase Agreements, Commercial Paper Funding Facility ("CPFF"), Money Market Investor Funding Facility ("MMIFF"), and Term Asset-Backed Securities Loan Facility ("TALF"). *See generally* BD. OF GOVERNORS OF THE FED. RSRV. SYS., THE FEDERAL RESERVE'S SECTION 13(3) LENDING FACILITIES TO SUPPORT OVERALL MARKET LIQUIDITY: FUNCTION, STATUS, AND RISK MANAGEMENT (2010), https://oig.federalreserve.gov/reports/FRS_Lending_Facilities_Report_final-11-23-10_web.pdf [https://perma.cc/9SQA-SBUW].

217. FDIC, CRISIS AND RESPONSE: AN FDIC HISTORY, 2008–2013 36 (2018).

218. Pub. L. No. 102-242, 105 Stat. 2236–2392 (1991) (codified as amended in scattered sections of 12 U.S.C.).

219. FDIC, *supra* note 217, at 36.

220. *Id.*

Under the statute, the FDIC could not invoke the SRE on its own authority. Reflecting the extraordinary nature of the authority, the decision to trigger the SRE could be made only by the Secretary of the Treasury, in consultation with the President and only with a written recommendation of a two-thirds majority of both the FDIC and Fed boards.[221] In October 2008, these requirements were satisfied and the SRE was invoked to create the Temporary Liquidity Guarantee Program ("TLGP").[222]

The TLGP had two important parts. First, it provided a guarantee for newly-issued debt of banks, thrifts, and their holding companies to free up interbank lending which was effectively frozen.[223] In addition, it fully guaranteed certain non-interest-bearing transaction deposit accounts, even above the insured deposit limit.[224] This unlimited guarantee was to stabilize deposit accounts mostly for businesses that might otherwise be inclined to withdraw their money above the insured deposit limit if they believed that their bank was at risk of failure.[225]

The TLGP was unprecedented for the FDIC in that it provided a guarantee for debt in addition to the deposits that had traditionally been insured by the agency, a significant expansion of its authority. To create this broad program, the FDIC also had to reinterpret its authority under the SRE to broaden its application from a single institution to an interpretation that permitted system-wide assistance.[226]

D. Analyzing the 2008 Emergency Actions by the Financial Regulators Under the Major Questions Doctrine

Based on the tests laid out in *West Virginia*, any litigation challenging the actions and authority of the Treasury, Fed, and FDIC in 2008 likely would have been reviewed under the *West Virginia* major questions doctrine if it had been in effect during the financial crisis. There is not much doubt that the actions of the federal financial regulators satisfied the first part of the *West Virginia* Court's major

221. *See* 12 U.S.C. § 1823(c)(4)(G).
222. FDIC, *supra* note 217, at 36.
223. *Id.* at 44.
224. *Id.* at 51.
225. *Id.* at 52.
226. *Id.* at 41.

questions test. All three agencies in their own ways were attempting to resolve matters of "great political significance."[227] Fewer issues are of greater political and economic significance than the imminent collapse of the nation's economy. Their regulatory actions also would ultimately affect a significant portion of the American economy and place billions of dollars of government funds at risk, although actual losses ultimately would be offset by revenue generated by the programs.[228] As the first part of the major questions doctrine analysis is clear that the federal regulators' actions in 2008 constituted a major question, the real issue for analysis is whether the Court in applying the doctrine would have found sufficient congressional authorization in each case to justify the regulators' actions.

Treasury's use of the ESF to provide a guarantee for money market mutual funds was the first time the ESF was ever used in this manner.[229] Commenters have noted that "[i]n mid-September 2008, Treasury did not have broad powers to address a financial crisis, and it used [ESF] authority in an extraordinary and innovative way to stem the runs on money market mutual funds that threatened the financial system following Lehman's failure."[230] Expanding well beyond its prior use for foreign financial crises, this action "was certainly novel and creative."[231]

While it could be argued that the use of the ESF was "well within the discretion of the secretary under Section 10 of the Gold Act,"[232] a court applying the major questions doctrine might well focus on the history and usage of the statutory authority to address foreign financial crises as opposed to its usage in 2008 to provide a guarantee for domestic money market mutual funds. This new use of the authority was unlike any past use, and the Treasury's argument that a collapse of the money market mutual funds could affect the value of the dollar was tortured enough that a court might have found that the new usage was

227. West Virginia v. EPA, 142 S. Ct. 2587, 2620 (2022).

228. BAIRD WEBEL & MARC LABONTE, CONG. RSCH. SERV., R43413, COSTS OF GOVERNMENT INTERVENTIONS IN RESPONSE TO THE FINANCIAL CRISIS: A RETROSPECTIVE (September 12, 2018) https://crsreports.congress.gov/product/pdf/R/R43413/6 [https://perma.cc/TE75-9J9W (dark archive)] ("Altogether, realized gains across the various programs exceed realized losses by tens of billions of dollars.").

229. FIRST RESPONDERS, *supra* note 211, at 163.

230. *Id.*

231. *Id.*

232. *Id.*

beyond anything contemplated by Congress.[233] The Treasury's use of the ESF in 2008 arguably runs afoul of the Court's view that the mere plausibility of the statutory interpretation is not sufficient if it effects a major programmatic change.[234]

The Fed's use of its 13(3) authority in 2008 also likely would have faced scrutiny under the major questions doctrine if it had been in place at that time and its actions had been subject to legal challenge. Unlike Treasury's use of the ESF, the Fed had relatively clear statutory authority to be exercised in "unusual and exigent circumstances,"[235] and its actions were closely related to its assigned mission. By its very terms, the authority is to be used sparingly in extraordinary circumstances. Still, the statutory authority had not been used since the Great Depression, and then, it was used only to provide limited assistance to a small group of non-depository institutions.[236] The Fed's expansive use of 13(3) in 2008 to provide direct lending to one of the world's largest insurance companies, AIG, and to implement a wide range of credit facilities to support vast sectors of the financial industry was breathtakingly broader than any prior use or any use that might have been anticipated by Congress. Unlike in the Treasury example, the Fed's authority was clear, but the "history and the breadth of the authority"[237] and the "economic and political significance"[238] of its application likely would provide the Court a "reason to hesitate before concluding that Congress meant to confer such authority."[239] This was especially true with regard to the Fed's use of this authority to create broad-based industry assistance programs.

While the Treasury's actions involved the novel interpretation of a statute, and the Fed's actions involved a newly expansive use of statutory authority, the FDIC's quest for statutory authority to implement the TLGP was broader than either of those two agencies. The FDIC Board knew at the time that its actions were "perhaps the

233. West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022) (citation omitted) ("Nor does Congress typically use oblique or elliptical language to empower an agency to make a 'radical or fundamental change' to a statutory scheme.").

234. *Id.* at 2608.

235. 12 U.S.C. § 343(3)(A).

236. FIRST RESPONDERS, *supra* note 211, at 151.

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

238. *Id.*

239. *Id.* (internal quotation omitted).

most extraordinary ever taken by an FDIC Board."[240] A 2010 GAO Report found that:

> Some have noted that under a possible reading of the exception, the statute may authorize assistance only to particular institutions, based on those institutions' specific problems, not, as was done in creating TLGP, systemic risk assistance based on problems affecting the banking industry as a whole. Treasury, FDIC, and the Federal Reserve considered this and other legal issues in recommending and making TLGP determination. The agencies believe the statute could have been drafted more clearly and that it can be interpreted in different ways. They concluded, however, that under a permissible interpretation, assistance may be based on industry-wide concerns . . . . Under this reading, the agencies believe the statutory criteria were met in the case of TLGP and that the assistance was authorized.[241]

The FDIC not only interpreted a vague statutory term; it converted language designed to address issues caused by a single firm into language that permitted aid on an industry-wide basis. A broad usage of a long-extant, vague statute to create a program that expanded the agency's mission of insuring deposits to guaranteeing the debt of certain financial firms is exactly the kind of action that the Court said would give it pause under the major questions doctrine.[242]

The FDIC understood that the action it was taking was novel and potentially controversial. Prior to announcing that it was taking this action, the FDIC provided select members of Congress with advance notice of its intended actions and did not receive any objections before proceeding.[243] Perhaps the congressional acquiescence in the creation

240. FDIC, *supra* note 217 at 41.

241. U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-100, FEDERAL DEPOSIT INSURANCE ACT: REGULATORS' USE OF SYSTEMIC RISK EXCEPTION RAISES MORAL HAZARD CONCERNS AND OPPORTUNITIES EXIST TO CLARIFY THE PROVISION 18 (April 2010) https://www.gao.gov/assets/gao-10-100.pdf [https://perma.cc/T2NP-VQ4C]; *see also* Lissa L. Broome, *Extraordinary Government Intervention to Bolster Bank Balance Sheets*, 13 N.C. BANKING INST. 137 (2009).

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

243. FDIC, *supra* note 217 at 41.

of the TLGP would constitute the kind of authorization that Court is seeking. But the fact that there was no vote and that only a handful of congressional members were consulted illustrates the difficulties created by the doctrine's foundational requirement of congressional intent and the inevitable issues that arise in emergencies.

The actions by the federal financial agencies during the 2008 financial crisis "managed to stop the panic, stabilize the financial system, revive the credit markets, and jump-start a recovery . . . that compares favorably to recoveries from previous severe financial crises and the recoveries of other advanced economies from this crisis."[244] The actions by the agencies, however, were not without critics, and those actions would come under public and congressional scrutiny once the immediate crisis had passed.[245]

E. Congress Redefines Powers and Reauthorizes Them in the Pandemic

Even while the 2008 financial crisis raged, Congress had concerns about Treasury's actions and moved quickly to restrict its discretion with regard to the ESF. The Emergency Economic Stabilization Act ("EESA"),[246] which passed less than a month after Treasury used the ESF to guarantee money market funds, provided $700 billion for the purchase of distressed assets under the Temporary Asset Relief Program ("TARP").[247] It also included language prohibiting the Secretary from using ESF funds for a future guarantee program for money market mutual funds and directed the Secretary to reimburse the ESF for any funds used for the program.[248]

EESA, however, would not be the last word on the use of the ESF to guarantee money market funds and to support actions to address a financial crisis. In 2020, facing a developing financial crisis resulting from the COVID-19 pandemic, Congress would revive authorization for

244. Bernanke et. al., *supra* note 190 at 110.

245. *See* FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES (Feb. 2011), https://www.govinfo.gov/content/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf [https://perma.cc/J4HK-4WFG].

246. Pub. L. No. 110–343, 122 Stat. 3765–3933.

247. *Id.* § 131, 122 Stat. at 3797.

248. *Id.*

the use of the ESF as part of the Coronavirus Aid, Relief, and Economic Security (CARES) Act.[249] Section 4015 of the Act temporarily suspended the 2008 statutory prohibition on the use of the ESF enacted in the Economic Stabilization Act of 2008[250] to again permit a guarantee for customers of money market funds and to appropriate any funds paid out from the ESF in excess of fees under that guarantee. Congress even expanded the authority and provided Treasury with up to $500 billion through the ESF to support loans, loan guarantees, or investments to assist eligible businesses, states, and municipalities affected by COVID-19 until the end of 2020.[251] The ESF was used not only to stabilize the money market mutual fund industry again, but the bulk of the funds were used to support facilities established by the Fed to provide liquidity to the financial system and to cover future losses. These included facilities to support corporate bonds, commercial paper, asset-backed securities, money market funds, and municipal debt, among others.[252]

Like the actions of Treasury, the Fed's actions to address the 2008 financial crisis came under scrutiny following the crisis, and Congress saw a need to circumscribe the broad 13(3) statutory authority to provide assistance to non-depository institutions. In 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act")[253] to comprehensively address issues regarding the causes of and response to the financial crisis from two years earlier. In the Dodd-Frank Act, Congress made significant changes to the Fed's 13(3) authority. For example, it eliminated the Fed's ability to lend to individual failing firms. It required that future extensions of emergency credit only be through broad-based lending facilities to help the entire financial system and it eliminated the ability of the Fed to take assets off the balance sheets of failing firms.[254]

The Fed's Section 13(3) authority was also resurrected with the onset of the COVID-19 pandemic. In the early days of the pandemic,

249. Pub. L. No. 116–136, 134 Stat. 281–615.

250. Pub. L. No. 110-343, § 131, 122 Stat. 3765, 3797 (codified as amended at 12 U.S.C. § 5236 (2008)).

251. TREASURY'S EXCHANGE STABILIZATION FUND, *supra* note 201.

252. *Id.*

253. Pub. L. No. 111–203, 124 Stat. 1376–2223 (2010) (codified as amended in sections of 12 U.S.C. and 15 U.S.C.).

254. *Id.* § 1101(a), 124 Stat. at 1985 (codified as amended in 12 U.S.C. § 343 (2010)).

the Fed moved aggressively to stem the financial damage from the economic shutdowns in the country. Within the parameters established by the Dodd-Frank Act and with a $500 billion appropriation in the CARES Act to Treasury to support its programs, the Fed set up a series of emergency facilities in response to COVID-19 to expand its lender of last resort role to other sectors of the economy. The Fed created facilities to assist commercial paper markets, corporate bond markets, money market mutual funds, primary dealers, asset-backed securities, states and municipalities, and a Main Street Lending Program for mid-size businesses and nonprofits. It also created a facility to make funds available for lenders to make loans to small businesses through the Paycheck Protection Program (another CARES Act program) . . . . Assistance outstanding under these facilities peaked at nearly $200 billion in April 2020 but hovered around $100 billion for the rest of the year. Treasury pledged $215 billion to backstop potential losses on these facilities.[255]

With congressional support, the Fed's revised 13(3) powers were used extensively in 2020 to create lending facilities to support the economy. Congress, in some instances, even tasked the Fed to use its authority even more expansively through programs like the Main Street Lending Facility.[256]

As was the case with the authorities exercised in the 2008 crisis by Treasury and the Fed, Congress acted aggressively to restrict the ability of the FDIC to create a TLGP program in the future once the crisis had passed. In Section 1105(d) of the Dodd-Frank Act,[257] Congress required that any future program of this nature be requested by the President and that Congress would be required to pass a joint resolution for it to go into effect. Thus, Congress ensured that any future program like the TLGP could be created only with its express authorization.

With the onset of the COVID-19 pandemic and its attendant financial issues, the FDIC's TLGP authority too would be revived by

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255. CONG. RSCH. SERV., R46411, THE FEDERAL RESERVE'S RESPONSE TO COVID-19: POLICY ISSUES (Feb. 8, 2021), https://crsreports.congress.gov/product/pdf/R/R46411 [https://perma.cc/5L39-DJUH (dark archive)].

256. *See* NICK TIMIRAOS, TRILLION DOLLAR TRIAGE: HOW JAY POWELL AND THE FED BATTLED A PRESIDENT AND A PANDEMIC—AND PREVENTED ECONOMIC DISASTER 199 (2022).

257. Pub. L. No. 111-203 § 1105(d), 124 Stat. 1376, 2121 (codified as amended at 12 U.S.C. § 5612).

Congress. Congress included an authorization for the FDIC to establish a program to guarantee bank debt in Section 4008 of the CARES Act.[258] It also authorized the FDIC to provide an unlimited guarantee for non-interest-bearing deposit accounts as it did in 2008. Despite the congressional authorization, neither of these programs would prove necessary during the pandemic and the authorization expired at the end of 2020.

Through the CARES Act, Congress acted swiftly in an emergency to provide necessary authority for the federal financial regulators to act quickly and forcefully to address the financial issues created by the COVID-19 pandemic. However, the statutory authorities provided in response to the pandemic have generally expired, leaving regulators concerned about the next crisis. In comparing current statutory authority to the authority used to address the 2008 financial crisis, some regulators have noted that "the crisis managers of tomorrow will have less authority and less flexibility to take action to support the financial system than we had."[259]

VI. WHAT DOES THE MAJOR QUESTIONS DOCTRINE MEAN FOR THE FUTURE OF FINANCIAL REGULATION?

The likelihood that actions by financial regulators could be challenged or invalidated under the major questions doctrine are best examined across a spectrum. On one end of the spectrum are regulatory actions where statutes provide a high level of detail and the statutory authority is relatively new. The middle of the spectrum is occupied by the vast bulk of financial regulations which are based on broad expressions of congressional authority, in many cases decades old. At the opposite end of the spectrum are regulatory actions involving emerging financial issues or products, such as cryptocurrency, where Congress has not yet acted.

Based on the Court's desire to see clear congressional statements of authorization, regulatory actions where statutes provide a high level of detail or there is a recent history of congressional involvement would seem to have the best chance of surviving legal

258. Pub. L. No. 116-136 § 4008, 134 Stat. 281, 478 (codified as amended at 12 U.S.C. § 5612).

259. Bernanke et. al., *supra* note 190, at 120.

challenge. For example, many actions taken by financial regulators to avert economic disaster could have been challenged or even invalidated under the major questions doctrine if that had been the controlling legal standard in 2008. Facing the collapse of the financial system, Treasury's use of the Exchange Stabilization Fund, the Fed's use of its Section 13(3) authority and the FDIC's use of the systemic risk exception to create the TLGP all involved novel or expansive interpretations of long dormant or newly interpreted statutory authority.[260]

Yet, it was Congress, not the courts, that determined the agencies had overreached and acted to either constrain, redefine, or reauthorize each of these programs through legislative action in the Dodd-Frank Act, the CARES Act, and other legislation. At the same time, the Dodd-Frank Act added additional provisions to create a broad integrated scheme for addressing systemic risks in the financial system.[261] In 2020, when the nation faced a financial crisis connected to the COVID-19 pandemic, Congress revived, and in some cases expanded, these programs[262] as the government attempted to lessen the impact of shutdowns and declining economic activity. The specific statutory changes and the continued interaction with Congress to fine-tune statutory authority would seem to exemplify the type of regulatory action backed by congressional authorization that the Court deems essential, and these changes should insulate at least these emergency powers from future challenge under the Court's new doctrine.

While agency actions to exercise the Dodd-Frank emergency powers would appear likely to pass congressional muster, the risk is that the powers may be seen as "fighting the last war," and the Court would invalidate the usage of these authorities to address similar but novel issues that create a financial crisis or its use might not be necessary for decades in the future. Nonetheless, these provisions evidence some of the clearest statements of congressional authorization in the financial realm given how infrequently Congress passes financial legislation.

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260. *See supra* Part V.

261. *See, e.g.*, provisions of the Dodd-Frank Act that establish: leverage and risk-based capital requirements, Pub. L. No. 111-203 § 171, 124 Stat. 1376, 1435; enhanced supervision and prudential standards for nonbank financial companies supervised by the Fed, § 161, 124 Stat. at 1423; and orderly liquidation authority for the resolution of failed non-bank financial entities, § 201 *et. seq.*, 124 Stat. at 1442 *et seq.*).

262. *See supra* Part V.

The application of the major questions doctrine to the traditional, non-emergency authorities of the federal financial regulators is not as clear. Much of the current regulatory structure has its origins in the aftermath of the Great Depression[263] or earlier, and the general grants of authority to the financial regulators are broad. For example, the Fed's statutory charge is to "promote effectively the goals of maximum employment, stable prices, and moderate long-term interest rates."[264] The FDIC is statutorily authorized to "insure . . . the deposits of all banks and savings associations."[265] The Securities and Exchange Commission's responsibility for "protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation"[266] is derived from several statutes.[267] The newest financial regulatory agency, the Consumer Finance Protection Bureau (CFPB), is similarly authorized by Congress to "regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws."[268] Today's financial regulatory landscape is comprised of a combination of these general authorities and more specific statutes, often with their own broad statements of authority. Over time, the federal financial regulators have implemented various regulatory schemes to achieve their statutory mandates.

The *West Virginia* Court held that if there is a question as to whether statutory language is sufficient to authorize the agency action, "something more than a merely plausible textual basis for the agency action is necessary"—the agency instead must point to "clear congressional authorization" for the power it claims.[269] Yet as Justice Kagan pointed out in her dissent in *West Virginia*, "A broad term is comprehensive, extensive, wide-ranging; a 'vague' term is unclear,

263. *See* CONG. OVERSIGHT PANEL, SPECIAL REPORT ON REGULATORY REFORM: MODERNIZING THE AMERICAN FINANCIAL REGULATORY SYSTEM: RECOMMENDATIONS FOR IMPROVING OVERSIGHT, PROTECTING CONSUMERS, AND ENSURING STABILITY (Jan. 2009) 1–6, https://www.govinfo.gov/content/pkg/CPRT-111JPRT47018/pdf/CPRT-111JPRT47018.pdf [https://perma.cc/BW3V-5Z3V].

264. 12 U.S.C. § 225a.

265. 12 U.S.C. § 1811(b).

266. *What We Do*, SEC, https://www.sec.gov/about/what-we-do [https://perma.cc/CQB3-B5SX] (last visited Feb. 4, 2023).

267. Statutes authorizing regulatory action by the SEC include, among others, the Securities Act of 1933, 15 U.S.C. § 77a *et seq*.; the Securities Exchange Act of 1934, U.S.C. § 78a *et seq.*; the Investment Company Act of 1940, 15 U.S.C. § 80a-1–80a-64; and the Investment Advisers Act of 1940, 15 U.S.C. §80b-1–80b-21.

268. 12 U.S.C. § 5491.

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

ambiguous, hazy."[270] She also described the logical basis for Congress providing broad delegations of authority.

> Members of Congress often can't know enough—and again, know they can't—to keep regulatory schemes working across time. Congress usually can't predict the future—can't anticipate changing circumstances and the way they will affect varied regulatory techniques. Nor can Congress (realistically) keep track of and respond to fast-flowing developments as they occur. Once again, that is most obviously true when it comes to scientific and technical matters . . . . So for this reason too, a rational Congress delegates. It enables an agency to adapt old regulatory approaches to new times, to ensure that a statutory program remains effective . . . . Over time, the administrative delegations Congress has made have helped to build a modern Nation.[271]

In this way, these broad grants of authority have permitted the financial regulatory agencies to perform their responsibilities in the face of constant change and innovation in the financial industry for the better part of a century.

In addition to their broad grants of regulatory authority, "the prudential regulators have fairly detailed and explicit statutory authority vested in them, including the duty to ensure 'safety and soundness' in the banking system. As a result, it has remained relatively unusual for the prudential bank regulators to be dragged into courtroom battles relative to other agencies."[272] Although providing detailed and explicit statutory authority, many of these statutes are decades-old and contemplate issues, such as financial stability, that have remained constant while being applied to a financial universe that could not have been imagined when Congress enacted those statutes.

It is in this regulatory space where the major questions doctrine is likely to be a factor for the immediate future. Within days of the Court's *West Virginia* decision, opponents of the Securities and Exchange Commission's ("SEC") proposed rule to enhance financial

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270. *Id.* at 2630.

271. *Id.* at 2642.

272. Brendan Pedersen, *What The End Of 'Chevron Deference' Could Mean For Banks*, AM. BANKER (June 12, 2022), https://www.americanbanker.com/news/what-the-end-of-chevron-deference-could-mean-for-banks [https://perma.cc/2UNG-BET3].

disclosures related to climate change[273] announced their intention to challenge the rule under the major questions doctrine.[274] They raise the full spectrum of challenges available under the major questions doctrine, including imposing broad changes on the economy, lack of expertise by the agency, new understanding of an old statute, expanding the agency's authority, and adopting a measure that Congress has considered and declined to act upon.[275] This challenge clearly illustrates the breadth of arguments available to opponents of regulatory action under the major questions doctrine.

Despite Chief Justice Roberts's argument for the application of the major questions doctrine in "extraordinary circumstances,"[276] it has already become the go-to tool for those wishing to challenge regulatory actions by financial regulators. In addition to the SEC climate change rule, Opponents of agency actions have cited the doctrine to challenge a host of existing and proposed financial regulations, especially by the SEC[277] and the CFPB,[278] including actions that would seem to be well

273. SEC, 17 CFR 210, 229, 232, 239, AND 249, THE ENHANCEMENT AND STANDARDIZATION OF CLIMATE-RELATED DISCLOSURES FOR INVESTORS (March 2022), https://www.sec.gov/rules/proposed/2022/33-11042.pdf [https://perma.cc/9D8D-PVKL].

274. *See* Paul Atkins & Paul Ray, *The SEC's Climate Rule Won't Hold Up in Court*, WALL STREET J. (July 12, 2022), https://www.wsj.com/articles/the-sec-climate-rule-wont-hold-up-in-court-west-virginia-epa-agency-congress-11657659630 [https://perma.cc/GXQ3-2RU3 (dark archive)].

275. *Id*.

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

277. Letter from Rep. McHenry, et. Al. to SEC Chairman Gary Gensler (Sept. 20, 2022), https://republicans-financialservices.house.gov/uploadedfiles/2022-09-0_final_mchenry_granger_comer_letter_to_sec_re_west_virginia_v._epa.pdf [https://perma.cc/GA86-H8QW]. In this letter, the authors pointedly question whether several SEC rulemakings and proposed regulations satisfy the requirements of the major questions doctrine: (1) "The Enhancement and Standardization of Climate-Related Disclosures for Investors;" (2) "Special Purpose Acquisition Companies, Shell Companies, and Projections;" (3) "Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure;" (4) "Amendments to Exchange Act Rule 3b-16 Regarding the Definition of 'Exchange;' Regulation ATS for ATSs That Trade U.S. Government Securities, NMS Stocks, and Other Securities;" (5) "Further Definition of 'As a Part of a Regular Business' in the Definition of Dealer and Government Securities Dealer;" and (6) "Regulation Crowdfunding, an 11 page bill that was turned into hundreds of pages of regulatory requirements."

278. Letter from Rep. McHenry, et. Al. to CFPB Dir. Rohit Chopra (Sept. 20, 2022), https://republicans-financialservices.house.gov/uploadedfiles/2022-09-20_final_mchenry_comer_letter_to_cfpb_on__west_virginia_v._epa.pdf [https://perma.cc/SQX8-C48Y] (questioning whether the expanding major questions doctrine implicates CFPB regulatory actions regarding 1) an interpretive rule expanding the authority of States to enforce the Consumer Financial Protection Act of 2010; 2) an advisory opinion expanding Equal Credit Opportunity (Regulation B); as well as making revocations

within the normal regulatory activity of the agency. The major questions doctrine also has been cited in litigation that goes beyond regulations to challenge the CFPB's recent update to the Unfair, Deceptive, or Abusive Acts or Practices ("UDAAP") section of its examination manual.[279] The major questions doctrine has even been used to question personnel decisions of financial regulators.[280] Opponents of actions by the financial regulators will continue to attempt to use the major questions doctrine as a foundation of their challenges until the courts set some limits on its application.

The most extreme circumstance on the major questions spectrum, and perhaps the most problematic, is where there is a clear need for financial regulation, and may be a need for emergency action, but the situation involves a new or evolving issue where Congress has not anticipated the issue and has not responded to it specifically. The absence of a regulatory scheme for digital assets and cryptocurrency where agencies are attempting to regulate under their general authority and Congress has so far not acted is a prime example of this kind of issue. Proponents of digital assets recognize this existing gap in the regulatory scheme and the dangers it presents, and they are urging Congress to act quickly to provide clear authority to regulators.[281] In the absence of congressional action, some are advocating for at least some regulatory action under the agencies' general authorities to

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or unfavorable changes to the terms of existing credit arrangements; 3) an advisory opinion interpreting the Fair Credit Reporting Act with respect to name-only matching procedures; and 4) an interpretive rule limiting the Fair Credit Reporting Act's preemption authority.

279. Compl., Chamber of Com. Of the U.S. v. CFPB, No. 6:22-cv-00381 (E.D. Tex. Sept. 28, 2022), available at perma.cc/LPH6-XH2U.

280. Letter from Utah Att'y Gen. Sean Reyes & Sixteen State Att'ys Gen. to Acting Comptroller of the Currency Michael Hsu (Sept. 29, 2022), https://ago.wv.gov/Documents/2022-09-29%20Utah%20Letter%20to%20Hsu%20re%20Climate%20Risk%20Officer.pdf [https://perma.cc/W9QG-46RA] (expressing concerns about the validity of the OCC's hiring of Chief Climate Risk Officer).

281. Tomicah Tillemann, JP Schnapper-Casteras, & James Rathmell, *How the Supreme Court's EPA Decision Could Shape the Future of Web3*, HAUN VENTURES (Aug. 14, 2022) ("Although *West Virginia v. EPA* tackled the enduring problems of climate change and national energy supply, nowhere is this jurisprudential evolution likely to prove more consequential than the regulation of emerging technologies . . . . [G]reater statutory and regulatory clarity will benefit all involved.") https://mirror.xyz/haunventures.eth/eHHX2-cG5pqB-frgB2qJBwnQDcnXT8Of92XRVzRDRYA [https://perma.cc/BXK3-YQA5].

provide interim guardrails and protections until Congress acts.[282] At the same time, those who want less regulatory intervention are pointing to the major questions doctrine to delay any regulatory action until Congress acts.[283] Yet as investor losses rise in the wake of the collapse in various areas involving digital assets, the call for regulatory action grows even absent a statutory scheme; a call that will only grow if the turmoil begins to create problems for the greater economy.[284]

Given that financial regulation, by definition, often involves rulemaking in areas with significant economic and political importance, the financial agencies should expect increasing challenges to their actions in the coming years regardless of whether they are on the clear regulatory authority side of the spectrum or the opposite extreme with no statutory framework. Challenges of regulatory action under the major questions doctrine are growing rapidly across the administrative landscape,[285] and there is no reason to believe that financial regulation will be immune.

A. How Much Does the Major Questions Doctrine Weaken the Ability of the Government to Respond to Threats?

The Court's fundamental requirement under the major questions doctrine—clear congressional authorization for regulatory action—may create issues under older statutes but can be satisfied with relative ease in future legislation.[286] For example, within weeks of the Court's *West Virginia* decision, Congress passed, and the President signed, legislation to provide exactly the authorization the Court said was required in that

282. Pedersen, *supra* note 272 ("There is currently no federal law that addresses digital assets in the United States, but the sector remains a source of significant risk, and some analysts would prefer that financial regulators establish early guardrails as Congress mulls crypto's broader future.").

283. Bryan Bashur, *The Fed Wants To Replace Private Cryptocurrencies With Its Own*, THE HILL (Aug. 25, 2022), https://thehill.com/opinion/finance/3615128-the-fed-wants-to-replace-private-cryptocurrencies-with-its-own [https://perma.cc/LDF3-NY59].

284. Lee Reiners, *Regulators Are Thinking About Stablecoins In The Wrong Way*, THE HILL (Nov. 12, 2022), https://thehill.com/opinion/finance/3731399-regulators-are-thinking-about-stablecoins-in-the-wrong-way [https://perma.cc/4R5R-7EGM].

285. Erin Webb, *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/LBR3-6RC4].

286. Hickman, *supra* note 54.

case. Democrats inserted language in the Inflation Reduction Act[287] that "according to legal experts as well as the Democrats who worked it into the legislation, explicitly gives the EPA the authority to regulate greenhouse gases and to use its power to push the adoption of wind, solar and other renewable energy sources."[288] The ultimate impact of the major questions doctrine is likely to be neither as impactful as its opponents believe, nor as benign as its adherents assert.[289] Going forward, the requirements of the doctrine are likely to be subsumed within the legislative process such that the chances of successful court challenges based on it will be mitigated. At the same time, the doctrine poses real risks in times of crisis, especially economic crisis, and does real damage to the separation of powers.

Congress is clearly aware of the need to incorporate clear language providing for regulatory authorization in future legislation. As discussed in Part III of this article,[290] the ranking member of the Senate Agriculture Committee has already written the Secretary of Agriculture requesting the Department's cooperation and assistance with developing statutory language that clearly establishes USDA's authority to craft and issue implementing regulations.[291] Congress may formalize its authorization language into boilerplate to address the Court's requirements while only adding another step to the legislative drafting process.[292] Given the relative ease with which Congress can address the major questions doctrine, opponents of the administrative state can be expected to abandon it as a primary weapon against the administrative state in fairly short order and look to other doctrinal tools, such as the nondelegation doctrine,[293] to advance their goals.[294]

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287. Pub. L. No. 117-169, 136 Stat. 1818–2090 (2022).

288. Lisa Friedman, *Democrats Designed the Climate Law to Be a Game Changer. Here's How*, N.Y. TIMES (August 22, 2022), https://www.nytimes.com/2022/08/22/climate/epa-supreme-court-pollution.html [https://perma.cc/3EDZ-K8F9].

289. Hickman, *supra* note 54.

290. *See supra* Part III.

291. *See supra* notes 72–76 and accompanying text.

292. Maeve Sheehey, *Climate Ruling Offers Opening to Challenge USDA Antitrust Role*, BLOOMBERG L. (Aug 1. 2022), https://news.bloomberglaw.com/environment-and-energy/climate-ruling-offers-opening-to-challenge-usda-antitrust-role [https://perma.cc/4562-A2R7].

293. Steven Wermiel, *SCOTUS For Law Students: Non-Delegation Doctrine Returns After Long Hiatus*, SCOTUSBLOG (Dec. 4, 2014), https://www.scotusblog.com/2014/12/scotus-for-law-students-non-delegation-doctrine-returns-after-long-hiatus/ ("The non-delegation doctrine stands for the general proposition

However, the impracticability of retroactively fixing the statutory language in all past legislation creates risk, especially in the financial sector, in cases of novel or unanticipated existential threats. In a world where future threats can emerge and metastasize in the financial system with almost unimaginable speed, the major questions doctrine—with its bias toward inaction and the possibility for legal challenges that delay agency action—increases risk that the government will not be able to protect its citizens or the economy effectively in future financial crises.

In the 2008 financial crisis, there was only one challenge to any of the emergency actions by the Treasury and the Fed to rescue the economy, and it was based on the use of regulatory authority, not the absence of authority.[295] While there were no legal challenges to the emergency regulatory actions by the financial regulators arising out of the COVID-19 pandemic, the major questions doctrine has been applied to invalidate actions by several non-financial agencies.

In *Alabama Association of Realtors v. HHS*,[296] the Court upheld a finding by the district court that the CDC's reliance on its statutory authority to adopt measures necessary to prevent the spread of disease did not give it the authority to impose a nationwide moratorium on evictions. In a precursor to the *West Virginia* decision, the Court stated, "[w]e expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"[297] Similarly, in *NFIB v. OSHA*,[298] the Court stayed an OSHA rule mandating a vaccination mandate for much of the nation's workforce. It found that the agency's authority to regulate occupational hazards was not sufficient for the agency to mandate COVID-19 vaccines or weekly medical testing broadly for employees. The decision did not explicitly

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that Congress cannot delegate the power to legislate to anyone else, specifically the executive branch. The doctrine is derived from Article I of the Constitution, which says that, 'All legislative powers herein granted shall be vested in a Congress of the United States . . . .'").

294. *See* Philip Hamburger, *Delegating or Divesting?*, 115 NW. U. L. REV. ONLINE 88 (2020).

295. Starr Int'l Co. v. United States, 856 F.3d 953 (Fed. Cir. 2017), *cert. denied* 138 S. Ct. 1324 (2018) (mem.) (holding that shareholders who sued the government over the terms of the financial assistance to AIG lacked standing).

296. 141 S. Ct. 2485 (2021).

297. *Id.* at 2489.

298. 142 S. Ct. 661 (2022).

cite the major questions doctrine, but Justice Gorsuch's concurrence did.[299]

In these cases, the Court has demonstrated that the major questions doctrine can be used to invalidate regulatory actions designed to protect the public even in a severe, nationwide crisis. While the decisions of the Court in the pandemic came at a time where the vaccinations and treatments were available and the most extreme threats of the pandemic were arguably contained, the Court never acknowledged the changed context. It is unclear whether the Court would have decided similarly at the peak of the 2008 financial crisis where risks to the financial system were increasing sometimes hourly and a halt to rescue efforts could exacerbate the crisis.

Under the Court's major questions doctrine, there is no mechanism for moving quickly to address new risks like cryptocurrency and as-yet undiscovered risks that can cause massive damage with great speed. The financial risks of today, where trades can take place in milliseconds and markets can move in an instant, are unlike any we have faced in the history of the nation, both in their speed and ability to inflict damage. Applying new doctrines that harken back to a time that allowed leisurely debate and resolution is not wise or sustainable. It is difficult to believe that a doctrine that forces inaction when society faces imminent risk could have been the intention of the Founding Fathers.

B. The Major Questions Doctrine Undermines the Separation of Powers

The fundamental flaw in the major questions doctrine is that there is a far simpler approach to addressing major policy questions with stronger constitutional underpinnings—it is called legislating. Under the Constitution, it is the job of the Congress and the President, the representatives of the people, to determine what constitutes major questions requiring government action. If there is overreach by the Executive Branch, or the administrative state as the Court's majority likes to call it, Congress has the tools it needs to address it. Oversight, the power of the purse, the ability to make legislative changes and the Congressional Review Act are all available to Congress to stop an

299. *Id.* at 667 (Gorsuch, J., concurring).

overreaching bureaucracy.[300] Congress does not need the Court acting as a judicial helicopter parent to step in and fight its policy battles with the Executive.

The Court's use of the major questions doctrine in this case damages the very legislative process that it claims to protect. Try as they might, West Virginia's legislators were unable to fashion a majority sufficient to overcome the President's veto and invalidate the rule through the legislative process.[301] The proper response is for the Congress and the President to continue working until, either through elections or compromise, a solution is achieved. Through its actions in this case, the Court permits the state of West Virginia to achieve in the judiciary what it could not achieve through the legislative process. By short-circuiting the legislative process and injecting itself into the issue the Court effectively nullifies a constitutionally valid presidential veto and ends the need for the people's representatives to develop the consensus to support lasting and meaningful policy.

Policy is best determined—and most effective—when Congress and the Executive define their own relationship within constitutional constraints. While the Court claims strenuously that it is not interested in particular policy outcomes and that the doctrine only applies in extraordinary cases, it rings hollow when a recently constituted majority decides three "extraordinary" cases in two years and relies on extra-constitutional doctrines to achieve those results.[302]

Statements by those committed to battling the actions of the administrative state also cast doubt that the major questions doctrine is only about ensuring proper congressional authorization. For example, following the 2008 financial crisis, Congress passed broad legislation directing a host of federal financial agencies to implement regulations designed to address the weaknesses that lead to it. The Dodd-Frank Act is a clear expression of congressional authority that should easily satisfy the requirements of the major questions doctrine. But in decrying the growth of the administrative state, one commentator says:

> The poster child for this problem is the Dodd-Frank Wall Street Reform and Consumer Protection Act of

300. See *supra* Parts III and IV for a more detailed description of these powers.

301. *See supra* notes 160–63 and accompanying text.

302. *Cf.* Ala. Ass'n. of Realtors v. HHS, 141 S. Ct. 2485 (2021); Nat'l Fed'n of Indep. Bus. v. OSHA, 142 S. Ct. 661 (2022).

> 2010, a massive law (2,300 pages in the original bill and 847 pages in its enrolled version) enacted in the wake of the financial crisis. Because the Democrats in the House correctly assessed that they might lose control of that body in the 2010 elections, the law was passed by Congress and sent to the president before lawmakers had fully investigated the causes of the crisis, and even before the Financial Crisis Inquiry Commission, established by Congress to outline the causes of the crisis, had issued its report (in which the Democratic majority on the commission simply adopted the view of the Democratic super-majority in Congress) . . . . Congress sought to address the underlying problems by authorizing almost 400 separate new regulations to be enforced by at least eight different agencies.[303]

Two things stand out in this quote. For all the expressions of a desire to see clear congressional authorization for regulatory action, that support vanishes when Congress clearly provides authority inconsistent with an opponent's policy goals. Also, for all the expressions about the importance of the people's expressed will through their representatives, successful legislative enactments by a "Democratic majority" and President are viewed not as the will of the people, but the unchecked growth of the administrative state.

The truth is that for opponents of the administrative state, the statements of the importance of congressional authorization as a reflection of popular will are really a smokescreen for their true intent, which is to use the judiciary as a tool to implement policies that lack sufficient support at the ballot box. They are quite clear about it. As Peter Wallison says,

> Congress cannot be relied upon to uphold the constitutional structure. Indeed, the difficulties of the legislative process and the pressures of partisan loyalties essentially guarantee that the administrative state will continue to grow in the future. Some alternative is necessary.

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303. Wallison, *supra* note 11.

> With Congress unable or unwilling to prevent the growth and consolidation of administrative power, the judiciary is the only possible constitutional impediment to that continued growth.[304]

There it is in a nutshell. For all the talk about the people's will, the major questions doctrine is ultimately about vesting the power to make policy in the least diverse, least responsive branch of the federal government—a branch which conservatives have dedicated years and resources to reshaping.[305] The Court has a choice to make. It can continue down this path, as it has done in the past,[306] until its actions are so out of touch with the will of the people that it calls its own legitimacy into question.[307] The negative impact of these kinds of decisions on the Court's standing with the public are already evident.[308] Alternatively, it can allow the political controversies of the day to be addressed through the people's elected representatives with it providing restrained input when actions stray outside constitutional bounds. Which path the Court selects will go a long way in determining not only the ability of the

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304. *Id.*

305. Caroline Fredrickson & Eric J. Segall, *Trump Judges or Federalist Society Judges? Try Both*, N.Y. TIMES (May 20, 2020), https://www.nytimes.com/2020/05/20/opinion/trump-judges-federalist-society.html [https://perma.cc/VN44-BCPV].

306. *See, e.g.*, William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 SUP. CT. REV. 347 (1966); Gregory A. Caldeira, *Public Opinion and The U.S. Supreme Court: FDR's Court-Packing Plan*, 81 AM. POL. SCI. REV. 1139 (1987).

307. E.J. Dionne Jr., *Congress Tries To Protect The Planet From An Overreaching Court*, WASH. POST (Aug. 28. 2022) https://www.washingtonpost.com/opinions/2022/08/28/west-virginia-epa-inflation-reduction-act [https://perma.cc/43NW-Y9ZP] ("If the court stays on its current course, it risks an outright clash with Congress and would add fuel to a movement among some Democrats to offset the current conservative majority by increasing the number of justices.").

308. *Positive Views of Supreme Court Decline Sharply Following Abortion Ruling*, PEW RSCH. CTR. (Sept. 1, 2022), https://www.pewresearch.org/politics/2022/09/01/positive-views-of-supreme-court-decline-sharply-following-abortion-ruling [https://perma.cc/SUA4-MHWZ] (finding that "48% of the public holds a favorable view of the court, while a similar share (49%) holds an unfavorable view" and that "the partisan gap in favorable views of the Supreme Court— 45 percentage points—is wider by far than at any point in 35 years of polling on the court"); Chuck Todd, Mark Murray, Ben Kamisar, Bridget Bowman & Alexandra Marquez, *Public's Opinion Of Supreme Court Plummets After Abortion Decision*, NBC NEWS (Aug. 26, 2022), https://www.nbcnews.com/meet-the-press/first-read/publics-opinion-supreme-court-plummets-abortion-decision-rcna44962 [https://perma.cc/YW2V-XBFY].

government to protect its citizens against existential threats, but also the kind of nation we have in the coming decades. That is the real major question facing the nation.