THE MAJOR QUESTIONS WRECKING BALL

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INTRODUCTION

On the last day of the United States Supreme Court's October 2021 term, it unveiled its much-awaited opinion in *West Virginia v. EPA*, a case involving the scope of the Environmental Protection Agency's ("EPA") authority to regulate greenhouse emissions from coal-fired electric power plants. The litigation had been proceeding on-and-off for six years, and it involved issues of great consequence because coal-fired power plants were a major source of the gases that contribute to climate disruption. The case was also important because EPA claimed that its authority extended "beyond the fenceline" to require utility companies to shift their electricity generating capacities from coal-fired plants to natural gas plants and renewable sources of electricity. In concluding that the Clean Air Act did not grant EPA that power, the Court for the first time invoked the "major questions doctrine" by name to refer to an evolving approach to judicial review of agency interpretations of statutes that has become "[o]ne of the most controversial features of modern administrative law . . . ."[1]

The Supreme Court has applied various manifestations of the major questions doctrine to overturn the Food and Drug Administration's ("FDA") herculean efforts to protect smokers from the multiple health hazards of cigarettes, prevent EPA from adapting an aging Clean Air Act to major sources of greenhouse gas pollutants, and halt emergency initiatives by the Occupational Safety and Health Administration and the Centers for Disease Control and Prevention ("CDC") to address the ruinous health and economic impacts of the COVID-19 pandemic. The lower courts are beginning to invoke the major questions doctrines to resolve important issues like CDC's authority to require passengers on airplanes, trains, and taxis to wear masks to prevent the spread of COVID-19, as well as much less consequential issues like the role of the

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[1] Aaron Nielson, *The Minor Questions Doctrine*, 169 U. PA. L. REV. 1181, 1182 (2021) [hereinafter Nielson, *Minor Questions*]. *See also* West Virginia v. EPA, 142 S. Ct. 2587, 2633–34 (2022) (Kagan, J., dissenting) (acknowledging the Court mentioning the major questions doctrine for the first time).

state in determining the procedures to be employed under the Indian Gambling Regulatory Act for regulating gambling on Indian reservations.[2]

Under the major questions doctrine, a court must treat questions of "vast economic and political significance" differently from run-of-the-mill questions when reviewing agency interpretations of their statutory authorities.[3] The doctrine originated as a vehicle for courts to avoid the longstanding *Chevron* prescription that courts must defer to reasonable agency interpretations of ambiguous provisions in their authorizing statutes. But the major questions doctrine has evolved into a more aggressive approach to reviewing agency implementation of aging statutes as the Supreme Court has demanded that agencies demonstrate that Congress has clearly and specifically authorized the agency to resolve the major issues that prompt new agency initiatives. That insistence has amounted to a presumption against agency attempts to find in aging statutes powers that they have not previously exercised and a judicially imposed limitation on Congress's power to address dynamic situations by employing broad statutory language to allow agencies to adapt to changing circumstances. Justice Brett Kavanaugh has suggested that the Court go a step further and simply declare that Congress may not delegate to federal agencies the power to decide major questions, even with clear and specific statutory language. This latter limitation, which no court has yet adopted, goes beyond even the nondelegation doctrine to posit that only Congress and not executive branch agencies may decide major questions.

Administrative law scholars have given much thought to doctrinal aspects of the major questions doctrine or, as some have suggested, the major questions canon. It is a judge-made doctrine with no clear predicate in the Constitution or any statute.[4] Initially conceived as a way to give effect to congressional intent, the major questions doctrine has evolved into a limitation on Congress's power to delegate to agencies the authority to regulate private sector activities.[5] The doctrine's scope is limited to "major" government actions, but the Court has provided little guidance on how to determine "majorness."[6] And the doctrine

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[2] New Mexico v. Dep't of the Interior, 854 F.3d 1207, 1226 (10th Cir. 2017).

[3] Jonas J. Monast, *Major Questions about the Major Questions Doctrine*, 68 ADMIN. L. REV. 445, 447 (2016).

[4] Joshua S. Sellers, *"Major Questions" Moderation*, 87 GEO. WASH. L. REV. 930, 934 (2019); Robert Fischman, *Supreme Court Swings at Phantoms in* West Virginia v. EPA, CTR. FOR PROGRESSIVE REFORM (June 30, 2022), https://progressivereform.org/cpr-blog/supreme-court-swings-phantoms-west-virginia-v-epa/.

[5] *See* discussion *infra* Part I–IV.

[6] *See* discussion *infra* Part II.C.1.

increasingly appears to be a vehicle for judicial aggrandizement to the detriment of the legislative and executive branches.[7] This Article will contribute to the doctrinal analysis, but it will also focus on the doctrine's practical implications for the administrative state.

Proponents of the major questions doctrine see it as a much-needed bulwark against the unauthorized expansion of the administrative state.[8] For them, the doctrine is part of a larger effort by conservative scholars "to reconsider the foundations of the modern regulatory state" that may include the repeal of the *Chevron* doctrine and the revival of the nondelegation doctrine.[9] This Article, however, will argue that the doctrine has become the legal wrecking ball that conservative activists have been searching for to demolish the protective edifice that Congress has created over many years to protect consumers, workers, communities, and the planet from the vicissitudes of unregulated markets.[10] With this powerful but indiscriminate tool in the hands of judges selected for their antipathy to big government, *Chevron* may be largely irrelevant in the cases that really matter, and the nondelegation doctrine may come in through the back door.

Part I of this Article will describe and analyze the initial manifestation of the major questions doctrine as a *Chevron* workaround, concluding that this approach does not pose a major threat to the administrative state. Part II will examine the bulwark manifestation of the doctrine and its advantages and disadvantages. It concludes that the vagueness of the bulwark manifestation's critical concepts, the limitations that it places on federal agencies, and its tendency to reduce public accountability for lost protections outweigh the modest advantage of restraining unauthorized attempts by agencies to expand their power into areas where they have

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[7] *See* discussion *infra* Part II.C.4, Part V.B.

[8] White House Counsel Donald McGahn played a critical role in selecting President Trump's appointees to the Supreme Court. He told a meeting of the Federalist Society that "[t]he greatest threat to the rule of law in our modern society is the ever-expanding regulatory state, and the most effective bulwark against that threat is a strong judiciary." Adrian Vermeule, *There Is No Conservative Legal Movement*, WASH. POST (July 6, 2022), https://www.washingtonpost.com/outlook/2022/07/06/epa-roberts-conservative-court-libertarian/ (quoting Don McGahn). *See also* David B. Rivkin, Jr. & Mark Wendell DeLaquil, *No More Deference to the Administrative State*, WALL ST. J. (July 10, 2022), https://www.wsj.com/articles/no-more-deference-to-the-administrative-state-west-virginia-v-epa-chevron-major-questions-john-roberts-regulation-democracy-congress-11657475255 (noting that the major questions doctrine "effectively strips agencies of much of their regulatory willfulness, compelling them to regulate only as Congress intended").

[9] Christopher J. Walker, *Toward a Context-Specific* Chevron *Deference*, 81 MO. L. REV. 1095, 1095–96 (2016).

[10] THOMAS O. MCGARITY, DEMOLITION AGENDA: HOW TRUMP TRIED TO DISMANTLE AMERICAN GOVERNMENT, AND WHAT BIDEN NEEDS TO DO TO SAVE IT 4–6 (2022) [hereinafter MCGARITY, DEMOLITION AGENDA].

little expertise and experience. Part III of the Article will suggest that, during the past year, the major questions doctrine evolved into a wrecking ball that greatly limits the federal government's ability to adapt to changing circumstances, destroys ongoing protective initiatives that are easily within the ranges of congressional delegations to the relevant agencies, facilitates rollbacks of existing programs, and may be more effective than the nondelegation doctrine in limiting Congress's ability to delegate regulatory authority to agencies. Part IV will probe the implications of the evolving major questions doctrine for the administrative state, including the excuse it provides for judicial laziness, its disregard for expertise, its potential for judicial aggrandizement, its tendency to shrink the role of federal regulation, and its capacity to harm the public and the environment. Finally, Part V will explore some possibilities for executive branch and legislative actions to limit the impact of the major questions doctrine in the future.

I. THE *CHEVRON* WORKAROUND

A. Doctrine

In the seminal case of *Chevron, U.S.A. v. Natural Resources Defense Council*, the United States Supreme Court established a two-step test for judicial review of an agency's interpretation of its authorizing statutes. The first step ("Step One") requires the reviewing court to determine "whether Congress has directly spoken to the precise question at issue."[11] If it has and congressional intent is clear, then the court and the agency must "give effect to the unambiguously expressed intent of Congress."[12] "If, however, the court determines Congress has not directly addressed the precise question at issue" or the statute is ambiguous with regard to the relevant issue, the court should "not simply impose its own construction on the statute . . . ."[13] At this second step ("Step Two"), the court must determine whether the agency's interpretation is based on "a permissible construction of the statute."[14] In such cases, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."[15]

The theoretical underpinning for this test was an interpretive theory of implied delegation. When Congress uses ambiguous language to delegate

[11] Chevron, U.S.A. v. Nat. Res. Def. Council, 467 U.S. 837, 842 (1984).
[12] *Id.* at 843.
[13] *Id.*
[14] *Id.*
[15] *Id.* at 844.

power to agencies, it is impliedly delegating to the agency the power to interpret that language in a way that is consistent with the statutory purpose.[16] From an institutional perspective, the Court's rationale for deferring to the agency's interpretation of its authorizing statute rested on its conclusion that agencies are more politically accountable than judges through the president's ability to hire and fire agency heads.[17] Noting that "[j]udges are not experts in the field," the Court also relied on the expertise that agencies gain in working with their authorizing statutes over the years.[18] Agencies are therefore in a better position than courts to make the policy choices that are often involved in interpreting statutes.[19]

In the ensuing decades, judges sometimes chafed under *Chevron's* prescription for deference to administrative agencies.[20] And they came up with ways to avoid deferring to agencies in situations in which deference was not, in their view, warranted.[21] The most straightforward *Chevron* workaround was for a court to find at Step One that the statute was unambiguous and that the agency's interpretation was inconsistent with the statute's unambiguous meaning. This approach frequently involved a trip to the dictionary to determine the meaning of a word in the statute. This literalistic strategy avoided excursions into the statute's overall purpose to determine how different interpretations of the word were or were not consistent with that purpose.[22] When a court could not with a straight face find a statutory term unambiguous, it could always find the agency's interpretation to be "unreasonable" at Step Two, given the huge grant of judicial discretion in that elusive term. At the same time, the Court has crafted workarounds that can be applied at "Step Zero" of the *Chevron* analysis where the court decides whether the *Chevron* two-step

[16] *Id.* at 843–44. *See also* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000) ("Deference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps.").

[17] Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777, 786 (2017); Kevin O. Leske, *Major Questions About the "Major Questions" Doctrine*, 5 MICH. J. ENV'T & ADMIN. L. 479, 482 (2016); Sellers, *supra* note 4, at 937.

[18] *Chevron*, 467 U.S. at 865. *See* Coenen & Davis, *supra* note 17, at 786; Sellers, *supra* note 4, at 937; Marla D. Tortorice, *Nondelegation and the Major Questions Doctrine: Displacing Interpretive Power*, 67 BUFF. L. REV. 1075, 1082 (2019).

[19] *Chevron,* 467 U.S. at 865–66.

[20] Nielson, *Minor Questions*, *supra* note 1, at 1191.

[21] Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 24–27 (2017); Nathan Richardson, *Keeping Big Cases from Making Bad Law: The Resurgent "Major Questions" Doctrine*, 49 CONN. L. REV. 355, 362 (2016) [hereinafter Richardson, *Big Cases*].

[22] *See, e.g.*, Mexichem Fluor, Inc. v. EPA, 866 F.3d 451, 458–59 (D.C. Cir. 2017) (using the dictionary definition of the word "replace" to find EPA's interpretation of the word exceeded the scope of EPA's authority under the Clean Air Act).

process is applicable at all.[23] For example, the Supreme Court in 2018 held that *Chevron* is inapplicable when the Justice Department and an independent agency disagree about the meaning of statutory language.[24]

Elaborating on the *Chevron* doctrine in 1986, Judge Stephen Breyer (then serving on the First Circuit Court of Appeals) suggested another possible workaround when he surmised that "Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration."[25] Breyer suggested that *Chevron*'s assumption that Congress has delegated to the agency the interpretational function when it uses ambiguous language does not hold when the case poses a major question.[26]

The Supreme Court picked up on then-Judge Breyer's suggestion in *FDA v. Brown & Williamson Tobacco Corp*., a case in which the Court declined to afford full *Chevron* deference to the FDA's interpretation of its statute to allow it to regulate tobacco products.[27] After the FDA declined to regulate those products for decades, the agency during the Clinton Administration concluded that restrictions on sales to children and adolescents were necessary to prevent thousands of deaths resulting from nicotine addiction.[28] In an opinion written by Justice Sandra Day O'Connor, the Court acknowledged that the interpretation of the words "drug" and "device" in the statute was governed by the *Chevron* doctrine.[29] At Step One in its *Chevron* analysis, the Court noted that its "inquiry into whether Congress has directly spoken to the precise question at issue is shaped, at least in some measure, by the nature of the question presented."[30] Citing then-Judge Breyer, the Court observed that "[d]eference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps."[31] In extraordinary cases, however, "there may be reason to hesitate before concluding that Congress has intended such an implicit delegation."[32]

[23] Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 191 (2006); Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 836 (2001).

[24] Epic Systems Corp. v. Lewis, 138 S. Ct. 1612, 1630 (2018).

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

[26] Richardson, *Big Cases*, *supra* note 21, at 390.

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

[28] *Id.* at 126–27.

[29] *Id.* at 132

[30] *Id.* at 159.

[31] *Id.*

[32] *Id.*

In the case before it, the Court was confident that "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[33] Among other things, Congress had passed statutes regulating cigarette labels and other aspects of tobacco products that were arguably based on the assumption that FDA lacked authority to regulate tobacco.[34] Congress had "created a distinct regulatory scheme for tobacco products," and it had "squarely rejected proposals to give the FDA jurisdiction over tobacco . . . ."[35] The Court cautioned that "[i]n our anxiety to effectuate the congressional purpose of protecting the public, we must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop."[36]

Legal scholars read *Brown & Williamson* to say that a court need not defer to an agency's interpretation of its statute under *Chevron* when it is resolving a question of "vast economic and political significance."[37] Instead, the court must undertake its own de novo interpretation of the relevant statutory provision using dictionaries, relevant canons of construction, and other applicable tools of statutory interpretation "without giving any weight" to the agency's interpretation.[38] This was true despite the fact that *Chevron* deference would seem to be especially appropriate in the drug context given the agency's expertise and many decades of experience with regulating drugs.[39]

The Court clarified this *Chevron* workaround manifestation of the major questions doctrine in *King v. Burwell*.[40] The question in that case was whether the Patient Protection and Affordable Care Act's tax credits were available in states that had a federal exchange instead of a state exchange.[41] Under the statute, the tax credits were available to any "applicable taxpayer," but for some unexplained reason (most likely a drafting error), the amount of the tax credit depended on the taxpayer's being enrolled in a health insurance plan through "an Exchange

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[33] *Id.* at 160.

[34] *Id.* at 156. *See* Richardson, *Big Cases*, *supra* note 21, at 365 (noting that "[s]ubsequent legislation that arguably ratified the FDA's historical refusal to regulate tobacco appears to have been crucial for the Court's holding").

[35] *Brown & Williamson Tobacco Corp.*, 529 U.S. at 159–60.

[36] *Id.* at 161 (quoting United States v. Art. of Drug Bacto-Unidisk, 394 U.S. 784, 800 (1969)).

[37] Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2037 (2020) (internal quotation marks omitted); Monast, *supra* note 3, at 449; Nielson, *Minor Questions*, supra note 1, at 1182, 1192; Nathan Richardson, *Antideference: COVID, Climate, and the Rise of the Major Questions Canon*, 108 VA. L. REV. ONLINE 174, 180 (2022) [hereinafter Richardson, *Antideference*].

[38] Emerson, *supra* note 37, at 2022, 2036.

[39] Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19, 34 (2010) [hereinafter Loshin & Nielson, *Hiding Nondelegation*].

[40] King v. Burwell, 576 U.S. 473 (2015).

[41] *Id.* at 483.

established by the State . . . ."[42] The Internal Revenue Service ("IRS") interpreted these provisions to mean that a taxpayer who purchased insurance with either a state *or* the federal exchange was eligible for the tax credit.[43]

Acknowledging that it often applied *Chevron*'s two-step analysis to agency interpretations of statutes, the Court noted that "[i]n extraordinary cases . . . there may be reason to hesitate before concluding that Congress has intended" "an implicit delegation . . . to the agency to fill in the statutory gaps."[44] Since this was one of those cases, the Court applied the major questions doctrine at *Chevron* Step Zero to conclude that *Chevron* deference was unnecessary absent an explicit congressional delegation of authority to fill in the gaps.[45]

Determining whether tax credits were available on federal exchanges was "a question of deep 'economic and political significance'" that was central to the statutory scheme.[46] If Congress had wanted courts to defer to the agency's interpretation of the statute, it would have said so explicitly.[47] The Court further noted that it was "especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy . . . ."[48] Since the resolution of this major question was not entitled to *Chevron* deference, the Court itself was the proper entity to decide what the statute meant.[49] The Court then interpreted the statute to allow tax credits for purchasers of insurance from any exchange created under the statute.[50] Although the Court agreed with the agency's resolution of the question, the Court's approach mattered because it ensured that the agency in some future administration could not reverse the interpretation.[51]

B. Virtues

The major questions doctrine, as originally created to be a *Chevron* workaround, facilitated judicial nondeference at all three steps of the

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[42] *Id.* (emphasis omitted). *See* Coenen & Davis, *supra* note 17, at 792 (noting the presence of a drafting error in the Affordable Care Act provision at issue in *King v. Burwell*).

[43] *King*, 576 U.S. at 483.

[44] *Id.* at 485 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)).

[45] *Id.* at 486; Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 1956 (2017) [hereinafter Heinzerling, *Power Canons*]; Monast, *supra* note 3, at 451.

[46] *King*, 576 U.S. at 486 (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

[47] *Id.*

[48] *Id.* (emphasis omitted).

[49] *Id.*

[50] *Id.* at 498.

[51] Tortorice, *supra* note 18, at 1119.

Chevron analysis.[52] It therefore had the potential to "significantly reduce *Chevron*'s reach." [53] It was welcomed by conservative scholars, politicians, and activists who agreed with Justice Neil Gorsuch that *Chevron* represented an "abdication of the judicial duty."[54] In their view, judicial intervention was necessary to cabin the incentive that agencies naturally felt to expand their turf by interpreting their statutes to give them more power than Congress intended. [55] Such agency aggrandizement posed a threat to economic liberty, and that threat was greatest when agencies proposed regulations with vast economic and political significance. [56] The major questions doctrine enhanced democracy by presuming that Congress generally means for major questions to be resolved through the legislative process and not by unelected bureaucrats.[57] It also provided stability because, once a court has determined what a statute says, the agency is powerless to reverse that determination to reflect changed policies or address changing circumstances.[58]

C. Objections

The *Chevron* workaround, however, was greeted with considerable skepticism by those who favored strong federal regulation.[59] Opponents of the major questions doctrine challenged the unsupported assumption that Congress is less likely to delegate the authority to interpret statutory language when agencies are addressing big issues.[60] Far from enhancing democratic accountability, critics argued that the major questions doctrine transferred the power to interpret ambiguous statutory language from agency decisionmakers who are accountable to a president who is elected by the people to unelected judges. [61] From an institutional perspective, judges are no better qualified to discern the meaning of

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[52] Jonathan Skinner-Thompson, *Administrative Law's Extraordinary Cases*, 30 DUKE ENV'T L. POL'Y F. 293, 298 (2020).

[53] Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475, 480 (2021) [hereinafter Sunstein, *Two Major Questions Doctrines*].

[54] Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring).

[55] Monast, *supra* note 3, at 462–63; Nielson, *Minor Questions*, *supra* note 1, at 1191; Sunstein, *Two Major Questions Doctrines*, *supra* note 53, at 488.

[56] Richardson, *Big Cases*, *supra* note 21, at 397–401.

[57] Emerson, *supra* note 37, at 2048.

[58] Coenen & Davis, *supra* note 17, at 811; Tortorice, *supra* note 18, at 1104.

[59] *See, e.g.*, Sellers, *supra* note 4, at 935; Philip Hamburger, Chevron *Bias*, 84 GEO. WASH. L. REV. 1187, 1250 (2016).

[60] Richardson, *Big Cases*, *supra* note 21, at 391.

[61] Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 70–71 (2014); Leske, *supra* note 17, at 500; Nielson, *Minor Questions*, *supra* note 1, at 1194.

statutory language—with the value choices that interpretation often involves—than the agency attorneys who work with their authorizing statutes on a day-to-day basis.[62] Although judicial resolution of major questions may provide more stability than agency determinations, it is unclear why permanence is more desirable for major questions than for run-of-the-mill decisions.[63] Given the inherent vagueness in the phrase "vast economic and political significance," critics worried that the major questions doctrine would soon replace *Chevron* deference in all cases that really matter from a public policy perspective.[64]

At the end of the day, however, the *Chevron* workaround does not pose a major threat to the administrative state. This approach is a straightforward way for judges to impose their preferred interpretations on agencies in big cases. It allows judges to impose their preferred interpretations of statutory language on agencies without having to engage in the *Chevron* two-step analysis. But the *Chevron* doctrine has always been sufficiently flexible in practice to allow judges who are so inclined to find that a statute unambiguously leads to the preferred result at Step One. And in situations in which they cannot with a straight face find a lack of ambiguity, they can conclude that the agency's interpretation is unreasonable.[65] The major questions doctrine just makes it a little easier for judges to reach the desired result.

II. THE BULWARK

The Supreme Court applied the major questions doctrine "only sporadically" between 2000 and 2016, when it primarily served as a *Chevron* workaround.[66] There were, however, hints in several opinions of a more aggressive application of the doctrine that called on the agencies to point to clear language in their statutes authorizing them to resolve major questions. This gradually evolved into a more aggressive version of the major questions doctrine that demands that agencies point to specific language in their statutes authorizing them to resolve questions of vast economic and political significance.

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[62] Coenen & Davis, *supra* note 17, at 808; Emerson, *supra* note 37, at 2049; Richardson, *Big Cases*, *supra* note 21, at 393–94; Sellers, *supra* note 4, at 932.

[63] Coenen & Davis, *supra* note 17, at 811.

[64] *Id.* at 786; Richardson, *Big Cases*, *supra* note 21, at 424. *But see* Kent Barnett & Christopher J. Walker, *Short-Circuiting the New Major Questions Doctrine*, 70 VAND. L. REV. EN BANC 147, 163 (2017) (arguing that they are "not as worried . . . that the circuit courts will strategically use the new major questions doctrine to overturn agency statutory interpretations").

[65] Freeman & Spence, *supra* note 61, at 78; Richardson, *Big Cases*, *supra* note 21, at 412.

[66] Monast, *supra* note 3, at 453.

A. Doctrine

In a case involving the Carter Administration's attempt to protect workers from the ubiquitous, but leukemogenic chemical benzene, the Occupational Safety and Health Administration ("OSHA") promulgated a standard limiting worker exposure to benzene to one part per million. The statute required the agency to promulgate occupational health standards that were "reasonably necessary or appropriate to provide . . . healthful employment and places of employment,"[67] and it instructed the agency to write standards for occupational toxins at the level "which most adequately assures, to the extent feasible, . . . that no employee will suffer material impairment of health or functional capacity . . . ."[68]

Writing for a plurality of four justices in this pre-*Chevron* case, Justice John Paul Stevens found that the word "safe" in the statute meant the absence of "significant risk."[69] He therefore rejected OSHA's contention that the statute empowered it to require feasible exposure controls without first determining that the risk at status quo exposure levels was significant.[70] He allowed that "[i]n the absence of a clear mandate in the Act, it is unreasonable to assume that Congress intended to give [OSHA] the unprecedented power over American industry that would result from the Government's view . . . ."[71] Indeed, if OSHA's view was correct, "the statute would make such a 'sweeping delegation of legislative power' that it might be unconstitutional."[72] This language suggests that the courts should not merely decline to afford *Chevron* deference to agencies in cases involving major questions; they should affirmatively forbid agency assertions of expansive new powers in the absence of clear statutory language granting those powers.[73] Prior to ascending to the bench, Professor Antonin Scalia astutely saw the *Benzene* case as "judicial activism in a new direction . . . reduc[ing], rather than augment[ing], health and safety regulatory impositions upon the private sector."[74]

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[67] 29 U.S.C. § 652(8).
[68] *Id.* § 655(b)(5).
[69] Indus. Union Dep't, AFL-CIO v. Am. Petrol. Inst., 448 U.S. 607, 639–40 (1980).
[70] *Id.*
[71] *Id.* at 645.
[72] *Id.* at 646. Justice Rehnquist concurred in the judgment, but he would have declared the statute to be an unconstitutional violation of the nondelegation doctrine. *Id.* at 675 (Rehnquist, J., concurring).
[73] Loshin & Nielson, *Hiding Nondelegation*, *supra* note 39, at 21.
[74] Antonin Scalia, *A Note on the* Benzene *Case*, 4 J. GOV'T & SOC'Y 25, 26–27 (1980).

The Court refined this more aggressive manifestation of the major questions doctrine in *Utility Air Regulatory Group v. EPA*, a case in which the Obama Administration struggled mightily to fit greenhouse gas emissions within the Clean Air Act's aging regulatory framework.[75] In an opinion written by Justice Scalia, the majority rejected EPA's conclusion that a stationary source's greenhouse gas emissions in greater than specified amounts subjected the source to the statute's new source review program.[76] That program required a company planning to build or modify a "major emitting facility" to obtain a permit imposing certain specified conditions, including a requirement that the company install the "best available control technology" ("BACT").[77] EPA had interpreted the phrase "any air pollutant" to include carbon dioxide, a greenhouse gas.[78] The problem EPA encountered was that even tiny facilities that burned fossil fuels would emit more carbon dioxide than the statutory thresholds of 100 tons per year ("tpy") of "any air pollutant" for certain listed facilities and 250 tpy for all other facilities.[79] To deal with the administrative nightmare of having to conduct permit proceedings for tens of thousands of small sources, EPA wrote a "tailoring" rule that limited the permit requirement to sources that emitted 100,000 tpy or more.[80]

The Court found ambiguity in the Clean Air Act's use of the term "air pollutant."[81] In the general definitions section of the Act, the Court in *Massachusetts v. EPA* had already held that the definition of "air pollutant" encompassed greenhouse gases.[82] But that did not mean that the use of the word "air pollutant" in the section of the statute subjecting stationary sources to the new source review program had the same meaning.[83] The Court held that EPA's use of the general definition of "air pollutant" when determining whether a source's emissions triggered the new source review thresholds was unreasonable.[84] As EPA acknowledged, its literal application of the statute's 100 and 250 tpy thresholds to greenhouse gases would subject tens of thousands of previously unaffected sources to new source review, and that was

[75] Professor Sunstein refers to this branch of the major questions doctrine the "strong" version because it operates as "a firm barrier to certain agency interpretations." Sunstein, *Two Major Questions Doctrines*, *supra* note 53, at 477.
[76] Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 333–34 (2014).
[77] *Id.* at 308–09.
[78] *Id.* at 310.
[79] *Id.* at 310–11.
[80] *Id.* at 312–13.
[81] *Id.* at 315.
[82] *Id.* at 316.
[83] *Id.* at 319–20.
[84] *Id.* at 324.

"'incompatible' with 'the substance of Congress' regulatory scheme.'"[85] Had the opinion stopped there, it would have been a textbook example of *Chevron* analysis at Step Two.

The Court, however, further concluded that EPA's insistence on applying the statute's general definition of "air pollutant" to the new source review program "would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization."[86] The Court reasoned that "[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' . . . we typically greet its announcement with a measure of skepticism," because "[w]e expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"[87] The tailoring rule could not save the agency's interpretation of the statute because the statute unambiguously established the 100 and 250 tpy thresholds, and the agency had "no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms."[88]

Notably, the Court did not employ the major questions doctrine as a *Chevron* workaround. Instead, the doctrine assisted the Court's conclusion that the agency's interpretation was unreasonable at Step Two of its *Chevron* analysis.[89] Read narrowly, the opinion merely suggests judicial skepticism in determining the reasonableness of an agency's interpretation of ambiguous language when the interpretation involves a major question.[90] But the Court also appeared to employ the doctrine to require that an agency point to specific statutory language that clearly authorizes any interpretation of an aging statute that significantly expands the agency's regulatory power in the context of a decision with vast economic and political significance.[91]

Three years later, then-Judge Kavanaugh clearly articulated this aggressive version of the major questions doctrine in a dissent from the D.C. Circuit's denial of a motion to rehear *en banc* the internet service

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[85] *Id.* at 322 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 156 (2000)).
[86] *Id.* at 324.
[87] *Id.* (quoting *Brown & Williamson Tobacco Corp.*, 529 U.S. at 159–60).
[88] *Id.* at 325. The agency's decision to apply the statute's BACT requirement to so-called "anyway" sources did not, however, resolve a major question. The Court concluded that "applying BACT to greenhouse gases is not so disastrously unworkable, and need not result in such a dramatic expansion of agency authority . . . ." *Id.* at 332.
[89] Leske, *supra* note 17, at 480; Monast, *supra* note 3, at 462.
[90] Skinner-Thompson, *supra* note 52, at 308.
[91] *Util. Air Regul. Grp.*, 573 U.S. at 324. *See* Heinzerling, *Power Canons*, *supra* note 45, at 1937 (reading the *UARG* opinion to say that "[w]hen an agency charged with administering an ambiguous statutory provision answers a question of large economic and political significance central to the statutory regime . . ., the Court may ignore the agency's interpretation altogether").

providers' challenge to the Federal Communications Commission's ("FCC") "net neutrality" rule.[92] Judge Kavanaugh stated that "[i]f an agency wants to exercise expansive regulatory authority over some major social or economic activity . . . an *ambiguous* grant of statutory authority is not enough. Congress must *clearly* authorize an agency to take such a major regulatory action."[93] He stated: "[W]hile the *Chevron* doctrine *allows* an agency to rely on statutory ambiguity to issue *ordinary* rules, the major rules doctrine *prevents* an agency from relying on statutory ambiguity to issue *major* rules."[94]

In *Alabama Association of Realtors v. HHS*, the Supreme Court relied on the major questions doctrine, without even mentioning *Chevron*,[95] in staying the Department of Health and Human Services' nationwide moratorium on evictions of residential tenants during the emergency created by the COVID-19 pandemic.[96] Section 361(a) of the Public Health Service Act of 1944 empowered the CDC to "make and enforce such regulations as in [its] judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases" across state lines.[97] The second sentence of that section specifically authorized CDC to undertake "inspection, fumigation, disinfection, sanitation, . . . and other measures, as in [its] judgment may be necessary."[98] The agency determined that the moratorium was necessary to prevent evicted tenants who were infected with COVID-19 from spreading the disease to people in other states.[99]

In determining whether the challengers had a substantial likelihood of prevailing on the merits, the Court applied the major questions doctrine to conclude that CDC lacked the authority to impose the moratorium. Given the "pedestrian" examples specified in the statute and the fact that previous regulations under the statute had "generally been limited to quarantining infected individuals and prohibiting the import or sale of animals known to transmit disease," the per curium majority opinion found it a "stretch" to conclude that the statute envisioned an eviction moratorium.[100] The Court "expect[ed] Congress to speak clearly when authorizing an agency to exercise powers of 'vast economic and political

[92] U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting); Richardson, *Antideference*, *supra* note 37, at 184–85.
[93] *U.S. Telecom Ass'n*, 855 F.3d at 421.
[94] *Id.* at 419.
[95] Richardson, *Antideference*, *supra* note 37, at 187.
[96] Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2490 (2021).
[97] Public Health Service Act § 361(a), 42 U.S.C. § 264(a).
[98] *Id.*
[99] *Ala. Ass'n of Realtors*, 141 S. Ct., at 2488.
[100] *Id.* at 2487–88.

significance.'"[101] And the broad language of the Public Health Service Act was "a wafer-thin reed on which to rest such sweeping power."[102] The Court recognized that "the public has a strong interest in combating the spread of COVID-19," but "our system does not permit agencies to act unlawfully even in pursuit of desirable ends."[103] Finally, the Court noted that "[t]he moratorium intrud[ed] into an area that is the particular domain of state law: the landlord-tenant relationship."[104]

In *Utility Air Regulatory Group* and *Alabama Association of Realtors*, the Court deployed the major questions doctrine as a bulwark against expansion of the administrative state. Justice Gorsuch later provided a clear articulation of this bulwark function when he expressed his concern that an "agency may seek to exploit some gap, ambiguity, or doubtful expression in Congress's statutes to assume responsibility far beyond its initial assignment."[105] The major questions doctrine "guards against this possibility by recognizing that Congress does not usually 'hide elephants in mouse holes.'"[106] Thus, the doctrine serves as "a vital check on expansive and aggressive assertions of executive authority."[107]

This bulwark manifestation of the major questions doctrine presumes that Congress did not delegate to agencies the power to resolve a question of vast economic and political significance absent an explicit delegation of power from Congress to resolve the precise legal question at issue.[108] Moreover, the bulwark manifestation presumes that it is the obligation of the court, not the agency, to decide what the statute says in determining whether Congress did in fact clearly delegate the relevant authority to the agency.[109] Only when the court is convinced by clear statutory language that Congress has empowered the agency to decide the precise question at issue will the court allow the agency's action to stand.[110] It is an imperfect bulwark because Congress can still authorize expansions, so

[101] *Id.* at 2489 (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).
[102] *Id.*
[103] *Id.* at 2490.
[104] *Id.* at 2489.
[105] Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring).
[106] *Id.* (quoting Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 468 (2001)).
[107] *Id.* (quoting U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 417 (D.C. Cir. 2017) (Kavanaugh, J., dissenting)).
[108] Monast, *supra* note 3, at 447.
[109] *Id.*
[110] For an exploration of criticism, see, e.g., Patrick Parenteau, *The Supreme Court Has Curtailed EPA's Power to Regulate Carbon Pollution – And Sent a Warning to Other Regulators*, CONVERSATION (June 30, 2022), https://theconversation.com/the-supreme-court-has-curtailed-epas-power-to-regulate-carbon-pollution-and-sent-a-warning-to-other-regulators-185281 (stating that the major questions doctrine "holds that agencies may not regulate on questions of 'vast economic and political significance' without clear directions from Congress").

long as it is clear that it means to do so. But the bulwark metaphor works for people who prefer small government with limited powers to intervene into private sector activities.

B. Virtues

Supporters of the bulwark manifestation of the major questions doctrine have offered several justifications for the doctrine.[111] First, they argue that the bulwark reflects congressional intent. Congress could not have intended to delegate to the agency the power that the agency is claiming when its exercise of that power could have vast economic or political consequences.[112] In his dissent in the *Net Neutrality* case, Judge Kavanaugh argued that the major questions doctrine was grounded in "a presumption that Congress intend[ed] to make major policy decisions itself, not leave those decisions to agencies."[113] That presumption, however, usually lacks any basis in statutory language or legislative history. Congress has used broad language to delegate policymaking power to agencies in contexts where it must have been aware that the agency would be resolving major questions. For example, Congress knew full well when it delegated to EPA the power to promulgate national ambient air quality standards "requisite to protect public health" and "public welfare" that those standards would have a huge economic and political impact.[114] Congress could have prescribed specific concentrations of all of the pollutants that it cared to regulate in the statute itself. But Congress left the major policy decisions that went into setting ambient air quality standards to EPA. Likewise, Congress knew that EPA would be deciding major questions regarding controls on chemicals emitted into the air when it provided what Justice Stevens called "the Clean Air Act's capacious definition of 'air pollutant' . . . ."[115]

Second, supporters claim that the major questions bulwark is necessary to combat agency aggrandizement in what columnist George F. Will calls "the increasingly autonomous, unleashed and unaccountable administrative state."[116] Chief Justice John Roberts has decried federal

[111] Emerson, *supra* note 37, at 2041–42 (discussing several justifications for the doctrine); Heinzerling, *Power Canons*, *supra* note 45, at 1937 (describing the canon); Richardson, *Antideference*, *supra* note 37, at 175–76 (same).

[112] Richardson, *Big Cases*, *supra* note 21, at 394–95.

[113] U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

[114] 42 U.S.C § 7409(b)(1)–(2).

[115] Massachusetts v. EPA, 549 U.S. 497, 532 (2007).

[116] George F. Will, *The EPA Decision Is the Biggest One of All, and the Court Got It Right*, WASH. POST (June 30, 2020), https://www.washingtonpost.com/opinions/2022/06/30/supreme-court-decision-environmental-protection-agency/. *See also* Emerson, *supra* note 37, at 2042;

agencies "poking into every nook and cranny of daily life . . . ."[117] In particular, supporters of the bulwark manifestation believe that courts should not tolerate agency reliance on unclear language in aging statutes to validate major expansions of their regulatory powers into areas where they lack expertise and experience.[118] Supporters of the administrative state, however, contest the assertion that agencies rely on vague statutory language for their own aggrandizement. Relying on their empirical study of agency attempts to address new problems under aging statutes, Professors Jody Freeman and David Spence conclude that "agencies seek to get this process *just right* by balancing the perceived need for regulatory innovation with a concern about potential overreach."[119] Their data show that agencies "proceed strategically, cognizant of the preferences of their political overseers and the risk of being overturned in the courts."[120] As they proceed, they remain "surprisingly accountable, not just to the President, but also to Congress, the courts, and the public."[121] In short, "they are anything but out-of-control."[122] And this is especially true in high-stakes rulemakings involving matters of great economic and political salience.[123]

Third, proponents of the bulwark manifestation view the courts' role in major questions cases as protecting liberty from the tyranny of the administrative state.[124] Justice Gorsuch posits that "[i]f administrative agencies seek to regulate the daily lives and liberties of millions of Americans, the [major questions] doctrine says, they must at least be able

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Alison Frankel, *U.S. Supreme Court Just Gave Federal Agencies a Big Reason to Worry*, REUTERS (June 30, 2022), https://www.reuters.com/legal/government/us-supreme-court-just-gave-federal-agencies-big-reason-worry-2022-06-30/ (noting that the conservative New Civil Liberties Alliance argues that the major questions doctrine ensures that "the major decisions affecting people's lives are to be made by the people's representatives in Congress, not by unelected bureaucrats"); Katie Tubb, *Supreme Court's Ruling in* West Virginia v. EPA *Delivers Win for Self-Government, Affordable Energy*, DAILY SIGNAL (June 30, 2022), https://www.heritage.org/government-regulation/commentary/supreme-courts-ruling-west-virginia-v-epa-delivers-win-self (expressing pleasure that that the Supreme Court "has made it harder for . . . regulatory agencies to get away with . . . power grabs").

[117] City of Arlington v. FCC, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting).

[118] Freeman & Spence, *supra* note 61, at 69–70 (relating the position of some judges).

[119] *Id.* at 3 (emphasis added).

[120] *Id.*

[121] *Id.*

[122] *Id.* at 19.

[123] *Id.* at 75–76.

[124] *See, e.g.*, Mila Sohoni, *The Trump Administration and the Law of the* Lochner *Era*, 107 GEO. L.J. 1323, 1328–29 (2019); Sunstein, *Two Major Questions Doctrines*, *supra* note 53, at 492; Daniel E. Walters, *Symmetry's Mandate: Constraining the Politicization of American Administrative Law*, 199 MICH. L. REV. 455, 503–05 (2020).

to trace that power to a clear grant of authority from Congress."[125] The liberty that proponents of the bulwark manifestation value, however, appears to be the very narrow version of liberty that roughly equates to the "economic liberty" touted by Mises, Hayek and other free market fundamentalists.[126] As Professor Lisa Heinzerling observes, the liberty these proponents have in mind does not include "the liberty that comes from programs designed to redress past and ongoing injustices inflicted by the government and private persons and entities."[127]

Finally, proponents of the bulwark manifestation of the major questions doctrine suggest that the doctrine ensures against assertions of regulatory power by agencies that lack the expertise to exercise that power. In *King v. Burwell*, for example, the Court found it "especially unlikely" that Congress had delegated the authority to regulate insurance rates to the IRS, given its lack of "expertise in crafting health insurance policy of this sort."[128] The bulwark makes sense when an agency relies on vague statutory language to authorize it to venture beyond its areas of expertise.[129]

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[125] Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661, 668 (2022) (Gorsuch, J., concurring). In his concurrence in *West Virginia v. EPA*, Justice Gorsuch further claimed that the major questions doctrine seeks to protect against "unintentional, oblique, or otherwise unlikely" intrusions by federal agencies on "self-government, equality, fair notice, federalism and the separation of powers." 142 S. Ct. 2587, 2620 (2022) (Gorsuch, J., concurring) (quoting *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 669 (Gorsuch, J., concurring)). Justice Gorsuch did not explain how preventing the expansion of the administrative state protected "self-government, equality, fair notice, federalism and the separation of powers" other than by quoting Justice Roberts's majority opinion's assertion that a "recurring problem" was "agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted." *Id.* Neither Justice Gorsuch nor Justice Roberts provided any empirical support for the assertion that agencies' acting ultra vires to exercise consequential power was in fact a "recurring problem." To the contrary, professors Jody Freeman and David Spence have shown that EPA and the Department of Energy have carefully avoided asserting highly consequential power in unaccountable ways. See discussion *supra* notes 61–65 and accompanying text.

[126] Lisa Heinzerling, *Nondelegation on Steroids*, 29 N.Y.U. ENV'T L.J. 379, 399 (2021) [hereinafter Heinzerling, *Nondelegation*]. *See* MCGARITY, DEMOLITION AGENDA, *supra* note 10, at 22–25 (describing free market fundamentalism).

[127] Heinzerling, *Nondelegation*, *supra* note 126, at 399. *See also* Sunstein, *Two Major Questions Doctrines*, *supra* note 53, at 492 ("[L]iberty is compromised not only when government intrudes itself into private ordering, but also when private ordering results in (for example) environmental degradation, racial discrimination, and serious harms to public health and safety.").

[128] 576 U.S. 473, 474 (2015).

[129] *See West Virginia*, 142 S. Ct. at 2633 (2022) (Kagan, J., dissenting) ("Congress does not usually grant agencies the authority to decide significant issues on which they have no particular expertise.").

C. Objections

Critics of the major questions doctrine find much to dislike in this fairly recent Supreme Court creation. Many of the critical terms of the bulwark manifestation are hopelessly vague. The doctrine tends to focus the courts' attention more on the nature of the questions presented in a rulemaking exercise than on the text and purpose of the statute that the agency relies on for its authority. The doctrine is not neutral in that it favors deregulation over regulation. The doctrine prevents agencies from exercising delegated powers that they have not used in the past. The bulwark manifestation is arguably inconsistent with the Congressional Review Act. And the doctrine also renders regulatory decision-making less accountable to the public.

1. Vagueness of Critical Terms

The first (and most obvious) objection is the impenetrable vagueness of "majorness" and the defining criterion of "vast economic and political significance."[130] The majorness of a legal question apparently lies in the eye of the beholder.[131] Judges Griffith Brown and Kavanaugh conceded as much in their *U.S. Telecom Ass'n* dissent when they allowed that "determining whether a rule constitutes a major rule sometimes has a bit of a 'know it when you see it' quality."[132] If, for example, political controversy is sufficient to elevate a question to "major" status, all it takes to meet that threshold is a robust public relations campaign or a few noisy politicians on cable news to stir up the appearance of political controversy.[133]

No Supreme Court majority opinion has attempted to set out the factors that courts should take into consideration in invoking the major questions

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[130] Monast, *supra* note 3, at 448.

[131] Richardson, *Antideference*, *supra* note 37, at 197–98.

[132] U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 423 (D.C. Cir. 2017) (Brown, J., dissenting). *See also* Coenen & Davis, *supra* note 17, at 780 (suggesting that "the Court knows a major question when it sees it, applying an all-things-considered judgment based upon . . . a felt sense of the legal and political times").

[133] *See* Natasha Brunstein & Richard L. Revesz, *Mangling the Major Questions Doctrine*, 74 ADMIN. L. REV. 317, 354 (2022) (suggesting that "a well-funded, sophisticated group, could undertake actions that could then be used as evidence for the intensity of public concern and a reason for striking down a regulatory program"); Dawn Reeves & Curt Barry, *More Rules Could Face "Major Questions" Test Under Gorsuch Concurrence*, INSIDE EPA (July 8, 2022) (quoting Professor Dan Farber), https://insideepa.com/climate-news/more-rules-could-face-major-questions-test-under-gorsuch-concurrence ("[I]f an issue gets enough airtime on Fox [News], it's a major question.").

doctrine.[134] In a concurring opinion, however, Justice Gorsuch suggested that the doctrine applies when: (1) the "agency claims the power to resolve a matter of great 'political significance' or end an 'earnest and profound debate across the country'"; (2) the agency attempts to regulate "a significant portion of the American economy"; or (3) the agency "seeks to 'intrud[e] into an area that is a particular domain of state law.'"[135] He acknowledged, however, that the list may not be exclusive, thereby giving the Court an opportunity to expand the list when needed to justify including some future action that did not pass the three-factor test.[136] Except for the concern for federalism, which is already covered by a clear statement rule,[137] the Gorsuch factors offer little additional guidance.[138] They do, however, appear to provide a fairly low hurdle for a court that wants to invoke the major questions doctrine.[139]

Congress has provided a test for determining whether regulations are "major" for purposes of congressional consideration under the Congressional Review Act, which provides special procedures for allowing Congress to pass a joint resolution disapproving "major" regulations.[140] That statute defines a "major" rule to be one that is likely to result in "an annual effect on the economy of $100,000,000 or more," "a major increase in costs or prices," or "significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based [companies]."[141] To date, the Supreme Court has ignored this statutory test, despite the fact that it appears to reach rulemakings addressing roughly the same big issues as the major questions doctrine.[142]

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[134] Brunstein & Revesz, *supra* note 133, at 318–19; Richardson, *Big Cases*, *supra* note 21, at 381.

[135] West Virginia v. EPA, 142 S. Ct. 2587, 2620–21 (2022) (Gorsuch, J., concurring) (internal citations omitted).

[136] *Id.* at 2621.

[137] *Id.*

[138] Scholars have also suggested criteria for distinguishing between "major" questions of substantive administrative law and "minor" or "interstitial" questions. *See, e.g.*, Richardson, *Big Cases*, *supra* note 21, at 381–85 (suggesting four factors: (1) major shift in regulatory scope; (2) economic significance; (3) political controversy; and (4) thin statutory basis); Andrew Michaels, *OSHA Case Shows Fluidity of Major Questions Doctrine*, LAW360 (Jan. 26, 2022), https://www.law360.com/articles/1458155/osha-case-shows-fluidity-of-major-questions-doctrine (suggesting a sliding scale).

[139] Pamela King, *Gorsuch Wanted Climate Ruling to Hobble Congress*, GREENWIRE (July 5, 2022) (quoting Professor Hajin Kim), https://www.eenews.net/articles/gorsuch-wanted-climate-ruling-to-hobble-congress/ (suggesting that it will be "super-easy" to find something to be a major question).

[140] 5 U.S.C. § 801.

[141] *Id.* § 804(2).

[142] Chad Squitieri, *Who Decides Majorness?*, 44 HARV. J.L. & PUB. POL'Y 463, 500–02 (2021). The court in *Health Freedom Defense Fund v. Biden* referred to the Congressional Review Act test

Determining whether a statute authorizes agency action with sufficient "clarity" to satisfy the major questions doctrine also presents a challenge to agencies and courts. Once again, Justice Gorsuch has suggested four factors for courts to consider. First, courts must "look to the legislative provisions on which the agency seeks to rely 'with a view to their place in the overall statutory scheme,'" so as to prevent agencies from "hid[ing] 'elephants in mouseholes.'"[143] Second, courts "may examine the age and focus of the statute the agency invokes in relation to the problem the agency seeks to address."[144] Third, "courts may examine the agency's past interpretations of the relevant statute."[145] Fourth, courts should determine whether "there is a mismatch between an agency's challenged action and its congressionally assigned mission and expertise."[146]

The first criterion is just as vague as the "elephants in mouseholes" metaphor it incorporates.[147] That phrase suggests that Congress does not hide grants of power to decide major questions (i.e., elephants) in vague or incidental statutory language (i.e., mouseholes). But the metaphor is "not amendable to consistent application."[148] As Jacob Loshin and Aaron Nielson observe, "[o]ne judge's mouse is another judge's elephant . . . ."[149] The second criterion is equally troublesome. While a statute's "focus" seems relevant to assessing the clarity of its delegation of power to an agency, its "age" seems of marginal relevance. An old statute can still speak clearly to problems that arise in the future. As discussed below,[150] Congress can clearly delegate the power to agencies to address changes in circumstances, technologies, or scientific understandings. The third criterion has little to do with whether Congress spoke with clarity in the relevant statute; it has more to do with the consistency of the agency's perception of the statute. The fourth criterion

in concluding that a nationwide transportation mask mandate issued by the Centers for Disease Control and Prevention raised a major question. No. 8:21-CV-1693-KKM-AEP, 2022 WL 1134138, at *11 (M.D. Fla. Apr. 18, 2022).

[143] West Virginia v. EPA, 142 S. Ct. 2587, 2622 (2022) (Gorsuch, J., concurring) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000); Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 468 (2001)).

[144] *Id.* at 2623.

[145] *Id.*

[146] *Id.*

[147] Justice Scalia coined the "elephants in mouseholes" phrase in a case in which the Supreme Court rejected EPA's assertion that Congress had authorized it to consider costs in setting national ambient air quality standards, which would invariably have the effect of making them less stringent. Justice Scalia explained that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman*, 531 U.S. at 468.

[148] Loshin & Nielson, supra note 39, at 23.

[149] *Id.*

[150] See discussion *infra* notes 368–369 and accompanying text.

bears no relationship to the "clarity" of a statute, but there is a common-sense logic to the suggestion that Congress would probably not have assigned the resolution of a major question to an agency that lacks expertise in the subject matter and whose mission does not include resolving the question.[151] The problem with this criterion lies in its application. As discussed below, the Court has sometimes too quickly concluded that the resolution of a major question was not within the agency's mission and expertise.[152]

2. Bias Against Regulation

A second objection to the bulwark manifestation of the major questions doctrine is that it places unauthorized constraints on agencies that bias them against future regulation. The original major questions doctrine was neutral in the sense that it moved from the deferential *Chevron* regime to a regime for major questions in which the court attempted to divine the statute's meaning on its own. That interpretation may align with the agency's interpretation, as it did in *King v. Burwell*, or it may even overturn deregulatory action if that is where the court's reading of the text, legislative history, and relevant canons of construction take it.[153] The major questions bulwark, by contrast, is not neutral because it erects a presumption against agency exercises of power to decide major questions and allows them only if authorized by clear statutory language.[154] It does not appear to be available to overturn deregulatory actions involving major questions.[155] Instead, it shackles agencies as they attempt to advance their statutory missions through actions that have vast economic and political significance.[156] While the doctrine's bias against new

[151] *West Virginia*, 142 S. Ct. at 2633 (2022) (Kagan, J., dissenting) ("Congress does not usually grant agencies the authority to decide significant issues on which they have no particular expertise.").

[152] See discussion *infra* notes 364–369 and accompanying text.

[153] This happened in *MCI Telecommunications Corp. v. AT&T Co.*, characterized by some as the first major questions case, in which the Court overturned the Federal Communications Commission's decision to relieve all carriers other than the dominant carrier of the obligation to file tariffs for approval by the agency. 512 U.S. 218, 229, 231 (1994). *See also* Texas v. United States, 809 F.3d 134, 181–82 (5th Cir. 2015) (employing major questions doctrine to overturn Department of Homeland Security program to exercise its enforcement discretion to make approximately 4.3 million undocumented parents of U.S. citizens or lawful permanent residents not subject to removal proceedings).

[154] Monast, *supra* note 3, at 474; Richardson, *Antideference*, *supra* note 37, at 177.

[155] Heinzerling, *Nondelegation*, *supra* note 126, at 386.

[156] Emerson, *supra* note 37, at 2075–76; David B. Spence, *Naïve Administrative Law: Complexity, Delegation and Climate Policy*, 39 YALE J. REG. 964, 969 (2022) [hereinafter Spence, *Naïve Administrative Law*] (arguing that the major questions doctrine "hamstrings the ability of the regulators—the EPA and FERC—to respond to the climate challenge now and in the future").

federal regulation may be highly desirable to judges who harbor a deep distrust of the administrative state, it runs counter to many statutes that empower agencies to protect the public health, safety, and welfare.[157]

The major questions bulwark is especially resistant to assertions of power not previously exercised.[158] The Court in *Utility Air Regulatory Group* remarked that "[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' we typically greet its announcement with a measure of skepticism."[159] Similarly, the Court in *Alabama Association of Realtors* relied on the fact that previous regulations under the statute had generally been limited to "quarantining infected individuals and prohibiting the import or sale of animals known to transmit disease" to conclude that Congress had not clearly delegated to CDC the authority to impose an eviction moratorium.[160] The doctrine serves as a constraint on an agency's exercises of authority that Congress has delegated to the agency but the agency has not needed to employ in the past.[161] The doctrine therefore has a "use-it-or-lose-it" quality that may well depart from congressional intent in the agency's authorizing statute.

3. Inconsistency with the Congressional Review Act

The bulwark manifestation of the major questions doctrine is arguably inconsistent with the Congressional Review Act. That statute requires federal agencies to submit all "major" regulations to Congress ninety days prior to their effective dates to afford Congress an opportunity to pass a joint resolution of disapproval.[162] Implicit in this procedure is a congressional intent to allow major rules that have survived the process to go into effect. It is more than a little incongruous for a court to declare that it is up to Congress to decide a major question presented by a major rule when Congress has already evaluated that rule under the Congressional Review Act and decided to allow it to go into effect.[163] To the extent that the major questions doctrine is based on a presumption that Congress desires to address major questions on its own, it would appear

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157 *See* Heinzerling, *Power Canons*, *supra* note 45, at 1937, 1983.

158 Richardson, *Antideference*, *supra* note 37, at 186; Sunstein, *Two Major Questions Doctrines*, *supra* note 53, at 493.

159 Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014) (internal citation omitted).

160 Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2487–88 (2021).

161 *See* Heinzerling, *Power Canons*, *supra* note 45, at 1937.

162 5 U.S.C. § 801(a).

163 Squitieri, *supra* note 142, at 491.

that Congress has had an opportunity to do just that during the Congressional Review Act process.[164]

4. Reducing Accountability

The bulwark manifestation of the major questions doctrine avoids public accountability for major regulatory decisions. Its exclusive focus on legislation as the vehicle for ensuring accountability to the public ignores the accountability of agency heads through the president and the broader accountability that is accomplished through notice-and-comment rulemaking, a process through which agency decisionmakers interact with the public during the time that the agency is writing the rule.[165] And it ignores the reality that the wholly unaccountable federal judiciary is the institution that is using the major questions doctrine to prevent the other two politically accountable branches from enacting and implementing laws necessary to address the nation's most pressing problems.[166]

III. THE WRECKING BALL

Since the New Deal, a protective edifice of federal laws and regulations has been built on broad delegations of authority to federal agencies to protect the American public and the environment. The Court is now employing the major questions doctrine as a wrecking ball to demolish that edifice in at least four ways: (1) by limiting the ability of Congress to empower agencies to adapt to changing circumstances; (2) by dismantling major protective initiatives that fall well within the range of programs that the agencies have traditionally administered; (3) by facilitating agency rollbacks of existing programs; and (4) by preventing Congress from delegating the resolution of major questions to agencies, even when it employs pellucid prose.

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[164] *Id.* at 494–95.

[165] Emerson, *supra* note 37, at 2083; Sellers, *supra* note 4, at 946–47; Sunstein, *Two Major Questions Doctrines*, *supra* note 53, at 492; Tortorice, *supra* note 18, at 1123.

[166] Richard Lazarus, *The Supreme Court Just Upended Environmental Law at the Worst Possible Moment*, WASH. POST (June 30, 2022), https://www.washingtonpost.com/opinions/2022/06/30/supreme-court-just-upended-environmental-law-worst-possible-moment/.

A. Doctrine

As the COVID-19 pandemic raged throughout the country for a second year in November 2021, OSHA issued an emergency temporary standard (“ETS”) to protect employees of employers with at least 100 workers from the risk of infection while on the job.[167] Among other things, the standard required covered employees to be vaccinated against COVID-19 or to undertake regular testing for COVID-19 and wear masks in covered workspaces.[168] In a lengthy preamble supporting the ETS, the agency explained in great detail that the covered employees were, in the language of the authorizing statute, “exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards” and that the ETS’s requirements were “necessary to protect employees from such danger.”[169] The agency found that the SARS CoV-2 virus was “readily transmissible in workplaces because they are areas where multiple people come into contact with one another, often for extended periods of time.”[170] Based on hundreds of studies and reports, it concluded that “workers may have little ability to limit contact with coworkers, clients, members of the public, patients, and others, any one of whom could represent a source of exposure to [the virus].”[171] The agency estimated that the standard would save more than 6,500 lives and prevent more than 250,000 hospitalizations during the six months that it remained in effect.[172]

Challenges to the standard in multiple circuit courts of appeal were consolidated in the Sixth Circuit, which lifted a temporary stay issued by the Fifth Circuit.[173] The Supreme Court, however, decided to intervene before the Sixth Circuit reached the merits of the challenge. In a brief per curiam opinion, the six Republican-appointed justices issued a new stay

[167] COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61402 (Nov. 5, 2021) [hereinafter OSHA ETS].

[168] *Id.* at 61403. The standard provided exceptions for employees who were at a reduced risk of infection because they worked at home, they were otherwise alone while working, or were working outdoors. *Id.* at 61419. And it provided exemptions for religious objections or reasons of medical necessity. *Id.* at 61552.

[169] 29 U.S.C. § 655(c)(1) (authorizing statute); OSHA ETS, 86 Fed. Reg. at 61402, 61407–47 (preamble).

[170] OSHA ETS, 86 Fed. Reg. at 61411.

[171] *Id.* at 61408; Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661, 674 (2022) (Breyer, J., dissenting) (arguing that the OSHA ETS demonstrated that OSHA met the requirements in showing the necessity of an emergency temporary standard, backed by “hundreds of reports”).

[172] OSHA ETS, 86 Fed. Reg. at 61408.

[173] *Nat’l Fed’n of Indep. Bus.*, 142 S. Ct. at 663.

after concluding that the challengers were "likely to succeed on the merits of their claim that [OSHA] lacked authority to impose the mandate."[174]

The Court relied exclusively on the major questions doctrine, with no mention of *Chevron*, to justify the stay.[175] Since the ETS was, in the Court's opinion, "a significant encroachment into the lives—and health—of a vast number of employees," the Court "expect[ed] Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance."[176] The question then was "whether the Act plainly authoriz[ed OSHA's] mandate," and the Court held that it did not.[177] The Court reasoned that the statute only empowered OSHA to set standards for workplaces and not "public health more generally, which falls outside of OSHA's sphere of expertise."[178] Without citing any empirical evidence, the Court made the empirical claim that "[a]lthough COVID-19 is a risk that occurs in many workplaces, it is not an *occupational* hazard in most."[179] In its expert opinion, the Court found that the "kind of universal risk" posed by COVID-19 "is no different from the day-to-day dangers that all face from crime, air pollution, or any number of communicable diseases."[180] The Court then concluded that "[p]ermitting OSHA to regulate the hazards of daily life—simply because most Americans have jobs and face those same risks while on the clock—would significantly expand OSHA's regulatory authority without clear congressional authorization."[181] The fact that the ETS would save 6,500 lives and prevent 250,000 hospitalizations was irrelevant to the Court because it was not the Court's "role to weigh such tradeoffs."[182] If Congress wanted to prevent those deaths and hospitalizations, it would have to do so with legislation specifically empowering OSHA to promulgate ETSs to protect workers in pandemics.[183]

A dissenting opinion written by Justice Breyer and joined by Justices Elena Kagan and Sonia Sotomayor provides a devastating critique of the shallow statutory analysis that the major questions doctrine permitted the majority to employ. The dissent sharply disagreed with the majority's conclusion that the risk of contracting COVID-19 was not an

[174] *Id.* at 664–65.
[175] *See* Richardson, *Antideference*, *supra* note 37, at 177.
[176] *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 665 (quoting Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021)).
[177] *Id.*
[178] *Id.*
[179] *Id.*
[180] *Id.*
[181] *Id.*
[182] *Id.* at 666.
[183] *Id.*

occupational hazard in most workplaces.[184] Because it spread from person-to-person in indoor spaces, COVID-19 was indeed a hazard in nearly all indoor workplaces.[185] And OSHA had on many previous occasions promulgated standards applicable "to all or nearly all workplaces in the Nation, affecting at once many tens of millions of employees."[186] The statute did not require as a precondition for OSHA regulation that employees be exposed to the risks posed by the transmission of COVID-19 "only while on the workplace clock."[187] In fact, OSHA had for many years "regulated risks that arise both inside and outside of the workplace."[188] OSHA had "issued, and applied to nearly all workplaces, rules combating risks of fire, faulty electrical installations, and inadequate emergency exits—even though the dangers prevented by those rules arise not only in workplaces but in many physical facilities . . . ."[189] More important, in indoor workplaces, more than in other indoor environments, "individuals have little control, and therefore little capacity to mitigate risk."[190] Finally, the risk of contracting COVID-19 in the workplace was quite different from the everyday risks that people faced from crime, air pollution, and other airborne diseases that did not spread asymptomatically. Indeed, the fact that COVID-19 was an occupational disease in indoor workplaces was dramatically demonstrated by the fact that the pandemic had transformed the workplaces of most Americans.[191]

Unlike the majority opinion, the dissent analyzed the statutory language and showed how the risk posed by COVID-19 in the workplace fit easily within the dictionary definitions of "new hazard" and "physically harmful agent."[192] Unlike the majority, the dissent showed how OSHA based its conclusion that either vaccination or testing and masking was "necessary" on "a host of studies and government reports . . . ."[193] OSHA's preamble referenced "hundreds of reports of workplace COVID-19 outbreaks—not just in cheek-by-jowl settings like factory assembly lines, but in retail stores, restaurants, medical facilities, construction areas, and standard offices."[194] And the ETS exempted

[184] *Id.* at 674–75 (Breyer, J., dissenting).
[185] *Id.* at 670.
[186] *Id.* at 674.
[187] *Id.* at 673.
[188] *Id.*
[189] *Id.*
[190] *Id.* at 670.
[191] *Id.*
[192] *Id.* at 672.
[193] *Id.*
[194] *Id.* at 674.

workplaces where employees were not exposed to grave danger from the risk of contracting COVID-19. In short, the ETS lay "at the core of OSHA's authority."[195] It was "part of what the agency was built for."[196] Substituting "judicial diktat for reasoned policymaking,"[197] the majority had "displace[d] the judgments of the Government officials given the responsibility to respond to workplace health emergencies."[198]

The same six conservative justices in *West Virginia v. EPA* deployed the major questions doctrine to demolish an approach to regulating greenhouse gas emissions from coal-fired power plants that was well within EPA's regulatory wheelhouse.[199] Section 111(b) of the Clean Air Act requires EPA to promulgate standards of performance for classes and categories of new stationary sources of air pollutants.[200] Having issued a standard of performance for *new* plants in a category, section 111(d) obligates EPA to establish a procedure under which states promulgate standards of performance for *existing* plants in the same category that address pollutants that EPA has not otherwise regulated under one of its other Clean Air Act authorities.[201] The statute defines the critical term "standard of performance" to be:

> [A] standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the *best system of emission reduction* which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the [agency] determines has been *adequately demonstrated*.[202]

Late in the Obama Administration, EPA unveiled standards for new fossil fuel-fired power plants and guidelines for existing plants in a massive regulation that it called the "Clean Power Plan."[203] EPA concluded that technology for removing greenhouse gases from power plant emissions was not yet available for existing plants.[204] The agency, therefore, based the "best system of emissions reduction" on improved power plant efficiency and measures that companies could take by

[195] *Id.* at 675.
[196] *Id.*
[197] *Id.* at 674.
[198] *Id.* at 670.
[199] West Virginia v. EPA, 142 S. Ct. 2587, 2614–16 (2022).
[200] 42 U.S.C. § 7411(b)(1).
[201] *Id.* § 7411(d).
[202] *Id.* § 7411(a)(1) (emphasis added).
[203] Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64662, 64663–64 (Oct. 23, 2015).
[204] *Id.* at 64883–84.

shifting the generation of electricity to lower-emitting sources.[205] For one thing, a company could shift load from coal-fired plants to gas-fired plants that it owned or gas-fired plants owned by others by purchasing power from them.[206] Since gas-fired plants yielded fewer greenhouse gas emissions per kilowatt-hour than coal-fired plants, this would have the effect of reducing greenhouse gas emissions.[207] Likewise, a company could build solar arrays or wind farms, neither of which emitted greenhouse gases, or purchase renewable power from existing facilities.[208] EPA based this unprecedented look "beyond the fenceline" for emissions reductions on a broad reading of the statutory words "best system of emissions reduction" ("BSER"). A state could establish emissions limitations for generating units within the state that mirrored the rates EPA selected as BSER for those units.[209] Alternatively, a state could create a cap-and-trade regime so long as it employed caps that reflected EPA's determination of BSER for the units within the state.[210]

The publication of the regulations in October 2015 resulted in a "torrent of lawsuits" in the D.C. Circuit Court of Appeals.[211] The D.C. Circuit denied an emergency petition to stay the regulation in January 2016.[212] A month later, the Supreme Court by a 5-4 vote decided to issue the requested stay.[213] It was the first time that the Court had stayed an action pending in a court of appeals after the lower court had refused to issue a stay.[214] The Obama Clean Power Plan never went into effect.[215]

The Trump Administration repealed the Clean Power Plan and replaced it with a much less stringent "Affordable Clean Energy Plan" based on its legal conclusion that the agency lacked the authority to

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[205] *Id.* at 64787.
[206] *Id.* at 64795.
[207] *Id.* at 64918.
[208] *Id.* at 64804.
[209] *Id.* at 64667.
[210] *Id.* at 64667–68.
[211] *At Deadline, Critics File Host of New Challenges to Power Plant GHG Rules*, INSIDE EPA (Dec. 23, 2015), https://insideepa.com/daily-news/deadline-critics-file-host-new-challenges-power-plant-ghg-rules.
[212] Coral Davenport, *Court Rejects a Bid to Block Coal Plant Regulations*, N.Y. TIMES (Jan. 21, 2016), https://www.nytimes.com/2016/01/22/us/politics/court-rejects-bid-to-delay-obama-rule-on-climate-change.html.
[213] Adam Liptak & Coral Davenport, *Supreme Court Deals Blow to Obama's Efforts to Regulate Coal Emissions*, N.Y. TIMES (Feb. 9, 2016), nytimes.com/2016/02/10/us/politics/supreme-court-blocks-obama-epa-coal-emissions-regulations.html.
[214] *Id.*
[215] Nathan Rott, *Trump Moves to Let States Regulate Coal Plant Emissions*, NPR (Aug. 21, 2018), https://www.npr.org/2018/08/21/639396683/trump-moves-to-let-states-regulate-coal-plant-emissions.

require generation shifting beyond the fenceline.[216] The Trump EPA took the position that its interpretation was compelled by the major questions doctrine.[217] The D.C. Circuit, however, set aside the Affordable Clean Energy Plan in a lengthy opinion rejecting the Trump EPA's reading of the Clean Air Act to preclude generation shifting.[218] The court also rejected the argument that the major questions doctrine applied.[219] By that time, however, President Joe Biden had taken office and ordered EPA to establish new guidelines for existing coal-fired power plants.[220] The Supreme Court then granted certiorari in the challenge to the Trump plan.[221]

The majority opinion written by Chief Justice Roberts, in which all of the Republican-appointed justices joined, employed the major questions doctrine to conclude that EPA lacked the authority to base the "best system of emission reduction" on generation shifting beyond the fenceline.[222] The Court observed that the major questions doctrine referred to "an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted."[223] The Court's use of the passive voice did not obscure its clear understanding that the federal courts would be deciding whether or not Congress had granted the highly consequential power.

The Court noted that:

> [O]ur precedent teaches that there are "extraordinary cases" that call for a different approach—cases in which the "history and breath 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.[224]

After taking the reader on a tour of its major questions cases, the Court concluded that in each of the cases, "'common sense as to the manner in

[216] Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32520, 32523 (July 8, 2019).

[217] *Id.* at 32524, 32529.

[218] Am. Lung Ass'n v. EPA, 985 F.3d 914, 930 (D.C. Cir. 2021).

[219] *Id.* at 958–59, 968.

[220] West Virginia v. EPA, 142 S. Ct. 2587, 2606 (2022); Exec. Order No. 13990, 86 Fed. Reg. 7037, 7037–38 (Jan. 25, 2021).

[221] *West Virginia*, 142 S. Ct. at 2606.

[222] *Id.* at 2615–16.

[223] *Id.* at 2609.

[224] *Id.* at 2608 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000)).

which Congress [would have been] likely to delegate' such power to the agency at issue made it very unlikely that Congress had actually done so."[225] In these "extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us 'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking in there."[226] To convince a court otherwise, "something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to 'clear congressional authorization' for the power it claims."[227] This is the Court's clearest statement of the major questions doctrine since the Court departed from its *Chevron* workaround approach.

The Court easily concluded that EPA's action presented a major question. It found that EPA had "'claim[ed] to discover in a long-extant statute an unheralded power' representing a 'transformative expansion in [its] regulatory authority'" and "located that newfound power in the vague language of an 'ancillary provision[]' of the Act, one that was designed to function as a gap filler and had rarely been used in the preceding decades."[228] In addition, "the Agency's discovery allowed it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself."[229]

Prior to the Clean Power Plan, EPA had consistently focused on the words "best adequately demonstrated" to employ a "technology-based" approach that focused on identifying technologies that could reduce emissions at individual sources.[230] In support of its conclusion, the Court quoted from a 1983 article by this author describing the technology-based approach as one that "focuses upon the control technologies that are available to industrial entities and requires the agency to . . . ensur[e] that regulated firms adopt the appropriate cleanup technology . . . ."[231] The agency's shift in focus to the words "best system of emissions reduction" in the Clean Power Plan, in the Court's view, represented an attempt to discover in a long-extant statute an unheralded power that represented a transformative expansion of its regulatory authority. Not only was it

[225] *Id.* at 2609 (internal citation omitted) (quoting *Brown & Williamson Tobacco Corp.*, 529 U.S. at 133).

[226] *Id.* (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

[227] *Id.* (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324).

[228] *Id.* at 2610 (internal citations omitted) (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324; Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 468 (2001)).

[229] *Id.*

[230] *Id.* at 2611.

[231] *Id.* at 2601 (quoting Thomas O. McGarity, *Media-Quality, Technology, and Cost-Benefit Balancing Strategies for Health and Environmental Regulation*, 46 L. & CONTEMP. PROBS. 159, 160 (1983)).

unprecedented, "it also effected a 'fundamental revision of the statute, changing it from [one sort of] scheme of . . . regulation' into an entirely different kind."[232]

The Court further noted that it was unlikely that Congress had delegated to EPA the authority to base standards on beyond-the-fenceline strategies because EPA lacked the expertise to make policy judgments concerning the proper sourcing of electrical power on the national grid.[233] The last place the Court would expect to find such a delegation was "in the previously little-used backwater of Section 111(d)."[234]

Finally, EPA had pointed to no "clear congressional authorization" for its beyond-the-fenceline approach as required by the major questions doctrine.[235] The Court admitted that EPA's generation shifting regime could properly be characterized as a "system" capable of reducing emissions.[236] But "almost anything could constitute such a 'system' . . . ."[237] Out of context, the word was "an empty vessel."[238] Interestingly, the Court did not go to the dictionary definition of "system" to fill that vessel. Instead, it concluded *ipse dixit* that "[s]uch a vague statutory grant is not close to the sort of clear authorization required by" the major questions doctrine.[239]

In a lengthy dissent, Justice Kagan, joined by Justices Breyer and Sotomayor, accused the majority of "strip[ping] the [EPA] of the power Congress gave it to respond to 'the most pressing environmental challenge of our time.'"[240] To the majority's characterization of Section 111(d) as a "little used backwater," Justice Kagan responded that it was more accurately characterized as a "backstop or catch-all provision, protecting against pollutants" that the Clean Air Act's other programs had "let go by."[241] Section 111(d) was used rarely because it was rare that a new source performance standard under Section 111(b) addressed a pollutant that was not already regulated by some other Clean Air Act program.[242] But that did not diminish its importance as a backstop for

[232] *Id.* at 2612 (quoting MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 231 (1994)).
[233] *Id.* at 2612–13.
[234] *Id.* at 2613.
[235] *Id.* at 2614.
[236] *Id.*
[237] *Id.*
[238] *Id.*
[239] *Id.*
[240] *Id.* at 2626 (Kagan, J., dissenting) (quoting Massachusetts v. EPA, 549 U.S. 497, 505 (2007)).
[241] *Id.* at 2629.
[242] *See id.*

pollutants like greenhouse gases that otherwise would have fallen through the cracks.[243]

For the dissent, the definition of "standard of performance" in Section 111(a) provided "regulatory flexibility and discretion" while at the same time containing meaningful constraints in its requirement that EPA consider costs, nonair environmental impacts, and energy considerations.[244] The use of the word "system" suggested that Congress contemplated approaches like generation shifting to limit emissions.[245] Unlike the majority opinion, Justice Kagan's dissent probed the dictionary definitions of "system" and found them entirely consistent with EPA's generation-shifting approach.[246] To the majority's complaint that "'[a]lmost anything' capable of reducing emissions . . . 'could constitute such a "system"'," Justice Kagan replied "that is rather the point."[247] Congress had "used an obviously broad word . . . to give EPA lots of latitude in deciding how to set emissions limits."[248] Indeed, "[t]o ensure the statute's continued effectiveness, the 'best system' should evolve as circumstances evolved—in a way Congress knew it couldn't then know."[249] Thus, when Congress used the word "system," it was speaking with great clarity—"a broad term is not the same thing as a 'vague' one."[250] EPA was therefore correct in concluding that the plain meaning of the word "system" in Section 111(a) referred to "a set of measures that work together to reduce emissions," and generation shifting fit comfortably within that meaning.[251]

The majority, in the dissent's assessment, had "substitute[d] its own ideas about policymaking for Congress's." Instead of Congress deciding "how much regulation is too much," the majority made that policy call.[252] This was wrong for a number of reasons, but an important one was that the majority did not "have a clue about how to address climate change."[253] Nevertheless, the majority "appoint[ed] itself—instead of Congress or the expert agency—the decision-maker on climate policy."[254]

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[243] *Id.*
[244] *Id.*
[245] *Id.* at 2630.
[246] *Id.*
[247] *Id.*
[248] *Id.*
[249] *Id.* at 2640.
[250] *Id.* at 2630.
[251] *Id.* (quoting Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64662, 64762 (Oct. 23, 2015)).
[252] *Id.* at 2643.
[253] *Id.*
[254] *Id.* at 2644.

B. Virtues

Proponents of the wrecking ball manifestation of the major questions doctrine argue that it has the virtue of forcing Congress to make the big policy decisions that affect individual liberty and/or the economy.[255] Justice Gorsuch suggests that the doctrine "ensures that the national government's power to make the laws that govern us remains . . . with the people's elected representatives."[256] Created in response to "the explosive growth of the administrative state since 1970,"[257] it "serves a similar function" to the nondelegation doctrine by "guarding against unintentional, oblique, or otherwise unlikely delegations of the legislative power."[258] Katie Tubb, a Heritage Foundation policy analyst, argues that cases like *West Virginia* are reminders that "America is not run by an unaccountable king in the White House and his regulatory agents, but rather by Americans' elected representatives in partnership with the states."[259] Professor Jennifer Mascott and Eli Nachmany predict that Congress "will now face greater pressure to reach policy consensus more routinely and update old regulatory schemes to address new technological and industrial innovations."[260]

The major questions doctrine also has a structural role to play in enforcing separation of powers. Then-Judge Kavanaugh has suggested that the doctrine invokes "a separation of powers-based presumption against the delegation of major lawmaking authority from Congress to

[255] Randolph J. May, *A Major Ruling on Major Questions*, REGUL. REV. (July 15, 2022), https://www.theregreview.org/2022/07/15/may-major-questions/; 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/.

[256] Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661, 668 (2022) (Gorsuch, J., concurring).

[257] *West Virginia*, 142 S. Ct. at 2619 (Gorsuch, J., concurring).

[258] *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 669 (Gorsuch, J., concurring). *See* Nielson, *Minor Questions*, *supra* note 1, at 1192–93 (noting that under the major questions doctrine, "courts should address nondelegation concerns by reading statutes narrowly").

[259] Katie Tubb, *Supreme Court's Ruling in* West Virginia v. EPA *Delivers Win for Self-Government, Affordable Energy*, DAILY SIGNAL (June 30, 2022), https://www.dailysignal.com/2022/06/30/supreme-courts-ruling-in-west-virginia-v-epa-delivers-win-for-self-government-affordable-energy/. *See also* Jennifer L. Mascott & Eli Nachmany, *The Supreme Court Reminds the Executive Branch: Congress Makes the Laws*, WASH. POST (July 1, 2022), https://www.washingtonpost.com/opinions/2022/07/01/west-virginia-epa-supreme-court-ruling-carbon-emissions-congress-laws/ (opining that after *West Virginia*, "[u]sing regulation as a shortcut to lawmaking will no longer fly").

[260] Mascott & Nachmany, *supra* note 259. *See also* George F. Will, *The EPA Decision Is the Biggest One of All, and the Court Got It Right*, WASH. POST (June 30, 2022), https://www.washingtonpost.com/opinions/2022/06/30/supreme-court-decision-environmental-protection-agency/ (arguing that the major questions doctrine could "revive Congress by compelling it to resume its proper responsibilities").

the Executive Branch."[261] By insisting that Congress speak clearly and specifically in delegating authority to resolve major questions, the major questions doctrine returns Congress to its proper policymaking role under the Constitution.[262] The wrecking ball manifestation of the doctrine therefore provides a vehicle for courts unwilling to hold federal statutes unconstitutional under the nondelegation doctrine to prevent agencies from exercising broad delegations of power.[263] Using the major questions doctrine, a court can selectively neuter statutory delegations with which it disagrees without the eyebrow-raising assertion of judicial power to declare an act of Congress unconstitutional.[264] Employing a different metaphor, columnist Hugh Hewitt reads *West Virginia* as "a long, long overdue trimming of the wildly overgrown federal administrative state."[265]

C. Objections

The wrecking ball manifestation of the major questions doctrine has several troubling practical disadvantages. The wrecking ball manifestation can destroy the government's ability to adapt to changing conditions, to the great disadvantages of the statute's beneficiaries. It can wreck major initiatives launched by agencies to protect public health, safety, and the environment. The manifestation can facilitate attempts to move regulatory programs in a deregulatory direction. And, in the extreme, the wrecking ball manifestation can prevent Congress from delegating the resolution of major questions to agencies.

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[261] U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

[262] Kimberley A. Strassel, *The Justices Send a Message to Congress*, WALL ST. J. (June 30, 2022), https://www.wsj.com/articles/justices-message-to-congress-west-virginia-v-epa-supreme-court-administrative-law-major-questions-delegation-john-roberts-11656626942; Mascott & Nachmany, *supra* note 259 ("Congress must serve as the institutional actor reaching consequential policy choices by majority vote.").

[263] Monast, *supra* note 3, at 463–64.

[264] *See* Emerson, *Administrative Answers*, *supra* note 37, at 2044 (describing that under the major questions doctrine, "the Court construes statutes so as to avoid the impermissible delegation of legislative power that might occur if the agency could resolve important questions of principle and policy"); Richardson, *Antideference*, *supra* note 37, at 190 (arguing that the major questions canon has "emerged . . . as the nondelegation doctrine in other clothes"); Sunstein, *Two Major Questions Doctrines*, *supra* note 53, at 480 (noting that the major questions doctrine may reflect "a modern effort to resuscitate the nondelegation doctrine and in a way that is *relatively* easier to administer").

[265] Hugh Hewitt, *The Court's EPA Ruling Was About Something Much Bigger Than One Agency*, WASH. POST (July 3, 2022), https://www.washingtonpost.com/opinions/2022/07/03/supreme-court-epa-decision-meaning/.

1. Statutory Obsolescence

The major questions doctrine can impair the government's ability to react to new developments, technologies, and evasions that pose significant risks to public health, safety, and welfare. The protective edifice was constructed out of statutes in which Congress addressed unanticipated change by employing broad language that allowed implementing agencies to address new problems as they arose in ways that fulfilled their statutory missions. Justice Stevens wrote for the majority in *Massachusetts v. EPA* that Congress speaks in capacious terms because it knows that "without regulatory flexibility, changing circumstances and scientific developments would soon render the [statute] obsolete."[266]

When the courts use the major questions doctrine to prevent agencies from relying on broad statutory language in existing statutes to address newly arising problems, they guarantee statutory obsolescence.[267] Justice Gorsuch made this aspect of the major questions doctrine clear in his *West Virginia* concurrence, when he expressed concern about "an agency's attempt to deploy an old statute focused on one problem to solve a new and different problem," which was, in his view, a strong indication that the agency was "acting without clear congressional authority."[268] The major questions doctrine thus aims a wrecking ball at a cornerstone of the protective edifice—Congress's ability to delegate to agencies the flexibility needed to react to changing circumstances—when agencies attempt to resolve major questions. Since Congress is not clairvoyant, it cannot foresee all of the problems that will arise in the future and craft statutory language that "pellucidly covers the future problems and gives the agency the power to address them."[269]

In his dissent in *National Federation of Independent Business*, Justice Breyer observed that the Congress that enacted the Occupational Safety and Health Act in 1970 did not specifically instruct OSHA to write regulations protecting workers from viruses that cause pandemics

[266] Massachusetts v. EPA, 549 U.S. 497, 532 (2007).

[267] *See* Richardson, *Antideference*, *supra* note 37, at 198.

[268] West Virginia v. EPA, 142 S. Ct. 2587, 2623 (2022) (Gorsuch, J., concurring). Justice Gorsuch conceded that "sometimes old statutes may be written in ways that apply to new and previously unanticipated situations," citing a Racketeer Influenced and Corrupt Organizations Act prosecution by a Belgian corporation against a New York exporter in which the Court agreed with the plaintiff that the statute was not limited to mobsters and organized criminals. *Id.* (citing Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985)). He did not cite a single case involving the major questions doctrine. One suspects that the Court is likely to find few cases in which Congress has written old statutes in ways that apply to new and previously unanticipated situations.

[269] Heinzerling, *Power Canons*, *supra* note 45, at 1948.

"because that Congress could not predict the future."[270] But the enacting "Congress did indeed want OSHA to have the tools needed to confront emerging dangers (including contagious diseases) in the workplace."[271] The majority's application of the major questions doctrine to demand clear language that Congress wanted to address workplace risks posed by pandemics severely limited Congress's power to delegate authority to agencies to address unanticipated risks.

As a practical matter, the major questions doctrine as expanded by the current Supreme Court forces Congress to revisit statutory terrain every time circumstances and scientific developments change, or regulated entities figure out how to circumnavigate existing regulations. Unfortunately, Congress is "ill-suited to the iterative, ongoing task of making every important regulatory choice . . . ."[272] Indeed, as Professor Spence has observed, the Congress that the Court invites to react to its invocation of the major questions doctrine will not be the same Congress that enacted the statute providing the broad language under which the agency took that action.[273]

The Justices are doubtless aware that in an era of partisan congressional gridlock, it is highly unlikely that Congress will react to a decision nullifying a major regulation with legislation focused specifically on the problem that the regulation addressed.[274] That is just fine for those who were never happy with the statute in the first place, some of whom may be on the bench. When it comes to statutes empowering agencies to regulate, the source of congressional gridlock is usually Republicans who do not believe that the federal government should be solving newly emerging problems and who would prefer to see regulatory statutes enacted years ago become obsolete and unused.[275] It is beyond naïve to suggest that allowing federal courts to strike down consequential agency actions taken under fresh interpretations of old statutes will cause Congress to suddenly spring into action and refresh those statutes or write new statutes to address newly emerging problems. As a practical matter, the major questions wrecking ball may render

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[270] Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661, 674 (2022) (Breyer, J., dissenting).

[271] *Id.*

[272] Spence, *Naïve Administrative Law*, *supra* note 156, at 1001. *See also* Richardson, *Antideference*, *supra* note 37, at 204.

[273] Spence, *Naïve Administrative Law*, *supra* note 156, at 1005.

[274] Freeman & Spence, *Old Statutes*, *supra* note 61, at 64–65.

[275] Jonathan Bernstein, *Gridlock Is Still the Main Republican Political Strategy*, BL (Mar. 30, 2021), https://www.bloomberg.com/opinion/articles/2021-03-30/gridlock-is-still-the-main-republican-political-strategy; Alex Garlick, *A Method to the Gridlock Madness*, U.S. NEWS & WORLD REP. (Dec. 2, 2014), https://www.usnews.com/opinion/articles/2014/12/02/republicans-use-gridlock-because-it-works.

federal regulators incapable of protecting the public from serious threats like climate disruption and deadly pandemics, no matter how much the public supports such protections.

2. Demolishing Major Protective Initiatives

In *National Federation of Independent Business* and *West Virginia*, the Supreme Court deployed the major questions doctrine to destroy major protective initiatives that were well within the traditional range of the agencies' authorities and well within their expertise because the initiatives were of "vast economic and political significance" and because the Court found that the agencies' statutes had not with sufficient clarity authorized the particular actions that the agencies took to protect the public.[276] The lower courts are vigorously wielding the major questions doctrine wrecking ball to demolish other agency initiatives, many of which were aimed at protecting public health from the risks posed by the COVID-19 pandemic.[277]

The lynchpin of the Supreme Court's major questions analysis in *National Federation of Independent Business* was its unsupported empirical claim that COVID-19 was not an occupational disease in most workplaces. COVID-19 was a disease that people faced in all indoor environments and therefore was not a particular problem of workplaces. In the majority's expert opinion, the "kind of universal risk" posed by COVID-19 was "no different from the day-to-day dangers that all face from crime, air pollution, or any number of communicable diseases."[278]

In the past, OSHA and reviewing courts have not limited OSHA's reach to hazards that were unique to the workplace. OSHA has on many occasions regulated air contaminants that are found outside the workplace, and it has published guidelines on workplace violence designed to protect workers, such as convenience store clerks, from criminals who can also mug people on the street.[279] More to the point, OSHA has regulated exposure to pathogens in the workplace.[280] OSHA has also frequently required workers to wear masks in the workplace, and

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[276] *See* Rachel Frazin, *Supreme Court's EPA Ruling Could Put Other Regs in Danger*, HILL (June 30, 2022) (quoting Professor William Buzbee), https://thehill.com/policy/energy-environment/3543285-supreme-courts-epa-ruling-could-put-other-regs-in-danger/.

[277] *See, e.g.*, Louisiana v. Becerra, 577 F. Supp. 3d 483, 487–88 (W.D. La. 2022); Louisiana v. Biden, 585 F. Supp. 3d 840, 865 (W.D. La. 2022).

[278] Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661, 665 (2022).

[279] *See, e.g.*, *Workplace Violence*, OCCUPATIONAL SAFETY & HEALTH ADMIN., https://www.osha.gov/workplace-violence (last visited Jan. 29, 2023).

[280] *See, e.g.*, 29 C.F.R. § 1910.1030(f) (2022).

it has required testing of blood levels to administer its lead standard, which goes back to 1978.[281] OSHA had not required employees to be vaccinated prior to the COVID-19 ETS, but the ETS did not require vaccination.[282] It gave employees the option of getting vaccinated if they did not want to undergo mandatory testing and wear masks, requirements that were well within the agency's traditional wheelhouse.[283]

If the Court is serious about its assertion that the Occupational Safety and Health Act does not empower OSHA to regulate "day-to-day dangers" that we all face in environments other than workplaces, then all of these longstanding standards are at risk. Many Americans face the risk of exposure to lead in contexts other than the workplace.[284] Does that mean that OSHA lacked the authority to promulgate its highly successful lead standard?[285] Many Americans face the risk of Hepatitis B in contexts other than the workplace.[286] Does that mean that OSHA lacked the authority to promulgate its bloodborne pathogens standard?[287] If so, then what is to prevent employers subject to those standards from petitioning OSHA to repeal them on the ground that their original promulgation violated the major questions doctrine?

Inspired by the Supreme Court's decisions in *Alabama Association of Realtors* and *National Association of Independent Business*, challengers of other Biden Administration regulations requiring vaccinations and/or masks invoked the major questions doctrine in lawsuits filed in district courts in Kentucky, Florida, Louisiana, and Texas. Nearly all of the challenges were successful.[288] A good example of the wrecking ball in

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[281] *See Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 674 (Breyer, J., dissenting) (face coverings); 29 C.F.R. § 1910.1025(j)(2)(i) (blood testing).

[282] *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 671 (Breyer, J., dissenting).

[283] *Id.*

[284] *See, e.g.*, Emily A. Benfer et al., *Health Justice Strategies to Eradicate Lead Poisoning: An Urgent Call to Action to Safeguard Future Generations*, 19 YALE J. HEALTH POL'Y L. & ETHICS 146, 149 (2020).

[285] 29 C.F.R. § 1910.1025.

[286] *See, e.g.*, Joseph K. Lim, *Prevalence of Chronic Hepatitis B Virus Infection in the United States*, 115 AM. J. GASTROENTEROLOGY 1429, 1429 (2020).

[287] 29 C.F.R. § 1910.1030.

[288] Kentucky v. Biden, 23 F.4th 585, 589 (6th Cir. 2022) (upholding injunction against the federal government's requirement that most employees of government contractors be vaccinated against COVID-19); Louisiana v. Becerra, 20 F.4th 260, 262–63 (5th Cir. 2021) (upholding district court's fourteen state injunction against enforcing regulations requiring healthcare facilities receiving Medicare and Medicaid funds to ensure that their workers were vaccinated); Louisiana v. Becerra, 577 F. Supp. 3d 483, 487–88 (W.D. La. 2022) (enjoining Department of Health and Human Service regulations requiring workers and volunteers in the Head Start program to be vaccinated and wear masks and that children over two wear masks); Health Freedom Def. Fund, Inc. v. Biden, 599 F. Supp. 3d 1144, 1153 (M.D. Fla. 2022) (vacating CDC mask mandate for users of commercial transportation services). *But see* Florida v. Dep't of Health & Hum. Serv., 19 F.4th 1271, 1275 (11th Cir. 2021) (upholding regulations requiring healthcare facilities receiving

operation is the litigation over regulations issued by CDC in early February 2021 requiring most users of commercial transportation services to wear masks, which resulted in decisions by two judges on the same Florida district court.[289] One judge undertook a traditional *Chevron* analysis; the other deployed the major questions wrecking ball.[290] Not surprisingly, they reached different outcomes.[291]

Judge Kathryn Mizelle, a Trump appointee, held that the legality of the nationwide mask mandate raised a major question because it was concededly a "major rule" under the Congressional Review Act and would therefore have a significant effect on the economy.[292] By contrast, Paul Byron, an Obama appointee, concluded that the CDC regulation did not present a major question because it "place[d] negligible financial burdens on travelers"[293] and it "help[ed] *prevent* the imposition of economic burdens by stymying the spread of COVID-19 and, consequently, avoiding future lockdowns and resulting losses."[294]

Judge Mizelle held that Congress had not spoken with sufficient clarity to authorize CDC to impose a nationwide mask mandate.[295] The Public Health Services Act of 1944 empowered CDC "to make and enforce such regulations as in [its] judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from . . . one State . . . into any other State . . . ."[296] That broad grant of authority easily encompassed the CDC mask requirement. But Judge Mizelle focused on the following sentence, which provided that "[f]or purposes of carrying out and enforcing" those regulations, the CDC "may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in [its] judgment may be necessary."[297] In Judge Mizelle's

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Medicare and Medicaid funds to ensure that their workers were vaccinated); Wall v. Ctrs. for Disease Control & Prevention, No. 6:21-CV-975-PGB-DCI, 2022 WL 1619516, at *1 (M.D. Fla. Apr. 29, 2022) (upholding CDC mask mandate for users of commercial transportation services).

[289] Exec. Order No. 13998, 86 Fed. Reg. 7205 (Jan. 26, 2021); Requirement for Persons to Wear Masks on Conveyances and at Transportation Hubs, 86 Fed. Reg. 8025 (Feb. 3, 2021). *Health Freedom Def. Fund*, 599 F. Supp. 3d 1144; *Wall*, 2022 WL 1619516.

[290] *Compare Wall*, 2022 WL 1619516, *with Health Freedom Def. Fund*, 599 F. Supp. 3d 1144.

[291] *Compare Wall*, 2022 WL 1619516, at *1 (upholding the mask mandate), *with Health Freedom Def. Fund*, 599 F. Supp. 3d at 1153 (vacating the mask mandate).

[292] *Health Freedom Def. Fund*, 599 F. Supp. 3d at 1164 (acknowledging the possibility that the action did not present a major question); *see also id.* at 1164 (undertaking a quick *Chevron* analysis to conclude that the agency's interpretation failed at both Step One and Step Two).

[293] *Wall*, 2022 WL 1619516, at *4.

[294] *Id.*

[295] *Health Freedom Def. Fund*, 599 F. Supp. 3d at 1166.

[296] 42 U.S.C. § 264(a).

[297] *Id.*

view, the examples of possible actions in the second sentence limited the broad scope of the first sentence.[298] Of those examples, only "sanitation" could possibly encompass a mask mandate.[299]

Judge Byron engaged in an even more thorough analysis of the statutory language than Judge Mizelle, but he did so at *Chevron* Step One. In his view, the title of Section 361 of the Public Health Service Act—"Regulations to Control Communicable Diseases"—suggested a broad grant of authority, as did the language granting CDC the authority "to 'make and enforce such regulations as . . . are necessary.'"[300] For Judge Byron, the second sentence of Section 361(a) did "not *limit* the scope of the first," as Judge Mizelle claimed.[301] Instead, "the second sentence *clarifies* the breadth of the first by enumerating various 'tools' at the CDC's disposal . . . and concluding with the open-ended phrase 'and other measures, as in [its] judgment may be necessary.'"[302] The second sentence did not contain an exhaustive list; it merely provided "a list of examples or suggestions."[303] Judge Byron's reading of the two critical sentences was the more natural reading, and it was unquestionably more consistent with the statute's protective purpose, a factor that did not enter into Judge Mizelle's analysis.

Employing dictionaries from the 1940s, Judge Mizelle found two possible definitions for "sanitation."[304] Congress could have been referring to "active measures to cleanse something," or the word could have meant "to preserve the cleanliness of something."[305] The second definition would include a mask mandate because it would preserve the cleanliness of the air surrounding the mask wearer.[306] The first would not because wearing a mask does not actively clean anything.[307] Judge Mizelle went with the first definition because it fit more comfortably with "inspection, fumigation, disinfection," etc., which involved "identifying and eliminating known sources of disease."[308] Under the broader second

[298] *Health Freedom Def. Fund*, 599 F. Supp. 3d at 1157.

[299] *Id.*

[300] Wall v. Ctrs. for Disease Control & Prevention, No. 6:21-CV-975-PGB-DCI, 2022 WL 1619516, at *3 (M.D. Fla. Apr. 29, 2022) (emphasis omitted) (quoting 42 U.S.C. § 264(a)).

[301] *Id*. at *4.

[302] *Id.* (quoting 42 U.S.C. § 264(a)).

[303] *Id.*

[304] *Health Freedom Def. Fund*, 599 F. Supp. 3d at 1158.

[305] *Id.*

[306] *Id.* at 1158–59.

[307] *Id.* at 1159.

[308] *Id.* at 1159–60. *See also id.* at 1161 (noting that the federal government had previously limited its quarantine power "to localized disease elimination measures applied to individuals and objects suspected of carrying disease"); *id.* at 1165 (finding that the federal government had never used that authority to impose a mask requirement; therefore, it was safe to presume that Congress had not intended in 1944 to delegate that power to CDC).

definition of "sanitation," the CDC could "justify requiring that businesses install air filtration systems to reduce the risks from airborne contagions or install plexiglass dividers between desks or office spaces." [309] The "sheer scope" of the government's asserted and unheralded power counseled against its interpretation.[310] Judge Mizelle then vacated the CDC regulation, thereby rendering it unenforceable throughout the country.[311]

Like Judge Mizelle, Judge Byron consulted dictionaries from the 1940s to probe the meaning of the word "sanitation."[312] He agreed with Judge Mizelle that the word had multiple dictionary definitions, at least some of which were consistent with a grant of authority to take action to prevent the spread of disease.[313] He went a step further, however, to consult the dictionary definitions of "sanitary," which included "for or relating to the preservation or restoration of health . . . ."[314] Unlike Judge Mizelle, Judge Byron consulted the legislative history for indications of the purpose of Section 361 and found that it "support[ed] either the broad reading of the statutory text or the narrow reading . . . ."[315] Concluding that Congress did not directly address whether Section 361 authorized the regulations, a conclusion that would have doomed the regulation under the major questions doctrine, Judge Byron found the statute to be "inherently ambiguous."[316] Under *Chevron* Step Two, then, the question was whether the CDC's resolution of the question was "reasonable," which Judge Byron concluded it was.[317]

Referring to the protective purpose of the statute, Judge Byron observed that the "narrow" reading of the statute "constrains the CDC's ability to expediently address health crises, such as the COVID-19 pandemic, to the detriment of the public health."[318] He then recounted how the expert agency had thoroughly documented the need for and the efficacy of masks in transportation facilities.[319] In his view, "the COVID-19 pandemic was exactly the type of situation imagined by Congress where courts should refrain from imposing its own judgment and give appropriate deference to the agency's scientific expertise in determining

[309] *Id.* at 1164.
[310] *Id.*
[311] *Id.* at 1178.
[312] Wall v. Ctrs. for Disease Control & Prevention, No. 6:21-CV-975-PGB-DCI, 2022 WL 1619516, at *5 (M.D. Fla. Apr. 29, 2022).
[313] *Id.*
[314] *Id.*
[315] *Id.* at *6.
[316] *Id.* at *5.
[317] *Id.* at *6.
[318] *Id.* at *7.
[319] *Id.* at *8.

the best way to stem the spread of the unprecedented disease."[320] Judge Byron therefore granted summary judgment to the government.[321] But that action was irrelevant as a practical matter because Judge Mizelle had already vacated the regulations, and the CDC was no longer enforcing them.[322]

By the summer of 2022, federal courts had employed the major questions doctrine to demolish nearly every aspect of the Biden Administration's COVID-19 regulatory initiatives. Because Congress had not in several unrelated statutes specifically authorized the implementing agencies to take the particular actions that they employed to address the pandemic, they were powerless to do so. Never mind the purposes of the statutes or the missions of the agencies, if the courts could not find clarity in the statutory text, the initiatives were doomed. When the courts were done with the protective edifice that the Biden Administration had erected, it lay in tatters on the ground while the COVID-19 pandemic raged on unimpeded by federal regulation.

The major questions doctrine also provided a wrecking ball for courts to demolish major initiatives to combat climate disruption. The Supreme Court's decision in *West Virginia* destroyed a federal initiative aimed at limiting greenhouse gas emissions from coal-fired power plants by shifting generation load to lower emitting units.[323] As Justice Kagan pointed out in her dissent, there was no reason for the Court to involve itself in the controversy over the Clean Power Plan because the Trump Administration had repealed that Obama Administration initiative and the Biden Administration had announced that it would be commencing a new rulemaking that might yield a very different regulation.[324] Indeed, the electric power industry had already met the Clean Power Plan's nationwide emissions target using generation shifting inspired by market forces.[325] There was absolutely no reason for the Court to hear the case other than its desire to ensure that the Biden EPA did not get too aggressive with its plan and to send a message to all executive branch agencies that they should think twice about relying upon broad statutory delegations to write regulations that have large economic or political impacts.

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[320] *Id.*

[321] *Id.* at *1.

[322] Health Freedom Def. Fund, Inc. v. Biden, 599 F. Supp. 3d 1144, 1178 (M.D. Fla. 2022).

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

[324] *Id. See also* Lazarus, *supra* note 166.

[325] *West Virginia*, 142 S. Ct. at 2638 (Kagan, J., dissenting); Shannon Osaka, *The Supreme Court's EPA Decision Could Have Been Much, Much Worse*, GRIST (June 30, 2022), https://grist.org/regulation/supreme-court-epa-west-virginia-emissions/.

The Court's assertion that the Obama Administration's plan effected a "fundamental revision" and "transformative expansion" of the statute from a technology-based approach focused on individual sources to a generation-shifting approach focused on a system of emission reduction strategies fundamentally misconstrued the statute.[326] A more deferential court focusing on the statute's purpose and history would have seen EPA's focus on the "best system of emission reduction" as a legitimate attempt to use authority that Congress had granted long ago to address problems like climate disruption that Congress did not envision when it wrote the statute in 1970. The agency did not "newly discover" that authority. It had been there all along, but the agency never had occasion to use it. With the discovery that greenhouse gases were contributing to climate disruption and that there was no available technology to remove them from coal-fired power plant emissions, EPA now needed to focus on systems rather than on individual sources. This shift in emphasis was especially appropriate in the case of the electric power industry because utility companies were constantly shifting load from plants where the cost of producing a megawatt of power was expensive to plants where the cost of production was lower.[327] The focus on systems, rather than technologies, was hardly transformative. It represented a choice between two tools that Congress provided to EPA to use in promulgating performance standards for new stationary sources and guidelines for states to use in addressing otherwise unregulated emissions from existing stationary sources.[328]

The Court was also reluctant to conclude that Congress delegated the power to base the "best system of emission reduction" on generation shifting because EPA, in its view, lacked expertise in the proper sourcing of electrical power on the national grid.[329] But EPA had been regulating emissions from coal-fired power plants since the early 1970s under a statute that required it to consider economic costs and the impact of its regulations on the nation's energy supply.[330] As Justice Kagan pointed out in her dissent, EPA's power plant regulations had been indirectly dictating the mix of energy resources nationwide since it started regulating power plants in 1971.[331] The source-specific controls that

[326] *West Virginia*, 142 S. Ct. at 2610, 2612.

[327] *Id.* at 2640–41 (Kagan, J., dissenting).

[328] *See id.* at 2632–33.

[329] *Id.* at 2596, 2615–16 (majority opinion).

[330] *See* Alex Guillén, *Supreme Court Handcuffs Biden's Climate Efforts*, POLITICO (June 30, 2022), https://www.politico.com/news/2022/06/30/supreme-court-handcuffs-biden-on-major-climate-rule-00043423.

[331] *See West Virginia*, 142 S. Ct. at 2640 (Kagan, J., dissenting). *See also* Brunstein & Revesz, *supra* note 133, at 250 ("EPA regularly does this by imposing regulatory costs on dirtier forms of

EPA had imposed in the past affected both the mix of fuels that power plants used and the mix of generating resources utility companies employed as the cost of complying with regulations requiring source-specific emissions reductions in coal-fired plants caused companies to depend more on gas-fired power plants and, somewhat later, renewables.[332] The agency's decision to require generation shifting was clearly within the agency's traditional wheelhouse.[333]

The Supreme Court used the major questions wrecking ball to destroy a program, years in the making, that provided the most efficient and least expensive vehicle for reducing emissions from the nation's largest greenhouse gas-emitting industry. The agency is now left with tools that operate within the fenceline and involve more conventional pollution control technologies.[334] The wrecking ball swung at a particularly inopportune time, as more expensive natural gas was inspiring utility companies to rely more heavily on coal-fired plants.[335]

Another Biden Administration climate change initiative suffered a similar disruption when a Louisiana district court stayed the federal government's use of an estimate of the social cost of greenhouse emissions that the government had used in various decision-making contexts for many years.[336] Soon after his inauguration, President Biden issued an executive order tasking an interagency working group with updating the estimate for agencies to use to the extent consistent with their authorizing statutes.[337] After the working group completed its task in late February 2021, several states sued President Biden in a Louisiana district court seeking an injunction against the federal government's "[a]dopting, employing, treating as binding, or relying upon" any social cost of carbon estimate "based on global effects."[338] Among other things, the states claimed that the action violated the major questions doctrine

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energy production, . . . which creates an incentive for cleaner plants to cover a greater proportion of the electricity demand.").

[332] THOMAS O. MCGARITY, POLLUTION, POLITICS AND POWER: THE STRUGGLE FOR SUSTAINABLE ELECTRICITY 299–300 (2019).

[333] *See* Guillén, *supra* note 330; Robert Fischman, *Supreme Court Swings at Phantoms in* West Virginia v. EPA, CTR. FOR PROGRESSIVE REFORM BLOG (June 30, 2022), https://progressivereform.org/cpr-blog/supreme-court-swings-phantoms-west-virginia-v-epa/.

[334] Osaka, *supra* note 325.

[335] Erin Douglas, *U.S. Supreme Court Ruling Limits EPA's Authority in Regulating Greenhouse Gases*, TEX. TRIB. (June 30, 2022), https://www.texastribune.org/2022/06/30/environment-epa-supreme-court/.

[336] Louisiana v. Biden, 55 F.4th 1017, 1021 (5th Cir. 2022).

[337] Exec. Order No. 13990, 86 Fed. Reg. 7037, 7042 (Jan. 25, 2021).

[338] Louisiana v. Biden, 585 F. Supp. 3d 840, 849 (W.D. La. 2022). The plaintiffs also sought injunctive relief against any federal agency's failure to use "discount rates of 3 and 7 percent" as allegedly required by an Office of Management guidance document. *Id.* at 352.

because the case involved what "might be the most consequential rulemaking in American history . . . ."[339]

The court agreed with the states that the estimate would impose heavy costs on companies subject to the regulatory actions that would be based in part on the estimate. The estimate, therefore, presented a major question of vast economic and political significance.[340] The court rejected the government's argument that the executive order was merely a "routine exercise of traditional presidential control over subordinates,"[341] finding instead that it was a "legislative rule that dictates specific numerical values for use across all decisionmaking affecting private parties."[342]

The court then held that President Biden could not insist that agencies use the estimate because Congress had not clearly delegated that power to the president or to any agency.[343] In particular, Congress had not authorized the working group to include the costs that releases of greenhouse gases from U.S. plants imposed on people in other countries.[344] The fact that agencies had been including adverse effects in other countries in their pollution control benefits estimates for decades (with the notable exception of the Trump Administration) was apparently irrelevant. Until Congress specifically authorized the president to tell the federal agencies to use a quantitative measure of the social cost of carbon in their decisions and until Congress specifically authorized including nondomestic cost impacts in the estimate, the executive branch was powerless to do so.

The court's reliance on the major questions doctrine was misplaced. Unlike agencies, the presidency was not created by statute, and the president may exercise all of the powers that the Constitution assigns to the executive branch without permission from Congress. One of those powers is to instruct executive branch agencies how to go about executing statutes enacted by Congress, so long as the instructions do not violate a statute.[345] And that is what President Biden did when he issued his executive order. That order made it clear that it applied only to the extent

[339] Application to Vacate an Order of the United States Court of Appeals for the Fifth Circuit Staying an Injunction Issued by the United States District Court for the Western District of Louisiana Pending Appeal to the Fifth Circuit and Further Proceedings in This Court at 4, Louisiana v. Biden, 142 S. Ct. 2750 (2022) (No. 21A658).

[340] *Louisiana*, 585 F. Supp. 3d at 863.

[341] *Id.*

[342] *Id.* at 865.

[343] *Id.*

[344] *Id.* at 864.

[345] *See* Free Enter. Fund v. Public Co. Acct. Oversight Bd., 561 U.S. 477, 492 (2010); Meyers v. United States, 272 U.S. 52, 135 (1926).

that it was "consistent with applicable law."[346] The court used the major questions doctrine as a wrecking ball to roll back the executive power exercised by President Biden to manage executive branch agencies in a way that would have provided greater protection to the planet.[347]

The Fifth Circuit Court of Appeals stayed the district court's injunction, finding that the states lacked standing to bring the case.[348] The Supreme Court then denied the states' application to vacate the Fifth Circuit stay.[349] But the district court's decision wreaked havoc with several ongoing agency programs until the Fifth Circuit acted. According to the Biden Administration, the decision "unsettle[ed] more than five decades of regulatory practice" under which the president had by executive order told executive branch agencies how to go about calculating the costs and benefits of major regulations.[350]

3. Facilitating Deregulation

A future administration with a preference for deregulation may invoke the major questions doctrine to facilitate repeal of existing regulations. An agency could argue that an existing regulation that it wanted to repeal was based on its resolution of one or more major questions during a previous administration and should never have been promulgated because the relevant statute did not clearly authorize the agency to resolve the major questions. Since the major questions doctrine is based on the Supreme Court's fear of "expansive and aggressive assertions of executive authority,"[351] and not of federal agencies' failure to fulfill their statutory missions, the repeal of a regulation resting on the improper resolution of a major question would presumably not trigger judicial skepticism. The agency would not have to trouble itself with supporting the repeal with facts and reasons, thereby short-circuiting the Supreme Court's holding in *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.* that both regulatory and deregulatory

[346] Exec. Order No. 13990, 86 Fed. Reg. 7037, 7042 (Jan. 25, 2021).

[347] *See* Response in Opposition to Application to Vacate the Stay Pending Appeal Issued by the United States Court of Appeals for the Fifth Circuit at 29–30, Louisiana v. Biden, 142 S. Ct. 2750 (2022) (No. 21A658).

[348] Louisiana v. Biden, No. 22-30087, 2022 WL 866282, at *2 (5th Cir. Mar. 16, 2022).

[349] Louisiana v. Biden, 142 S. Ct. 2750 (2022).

[350] Peggy Otum, Rachel Jacobson & Chaz Kelsh, *Carbon Cost Injunction Signals Hurdles for Biden Plans*, LAW360 (Feb. 23, 2022) (quoting Government's Memorandum in Support of Motion for Stay at 6, Louisiana v. Biden, No. 2:21-cv-01074 (W.D. La. Feb. 19, 2022)), https://www.law360.com/articles/1467433/carbon-cost-injunction-signals-hurdles-for-biden-plans.

[351] U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 417 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

actions must survive the "arbitrary and capricious" test.[352] If the agency never had the power to promulgate the rule in the first place, the argument goes, it should not have to justify repealing it. Although this aspect of the major questions doctrine may seem like an unlikely gambit, it was attempted at least twice during the Trump Administration to justify regulatory rollbacks.[353] One of those occasions was the Clean Power Plan that the Court eviscerated in *West Virginia*.[354]

IV. BEYOND THE NONDELEGATION DOCTRINE

The bulwark version of the major questions doctrine does not prevent Congress from delegating authority to decide major questions, "so long as Congress does so explicitly" by using clear language.[355] At least two current justices, however, would apparently enhance the destructive power of the major questions wrecking ball to limit the ability of Congress to delegate to agencies the power to address major questions even by enacting legislation specifically empowering them to do so.

In a dissenting opinion in *Gundy v. United States*, Justice Gorsuch bemoaned the fact that the Court had not adequately enforced the nondelegation doctrine. He then explained that "[w]hen one legal doctrine becomes unavailable to do its intended work, the hydraulic pressures of our constitutional system sometimes shift the responsibility to different doctrines."[356] Thus, courts had employed the major questions doctrine "in service of the constitutional rule that Congress may not divest itself of its legislative power . . . ."[357] In his concurrence with the Court's denial of certiorari in *Paul v. United States*, Justice Kavanaugh read Chief Justice William Rehnquist's dissent in the *Benzene* case[358] and Justice Gorsuch's dissent in *Gundy* to suggest that Congress may not constitutionally delegate to agencies the authority to decide major questions "even if Congress expressly and specifically delegates that

[352] Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42–43 (1983).

[353] Brunstein & Revesz, *supra* note 133, at 319; Erin Webb, *The Major Questions Doctrine Was Waiting in the Wings*, BL (July 15, 2022), https://news.bloomberglaw.com/health-law-and-business/analysis-the-major-questions-doctrine-was-waiting-in-the-wings.

[354] Brunstein & Revesz, *supra* note 133, at 320; Webb, *supra* note 353.

[355] Squitieri, *supra* note 142, at 477.

[356] Gundy v. United States, 139 S. Ct. 2116, 2141 (2019) (Gorsuch, J., dissenting).

[357] *Id.* at 2142.

[358] Justice Rehnquist's concurrence in the *Benzene* case concluded that "important choices of social policy," such as the economic value to be assigned to human life, had to be "made by Congress, the branch of our Government most responsive to the popular will." Indus. Union Dep't, AFL-CIO v. Am. Petrol. Inst., 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring).

authority."[359] At the very least, this appears to be an invitation to courts to revive the nondelegation doctrine through the back door in the context of regulations that raise major questions.[360]

Indeed, this suggested use of the wrecking ball may go beyond a reinvigoration of the nondelegation doctrine, because the nondelegation doctrine would allow Congress to delegate the power to solve major questions if Congress provided an "intelligible principle" to guide the agencies in using that power.[361] This amped-up wrecking ball would be an assertion by the Supreme Court that Congress cannot ever delegate to executive branch agencies governmental power to solve big problems.[362] Congress would only be able to resolve major questions (as determined by the courts) through legislation.[363] As discussed below, in an era of congressional gridlock, this version of the major questions doctrine would mean that the federal government is, as a practical matter, powerless to address social problems involving major questions. This might be music to the ears of libertarians and right-wing advocacy groups, but it would be devastating to vulnerable people and places that depend on the federal government to protect them from harm.

V. IMPLICATIONS FOR THE ADMINISTRATIVE STATE

The *Chevron* workaround, bulwark, and wrecking ball manifestations of the major questions doctrine have significant implications for the administrative state in general and for the protective edifice that Congress has erected over the years to protect the public. The major questions doctrine denigrates expertise, while at the same time serving as a powerful vehicle for judicial aggrandizement. It also allows the activist courts to shrink the federal government to the detriment of public welfare and the environment.

A. Denigration of Expertise

The major questions doctrine's limitation on Congress's power to delegate to agencies the authority to decide major questions shifts the

[359] Paul v. United States, 140 S. Ct. 342, 342 (2019).
[360] Richardson, *Antideference*, *supra* note 37, at 177.
[361] J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).
[362] Squitieri, *supra* note 142, at 478.
[363] Justice Thomas lent some support to this application of the major questions doctrine when he explained in *Whitman v. American Trucking Ass'n* that "the significance of [a] delegated decision" may sometimes be "too great for the decision to be called anything other than 'legislative.'" 531 U.S. 457, 487 (2001) (Thomas, J., concurring).

locus of decision-making on major questions from agencies with expertise in the scientific and technical aspects of those decisions to Congress, which lacks such expertise.[364] In his *National Federation of Independent Business* dissent, Justice Breyer rhetorically asked which institution should decide "how much protection, and of what kind" workers should receive: "[a]n agency with expertise in workplace health and safety, acting as Congress and the President authorized? Or a court, lacking any knowledge of how to safeguard workplaces, and insulated from responsibility for any damage it causes?"[365]

Having done away with the Office of Technology Assessment, a small agency of Congress that provided technical advice to its committees, Congress is at the mercy of lobbyists for such advice.[366] Entities with a strong economic interest in the outcome of the decision are not likely to be a source of trustworthy facts and analysis. The need for sound scientific and technical input into decisions of great public importance is exactly why Congress created regulatory agencies.[367] The more extreme manifestations of the major questions monkey wrench will deprive Congress of that sensible option.

For the same reason, however, there is a good deal of plausibility to the suggestion that Congress would not delegate the power to decide major questions to an agency that lacks expertise in the subject matter.[368] If, for example, the Court had stopped with its holding in *Alabama Ass'n of Realtors* that the CDC lacked expertise in landlord-tenant law, the doctrine would at least have been consistent with the major assumption underlying the administrative state—that Congress may delegate gap-

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[364] Spence, *Naïve Administrative Law*, *supra* note 156, at 1001; Eric Katz, *'We're All Going to Be in a Lot of Trouble:' Officials Warn of Far-Reaching Impacts of Recent Supreme Court Decision*, GOV'T EXEC. (July 11, 2022), https://www.govexec.com/management/2022/07/were-all-going-be-lot-trouble-officials-warns-far-reaching-impacts-recent-supreme-court-decision/374072/.

[365] Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661, 676 (2022) (Breyer, J., dissenting).

[366] *See, e.g.*, Lee Drutman & Steven M. Teles, *Why Congress Relies on Lobbyists Instead of Thinking for Itself*, ATLANTIC (Mar. 10, 2015), https://www.theatlantic.com/politics/archive/2015/03/when-congress-cant-think-for-itself-it-turns-to-lobbyists/387295/.

[367] *See id.*; Bianca Majumder, *Congress Should Revive the Office of Technology Assessment*, CTR. FOR AM. PROGRESS (May 13, 2019), https://www.americanprogress.org/article/congress-revive-office-technology-assessment/.

[368] West Virginia v. EPA, 142 S. Ct. 2587, 2636 (2022) (Kagan, J., dissenting) (distinguishing cases in which "the agency had strayed out of its lane, to an area where it had neither expertise nor experience"). *See also* Lesley Clark & Niina H. Farah, *Congress Faces Climate Roadblock After Supreme Court Ruling*, CLIMATEWIRE (July 15, 2022) (quoting Jeffrey Holmstead), https://www.eenews.net/articles/congress-faces-climate-roadblock-after-supreme-court-ruling/.

filling authority to agencies with expertise.[369] The bulwark and wrecking ball manifestations of the major questions doctrine, however, go far beyond that limited application.

B. Judicial Aggrandizement

Although framed as judicial "skepticism" of agency exercises of broad delegated power to resolve major questions, the doctrine is in reality an exercise of judicial power.[370] Under the bulwark manifestation, the courts will not allow Congress to use unclear language to delegate power to agencies to resolve major questions, and the courts get to decide whether a question is major and whether language is unclear.[371] With no constraint in the Constitution or statute, the courts may substitute their judgment about the wisdom of policy choices for that of the agencies and Congress in areas of the greatest economic and political importance.[372] And, under the most aggressive aspects of the wrecking ball manifestation, the courts can demolish initiatives that easily fall within an agency's congressionally mandated wheelhouse and even prevent Congress from delegating to agencies the authority to provide protections that involve the resolution of major questions.[373] The major questions doctrine gives courts a veto over new initiatives[374] and a tool to roll back existing protections, so long as they come within the Court's malleable definition of "major."[375] This power can be exercised in the first instance by any

[369] The Court in *West Virginia* made reference to EPA's lack of expertise in national energy policy in justifying its conclusion that Congress had not delegated to the agency the authority to require generation shifting. 142 S. Ct. at 2624. As discussed above, however, EPA clearly had expertise in regulating power plants under a statute that made "energy" one of the considerations in writing those regulations. See *supra* notes 199–254, 326–333 and accompanying text. Similarly, CDC may not have had expertise in state landlord-tenant law, but it did have expertise in the spread of diseases, and it could reasonably conclude that evicting infected tenants during a pandemic would increase the risk that the disease would spread. Congress may well have desired CDC to intervene into the landlord-tenant relationship to prevent the spread of a pandemic.

[370] Heinzerling, *Power Canons*, *supra* note 45, at 1940; Monast, *supra* note 3, at 489; Richardson, *Antideference*, *supra* note 37, at 200; Tortorice, *supra* note 18, at 1077. *See also* Peter L. Strauss, *How the Administrative State Got to This Challenging Place*, 150 DÆDALUS 17, 28 (2021).

[371] Int'l Refugee Assistance Project v. Trump, 883 F.3d 233, 329 n.3 (4th Cir. 2018) (Wynn, J., concurring) ("[T]he major questions doctrine has the potential to broadly empower the judiciary to strike down any executive action that it deems sufficiently 'major,' even if the action in no way implicates the Constitution."); Richardson, *supra* note 37, at 201.

[372] Heinzerling, *Power Canons*, supra note 45, at 1987, 1999; Monast, *supra* note 3, at 489; Richardson, *Antideference*, *supra* note 37, at 206; Squitieri, *supra* note 142, at 503; Tortorice, *supra* note 18, at 1130.

[373] See discussion *supra* notes 276–350 and accompanying text.

[374] Richardson, *Antideference*, *supra* note 37, at 201; Squitieri, *supra* note 142, at 503.

[375] See discussion *supra* notes 130–133, 266–354 and accompanying text.

court of appeals or, in many cases, any district court that opponents to a regulatory action care to select.[376] Is it likely that the lower courts (or even the Supreme Court) will limit the doctrine to truly "extraordinary" cases? Like "major question," the term "extraordinary" is in the eye of the beholder.

C. A Court-Imposed Shrinking Government Mandate

It is an article of faith among conservative activists and a prominent talking point in conservative media that "'the administrative state' has become too big and powerful, and must be cut down to size."[377] For these critics of federal regulation, the bulwark and wrecking ball manifestations of the major questions doctrine are just what the doctor ordered.[378] They no longer have to make their case for deconstructing the administrative state to Congress, which has consistently proved unreceptive to efforts to roll back the statutes that form the core of the protective edifice. Instead, they can let the courts do the job by challenging agency efforts to adapt to changing circumstances in Democratic administrations and supporting agency efforts to use the major questions doctrine to justify rolling back existing regulations in Republican administrations.

In all of its manifestations, the major questions doctrine is asymmetric in its application.[379] A neutral application of the doctrine would render the courts equally skeptical of major regulatory and deregulatory initiatives or agency failures to take major actions to advance their statutory missions. A decision to deregulate or not to regulate at all can have equally vast economic and political significance as a decision to regulate.[380] As a practical matter, however, the courts have applied the *Chevron* workaround manifestation of the major questions doctrine far more frequently to regulatory initiatives than to deregulatory

[376] Coenen & Davis, *supra* note 17, at 804–05; Richardson, *supra* note 37, at 201.

[377] Eugene Robinson, *The Planet Is Baking. But What's Reality to This Supreme Court?*, WASH. POST, (June 30, 2022), https://www.washingtonpost.com/opinions/2022/06/30/supreme-court-epa-ruling-further-imperils-planet/.

[378] Frankel, *supra* note 116 (quoting Brian Frazelle), https://www.reuters.com/legal/government/us-supreme-court-just-gave-federal-agencies-big-reason-worry-2022-06-30/ (describing the major questions doctrine as a "[f]undamentally . . . anti-regulatory doctrine"); Julia Kane, *The Supreme Court's Climate Decision Came Out of a Decades-Long Campaign to Kneecap Regulation*, GRIST (June 30, 2022), https://grist.org/accountability/the-supreme-courts-climate-decision-came-out-of-a-decades-long-campaign-to-kneecap-regulation/.

[379] Heinzerling, *Power Canons*, *supra* note 45, at 1938; Walters, *supra* note 124, at 461.

[380] Richardson, *Antideference*, *supra* note 37, at 205 (quoting Lisa Heinzerling (@heinzerlaw), TWITTER (Jan. 18, 2022, 11:07 AM), https://perma.cc/6XB5-KZFK?type=image).

initiatives.[381] And the bulwark and wrecking ball manifestations are, by their nature, only applicable to affirmative exercises of government authority over private sector activities and not to failures to regulate.[382] In practice, the doctrine displays a libertarian bias against federal regulation that has no basis in the statutes or the Constitution.[383] Indeed, it runs counter to the Administrative Procedure Act's symmetrical treatment of agency actions and failures to act.[384]

If the bulwark manifestation of the major questions doctrine discourages Congress from using broad language to allow agencies to adapt to changing circumstances, there is an alternative. Congress can be at the ready to enact legislation providing new authority to agencies when they encounter new problems or when regulated entities figure out ways to work around regulations based on existing grants of authority. The problem with this alternative is that Congress in more recent years has been deadlocked between forces seeking to protect health, safety, and the environment and those seeking to stimulate economic activity by reducing regulatory constraints.[385] As a practical matter, it is very difficult to pass precisely tailored legislation in a polarized and gridlocked Congress.[386]

The wrecking ball manifestation of the major questions doctrine is affirmatively reactionary. It is aimed not just at new initiatives that threaten to extend the reach of the administrative state, but also at reducing the power that Congress has already granted to regulatory

[381] The author is aware of only two cases in which courts have employed the *Chevron* workaround version of the major questions doctrine to overturn deregulatory actions. *See* MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 231 (1994); Texas v. United States, 809 F.3d 134, 187–88 (5th Cir. 2015). *See also supra* note 153.

[382] Heinzerling, *Nondelegation*, *supra* note 126, at 386 (noting that the major questions doctrine applies "only to cases in which an agency controls private behavior, and not to cases in which an agency declines to control private behavior at the expense, for example, of public health"); Walters, *supra* note 124, at 475.

[383] Walters*, supra* note 124, at 461. In enjoining the Department of Health and Human Services regulations requiring vaccination and masks in the Head Start Program, the court in *Louisiana v. Becerra* made no secret of its contempt for federal regulation, initiating the opinion with President Reagan's quip that "the nine most terrifying words in the English language are, 'I'm from the government and I'm here to help.'" Louisiana v. Becerra, 577 F. Supp. 3d 483, 487 (W.D. La. 2022).

[384] 5 U.S.C. § 706; Walters, *supra* note 124, at 461.

[385] Freeman & Spence, *supra* note 61, at 2; Metzger, *supra* note 21, at 76.

[386] Richardson, *Antideference*, *supra* note 37, at 201; Sunstein, *Two Major Questions Doctrines*, *supra* note 53, at 492; 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/. *But see* Cynthia R. Farina, *Congressional Polarization: Terminal Constitutional Dysfunction?*, 115 COLUM. L. REV. 1689, 1693 (2015) (suggesting that congressional polarization is not a great as some believe).

agencies and at rolling back existing regulatory programs. In its most extreme version, suggested by Justice Kavanaugh, the goal is to prevent Congress from delegating to agencies the power to decide major questions.[387] The predictable end result is a gradual contraction of the administrative state over time with fewer public protections coming from Congress and the federal agencies.[388] That, of course, is the goal of the conservative activists who have worked so hard to ensure that like-minded judges and justices are appointed to the bench.[389] With the major questions doctrine at their disposal, they can achieve through the courts the contraction of the administrative state that they cannot achieve in a gridlocked Congress.[390]

D. Harm to the Public and the Environment

The most recent wrecking ball manifestation of the major questions doctrine has precipitated a rash of challenges to agency regulations, including: EPA's limitations on greenhouse gas emissions from automobiles, EPA's ban on products containing asbestos, EPA's ban on disposable containers containing hydrofluorocarbons, the Security and Exchange Commission's climate disclosure rule, the Consumer Financial Protection Bureau's manual updating its policy on unfair, deceptive, or abusive acts and practices, the Department of Health and Human Service's guidance on the use of abortion in emergency health care, and EPA's anti-tampering regulations for race cars.[391] The doctrine will undoubtedly be raised in challenges to the Federal Energy Regulatory Commission's proposal to assess the global warming effects of permitting new natural gas pipelines, to the Department of Transportation's highway emissions proposal, and to any future attempts by the Federal Communications Commission to revive the Obama Administration's net neutrality rule for internet service providers.[392] A

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[387] U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

[388] Richardson, *Antideference*, *supra* note 37, at 175; Spence, *Naïve Administrative Law*, *supra* note 156, at 998–99; Lazarus, *supra* note 166.

[389] *See* Alex Guillén, *Impact of Supreme Court's Climate Ruling Spreads*, POLITICO (July 20, 2022), https://www.politico.com/news/2022/07/20/chill-from-scotus-climate-ruling-hits-wide-range-of-biden-actions-00045920.

[390] *See* Spence, *Naïve Administrative Law*, *supra* note 156, at 1007.

[391] Lesley Clark & Niina H. Farrah, *3 Climate Rules Threatened by the Supreme Court Decision*, CLIMATEWIRE (July 7, 2022), https://www.eenews.net/articles/3-climate-rules-threatened-by-the-supreme-court-decision/; Guillén, *supra* note 389; Katz, *supra* note 364; Allison Wood, *EPA Ruling Signals Arrival of 'Major Questions Doctrine'*, LAW360 (July 14, 2022), https://www.law360.com/articles/1511354.

[392] Randolph J. May, *A Major Ruling on Major Questions*, REGUL. REV. (July 15, 2022), https://www.theregreview.org/2022/07/15/may-major-questions/; Jeffrey Westling, *Major*

doctrine that was initially limited to "'extraordinary' cases" may now routinely be applied to regulations that attract political controversy by judges appointed to the bench in part for their hostility to federal regulation.[393]

Noticeably missing from the Supreme Court opinions invoking the major questions doctrine is any serious mention of the overall purposes of the statute the agency is administering.[394] For the most part, Congress enacted those statutes to address problems that had arisen because current federal laws and state regulation were not protecting consumers, workers, neighbors, and the environment from dangerous products, activities, and enticements in the private sector. The extra-statutory limits that the recent wrecking ball manifestation of the major questions doctrine places on the ability of the agencies created by those statutes to address newly arising threats and its potential to roll back existing protections will deprive the beneficiaries of regulatory programs of the protections that Congress meant to provide when it enacted those statutes.[395] The damage to the

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Questions Doctrine and the Impact on Biden's Technology Priorities, AM. ACTION F. (July 14, 2022), https://www.americanactionforum.org/insight/major-questions-doctrine-and-the-impact-on-bidens-technology-priorities/; Editorial Board, *Pete Buttigieg's Climate Toll Road*, WALL ST. J., (July 10, 2022), https://www.wsj.com/articles/pete-buttigieg-runs-off-the-road-supreme-court-transportation-highways-emissions-climate-environment-11657310842; Christopher Cole, *Can EPA Ruling Zap Net Neutrality? Not Everyone Agrees*, LAW360 (July 8, 2022), https://www.law360.com/articles/1508145/can-epa-ruling-zap-net-neutrality-not-everyone-agrees; Miranda Wilson, *Could Supreme Court Ruling Thwart FERC's Clean Energy Plans?*, ENERGYWIRE (July 6, 2022), https://www.eenews.net/articles/could-supreme-court-ruling-thwart-fercs-clean-energy-plans/.

[393] Guillén, *supra* note 389. Professor Dan Farber suggests that if the Court limited the major questions doctrine to truly extraordinary situations in which "agencies regulate . . . in unexpected ways that diverge from . . . prior approaches," the doctrine would not pose a great threat to the administrative state. Clark & Farah, *supra* note 368. As discussed in the text, however, the Court has not limited the doctrine's application to such situations.

[394] Clark & Farah, *supra* note 368 (quoting Professor David Driesen). The same is generally true of the lower court opinions invoking the major questions doctrine as a wrecking ball. For example, unlike Judge Byron's careful attention to the purpose of Section 361 of the Public Health Service Act, Judge Mizelle's intricate statutory analysis is devoid of any inquiry into the purpose of that statute, which unquestionably included protecting Americans from communicable diseases. For the discussion on Judge Mizelle's interpretive approach, see *supra* notes 295–317 and accompanying text. Her failure to find in the broad statutory language "other measures, as in [CDC's] judgment may be necessary," 42 U.S.C. § 264(a), the authority to address pandemics through mask requirements rendered the statute a dead letter in the context of the COVID-19 and future pandemics. Health Freedom Def. Fund, Inc. v. Biden, 599 F. Supp. 3d 1144, 1157 (M.D. Fla. 2022). *See also* Lawrence Gostin & Duncan Hosie, *No Matter How You Feel About Masks, You Should Be Alarmed by This Judge's Decision*, N.Y. TIMES (Apr. 25, 2022), https://www.nytimes.com/2022/04/25/opinion/masks-covid-ban.html.

[395] *See* Vivienne Pismarov, *The Elephant Named "Climate Change": Why the Major Questions Doctrine After* Bostock *Shouldn't Prohibit Extensive Climate Action Under the Clean Air Act*, 45 U.C. DAVIS L. REV. 35, 66 (2021) (opining that the major questions doctrine "may halt environmental policy altogether"); Lazarus, *supra* note 166 (describing the upshot of the major questions doctrine as "the unraveling of the national government's ability to safeguard the public

protective edifice likely will become apparent in higher mortality and morbidity rates, less consumer confidence in the marketplace, and a rapidly warming planet.

VI. Reducing the Damage

As the courts' deployment of the major questions doctrine to invalidate important agency protections begins to result in demonstrable harm to the people and places that federal statutes were intended to protect, public pressure will build to free the agencies from that judicially imposed constraint. Although no magic bullet solution is available to prevent judicial aggrandizement, Congress and the agencies can take some steps to mitigate the damage that the major questions doctrine is causing.

A. Agency Workarounds

Since the primary thrust of all of the manifestations of the major questions doctrine is to reduce judicial deference to agencies, they have little power to avoid judicial reversal when major questions are involved. Agency efforts to demonstrate that Congress has clearly delegated power to decide major questions have proved unavailing, and their attempts to persuade courts that challenged actions do not raise major questions have had only modest success.[396] Courts need not defer to agencies on the questions of majorness and clarity.[397]

Agencies might attempt to avoid a majorness determination by limiting the economic consequences of their decisions and/or downplaying their political significance. Where feasible, they could limit the economic impact of major initiatives by subdividing them into several discrete actions, each one of which has a modest impact. OSHA, for example, could have written separate regulations requiring workers to be tested and wear masks or be vaccinated against COVID-19 in the health care industry, in the meat packing industry, in the nursing home industry, in the transportation industry, and many others. The agency would then take the position that each action should be evaluated separately for majorness. It is, however, entirely possible that courts would hold that each of those regulations involved major questions, given the impenetrable vagueness of the majorness inquiry. Alternatively,

health and welfare just as the United States and all nations face the greatest environmental challenge of all: climate change").

[396] *See supra* note 381.

[397] Squitieri, *supra* note 142, at 480.

challengers might persuade a single court to consolidate challenges to all of the regulations in a single action contesting the agency's resolution of a single issue, which they would characterize as a major question. Nevertheless, the divide and conquer strategy might work in some instances.

Agencies could attempt to avoid attaching major political significance to their actions by downplaying them in public utterances.[398] In support of their conclusion that the Clean Power Plan involved the resolution of major questions, both Chief Justice Roberts's majority opinion and Justice Gorsuch's concurring opinion made frequent reference to statements of Obama Administration officials emphasizing how important the regulations were for the economy and the environment.[399] Instead of highlighting the significance of their regulations, agencies might load up their public pronouncements with technical jargon to suggest that there is nothing extraordinary about the actions they describe. This strategy would, of course, hamper agency communication with the public and perhaps contribute to the declining image of agencies in the public mind. But it would give aggressive reviewing courts less ammunition to use in characterizing actions as major because of their political significance.

B. Legislative Solutions

Because the Court has offered little guidance on how significant the economic and/or political consequences of a regulation need to be to raise a major question or on how precise statutory language has to be to survive major questions scrutiny, Congress will find it difficult to respond to public pressure for protection against the aggressive judicial review that the major questions doctrine portends. As noted above, Congress has provided criteria for determining whether regulations are major for purposes of the Congressional Review Act, but the Supreme Court has ignored those criteria.[400] In theory, Congress should be able to specify criteria for determining whether a question is "major" for purposes of the application of the major questions doctrine.

In future legislation, Congress might declare in unambiguous language that an issue that it delegates to an agency for decision does not raise a major question. Or Congress could specify in crystal clear language that

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[398] *See* Pamela King, *Supreme Court Muzzles EPA on Climate*, GREENWIRE (July 18, 2022), https://www.eenews.net/articles/supreme-court-muzzles-epa-on-climate/.
[399] *Id.*
[400] Squitieri, *supra* note 142, at 465–66, 480.

it means for the agency to decide a question that the courts are likely to characterize as major. For example, Congress could amend the second sentence of Section 361(a) of the Public Health Service Act to say that the CDC "may provide for such protective measures as determined by [the CDC] to be necessary to prevent the transmission of infectious disease from one state to another."[401] This would prevent courts from finding that the second sentence limits the CDC's authority to address pandemics to preserving the cleanliness of things.

Presumably, courts applying the *Chevron* workaround and bulwark manifestations of the major questions doctrine would defer to Congress's judgment on that issue. It is not clear, however, that a court applying the wrecking ball manifestation of the doctrine would defer to the agency, despite a specific congressional delegation to the agency. Under the wrecking ball manifestation's most aggressive applications, Congress is powerless to delegate to agencies the authority to decide major questions, even if it employs pellucid language. If, as many have suggested, that aspect of the major questions doctrine is merely the nondelegation doctrine in disguise and, therefore, has a constitutional basis, the courts would presumably set aside any regulation promulgated under that provision that requires the agency to resolve a major question.[402]

These modest suggestions for congressional action, of course, assume that Congress can be persuaded to push back against the aggressive judicial assertion of power in the various manifestations of the major questions doctrine. In the current era of polarization and gridlock, that assumption is probably misplaced. Nevertheless, efforts to create legislative responses to the major questions doctrine should continue in anticipation of a time when proponents of effective government protections are in a position to enact them.

CONCLUSION

The major questions doctrine is one manifestation of broader efforts by conservative foundations, think tanks, and activist groups to reduce the power of federal agencies to intervene in private economic arrangements.[403] It is a validation of the strategy adopted by those groups to persuade Republican presidents to appoint judges who are skeptical of

[401] For original language, see 42 U.S.C. § 264(a).
[402] Squitieri, *supra* note 142, at 480, 496.
[403] *See* Charlie Savage, *Major Victory in Long Game to Dismantle Business Regulations*, N.Y. TIMES, July 1, 2022, at A1. *See generally* THOMAS O. MCGARITY, FREEDOM TO HARM: THE LASTING LEGACY OF THE LAISSEZ FAIRE REVIVAL (2013).

federal regulation.[404] Conservative critics of the administrative state who have consistently failed to persuade Congress to roll back longstanding consumer, worker, and environmental protections have successfully installed a Supreme Court that is apparently willing to render them obsolete.

With the Supreme Court's decision in *West Virginia*, where the Court for the first time referred to the doctrine by name,[405] the major questions doctrine emerged from the cloistered halls of academia into the turbulent world of politics. The Court invoked the doctrine three times during the first two years of the Biden Administration, and there is no indication that the affinity of the Republican-appointed members of the Court for the doctrine has diminished. Some lower courts are enthusiastically deploying the doctrine to overturn Biden Administration initiatives and to roll back programs that have been around for many years. Although the Supreme Court has repeatedly claimed that the doctrine is limited to "extraordinary" cases, there is little indication in the real world that the courts will confine themselves to rare cases. Judicial self-restraint is not much in vogue these days.

With this "new arrow in [their] quiver," attorneys for companies challenging agency regulations will routinely invoke the major questions doctrine as a vehicle for persuading courts that agencies should not be allowed to take aggressive regulatory action.[406] Wrecking balls have the virtue of facilitating the removal of decrepit structures that have lost their usefulness. But there is little evidence that the American public believes that the existing laws protecting them from consumer fraud, unsafe workplaces, pipelines and highways, and environmental devastation are no longer useful.[407]

Aggressive deployment of the major questions doctrine by the courts will probably contribute to the declining public respect for the federal

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[404] Savage, *supra* note 403, at A15.

[405] West Virginia v. EPA, 142 S. Ct. 2587, 2605 (2022). *See also id.* at 2633–34 (Kagan, J., dissenting).

[406] Frankel, *supra* note 116 (quoting Professor Jonathan Adler); Jennifer Hijazi & Stephen Lee, *Supreme Court Limits EPA Options in Power Plant Emissions Fight*, BL (July 1, 2022) (quoting Karen Sokol), https://news.bloomberglaw.com/environment-and-energy/epa-options-to-fight-emissions-limited-after-sobering-ruling; Frazin, *supra* note 276 (quoting Professor William Buzbee).

[407] In a January 2021 poll of 1,156 likely voters, fifty-eight percent of respondents believed that government should prioritize protecting people's health and safety even if it comes at the expense of economic growth, and only thirty-two percent believed that it should prioritize economic growth. JAMES GOODWIN & ETHAN WINTER, BUILDING A PROGRESSIVE REGULATORY AGENDA 8 (2021). In the same poll, fifty-four percent of respondents believed that we needed more regulation of business practices of large banks, while only seventeen percent believed that we should have less regulation. *Id.* at 3.

judiciary.[408] A Gallup poll taken in June 2022 found that the proportion of respondents who had a great deal or quite a lot of confidence in the Supreme Court was at an all-time low of twenty-five percent.[409] With its focus on economically and politically significant agency actions, the major questions doctrine virtually guarantees that its decisions will generate partisan controversy.[410] Given the absence of constraints on the doctrine's application, the beneficiaries of the regulations that die at the hands of the major questions doctrine are not likely to accept the courts' decisions. It will be hard for courts to refute the charge that the doctrine is just a "weapon" that partisan judges can use "to strike down any regulations they don't like."[411] Professor Michael Livermore and Daniel Richardson warn that "[r]epeated forays into the heart of the most deeply contested policy questions of the day runs the risk of undermining the legitimacy of judicial review and increasing partisan pressure on the process of judicial nomination and confirmation."[412] Apparently, this potential loss of institutional legitimacy does not concern the Republican appointees who now make up a supermajority of the Supreme Court.

Professor Kristin Hickman suggests that the major questions doctrine will not prove to be as great a threat to the administrative state as the analysis in this Article suggests.[413] Because of its limited capacity to decide more than sixty-five or so cases a year, the Supreme Court will only intervene in a few cases.[414] And the courts of appeals will, in her view, "not be itching to apply the major questions doctrine as aggressively as possible."[415] The first observation is unquestionably

[408] Heinzerling, *Nondelegation*, *supra* note 126, at 391. *See also* PEW RESEARCH CENTER, PUBLIC'S VIEWS OF SUPREME COURT TURNED MORE NEGATIVE BEFORE NEWS OF BREYER'S RETIREMENT 4 (2022) (reporting that favorable ratings of the Supreme Court declined from sixty-nine percent in August 2019 to fifty-four percent in January 2022, and unfavorable views increased from thirty percent to forty-four percent).

[409] Jeffrey M. Jones, *Confidence in U.S. Supreme Court Sinks to Historic Low*, GALLUP (June 23, 2022), https://news.gallup.com/poll/394103/confidence-supreme-court-sinks-historic-low.aspx.

[410] Michael A. Livermore & Daniel Richardson, *Administrative Law in an Era of Partisan Volatility*, 69 EMORY L.J. 1, 8 (2019). *See also* Adam Serwer, *The Constitution Is Whatever the Right Wing Says It Is*, ATLANTIC (June 25, 2022), https://www.theatlantic.com/ideas/archive/2022/06/roe-overturned-supreme-court-samuel-alito-opinion/661386/ ("[T]he Supreme Court has become an institution whose primary role is to force a right-wing vision of American society on the rest of the country.").

[411] Miles Mogulescu, *Supreme Court Stages a Coup Against Government Regulation*, AM. PROSPECT (July 1, 2022), https://prospect.org/justice/supreme-court-stages-coup-against-government-regulation/.

[412] Livermore & Richardson, *supra* note 410, at 57.

[413] Kristin E. Hickman, *Thoughts on* West Virginia v. EPA, YALE J. ON REGUL. NOTICE & COMMENT (July 5, 2022), https://www.yalejreg.com/nc/thoughts-on-west-virginia-v-epa/.

[414] *Id.*

[415] *Id.*

correct. The Supreme Court will, of necessity, reserve the major questions doctrine for at most a handful of "extraordinary" cases per year. But her assurance that courts of appeals will not actively endorse the major questions doctrine is debatable in a partisan age in which candidates for courts of appeals and district courts must demonstrate their anti-regulatory bona fides to Republican presidents to ensure their appointments.[416] In any event, the Supreme Court's active embrace of the major questions doctrine will discourage agencies from attempting to solve new problems during Democratic administrations and encourage agencies to roll back regulations during Republican administrations. The statutes that are at the core of the administrative state's protective edifice will remain, but they will become less and less protective as the courts pound away at them with the major questions wrecking ball.

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[416] *See* Vermeule, *supra* note 8 ("Who knows when the court, or for that matter any one of the nation's 700 district judges, will deem a case 'extraordinary' and shut down a national federal regulatory program?").