MAJOR QUESTIONS: AN EXTRAORDINARY DOCTRINE FOR "EXTRAORDINARY" CASES

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In West Virginia v. EPA*, the Supreme Court held a climate-change policy unlawful by relying on what it called for the first time the "major questions doctrine." In the wake of the Court's decision, commentators and litigants have argued that this doctrine should prove fatal to a wide range of regulatory actions on topics ranging from environmental and economic policy to civil rights and immigration. This Article contends that those claims are wrong. To start,* West Virginia *does not stand alone, but instead must be interpreted in light of the decisions that preceded it. As the Court explained, the major questions doctrine "developed over a series of significant cases," and close examination of those cases yields fundamental lessons about the doctrine's limited scope—lessons that* West Virginia *itself confirms. Most importantly, the economic and political significance of an agency's action, however great, does not alone trigger the doctrine. Instead, to qualify as one of the "extraordinary cases" in which the doctrine applies, additional factors must demonstrate that an agency is seeking to fundamentally alter and expand its authority "beyond what Congress could reasonably be understood to have granted." In short, the doctrine applies only where an agency asserts a breathtaking new power that context reveals to be a dubious effort to transform the basic nature of its authority. The Court's decision to limit the doctrine to such extraordinary cases makes sense because the doctrine is in tension with principles of textualism, the original understanding of the Constitution, and the judiciary's limited role under the separation of powers. Aggressively employing the doctrine beyond the limited sphere prescribed by the Court would exacerbate those tensions and undermine the legitimacy of the courts. By relying on the doctrine only sparingly, as* West Virginia *instructs, courts can best ensure that they stay within their*

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constitutional role interpreting the laws and avoid inappropriately interfering with the decisions of the elected branches.

TABLE OF CONTENTS

INTRODUCTION

In June 2022, in *West Virginia v. EPA*,[1] the Supreme Court relied on what it called the "major questions doctrine" to conclude that an Obama-era climate policy was not authorized by the Clean Air Act.[2] According to the Court, this dispute was among the "extraordinary cases" that "call for a different approach" from the "ordinary method of normal statutory interpretation,"[3] requiring the EPA to "point to clear congressional authorization to regulate in that manner."[4] Because the Court concluded that the agency could not point to such clear authorization, it declared the climate policy unlawful.[5]

While *West Virginia* is an important case that affects the relationship between Congress, federal agencies, and the courts, its scope, properly understood, is not as broad as many on both the right and the left have claimed.[6] Opponents of a wide range of regulatory actions are now arguing that those actions cannot survive in light of *West Virginia* and the major questions doctrine it articulated,[7] but those claims misunderstand both the decision and the doctrine.

As the Court itself emphasized in *West Virginia*, the major questions doctrine applies only in "extraordinary cases."[8] Indeed,

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1. 142 S. Ct. 2587 (2022).
2. *Id.* at 2614–16.
3. *Id.* at 2608–09 (internal quotations omitted).
4. *Id.* at 2614 (internal quotations omitted).
5. *See id.* at 2614–16.
6. From the right, see, for example, Louis Capozzi, *The Past and Future of the Major Questions Doctrine*, 84 OHIO ST. L.J. (forthcoming 2023) (manuscript at 194) (on file with authors), https://ssrn.com/abstract=4234683 ("[T]he doctrine is likely to substantially reduce the power of administrative agencies unless Congress can muster the political will to specifically grant them new powers to solve new problems."). From the left, see, for example, Lisa Heinzerling, *The Supreme Court Is Making America Ungovernable*, THE ATLANTIC, July 26, 2022, https://www.theatlantic.com/ideas/archive/2022/07/supreme-court-major-questions-doctrine-congress/670618/ ("Broad statutory language, written with the aim of empowering an agency to take on new problems in new ways, will no longer suffice.").
7. *See, e.g.*, Jennifer Hijazi, *Biden Tailpipe Emission Rules Face 'Major Questions' Legal Wave*, BLOOMBERG LAW, Apr. 14, 2023, https://news.bloomberglaw.com/environment-and-energy/biden-tailpipe-emission-rules-face-major-questions-legal-wave; Bernard S. Sharfman & James R. Copland, *The SEC Can't Transform Itself Into a Climate-Change Enforcer*, WALL ST. J. (Sept. 14, 2022), https://www.wsj.com/articles/securities-exchange-sec-climate-change-esg-major-questions-doctrine-west-virginia-v-epa-supreme-court-disclosure-rule-11663178488; Svetlana Gans & Eugene Scalia, *The FTC Heads for Legal Trouble*, WALL ST. J. (Aug. 8, 2022), https://www.wsj.com/articles/ftc-may-test-the-courts-limits-meta-lina-khan-roberts-nondelegation-major-questions-enforcement-authority-humphreys-executor-administrative-law-noncompete-11659979935.
8. 142 S. Ct. at 2608 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)).

that is the only understanding of the doctrine that is consistent with the precedent on which the Court relied in *West Virginia*, which explained that the doctrine "refers to an identifiable body of law that has developed over a series of significant cases."[9] *West Virginia* was hardly the first "major questions" case, and although it represents an important step in the doctrine's evolution, it incorporates precedent that helps clarify when the doctrine should apply and why it applies only in "extraordinary" cases.[10]

Over the last few decades, the Court has gradually developed the concept of a "major question" when considering the validity of agency actions.[11] In each case, the Court has taken notice that an agency was making a novel assertion of vast regulatory authority in a situation where context suggested that Congress had not meant to confer that authority. Although the role played by the major questions concept in the Court's analysis has differed from case to case, these precedents and *West Virginia* provide a fundamental lesson about the scope of the major questions doctrine. It is not enough that an agency action has vast economic and political significance, as this showing is necessary but not sufficient for the doctrine to apply. Instead, when an agency asserts a breathtaking new power of vast economic and political significance, context must also indicate that the agency is seeking to fundamentally transform its authority "beyond what Congress could reasonably be understood to have granted."[12] Deciding whether this second showing has been made requires examining a variety of factors involving the text, structure, and history of the relevant statute, along with the agency's established practice in implementing it.[13]

The Supreme Court's decision to limit the major questions doctrine to these "extraordinary cases" makes sense, not only for the reasons the Court has indicated but for others as well. The major questions doctrine is in tension with principles of textualism, the original understanding of the Constitution, and the courts' limited role under the separation of powers. If the doctrine is employed rarely and with a focus on identifying attempts to reshape an agency's congressionally granted authority, as the Court has instructed, those tensions can be alleviated. But if the doctrine were employed as

9. *Id.* at 2609.

10. *See* Biden v. Nebraska, 143 S. Ct. 2355, 2374 (2023) ("[W]hile the major questions 'label' may be relatively recent, it refers to 'an identifiable body of law that has developed over a series of significant cases' spanning decades." (quoting *West Virginia*, 142 S. Ct. at 2609)); *id.* at 2374 (applying the major questions doctrine because "indicators from our previous major questions cases are present" (internal quotation omitted)).

11. *See* discussion *infra* Part I.A.

12. *West Virginia*, 142 S. Ct. at 2609 (brackets omitted).

13. *See* discussion *infra* Part I.B.

aggressively as some suggest it could be,[14] it would threaten to undermine the courts' legitimacy by pushing them beyond their proper sphere—enabling them to essentially play a policymaking role with respect to the government's most controversial regulatory endeavors.

With respect to textualism, the major questions doctrine risks marginalizing the best reading of a statute's language in favor of pragmatic considerations, legislative history, post-enactment developments, and other factors outside of the statutory text.[15] Instead of putting text first, the doctrine requires courts to make political and economic appraisals that are inherently subjective and beyond the courts' expertise to determine if the doctrine applies. If it does, courts must then look for "clear congressional authorization,"[16] instead of simply discerning the statute's meaning through the usual methods of interpretation. Ultimately, this approach subordinates text to a judge's personal assessment of whether Congress would have spoken more clearly if it wanted to authorize a particular agency action.

The major questions doctrine is also in tension with the original understanding of the Constitution.[17] The Constitution's text, Founding-era history, and early congressional practice all demonstrate that there is nothing constitutionally suspect about agencies resolving major questions at Congress's behest. Nor does text, history, or practice suggest that Congress must speak in any particular fashion to assign such authority. Indeed, from the very beginning, Congress has authorized the executive branch to make major policy decisions concerning some of the most important questions facing the nation, often using broad language with little or no specific guidance.

Finally, the major questions doctrine is in tension with the separation of powers.[18] Without providing a thorough justification, the Supreme Court has imposed a new and heightened requirement on the elected branches' ability to authorize certain agency actions. It has done so even when construing statutes that predate this new requirement, retroactively imposing standards that Congress could not have known it needed to satisfy. The most extreme view of the doctrine could allow contemporary partisan debates to effectively alter the meaning of existing statutes outside of the constitutionally prescribed means of doing so. And the subjective judgments that are unavoidable in major questions analysis increase the risk that

14. *See* Heinzerling, *supra* note 6.

15. *See* discussion *infra* Part II.A.

16. *West Virginia*, 142 S. Ct. at 2609 (quoting Util. Air Regul. Grp. v. EPA, 134 S. Ct. 2427, 2444 (2014)).

17. *See* discussion *infra* Part II.B.

18. *See* discussion *infra* Part II.C.

decisions striking down agency policies, whether consciously or unconsciously, will be skewed by judges' own political views.

These tensions with textualism, constitutional history, and the separation of powers all underscore why the Supreme Court was right in *West Virginia* to limit the major questions doctrine to the most "extraordinary" cases.[19] As shown below, the Court has incorporated some version of major questions analysis into its opinions at most eleven times.[20] To put that in perspective, one study found that the Court took up more than 1,000 cases involving statutory interpretation by a federal agency between 1983 and 2006.[21]

By continuing to rely on the major questions doctrine only sparingly, as *West Virginia* instructs, courts can best ensure that they stay within their constitutional role interpreting the laws and avoid inappropriately interfering with the elected branches of government.

I. THE HISTORY AND SCOPE OF THE MAJOR QUESTIONS DOCTRINE

A. Development of the Major Questions Doctrine

What is now known as the "major questions doctrine" emerged in fits and starts, beginning in the 1980s and firmly taking root in the twenty-first century. Initially, the Supreme Court used a rudimentary form of major questions analysis to help confirm a statute's unambiguous meaning after employing other interpretive methods. Over time, the Court used the concept in new contexts, applying it to show that an agency's interpretation of an ambiguous statute was unreasonable or to withhold deference from an agency's reasonable interpretation. In 2022, the doctrine transformed into its current iteration: a requirement of "clear congressional authorization" to permit agency action "in certain extraordinary cases."[22]

Throughout the doctrine's evolution, one thing has remained constant: the Court has never treated the political and economic significance of an agency's action as sufficient to warrant application of the doctrine. Particularly as the major questions doctrine has come to play a larger role in shaping outcomes, the Court instead has made clear that it applies only in "extraordinary" cases where context indicates that an agency is subverting Congress's likely intent by

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19. 142 S. Ct. at 2608 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)).

20. Some argue that the number is even smaller. *See, e.g.*, Natasha Brunstein & Richard L. Revesz, *Mangling the Major Questions Doctrine*, 74 ADMIN. L. REV. 217, 224 (2022) (identifying just five major questions cases before 2021).

21. William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L. J. 1083, 1094 (2008).

22. *West Virginia*, 142 S. Ct. at 2609.

claiming "an unheralded power representing a transformative expansion in its regulatory authority."[23]

The following discussion traces the steps in the development of the major questions doctrine, showing how the Supreme Court has defined the concept of a "major question" and has used that concept to interpret statutes.

1. Major questions analysis is used to reinforce traditional statutory interpretation.

Some scholars view "*The Benzene Case*," decided in 1980, as articulating the earliest precursor of the major questions doctrine,[24] though the decision did not turn on major questions analysis. Instead, the Court plurality held that a statute clearly foreclosed the regulation at issue, basing its conclusion on "the language and structure of the Act, as well as its legislative history."[25] In *Benzene*, industry groups claimed that the Secretary of Labor exceeded his authority by setting a new workplace standard for benzene.[26] Looking to the statute's text, a plurality of Justices agreed, concluding that the agency failed to show a "significant risk of harm" before issuing its new standard, as required by the statute.[27] The Justices then bolstered that conclusion by noting that "[i]n the absence of a clear mandate in the Act, it is unreasonable to assume that Congress intended to give the Secretary the unprecedented power" asserted.[28]

Four years later, the Court adopted its so-called *Chevron* framework for deciding when courts should defer to an agency's interpretation of a law it administers.[29] Under *Chevron*, courts first decide whether a statute is ambiguous, and if so, whether the agency's

23. *Id.* at 2610 (internal quotations omitted).

24. *See* Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst. (*Benzene*), 448 U.S. 607 (1980) (plurality opinion); *see also, e.g.*, Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475, 484–86 (2021); Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2044 (2018); Daniel Deacon & Leah Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. (forthcoming 2023) (manuscript at 35) (on file with authors), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4165724. *But see* David M. Driesen, Does the Separation of Powers Justify the Major Questions Doctrine? 9 n.51 (May 4, 2023) (unpublished manuscript) (on file with authors) (questioning the "tenuous" links between *Benzene* and the major questions doctrine), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4200508. Notably, *Benzene* was not cited by other major questions cases for more than three decades. *Cf.* Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014).

25. *Benzene*, 448 U.S. at 641 (plurality opinion) (emphasis added).

26. *Id.* at 612 (quoting 29 U.S.C. § 652(8)).

27. *Id.* at 639–40, 644–45, 662.

28. *Id.* at 645.

29. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

interpretation of that ambiguous statute is "permissible."[30] After *Chevron*, the Court initially used major questions analysis much like in *Benzene*—only to buttress conclusions reached on other grounds about a statute's unambiguous meaning. For example, in *MCI v. AT&T*,[31] the Federal Communications Commission interpreted its statutory authority to "modify" rate-reporting requirements as allowing it to exempt many entities from those requirements entirely.[32] The Court determined that because the word "modify," in context, "connotes moderate change," the statute did not permit a "radical or fundamental change."[33] Then, in concluding that the agency's exemption was not a "modification" but a "fundamental revision of the statute," the Court noted the "enormous importance to the statutory scheme" of the reporting requirements and that the agency had changed a "crucial provision . . . for 40% of a major sector."[34] It was "highly unlikely," the Court concluded, that Congress would empower an agency to make such sweeping exemptions through the "subtle device" of "permission to 'modify' rate-filing requirements."[35]

A "key case" in the development of the major questions doctrine, as many have recognized,[36] was *FDA v. Brown & Williamson*, decided in 2000.[37] And there, the Court still invoked major questions analysis only as a rule of thumb to supplement more traditional statutory interpretation. After years of claiming that it could not regulate tobacco products as "drugs" or "devices," the Food and Drug Administration reversed course and issued tobacco regulations.[38] The Court examined the FDA Act to see if Congress had directly resolved the issue or left it ambiguous.[39] This examination, the Court explained, "must be guided to a degree by common sense" about how "Congress is likely to delegate a policy decision of such economic and political magnitude."[40]

The Court first looked to how the FDA's new regulation would fit within the statutory scheme. To meet the Act's objective of making regulated products safe and effective, the Court concluded, the FDA would have to remove tobacco products from the market.[41] But this

30. *Id.* at 842–43 (1984).
31. 512 U.S. 218 (1994).
32. *Id.* at 223–25.
33. *Id.* at 227–29.
34. *Id.* at 231.
35. *Id.*
36. *See, e.g.*, West Virginia v. EPA, 142 S. Ct. 2587, 2634 (2022) (Kagan, J., dissenting).
37. 529 U.S. 120 (2000).
38. *Id.* at 125.
39. *Id.* at 132–33.
40. *Id.* at 133 (citing MCI Telecomms. Corp. v. Am Tel. & Tel. Co., 512 U.S. 218, 231 (1994)).
41. *Id.* at 133–37.

would conflict with other, tobacco-specific legislation that "stopped well short of ordering a ban."[42] And this meant "that there is no room for tobacco products within the [FDA's] regulatory scheme."[43]

Only then did the Court briefly cite major questions considerations. "In extraordinary cases," the Court explained, "there may be reason to hesitate" before finding that a statute implicitly empowers an agency.[44] The FDA case was "extraordinary" in part because tobacco made up "a significant portion of the American economy" and held a "unique place in American history and society."[45] But the Court also emphasized that Congress had "created a distinct regulatory scheme" for tobacco, had rejected proposals to extend FDA jurisdiction to tobacco, and had precluded other agencies from making tobacco policy.[46] In concluding that Congress did not "intend[] to delegate a decision of such economic and political significance . . . in so cryptic a fashion," the Court relied in part on "the plain implication" of this other legislation.[47] Thus, the tensions with the overall regulatory scheme created by the FDA's attempted expansion of its jurisdiction were key to the conclusion that Congress had barred it from regulating tobacco.[48]

Into the twenty-first century, the Court continued to use major questions analysis to buttress conclusions reached on other grounds about a statute's plain meaning.[49] And in 2007, in *Massachusetts v. EPA*,[50] the Court emphasized the proper focus and limited reach of its major questions case law, refusing "to read ambiguity into a clear statute" merely because major consequences flowed from the statute's clear meaning.[51] The EPA had refused to establish limits on

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42. *Id.* at 137–39.

43. *Id.* at 143.

44. *Id.* at 159 (citing Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986)).

45. *Id.* at 159.

46. *Id.*

47. *Id.* at 160.

48. *Id.* at 160–61.

49. In *Whitman v. American Trucking Associations*, 531 U.S. 457 (2001), the EPA used its authority to establish air quality standards to set new emission limits without considering compliance costs. When industry claimed that compliance costs must be taken into account, the Court sided with the EPA, concluding that the statute "unambiguously bars cost considerations." *Id.* at 468, 471. The Court explained that any such authorization to consider costs had to be "clear" because of the standards' importance to the regulatory scheme. *Id.* at 468. It rejected claims that various statutory phrases provided such authorization because Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions" or "hide elephants in mouseholes." *Id.* (citing MCI Telecomms. Corp. v. Am Tel. & Tel. Co., 512 U.S. 218, 231 (1994); *Brown & Williamson*, 529 U.S. at 159–60).

50. 549 U.S. 497 (2007).

51. *Id.* at 531.

vehicular greenhouse gas emissions, claiming that because such limits "would have even greater economic and political repercussions than regulating tobacco," Congress must speak "with exacting specificity" to include greenhouse gases as "air pollutants."[52] The Court disagreed. While it was "unlikely that Congress meant to ban tobacco products," there was "nothing counterintuitive" about the EPA regulating greenhouse gas emissions.[53] And unlike in the tobacco case, there was no "unbroken series of congressional enactments" that "made sense only if" the agency lacked this authority.[54]

2. Major questions analysis is used to decide if an agency's interpretation is reasonable.

The Court's use of major questions analysis changed slightly in *Utility Air Regulatory Group v. EPA*,[55] where the analysis helped confirm that an agency's interpretation of the law was unreasonable under the *Chevron* framework.[56] But here too the decision did not turn on consequences alone—instead, the Court continued to focus on whether an agency sought to transform the power Congress gave it through improbable, novel interpretations of the governing statute.

In *Utility Air*, the Court considered whether the EPA could require permits for certain facilities based solely on greenhouse gas emissions.[57] The statute made permits necessary when specific emission thresholds were met, but applying those low thresholds to greenhouse gases—as the EPA proposed—would have regulated millions of new sources.[58] The EPA tried to exempt many of these sources by changing the statutory emission thresholds.[59] Ruling against the agency, the Court acknowledged that the statute was ambiguous.[60] But it held that the agency's interpretation was unreasonable because the EPA admitted that its interpretation "would overthrow" the statute's "structure and design."[61] Then, the Court turned to major questions analysis, explaining:

> EPA's interpretation is also unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization. When an agency claims to discover in a long-

52. *Id.* at 512–13.
53. *Id.* at 531.
54. *Id.*
55. 573 U.S. 302 (2014).
56. *Id.* at 321–28.
57. *Id.* at 311–13.
58. *Id.* at 324.
59. *Id.* at 320–21.
60. *Id.* at 317–20.
61. *Id.* at 318, 321.

> extant statute an unheralded power to regulate "a significant portion of the American economy," we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast "economic and political significance."[62]

As in *Brown & Williamson*, the regulation's incompatibility with the statutory scheme and its conspicuous novelty were key. The EPA's position was unreasonable not because the agency was claiming expansive power, but because it was claiming "expansive power *that it admits the statute is not designed to grant*."[63]

3. Major questions analysis is used to avoid deference to agencies.

While most of the Court's early major questions cases applied the doctrine as part of its *Chevron* analysis, two decisions used the doctrine to avoid that framework entirely. But in those cases, too, the Court's analysis of the relevant statute's text and plan was critical.

Gonzales v. Oregon,[64] decided in 2006, concerned an Attorney General–issued rule that barred the provision of drugs for assisted suicide.[65] Looking to text and statutory context, the Court concluded that the rule did not merit *Chevron* deference.[66] That was in part because "the authority claimed by the Attorney General is both beyond his expertise and incongruous with the statutory purposes and design," which conveyed "unwillingness to cede medical judgments to an executive official who lacks medical expertise."[67] The Court also observed that Congress would not use "vague terms or ancillary provisions" to give "broad and unusual authority" to alter "fundamental details" of a regulatory scheme, explaining that the "earnest and profound debate" around assisted suicide made this delegation even less likely.[68] The rule also conflicted with the statute's text and purpose.[69] Without deference to the Attorney General, the Court ultimately held the rule invalid.[70]

In 2015, in *King v. Burwell*,[71] the Court again used major questions analysis to avoid giving deference to an executive branch

62. *Id.* at 324 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000)).

63. *Id.* (emphasis added).

64. 546 U.S. 243 (2006).

65. *Id.*

66. *Id.* at 245.

67. *Id.* at 266–67.

68. *Id.* (internal quotations omitted).

69. The text expressly limited the Attorney General's authority to "registration and control," while its purpose was to combat drug abuse and illicit drug trafficking. *Id.* at 268.

70. *Id.* at 274–75.

71. 576 U.S. 473 (2015).

interpretation of a statute—this time an IRS regulation on health insurance tax credits—but the Court went on to uphold the agency's action.[72] The Court explained that "in extraordinary cases . . . there may be reason to hesitate" before concluding that Congress implicitly delegated power to an agency through statutory ambiguity.[73] This case qualified as such in part because the tax credits were "central to th[e] statutory scheme" and were among its "key reforms," costing billions of dollars and affecting insurance for millions.[74] Additionally, the IRS's lack of "expertise in crafting health insurance policy" contributed to the case's extraordinary character.[75] But when the Court examined the meaning of the statute without deference, it did not require clear congressional authorization: although the statute was ambiguous, the Court sided with the agency despite the immense practical significance of its rule, finding its interpretation consistent with a "fair understanding of the legislative plan."[76]

4. Major questions analysis is used to displace normal statutory interpretation by requiring "clear congressional authorization."

After *King v. Burwell*, major questions analysis lay dormant at the Court for six years, only to reemerge during the COVID pandemic. When a federal eviction moratorium was challenged in *Alabama Association of Realtors v. HHS*,[77] the Court used major questions analysis as it had in the past: to bolster its interpretation of statutory text.[78] But in *National Federation of Independent Business v. OSHA*,[79] the Court went further, first deciding that a major question was at issue and then asking whether the statute "plainly authorize[d]" a workplace vaccine-or-test requirement.[80]

That same day, however, the Court concluded that the doctrine did not apply in a different case involving an executive action that also had vast economic and political significance. In *Biden v. Missouri*,[81] the Court concluded that requiring vaccinations at health care facilities was not such a "surprising" exercise of the agency's authority as to justify using the doctrine, notwithstanding the dissenting Justices' effort to invoke it.[82] Finally, in *West Virginia v.*

72. *Id.* at 498.
73. *Id.* at 485 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)).
74. *Id.* at 485–86.
75. *Id.* at 486.
76. *Id.* at 490–98.
77. 141 S. Ct. 2485, 2486 (2021) (per curiam).
78. *See id.*
79. 142 S. Ct. 661 (2022) (per curiam).
80. *Id.*
81. 142 S. Ct. 647 (2022) (per curiam).
82. *Id.* at 653.

EPA, the Court overtly articulated the current iteration of the doctrine, requiring "clear congressional authorization" for agency action "in certain extraordinary cases."[83]

In *Alabama Association of Realtors*, the Court effectively struck down an eviction moratorium issued by the Centers for Disease Control ("CDC") under its authority "to prevent the introduction, transmission, or spread of communicable diseases."[84] The Court held that because the authorizing statute listed measures like "inspection, fumigation, [and] disinfection," it permitted only measures directly tied to the spread of disease, not the "more indirect[]" eviction ban.[85]

Only after analyzing the statutory text did the Court turn to its major questions case law, explaining that "[e]ven if the text were ambiguous, the sheer scope of the CDC's claimed authority . . . would counsel against the Government's interpretation."[86] The agency's claimed authority had vast economic and political significance because the eviction moratorium would cover "at least 80% of the country," its economic impact might approach $50 billion, and it would "intrude[] into . . . the particular domain of state law."[87] The Court expressed concern that this "breathtaking amount of authority" could be used whenever the agency deemed it "necessary."[88] Noting that no previous regulation under this authority "has even begun to approach the size or scope of the eviction moratorium," the Court concluded that the statute was "a wafer-thin reed on which to rest such sweeping power."[89]

The Court reframed its major questions analysis in *NFIB*, examining a vaccination-or-testing requirement for large employers issued by the Occupational Safety and Health Administration ("OSHA").[90] From the outset, the Court emphasized that this was "no 'everyday exercise of federal power'" but instead a "significant encroachment" into employees' lives and health.[91] The Court also considered other familiar factors: the poor fit between the vaccine-or-test requirement and OSHA's "sphere of expertise," the requirement's novelty, and Congress's failure to amend the law to provide OSHA with this power expressly.[92] Requiring that Congress "speak clearly" to authorize this type of action,[93] the Court concluded that the

83. 142 S. Ct. 2587, 2609 (2022).
84. 141 S. Ct. at 2487 (2021) (per curiam).
85. *Id.* at 2488.
86. *Id.* at 2489.
87. *Id.*
88. *Id.*
89. *Id.*
90. 142 S. Ct. 661 (2022).
91. *Id.* at 665 (quoting In re MCP No. 165, 20 F.4th 264, 272 (2021) (Sutton, C.J., dissenting)).
92. *See id.* at 665–66.
93. *Id.* at 665 (quoting *Realtors*, 141 S. Ct. at 2489).

mandate was not "plainly authorize[d]" because "[t]he Act empowers the Secretary to set *workplace* safety standards, not broad public health measures."[94]

Importantly, that same day, the Court in *Missouri* did not apply the major questions doctrine to a Department of Health and Human Services vaccination mandate for staff working at facilities receiving Medicare or Medicaid funds.[95] While dissenting Justices highlighted the economic and political significance of "put[ting] more than 10 million healthcare workers to the choice of their jobs or an irreversible medical treatment,"[96] the Court found such practical significance insufficient by itself to trigger application of the doctrine.[97] Instead, the Court concluded that the mandate was not "surprising" in light of the agency's "longstanding practice," viewing it as one of many "routinely impose[d]" funding conditions tied to healthcare workers' responsibilities.[98] The Court also noted the absence of any mismatch between the mandate and the agency's expertise.[99] This case illustrates an important principle under the major questions doctrine: even when an agency "goes further" than it has in the past, if the action "fits neatly within the language of the statute," the doctrine does not constrain a statute's "broad language."[100]

Finally, in *West Virginia*, the Court explicitly discussed the parameters of the "major questions doctrine," drawing heavily on its prior cases addressing the problem of "agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted."[101] For the first time, the Court named the doctrine and described it as requiring "clear congressional authorization . . . in certain extraordinary cases."[102]

While the procedural posture in *West Virginia* was complex, the Court reviewed whether the EPA could rely on shifts from higher-emitting to lower-emitting power plants as part of the "best system of emission reduction" when setting emission limits, as opposed to relying only on measures applied at individual plants.[103] The EPA's approach would "force a nationwide transition away from the use of coal to generate electricity."[104]

Before turning to the text of the Clean Air Act, the Court explained that in "extraordinary cases" the "history and the breadth

94. *Id.*
95. 142 S. Ct. 647.
96. *Id.* at 660 (Alito, J., dissenting).
97. *Id.* at 654–55 (majority opinion).
98. *Id.* at 652–53.
99. *Id.* at 653.
100. *Id.* at 652.
101. 142 S. Ct. 2587, 2609 (2022).
102. *Id.* (internal quotations omitted).
103. *Id.* at 2599, 2602–03.
104. *Id.* at 2616.

of the authority that [the agency] has asserted" and its "economic and political significance . . . provide a 'reason to hesitate before concluding that Congress' meant to confer such authority."[105] The Court said that in prior major questions cases there was a "colorable textual basis" for the agency action,[106] but "common sense" about how Congress would delegate such authority made these interpretations unlikely.[107] It cautioned against reading "modest words," "vague terms," "subtle device[s]," or "oblique or elliptical language" as providing "extraordinary grants of . . . authority" to make a "'radical or fundamental change' to a statutory scheme."[108] Citing "separation of powers and a practical understanding of legislative intent," the Court explained that in these extraordinary cases it is "'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking there."[109] To overcome this reluctance, agencies must show "clear congressional authorization."[110]

While the Court had not previously elaborated on when the major questions doctrine applies, much of *West Virginia* is dedicated to that issue. The requirement is two-fold. Agencies must assert "highly consequential power," and this power must reach "beyond what Congress could reasonably be understood to have granted."[111] Put differently, agencies must claim "[e]xtraordinary grants of regulatory authority," and their claims must entail "a radical or fundamental change to [the] statutory scheme."[112]

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

106. *Id.* at 2609. *West Virginia*'s contention that a "colorable textual basis" existed in past cases is seemingly at odds with the Court's conclusion in *Brown & Williamson* and *Alabama Association of Realtors* that the statutes unambiguously foreclosed the agencies' interpretations. *See supra* at notes 37–48, 84–89 & accompanying text. Regardless of whether the Court was offering a revisionist account of those decisions, however, this description of past cases—along with references to "a merely plausible textual basis" and "ambiguous statutory text"—may be meant to signal that courts cannot use the major questions doctrine to narrow the scope of unambiguous statutes, regardless of how far-reaching those statutes are. *See* Ilan Wurman, *Importance and Interpretive Questions*, 110 VA. L. REV. (forthcoming 2024) (manuscript at 32–34) (on file with authors), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4381708; Biden v. Nebraska, 143 S. Ct. 2355, 2378 (Barrett, J., concurring) (taking the position that no major questions decision "purports to depart from the best interpretation of the text").

107. *West Virginia*, 142 S. Ct. at 2609 (quoting *Brown & Williamson*, 529 U.S. at 133).

108. *Id.* (quoting Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001); MCI Telecomms. Corp. v. Am Tel. & Tel. Co., 512 U.S. 218, 229 (1994)).

109. *Id.* (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302 (2014)).

110. *Id.*

111. *Id.*

112. *Id.* (quoting *Whitman*, 531 U.S. at 468; *MCI*, 512 U.S. at 229).

The Court did not extensively discuss the first requirement, apparently leaving the meaning of "vast economic and political significance"[113] to intuition and the gradual development of case law. As to the second requirement, the Court was more definitive: it looks for scenarios in which context reveals that an agency is attempting a "fundamental revision" of the relevant statute, "changing it from [one sort of] scheme of . . . regulation into an entirely different kind."[114] Surveying its previous major questions cases, the Court explained that "in each case, given the various circumstances, common sense as to the manner in 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."[115]

These "various circumstances" may include several factors that arise from a statute's text, structure, history, and prior implementation. In *West Virginia*, for instance, the EPA "claim[ed] to discover in a long-extant statute an unheralded power representing a transformative expansion in [its] regulatory authority,"[116] it "located that newfound power in the vague language of an ancillary provision" that "was designed to function as a gap filler and had rarely been used,"[117] its discovery of this newfound power "allowed it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact,"[118] and its claimed authority involved "technical and policy" decisions over which it had "no comparative expertise."[119]

After concluding that the case was extraordinary and that clear authorization was therefore required,[120] the Court in *West Virginia* analyzed the statute's text and structure to assess the validity of the EPA's policy. While it conceded that the EPA's approach could be described as a "system" if that word was "shorn of all context," it found this insufficiently clear because such use of the word rendered it an "empty vessel."[121] The Court found no clear authorization in the statutory context either, after comparing the provision at issue with other parts of the Clean Air Act.[122] Thus, the Court held that the EPA's policy exceeded its statutory authority.[123]

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113. *Id.* at 2605 (internal quotation omitted).
114. *Id.* at 2612 (internal quotation omitted).
115. *Id.* at 2609 (citation and quotation marks omitted).
116. *Id.* at 2610 (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302 (2014)).
117. *Id.* (quoting *Whitman*, 531 U.S. at 468).
118. *Id.* (internal citations omitted).
119. *Id.* at 2612–13 (internal quotations omitted).
120. *Id.* at 2609.
121. *Id.* at 2614.
122. *Id.* at 2615–16.
123. *Id.* at 2616.

As this history shows, the major questions doctrine is a relatively new judicial creation that emerged as a tool to bolster traditional statutory interpretation and only recently evolved to require clear congressional authorization for certain agency actions.[124] But while the doctrine is quite new, the cases described above consistently show that its application is confined to the most extraordinary cases satisfying a rigorous two-part test. To trigger the doctrine, the vast economic and political significance of an agency's action must be coupled with persuasive indications that the agency's newly asserted authority is an unwarranted expansion of its power reaching beyond what Congress likely intended.

The Court's most recent major questions decision, *Biden v. Nebraska*, confirms these principles.[125] Two months after *West*

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124. Some claim that the doctrine's roots stretch back further to *ICC v. Cincinnati, N.O. & T.P. Ry. Co.*, 167 U.S. 479 (1897). *See West Virginia*, 142 S. Ct. at 2619 (Gorsuch, J., concurring). But that case—in which the Supreme Court determined that the Interstate Commerce Commission ("ICC") was not authorized to set railroad rates prospectively—rested on a different basis: legislation had long used specific, stock phrasing whenever authorizing agencies to set such rates, and so the pointed absence of that phrasing in the ICC's statute clearly indicated that Congress did not intend to grant it that authority. *See* ICC v. Cincinnati, 167 U.S. at 495 ("the language by which the power is given had been so often used, and was so familiar to the legislative mind, and is capable of such definite and exact statement, that no just rule of construction would tolerate a grant of such power by mere implication"); *id.* at 495–99 (quoting statutes from sixteen states to reiterate that Congress would know "what phraseology has been deemed necessary" to grant rate-setting power); *see also* Beau J. Baumann, *Capozzi on the Future of the Major Questions Doctrine*, ADMINWANNABE.COM (Oct. 19, 2022), https://adminwannabe.com/?p=114. The *ICC* decision obviously did not lead to the development of a major questions doctrine, which emerged only a century later. *See* discussion *supra*. And the decision has never been cited by the Court in any major questions case. The Court has, however, cited *ICC* for the proposition that "[w]here a statutory body has assumed a power *plainly not granted*, no amount of such interpretation is binding upon the courts," *Tex. & P. Ry. Co. v. United States*, 289 U.S. 627 (1933), further demonstrating that *ICC* simply resolved the plain meaning of the statute in light of the background drafting conventions known to Congress. Likewise, other supposed pre-*Benzene* precursors do not establish a historical pedigree for the major questions doctrine. *See* Capozzi, *supra* note 6 (manuscript at 194, 205, 210) (pointing to Siler v. Louisville & Nashville R.R. Co., 213 U.S. 175 (1909), and Kent v. Dulles, 357 U.S. 116 (1958), as additional examples). *Siler* merely applied *ICC*'s reasoning (that legislatures used specific, conventional language when they wanted to authorize rate-setting) to a state law governing a state railroad commission; it did not interpret a federal statute or address the plaintiffs' federal constitutional claims. 213 U.S. at 193–97. No rule based on the Constitution's separation of powers could apply to interpretation of a state statute. And in *Kent*, the Court exercised constitutional avoidance because the agency action affected the individual right to travel. 357 U.S. at 130 ("To repeat, we deal here with a constitutional right of the citizen, a right which we must assume Congress will be faithful to respect.").

125. Biden v. Nebraska, 143 S. Ct. 2355 (2023).

Virginia, the Secretary of Education announced a student debt relief plan based on his statutory authority to "waive or modify any statutory or regulatory provision applicable to [student loan programs] as the Secretary deems necessary in connection with a . . . national emergency."[126] Litigants challenging the plan claimed that it implicated the major questions doctrine and that the Secretary lacked "clear congressional authorization" for his action. The Supreme Court agreed, holding that the Secretary lacked authority to establish the relief plan.[127]

Unlike in *West Virginia*, the Court began by analyzing the statute's text to ascertain the meaning of "modify" and "waive,"[128] concluding that "the statutory text alone precludes the Secretary's program."[129] Only then did the Court turn to the major questions doctrine to bolster its conclusion.[130] In taking this approach, the Court essentially followed the pattern set by major questions cases predating *West Virginia*, such as *Alabama Association of Realtors v. HHS*[131] and seminal early decisions like *FDA v. Brown & Williamson*.[132]

The Court also reiterated that *West Virginia* built on "an identifiable body of law that has developed over a series of significant cases spanning decades,"[133] underscoring the importance of those cases in defining the scope of the major questions doctrine. Further reinforcing this point, when confronting the "extraordinary program" at issue, the Court's analysis focused on "indicators from our previous major questions cases" demonstrating that the doctrine applied to the debt relief plan.[134]

Specifically, the Court first concluded that the debt relief plan was an effort to expand the Secretary's statutory authority far beyond what Congress likely intended. The Court emphasized that, in its view, the Secretary claimed a "virtually unlimited power to rewrite the Education Act" in ways that would "effec[t] a fundamental revision of the statute."[135] The Court further concluded that the plan fundamentally differed from every policy previously implemented under the statute, which were all "extremely modest and narrow in scope."[136] And it noted that the debt relief plan was something

126. *Id.* at 2364, 2369 (quoting 20 U.S.C. § 1098bb(a)(1)).
127. *Id.* at 2375.
128. *Id.* at 2368–71.
129. *Id.* at 2375 & n.9.
130. *Id.* at 2372–75.
131. 141 S. Ct. 2485, 2486 (2021) (per curiam); *see supra* notes 84–89 & accompanying text.
132. *See supra* Part I.A.1.
133. *Nebraska*, 141 S. Ct. at 2374 (internal quotations omitted).
134. *Id.*
135. *Id.* at 2373 (internal quotations omitted).
136. *Id.* at 2372.

Congress had conspicuously "chosen not to enact itself," despite the introduction of numerous bills addressing student loans.[137]

Only after this discussion of congressional intent did the Court assess the economic and political significance of the program, which was "staggering by any measure."[138] The program's estimated cost was "nearly one-third of the Government's $1.7 trillion in annual discretionary spending," amounting to "ten times the economic impact" that the Court found adequate in an earlier major questions case.[139]

The Court thus concluded that both criteria for applying the major questions doctrine were satisfied: the debt relief plan (1) was an apparent effort to transform and radically expand the intended scope of an agency's statutory authority, (2) resulting in a decision of vast economic and political significance. Accordingly, the plan needed "clear congressional authorization."[140] And given the Court's determination that there was "no authorization for the Secretary's plan even when examined using the ordinary tools of statutory interpretation," such clear authorization was found lacking.[141]

In short, *Biden v. Nebraska* confirms that the major questions doctrine is confined to "extraordinary" situations,[142] in which a demanding two-part test is satisfied. That test is discussed below.

B. The Test for Applying the Major Questions Doctrine

The major questions doctrine does not apply whenever an agency asserts "highly consequential power."[143] It applies when an agency asserts "highly consequential power *beyond what Congress could reasonably be understood to have granted*."[144] As the Court explained in *West Virginia*, the "extraordinary" cases that call for the doctrine's application arise when both "the history and the breadth of the authority that [an 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."[145]

Adhering to that approach, *West Virginia* did not merely recognize the economic and political significance of the EPA's Clean Power Plan and apply the doctrine on that basis alone. Rather, it also examined a variety of contextual factors that persuaded the Court that the agency was seeking a "'transformative expansion in [its]

137. *Id.* (internal quotations omitted).
138. *Id.* at 2373.
139. *Id.* (internal quotations omitted) (citing *Alabama Ass'n*, 141 S. Ct. at 2489).
140. *Id.* at 2375.
141. *Id.* at 2375.
142. *Id.* at 2374.
143. West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022).
144. *Id.* (emphasis added).
145. *Id.* at 2608 (emphasis added) (internal quotations omitted).

regulatory authority'" which, notwithstanding its textual plausibility, Congress was "very unlikely" to have intended.[146] Mirroring previous major questions cases, those factors included the plan's novelty, the vagueness of the relevant statute, the agency's reliance on an ancillary provision, the ill fit between the EPA's claimed authority and its realm of expertise, and Congress's repeated failure to explicitly grant the agency that authority.[147]

1. Economic and political significance

A threshold requirement for the major questions doctrine is that an agency must be claiming "a breathtaking amount of authority,"[148] asserting the power to make decisions with "vast economic and political significance."[149] The Court has not provided criteria for this assessment or extensively discussed it. But prior cases provide some guidance.

In determining whether an action has vast economic significance, the Court has shown particular concern when an agency newly regulates or deregulates large segments of the economy. For example, in *Brown & Williamson*, the Court highlighted the agency's newly asserted jurisdiction over "an industry constituting a significant portion of the American economy."[150] And in *MCI*, the fact that the agency sought to eliminate the "crucial" portion of the statute "for 40% of a major sector of the industry" was too much for the Court to accept.[151] Similarly, in *Realtors*, the Court noted that at least 80 percent of the country would be governed by the CDC's eviction moratorium, with an estimated cost of "nearly $50 billion."[152]

In contrast, imposing new costs on already-regulated entities has been treated as less concerning. In *Utility Air*, the Court upheld greenhouse gas rules where the EPA was "not talking about extending [its] jurisdiction over millions of previously unregulated entities, but about moderately increasing the demands [it] . . . can make of entities already subject to its regulation."[153]

Nebraska clarifies that economic significance is not limited to costs imposed on industry or private individuals. The Court held that a debt forgiveness plan estimated to reduce federal revenue by "between $469 and $519 billion" sufficed, refusing to exempt actions

146. *Id.* at 2609–10 (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

147. *See id.* at 2610, 2612–15.

148. Alabama Ass'n of Realtors v. Dep't of Health and Hum. Servs., 141 S. Ct. 2485, 2489 (2021) (per curiam).

149. *Utility Air*, 573 U.S. at 324 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000)).

150. 529 U.S. at 159.

151. MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 231 (1994).

152. 141 S. Ct. at 2489.

153. 573 U.S. at 332.

in which the government "is providing monetary benefits rather than imposing obligations."[154]

To determine whether an issue has vast political significance, the Court looks to indicators like the amount of public or congressional discussion of an issue. For example, in *Gonzales*, the fact that physician-assisted suicide was "the subject of an earnest and profound debate across the country" provided reason to doubt that Congress had authorized the Attorney General to essentially prohibit physician-assisted suicide unilaterally.[155] Likewise, in *West Virginia*, nationwide debates over cap-and-trade climate policy, including those in Congress, provided reason to doubt that Congress had already given the EPA a similar authority in the Clean Air Act.[156]

Notably, however, in no case has economic significance or political controversy alone been enough to trigger application of the doctrine. In *Realtors*, the Court explained that the "issues at stake are not merely financial" and emphasized the "unprecedented" expansion of the agency's claimed authority.[157] In *Gonzales*, the Court considered the overall statutory structure and the Attorney General's lack of medical expertise in addition to ongoing political debates.[158] While *NFIB* and *Missouri* both involved "a significant encroachment" into employees' lives and health, the major questions doctrine was applied only in *NFIB,* where the Court found the vaccine-or-test requirement to be "outside of OSHA's sphere of expertise" and highlighted its novelty.[159] In *Utility Air*, the Court explained that major questions were not implicated by the EPA's application of new controls to already-regulated sources even though this facilitated most of the rule's reduction in emissions.[160] That same year, the Court did not employ major questions analysis when reviewing an EPA rule projected to impose $1.4 billion in compliance

154. 143 S. Ct. at 2373, 2375.

155. Gonzales v. Oregon, 546 U.S. 243, 267 (2006) (internal quotation omitted) (quoting Washington v. Glucksberg, 521 U.S. 702, 735 (1997)).

156. West Virginia v. EPA, 142 S. Ct. 2587, 2614 (2022).

157. 141 S. Ct. at 2489.

158. 546 U.S. at 267–68.

159. Nat'l Fed'n of Indep. Bus. v. DOL, 142 S. Ct. 661, 665 (2022); *see id.* at 666 ("This 'lack of historical precedent,' *coupled with* the breadth of authority that the Secretary now claims, is a 'telling indication' that the mandate extends beyond the agency's legitimate reach." (emphasis added) (quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 505 (2010))).

160. *See* Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 331–34 (2014).

costs in a single year,[161] even though the lower court cited the rule's "economic and political significance."[162]

Likewise in *West Virginia*, the Court cited numerous factors beyond economic and political significance in declaring that "this is a major questions case."[163] The problem was not just that the EPA sought "to substantially restructure the American energy market," but that to justify this effort it "claim[ed] to discover in a long-extant statute an unheralded power representing a transformative expansion in [its] regulatory authority";[164] it "located that newfound power in the vague language of an ancillary provision[ ] . . . that was designed to function as a gap filler and had rarely been used in the preceding decades";[165] it attempted "to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself";[166] and its claimed authority involved "technical and policy" decisions over which it has "no comparative expertise."[167]

The same was true a year later in *Nebraska*. Before discussing the economic and political significance of the student debt plan, the Court first concluded that the administration was asserting "virtually unlimited power to rewrite the Education Act" and attempting a "fundamental revision of the statute," pointing to the plan's striking novelty and the unbounded scope of the administration's claimed authority.[168]

It makes sense that "extraordinary" cases triggering a departure from "the ordinary tools of statutory interpretation"[169] require something more than just a large economic and political impact. After all, agencies routinely make such decisions at Congress's direction. In 2020 alone, more than 160 agency actions met the definition of a

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161. *See* EPA v. EME Homer City Generation, L.P., 572 U.S. 489, 500 (2014); Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, 76 Fed. Reg. 48208, 48317 (Aug. 8, 2011); *see also* Jonas J. Monast, *Major Questions About the Major Questions Doctrine*, 68 ADMIN. L. REV. 445, 466–67 (2016).

162. EME Homer City Generation, L.P. v. EPA, 696 F.3d 7, 28 (D.C. Cir. 2012) (Kavanaugh, J.). Similarly, the Court did not apply the doctrine the next year when considering another EPA regulation that would have cost power plants $9.6 billion annually. *See* Michigan v. EPA, 576 U.S. 743, 749 (2015); Brunstein & Revesz, *supra* note 20, at 239–40 (discussing this regulation and others with higher costs than the Clean Power Plan over which no major questions concerns were raised); Monast, *supra* note 161, at 467–69.

163. 142 S. Ct. 2587, 2610 (2022).

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 2612–13 (quoting Kisor v. Wilkie, 139 S. Ct. 2400, 2417 (2019)).

168. Biden v. Nebraska, 143 S. Ct. 2355, 2372–73 (2023).

169. *Id.* at 2374, 2375.

"major rule" under the Congressional Review Act.[170] For purposes of the Act, a "major rule" is one that results in annual economic effects of $100 million or more, "a major increase in costs or prices," or certain other "significant adverse effects" on the economy.[171] Clearly, the issuance of such rules is far from extraordinary.

2. Dubious transformations of power unlikely to reflect Congress's intent

When the threshold requirement of vast economic and political significance is satisfied, a second requirement must also be met: the agency claiming that power must have fundamentally transformed its regulatory authority in a manner "very unlikely" to have been intended by Congress.[172] This inquiry is grounded in "a practical understanding of legislative intent,"[173] and the Supreme Court has looked to several indicators to determine whether such a transformation has occurred—placing particular emphasis on eyebrow-raising novelty, conflict with the overall regulatory scheme, and reliance on vague, obscure, or ancillary provisions.[174]

a. Novelty

The novelty of an agency's claimed authority "has increasingly featured in the Court's major questions cases and has also taken on additional significance."[175] When an agency takes a regulatory action

170. *Congressional Review Act*, *Search Database of Rules*, U.S. GAO, https://www.gao.gov/legal/other-legal-work/congressional-review-act (choose "Major" Rule Type and enter "01/01/2020" to "12/31/2020" for Date Received by GAO; then click Search and note number of results) (last visited Jan. 30, 2023).

171. 5 U.S.C. § 804(2).

172. *West Virginia*, 142 S. Ct. at 2609; *see Nebraska*, 143 S. Ct. at 2374 ("[I]magine . . . asking the enacting Congress [the] question: 'Can the Secretary use his powers to abolish $430 billion in student loans, completely canceling loan balances for 20 million borrowers, as a pandemic winds down to its end?' We can't believe the answer would be yes.").

173. *West Virginia*, 142 S. Ct. at 2609.

174. Some of these factors are identified in Justice Gorsuch's *West Virginia* concurrence as instead relevant to whether an action is clearly authorized. However, that concurrence (joined only by Justice Alito) "does not restate the majority opinion with helpful clarifying analysis; it changes the majority opinion's approach." Natasha Brunstein & Donald L. R. Goodson, *Unheralded and Transformative: The Test for Major Questions After* West Virginia, 47 WM. & MARY ENV'T L. & POL'Y REV. 47, 91 (2022). *Compare West Virginia*, 142 S. Ct. at 2610–14 (examining these factors, then explaining that "[g]iven these circumstances, . . . the [g]overnment must . . . point to 'clear congressional authorization'" (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014))), *with id.* at 2622–23 (Gorsuch, J., concurring) (describing some of these factors as "clues" as to "what qualifies as a clear congressional statement").

175. Deacon & Litman, *supra* note 24 (manuscript at 49).

"strikingly unlike" what it has done before,[176] that fact can point toward application of the doctrine, especially when the agency cites "a long-extent statute" as authorizing its action.[177] For example, in *West Virginia*, the Court relied heavily on its judgment that the EPA's asserted authority was "unheralded" and "unprecedented," asserting that the agency had never before set emission limits by reference to a system of "shifting polluting activity from dirtier to cleaner sources."[178] Likewise, *Nebraska, NFIB*, *Realtors*, and *Utility Air* all relied on the unprecedented nature of the agencies' claims of authority.[179]

However, novelty must be considered at a high level of generality. The major questions doctrine is not inevitably triggered by innovation, which the Court has recognized is often a response to new challenges rather than an effort to transform longstanding authority.[180] The Court's *Missouri* decision makes this clear: while the dissenting Justices maintained that the doctrine should apply because prior agency regulations were "far afield from immunization,"[181] the Court characterized the agency's past practice in more general terms and did not invoke the doctrine.[182] As the Court explained, the agency had a "longstanding practice" of requiring facilities to meet conditions for safe and effective health care, which included regulations affecting the "qualifications and duties of healthcare workers."[183] It did not matter that the mandate went "further than what the Secretary has done in the past," because "he has never had to address an infection problem of this scale and scope before."[184]

b. Incongruence with overall regulatory scheme

If an agency's claimed authority appears to fit poorly within the overall statutory scheme, that incongruence can be a strong signal

176. Nat'l Fed'n of Indep. Bus. v. DOL, 142 S. Ct. 661, 665 (2022).

177. *Util. Air*, 573 U.S. at 324.

178. 142 S. Ct. at 2610, 2612 (internal quotations omitted).

179. *Nebraska,* 143 S. Ct. at 2372; *NFIB*, 142 S. Ct. at 666; *Realtors*, 141 S. Ct. at 2489; *Util. Air*, 573 U.S. at 310–11.

180. As Natasha Brunstein and Donald L. R. Goodson explain, "[o]bviously, the agency need not identify an identical regulatory precedent, because new regulations will rarely, if ever, be identical to previous ones as they would then be unnecessary." Brunstein & Goodson, *supra* note 174, at 76 n.221; *see also* Richard L. Revesz & Max Sarinsky, *Regulatory Antecedents and the Major Questions Doctrine* (N.Y.U. Sch. of L., Working Paper No. 23-25, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4291030 (explaining that "regulatory history rarely contains a perfect parallel" and calling on agencies to consider and identify a "broad range of antecedents").

181. Biden v. Missouri, 142 S. Ct. 647, 658 (2022) (Thomas, J., dissenting).

182. *Id.* at 652 (majority opinion) (per curiam).

183. *Id.* at 652–53.

184. *Id.* at 653.

that the agency is attempting a "fundamental revision of the statute," calling for application of the major questions doctrine.[185] For example, in *Brown & Williamson*, the Court concluded that if the FDA could regulate tobacco products, as it claimed, other statutory provisions would require it to ban them entirely as unsafe.[186] The Court was troubled that the agency's preferred interpretation would require "adopt[ing] an extremely strained understanding of 'safety' . . . a concept central to the [statute]'s regulatory scheme."[187] And in *Utility Air*, the Court similarly relied on the EPA's acknowledgment "that the authority [it] claimed would render the statute 'unrecognizable to the Congress that designed it.'"[188]

This theme runs through each of the most recent major questions cases. In *Realtors*, the Court explained that the eviction moratorium was dramatically different from the types of infection-control measures listed in the statute.[189] In *NFIB*, the Court explained that the statute concerned "*workplace* safety standards, not broad public health measures."[190] And in both *West Virginia* and *Nebraska*, the Court explained that the agency's asserted authority changed the statute "from [one sort of] scheme of . . . regulation into an entirely different kind."[191] Indeed, concern with whether an agency's newly claimed authority fits the structure of the regulatory scheme goes back to the early major questions cases.[192]

By the same token, apparent congruence with the overall regulatory scheme strongly suggests that the doctrine should not apply, even when an agency is attempting something it has never done before. For example, in *Missouri*, the Court declined to apply the major questions doctrine, concluding instead that a vaccine-or-test mandate for medical staff was "a straightforward and predictable example of the 'health and safety' regulations that Congress has authorized the Secretary [of Health and Human Services] to impose."[193] Likewise, in *Massachusetts,* the Court did not apply the major questions doctrine in part because "there is nothing

185. West Virginia v. EPA, 142 S. Ct. 2587, 2596 (2022) (quoting MCI Telecomms. Corp. v. Am Tel. & Tel. Co., 512 U.S. 218, 231 (1994)).

186. 529 U.S. 120, 134–35 (2000).

187. *Id.* at 160.

188. 573 U.S. 302, 324 (2014).

189. 141 S. Ct. 2485, 2488 (2021) (per curiam).

190. 142 S. Ct. 661, 665 (2022).

191. Biden v. Nebraska, 143 S. Ct. 2355, 2373 (2023) (quoting *West Virginia*, 142 S. Ct. at 2612).

192. *See* MCI Telecomms. Corp. v. Am Tel. & Tel. Co., 512 U.S. 218, 231–32 (1994) ("What we have here, in reality, is a fundamental revision of the statute, changing it from a scheme of rate regulation in long-distance common-carrier communications to a scheme of rate regulation only where effective competition does not exist. That may be a good idea, but it was not the idea Congress enacted into law in 1934.").

193. 142 S. Ct. 647, 653 (2022).

counterintuitive to the notion that EPA can curtail the emission of substances that are putting the global climate out of kilter."[194]

c. Use of vague or ancillary provisions

The Court is particularly suspicious when an agency asserts broad authority under a provision that is peripheral to the statutory scheme or conspicuously vague.[195] Foundational cases like *MCI* and *Brown & Williamson* show a concern with claims of far-reaching authority that rest on "subtle device[s]" and "cryptic" delegations.[196] *Whitman* likewise cautions that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions."[197] *West Virginia* stressed the "obscure" and "ancillary" nature of the provision relied upon by the EPA, which had been used "only a handful of times since the enactment of the statute in 1970."[198] The Court was concerned that this "little-used backwater" was being employed to claim power that could potentially force coal plants to shut down.[199]

Importantly, though, broad authorizations should not be conflated with vague ones. In *Missouri*, for instance, the HHS Secretary's vaccine mandate relied on a statutory provision empowering him to impose funding conditions that he found "necessary in the interest of the health and safety" of patients.[200] Notwithstanding its "broad language," that mandate was clear, and the major questions doctrine did not apply.[201]

d. Mismatch with agency expertise

The Court also takes into account an agency's expertise when determining whether it is seeking to transform its basic power in a way inconsistent with Congress's intent. "When [an] agency has no comparative expertise" in making the relevant policy judgments, it may have strayed beyond its proper sphere.[202] For example, in *West Virginia*, the EPA acknowledged that its new regulatory approach required "technical and policy expertise *not* traditionally needed in EPA regulatory development."[203] In *King*, the Court found it "especially unlikely" that Congress would assign the decision in

194. 549 U.S. 497, 531 (2007).

195. *See MCI*, 512 U.S. at 228; FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–61 (2000).

196. *Brown & Williamson*, 529 U.S. at 160 (internal quotation omitted).

197. 531 U.S. 457, 468 (2001).

198. 142 S. Ct. 2587, 2602 (2022).

199. *Id.* at 2612–13.

200. 142 S. Ct. 647, 652 (2022).

201. *Id.*

202. *West Virginia*, 142 S. Ct. at 2612–13 (quoting Kisor v. Wilkie, 139 S. Ct. 2400, 2417 (2019)).

203. *Id.* at 2612.

question "to the *IRS*, which has no expertise in crafting health insurance policy of this sort."[204] And in *Gonzalez*, when the Attorney General tried to prohibit prescribing drugs for assisted suicide, the Court concluded that the statute did not "cede medical judgments" to an official "who lacks medical expertise."[205]

The twin COVID vaccination cases of 2021 show the importance of the expertise factor in major questions analysis: the Court applied the major questions doctrine when it concluded that OSHA stepped "outside [its] sphere of expertise" by issuing "a general public health measure,"[206] but it did not apply the doctrine when the HHS Secretary imposed a similar mandate, noting that "addressing infection problems in Medicare and Medicaid facility is what he does."[207]

e. Legislative activity implying lack of authorization

The Court's analysis has occasionally referenced what Congress or its members have done after an authorizing statute was passed—interpreting Congress's subsequent activity as evidence of the existing statute's meaning, or perhaps simply as illustrating the importance of the issue. For example, *West Virginia* observed that Congress "considered and rejected multiple times" bills that would have authorized the type of program the EPA sought to implement, thereby suggesting to the Court that the existing Clean Air Act did not already authorize that program.[208] *Nebraska* remarked that Congress had not enacted a student debt relief plan like the administration's, despite considering numerous student-loan related bills.[209] And *NFIB* briefly noted, to similar effect, that the Senate had voted to disapprove OSHA's vaccine-or-test mandate.[210]

These comments should not be given undue weight, however. They were offered as brief asides in the context of discussing agency actions that were deemed strikingly novel, beyond the agency's expertise, and at odds with the relevant statutory schemes. And the way the Court framed these observations gives reason to question how significant they were to its analysis.[211]

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204. King v. Burwell, 576 U.S. 473, 486 (2015).

205. Gonzales v. Oregon, 546 U.S. 243, 266 (2006).

206. Nat'l Fed'n of Indep. Bus. v. DOL, 142 S. Ct. 661, 665–66 (2022).

207. Biden v. Missouri, 142 S. Ct. 647, 653 (2022) (per curiam).

208. 142 S. Ct. at 2614 (internal quotation omitted).

209. 142 S. Ct. at 2373.

210. 142 S. Ct. at 666.

211. In *NFIB*, the Court was primarily responding to the dissent's effort to find "legislative support for the vaccine mandate." 142 S. Ct. at 666; *see id.* (dismissing the dissent's evidence and continuing: "In fact, the most noteworthy action concerning the vaccine mandate by either House of Congress has been a majority vote of the Senate disapproving the regulation . . . ."). In *West Virginia*,

Moreover, other cases, consistent with standard principles of statutory interpretation, suggest that such subsequent legislative history should be given very little weight. As the Court has observed, the "interpretation given by one Congress . . . to an earlier statute is of little assistance in discerning the meaning of that statute."[212] For this reason, among others, subsequent inaction by Congress after considering new bills is "a particularly dangerous ground" for interpretation.[213] In *Brown & Williamson*, the Court briefly mentioned subsequent congressional inaction, noting that Congress "squarely rejected proposals to give the FDA jurisdiction over tobacco,"[214] but the Court disclaimed any focus on such inaction, emphasizing that it did "not rely on Congress' failure to act—its consideration and rejection of bills that would have given the FDA this authority."[215] Instead, the Court focused on how the FDA's claimed authority would interact with subsequently *passed* legislation, explaining that statutory meaning may be affected when "Congress has spoken subsequently and more specifically to the topic at hand."[216]

* * *

West Virginia, *Nebraska*, and their predecessors show that determining whether a case implicates the major questions doctrine requires more than identifying significant economic and political consequences of an agency action. When this threshold requirement is met, context must further indicate that the agency claiming this broad power is attempting a "transformative expansion" of its regulatory authority,[217] seeking power that, despite its textual plausibility, Congress is "very unlikely" to have conferred upon the agency.[218]

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the Court noted the history of failed cap-and-trade legislation only at the end of its major questions analysis, concluding that "the fact that the same basic scheme EPA adopted has been the subject of an earnest and profound debate across the country, . . . makes the oblique form of the claimed delegation all the more suspect." 142 S. Ct. at 2614 (internal quotation omitted). And in *Nebraska*, the Court mentioned Congress's failure to enact student debt relief legislation in response to the dissent's criticism that the decision represented "one branch of government arrogating to itself power belonging to another," arguing instead that the executive branch was "seizing the power of the Legislature." 143 S. Ct. at 2373.

212. Pub. Emps. Ret. Sys. of Ohio v. Betts, 492 U.S. 158, 168 (1989).

213. Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 650 (1990).

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

215. *Id.* at 155.

216. *Id.* at 133.

217. West Virginia v. EPA, 142 S. Ct. 2587, 2610 (2022) (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

218. *West Virginia*, 142 S. Ct. at 2609.

In short, the "particular and recurring problem" addressed by the major questions doctrine is that of "agencies asserting highly consequential power *beyond what Congress could reasonably be understood to have granted*."[219] To determine whether the second half of that test is satisfied, and whether a novel assertion of power "extends beyond the agency's legitimate reach,"[220] courts must consider the relationship between the claimed authority and the statute's text and structure, the agency's expertise, established practice implementing the statute, and other contextual clues shedding light on the likely extent of Congress's intended authorization.

Ultimately, the touchstone is whether an agency's newly claimed power has "effected a fundamental revision of the statute, changing it from [one sort of] scheme of . . . regulation into an entirely different kind."[221] Only when that high standard is met may a court take the "extraordinary" step of eschewing "normal statutory interpretation" by applying the doctrine.[222]

II. AN EXTRAORDINARY DOCTRINE FOR "EXTRAORDINARY" CASES

Constitutional considerations and textualist principles of statutory interpretation further support limiting the major questions doctrine to the most extraordinary cases, as the Supreme Court has instructed.

The major questions doctrine deviates in multiple ways from textualism and from standard methods of statutory interpretation, injecting assessments about real-world considerations that are inherently subjective and outside of judges' expertise. Anything but the most sparing use of this doctrine therefore threatens the separation of powers by permitting judges to go beyond their role interpreting the laws—enabling them to block the executive branch from implementing those laws based on extratextual considerations such as political controversy and economic consequences. Such concerns are particularly acute when the doctrine is applied retroactively to laws that were passed before the Court articulated it, giving Congress no warning as to what language was necessary to authorize agency action.

By heightening the clarity required to authorize certain executive branch actions, the doctrine also constrains Congress's drafting choices. And it does so based in part on a judicial presumption with no historical foundation: that it is abnormal for agencies to resolve major policy questions. As constitutional text and history make clear, however, there is nothing suspect about Congress authorizing

219. *Id.* (emphasis added).
220. Nat'l Fed'n of Indep. Bus. v. DOL, 142 S. Ct. 661, 666 (2022).
221. *West Virginia*, 142 S. Ct. at 2612.
222. *Id.* at 2609 (internal quotation omitted).

agencies to decide questions of vast economic and political significance, and Congress has done so—routinely—since the nation's Founding.

In light of the tensions between the major questions doctrine and textualism, original meaning, and the separation of powers, courts should not apply the doctrine except in the most extraordinary cases, and always with an eye toward respecting congressional intent rather than subverting it.

A. Textualist Principles Support Limiting Application of the Major Questions Doctrine.

1. The doctrine departs from core tenets of textualism.

Although there is no universally agreed-upon definition of "textualism," certain features are often regarded as distinguishing this approach from other methods of interpretation. The language of a statute controls over other considerations, so the best reading of that language is paramount.[223] Meaning is fixed at the time a statute is enacted.[224] Legislative history is deemphasized, and with it the subjective views of lawmakers not embodied in the enacted text.[225] Although individual provisions are construed within the overall structure and plan of the legislation, the text should not be distorted to facilitate perceived general purposes, or in light of pragmatic concerns about practical consequences.[226]

The major questions doctrine departs from these principles. Its adoption by a Supreme Court committed to textualism has therefore

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223. *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 22 (1997) ("The text is the law, and it is the text that must be observed.").

224. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1738 (2020) ("To [determine the ordinary public meaning], we orient ourselves to the time of the statute's adoption.").

225. *See, e.g.*, John F. Manning, *Textualism as a Nondelegation Doctrine,* 97 COLUM. L. REV. 673, 684–89 (1997) ("[T]extualist judges strongly object to the premise that legislative history supplies evidence of 'genuine' legislative intent."); John F. Manning, *Textualism and Legislative Intent,* 91 VA. L. REV. 419, 424 (2005) ("[T]exualists believe that the only meaningful collective legislative intentions are those reflected in the *public meaning* of the final statutory text."); Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 112–13 (2010) ("[T]he outcome of this complex process – the statutory text – must control.").

226. *See, e.g.*, *Bostock*, 140 S. Ct. at 1753 (rejecting "naked policy appeals" that applying Title VII's "plain language" would lead to "any number of undesirable policy consequences"); Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193, 2193 (2017) ("[T]oday, one would be hard pressed to find anyone willing to say that a court should depart from a statutory text to better serve Congress's purpose.").

been heavily criticized.[227] And indeed, justices across the ideological spectrum have recognized that at least "some articulations of the major questions doctrine on offer" are in tension with textualism.[228] But that tension can be ameliorated if the judiciary follows the Court's own guidance: precisely because the major questions doctrine is "distinct" from "routine statutory interpretation," it applies only in "'extraordinary cases.'"[229]

As the Supreme Court has recognized, "[t]he people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration."[230] Looking beyond the text to "impos[e] limits on an agency's discretion" can therefore amount to "alter[ing]" rather than "interpret[ing]" a statute.[231] Because the major questions doctrine relies on extratextual factors such as the practical consequences of an agency's action, how the agency has previously used its authority, and the development of political controversies after a statute's enactment, the doctrine is a significant departure from textualism.

Indeed, the doctrine requires courts to depart from textualism at the very outset of their inquiry. Normally, statutory interpretation "begins with the text,"[232] meaning that courts "begin by analyzing the statutory language, assum[ing] that the ordinary meaning of that language accurately expresses the legislative purpose."[233]

This is not the case under the major questions doctrine. Instead, courts may begin by deciding whether an agency's challenged action involves a "major question," and the result of that inquiry will determine how clearly the text needs to authorize what the agency

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227. *See, e.g.*, West Virginia v. EPA, 142 S. Ct. 2587, 2641 (2022) (Kagan, J., dissenting) ("The current Court is textualist only when being so suits it. When that method would frustrate broader goals, special canons like the 'major questions doctrine' magically appear as get-out-of-text-free cards."); *see also, e.g.*, Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 282-90 (2022); Chad Squitieri, *Major Problems with Major Questions*, L. & LIBERTY (Sept. 6, 2022), https://lawliberty.org/major-problems-with-major-questions/.

228. Biden v. Nebraska, 143 S. Ct. 2355, 2376 (2023) (Barrett, J., concurring) ("I grant that some articulations of the major questions doctrine on offer—most notably, that the doctrine is a substantive canon—should give a textualist pause."); *West Virginia*, 142 S. Ct. at 2641 (Kagan, J., dissenting) (calling the doctrine a "get-out-of-text-free card[]").

229. *West Virginia*, 142 S. Ct. at 2609 (majority opinion) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)); *accord Nebraska*, 143 S. Ct. at 2374, 2375 (distinguishing the major questions doctrine from "the ordinary tools of statutory interpretation" but applying it to "the Secretary's extraordinary program").

230. *Bostock*, 140 S. Ct. at 1749.

231. Little Sisters of the Poor v. Pennsylvania, 140 S. Ct. 2367, 2381 (2020).

232. Ross v. Blake, 578 U.S. 632, 638 (2016).

233. Hardt v. Reliance Standard Life Ins. Co., 560 U.S. 242, 251 (2010) (quotation marks omitted).

has done.[234] As discussed above in Part I.B, this determination requires examining numerous factors having nothing to do with the text of the law that Congress enacted, including the political and economic significance of the agency action, how the agency has previously exercised its authority, contemporary political debates, and failed efforts to amend the law in question.[235]

Such analysis requires judges to evaluate various non-textual considerations with undetermined relative weights, resembling a multi-factor balancing test of the kind that textualists typically disparage.[236] Moreover, judges have no special professional expertise in making some of these non-textual assessments. For instance, the "importance of the issue" and whether it "has been the subject of an earnest and profound debate" are political, not legal, judgments.[237]

The major questions doctrine therefore allows pragmatic considerations to displace strict adherence to text and ordinary meaning. Indeed, one influence on the doctrine was a law review article by future Justice Stephen Breyer, a noted pragmatist, asserting that "Congress is more likely to have focused upon, and answered, major questions" while leaving only "interstitial matters" to agencies.[238] By emphasizing a statute's "purpose" and "practical consequences," and by allowing these considerations to shape how the statute is construed, the major questions doctrine is a form of legal pragmatism that is "inconsistent with textualism."[239]

The doctrine also invites judges to consider forms of external evidence that textualists generally eschew—most notably, legislative

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234. *See West Virginia*, 142 S. Ct. at 2607–09; Nat'l Fed'n of Indep. Bus. v. DOL, 142 S. Ct. 661, 665 (2022).

235. *See West Virginia*, 142 S. Ct. at 2610–14.

236. *See* Wooden v. United States, 142 S. Ct. 1063, 1080 (2022) (Gorsuch, J., concurring in the judgment); Gamble v. United States, 139 S. Ct. 1960, 1988 (2019) (Thomas, J., concurring); United States v. Mead Corp., 533 U.S. 218, 241 (2001) (Scalia, J., dissenting) (deriding such a framework as "that test most beloved by a court unwilling to be held to rules . . . th'ol' 'totality of the circumstances' test").

237. *West Virginia*, 142 S. Ct. at 2614 (internal quotations omitted).

238. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000) (quoting Breyer, *supra* note 44, at 370). Note, however, that Breyer's article described the importance of an issue as a relevant factor only when courts decide whether to defer to an agency's statutory interpretation; he did not otherwise call for heightened skepticism of significant agency actions or a presumption against them. *See* Breyer, *supra* note 44, at 371–72. And indeed, "with one notable exception," Justice Breyer "dissented from opinions that use the major questions doctrine as a canon of construction to limit agencies' substantive regulatory powers." Thomas B. Griffith & Haley N. Proctor, *Deference, Delegation, and Divination: Justice Breyer and the Future of the Major Questions Doctrine*, 132 YALE L.J. F. 693, 708 (2022).

239. Squitieri, *supra* note 227.

history.[240] In *West Virginia*, for example, the Court cited a single floor statement by an individual congressman to support its view that the statutory provision at issue was ancillary and "obscure."[241] The Court did so despite having repeatedly admonished that "floor statements by individual legislators rank among the least illuminating forms of legislative history."[242]

Even more strikingly, some major questions decisions have, as previously noted, discussed *subsequent* legislative history—Congress's consideration and rejection of new bills after the original statute's enactment.[243] The Court has traditionally warned, however, that subsequent legislative activity is a "hazardous basis for inferring the intent of an earlier Congress."[244] Failed proposals are "a particularly dangerous ground" for doing so,[245] because "several equally tenable inferences may be drawn from such inaction, including . . . that the existing legislation already incorporated the offered change."[246] But while "Congressional inaction cannot amend a duly enacted statute,"[247] as the Court has recognized, it risks doing so under the major questions doctrine. In *West Virginia*, for instance,

240. *See, e.g.*, Digit. Realty Tr. Inc. v. Somers, 138 S. Ct. 767, 783–84 (2018) (Thomas, J., concurring in part and concurring in the judgment) (disagreeing with the consideration of a Senate Report when interpreting a statute); Lawson v. FMR LLC, 571 U.S. 429, 459–60 (2014) (Scalia, J., concurring in principal part and concurring in the judgment) (rejecting judicial "excursions . . . into the swamps of legislative history").

241. *West Virginia*, 142 S. Ct. at 2602 (quoting remarks of Sen. Durenberger).

242. NLRB v. SW Gen., Inc., 580 U.S. 288, 307 (2017); *see* Advoc. Health Care Network v. Stapleton, 581 U.S. 468, 481 (2017); Trump v. Hawaii, 138 S. Ct. 2392, 2412–13 (2018).

243. *See supra* Part I.B.2.e.

244. Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 650 (1990) (quoting United States v. Price, 361 U.S. 304, 313 (1960)) (quotation marks omitted).

245. Yellen v. Confederated Tribes of Chehalis Rsrv., 141 S. Ct. 2434, 2449 n.9 (2021) (quoting United States v. Craft, 535 U.S. 274, 287 (2002)).

246. *Craft*, 535 U.S. at 287 (quoting *Pension Benefit*, 496 U.S. at 650); *see Pension Benefit*, 496 U.S. at 650 (the explanation for Congress's failure to expressly authorize an agency action may be "that Congress thought the [agency] was properly exercising its authority"). There are many reasons why legislators might introduce bills to authorize policies that an agency already has the power to implement. Such bills may reflect a "preference for more detailed policy guidance" from Congress, *United States v. Sw. Cable Co.*, 392 U.S. 157, 170–71 (1968), including limits on the agency's procedural or substantive discretion. They may reflect a desire to make the agency's authority more durable and unassailable, or to expand its scope. Therefore the introduction (and failure) of such bills does not necessarily indicate a belief that the agency lacks comparable authority under existing law.

247. Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 186 (1994) (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 175 n.1 (1989)).

the Court viewed Congress's rejection of proposals to amend the Clean Air Act as evidence that the Act did not already provide the authority the EPA claimed.[248]

More broadly, by taking into account contemporary political controversies and the present-day consequences of an agency's action, the major questions doctrine runs counter to the credo that statutory meaning is fixed at enactment. A textualist approach typically "orient[s] [itself] to the time of the statute's adoption" to determine "the ordinary public meaning" of its words,[249] as they were understood "at the time Congress enacted the statute."[250] Under the major questions doctrine, by contrast, developments in society and politics over time can change how a statute's words are interpreted. If an agency action has sufficiently broad implications in today's world, and if enough clues have accumulated since the statute's passage suggesting that the enacting Congress would not have given the agency the power it claims (had it considered the matter), then courts may read the statutory language differently than they would have if those developments never occurred.[251] Although the words of the statute remain unchanged, courts may read them more parsimoniously, requiring "clear" authorization for the agency's action instead of following the neutral approach of simply discerning the most persuasive reading of the text.[252]

By allowing a statute's meaning to be altered by post-enactment developments like current policy debates, the prospective impact of an agency's action, and contemporary officials' understanding of past legislation, the major questions doctrine risks "amending legislation outside the 'single, finely wrought and exhaustively considered, procedure' the Constitution commands."[253] After all, an agency's conclusion that it has a particular authority might well have financial repercussions or political salience that were lacking during an earlier period of the statute's existence. Under the major questions doctrine, the evolution of these real-world implications can narrow the reach of

248. West Virginia v. EPA, 142 S. Ct. 2587, 2610, 2614 (2022).

249. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1738 (2020).

250. Wis. Cent. Ltd. v. United States, 138 S. Ct. 2067, 2074 (2018) (quotation marks omitted).

251. *See* Biden v. Nebraska, 143 S. Ct. 2355, 2373–74 (2023) (relying on the "sharp debates" generated by the student debt program, its financial implications, its departure from prior applications of the statute, and Congress's failure to pass comparable debt relief legislation, in concluding that the enacting Congress did not pass the statute "with such power in mind").

252. *See id.* at 2375 (explaining that even if the student debt plan survived "when examined using the ordinary tools of statutory interpretation," it would be struck down under the major questions doctrine for lack of "clear congressional authorization").

253. New Prime Inc. v. Oliveira, 139 S. Ct. 532, 539 (2019) (quoting INS v. Chadha, 462 U.S. 919, 951 (1983)); *see* Clinton v. City of New York, 524 U.S. 417, 439–40 (1998); Deacon & Litman, *supra* note 24 (manuscript at 39–40).

a statute whose text has not changed since its passage. "When courts apply doctrines that allow them to rewrite the laws (in effect), they are encroaching on the legislature's Article I power."[254] As the Court has recognized: "If judges could . . . detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives."[255]

This problem can be cabined by employing the major questions doctrine only rarely, as the Court has instructed. An overbroad application would further exacerbate the constitutional friction. For instance, if courts incorrectly apply the doctrine based on "vast economic and political significance" alone, politicians and interest groups would effectively be handed the power to amend longstanding statutes merely by "engag[ing] in robust debates" about a particular type of regulatory authority.[256] Properly limiting the doctrine to instances where other considerations, including the overall statutory scheme, suggest that the agency is seeking to transform its authority helps to keep the focus on the statute passed by Congress.

The doctrine's focus on novelty similarly exacerbates its tension with textualism. An agency's failure to assert a particular authority in the past does not alter the terms of the relevant statute or the original public meaning of those terms. But the major questions doctrine allows this post-enactment development to affect the statute's interpretation as well. Not only that, it does so based on an unsound inference—that failing to exercise an authority indicates the absence of such authority. Yet there are many reasons why an agency might not exercise a statutory power it possesses. Newfound use of a dormant authority may simply reflect new challenges brought about by changes in society, technology, or related areas of the law.[257]

Moreover, to a textualist, it should not matter how the legislators who voted for a statute predicted it would be used in the future, as long as a fair reading of the text supports that usage. As the Court recently wrote, "the limits of the drafters' imagination supply no reason to ignore the law's demands," and significant legislative initiatives "practically guarantee . . . unexpected consequences."[258] Congress routinely uses broad statutory language to allow "the fresh

254. Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2120 (2016) (book review).

255. *Bostock*, 140 S. Ct. at 1738.

256. West Virginia v. EPA, 142 S. Ct. 2587, 2620 (2022) (Gorsuch, J., concurring); *see* Deacon & Litman, *supra* note 24.

257. Deacon & Litman, *supra* note 24 (manuscript at 53–54).

258. *Bostock*, 140 S. Ct. at 1737; *contra* Biden v. Nebraska, 143 S. Ct. 2355, 2374 (2023) (rhetorically imagining "asking the enacting Congress" what it would have thought of the student debt program and concluding that Congress did not pass the relevant statute "with such power in mind").

assertion of regulatory authority as information develops showing that regulatory intervention is warranted."[259]

Further heightening the tension with textualism, the major questions doctrine and its "distinct" rules of interpretation[260] are applied retroactively to statutes enacted before the Court developed those rules.[261] Where the doctrine applies, courts must now ask whether a statute contains "clear congressional authorization" for the agency's action.[262] As a result, statutory language that would have been held sufficient at the time Congress wrote the statute may, in some cases, no longer be good enough. In *West Virginia*, for instance, the Court acknowledged that the Clean Air Act provided a "plausible textual basis" for the EPA's action but nevertheless demanded "something more."[263] When Congress last amended the Act in 1990, however, it did not know that the Court would later change the interpretive framework and add this heightened demand for clarity.

The same assumptions that lead many textualists to consult dictionaries "roughly contemporaneous"[264] with a statute's passage also suggest that interpreters should "attempt to identify and apply the conventions in effect at the time of a statute's enactment," because legislators draft statutes in light of background legal precepts and understandings.[265] And from a separation-of-powers perspective, it is "unfair to Congress" to use newly crafted judicial rules to displace the ordinary meaning of the text Congress chose in "earlier-enacted legislation."[266] That approach risks undermining, rather than promoting, "a practical understanding of legislative intent."[267]

2. Efforts to reconcile the doctrine with textualism fall short.

Recognizing the tension between textualism and the major questions doctrine, some justices and commentators have sought to reconcile the two. But their efforts are not persuasive.

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259. Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 1991 (2017). Indeed, the Court recognized this when rejecting a recent major-questions challenge, holding that a longstanding statute could be used to impose a novel mandate even though it "goes further than what the Secretary has done in the past." Biden v. Missouri, 142 S. Ct. 647, 653 (2022) (per curiam).

260. *West Virginia*, 142 S. Ct. at 2609.

261. Sohoni, *supra* note 227, at 286–87.

262. *West Virginia*, 142 S. Ct. at 2614.

263. *Id.* at 2609.

264. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1739 (2020).

265. John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2474 n.318 (2003); *see* Cannon v. Univ. of Chi., 441 U.S. 677, 698–99 (1979) ("[O]ur evaluation of congressional action in 1972 must take into account its contemporary legal context."); Bond v. United States, 572 U.S. 844, 872 (2014) (Scalia, J., concurring in the judgment) (explaining that courts should look to "established interpretative presumptions" that are "well known to Congress").

266. Sohoni, *supra* note 227, at 286.

267. *West Virginia*, 142 S. Ct. at 2609.

One effort to bridge the gap between these two approaches is to liken the major questions doctrine to other interpretive rules that demand heightened clarity from certain types of laws in order to protect specific constitutional values.[268] The major questions doctrine fundamentally differs from those traditional rules, however, and cannot claim the same justifications.

To start, interpretive rules demanding special clarity are generally based on relatively objective categories that are in the judiciary's wheelhouse. Whether a law applies retroactively or extraterritorially, for instance,[269] is typically a straightforward inquiry. It is certainly a *judicial* inquiry, examining the *legal* effect of a statute. By contrast, the major questions doctrine requires courts to apply a non-legal concept with hazy boundaries—the "economic and political significance" of an agency action.[270] Deciding whether an action is sufficiently "important" in this sense is inherently value-laden, not a neutral judicial task. And when a court does find an issue to be important enough, the doctrine then demands another inquiry with a subjective (and speculative) component: appraising the likelihood that Congress, had it thought about the matter, would have chosen to authorize a specific future agency action that its legislation plausibly allows.[271]

Furthermore, other heightened-clarity rules address questions foreseeable when a law is written and passed, such as whether the law is meant to abrogate sovereign immunity.[272] That allows Congress to easily prevent judges from negating its work by expressly addressing the issue. In comparison, it is difficult, if not impossible, for Congress to predict when a court will deem an agency's implementation of a statute to trigger the major questions doctrine—in part because the doctrine allows courts to consider events that occurred after a statute's enactment.[273]

The major questions doctrine also has a much greater potential scope than other heightened-clarity rules. Instead of being "limited to specific subject matter" or to "statutes with particular kinds of legal effects," it potentially applies to all executive branch actions

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268. *Id.* at 2616 (Gorsuch, J., concurring).

269. *See id.*; Barrett, *supra* note 225, at 122–23.

270. *West Virginia*, 142 S. Ct. at 2605.

271. *See, e.g.*, Biden v. Nebraska, 143 S. Ct. 2355, 2374 (2023); *see also supra* Part I.B.

272. *See, e.g.*, Barrett, *supra* note 225, at 145–50.

273. *See* Driesen, *supra* note 24, at 21 (discussing the difficulty of "draft[ing] legislation that avoids raising significant unanticipated issues in the future" or "predict[ing] which issues future judges will find sufficiently significant and novel"); Heinzerling, *supra* note 259, at 1948 (comparing the heightened-clarity requirement to "instruct[ing] Congress to fabricate a crystal ball").

implementing statutes.[274] And unlike most other rules, it does not clearly implement any specific constitutional command.[275] This combination makes the major questions doctrine the first rule of interpretation "that systematically imposes an extra-legal substantive criterion in every interpretive exercise."[276] And whereas some rules that dissuade courts from adopting the most persuasive reading of a statute can at least claim legitimacy from their historical pedigree,[277] the major questions doctrine is a recent invention, fashioned by the judiciary two centuries into our nation's history.[278]

Even traditional heightened-clarity rules "are in significant tension with textualism, . . . insofar as their application can require a judge to adopt something other than the most textually plausible meaning of a statute." [279] As Justice Scalia put it: "For the honest textualist, all of these preferential rules and presumptions are a lot of trouble," amounting to "dice-loading rules" that "increase the unpredictability, if not the arbitrariness, of judicial decisions."[280] Because such rules "direct courts to select something other than the most natural and probable reading of a statute," they "displace congressional choice," not due to "any finding of unconstitutionality"

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274. Daniel E. Walters, *The Major Questions Doctrine at the Boundaries of Interpretive Law,* 109 IOWA L. REV. (forthcoming 2023) (manuscript at 37–38) (on file with authors); *see also Nebraska*, 143 S. Ct. at 2375 (declining to limit the doctrine to situations in which the government is "imposing obligations").

275. *See* Walters, *supra* note 274 (manuscript at 42–46); *see also* Barrett, *supra* note 225, at 177–79 & n.331 (arguing that canons used to "stretch plain language" must be "connected to a reasonably specific constitutional value" and "actually promote the value" and that "a canon designed to protect the constitutional separation of powers . . . is probably stated at too great a level of generality to justify departures from a text's most natural meaning"). The Supreme Court has never tied the major questions doctrine to any specific constitutional imperative, much less explained how it promotes that imperative. The closest the Court has come is *West Virginia*'s brief and unexplained reference to "separation of powers principles." 142 S. Ct. at 2609. Although Justice Gorsuch's concurrence claims that the doctrine enforces Article I's vesting of legislative power in Congress, *id.* at 2616–20 (Gorsuch J., concurring), only Justice Alito joined that concurrence.

276. Walters, *supra* note 274 (manuscript at 46).

277. *See, e.g.*, Manning, *supra* note 265, at 2388 ("From the earliest days of the Republic, the Supreme Court has subscribed to the idea that judges may deviate from even the clearest statutory text when a given application would otherwise produce 'absurd' results.").

278. *See supra* Part I.A.

279. Barrett, *supra* note 225, at 123–24; *see* Benjamin Eidelson & Matthew C. Stephenson, *The Incompatibility of Substantive Canons and Textualism* 23 (Harvard Pub. L., Working Paper No. 23-06, 2023) https://ssrn.com/abstract=4330403.

280. ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION 3, 28 (1997).

but rather to "enforce a judge-made 'penumbra' that may in fact extend the reach of constitutional limitations upon the political branches."[281] The major questions doctrine is even more extreme, because it potentially applies to every possible subject of executive branch action, based in part on subjective answers to fundamentally non-legal questions.

These tensions would be heightened further if courts incorrectly took *West Virginia*'s call for "clear congressional authorization"[282] as requiring a highly specific reference to the precise type of agency action in question—which would prevent Congress from authorizing broad agency authority through general language.[283] As a practical matter, this would dramatically hinder the legislative branch.[284] It would also would conflict with the "imperative" textualist precept that courts must "respect the level of generality at which Congress speaks."[285] To a textualist, statutes do not become vague or ambiguous because of their scope or their consequences.[286] And even

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281. John Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 402 (2010) (internal quotation omitted) (summarizing criticism of clear-statement rules).

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

283. The *West Virginia* opinion provides little insight into what it means by "clear congressional authorization." But the opinion consistently and notably avoids describing this requirement as a "clear statement" rule. As Brunstein and Goodson argue, this may be because some textualists believe that clear-statement rules, which override the most natural reading of a statute instead of choosing between equally plausible readings, must be based on constitutional norms. *See* Brunstein & Goodson, *supra* note 174, at 98–99. The *Nebraska* majority reiterated the "clear congressional authorization" requirement but shed no further light on its content, although it did describe the Court as having sought a "clear statement" in *King v. Burwell*. 143 S. Ct. at 2375. However, Justice Barrett expressly rejected the "'clear statement' view of the major questions doctrine," instead framing the doctrine as "an interpretive tool" that does not allow courts "to depart from the best interpretation of the text." *Id.* at 2378 (Barrett, J., concurring). Likewise, one textualist scholar has defended the major questions doctrine as compatible with textualism only on the supposition that it does not require specificity in an otherwise unambiguous statute, but instead is a tool for resolving ambiguity, giving it a "significant but narrow role." Wurman, *supra* note 106 (manuscript at 1); *see id.* (manuscript at 34) ("[I]f the major questions doctrine is indeed a clear-and-specific statement rule . . . then it is difficult to defend.").

284. *See* Mistretta v. United States, 488 U.S. 361, 372 (1989) ("Congress simply cannot do its job absent an ability to delegate power under broad general directives.").

285. Manning, *Textualism and Legislative Intent*, *supra* note 225, at 424.

286. *See* Bond v. United States, 572 U.S. 844, 870 (2014) (Scalia, J., dissenting) (alteration in original) (criticizing the conclusion that a statute was ambiguous due to its federalism implications: "Imagine what future courts can do with that judge-empowering principle: Whatever has improbably broad, deeply serious, and apparently unnecessary consequences . . . *is ambiguous*!").

when a law applies "'beyond the principal evil' legislators may have intended or expected to address,"[287] its application outside of "'situations not expressly anticipated by Congress' does not demonstrate ambiguity; instead, it simply 'demonstrates [the] breadth' of a legislative command."[288]

Another effort to reconcile textualism with the major questions doctrine involves treating the doctrine as a canon of interpretation that helps discern legislative intent—embodying the premise that "interpreters tend to expect clarity" when "lawmakers or parties authorize others to make important decisions on their behalf."[289] The accuracy of this premise, however, is far from clear. Indeed, one recent empirical study found that "ordinary people do not adjust their judgments of clarity according to the stakes of interpretation."[290]

More broadly, this justification does not resolve the most troublesome tensions between textualism and the major questions doctrine. Although this approach attempts to orient the doctrine toward discerning congressional intent—rather than imposing restraints on Congress to serve extrinsic values—it still requires courts to make subjective assessments about political and economic significance that fundamentally are policy inquiries, not legal determinations. And it still invites courts to look outside the text to consider legislative history, practical consequences, public opinion, and events that occur after a statute's enactment. So while it is possible that a parent directing a babysitter to "[m]ake sure the kids have fun" would not expect the babysitter to take the kids on a two-day road trip to an amusement park,[291] federal judges evaluating the actions of real-world agencies in light of complex statutory authority cannot implement that colloquial insight without running headlong into serious textualist problems.

In addition, this justification for the doctrine is still "rooted in the basic premise that Congress normally 'intends to make major policy decisions itself, not leave those decisions to agencies.'"[292] As discussed below, however, that premise is unsound.

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287. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1749 (2020) (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998)).

288. *Id.* (quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985)); *see also Bond*, 572 U.S. at 870 (Scalia, J., dissenting).

289. Wurman, *supra* note 106 (manuscript at 7); *see also Nebraska*, 143 S. Ct. at 2377–80 (Barrett, J., concurring) (arguing for the relevance of "context" and "commonsense principles of communication").

290. Kevin Tobia, Daniel E. Walters, & Brian Slocum, Major Questions, Common Sense? 5 (Aug. 18, 2023) (unpublished manuscript) (on file with authors), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4520697.

291. *Nebraska*, 143 S. Ct. at 2379 (Barrett, J., concurring). *But see* Tobia, Walters, & Slocum, *supra* note 290, at 39–43.

292. *Id.* at 2380 (Barrett, J., concurring) (quoting U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of reh'g en banc)).

B. The Constitution's Original Meaning Supports Limiting Application of the Major Questions Doctrine.

Another reason the major questions doctrine should be applied only in "certain extraordinary cases"[293] is that the various rationales provided for it are in tension with the original public meaning of the Constitution.

While a Supreme Court majority has yet to cohere around a detailed justification for the doctrine, *West Virginia* cited a presumption that "Congress intends to make major policy decisions itself, not leave those decisions to agencies."[294] The Court has offered two grounds for this presumption.

First, it has suggested that this is how Congress actually operates,[295] so the doctrine reflects "a practical understanding of legislative intent."[296] But the Court has never cited any evidence that Congress actually seeks to reserve major policy questions for itself instead of assigning them to agencies, making this premise "inherently speculative" at best.[297] Indeed, Congress has made plain, in the Congressional Review Act, that it fully expects agencies to make policy decisions with vast economic and political significance.[298]

Second, the Court has hinted that making major policy decisions itself is how Congress *should* operate. Without elaborating further, the Court has cited "separation of powers principles" to support the doctrine.[299]

Individual justices have offered dueling accounts of how separation of powers principles could relate to the major questions

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293. *West Virginia*, 142 S. Ct. at 2609.

294. *Id.* at 2609 (quoting *U.S. Telecom Ass'n*, 855 F.3d at 419 (Kavanaugh, J., dissenting from denial of rehearing en banc)).

295. *See id.* (focusing on "what Congress could reasonably be understood to have granted" in a statute).

296. *Id.*

297. Ronald M. Levin, *The Major Questions Doctrine: Unfounded, Unbounded, and Confounded* 35 (Wash. U. Sch. L., Working Paper No. 22-10-02, 2022), https://administrativestate.gmu.edu/wp-content/uploads/2022/12/Levin_22-23.pdf.

298. *See* discussion *supra* Part I.B.1.

299. *Id.* Notably, *West Virginia* did not explain what it meant by "separation of powers principles." One interpretation is simply that the major questions doctrine helps prevent the executive branch from exercising powers that Congress did not actually intend to grant it. *See infra* note 360. But another plausible interpretation is that, motivated by nondelegation concerns, the Court was suggesting that Congress should make major policy decisions itself instead of assigning them to agencies. The Court has previously gestured at this idea, stating: "We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000)). Like the passage in *West Virginia*, however, it is unclear whether this statement is prescriptive, descriptive, or both.

doctrine. Justice Gorsuch, joined by Justice Alito, has described the doctrine as enforcing constitutional limits on delegation that purportedly arise from Article I's vesting of "Legislative" power in Congress.[300] Justice Barrett rejects this account,[301] but she cites the same aspect of "our constitutional structure" to justify the premise that "a reasonable interpreter would expect [Congress] to make the big-time policy calls itself, rather than pawning them off to another branch."[302]

Contrary to both of these views, the idea that it is abnormal for Congress to assign major policy decisions to agencies is at odds with the original understanding of the Constitution. The Founders had no qualms about legislation authorizing the executive branch to resolve critically important policy questions, and they did not require Congress to speak in any particular manner to confer such authority. Indeed, early Congresses repeatedly used broad language to give the executive branch vast discretion over major policy decisions concerning the most significant economic and political problems facing the nation. Courts have no basis, therefore, for assuming that Congress does not entrust agencies with major policy decisions, for looking askance at such legislation, or for demanding heightened clarity from it.

1. Constitutional Text

Nothing in the Constitution's text or structure prevents Congress from empowering the executive branch to resolve major policy questions at Congress's behest. Nor does the Constitution create any presumption against such legislation or otherwise justify special rules for its interpretation.

The Constitution vests Congress with all of the "legislative Powers" that it grants.[303] But when Congress enacts legislation directing the executive branch to establish policies on a particular subject, the Constitution does not imply that carrying out those instructions is itself an exercise of Congress's legislative power.[304] And even if it did, "nothing in the Constitution . . . specifically states . . . that Congress may not authorize other actors to exercise

300. West Virginia v. EPA, 142 S. Ct. 2587, 2616–20 (2022) (Gorsuch, J., concurring).

301. Biden v. Nebraska, 143 S. Ct. 2355, 2377–78 (2023) (Barrett, J., concurring).

302. *Id.* at 2380.

303. U.S. CONST. art. I, § 1.

304. *See* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1729 (2002).

legislative power."[305] The text, rather, is "silent on the question whether or to what extent legislative power may be shared."[306]

2. Constitutional History

Founding-era history confirms that the Constitution's Framers and ratifiers saw no problem with legislative assignments of important policymaking authority to the executive branch. Such grants of authority were well known to the Founders and were entirely uncontroversial at the time of the Constitution's drafting and ratification. Parliament had a long tradition of granting broad rulemaking power to the monarch and other government authorities.[307] The same practice was pervasive in American state governments after the Revolution—including in states that adopted a formal separation of powers like the federal Constitution later would.[308] The states "expressly delegated" many legislative authorities to the Continental Congress,[309] which in turn further assigned authority over many important subjects to committees, boards, and officers.[310]

There is no evidence from the time of the Constitution's ratification that the Founders viewed legislative assignments of

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305. Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 335 (2002) (citations omitted).

306. Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2127 (2004). If anything, the Constitution's text implies an *absence* of limits on Congress's ability to delegate legislative power. The Constitution expressly restricts Congress's legislative authority in several respects, *see* U.S. CONST. art. I, § 9, which weighs against inferring additional unwritten restrictions like a limit on delegation. The Constitution also empowers Congress to enact any laws that are "necessary and proper for carrying into Execution" its own legislative powers. *Id.* art. I, § 8, cl. 18.

307. *See* CECIL T. CARR, DELEGATED LEGISLATION: THREE LECTURES 48–56 (1921); Paul Craig, *The Legitimacy of US Administrative Law and the Foundations of English Administrative Law: Setting the Historical Record Straight* 19–27 (Oxford Legal Stud. Rsch., Working Paper No. 44/2016, 2016), https://ssrn.com/abstract=2802784 (discussing "prominent instances of rulemaking power accorded to administrators by Parliament from the sixteenth century onwards").

308. Virginia's constitution, for example, required the "legislative, executive, and judiciary" departments to be "separate and distinct, so that neither exercise the powers properly belonging to the other." VA. CONST. OF 1776 pmbl. Yet Virginia's legislature "delegated many special powers" to the governor and Council of State, including the power to restrict counterfeiting and "maintain fair prices." Session of Virginia Council of State, NATIONAL ARCHIVES (Jan. 14, 1778) (editorial note), https://founders.archives.gov/documents/Madison/01-01-02-0065.

309. ARTICLES OF CONFEDERATION OF 1781, art. II.

310. *See* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 303–04 & n.134 (2021).

policymaking authority to executive agencies as threatening liberty, or as violating the separation of powers established by the new Constitution.[311] That is unsurprising. Although the Founders divided authority among three branches of government to prevent any branch from becoming all-powerful, they did not fear *any* mixture of legislative, executive, and judicial powers—such as when an executive agency wields statutory authority that could be characterized in the abstract as "legislative."[312]

On the contrary, James Madison stressed in *The Federalist Papers* "the impossibility and inexpediency of avoiding any mixture whatever of these departments."[313] The true danger, Madison explained, was if "the *whole* power of one department [were] exercised by the same hands which possess[ed] the *whole* power of another department."[314] While that danger would arise if the "executive magistrate" possessed "*the complete* legislative power," there was no danger as long as the executive magistrate "cannot of himself make a law."[315]

That is precisely the situation when Congress passes laws authorizing the president (or an agency) to implement the law by making policy decisions—even major ones. The president "cannot of himself make a law,"[316] nor can an agency, because their authority to establish policy depends entirely on Congress's use of its own legislative powers—and can be revoked by the same means. Therefore, no matter how significant the decision assigned to an agency, there is no threat of "[t]he accumulation of all powers,

311. *See* Posner & Vermeule, *supra* note 304, at 1734 ("The overall picture is that the founding era wasn't concerned about delegation."). Among all the records of the Constitutional Convention, the ratification debates, and *The Federalist*, there is "remarkably little evidence" that the Founders envisioned any limit on legislative delegations. *Id.* at 1733. That is understandable because the Founders' "principal concern was with legislative aggrandizement," not "grants of statutory authority to executive agents." *Id.* at 1733–34; *see also* Nicholas R. Parrillo, *Supplemental Paper to "A Critical Assessment of the Originalist Case Against Administrative Regulatory Power"* 8 (C. Boyden Gray Ctr. for the Study of Admin. State Rsch., Working Paper No. 20-17, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3696902 (addressing the few "scattered" references to nondelegation concepts in Founding-era sources, which "appear to have been rejected by majorities of their audiences, or involved types of delegations categorically different from those that Congress makes to an agency").

312. The Constitution itself requires the president to exercise powers that can be thought of as "legislative," such as approving or vetoing legislation, U.S. CONST. art. I, § 7, cl. 2, and it requires Congress to exercise certain powers that can be thought of as "executive," such as providing advice and consent on the appointment of officers, U.S. CONST. art. II, § 2, cl. 2.

313. THE FEDERALIST NO. 47 (James Madison).

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

315. *Id.* (emphasis added).

316. *Id.*

legislative, executive, and judiciary, in the same hands."[317] Congress always retains ultimate control and can reclaim whatever authority it has granted to the executive branch, if necessary over a presidential veto.

In sum, Founding-era history also fails to supply any basis for imposing special interpretive rules on statutes that allow the executive branch to make decisions with vast significance.

3. Early Congressional Practice

Even if the Constitution's text and pre-ratification history were ambiguous, precedent established by the earliest Congresses confirms that the Constitution was originally understood to permit broad assignments of major policy decisions to the executive branch. And this history shows that Congress did not feel the need to use particular language when authorizing the executive to make these decisions. In statute after statute, the first Congresses assigned virtually unguided policymaking authority to the executive branch over the most pressing questions confronting the nation.[318] This early practice, which is "strong evidence of the original meaning of the Constitution,"[319] confirms what constitutional text and history indicate: there is no basis for judicial suspicion of an agency's claim that Congress has empowered it to make major policy decisions.

Foreign Debt. After ratification, "arguably *the* greatest problem facing our fledgling Republic" was its "potentially insurmountable national debt."[320] To solve that problem, Congress authorized the president to restructure the nation's foreign debt on essentially whatever terms he judged best.[321] Specifically, Congress authorized

317. *Id.*

318. Recent scholarship has surveyed these early assignments of decision-making authority in the context of examining whether the Constitution's original meaning supports a nondelegation doctrine. *See* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021); Kevin Arlyck, *Delegation, Administration, and Improvisation*, 97 NOTRE DAME L. REV. 243, 246 (2021); Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, 56 GA. L. REV. 81 (2021); Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288 (2021). These historical findings are also relevant, however, to whether the Constitution's original meaning supports the notion that "Congress intends to make major policy decisions itself, not leave those decisions to agencies." West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022).

319. Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1659 (2020). Indeed, such "contemporaneous legislative exposition of the Constitution . . . acquiesced in for a long term of years, fixes the construction to be given its provisions." Myers v. United States, 272 U.S. 52, 175 (1926) (citations omitted).

320. Chabot, *supra* note 318, at 81.

321. *See* Mortenson & Bagley, *supra* note 318, at 344–45.

the president to borrow up to $1.2 trillion dollars (in today's money) in new loans, and to make other debt-related contracts "as shall be found for the interest of the [United] States."[322] Major questions about the terms of these new loans and the repayment of existing loans were left almost entirely to the president's discretion.[323]

Domestic Debt. Congress gave similarly broad policymaking authority over the domestic debt to an agency. It created a multi-member commission of high-level officials that was empowered to purchase debt "in such manner, and under such regulations as shall appear to them best calculated to fulfill the intent of this act."[324] Thus, the entire responsibility for Congress's plan to reduce the domestic debt was vested in a commission given little guidance.[325]

By empowering the president and an agency to make "decisions regarding borrowing and payment policies of the utmost importance to the national economy,"[326] Congress essentially instructed the executive branch to set national fiscal policy as it saw best. The borrowing power alone, James Madison observed, involved the "execution of one of the most important laws."[327]

Exclusive Patent Rights. To foster commercial innovation and economic development, the Constitution allows Congress to grant patent rights to authors and inventors.[328] The First Congress promptly assigned this crucial power to a three-member board of executive officials.[329] The only statutory guidance was that any patented discovery must be "sufficiently useful and important,"[330] and the board was "left almost entirely to its own devices" in deciding what this standard meant.[331] Whenever the board granted a patent under this vague mandate, all other Americans were denied the "right and liberty" of making and selling the same product.[332] In some cases

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322. Act of Aug. 4, 1790, ch. 34, § 2, 1 Stat. 138, 138; *see* Chabot, *supra* note 318, at 124.

323. The only limit on the president's authority was a fifteen-year cap on the life of any restructured loans. Act of Aug. 4, 1790, ch. 34, § 2, 1 Stat. at 139.

324. Act of Aug. 12, 1790, ch. 47, § 2, 1 Stat. 186.

325. *See id.* §§ 1, 2, 1 Stat. at 186 (specifying minimal requirements, such as that purchases be made openly).

326. Chabot, *supra* note 318, at 82.

327. 12 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 1349, 1354 (Linda Grant DePauw et al. eds., 1972).

328. *See* U.S. CONST. art. I, § 8, cl. 8.

329. Act of Apr. 10, 1790, ch. 7, § 1, 1 Stat. 109, 109–10.

330. *Id.* § 1, 1 Stat. at 110.

331. Edward C. Walterscheid, *Patents and the Jeffersonian Mythology*, 29 J. MARSHALL L. REV. 269, 280 (1995).

332. Act of Apr. 10, 1790, § 1, 1 Stat. at 110. The patent board crafted substantive and procedural standards that were nowhere to be found in the statute. *See* Mortenson & Bagley, *supra* note 318, at 339.

its use of this power "rendered . . . inventors' interests in existing state patents effectively worthless."[333]

Trade with Native American Tribes. "Nothing preoccupied [President Washington's] administration more" than relations with the Native Americans of the trans-Appalachian West.[334] Accordingly, Congress prohibited "any trade or intercourse" with these tribes without a license issued by the executive branch—and it gave the president total control over the "rules, regulations and restrictions" of the licensing scheme.[335] Saying nothing about the content of these rules and restrictions, the statute left these major policy questions entirely up to the president, who had "complete discretion to decide whether, to whom, and why to grant such licenses."[336]

Laws Within Federal Territories. Congress assigned similarly unbounded authority to resolve major policy decisions concerning the laws that would govern within the nation's federal territories, including the vast Northwest Territory. In one of its first acts, Congress authorized territorial officials to adopt "such laws . . . criminal and civil, as may be necessary, and best suited to the circumstances of the[ir] district."[337] In essence, the statute empowered these officials to craft the entire body of laws for the territories. Exercising this standardless discretion, territorial officials adopted measures governing all manner of private conduct, imposing harsh criminal sanctions such as public whippings for violations of these measures.[338]

Customs Penalties. Nearly all of the early federal government's income came from customs duties, which were enforced under a detailed statutory regime that involved fines and forfeitures for the evasion of payments.[339] But Congress gave the executive branch the "authority to effectively rewrite the statutory penalties for customs violations," allowing it "to determine what financial punishments the government would impose on private individuals for violations of the

333. Chabot, *supra* note 318, at 142–46 (describing the board's resolution of controversial steamboat technology questions).

334. GORDON S. WOOD, EMPIRE OF LIBERTY 123 (2009); *see* Mortenson & Bagley, *supra* note 318, at 340.

335. Act of July 22, 1790, ch. 33, § 1, 1 Stat. 137, 137; *see* Mortenson & Bagley, *supra* note 318, at 340–41.

336. Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490, 1543 (2021). Congress gave the president even *more* discretion regarding "the tribes surrounded in their settlements by the citizens of the United States," by authorizing him to waive the license requirement whenever he "deem[ed] it proper." Act of July 22, 1790, § 1, 1 Stat. at 137.

337. Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 50–51.

338. *See* Mortenson & Bagley, *supra* note 318, at 335. Whenever early Congresses created new territories, they routinely empowered their officials to adopt such rules. *See id.* at 335–36.

339. Act of July 4, 1789, ch. 2, § 1, 1 Stat. 24, 24; Act of July 31, 1789, ch. 5, § 1, 1 Stat. 29, 29.

law."[340] If the Treasury Secretary concluded that customs violators acted without intention of fraud, he could impose as much or as little of the penalty as he "deem[ed] reasonable and just."[341] No further standards were prescribed to govern "one of the most important and extensive powers" of the federal government.[342]

Trade Embargoes. The pattern of granting momentous decision-making powers to the executive branch continued beyond the First Congress. In 1794, for instance, Congress gave the president unilateral authority to lay an embargo "on all ships and vessels in the ports of the United States" whenever, "in his opinion, the public safety shall so require" and Congress was out of session.[343] A decision to halt foreign trade was indisputably a matter of great economic and political significance. But beyond the statute's vague requirement of a perceived threat to "public safety," a term left undefined, the statute was entirely open-ended, allowing the president to impose embargoes "under such regulations as the circumstances of the case may require."[344]

Direct Taxes. Facing another fiscal shortfall in 1798, Congress exercised its power to levy a "direct tax" on property,[345] which "fell upon literally every farmer, homeowner, and slaveholder" in the nation.[346] Virtually "all private real estate in every state" was taxed,[347] and to ensure that property valuations were consistent, Congress empowered federal officials "to revise, adjust and vary" the tax burdens of property owners "as shall appear to be just and equitable."[348] The statute did not specify a method for these determinations or define "just and equitable," even though the question of how to appraise property values was an important political issue hotly contested in state legislatures.[349]

Other Examples. These are but a few examples of the early Congresses assigning major policy decisions to executive agencies and other government officials. In the First Congress alone, statutes also authorized the executive branch to devise and implement standards for (1) engaging in warrantless searches of houses and commercial

340. Arlyck, *supra* note 318, at 249, 306.

341. Act of May 26, 1790, ch. 12, § 1, 1 Stat. 122, 122–23. Congress repeatedly reauthorized the act before making it permanent in 1800. Arlyck, *supra* note 318, at 249–50.

342. The Margaretta, 16 F. Cas. 719, 721 (C.C.D. Mass. 1815) (Story, C.J.).

343. Act of June 4, 1794, ch. 41, § 1, 1 Stat. 372, 372.

344. *Id.*

345. *See* Act of July 9, 1798, ch. 70, § 8, 1 Stat. 580, 585.

346. Parrillo, *supra* note 318, at 1302.

347. *Id.* at 1332–33; *see* Act of July 9, 1798, § 8, 1 Stat. at 585.

348. Act of July 9, 1798, § 22, 1 Stat. at 589.

349. Parrillo, *supra* note 318, at 1304, 1391–401. The only requirement was that the "relative valuations" of properties within an assessment district could not be altered. *See* Act of July 9, 1798, § 22, 1 Stat. at 589.

premises to enforce liquor taxes,[350] (2) boarding and examining incoming ships for customs enforcement,[351] (3) designating veterans and military members for pensions,[352] and (4) calling up state militias for protection of the frontiers.[353] These statutes provided little or no guidance on how to resolve the various policy questions they implicated.

In short, the early Congress did not feel obligated "to make major policy decisions itself," but rather felt free to "leave those decisions to agencies."[354] These laws, enacted when the ink was still wet on the Constitution, offer "contemporaneous and weighty evidence of the Constitution's meaning."[355] They confirm that entrusting major questions to the executive branch was not regarded as unusual, suspect, or at odds with "separation of powers principles."[356]

Indeed, even when some legislators in the 1790s began objecting on constitutional grounds to certain statutory assignments of authority (articulating the first glimmers of a nondelegation doctrine),[357] none suggested that economic or political significance marked the dividing line between what Congress could and could not delegate.[358] In other words, no one in the eighteenth century articulated anything resembling a "major questions" doctrine.

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350. Act of Mar. 3, 1791, ch. 15, § 29, 1 Stat. 199, 206*; see* Mortenson & Bagley, *supra* note 318, at 346.

351. Act of Aug. 4, 1790, ch. 35, § 30, 1 Stat. 145, 164; *id.* § 64, 1 Stat. at 175; *see* Mortenson & Bagley, *supra* note 318, at 346.

352. Act of Sept. 29, 1789, ch. 24, § 1, 1 Stat. 95, 95; Act of Apr. 30, 1790, ch. 10, § 11, 1 Stat. 119, 121; *see* Mortenson & Bagley, *supra* note 318, at 342–44.

353. Act of Apr. 30, 1790, ch. 10, § 16, 1 Stat. 119, 121; *see* Mortenson & Bagley, *supra* note 318, at 348.

354. West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022) (quotation marks omitted).

355. Printz v. United States, 521 U.S. 898, 905 (1997) (quotation marks omitted).

356. *Id.* at 908 n.2.

357. Notably, these objections virtually always failed: in every case, with one possible exception, Congress rebuffed the objection and enacted the legislation in question. *See* Mortenson & Bagley, *supra* note 318, at 358–66; Arlyck, *supra* note 318, at 258; Chabot, *supra* note 318, at 116–17.

358. For instance, in a debate during the Second Congress about whether Congress should authorize the president to choose the routes of the nation's post roads, or make those choices itself, one congressman suggested that these routes were more "important" than the locations of the post offices along those roads, another topic of debate. 3 ANNALS OF CONG. 230 (1791). But for him, the relative importance of these two topics was irrelevant: because the Constitution empowered Congress "to establish post offices and post roads," it was "as clearly their duty" to establish the offices as the roads. *Id.* at 229. Thus, congressmen who tried to establish a proto-nondelegation doctrine in the 1790s did not assign constitutional significance to whether or not a decision was a "major question."

In sum, the major questions doctrine—whatever its functional value in the modern era—is in deep tension with the original public meaning of the Constitution. For this reason, among others, it must be reserved for "extraordinary cases."[359]

C. The Separation of Powers Supports Limiting Application of the Major Questions Doctrine.

The Supreme Court has said that the major questions doctrine promotes "separation of powers principles."[360] But as a judicially imposed constraint on legislative and executive authority, the doctrine raises its own separation-of-powers concerns. If applied too widely, it threatens to become "a license for judicial aggrandizement," shifting authority "over substantial parts of American law and American life from agencies, the President, and Congress" to the courts.[361]

While the major questions doctrine is often described as protecting democratic accountability by preserving Congress's authority to decide significant questions itself, the doctrine actually operates to constrain Congress's power—specifically, Congress's power to authorize significant agency actions. It does so by imposing a heightened standard of clarity on Congress when the courts

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

360. *Id.* Because the Court did not elaborate on this comment, it has not explained precisely which separation-of-powers principles are implicated by the major questions doctrine or how the doctrine advances those principles. This unexplained remark in *West Virginia* is the only instance in which the Court has linked the major questions doctrine to constitutional considerations. Although some have described the major questions doctrine as enforcing a constitutional nondelegation doctrine, a different interpretation of the Court's reference to separation of powers is simply that the major questions doctrine helps prevent the executive branch from exercising powers that Congress did not intend to grant it. That interpretation is consistent with the Court's focus in *West Virginia* and in other major questions cases on whether Congress likely meant to assign an agency the broad new power it suddenly asserts. *See supra* Part I. Notably, *West Virginia* indicates that Congress is free to grant the EPA the power it claimed but must do so more clearly than it did in the Clean Air Act: "A decision of such magnitude and consequence rests with Congress itself, *or an agency acting pursuant to a clear delegation from that representative body*." 142 S. Ct. at 2616 (emphasis added); *accord* Biden v. Nebraska, 143 S. Ct. 2355, 2374 (2023). This may suggest that the major questions doctrine is not covertly enforcing a constitutional prohibition on delegation but instead is focused only on respecting congressional intent where circumstances suggest that an agency's otherwise-plausible reading of a statute departs from that intent. *See generally Nebraska*, 143 S. Ct. at 2376–84 (Barrett, J., concurring).

361. Nathan Richardson, *Antideference: Covid, Climate, and the Rise of the Major Questions Canon*, 108 VA. L. REV. ONLINE 174, 175, 200 (2022).

conclude that a judicially invented standard of "majorness" is satisfied.[362]

Thus, instead of being merely "a check on executive power," the major questions doctrine "directs how Congress must draft statutes and is therefore a check on congressional power as well."[363] And this check is enforced by "the one part of our government specially designed to be democratically unaccountable."[364] By "defining the permissible characteristics of otherwise valid legislation," the judiciary in effect takes for itself "a part of the legislative power."[365]

Once again, this problem can be mitigated if courts hew closely to the Supreme Court's guidance in *West Virginia* and elsewhere: the doctrine is reserved for "extraordinary" cases, requires more than practical significance alone, and applies only when an agency has transformed and expanded its power in a manner that Congress did not likely intend.[366] But if courts ignore these limits, the situation will be quite different: unelected judges will routinely block actions by the executive branch, not to enforce the limits of the Constitution or statutory text, but simply because the judges deem those actions to be "major" based on their own views about economic and political importance. To assume such a role would place judges in the position of "assert[ing] power over Congress—and, by extension, over popular rule and representative government."[367] "The normal legislative process" would "no longer [be] adequate" whenever judges decide that the executive branch is doing something with "major" importance.[368]

Exacerbating its tension with representative government, the major questions doctrine is based on a judicially devised premise—that "Congress intends to make major policy decisions itself, not leave those decisions to agencies."[369] Instead of attempting to discern "the policies of the Congress that enacted the legislation the Court is examining," the doctrine therefore presumes "a general meta-intent shared by all [C]ongresses at all times," namely "that all Congresses share a general intention not to delegate power over significant new issues through general language."[370] The Court has never cited any empirical or historical evidence to support that assumption as a descriptive matter. And in any event, the judiciary's unilateral adoption of "[s]weeping presumptions" like this "only disserve[s] the

362. *See West Virginia*, 142 S. Ct. at 2609.

363. Sohoni, *supra* note 227, at 276.

364. Lisa Heinzerling, *Nondelegation on Steroids*, 29 N.Y.U. ENVTL. L. J. 379, 379 (2021) (emphasis omitted).

365. Walters, *supra* note 274 (manuscript at 52).

366. *See supra* Part I.

367. Richardson, *supra* note 361, at 177–78.

368. *Id.*

369. West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022) (quotation marks omitted).

370. Driesen, *supra* note 24, at 28.

underlying separation-of-powers principle, which is that Congress has exclusive authority to decide the scope of agency authority."[371]

Not only does the doctrine's underlying presumption lack any evident basis, but Congress has explicitly rejected it, making clear in enacted legislation that Congress fully expects agencies to resolve policy questions with vast economic and political significance. The Congressional Review Act requires federal agencies to report new rules to Congress and to state whether a rule is "major," which is defined by its effect on the economy, prices, employment, competition with foreign enterprise, and other metrics of economic and political significance.[372] Such rules take effect within sixty days unless Congress legislates to disapprove them.[373] The Act thus "presumes that federal agencies will answer major questions,"[374] contrary to the presumption underlying the major questions doctrine. Indeed, the doctrine's presumption flips Congress's choice upside down, implying a need for clear congressional approval to validate major rules instead of clear congressional disapproval to invalidate them.[375]

The major questions doctrine further risks encroachment on congressional authority because it is imposed retroactively, "abruptly rewriting the ground rules for how courts today read regulatory statutes enacted decades ago in a very different interpretive world."[376] Many laws on the books today "were passed during a period . . . when Congress appeared to desire broad delegations and certainly understood delegations would be read in that way."[377] And while it is one thing to "apply[] existing interpretive rules to statutes enacted in the shadow of such rules," "[i]t is quite another thing to make up interpretive rules after the enactment."[378]

At the same time that the doctrine risks undermining the efforts of prior Congresses, it also does little to enable today's Congress to ensure that its handiwork will not run afoul of the doctrine. The reality is that "Congress cannot . . . draft legislation that avoids raising significant unanticipated issues in the future" or "predict which issues future judges will find sufficiently significant and novel" to trigger the doctrine.[379] "In many contexts," after all, "there is no

371. Tom Merrill, *West Virginia v. EPA: Getting to Actual Delegation*, THE VOLOKH CONSPIRACY (July 29, 2022), https://reason.com/volokh/2022/07/29/west-virginia-v-epa-getting-to-actual-delegation/.

372. 5 U.S.C. § 801(a)(1)(A)(ii), § 804(2); *see* Chad Squitieri, *Who Determines Majorness,* 44 HARV. J.L. & PUB. POL'Y 463, 491–95 (2021).

373. 5 U.S.C. § 802.

374. Squitieri, *supra* note 372, at 466.

375. *See* Squitieri, *supra* note 227.

376. Sohoni, *supra* note 227, at 314.

377. Mike Rappaport, *Against the Major Questions Doctrine*, THE ORIGINALISM BLOG (Aug. 15, 2022), https://originalismblog.typepad.com/the-originalism-blog/2022/08/against-the-major-questions-doctrinemike-rappaport.html.

378. *Id.*

379. Driesen, *supra* note 24, at 21.

way for Congress to know when delegated authority may be used, how consistently it will be interpreted, and when it will become politically controversial."[380]

The doctrine also creates perverse incentives that discourage legislation, despite its ostensible purpose of preserving Congress's authority to resolve major questions. For instance, if courts view failed bills addressing a particular topic as evidence that the topic is off-limits to agencies—as *West Virginia* did in its passing reference to a failed carbon tax bill—lawmakers rationally might refrain from trying to address a problem when the success of their efforts is not certain, for fear that failure will contribute to a judicial decision barring agencies from taking any comparable action in that sphere.[381] Likewise, if courts use the doctrine to impose new limits on the scope of statutory text, it "facilitates congressional shirking of responsibility" by permitting legislators who favor a narrowing of agency power to stand idle instead of publicly voting to repeal or restrict broad authorizations of the past.[382]

The doctrine may even discourage Congress from striking down agency regulations it disfavors. The Court has suggested that a successful vote in the House or Senate to invalidate an agency rule under the Congressional Review Act can be evidence of the rule's economic and political significance—and therefore can help trigger the major questions doctrine.[383] Lawmakers who disfavor a particular rule on policy grounds, but who believe the agency has authority to issue it, are therefore put in a bind: voting to invalidate the rule could jeopardize the agency's basic authority to promulgate that type of measure. Thus, the doctrine may very well have the effect of distorting and diminishing the very legislative process it purports to elevate.

The risk of judicial aggrandizement is further heightened by the subjective and political nature of several factors that affect whether the doctrine applies. Assessing the significance of a regulation's economic implications, or the depth of controversy surrounding it, is fundamentally a political judgment rather than a judicial inquiry. Whether an agency action is sufficiently transformative to trigger the doctrine, especially in the face of competing indicia, may often be unclear, which threatens to "over-empower the courts by allowing

380. Richardson, *supra* note 361, at 198.

381. *See* Daniel Himebaugh, *Against Interpreting Dead Bills*, N.Y.U. J. LEGIS. & PUB. POL'Y QUORUM (Feb. 10, 2020), https://nyujlpp.org/quorum/himebaugh-against-interpreting-dead-bills/; Fred B. Jacob, *The Major Questions Doctrine and Legislative Experimentation*, YALE J. REG. NOTICE & COMMENT (Mar. 3, 2023), https://www.yalejreg.com/nc/the-major-questions-doctrine-and-legislative-experimentation-by-fred-b-jacob/.

382. Driesen, *supra* note 24, at 34.

383. Nat'l Fed'n of Indep. Bus. v. DOL, 142 S. Ct. 661, 666 (2022).

judges to fill the vacuum with their own political preferences."[384] Inevitably, "judges with different policy views might weigh [these] non-textual factors . . . differently, thereby risking judicial decisions that appear motivated by the judges' differing policy views."[385]

If extended beyond the most extraordinary cases, the major questions doctrine could begin to resemble the "council of revision"[386] expressly rejected by the Constitution's Framers. Under this early proposal for the executive branch, a council composed of federal judges and the executive would have been empowered to veto legislation on policy grounds.[387] In support of this proposal, James Madison advocated for "annexing the wisdom and weight of the Judiciary" in preventing Congress from "passing laws unwise in their principle,"[388] and George Mason lauded the potential "restraining power" of federal judges in vetoing "unjust and pernicious laws."[389]

Opponents of the council of revision, however, "complained that judges should not be legislators, interfere in legislative business, or meddle in politics."[390] As Nathaniel Gorham put it: "Judges . . . are not to be presumed to possess any peculiar knowledge of the mere policy of public measures."[391] The Constitutional Convention "voted twice on the proposal for a Council of Revision, and it was twice voted down."[392] An aggressive major questions doctrine, unmoored from legislative intent and instead used to impose heightened clarity standards whenever the judiciary deems an action sufficiently important, would tread uncomfortably close to this rejected vision of the proper role for federal judges.

Moreover, this threat of encroachment on the elected branches comes into play in the most fraught situation for the courts: resolving the fate of government policies that are highly controversial. By

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384. Heinzerling, *supra* note 364, at 390.

385. Squitieri, *supra* note 227.

386. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (Max Farrand ed., 1911).

387. *Id.*

388. *Id.* at 139.

389. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 386, at 78; *cf.* Transcript of Oral Argument at 27–28, Dep't of Educ. v. Brown (U.S. Feb. 23, 2022) (No. 22-535) (Chief Justice Roberts asking whether the "fairness" of forgiving some loans but not others should "enter into our consideration under the Major Questions Doctrine").

390. Kurt Eggert, *Originalism Isn't What It Used to Be: The Nondelegation Doctrine, Originalism, and Government by Judiciary*, 24 CHAP. L. REV. 707, 722 (2021); *see, e.g.*, 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 386, at 139–40.

391. 2 THE RECORDS OF THE FEDERAL CONVENTION of 1787, *supra* note 386, at 73.

392. Eggert, *supra* note 390, at 722; *see* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 386, at 140; 2 THE RECORDS OF THE FEDERAL CONVENTION of 1787, *supra* note 386, at 80.

making vast economic and political significance a prerequisite for its application, the major questions doctrine encourages judicial involvement in "issues that have the highest visibility for the American public."[393] If the judiciary "starts to reject Congress's legislation on important matters precisely because it is important,"[394] the result may be a further erosion of the courts' perceived status as a non-political arbiters of the law. As Luther Martin stated at the Constitutional Convention, in explaining why he opposed allowing judges to veto legislation on policy grounds: "It is necessary that the Supreme Judiciary should have the confidence of the people. This will soon be lost, if they are employed in the task of remonstrating against popular measures of the Legislature."[395]

One response to these concerns is that "Congress has an easy fix: debate the matter and pass a law."[396] This response elides the fact that Congress has *already* passed a law that the separation of powers requires to be read fairly. By design, our constitutional system makes the enactment of laws quite challenging, and for that reason, as Justice Kavanaugh has maintained, "[t]he backdrop of possible congressional correction is not a good reason for courts to do anything but their level best to decide the case correctly in the first place."[397] "For a court to say that Congress can fix a statute if it does not like the result is *not* a neutral principle in our separation of powers scheme because it is very difficult for Congress to correct a mistaken statutory decision."[398]

Once the major questions doctrine is triggered, its focus on evaluating the clarity of legislative text further heightens the risk of judicial interference with legislative judgments. "Determining the level of ambiguity in a given piece of statutory language is often not possible in any rational way," and "[i]t is difficult for judges (or anyone else) to perform that kind of task in a neutral, impartial, and predictable fashion."[399] Because the assessment "turn[s] on little more than a judge's instincts, it is harder for judges to ensure that they are separating their policy views from what the law requires of them."[400] And because the doctrine requires judges to make this assessment precisely where political controversy is at its peak, it may

393. Emerson, *supra* note 24, at 2023.

394. Heinzerling, *supra* note 364, at 391.

395. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 386, at 75–76.

396. Capozzi, *supra* note 6 (manuscript at 235).

397. Kavanaugh, *supra* note 254, at 2134.

398. *Id.* at 2133–34.

399. *Id.* at 2137.

400. *Id.* at 2139. Although Justice Kavanaugh was discussing the clarity-ambiguity determination that is required at the first step of the *Chevron* framework, judges must similarly decide on the amount of clarity required when applying *West Virginia*'s demand for "clear congressional authorization."

be even more difficult to keep policy considerations out of judicial decision-making.[401]

CONCLUSION

There is no denying that the major questions doctrine will have a lasting impact on legislators, regulators, and the public at large. But the doctrine does not extend as far as opponents of the administrative state claim nor agency proponents fear. The Supreme Court should be taken at its word: only in "extraordinary" cases should the doctrine be imposed, and its ultimate touchstone is "legislative intent."[402] Courts should therefore reject calls to eschew traditional statutory interpretation merely because an agency's action has vast economic and political significance. The doctrine applies only when the agency asserting such vast power is seeking a transformative expansion of its regulatory sphere—using vague or ancillary provisions in a novel attempt to claim authority that is incongruent with the statutory scheme and outside the agency's expertise. This limited role for the major questions doctrine is both required by precedent and warranted by the doctrine's significant tension with textualism, the original understanding of the Constitution, and the separation of powers.

401. *See* Driesen, *supra* note 24, at 58 (suggesting that cases with "major economic and political consequences . . . tend to unbalance judicial judgement" (citing ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 184 (2d ed. 1986))).

402. West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022); *accord* Biden v. Nebraska, 143 S. Ct. 2355, 2374 (2023).