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THE NEW MAJOR QUESTIONS DOCTRINE

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

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At the same time, the Court has increasingly relied on three new indicia of majorness to determine whether an agency policy is major: the political significance of or political controversy surrounding the policy; the novelty of the policy; and the possibility that other, supposedly even more controversial agency policies might be supported by the agency's broader statutory rationale.

Understanding how the major questions doctrine operates today is important not only to bring a modicum of clarity to a doctrine often described as radically indeterminate. Unpacking the new major questions doctrine also provides a way to interrogate and evaluate the doctrine and to assess how it relates to, and enforces, previously understood institutional and political pathologies. In particular, this Article argues that the new major questions doctrine allows the presence of present-day political controversy surrounding a policy to alter otherwise broad regulatory statutes outside of the formal legislative process. It supplies an additional means for minority rule in a constitutional system that already skews toward minority rule. What's more, it invites politically infused judgments by the federal courts, further eroding democratic control of policy. And it operates as a powerful de-regulatory tool that limits or substantially nullifies congressional delegations to agencies in the circumstances where delegations are more likely to be used—and more likely to be effective—even as the Court claims it is simply doing statutory interpretation.

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INTRODUCTION

Stymieing agency efforts to address issues from climate change to the COVID-19 pandemic,¹ the major questions doctrine has emerged as a powerful weapon wielded against the administrative state.² The doctrine’s roots extend as far back as 2000 and arguably before.³ But its shape has morphed significantly over time.⁴ Most recently, the Supreme Court’s October term 2021 saw the doctrine become stronger, more powerful. At the same time, the Court more fully articulated its vision of when the doctrine applies. And at least one thing has become crystal clear: the

¹ See *West Virginia v. EPA*, 142 S. Ct. 2587 (2022) (invoking major questions doctrine to invalidate EPA regulation designed to curb emissions from greenhouse gasses); *Nat’l Fed’n of Indep. Bus. v. Dep’t of Labor, Occupational Safety & Health Admin.*, 142 S. Ct. 661 (2022) [hereinafter *NFIB v. OSHA*] (invoking major questions doctrine to invalidate Occupational Safety and Health Administration (“OSHA”) regulation designed to address COVID-19).

² See, e.g., Alison Goeke, *Chevron’s Next Chapter: A Fig Leaf for the Nondelegation Doctrine*, 55 U.C. Davis L. Rev. 955, 994 (2022) (“The legal fictions underlying the major questions doctrine (specifically, the ‘major questions doctrine as *Chevron* step zero test’) and Chief Justice Roberts’ jurisdictional exception are poised to become the Court’s new nondelegation tests.”); Lisa Heinzerling, *The Power Canons*, 58 Wm. & Mary L. Rev. 1933, 1937–38 (2017) (arguing that the Court’s earlier major questions cases diverted power to courts and away from administrative agencies).

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

⁴ See Cass R. Sunstein, *There Are Two “Major Questions” Doctrines*, 73 Admin. L. Rev. 475, 481–83 (2021) [hereinafter Sunstein, *Two “Major Questions” Doctrines*] (arguing that the Court has deployed two different formulations of the doctrine).

major questions doctrine has become an important—perhaps the most important—constraint on agency power, particularly when it comes to some of the most pressing problems of our time.

This Article critically analyzes significant recent developments in the major questions doctrine. It highlights important shifts in *what role* the “majorness” of an agency policy plays in statutory interpretation, as well as changes in *how the Court determines* whether an agency policy is major. The major questions doctrine originally operated within the familiar *Chevron* framework.⁵ When an agency promulgated a policy that was dramatic or unexpected, the broader context of the statute, consulted in conjunction with common sense, might indicate that the statute unambiguously foreclosed that policy.⁶ In such form, the major questions doctrine (a phrase the Court did not use until last term) was simply one tool of statutory interpretation, sitting alongside others in the tool kit such as ordinary meaning and the semantic canons.

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

At the same time, the Court has increasingly relied on three indicia of majorness, in addition to the costs imposed by the agency policy, to determine whether an agency rule is major. First, the Court has indicated

⁵ See Coenen & Davis, *supra* note 3, at 788–91 (describing doctrinal origins and operation). On *Chevron*, see *infra* notes 45–67 and accompanying text.

⁶ See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 137, 160 (2000) (rejecting the FDA’s attempt to regulate cigarettes in part because of the vast economic impacts of the tobacco industry and the “cryptic” statutory provision at issue). In a slightly different form, the doctrine operated to inform the courts’ analysis of whether the agency’s interpretation was a reasonable one. See *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 321 (2014).

⁷ 576 U.S. 473, 485–86 (2015).

⁸ See *West Virginia v. EPA*, 142 S. Ct. 2587, 2616 (2022) (Gorsuch, J., concurring) (describing the Court’s articulation of the major questions doctrine as a clear statement rule); *id.* at 2641 (Kagan, J., dissenting) (describing the major questions doctrine as a “get-out-of-text-free card[”]).

⁹ See *id.* at 2633–34, 2641 (Kagan, J., dissenting).

that politically significant or controversial policies are more likely to be major and thus require clear authorization.¹⁰ Second, the Court has signaled that the novelty of a policy—i.e., the fact that the agency had never promulgated a similar policy before—is a reason to think that the policy is a major one.¹¹ Finally, the Court has considered the majorness of other, theoretically possible agency policies not actually before the Court but that might be supported by the agency’s broader rationale in determining whether the agency’s current claim of interpretive authority is major.¹² (Although we describe these developments in the doctrine at the Court, it is the Republican appointees on the Court who are in the majority in the relevant cases.)

This new major questions doctrine was most clearly on display in the Supreme Court’s end-of-term blockbuster decision in *West Virginia v. EPA*.¹³ There, the Court invoked the major questions doctrine to invalidate an EPA regulation requiring coal-fired power plants to adopt so-called “generation shifting” methods in order to shift production to cleaner sources of electricity.¹⁴ The case was the first time the Court actually used the phrase “major questions doctrine,” and it represents the full emergence of the doctrine as a clear-statement rule.¹⁵ The consequence is that “major” agency policies now require “clear congressional authorization”—even broadly worded, otherwise unambiguous statutes may not do.¹⁶

¹⁰ See *NFIB v. OSHA*, 142 S. Ct. 661, 665 (2022) (quoting *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021)); *West Virginia v. EPA*, 142 S. Ct. at 2620 (Gorsuch, J., concurring) (explaining that an issue may be major where “certain States were considering” the issue or “when Congress and state legislatures were engaged in robust debates”); *id.* at 2614 (majority opinion).

¹¹ See *West Virginia v. EPA*, 142 S. Ct. at 2595–96 (invoking novelty of the regulation as an indicium of majorness); *NFIB v. OSHA*, 142 S. Ct. at 666 (“This ‘lack of historical precedent,’ coupled with the breadth of authority that the Secretary now claims, is a ‘telling indication’ that the mandate extends beyond the agency’s legitimate reach.” (internal quotation marks omitted) (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 505 (2010))).

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

¹³ 142 S. Ct. at 2595.

¹⁴ See *id.*; see also Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64662, 64728 (Oct. 23, 2015).

¹⁵ *West Virginia v. EPA*, 142 S. Ct. at 2634 (Kagan, J., dissenting). Justice Gorsuch labeled the doctrine as a clear statement rule in his concurrence. See *id.* at 2622 (Gorsuch, J., concurring).

¹⁶ See *id.* at 2609 (majority opinion) (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

West Virginia v. EPA also displayed the Court's new indicia of majorness—the criteria used to assess whether the doctrine applies. The Court made clear that the “political significance” of a rule is evidence of majorness,¹⁷ pointing to political disagreement over whether to adopt generation shifting programs.¹⁸ The concurrence, which agreed with the Court's application of the major questions doctrine, underscored that the agency's rule was major because “certain States were considering” the issue and “Congress and state legislatures were engaged in robust debates.”¹⁹ The Court also invoked the novelty of the agency's regulatory approach in finding it to be a major one,²⁰ and it considered the possible future implications of the agency's theory of its statutory authority.²¹ These trends continued in the October term 2022.²²

Understanding how the major questions doctrine operates today is important not only to bring a modicum of clarity to a doctrine often described as radically indeterminate.²³ Unpacking the new major questions doctrine also allows us to normatively evaluate the doctrine on its own terms and to assess how it relates to, and enforces, previously understood institutional and political pathologies. And we will suggest that, judged in this manner, the doctrine does quite poorly.

¹⁷ *Id.* at 2595 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000)).

¹⁸ *Id.* at 2614 (“‘The importance of the issue,’ along with the fact that the same basic scheme EPA adopted ‘has been the subject of an earnest and profound debate across the country, . . . makes the oblique form of the claimed delegation all the more suspect.’” (quoting *Gonzales v. Oregon*, 546 U.S. 243, 267–68 (2006))).

¹⁹ *Id.* at 2620 (Gorsuch, J., concurring).

²⁰ See *id.* at 2596 (majority opinion).

²¹ See *id.* at 2612 (“[T]his argument does not so much limit the breadth of the Government's claimed authority as reveal it.” (emphasis omitted)).

²² See *Biden v. Nebraska*, 143 S. Ct. 2355 (2023).

²³ See, e.g., Heinzerling, *supra* note 2, at 1938–90 (describing uncertainty in the major questions doctrine); Gocke, *supra* note 2, at 1002 (describing the major questions doctrine as “illusory”); Coenen & Davis, *supra* note 3, at 809–10 (describing lack of clarity in the major questions doctrine); Jonas J. Monast, Major Questions About the Major Questions Doctrine, 68 *Admin. L. Rev.* 445, 448 (2016) (“More is unclear than clear about the bounds of the major questions doctrine at this stage.”); Jacob Loshin & Aaron Nielson, Hiding Nondelegation in Mouseholes, 62 *Admin. L. Rev.* 19, 45 (2010) (describing a related interpretive principle as applied “haphazardly”); Natasha Brunstein & Richard L. Revesz, Mangling the Major Questions Doctrine, 74 *Admin. L. Rev.* 217, 218 (2022) (“What constitutes a major question is as unclear today as it was when Justice Breyer wrote those words in 1986.”); Nathan Richardson, Antideference: COVID, Climate, and the Rise of the Major Questions Canon, 108 *Va. L. Rev. Online* 174, 195 (2022) (“The most prominent critique of the major questions doctrine has been that its boundaries are unclear, unpredictable, and arbitrary.”).

This Article makes three principal contributions. The first is descriptive and synthetic: the Article offers the first account of how the new major questions doctrine operates in light of the Supreme Court's decisions from October term 2021, showing how it has emerged as a clear-statement rule and cataloguing the new indicia of majorness.

The Article's second contribution is analytic: identifying how the Court assesses majorness makes it easier to evaluate the new major questions doctrine and to critically assess its potential consequences. Specifically, we suggest that the Court's new approach may allow present-day political controversy surrounding a policy to restrict authority that agencies would otherwise have under broadly worded statutes. This permits political parties and political movements more broadly—and whether as part of a conscious strategy or not—to effectively amend otherwise broad regulatory statutes by generating controversy surrounding an agency policy. This dynamic undermines the purported purpose of the doctrine, which is to channel policy disputes into legislatures.

The third contribution is more straightforwardly normative: unpacking the new major questions doctrine identifies how the doctrine reinforces previously identified pathologies of the American constitutional system and undermines public policy by hobbling delegations when they are most likely to be effective. We argue that the doctrine supplies an additional means for minority rule in a constitutional system that already skews toward minority rule. It provides an additional mechanism for courts to exercise what is essentially political oversight of statutes—inviting judges to opine on what policies are sufficiently controversial and thus require special authorization, an inquiry that may often depend on the judges' own deeply held politics.²⁴ And it operates to kneecap delegations to agencies in precisely the circumstances in which Congress may have had particular reason to delegate broad authority to agencies, all while supposedly simply doing statutory interpretation.

Now is an especially important time to unpack and assess the major questions doctrine. In the wake of the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* overruling *Roe v. Wade*,²⁵ the federal government is reportedly considering and undertaking some

²⁴ Cf. Coenen & Davis, *supra* note 3, at 831 (arguing that lower courts' application of the version of the major questions doctrine articulated in *King v. Burwell* raised "concerns about major political dysfunction and institutional breakdowns").

²⁵ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (overruling *Roe v. Wade*, 410 U.S. 113 (1973)).

administrative responses to secure access to abortion, particularly medication abortion.²⁶ Possible responses include regulatory action by the FDA²⁷ and declarations of public health emergencies under the Public Readiness and Emergency Preparedness Act.²⁸ Both responses rely on statutory delegations to agencies.²⁹ These agency responses may be evaluated under the major questions doctrine, making it important to understand what the doctrine is and how it might be applied.³⁰

The Article proceeds in four Parts. Part I provides a brief overview of different judicial constraints on administrative agencies' authority to interpret and implement federal statutes. Part II provides a synthesis of the new major questions doctrine, focusing on three recent cases, two from the Supreme Court's most recent term and the third from August 2021. Part III then critically evaluates the new major questions doctrine. We conclude by arguing the new major questions doctrine erodes the bases for several recently offered justifications for the exercise of agency power—and, perhaps from the standpoint of the doctrine's defenders, maybe that's the whole point.

²⁶ See Shira Stein, Fiona Rutherford & Celine Castronuovo, White House Touts Abortion Pill as Answer to *Roe* Reversal but FDA Rules Limit Use, *Bloomberg* (June 30, 2022, 11:57 AM), <https://www.bloomberg.com/news/articles/2022-06-30/white-house-touts-abortion-pill-as-answer-to-roe-reversal-but-fda-rules-limit-use> [https://perma.cc/DWZ3-K25Z]; Dan Diamond & Rachel Roubein, Biden Official Vows Action on Abortion Following 'Despicable' Ruling, *Wash. Post* (June 28, 2022, 1:28 PM), <https://www.washingtonpost.com/health/2022/06/28/abortion-access-becerra/> [https://perma.cc/4UKJ-GXJ9].

²⁷ See U.S. Food & Drug Admin., Information About Mifepristone for Medical Termination of Pregnancy Through Ten Weeks Gestation, <https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/mifeprex-mifepristone-information> [https://perma.cc/G7Q4-VNU7] (last visited Jan. 24, 2023); U.S. Food & Drug Admin., Risk Evaluation and Mitigation Strategy (REMS) Single Shared System for Mifepristone 200MG (2019), https://www.accessdata.fda.gov/drugsatfda_docs/remis/Mifepristone_2021_05_14_REMS_Full.pdf [https://perma.cc/ULJ3-ZUET].

²⁸ 42 U.S.C. §§ 247d, 247d-6d(b)(1).

²⁹ U.S. Gov't Accountability Off., GAO-08-751, Approval and Oversight of the Drug Mifeprex 2 (2008), <https://www.gao.gov/assets/280/279424.pdf> [https://perma.cc/J63V-C6CY]; Memorandum from Ctr. for Drug Evaluation & Rsch. to Sandra P. Arnold, Vice President, Corp. Affs., Population Council, 1 (Sept. 28, 2000), https://www.accessdata.fda.gov/drugsatfda_docs/appltr/2000/20687appltr.pdf [https://perma.cc/36XJ-FFZA]; 21 U.S.C. § 355-1(a)(1), (f)(2); id. § 355(b)(1), (d); 42 U.S.C. § 247d-6d(b).

³⁰ Original Complaint at 12, *Texas v. Becerra*, No. 22-cv-00185, 2022 WL 18034483 (N.D. Tex. Nov. 15, 2022), ECF No. 1 (challenging Department of Health and Human Services Secretary Becerra's post-*Dobbs* guidance on major questions grounds).

I. JUDICIAL CONSTRAINTS ON ADMINISTRATIVE AUTHORITY

This Part discusses three constraints on agencies' authority that have gained recent prominence. Section I.A discusses a potential limitation on agencies' authority most associated with the Constitution: the nondelegation doctrine. Section I.B turns to the Supreme Court's recent trend of constraining agencies through finding statutes to be unambiguous. Finally, Section I.C introduces the major questions doctrine, focusing on the Supreme Court's major questions cases decided prior to 2021.

A. Nondelegation: Constitutional Law as Constraint

One tool the courts may use to constrain agency authority is the nondelegation doctrine, under which Congress may not authorize agencies to exercise legislative power. While the nondelegation doctrine has only been used in two cases that were both decided in 1935, several Justices on the current Supreme Court have indicated an interest reviving it.³¹

For almost 150 years after the Founding, the federal courts did not invalidate statutes on the ground that they delegated too much authority to agencies or the president.³² Then, in 1935, the Court invalidated two federal statutes on nondelegation grounds.³³ In *Panama Refining Co. v. Ryan*, the Court held that a provision of the National Industrial Recovery Act unconstitutionally delegated authority to the president to prohibit the transportation of oils taken above established quotas.³⁴ And in *A.L.A. Schechter Poultry Corp. v. United States*, the Court held unconstitutional another provision in the National Industrial Recovery Act authorizing the president to approve codes of fair competition proposed by certain trade associations.³⁵

Since those cases, the Court has not invalidated any statute on the ground that it delegates too much power. Rather, the Court has reaffirmed that to avoid an unconstitutional delegation, Congress need only provide

³¹ Julian Davis Mortenson & Nicholas Bagley, Delegation at the Founding, 121 Colum. L. Rev. 277, 278–79 (2021).

³² Id. at 282–83; Keith E. Whittington & Jason Iuliano, The Myth of the Nondelegation Doctrine, 165 U. Pa. L. Rev. 379, 422 (2017).

³³ The Court expressed nondelegation concerns about another statute that it invalidated on Commerce Clause grounds. *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936).

³⁴ 293 U.S. 388, 389, 430 (1935).

³⁵ 295 U.S. 495, 541–42 (1935).

an intelligible principle to guide the agency's discretion, and most statutory guidance will count. Indeed, the Court has found that merely directing agencies to regulate in the public interest or to adopt standards requisite to protect the public health suffice as intelligible principles.³⁶

However, change may be afoot. A number of Justices signaled a renewed interest in policing congressional delegations to agencies in *Gundy v. United States*.³⁷ *Gundy* rejected a nondelegation challenge to a provision of the Sex Offender Registration and Notification Act (“SORNA”) that authorized the Attorney General to “specify the applicability of the requirements” of the Act to persons convicted of sex offenses before SORNA was enacted.³⁸ Writing for a plurality of four Justices, Justice Kagan applied a permissive version of the intelligible principle standard and also defended it.³⁹ In dissent, Justice Gorsuch indicated he would have overruled the intelligible principle standard and placed greater limits on Congress's ability to delegate issues to agencies.⁴⁰ For Justice Gorsuch, the Constitution allows Congress to enlist agencies in “filling up [the] details” of a legislative scheme (among other things) but prohibits broader delegations.⁴¹ In that conclusion Justice Gorsuch was joined by Justice Thomas and Chief Justice Roberts.⁴² Justice Alito voted to reject the nondelegation challenge in *Gundy*, but he expressed an openness to revisiting the intelligible principle standard in a future case when doing so would not result in an evenly divided Court (the Court heard oral argument in the case before Justice Kavanaugh was confirmed).⁴³ Subsequently, in a statement regarding a denial of certiorari in another case, Justice Kavanaugh indicated an openness to reviving some form of the nondelegation doctrine.⁴⁴

³⁶ *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 473–76 (2001).

³⁷ 139 S. Ct. 2116, 2130–31 (2019) (Alito, J., concurring in the judgment); *id.* at 2131 (Gorsuch, J., dissenting).

³⁸ *Id.* at 2121–22 (plurality opinion).

³⁹ *Id.* at 2123, 2129–30.

⁴⁰ *Id.* at 2135–36 (Gorsuch, J., dissenting).

⁴¹ *Id.* at 2148.

⁴² *Id.* at 2131.

⁴³ *Id.* at 2131 (Alito, J., concurring in the judgment).

⁴⁴ *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (statement of Kavanaugh, J., respecting the denial of certiorari).

B. Limitations on Chevron: Finding Statutes to Be Unambiguous

Whereas the nondelegation doctrine would prohibit Congress from investing agencies with certain kinds of discretion, other tools allow the courts to conclude that Congress simply has not, as a matter of statutory interpretation, allowed the agency to make the relevant choice. These tools have largely related to the *Chevron* framework. Under that framework, courts are generally supposed to defer to administrative agencies' reasonable interpretations of ambiguous provisions in statutes they administer.⁴⁵ The formal doctrinal articulation of the *Chevron* framework has two steps.⁴⁶ The first asks "whether Congress has directly spoken to the precise question at issue."⁴⁷ If Congress has directly spoken to the issue, courts follow Congress's directives.⁴⁸ If, however, the statute is ambiguous, courts proceed to the second step, at which point they are supposed to defer to the agency's interpretation of the statute so long as the agency's interpretation is a "permissible" or reasonable one.⁴⁹

The *Chevron* framework has fallen out of favor with the Court's Republican-appointed Justices. Though the Court has never formally overruled it, recent trends have significantly curtailed it, especially among Supreme Court Justices.⁵⁰

The first such trend involves the Court insisting that, when deployed properly, the Court's methods of statutory interpretation resolve any purported statutory ambiguity and that a statutory provision is actually unambiguous, sometimes without even citing *Chevron* or relying on its

⁴⁵ *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).

⁴⁶ *Id.* at 842–43. Some scholars have argued that there are three steps to *Chevron*, including a "Step Zero," which asks some variation of the question of whether Congress intended to delegate interpretive authority over a given issue to an agency. See Cass R. Sunstein, *Chevron Step Zero*, 92 Va. L. Rev. 187, 191 (2006) [hereinafter Sunstein, *Step Zero*]. Some of the early major questions cases were sometimes understood to fit within this threshold inquiry. Sunstein, *Two "Major Questions" Doctrines*, *supra* note 4, at 480–82. Matthew Stephenson and Adrian Vermeule argued that *Chevron* has only one step—asking whether the agency's interpretation of the statute is reasonable. Matthew Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 Va. L. Rev. 597, 597–98 (2009).

⁴⁷ *Chevron*, 467 U.S. at 842.

⁴⁸ *Id.* at 842–43.

⁴⁹ *Id.* at 843.

⁵⁰ See, e.g., *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (suggesting that *Chevron* "seems more than difficult to square with the Constitution of the framers' design" and the time may have come "to face the behemoth").

framework.⁵¹ Taken at face value, there is nothing particularly odd about courts finding statutes to be unambiguous—it is a possibility whenever the *Chevron* framework is deployed. What’s more striking is the frequency with which the Supreme Court in particular has found statutes to have only a single, unambiguous meaning in recent terms. The Court has not clearly upheld an agency’s interpretation after reaching *Chevron*’s second step since 2016.

In these cases, the Court rules (though sometimes not in such terms) that the statute either unambiguously precludes or requires the agency’s interpretation. In *Encino Motorcars, LLC v. Navarro*, for example, the Court held that service advisors at car dealerships were not “salesm[e]n, partsm[e]n, or mechanic[s] primarily engaged in selling or servicing automobiles” under the Fair Labor Standards Act, and therefore the agency had transgressed its statutory authority when it interpreted the Act to cover them.⁵² In other cases, the Court has upheld an agency’s interpretation after seeming to find that the statute, properly interpreted, requires it.⁵³ Although in such cases the agency wins, its discretion is still reduced because the Court has held that the agency may only treat the statutory language in one particular way—it may not later change course.

C. Limitations on Chevron: The Major Questions Doctrine

In the cases discussed in Section I.B, courts simply apply the *Chevron* framework as it has existed since the Court announced it. The second increasingly prominent way of constraining agencies’ authority to interpret and implement statutes more expressly modifies the normal *Chevron* framework. In a set of cases, the Court has suggested either that an issue should not be analyzed using the *Chevron* framework because

⁵¹ See, e.g., *Am. Hosp. Ass’n v. Becerra*, 142 S. Ct. 1896, 1906 (2022) (maintaining that the Court was “employing the traditional tools of statutory interpretation” to determine whether to uphold the agency’s interpretation of the statute).

⁵² 138 S. Ct. 1134, 1138 (2018) (quoting 29 U.S.C. § 213(b)(10)(A)); see also *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1567 (2017) (interpreting the Immigration and Nationality Act to conclude that the California offense of “unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator” did not qualify as “sexual abuse of a minor”).

⁵³ See *Becerra v. Empire Health Found.*, 142 S. Ct. 2354, 2362 (2022) (concluding, somewhat peculiarly, that the agency had “correctly construe[d] the statutory language” in its regulations). That phrasing is curious because, under *Chevron*, the agency’s interpretation would not have to be correct; in order to be upheld, it would just have to be reasonable. Thus, what the Court appeared to be saying—without really saying it—was that the statute was unambiguously in the agency’s favor.

Congress did not authorize agencies to resolve the issue due to its majorness, or that the *Chevron* analysis operates differently because the agency policy is a major one.⁵⁴

These cases have come to be known as the major questions doctrine. Though it has roots in earlier cases such as *MCI Telecommunications Corp. v. AT&T*,⁵⁵ the major questions inquiry was most clearly incorporated into the *Chevron* framework in *FDA v. Brown & Williamson Tobacco Corp.*⁵⁶ There, the Court concluded that “Congress [had] directly spoken to the issue” of whether the FDA had the authority to regulate tobacco products under the Food, Drug, and Cosmetic Act.⁵⁷ The Court held that the FDA did not have that authority; as part of its analysis, the Court explained that its analysis at step one of *Chevron* was “shaped, at least in some measure, by the nature of the question presented,” which the Court described as whether the FDA had the authority “to ban cigarettes and smokeless tobacco,” the sale of which constituted a major sector of the American economy.⁵⁸ Notably, the Court made these statements only after seeming to conclude that the statute unambiguously foreclosed the agency’s interpretation on other grounds. And the reasons it gave for its skepticism still sounded in congressional intent: in the Court’s view, the

⁵⁴ These cases reflect, in part, the intentionalist strand of “*Chevron* step zero,” which asks whether Congress intended to delegate an agency interpretive authority over the question at issue. See *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001); Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 *Geo. L.J.* 833, 836–37 (2001) (arguing that *Chevron* extends only as far as Congress allows it); Sunstein, *Step Zero*, *supra* note 46, at 191 (explaining that there is sometimes a “Step Zero” inquiry which asks whether *Chevron* applies at all).

⁵⁵ 512 U.S. 218 (1994); see Coenen & Davis, *supra* note 3, at 787 n.33. In a recent article, Louis Capozzi argues that the major questions doctrine—and indeed what we term its “new” form—has deeper historical roots than previously acknowledged. See Louis J. Capozzi III, *The Past and Future of the Major Questions Doctrine*, 84 *Ohio St. L.J.* 191, 214 n.177 (2023). We do not believe that the pre-*Chevron* case law as clearly supports the doctrine in its present form. See Ronald M. Levin, *The Major Questions Doctrine: Unfounded, Unbounded, and Confounded*, *Calif. L. Rev.* (forthcoming 2023) (manuscript at 9), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4304404 [<https://perma.cc/WWS5-SGNZ>]; Mila Sohoni, *The Major Questions Quartet*, 136 *Harv. L. Rev.* 262, 263 (2022) (“While ostensibly applying existing major questions case law, the quartet in actuality altered the doctrine of judicial review of agency action in its method and content, in ways that will have momentous consequences.”). But in any event, the critiques we develop below do not depend on the historical provenance of the doctrine, and when we distinguish between “new” and “old” forms of the major questions doctrine we mean the comparison to be between cases decided since *Chevron*.

⁵⁶ See Coenen & Davis, *supra* note 3, at 787.

⁵⁷ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

⁵⁸ *Id.* at 159–60.

Food, Drug, and Cosmetic Act’s context, read in conjunction with other statutes passed by Congress and perhaps a dose of common sense, revealed that Congress did not really intend to authorize something as “major” as the banning of tobacco productions, which the Court took to be the consequence of the FDA’s position.⁵⁹

Subsequently, in *Utility Air Regulatory Group v. EPA (UARG)*, the Court also appeared to locate the major questions doctrine within *Chevron*.⁶⁰ In that case, the Court evaluated the EPA’s conclusion that various greenhouse gases were “air pollutants” for purposes of two Clean Air Act programs and that major stationary sources of greenhouse gas therefore had to comply with those programs’ requirements.⁶¹ After finding that the statute was ambiguous in the relevant respect, the Court concluded that the agency’s interpretation was “unreasonable”—seemingly at step two of *Chevron*—because it “would bring about an enormous and transformative expansion in EPA’s regulatory authority without clear congressional authorization” and have significant implications on “the national economy.”⁶²

Whereas *Brown & Williamson* and *UARG* seemed to resolve matters within the *Chevron* framework, in *King v. Burwell* the Court applied the doctrine to take the question wholly outside *Chevron*. In that case, the Court addressed the Internal Revenue Service’s (“IRS”) position that it was authorized to issue tax credits to individuals who had purchased health insurance on federally run health insurance exchanges.⁶³ Early in its opinion, the Court concluded that the IRS’s interpretation was not entitled to *Chevron* deference. Issuing tax credits would involve “billions of dollars in spending each year and affect[] the price of health insurance for millions of people.”⁶⁴ Moreover, in the Court’s view, the IRS was not particularly expert on the matter.⁶⁵ On those grounds, the Court announced that it would not defer to the IRS’s view and would undertake the statutory interpretation analysis *de novo*.⁶⁶ Applying *de novo* review, the Court found that the statute was ambiguous regarding the availability of tax credits on federal exchanges but that the statutory purpose favored

⁵⁹ See *id.*

⁶⁰ *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 315 (2014).

⁶¹ *Id.* at 307.

⁶² *Id.* at 322–24.

⁶³ *King v. Burwell*, 576 U.S. 473, 479 (2015).

⁶⁴ *Id.* at 485.

⁶⁵ *Id.* at 486.

⁶⁶ *Id.*

their availability.⁶⁷ The Court thus authorized the expenditure of the very same billions of dollars in expenditures that had been among the grounds for denying the agency deference. The major questions doctrine did not factor into the Court's own, independent analysis.

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

II. A NEW CONSTRAINT: THE NEW MAJOR QUESTIONS DOCTRINE

This Part unpacks the three most recent cases in which the Court has used the major questions doctrine, all from the October term 2021 or the summer before. It shows how the Court has begun to use the major questions doctrine as a rule that alters the very enterprise of statutory interpretation—not simply by factoring majorness into the *Chevron* analysis or by justifying a court in applying *de novo* review, but by requiring a particular form of statutory clarity when an agency seeks to take certain actions. It also highlights how the Court assesses whether a policy is major. Section II.A unpacks the cases; Section II.B synthesizes and compares them to previous major questions cases and to other ways of constraining agencies' interpretive authority.

A. *The Evolving Major Questions Doctrine*

This Section discusses the evolution of the major questions doctrine over October term 2021. That evolution was precipitated by a challenge

⁶⁷ *Id.* at 498.

to the Centers for Disease Control and Prevention’s (“CDC”) eviction moratorium, and it continued on through challenges to the Occupational Safety and Health Administration’s test-or-vaccine policy and the Environmental Protection Agency’s authority to require “generation shifting” measures in order to tackle climate change.

1. CDC Eviction Moratorium

The Court’s refashioning of the major questions doctrine began with a case challenging the CDC’s moratorium on evictions—a policy created as a response to the COVID-19 pandemic.⁶⁸ The Public Health Service Act authorizes the Surgeon General, with the approval of the Secretary of Health and Human Services:

to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession. For purposes of carrying out and enforcing such regulations, the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary.⁶⁹

In the challenge, the six Justices appointed by Republican presidents all (apparently) concluded that the Public Health Service Act did not authorize the CDC to establish an eviction moratorium in high-transmission areas as the pandemic entered into one of its spikes.⁷⁰ In the section discussing the merits of the challenge, the Court started with a single paragraph asserting that the “broad authority” granted to the CDC in the statute’s first sentence was narrowed by the statute’s second sentence, which listed particular measures the CDC could take to control diseases.⁷¹ That paragraph contains the extent of the Court’s

⁶⁸ *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2486 (2021).

⁶⁹ 42 U.S.C. § 264(a).

⁷⁰ The decision was a per curiam opinion issued on the shadow docket and the only three Justices noting their dissents were Justices Breyer, Sotomayor, and Kagan. *Ala. Ass’n of Realtors*, 141 S. Ct. at 2486, 2490 (Breyer, J., dissenting, joined by Sotomayor & Kagan, JJ.).

⁷¹ *Id.* at 2488 (per curiam).

interpretation of the statute without reference to the major questions doctrine.

After acknowledging the statutory text, the Court framed the next several paragraphs around its articulation of the major questions doctrine, seemingly as something like an alternative basis for the Court's holding. The Court declared that "[e]ven if the text were ambiguous, the sheer scope of the CDC's claimed authority . . . would counsel against the Government's interpretation."⁷² That is because, the Court explained, the Court "expect[s] Congress to speak clearly when authorizing an agency to exercise powers of 'vast economic and political significance.'"⁷³

The Court then spent paragraph after paragraph explaining why it believed the eviction moratorium compromised various constitutional values, apparently to explain why the issue or policy involved was major.⁷⁴ The Court explained that the "vast economic . . . significance" of the moratorium stemmed in part from the "financial burden[s] on landlords."⁷⁵ But the Court also pointed to the potentially dramatic future consequences that may occur if the agency's assertion of authority was upheld. The Court claimed that, under the Government's interpretation, "[i]t is hard to see what measures this interpretation would place outside the CDC's reach," since "the Government has identified no limit in § 361(a) beyond the requirement that the CDC deem a measure 'necessary.'"⁷⁶ The Court also relied on the novelty of the moratorium as an indication of its majorness, noting that the policy was "unprecedented."⁷⁷

In some ways, the eviction moratorium case was in line with major questions cases that came before. The Court claimed that the text leaned against the agency's interpretation—or perhaps foreclosed it—even absent invocation of the major questions doctrine. But partly what was

⁷² Id. at 2489.

⁷³ Id. (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

⁷⁴ In balancing the equities in the case, the Court asserted that "preventing [landlords] from evicting tenants who breach their leases intrudes on one of the most fundamental elements of property ownership—the right to exclude." Id. The Court also claimed that the moratorium implicated values of federalism and intruded on states' authority, since the states primarily regulate "the landlord-tenant relationship." Id. The Court explained: "Our precedents require Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property." Id. (quoting *U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1849–50 (2020)).

⁷⁵ Id. (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324).

⁷⁶ Id.

⁷⁷ Id.

notable about the opinion was the relatively small space given to traditional interpretive tools—reading the grant of authority to the CDC in light of the statute’s specific examples of measures the agency could take—versus the Court’s reasons for concluding the rule was major, such as the novelty of the regulation and the breadth of the Government’s theory of agency authority. The former modes of analysis speak to the meaning of the text; the latter, by contrast, may not—they instead provide substantive reasons why the Court should avoid interpreting the text in a particular way. And the relative airtime given to the latter compared to the former suggested that the Court’s proffered reasons for skepticism of the agency’s regulation may have considerably swayed in the outcome.

2. *Vaccine Cases*

The major questions doctrine appeared to be an even more significant driver of the Supreme Court’s decision regarding the Occupational Safety and Health Administration’s (“OSHA”) emergency temporary standard issued in response to the COVID-19 pandemic. The standard required indoor workplaces with more than one hundred employees to adopt a testing and masking regimen, or, alternatively, establish a vaccination requirement.⁷⁸ The Court stayed the OSHA regulation, and both the per curiam opinion and Justice Gorsuch’s concurrence relied heavily on the idea that the rule represented a major policy requiring particularly clear authorization.⁷⁹ Of note, one of the main reasons that the opinions treated the policy as major was because of its politically controversial nature.

Enacted in 1970, the Occupational Safety and Health (“OSH”) Act “authoriz[ed] the Secretary of Labor to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce.”⁸⁰ Congress stated that one of the statute’s objectives was to “develop[] innovative methods, techniques, and approaches for dealing with occupational safety and health problems”;⁸¹ another was to “achiev[e] safe and healthful working conditions.”⁸² To that end, the OSH Act authorizes the Secretary of Labor to “promulgate[]” “occupational safety or health standard[s],”⁸³ meaning a standard that is “reasonably

⁷⁸ *NFIB v. OSHA*, 142 S. Ct. 661, 662 (2022).

⁷⁹ *Id.* at 665–67.

⁸⁰ 29 U.S.C. § 651(b)(3).

⁸¹ *Id.* § 651(b)(5).

⁸² *Id.* § 651(b)(2); see *id.* § 651 (b)(1).

⁸³ *Id.* § 655(a).

necessary or appropriate to provide safe or healthful employment and places of employment.”⁸⁴

While occupational safety or health standards generally must go through the ordinary regulatory process, including notice and comment, the OSH Act also authorized the agency to issue “an emergency temporary standard to take immediate effect” if the Secretary “determines (A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger.”⁸⁵ In response to the COVID-19 pandemic, OSHA issued an emergency temporary standard requiring employers with at least one hundred employees to require that employees working indoors at a workplace with at least one hundred employees either (1) be vaccinated against COVID-19 or (2) take a weekly COVID-19 test and wear a mask at work.⁸⁶

The per curiam opinion in *National Federation of Independent Business v. Department of Labor, Occupation Safety & Health Administration (NFIB v. OSHA)* concluded that OSHA’s rule was not authorized under the statute’s general grant of regulatory authority,⁸⁷ and for the first time in the doctrine’s history, the Court framed its entire analysis of the statutory question around the major questions doctrine. In the opening paragraph of the section beginning that analysis, the Court declared that OSHA’s rule was “no ‘everyday exercise of federal power,’” but rather “a significant encroachment into the lives—and health—of a vast number of employees.”⁸⁸ And, picking up on language from the CDC case, the Court described the consequence of that determination: “We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance.”⁸⁹ The Court declared that there was “little doubt” that

⁸⁴ Id. § 652(8).

⁸⁵ Id. § 655(c)(1).

⁸⁶ COVID-19: Vaccination, Testing, and Face Coverings, 86 Fed. Reg. 61402, 61551–53 (Nov. 5, 2021).

⁸⁷ The majority did not limit its conclusion to the agency’s statutory authority to promulgate emergency temporary standards. *NFIB v. OSHA*, 142 S. Ct. 661, 666 n.1 (2022).

⁸⁸ Id. at 665 (quoting *In re MCP No. 165*, 20 F.4th 264, 272 (6th Cir. 2021) (Sutton, C.J., dissenting from the denial of initial hearing en banc)).

⁸⁹ Id. (quoting *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam)).

OSHA’s rule “qualifies as an exercise of such authority.”⁹⁰ That conclusion drove the standard the Court applied to interpreting the statute: because the rule was major, the Court explained, “[t]he question . . . is whether the Act plainly authorizes the Secretary’s mandate.”⁹¹

Figuring out how the Court went about deciding that the statute did not plainly authorize the rule—and what work the major questions doctrine did exactly—takes a bit of unpacking.

The Court’s statutory analysis was mostly contained in a single short paragraph, much of which relied on italicization, establishing that OSHA allows the Secretary to set workplace standards. The Court substantiated its conclusion that the OSH Act empowered the Secretary “to set *workplace* safety standards, not broad public health measures,”⁹² by citing two provisions in the Act, one of which referred to “occupational safety and health standards,” and the other to “employees.”⁹³ (The Court italicized the word “occupational” in “occupational safety and health standards” to make the point.⁹⁴) The Court confirmed this conclusion by gesturing toward provisions in the Act that “speak to hazards that employees face at work.”⁹⁵ (One provision refers to “working conditions,”⁹⁶ another to “work situations,”⁹⁷ and another to “workplace or environment where work is performed.”⁹⁸)

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

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* (citing 29 U.S.C. § 655(b), (c)(1)); see also *id.* (citing 29 U.S.C. §§ 652(8), 654(a)(2), 655(b)–(c)) (emphasizing the “text of the agency’s Organic Act”).

⁹⁴ *Id.* (citing 29 U.S.C. § 655(b)).

⁹⁵ *Id.*

⁹⁶ 29 U.S.C. § 653(b)(1).

⁹⁷ *Id.* § 651(a).

⁹⁸ *Id.* § 657(a)(1).

gather”; it was accordingly a “hazard[] of daily life” and a “day-to-day danger[].”⁹⁹

This is where the major questions doctrine as a “clear statement” rule seems to have done some work. Although limiting words like “unique” or “particular” are not contained in the Act, the majority appeared to believe that the Act did not clearly empower the Secretary to address dangers that can be characterized as societal as opposed to workplace specific. In other words, the major questions doctrine allowed the Court to move from the claim that the OSH Act allows OSHA to regulate dangers in the workplace to a related but distinct conclusion that the OSH Act allows OSHA to regulate only those dangers that are unique to the workplace, or somehow uniquely tied to the workplace—even in the absence of statutory language pointing in that direction. Although Congress had not explicitly limited OSHA’s authority in that respect, Congress also had not specifically granted OSHA authority to regulate hazards that appear in the workplace or in other contexts like it, including through measures such as vaccine mandates. And because under the new major questions doctrine the onus is on Congress to explicitly grant authority in its particulars, the doctrine operated to terminate the agency’s authority.

The rest of the per curiam opinion’s analysis of the statutory question focused even less on the language in the statute and more on the value-laden interpretive tools that the Court had deployed in the CDC case in order to justify the application of the major questions doctrine. For example, similar to the CDC case, the opinion noted that OSHA “has never before adopted a broad public health regulation of this kind.”¹⁰⁰ In doing so, the Court invoked cases suggesting that the novelty of a federal statute is a sign that the statute is unconstitutional, declaring that the “lack of historical precedent” is a “telling indication” that OSHA’s rule “extends beyond the agency’s legitimate reach.”¹⁰¹

Justice Gorsuch, joined by Justice Thomas and Justice Alito, wrote a separate concurrence that focused even less on ordinary textualist tools of statutory interpretation to determine whether the OSHA rule was

⁹⁹ *NFIB v. OSHA*, 142 S. Ct. at 665; see also *id.* at 665–66 (suggesting OSHA could regulate “[w]here the virus poses a special danger because of the particular features of an employee’s job or workplace” or where “the danger present in such workplaces differs in both degree and kind from the everyday risk of contracting COVID-19 that all face”).

¹⁰⁰ *Id.* at 666.

¹⁰¹ *Id.* (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 505 (2010)).

authorized by statute.¹⁰² First, Justice Gorsuch pointed to Congress's more recent inaction, and specifically Congress's failure to enact a vaccination (or testing and masking) requirement while Congress was passing legislation related to COVID-19.¹⁰³ He described that as evidence that Congress, in the OSH Act, did not authorize OSHA to enact a vaccination (or testing and masking) requirement.¹⁰⁴ Relatedly, Justice Gorsuch relied on a subsequent resolution of the Senate which had disapproved of OSHA's rule.¹⁰⁵ That too is a form of subsequent legislative history, and it was also adopted by only one chamber of Congress and not signed into law by the President.¹⁰⁶

Justice Gorsuch's concurrence also wielded the major questions doctrine in a similar way to how the per curiam opinion relied on the doctrine. It too framed its analysis of the statute around the rule that Congress must "'speak clearly' if it wishes to assign to an executive agency decisions 'of vast economic and political significance.'"¹⁰⁷ In addition to the preceding analysis, Justice Gorsuch noted that the OSH Act "was not adopted in response to the pandemic," and that "OSHA arguably is not even the agency most associated with public regulation."¹⁰⁸ And Justice Gorsuch, like the majority, relied on OSHA's regulatory history, arguing that OSHA had previously adopted "only comparatively modest rules addressing dangers uniquely prevalent inside the workplace, like asbestos and rare chemicals,"¹⁰⁹ which suggested it lacked the power to enact more far-reaching rules.

¹⁰² Cf. Anita Krishnakumar, Some Bright Thoughts on Gorsuch's Opinion in *NFIB v. OSHA*, Election L. Blog (Jan. 15, 2022, 8:06 AM), <https://electionlawblog.org/?p=126944> [<https://perma.cc/Z6ND-325G>] (describing "how stunningly atextual Justice Gorsuch's concurring opinion (and for that matter, the per curiam opinion) was").

¹⁰³ *NFIB v. OSHA*, 142 S. Ct. at 667–68 (Gorsuch, J., concurring).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Professor John Manning has argued that textualists should generally limit the interpretation of statutes to language that made it through the bicameralism and presentment requirements. See John F. Manning, Textualism as a Nondelegation Doctrine, 97 Colum. L. Rev. 673, 706–07 (1997).

¹⁰⁷ *NFIB v. OSHA*, 142 S. Ct. at 667 (Gorsuch, J., concurring) (quoting Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) (per curiam)).

¹⁰⁸ *Id.* at 668.

¹⁰⁹ *Id.*

3. *Climate Cases*

The major questions doctrine emerged in even more fully realized form in *West Virginia v. EPA*.¹¹⁰ The procedural posture and precise challenge at issue in the case are complicated: the Supreme Court was reviewing a U.S. Court of Appeals for the District of Columbia Circuit decision that had vacated two Trump Administration rules, one rescinding the Obama Administration's Clean Power Plan and the second imposing requirements related to equipment upgrades and operating practices on coal-fired power plants.¹¹¹ The Court's analysis, however, ultimately turned on the legality of the Clean Power Plan.

The Clean Air Act's ("CAA") complicated regulatory scheme authorizes the EPA to establish performance standards for new stationary sources in Section 111. For sources that "cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare," the agency must promulgate "[f]ederal standards of performance for new sources."¹¹² A standard of performance "reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any non-air quality health and environmental impact and energy requirements) the [EPA] Administrator determines has been adequately demonstrated."¹¹³ After the EPA establishes new source standards, it must then address existing sources if they are not regulated under the CAA's other programs.¹¹⁴ It also does so by identifying the "best system of emission reduction" that the agency determines is "adequately demonstrated."¹¹⁵

In October 2015, the EPA announced the Clean Power Plan, which consisted of rules for new power plants as well as existing ones. For existing coal-fired power plants, the Clean Power Plan included three kinds of requirements—one required practices that would burn coal more efficiently; the other two were "generating shifting" requirements that required some transition to methods of electricity production that emit

¹¹⁰ 142 S. Ct. 2587, 2595 (2022).

¹¹¹ *Id.* at 2593–94.

¹¹² 42 U.S.C. § 7411(b)(1)(A)–(B).

¹¹³ *Id.* § 7411(a)(1).

¹¹⁴ *Id.* § 7411(d)(1); Structure of the CAA and Pre-1990 Section 112 Exclusion, 80 Fed. Reg. 64711 (Oct. 23, 2015).

¹¹⁵ *West Virginia v. EPA*, 142 S. Ct. at 2599 (quoting 42 U.S.C. § 7411(a)(1)).

less carbon dioxide.¹¹⁶ The EPA explained that methods other than generation shifting were generally inferior in reducing greenhouse gas emissions and that generation shifting had been adequately demonstrated to be the best system of emission reduction, taking into account cost, health, and other factors.

In *West Virginia v. EPA*, the Court declared that the Clean Power Plan was not authorized by statute. Once again, as in the OSHA case, the Court began its analysis of the agency's authority under the statutes by framing the entire case around the major questions doctrine. The Court explained that while "[i]n the ordinary case," the "nature of the question presented" "has no great effect on the appropriate analysis," in "extraordinary cases," the Court uses "a different approach."¹¹⁷ In those extraordinary cases, the Court explained "the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority."¹¹⁸

The Court acknowledged that, in prior major questions cases, the "regulatory assertions had a colorable textual basis."¹¹⁹ But, the Court declared, it "presume[s] that 'Congress intends to make major policy decisions itself, not leave those decisions to agencies.'"¹²⁰ And so, "in certain extraordinary cases," "something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to 'clear congressional authorization' for the power it claims."¹²¹

The majority then proceeded to explain why "this is a major questions case."¹²² The Court declared that the provision authorizing the agency to regulate existing power plants not already regulated under other EPA programs was an "ancillary provision."¹²³ The Court explained that the agency's assertion of authority "allowed it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact

¹¹⁶ Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64512, 64662, 64727–28, 64731–32 (Oct. 23, 2015).

¹¹⁷ *West Virginia v. EPA*, 142 S. Ct. at 2608 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

¹¹⁸ *Id.* (quoting *Brown & Williamson*, 529 U.S. at 159–60).

¹¹⁹ *Id.* at 2609.

¹²⁰ *Id.* (quoting *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc)).

¹²¹ *Id.* (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

¹²² *Id.* at 2610.

¹²³ *Id.* (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001)).

itself.”¹²⁴ The Court also, once again, relied on the seeming novelty of the agency’s assertion of authority, claiming that prior to 2015, the EPA had only regulated sources by reducing the sources’ pollution rather than requiring sources to transition to other methods of energy production.¹²⁵ After characterizing the EPA’s regulatory approach as “unprecedented,” the Court highlighted possible implications of the EPA’s regulatory approach: it explained that if the EPA could require generation shifting, “it could go further, perhaps forcing coal plants to ‘shift’ away virtually all of their generation.”¹²⁶ And the Court characterized it as “surprising” that Congress would have assigned to the EPA the task of “balancing the many vital considerations of national policy implicated in deciding how Americans will get their energy.”¹²⁷

After ticking off all of these reasons for why the agency’s rule was major, the Court declared that “precedent counsels skepticism toward EPA’s claim” that the statutory provision authorizes it to adopt “a generation shifting approach.”¹²⁸ Rather, “the Government must—under the major questions doctrine—point to ‘clear congressional authorization’ to regulate in that manner.”¹²⁹

Having framed the inquiry this way, the Court concluded the statute did not provide such clear authorization. The Court characterized the word “system” as “an empty vessel” and a “vague statutory grant . . . not close to the sort of clear authorization required.”¹³⁰ And that was that.

Justice Gorsuch concurred, joined by Justice Alito.¹³¹ He characterized the major questions doctrine as a “clear-statement rule[]” that “operates to protect foundational constitutional guarantees,”¹³² and specifically the “separation of powers.”¹³³ The major questions doctrine, he wrote, makes sure that Congress resolves major issues through legislation.¹³⁴ He

¹²⁴ Id.; id. at 2614 (“Congress, however, has consistently rejected proposals to amend the Clean Air Act to create such a program.”).

¹²⁵ Id. at 2595.

¹²⁶ Id. at 2612.

¹²⁷ Id. at 2612–13.

¹²⁸ Id. at 2614.

¹²⁹ Id. (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

¹³⁰ Id.

¹³¹ Id. at 2616 (Gorsuch, J., concurring).

¹³² Id.

¹³³ Id. at 2617, 2619 (“Much as constitutional rules about retroactive legislation and sovereign immunity have their corollary clear-statement rules, Article I’s Vesting Clause has its own: the major questions doctrine.”).

¹³⁴ Id. at 2617.

explained that “[b]y effectively requiring a broad consensus to pass legislation, the Constitution sought to ensure that any new laws would enjoy wide social acceptance, profit from input by an array of different perspectives during their consideration, and thanks to all this prove stable over time.”¹³⁵ Agency rules, by contrast, “[r]ather than embody a wide social consensus and input from minority voices,” “would more often bear the support only of the party currently in power.”¹³⁶

Justice Gorsuch also elaborated on what constitutes a major policy. He started by indicating that the doctrine applies “when an agency claims the power to resolve a matter of great ‘political significance’ or end an ‘earnest and profound debate across the country.’”¹³⁷ Writing of the OSHA case in particular, Justice Gorsuch elaborated that the “agency sought to mandate COVID-19 vaccines nationwide for most workers at a time when Congress and state legislatures were engaged in robust debates over vaccine mandates.”¹³⁸ And “when Congress has ‘considered and rejected’ bills authorizing something akin to the agency’s proposed course of action[,] [t]hat too may be a sign that an agency is attempting to ‘work [a]round’ the legislative process to resolve for itself a question of great political significance.”¹³⁹

Applying these principles to the EPA’s claim of authority to adopt generation shifting requirements, Justice Gorsuch explained, made for “a relatively easy case” because “[w]hether these plants should be allowed to operate is a question on which people today may disagree.”¹⁴⁰ “Congress has debated the matter frequently” and had declined “to adopt legislation similar to the Clean Power Plan.”¹⁴¹

B. The New Major Questions Doctrine

This Section draws out some similarities and differences between the three recent major questions cases and previous cases in which the Court has invoked the doctrine. While the next Part normatively evaluates the

¹³⁵ *Id.* at 2618.

¹³⁶ *Id.*

¹³⁷ *Id.* at 2620 (first quoting *NFIB v. OSHA*, 142 S. Ct. 661, 665 (2022); and then quoting *Gonzales v. Oregon*, 546 U.S. 241, 267 (2005)).

¹³⁸ *Id.*

¹³⁹ *Id.* at 2621 (first quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 144 (2000); and then quoting *NFIB v. OSHA*, 142 S. Ct. at 668 (Gorsuch, J., concurring)).

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 2621–22.

new major questions doctrine, this Part seeks to better understand how it works as a mode of statutory interpretation—in part by comparing the doctrine to the previous tools the Court has used, or might use, to constrain agencies’ interpretive authority. Of course, given the novelty of the recent major questions cases and their (possibly intentional) ambiguity in some key questions, our description of the new doctrine is necessarily tentative. And as ever, what the new major questions doctrine comes to mean will depend on how the Court applies it in the future. But it is still important to try and excavate what the opinions seem to suggest and how they could be deployed and even weaponized in the future.

As Justice Gorsuch has stated, the core features of the new major questions doctrine resemble a clear statement rule rather than a method of resolving statutory ambiguity in the traditional sense. To be sure, viewing the major questions doctrine as requiring Congress to speak with a certain amount of clarity finds support in language used in the pre-2021 cases—*Utility Air Regulatory Group v. EPA (UARG)* cited *FDA v. Brown & Williamson Tobacco Corp.* among other cases in support of its statement that “[w]e expect Congress to speak clearly if it wishes to assign to an agency decisions of vast ‘economic and political significance.’”¹⁴² In our view, however, what we are calling the “new” major questions doctrine—and its particular clear statement rule—operates somewhat differently than prior instantiations.

Previous major questions cases used majorness in one of three ways, the first being as one tool of statutory interpretation seemingly operating within *Chevron*. Thus, in *Brown & Williamson*, the Court worked through its interpretation of the provision of federal law before also observing that the significance and novelty of the agency’s assertion of authority supported its holding that the agency’s interpretation was unambiguously foreclosed.¹⁴³ In *UARG*, the Court used the majorness of the agency’s regulation as an indicium of unreasonableness—something the *Chevron* framework turns to only if there is statutory ambiguity.¹⁴⁴

Somewhat distinctly, *King v. Burwell* used the perceived majorness of the issue to take it outside of the *Chevron* framework entirely and subject the agency’s interpretation to *de novo* review. But neither did *King* put a thumb on the scale against the agency. And in *King v. Burwell* itself, the

¹⁴² *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (quoting *Brown & Williamson*, 529 U.S. at 160).

¹⁴³ See 529 U.S. at 160–61.

¹⁴⁴ See *Util. Air Regul. Grp.*, 573 U.S. at 321.

Court found the statute ambiguous and ultimately affirmed the agency's interpretation on the basis of the Court's own view of the statute's purpose.¹⁴⁵

In the new major questions cases, by contrast, the majorness of an issue frames—and alters—the entire enterprise of statutory interpretation. Rather than being one factor to consider within the *Chevron* framework or a reason to consider the case without using *Chevron* but also without putting a thumb on the scale either way, the new major questions doctrine flips the entire analysis. The structure of the opinions partially conveys this shift: whereas *NFIB v. OSHA* and *West Virginia v. EPA* began their sections on statutory interpretation with an introduction to the major questions doctrine and the standard it established for proving the agency had authority, *Brown & Williamson* concluded its analysis of the statute with an observation about the majorness of the agency's rule. In *West Virginia v. EPA* in particular, the Court organized its entire analysis around the interpretive rule it had announced.¹⁴⁶ Indeed, as Justice Kagan noted in dissent in the *West Virginia v. EPA* case, it was “not until page 28 of a 31-page opinion that [the Court] beg[an] to seriously discuss the meaning” of the statutory provision the agency had relied on.¹⁴⁷

These structural differences confirm what the rest of the opinions make plain: in the new major questions cases, the major questions doctrine fundamentally alters the degree of certainty and clarity that is required to uphold an agency's exercise of statutory authority. The new major questions doctrine functions as a kind of carve out to an agency's broad, but generally worded authority. Congress must clearly and explicitly authorize the particular agency action at issue. If Congress has not done so, that is the end of the matter. That is how lower courts have understood the Court's new major questions cases.¹⁴⁸ It is also how the Justices who joined the majority opinions have described the doctrine at subsequent oral arguments. In *Biden v. Nebraska*, one of the challenges to President

¹⁴⁵ See 576 U.S. 473, 485–86, 490 (2015).

¹⁴⁶ See 142 S. Ct. 2587, 2600, 2610 (2022).

¹⁴⁷ *Id.* at 2634 (Kagan, J., dissenting).

¹⁴⁸ *Brnovich v. Biden*, 562 F. Supp. 3d 123, 153 (D. Ariz. 2022) (invoking clear statement version of major questions doctrine to invalidate federal contractor vaccine requirement); *Feds for Med. Freedom v. Biden*, 581 F. Supp. 3d 826, 829, 833–34 (S.D. Tex. 2022) (same to invalidate federal employee vaccine requirement), *rev'd on other grounds*, 30 F.4th 503 (5th Cir. 2022); *Louisiana v. Biden*, 585 F. Supp. 3d 840, 862–63, 865 (W.D. La. 2022) (same for executive order requiring calculation of carbon costs).

Biden's student debt cancellation, the Chief Justice offered the following formulation of the new major questions doctrine:

Just pick up on the discussion that we've been having, the breadth of the statute at issue here. How does it compare to the breadth of the statutes that were at issue in our Major Questions Doctrine, where we indicated enough even though the breadth of some of those provisions would by their terms literally cover the authority that the agency exercised, that given the nature of the authority and its consequences, that was not clear enough?¹⁴⁹

The question remains, however: how clear, exactly, must Congress be? The Court has remained somewhat cagey about the answer to this question. There are two possibilities.

First, the Court might simply be saying that an ambiguous statute will not be construed to authorize a "major" policy but that an unambiguous statute (in the normal sense) would suffice. This framing is still dramatic, as it would deny the agency authority even where the statute is ambiguous but the "best" interpretation supports the agency.

Second, the Court might be saying that, when it comes to major questions, even a broadly worded, *otherwise unambiguous* statute is not enough and that the statute must specifically grant the agency the precise authority in question.

We believe that this second formulation—requiring a statute that is not only unambiguous but specific—may be the one reflected in the cases, and in *West Virginia v. EPA* in particular, though it is yet unclear. That belief is partly rooted in the paucity of the Court's "ordinary" statutory analysis after finding a question to be major. Resolving whether a statute is ambiguous or unambiguous can be an extensive enterprise, requiring consultation of the full range of interpretive tools. But especially in *West Virginia v. EPA*, the Court gives no indication that such a wide-ranging analysis is required under the major questions doctrine. The Court did not consult any dictionaries or linguistic canons to assess the statute's meaning. Rather, the Court seems to take a "quick look" at the statute to ascertain whether the particular agency action at issue has been explicitly authorized.¹⁵⁰ That is requiring something more than that the statute be unambiguous in the normal sense. It is requiring that the authorization

¹⁴⁹ Transcript of Oral Argument at 107–08, *Biden v. Nebraska*, 143 S. Ct. 2355 (2023) (No. 22-506).

¹⁵⁰ *West Virginia v. EPA*, 142 S. Ct. at 2614.

jump off the page. Indeed, the Court even acknowledged that the EPA's generation shifting requirements "can be described as a 'system,'" which is what the statute authorized the agency to establish.¹⁵¹ What ultimately mattered is that the statute lacked a clear reference to generation shifting itself.

Nor would such strength be unheard of for a doctrine referred to as a clear statement rule. Indeed, examining other clear statement rules helps to shed light on how the new major questions doctrine differs from previous applications of it. Under an analogous "federalism" clear statement rule, Congress must clearly specify whether a law applies to state governments.¹⁵² Although (again) the Court has been cagey about just how clear Congress must be to satisfy the federalism clear statement rule, Professors Eskridge and Frickey have identified the canon as a "super-strong clear statement rule[] . . . that can be rebutted only through unambiguous statutory text *targeted at the specific problem.*"¹⁵³ Thus, if a federal statute requires employers to pay a minimum wage, but the statute does not clearly specify that "employers" include state and local government employers, the minimum wage requirement would not apply to state and local governments, even though "employer" would in ordinary language unambiguously include both public and private employers. That clear statement rule thus changes the entire enterprise of statutory interpretation: the question is not what the best interpretation of the statute is or even whether it is unambiguous in the normal sense. The question is instead whether the statute speaks with particular clarity. That is why Justice Kagan, in dissent, described the "major questions doctrine" as a "get-out-of-text-free card[]."¹⁵⁴

This version of the major questions doctrine differs from how the Court has previously used statutory interpretation to constrain agencies' authority, including in the prior major questions cases. When the Court decides whether an agency's interpretation is correct, rather than expressly analyzing the issue under the *Chevron* framework, the Court is engaged in an exercise of statutory interpretation and a search for the ordinary meaning of the statutory provision in question. Alternatively, the major questions doctrine might factor into *Chevron* by functioning as one

¹⁵¹ *Id.*

¹⁵² *Gregory v. Ashcroft*, 501 U.S. 452, 460–61 (1991).

¹⁵³ William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 *Vand. L. Rev.* 593, 611–12 (1992) (emphasis added).

¹⁵⁴ *West Virginia v. EPA*, 142 S. Ct. at 2641 (Kagan, J., dissenting).

mark against an agency's interpretation of a statute, similar to *Brown & Williamson* or *UARG*.¹⁵⁵ Or the majorness of the question might mean that courts, rather than agencies, should decide what the statute means. But in all of these examples, the Court is still trying to figure out what the enacting Congress said or intended—or, sometimes, to determine whether the agency's interpretation was not only wrong but unreasonable.¹⁵⁶

That is not true of the new major questions clear statement rule, which is less oriented around the text and less rooted in notions of what Congress or the public would have understood to be unreasonable at the time of enactment. Indeed, clear statement rules—especially in their strong form—can generate errors about what Congress said and what it meant. Take the *Gregory v. Ashcroft* federalism canon.¹⁵⁷ Before the Court announced the clear statement rule in that case, a statute that required all employers to pay a minimum wage would probably have been thought to include state and local employees. (State and local governments are employers, after all.) But under the clear statement rule, interpreting the

¹⁵⁵ See, e.g., *Loving v. Internal Revenue Serv.*, 742 F.3d 1013, 1014, 1016, 1021 (D.C. Cir. 2014) (invoking major questions doctrine after deploying other tools of statutory interpretation); *Nat. Res. Def. Council v. Abraham*, 355 F.3d 179, 199 (2d Cir. 2004) (applying doctrine to support conclusion based on plain language); *Merck & Co. v. Dep't of Health & Hum. Servs.*, 962 F.3d 531, 540 (D.C. Cir. 2020) (applying doctrine as fourth and final indicator of unreasonableness under *Chevron* step two); *New Mexico v. Dep't of the Interior*, 854 F.3d 1207, 1224, 1226 (10th Cir. 2017) (applying doctrine only after determining that “the text of [the Indian Gaming Regulatory Act] is explicit”).

¹⁵⁶ This is how lower courts understood the major questions doctrine before the three most recent cases discussed in the Article—as requiring a court to determine whether a provision is ambiguous, and also as requiring a court to apply ordinary rules of statutory interpretation to discern the meaning of an ambiguous provision governing a major question. See, e.g., *ClearCorrect Operating, LLC v. Int'l Trade Comm'n*, 801 F.3d 1283, 1286, 1290 (Fed. Cir. 2015) (concluding provision was not ambiguous, invoking *King v. Burwell*); *Cuthill v. Blinken*, 990 F.3d 272, 279, 286 (2d Cir. 2021) (same); *Texas v. United States*, 809 F.3d 134, 183 n.191 (5th Cir. 2016), *aff'd by an equally divided court*, 136 S. Ct. 2271 (same); *Vullo v. Off. of the Comptroller of the Currency*, 378 F. Supp. 3d 271, 292 (S.D.N.Y. 2019) (same), *rev'd and remanded sub nom. Lacewell v. Off. of the Comptroller of the Currency*, 999 F.3d 130 (2d Cir. 2021); *Chamber of Comm. v. Dep't of Lab.*, 885 F.3d 360, 369, 388 (5th Cir. 2018) (same and alternatively holding the interpretation unreasonable); *In re Gateway Radiology Consultants, P.A.*, 983 F.3d 1239, 1255 n.8 (11th Cir. 2020) (invoking *King* for the proposition that courts rather than agencies would resolve statutory ambiguity in major questions cases).

¹⁵⁷ 501 U.S. 452, 452 (1991); see *West Virginia v. EPA*, 142 S. Ct. at 2621 (Gorsuch, J., concurring).

words that Congress used in their normal sense is not enough.¹⁵⁸ A clear statement rule requires something else, something like specificity or explicitness about a particular result.

For this reason, the new major questions doctrine is decidedly less textualist than its prior incarnations. A considerable amount of scholarship has identified the less textualist features of the major questions doctrine as applied prior to 2021.¹⁵⁹ Although the “old” major questions doctrine was more closely tied to normal statutory interpretation in the ways described above, it was always partly inspired by underlying substantive (and arguably constitutional) values that were unique to a particular context—statutes empowering administrative agencies—as opposed to trans-substantive tools that assist in identifying the semantic meaning of statutory language.¹⁶⁰ As such, it required courts to draw on values that cannot be straightforwardly derived from any given piece of text. And indeed, in any of its various iterations, the major questions doctrine asks courts to consider, alongside the ordinary meaning, context, and structure of a statute, the consequences of an interpretation and whether those consequences cohere with certain precepts of our system of separated powers.¹⁶¹

¹⁵⁸ See, e.g., Richard D. Friedman & Julian Davis Mortenson, *Constitutional Law: An Integrated Approach* 505–06 (2021) (discussing the requirement that Congress make its intentions clear).

¹⁵⁹ E.g., Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 *Admin. L. Rev.* 19, 23 (2010); Beau J. Baumann, *Americana Administrative Law*, 111 *Geo. L.J.* 465, 468–69 (2023); see Natasha Brunstein & Richard L. Revesz, *Mangling the Major Questions Doctrine*, 74 *Admin. L. Rev.* 217, 256 (2022) (“The Trump Administration’s arguments [against the Clean Air Act] are part of a broader trend, under which opponents of greenhouse gas regulations attack them by invoking the major questions doctrine. These efforts are particularly unpersuasive because the text and history of the Clean Air Act show that it was written to produce exactly the results that these opponents argue are problematic.”); Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 *Minn. L. Rev.* 2019, 2035–36 (2018).

¹⁶⁰ See Anita Krishnakumar, *Reconsidering Substantive Canons*, 84 *U. Chi. L. Rev.* 825, 827 (2017).

¹⁶¹ See Baumann, *supra* note 159, at 4 (“The Court did not explain whether its major questions doctrine is grounded in some claim about how Congress ‘speaks’ in statutes or whether the Court believed it was nudging Congress to draft with greater specificity.”); Cass R. Sunstein, *Nondelegation Canons*, 67 *U. Chi. L. Rev.* 315, 316 (2000); Loshin & Nielsen, *supra* note 159, at 63 (“The notion that Congress ‘does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions’ is premised more in normative aspiration than legislative reality and is startlingly out of sync with the Court’s modern approach to statutory language.”); Emerson, *supra* note 159, at 2043–45.

But the most recent iteration of the major questions doctrine has only become less tied to the text of the statute in question.¹⁶² The major questions doctrine is now even more fully realized as a “substantive” canon of interpretation—“principles and presumptions that judges have created to protect important background norms derived from the Constitution, common-law practices, or policies related to particular subject areas”—not keyed to the meaning of the statute but rather to broader values.¹⁶³ Substantive canons differ from semantic canons that focus on the text or rules of grammar to interpret language no matter the subject area or design of the statute.¹⁶⁴

A striking indication that the major questions doctrine has moved even farther away from a focus on the meaning of enacted text is the time horizon over which the courts now assess whether an issue is major. In its contemporary form, textualism focuses on the meaning that the words of a statute would have had at the time the statute was enacted.¹⁶⁵ Were the major questions doctrine a textualist tool, one would think that courts would assess whether the Congress that enacted the statute would have understood the policy in question to be a major one (and thus requiring special authorization) at the time of the statute’s passage.¹⁶⁶

In the major questions doctrine of 2021, the Supreme Court mostly seemed to care about whether members of the public *today* would view the agency’s policy as a major one. In that form, the major questions doctrine shares some similarities with subsequent legislative history: it asks what subsequent legislatures or the broader, inter-temporal public think about the agency’s approach.

This marks a subtle but important shift from prior forms of the doctrine, which tied majorness to suppositions regarding the prevailing views at the time the statute was passed. Compare, for example, *King*, which

¹⁶² See Sunstein, Two “Major Questions” Doctrines, *supra* note 4, at 477–78 (noting that there could be two ways of understanding the major questions doctrine).

¹⁶³ Krishnakumar, *supra* note 160, at 833.

¹⁶⁴ *Id.*

¹⁶⁵ E.g., *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020) (“We must determine the ordinary public meaning of Title VII’s command To do so, we orient ourselves to the time of the statute’s adoption.”).

¹⁶⁶ Even in its origins, *FDA v. Brown & Williamson Tobacco Corp.* considered some post-enactment history. 529 U.S. 120, 150–59 (2000). But the major questions analysis appeared to turn more on the political history of cigarettes and their “portion of the American economy” dating back to the statute’s enactment. *Id.* at 159–60. *Gonzales v. Oregon* similarly relied on the political history of physician-assisted suicide that predated and was contemporaneous to the Controlled Substances Act. 546 U.S. 243, 267–68 (2006).

concluded that Congress had not assigned to the Internal Revenue Service the authority to decide whether to offer tax credits for federally created exchanges.¹⁶⁷ *King* focused on the significance of the issue in the context of the statutory scheme of which it was a part—i.e., evidence that was contemporaneous to the statute’s enactment.¹⁶⁸ *King*, of course, was decided not too long after the passage of the relevant statute. But that was not true of *UARG*, which similarly determined that the agency’s assertion of authority in that case “would render the statute ‘unrecognizable to the Congress that designed’ it.”¹⁶⁹ In both cases, therefore, the Court purported to render its majorness determination—and the reasonability or un-reasonability of the agency’s interpretation—by reference to the public (or the Congress) that existed at the time the statute was passed.

The approach in those cases differs from the 2021 cases, which rooted majorness in more presentist concerns—recent congressional inaction or simply a sense of the present-day controversy surrounding a particular policy. Take *Alabama Ass’n of Realtors v. Department of Health & Human Services*, which interpreted the CDC’s authority under the 1944 Public Health Service Act.¹⁷⁰ In that case, the Court focused on how and why the agency’s asserted authority was major from the perspective of the present day. The monetary costs of the order and the number of people potentially shielded from eviction by the order were of course expressed in present-day terms.¹⁷¹ But the Court’s parade of horrors was also devoid of any historical grounding. For example, the Court expressed disbelief that the statutory authorization would allow the agency to “mandate free grocery delivery” or “provide free computers.”¹⁷² Perhaps those applications—or whatever their historical analogues might be—would prove startling to 1914 Americans. But the Court gives no reason, apart from its members’ own presently grounded intuitions, for concluding that they would be.

The other recent agency case involving COVID-19, *NFIB v. OSHA*, reasoned similarly. There, the Court interpreted OSHA’s authority under

¹⁶⁷ *King v. Burwell*, 576 U.S. 473, 486 (2015).

¹⁶⁸ See *id.* at 485–86.

¹⁶⁹ *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (emphasis added) (quoting Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31514, 31555 (June 3, 2010)).

¹⁷⁰ 141 S. Ct. 2485, 2486–87 (2021).

¹⁷¹ *Id.* at 2489.

¹⁷² *Id.*

the 1970 OSH Act.¹⁷³ There too, the Court relied on the present-day numbers of persons affected by OSHA’s rule.¹⁷⁴ But more strikingly, the Court simply asserted that a vaccine mandate is “a significant encroachment into the lives—and health—of a vast number of employees.”¹⁷⁵ That judgment barely hides the fact that it is grounded in the public debates of the present. To be clear, we have no idea whether, in 1970, a vaccine mandate (let alone a vaccine-or-testing mandate, as OSHA’s rule was) would have been viewed to be as severe of an encroachment on liberty as some view it to be today. But the Court gave no indication that it cared to know.

The Court’s recent focus on the present-day “majorness” of an agency policy also distinguishes the new major questions doctrine from the traditional “mischief rule.”¹⁷⁶ Under the mischief rule, courts consider the problem that the statute was meant to address, and they may limit the application of otherwise broad statutes in light of that problem. Some of the pre-2021 major questions cases have a similar flavor.¹⁷⁷ In *UARG*’s telling, Congress’s focus in the Clean Air Act was on “a relative handful of large sources capable of shouldering heavy substantive and procedural burdens.”¹⁷⁸ Because (absent the tailoring rule) the agency’s interpretation swept in many other categories of sources, it was unreasonable.¹⁷⁹ As in these cases, the mischief rule is fundamentally backward looking—courts use it to read statutory language “in the context of the problem to which the statute was addressed” in an effort to “decide what it was that Congress had actually done.”¹⁸⁰ It is possible that cases like *West Virginia v. EPA* could be rewritten in such terms, but attention

¹⁷³ *NFIB v. OSHA*, 142 S. Ct. 661, 662–63 (2022).

¹⁷⁴ *Id.* at 665.

¹⁷⁵ See *id.* (“This is no ‘everyday exercise of federal power.’” (quoting *In re MCP No. 165*, 20 F.4th 264, 272 (6th Cir. 2021) (Sutton, C.J., dissenting))).

¹⁷⁶ See generally Samuel L. Bray, *The Mischief Rule*, 109 *Geo. L.J.* 967 (2021) (reviewing the “mischief rule,” its functions, and its general applicability to today’s statutory interpretation debates).

¹⁷⁷ See *id.* at 1011 (noting that “the major questions doctrine has an essential similarity with the mischief rule”).

¹⁷⁸ *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 322 (2014).

¹⁷⁹ *Id.* at 310. Without invoking the canonical major questions cases, the U.S. Court of Appeals for the District of Columbia Circuit struck a similar chord in *ACA International v. FCC*, 885 F.3d 687 (D.C. Cir. 2018). There, the court noted that the agency’s interpretation would have subjected widely used smartphones to the prohibitions contained in the Telephone Consumer Protection Act, vastly expanding the scope of the Act outside of the domain with which Congress was concerned. See *id.* at 698.

¹⁸⁰ Bray, *supra* note 176, at 1002.

to the mischief has not been the primary concern in the new major questions doctrine cases. The drivers are much more firmly presentist.

The temporal slipperiness of the new major questions doctrine undercuts its textualist bona fides in other ways as well. The new major questions doctrine allows the Court to deem a statute ambiguous or require explicit authorization *ex post* when Congress passed the statute against a different, more generous jurisprudential backdrop.

For some of the same reasons, we find Justice Barrett's recent attempt to root the doctrine in textualism to be unconvincing. Justice Barrett's concurrence in *Biden v. Nebraska*, which invalidated President Biden's student debt relief program, pushed back against depicting the major questions doctrine as a clear statement rule.¹⁸¹ She argued instead that the doctrine "emphasize[s] the importance of *context* when a court interprets a delegation" and is therefore "a tool for discerning—not departing from—the text's most natural interpretation."¹⁸² But that attempted reframing does not do a better job of accounting for how the Court has used the doctrine in recent cases. In fact, it does not make sense of several features of the current doctrine. For example, the political controversy surrounding an agency rule or regulation, which the Court relied on in the student debt relief challenge, is not really context for the statute as it was adopted; neither is the apparent novelty of a rule or regulation, which the Court also relied on in that case.¹⁸³ And, as Justice Kagan pointed out in dissent, the actual contextual clues about the meaning of the statute in *Biden v. Nebraska*, such as the centrality of the delegatory provision, weighed in favor of the agency's regulation.¹⁸⁴ Finally, the key premise of Justice Barrett's argument is that Congress generally does not intend to kick the most consequential, difficult, or controversial policy questions to agencies, but there is reason to be skeptical of that premise.¹⁸⁵

Nor does the new major questions doctrine appear to rest on a particularly textual form of constitutional interpretation. One possible justification for the doctrine is that it is a means of enforcing a revived

¹⁸¹ 143 S. Ct. 2355, 2376–78 (2023) (Barrett, J., concurring).

¹⁸² *Id.* at 2376.

¹⁸³ *Id.* at 2382–83.

¹⁸⁴ *Id.* at 2398 n.3 (Kagan, J., dissenting).

¹⁸⁵ See *id.* at 2383–84 (Barrett, J., concurring). But see Matthew C. Stephenson, Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies, 91 Va. L. Rev. 93, 140–41 (2005) (describing institutional incentives to delegate); Edward H. Stiglitz, Delegating for Trust, 166 U. Pa. L. Rev. 633, 653 (2018) ("[I]t is often in the elected representative's interest to delegate to administrative agencies.").

nondelegation doctrine.¹⁸⁶ But despite some Justices' efforts to tie the major-questions-doctrine-as-clear-statement rule to the values underlying the nondelegation doctrine,¹⁸⁷ the clear statement rule, at least as it has been articulated thus far, operates differently than the nondelegation doctrine (either the current version or the revived one). Under current precedent, Congress may constitutionally delegate authority to agencies if it supplies them with an "intelligible principle" to guide their discretion, and most any criteria, even broad, vague ones, suffice as intelligible principles.¹⁸⁸ As described above, some Justices would revive the nondelegation doctrine to place greater constraints on Congress that would require Congress to "make[] the policy decisions when regulating private conduct" and only allow Congress to rely on "another branch to 'fill up the details.'" ¹⁸⁹

The new major questions doctrine does not clearly "enforce" either form of the nondelegation doctrine.¹⁹⁰ In the major questions cases to date, the doctrine requires Congress only to clearly specify a particular mode or method of regulation as a *permissible* one.¹⁹¹ Congress may still be able to provide vague terms for when an agency may adopt that mode or method of regulation. For example, in the vaccine cases, Congress might have said that "the agency can impose a vaccine requirement for all workers when it concludes it would be necessary to avoid grave danger." That provision would seem to satisfy the Court's new major questions cases with respect to whether OSHA could adopt a vaccination requirement for everyone in the workplace, satisfying the major questions rule. But that provision would still allow an agency to impose obligations on third parties based on an agency's determination, rather than

¹⁸⁶ See Gocke, *supra* note 2, at 994 (describing the major questions doctrine in these terms, but not defending it). One response might be that the nondelegation doctrine itself is not well-grounded in constitutional text and history, but we can put that to the side for now.

¹⁸⁷ E.g., *West Virginia v. EPA*, 142 S. Ct. 2587, 2619–20 (2022) (Gorsuch, J., concurring); *NFIB v. OSHA*, 142 S. Ct. 661, 667 (2022) (Gorsuch, J., concurring) (arguing that the federal government must "act consistently with the Constitution's separation of powers").

¹⁸⁸ *Mortenson & Bagley*, *supra* note 31, at 283; *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 474–75 (2001).

¹⁸⁹ *Gundy v. United States*, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting).

¹⁹⁰ Mila Sohoni recently made the provocative claim that the Court's major questions cases enforce an exclusive delegation doctrine, rather than a nondelegation doctrine. Sohoni, *supra* note 55, at 306–07. Under the exclusive delegation doctrine, articulated by Thomas Merrill, only Congress may delegate legislative power. Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 *Colum. L. Rev.* 2097, 2099 (2004).

¹⁹¹ For a summary of these cases, see *supra* Section II.A.

Congress's, and so it would not satisfy proponents of a reinvigorated nondelegation doctrine.¹⁹²

For similar reasons, the major questions doctrine does not operate to avoid a constitutional nondelegation issue. Under the constitutional avoidance canon, which also can operate as a super-strong clear statement rule, the courts are instructed to avoid interpretations of statutes that would raise a constitutional issue.¹⁹³ Applied in the agency context, one way to think about constitutional avoidance is as follows: If the statute had clearly and explicitly said what the agency is interpreting the statute to mean, would that require the court to resolve a constitutional question? If yes, constitutional avoidance applies and provides a reason to reject the agency's interpretation. The major questions doctrine, however, does not avoid a constitutional issue in this way. Let's return to the vaccine mandate example. Assume for sake of argument that no one contends that the statute granting OSHA power to promulgate emergency standards if it makes certain findings violates the nondelegation doctrine. (It actually does not matter if you agree or not.) OSHA interprets the statute to provide it with the authority to mandate vaccines. Then ask the question above: Had Congress explicitly granted such authority—say by including “and this power extends to mandating vaccines” in the statute—would that raise a nondelegation problem? Not any more so than the underlying statute under current doctrine, and not any less than the underlying statute under a revived nondelegation doctrine. The findings required are the same; it is only the methods of regulation that have been altered.

Thus, the major questions doctrine, at least as articulated thus far, does not itself prohibit agencies from exercising delegated authority under open-ended guidelines. It just requires Congress to specifically list potentially major things an agency might do pursuant to those open-ended guidelines. As the next Part discusses, that is still a significant practical limit on agencies' authority: the clear statement rule increases the obstacles to delegation (in particular, it makes them more difficult to carry out and therefore less likely to be used effectively). But the new major questions doctrine does not avoid constitutional issues with broad or

¹⁹² *Gundy*, 139 S. Ct. at 2139 (Gorsuch, J., dissenting) (urging the Court to reject the intelligible principle standard, which allows agencies to impose requirements on third parties based on broadly defined criteria).

¹⁹³ See Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 Harv. L. Rev. 2109, 2115–18 (2015) (explaining constitutional avoidance doctrine).

open-ended delegations to agencies. As the closing section of *West Virginia v. EPA* said: “A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body.”¹⁹⁴

* * *

With these developments laid out, it is interesting to compare and contrast the new major questions cases with the absurdity doctrine.¹⁹⁵ Both doctrines attempt, in a way, to constrain statutes when a literal reading of the text may support a seemingly severe or counterintuitive outcome. But the new major questions doctrine is even more fundamentally anti-textual than the traditional absurdity doctrine.

Under the absurdity doctrine, if an interpretation of a statute would “lead[] to an absurd result,” the statute “must be so construed as to avoid the absurdity.”¹⁹⁶ Professor John Manning has argued forcefully that the Court’s version of the absurdity doctrine rests on an explicit form of intentionalism or purposivism—specifically, under the absurdity doctrine, the absurdity of an interpretation (a value judgment made by judges) provides evidence that the interpretation is contrary to Congress’s intentions.¹⁹⁷ Manning has also argued that there are strong *formalist* objections to the absurdity doctrine, and that textualists should want to use the doctrine rarely, and only upon very clear showings of absurdity.¹⁹⁸

Today, the major questions doctrine also seems to rest on a similar kind of conjecture about the legislature. It assumes Congress would not license agency acts with “major” effects through broad general language.¹⁹⁹ As a descriptive claim about Congress’s intent, that statement is contestable, at least when applied across the board.²⁰⁰ But, notably, the major questions

¹⁹⁴ 142 S. Ct. 2587, 2616 (2022) (emphasis added).

¹⁹⁵ See John F. Manning, *The Absurdity Doctrine*, 116 Harv. L. Rev. 2387, 2387 (2003).

¹⁹⁶ *Church of the Holy Trinity v. United States*, 143 U.S. 457, 460 (1892).

¹⁹⁷ Manning, *supra* note 195, at 2485–86.

¹⁹⁸ *Id.*

¹⁹⁹ See sources cited *supra* note 159 (describing the anti-formalist major questions doctrine).

²⁰⁰ See Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 Stan. L. Rev. 725, 733 (2014) (using survey to show that some version of the major questions doctrine might be consistent with congressional drafters’ expectations). But see Levin, *supra* note 55, at 34–35 (questioning whether the survey results accurately reflect statutory meaning in many cases); Blake Emerson, “Policy” in the Administrative Procedure Act: Implications for Delegation, Deference, and Democracy, 97 Chi.-Kent. L. Rev. 113, 134–35 (2022) (arguing the major questions doctrine is inconsistent with the legislative history of the Administrative Procedure Act); Ryan D. Doerfler, *Who Cares How Congress Really Works?*,

doctrine appears to be even more vulnerable to Manning's formalist critique of the absurdity doctrine because it is deployed more often and based on weaker evidence.

Most significantly, the major questions doctrine turns on a dramatically lower threshold for establishing the relevant "absurdity" (or perceived oddity) than the traditional absurdity doctrine does. In traditional absurdity cases, the standard courts use is that the absurdity must be "absolutely clear."²⁰¹ Moreover, the relevant absurdity is supposed to be somewhat objective, in the sense that it should be clear to most everyone.²⁰² Yet the Court requires nothing approximating that degree of certainty regarding the perceived oddity of an agency's interpretation or application of a statute. Rather, in the context of the major questions doctrine, the Court seems to be willing to reject an agency's interpretation or application of a statute based only on its conclusion that the agency's application is major in the eyes of the Court, or in the eyes of some participants in the political process, not by reference to some unmistakable absurdity.²⁰³

This allows the Court to reach similar results as it would if applying the absurdity doctrine—the deviation from what otherwise would be supported under the text of the statute—but shoulder a much weaker burden of justification when doing so. If the consequences of the agency's interpretation or application of the statute were truly absurd—and if that absurdity were absolutely clear to most every reasonable person—then the absurdity doctrine would have constrained the agency's interpretation of the statute. But because that standard was (obviously) not satisfied in

66 Duke L.J. 979, 979–80 (2017) (questioning whether statutory interpretation principles must align with congressional expectations).

²⁰¹ *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 82 (1994) (Scalia, J., dissenting); see Manning, *supra* note 195, at 2459 n.265 (suggesting that "textualists' focus on context may support at least a narrow version" of the scrivener's error doctrine); Ryan D. Doerfler, *The Scrivener's Error*, 110 Nw. U. L. Rev. 811, 811 (2016).

²⁰² See *Pub. Citizen v. U.S. Dep't of Just.*, 491 U.S. 440, 470–71 (1989) (Kennedy, J., concurring in the judgment) ("[The absurdity canon] remains a legitimate tool of the Judiciary, however, only as long as the Court acts with self-discipline by limiting the exception to situations where the result of applying the plain language would be, in a genuine sense, absurd, *i.e.*, where it is quite impossible that Congress could have intended the result, and where the alleged absurdity is so clear as to be obvious to most anyone." (citation omitted)).

²⁰³ See, e.g., *NFIB v. OSHA*, 142 S. Ct. 661, 666 (2022) (describing OSHA's policy as "a broad public health regulation"); *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (describing the CDC's eviction moratorium as "of 'vast economic and political significance'" and accordingly invoking the major questions doctrine (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014))).

the major questions cases, the major questions doctrine supplied a vehicle to constrain the agency's authority, allowing the Justices to rely on an assessment that the agency's interpretation or application of the statute was merely "surprising" (to the Justices in the majority) and therefore required a more explicit authorization from Congress. That is a dramatic expansion of a doctrine justifying courts in departing from statutes' texts.

III. ASSESSING THE NEW MAJOR QUESTIONS DOCTRINE

This Part offers an initial, critical assessment of the recent developments in the major questions doctrine. It focuses on the increasing importance that certain evidence has taken on with respect to assessing whether a rule is major—in particular, the perceived political significance of a rule, as well as the extent to which a rule differs from previous rules that the agency has adopted—in conjunction with the clear statement nature of the doctrine as described in the previous Part. We show how the Court's new indicia of majorness could exacerbate institutional and political pathologies, undermine the ostensible premises of the major questions doctrine, and frustrate agency action in circumstances where the enacting Congress is most likely to have wanted an agency to have regulatory latitude and where open-ended delegations are most likely to be an effective tool.

Section III.A focuses on the pathologies created by the Court's attention to the political significance of an agency policy. It shows how, in politically polarized times, this aspect of the major questions doctrine allows the "majorness" determination to piggyback on societal controversies. This dynamic has the potential to effectively allow present-day controversies—often ginned up by political parties and movements more broadly—to generate exceptions to otherwise broad statutory grants of authority to agencies, all outside of formal lawmaking channels. Section III.A also unpacks the pathologies that this indicium of majorness contributes to, including how it exacerbates the constitutional system's skew toward minority rule and how it may undermine the doctrine's own purported bases.²⁰⁴ It further demonstrates how the new version of the

²⁰⁴ See, e.g., Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 *Yale L.J.* 346, 346 (2016) (illustrating how separation of powers doctrine vacillates between rules and standards); Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 *U. Chi. L. Rev.* 1819, 1839 (2016) ("This is the moment, to put it provocatively, when the theory begins to cannibalize itself.").

major questions doctrine is transparently and inescapably linked to political judgments made by judges.

Section III.B focuses on the pathologies created by the Court's attention, when determining majorness, to regulatory novelty and the potential future implications of the agency's theory of statutory authority. It shows how this approach to majorness hobbles agencies' ability to exercise delegated authority in circumstances where Congress would have the most reason to rely on delegations to agencies and where delegated authority would be most likely to be effective, which turns the doctrine into a de-regulatory cudgel. It also raises concerns about how this version of the major questions doctrine gives the appearance of faux minimalism but actually may result in fewer checks on the Court's authority to render politically infused judgments.

While this Part analyzes the Court's new indicia of majorness, it is worth emphasizing just how unclear the Court's assessment of majorness has been. The Court has not spelled out how important each indicium of majorness is, or how much weight it places on any one indicium alone. Although none of the factors appear to be sufficient, by themselves, to elevate a policy to major status,²⁰⁵ it remains unclear which factors or how many factors are required to determine a policy is major. Ultimately, the Court may be engaged in a loose, multi-factor sliding scale analysis that takes account of the various indicia of majorness and the extent to which each factor suggests a rule is major. And the looseness of the Court's majorness inquiry, coupled with the manipulability of some of the particular indicia of majorness, means that some of the individual indicium of majorness may have an outsized importance in individual cases.

A. Politics, Partisanship, and Minority Rule

This Section unpacks the implications of the Court's willingness to declare an agency policy major—and thus to require clear congressional authorization for it—based in part on whether the policy is politically controversial. This aspect of the new major questions doctrine has the potential to make it so that generating controversy surrounding a policy can cause courts to deviate from how they would otherwise interpret a

²⁰⁵ See, e.g., *Mayes v. Biden*, 67 F.4th 921, 934–35 (9th Cir. 2023) (rejecting the argument that *West Virginia v. EPA* established multiple independent factors that are individually “sufficient” to trigger application of the major questions doctrine).

statute, effectively allowing entities to unmake and amend laws by polarizing an issue and making it “major.” This doctrinal structure could enable and embolden a political party to use politicking rather than the legislative process to constrain agency authority. But a political party or movement need not *consciously* adopt such a strategy for that result to occur. The application of the new major questions doctrine has that effect anytime it is triggered by the perceived present-day controversy surrounding an issue. And this anti-textual mechanism of altering statutes may exacerbate several known pathologies in the political process and work to undermine the separation of powers principles purportedly undergirding the new major questions doctrine.

1. Political Significance and Majorness

Both the Supreme Court and the lower courts’ recent applications of the major questions doctrine suggest that a policy can be major, and accordingly require explicit congressional authorization, when the policy is politically significant or controversial.

Consider, as one example, the Supreme Court’s decision staying OSHA’s emergency temporary standard requiring employers with more than one hundred employees to impose a test-and-mask rule for unvaccinated workers, or require vaccination.²⁰⁶ Quoting from the Court’s prior decision invalidating the CDC’s eviction moratorium, the Court declared that “[w]e expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance.”²⁰⁷

A large part of the Court’s analysis characterized vaccine requirements in ways that reflected various objections to vaccination requirements that had been raised in the political process. For example, favorably quoting Chief Judge Sutton of the U.S. Court of Appeals for the Sixth Circuit, the Court declared that vaccines were “no ‘everyday exercise of federal power.’”²⁰⁸ The Court described vaccines as “a significant encroachment

²⁰⁶ *NFIB v. OSHA*, 142 S. Ct. at 662. The rule was limited to employees working indoors in close proximity with others. It also contained medical and religious exemptions. COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61402, 61472 (Nov. 5, 2021).

²⁰⁷ *NFIB v. OSHA*, 142 S. Ct. at 665 (quoting *Ala. Ass’n of Realtors*, 141 S. Ct. at 2489).

²⁰⁸ *Id.* (quoting *In re MCP No. 165*, 20 F.4th 264, 272 (6th Cir. 2021) (Sutton, C.J., dissenting)).

into the lives—and health” of employees.²⁰⁹ Only when the Court went on to consider the equities in the case did it note possible compliance costs with the OSHA standard.²¹⁰

The lower court opinions in cases about the OSHA rule used similarly politically charged language in order to explain why OSHA’s policy was a major one. The Fifth Circuit decision staying the OSHA rule described it as a “sweeping pronouncement[] on matters of public health” that “affect[ed]” people “in the profoundest of ways.”²¹¹ The Fifth Circuit opinion explicitly noted that the standard “purports to definitively resolve one of today’s most hotly debated political issues” as a reason why the case involved a major question.²¹² Judge Larsen’s dissenting opinion in the Sixth Circuit’s OSHA case, which would have stayed the OSHA rule, reasoned similarly. Characterizing the significance of what OSHA did, Judge Larsen noted: “A vaccine may not be taken off when the workday ends; and its effects, unlike this rule, will not expire in six months.”²¹³

The oral arguments at the Supreme Court echoed language that sounded in the register of policy objections to vaccine requirements or characterizations that reflected contingent present-day political arguments. Justice Alito observed that the OSHA vaccination rule “affects employees all the time.”²¹⁴ Justice Alito also pointed to the

²⁰⁹ Id. Again quoting favorably from Chief Judge Sutton’s opinion, the Court observed that “[a] vaccination, after all, ‘cannot be undone at the end of the workday.’” Id. (quoting *In re MCP No. 165*, 20 F.4th at 274 (Sutton, C.J., dissenting)).

²¹⁰ Id. at 666. The Court stated, despite the standard for granting stays, that it was “not our role to weigh such tradeoffs,” a hasty observation consistent with the Court’s hasty dispatching of the law on remedies in emergency applications. Id.; see also Texas’s Unconstitutional Abortion Ban and the Role of the Shadow Docket: Hearing Before the S. Comm. on the Judiciary, 117th Cong. 13, 26–27 (2021) (statement of Stephen I. Vladeck, Charles Alan Wright Chair in Federal Courts, University of Texas Law School). Similarly, in the CDC eviction moratorium case, the Court had explicitly noted that “the issues at stake” with the moratorium “are not merely financial,” in explaining why the case involved a major question that required explicit congressional authorization. *Ala. Ass’n of Realtors*, 141 S. Ct. at 2489.

²¹¹ *BST Holdings, LLC v. Occupational Safety & Health Admin.*, 17 F.4th 604, 611 (5th Cir. 2021).

²¹² Id. at 617.

²¹³ *In re MCP No. 165*, 21 F.4th 357, 397 (6th Cir. 2021) (Larsen, J., dissenting). Chief Judge Sutton likewise characterized vaccines as “a medical procedure that cannot be removed at the end of the shift.” *In re MCP No. 165*, 20 F.4th at 268 (Sutton, C.J., dissenting).

²¹⁴ Transcript of Oral Argument at 103, *NFIB v. OSHA*, 142 S. Ct. 661 (2022) (No. 21A244).

“risks” of vaccination and the possibility that some people “will suffer adverse consequences.”²¹⁵

The courts’ characterization of vaccine mandates closely resembled those voiced by Republicans in political debates surrounding COVID-19. At a conference with anti-vaccine activists, for example, President Donald Trump’s son Eric Trump attacked vaccine requirements, saying: “Do you want to be left alone or not?”²¹⁶ President Trump himself posed a challenge to vaccination requirements in these terms: “[We] have our freedoms.”²¹⁷ Commentators asked how “effective” and “necessary” the vaccine was.²¹⁸ And people expressed part of their concern about vaccines as a desire to “be[] able to kind of control something.”²¹⁹

The Court’s reasoning in *West Virginia v. EPA* also drew on present-day objections to generation shifting requirements in order to explain the political significance of the rule. The Court explained that “the fact that the same basic scheme EPA adopted ‘has been the subject of an earnest and profound debate across the country’” indicated that the EPA’s rule was major.²²⁰ And in his concurrence explaining when an issue was to be considered major, Justice Gorsuch noted points in time at which “certain States were considering” the issues involved and others “when Congress and state legislatures were engaged in robust debates” over them.²²¹

This analysis differs from how previous major questions cases had analyzed whether an issue was major. Most of the earlier cases purported

²¹⁵ *Id.* at 105–06; see also *id.* at 107 (“There is a risk, right?”). Justice Gorsuch made similar points during the oral argument in *Biden v. Missouri*, the challenge to the Centers for Medicare and Medicaid Services’ vaccination requirement for workers at federal healthcare facilities. Transcript of Oral Argument at 40–41, *Biden v. Missouri*, 142 S. Ct. 647 (2022) (No. 21A240) (suggesting that, because the vaccination acts “with respect to employees and actions they must take outside of the work environment,” Congress might “also implement regulations about exercise regimes, sleep habits, medicines and supplements that must be ingested by hospital employees”).

²¹⁶ Geoff Brumfiel, Inside the Growing Alliance Between Anti-Vaccine Activists and Pro-Trump Republicans, NPR (Dec. 6, 2021, 5:00 AM), <https://www.npr.org/2021/12/06/1057344561/anti-vaccine-activists-political-conference-trump-republicans> [<https://perma.cc/244G-FFKL>].

²¹⁷ Yamiche Alcindor, Mike Fritz, Rachel Wellford & Murrey Jacobsen, Why 41 Percent of Republicans Don’t Plan to Get the COVID Vaccine, PBS (Mar. 19, 2021, 6:30 PM), <https://www.pbs.org/newshour/show/why-41-percent-of-republicans-dont-plan-to-get-the-covid-vaccine> [<https://perma.cc/WS5A-D7AF>].

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *West Virginia v. EPA*, 142 S. Ct. 2587, 2614 (2022) (quoting *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006)).

²²¹ *Id.* at 2620 (Gorsuch, J., concurring).

to identify major questions based on whether an agency rule was economically significant and would result in substantial compliance costs or dramatically expand the reach of a regulatory regime. In *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, sometimes identified as the ur-source of the doctrine, Justice Stevens's plurality opinion concluded that OSHA lacked the authority to prohibit concentrations of benzene of one part per million of air, and impose medical testing requirements on workplaces that contain 0.5 parts per million of air.²²² The Court described the benzene standard as "an expensive way of providing some additional protection for a relatively small number of employees," noting that OSHA had estimated the standard would "require capital investments . . . of approximately \$266 million, first-year operating costs . . . of \$187 million to \$205 million and recurring annual costs of approximately \$34 million."²²³ Similarly, in *Utility Air Regulatory Group v. EPA (UARG)*, when the Court invalidated the EPA's emission standards for greenhouse gases from certain stationary sources for purposes of the relevant programs, the Court construed the agency's statutory authority in light of the economic costs from the agency action.²²⁴ The Court described the "calamitous consequences" from the EPA's interpretation of the statute—"annual administrative costs would swell from \$12 million to over \$1.5 billion; and decade-long delays in issuing permits would become common, causing construction projects to grind to a halt nationwide."²²⁵ And in *FDA v. Brown & Williamson Tobacco Corp.*, when the Supreme Court first articulated the major questions doctrine to support its conclusion that the FDA lacked the statutory authority to regulate tobacco, the Court similarly focused on the economic costs of interpreting the agency's statutory authority a particular way.²²⁶ The Court characterized the issue as whether the agency had "jurisdiction to regulate an industry constituting a significant portion of the American economy," including by outright prohibiting cigarettes and smokeless tobacco.²²⁷

We do not mean to champion the use of compliance costs or related metrics in assessing the majorness of an agency policy. But they do differ

²²² 448 U.S. 607, 608 (1980).

²²³ *Id.* at 628–29.

²²⁴ 573 U.S. 302, 322 (2014).

²²⁵ *Id.* at 321–22.

²²⁶ 529 U.S. 120, 121 (2000).

²²⁷ *Id.* at 159.

from the more overtly values-based criteria on display in the more recent cases. Indeed, in those cases, the federal courts' sense that vaccines were politically controversial, and therefore a major question, partially reflected a sustained campaign to politicize COVID-19 vaccines. Former President Trump consistently downplayed the threat posed by the virus, likening it to the flu, branding it a hoax, and accusing Democrats of politicizing it,²²⁸ and other Republican leaders and commentators followed suit.²²⁹ They suggested that the immune system can fight off the virus without the vaccine,²³⁰ and that the vaccine contributes to—rather than prevents—the contraction of, and death by, COVID-19.²³¹ Republican commentators have analogized vaccine mandates to behavior attributed to Nazis during World War II,²³² and some Republican-

²²⁸ Toby Bolsen & Risa Palm, *Politicization and COVID-19 Vaccine Resistance in the U.S.*, 188 *Progress in Molecular Biology & Translational Sci.* 81, 83 (2022); see also Tamara Keith, *Timeline: What Trump Has Said and Done About the Coronavirus*, NPR (Apr. 21, 2020, 5:00 AM), <https://www.npr.org/2020/04/21/837348551/timeline-what-trump-has-said-and-done-about-the-coronavirus> [<https://perma.cc/2X4Z-ZZ5V>] (comparing Trump's statements about the virus in the early months of the pandemic to his Administration's).

²²⁹ See, e.g., Laurie Kellman, *Iowa Sen. Joni Ernst Suggests COVID-19 Numbers Are Inflated by Health Care Providers for Profit*, Chi. Trib. (Sept. 2, 2020, 4:29 PM), <https://www.chicagotribune.com/coronavirus/ct-nw-joni-ernst-coronavirus-numbers-fake-20200902-xlydfywwzckvklce3gcc54ws4-story.html> [<https://perma.cc/J4NT-8XBM>] (statement of Republican Sen. Joni Ernst) (“These health care providers and others are reimbursed at a higher rate if COVID is tied to it, so what do you think they’re doing?”); Oliver Darcy, *Fox Business Parts Ways with Trish Regan, Host Who Dismissed Coronavirus as ‘Impeachment Scam,’* CNN Bus. (Mar. 27, 2020, 5:56 PM), <https://www.cnn.com/2020/03/27/media/trish-regan-fox-news/index.html> [<https://perma.cc/8WDZ-7C9F>] (discussing conservative news host Trish Regan's statements that the “liberal media” was using COVID-19 to “demonize and destroy” Trump to hurt his chances of reelection).

²³⁰ See Bill Glauber, *Republican U.S. Sen. Ron Johnson Uses God in One of Multiple Attempts at Sowing Doubt over the Efficacy of the COVID-19 Vaccines*, Milwaukee J. Sentinel (Jan. 7, 2022, 3:16 PM), <https://www.jsonline.com/story/news/2022/01/07/wisconsin-sen-ron-johnson-again-questions-proven-success-vaccines/9129753002/> [<https://perma.cc/3EDF-VP3L>] (statement of Republican Sen. Ron Johnson) (“Why do we think that we can create something better than God in terms of combating disease? Why do we assume that the body's natural immune system isn't the marvel that it really is?”).

²³¹ See, e.g., Gerrard Kaonga, *Tucker Carlson Suggests Vaccinated More Likely to Get COVID*, Newsweek (Jan. 6, 2022, 5:18 AM), <https://www.newsweek.com/tucker-carlson-fox-news-coronavirus-vaccine-covid-19-1666199> [<https://perma.cc/9FN5-52WZ>] (statement of Tucker Carlson) (“[I]t seems like the shot makes it more likely that you are going to get COVID . . .”); William Vaillancourt, *Charlie Kirk Suggests COVID Vaccines Are to Blame for America's High Death Rate*, Daily Beast (Feb. 8, 2022, 1:02 PM), <https://www.thedailybeast.com/charlie-kirk-goes-on-tucker-carlson-to-suggest-covid-vaccines-are-to-blame-for-high-death-rates?ref=scroll> [<https://perma.cc/2VKS-G5CQ>].

²³² Yelena Dzhanova, *Tucker Carlson Relates COVID-19 Vaccine Mandates to Nazi Experiments on Human Subjects in Concentration Camps*, Bus. Insider (Jan. 22, 2022, 11:26

controlled states have banned vaccine mandates altogether.²³³ The COVID-19 vaccination rate of a given geographical location is effectively a proxy for the party affiliation of its voters.²³⁴

2. *Implications*

This Subsection spells out the implications of the courts' increased focus on the political significance or controversy of a given agency policy.

a. Political Significance and Separation of Powers

The Court's attention to whether an agency rule is politically controversial allows ideological opponents of particular policies to, whether deliberately or not, effectively unmake portions of a statute delegating authority to an agency. This feature undermines one of the doctrine's foremost justifications—namely, that the doctrine ensures issues are resolved in the legislative process, rather than outside of it—and it is in tension with other aspects of the Court's separation of powers jurisprudence.

The focus in the new major questions doctrine on whether an agency policy is “politically controversial” is one of the more anti-formalist elements of the doctrine despite its purported grounding in a formalist

AM), <https://www.businessinsider.com/tucker-carlson-compares-vaccine-mandates-to-nazi-medical-experiments-2022-1> [<https://perma.cc/R33D-CTUA>]; see also Tiffany Hsu & Marc Tracy, On Podcasts and Radio, Misleading COVID-19 Talk Goes Unchecked, *N.Y. Times* (Nov. 12, 2021), <https://www.nytimes.com/2021/11/12/business/media/coronavirus-misinformation-radio-podcasts.html> [<https://perma.cc/524A-5RE3>] (stating that former Pennsylvania State Representative Sam Rohrer compared the promotion of the COVID-19 vaccine to Nazi tactics).

²³³ See State Efforts to Ban or Enforce COVID-19 Vaccine Mandates and Passports, *Nat'l Acad. for State Health Pol'y* (Dec. 27, 2022), <https://www.nashp.org/state-lawmakers-submit-bills-to-ban-employer-vaccine-mandates/> [<https://perma.cc/HV3V-7XWT>].

²³⁴ See Geoff Brumfiel, Emily Kwong & Rebecca Ramirez, What's Driving the Political Divide Over Vaccinations, *NPR* (Dec. 9, 2021, 12:30 AM), <https://www.npr.org/2021/12/08/1062476574/whats-driving-the-political-divide-over-vaccinations> [<https://perma.cc/476E-J2ZG>] (finding that counties that largely voted for Trump have had mortality rates nearly three times that of counties that voted for Biden, which “appears to be driven by a partisan divide in vaccination rates”); see also Don Albrecht, Vaccination, Politics, and COVID-19 Impacts, *22 BMC Pub. Health* 1, 9 (2022), <https://doi.org/10.1186/s12889-021-12432-x> [<https://perma.cc/G4ZS-MUGV>] (stating that, “[b]ecause Republican . . . leaders have downplayed the virus and failed to encourage vaccination, Republican leaning counties have failed to implement safety measures, failed to get a high proportion of residents vaccinated, and as a consequence suffered higher COVID-19 case and death rates”).

view of the constitutional separation of powers. As with all canons, the major questions doctrine only matters in the set of cases in which the court would have reached another result but for the application of the canon. By making the courts' interpretation depend in part on the present-day significance of the rule, the major questions doctrine allows political activity outside of formal lawmaking channels to affect the outcome of cases. Especially if the major questions doctrine results in a court deviating from the best or even the otherwise unambiguous meaning of the statute in question, this allows entities to functionally amend statutes through political opposition rather than by doing what would otherwise be required: passing legislation.

That fact undermines one of the major questions doctrine's purported main values—that it returns issues to the legislative process for resolution. In his concurrence in the OSHA case, for example, Justice Gorsuch wrote that “the major questions doctrine . . . ensures that the national government's power to make the laws that govern us remains where Article I of the Constitution says it belongs—with the people's elected representatives.”²³⁵ He went on: “There are some ‘important subjects, which must be entirely regulated by the legislature itself.’”²³⁶ But when whether an agency issue is major itself depends on political debate, the Court allows non-Article I processes to affect the resolution of the issues before it.

In this respect, the major questions doctrine sits uneasily alongside some of the Court's major separation of powers precedents. Consider, by way of contrast, *Immigration & Naturalization Service v. Chadha*²³⁷ and *Clinton v. City of New York*,²³⁸ both of which invalidated actions that the Court described as amending laws outside of the ordinary legislative process.²³⁹ In *Chadha*, the Court struck down the so-called legislative veto, a mechanism by which one house of Congress could overrule the Immigration and Naturalization Service's immigration determination

²³⁵ NFIB v. OSHA, 142 S. Ct. 661, 668 (2022) (Gorsuch, J., concurring).

²³⁶ Id. at 670 (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825)).

²³⁷ 462 U.S. 919 (1983).

²³⁸ 524 U.S. 417 (1998).

²³⁹ *Chadha*, 462 U.S. at 954; *Clinton*, 524 U.S. at 438. To be sure, these conclusions are debatable, particularly in *Clinton*; our point is only to highlight that it is a general proposition that laws cannot be amended except for through the legislative process of bicameralism and presentment. See, e.g., Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2366 (2001) (explaining the weaknesses of the bicameralism and presentment analysis); Daniel T. Deacon, *Administrative Forbearance*, 125 Yale L.J. 1548, 1561–62 (2016).

about a particular individual.²⁴⁰ (In brief, an immigration judge had decided to suspend Mr. Chadha’s deportation and adjust his status to that of a lawful permanent resident.²⁴¹ The House of Representatives, acting pursuant to the statutory provision authorizing legislative vetoes, then passed a resolution opposing the suspension of Mr. Chadha’s deportation and vetoing it.²⁴²) The Court held unconstitutional the statutory provision authorizing one house of Congress to alter the Attorney General’s immigration determination, reasoning “that the legislative power of the Federal Government [must] be exercised in accord with a single, finely wrought and exhaustively considered, procedure”—bicameralism and presentment.²⁴³ The legislative veto impermissibly allowed an exercise of the legislative power—altering the rights and duties of persons outside the legislative branch—outside of that process.²⁴⁴ *Clinton v. City of New York* reasoned similarly when it invalidated the Line Item Veto Act, a federal law that authorized the President to “cancel” certain spending items after they were signed into law.²⁴⁵ The Court stated that “[i]n both legal and practical effect, the President has amended two Acts of Congress by repealing a portion of each.”²⁴⁶

Triggering the major questions doctrine with some reference to the political controversy surrounding a policy allows political opponents of that policy “[i]n both legal and practical effect,” to amend an Act of Congress by essentially “repealing a portion” of an agency’s authority.²⁴⁷ Take the OSHA vaccine case: the statute there authorized the Secretary of Labor to promulgate “any occupational safety or health standard.”²⁴⁸ The Court concluded that the agency’s vaccination policy was a major question that couldn’t be promulgated under that broad, general grant of authority, but instead needed to be “plainly authorize[d]” by statute because of the politicized nature of vaccines, and because the mandate was deemed a “significant encroachment” and “no ‘everyday exercise of

²⁴⁰ *Chadha*, 462 U.S. at 921.

²⁴¹ *Id.* at 923–24.

²⁴² *Id.* at 926–27. The resolution applied to several other individuals as well. *Id.* at 926.

²⁴³ *Id.* at 951.

²⁴⁴ *Id.* at 952, 956–57.

²⁴⁵ 524 U.S. 417, 436 (1998).

²⁴⁶ *Id.* at 438.

²⁴⁷ *Id.*; see Deacon, *supra* note 239, at 1557–58, 1560–67 (urging a narrow reading of *Clinton* and illustrating why the decision has hallmarks of non-delegation analysis).

²⁴⁸ 29 U.S.C. § 655(b).

federal power.’”²⁴⁹ The political controversy around vaccines meant the Court was *not* merely asking whether a vaccination policy fell within the statute’s broad grant of authority according to its terms; it instead altered the inquiry to ratchet up the required statutory specificity and clarity, effectively creating a carve out from a broad statutory provision. So too with the decision invalidating the student debt relief program, where the Court justified its application of the major questions doctrine in part by citing the “earnest and profound debate across the country” about student debt relief,²⁵⁰ as evidenced by, among other things, an opinion piece describing how student loan cancellation “raises questions that are personal and emotionally charged.”²⁵¹

In some respects, this element of the major questions doctrine functions like a potential delegation to future political parties and people to amend a statute outside of the formal legislative process.²⁵² The doctrine allows them, well after a statute was enacted, to create the conditions that increase the odds of an agency policy being deemed “major,” and therefore unable to be enacted under a broad grant of authority that otherwise would authorize it. In other words, the doctrine empowers later-in-time entities to carve out statutory exceptions by creating political controversy around what an agency has done.

The above dynamic should be particularly troubling to textualists, who these days tend to believe that a statute’s meaning is fixed at the time of enactment. Remember that the major questions doctrine only matters to the extent that it causes a court to reach a result other than it would have otherwise. And the new major questions doctrine operates to alter the outcome of interpretive disputes based on considerations that attach to events potentially long after a statute’s enactment. That’s deeply a-textual. But it also has other troubling implications—for textualists and non-textualists alike—which we turn to next.

²⁴⁹ *NFIB v. OSHA*, 142 S. Ct. 661, 665 (2022) (quoting *In re MCP No. 165*, 20 F.4th 264, 272 (6th Cir. 2021) (Sutton, C.J., dissenting from the denial of initial hearing en banc)).

²⁵⁰ *Biden v. Nebraska*, 143 S. Ct. 2355, 2374 (2023) (quoting *West Virginia v. EPA*, 142 S. Ct. 2587, 2614 (2022)).

²⁵¹ *Id.* at 2373 (quoting Jeff Stein, *Biden Student Debt Relief Plan Fuels Broader Debate Over Forgiving Borrowers*, *Wash. Post* (Aug. 31, 2022, 6:00 AM), <https://www.washingtonpost.com/us-policy/2022/08/31/student-debt-biden-forgiveness/> [https://perma.cc/J2KT-9MHP]).

²⁵² See *supra* Subsection III.A.1 (explaining how the Court assesses political significance in terms of the present day).

b. Minority Rule

The new major questions doctrine's reliance on political controversy also exacerbates our constitutional system's skew toward minority rule.

The constitutional system's capacity to allow minority rule is, by this point, well documented. Professor Sandy Levinson has long argued that the Senate's apportionment scheme facilitates minority rule;²⁵³ and this was also understood at the Founding.²⁵⁴ The Electoral College's winner-take-all system, which awards all of a state's votes in the Electoral College to the presidential candidate who won the popular vote in a state, similarly allows a minority of national voters to select a president.²⁵⁵ More recently, scholars have pointed out how sub-constitutional mechanisms such as the filibuster, which requires a supermajority of votes in the Senate, provide other mechanisms allowing political minorities to govern.²⁵⁶

The Supreme Court itself contributes to minority rule. The counter-majoritarian design of the Court, which is insulated from formal political feedback mechanisms like elections, enables a kind of minority rule.²⁵⁷ And more recently, the Supreme Court's decisions have facilitated minority rule in the legislative process. In particular, the Supreme Court's partisan gerrymandering decision,²⁵⁸ as well as the Court's decisions on federal voting rights protections,²⁵⁹ have increased the likelihood that a political party that loses the statewide popular vote could retain control of a state legislature. (Partisan gerrymandering allows a political party to draw districts in ways that make it easier for them to retain power and

²⁵³ Sanford Levinson, *Framed: America's 51 Constitutions and the Crisis of Governance* 148–51 (2012). See generally Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong* 6, 25–140 (2006) (describing democratic deficits in the U.S. Constitution).

²⁵⁴ See James Madison, *Notes on the Constitutional Convention* (July 14, 1787), in 2 *The Records of The Federal Convention of 1787*, at 9 (Max Farrand ed., 1911) (describing the Senate as allowing “the minority [to] negative the will of the majority”).

²⁵⁵ Jonathan Gould & David Pozen, *Structural Biases in Structural Constitutional Law*, 97 *N.Y.U. L. Rev.* 59, 114–16 (2022).

²⁵⁶ *Id.* at 126–28, 128 n.345.

²⁵⁷ See Barry Friedman, *The Birth of an Academic Obsession: The History of the Counter-majoritarian Difficulty*, Part Five, 112 *Yale L.J.* 153, 155 (2002).

²⁵⁸ *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019); see also Nicholas Stephanopoulos, *The Anti-Carolene Court*, 2019 *Sup. Ct. Rev.* 111, 179 (noting that academic evidence confirms that Republicans have benefitted from gerrymandering in the past decade).

²⁵⁹ *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021); *Shelby County v. Holder*, 570 U.S. 529 (2013).

harder for the opposing party to obtain power.²⁶⁰ Vote dilution and voting preconditions that burden some groups more than others are other mechanisms that make it easier for parties to obtain political power to an extent that outpaces the share of votes they receive.²⁶¹) At a minimum, the decisions enable a party to obtain legislative seats that outstrip the share of the popular vote that the party secured.

The new major questions doctrine's reliance on political significance also facilitates minority rule.²⁶² That is not only because, as explained above, the doctrine allows courts to point to opposition by a minority political party as a reason to require clear statutory authorization for an agency policy and therefore to reach a result contrary to that the court otherwise would have reached.²⁶³ It is also because of some of the particular indicia the Court uses as evidence of political significance.

The Court's use of subsequent legislative history, in particular, highlights the dynamic. Consider the Court's explanation in *West Virginia v. EPA*²⁶⁴ for why the EPA's generation shifting rules constituted a major policy. The Court focused on subsequent legislative history, and specifically Congress's failure to enact generation shifting requirements, to assess whether the EPA's rule was major. The Court noted that the EPA had adopted "a regulatory program that Congress had conspicuously and repeatedly declined to enact itself"²⁶⁵: Congress "has consistently rejected proposals to amend the Clean Air Act to create" a cap-and-trade scheme, one kind of generation shifting requirement, as well as "similar

²⁶⁰ See Stephanopoulos, *supra* note 258, at 144–45.

²⁶¹ For example, the federal courts declined to issue injunctions in three cases (either through stay orders or equity balancing) after finding that vote dilution had reduced the number of majority-minority districts; in most of these states, the maps created a number of majority-minority districts that represented about half of the minority's demographic representation in the states. See *Merrill v. Milligan*, 142 S. Ct. 879, 879, 886, 889 (2022); *Robinson v. Ardoin*, 605 F. Supp. 3d 759, 820–31, 839–52 (M.D. La. 2022), *cert. granted*, 142 S. Ct. 2892, 2892 (2022) (mem.); *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, 587 F. Supp. 3d 1222, 1230, 1234 (N.D. Ga. 2022). The specific vote dilution in Alabama is explained in *Caster v. Merrill*. Black Alabamians represented twenty-seven percent of the state but could only elect the candidate of their choice in fourteen percent of the state's congressional districts. *Caster v. Merrill*, No. 21-cv-01536, 2022 WL 264819, at *39 (N.D. Ala. Jan. 24, 2022).

²⁶² While this reasoning has taken on increased relevance in the latest major questions cases, the Court had also noted in *FDA v. Brown & Williamson Tobacco Corp.* that "Congress considered and rejected several proposals to give the FDA the authority to regulate tobacco" when it instead adopted other federal legislation regarding tobacco. 529 U.S. 120, 147 (2000).

²⁶³ See *supra* notes 204–25, 249.

²⁶⁴ 142 S. Ct. 2587 (2022).

²⁶⁵ *Id.* at 2610.

measures, such as a carbon tax.”²⁶⁶ Justice Gorsuch’s concurrence in *West Virginia v. EPA* similarly emphasized that “Congress has debated the matter frequently” and has “‘declined’ to adopt legislation similar to the Clean Power Plan.”²⁶⁷ This kind of reasoning—that Congress had considered, but declined to adopt legislation codifying an agency’s regulatory program—appeared in the OSHA case,²⁶⁸ as well as the CDC eviction case.²⁶⁹

Subsequent legislative history has, of course, been considered a deeply a-textualist method of statutory interpretation.²⁷⁰ There are many reasons why Congresses might not act other than failure to support a vaccination requirement. Plus, even if Congress’s inaction did demonstrate that a subsequent Congress did not support a vaccination requirement, that would not provide particularly good evidence about what an earlier Congress had enacted and authorized the agency to do in the OSH Act.

Our focus is slightly different, however: using subsequent legislative history as the Court has done in the new major questions cases allows a minority opposed to the policy in question to affect the resolution of interpretive disputes. A party that controls the House, but not the Senate or the White House, can withhold consent to a bill and therefore make it more likely a policy is deemed “major.” Even a political party that controls zero branches can similarly block policies through the filibuster. Individual members acting as veto points can also effectively hold up legislation. Refusing to go along with legislation that overlaps with an agency’s delegated authority will also restrict future administrations’ statutory authority, even if those future administrations enjoy widespread public support.

This turns the minority checks that are built into the system into a power held by a minority to effectively amend statutes. Typically, the Senate filibuster allows a political minority to prevent new legislation

²⁶⁶ *Id.* at 2614.

²⁶⁷ *Id.* at 2621–22 (Gorsuch, J., concurring).

²⁶⁸ See *NFIB v. OSHA*, 142 S. Ct. 661, 666 (2022) (describing “the most noteworthy action concerning the vaccine mandate by either House of Congress” as “a majority vote of the Senate disapproving the regulation on December 8, 2021”); *id.* at 667–68 (Gorsuch, J., concurring) (“Congress has chosen not to afford OSHA—or any federal agency—the authority to issue a vaccine mandate. Indeed, a majority of the Senate even voted to *disapprove* OSHA’s regulation.”).

²⁶⁹ *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2485–86 (2021) (when summarizing the regulatory history, the Court noted that Congress “did not renew” its initial “120-day eviction moratorium” for certain properties).

²⁷⁰ See Anita S. Krishnakumar, *Statutory History*, 108 Va. L. Rev. 263, 271 (2022).

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

The Court’s other indicia of political significance also facilitate minority rule. For example, some Justices treat debate in the states as evidence of political significance. In his concurrence in *West Virginia v. EPA*, Justice Gorsuch argued that the Court had previously concluded vaccine requirements were politically significant because “state legislatures were engaged in robust debates” about them.²⁷¹ Many such state legislatures are themselves the product of severe partisan gerrymandering.²⁷² But even assuming state legislatures are representative of the people within those states, looking to political controversy in state legislatures (or local legislatures?) in order to require clear congressional authorization for a given policy may be deeply undemocratic. How much state opposition does it take to block federal policy? The Justices do not say, but neither do they give any indication that it must be enough to form a national majority.

The new major questions doctrine enables minority rule by giving more power to special interest groups. The *West Virginia v. EPA* case in particular highlights how the doctrine might allow special interest groups to generate political controversy about an agency’s statutory authority and nullify the legislative wins that a political majority was able to secure in the legislative process. The Clean Air Act (“CAA”), the statute at issue in *West Virginia v. EPA*, is a supposed rarity under theories of political economy that maintain that it is easier for smaller, organized interests to coordinate and overcome collective action programs and secure wins in the political process than it is for broad, diffuse coalitions (that may represent larger numbers of people) to do so.²⁷³ The unambiguously broad

²⁷¹ 142 S. Ct. at 2620 (Gorsuch, J., concurring).

²⁷² See Miriam Seifter, *Countermajoritarian Legislatures*, 121 *Colum. L. Rev.* 1733, 1762–67 (2021).

²⁷³ Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 *Q.J. Econ.* 371, 384–85, 395 (1983); see Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* 10–11 (1965); Lisa Heinzerling & Frank

CAA represented a political process win for the public interest given that the statute is supposed to benefit a broad, diffuse group.²⁷⁴ The new major questions doctrine effectively allows special interest groups to later neuter such achievements.²⁷⁵ By generating political controversy surrounding an issue already settled by the political process, special interest groups effectively negate pieces of a statute. This mechanism seems precisely backwards: it provides a 5,000-pound weight on the interpretive scale in favor of special interest groups that are at a comparative advantage in the political process and that can be deployed after those groups have already lost through normal channels.²⁷⁶ That too facilitates a kind of minority rule.²⁷⁷

Ackerman, *Law and Economics for a Warming World*, 1 *Harv. L. & Pol’y Rev.* 331, 356 (2007) (“Academic theory now almost dismisses the possibility that public policy and expenditures represent the public interest.”).

²⁷⁴ See Brunstein & Revesz, *supra* note 23, at 256–58; Heinzerling & Ackerman, *supra* note 273, at 340 (“The effect of these arguments is . . . to encourage the Court to turn away from plain language in the Clean Air Act authorizing the EPA to regulate all harmful air pollutants.”).

²⁷⁵ See Heinzerling & Ackerman, *supra* note 273, at 339–40; Leah M. Litman, *Taking Care of Federal Law*, 101 *Va. L. Rev.* 1289, 1344–45, 1350–51 (2015).

²⁷⁶ Cf. Stephanopoulos, *supra* note 258, at 112 (cataloguing other instances where the Court seems to use a reverse political process theory that affords greater protection to groups more easily able to protect their interests in the political process).

²⁷⁷ An analogy to constitutional theory may help to underscore the point. In order to explain and analyze constitutional precedent, Professor Richard Fallon developed the concept of the “superprecedent,” which refers to the category of cases that the Supreme Court should never overrule. Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 *N.C. L. Rev.* 1107, 1148–50 (2008) [hereinafter Fallon, *Constitutional Precedent*]. Several Justices have invoked the concept at their confirmation hearings. See, e.g., Brian Naylor, *Barrett Says She Does Not Consider Roe v. Wade ‘Super-Precedent,’* NPR (Oct. 13, 2020, 3:55 PM), <https://www.npr.org/sections/live-amy-coney-barrett-supreme-court-confirmation/2020/10/13/923355142/barrett-says-abortion-rights-decision-not-a-super-precedent> [https://perma.cc/WT26-4RBD] [hereinafter Naylor, *Barrett Says*]; Judge Gorsuch Says He Won’t Call *Roe v. Wade* a “Super Precedent,” C-SPAN (Mar. 21, 2017), <https://www.c-span.org/video/?c4662290/judge-gorsuch-call-roe-v-wade-super-precedent> [https://perma.cc/36WQ-8K3G]. Whether a Supreme Court decision qualifies as a super-precedent, and thus should not be overruled, Fallon explained, turns in part on whether the decision “deals with matters that no longer occasion broad, ongoing, unstable contestation in American law and politics.” Fallon, *Constitutional Precedent*, *supra*, at 1149. In her confirmation hearings, Justice Barrett explained that a case qualified as a super-precedent when “no political actors and no people [are] seriously pushing for [its] overruling.” Naylor, *Barrett Says*, *supra*, at 2. This feature of stare decisis turns on the political landscape. It makes the inquiry about respect for precedent turn on whether the public and political actors have accepted a decision of the Supreme Court: If they have accepted it, then the decision is safe. If they have not, then the decision can be overruled. This doctrinal or theoretical structure, then, seems to create an incentive for judges, political parties, and members of the public to

c. Judicial Politicization

Not only does the new major questions doctrine empower minority groups to exercise outsized influence over the interpretation of past congressional enactments, it also enables unelected officials—the federal judiciary—to render politically and ideologically infused judgments about the proper scope of an agency’s authority.

By basing application of the major questions doctrine in part on whether a given policy is sufficiently controversial, the doctrine invites reasoning that tends to ideologically align the Justices’ articulated views with those of the political party that appointed them. Indeed, it would not be particularly surprising for a judge’s assessment about what is politically controversial or politically significant to align with their own worldview, worldviews which these days often closely align with those of the political party that appointed them.

And that is precisely what seems to have been on display in the recent cases. Compare the cases in which the Court has applied the major questions doctrine and the cases in which the Court has not applied the doctrine. The Republican appointees on the Court identified the CDC’s moratorium on evictions during the COVID-19 pandemic as a major question because of its perceived political significance. The reasons given for why the eviction moratorium was a politically significant major question sounded in concerns reflecting the ideology and professed political philosophy of the Republican Party.²⁷⁸ Polling indicated that over half of Democrats supported the CDC’s eviction moratorium, while just sixteen percent of Republican voters did.²⁷⁹ The same dynamics played out in the case challenging OSHA’s rule governing workplaces. There, the Court’s views regarding the significance of COVID-19 vaccine

never accept and to continually contest Supreme Court decisions with which they disagree; at a minimum, it judicially solidifies political opposition to precedent into a judicial mechanism for less respect for that precedent. The major questions doctrine is almost the inverse of this aspect of the super-precedent concept. If the public and political actors have not accepted the agency’s decision, then the decision must be explicitly authorized by statute. But if they have accepted the agency’s decision—or at least if they have not mounted a sustained campaign against it—then the agency’s decision may not have to be explicitly authorized by statute.

²⁷⁸ See Leah M. Litman, “Hey Stephen,” 120 Mich. L. Rev. 1109, 1114–15 (2022) (book review).

²⁷⁹ Claire Williams, About 1 in 2 Voters Support New Eviction Moratorium, but They’re Uneasy About the CDC’s Authority to Issue It, Morning Consult (Aug. 11, 2021, 6:00 AM), <https://morningconsult.com/2021/08/11/cdc-eviction-ban-poll/> [https://perma.cc/ZQK2-SB5C].

requirements tracked those of conservative commentators.²⁸⁰ And there too, polling indicated that a majority of Americans and a majority of Democrats supported a vaccine mandate, whereas less than half of Republicans supported a general vaccine requirement and only thirty-five percent supported a vaccine requirement for large companies.²⁸¹ The same polling disparities existed with respect to the Clean Power Plan.²⁸² If these cases are any indication, courts' assessment regarding what issues are politically significant is likely to track rather closely with the views of the political party that appointed them—perhaps more so, or at least as much, than in other areas of law.

The Justices similarly relied on their own views regarding abstract matters of public policy during the oral arguments in the challenges to President Biden's student debt cancellation program, and again those views seemed to track those of the Republican electorate. During those arguments, some Justices posited that whether an agency policy is "fair" may matter in determining whether it was "major." Near the beginning of one of the arguments, the Chief Justice openly mused "that a factor that should enter into our consideration under the Major Questions Doctrine" was the fact that a policy raised "fairness" concerns, which he believed would be better resolved by Congress.²⁸³ After that, Justice Kavanaugh said that "the fact that there will be winners and losers, big winners and big losers, relatively speaking, if the executive branch has this kind of authority" was a reason to believe the program was major.²⁸⁴ Justice Alito echoed these ideas, pointedly asking the Solicitor General, "Why was [the policy] fair?"²⁸⁵ The Justices' notions of fairness would appear to point toward the bottom line favored by Republican voters. According to one poll, only eleven percent of Republicans think that student debt relief is a

²⁸⁰ See *supra* Subsection III.A.1.

²⁸¹ Christen Gall, *Most Americans Continue to Support Vaccine Mandates—and Want More*, *Nw. Now* (Oct. 13, 2021), <https://news.northwestern.edu/stories/2021/10/survey-shows-most-americans-continue-to-support-vaccine-mandatesand-want-more/> [<https://perma.cc/C22A-48BN>].

²⁸² Barry G. Rabe, Sarah B. Mills & Christopher Borick, *Issues in Energy & Env't Pol'y, Public Support for Regulation of Power Plant Emissions Under the Clean Power Plan 3* (Jan. 2015) <https://closup.umich.edu/sites/closup/files/uploads/iecp-nsee-2015-clean-power-plan.pdf> [<https://perma.cc/T8MH-UTHG>].

²⁸³ Transcript of Oral Argument at 28, *Dep't of Educ. v. Brown*, 143 S. Ct. 2343 (2023) (No. 22-535).

²⁸⁴ *Id.* at 43.

²⁸⁵ *Id.* at 32–35.

“good idea.”²⁸⁶ Other polls similarly reflect Republicans’ opposition to student debt relief.²⁸⁷ And the specific concerns raised by the Justices echoed the objections that were initially raised by Republican politicians: Senate Minority Leader Mitch McConnell described student debt relief as “a bad idea” because “[a]n awful lots of Americans choose not to go to college.”²⁸⁸ Another Republican Senator, Ted Cruz, characterized debt relief on the ground that it would “take from working class people” like “truck drivers and construction workers.”²⁸⁹ And the Court ended up applying the major questions doctrine in the case to justify invalidating student loan cancellation after quoting a piece that described how student loan cancellation “raises questions that are personal and emotionally charged.”²⁹⁰

Now consider the matters that the Court has *not* identified as major (spoiler alert: they are cases in which the agency’s policy was supported by Republican officials). In *Little Sisters of the Poor v. Pennsylvania*, the five Republican-appointed Justices on the Court upheld the Trump Administration’s statutory authority to create exemptions from regulations that required employer health insurance policies to cover certain forms of health care.²⁹¹ All of those five Republican Justices had signed onto opinions invoking the major questions doctrine, but in this case they joined an opinion reasoning that the Affordable Care Act gave the Health Resources and Services Administration “broad discretion . . . to create the religious and moral exemptions.”²⁹² The case involved an agency’s effort to exempt employers from covering certain forms of contraception. That issue, and specifically the existence of exemptions from health insurance coverage for contraception, is an issue

²⁸⁶ Alexandra Marquez, Voters Split on Student Loan Forgiveness, New Poll Shows, NBC News (Sept. 20, 2022, 2:32 PM), <https://www.nbcnews.com/meet-the-press/meetthepress/blog/voters-split-student-loan-forgiveness-new-poll-shows-rcna48490> [https://perma.cc/4ZV8-G3CP].

²⁸⁷ Olafimihan Oshin, Majority Backs Student Loan Debt Relief: Poll, Hill (Aug. 31, 2022, 5:37 PM), <https://thehill.com/homenews/administration/3623055-majority-backs-student-loan-debt-relief-poll/> [https://perma.cc/P7VX-2HHW].

²⁸⁸ Kathryn Watson, Biden’s Student Loan Forgiveness Plan Criticized by Republicans and a Few Democrats, CBS News (Aug. 25, 2022, 2:07 PM), <https://www.cbsnews.com/news/biden-student-loan-forgiveness-plan-backlash-criticism/> [https://perma.cc/R9ZH-FAR8].

²⁸⁹ Id.

²⁹⁰ *Biden v. Nebraska*, 143 S. Ct. 2355, 2373 (2023) (quoting Stein, *supra* note 251).

²⁹¹ 140 S. Ct. 2367, 2367 (2020). Justice Breyer and Justice Kagan concurred in a separate opinion. Id. at 2396–400 (Kagan, J., concurring, joined by Breyer, J.).

²⁹² Id. at 2381.

of national political significance insofar as it is politically controversial; it is economically significant as well.²⁹³ Yet that concern was nowhere evident in the Court's opinion; the Court did not require the statute to speak with the degree of specificity required in the OSHA or CDC cases. Rather, it sufficed that the statute contained a "broad" grant of authority to the agency, the very kind of authority that was not sufficient in the OSHA, CDC, or EPA cases.

Or take two examples involving presidential authority. In *Hamdi v. Rumsfeld*, a majority of the Court concluded that the Authorization of Use of Military Force Act gave the President the authority to detain American citizens.²⁹⁴ Nowhere did the Act specifically mention the detention of American citizens.²⁹⁵ And there was considerable political controversy surrounding the Bush Administration's detention policies.²⁹⁶ Yet the Court was willing to read the statute as a capacious grant of authority to the President, again because of its broad wording. The Court did not require Congress to specifically authorize such a politically significant action. Or take *Trump v. Hawaii*, a challenge to then-President Trump's policy of excluding persons from several Muslim majority countries from entering the United States.²⁹⁷ That policy was certainly politically controversial, and there were widespread protests against it and many of President Trump's immigration policies.²⁹⁸ Yet there too, the Court did not even seem to perceive that question as significant; it certainly did not allow the significance of that question to affect the Court's analysis of the statute. Rather, the Court again rested on the fact that the statute in question "grants the president broad discretion to suspend the entry" of

²⁹³ See, e.g., *New York v. Dep't of Health & Hum. Servs.*, 414 F. Supp. 3d 475, 530 (S.D.N.Y. 2019) (invoking major questions doctrine to construe exemption authority).

²⁹⁴ 542 U.S. 507, 509 (2004).

²⁹⁵ *Id.* at 510 (the Act authorized the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" or "harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons" (quoting Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001))).

²⁹⁶ Madeleine Carlisle, *How 9/11 Radically Expanded the Power of the U.S. Government*, *Time* (Sept. 11, 2021, 7:00 AM), <https://time.com/6096903/september-11-legal-history/> [<https://perma.cc/4266-PCQH>].

²⁹⁷ 138 S. Ct. 2392, 2392 (2018).

²⁹⁸ James Doubek, *Photos: Thousands Protest at Airports Nationwide Against Trump's Immigration Order*, *NPR* (Jan. 29, 2017, 5:30 AM), <https://www.npr.org/sections/thetwo-way/2017/01/29/512250469/photos-thousands-protest-at-airports-nationwide-against-trumps-immigration-order/> [<https://perma.cc/KE8R-9D96>].

noncitizens into the United States.²⁹⁹ Again, statutory specificity was not required.³⁰⁰

There are other examples, but the point remains: judges may be more inclined to perceive issues or policies as politically significant if the policies are opposed by the political party that appointed the judge. That is not to say that judges are intentionally adopting the views of the party that appointed them. Rather, this tendency simply reflects the fact that a judge's worldview, as well as their assessments of the political significance of a given policy, are more likely to align with the perspective of the political party that appointed them than with the political party that did not.³⁰¹ And so the currently articulated version of the major questions doctrine seems to facilitate that kind of ideological, political judging.

B. Novelty, Democracy, and the Regulatory State

This Section unpacks the implications of the Court's willingness to declare an agency policy major—and therefore require clear congressional authorization for it—based in part on whether the policy is a “novel” one or whether it may justify even more novel agency action in the future.

It shows how this approach to majorness hobbles an agency's ability to exercise delegated authority in situations where Congress would have had the most reason to rely on delegation to an agency and where such delegation would likely be most effective. It further argues that this aspect of the new major questions doctrine makes it appear that the doctrine

²⁹⁹ *Hamdi*, 138 S. Ct. at 2408.

³⁰⁰ See also *infra* notes 383–97 and accompanying text (discussing *Biden v. Missouri*, 142 S. Ct. 647 (2022)). *Hamdi* and *Trump v. Hawaii* might be distinguished from other cases in which the Court did or did not invoke the major questions doctrine on the grounds that they involved a delegation to the president in an area where the president may have had some independent constitutional authority to act even absent congressional delegation. But neither case was decided on those terms; both approached the issues as matters of pure statutory interpretation. And the Court did not say if the fact that the relevant delegations were to the president, or that they involved matters of international affairs, led to its decision not to consider the majorness of the policies in question. Any “international affairs is different” explanation for the decisions would also probably trade on the notion that nondelegation objections apply with less force to questions concerning international affairs. But that idea has been persuasively criticized by Nick Bagley and Julian Mortenson. See Bagley & Mortenson, *supra* note 31, at 357; Julian Davis Mortenson & Nick Bagley, *Delegation at the Founding: A Response to the Critics*, 122 *Colum. L. Rev.* 2323, 2350–52 (2022).

³⁰¹ See Litman, *supra* note 278, at 1114.

involves greater judicial humility than it in fact does, and makes the doctrine appear less significant and less consequential than it in fact is. The truth is that the Court's focus on regulatory novelty turns the major questions doctrine into a potent de-regulatory tool that will do much of the work—if a more selective and ideologically targeted form of the work—that a revived nondelegation doctrine would do.

1. Novelty, Regulatory Authority, and Majorness

Increasingly, the perceived novelty of an agency's policy, often in conjunction with speculation about the potential future implications of the agency's broader theory of statutory authority, have become indicia of the policy's majorness. Both of these doctrinal trends also mirror parallel developments in constitutional law.

The Court's major questions cases have increasingly relied on an anti-novelty principle that was first fleshed out in the Court's constitutional law cases. In constitutional federalism and separation of powers cases, the Court has reasoned repeatedly that legislative novelty—the fact that a federal statute is novel in some respects—is a sign that the statute is unconstitutional.³⁰² The Court's now standard formulation of the constitutional anti-novelty principle is that “the most telling indication of [a] severe constitutional problem with [a statute] is the lack of historical precedent.”³⁰³

A parallel skepticism of regulatory novelty is now firmly part of the major questions doctrine. In the major questions cases, of course, novelty is used in cases involving a statute, rather than the Constitution: the novelty of an agency's regulatory approach is an indication that the policy is major and therefore likely not authorized by statute. Similar to the origins of the constitutional anti-novelty rhetoric, the regulatory anti-novelty rhetoric began with the passing observation, in *Brown & Williamson*, that the agency had asserted a new and different authority to regulate the tobacco industry.³⁰⁴ The Court noted that the agency's

³⁰² See generally Leah M. Litman, *Debunking Antinovelty*, 66 *Duke L.J.* 1407, 1407–08 (2017) (discussing the evolution of the anti-novelty doctrine and its flaws).

³⁰³ *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 505 (2010) (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 537 F.3d 667, 699 (D.C. Cir. 2008) (Kavanaugh, J., dissenting)).

³⁰⁴ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 156 (2000) (noting that “the FDA's assertion of jurisdiction represents a sharp break with its prior interpretation of the [Food, Drug, and Cosmetic Act]”). On the origins of constitutional anti-novelty, see Litman, *supra* note 302, at 1410, 1415–16.

assertion of authority to regulate tobacco was “[c]ontrary to its representations to Congress since 1914.”³⁰⁵

Since *Brown & Williamson*, the novelty of an agency’s regulation has increasingly featured in the Court’s major questions cases and has also taken on additional significance. It has now hardened into a central principle guiding the application of the doctrine. When the Court concluded that the CDC lacked the authority to impose a moratorium on evictions, for example, the Court concluded its analysis of the merits with this observation: “This claim of expansive authority under § 361(a) is unprecedented. Since that provision’s enactment in 1944, no regulation premised on it has even begun to approach the size or scope of the eviction moratorium.”³⁰⁶

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

It is telling that OSHA, in its half century of existence, has never before adopted a broad public health regulation of this kind—addressing a threat that is untethered, in any causal sense, from the workplace. This ‘lack of historical precedent,’ coupled with the breadth of authority that the Secretary now claims, is a ‘telling indication’ that the mandate extends beyond the agency’s legitimate reach.³⁰⁷

Finally, in *West Virginia v. EPA*, the Court similarly relied on the purported regulatory novelty of the EPA’s generation shifting requirements as an indication that the agency had adopted a major rule.³⁰⁸

The Court’s new major questions cases have also incorporated another element of constitutional jurisprudence into their assessment of whether a rule is major—asking not just whether an agency’s rule is major, but also whether the theory justifying the agency’s current policy could undergird other potentially major policies not currently before the Court.

This aspect of the major questions doctrine resembles a method that the Court has come to use in constitutional cases examining the scope of

³⁰⁵ *Brown & Williamson*, 529 U.S. at 159.

³⁰⁶ *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021).

³⁰⁷ *NFIB v. OSHA*, 142 S. Ct. 661, 666 (2022) (quoting *Free Enter. Fund*, 561 U.S. at 505).

³⁰⁸ *West Virginia v. EPA*, 142 S. Ct. 2587, 2610–11 (2022).

Congress's powers, often under the Commerce Clause.³⁰⁹ There, in order to analyze whether a particular statute falls within the scope of Congress's powers, the Court has asked what other statutes Congress might be able to enact were it able to enact the one in question. If the answer to that question includes hypothetically possible, practically unlikely, but far-reaching exercises of federal authority, that is a mark against the federal statute. And if the theory justifying the federal statute would or could justify something akin to plenary congressional authority, that is a reason to invalidate the statute as exceeding Congress's powers.³¹⁰ Thus, in *United States v. Lopez*, the Court concluded that Congress lacked the authority under the Commerce Clause to prohibit gun possession in schools in part because if the Court "were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate."³¹¹ Similarly, in *National Federation of Independent Business v. Sebelius*, all of the Justices who concluded that Congress lacked the authority to enact the minimum-coverage requirement under the Commerce Clause relied on the idea that, were the minimum-coverage requirement constitutional, then Congress could regulate near anything.³¹²

This kind of analysis now appears to be a part of the major questions doctrine, too. The Court entertains hypotheticals about what the agency *might* do if its current regulation were authorized by statute. And if some of those hypothetical policies strike the Court as odd or themselves major, then that suggests that the current policy presents a major question that needs to be explicitly authorized by statute.

This differs slightly from the pre-2021 cases. Earlier iterations of the major questions doctrine focused on whether the particular policy that an agency had adopted qualified as major. Thus, *Brown & Williamson* analyzed "the nature of" the FDA "assert[ing] jurisdiction to

³⁰⁹ See, e.g., Richard Primus, *The Limits of Enumeration*, 124 *Yale L.J.* 576, 591–92 (2014) (describing this mode of analysis).

³¹⁰ *Id.* at 591.

³¹¹ 514 U.S. 549, 564 (1995).

³¹² See 567 U.S. 519, 553 (2012) ("[T]he Government's logic would justify a mandatory purchase to solve almost any problem."); *id.* at 655 (Scalia, J., dissenting, joined by Kennedy, Thomas & Alito, JJ.) ("The Government was invited, at oral argument, to suggest what federal controls over private conduct . . . could *not* be justified It was unable to name any. As we said at the outset, whereas the precise scope of the Commerce Clause and the Necessary and Proper Clause is uncertain, the proposition that the Federal Government cannot do everything is a fundamental precept.").

regulate . . . tobacco products,”³¹³ i.e., what it had done in the particular case, and *King v. Burwell* focused on the specific question the agency had addressed in that case—whether tax credits were available on health care exchanges established by the federal government.³¹⁴ Other cases reasoned similarly.

Of course, considerations regarding the particular policy or particular rule in front of the court remain important, but the more recent major questions cases have additionally inquired into the permissibility of other policies not before the Court. Take *Alabama Ass’n of Realtors v. Department of Health & Human Services*, which examined the CDC’s moratorium on evictions in certain places.³¹⁵ In addition to assessing whether the agency policy at issue in that case—a moratorium on evictions—was major, the Court incorporated into its analysis the possibility that the CDC would be able to “mandate free grocery delivery to the homes of the sick or vulnerable”; “[r]equire manufacturers to provide free computers to enable people to work from home”; or “[o]rder telecommunications companies to provide free high-speed Internet service to facilitate remote work.”³¹⁶ Such a “claim of expansive authority” triggered a determination regarding majorness.³¹⁷ Likewise, in *West Virginia v. EPA*, the Court evaluated the majorness of the EPA’s rule by asking what else the agency could do under its theory of statutory authority.³¹⁸

* * *

Before assessing the implications of these indicia of majorness, it is worth noting that these indicia, like political significance, have at most a tangential relationship to discerning statutory meaning.³¹⁹ Comparing and contrasting the justifications for regulatory anti-novelty with those

³¹³ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

³¹⁴ 576 U.S. 473, 485–86 (2015).

³¹⁵ 141 S. Ct. 2485, 2485 (2021).

³¹⁶ *Id.* at 2489.

³¹⁷ See *id.*; see also *NFIB v. OSHA*, 142 S. Ct. 661, 665 (2021) (“Permitting OSHA to regulate the hazards of daily life—simply because most Americans have jobs and face those same risks while on the clock—would significantly expand OSHA’s regulatory authority without clear congressional authorization.”).

³¹⁸ 142 S. Ct. 2587, 2612 (2022) (“[O]n this view of EPA’s authority, it could go further, perhaps forcing coal plants to ‘shift’ away virtually all of their generation—i.e., to cease making power altogether.”).

³¹⁹ On why the major questions doctrine itself, even earlier iterations of it, did not supply a sensible account of statutory interpretation, see Emerson, *supra* note 159, at 2049–59, 2073–76, 2078–81, 2083–87; Heinzerling, *supra* note 2, at 1947, 1957–60, 1966–69, 1986–90.

underlying the Court's constitutionally grounded statutory anti-novelty cases illuminates some of the deficiencies of the former.

One justification for the constitutional anti-novelty principle is that the novelty of a federal statute is an indication that prior Congresses "believed" that they lacked the constitutional power to enact the statute.³²⁰ But many of the reasons why novelty is not a reliable indication that prior Congresses thought that a statute was unconstitutional also demonstrate why novelty is likewise not a reliable indication that previous *agencies* thought a regulation exceeded the agency's authority under a statute. For one, while the procedures that constrain agency policymaking are not as cumbersome as the procedures that constrain Congress's power to make laws, the constraints on agencies are still substantial and limit what an agency might do.³²¹ And the difficulty of adopting rules is a reason why an agency might not exercise the full scope of its statutory authority within the first years following the statute's enactment.

Further, one of the most important limits on agencies' authority is grounded in the Administrative Procedure Act: agencies' policies must be the product of reasoned decision-making, which includes demonstrating that there is a rational connection between the facts found and the decision made.³²² Therefore, an agency must be able to ground its policies in the facts and context as they exist at the time, apart from whether the formal language in the statute might allow it.³²³

That requirement may help explain many exercises of "novel" agency authority—changes at the societal level mean that different policies become justifiable as facts and knowledge change.³²⁴ Relevant changes might include a subsequent regulation that requires the agency to make

³²⁰ See *Printz v. United States*, 521 U.S. 898, 907–08 (1997) ("[T]he numerosness of these statutes, contrasted with the utter lack of statutes imposing obligations on the States' executive (notwithstanding the attractiveness of that course to Congress), suggests an assumed *absence* of such power."); *Alden v. Maine*, 527 U.S. 706, 744 (1999) ("[E]arly Congresses did not believe they had the power to authorize private suits against the States in their own courts.").

³²¹ Nicholas Bagley, *The Procedure Fetish*, 118 Mich. L. Rev. 345, 360–64 (2019).

³²² See 5 U.S.C. § 706(2)(A), (E); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 34 (1983).

³²³ *State Farm*, 462 U.S. at 43. Professor Blake Emerson has forcefully argued that the legislative history of the Administrative Procedure Act reveals that the major questions doctrine runs afoul of Congress's understanding and intentions regarding statutory constraints on and judicial review of agency action. See Blake Emerson, "Policy" in the Administrative Procedure Act: Implications for Delegation, Deference, and Democracy, 97 Chi.-Kent L. Rev. 113, 134–35 (2022).

³²⁴ Litman, *supra* note 302, at 1437–38.

adjustments, or a judicial decision that altered the regulatory or statutory landscape.³²⁵ Say, for example, that an agency that has overlapping jurisdiction with another agency adopted a new regulation that requires the other agency to recalibrate its existing regulatory approach, or that a judicial decision has foreclosed one regulatory approach but opened up new ones. An agency may shift gears in light of those developments. Or there might have been some changes in markets or society more broadly that alter the field in which an agency is regulating,³²⁶ like when a novel pandemic shuts down entire sectors of the market. That might explain why, for example, OSHA had never previously adopted a vaccination requirement, or why the CDC had never previously concluded that a moratorium on evictions would restrict the spread of disease. Or we might develop new knowledge about, say, the harm caused by cigarettes and their intended effects.³²⁷ Alternatively, an agency's priorities or its assessment of the costs and benefits or political landscape might have shifted.³²⁸ That arguably occurred in *West Virginia v. EPA*: despite claims that the Clean Power Plan's metrics were unattainable without substantial economic consequences, the power industry achieved the metrics before the target dates.³²⁹ Having seen that, the agency sought to adapt its views going forward.³³⁰ That too might cause an agency to pursue a new regulatory approach.

Subsequent developments are likely not the only cause of regulatory novelty. But observing that they may be an important cause does, however, underscore that there are myriad reasons why an agency might not adopt a particular regulation aside from the agency (or anyone) thinking that the statute did not authorize the action in question. Indeed, the federal government argued that OSHA adopted the vaccination policy only after it had concluded that the measures adopted to date by

³²⁵ Id. at 1435, 1441.

³²⁶ Id. at 1438.

³²⁷ See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 120 (2000).

³²⁸ Litman, *supra* note 302, at 1441, 1443 (explaining how relatedly, there are “competing constitutional values for Congress to reconcile” and it may “strike the balance between these cross-cutting values in different places at different points in time”).

³²⁹ See *West Virginia v. EPA*, 142 S. Ct. 2587, 2627–28 (2022) (Kagan, J., dissenting) (“The ensuing years, though, proved the Plan’s moderation. Market forces alone caused the power industry to meet the Plan’s nationwide emissions target—through exactly the kinds of generation shifting the Plan contemplated.”).

³³⁰ See *id.* at 2628.

employers were not effective in controlling the spread of COVID-19.³³¹ So the fact that the agency took a new course in response to a developing problem could just reflect the agency's response to changed circumstances and new information; it is not a reliable proxy for the agency's view that it lacked certain kinds of authority under a statute.

The other justifications for the constitutional anti-novelty principle similarly underscore why regulatory anti-novelty is not a reliable proxy for statutory meaning. A second justification for the constitutional anti-novelty principle is that novelty might be evidence of actual unconstitutionality.³³² But there is no reason why regulatory novelty would be evidence about the actual meaning of a statute, particularly when a delegation is framed in unambiguously broad and capacious terms that Congress expected an agency to apply to changing circumstances.³³³ It is certainly not *better* evidence of statutory meaning than the courts' traditional tools for discerning such meaning.

A third justification for the constitutional anti-novelty principle is that the novelty of a federal statute supplies a second-best principle to constrain Congress's powers given that the Court's cases have allowed Congress more constitutional powers than Congress actually possesses.³³⁴ But this argument also does not map on to cases involving statutory interpretation, where there is not a similar body of judicial precedent that the Court might be trying to rein in (other than those on the nondelegation doctrine, which, as we have explained, bears only a tenuous relationship to the major questions doctrine). What the Court is limiting is the statute itself, and, as explained above, there isn't good reason to think that regulatory novelty is a reliable indicator of statutory meaning.

Finally, another possible reason to be skeptical of novel assertions of agency authority is unique to the agency context: perhaps there is a belief that when an agency uses an old authority in a new way it may likely be that the agency is attempting to use the statute pretextually in order to advance other, unstated purposes. The agency might *say* that a regulation serves some purpose (say reducing COVID-19, or pollution) when

³³¹ Response in Opposition to the Applications for a Stay at 8–10, *NFIB v. OSHA*, 142 S. Ct. 661 (2022) (No. 21A244); Interim Final Rule, COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61402, 61430–32 (Nov. 5, 2021).

³³² Litman, *supra* note 302, at 1454 (discussing Supreme Court precedent that argues novelty is “evidence of a constitutional defect”).

³³³ See Heinzerling, *supra* note 2, at 1938.

³³⁴ Litman, *supra* note 302, at 1479.

actually the regulation serves some *other* purpose (say eliminating evictions to reduce homelessness or benefiting certain energy suppliers over others).³³⁵ And as the Supreme Court made clear in *Department of Commerce v. New York*, which invalidated the Trump Administration's addition of a citizenship question to the 2020 census, agencies may not supply pretextual justifications for their actions.³³⁶

But the possibility that an agency may be proceeding pre-textually does not provide solid grounds for skepticism of regulatory novelty. First, the relationship between novelty and pretext is unclear, and invalidating novel agency actions because of an assumption they are pre-textually motivated seems designed to yield false positives. (As we have explained, many reasons could explain regulatory novelty.) Second, the pretext problem in *Department of Commerce v. New York* was particularly stark. As the Court made clear, the issue was not that the agency had other, unstated reasons for acting that operated in addition to those the agency had given.³³⁷ It was that the supplemental administrative record and extra-record discovery had revealed that the agency simply did not believe the rationale upon which it purported to make its decision.³³⁸ And there is simply not comparable evidence in the major questions cases indicating that the agency didn't believe or didn't care about the rationales provided, even if it is stipulated that the agencies had other reasons for acting as well. Third, the major questions cases do not indicate they are about

³³⁵ Some commentators have raised such pretext arguments alongside major questions ones or have suggested that major questions cases may be getting at pretext. See, e.g., Jed Shugerman, *Biden's Student-Debt Rescue Plan Is a Legal Mess*, *The Atlantic* (Sept. 4, 2022), <https://www.theatlantic.com/ideas/archive/2022/09/biden-student-debt-forgiveness-covid-relief-legal/671329/> [<https://perma.cc/6GWV-NLSB>] (“Perhaps the biggest problem here is that the administration's COVID explanation seems to be just a pretext for a broader program.”); Orin Kerr (@OrinKerr), *Twitter* (Jan. 13, 2022, 4:58 PM), <https://twitter.com/OrinKerr/status/1481747517779808258?s=20&t=8MgCxenQNraIk1s7mWG11w> [<https://perma.cc/SS7S-L528>].

³³⁶ *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2574–75 (2019).

³³⁷ *Id.* at 2573 (“[A] court may not reject an agency's stated reasons for acting simply because the agency might also have had other unstated reasons.”).

³³⁸ *Id.* at 2573–74. The Trump Administration did not bring any lawsuits to enforce the Voting Rights Act and yet claimed an interest in more effectively enforcing it. See Ari Berman, *In Census Case, Supreme Court Suddenly Cares a Lot About Voting Rights Act*, *Mother Jones* (Apr. 23, 2019), <https://www.motherjones.com/politics/2019/04/in-census-case-supreme-court-suddenly-cares-a-lot-about-voting-rights-act/> [<https://perma.cc/EFX4-LLND>]. Extra-record evidence highlighted the Administration's possible interest in diluting the votes of racial minorities. See Leah M. Litman, *Disparate Discrimination*, 121 *Mich. L. Rev.* 1, 45–46 (2022).

pretext but rather say they are about statutory authority. And if the idea is that certain statutes override the normal rule that agencies may act based on unstated reasons in addition to those given and instead require courts to inquire into an agency's predominant purpose for acting, the Court has never done the statutory interpretation work to demonstrate that. What's more, second-guessing agencies' stated rationale in search for their "true" purpose would require the Court to adopt a mode of interpretation (assessing an actor's unexpressed purposes) that textualism and textualists maintain is difficult to administer, conceptually incoherent, or otherwise problematic.³³⁹

2. *Implications*

This Subsection describes certain implications of the Court's increased reliance on regulatory novelty and the potential future implications of the agency's theory.

a. *Hobbling Delegations*

Although the Court's reliance on novelty and the implications of the agency's theory has limited connection to discerning statutory meaning, it does limit the effectiveness of congressional delegations to agencies. By limiting the exercise of agencies' authorities to familiar contexts, the Court undermines the reasons why Congress might delegate to an agency

³³⁹ See Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 *Yale L.J.* 1750, 1762 (2010); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 *Colum. L. Rev.* 1, 25 (2006). To be sure, in the major questions cases, the Court would be assessing the purposes of an agency, rather than a legislature, and several agencies are led by single Directors rather than multi-member bodies. Still, however, a rule or regulation reflects the input of many different people ranging from career agency staff, reviewing agencies like the Office of Management and Budget, and the president. So, there are still several different actors whose purposes would be relevant to determining what the purpose behind a regulation is. And in any case, the Justices skeptical of purposive methods of statutory interpretation do not only rely on the difficulty of ascertaining the purpose of multimember bodies. Rather, they view textualism, rather than purposivism, as the only coherent way of understanding legal texts, and that claim extends to legal texts that are regulations as well as those that are statutes. E.g., Neil Gorsuch with Jane Nitze & David Feder, *A Republic, If You Can Keep It* 132 (2019) ("The text of the statute and only the text becomes law. Not a legislator's unexpressed intentions, not nuggets buried in the legislative history."); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 *Harv. L. Rev.* 2118, 2118 (2016) (similar); Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 *U. Chi. L. Rev.* 2193, 2195 (2017) ("Textualists consider themselves bound to adhere to the most natural meaning of the words at issue.").

in the first place. It also hobbles delegations in circumstances in which Congress is most likely to have wanted an agency to be able to adopt new solutions to novel problems and where delegations are most likely to be an effective governance strategy.

First, the Court's new focus is in serious tension with the public-interest-oriented reasons that Congress may delegate to agencies. Consider two standard justifications for delegation: agencies' greater expertise and flexibility. Agencies have information (and the ability to generate it) and know-how often lacking in Congress.³⁴⁰ Administrative agencies usually have large professional staffs with specialized training and experience with particular regulatory issues.³⁴¹ In contrast, Congress has a far smaller, more generalist group of workers.³⁴² Thus, the argument goes, "to the extent we want policy made by persons who know what they are doing, it is better that policymaking be centered in the administrative agencies rather than in Congress."³⁴³ Agency expertise comes in a variety of forms. Agency officials are often professionals in their respective fields, and so they contribute their pre-existing knowledge and training to the task of creating and implementing policy. For example, the CDC relies on epidemiologists to evaluate the reliability of public-health studies,³⁴⁴ and multiple agencies rely on trained economists to generate credible cost-benefit assessments.³⁴⁵ However, agencies also benefit from expertise that is acquired from exposure and experience. Agency staff "will come to know deeply the web of laws that they are delegated to administer or those that intersect with their turf, plus subsequent implementing regulations, guidance documents, and court decisions."³⁴⁶ And, "[a]s repeat players in frequent political contact with congressional committees, the public, and more directly implicated stakeholders,

³⁴⁰ E.g., Deacon, *supra* note 239, at 1582; Matthew C. Stephenson, Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies, 91 Va. L. Rev. 93, 127 (2005).

³⁴¹ Merrill, *supra* note 190, at 2151–52.

³⁴² *Id.* at 2152.

³⁴³ *Id.*

³⁴⁴ See Sidney A. Shapiro, The Failure to Understand Expertise in Administrative Law: The Problem and the Consequences, 50 Wake Forest L. Rev. 1097, 1108 (2015) (explaining agency procedures).

³⁴⁵ *Id.* at 1109.

³⁴⁶ William W. Buzbee, The Tethered President: Consistency and Contingency in Administrative Law, 98 B.U. L. Rev. 1357, 1367 (2018).

agencies will come to know how various regulatory choices work or could be improved.”³⁴⁷

A related justification for delegation rests on agencies’ flexibility. Because they face fewer procedural hurdles than Congress, agencies are relatively well-positioned to adapt and revise policies to fit changing circumstances and new information.³⁴⁸ That flexibility can be invaluable in the face of unpredictable situations like the COVID-19 pandemic. Regulatory flexibility allows agencies to develop policies through trial-and-error experimentation;³⁴⁹ agencies can also implement innovative new policies in the face of uncertainty and use data about the resulting feedback to formulate more effective policies in the future.³⁵⁰ In contrast, Congress works with several institutional features that make flexible adaptations more difficult. The legislative process makes it difficult to enact federal statutes.³⁵¹ Proposed legislation must pass through countless “vetogates,” including the bicameralism and presentment requirements, internal roadblocks within each congressional chamber, and the need for supermajorities to overcome Senate filibusters.³⁵² As a result, Congress cannot move as quickly or as efficiently as agencies can; updating or revisiting prior legislation imposes enormous practical costs.

The power of the “expertise” and “flexibility” justifications for delegations to agencies have led some to claim that delegation is a practical necessity in light of the scale of modern government.³⁵³ The Supreme Court has noted that “Congress simply cannot do its job absent an ability to delegate power under broad general directives.”³⁵⁴ As Justice Kagan later wrote, if relatively open-ended delegations to agencies are not permissible, “then most of Government is unconstitutional—

³⁴⁷ Id.

³⁴⁸ E.g., Deacon, *supra* note 239, at 1585; Stephenson, *supra* note 340, at 139; Margaret H. Lemos, The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine, 81 S. Cal. L. Rev. 405, 453 (2008).

³⁴⁹ Deacon, *supra* note 239, at 1585–86; see also Stephenson, *supra* note 340, at 140 (explaining how agencies are better suited than Congress “to engage in [an] experimental, adaptive, trial-and-error approach to policymaking”).

³⁵⁰ See Yair Listokin, Learning Through Policy Variation, 118 Yale L.J. 480, 483–84 (1989); see also Zachary Gubler, Experimental Rules, 55 B.C. L. Rev. 129, 130 (2014) (arguing that path dependency and irreversibility pose obstacles to legal experimentation).

³⁵¹ E.g., William N. Eskridge, Jr., Vetogates, *Chevron*, Preemption, 83 Notre Dame L. Rev. 1441, 1441 (2008).

³⁵² Id. at 1444–48.

³⁵³ E.g., Merrill, *supra* note 341, at 2153 (“[B]road delegation is necessary if government is to realize the ambitious agenda it has set for itself.”).

³⁵⁴ *Mistretta v. United States*, 488 U.S. 361, 372 (1989).

dependent as Congress is on the need to give discretion to executive officials to implement its programs.”³⁵⁵

By discouraging novel exercises of agency authority, the new major questions doctrine prevents an agency from using its greater expertise and flexibility in precisely those situations where agencies’ greater expertise and flexibility are likely to be most valuable: when the agency’s considered expertise, perhaps in conjunction with unanticipated changes or new information, counsels a previously untried regulatory approach.

Take the expertise rationale for delegations. The premise of the expertise rationale is that Congress is not likely to know how or when or in what context a particular goal might be achieved. When Congress operates under those conditions, the thinking goes, it may delegate authority to an agency, which is more likely to know the best solution. Yet the major questions doctrine requires Congress to anticipate many of the means that an agency might use to pursue a particular goal. The fact that Congress did not anticipate a particular method of regulation (and perhaps could not have) is no longer an explanation for why Congress might instead have used a broad and unspecific delegation to an agency. Under the major questions doctrine, it is a reason why such a delegation may not be used in a particular way.

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

Nor may it work for Congress to attempt *ex ante* to specify a wide range of different approaches that an agency might take in a given area, hoping that one of them will bear future fruit. For one, due to its lack of expertise, Congress may guess wrong and fail to include the measure that would actually prove effective. And there are also costs to over-specification. Using the *expressio unius* canon, courts might find that policies other than

³⁵⁵ *Gundy v. United States*, 139 S. Ct. 2116, 2130 (2019) (plurality opinion).

those specified are impliedly prohibited.³⁵⁶ Or, using the canons *noscitur a sociis* and *eiusdem generis*, courts may limit agencies to adopting policies similar to those specified, even when Congress has included a catch-all phrase.³⁵⁷ In other words, there are good reasons for Congress to rely on broad, general terms such as it did in Section 111(d) of the Clean Air Act. Applying the major questions doctrine when Congress does so puts Congress in a very difficult position.

Understood in this way, the Court's major questions doctrine undermines the bases for delegation—not in a formal, constitutional sense by preventing Congress from using delegations—but in a practical sense that makes it difficult to realize the full benefits of delegation.³⁵⁸ These dynamics were on display in the Court's major questions cases. Consider the OSHA testing-or-vaccination policy that the Court invalidated by relying on the major questions doctrine.³⁵⁹ There, the Court claimed that it was “telling that OSHA, in its half century of existence, has never before adopted a broad public health regulation of this kind.”³⁶⁰ But since the Occupational Safety and Health Act had been enacted in 1970,³⁶¹ the agency had not faced a pandemic similar to COVID-19. The regulatory novelty was a product of the flexibility that delegations typically afford agencies to adapt to changed circumstances.³⁶² The possibility that changed factual circumstances might call for new, prompt action was traditionally a justification for delegation, and may have been why Congress relied on a delegatory approach in this context. Yet the Court treated it as a reason to be skeptical of the agency's exercise of its delegated authority.

These dynamics were also on display in *West Virginia v. EPA*. There, the EPA promulgated a rule, the Clean Power Plan, that adopted generation shifting requirements for coal-fired power plants.³⁶³ These requirements, the agency explained, were needed “[c]onsidering the

³⁵⁶ See generally *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 940 (2017) (noting that a negative inference can arise when a term is left out of a statute).

³⁵⁷ See *Yates v. United States*, 135 S. Ct. 1074, 1085 (2015).

³⁵⁸ See Blake Emerson, *The Real Target of the Supreme Court's EPA Decision*, *Slate* (June 30, 2022, 4:08 PM), <https://slate.com/news-and-politics/2022/06/west-virginia-environmental-protection-agency-climate-change-clean-air.html> [<https://perma.cc/YJ3S-59JH>].

³⁵⁹ *NFIB v. OSHA*, 142 S. Ct. 661, 666 (2022).

³⁶⁰ *Id.*

³⁶¹ Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590.

³⁶² See, e.g., Litman, *supra* note 302, at 1437–48 (noting that legislative novelty is often in response to precipitating changes); Deacon, *supra* note 239, at 1585.

³⁶³ *West Virginia v. EPA*, 142 S. Ct. 2587, 2593 (2022).

direction that the power sector has been taking and the changes that it is undergoing.”³⁶⁴ The agency also explained that generation shifting was possible because of “[a]dvancements and innovation in power sector technologies.”³⁶⁵ So the EPA’s knowledge about the changing circumstances in the technologically complicated power sector purportedly supplied the occasion for a new regulatory approach; the fact that pollution and air quality are topics that are scientifically complex and rapidly evolving may also be reasons why Congress relied on a delegatory approach. Yet the Court treated the new regulatory approach as an indication of majorness, even though it may have been the very reason why Congress relied on a delegation in the first place.

b. De-regulatory Faux Minimalism

This Subsection explains how the new major questions doctrine gives rise to the appearance of judicial humility, as the Court purports to be adopting a minimalist, non-constitutional approach when, in reality, the doctrine operates as a powerful de-regulatory tool that may accomplish many of the goals of a revived nondelegation doctrine but in a more tailored and politically selective way.

Because the major questions doctrine rests on a rule of statutory interpretation, the decisions invoking the major questions doctrine sometimes end up being described as the product of moderation or minimalism. For example, after the Court’s decision in the OSHA case, Professor Dan Farber wrote that, in light of the decisions, “[i]t looks like the moderates,” by which he meant Chief Justice Roberts, Justice Kavanaugh, and Justice Barrett, “aren’t game for a massive attack on regulatory power”³⁶⁶ And Professor Aaron Tang proposed that OSHA could require high-quality masking and testing, even if it could

³⁶⁴ Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64510, 64595 (Oct. 23, 2015); see also Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64662, 64694 (Oct. 23, 2015) (“Today, the electricity sector is undergoing a period of intense change.”).

³⁶⁵ Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. at 64696.

³⁶⁶ Dan Farber, *Today’s Vaccine Cases: Implications for Climate Change Regulation*, LegalPlanet (Jan. 13, 2022), <https://legal-planet.org/2022/01/13/todays-vaccine-cases-implications-for-climate-change-regulation/> [<https://perma.cc/HR3A-9NAA>].

not require vaccines.³⁶⁷ In some respects the major questions decisions are minimalist, at least relative to other alternative bases for the decisions, because the decisions formally hold out the possibility that Congress may amend the statute to authorize the relevant agency action.³⁶⁸

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

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

The difficulty of amending statutes also makes these decisions more practically significant than they might seem. It is a vast understatement to

³⁶⁷ Aaron Tang, Op-Ed: Here's How Biden Can Fix the Supreme Court's Terrible Mistake in the Vax or Mask Case, *L.A. Times* (Jan. 15, 2022, 6:00 AM), <https://www.latimes.com/opinion/story/2022-01-15/supreme-court-oshha-vaccination-mandate-joe-biden> [<https://perma.cc/F63B-B7HJ>].

³⁶⁸ Cf. *supra* Section I.A (describing the nondelegation doctrine).

say that passing legislation is difficult.³⁶⁹ The hypothetical possibility that Congress could amend a statute to authorize a particular agency action will, in most cases, remain just that—a hypothetical, not a reality. And that is true even if or when an agency action was authorized by a capacious, but general, grant of authority in a statute and even if or when that agency action enjoys majority support.

Given the “prevailing political geography of the United States,” moreover, the Court’s major questions doctrine provides a comparative advantage to the Republican Party’s likely levers of political power relative to those of the Democratic Party.³⁷⁰ As Professors Jonathan Gould and David Pozen have written, “a host of longstanding structural arrangements” make it easier for the Republican Party to obtain political power in the United States Congress.³⁷¹ The apportionment scheme of the Senate, which skews representation toward less diverse and smaller states, and state legislatures’ power to draw gerrymandered districts for federal congressional seats make it easier for Republicans to hold majorities in both houses of Congress.³⁷² As a result, Democrats find it harder to win political power in Congress and enact their preferred policies through legislation. That is particularly true given the existence of the filibuster, which in effect requires Democrats to win supermajority control of the Senate, an institution that is structurally stacked against the current Democratic Party, in order to advance policy goals that require legislation.³⁷³

This means that the Democratic Party may be more likely to try and effectuate their preferred policies through the executive branch and administrative agencies rather than through legislation. And the major questions doctrine, which limits the executive branch’s power relative to the federal legislature’s and the federal courts’, constrains their ability to

³⁶⁹ See *infra* note 373.

³⁷⁰ Jonathan S. Gould & David E. Pozen, *Structural Biases in Structural Constitutional Law*, 97 N.Y.U. L. Rev. 59, 114–15 (2022).

³⁷¹ *Id.*

³⁷² *Id.* at 115; Cameron Joseph, *A Red Wave Didn’t Give Republicans the House but Gerrymandering Probably Will*, *Vice* (Nov. 10, 2022, 2:11 PM), <https://www.vice.com/en/article/akeqv8/republican-gerrymandering-house-midterms> [<https://perma.cc/L25V-RYRE>]. Professors Gould and Pozen also discuss how the Electoral College system for selecting the President does the same but not to the same extent as Congress. Gould & Pozen, *supra* note 370, at 115–16.

³⁷³ Gould & Pozen, *supra* note 370, at 90–97.

do so. It accordingly doctrinally reinforces “perceived, and actual, partisan advantage,” no small or minimalist development.³⁷⁴

The major questions doctrine cases are more consequential than they might seem for other reasons as well. The increasing importance of regulatory novelty, together with the Court’s focus on the implications of the agency’s theory of authority, make the major questions doctrine into a powerful de-regulatory tool with effects similar to decisions based on the nondelegation doctrine, but simply delivered under the guise of statutory interpretation. In theory, the decisions allow for Congress to amend a statute so as to authorize a particular agency action. But in practice, that congressional response is unlikely to materialize—and even if it does, it will be hard for Congress to craft effective delegations. For that reason, the major questions decisions have the effect of severely restricting agencies from adopting regulations pursuant to generally worded congressional statutes. That result shares much in common with reinvigorated nondelegation doctrine, even if the two do not overlap completely. Those similarities are further reinforced because, as mentioned earlier in Subsection III.B.2, the Court’s reasons for skepticism of an agency’s authority overlap with the reasons why Congress might rely on delegations. This means the major questions doctrine limits Congress’s ability to rely on broad delegations to agencies in the circumstances where Congress may be most likely to do so—namely, to respond to changing circumstances or unforeseen developments using agencies’ superior expertise and flexibility.

Moreover, the emphasis on both the regulatory novelty of the agency’s policy and the theoretical implications of an agency’s claim of statutory authority are well tailored to effect deregulation.³⁷⁵ The regulatory anti-novelty bent seems to limit an agency to adopting rules that address problems that the agency tackled in the first few years after a statute’s enactment; at a minimum, it seems to limit an agency to regulatory means that the agency used in the same early time period. This turns statutory delegations to an agency into “use it or lose it” grants of power: in order to retain the powers granted to it, an agency has to exercise those powers within some ill-defined period of years after a statute’s enactment. In particular, it is not clear how many regulations an agency has to adopt

³⁷⁴ Cf. Stephanopoulos, *supra* note 258, at 177–78 (laying out a “cynical” account of the Roberts Court’s anti-*Carolene* decisions).

³⁷⁵ Cf. Heinzerling, *supra* note 2, at 1938 (explaining how the Court’s cases “mask a judicial agenda hostile to a robust regulatory state”).

before establishing a basis for its regulatory authority. Nor is it clear over what time horizon—that is how soon after a statute’s enactment—it has to adopt them.

It is not difficult to see how a “use it or lose it” approach to regulatory authority operates as a de-regulatory tool. It will result in agencies losing powers they possess under general and otherwise unambiguous grants of statutory authority. Again, consider the Clean Air Act’s grant of authority to the EPA to develop the “best system of emission reduction . . . adequately demonstrated” “taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements.”³⁷⁶ As Justice Kagan noted in dissent, “[t]he parties do not dispute that generation shifting is indeed the ‘best system’—the most effective and efficient way to reduce power plants’ carbon dioxide emissions.”³⁷⁷ But the majority concluded that the EPA did not possess the authority to adopt that best system in part because the agency had never tried that regulatory approach until 2015, forty-five years after the relevant statute’s enactment.³⁷⁸ An agency’s powers thus effectively shrink over time if the agency does not use them to the full extent.

This, too, undermines the effectiveness of delegations, which were supposed to provide agencies with flexibility to adapt to changing circumstances. The regulatory novelty principle limits agencies to relying on the set of methods or the modes of regulation that the agency adopted over some initial time period. Consider how that might work in the context of the EPA. When the Clean Air Act was adopted in the 1970s, the EPA might have focused on one kind of pollution—say, visible pollution causing short-term health effects. But later, the EPA might address other kinds of pollution, perhaps because scientific or technological developments identified other sources of pollution, or because industries and markets have changed, leading to new sources of pollution. The regulatory novelty approach would require the agency to regulate new possible sources of pollution or newly identified pollutants the same way it regulated old ones. That limitation restricts an agency’s

³⁷⁶ 42 U.S.C. § 7411(a)(1).

³⁷⁷ *West Virginia v. EPA*, 142 S. Ct. 2587, 2628 (2022) (Kagan, J., dissenting); see also *id.* at 2614 (“As a matter of ‘definitional possibilities,’ generation shifting can be described as a ‘system’—‘[a]n aggregation or assemblage of objects united by some form of regular interaction’—capable of reducing emissions.” (citations omitted)).

³⁷⁸ *West Virginia v. EPA*, 142 S. Ct. at 2600, 2602, 2613–14.

ability to tailor its regulatory approach to new problems and to leverage its expertise to develop new solutions to address new problems.

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

The major questions doctrine thus seems to embed de-regulatory preferences in the Court's methods of statutory interpretation. Indeed, Justice Gorsuch's concurrence in *West Virginia v. EPA* seemed to specifically link the major questions doctrine to de-regulation. He wrote that "[w]ith the explosive growth of the administrative state since 1970, the major questions doctrine soon took on special importance."³⁷⁹ During that period "Congress created dozens of new federal administrative agencies" and "[t]oday, Congress issues 'roughly two hundred to four hundred laws' every year, while 'federal administrative agencies adopt something on the order of three thousand to five thousand final rules.'"³⁸⁰ Instead of treating the rise of delegations as evidence of Congress's choice to provide agencies with flexibility and broad authority, this uses the major questions doctrine to push back against Congress's regulatory choices. That is also how then-Judge Kavanaugh described the doctrine: the major questions doctrine "operates as a vital check on expansive and aggressive assertions of executive authority."³⁸¹ And here too, that accomplishes an important part of what a revived nondelegation doctrine would do.

Unlike a revived nondelegation approach, however, the major questions doctrine provides a more selective and targeted de-regulatory tool. As Subsection III.A.3 argued, judges seem more likely to designate a policy as politically significant, and therefore major, when the policy is opposed by the political party that appointed the judge. That means, given the composition of the U.S. Supreme Court, Democratic administrations' agency initiatives are more likely to be deemed major, and therefore more

³⁷⁹ Id. at 2619 & n.2 (Gorsuch, J., concurring).

³⁸⁰ Id. at 2619 n.2.

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

likely to be invalidated, than Republican administrations' agency initiatives. The "perceived, and actual, partisan advantage" of the doctrine might suggest that the relative importance of the doctrine should be not minimized, even compared to other possible alternatives.³⁸²

The Court's other major decision concerning agency authority from the October term 2021 highlights both the manipulability of the new major questions doctrine and how it is a selectively invoked de-regulatory tool. In *Biden v. Missouri*, the Court upheld the Secretary of Health and Human Services's authority to condition facilities' Medicare and Medicaid funding on the facilities imposing COVID-19 vaccination requirements.³⁸³ The relevant statutes gave the Secretary the authority to make rules and regulations "as may be necessary to the efficient administration of the functions with which [they are] charged."³⁸⁴ Included among those functions were ensuring "the health and safety of individuals who are furnished services" in hospitals, outpatient rehabilitation facilities, skilled nursing facilities, and ambulatory surgical centers.³⁸⁵

In upholding the vaccination requirement, the Court did not apply the clear statement rule that had crystallized in the new major questions cases. Rather, the Court invoked the Secretary's general authority to ensure "the health and safety of individuals"³⁸⁶ and concluded the vaccination requirement "fit[] neatly within the language of the statute,"³⁸⁷ which did not clearly or specifically refer to vaccination requirements. That mode of analysis differs from the framework adopted in *West Virginia v. EPA*, the OSHA case, and the eviction moratorium case.³⁸⁸

Intriguingly, however, the Court did not explain why the Centers for Medicare and Medicaid Services ("CMS") rule was *not* major, and why the rule did *not* require more specific statutory authorization. Yet its conclusion seems to turn on that choice. The Court accepted broad, but

³⁸² Cf. Stephanopoulos, *supra* note 258, at 178 (describing the perceived and actual partisan advantage of other doctrines that the Court has announced).

³⁸³ 142 S. Ct. 647, 653 (2022). The requirements permitted medical and religious exemptions. Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination, 86 Fed. Reg. 61555, 61572 (Nov. 15, 2021).

³⁸⁴ 42 U.S.C. § 1302(a).

³⁸⁵ *Id.* §§ 1395x(e)(9), 1395x(cc)(2)(J), 1395i-3(d)(4)(B), 1395k(a)(2)(F)(i), 1396r(d)(4)(B), 1396d(l)(1), 1396d(o)(2)(A).

³⁸⁶ *Biden v. Missouri*, 142 S. Ct. at 652 (quoting 42 U.S.C. § 1395x(e)(9)).

³⁸⁷ *Id.*

³⁸⁸ See *supra* Part III.

generally worded, language as sufficient to authorize the agency action. It did not parsimoniously read the statutory grant of authority, even though there were superficially plausible formalist grounds to do so. For example, for some healthcare facilities covered by the CMS rule, the Secretary did not have express statutory authority to ensure “the health and safety of individuals” in the facilities.³⁸⁹ The Court dismissed that argument in a footnote, in part by maintaining that “the pertinent statutory language” in provisions *without* the health and safety authority “may be read as incorporating the ‘health and safety’ authorities” in the other statutory provisions.³⁹⁰ Without meaning to undercut the Court’s conclusion, we think it is safe to say that grafting language that is included in some statutory sections onto the sections that do not contain that language was an interpretive choice that could have gone another way.³⁹¹ Additionally, several of the provisions granting the Secretary authority to ensure the health and safety of patients contained specific examples of the kinds of requirements the Secretary could adopt.³⁹² In the eviction moratorium case, the Court had used the specific examples of the agency’s regulatory authority in the statute to narrow the scope of the agency’s authority to similar in kind regulations.³⁹³ The Court did not make that move in the CMS case.³⁹⁴

The Court’s failure to explain why the CMS rule was not major is additionally curious because several of the reasons why the Court seemed to identify other rules or regulations as major could have been applied to the CMS rule. In the OSHA case, the Court had identified the very nature of a vaccination requirement as a reason why the agency action was

³⁸⁹ *Biden v. Missouri*, 142 S. Ct. at 652 & n.*.

³⁹⁰ *Id.*

³⁹¹ Cf. Sohoni, *supra* note 55, at 282 n.154 (“To set my own cards on the table, I would think that a purely textualist approach would have resulted in the government losing the CDC case, losing the CMS case, winning the EPA case, and prevailing in the OSHA case . . .”).

³⁹² 42 U.S.C. § 1395x(e)(2), (3), (5); *id.* § 1395x(aa)(2), (dd)(2), (o)(6), (ff)(3)(B), (p)(4)(A), (cc)(2), (eee)(2); *id.* § 1396u-4(f)(4).

³⁹³ *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2488 (2021) (“But the second sentence informs the grant of authority by illustrating the kinds of measures that could be necessary: inspection, fumigation, disinfection, sanitation, pest extermination, and destruction of contaminated animals and articles.”).

³⁹⁴ Compare *Biden v. Missouri*, 142 S. Ct. at 652–63 (arguing that the Secretary of Health and Human Services’s role “goes far beyond that of a mere bookkeeper” and authorizing discretion on the basis of the “broad language” in the statute), with *id.* at 657 (Thomas, J., dissenting) (arguing that “context must inform the scope of the provision,” so the Secretary’s power is limited to creating rules similar “in kind” to specified statutory powers).

politically significant and required specific statutory authorization.³⁹⁵ That rationale for majorness seemingly applied to the CMS rule. In the eviction moratorium case, the Court concluded the moratorium “intrude[d] into an area that is the particular domain of state law,” which the Court defined as “the landlord-tenant relationship.”³⁹⁶ The dissenters in the CMS case characterized the area of regulation as “[v]accine mandates,” which they suggested more often fell to the states, rather than the federal government.³⁹⁷

Our point is not to challenge the Court’s conclusion that the CMS rule is not major. (Indeed, given the myriad problems with the new major questions doctrine, we think that courts *should* read “majorness” narrowly, rather than broadly.³⁹⁸) Rather, it is to point out that the Court’s lack of explanation for why the CMS rule was not major, coupled with the vagaries and generalizations with which the Court has defined other rules as major, underscores the ease with which the new major questions doctrine can be selectively applied. The Court’s decision *not* to explain why the CMS rule was not major also adds another de-regulatory thumb on the scale in the newly crystallized doctrine. The lack of explanation for why any rule is not major makes it easier for lower courts to seize on the language in other cases explaining why other rules were not major, because there is nothing to counterbalance that language or confine it.

The appearance of faux minimalism in the Court’s major questions doctrine may be of more than academic interest. If the Court’s decisions are consistently depicted and described as minimalist, or as something fixable, then that may contribute to a lack of attention to the decisions and their effects. To the extent people do not understand or appreciate how the decisions functionally disable administrative agencies in many important respects, that undermines one possible constraint on the Supreme Court and courts more generally—public opinion.

³⁹⁵ *NFIB v. OSHA*, 142 S. Ct. 661, 665 (2022) (“This . . . is . . . a significant encroachment into the lives—and health—of a vast number of employees.”).

³⁹⁶ *Ala. Ass’n of Realtors*, 141 S. Ct. at 2489.

³⁹⁷ *Biden v. Missouri*, 142 S. Ct. at 658 (Thomas, J., dissenting).

³⁹⁸ The Court might have concluded there was less political controversy surrounding the CMS rule. Alternatively, it might have defined the area of regulation as concerning federally funded healthcare facilities. Or it might have defined the kind of regulation as a health and safety requirement, rather than a vaccination requirement, which made it easier to identify regulatory antecedents. Cf. *Biden v. Missouri*, 142 S. Ct. at 653 (identifying previous training of employees as an analogous requirement).

CONCLUSION

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

Consider three explanations for the legitimacy of the administrative state. One, offered by Professor Daniel Walters, maintains that the administrative state is a salutary form of governance because it channels political contestation and enables political dispute resolution within administrative processes.³⁹⁹ In Walters's telling, what makes administrative agencies legitimate and beneficial is that they provide avenues for continued conflict and contestation.⁴⁰⁰

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

A second justification is the one offered by Professor Nicholas Bagley. Bagley argued that the legitimacy of the administrative state is derived from its ability to deliver substantively just and beneficial policies that benefit the public.⁴⁰¹ Yet here too, the major questions doctrine undermines agencies' ability to pursue policies that further their policy goals and concededly address a national problem. Any of the Court's three recent major questions cases illustrate why this might be. Of course, none of the agencies' policies—an eviction moratorium, a testing-and-

³⁹⁹ Daniel E. Walters, *The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State*, 132 *Yale L.J.* 1, 58 (2022).

⁴⁰⁰ See *id.* at 70–72.

⁴⁰¹ See Bagley, *supra* note 321, at 379–80.

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

A third and final justification for administrative governance is the one articulated most recently by Professor Jed Stiglitz. Broadly speaking, it maintains that agency governance is legitimate because agency rules must be evidence-based, and agencies must give reasons for their decisions.⁴⁰² Agencies, unlike Congress, must adopt policies in a manner that is “highly constrained and subject to scrutiny by external reviewers.”⁴⁰³ These procedural requirements exist to create policies that are supported by evidence and shaped by public input.⁴⁰⁴

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

⁴⁰² Edward H. Stiglitz, *Delegating for Trust*, 166 U. Pa. L. Rev. 633, 654–56 (2018).

⁴⁰³ *Id.* at 653.

⁴⁰⁴ *Id.* at 655–66; see also Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 Minn. L. Rev. 2019, 2028, 2087–89 (2018) (presenting a theory of the administrative state as a democratic institution).

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