

# COMMENTS

## DEFINING “EXTRAORDINARY”: LIMITING PRINCIPLES FOR THE MAJOR QUESTIONS DOCTRINE IN *WEST VIRGINIA v. EPA*\*

### INTRODUCTION

The field of administrative law is facing a moment of unprecedented upheaval. For almost forty years, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* has been the central pillar of administrative law guiding the interpretation of congressional acts by federal executive agencies.<sup>1</sup> The *Chevron* doctrine has promoted good governance and democratic accountability by directing judges to defer to the policy expertise of federal agencies and providing a workable test for analyzing administrative law cases.<sup>2</sup> *Chevron*'s influence is waning, though, driven by the Supreme Court's growing distrust of administrative agencies.<sup>3</sup> This skepticism recently coalesced into a new Major Questions doctrine (“Major Questions”), which undercuts *Chevron* and threatens the federal government's ability to address complex challenges.<sup>4</sup>

In 2022, the landmark case *West Virginia v. EPA* codified the shift from judicial deference to skepticism of administrative agencies.<sup>5</sup> For the first time, a Supreme Court majority explicitly held that the Major Questions doctrine—not *Chevron*—governed

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1. 467 U.S. 837 (1984); see also Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 912 (2017) (“[O]n every single working day of the year, there exists in the employ of the federal government a judge, an executive officer, or a legislator who expressly invokes or formulates policy premised on *Chevron*.”).

2. See Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 351–52, 374 (1994) (“The practice of deferring to executive interpretations of statutes performs many valuable functions: it allows policy to be made by actors who are politically accountable; it draws upon the specialized knowledge of administrators; it injects an element of flexibility into statutory interpretations; and it helps assure nationally uniform constructions.” (quoting Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 1002 (1992))).

3. See Nathan Richardson, *Deference Is Dead (Long Live Chevron)*, 73 RUTGERS U. L. REV. 441, 523 (2021) [hereinafter Richardson, *Deference is Dead*] (describing *Chevron*'s decline as driven by a “wider ideological project skeptical of administrative authority”).

4. See *id.* at 504 (“*Chevron* empowers agencies to interpret statutes more boldly; a weakened, narrowed, and muddled *Chevron* does the reverse. Agencies might react to the decline of deference by interpreting statutes more narrowly or by not regulating at all in areas of statutory ambiguity.”).

5. See 142 S. Ct. 2587, 2609 (2022).

the legality of a federal agency rule.<sup>6</sup> Now, when Major Questions applies, important administrative actions are inherently “suspect,” and the issuing agency must point to “clear congressional authorization” to regulate in their chosen manner.<sup>7</sup> However, *West Virginia* limited the doctrine to “certain extraordinary cases,” leaving *Chevron* intact “in the ordinary case.”<sup>8</sup>

Federal courts now face an avalanche of Major Questions claims, with little guidance to help them determine when the new doctrine should apply instead of *Chevron*.<sup>9</sup> How broadly lower courts choose to interpret the “extraordinary cases” limitation in *West Virginia* will have sweeping ramifications.<sup>10</sup> *Chevron* lets agencies develop new solutions to evolving problems.<sup>11</sup> Major Questions thwarts federal agency action, directing judges to look askance at new or creative solutions.<sup>12</sup> *Chevron* encourages the political branches of government—not the unelected judiciary—to set public policy.<sup>13</sup> Major Questions appoints ill-equipped federal courts as the arbiters of policy decisions.<sup>14</sup> Broad applications of Major Questions threaten to hold federal policy hostage to innumerable legal challenges, resulting in the massive waste of taxpayer dollars and governmental paralysis.<sup>15</sup> Narrow applications of Major Questions could preserve the beneficial effects of *Chevron*.<sup>16</sup>

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6. *Id.* All previous uses of the term “major questions doctrine” by Supreme Court Justices were in dissents and concurrences. *See, e.g., West Virginia*, 142 S. Ct. at 2634 (Kagan, J., dissenting) (“The Court has never even used the term ‘major questions doctrine’ before.”); *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., concurring).

7. *West Virginia*, 142 S. Ct. at 2614 (quoting *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006)); *see also Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014).

8. *West Virginia*, 142 S. Ct. at 2608–09. *See infra* Part III.A discussing the implications of *West Virginia*’s failure to cite *Chevron*.

9. *See infra* Part III.B.

10. *West Virginia*, 142 S. Ct. at 2608–09; *see also* Edwin E. Huddleson, *Chevron Under Siege*, 58 U. LOUISVILLE L. REV. 17, 20 (2019) (noting that an embrace of the Major Questions doctrine by the Supreme Court could “dramatically change the status quo and result in invalidating many . . . agency rules”).

11. *See* Merrill, *supra* note 2, at 351–52, 374.

12. *See* Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 1938 (2017) (describing Major Questions cases as part of a “judicial agenda hostile to a robust regulatory state”).

13. *See* *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 866 (1984) (“The responsibilities for assessing the wisdom of . . . policy choices and resolving the struggle between competing views of the public interest are not judicial ones: ‘Our Constitution vests such responsibilities in the political branches.’” (quoting *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 195 (1978))).

14. *See* Nathan Richardson, *Antideference: COVID, Climate, and the Rise of the Major Questions Canon*, 108 VA. L. REV. ONLINE 174, 178 (2022) [hereinafter Richardson, *Antideference*], <https://virginialawreview.org/articles/antideference-covid-climate-and-the-rise-of-the-major-questions-canon/> [https://perma.cc/UY8P-6CAV] (describing the Major Questions doctrine as a “purely judicial creation, with indistinct and arbitrary boundaries that appear to shift to match the policy preferences of the judges applying it”); *West Virginia*, 142 S. Ct. at 2644 (Kagan, J., dissenting) (“The Court appoints itself—instead of Congress or the expert agency—the decision-maker on climate policy.”); *see also* *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (“In *Chevron*, this Court held that ambiguities in statutes within an agency’s jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. Filling these gaps, the Court explained, involves difficult policy choices that agencies are better equipped to make than courts.”).

15. Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 266 (2022) (“Major questions challenges will load the Court’s docket for years to come.”); *see also* *United States v. Mead Corp.*, 533 U.S.

Despite the sweeping potential consequences of Major Questions, the Supreme Court has never adequately instructed lower courts regarding when to apply it.<sup>17</sup> *West Virginia* did little to clarify the situation.<sup>18</sup> Early interpretations of *West Virginia* by lower courts have taken drastically different approaches, highlighting the importance of clarifying the doctrine.<sup>19</sup>

This Comment proposes that *West Virginia*'s repeated use of the phrase "extraordinary cases" to describe the Major Questions doctrine creates a clear limiting principle and provides workable guidance for lower courts. The Supreme Court uses "extraordinary cases" to indicate a rare and unusual exception to the general rule.<sup>20</sup> Further, the Supreme Court consistently reminds lower courts to apply exceptions narrowly to prevent the exception from swallowing the rule.<sup>21</sup> Accordingly, courts must only apply Major Questions in rare factual situations and prevent the doctrine from becoming the default in administrative law cases.<sup>22</sup>

This Comment proceeds in several sections. Section II traces the development of Major Questions from its origins as part of the *Chevron* doctrine, describes the codification of the doctrine in *West Virginia*, and examines the chaotic interpretations of Major Questions in the wake of *West Virginia*. Section III argues that *West Virginia* placed clear limits on the Major Questions doctrine by holding that it only applies in

218, 250 (2001) (Scalia, J., dissenting) (describing the consequences of narrowing *Chevron* as "a recipe for uncertainty, unpredictability, and endless litigation").

16. See Nathan Richardson, *Keeping Big Cases from Making Bad Law: The Resurgent "Major Questions" Doctrine*, 49 CONN. L. REV. 355, 359 (2016) [hereinafter Richardson, *Keeping Big Cases*] (proposing that the Major Questions doctrine could serve as a "safety valve" to prevent *Chevron* from being overturned).

17. See Kent Barnett & Christopher J. Walker, *Short-Circuiting the New Major Questions Doctrine*, 70 VAND. L. REV. EN BANC 147, 149 (2017) (noting that the Supreme Court has "not provide[d] clear guidance to lower courts on how to apply the new major questions doctrine"); Nicholas R. Bednar, *The Clear-Statement Chevron Canon*, 66 DEPAUL L. REV. 819, 856 & n.243 (2017) ("The Supreme Court has never articulated how reviewing courts should identify 'extraordinary cases' with any particularity, preferring an 'I know it when I see it' attitude . . ."); Jonathan Skinner-Thompson, *Administrative Law's Extraordinary Cases*, 30 DUKE ENV'T L. & POL'Y F. 293, 294 (2020) (noting that the authors are "befuddled" by the application of the doctrine).

18. See Sohoni, *supra* note 15, at 266 (describing *West Virginia* as a "rain check").

19. Recent court opinions discussing the Major Questions doctrine demonstrate a high degree of uncertainty about its scope and nature. See, e.g., *Georgia v. President of the United States*, 46 F.4th 1283, 1314 (11th Cir. 2022) (Anderson, J., concurring in part and dissenting in part) (speculating that "[a]lthough the major questions doctrine has never been applied to an exercise of proprietary authority and has never been applied to the exercise of power by the President, I will assume that the doctrine does apply"); *Wash. All. of Tech. Workers v. DHS*, 50 F.4th 164, 204 n.11 (D.C. Cir. 2022) (Henderson, J., concurring in part and dissenting in part) (speculating that the "implication of [*West Virginia*] is that the major questions inquiry appears to be a threshold question to *Chevron* analysis"); *United States v. Freeman*, No. 21-cr-41, 2023 WL 5391417, at \*25–26 (D.N.H. Aug. 22, 2023) ("The major questions doctrine operates as something of an exception to *Chevron* deference."); *appeal pending*, No. 23-1771 (1st Cir. Sep. 21, 2023); *N.C. Coastal Fisheries Reform Grp. v. Capt. Gaston LLC*, No. 21-2184, 2023 U.S. App. LEXIS 20325, at \*6 (4th Cir. Aug. 7, 2023) ("The [Major Questions] doctrine's boundaries remain hazy . . .").

20. See *infra* Part III.A.

21. See, e.g., *Bernal v. Fainter*, 467 U.S. 216, 222 n.7 (1984) ("We emphasize, as we have in the past, that the political-function exception must be narrowly construed; otherwise the exception will swallow the rule . . .").

22. See *infra* Part III.A.2.

“certain extraordinary cases.”<sup>23</sup> Part III.A analyzes the textual definition of “extraordinary cases,” finding that the Supreme Court consistently uses this phrase to refer to a rare exception to a general rule. Part III.B explores the well-known principle that courts must interpret exceptions narrowly. Part III.C demonstrates how the “extraordinary cases” limitation could be deployed by courts as a workable test and highlights that *West Virginia* lacks other useful guidance for lower courts. This Comment concludes that lower courts must follow *West Virginia*’s clear direction to distinguish the “certain extraordinary cases,” where the Major Questions doctrine applies, from “ordinary circumstances” and “routine statutory interpretation.”<sup>24</sup> By limiting the Major Questions doctrine to the few and unusual cases that are truly extraordinary, federal courts will preserve judicial resources and maintain the predictable application of law that the federal government requires to function effectively.<sup>25</sup>

## II. OVERVIEW

The Major Questions doctrine has four developmental phases. Part II.A discusses how the roots of the doctrine developed sporadically from the mid-1990s to the 2000s, as part of the *Chevron* analysis. Part II.B shows how the modern Major Questions doctrine began to take shape in the mid-2010s, shifting away from *Chevron* deference and toward judicial skepticism of all administrative action.<sup>26</sup> Part II.C discusses the spree of Major Questions cases in the early 2020s, culminating in *West Virginia*.<sup>27</sup> Part II.D explores Major Questions after *West Virginia*, examining the growing avalanche of Major Questions cases and analyzing the different interpretations by different judges.

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

24. *Id.* at 2608–09 (internal quotation marks omitted) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

25. See Kathryn M. Baldwin, *Endangered Deference: Separation of Powers and Judicial Review of Agency Interpretation*, 92 ST. JOHN’S L. REV. 91, 97, 108 (2018) (arguing that “the growing complexity and technicality of the administrative state requires an executive-legislative blend to nimbly create and enforce the rules, guidelines, and regulations for a functioning modern government” and that the Major Questions doctrine undercuts government functions by “infring[ing] on the power of the legislative and executive branches to make and determine policy”).

26. See *The Rise of Purposivism and Fall of Chevron: Major Statutory Cases in the Supreme Court*, 130 HARV. L. REV. 1227, 1238 (2017) [hereinafter *Rise of Purposivism*].

27. This Comment limits this historical discussion to cases cited by *West Virginia*. Academics have long struggled to determine which cases represent the Major Questions doctrine, and the Supreme Court has often discussed the doctrine in dissents and concurrences with questionable precedential value. *West Virginia* clarified this question to some degree by pointing to an “identifiable body of law” which represents the doctrine. *West Virginia*, 142 S. Ct. at 2609; see also, e.g., *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218 (1994); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000); *Gonzales v. Oregon*, 546 U.S. 243 (2006); *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302 (2014); *King v. Burwell*, 576 U.S. 473 (2015). Further, *West Virginia* repeatedly quoted four other cases: *Whitman v. Am. Trucking Ass’n, Inc.*, 531 U.S. 457 (2001); *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381 (2017) (Kavanaugh, J., dissenting from a denial of a rehearing en banc); *Ala. Ass’n of Realtors v. HHS*, 141 S. Ct. 2485 (2021); *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab. (NFIB v. OSHA)*, 595 U.S. 109 (2022). Many other cases shed light on the doctrine, but they are beyond the scope of this Comment.

### A. *The Roots of Major Questions*

The histories of Major Questions and the *Chevron* doctrine are inextricably linked.<sup>28</sup> In 1984, *Chevron* announced its famous two-step process for analyzing the legality of statutory interpretations by federal administrative agencies.<sup>29</sup> Under *Chevron*, courts first determine whether statutory text is ambiguous; if it is, courts defer to any reasonable interpretation by the administrative agency.<sup>30</sup> *Chevron* quickly became “one of the central principles in modern American public law.”<sup>31</sup>

The Supreme Court explicitly decided early Major Questions cases using the *Chevron* framework.<sup>32</sup> In these cases, the Court refused to defer to administrative agencies’ statutory interpretations due to their economic or political importance, but lack of deference did not determine the final outcome.<sup>33</sup> Instead, the Court decided the legal issues de novo, using neutral statutory interpretation methods such as consulting dictionary definitions, examining the statute’s text and design, and considering legislative history.<sup>34</sup> These early Major Questions cases are difficult to reconcile with modern Major Questions cases. First, Major Questions is now explicitly *not* part of the *Chevron* doctrine, despite the repeated reliance on *Chevron* in early Major Questions cases.<sup>35</sup> Second, the skepticism of administrative agency action is absent from the early cases but is now central to Major Questions cases.<sup>36</sup> The unreconciled differences between early and recent Major Questions cases often lead scholars to criticize the doctrine as inconsistent and unpredictable.<sup>37</sup> However, *West Virginia* relied heavily on

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28. Richardson, *Keeping Big Cases*, *supra* note 16, at 409.

29. See *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842–43 (1984).

30. *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 986 (2005).

31. Bamzai, *supra* note 1, at 909.

32. See, e.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) (“Because this case involves an administrative agency’s construction of a statute that it administers, our analysis is governed by *Chevron* . . .”).

33. See, e.g., *Gonzales v. Oregon*, 546 U.S. 243, 268 (2006) (holding that the rule at issue “does not receive *Chevron* deference[;] [i]nstead, it receives deference only in accordance with *Skidmore*” equal to the persuasiveness of the statutory interpretation the rule was based on).

34. See, e.g., *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 225–26 (1994) (using dictionaries to determine the statutory meaning of “modify”); *Gonzales*, 546 U.S. at 270–75 (concluding that the statute’s “text and structure” precluded the Attorney General’s interpretation); *Brown & Williamson*, 529 U.S. at 146–56 (considering Congress’s history of tobacco regulations).

35. Compare *Brown & Williamson*, 529 U.S. at 132, with *King v. Burwell*, 576 U.S. 473, 485 (2015) (rejecting explicitly the applicability of *Chevron*).

36. Compare *West Virginia v. EPA*, 142 S. Ct. 2587, 2614 (2022) (holding that “our precedent counsels skepticism toward EPA’s claim”), with *Gonzales*, 546 U.S. at 268 (granting the Attorney General deference in accordance with the *Skidmore* test, wherein “[t]he weight of [an agency’s] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade” (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944))).

37. See Huddleson, *supra* note 10, at 53; see also, e.g., Joshua S. Sellers, “Major Questions” Moderation, 87 GEO. WASH. L. REV. 930, 946 (2019); Alison Goeke, *Chevron’s Next Chapter: A Fig Leaf for the Nondelegation Doctrine*, 55 U.C. DAVIS L. REV. 955, 968 (2021); Marla D. Tortorice, *Nondelegation and the Major Questions Doctrine: Displacing Interpretive Power*, 67 BUFF. L. REV. 1075, 1104 (2019).

quotes from early cases to support its codification of Major Questions,<sup>38</sup> so understanding the doctrine requires a thorough examination of these cases.

1. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*

*Chevron* codified the Court's long history of trusting federal agencies to perform their congressionally created functions, regardless of the political importance of the policies at issue.<sup>39</sup> The Supreme Court has consistently deferred to statutory interpretations by executive agencies since at least 1827.<sup>40</sup> *Chevron* surveyed this history at length, unanimously concluding that "[w]e have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer."<sup>41</sup> Given this extensive history, the principle of deference to administrative interpretations articulated by *Chevron* was hardly groundbreaking.<sup>42</sup> *Chevron*'s main impact was streamlining this principle into an easily applicable two-step test.<sup>43</sup>

Step One of the *Chevron* analysis determines whether the statutory language is "ambiguous."<sup>44</sup> If "Congress has directly spoken to the precise question at issue" and "the intent of Congress is clear," courts "must give effect to the unambiguously expressed intent of Congress."<sup>45</sup> If a court can resolve the issue at *Chevron* Step One, "that is the end of the matter."<sup>46</sup> If the text is silent or ambiguous on the specific issue, the court enters Step Two, deciding whether the agency's interpretation is a "permissible construction" of the statute.<sup>47</sup> Crucially, "the court does not simply

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38. See *West Virginia*, 142 S. Ct. at 2608–09.

39. See *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 844 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . ."); see also *Rise of Purposivism*, *supra* note 26, at 1238–39 ("Chevron's fundamental premise is that ambiguous statutory language functions as an implicit delegation from Congress to an agency. Filling in ambiguous language, the theory goes, resembles policymaking more than interpretation, so Congress would prefer an expert, politically accountable agency for that task over a generalist, unelected court.").

40. See Craig Green, *Chevron Debates and the Constitutional Transformation of Administrative Law*, 88 GEO. WASH. L. REV. 654, 680 (2020) (exploring the history of deference to executive agencies at the Supreme Court).

41. *Chevron*, 467 U.S. at 844 & n.14 (listing Supreme Court precedents).

42. *Id.* at 844.

43. Skinner-Thompson, *supra* note 17, at 294; see also Jonathan R. Siegel, *The Constitutional Case for Chevron Deference*, 71 VAND. L. REV. 937, 938 n.2 (2018) ("[F]ederal courts of appeals have cited *Chevron* nearly five thousand times, as have federal district courts. Law review articles have cited the case more than eight thousand times. The Supreme Court itself has cited *Chevron* more than two hundred times.").

44. See, e.g., *King v. Burwell*, 576 U.S. 473, 485 (2015).

45. *Chevron*, 467 U.S. at 842–43.

46. *Id.* at 842.

47. *Id.* at 843.

impose its own construction” of the statute.<sup>48</sup> Instead, it must defer to any reasonable interpretation made by the agency.<sup>49</sup>

Notably, *Chevron* did not consider the wisdom—or importance—of the policy at issue,<sup>50</sup> noting that “[o]ur Constitution vests such responsibilities in the political branches.”<sup>51</sup> The Court concluded that the power to administer a congressionally created program “necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.”<sup>52</sup> In subsequent cases, the Court has repeatedly noted that “*Chevron* requires a federal court to accept the agency’s construction of the statute, even if the agency’s reading differs from what the court believes is the best statutory interpretation.”<sup>53</sup> Under *Chevron*, the relative importance of a policy is a political question that should be “addressed to legislators or administrators, not to judges.”<sup>54</sup> Thus, there is no reason why important cases should receive less deference than unimportant ones.

## 2. *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*

The oldest Major Questions case, the 1994 *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, shows how early Major Questions cases relied on *Chevron*, striking down, in Step One, a Federal Communications Commission (FCC) requirement that certain long-distance telephone carriers make their rates public.<sup>55</sup> The FCC cited its power to “modify any requirement” of the Communications Act of 1934 as the basis for the rule.<sup>56</sup> MCI—a company benefiting from the rule—argued that the FCC’s decision merited *Chevron* deference, because the statutory meaning of “modify” was ambiguous.<sup>57</sup> However, the Court decided that “modify” was unambiguous because it “has a connotation of increment or limitation” in several dictionaries.<sup>58</sup>

Since the statute was unambiguous, the Court resolved the case under a *de novo* standard of review, using normal statutory interpretation to determine whether the FCC

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48. *Id.*

49. *Id.* at 844; see also Kevin O. Leske, *Major Questions About the “Major Questions” Doctrine*, 5 MICH. J. ENV’T & ADMIN. L. 479, 484 (2016) (noting that Step Two is the part of the *Chevron* analysis involving deference).

50. *Chevron*, 467 U.S. at 866 (“When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency’s policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.”).

51. *Id.* (quoting *Tenn. Valley. Auth. v. Hill*, 437 U.S. 153, 195 (1978)).

52. *Id.* at 844 (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)).

53. *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005).

54. *Chevron*, 467 U.S. at 864.

55. *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 245 (1994); see also Skinner-Thompson, *supra* note 17, at 295 (describing *MCI* as “the first major questions case” and noting that the Court in *MCI* refused to grant the FCC rule *Chevron* deference at Step One).

56. *MCI*, 512 U.S. at 225 (quoting the Communications Act, Pub. L. No. 73-416, 48 Stat. 1064 (1934) (as amended 1976) (current version at 47 U.S.C. § 203(b)(2))).

57. *Id.*

58. *Id.*

rule was a modification.<sup>59</sup> The Court discussed the importance of the rate-filing requirement only to determine whether the FCC’s rule was sufficiently minor so as to constitute a modification or incremental change.<sup>60</sup> In doing so, the Court decided that Congress would not have granted the FCC the discretionary power to regulate the telecommunications industry through such a “subtle device” as the word “modify.”<sup>61</sup> However, the economic importance of the FCC rule was only relevant because of the dictionary definition the Court chose for the key statutory term at issue.<sup>62</sup>

### 3. *FDA v. Brown & Williamson Tobacco Corp.*

*FDA v. Brown & Williamson Tobacco Corp.*,<sup>63</sup> a 2000 case, was designated in *West Virginia* as the “key case” in the Major Questions doctrine.<sup>64</sup> *Brown & Williamson* struck down an FDA rule which prohibited selling cigarettes to children, under the agency’s authority to regulate “drugs” and “devices” for administering drugs.<sup>65</sup> Like every Major Questions case before 2015, the *Brown & Williamson* Court used *Chevron* to analyze the legality of the FDA rule.<sup>66</sup>

Similar to *MCI*, the Court decided *Brown & Williamson* at *Chevron* Step One, concluding that “Congress has directly spoken to the issue here and precluded the FDA’s jurisdiction to regulate tobacco products.”<sup>67</sup> Unlike *MCI*, though, the Court decided the meaning of the statutory text through a broad contextual analysis, rather than a textual analysis using dictionary definitions.<sup>68</sup> This contextual analysis considered the overall statutory scheme, reviewed other congressional acts relating to tobacco regulation, and concluded with a “common sense” inquiry into “the manner in which Congress [was] likely to delegate a policy decision of such economic and political magnitude.”<sup>69</sup>

Before considering the importance of the FDA’s rule—the section of the analysis that supports the Major Questions doctrine<sup>70</sup>—the Court concluded that the plain text

59. *See id.* at 224–25 (determining that “modify” means “to change moderately or in minor fashion” according to several common use dictionaries). Using dictionary definitions to determine the meaning of an undefined statutory term is a quintessential method of statutory interpretation. *See Perrin v. United States*, 444 U.S. 37, 42 (1979) (“A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.”).

60. *See MCI*, 512 U.S. at 231.

61. *Id.*

62. *See id.* at 225.

63. 529 U.S. 120, 125 (2000).

64. *See West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022).

65. *Brown & Williamson*, 529 U.S. at 126. The FDA issued the regulation after determining that nicotine was a “drug,” and cigarettes were “drug delivery devices,” a decision strenuously opposed by the tobacco industry. *Id.* at 126–27.

66. *Id.* at 132. *But cf.* *King v. Burwell*, 576 U.S. 473, 485 (2015) (explicitly rejecting the applicability of *Chevron*).

67. *Brown & Williamson*, 529 U.S. at 133; *see also* Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 243 (2006) (concluding that *MCI* and *Brown & Williamson* were Step One cases).

68. *Brown & Williamson*, 529 U.S. at 132 (noting that “[t]he meaning—or ambiguity—of certain words or phrases may only become evident when placed in context”).

69. *Id.* at 133, 141, 159.

70. *See West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022).



of the Act “preclude[d] the FDA from regulating tobacco products.”<sup>71</sup> This finding could have ended the analysis.<sup>72</sup> However, Justice O’Connor, writing for the majority, went on to perform a seemingly unnecessary analysis of *Chevron* and congressional intent:

Whether Congress has directly spoken to the precise question at issue is shaped, at least in some measure, by the nature of the question presented. Deference under *Chevron* to an agency’s construction of a statute . . . is premised on the theory that a statute’s ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps. In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation [because] “Congress is more likely to have focused upon, and answered, major questions . . . .”<sup>73</sup>

Justice O’Connor’s analysis essentially invented the Major Questions doctrine.<sup>74</sup> First, Justice O’Connor relied on contextual analysis, interpreting congressional intent instead of the statute’s plain language.<sup>75</sup> This approach continues to define Major Questions, even though it conflicts with the “textualism” that has dominated the Court in recent years.<sup>76</sup> Second, Justice O’Connor articulated the central ideological pillar of

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71. *Brown & Williamson*, 529 U.S. at 133, 156. The Court noted that the core objective of the Food, Drug, and Cosmetics Act (FDCA) is ensuring that all products regulated by the FDA are safe and effective for their intended use. *Id.* at 134. Relying on the FDA’s extensive findings on the dangers of tobacco products, the Court concluded that the FDCA could not cover tobacco products because there was no safe, therapeutic use for them. *See id.* at 142 (“Considering the FDCA as a whole, it is clear that Congress intended to exclude tobacco products from the FDA’s jurisdiction.”).

72. Under *Chevron*, deference is only granted when the statutory text is ambiguous. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842–43 (1984). Once *Brown & Williamson* found that the statutory text was clear and contravened the FDA’s interpretation, there was no need to consider whether deference was warranted. *Compare Brown & Williamson*, 529 U.S. at 142 (finding Congress’ intent “clear”), with *Chevron*, 467 U.S. at 842–43 (courts “must give effect to the unambiguously expressed intent of Congress”).

73. *Brown & Williamson*, 529 U.S. at 159 (citations omitted) (quoting Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986)). Notably, this crucial paragraph does not cite any case law, relying instead on a 1986 article by then-Judge Breyer expressing concerns about overly broad interpretations of *Chevron* by lower courts. In this article, then-Judge Breyer proposed that courts’ deference should vary based on the circumstances. *See Breyer, supra*, at 370. Then-Judge Breyer asserted that courts should “defer more when the agency has special expertise that it can bring to bear on the legal question.” *Id.* But he believed that deference was less merited on important legal questions because Congress was less likely to delegate them to executive agencies. *Id.* In this way, then-Judge Breyer cast doubt on a central tenant of *Chevron*—that Congress’s silence on a particular issue is an implicit grant of authority. *Id.* His article is now often cited as the ideological genesis of the Major Questions doctrine, despite Justice Breyer’s ardent dissent in *Brown & Williamson*. *See, e.g.*, *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from a denial of a rehearing en banc) (“Justice Breyer appears to have been the first to describe a dichotomy between ordinary and major rules and to articulate the major rules doctrine as a distinct principle of statutory interpretation.”); *Georgia v. President of the United States*, 46 F.4th 1283, 1314 (11th Cir. 2022) (Anderson, J., concurring in part and dissenting in part).

74. *See West Virginia*, 142 S. Ct. at 2608 (quoting *Brown & Williamson*, 529 U.S. at 126–27, 159–60).

75. *See Sohoni, supra* note 15, at 282 (discussing the tensions between Major Questions and textualism); *West Virginia*, 142 S. Ct. at 2641 (Kagan, J., dissenting) (describing Major Questions as a “get-out-of-text-free card”).

76. *See Sohoni, supra* note 15, at 282–90 (discussing whether the Major Questions doctrine is compatible with the Court’s supposed commitment to textualism). Notably, Justice Barrett wrote a concurring opinion in *Biden v. Nebraska* attempting to reconcile her support for the Major Questions doctrine and her

the Major Questions doctrine by asserting that the “economic and political magnitude” of a policy changes the meaning of the statutory text on which the policy is based.<sup>77</sup> Finally, Justice O’Connor limited Major Questions to “extraordinary cases,” designating her analysis as an exception to the general rule.<sup>78</sup>

Justice O’Connor then applied these principles, noting that “[t]his is hardly an ordinary case,” because the FDA had sought to “regulate an industry constituting a significant portion of the American economy.”<sup>79</sup> This language appears to support the central premise of Major Questions, that important agency rules should be held to a different standard than unimportant ones.<sup>80</sup> But Justice O’Connor then muddied the waters by noting that Congress had “created a distinct regulatory scheme for tobacco products” and “squarely rejected proposals to give the FDA jurisdiction over tobacco.”<sup>81</sup> Justice O’Connor then combined all of the factors of her analysis, concluding that “[g]iven [the] history and the breadth of the authority that the FDA has asserted, we are obliged to defer not to the agency’s expansive construction of the statute, but to Congress’ consistent judgment to deny the FDA this power.”<sup>82</sup> Yet, under *Chevron*, if Congress has directly spoken on an issue, there is no need for another reason to deny deference.<sup>83</sup>

Finally, Justice O’Connor drew a parallel to *MCI*, stating that, in both cases, “Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”<sup>84</sup> Therefore, “Congress had directly spoken to the question,” because Congress would be unlikely to delegate regulatory authority over an important industry through such a “subtle device.”<sup>85</sup> By focusing on Congress’s direct speech, Justice O’Connor rooted her analysis in *Chevron* Step One.<sup>86</sup>

Justice O’Connor also introduced another, now central, component of Major Questions—weighing the importance of a regulation against the “subtlety” or

textualist bona fides. See 143 S. Ct. 2355, 2376 (2023) (Barrett, J., concurring) (admitting that “some articulations of the major questions doctrine on offer—most notably, that the doctrine is a substantive canon—should give a textualist pause”).

77. *Brown & Williamson*, 529 U.S. at 133 (citing *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 231 (1994)); see also *West Virginia*, 142 S. Ct. at 2609 (noting that Major Questions cases have rejected regulatory policies that had a “colorable textual basis”).

78. See *West Virginia*, 142 S. Ct. at 2608–09 (repeatedly limiting Major Questions to “extraordinary cases”).

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

80. See, e.g., *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (“When an agency claims to discover in a long-extant statute an unheralded power to regulate ‘a significant portion of the American economy,’ we typically greet its announcement with a measure of skepticism.” (citation omitted) (quoting *Brown & Williamson*, 529 U.S. at 159)).

81. *Brown & Williamson*, 529 U.S. at 159–60. This part of the analysis is usually ignored by later Major Questions cases. See, e.g., *Utility Air*, 573 U.S. at 324.

82. *Brown & Williamson*, 529 U.S. at 160.

83. See *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842–43 (1984).

84. *Brown & Williamson*, 529 U.S. at 160.

85. *Id.* (quoting *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 231 (1994)).

86. See *Skinner-Thompson*, *supra* note 17, at 297 (noting that the Court’s focus on Congress’s “unambiguous intent” indicates that *Brown & Williamson* was decided at *Chevron* step one).

“vagueness” of its statutory authority.<sup>87</sup> Again though, Justice O’Connor’s analysis is contradictory. Under *Chevron*, statutory ambiguity is the reason to grant deference.<sup>88</sup> “Vague” and “cryptic” are synonymous with “ambiguity.”<sup>89</sup> Therefore, under *Chevron*, O’Connor’s finding that the FDA’s statutory authority was “cryptic” should have been a reason to *grant* deference, not *deny* deference. Yet, O’Connor insisted that “our analysis is governed by *Chevron*.”<sup>90</sup> The contradictory nature of Major Questions in *Brown & Williamson* is likely unreconcilable, potentially explaining why the doctrine eventually split off *Chevron*.<sup>91</sup>

#### 4. *Whitman v. American Trucking Ass’ns*

*Whitman v. American Trucking Ass’ns*, a complex dispute over the text of the Clean Air Act, was rarely considered a Major Questions case before *West Virginia*.<sup>92</sup> *Whitman* rejected an attempt to force the EPA to consider economic costs when drafting air quality regulations.<sup>93</sup> Trucking industry groups argued that the Clean Air Act’s requirement that the EPA set ambient air quality standards “requisite to protect the public health” included an implicit consideration of the economic costs of environmental regulations.<sup>94</sup> The Trucking Association argued that emissions regulations might close down whole industries, harming public health by reducing the incomes of workers.<sup>95</sup> But the Court found it “implausible that Congress would give to the EPA through these modest words the power to determine whether implementation costs should moderate national air quality standards.”<sup>96</sup> *Whitman*’s main contribution to Major Questions was the Court’s statement that Congress “does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.”<sup>97</sup>

This “elephants in mouseholes” principle was built on arguments from *MCI* and *Brown & Williamson* that the importance of a rule should be weighed against the

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87. See *Brown & Williamson*, 529 U.S. at 160 (citing *MCI*, 512 U.S. at 231); *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (“Extraordinary grants of regulatory authority are rarely accomplished through ‘modest words,’ ‘vague terms,’ or ‘subtle device[s].’” (alteration in original) (quoting *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001))).

88. See *Chevron*, 467 U.S. at 843.

89. See, e.g., *Vague*, Merriam-Webster Thesaurus (11th ed. 2022) (listing “ambiguous” and “cryptic” as synonyms of “vague”); *Cryptic*, Merriam-Webster Thesaurus, *supra* (listing “vague” as a synonym of “cryptic”).

90. *Brown & Williamson*, 529 U.S. at 132.

91. See *infra* Part II.B.

92. *Whitman*, 531 U.S. at 486. Prior to *West Virginia*, some academic works on Major Questions did not include *Whitman* in their discussions of the doctrine’s development. See, e.g., Richardson, *Keeping Big Cases*, *supra* note 16, at 385. However, the prominent citations to *Whitman* in *West Virginia* seem to have cemented *Whitman* as a Major Questions case. See *West Virginia*, 142 S. Ct. at 2600, 2609–10, 2622, 2626 n.13.

93. See *Whitman*, 531 U.S. at 468.

94. *Id.* at 472. (quoting 42 U.S.C. § 7409(b)(1)).

95. *Id.* at 466.

96. *Id.*

97. *Id.* at 468 (first citing *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 231 (1994); and then citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000)).

vagueness of its statutory authority.<sup>98</sup> However, *Whitman* fits poorly into the Major Questions doctrine.<sup>99</sup> The Court admitted that air quality standards could bankrupt entire industries but forbid the EPA from considering those consequences.<sup>100</sup> Further, the Trucking Association argued that the EPA was required to add a particular consideration—cost-benefit analysis—to its regulations.<sup>101</sup> Major Questions cases normally address whether an agency has the authority to regulate in a particular manner, rather than specifying the factors the agency must consider.<sup>102</sup> Despite the poor fit between *Whitman* and the Major Questions doctrine, courts often cite the “elephants in mouseholes” metaphor in Major Questions cases.<sup>103</sup>

### 5. *Gonzales v. Oregon*

The final Major Questions case from this early period, *Gonzales v. Oregon*, invalidated an interpretive rule issued by the U.S. Attorney General Alberto Gonzales (AG) which threatened to revoke the medical license of any doctor prescribing drugs for physician-assisted suicide, recently legalized in Oregon.<sup>104</sup> The AG grounded the rule in authority under the Controlled Substances Act (CSA) to issue regulations “relating to the registration and control . . . of controlled substances” and to require prescriptions to have a “legitimate medical purpose.”<sup>105</sup> The AG determined that assisted suicide was not a “legitimate medical purpose,” so using a controlled substance for that purpose violated the Act.<sup>106</sup>

*Gonzales* analyzed the AG’s rule under the *Chevron* framework, but in a way that baffles academics to this day.<sup>107</sup> The Court first stated that the statutory phrase “legitimate medical purpose” was “ambiguous in the relevant sense,”<sup>108</sup> seeming to indicate that the analysis would take place under *Chevron* Step Two.<sup>109</sup> But the Court also found that the AG had no authority to issue the rule under the plain text of the statute, because the AG failed to use the appropriate procedural steps.<sup>110</sup> This textual

98. See *Brown & Williamson*, 529 U.S. at 160; *MCI*, 512 U.S. at 231.

99. The poor fit likely explains why many academics have failed to consider *Whitman* as part of the doctrine. See, e.g., Skinner-Thompson, *supra* note 17 (recounting the history of Major Questions without including a discussion on *Whitman*); Richardson, *Keeping Big Cases*, *supra* note 16, at 385 (listing Major Questions cases, but not including *Whitman*).

100. See *Whitman*, 531 U.S. at 465, 486.

101. *Id.* at 466.

102. See, e.g., *West Virginia v. EPA*, 142 S. Ct. 2587, 2600 (2022) (“The question before us is whether [the EPA’s Clean Power Plan] is within the power granted to it by the Clean Air Act.”).

103. See, e.g., *Louisiana v. Becerra*, 629 F. Supp. 3d 477, 492 (W.D. La. 2022), *aff’d in part and vacated in part*, No. 22-30748, 2023 WL 8368874 (5th Cir. 2023).

104. *Gonzales v. Oregon*, 546 U.S. 243, 254 (2006).

105. *Id.* at 257–59 (first quoting 21 U.S.C. § 821; and then quoting § 830(b)(3)(A)(ii)).

106. *Id.* at 254.

107. Some authorities argue that *Gonzales* is a Step Zero case. See Skinner-Thompson, *supra* note 17, at 298–99. Others place *Gonzales* at Step Two. See, e.g., Sellers, *supra* note 37, at 946.

108. *Gonzales*, 546 U.S. at 257–58.

109. See Sellers, *supra* note 37, at 946.

110. *Gonzales*, 546 U.S. at 260–67.

interpretation most resembles a *Chevron* Step One determination that the AG had contradicted the clear intent of Congress.<sup>111</sup>

Under *Chevron*, the Court's findings that the AG's rule "cannot be justified" under the statutory text cited by the AG should have ended the analysis.<sup>112</sup> However, the *Gonzales* Court added a consideration, cited by subsequent cases as part of the Major Questions analysis.<sup>113</sup> The AG made an alternate argument that his power under the CSA to revoke physicians' licenses that were "inconsistent with the public interest" implicitly authorized the rule revoking licenses of doctors practicing physician-assisted suicide.<sup>114</sup> The Court rejected this argument as well, citing *Whitman* and *Brown & Williamson* to conclude that "[t]he idea that Congress gave the Attorney General such broad and unusual authority through an implicit delegation . . . is not sustainable."<sup>115</sup> The Court asserted, further, that the "importance of the issue of physician-assisted suicide, which 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."<sup>116</sup>

The notion that a case becomes a Major Question based on the amount of political controversy it generates is the most enduring impact of *Gonzales*, and it remains a prominent feature in modern Major Questions cases.<sup>117</sup> However, as it did in *MCI*, the *Gonzales* Court only used the perceived importance of the case to deny *Chevron* deference, not to determine that the AG's rule was unlawful.<sup>118</sup> The *Gonzales* Court went on to review the AG statutory interpretation *de novo*, based solely on the persuasiveness of the AG's textual analysis, and yet again found it lacking.<sup>119</sup>

### B. *The Modern Major Questions Doctrine Takes Shape*

In the mid-2010s, Major Questions made a resurgence after an eight-year absence. Through three cases in this pivotal period, Major Questions shifted from a reason to deny deference to a doctrine of judicial skepticism,<sup>120</sup> splitting away from its roots in the *Chevron* analysis.<sup>121</sup> *Utility Air Regulatory Group v. EPA*,<sup>122</sup> in 2014, and *King v.*

111. *See id.* at 260–61 (holding that "[t]he Interpretive Rule . . . does not concern the scheduling of substances and was not issued after the required procedures for rules regarding scheduling, so it cannot fall under the Attorney General's 'control' authority," and that "[t]he Interpretive Rule cannot be justified under this part of the statute" because "[i]t does not undertake the five-factor analysis and concerns much more than registration"); *see also* *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842–43 (1984).

112. *Gonzales*, 546 U.S. at 261; *see also* *Chevron*, 467 U.S. at 842.

113. *See* *West Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022).

114. *Gonzales*, 546 U.S. at 261–62 (quoting 21 U.S.C. § 823(f)).

115. *Id.* at 267.

116. *Id.* (citation omitted) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997)).

117. *See* *West Virginia*, 142 S. Ct. at 2614 (citing *Gonzales*, 546 U.S. at 267).

118. *See* *Gonzales*, 546 U.S. at 268.

119. *Id.* at 269–75; *see also* Tortorice, *supra* note 37, at 1103.

120. *Compare* *Gonzales*, 546 U.S. at 268, with *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) ("When an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy' we typically greet its announcement with a measure of skepticism." (citation omitted) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000))).

121. *See* *King v. Burwell*, 576 U.S. 473, 485 (2015).

122. 573 U.S. at 324.

*Burwell*,<sup>123</sup> in 2015, are the first cases that truly resemble modern Major Questions cases.<sup>124</sup> *United States Telecommunications Ass'n v. FCC*, in 2017, is the first case to propose a process for deciding Major Questions cases.<sup>125</sup> These cases solidified the essential elements of the modern Major Questions doctrine but did not put them all together.

1. *Utility Air Regulatory Group v. EPA*

*Utility Air* struck down EPA regulations, under the Clean Air Act that required “stationary sources” of pollution, such as power plants, to obtain permits to emit carbon dioxide (CO<sub>2</sub>).<sup>126</sup> The case arose from the complicated aftermath of the Supreme Court’s 2007 *Massachusetts v. EPA* holding that the Clean Air Act required the EPA to regulate greenhouse gases, such as CO<sub>2</sub>, if the agency determined they were air pollutants.<sup>127</sup> *Massachusetts v. EPA* explicitly refused to apply the Major Questions analysis from *Brown & Williamson*—causing some overeager academics to pronounce Major Questions dead.<sup>128</sup> *Utility Air* revived, reshaped, and strengthened Major Questions by placing “skepticism” of new regulations at the heart of the doctrine.<sup>129</sup>

After *Massachusetts v. EPA*, the EPA determined that CO<sub>2</sub> emissions were air pollutants, added limits to existing regulations on stationary sources of pollution, and established a “tailoring rule” to exclude small sources such as schools and hospitals.<sup>130</sup> *Utility Air* struck down the EPA rule under *Chevron* Step Two, finding that it was unreasonable because it claimed “extravagant statutory power over the national economy.”<sup>131</sup> The “tailoring” provision effectively limited the rule’s economic impact, but the Court struck down that section of the regulation on a separate technicality.<sup>132</sup> Without the tailoring rule, the economic effect rose dramatically, so the Court

123. 576 U.S. 473.

124. Explicit skepticism of administrative action and the application of Major Questions as a separate doctrine from *Chevron* are key features of *West Virginia*, both of which were absent in earlier cases. Compare *Utility Air*, 573 U.S. at 324 (adding skepticism of administrative action to the Major Questions analysis), and *King*, 576 U.S. at 485 (splitting Major Questions off from *Chevron*), and *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (ignoring *Chevron* and asserting that there is a “recurring problem” of agencies “asserting highly consequential power”), with *Gonzales*, 546 U.S. at 255–56, 268 (analyzing the case under *Chevron* and granting the AG deference under the *Skidmore* standard even though the court had previously found that the AG failed to follow statutorily required procedures).

125. U.S. Telecom Ass’n v. FCC, 855 F. 3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from a denial of a rehearing en banc)

126. *Utility Air*, 573 U.S. at 314.

127. *Massachusetts v. EPA*, 549 U.S. 497, 528 (2007); see also Skinner-Thompson, *supra* note 17, at 302–04 (discussing the complicated interplay between *Massachusetts v. EPA* and *Utility Air*).

128. See, e.g., Abigail R. Moncrieff, *Reincarnating the “Major Questions” Exception to Chevron Deference as a Doctrine of Noninterference (or Why Massachusetts v. EPA Got It Wrong)*, 60 ADMIN. L. REV. 593, 594 (2008).

129. See *Utility Air*, 573 U.S. at 324.

130. *Id.* at 325.

131. *Id.* at 321, 323–24. The Court concluded that the EPA rule was not a reasonable interpretation of the statute, clearly placing *Utility Air* at *Chevron* Step Two. *Id.*

132. *Id.* at 325–26.

rephrased the Major Questions reasoning from *Brown & Williamson* to strike down the rest of the rule.<sup>133</sup>

Justice Scalia, writing for the majority, found the EPA's interpretation unreasonable, because it would "bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization."<sup>134</sup> Justice Scalia asserted that when "an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' we typically greet its announcement with a measure of skepticism."<sup>135</sup> Further, Justice Scalia condensed Justice O'Connor's sprawling inquiry in *Brown & Williamson* into the presumption that "[w]e expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"<sup>136</sup>

Justice Scalia purported to rely on *Brown & Williamson*,<sup>137</sup> but added at least three new concepts that are now part of the Major Questions doctrine. First, he added the idea that courts should view agency actions with skepticism and be "reluctant to read [regulatory power] into ambiguous statutory text."<sup>138</sup> This addition of skepticism of agency action was a decisive shift from earlier Major Questions cases, which refused to defer to the administrative agency but decided statutory interpretation issues de novo, using neutral interpretation methods.<sup>139</sup> Second, Justice Scalia's focus on Major Questions as preventing the expansion and transformation of regulatory authority solidified the deregulatory and status quo bias of the Major Questions doctrine.<sup>140</sup> The idea that agencies should not "discover" regulatory power in existing laws became a

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133. *Id.* at 325. Without the Tailoring Rule, the EPA admitted that administrative costs would spike and that permit applications from stationary sources would jump from 800 to 82,000 per year with "the great majority . . . be[ing] small sources that Congress did not expect would need to undergo permitting." *Id.* at 322 (quoting Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,533 (June 3, 2010)). Based on this outcome, the Court found that the rule was "incompatible with the substance of Congress' regulatory scheme," even though the EPA had taken steps to avoid the very outcome that concerned the Court. *Id.* (internal quotation marks omitted) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 156 (2000)).

134. *Id.* at 323–24.

135. *Id.* at 324 (citation omitted) (quoting *Brown & Williamson*, 529 U.S. at 159).

136. *Id.* (quoting *Brown & Williamson*, 529 U.S. at 160).

137. *See id.*

138. *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) ("[I]n certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us 'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking there." (quoting *Utility Air*, 573 U.S. at 324)); *see also, e.g., Finnbin, LLC v. Consumer Prod. Safety Comm'n*, 45 F.4th 127, 134 (D.C. Cir. 2022) ("Finnbin also urges skepticism of what it describes as the CPSC's claim to have 'discover[ed] in a long-extant statute an unheralded' major power." (alteration in original) (quoting *Utility Air*, 573 U.S. at 324)).

139. *See MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 225–27 (1994) (defining the statutory term "modify any requirement" using dictionary definitions); *Brown & Williamson*, 529 U.S. at 155–56 (determining legislative intent by examining other congressional acts relating to tobacco regulation); *Gonzales v. Oregon*, 546 U.S. 243, 268 (2006).

140. *See Daniel Hornung, Agency Lawyers' Answers to the Major Questions Doctrine*, 37 YALE J. ON REG. 759, 761 (2020) ("[T]he major questions doctrine, as it has been applied, incentivizes agency lawyers to privilege deregulatory statutory interpretations over proregulatory ones.").

central factor in later Major Questions cases.<sup>141</sup> This inflexible approach continued the contradiction of applying Major Questions as part of *Chevron*, which allows—or even encourages—new interpretations of old statutes.<sup>142</sup> Third, Justice Scalia reframed Major Questions as a “clear statement rule,” tying the doctrine to additional sources of precedent.<sup>143</sup> Justice Scalia’s additions in *Utility Air* were a critical step towards the type of analysis used in modern Major Questions cases, but he still framed his reasoning in *Chevron*’s language.<sup>144</sup>

## 2. *King v. Burwell*

In 2015, *King v. Burwell*<sup>145</sup> took the final step of divorcing Major Questions from *Chevron*—clarifying that when Major Questions applies, *Chevron* does not.<sup>146</sup> *King* upheld the legality of an IRS rule giving tax credits to individuals who purchased healthcare through exchanges created by the Affordable Care Act, despite the ambiguity caused by the “inartful drafting” of the Act.<sup>147</sup> Under the Act, healthcare exchanges are either made by states or by the federal government.<sup>148</sup> The IRS provided tax credits to customers of both types of exchanges, but the Act only described the amount of the tax credit for insurance purchased through “an Exchange *established by the State*.”<sup>149</sup> A group of taxpayers sued, claiming that the IRS had no authority to give them tax credits, because they purchased healthcare through exchanges created by the federal government.<sup>150</sup>

Chief Justice Roberts, writing for the majority, concluded that the text was ambiguous but explicitly refused to apply *Chevron*.<sup>151</sup> Providing the Court’s only explanation to date of the relationship between Major Questions and *Chevron*, Chief

141. See, e.g., *West Virginia*, 142 S. Ct. at 2610 (holding that the EPA “claim[ed] to discover in a long-extant statute an unheralded power” representing a “transformative expansion in [its] regulatory authority.” (alterations in original) (quoting *Utility Air*, 573 U.S. at 324)).

142. See *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (“Agency inconsistency is not a basis for declining to analyze the agency’s interpretation under the *Chevron* framework.”); see also Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 518–19 (1989) (noting that “accept[ing] changes in agency interpretations *ungrudgingly* seems to me one of the strongest indications that the *Chevron* approach is correct.”).

143. See *West Virginia*, 142 S. Ct. at 2616 (Gorsuch, J., concurring) (discussing the “many parallel clear-statement rules in our law”). *But see* *Biden v. Nebraska*, 143 S. Ct. 2355, 2381 (2023) (Barrett, J., concurring) (asserting that Major Questions is not a clear statement rule).

144. *Skinner-Thompson*, *supra* note 17, at 305–06.

145. 576 U.S. 473 (2015).

146. See *Rise of Purposivism*, *supra* note 26, at 1238–39 (“Before *King*, the Court . . . had never held that *Chevron* was altogether inapplicable in such a case.”).

147. *King*, 576 U.S. at 491. *King* remains the only Supreme Court case to uphold an agency action after finding that the Major Questions doctrine applied. See *Sellers*, *supra* note 37, at 945.

148. *King*, 576 U.S. at 483.

149. *Id.* (quoting 26 U.S.C. § 36B(b)–(c)).

150. *Id.* at 484.

151. Compare *id.* at 490, with *id.* at 487.



Justice Roberts quoted *Brown & Williamson* but removed it from the *Chevron* framework.<sup>152</sup>

When analyzing an agency’s interpretation of a statute, we often apply the two-step framework announced in *Chevron* . . . . This approach is premised on the theory that a statute’s ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps. In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.<sup>153</sup>

Chief Justice Roberts punctuated the separation of Major Questions from *Chevron* by declaring that this was “one of those [extraordinary] cases” and that it was “not a case for the IRS. It [was] instead [the Court’s] task to determine the correct reading” of the statutory text.<sup>154</sup> In severing Major Questions from *Chevron*, Chief Justice Roberts added a quantitative comparison between the two doctrines—*Chevron* applies “often,” but Major Questions applies only in “extraordinary cases.”<sup>155</sup> This quantitative comparison strengthened *Brown & Williamson*’s designation of Major Questions as an exception to the general rule in administrative law cases.<sup>156</sup>

In concluding that *King* was an extraordinary case implicating the Major Questions doctrine, Chief Justice Roberts pointed to several factors that courts continue to use to identify Major Questions. He noted that the availability of the tax credits was a “question of deep ‘economic and political significance’” because it involved “billions of dollars in spending each year” and affected the price of health insurance for “millions of people.”<sup>157</sup> Further, he asserted that tax credits were one of the “key reforms” of the Affordable Care Act and were “central to this statutory scheme.”<sup>158</sup> This language strengthens the differentiation in *Whitman* between “central” and “ancillary” statutory provisions as part of the Major Questions analysis.<sup>159</sup> But *King* obscures the importance of this distinction by turning the “elephants in mouseholes” principle from *Whitman* on its head.<sup>160</sup> Chief Justice Roberts also noted that the IRS

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152. Compare *id.* at 485 (refusing to apply *Chevron*), with *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000).

153. *King*, 576 U.S. at 485 (citation omitted) (internal quotation marks omitted) (quoting *Brown & Williamson*, 529 U.S. at 159).

154. *Id.* at 487.

155. *Id.* at 485 (quoting *Brown & Williamson*, 529 U.S. at 159).

156. *Brown & Williamson*, 529 U.S. at 159 (“This is hardly an ordinary case.”). The designation of Major Questions as a rare exception in *King* and *Brown & Williamson* is borne out by the results of administrative law cases. *King* was just the sixth Major Questions case between 1994 and 2015, but a quantitative study found that that *Chevron* had been cited in over two thousand circuit court opinions between 2003 and 2013. See Barnett & Walker, *supra* note 17, at 149 (citing Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1 (2017)).

157. *King*, 576 U.S. at 485–87 (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)); see also *Ala. Ass’n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021) (citing Congress’s provision of nearly \$50 billion in emergency rental assistance as a reason why the case implicated the Major Questions doctrine); *Biden v. Nebraska*, 143 S. Ct. 2355, 2375 (2023).

158. *King*, 576 U.S. at 485–86.

159. See *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 468 (2001) (“Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions . . .”).

160. Compare *West Virginia v. EPA*, 142 S. Ct. 2587, 2610 (2022) (applying Major Questions because the Clean Power Plan was based on an “ancillary provision” of the Clean Air Act (quoting *Whitman*, 531 U.S.

had “no expertise in crafting health insurance policy,” building on the principle from *Utility Air* that the expansion of an agency’s regulatory authority indicates a Major Questions case.<sup>161</sup>

Unlike *Utility Air*, though, the Court went on to uphold the IRS rule after performing a neutral, de novo review of the statute, showing no skepticism towards the result reached by the IRS.<sup>162</sup> In fact, Chief Justice Roberts upheld the rule despite admitting that the IRS interpretation was a “depart[ure] from what would otherwise be the most natural reading of the pertinent statutory phrase.”<sup>163</sup> Notably, he could have reached this same conclusion under *Chevron*—after all, he found the statute ambiguous and the IRS rule reasonable.<sup>164</sup> Instead, Chief Justice Roberts relied on *Marbury v. Madison*, asserting the Supreme Court’s role “to say what the law is.”<sup>165</sup> This choice hammered home the point that Major Questions was no longer part of the *Chevron* analysis.<sup>166</sup>

### 3. *United States Telecom Ass’n v. FCC*

The final Major Questions case from this pivotal period, the 2017 case *United States Telecom Ass’n v. FCC*,<sup>167</sup> is notable in that it is not a Supreme Court case but a dissenting opinion in a denial of rehearing en banc at the United States Court of Appeals for the District of Columbia Circuit. The court had refused to reconsider net neutrality rules issued by the FCC.<sup>168</sup> Then-Judge Kavanaugh dissented, asserting that the FCC rule was invalid under the Major Questions doctrine.<sup>169</sup>

at 468)), with *King*, 576 U.S. at 486 (applying Major Questions because tax credits were “central” to the statutory scheme).

161. *King*, 576 U.S. at 486. Chief Justice Roberts cites *Gonzales* to support this assertion, but this citation is misleading because the discussion of expertise in *Gonzales* came in the section analyzing the specific power of the AG under the text of the statute, not in the section cited to support the Major Questions Doctrine. See *Gonzales v. Oregon*, 546 U.S. 243, 266–67; see also *Utility Air*, 573 U.S. at 323–24 (holding that the regulations were an “enormous and transformative expansion in EPA’s regulatory authority”).

162. *King*, 576 U.S. at 498 (concluding that Congress’s goal of expanding health insurance coverage would be harmed by disallowing tax credits at federally created exchanges, so the ambiguous language must be interpreted as allowing the tax credits).

163. *Id.* at 497.

164. This was the approach taken by the Fourth Circuit. See *id.* at 484; see also *King v. Burwell*, 759 F.3d 358, 372 (4th Cir. 2014).

165. *King*, 576 U.S. at 498 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

166. See Seth P. Waxman, *The State of Chevron: 15 Years After Mead*, 1 ALR ACCORD, no. 2, 1, 13, 19 (2016), [https://amunlawreview.wpengine.com/wp-content/uploads/2016/05/Waxman\\_Keynote-Address.pdf](https://amunlawreview.wpengine.com/wp-content/uploads/2016/05/Waxman_Keynote-Address.pdf) [<https://perma.cc/RBY6-KFJR>] (discussing how *King*’s use of *Marbury* fits the court’s recent pattern of creating a “more muscular judicial authority,” shifting power from Congress and the executive branch to the Supreme Court). This is a hugely important aspect of the Major Questions doctrine that is, unfortunately, beyond the scope of this Comment.

167. 855 F.3d 381 (D.C. Cir. 2017).

168. *Id.* at 382 (Srinivasan, J., concurring in the denial of a rehearing en banc); see also *Protecting and Promoting the Open Internet*, 80 Fed. Reg. 19,737 (Apr. 13, 2015) (to be codified at 47 C.F.R. pts. 1, 8, 20). The FCC replaced the net neutrality rule in 2018, shortly after the case was heard. See *U.S. Telecom*, 855 F.3d at 382 (Srinivasan, J., concurring in the denial of a rehearing en banc); *Restoring Internet Freedom*, 83 Fed. Reg. 7,852 (Feb. 22, 2018) (codified at 47 C.F.R. pts. 1, 8, 20).

169. *Id.* at 417 (Kavanaugh, J., dissenting from a denial of a rehearing en banc). The case is also notable because then-Judge Kavanaugh’s dissent came the year before his nomination to the Supreme Court by the

Much of then-Judge Kavanaugh's analysis is more expansive and aggressive than the version of Major Questions adopted by *West Virginia* and has not been accepted by the Supreme Court.<sup>170</sup> Several key pieces of then-Judge Kavanaugh's analysis were later quoted by the majority and concurring opinions in *West Virginia*, though, introducing elements not present in prior cases.<sup>171</sup> Then-Judge Kavanaugh used the phrase "the major questions doctrine,"<sup>172</sup> which had never before appeared in a Supreme Court case.<sup>173</sup> He also described Major Questions as a two-step process; first, deciding if the question is "major," then looking for clear congressional authorization for the agency rule.<sup>174</sup> *West Virginia* attempted to utilize this two-step structure.<sup>175</sup> Then-Judge Kavanaugh also pioneered a crucial change in the Major Questions doctrine by claiming that there is a general "presumption that Congress intends to make major policy decisions itself, not leave those decisions to agencies."<sup>176</sup> Early Major Questions cases were rooted in specific statutory text rather than a general presumption.<sup>177</sup> *West Virginia* incorporated Justice Kavanaugh's presumption into the basis of the Major Questions doctrine.<sup>178</sup> Finally, Justice Kavanaugh repeated the distinction between the "ordinary" cases where *Chevron* applied and the "narrow class of cases" involving Major Questions, reaffirming that Major Questions is a rare exception to the general rule.<sup>179</sup>

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Trump administration—an administration with a deep desire to have its own regulatory authority curtailed by the Major Questions doctrine. See Natasha Brunstein & Richard L. Revesz, *Mangling the Major Questions Doctrine*, 74 ADMIN. L. REV. 217, 219 (2022).

170. See Richardson, *Deference Is Dead*, *supra* note 3, at 523 (discussing Daniel Deacon's argument that then-Judge Kavanaugh's "'major rules' variant is no mere restatement of the existing major questions doctrine, but rather an expansion and 'weapon[ization]' of it" (alteration in original) (quoting Daniel Deacon, *Judge Kavanaugh and "Weaponized Administrative Law,"* YALE J. ON REGUL.: NOTICE & COMMENT (July 11, 2018), <https://www.yalejreg.com/nc/judge-kavanaugh-and-weaponized-administrative-law-by-daniel-deacon/> [<https://perma.cc/E55C-54S7>])).

171. See *West Virginia v. EPA*, 142 S. Ct. 2587, 2609, 2622 (2022).

172. *U.S. Telecom*, 855 F.3d at 419 (Kavanaugh, J., dissenting from denial of rehearing en banc).

173. *West Virginia*, 142 S. Ct. at 2634 (Kagan, J., dissenting) ("The Court has never even used the term 'major questions doctrine' before.").

174. *Id.* at 420 ("We therefore must address two questions in this case: (1) Is the net neutrality rule a major rule? (2) If so, has Congress clearly authorized the FCC to issue the net neutrality rule?").

175. See *West Virginia*, 142 S. Ct. at 2610, 2614 (holding, first, that "this is a major questions case" and, second, that "the Government must—under the major questions doctrine—point to 'clear congressional authorization' to regulate in th[e] manner [it has chosen]" (quoting *Util. Air Regul. Grp. v. EPA*, 573 U. S. 302, 324 (2014))).

176. *U.S. Telecom*, 855 F.3d at 419 (Kavanaugh, J., dissenting from denial of rehearing en banc); see also *West Virginia*, 142 S. Ct. at 2609 ("We presume that 'Congress intends to make major policy decisions itself, not leave those decisions to agencies.'" (quoting *U.S. Telecom*, 855 F.3d at 419) (Kavanaugh, J., dissenting from denial of rehearing en banc))).

177. See, e.g., *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 225 (1994) (holding that Congress had directly addressed the issue because the word "modify" in the statute had a "connotation of increment or limitation"); *Gonzales v. Oregon*, 546 U.S. 243, 266 (2006) ("The structure of the [Controlled Substances Act], then, conveys unwillingness to cede medical judgments to an executive official who lacks medical expertise.").

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

179. *U.S. Telecom*, 855 F.3d at 419 (Kavanaugh, J., dissenting from denial of rehearing en banc).

### C. *The Arrival of Major Questions*

Major Questions continued to gather steam at the Supreme Court throughout the late 2010s, with Justices repeatedly advocating for broader application of the doctrine in concurrences and dissents.<sup>180</sup> The massive federal response to the COVID-19 pandemic, starting in 2020, provided the opportunity for these Justices to put their enthusiasm for the Major Questions doctrine into action, with back-to-back cases striking down agency actions aimed at curbing the spread of COVID-19.<sup>181</sup> At this point, though, no Supreme Court majority opinion had stated that a holding was based on the Major Questions doctrine.<sup>182</sup> Finally, in 2022, *West Virginia* announced the arrival of Major Questions in explicit terms, for the first time reviewing the precedent supporting the doctrine and attempting to explain its operation.<sup>183</sup>

#### 1. The COVID-19 Cases

The massive federal response to COVID-19 led to a significant expansion of the Major Questions doctrine.<sup>184</sup> *Alabama Ass'n of Realtors v. Department of Health and Human Services*<sup>185</sup> and *National Federation of Independent Business v. Department of Labor*<sup>186</sup> (*NFIB v. OSHA*) both struck down federal agency efforts to mitigate the effects of the pandemic.<sup>187</sup> In doing so, these cases combined the explicit skepticism of administrative agencies from *Utility Air* with the rejection of *Chevron from King*, forming a powerful substantive canon.<sup>188</sup>

The codification of Major Questions into a substantive canon was a drastic doctrinal shift.<sup>189</sup> Early Major Questions cases used the ordinary tools of statutory interpretation to determine the meaning of specific statutory text, such as *MCI's* use of

180. See, e.g., *Gundy v. United States*, 139 S. Ct. 2116, 2141 (2019) (Gorsuch, J., dissenting); *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., concurring in denial of certiorari); *DHS v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1925 (2020) (Thomas, J., concurring in the judgment in part and dissenting in part); *City of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1490 (2020) (Alito, J., dissenting). A major throughline of these cases is Justices Gorsuch and Kavanaugh attempting to use Major Questions as a beachhead in their campaign to revive the nondelegation doctrine. See, e.g., *Gundy*, 139 S. Ct. at 2131. This subject is beyond the scope of this Comment.

181. See KATE R. BOWERS & DANIEL J. SHEFFNER, CONG. RSCH. SERV., THE SUPREME COURT'S "MAJOR QUESTIONS" DOCTRINE: BACKGROUND AND RECENT DEVELOPMENTS 2–5 (2022), <https://crsreports.congress.gov/product/pdf/LSB/LSB10745> [<https://perma.cc/7MEM-NPY8>] (discussing recent cases in which "the Supreme Court has signaled its heightened interest in applying the major questions doctrine to the review of agency actions").

182. *West Virginia*, 142 S. Ct. at 2634 (Kagan, J., dissenting).

183. See *West Virginia*, 142 S. Ct. at 2614.

184. See Richardson, *Antideference*, *supra* note 14, at 176.

185. 141 S. Ct. 2485 (2021).

186. 595 U.S. 109 (2022).

187. Strikingly, these essential cases were issued on the Supreme Court's "shadow docket" based on truncated briefings and limited oral argument. See Steven E. Kish, *Unprecedented Times Call for Quick Precedent from the Supreme Court's "Shadow Docket"*, FED. LAW., Nov.-Dec. 2021, at 19, 19.

188. See Richardson, *Antideference*, *supra* note 14, at 176. *But see* Biden v. Nebraska, 143 S. Ct. 2355, 2383 (2023) (Barrett, J., concurring) (asserting that Major Questions is not a substantive canon).

189. See Richardson, *Antideference*, *supra* note 14, at 176.

dictionary definitions to interpret the term “modify.”<sup>190</sup> By contrast, substantive canons—in the words of then-Professor Amy Coney Barrett—“serve a variety of purposes, all of which are *external to the statute* before the court.”<sup>191</sup> The transformation of Major Questions into a substantive canon allows the doctrine to apply regardless of the statutory text at issue.<sup>192</sup>

*Alabama Ass’n of Realtors* struck down an eviction moratorium for counties with high COVID-19 rates which had been issued under the CDC’s authority to “prevent the introduction, transmission, or spread of communicable diseases.”<sup>193</sup> The Court consolidated Major Questions by rephrasing *Utility Air* and *Brown & Williamson*, stating that “[w]e expect Congress to speak clearly when authorizing an agency to exercise powers of ‘vast economic and political significance.’”<sup>194</sup> The Court did not cite *King* but followed *King*’s lead in rejecting *Chevron*, stating that “[e]ven if the text were ambiguous, the sheer scope of the CDC’s claimed authority . . . would counsel against the Government’s interpretation.”<sup>195</sup> By combining the skepticism of agency action from *Utility Air* with the rejection of *Chevron* in *King*, *Alabama Ass’n of Realtors* created a stand-alone doctrine distinct from all previous Major Questions cases.<sup>196</sup>

The Court offered several reasons to explain why the eviction moratorium was a Major Question, pointing to the millions of tenants at risk of eviction, the billions of dollars of potential costs to landlords, and the moratorium’s intrusion into an area that is “the particular domain of state law.”<sup>197</sup> None of these factors were analyzed in detail though, and the economic analysis was particularly brief given the weight the Court placed on this factor.<sup>198</sup>

The Court’s analysis of whether the statute authorized the eviction moratorium was equally brief. The Court pointed to the indirect connection between evictions and the interstate spread of disease and speculated about the lack of a limiting principle to

190. *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 225 (1994); *see also West Virginia v. EPA*, 142 S. Ct. 2587, 2633 (2022) (Kagan, J., dissenting).

191. Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 120 (2010) (emphasis added).

192. *See Richardson, Antideference*, *supra* note 14, at 176; *see also West Virginia*, 142 S. Ct. at 2633 (describing Major Questions as a “get-out-of-text-free card”).

193. *Ala. Ass’n of Realtors v. HHS*, 141 S. Ct. 2485, 2487 (2021) (quoting 42 U.S.C. §264(a)). The district court had found the rule exceeded the CDC’s authority but stayed the order pending appeal. The Court vacated the stay, effectively ruling that the eviction moratorium was illegal. *Id.* at 2488. This is the mechanism referred to as the “shadow docket.” *See Kish, supra* note 187, at 19–20.

194. *Ala. Ass’n of Realtors*, 141 S. Ct. at 2489 (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

195. *Id.*

196. *See Richardson, Antideference*, *supra* note 14, at 175–76.

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

198. Notably, the Court did not address the dissent’s assertion that the economic impact on landlords was negated by the federal funds available to compensate financial losses. *Id.* at 2492 (Breyer, J., dissenting). In fact, the majority saw those funds as a proxy for the cost to businesses, not as a means of redressing those costs. *Id.* at 2489 (majority opinion). The Court’s lack of expertise on issues such as complex economic analysis is one of the reasons why judicial deference to administrative agencies developed in the first place. *See Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (noting that agencies are better equipped than courts to make policy choices).

the CDC rule.<sup>199</sup> The Court also described the moratorium as “unprecedented,” because “no regulation [ever] premised on [the statute had] even begun to approach the size or scope of the eviction moratorium.”<sup>200</sup> This description introduced a new “use it or lose it” principle to the Major Questions analysis, suggesting—without citing any precedent—that Congress only authorizes agencies to take important actions soon after a statute is enacted.<sup>201</sup> The Court concluded, without any serious exploration of the CDC’s statutory authority, that the Act was “a wafer-thin reed on which to rest such sweeping power.”<sup>202</sup> This metaphor appears to build on the “elephants in mouseholes” principle,<sup>203</sup> but *Whitman* was not cited, and the Court never addressed how or whether these principles are different.

Just five months later, *NFIB v. OSHA* struck down OSHA COVID-19 vaccine and testing requirements for businesses with at least one hundred employees, which had been grounded in the authority of OSHA’s board to ensure “safe and healthful working conditions.”<sup>204</sup> The Court applied the Major Questions doctrine in a remarkably conclusory analysis:

[OSHA] ordered 84 million Americans to either obtain a COVID-19 vaccine or undergo weekly medical testing at their own expense. This is no “everyday exercise of federal power.” It is instead a significant encroachment into the lives—and health—of a vast number of employees. “We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance.” There can be little doubt that OSHA’s mandate qualifies as an exercise of such authority.<sup>205</sup>

*NFIB v. OSHA* is striking for its lack of economic analysis, applying Major Questions based solely on the number of people affected and the encroachment into everyday lives.<sup>206</sup> This holding contrasts with the heavy reliance on economic impacts in *Alabama Ass’n of Realtors*, and highlights that no particular factor is required to make a case a Major Question.<sup>207</sup>

The Court then struck down the vaccine mandate as not clearly authorized by Congress, relying on a variety of factual and statutory considerations providing no indication of the weight of any particular factor.<sup>208</sup> The Court stated that OSHA is authorized to set “workplace safety standards, not broad public health measures,” and that “[a]lthough COVID-19 is a risk that occurs in many workplaces, it is not

199. See *Ala. Ass’n of Realtors*, 141 S. Ct. at 2488–89.

200. *Id.*

201. See Richardson, *Antideference*, *supra* note 14, at 198.

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

203. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001).

204. *NFIB v. OSHA*, 595 U.S. 109, 114 (2022) (quoting 29 U.S.C. § 651(b)).

205. *NFIB v. OSHA*, 595 U.S. at 117 (citation omitted) (first quoting *MCP No. 165 v. Dep’t of Lab.*, 20 F.4th 264, 272 (6th Cir. 2021) (Sutton, C.J., dissenting); and then quoting *Ala. Ass’n of Realtors*, 141 S. Ct. at 2489).

206. See Richardson, *Antideference*, *supra* note 14, at 196 (noting that the “Court’s ‘analysis’ of the regulation’s significance is . . . perfunctory, little more than a bare assertion”).

207. See *Ala. Ass’n of Realtors*, 141 S. Ct. at 2489 (designating the \$50 billion in emergency rental assistance “a reasonable proxy of the moratorium’s economic impact”).

208. See *NFIB v. OSHA*, 595 U.S. at 117–20.

an *occupational* hazard in most.”<sup>209</sup> The Court then noted that Congress had recently considered and failed to enact a vaccine mandate, highlighting one of the strangest innovations of the Major Questions analysis—that Congress’s intent when passing an act is affected by Congress’s later inaction on a similar topic.<sup>210</sup> The Court concluded by building on the “use it or lose it” principle from *Alabama Ass’n of Realtors*, stating that the “‘lack of historical precedent’ coupled with the breadth of authority that [OSHA] now claims, is a ‘telling indication’ that the mandate extends beyond the agency’s legitimate reach.”<sup>211</sup>

Taken together, the two COVID-19 cases assembled all the parts of the modern Major Questions analysis.<sup>212</sup> However, the reasoning in both cases is notably short and conclusory, and neither case attempted to describe a standard or test that could be applied by lower courts. The COVID-19 cases set the stage for the official arrival of Major Questions, but neither contained a sufficiently cogent explanation to make it the landmark case announcing the doctrine.

## 2. *West Virginia v. EPA*

Throughout two decades of precedent, a majority opinion of the Supreme Court never used the phrase “major questions doctrine.”<sup>213</sup> *West Virginia v. EPA* finally

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209. *Id.* The Court claimed that COVID-19 spreads in nonworkplace locations and that vaccinations are permanent; therefore, OSHA failed to distinguish “between occupational risk and risk more generally.” *Id.* at 119. The analysis ignored the well-publicized and scientifically proven spread of COVID-19 in workplaces. *See, e.g.*, Alexandra Sternlicht, *Over 10,000 Tyson Employees Reportedly Test Positive for Covid*, FORBES (July 30, 2020), <https://www.forbes.com/sites/alexandrasternlicht/2020/07/30/over-10000-tyson-employees-reportedly-test-positive-for-covid/?sh=51fddb246da4> [<https://perma.cc/C95L-TMC5>]; Hal Bernton, *Coronavirus Outbreak Strikes Seattle Factory Trawler as Most of 126 Crew Tests Positive*, SEATTLE TIMES (June 1, 2020), <https://www.seattletimes.com/seattle-news/health/american-seafoods-factory-trawler-returns-to-seattle-after-85-crew-members-test-positive-for-covid-19/> [<https://perma.cc/56KY-SCX6>]; Vanessa Friedman, *Los Angeles Apparel Factory Shut Down After More than 300 Coronavirus Cases*, N.Y. TIMES (July 15, 2020), <https://www.nytimes.com/2020/07/13/style/los-angeles-apparel-dov-charney-coronavirus.html> [<https://perma.cc/Q5VD-9SAD>]; *see also* Michelle Murti, Camille Achonu, Brendan T. Smith, Kevin A. Brown, Jin Hee Kim, James Johnson, Saranyah Ravindran & Sarah A. Buchan, *COVID-19 Workplace Outbreaks by Industry Sector and Their Associated Household Transmission, Ontario, Canada, January to June, 2020*, 63 J. OCCUPATIONAL & ENV’T MED. 574, 574–80, (2021) (finding COVID-19 outbreaks in the manufacturing, agriculture, forestry, fishing, hunting, transportation, and warehousing industries); Richardson, *Antideference*, *supra* note 14, at 188 (describing the Court’s analysis as “profoundly unpersuasive”).

210. *See NFIB v. OSHA*, 595 U.S. at 119; *see also* Richardson, *Antideference*, *supra* note 14, at 199 (noting that in both COVID-19 cases, the Court reasoned post-enactment *inaction* by Congress somehow reduced the clarity of previous delegations).

211. *NFIB v. OSHA*, 595 U.S. at 119–20 (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 505 (2010)); *see also* Richardson, *Antideference*, *supra* note 15, at 198. This Section again emphasizes the anti-regulatory bias of the Major Questions doctrine. It is hard to imagine the Court accepting the reverse argument, that an agency’s historical decision to regulate an issue proves that the agency has no authority to *deregulate* that issue. *See* Hornung, *supra* note 140, at 761 (discussing how the Major Questions doctrine incentivizes agencies to deregulate).

212. *See* Richardson, *Antideference*, *supra* note 14, at 176.

213. *West Virginia v. EPA*, 142 S. Ct. 2587, 2634 (2022) (Kagan, J., dissenting).

labeled and codified the doctrine, thrusting it into the national spotlight.<sup>214</sup> *West Virginia* condensed the doctrine into a two-step process,<sup>215</sup> creating an antideference mirror of *Chevron's* two-step deference test. *West Virginia* was also the Court's first attempt to guide lower courts by reviewing precedent for Major Questions and emphasizing the distinction from *Brown & Williamson* that Major Questions doctrine must be limited to "certain extraordinary cases."<sup>216</sup>

*West Virginia* struck down the EPA's Clean Power Plan, which sought to cap CO<sub>2</sub> emissions from power plants in order to encourage "generation shifting" in which utilities switch a portion of their electricity production from coal to cleaner sources.<sup>217</sup> The EPA based the Clean Power Plan on the Clean Air Act's mandate to set performance standards for power plants that reflect the "adequately demonstrated" output of the "best system of emission reduction."<sup>218</sup> The question before the Court was whether the EPA's generation-shifting approach could qualify as the "best system of emission reduction."<sup>219</sup>

*a. Principles and Precedent*

Writing for the majority, Chief Justice Roberts began by laying out the principles and precedential cases that will now define the Major Questions doctrine.<sup>220</sup> Chief Justice Roberts noted that statutory text must be interpreted in context and that, in administrative law cases, that context requires an inquiry into "whether Congress in fact meant to confer the power the agency has asserted."<sup>221</sup> Then, Chief Justice Roberts laid out the closest thing to a standard for applying the Major Questions doctrine:

[i]n the ordinary case . . . context has no great effect on the appropriate analysis. Nonetheless . . . there are "extraordinary cases" that call for a different approach—cases in which the "history and the breadth of the authority that [the agency] has asserted," and the "economic and political significance" of that assertion, provide a "reason to hesitate before concluding that Congress" meant to confer such authority.<sup>222</sup>

This paragraph is crucial for understanding the modern Major Questions doctrine. First, Chief Justice Roberts delineated two clear categories of administrative law

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214. *Id.*; see also, e.g., Adam Liptak, *The Case Tests the Sweep of the 'Major Questions Doctrine'*, N. Y. TIMES (June 30, 2022), <https://www.nytimes.com/2022/06/30/us/scotus-major-questions-doctrine.html> [<https://perma.cc/W543-UF3P>].

215. See *West Virginia*, 142 S. Ct. at 2610, 2614 (deciding in Part III.B that "this is a major questions case" before deciding in Part III.C whether the Clean Power Plan had "clear congressional authorization"); *id.* at 2634 (Kagan, J., dissenting).

216. See *id.* at 2608–09 (majority opinion).

217. *Id.* at 2603.

218. *Id.* at 2599 (quoting 42 U.S.C. § 7401(a)(1), (b)(1)(d) (referred to as Section 111 throughout the case)).

219. *Id.* at 2607.

220. *Id.* at 2608; see also, e.g., *Wash. All. of Tech. Workers v. DHS*, 50 F.4th 164, 206 (D.C. Cir. 2022) (Henderson, J., concurring in part and dissenting in part) (citing *West Virginia*, 142 S. Ct. at 2608); *infra* Section III.

221. *West Virginia*, 142 S. Ct. at 2608–09 (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000)).

222. *Id.* at 2608 (alteration in original) (quoting *Brown & Williamson*, 529 U.S. at 159–60).



cases: “ordinary case[s]” and “extraordinary cases” where the Major Questions doctrine applies.<sup>223</sup> This designation of Major Questions as an exception to the general rule in administrative law cases precludes the possibility that Major Questions can replace *Chevron* as the default doctrine in administrative law.<sup>224</sup> This section of the analysis also suggests what could become the basis for a multipart test for applying the Major Questions doctrine.<sup>225</sup> Chief Justice Roberts then officially labeled “the major questions doctrine.”<sup>226</sup> To support the assertion that Major Questions is a distinct and independent legal doctrine, Chief Justice Roberts reviewed the history of Major Questions, stating that “[s]uch cases have arisen from all corners of the administrative state.”<sup>227</sup> From *Brown & Williamson*, he noted that “‘Congress could not have intended to delegate’ such a sweeping and consequential authority” as regulating cigarette sales “in so cryptic a fashion.”<sup>228</sup> From *Alabama Ass’n of Realtors*, he stated the Court found statute’s language a “wafer-thin reed” on which to rest an eviction moratorium “given ‘the sheer scope of the . . . claimed authority,’ its ‘unprecedented’ nature, and the fact that Congress had failed to [enact it].”<sup>229</sup> From *Gonzales v. Oregon*, Chief Justice Roberts took the principle that it was “not sustainable” to think that Congress would grant an agency “broad and unusual authority through an implicit delegation.”<sup>230</sup> From *NFIB v. OSHA*, Chief Justice Roberts found it “‘telling that OSHA, in its half century of existence,’ had never relied on its authority to regulate occupational hazards to impose such a remarkable measure” as vaccine and testing requirements.<sup>231</sup> From *Whitman*, he noted that “[e]xtraordinary grants of regulatory authority are rarely

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223. *Id.* This distinction is clearly supported by *Brown & Williamson*, which denied *Chevron* deference because it was “hardly an ordinary case.” *Brown & Williamson*, 529 U.S. at 159.

224. See *Extraordinary*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining “extraordinary” as “[b]eyond what is usual, customary, regular, or common” and “of, relating to, or involving a legal proceeding or procedure not normally required or resorted to”).

225. Chief Justice Roberts appears to suggest seven factors, directing lower courts to weigh: (1) the agency efforts to regulate the issue, (2) the nature of the authority that the agency has asserted, (3) the breadth of the authority asserted by the agency, (4) the economic significance of the agency’s action, (5) the political significance of the agencies action, (6) Congress’s intent behind the statute at issue, (7) and whether all these factors result in a case that is “extraordinary.” *West Virginia*, 142 S. Ct. at 2608; Justice Scalia once derided such an impossible-to-administer standard as the “test most beloved by a court unwilling to be held to rules (and most feared by litigants who want to know what to expect): th’ ol’ ‘totality of the circumstances’ test.” *United States v. Mead Corp.*, 533 U.S. 218, 241 (2001) (Scalia, J., dissenting). This part of Chief Justice Roberts’s analysis in *West Virginia* also rejects the theory espoused by Justice Gorsuch that Major Questions is a proxy for the nondelegation doctrine by focusing solely on whether Congress *intended* to confer authority, not whether Congress *had the power* to confer that authority. *Cf. Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (asserting that “we apply the major questions doctrine in service of the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency”) (Gorsuch, J., dissenting). The relationship between Major Questions and nondelegation is beyond the scope of this Comment.

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

227. *Id.*

228. *Id.* (quoting *Brown & Williamson*, 529 U.S. at 160).

229. *Id.* (quoting *Ala. Ass’n of Realtors v. HHS*, 141 S. Ct. 2485, 2489–90 (2021)).

230. *Id.* (quoting *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006)).

231. *Id.* at 2608–09 (quoting *NFIB v. OSHA*, 595 U.S. 109, 119 (2022)).

accomplished through ‘modest words,’ ‘vague terms,’ or ‘subtle device[s].’”<sup>232</sup> From *MCI*, he found that Congress does not “typically use oblique or elliptical language to empower an agency to make a ‘radical or fundamental change’ to a statutory scheme.”<sup>233</sup>

In each of these examples, Chief Justice Roberts admitted that the “regulatory assertions had a colorable textual basis,” but “‘common sense as to the manner in which Congress [would have been] likely to delegate’ such power” made it “very unlikely that Congress had actually done so.”<sup>234</sup> By rejecting colorable statutory interpretations, Major Questions is the inverse of *Chevron*, which accepts any reasonable interpretation of ambiguous statutory text.<sup>235</sup> After *West Virginia*, Major Questions officially became a doctrine of antideference.<sup>236</sup>

The Court concluded its whirlwind tour through the history of the Major Questions doctrine by quoting then-Judge Kavanaugh’s dissent in *United States Telecom* that “[w]e presume that ‘Congress intends to make major policy decisions itself, not leave those decisions to agencies.’”<sup>237</sup> This quote compacts the highly fact-dependent Major Questions precedent into a single substantive canon of statutory interpretation, completing the process started by the COVID-19 cases.<sup>238</sup> This presumption is a marked shift from the early Major Questions cases the Court had just cited, which relied on the particular statutory text and context at issue rather than a general presumption about congressional intent.<sup>239</sup>

Chief Justice Roberts did not discuss the relationship between Major Questions and *Chevron*—even though many of the cases he cited were explicitly decided under *Chevron*. The closest Chief Justice Roberts came to explaining why *Chevron* did not apply was his statement that “separation of powers principles and a practical understanding of legislative intent make us ‘reluctant to read into ambiguous statutory text’ the delegation claimed to be lurking there.”<sup>240</sup> This reference to “ambiguous statutory text” appears to be a nod to *Chevron*.<sup>241</sup> Chief Justice Roberts also quoted a twenty-year-old article titled *Controlling Chevron-Based Delegations* for the principle that “‘enabling legislation’ is generally not an ‘open book to which the agency [may]

232. *Id.* at 2609 (alteration in original) (quoting *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 468, (2001)).

233. *Id.* (quoting *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 229 (1994)).

234. *Id.* (alteration in original) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)).

235. See *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 844 (1984).

236. See generally Richardson, *Antideference*, *supra* note 14.

237. *West Virginia*, 142 S. Ct. at 2609 (quoting *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from a denial of rehearing en banc)).

238. See Richardson, *Antideference*, *supra* note 14, at 177 (“Where the earlier major questions doctrine shifted a reviewing court from a deference regime to one of rough neutrality, the new canon further shifts from neutrality to *antideference*.”).

239. See *supra* Part II.A.

240. *West Virginia*, 142 S. Ct. at 2609 (quoting *Util. Air Reg. Group v. EPA*, 573 U.S. 302, 324 (2014)).

241. See Sohoni, *supra* note 15, at 281 (noting that “nowhere in [*West Virginia*] did the Court discuss how the major questions doctrine relates to *Chevron*.”).

add pages and change the plot line.”<sup>242</sup> This article argued that “*Chevron* does not apply to extension of an agency’s jurisdiction beyond its core powers” and that “denying deference to expansive agency readings of their jurisdictional claims would not require overruling any precedent.”<sup>243</sup> The theories in this article could explain why the recent spree of Major Questions cases left *Chevron* intact.<sup>244</sup>

Chief Justice Roberts then addressed Justice Kagan’s dissenting opinion, which criticized the majority for “announc[ing] the arrival” of a brand-new doctrine and asserted that the precedent cited by the majority was not a separate doctrine at all, but simply the “ordinary method[s]” of “normal statutory interpretation.”<sup>245</sup> Chief Justice Roberts, writing for the majority, returned to the start of his analysis:

[I]n what the dissent calls the “key case” in this area, *Brown & Williamson* the Court could not have been clearer: “In extraordinary cases . . . there may be reason to hesitate” before accepting a reading of a statute that would, under more “ordinary” circumstances, be upheld. Or, as we put it more recently, we “typically greet” assertions of “extravagant statutory power over the national economy” with “skepticism.” The dissent attempts to fit the analysis in these cases within routine statutory interpretation, but the bottom line—a requirement of “clear congressional authorization,”—confirms that . . . the major questions doctrine is distinct.<sup>246</sup>

Citing *MCI*, *Brown & Williamson*, *Gonzales*, *Utility Air*, and *King*, Chief Justice Roberts concluded that the Major Questions label “took hold because it refers to an identifiable body of law” that addresses “a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted.”<sup>247</sup>

This section of the analysis made at least three essential points for lower courts attempting to apply Major Questions to new cases. First, Chief Justice Roberts reaffirmed and emphasized the distinction between “ordinary circumstances” and the “extraordinary cases” where Major Questions applies.<sup>248</sup> He had made this point just a page earlier, so the repetition adds particular emphasis.<sup>249</sup> Notably, Chief Justice Roberts designated Major Questions as an exception to the general rule without

242. *West Virginia*, 142 S. Ct. at 2609 (alteration in original) (quoting Ernest Gellhorn & Paul Verkuil, *Controlling Chevron-Based Delegations*, 20 CARDOZO L. REV. 989, 1011 (1999)).

243. Gellhorn & Verkuil, *supra* note 242, at 993, 1018.

244. See *Social Security Act—Administrative Law—Chevron Deference—American Hospital Ass’n v. Becerra*, 136 HARV. L. REV. 480, 485 (2022) [hereinafter *Social Security Act*] (discussing the potential ramifications of the Courts decision to dodge *Chevron* in *West Virginia*).

245. *West Virginia*, 142 S. Ct. at 2609 (first alteration in original) (quoting *id.* at 2633 (Kagan, J., dissenting)).

246. *Id.* (first omission in original) (citations omitted) (first quoting *id.* at 2633 (Kagan, J., dissenting); then quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000); and then quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

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

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

249. See *West Virginia*, 142 S. Ct. at 2609 (asserting that *Brown & Williamson* “could not have been clearer” on this point).

identifying what doctrine should ordinarily apply.<sup>250</sup> Second, he repeated *Utility Air*'s framing of Major Questions as a clear statement rule and a doctrine of judicial skepticism of agency action.<sup>251</sup> Third, Chief Justice Roberts designated Major Question's precedential cases, directing courts to look to those cases for guidance.<sup>252</sup>

*b. Application*

With these principles established, Chief Justice Roberts turned to the case's merits. Chief Justice Roberts attempted to utilize the two-step process proposed by then-Judge Kavanaugh's dissent in *United States Telecom*—first, determining whether the case represented a Major Question and, second, deciding whether the EPA rule had clear congressional authorization.<sup>253</sup> However, Chief Justice Roberts struggled to differentiate the two steps and considered some of the same factors in both.

In the first step, Chief Justice Roberts announced that “[u]nder our precedents, this is a major questions case.”<sup>254</sup> He stated that the Clean Power Plan was seeking to “substantially restructure the American energy market” and that the EPA had “claim[ed] to discover in a long-extant statute an unheralded power representing a transformative expansion in [its] regulatory authority.”<sup>255</sup> Chief Justice Roberts accused the EPA of basing its rule on “vague language” from an “ancillary provision” of the Clean Air Act, which was “designed to function as a gap filler and had rarely been used.”<sup>256</sup> Further, the EPA had no “comparative expertise” in electricity transmission.<sup>257</sup> Chief Justice Roberts quoted *MCI* for the principle that the EPA rule was a “fundamental revision of the statute, changing it from [one sort of] scheme of . . . regulation into an entirely different kind,” because previous rules had related to technological improvements instead of imposing emissions caps.<sup>258</sup> Finally, “the

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250. By not listing *Chevron* as the ordinary rule, Chief Justice Roberts prevented Major Questions from becoming the default if *Chevron* is overturned. *Cf. Rise of Purposivism*, *supra* note 26, at 1239 (“[T]he so-called ‘major question’ exception threatens *Chevron*’s predominance. The exception’s trigger—‘deep economic and political significance’—is vague and difficult to administer. As such, five Justices could invoke it in a significant proportion of agency statutory interpretation cases, which would allow the exception to swallow *Chevron*’s rule.” (footnote omitted)).

251. See *West Virginia*, 142 S. Ct. at 2609; *Utility Air*, 573 U.S. at 324.

252. *West Virginia*, 142 S. Ct. at 2609 (describing an “identifiable body of law” that represents the Major Questions doctrine). *But see* *Biden v. Nebraska*, 143 S. Ct. 2355, 2381 (2023) (Barrett, J., concurring) (asserting that Major Questions is not a clear statement rule).

253. See *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 420 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from a denial of a rehearing en banc).

254. *West Virginia*, 142 S. Ct. at 2610.

255. *Id.* (alterations in original) (internal quotation marks omitted) (quoting *Utility Air*, 573 U.S. at 324).

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

257. *Id.* at 2613 (quoting *Kisor v. Wilkie*, 139 S. Ct. 2400, 2417 (2019)). This claim is dubious; the EPA has regulated power plants for decades. *Id.* at 2638 (Kagan, J., dissenting).

258. *Id.* at 2612 (alteration and omission in original) (internal quotation mark omitted) (quoting *MCI Telecomm. Corp. v. AT&T Co.*, 512 U.S. 218, 213 (1994)).

Agency’s discovery allowed it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself.”<sup>259</sup>

Chief Justice Roberts’s Step One analysis builds on the principle from *Utility Air* that Major Questions can be identified by looking for expansions of regulatory authority and large economic effects.<sup>260</sup> But the rest of his analysis seems out of place in a consideration of whether the rule was sufficiently “major” to implicate the Major Questions doctrine. Chief Justice Roberts expanded on the theory from *NFIB v. OSHA* that Congress’s current inaction reflected on Congress’s intent decades earlier when passing the Clean Air Act.<sup>261</sup> But this addressed congressional authorization, not whether the case was a Major Question. Chief Justice Roberts’s analysis of whether the statutory text was “ancillary,” “vague,” or a “backwater” provision also seems more related to congressional authorization.<sup>262</sup> Further, he quoted the assertion in *Gonzales* that “[t]he 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.”<sup>263</sup> If Major Questions is a two-step process,<sup>264</sup> finding a statutory interpretation “suspect” should take place in the Step Two consideration of whether the agency had clear congressional authorization for the rule, not in the Step One analysis of whether Major Questions applies.

Chief Justice Roberts then turned to the second step, holding that “the Government must—under the major questions doctrine—point to ‘clear congressional authorization’” for the Clean Power Plan.<sup>265</sup> This second step is nothing short of conclusory. Chief Justice Roberts had already found that the Clean Power Plan was “suspect,” because it was a “transformative expansion” of regulatory authority intended to settle an “earnest and profound debate across the country” on which the EPA did not have any expertise.<sup>266</sup> Further, Chief Justice Roberts had already characterized the EPA’s statutory authority for the Clean Power Plan as “vague” and “ancillary” statutory text in a “backwater” provision.<sup>267</sup> What was left to decide in Step Two? The answer: not much. Chief Justice Roberts admitted that, as a matter of “definitional possibilities,” generation shifting could be described as a “system,” but that such “a vague statutory grant is not close to the sort of clear authorization required.”<sup>268</sup> Chief

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259. *Id.* at 2610 (first citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000); then citing *Gonzales v. Oregon*, 546 U.S. 243, 267–68 (2006); and then citing *Ala. Ass’n of Realtors v. HHS*, 141 S. Ct. 2485, 2485 (2021)).

260. *See Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 323–24 (2014).

261. *See NFIB v. OSHA*, 595 U.S. 109, 119 (2022).

262. *West Virginia*, 142 S. Ct. at 2610, 2613.

263. *Id.* at 2614 (quoting *Gonzales*, 546 U.S. at 267–68).

264. *See West Virginia*, 142 S. Ct. at 2610, 2614; *id.* at 2634 (Kagan, J., dissenting) (“Apparently, there is now a two-step inquiry.”); *see also* *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 420 (D.C. Cir. 2017) (Kavanaugh J., dissenting from a denial of a rehearing en banc) (inventing a two-step process for the Major Questions doctrine).

265. *West Virginia*, 142 S. Ct. at 2614 (quoting *Utility Air*, 573 U.S. at 324).

266. *Id.* at 2610, 2614 (first quoting *Utility Air*, 573 U.S. at 324; and then quoting *Gonzales*, 546 U.S. at 267–68).

267. *Id.* at 2602, 2613–14.

268. *Id.* at 2614.

Justice Roberts concluded that the Clean Power Plan might be “a sensible ‘solution to the crisis of the day,’” but it was “not plausible” that Congress gave the EPA authority to create such a regulatory scheme in Section 111 of the Clean Air Act.<sup>269</sup>

*c. Justice Gorsuch Concurring*

Justice Gorsuch concurred to ruminate on the reasons behind the Major Questions doctrine and attempted to rearrange Chief Justice Roberts’s garbled analysis into something resembling an applicable test.<sup>270</sup> Justice Gorsuch highlighted different factors and precedents than those set out in the majority opinion, so the precedential value of Justice Gorsuch’s test is unclear.<sup>271</sup> Still, lower courts have already begun citing Justice Gorsuch’s concurrence interchangeably with Chief Justice Roberts’s majority opinion.<sup>272</sup>

Justice Gorsuch broke up Major Questions into a two-step process then subdivided it further into additional, nonexhaustive considerations.<sup>273</sup> For Step One, Justice Gorsuch suggested three “triggers” for the Major Questions doctrine.<sup>274</sup> First, Justice Gorsuch posited that a case might be a Major Question if “an agency claims the power to resolve a matter of great political significance,” or “end an earnest and profound debate across the country.”<sup>275</sup> Justice Gorsuch summarized this principle by quoting his own concurrence from *NFIB v. OSHA* that Congress’s failure to act could be a sign that the agency was attempting to “‘work [a]round’ the legislative process.”<sup>276</sup> Second, Justice Gorsuch stated that a case might be “major” if an agency seeks to regulate “a significant portion of the American economy” or require “billions of dollars in spending by private persons or entities.”<sup>277</sup> Third, Justice Gorsuch tied the major questions doctrine to federalism, stating that a question might be “major” if an agency seeks to “intrud[e] into an area that is the particular domain of state law.”<sup>278</sup> Justice Gorsuch did not give any indication of how these factors should be weighed, though, and noted that “this list of triggers may not be exclusive.”<sup>279</sup>

Justice Gorsuch then identified four “telling clues” for finding clear congressional authorization.<sup>280</sup> First, he stated that courts should analyze “the legislative provisions

269. *Id.* at 2616 (quoting *New York v. United States*, 505 U.S. 144, 187 (1992)).

270. *See* Sohoni, *supra* note 15, at 288.

271. *Compare West Virginia*, 142 S. Ct. at 2610, 2614, with *id.* at 2620–24 (Gorsuch, J., concurring).

272. *See, e.g., Louisiana v. Becerra*, 629 F. Supp. 3d 477, 492–93 (W.D. La. 2022), *aff’d in part and vacated in part*, No. 22-30748, 2023 WL 8368874 (5th Cir. 2023); *United States v. Freeman*, No. 21-cr-41, 2023 U.S. Dist. LEXIS 147548, at \*21–24 (D.N.H. Aug. 22, 2023), *appeal pending*, No. 23-1771 (1st Cir. Sep. 21, 2023).

273. *See West Virginia*, 142 S. Ct. at 2620–24 (Gorsuch, J., concurring).

274. *Id.*

275. *Id.* at 2620 (internal quotation marks omitted) (first quoting *NFIB v. OSHA*, 595 U.S. 109, 117 (2022); and then quoting *Gonzales v. Oregon*, 546 U.S. 243, 267–68 (2006)).

276. *Id.* at 2621 (alteration in original) (internal quotation marks omitted) (quoting *NFIB v. OSHA*, 595 U.S. at 122) (Gorsuch, J., concurring)).

277. *Id.* (internal quotations omitted) (first quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014); and then quoting *King v. Burwell*, 576 U.S. 473, 485 (2015)).

278. *Id.* (alteration in original) (quoting *Ala. Ass’n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021)).

279. *Id.*; *see also* Sohoni, *supra* note 15, at 288.

280. *West Virginia*, 142 S. Ct. at 2622.

on which the agency seeks to rely ‘with a view to their place in the overall statutory scheme.’”<sup>281</sup> He further clarified that, to that end, “[o]blique or elliptical language’ will not supply a clear statement . . . [n]or may agencies seek to hide ‘elephants in mouseholes,’ or rely on ‘gap filler’ provisions.”<sup>282</sup> Second, courts should “examine the age and focus of the statute the agency invokes in relation to the problem the agency seeks to address.”<sup>283</sup> Third, courts should “examine the agency’s past interpretations” because a “‘contemporaneous’ and long-held Executive Branch interpretation of a statute is entitled to some weight as evidence of the statute’s original charge to an agency.”<sup>284</sup> Fourth, Justice Gorsuch indicated that “skepticism may be merited when there is a mismatch between an agency’s challenged action and its congressionally assigned mission and expertise.”<sup>285</sup>

#### D. Major Questions After West Virginia

In the wake of *West Virginia*, lower courts are facing an ever-growing wave of Major Questions claims.<sup>286</sup> To date, lower courts have diverged dramatically in their interpretations of Major Questions, focusing on different language from *West Virginia* and other Major Questions cases when deciding whether to apply the doctrine.<sup>287</sup> The high degree of variation among these interpretations highlights the need to clarify Major Questions. The Supreme Court returned to Major Questions less than a year after *West Virginia*, in *Biden v. Nebraska*,<sup>288</sup> but provided little clarification.

##### 1. Lower-Court Interpretations of *West Virginia*

In just the first year and a half after *West Virginia*, federal courts addressed Major Questions claims related to a staggering array of topics and contexts, running the gamut from the definition of a “rifle” under the National Firearms Act of 1934 to the regulation of cryptocurrency.<sup>289</sup> Lower court interpretations of *West Virginia* have been

281. *Id.* (internal quotation marks omitted) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)).

282. *Id.* (first alteration in original) (first quoting *id.* at 2608; then quoting *Whitman v. Am. Trucking Ass’n, Inc.*, 531 U.S. 457, 468 (2001); and then quoting *West Virginia*, 142 S. Ct. at 2610)).

283. *Id.* at 2623.

284. *Id.* (quoting *United States v. Philbrick*, 120 U.S. 52, 59 (1887)).

285. *Id.*

286. See Sohoni, *supra* note 15, at 266 (“Major questions challenges will load the Court’s docket for years to come.”).

287. See *supra* Part II.D.1 for a discussion comparing and contrasting lower court cases.

288. 143 S. Ct. 2355 (2023).

289. See, e.g., *Miller v. Garland*, No. 23-cv-195, 2023 U.S. Dist. LEXIS 93105, at \*25 (E.D. Va. May 26, 2023) (the definition of a “rifle” under the National Firearms Act of 1934), *appeal pending*, No. 23-1604 (4th Cir. June 1, 2023); *Arizona v. Walsh*, No. CV-22-00213, 2023 WL 120966, at \*7 (D. Ariz. Jan. 6, 2023) (raising the minimum wage for federal contractors), *appeal pending sub nom.*, *Nebraska v. Martin*, No. 22-CV-00213 (9th Cir. Feb. 09, 2023); *Ohio v. Yellen*, 53 F.4th 983, 989 (6th Cir. 2022) (conditions for states to receive federal funds under the American Rescue Plan Act), *cert. denied*, 143 S. Ct. 2631 (2023); *Louisiana v. Becerra*, 629 F. Supp. 3d 477, 492 (W.D. La. 2022) (requirements that staff in the Head Start program wear masks or receive COVID-19 vaccinations), *aff’d in part, vacated in part*, No. 22-30748, 2023 WL 8368874 (5th Cir. Aug. 29, 2023); *Allstates Refractory Contractors, LLC v. Su*, 79 F.4th 755, 767 n.3 (6th Cir. 2023) (the constitutionality of the Occupational Health and Safety Act), *rehearing en banc denied by* No. 22-3772,

almost as varied as the topics of the cases and have demonstrated a high degree of judicial uncertainty.<sup>290</sup> Considering the sheer variety of these cases, and the uncertainty around whether a Major Questions claim is warranted or not in a particular case, it is hard to imagine a federal policy that would not soon be challenged under the Major Questions doctrine.<sup>291</sup>

Some lower federal courts have refused to apply Major Questions, citing a variety of reasons. *Loper Bright Enterprises v. Raimondo* focused on impacts on the national economy when rejecting a claim that regulation by the National Marine Fisheries Service creating a fisheries management program was a Major Question.<sup>292</sup> The Court of Appeals for the D.C. Circuit found that the Major Questions doctrine did not apply, because “Congress has delegated broad authority to an agency with expertise and experience within a specific industry, and the agency action is so confined, claiming no broader power to regulate the national economy.”<sup>293</sup> By contrast, *United States v. Empire Bulkers Ltd.* rejected a Major Questions claim related to Coast Guard regulation on the discharge of oil from ships, by focusing on whether the agency had changed its regulatory regime.<sup>294</sup> The United States District Court for the Eastern District of Louisiana concluded that “there is no major enforcement shift that could be considered a ‘major question.’”<sup>295</sup> *SEC v. Terraform Labs Ltd.*, a case in the United States District Court for the Southern District of New York, focused on the importance of the regulated industry.<sup>296</sup> The court rejected a Major Questions challenge to cryptocurrency regulations because “it would ignore reality to place the crypto-currency industry and the American energy and tobacco industries—the subjects of *West Virginia* and *Brown & Williamson*, respectively—on the same plane of importance.”<sup>297</sup>

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2023 WL 8947131 (6th Cir. Dec. 20, 2023); *Niblock v. Univ. of Ky.*, No. 19-394, 2023 WL 4997678, at \*3 (E.D. Ky. Aug. 4, 2023) (the regulation of college sports under Title IX); *Ready for Ron v. FEC*, No. 22-3282, 2023 WL 3539633, at \*10 (D.D.C. May 17, 2023) (regulations on political action committees under federal campaign finance laws); *Alaska Indus. Dev. v. Biden*, No. 21-cv-00245, 2023 U.S. Dist. LEXIS 136474, at \*25 (D. Alaska Aug. 7, 2023) (the granting of oil and gas drilling leases in the Arctic National Wildlife Refuge); *United States v. Empire Bulkers Ltd.*, No. 21-126, 2022 U.S. Dist. LEXIS 151817, at \*4 (E.D. La. Aug. 24, 2022) (requirements that oceangoing ships maintain an oil record book); *Rest. L. Ctr. v. Dep’t of Lab.*, No. 21-CV-1106, 2023 U.S. Dist. LEXIS 115630, at \*35 (W.D. Tex. July 6, 2023) (receipt of tips by restaurant workers); *SEC v. Terraform Labs Pte. Ltd.*, No. 23-cv-1346, 2023 U.S. Dist. LEXIS 132046, at \*22 (S.D.N.Y. July 31, 2023) (cryptocurrency regulations).

290. See *supra* note 19 and accompanying text.

291. See Cissy Jackson & David M. Loring, *West Virginia v. EPA—Will Chevron Go the Way of the Dinosaurs?*, FED. LAW., Sept.-Oct. 2022, at 5, 27 (“Although progressives are often seen as more supportive of agency regulation than conservatives, in reality, one’s view of agency action is often inextricably entwined with the policies of the administration in control of the agency at the time. In other words, we may see both progressives and conservatives deploying *West Virginia* as a sword and a shield, depending on the circumstances.”).

292. See 45 F.4th 359, 364 (D.C. Cir. 2022).

293. *Id.* at 365.

294. *Empire Bulkers Ltd.*, 2022 U.S. Dist. LEXIS 151817, at \*6.

295. *Id.*

296. *SEC v. Terraform Labs Pte. Ltd.*, No. 23-cv-1346, 2023 U.S. Dist. LEXIS 132046, at \*22 (S.D.N.Y. July 31, 2023).

297. *Id.* at \*24.



When courts do apply Major Questions, they have also taken different approaches. *Louisiana v. Becerra* invoked the Major Questions doctrine to strike down a regulation requiring COVID-19 vaccinations and mask usage in the Head Start program.<sup>298</sup> The court quoted *Whitman*, proclaiming that “the elephant is the Head Start Mandate and its vaccine and mask requirements” and the “mousehole” is the attempt of the United States Department of Health and Human Services (HHS) “to disguise the Head Start Mandate as a mere modification.”<sup>299</sup> The court also cited Justice Gorsuch’s concurring opinion in *West Virginia*, stating that there was a “disconnect between the Agency’s challenged actions and its assigned mission and expertise,” because Head Start had no expertise in making medical decisions.<sup>300</sup> In the Fifth Circuit case *Midship Pipeline Company L.L.C. v. Federal Energy Regulatory Commission*, the court struck down the Federal Energy Regulatory Commission’s (FERC) determination of the costs Midship owed to remediate properties affected by oil pipeline construction.<sup>301</sup> The court quoted the assertion from *West Virginia* that “‘enabling legislation’ is generally not an ‘open book to which the agency [may] add pages and change the plot line,’” and found that the FERC had violated this principle by calculating the costs of remediation rather than simply determining that Midship Pipeline had violated its order.<sup>302</sup> In *North Carolina Coastal Fisheries Reform Group v. Captain Gaston, LLC*, the Fourth Circuit found that Major Questions was implicated by a claim that the Clean Water Act requires fishing boats to apply for a pollution discharge permit to dump bycatch in coastal waters.<sup>303</sup> The court focused on the size of the entire fishing industry, noting that it “generates hundreds of billions of dollars, employs millions of people, and provides recreational sport for millions more,” and found that requiring fishers to obtain EPA permits would “upset the federal-state balance by intruding on states’ authority to manage fisheries in their own waters.”<sup>304</sup>

Both the Fifth and Eleventh Circuits cited *West Virginia* to strike down President Biden’s 2021 executive order,<sup>305</sup> issued under the Procurement Act of 1949 (also known as the Federal Property and Administrative Services Act of 1949), which required employees of federal contractors to be vaccinated for COVID-19.<sup>306</sup> But the

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298. *Louisiana v. Becerra*, 629 F. Supp. 3d 477, 492 (W.D. La. 2022), *aff’d in part and vacated in part*, No. 22-30748, 2023 WL 8368874 (5th Cir. 2023).

299. *Id.* at 491.

300. *Id.* at 493. This claim is dubious given that the agency demonstrated its long history of establishing health standards for the Head Start program, including eighteen prior regulations related to the health and wellness of faculty, staff, and students. *See id.*

301. *Midship Pipeline Co., LLC v. FERC*, 45 F.4th 867, 877 (5th Cir. 2022).

302. *Id.* at 876 (alterations in original) (internal quotation marks omitted) (quoting Gellhorn & Verkuil, *supra* note 242, at 1011).

303. *N.C. Coastal Fisheries Reform Grp. v. Capt. Gaston LLC*, No. 21-2184, 2023 U.S. App. LEXIS 20325, at \*14 (4th Cir. Aug. 7, 2023).

304. *Id.* at \*13–14.

305. Exec. Order No. 14,042, 86 Fed. Reg. 50,985 (Sept. 9, 2021).

306. *See Georgia v. President of the United States*, 46 F.4th 1283, 1295 (11th Cir. 2022); *Louisiana v. Biden*, 55 F.4th 1017, 1029 (5th Cir. 2022). The Procurement Act of 1949 authorizes the President of the United States to “prescribe policies and directives that the President considers necessary” to “procure and supply personal property and nonpersonal services for executive agencies.” *See Georgia v. President of the United States*, 46 F.4th at 1290 (first quoting 40 U.S.C. § 121(a); and then quoting § 501(b)(1)(A)).

two courts used different reasoning to determine why the Major Questions doctrine applied. In *Georgia v. President of the United States*, the Eleventh Circuit relied entirely on *NFIB v. OSHA*, stating that Major Questions applied because “requiring widespread COVID-19 vaccination is ‘no everyday exercise of federal power.’”<sup>307</sup> By contrast, *Louisiana v. Biden* relied on *Utility Air*.<sup>308</sup> The Fifth Circuit applied the Major Questions doctrine after finding that the executive order was an “enormous and transformative expansion in’ the President’s power under the Procurement Act,” because the vaccine mandate was different from previous orders.<sup>309</sup>

Powerful dissents in both cases pointed to two distinct problems with applying the Major Questions doctrine. First, dissents in both cases noted that *West Virginia* and prior Major Questions cases only addressed the actions of federal agencies.<sup>310</sup> But the Procurement Act grants powers directly to the President, not an administrative agency.<sup>311</sup> Second, as Judge Anderson pointed out in his dissenting opinion in *Georgia v. President of the United States*, presidents have routinely used the Procurement Act to issue important national policies.<sup>312</sup> Presidents have used the Procurement Act to require federal contractors to adopt antidiscrimination policies, follow wage and price standards, and provide paid sick leave for employees—all of which have been upheld as lawful.<sup>313</sup>

## 2. *Biden v. Nebraska*

Less than a year after *West Virginia*, the Supreme Court returned to the Major Questions doctrine. *Biden v. Nebraska* found that the Department of Education’s emergency powers under the Higher Education Relief Opportunities for Students Act (“HEROES Act”) to “waive or modify any statutory or regulatory provision applicable to . . . student financial assistance” were insufficient to institute a student loan forgiveness program in response to the COVID-19 pandemic.<sup>314</sup> The Court did little to clarify the operation of the doctrine though, and even stated that Major Questions was not necessary to its holding.<sup>315</sup>

First, the Court used the ordinary tools of statutory interpretation to determine that the plain text of the statute did not authorize the loan forgiveness program.<sup>316</sup> The

307. *Georgia v. President of the United States*, 46 F.4th at 1296 (quoting *NFIB v. OSHA*, 595 U.S. 109, 117 (2022)).

308. *See Louisiana v. Biden*, 55 F.4th at 1029.

309. *Id.* at 1030, 1031 (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

310. *See id.* at 1038 (Graves, J., dissenting) (citing *Georgia v. President of the United States*, 46 F.4th at 1308–17) (Anderson, J., concurring in part and dissenting in part)).

311. *Id.*

312. *See Georgia v. President of the United States*, 46 F.4th at 1311–12 (Anderson, J., concurring in part and dissenting in part).

313. *Id.*

314. *Biden v. Nebraska*, 143 S. Ct. 2355, 2363 (2023) (quoting the Higher Education Relief Opportunities for Students Act (HEROES Act) of 2003, 20 U.S.C. § 1098bb(a)(1)).

315. *Id.* at 2375 (“[T]he HEROES Act provides no authorization for the Secretary’s plan even when examined using the ordinary tools of statutory interpretation . . .”).

316. *See id.* at 2375 n.9 (noting that “the statutory text alone precludes the Secretary’s program”); *id.* at 2376 (Barrett, J., concurring) (“[T]he Court applies the ordinary tools of statutory interpretation to conclude

Court relied on *MCI* to find that the term “‘modify’ carries ‘a connotation of increment or limitation,’ and must be read to mean ‘to change moderately or in minor fashion.’”<sup>317</sup> The Court emphasized that the Department of Education had “created a novel and fundamentally different loan forgiveness program.”<sup>318</sup> The Court also rejected the argument that loan forgiveness is a “waiver,” because the Department had not identified any specific statutory provision that was waived.<sup>319</sup>

Finding that the text of the HEROES Act provided no authority for the student loan forgiveness plan could have ended the analysis, but the Court went on to address the Major Questions doctrine.<sup>320</sup> Chief Justice Roberts, writing for the majority, made clear that *West Virginia* was the leading case on the doctrine and pointed to several similarities between the two cases.<sup>321</sup> Chief Justice Roberts primarily focused on the scope and cost of the program, noting that it would release forty-three million borrowers from their obligations to repay over \$400 billion in student loans.<sup>322</sup> Chief Justice Roberts also found the program to be unprecedented, because previous regulations under the HEROES Act were smaller in scope.<sup>323</sup> Therefore, the program was a “‘fundamental revision of the statute, changing it from [one sort of] scheme of . . . regulation’ into an entirely different kind.”<sup>324</sup> Further, as in *West Virginia*, Congress had recently considered—but not passed—multiple student loan forgiveness programs, so the Department’s interpretation “‘conveniently enabled [it] to enact a program’ that Congress has chosen not to enact itself.”<sup>325</sup>

There are several notable differences between *Biden v. Nebraska* and *West Virginia*, though, which will confound the ability of lower courts to implement Major Questions consistently. First, Chief Justice Roberts did not attempt to utilize *West Virginia*’s two-step approach of finding that Major Questions applied and then looking for statutory support. Instead, he found that there was no statutory support before addressing the Major Questions doctrine.<sup>326</sup> Second, a student loan forgiveness

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that the HEROES Act does not authorize the Secretary’s plan. The major questions doctrine reinforces that conclusion but is not necessary to it.” (citation omitted)).

317. *Id.* at 2368 (majority opinion) (quoting *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 225 (1994)).

318. *Id.* at 2369.

319. *Id.* at 2370.

320. *See id.* at 2383–84.

321. *See id.* at 2374 (“[T]he issue now is not whether [*West Virginia*] is correct. The question is whether that case is distinguishable from this one. And it is not.” (second alteration in original) (quoting *Collins v. Yellen*, 141 S. Ct. 1761, 1800 (2021) (Kagan, J., concurring in part and concurring in judgment))).

322. *Id.* at 2373 (noting that the estimated costs were “ten times the ‘economic impact’ that we found significant in concluding that an eviction moratorium implemented by the Centers for Disease Control and Prevention triggered analysis under the major questions doctrine” in *Ala. Ass’n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021)).

323. *Id.* at 2373–74.

324. *Id.* at 2373 (alteration in original) (omission in original) (quoting *West Virginia v. EPA*, 142 S. Ct. 2587, 2596 (2022)).

325. *Id.* (quoting *West Virginia*, 142 S. Ct. at 2614).

326. *Id.* at 2368–75.

program was well within the expertise of the Department of Education.<sup>327</sup> By contrast, the lack of agency expertise was an important factor in *West Virginia, NFIB v. OSHA*, and *King*.<sup>328</sup> The fact that Major Questions applied despite the lack of this important indicator from other Major Questions cases highlights the difficulty for lower courts in determining how “major” is major enough.<sup>329</sup>

Given the explosion of Major Questions claims after *West Virginia*—and the unpredictable applications of the doctrine by different courts—it is essential to quickly find a way to apply the doctrine consistently. For the federal government to function, legislators need to know how their words will be interpreted by courts, and administrative agencies need to know what policies they can implement.<sup>330</sup> Until the Supreme Court provides clearer guidance, federal courts must find their own way to implement a consistent Major Questions jurisprudence.

### III. DISCUSSION

Academics have rightly worried that an overly broad adoption of the major questions doctrine will lead to the exception swallowing the rule, with Major Questions replacing *Chevron* as the default in administrative law.<sup>331</sup> This transition would be a detrimental outcome for the ability of the federal government to serve its many important and often overlooked functions.<sup>332</sup> It would also be a misinterpretation of the term “extraordinary,” which the Supreme Court consistently uses to indicate that an exception to a general rule should be applied sparingly.<sup>333</sup> This Comment proposes that the Supreme Court’s repeated reminders that the Major Questions doctrine *only* applies in “certain extraordinary cases”—and not “in the ordinary case”—requires lower courts

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327. *Id.* at 2384 (Barrett, J., concurring) (admitting that “some context clues from past major questions cases are absent here—for example, this is not a case where the agency is operating entirely outside its usual domain”).

328. *See West Virginia*, 142 S. Ct. at 2613–14; *King v. Burwell*, 576 U.S. 473, 486 (2015); *NFIB v. OSHA*, 595 U.S. 109, 118 (2022).

329. *See Sohoni*, *supra* note 15, at 288 (discussing the difficulties in consistently applying Major Questions).

330. *See Richardson, Keeping Big Cases*, *supra* note 16, at 407 (“[A] problem created by the major questions doctrine is that it could undermine *Chevron*’s role as a more-or-less well understood judicial principle which Congress knows and can legislate against.”).

331. *See, e.g., Social Security Act*, *supra* note 244, at 487 (noting that the recent expansion of the Major Questions doctrine “by swallowing *Chevron* step one, may prevent courts from even citing the landmark decision, thus easing the path to its eventual overruling”); *Rise of Purposivism*, *supra* note 26, at 1239 (noting that the Supreme Court could invoke Major Questions “in a significant proportion of agency statutory interpretation cases, which would allow the exception to swallow *Chevron*’s rule”).

332. *See Richardson, Deference Is Dead*, *supra* note 3, at 504–05; *see also* MICHAEL LEWIS, *THE FIFTH RISK* 87–88, 159–60 (Penguin Books 2019) (2018) (discussing the many important and misunderstood duties of the U.S. Department of Agriculture and the U.S. Department of Commerce as examples of the important work performed by federal agencies).

333. *See, e.g., Calderon v. Thompson*, 523 U.S. 538, 558 (1998) (“The miscarriage of justice standard . . . is limited to the most rare and extraordinary case.”); *Roberts v. Dist. Ct.*, 339 U.S. 844, 845 (1950) (“Mandamus is an extraordinary remedy, available only in rare cases.” (citing *Ex Parte Collett*, 337 U.S. 55, 72 (1949))).

to reject most Major Questions claims.<sup>334</sup> Since *West Virginia* designated Major Questions as an exception without referencing *Chevron*, this conclusion holds even if *Chevron* is overturned.<sup>335</sup>

The subjective nature of determining exactly which cases are Major Questions is the primary barrier to applying the doctrine consistently.<sup>336</sup> However, courts are familiar with the principle that “extraordinary cases” must be objectively rare.<sup>337</sup> The principle that courts must prevent exceptions from swallowing general rules is also objectively measurable.<sup>338</sup> These objective principles could help lower courts apply Major Questions quickly and consistently,<sup>339</sup> reduce the disruption of government functions, and preserve judicial resources.<sup>340</sup>

The lack of other useful guidance for lower courts in *West Virginia* heightens the importance of preserving the extraordinary nature of the Major Questions doctrine.<sup>341</sup> *West Virginia* failed to provide a workable test for applying Major Questions.<sup>342</sup> It buried lower courts in an endless “smorgasbord” of considerations and factors.<sup>343</sup> And it directed courts to look to the highly inconsistent Major Questions precedent for guidance.<sup>344</sup> The chaotic and speculative Major Questions analysis breaking out in federal courts around the country shows the futility of this totality-of-the-circumstances

334. *West Virginia v. EPA*, 142 S. Ct. 2587, 2608–09 (2022); *see also* *King v. Burwell*, 576 U.S. 473, 485 (2015); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

335. *See infra* Part III.A.1.

336. *See, e.g.*, *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 423 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from a denial of a rehearing en banc) (“[D]etermining whether a rule constitutes a major rule sometimes has a bit of a ‘know it when you see it’ quality.”).

337. *See, e.g.*, *Petrella v. MGM*, 572 U.S. 663, 676 n.12 (2014) (noting that the application of “laches should be ‘extraordinary,’ confined to ‘few and unusual cases’” (quoting *id.* at 688, 700 (Breyer, J., dissenting))); *Calderon*, 523 U.S. at 558; *Roberts*, 339 U.S. at 845.

338. *See, e.g.*, *United States v. Honken*, 184 F.3d 961, 968–70 (8th Cir. 1999) (holding that “extraordinary case” means “a situation that is extremely rare and highly exceptional,” and overturning the district court’s ruling because “the district court’s definition of an ‘extraordinary case’ is so broad that it swallows the ‘ordinary’ case”).

339. *Cf. Sellers*, *supra* note 37, at 932 (“Prominent commentators perceive [the Major Questions doctrine] as dangerous and destabilizing.”).

340. *See Jackson & Loring*, *supra* note 291, at 5, 27 (“[T]he major question doctrine . . . provides a new, strong, weapon to attack . . . proposed regulation based on the clarity of the underlying statute and the significance of the regulation itself. For existing rules, the major question doctrine raises the likelihood of fresh challenges . . .”).

341. *See infra* Part III.B.

342. *See* Thomas B. Griffith & Haley N. Proctor, *Deference, Delegation, and Divination: Justice Breyer and the Future of the Major Questions Doctrine*, 132 YALE L.J. FORUM 693, 698–702 (2022) (noting that *West Virginia* fails to answer three questions: (1) “[W]hat makes a question ‘major?’”; (2) “[H]ow does the doctrine interact with *Chevron*?”; and (3) “[D]oes the doctrine’s presumption reflect the way Congress does act or the way Congress should act?”).

343. *See* Sohoni, *supra* note 15, at 288 (describing *West Virginia*’s “smorgasbord . . . of considerations that courts may balance and weigh” as inviting “exactly the kind of all-things-considered, open-ended inquiry that textualism was meant to teach courts to avoid like the plague”).

344. *See* *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (describing the Major Questions doctrine as an “identifiable body of law” and listing *MCI*, *Brown & Williamson*, *Gonzales*, *King*, and *Utility Air*); *see also* *Major Question Objections*, 129 HARV. L. REV. 2191, 2192 (2016) (proposing to “abandon the fruitless quest to rationalize the disorderly major question cases”).

approach.<sup>345</sup> Judges should avoid the freewheeling analysis exemplified by *West Virginia* and remember that “extraordinary cases are presented only in the rarest circumstances.”<sup>346</sup>

A. *The “Extraordinary Cases” Limitation to the Major Questions Doctrine*

*West Virginia* emphatically placed the distinction between extraordinary and ordinary cases at the heart of the Major Questions doctrine.<sup>347</sup> The Court repeatedly emphasized this language, describing the Major Questions doctrine as applying in “extraordinary cases” three separate times and repeatedly contrasting Major Questions with “‘ordinary’ circumstances.”<sup>348</sup>

First, Chief Justice Roberts stated that “[i]n the ordinary case . . . context has no great effect” in determining administrative law issues, but “our precedent teaches that there are ‘extraordinary cases’ that call for a different approach . . . .”<sup>349</sup> He returned to this point later in the analysis, stating that “the key case in this area, *Brown & Williamson* . . . could not have been clearer: ‘In extraordinary cases . . . there may be reason to hesitate’ before accepting a reading of a statute that would, under more ‘ordinary’ circumstances, be upheld.”<sup>350</sup> Chief Justice Roberts is correct on this point: *Brown & Williamson* explicitly stated that it was “hardly an ordinary case.”<sup>351</sup> In fact, both the majority and dissenting opinions in *West Virginia* agreed that *Brown & Williamson*—which originated the “extraordinary cases” limitation—was the key case in the development of the Major Questions doctrine.<sup>352</sup> The heavy emphasis on this ordinary versus extraordinary distinction throughout *West Virginia* can only be interpreted as a deliberate effort to place a limiting principle on the Major Questions doctrine.

The “extraordinary cases” limitation also appears in *King* in the crucial analytical step where the Court separated Major Questions from *Chevron*.<sup>353</sup> *King* is especially important because it is the Court’s only explanation of the relationship between the two

345. See *infra* Part III.B.

346. *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 560 (2010) (Kennedy, J., concurring).

347. See *West Virginia*, 142 S. Ct. at 2587, 2608 (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

348. *Id.* at 2608–09 (quoting *Brown & Williamson*, 529 U.S. at 159) (citing to *Utility Air* when using the “extraordinary cases” language, even though that phrase did not appear in that opinion).

349. *Id.* at 2608 (quoting *Brown & Williamson*, 529 U.S. at 159–60).

350. *Id.* (omission in original) (internal quotation marks omitted) (first quoting *id.* at 2634 (Kagan, J., dissenting); and then quoting *Brown & Williamson*, 529 U.S. at 159).

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

352. *West Virginia*, 142 S. Ct. at 2609, 2634; see also *Brown & Williamson*, 529 U.S. at 159 (“This is hardly an ordinary case.”).

353. *King v. Burwell*, 576 U.S. 473, 485 (2015) (quoting *Brown & Williamson*, 529 U.S. at 159).

doctrines.<sup>354</sup> Further, *King* added a definitive, quantitative comparison—*Chevron* applies “often,” but Major Questions applies only in “extraordinary cases.”<sup>355</sup>

The quantitative comparison between extraordinary and ordinary cases indicated by *West Virginia, King*, and *Brown & Williamson* fits with the Court’s consistent use of the phrase “extraordinary cases.” The term “extraordinary case” appears in Supreme Court jurisprudence in many contexts, to indicate a rare exception to a general rule. In *Petrella v. Metro-Goldwyn-Mayer, Inc.*, both the majority and the dissent agreed that the doctrine of laches “should be extraordinary” and “confined to few and unusual cases.”<sup>356</sup> Similarly, *Roberts v. District Court* noted that “[m]andamus is an extraordinary remedy, available only in rare cases.”<sup>357</sup> *Salinas v. United States* held that legislative history only justifies a departure from the statutory text in “rare and exceptional circumstances” with “the most extraordinary showing of contrary intentions.”<sup>358</sup> These cases are representative of the Supreme Court’s consistent use of “extraordinary” to mean “rare,” dating back to the 1800s.<sup>359</sup>

The Supreme Court’s use fits precisely with the common meaning of “extraordinary.” *Black’s Law Dictionary* defines “extraordinary” as “[b]eyond what is usual, customary, regular, or common” and “of, relating to, or involving a legal proceeding or procedure not normally required or resorted to.”<sup>360</sup> In 1999, the Eighth Circuit reached a similar conclusion when defining the phrase “extraordinary case” in a set of sentencing guidelines.<sup>361</sup> The court cited several dictionaries defining the phrase as “more than ordinary,” “going beyond what is usual, regular, common, or customary,” “exceptional’ to a very marked extent,” “remarkable,” “uncommon,” or “rare.”<sup>362</sup> The court concluded that an “‘extraordinary case’ . . . means a situation that

354. See Barry Smitherman, *From Chevron to the Clean Power Plan: Is the Doctrine of Agency Deference About to End?*, 13 TEX. J. OIL, GAS & ENERGY L. 47, 60 (2018) (“In writing the majority opinion in *King v. Burwell*, Chief Justice Roberts, after reviewing the principle of *Chevron* deference and the two-prong test, essentially discards *Chevron*.”); see also Griffith & Proctor, *supra* note 342, at 700 (discussing the ambiguity in the relationship between *Chevron* and Major Questions).

355. *King*, 576 U.S. at 485 (quoting *Brown & Williamson*, 529 U.S. at 159).

356. *Petrella v. MGM, Inc.*, 572 U.S. 663, 676 & n.12 (2014) (internal quotation marks omitted) (quoting *id.* at 688, 700 (Breyer, J., dissenting)).

357. *Roberts v. Dist. Ct.*, 339 U.S. 844, 845 (1950).

358. *Salinas v. United States*, 522 U.S. 52, 57 (1997) (first quoting *Ardestani v. INS*, 502 U.S. 129, 135 (1991); and then quoting *United States v. Albertini*, 472 U.S. 675, 680 (1985)).

359. See *United States v. Gooding*, 25 U.S. (12 Wheat.) 460, 479 (1827). (“[I]t is not wholly incompetent for the Court to entertain such questions during the trial, in the exercise of a sound discretion. It should, however, be rarely done, and only under circumstances of an extraordinary nature.”); *Ex parte Fahey*, 332 U.S. 258, 259–60 (1947) (“Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. . . . [T]hey are reserved for really extraordinary causes.”); *W. Airlines, Inc. v. International Brotherhood of Teamsters*, 480 U.S. 1301, 1304–05 (1987) (holding that “this situation presents one of those rare, extraordinary circumstances in which request for a stay before the Court of Appeals is not required”); *Davis v. Scherer*, 468 U.S. 183, 201 (1984) (listing the “rare and extraordinary situations in which we have held that deprivation of a protected interest need not be preceded by opportunity for some kind of hearing”).

360. *Extraordinary*, BLACK’S LAW DICTIONARY (11th ed. 2019).

361. *United States v. Honken*, 184 F.3d 961, 969 (8th Cir. 1999).

362. *Id.* (first quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 807 (1993); and then quoting BLACK’S LAW DICTIONARY 527 (5th ed. 1979)).

is extremely rare and highly exceptional” and chastised the district court for adopting a definition “so broad that it swallows the ‘ordinary’ case.”<sup>363</sup>

Supreme Court Justices have also often expressed concerns that courts will dilute the meaning of “extraordinary” by applying it too lightly. In *Caperton v. A. T. Massey Coal Company*, Justices Roberts, Scalia, Thomas, and Alito—all proponents of the Major Questions doctrine—dissented to criticize the majority for being too quick to make an exception in an “extraordinary situation.”<sup>364</sup> The majority held that campaign contributions to a judge were so “extraordinary” that the Constitution required the judge’s recusal.<sup>365</sup> The dissent predicted that “all future litigants will assert that their case is *really* the most extreme thus far” and claim that they need an exception due to the extraordinary circumstances.<sup>366</sup>

*Perdue v. Kenny A. ex rel. Winn*, a 2010 Supreme Court case, provides an insightful discussion of “extraordinary cases.”<sup>367</sup> Federal law allows trial judges to award attorney’s fees in “extraordinary circumstances,” but the general rule is that each party pays their own fees.<sup>368</sup> The Court reversed an award of attorney’s fees because there was not sufficient evidence that the case was truly extraordinary.<sup>369</sup> Justice Kennedy concurred to highlight the importance of being objective when labeling a case “extraordinary.”<sup>370</sup> He observed that “[w]hen immersed in a case, lawyers and judges find within it a fascination, an intricacy, an importance that transcends what the detached observer sees,” leading the case to “seem extraordinary to its participants.”<sup>371</sup> However, he emphasized that, objectively, “it must be understood that extraordinary cases are presented only in the rarest circumstances.”<sup>372</sup>

Justice Kennedy’s admonishment to think objectively about which cases are *actually* extraordinary is especially prescient in the context of the Major Questions doctrine. Industry insiders are most familiar with the regulations affecting their businesses, naturally viewing those regulations as imperative.<sup>373</sup> *West Virginia* will undoubtedly set off a stampede of litigants “assert[ing] that their case is *really* the most extreme.”<sup>374</sup> This trend is already apparent in cases such as *Empire Bulkers Ltd.*, where the plaintiff claimed that a Coast guard regulation requiring oceangoing ships weighing more than four hundred gross tons to maintain records of motor oil discharge locations

363. *Id.* at 970.

364. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 899 (2009) (Roberts, J., dissenting).

365. *Id.* at 886–87 (majority opinion). The majority felt confident, though, that its holding could be “confined to rare instances.” *Id.* at 890.

366. *Id.* at 899 (Roberts, J., dissenting). To illustrate this point, the dissent pointed to *United States v. Halper*, 490 U.S. 435 (1989), which created an exception in double jeopardy cases, but had to be overturned just eight years later because “[t]he novel claim that we had recognized in *Halper* turned out not to be so ‘rare’ after all.” *Caperton*, 556 U.S. at 900 (Roberts, J., dissenting).

367. 559 U.S. 542, 560 (2010) (Kennedy, J., concurring).

368. *See id.* at 550 (majority opinion) (discussing 42 U.S.C. § 1988).

369. *Id.* at 558.

370. *Id.* at 560 (Kennedy, J., concurring).

371. *Id.*

372. *Id.*

373. *See, e.g.*, *United States v. Empire Bulkers Ltd.*, No. 21-126, 2022 U.S. Dist. LEXIS 151817, at \*4 (E.D. La. Aug. 24, 2022).

374. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 899 (Roberts, J., dissenting).



had “far-reaching consequences that implicate the major questions doctrine.”<sup>375</sup> However, *West Virginia*’s clear limitation of the Major Questions doctrine to “extraordinary cases” should cause judges to view Major Questions claims more skeptically when plaintiffs expound on the extraordinary consequences of some obscure federal regulation.

### B. Keeping the Exception from Swallowing the Rule

Limiting Major Questions claims to truly extraordinary cases takes on additional importance when considering the well-known principle that exceptions must not be allowed to swallow the general rule.<sup>376</sup> Supreme Court case law is overflowing with reminders to interpret exceptions narrowly in order to preserve their exceptional status.<sup>377</sup> Because *West Virginia* designated Major Questions as an exception to the general rule,<sup>378</sup> lower courts must reject Major Questions claims that would expand the doctrine or erode its status as an exception.

*Bailey v. United States*, a 2013 Supreme Court case, illustrates the “exception swallows the rule” principle in a context that parallels the Major Questions doctrine.<sup>379</sup> The Fourth Amendment generally requires police to establish probable cause before seizing a person, but *Michigan v. Summers* permitted police to temporarily detain, without probable cause, the occupants of premises while executing a search warrant.<sup>380</sup> The Second Circuit expanded the *Summers* exception after engaging in an “open-ended balancing” inquiry into the needs of law enforcement.<sup>381</sup> In *Bailey*, the Supreme Court reversed the Second Circuit’s ruling.<sup>382</sup> Justice Scalia noted that “[i]t bears repeating that the general rule is that Fourth Amendment seizures are reasonable only if based on probable cause” and that if courts began using multifactor balancing tests, the “protections intended by the Framers could all too easily disappear in the consideration

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375. *Empire Bulkers Ltd.*, 2022 U.S. Dist. LEXIS 151817, at \*4–5 (citing 33 C.F.R. § 151.25(a), (i)).

376. See, e.g., *Bernal v. Fainter*, 467 U.S. 216, 222 n.7 (1984) (“We emphasize, as we have in the past, that the political-function exception must be narrowly construed; otherwise the exception will swallow the rule and depreciate the significance that should attach to the designation of a group as a ‘discrete and insular’ minority for whom heightened judicial solicitude is appropriate.” (citing *Nyquist v. Mauclet*, 432 U.S. 1, 11 (1977))).

377. See, e.g., *City of Los Angeles v. Patel*, 576 U.S. 409, 424–25 (2015) (“To classify hotels as pervasively regulated would permit what has always been a narrow exception to swallow the rule.”); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 655 (2001) (holding that “a nonmember’s actual or potential receipt of tribal police, fire, and medical services does not create the requisite connection. If it did, the exception would swallow the rule”); *Cuomo v. Clearing House Ass’n, LLC*, 557 U.S. 519, 530 (2009) (“The exception could not possibly exempt that manner of exercising visitation, or else the exception would swallow the rule.”); *Warger v. Shauers*, 574 U.S. 40, 52–53 (2014) (“[I]f Warger’s understanding of the ‘extraneous’ information exception were accepted . . . [the] ‘extraneous’ information exception would swallow much of the rest of Rule 606(b).”); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 702–03 (2004) (“The potential effect of this sort of headquarters analysis flashes the yellow caution light . . . [because it] threatens to swallow the foreign country exception whole . . .”).

378. *West Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022) (citing *FDA v. Brown & Williamson Tobacco Corp.* 529 U.S. 120, 159) (2000)).

379. 568 U.S. 186, 205 (2013) (Scalia, J., concurring).

380. 452 U.S. 692 (1981); see also *Bailey*, 568 U.S. at 192–93.

381. See *Bailey*, 568 U.S. at 204 (Scalia, J., concurring).

382. *Id.* at 202 (majority opinion).

and balancing of the multifarious circumstances presented by different cases.”<sup>383</sup> Justice Scalia noted that “[r]egrettably, this Court’s opinion in *Summers* facilitated the Court of Appeals’ error here by setting forth a smorgasbord of law-enforcement interests assertedly justifying its holding . . . . We should not have been so expansive.”<sup>384</sup>

Justice Scalia’s concerns in *Bailey* parallel the situation facing lower courts interpreting the Major Questions doctrine. Major Questions is the exception to the general rule in administrative law cases, but Major Questions cases have justified their holdings with an assortment of conflicting facts and considerations.<sup>385</sup> The extraordinary status of the Major Questions doctrine “could all too easily disappear in the consideration and balancing of the multifarious circumstances presented by different cases.”<sup>386</sup>

Applications of Major Questions by lower courts are already demonstrating how undisciplined applications of the doctrine will lead to the exception swallowing the rule. For example, *Georgia v. President of the United States* expands the Major Questions doctrine in at least two ways.<sup>387</sup> First, the Eleventh Circuit assumed—with no analysis at all—that the Major Questions doctrine applies to congressional delegations to the President, as well as to administrative agencies.<sup>388</sup> This expansion could open new avenues for bringing Major Questions challenges against other presidential actions, such as military decisions. Second, presidents have routinely used the Procurement Act of 1949 to require federal contractors to adopt policies similar to the vaccine mandate at issue, such as antidiscrimination policies, wage and price standards, and providing paid sick leave for employees.<sup>389</sup> All of these policies have been upheld as lawful uses of the Procurement Act, but now they are all open to fresh challenges under the Major Questions doctrine.<sup>390</sup> These policies cannot all fit the definition of “extraordinary,” because there are too many similar instances based on the same statutory text.<sup>391</sup> The clear conclusion is that *Georgia v. President of the United States* violated *West Virginia* by failing to consider whether its holding could be limited to “extraordinary cases.”<sup>392</sup>

The dangers of letting the extraordinary Major Questions exception swallow the general rule are already becoming clear. Just four months after *Georgia v. President of*

383. *Id.* at 204–05 (Scalia, J., concurring) (internal quotation marks omitted) (first quoting *Dunaway v. New York*, 442 U.S. 200, 213 (1979); and then quoting *Summers*, 452 U.S. at 705 n.19).

384. *Id.* at 205.

385. See Sohoni, *supra* note 15, at 266.

386. *Bailey*, 568 U.S. at 204 (Scalia, J., concurring) (quoting *Summers*, 452 U.S. at 705 n.19).

387. 46 F.4th 1283, 1314 (11th Cir. 2022).

388. See *id.* (Anderson, J., concurring in part and dissenting in part) (“Although the major questions doctrine has never been applied to an exercise of proprietary authority and has never been applied to the exercise of power by the President, I will assume that the doctrine does apply.”).

389. *Id.* at 1311–12.

390. *Id.*

391. *Cf. id.* at 1301 (majority opinion) (avoiding this question and simply noting that “President Obama requir[ed] federal contractors to provide paid sick leave to employees” and that “[w]e do not weigh in on its validity here” (citing Exec. Order No. 13,706, 80 Fed. Reg. 54,697 (Sept. 7, 2015))).

392. *West Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

*the United States*, an Arizona district court addressed another Major Questions claim against an application of the Procurement Act, this time trying to overturn a minimum wage increase.<sup>393</sup> The district court rejected the Major Questions claim,<sup>394</sup> but the ruling is likely to be appealed, using up yet more taxpayer dollars and judicial resources to relitigate a long-settled issue.<sup>395</sup> This is exactly the erosion of boundaries that causes the Supreme Court to repeatedly remind lower courts not to let exceptions swallow the rule.

*West Virginia*'s failure to address the relationship between Major Questions and *Chevron* further raises the possibility that courts could attempt to use Major Questions as the default administrative law doctrine if *Chevron* is overturned or becomes obsolete.<sup>396</sup> Such a result would be a massive expansion of the Major Questions doctrine, with drastic implications for the ability of the federal government to function, but *West Virginia* clearly precludes this result. *West Virginia* designated Major Questions as a rare exception to the general rule.<sup>397</sup> However, *West Virginia* did not state—as *King* and *Brown & Williamson* did—that the general rule in administrative law is *Chevron*.<sup>398</sup> Instead, *West Virginia* simply stated that Major Questions does not apply in the “ordinary case” and that the doctrine is distinct from methods of “routine statutory interpretation.”<sup>399</sup> The absence of *Chevron* in *West Virginia* means that the “exceptional cases” limitation is insulated from changes in other areas of administrative law. Even if *Chevron* is going the way of the dinosaurs,<sup>400</sup> Major Questions cannot replace it as the default in administrative law cases. Courts must remember to prevent the exception from swallowing the rule, even if the general rule changes over time.

### C. “Extraordinary Cases” Is the Only Workable Guidance in *West Virginia*

The “extraordinary cases” limitation and the principle that exceptions should not swallow the rule provide workable guidance for lower courts in applying the Major Questions doctrine. *West Virginia* provides almost no other justiciable guidance. Scholars have long criticized the Major Questions doctrine as subjective, “vague and difficult to administer,” “inconsistently applied,” and more akin to an equitable intervention than a consistent rule.<sup>401</sup> *West Virginia* only added to the confusion.<sup>402</sup> The

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393. *Arizona v. Walsh*, No. CV-22-00213, 2023 WL 120966, at \*7 (D. Ariz. Jan. 6, 2023).

394. *See id.* at \*22–26.

395. *See Georgia v. President of the United States*, 46 F.4th at 1311–12 (Anderson, J., concurring in part and dissenting in part).

396. *See Griffith & Proctor*, *supra* note 342, at 717; *Sohoni*, *supra* note 15, at 281.

397. *See supra* Part III.A.

398. *See King v. Burwell*, 576 U.S. 473, 485 (2015); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000).

399. *West Virginia v. EPA*, 142 S. Ct. 2587, 2608–09 (2022).

400. *Jackson & Loring*, *supra* note 291, at 27 (“The elephant—or perhaps dinosaur—in the room is the *Chevron* doctrine.” (footnote omitted)).

401. *Richardson*, *Keeping Big Cases*, *supra* note 16, at 381 (“What makes a question ‘major,’ a case ‘extraordinary,’ a change in regulatory authority an ‘elephant,’ or a statutory provision a ‘mousehole’? The short and perhaps most accurate answer is that it is in the eye of the beholder.”); *Rise of Purposivism*, *supra* note 26, at 1238; *see also Hornung*, *supra* note 140, at 761; *Huddleson*, *supra* note 10, at 52; *Sellers*, *supra* note 37, at 946; *Gocke*, *supra* note 37, at 968; *Major Question Objections*, *supra* note 344, at 2191; *Tortorice*, *supra* note 37, at 1104.

difficulty courts will have in consistently applying the doctrine increases the importance of the “extraordinary cases” limitation.

### 1. Applying the Extraordinary Cases Limitation

Courts could easily apply the “extraordinary cases” limitation as a dispositive test to determine whether Major Questions applies. In fact, some lower courts have already begun focusing on the “extraordinary” nature of Major Questions cases to reject the application of the doctrine.<sup>403</sup> “Extraordinary cases” must be objectively rare and limited to cases that would not cause the exception to swallow the general rule.<sup>404</sup> Therefore, a court considering a Major Questions claim must ask two questions: (1) are there many similar policies issued by the agency based on the same statutory authority, and (2) will applying Major Questions expand the doctrine or lead to new Major Questions challenges?

For example, in *Louisiana v. Becerra*, the Department of Health and Human Services (HHS) issued a regulation requiring Head Start employees, volunteers, and students to wear masks while participating in Head Start programs.<sup>405</sup> HHS previously used the same statutory authority to issue eighteen separate regulations relating to the health and wellness of staff, including, for example:

- (7) health screenings for all Head Start staff;
- (8) meeting the childcare standards of the states in which they operate;
- (9) verification of immunization records;
- ....
- (11) health examinations for Head Start staff;
- (12) health and wellness standards;
- (13) staff training on prevention and control of infectious diseases; [and]
- ....
- (16) determining whether children are up to date on state required vaccinations, and . . . assist[ing] the child and parents in getting up to date vaccinations.<sup>406</sup>

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

403. See, e.g., *SEC v. Terraform Labs Pte. Ltd.*, No. 23-cv-1346, 2023 U.S. Dist. LEXIS 132046, at \*23 (S.D.N.Y. July 31, 2023) (noting that the Supreme Court has justified the Major Questions doctrine by highlighting “the extraordinary nature of the agency’s claims and the exceptional importance of the industries to be regulated” and that “the crypto-currency industry—though certainly important—falls far short of being a ‘portion of the American economy’ bearing ‘vast economic and political significance.’” (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)); *Ready for Ron v. FEC*, No. 22-3282, 2023 U.S. Dist. LEXIS 86629, at \*31-32 (D.D.C. May 17, 2023) (“The major questions doctrine addresses those extraordinary cases in which the history and the breadth of the authority that [the agency] has asserted, and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress’ meant to confer such authority. . . . Nothing like that is presented here. The authority the FEC asserts is no different than the authority it has always asserted . . . .” (alteration in original) (internal quotation marks omitted) (quoting *West Virginia*, 142 S. Ct. at 2608)).

404. See *supra* Parts III.A–B.

405. *Louisiana v. Becerra*, 629 F. Supp. 3d 477, 484 (W.D. La. 2022), *aff’d and vacated in part*, No. 22-30748, 2023 WL 8368874 (5th Cir. Aug. 29, 2023).

406. *Id.* at 493.

There was clearly nothing rare or unusual about HHS requiring Head Start participants to wear masks. Further, striking down the mask mandate opened over a dozen existing HHS policies to Major Questions challenges. *Louisiana v. Becerra* clearly pushes the Major Questions exception towards swallowing the general rule. The “extraordinary cases” limitation decisively shows that *Louisiana v. Becerra* was erroneous in its decision to apply the Major Questions doctrine.<sup>407</sup>

## 2. The Lack of Other Useful Guidance in *West Virginia*

Apart from clearly limiting the Major Questions doctrine to extraordinary cases, it is very difficult to consistently apply *West Virginia* to new factual situations. First, the Court failed to articulate a workable test for applying the Major Questions doctrine.<sup>408</sup> Second, the Court listed an overwhelming number of factors and considerations without indicating the weight of any particular factor.<sup>409</sup> Third, the Court pointed to a body of case law to support the doctrine that scholars have long criticized as contradictory and difficult to reconcile.<sup>410</sup> All of these difficulties highlight the importance of limiting the Major Questions doctrine to those few and usual cases that are truly extraordinary.

### a. *The Lack of a Workable Test in West Virginia*

*Chevron*’s endurance is, in part, the result of the way Justice Stevens structured the opinion, establishing an easily administrable two-step test in a single, clear paragraph.<sup>411</sup> *West Virginia* was not so considerate. The Court defined Major Questions as “extraordinary cases” in which “the history and the breadth of the authority that [the agency] has asserted, and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress’ meant to confer such authority.”<sup>412</sup> This statement is the closest the Court came to establishing a test for identifying Major Questions, but it would be hopelessly difficult to consistently administer. There are simply too many factors to balance. This test would require courts to weigh seven factors: Congress’ intent behind the statute, the nature of the authority asserted by the agency, and the history, breadth, economic significance, and political significance of that authority, and whether the combination of these factors make the case extraordinary. Adding to the difficulty, many of these factors are difficult to define. Legislative history and congressional intent are famously subjective.<sup>413</sup> The political significance of an issue is in the eye of the beholder. In essence, *West Virginia* announced the type of “totality of the circumstances” test which

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407. See *West Virginia*, 142 S. Ct. at 2609 (limiting the Major Questions doctrine to “certain extraordinary cases”).

408. See *infra* Part III.C.2.a.

409. See *infra* Part III.C.2.b.

410. See *infra* Part III.C.2.c.

411. See *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842–43 (1984).

412. *West Virginia*, 142 S. Ct. at 2608 (alteration in original) (internal quotation marks omitted) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

413. See *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment) (describing the use of legislative history in statutory construction as “the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one’s friends”).

the Supreme Court recently described as “a fluid concept . . . not readily, or even usefully, reduced to a neat set of legal rules.”<sup>414</sup> This is hardly a recipe for consistent application of the Major Questions doctrine by lower courts.<sup>415</sup>

*West Virginia* also attempted to establish a two-step process for determining Major Questions but failed to apply two separate analytical steps. Supposedly, courts should first determine whether the Major Questions doctrine applies, then determine whether the agency action has clear congressional permission.<sup>416</sup> However, many issues *West Virginia* listed as justifications for applying the Major Questions doctrine are also considerations of congressional authorization. In Step One, the Court applied the Major Questions doctrine because the Clean Power Plan rested on “vague,” “ancillary,” and “cryptic” statutory authority.<sup>417</sup> Then, in Step Two, the Court struck down the Clean Power Plan, because “[s]uch a vague statutory grant is not close to the sort of clear authorization required.”<sup>418</sup> If statutory vagueness is a deciding factor in both steps, how is it a two-step process?<sup>419</sup>

Compounding the lack of a workable test, *West Virginia* left undefined the constitutional basis for the Major Questions doctrine.<sup>420</sup> If lower courts knew the constitutional grounds, they could reverse engineer a test from existing precedent. But *West Virginia* and all other Major Questions cases have punted on this point. In *West Virginia*, Chief Justice Roberts vaguely referenced “separation of powers principles” but did not say what they are.<sup>421</sup> Justice Gorsuch concurred to claim that the Major Questions doctrine is part of the nondelegation doctrine.<sup>422</sup> But the majority opinion appears to contradict this approach by repeatedly stating that Major Questions addresses Congress’s *intention* to delegate,<sup>423</sup> not its *power* to delegate.<sup>424</sup> Justice

414. *District of Columbia v. Wesby*, 583 U.S. 48, 57 (2018) (internal quotation mark omitted) (quoting *Illinois v. Gates*, 462 U.S. 213, 232 (1983)).

415. *See* *Sohoni*, *supra* note 15, at 288 (discussing the difficulty of applying Major Questions consistently); *see also* *United States v. Mead Corp.*, 533 U.S. 218, 241 (2001) (Scalia, J., dissenting).

416. *See West Virginia*, 142 S. Ct. at 2610, 2614; *id.* at 2634 (Kagan, J., dissenting).

417. *Id.* at 2608, 2610–13 (citing *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001)).

418. *Id.* at 2614.

419. *West Virginia*’s difficulty in separating the analytical steps is likely the result of the Court’s choice to rely heavily on precedential cases, none of which applied a clean two-step process. For example, the “elephants in mouseholes” principle from *Whitman* supports the idea that Major Questions can be identified by the lack of clear congressional authorization for a regulatory action. *See, e.g., Louisiana v. Becerra*, 629 F. Supp. 3d 477, 492 (W.D. La. 2022) (quoting *Whitman*, 531 U.S. at 468), *aff’d in part and vacated in part*, No. 22-30748, 2023 WL 8368874 (5th Cir. 2023). However, this principle undercuts *West Virginia*’s attempt to analyze “clear congressional authorization” separately from deciding to apply the Major Questions doctrine. *See West Virginia*, 142 S. Ct. at 2610, 2614. This confusion likely explains why early lower court interpretations of *West Virginia* have continued the pre-*West Virginia* trend of applying Major Questions in one long, garbled analysis. *See, e.g., Louisiana v. Becerra*, 629 F. Supp. 3d. at 491–95.

420. *See Griffith & Proctor*, *supra* note 342, at 726.

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

422. *Id.* at 2619 (Gorsuch, J., concurring).

423. *See id.* at 2608 (majority opinion) (describing the questions presented as “whether Congress in fact meant to confer the power the agency has asserted”). The connections and tensions between Major Questions and nondelegation deserves a much fuller treatment than the scope of this Comment allows.

Gorsuch’s concurrence also tried to tie Major Questions to the federalism doctrine, a conclusion that seems to be supported by *Alabama Ass’n of Realtors*.<sup>425</sup> But Chief Justice Roberts quoted extensively from *Alabama Ass’n of Realtors* while omitting the language suggesting federalism as the basis for the Major Questions doctrine.<sup>426</sup>

*b. The Panoply of Factors*

*West Virginia* further complicates the ability of lower courts to interpret the Major Questions doctrine by citing an overwhelming “panoply” of factual considerations from earlier cases.<sup>427</sup> So many factors are mentioned that it is impossible for lower courts to do anything other than cherry-pick some of these factors when applying the Major Questions doctrine.<sup>428</sup> Under *West Virginia*, a case *might* be a Major Question based on the following factors:

1. If it involves “sweeping and consequential authority” delegated in a “cryptic” fashion;
2. If it involves “broad and unusual authority” based on an implicit delegation;
3. If regulatory authority is based on “modest words,” “vague terms,” or “subtle device[s]”;
4. If a regulation based on a statutory provision “designed to function as a gap filler”;
5. If an agency treats its enabling legislation like an “open book”;
6. If an agency claims to “discover” regulatory power in a “long-extant statute”;
7. If an agency attempts a “transformative expansion in [its] regulatory authority”;
8. If an agency tries to institute an eviction moratorium;
9. If a regulation requires COVID-19 vaccinations;
10. If a regulation might “substantially restructure the American energy market”;
11. If a regulation is “the subject of an earnest and profound debate across the country”;
12. If an agency tries to adopt an “unprecedented” regulation;

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424. Compare *id.*, with *Gundy v. United States*, 139 S. Ct. 2116, 2141 (2019) (Gorsuch, J., dissenting) (“We still regularly rein in Congress’s efforts to delegate legislative power; we just call what we’re doing by different names . . . for example, the ‘major questions’ doctrine.”).

425. See *West Virginia*, 142 S. Ct. at 2621 (Gorsuch, J., concurring); *Ala. Ass’n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021) (stating that the “moratorium intrudes into an area that is the particular domain of state law: the landlord-tenant relationship” (citing *Lindsey v. Normet*, 405 U.S. 56, 68–69 (1972))).

426. See *West Virginia*, 142 S. Ct. at 2608, 2610, 2614.

427. See *Sohoni*, *supra* note 15, at 288; *West Virginia*, 142 S. Ct. at 2634 (Kagan, J., dissenting) (“Apparently . . . a court must decide, by looking at some panoply of factors, whether agency action presents an ‘extraordinary case[.]’” (alteration in original) (quoting *id.* at 2595 (majority opinion))).

428. See, e.g., *Georgia v. President of the United States*, 46 F.4th 1283, 1295 (11th Cir. 2022) (citing COVID-19 vaccinations alone as sufficient to apply the Major Questions doctrine); see also *Sohoni*, *supra* note 15, at 288 (discussing the difficulty of applying the Major Questions doctrine consistently).

13. If an agency makes policy judgments in an area where it has “no comparative expertise”;
14. If an agency tries to adopt a regulation that Congress considered and rejected;
15. If a regulation affects millions of people;
16. If an agency claims “unheralded” regulatory power over “a significant portion of the American economy”;
17. Or if a regulation is a “fundamental revision of the statute, changing it from [one sort of] scheme of . . . regulation into an entirely different kind.”<sup>429</sup>

These are just *some* of the factors mentioned in *West Virginia*. Other Major Questions cases include many other considerations, such as whether a regulation requires billions of dollars in compliance costs,<sup>430</sup> or is an “elephant[]” in a “mousehole[],”<sup>431</sup> or “intrudes into an area that is the particular domain of state law.”<sup>432</sup>

*West Virginia* gives no indication of the relative importance of any of these factors or how many are required to make a case a Major Question.<sup>433</sup> Therefore, courts can cherry-pick as many factors as they see fit. This is what the Eleventh Circuit did in *Georgia v. President of the United States*, stating that the Major Questions doctrine applied *solely* because the case involved COVID-19 vaccinations.<sup>434</sup> If courts can pick just a single factor from this list, then virtually every administrative law case is a Major Question, and the exception swallows the rule. This is exactly the result that *West Virginia* clearly warned lower courts against by limiting Major Questions to “extraordinary cases.”<sup>435</sup>

### c. *Contradictory Precedent*

*West Virginia* added further difficulty by directing lower courts to look to the inconsistent Major Questions precedent for guidance.<sup>436</sup> In particular, the differences between older and more recent Major Questions cases complicate their usefulness in

429. *West Virginia*, 142 S. Ct. at 2608–13 (alterations in original) (first quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000); then quoting *Ala. Ass’n of Realtors*, 141 S. Ct. at 2487; then quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 334 (2015); then quoting *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006); then quoting *NFIB v. OSHA*, 595 U.S. 109, 119 (2022); then quoting *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 468 (2001); then quoting *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 231 (1994); then quoting *Gellhorn & Verkuil*, *supra* note 242, at 1011; and then quoting *Kisor v. Wilkie*, 139 S. Ct. 2400, 2417 (2019)).

430. *See King v. Burwell*, 576 U.S. 473, 485 (2015).

431. *See Whitman*, 531 U.S. at 468.

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

433. *See Sohoni*, *supra* note 15, at 288.

434. *See supra* Part II.D.1.

435. *See supra* Part III.A.

436. *See West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (stating that the Major Questions doctrine “refers to an identifiable body of law” and listing *MCI*, *Brown & Williamson*, *Gonzales*, *Utility Air*, and *King*). Numerous scholars have pointed out the inconsistencies among these cases. *See, e.g.*, Huddleson, *supra* note 10, at 53; Sellers, *supra* note 37, at 946; Gocke, *supra* note 37, at 968; Tortorice, *supra* note 37, at 1104.



determining future Major Questions claims.<sup>437</sup> For example, *MCI, Brown & Williamson, Gonzales*, and *Utility Air* applied Major Questions as part of the *Chevron* analysis, but *King, Alabama Ass'n of Realtors*, and *NFIB v. OSHA* did not.<sup>438</sup> *West Virginia* ignored *Chevron* in its codification of the Major Questions doctrine, so how should courts view the discussions of *Chevron* in early Major Questions cases?

Similar differences appear between older and newer Major Questions cases regarding the standard of review used by the Supreme Court. *MCI, Brown & Williamson*, and *Gonzales* used Major Questions to reject deference to administrative agencies but interpreted statutes de novo using neutral methods.<sup>439</sup> *King* upheld the IRS's statutory interpretation even though it was a "depart[ure] from what would otherwise be the most natural reading of the pertinent statutory phrase."<sup>440</sup> But *Utility Air* and *West Virginia* held that Major Questions requires the Court to view agency interpretations with "skepticism."<sup>441</sup> It is hard to imagine *King* reaching the same result by applying the "clear congressional authorization" standard announced in *West Virginia*.<sup>442</sup> How, then, should lower courts reconcile *West Virginia's* direction to look to *King* for guidance?<sup>443</sup>

Numerous other inconsistencies among Major Questions cases promise to sow confusion in lower courts. Some cases use similar but slightly different metaphors to describe the same concepts. Is there a difference between the "elephants in mouseholes" principle from *Whitman* and the "wafer-thin reed" principle from *Alabama Ass'n of Realtors*?<sup>444</sup> Are "vague" statutory terms different than "cryptic" ones?<sup>445</sup> Other cases set up a "heads-I-win-tails-you-lose" dynamic. *King* found a Major Question when a regulation was based on a provision "central to th[e] statutory scheme."<sup>446</sup> Conversely, *West Virginia* found a Major Question because a regulation was based on an "ancillary provision."<sup>447</sup> *Brown & Williamson* found a Major Question because Congress had a long history of regulating tobacco products.<sup>448</sup> However, *NFIB v. OSHA* found a Major Question because Congress had considered instituting a vaccine mandate but decided not to do so.<sup>449</sup> The many inconsistencies among Major Questions cases—combined with *West Virginia's* failure to provide a

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437. See Richardson, *Antideference*, *supra* note 14, at 176–77.

438. See *supra* Parts II.A–D.

439. See *supra* Part II.A.

440. *King v. Burwell*, 576 U.S. 473, 497 (2015); see also Barnett & Walker, *supra* note 17, at 150.

441. *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014); *West Virginia*, 142 S. Ct. at 2614.

442. See *West Virginia*, 142 S. Ct. at 2614 (quoting *Utility Air*, 573 U.S. at 324) ("To overcome that skepticism, the Government must—under the major questions doctrine—point to 'clear congressional authorization' to regulate in that manner.").

443. Compare *id.*, with *id.* at 2609 (labeling *King* as a Major Questions case).

444. Compare *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001), with *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021).

445. Compare *Whitman*, 531 U.S. at 468, with *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000).

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

447. *West Virginia*, 142 S. Ct. at 2610 (quoting *Whitman*, 531 U.S. at 468).

448. See *Brown & Williamson*, 529 U.S. at 137.

449. See *NFIB v. OSHA*, 595 U.S. 109, 119 (2022).

workable test—have resulted in lower courts applying very different versions of the Major Questions doctrine.<sup>450</sup>

#### IV. CONCLUSION

Congress, federal administrative agencies, and regulated industries all rely on courts applying administrative law in a consistent and predictable manner. The chaotic application of Major Questions by lower courts in the wake of *West Virginia v. EPA* threatens to undercut the ability of the federal government to function effectively. Therefore, it is essential for lower courts to find a way to apply the Major Questions doctrine consistently and predictably.

*West Virginia* provided no easily applicable test for finding Major Questions, cited an overwhelming number of factors and considerations, and pointed lower courts to a notoriously fact-dependent, contradictory, and difficult-to-reconcile body of law. However, *West Virginia* provided one clear principle: the Major Questions doctrine is an exception in administrative law limited to “extraordinary cases”—cases that are objectively rare and will not lead to the exception swallowing the general rule.<sup>451</sup> Even though the general rule of *Chevron* is in a state of flux, *West Virginia* prevents the Major Questions doctrine from applying in the “ordinary case,” whatever the ordinary case may be.<sup>452</sup> Following these principles will reduce the disruption to the smooth operation of the federal government and courts that would result from a chaotic or overly broad application of the Major Questions doctrine.

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450. See *supra* Part II.D.

451. See *supra* Part III.A.

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