

ARTICLES

MANGLING THE MAJOR QUESTIONS DOCTRINE

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The Supreme Court has made clear, in the five cases in which it has dealt with this issue before the end of the Trump Administration, that the major questions doctrine applies only in exceptional cases. In contrast, during its four years in office, the Trump Administration invoked the doctrine routinely in support of its deregulatory assault on the administrative state. In doing so, the Trump Administration construed the major questions doctrine enormously expansively and inconsistently, in ways untethered to the Court's jurisprudence, turning it into little more than an invitation for courts to strike down regulations the Administration did not favor for policy-based reasons. This pattern is especially problematic considering that unlike individual private litigants, the Justice Department normally strives to develop a consistent approach to important legal doctrines.

The Trump Administration's most sustained weaponization of the major questions doctrine was against the Clean Power Plan, which regulated the greenhouse gas emissions of existing power plants. And, under the similarly wrongheaded and even broader arguments made by the Administration's allies, all greenhouse gas regulations could be suspect on major question grounds.

The Trump Administration's arguments with respect to the major questions doctrine are not merely of historical interest. They have already found support in lower court decisions and are still being pressed by state attorneys general and other influential litigants; bringing to light their enormously problematic application is important both because some of these arguments are currently pending before the courts and to foreclose their successful revival by future administrations.

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INTRODUCTION

In *Food & Drug Administration v. Brown & Williamson Tobacco Corp.*,¹ the Supreme Court famously stated that “*Chevron* deference 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,” but “[i]n extraordinary cases, . . . there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.”² To support this observation, the Court cited a law review article authored by Justice Breyer, when he was a law professor, in which he made a fairly innocuous statement that in cases of statutory ambiguity, before deferring to an agency, a court may ask “whether the legal question is an important one” because “Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute’s daily administration.”³

What constitutes a major question is as unclear today as it was when Justice Breyer wrote those words in 1986. At the time that Justice Breyer was writing, the major questions doctrine did not yet exist, and Justice Breyer could never have envisioned how the Court would construe his statement.⁴ Since then, the Court has failed to clarify the scope and application of the doctrine. The Court has never defined what constitutes a major question, nor has it ever enumerated factors or set thresholds to

1. 529 U.S. 120, 159 (2000).

2. *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

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

4. Justice Breyer disagreed with the Court’s characterization of his law review article. He dissented in *Food & Drug Administration v. Brown & Williamson Tobacco Corp.* See 529 U.S. at 161 (Breyer, J., dissenting); see also *infra*, note 73 (further discussing Justice Breyer’s dissent).

answer this inquiry. Scholars have noted the ambiguity surrounding the contemporary understanding of the major questions doctrine.⁵

Though the Court has not defined the doctrine's limits in those cases, it has made one thing clear: the doctrine is meant to apply only to the most exceptional cases, invoking it in only five cases before the end of the Trump Administration,⁶ and in each the Court has grounded its decision in the exceptional circumstances surrounding the case.

In contrast, during its four years in office, the Trump Administration invoked the doctrine routinely in support of its deregulatory assault on the administrative state.⁷ In doing so, the Trump Administration construed the major questions doctrine enormously expansively and inconsistently, in ways untethered to the Court's jurisprudence, turning it into little more than an invitation for courts to strike down regulations the Administration did not favor for policy-based reasons.⁸ While the Trump Administration manipulated the doctrine to attack important Obama era regulations, it took a far narrower and more conventional approach towards the doctrine when its own regulations were attacked on major questions grounds.⁹ This pattern is especially problematic considering that unlike individual private litigants, the Justice Department normally strives to develop a consistent approach to important legal doctrines.¹⁰

5. Jonas J. Monast, *Major Questions About the Major Questions Doctrine*, 68 ADMIN. L. REV. 445, 448 (2016) ("More is unclear than clear about the bounds of the major questions doctrine at this stage. The doctrine is defined in the most general of terms, providing little guidance to courts or to federal agencies evaluating their statutory mandates."); see also Note, *Major Question Objections*, 129 HARV. L. REV. 2191, 2202 (2016) ("As it has developed so far, the protean major question exception has an air of judicial improvisation."); Cass Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 243 (2006) ("[T]he difference between interstitial and major questions is extremely difficult to administer."); Johnathan Skinner-Thompson, *Administrative Law's Extraordinary Cases*, 30 DUKE ENV'T L. & POL'Y F. 293, 299 (2020) (describing Sunstein's observation as "prophetic").

6. While the Supreme Court has relied on the major questions doctrine in only five cases before the end of the Trump Administration, lower courts have done so more frequently. For a critique of the use of the major questions doctrine in the lower courts, see Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777 (2017). See also Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2023 n.18 (2018). As this Article was going to press, after the end of the Trump Administration, the Supreme Court decided two additional cases invoking the major questions doctrine. See *Nat'l Fed'n of Indep. Bus. v. OSHA*, 142 S. Ct. 661 (2022); *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485 (2021).

7. See *infra* Part II.

8. See *infra* Part II.

9. See *infra* note 146.

10. See Neal Devins & Michael Herz, *The Uneasy Case for Department of Justice Control of Federal Litigation*, 5 UNIV. PA. J. CONST. L. 558, 570-77 (2003).

This Article brings to light the many ways in which the Trump Administration distorted the major questions doctrine. We reviewed the arguments in the briefs that the Trump Department of Justice filed in federal appellate courts and the U.S. Supreme Court concerning the major questions doctrine's scope. Our analysis of these briefs reveals that the Trump Administration distorted the doctrine by raising whichever factors and metrics it found most helpful in any given case, however devoid of established doctrinal support, often contradicting arguments that it made in other cases.

The Trump Administration grounded its arguments on five metrics completely unsupported by the Court's jurisprudence: the magnitude of regulatory costs, the number of public comments, the number of a rule's beneficiaries, the intent of the agency, and the level of the rulemaking's public salience. As this Article shows, accepting any of these factors as legitimate or germane to the major questions doctrine would lead to pernicious outcomes.¹¹

First, the Trump Administration argued that rules may raise major questions concerns due to their regulatory costs.¹² This is one argument that the Administration advanced in its attack of the Clean Power Plan, the Obama Administration's most significant regulatory effort to combat climate change.¹³ But the Trump Administration's argument presented only the regulatory costs, completely divorced from any understanding of the numbers in context. For example, the Clean Power Plan had benefits that far exceeded its cost and had overall significant net benefits.¹⁴ Moreover, the cost of the rule was only an extremely small proportion of the regulated industry's revenue.¹⁵ And, the Trump Administration conveniently ignored that several previous rules from both Republican and Democratic administrations had higher regulatory costs but had never been challenged in court on major questions grounds.¹⁶

Second, the Trump Administration argued that the number of public comments a rule received informed whether it raised major questions

11. See *infra* Part II.B.

12. See *infra* Part II.A.

13. See Lisa Friedman & Brad Plumer, *E.P.A. Announces Repeal of Major Obama-Era Carbon Emissions Rule*, N.Y. TIMES (Oct. 9, 2017), <https://www.nytimes.com/2017/10/09/climate/clean-power-plan.html>.

14. See Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,661, 64,679–83 (Oct. 23, 2015) (to be codified at 40 C.F.R. 60); see also *infra* notes 159, 162 and accompanying text.

15. See *Revenue from Sales of Electricity to Ultimate Customers*, U.S. ENERGY INFO. ADMIN. (last visited Feb. 20, 2022), https://www.eia.gov/electricity/annual/html/epa_02_03.html.

16. See *2016 Draft Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act*, OFF. MGMT. & BUDGET 19–20 (Dec. 23, 2016).

concerns, again advancing this argument against the Clean Power Plan.¹⁷ It ignored the well-documented abuses that plague the comment system, which were brought to light under Republican leadership in a Senate Committee on Homeland Security and Governmental Affairs report published during the Trump Administration.¹⁸ And, meanwhile, the Trump Administration defended another rule on major questions grounds, the Federal Communications Commission's (FCC's) net neutrality rule, despite the fact that the FCC rule had received more comments than the Clean Power Plan rule.¹⁹ Accepting the Trump Administration's standard would lead to perverse incentives for advocacy organizations and industry groups, which could simply fund mass comment campaigns to get a rule they disfavored invalidated.²⁰

Third, the Trump Administration argued that the number of individuals who benefit from a rule is relevant to the major questions analysis, advancing this argument in the Deferred Action for Childhood Arrivals (DACA) litigation.²¹ In doing so, the Trump Administration failed to recognize that many rules have benefitted a larger number of individuals but have not been challenged in court on major questions grounds,²² and that some rules, like air quality rules, can often benefit everyone in the country.

Fourth, the Trump Administration argued that agency intent informs the major questions inquiry.²³ In the Clean Power Plan litigation, it argued that the Environmental Protection Agency's (EPA's) intent for the Clean Power Plan to impose generation-shifting measures raised major questions concerns.²⁴ But environmental regulations regularly impose regulatory costs on dirtier forms of energy production, like coal-burning plants, which creates

17. See *infra* Part II.B.

18. See STAFF OF S. SUBCOMM. ON INVESTIGATIONS, 116TH CONG., ABUSES OF THE FED. NOTICE-AND-COMMENT RULEMAKING PROCESS 2–3 (2019), available at <https://www.hsgac.senate.gov/imo/media/doc/2019-10-24%20PSI%20Staff%20Report%20-%20Abuses%20of%20the%20Federal%20Notice-and-Comment%20Rulemaking%20Process.pdf>.

19. See *id.* at 1 (recounting that the Federal Communications Commission's (FCC's) net neutrality rule received nearly 24 million comments).

20. See *infra* Part II.B.

21. See *infra* Part II.C.

22. See, e.g., *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001) (upholding the Environmental Protection Agency's (EPA's) ability to impose national air quality standards without engaging in a major questions analysis); see also *Texas v. United States*, 809 F.3d 134, 216 n.58 (5th Cir. 2015) (King, J., dissenting) (explaining that the number of beneficiaries affected by an agency rule does not bear on the legality of that rule).

23. See *infra* Part II.D.

24. See Final Brief for the U.S. Environmental Protection Agency and EPA Administrator Andrew Wheeler at 99, *American Lung Ass'n v. EPA*, 985 F.3d 914, 966 (D.C. Cir. 2021) (No. 19-1140) [hereinafter Brief for EPA].

incentives for cleaner plants to produce a greater proportion of the energy demand.²⁵ To distinguish the Clean Power Plan from all these other environmental regulations, the Trump Administration drew a line between “intentional” and “incidental” results.²⁶ This argument attempts to transform the major questions doctrine from an effects-based inquiry to an intent-based one and runs contrary to every case in which the Court has applied the doctrine.²⁷

Finally, the Trump Administration argued that the level of a rulemaking’s public salience may also implicate the major questions doctrine.²⁸ To this end, the Administration contended that the litigation surrounding the Clean Power Plan, which included numerous states, organizations, and members of Congress, raised major questions concerns.²⁹ But the Trump Administration failed to recognize that this type of litigation is typical for important environmental regulations, and the Court has never invalidated environmental regulations on these grounds.³⁰ And, moreover, adopting the Trump Administration’s standard would mean that agencies’ authority to regulate may change in scope over time depending on the public salience of an issue.³¹ It is also unclear how courts could develop judicially manageable standards on the threshold for public interest.³² Lastly, adopting the Trump Administration’s standard would incentivize opponents of a rule to fund public opposition campaigns to have a rule invalidated.³³

All of this is particularly concerning in the context of environmental regulation. The Trump Administration’s most sustained weaponization of the major questions doctrine was against the Clean Power Plan, which regulated the greenhouse gas emissions of existing power plants, and opponents of greenhouse gas regulations are likely to rely on the doctrine against future regulations. The opponents have used the major questions doctrine in conjunction with two other arguments. First, opponents argue that when Congress enacted the modern version of the Clean Air Act in 1970, it did not contemplate the problem of greenhouse gas emissions.³⁴ Second, opponents argue that beyond-the-fenceline and generation-shifting approaches, which were a feature of the Clean Power Plan, are a novel

25. See *infra* note 231 and accompanying text.

26. Brief for EPA, *supra* note 24, at 6.

27. See *infra* Part II.D.

28. See *infra* Part II.E.

29. See Brief for EPA, *supra* note 24, at 104–05.

30. See *infra* notes 249–254 and accompanying text.

31. See *infra* Part II.E.

32. See *infra* Part II.E.

33. See *infra* Part II.E.

34. See *infra* Part III.A.

departure from prior EPA regulatory approaches.³⁵ Both of these arguments are meritless. In reality, the legislative history of the Clean Air Act shows that Congress was aware of and concerned with climate change when it passed the Clean Air Act.³⁶ Moreover, the regulatory history of the EPA reflects numerous examples in which the EPA has imposed beyond-the-fenceline and generation-shifting provisions through the Clean Air Act—the Clean Power Plan is far from the first instance of this type of policy.³⁷ Opponents of greenhouse gas regulation are likely to continue advancing these arguments in the future, building on the Trump Administration’s amorphous and unrestrained vision of the major questions doctrine.

The Trump Administration’s arguments with respect to the major questions doctrine are not merely of historical interest. They have already found support in lower court decisions,³⁸ and bringing to light the enormously problematic nature of these arguments is important to avoid having them be embraced in pending cases and to foreclose their successful revival in future administrations.

This Article proceeds in three parts. Part I discusses the five cases, decided before the end of the Trump Administration, in which the Supreme Court held that extraordinary circumstances merited the invocation of the major questions doctrine. Taken together, these five cases show that the Supreme Court has reserved the major questions doctrine only for the most exceptional cases. Part II presents the cases in which the Trump Administration invoked the major questions doctrine and analyzes the Administration’s arguments. It details how the Trump Administration relied on factors untethered to Supreme Court precedents—regulatory cost, public comments, beneficiaries, agency intent, and public salience—to advance its policy-based goals. Throughout these cases, the Trump Administration advanced arguments that were baseless, inconsistent, and problematic.

35. See *infra* Part III.B.

36. See *infra* notes 274–281 and accompanying text.

37. See, e.g., Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units, 70 Fed. Reg. 28,606, 28,616–17 (May 18, 2005) (to be codified at 40 C.F.R. pts. 60, 72, 75); see also *infra* notes 288–292.

38. See, e.g., Ala. Ass’n of Realtors v. United States Dep’t of Health & Hum. Servs., No. 20-CV-3377 (DLF), 2021 WL 1779282, at *7 (D.D.C. May 5, 2021), *vacated*, No. 21-5093, 2021 WL 2221646 (D.C. Cir. June 2, 2021), Order at 1, Ala. Ass’n of Realtors v. United States Dep’t of Health & Hum. Servs., (denying the plaintiff’s motion to vacate the stay of the Center for Disease Control and Prevention’s first nationwide eviction moratorium that expired on July 31, 2021). The Biden Administration then renewed the eviction moratorium, which the Court held was unlawful in part due to major questions doctrine concerns. See Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs., 141 S. Ct. 2485, 2490 (2021). The Court decided this case as this Article was going to press.

Finally, Part III unpacks the two primary arguments for invoking the major questions doctrine that are advanced by opponents of greenhouse gas regulation: that when Congress enacted the modern version of the Clean Air Act in 1970 it did not contemplate the problem of greenhouse gas emissions, and that beyond-the-fenceline and generation-shifting approaches, which were features of the Clean Power Plan, are departures from prior EPA regulatory approaches.

I. THE MAJOR QUESTIONS DOCTRINE IN THE SUPREME COURT

The Supreme Court has applied the major questions doctrine only in highly unusual situations, and, despite its steady stream of regulatory cases, has done so in merits cases only five times over a period of almost three decades.³⁹ These cases were far from run of the mill. In each, there was a significant expansion of the agency's asserted authority and an important departure from prior agency practices.

The major questions doctrine is generally traced back to the Supreme Court's opinions in *MCI Telecommunications Corp. v. AT&T*,⁴⁰ decided in 1994, and *FDA v. Brown & Williamson Tobacco Corp.*,⁴¹ decided in 2000.⁴² At issue in *MCI Telecommunications* was § 203 of the Communications Act, which required communications common carriers to file tariffs with the FCC.⁴³ The Act also allowed the FCC to "modify any requirement made by or under the authority of [that] section."⁴⁴ The FCC interpreted this modification authority to

39. See *MCI Telecomms. Corp. v. AT&T*, 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). For a discussion of the Court's five major questions doctrine cases, see Emerson, *supra* note 6 (discussing the five Supreme Court major questions doctrine cases); Nathan D. Richardson, *Keeping Big Cases from Making Bad Law: The Resurgent "Major Questions" Doctrine*, 49 CONN. L. REV. 355, 386 (2016) (outlining a table of all Supreme Court cases in which the major questions doctrine was invoked); Skinner-Thompson, *supra* note 5, at 295 ("The origins of the major questions doctrine can be traced to two core cases: *MCI Telecomms. Corp. v. American Telephone & Telegraph* and *FDA v. Brown & Williamson Tobacco* . . . these two opinions embody the genesis (*MCI*) and common refrain (*Brown & Williamson*) that lead to the doctrinal incantation[.]") (citations omitted); Kevin O. Leske, *Major Questions About the "Major Questions" Doctrine*, 5 MICH. J. ENV'T & ADMIN. L. 479, 485 (2016) ("[T]he doctrine's genesis can be traced back to two principal cases—*MCI* and *Brown & Williamson*.").

40. 512 U.S. 218 (1994).

41. 529 U.S. 120 (2000).

42. See Emerson, *supra* note 6, at 2034–35.

43. *MCI Telecomms. Corp.*, 512 U.S. at 220.

44. *Id.* at 224 (citing 47 U.S.C. § 203).

include the power to eliminate the tariff filing requirement altogether.⁴⁵ Based on this interpretation, the agency determined that tariff-filing requirements would be optional for all nondominant long-distance carriers—making it optional for every carrier in the industry except for the sole dominant carrier, which was AT&T.⁴⁶ The Court held that this reading was clearly outside the bounds of congressional intent since “[t]he tariff-filing requirement is . . . the heart of the common-carrier section of the Communications Act.”⁴⁷

In what the Court later cited as the inception of the major questions doctrine,⁴⁸ it stated that: “It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to ‘modify’ rate-filing requirements.”⁴⁹

According to the Court, what distinguished this case and justified the invocation of the major questions doctrine was that the FCC’s interpretation constituted “a fundamental revision of the statute.”⁵⁰ The Court explained that while the FCC could certainly “modify the form, contents, and location of required filings, and . . . defer filing or perhaps even waive it altogether in limited circumstances,” its construction here went “well beyond that” since “[i]t [was] effectively the introduction of a whole new regime of regulation (or of free-market competition), which . . . is not the one that Congress established.”⁵¹

The Court relied on the major questions doctrine again in *Brown & Williamson*.⁵² In 1996, the Food and Drug Administration (FDA) for the first time concluded that tobacco products were under its jurisdiction pursuant to the Food, Drug, and Cosmetic Act (FDCA), thereby allowing the FDA to regulate these products.⁵³ This sudden shift to regulating tobacco products reversed the practice the FDA had followed since its inception.⁵⁴ Based on its new-found interpretation, the FDA promulgated regulations to restrict the sale and distribution of cigarettes and smokeless tobacco to minors.⁵⁵

45. *See id.* at 221.

46. *See id.* at 231.

47. *Id.* at 229.

48. Emerson, *supra* note 6, at 2034–35 (referring to this passage as the “dictum [that] inaugurate[d] the major questions doctrine”).

49. 512 U.S. at 231.

50. *Id.* at 231–32.

51. *Id.* at 234.

52. 529 U.S. 120 (2000).

53. *See id.* at 125; 21 U.S.C. §§ 321(g)–(h), 353(g)(1).

54. *See* 529 U.S. at 125.

55. *See id.* at 120.

The Court found that the FDA's interpretation of the statutory language was "extremely strained" and "ignore[d]" "plain" congressional intent.⁵⁶ Three factors were significant to the Court's conclusion. First, the FDA's regulation of tobacco created a major inconsistency within the statute as a whole.⁵⁷ A "core objective" pervading the statute is that any product regulated by the FDA is "safe" and "effective" for its intended use.⁵⁸ But the FDA itself had found that tobacco products are "dangerous to health."⁵⁹ The statute's misbranding and device classification provisions would thus have required the FDA to ban cigarettes and smokeless tobacco if the FDA asserted the authority to regulate them.⁶⁰ And, in fact, the FDA had previously taken this position, admitting that had tobacco products been within its jurisdiction, it would have to ban them since they could never be safe for their "intended use."⁶¹ Yet, at the same time, Congress had foreclosed the possibility of removing tobacco products from the market: "The marketing of tobacco constitutes one of the greatest basic industries of the United States with ramifying activities which directly affect interstate and foreign commerce at every point, and stable conditions therein are necessary to the general welfare."⁶²

Second, Congress had repeatedly taken it upon itself to legislate in this area instead of delegating that role to an agency. Since 1965, Congress had passed six relevant pieces of legislation.⁶³ Importantly, instead of banning tobacco products, Congress had chosen to regulate the labeling and advertisement of tobacco products, consistent with its express policy of

56. *Id.* at 160.

57. *See id.* at 126.

58. *Id.* at 133.

59. *Id.* at 135.

60. *See id.* at 137.

61. *Id.* (citing Public Health Cigarette Amendments of 1971: Hearings before the Commerce Subcomm. on S. 1454, 92d Cong., 2d Sess., 239 (1972) (statement of Food and Drug Administration (FDA) Comm'r Charles Edwards) and Cigarette Labeling and Advertising: Hearings before the H. Comm. on Interstate and Foreign Com., 88th Cong., 2d Sess., 18 (1964) (statement of Dep't. of Health, Education, and Welfare Secretary Anthony Celebrezze that proposed amendments to the Food, Drug, and Cosmetic Act (FDCA) that would have given the FDA jurisdiction over "smoking product[s]" "might well completely outlaw at least cigarettes").

62. *Id.* (citing 7 U.S.C. § 1311(a)).

63. *Id.* at 137–38 (citing Federal Cigarette Labeling and Advertising Act (FCLAA), Pub. L. No. 89–92, 79 Stat. 282 (1965); Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91–222, 84 Stat. 87; Alcohol and Drug Abuse Amendments of 1983, Pub. L. No. 98–24, 97 Stat. 175; Comprehensive Smoking Education Act, Pub. L. No. 98–474, 98 Stat. 2200 (1984); Comprehensive Smokeless Tobacco Health Education Act of 1986, Pub. L. No. 99–252, 100 Stat. 30; Alcohol, Drug Abuse, and Mental Health Administration Reorganization Act, Pub. L. No. 102–321, § 202, 106 Stat. 394 (1992)).

protecting commerce and the national economy to the maximum extent consistent with adequately informing consumers about any adverse health effects.⁶⁴ As a result, the Court concluded that Congress had “clear intent” to exclude tobacco products from the FDA’s jurisdiction.⁶⁵

Finally, throughout the time that Congress had been legislating, it was doing so against a “backdrop of the FDA’s consistent and repeated statements that it lacked authority under the FDCA to regulate tobacco”⁶⁶ “In the 73 years since the enactment of the original Food and Drug Act, and in the 41 years since the promulgation of the modern [Act], the FDA has repeatedly informed Congress that cigarettes are beyond the scope of the statute”⁶⁷ On various occasions, Congress had even considered and rejected bills that would have given the FDA jurisdiction to regulate tobacco products.⁶⁸ And Congress did not just reject these proposals, but explicitly decided to pre-empt any agency from promulgating any regulation on cigarette labeling.⁶⁹

Invoking the major questions doctrine, the Court concluded that “[a]s in *MCI*, [it is] confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”⁷⁰ In order to accept the FDA’s reading of the statute, it would have to “adopt an extremely strained” understanding of the statutory provisions and “ignore the plain implication” of subsequent legislation in which Congress had “directly spoken to the question at issue.”⁷¹ The Court

64. See *Brown & Williamson Tobacco Corp.*, 529 U.S. at 138–39.

65. See *id.* at 126 (“In this case, we believe that Congress has clearly precluded the FDA from asserting jurisdiction to regulate tobacco products. Such authority is inconsistent with the intent that Congress has expressed in the FDCA’s overall regulatory scheme and in the tobacco-specific legislation that it has enacted subsequent to the FDCA. In light of this clear intent, the FDA’s assertion of jurisdiction is impermissible.”).

66. *Id.* at 144.

67. *Id.* at 146 (quoting Brief for Appellee at 14–15. *Action on Smoking & Health v. Harris*, 655 F.2d 236 (D.C. Cir. 1980)).

68. See *id.* at 144.

69. *Id.* at 148 (citing the Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, § 5(a), 79 Stat. 283 (1965) (“Not only did Congress reject the proposals to grant the FDA jurisdiction, but it explicitly pre-empted any other regulation of cigarette labeling: ‘No statement relating to smoking and health, other than the statement required by . . . this Act, shall be required on any cigarette package.’”)).

70. *Id.* at 160; see also Cass R. Sunstein, *Foreword: The American Nondelegation Doctrine*, 86 GEO. WASH. L. REV. 1181, 1200 (2018) (characterizing this as “a nondelegation canon, forbidding the agency from seizing on ambiguous language to aggrandize its own power”).

71. 529 U.S. at 160–61.

acknowledged explicitly that this was “hardly an ordinary case”⁷² and stressed that “tobacco has its own unique political history.”⁷³

The Court used the *Brown & Williamson* reasoning in deciding *Gonzales v. Oregon*⁷⁴ in 2006. In 1994, Oregon passed the Oregon Death with Dignity Act, becoming the first state to legalize assisted suicide.⁷⁵ This provision allowed state-licensed physicians to administer lethal doses of drugs upon the request of a terminally ill patient.⁷⁶ The drugs that Oregon physicians were administering were regulated under the Controlled Substances Act (CSA).⁷⁷ In 2001, the Attorney General issued an Interpretive Rule under this statute, determining that using controlled substances to assist suicide was not a “legitimate medical practice” and was therefore unlawful under this Act.⁷⁸

The Court held that the Attorney General did not have the power to make this determination.⁷⁹ While the Attorney General could promulgate rules to fulfill his duties under the CSA, he was “not authorized to make a rule declaring illegitimate a medical standard for care and treatment of patients that is specifically authorized under state law.”⁸⁰ The Court found that the Attorney General’s powers under the Act are specific and clearly delineated.⁸¹ Congress gave the Attorney General the power to promulgate rules only to the extent that they are related to “‘registration’ and ‘control,’ and ‘for the efficient execution of his functions’ under the statute.”⁸² The Court refused to read the Attorney General’s limited power to register and

72. *Id.* at 159; see also Marla D. Tortorice, *Nondelegation and the Major Questions Doctrine: Displacing Interpretive Power*, 67 *BUFF. L. REV.* 1075, 1108 (2019) (“In the Court’s view, *Brown & Williamson* was an extraordinary case.”).

73. 529 U.S. at 159. Justice Breyer dissented, arguing that the decision to regulate tobacco “is a decision for which that administration, and those politically elected officials who support it, must (and will) take responsibility. And the very importance of the decision taken here, as well as its attendant publicity, means that the public is likely to be aware of it and to hold those officials politically accountable.” *Id.* at 190 (Breyer, J., dissenting). For discussion on Justice Breyer’s dissent, see Monast, *supra* note 5, at 459 (“Breyer dissented, contradicting his 1986 article by arguing that tobacco regulation is such a major political question that it is appropriately addressed by one of the politically-accountable branches—whether it be Congress or the Executive Branch—rather than the courts.”).

74. 546 U.S. 243 (2006).

75. See *id.* at 249.

76. *Id.*

77. See *id.*

78. *Id.*

79. See *id.* at 258.

80. *Id.*

81. See *id.* at 265.

82. *Id.* at 259.

deregister physicians as a basis for the Interpretive Rule.⁸³ Doing so would give him “extraordinary authority” since “his power to deregister necessarily would include the greater power to criminalize even the actions of registered physicians, whenever they engage in conduct he deems illegitimate.”⁸⁴ The Court pointed out that it would be “anomalous for Congress to have so painstakingly” delineated the Attorney General’s narrow powers to register a physician and schedule a drug while simultaneously implicitly granting him the power to criminalize an entire class of activity.⁸⁵

It was also relevant to the Court that the Attorney General did not have sole authority under the CSA; the power was shared with the Secretary of Health and Human Services, who had the decisionmaking power over medical judgments.⁸⁶ In this structure, the Court found a congressional refusal to give the Attorney General—an executive official with absolutely no medical expertise—the power to make medical determinations.⁸⁷ And, it was also relevant to the Court that despite this lack of expertise, in promulgating the Interpretive Rule, the Attorney General relied extensively on medical judgments to conclude that assisted suicide does not qualify as a “legitimate medical purpose.”⁸⁸

Invoking the major questions doctrine, the Court concluded that “[t]he idea that Congress gave the Attorney General such broad and unusual authority through an implicit delegation in the CSA’s registration provision is not sustainable,” and quoted *Brown & Williamson* for the proposition that “Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”⁸⁹ And, moreover, “[t]he 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.”⁹⁰ Overall, according to the Court, it was unreasonable to believe

83. *See id.* at 262.

84. *Id.*

85. *Id.*

86. *See id.* at 265 (“The [Controlled Substances Act] CSA allocates decisionmaking powers among statutory actors so that medical judgments, if they are to be decided at the federal level and for the limited objects of the statute, are placed in the hands of the Secretary. In the scheduling context, for example, the Secretary’s recommendations on scientific and medical matters bind the Attorney General. The Attorney General cannot control a substance if the Secretary disagrees.”).

87. *See id.* at 266 (“The structure of the CSA, then, conveys unwillingness to cede medical judgments to an executive official who lacks medical expertise.”).

88. *Id.* at 267.

89. *Id.* at 267 (first citing *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001); then quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)).

90. *Gonzales*, 546 U.S. at 267–68 (citing *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997)).

that Congress had delegated to a single executive officer the authority “to effect a radical shift” in the allocation of power between the states and the federal government in defining medical practices.⁹¹

In *Utility Air Regulatory Group v. EPA*,⁹² decided in 2014, the Court held that the EPA did not have the authority to require stationary sources to obtain permits under the Prevention of the Significant Deterioration (PSD) program and Title V of the Clean Air Act on the sole basis that these sources had the potential to emit greenhouse gases.⁹³ The case involved regulations the EPA adopted in the wake of its promulgation of greenhouse-gas emission standards for motor vehicles—an action that, as EPA interpreted the statute, automatically subjected stationary sources of greenhouse gases to two Clean Air Act permitting programs.⁹⁴ The EPA took actions reflecting its interpretation that emissions of any regulated air pollutant would trigger the PSD and Title V permitting requirements, and then seeking to mitigate what the agency described as the overwhelmingly adverse consequences of applying the interpretation to sources of greenhouse gas emissions, the EPA promulgated what it described as a “Tailoring Rule” to significantly reduce the number of sources that would be covered by the new permitting requirements.⁹⁵ The EPA argued that the Tailoring Rule was “necessary” because the PSD program and Title V were designed to regulate “a relatively small number of large industrial sources,” and requiring permits for all sources with greenhouse-gas emissions above the statutory thresholds would radically expand those programs, making them both administrable and “unrecognizable to the Congress that designed the PSD.”⁹⁶

Under the Clean Air Act, the PSD permitting requirements apply to sources with the potential to emit 100 or 250 tons (depending on the source) of “any air pollutant” per year, and the Title V permitting requirements apply to sources emitting 100 tons per year.⁹⁷ Despite the clear statutory thresholds, the Tailoring Rule raised the thresholds for greenhouse gases to 75,000 or 100,000 tons per year to keep the number of additional sources that would be subject to EPA regulation manageable because of their

91. *Id.* at 275.

92. 573 U.S. 302 (2014).

93. *See id.* at 333.

94. *See id.* at 310.

95. *See id.* at 312.

96. *Id.* (citing Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,555, 31,562 (June 3, 2010) (to be codified at 40 C.F.R. pts. 51, 52, 70, et al.) [hereinafter Tailoring Rule]).

97. *Id.* at 309–10.

greenhouse gas emissions.⁹⁸ To justify this rewriting of the statutory thresholds, the EPA invoked the “absurd results’ doctrine,” concluding that Congress could not have intended that the PSD or Title V applicability provisions—in particular, the threshold levels and timing requirements—apply literally to greenhouse gas emitting sources as of that date.⁹⁹ In oral argument before the Court, Solicitor General Verrilli admitted that he was unaware of any prior case in which an agency had altered a number included in a statute.¹⁰⁰

In the Tailoring Rule, the EPA described the “calamitous consequences” of its interpretation to require stationary sources to obtain greenhouse gas emissions permits.¹⁰¹ First, under the PSD program, “annual permit applications would jump from about 800 to nearly 82,000” and, as a result, “decade-long delays in issuing permits would become common, causing construction projects to grind to a halt nationwide.”¹⁰² Second, under Title V “[t]he number of sources required to have permits would jump from fewer than 15,000 to about 6.1 million; annual administrative costs would balloon from \$62 million to \$21 billion; and collectively the newly covered sources would face permitting costs of \$147 billion.”¹⁰³ The EPA admitted that “the great majority of additional sources brought into the PSD and [T]itle V programs would be small sources that Congress did not expect would need to undergo permitting.”¹⁰⁴

The Court determined that the Tailoring Rule constituted a “rewriting” of the statute.¹⁰⁵ It underscored that the EPA went as far as to say that these results would be “contrary to congressional intent,” and would “severely

98. *See id.* at 313.

99. Tailoring Rule, 75 Fed. Reg. at 31,517. The EPA gave three justifications for the Tailoring Rule. In addition to the “absurd results” doctrine, “[t]he judicial doctrine of ‘administrative necessity’ authorizes an agency to depart from statutory requirements if the agency can demonstrate that the statutory requirements, as written, are impossible to administer” and “[t]he ‘one-step-at-a-time’ doctrine authorizes an agency, under certain circumstances, to implement a statutory requirement through a phased approach.” *Id.* at 31,533.

100. During oral argument before the Court, Justice Alito asked whether “in the entire history of Federal regulation what is the best example you can give us of an agency’s doing something like that, where it has taken a statute with numbers and has crossed them out and written in the numbers that it likes?” Solicitor General Verrilli responded that he “[didn’t] have a case that’s exactly on point.” Transcript of Oral Argument at 80, *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302 (2014) (No. 12-1146).

101. *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 321 (2014) (citing Tailoring Rule, 75 Fed. Reg. at 31,557).

102. *Id.* at 322 (citing Tailoring Rule, 75 Fed. Reg. at 31,557).

103. *Id.* (citing Tailoring Rule, 75 Fed. Reg. at 31,562–63).

104. *Id.* (citing Tailoring Rule, 75 Fed. Reg. at 31,533).

105. *Id.* at 325.

undermine what Congress sought to accomplish.”¹⁰⁶ The Court claimed that it was clear that “the PSD program and Title V are designed to apply to, and cannot rationally be extended beyond, a relative handful of large sources capable of shouldering heavy substantive and procedural burdens.”¹⁰⁷

Furthermore, the Court found that the EPA’s interpretation was “also unreasonable” because it would constitute “an enormous and transformative expansion in [the] EPA’s regulatory authority without clear congressional authorization.”¹⁰⁸ Turning to the major questions issue, citing *Brown & Williamson*, the Court emphasized that “[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate ‘a significant portion of the American economy,’ [the Court] typically greet[s] its announcement with a measure of skepticism” because the Court “expect[s] Congress to speak clearly if it wishes to assign to an agency decisions of vast ‘economic and political significance.’”¹⁰⁹

Underscoring the exceptional nature of the case, the Court characterized the situation at issue as “singular.”¹¹⁰ To have an agency simultaneously asserting “extravagant statutory power” while also admitting its interpretation would leave the statute “unrecognizable to the Congress that designed it” was, according to the Court, “patently unreasonable—not to say outrageous.”¹¹¹

In 2015, the Court applied the major questions doctrine in *King v. Burwell*.¹¹² At issue in this case was whether tax credits under the Affordable Care Act (ACA) were available in states that had a federal exchange.¹¹³ The ACA required the establishment of exchanges in every state.¹¹⁴ It gave states an opportunity to establish their own exchanges but created a fallback federal exchange for states that declined to do so.¹¹⁵ In addition, the ACA also provided tax credits for individuals with household incomes between 100% and 400% of the federal poverty line.¹¹⁶ The statute contained contradictory language, however, as to whether these tax credits were available in federal

106. *Id.* at 322 (citing Tailoring Rule, 75 Fed. Reg. at 31,554, 31,562).

107. *Id.* at 322.

108. *Id.* at 324.

109. *Id.* (citation omitted) (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

110. *Id.*

111. *Id.*; Tailoring Rule, 75 Fed. Reg. at 31,555; *Brown & Williamson Tobacco Corp.*, 529 U.S. at 324.

112. 576 U.S. 473 (2015).

113. *Id.* at 479.

114. *See id.* at 482.

115. *See id.* at 479, 482–83.

116. *Id.* at 493.

exchanges.¹¹⁷ While the ACA first provided that tax credits “shall be allowed” for any “applicable taxpayer,”¹¹⁸ it went on to say that the amount of the tax credit depended in part on whether the taxpayer was enrolled through “an Exchange established by the State under § 1311 of the Patient Protection and Affordable Care Act.”¹¹⁹ To address this discrepancy, the Internal Revenue Service (IRS) promulgated a rule that made tax credits available on both federal and state exchanges.¹²⁰

The Court acknowledged that it would ordinarily engage in a *Chevron* analysis to deal with ambiguities of this sort.¹²¹ But it did not do so in this instance, determining that this was an “extraordinary case[]” in which “there may be reason to hesitate before concluding that Congress ha[d] intended such an implicit delegation.”¹²² Citing *UARG* and *Brown & Williamson*, the Court reasoned that “[t]he tax credits are among the Act’s key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people.”¹²³ Turning to its major questions analysis, the Court stated that “[w]hether those credits are available on Federal Exchanges is thus a question of deep ‘economic and political significance’ that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly.”¹²⁴ Relying on its reasoning in *Gonzales v. Oregon*, the Court added that “[i]t is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort.”¹²⁵

The Court emphasized that deciding whether the tax credit applied in federal exchanges would have had an enormous impact on state insurance markets and the number of covered individuals.¹²⁶ Tax credits were one of

117. *Id.* at 483.

118. *Id.* at 483 (citing 26 U.S.C. § 36B(a)).

119. *Id.* (citing 26 U.S.C. §§ 36B(b)–(c)).

120. *See id.* (citing Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377, 30,378 (May 23, 2012) (to be codified at 26 C.F.R. pts. 1, 602)).

121. *See id.* at 485–86.

122. *Id.* at 485.

123. *Id.*

124. *Id.* at 485–86 (citing *Util. Air Reg. Grp. v. EPA*, 573 U.S. 302 (2014) (quoting *Brown & Williamson*, 529 U.S. at 160)).

125. *Id.* at 486 (citing *Gonzales v. Oregon*, 546 U.S. 243, 266–67 (2006)); *see also* *Monast*, *supra* note 5, at 462 (“While the Court has neglected to articulate the bounds of the major questions doctrine, *UARG* and *Burwell* reiterate that there exists a category of ‘extraordinary cases’ that raise major economic and political questions that the courts, rather than the agencies, must answer.”).

126. *See King*, 576 U.S. at 493–95.

three of the ACA's major reforms.¹²⁷ The Court cautioned that stripping away the tax credits would also mean that another one of the three major reforms, the coverage requirement, would also not apply in a meaningful way.¹²⁸ Therefore, the Court argued, without the tax credits, the coverage requirement would apply to "a *lot* fewer" individuals.¹²⁹ For example, in 2014, around 87% of individuals on a federal exchange bought health insurance with tax credits.¹³⁰ Eliminating these two of the ACA's three major reforms in states with federal exchanges could "push a [s]tate's individual insurance market into a death spiral."¹³¹ Studies predicted that enrollment would decrease by approximately 70%, causing unsubsidized premiums to increase by approximately 35% to 47% in states with federally run marketplaces.¹³² And because the ACA requires insurance providers to treat the market as a single risk pool, premiums outside the exchange would rise as well.¹³³ Ultimately, even though the Court had invoked the major questions doctrine to decline to give *Chevron* deference to the IRS, the Court's independent interpretation led to the same conclusion.¹³⁴

In each of these five cases decided before the end of the Trump Administration where the Court invoked the major questions doctrine, the Court understood there to be exceptional circumstances that represented extreme deviations from run-of-the-mill administrative law cases. In each case, the Court meticulously documented how these agency actions went beyond the agencies' statutory power. In *MCI Telecommunications*, the Court explained that the agency's interpretation constituted a "fundamental" transformation of the regulatory "regime" at the "heart" of the statute, in which a regulated industry became deregulated except for one single firm.¹³⁵ In *Brown & Williamson*, the Court acknowledged that it was not facing an "ordinary case" because, since its inception, the FDA had acknowledged that it lacked jurisdiction to regulate

127. *See id.* at 493–95.

128. *See id.* at 475–76.

129. *Id.* at 494 (emphasis in original).

130. *See id.* (noting that "virtually all of those people would become exempt").

131. *Id.*

132. *See id.* (citing Evan Saltzman & Christine Eibner, *The Effect of Eliminating the Affordable Care Act's Tax Credits in Federally Facilitated Marketplaces*, 5 RAND HEALTH Q. 7 (2015); Linda J. Blumberg, Matthew Buettgens & John Holahan, *The Implications of a Supreme Court Finding for the Plaintiff in King v. Burwell: 8.2 Million More Uninsured and 35% Higher Premiums*, URB. INST. (2015)).

133. *See* 576 U.S. at 494 (citing Brief for Bipartisan Economic Scholars as Amici Curiae 11–12, *King v. Burwell*, 576 U.S. 473 (2015) (No. 14-114)).

134. *See id.* at 486; *see also* Monast, *supra* note 5, at 448–51 (discussing *King v. Burwell* and observing that the Executive Branch's interpretation won, even if the Court refused to defer).

135. 512 U.S. 218, 229, 234 (1994).

tobacco products and had repeatedly made such representations to Congress.¹³⁶ In *UARG*, the Court believed that it was “patently unreasonable” if not “outrageous” for the agency to greatly expand its power to regulate, while the agency simultaneously acknowledged that this expansion would have been “unrecognizable to the Congress that designed” the statute.¹³⁷

In some of these cases, the Court believed that the illegitimacy of the agency interpretation stemmed from the fact that the wrong agency offered an interpretation of one of the statute’s core issues. For example, in *Gonzales v. Oregon*, the Court believed that the Attorney General lacked the expertise to make a scientific judgment, which was rightfully assigned to the Secretary of Health and Human Services.¹³⁸ In *King v. Burwell*, the IRS did not have primary authority over the statute at issue.¹³⁹

These five cases define four narrow categories in which the Court invoked the major questions doctrine. First, it did so when an agency reduced by orders of magnitude the reach of regulatory coverage.¹⁴⁰ Second, and conversely, the Court invoked the doctrine when an agency increased the regulatory coverage of a statutory provision by orders of magnitude, before terming this result absurd and rewriting the statute to avoid it.¹⁴¹ Third, the Court deemed the application of the doctrine appropriate where an agency decided to regulate an important industry despite having made decades of repeated representations to Congress that it lacked this authority, and despite decades of repeated congressional action undertaken in part on the basis of such representations.¹⁴² The fourth category involves actions with enormous impacts on an important sector of the economy and society, where the agency making the interpretation is not the primary agency empowered to administer the statutory provision at issue.¹⁴³

II. THE TRUMP ADMINISTRATION’S DISTORTION OF THE MAJOR QUESTIONS DOCTRINE

Without any regard to the Court’s constraints on the major questions doctrine, the Trump Administration employed arbitrary and malleable metrics to weaponize the doctrine against rules it disfavored. These metrics included regulatory costs, the number of public comments, the number of

136. 529 U.S. 120, 123, 125, 130, 144, 159 (2000).

137. *Util. Air Reg. Grp. v. EPA*, 573 U.S. 302, 324 (2014).

138. *Gonzales v. Oregon*, 546 U.S. 243, 267 (2005).

139. *King v. Burwell*, 576 U.S. 473, 483 (2015).

140. *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 233–34 (1994).

141. *Util. Air Reg. Grp.*, 573 U.S. at 322–24.

142. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125, 144 (2000).

143. *Gonzales*, 546 U.S. at 267; *King*, 576 U.S. at 486.

beneficiaries, the level of public salience, and even agencies' intent.¹⁴⁴ The Court has never relied on these metrics to raise major questions concerns.¹⁴⁵ Yet, in searching for any justification to strike down regulations it disfavored, the Trump Administration grasped for any metric at its disposal, regardless of the absurd, inconsistent, or irrational implications. And, none of the Trump Administration's invocations of the major questions doctrine fall into any of the four categories that explain the Court's actions.¹⁴⁶

144. See *infra* The Trump Administration's Distortion of the Major Questions Doctrine (discussing each factor and the Court's decisions not to incorporate the factors as part of the major questions analysis).

145. *Id.*

146. The cases discussed in this Part are all ones in which the Trump Administration was using the major questions doctrine to attack Obama Administration regulations. In contrast, the Trump Administration took a far narrower and more conventional approach when its own regulations were attacked on major questions grounds. In *Merck & Co. v. United States Dep't of Health and Human Services*, the Trump Administration defended its Wholesale Acquisition Cost disclosure rule by arguing: (1) that the Agency never disclaimed the power to regulate prescription drug advertising; (2) that there was no history of congressional reliance on this disclaimer; (3) that the rule would only add \$2.45 million in annualized compliance costs; and (4) that it would only require the addition of two textual sentences in the television advertisement. See Final Brief for Appellants at 41–42, *Merck & Co. v. U.S. Dep't of Health & Hum. Servs.*, 385 F. Supp. 3d 81 (D.D.C. 2019) (No. 19-5222), 2019 WL 6250875. In *SEC v. Alpine Securities Group*, the Trump Administration argued that the rule did not raise major questions concerns because the broad statutory language was not “cryptic,” the Securities and Exchange Commission (SEC) had consistently taken the position that it had authority to regulate, and the history of regulation shows that Congress had approved the SEC's enforcement efforts. See Final Brief for SEC at 52–53, *SEC v. Alpine Sec. Corp.*, (No. 19-3272), 2020 WL 1131384. In *Genus Medical Technologies v. FDA*, the Administration defended the rule against a major questions attack by arguing that the FDA had specifically been granted to the authority to classify products as drugs or devices under the FDCA based on the statutory text. See Final Reply Brief for Appellant at 9–10, *Genus Med. Techs. v. FDA*, (No. 20-5026), 2020 WL 5909081. In *National Association for Fixed Annuities v. United States Dep't of Labor*, the Administration defended a rule against a major questions attack by arguing that the agency that promulgated the rule was the right agency to do so since it had the relevant expertise. See Brief for Appellees at 20–21, *Nat'l Ass'n. for Fixed Annuities v. U.S. Dep't of Labor*, (No. 16-5345), 2017 WL 4098879. Finally, in *Center for Biological Diversity v. Wolf*, the Administration defended its rule by emphasizing that the power at issue was limited to individual projects and could not reach national significance. See Brief for Respondents in Opposition to Petition for a Writ of Certiorari to the United States District Court for the District of Columbia at 24–25, *Ctr. for Biological Diversity v. Wolf, Acting Secretary of Homeland Security*, (No. 19-975), 2020 WL 2749089.

A. Regulatory Costs

While the Court invoked the major questions doctrine in cases in which the agency's action was economically significant, it never did so by relying on the action's regulatory costs. For example, in *MCI Telecommunications*, the Court was not concerned with the regulatory cost of removing the rate filing provision.¹⁴⁷ If anything, removing the rate filing provision would decrease regulatory costs.¹⁴⁸ Instead, the Court was concerned that eliminating the provision would introduce an entirely new economic "regime" of regulation.¹⁴⁹ Similarly, in *Brown & Williamson*, the Court did not express concern about the regulatory costs to the tobacco industry; rather, the Court reasoned that there was a major questions issue in part because tobacco marketing was "one of the greatest basic industries" in the country and affects "interstate and foreign commerce at every point."¹⁵⁰ In *UARG*, the Court discussed ballooning regulatory costs only as evidence of the "calamitous consequences" that would ensue in the absence of the Tailoring Rule, but the Rule would have made these costs go away.¹⁵¹ Instead, the Court's major questions analysis hinged on the Agency's "extravagant" expansion of regulatory power.¹⁵² Finally, in *King v. Burwell*, the Court reasoned that the tax credits at issue were among the ACA's "key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people" and therefore "[w]hether those credits [were] available on Federal Exchanges [was] a question of deep 'economic and political significance.'"¹⁵³ But once again, the Court did not weigh the regulatory costs to regulated entities.

The Trump Administration nonetheless determined that the doctrine should be invoked against regulations with high regulatory costs, and it did so without establishing any objective threshold.¹⁵⁴ The Trump Administration invoked the doctrine arbitrarily, using it against Obama era rules that had lower regulatory costs than longstanding rules, including ones that the Court and the lower courts had upheld with no party raising any major questions concerns.

147. *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 233–34 (1994).

148. *Id.*

149. *Id.* at 234.

150. 529 U.S. 120, 137 (2000).

151. *Util. Air Reg. Grp. v. EPA*, 573 U.S. 302, 321–22 (2014).

152. *Id.* at 324.

153. 576 U.S. 473, 485–86 (2015).

154. See Brief for EPA, *supra* note 24 (arguing, in part, that the Clean Power Plan raised major questions concerns due to its regulatory costs, but failing to identify an appropriate threshold for acceptable regulatory costs).

This is precisely the strategy the Trump Administration employed in its attack of the legality of the Clean Power Plan. Arguing that the Clean Power Plan violated the major questions doctrine,¹⁵⁵ the Trump Administration repealed the Clean Power Plan and replaced it with the Affordable Clean Energy Rule—a far weaker substitute.¹⁵⁶ In defending its repeal and replacement of the Clean Power Plan, the Trump Administration argued that the Clean Power Plan was unlawful under the major questions doctrine due to its regulatory costs.¹⁵⁷ The Trump Administration explained that “[a]t the time the [Clean Power Plan] was promulgated, its generation-shifting scheme was projected to have billions of dollars of impact on regulated parties and the economy.”¹⁵⁸ The EPA had “estimated annual incremental compliance costs were up to \$8.4 billion if States adopted a rate-based approach and \$5.1 billion if they adopted a mass-based approach.”¹⁵⁹

But the Trump Administration also failed to disclose that these costs constituted an extremely small proportion of the industry’s annual revenues, which amount to approximately \$400 billion.¹⁶⁰ Thus, the additional costs of the regulation, most likely 1% or 2% of the industry’s revenues, were unlikely to cause the massive dislocation that the Supreme Court had decried in *King v. Burwell*, where eliminating the tax credit provision would decrease healthcare enrollment by approximately 70% and thereby cause unsubsidized premiums to increase by approximately 35% to 47%.¹⁶¹

More importantly, the Trump Administration’s single-minded focus on costs ignored the regulation’s much larger annual benefits, which ranged between \$32 billion and \$54 billion.¹⁶² Therefore, the regulation was very much on the right line of the command in *Michigan v. EPA*,¹⁶³ in which Justice Scalia, writing for

155. *See id.* at 99.

156. *See* Richard L. Revesz, *Trump’s EPA Chooses Coal over the American People*, THE HILL (Sept. 13, 2018), <https://thehill.com/opinion/energy-environment/406546-trumps-epa-chooses-coal-over-the-american-people>.

157. Brief for EPA, *supra* note 24, at 103.

158. *Id.* at 103 (citing Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32,520, 32,529 (Sept. 6, 2019) (to be codified at 40 C.F.R. 60)).

159. *Id.* (citing EPA, EPA-452/R-15-003, REGULATORY IMPACT ANALYSIS FOR THE CLEAN POWER PLANT FINAL RULE, at 3–22 (2015)).

160. *See Revenue from Sales of Electricity to Ultimate Customers*, U.S. ENERGY INFO. ADMIN. (last visited Feb. 20, 2022), https://www.eia.gov/electricity/annual/html/epa_02_03.html.

161. *See supra* note 132 and accompanying text.

162. *See* Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,661, 64,679 (Oct. 23, 2015) (to be codified at 40 C.F.R. 60).

163. 576 U.S. 743 (2015).

the Court, said that “[n]o regulation is ‘appropriate’ if it does significantly more harm than good.”¹⁶⁴ Pursuant to *Michigan v. EPA*, the correct metric for evaluating whether a rule’s economic consequences render it impermissible are its net benefits—that is, its benefits minus its costs—not solely its costs. The Trump Administration’s reliance on regulatory cost, untethered to net benefits, also contradicts the mandate set out in Executive Order 12,866 and runs counter to presidential practice dating back to the Reagan Administration.¹⁶⁵

The Trump Administration also did not acknowledge that the Supreme Court had previously considered costlier rules without any parties, or the Court itself raising major questions concerns. *Michigan v. EPA* itself serves as a good example. In that case, decided five years before the Clean Power Plan litigation, the Supreme Court considered the legality of the EPA’s mercury and toxic standards, which had annual regulatory costs that exceeded those of the Clean Power Plan: \$9.6 billion.¹⁶⁶ Despite these far higher regulatory costs, the Court did not invoke the major questions doctrine.

Other regulations that are important parts of the fabric of U.S. environmental law also have costs that exceed those of the Clean Power Plan, and no major questions concerns were ever raised by the parties challenging them or by the reviewing courts. For example, according to the Office of Management and Budget’s annual reports, three other environmental regulations had higher annual costs in current dollars than the Clean Power Plan did.¹⁶⁷ The George W. Bush Administration’s clean air fine particle implementation rule had annual costs of \$10.868 billion in current dollars.¹⁶⁸

164. *Id.* at 752.

165. Executive Order 12,866 requires all “significant regulatory actions” to undergo cost-benefit analysis. Exec. Order No. 12,866: Regulatory Planning and Review, 58 Fed. Reg. 51,735, 51,738 (Oct. 4, 1993). A key principle underpinning Executive Order 12,866 is that “in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits.” *Id.* at 51,735. A judicially imposed standard that courts must assess whether regulatory costs render a rule unlawful would contravene the mandate of Executive Order 12,866. For example, a rule like the Clean Power Plan with very high costs but even higher benefits and extremely high net benefits would not pass muster, while a rule with much smaller costs but also smaller benefits and smaller net benefits would pass muster.

166. *See id.* at 749.

167. *See 2016 Draft Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act*, OFF. OF MGMT. & BUDGET (2016), https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/assets/legislative_reports/draft_2016_cost_benefit_report_12_14_2016_2.pdf.

168. *See* Clean Air Fine Particle Implementation Rule, 72 Fed. Reg. 20,586, 20,586 (Apr. 25, 2007) (to be codified at 40 C.F.R. 51); *see* OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, 77, 2016 DRAFT REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND AGENCY COMPLIANCE WITH THE UNFUNDED MANDATE

Another rule from the George W. Bush Administration, the review of the national ambient air quality standards for ozone, had annual costs between \$9.912 and \$11.476 billion in current dollars.¹⁶⁹ Finally, the Obama Administration's greenhouse gas emissions standard for automobiles had annual costs between \$7.876 and \$13.107 billion in current dollars.¹⁷⁰ Though both the Bush era rules were challenged in the D.C. Circuit, in neither case did any of the parties or the court raise any major questions doctrine issues.¹⁷¹ In fact, in neither case did the court include a discussion of the costs of the rules whatsoever.

Recognizing this pattern, the D.C. Circuit rejected the Trump Administration's major questions argument, pointing out that "the Clean Power Plan's significant projected economic impact was not atypical for Clean Air Act rulemakings by the EPA."¹⁷² The D.C. Circuit cited to its decisions in *Sierra Club v. Costle*,¹⁷³ in which it upheld the 1979 New Source Performance standards for coal-burning power plants, which the EPA had estimated would require utilities to spend "tens of billions of dollars" by 1995 on pollution control.¹⁷⁴

Throughout all of its discussion of why the costs of the Clean Power Plan made it violate the major questions doctrine, the Trump Administration never said what cost needed to be exceeded for a regulation to be problematic on this ground. Thus, it invited standardless judicial interference with administrative action. But even an explicit threshold would lead to illogical results, and these illogical results underscore why tethering the doctrine to a cost threshold does not serve a useful purpose.

REFORM ACT (2016) [hereinafter OFF. OF MGMT. & BUDGET 2016 REPORT]; *Survey of Costliest Regulations from 2000-2016*, INST. FOR POL'Y INTEGRITY 1 (May 10, 2020) (on file with author) (estimating costs in 2019 dollars).

169. See National Ambient Air Quality Standards for Ozone, 73 Fed. Reg. 16,435, 16,436 (Mar. 27, 2008) (to be codified at 40 C.F.R. 50, 58); see also OFF. OF MGMT. & BUDGET 2016 REPORT, *supra* note 168, at 77; *Survey of Costliest Regulations from 2000-2016*, *supra* note 168, at 1.

170. See Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324, 25,324 (May 7, 2010) (to be codified 40 C.F.R. 85); see OFF. OF MGMT. & BUDGET 2016 REPORT, *supra* note 168, at 76; *Survey of Costliest Regulations from 2000-2016*, *supra* note 168, at 1.

171. *Nat. Res. Def. Council v. EPA*, 706 F.3d 428, 428 (D.C. Cir. 2013) (holding that the Clean Air Act required that the EPA promulgate the final implementation national ambient air quality standard for particulate matter less than 2.5 micrometers pursuant to the particulate-matter-specific provisions of Subpart 4 of Part D of Title I, rather than pursuant to the general implementation provisions of Subpart 1 of Part D of Title I of the Act and remanding the rule); *Mississippi v. EPA*, 744 F.3d 1334, 1334 (D.C. Cir. 2013) (reviewing the EPA's National Ambient Air Quality Standards (NAAQS) for ozone and remanding only the secondary NAAQS).

172. *Am. Lung Ass'n v. EPA*, 985 F.3d 914, 965 (D.C. Cir. 2021).

173. 657 F.2d 298 (D.C. Cir. 1981).

174. 985 F.3d at 965 (citing 657 F.2d at 314).

For example, the Trump Administration's approach would safeguard rules with lower net benefits while striking down rules with higher net benefits on account of their costs. Say that, if pressed at oral argument, the Trump Administration had said that annual costs of over \$5 billion trigger the major questions doctrine. A rule of \$4.9 billion in annual costs and \$5.1 billion in annual benefits, resulting in \$0.2 billion in net benefits, would be in the clear. But a rule with \$5.1 billion in annual costs and \$10 billion in annual benefits, with the consequent \$4.9 billion in net benefits would run afoul of the major questions doctrine. The fiction that Congress intended to delegate authority to an agency to promulgate the first regulation, but not the second, cannot withstand scrutiny.

This example also illustrates why the decision to pick the first rule rather than the second goes against Justice Scalia's command in *Michigan v. EPA* that a regulatory choice should not do "more harm than good."¹⁷⁵ Indeed, foregoing \$4.9 billion in annual benefits (\$10 billion minus \$5.1 billion) in order to save \$0.2 billion in annual costs (\$5.1 billion minus \$4.9 billion) is a paradigmatic example of an irrational choice, invalid under the Administrative Procedure Act, that does "more harm than good."¹⁷⁶ As a result, in this example, the agency would be put in a situation in which if it picked the first rule, it would violate the Administrative Procedure Act; but if it picked the second one, it would go against the major questions doctrine. It is hard to envision a more pernicious legal regime!

The cost threshold approach would also create perverse incentives for agencies. For example, an agency could easily take a large, costly rule like the Clean Power Plan and split it up into several smaller rules, each having smaller costs. The fact that an agency could do so to get around such a major questions doctrine standard is a testament to how senseless such a standard would be. And, moreover, splitting a regulation into such components could well lead to higher total costs and would therefore defeat the very purpose that the Trump Administration's approach was presumably designed to promote.

Finally, the Trump Administration also inconsistently applied the baseline against which the Clean Power Plan's costs were measured. As indicated above,¹⁷⁷ consistent with *Michigan v. EPA*, the standard metric for evaluating whether a rule's economic consequences render it impermissible are its net benefits. Given this standard, the repeal of the Clean Power Plan was problematic because it is harmful to repeal a rule that has net benefits, as was the case for the Clean Power Plan.¹⁷⁸ To get around this problem, the Trump Administration took the position that the economic consequences of

175. 576 U.S. 743, 752 (2015); see also *supra* text accompanying notes 163–165.

176. See 576 U.S. at 752.

177. See *supra* notes 163–165 and accompanying text.

178. See Carbon Pollution Emission Guidelines, *supra* text accompanying note 162.

the Clean Power Plan should be determined at the time of its repeal, not at the time of its promulgation.¹⁷⁹ And, it found that the repeal of the Clean Power Plan would have no costs and no benefits as a result of market shifts that had put the United States on a path to meet the Clean Power Plan's goals even in the absence of any regulatory requirements.¹⁸⁰

But if the Clean Power Plan no longer had any consequences—either positive or negative—as a result of market shifts, how could its repeal be justified on the grounds that the regulation's costs were too high and therefore created problems under the major questions doctrine? For this analysis, the Trump Administration used an altogether different baseline: the time of the promulgation instead of the time of the repeal.¹⁸¹ The use of inconsistent baselines for analyzing economic consequences is the sort of internal inconsistency that leads courts to set aside agency actions as “arbitrary and capricious” for the purposes of the Administrative Procedure Act.¹⁸² And, the Trump Administration's use of the earlier baseline for major questions doctrine purposes also runs afoul of the Court's clear command that the validity of agency action must be evaluated at the time the action is taken,¹⁸³ which was the repeal of the Clean Power Plan, not its promulgation.¹⁸⁴

The Trump Administration advanced a theory of the major questions doctrine that opportunistically relied solely on regulatory costs in defending its repeal and replacement of the Clean Power Plan. In doing so, the Trump Administration ignored that the regulatory costs of the Clean Power Plan constituted an extremely small proportion of the industry's annual revenue, and that many prior rules with costs higher than those of the Clean Power Plan never raised any major questions concerns for the Court. The Trump Administration also inconsistently applied the baseline against which the Clean Power Plan's costs were measured. Most importantly, the Trump Administration failed to consider the most important metric in evaluating agency rules: net benefits. Overall, the Trump Administration's approach could serve to safeguard less beneficial rules and create perverse incentives for agencies.

179. See Richard L. Revesz, *Bostock and the End of the Climate Change Double Standard*, 46 *COLUM. J. ENV'T L.* 1, 30–31 (2020).

180. See *id.* at 31.

181. Brief for EPA, *supra* note 24, at 102–03.

182. See Revesz, *supra* note 179, at 32.

183. See *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1907 (2020) (quoting *Michigan v. EPA*, 576 U.S. 743, 758 (2015)).

184. See Revesz, *supra* note 179, at 32.

B. Public Comments

The Trump Administration also argued that the large number of comments in the Clean Power Plan rulemaking gave rise to major questions concerns.¹⁸⁵ The Court has never relied on the number of comments as an indication of a major questions problem. In fact, the FDA received 700,000 paper comments, “many of which were identical, so-called ‘postcard comments’” in its 1996 rulemaking asserting regulatory jurisdiction over tobacco cigarettes in 1996, which was at issue *FDA v. Brown & Williamson Tobacco Corp.*¹⁸⁶ Though the Court in *Brown & Williamson* noted that the FDA has received more comments than “at any other time in its history on any other subject,” it did not include this fact in its “major questions” doctrine analysis.¹⁸⁷

Nevertheless, the Trump Administration argued that the fact that the Clean Power Plan rule had received 4.3 million comments was evidence of “political significance.”¹⁸⁸ Yet, large numbers of comments are not atypical in complex rulemakings.¹⁸⁹ In 2017, for example, the FCC’s net neutrality rule received nearly 24 million comments.¹⁹⁰ Nevertheless, in that case, the Trump Administration strongly defended its own rule despite the far higher number of comments and did not offer any justification for this discrepancy.¹⁹¹

Relying on the number of comments to determine the legality of a regulation is completely unjustifiable in light of the thoroughly documented abuses that plague the comment process. The Senate Committee on Homeland Security and Governmental Affairs, under then-Chairman Senator Rob Portman (R-Ohio), published a report in October 2019 entitled *Abuses of the Federal Notice-and-Comment Rulemaking*

185. Brief for EPA, *supra* note 24, at 104–06.

186. Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396, 44,418 (proposed Aug. 28, 1996).

187. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 126–127 (2000) (citing Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396, 44,418 (Aug. 28, 1996) (to be codified at 21 C.F.R. pts. 801, 803, 804, 807, 820, 897)).

188. Brief for EPA, *supra* note 24, at 104; *Am. Lung Ass’n v. EPA*, 985 F.3d 914, 996, 998–99 (D.C. Cir. 2021) (No. 19-1140) (citing *Util. Air Reg. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

189. See STAFF OF PERMANENT SUBCOMMITTEE ON INVESTIGATIONS, 116TH CONG., REP. ON ABUSES OF THE FEDERAL NOTICE-AND-COMMENT RULEMAKING PROCESS (Comm. Print. 2019) [hereinafter Senate Report] at 5 (describing how some rules receive thousands or millions of comments).

190. See *id.* at 5 (citing FCC Docket No. 17–108, Restoring Internet Freedom, https://www.fcc.gov/ecfs/search/filings?proceedings_name=17-108&sort=date_disseminated,DESC).

191. See Brief for Respondents at 2, *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019) (18-1051). In this case, the Trump Administration even acknowledged that the FCC had received “extensive public comment.” *Id.*

Process.¹⁹² The Senate report identified three types of comments that undermine the comment system: mass comments, fraudulent or mal-attributed comments, and computer-generated comments.¹⁹³

The Senate report exposed the sheer volume of these comments that single rulemakings receive. The FCC's Restoring Internet Freedom (net neutrality) rulemaking in 2017 received nearly 24 million comments—setting a new record—but out of those 24 million comments, “nearly eight million comments came from email addresses associated with fakemailgenerator.com and more than 500,000 came from Russian email addresses.”¹⁹⁴ The Senate report also discussed a *Wall Street Journal* study that revealed that “[i]n a random sample of 2,757 comments on the FCC's Restoring Internet Freedom proposal, the Journal found that 72 percent of alleged commenters had not submitted the comments associated with their names and addresses.”¹⁹⁵

Moreover, the Senate report documented the number of comments the FCC rulemaking received under names of individuals who would not have submitted any such comments. Nearly 1,500 comments were filed under the name of the then-Chair of the Commission, Ajit Pai, over 300 under the name Donald Trump, and around 50 from each of the names of Barack Obama, LeBron James, and Adolf Hitler.¹⁹⁶ Dozens of comments were also filed under the names of Richard Nixon, Ronald Reagan, Elvis Presley, and Kim Kardashian.¹⁹⁷ The Senate Committee on Homeland Security and Governmental Affairs, under Republican leadership, brought these widespread abuses to light nearly a year before the Trump Administration filed its brief in its litigation defending the repeal of the Clean Power Plan in June 2020.¹⁹⁸

In May 2021, the Administrative Conference of the United States also released a report entitled *Mass, Computer-Generated, and Fraudulent Comments*,

192. See generally Senate Report, *supra* note 189.

193. *Id.* at 5–6.

194. *Id.* at 19.

195. *Id.* at 16–17 (citing James V. Grimaldi & Paul Overberg, *Millions of People Post Comments on Federal Regulations. Many Are Fake*, WALL ST. J. (Dec. 12, 2019, 2:13 PM), <https://www.wsj.com/articles/millions-of-people-post-comments-on-federal-regulations-many-are-fake-1513099188>).

The *Wall Street Journal* also conducted a survey on mal-attributed comments filed in response to the Obama Administration Department of Labor's “fiduciary rule” and found that 40% of its respondents claimed that they did not author the comment that was submitted using their information. See James V. Grimaldi & Paul Overberg, *Many Comments Critical of ‘Fiduciary’ Rule Are Fake*, WALL ST. J. (Dec. 27, 2017), <https://www.wsj.com/articles/many-comments-critical-of-fiduciary-rule-are-fake-1514370601>.

196. See Senate Report, *supra* note 189, at 20; see also Michael Herz, *Fraudulent Malattributed Comments in Agency Rulemaking*, 42 CARDOZO L. REV. 1, 6 (2020).

197. See Senate Report, *supra* note 189, at 20; Herz, *supra* note 196, at 6.

198. Brief for EPA, *supra* note 24.

which provided further insights into the undermining of the comments system.¹⁹⁹ For example, the Administrative Conference report shed more light on the pervasiveness of these issues during the FCC's net neutrality rulemaking. The Administrative Conference report discussed the New York Attorney General's investigation into the FCC's rulemaking, which concluded that "9.3 million comments were submitted with false identities, including 7 million from a single submitter."²⁰⁰ The Administrative Conference report also highlighted other abnormalities. "On nine different occasions, more than 75,000 comments were dumped into the docket at the very same second,"²⁰¹ which strongly suggests that the comments were computer-generated.²⁰² This included comments that came from "stolen email addresses, defunct email accounts, and people who unwittingly gave permission for their comments to be posted."²⁰³

The New York Attorney General's investigation also revealed that the country's largest broadband companies had worked together to fund a campaign that generated millions of comments in the net neutrality proceeding.²⁰⁴ According to the campaign's internal planning document, the effort was "intended to create the appearance of widespread grassroots opposition to existing net neutrality rules," which would "provide 'cover' for the FCC's proposed repeal."²⁰⁵ Industry actors were able to accomplish this by recruiting unrelated anti-regulation advocacy groups to publicly lead the campaign.²⁰⁶ "Budget documents show that, in all, the broadband industry players that funded the campaign spent \$4.2 million generating and submitting more than 8.5 million fake comments to the FCC."²⁰⁷

199. See STEVE BALLA, REEVE BULL, BRIDGET DOOLING, EMILY HAMMOND, MICHAEL HERZ, MICHAEL LIVERMORE & BETH SIMONE NOVECK, MASS, COMPUTER-GENERATED, AND FRAUDULENT COMMENTS 24 (May 28, 2021) (report to the Admin. Conf. of the U.S.).

200. *Id.* at 4 (citing N.Y. STATE OFF. OF THE ATTORNEY GENERAL LETITIA JAMES, FAKE COMMENTS: HOW U.S. COMPANIES & PARTISANS HACK DEMOCRACY TO UNDERMINE YOUR VOICE (2021) and Letter from Eric Schneiderman, Att'y Gen., N.Y., to Thomas M. Johnson, Jr., Gen. Counsel, FCC (Dec. 13, 2017)), https://ag.ny.gov/sites/default/files/ltr_to_fcc_gen_coun_sel_re_records_request.pdf (noting 8 million comments filed under false identities).

201. BALLA, BULL, DOOLING, HAMMOND, HERZ, LIVERMORE & NOVECK, *supra* note 199, at 3.

202. *See id.* at 42.

203. *Id.* at 3–4.

204. See N.Y. STATE OFF. OF THE ATTORNEY GENERAL LETITIA JAMES, FAKE COMMENTS: HOW U.S. COMPANIES & PARTISANS HACK DEMOCRACY TO UNDERMINE YOUR VOICE 4 (2021).

205. *Id.*

206. *Id.*

207. *Id.*

As a result of all the problems the Senate report and Administrative Conference report found, grounding any legal argument on the number of comments is misplaced. Given the frequency of mass, fraudulent or mal-attributed comments, and computer-generated comments, and comments funded by interest group campaigns, counting the number of comments cannot possibly be a legitimate indicator of a major questions concern.

Moreover, linking the legality of a rule to the public comments an agency received would create perverse incentives for advocacy organizations. Such organizations already use mass comments to achieve various goals other than directly influencing an agency's decisionmaking.²⁰⁸ These goals could include calling public attention to a rulemaking or more internal goals like increasing membership participation and financial contributions.²⁰⁹ And, as the New York Attorney General's investigation revealed, industry groups even submit comments to create an excuse for agency actions.²¹⁰ If the Court were to adopt the Trump Administration's standard, advocacy organizations would be further incentivized to execute mass comment campaigns for any rule they disfavored. It is bad enough that industry groups pay large amounts of money to clog the agency rulemaking process with repetitive comments,²¹¹ but it would be even worse if campaigns of this sort also generated wins under the major questions doctrine. Under the Trump Administration's standard, organizations would simply need to pump out as many comments as possible without needing to pay mind to the strength of the comments' substance. Organizations could even send out comments that advanced their opposing view, since all that matters under the Trump Administration's formulation is the sheer number of comments. And, it would not matter if the comments were from real people, or whether they were mal-attributed or computer-generated comments. Indeed, in the Clean Power Plan litigation, the Trump Administration only cites that there were 4.3 million comments without discussing the commenters' position on the rule or whether they were from real people.²¹²

The Court has never relied on the number of comments as a reason for invoking the major questions doctrine. In *Brown & Williamson*, one of the two foundational major questions cases, the Court even noted that the FDA rule at issue had broken the record for the number of comments but did not rely on this fact in its major questions doctrine analysis.²¹³ Yet, untethered to any prior caselaw, the Trump Administration used the number of comments to

208. *See id.* at 22.

209. *See id.* at 22–23.

210. *See id.* at 23–24.

211. *See id.* at 12.

212. Brief for EPA, *supra* note 24, at 104.

213. *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 126–27 (2000).

attack the Clean Power Plan under the major questions doctrine. It did so despite having defended the FCC's net neutrality rule—a rule with an even higher number of comments—against a major questions doctrine attack and having knowledge of the Senate report which thoroughly documented the widespread abuses of the comment system. And finally, a rule of the type advanced by the Trump Administration would give rise to perverse incentives to advocacy organizations to simply submit as many comments as possible—even ones that advance their opposing view or are computer-generated.

C. *Rule Beneficiaries*

The Trump Administration also invoked the major questions doctrine by using the metric of the number of beneficiaries. In its litigation over the legality of the DACA program, for example, the Trump Administration argued that DACA violated the major questions doctrine because of the large number of DACA beneficiaries: 1.7 million individuals were eligible for DACA, and nearly 700,000 individuals had already been granted DACA.²¹⁴

The Court has never used the number of beneficiaries to strike down a rule for major questions concerns. Instead, in advancing this argument, the Trump Administration relied on the Fifth Circuit's reasoning in *Texas v. United States*,²¹⁵ which concerned the legality of the Deferred Action for Parents of Americans (DAPA) policy.²¹⁶ There, the Fifth Circuit struck down DAPA for major questions concerns: "DAPA would make 4.3 million [individuals] eligible for lawful presence, employment authorization, and associated benefits, and 'we must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.' DAPA undoubtedly implicates 'question[s] of deep economic and political significance.'"²¹⁷ In dissent, Judge King strongly disagreed with the majority's account of the major questions doctrine, stating: "I am aware of no principle that makes scale relevant in this analysis, and the majority does not cite any authority otherwise. The question of whether an agency has violated its governing statute does not change if its actions affect one person or '4.3 million' persons."²¹⁸

In its litigation against DACA, the Trump Administration claimed that "whether 1.7 million or nearly 700,000 aliens, there can be no debate that DACA, like DAPA . . . is a policy of 'vast economic and political significance'

214. See Brief for Petitioners at 36, *Dep't Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020) (Nos. 18,587, 18,588, 18,589).

215. 809 F.3d 134 (5th Cir. 2015).

216. *See id.*

217. *Id.* at 181.

218. *Id.* at 216 n.58.

to which the Fifth Circuit's reasoning applies."²¹⁹ Moreover, the Trump Administration said, "[t]he type of deferred-action policies that the Fifth Circuit suggested might be permissible typically 'affect[ed] only a few thousand aliens for months or, at most, a few years.'"²²⁰ The Trump Administration gave no justification as to why this bar was the correct threshold for the major questions doctrine inquiry.²²¹

In any case, many regulations have larger numbers of beneficiaries than either DAPA or DACA. To take just one example, the EPA's national air quality standards for particulate matter and ozone emissions have prevented 230,000 premature adult deaths, 2.4 million cases of asthma exacerbation, 17 million lost workdays, and 110 million restricted activity days as of the year 2020.²²² These standards have been routinely upheld by the courts without major questions concerns, including in a unanimous Supreme Court opinion by Justice Scalia in *Whitman v. American Trucking Ass'ns*.²²³ And, more generally, countless agency regulations benefit every person in the United States. For example, any regulations surrounding the safety of food and drugs do not just benefit the number of people who would have otherwise been harmed by contaminated products, but everyone who can choose to use these products, confident in their safety. The same could be said for automobile safety regulations, aviation safety regulations, and many others.

Accepting the Trump Administration's standard would create perverse incentives for agencies. Under its standard, to get around the major questions doctrine bar, agencies could simply split up a rule into several smaller rules, each of which would have a smaller number of beneficiaries. For example, an agency could promulgate one rule that is targeted at one subset of the population, say individuals under eighteen, another rule that is targeted at individuals ages eighteen to sixty-five, and a third rule targeted at individuals over sixty-five. Of course, dividing up a rule in this manner offers no additional advantages from a policy perspective. And it could well be a more costly and less effective way to accomplish the agency's objective. It is clear that such a major questions standard based on the number of beneficiaries would serve no useful purpose.

219. Brief for Petitioners, *supra* note 214, at 36.

220. *Id.* (citing *Texas v. United States*, 809 F.3d 134, 185 n.197 (5th Cir. 2015)).

221. In making this assertion, the Trump Administration only cited to a line in *Texas*, 809 F.3d at 185 n.197, citing to *Heckler v. Chaney*, 470 U.S. 821, 832 (1985), which does not concern a "major question" and in fact predates the inception of the "major questions" doctrine.

222. See ENV'T PROT. AGENCY, *Progress Cleaning the Air and Improving People's Health*, <https://www.epa.gov/clean-air-act-overview/progress-cleaning-air-and-improving-peoples-health> (last visited Feb. 20, 2022).

223. 531 U.S. 457 (2001).

The Court has never relied on the number of beneficiaries to evaluate major questions doctrine concerns. Yet, relying on a lower court decision, the Trump Administration used this metric to launch an attack on DACA. In doing so, the Trump Administration failed to acknowledge that many rules have higher numbers of beneficiaries and have not been challenged by parties or the Court on major questions doctrine grounds. Moreover, the Trump Administration's proposed metric would incentivize agencies to divide up a rule, making regulation more costly for no real purpose.

D. Agency Intent

In another prong of its major questions attack on the legality of the Clean Power Plan, the Trump Administration argued that the agency's intent implicated the major questions doctrine. This standard is completely untethered to the case law and transforms the major questions inquiry from an effects-based inquiry to an intent-based inquiry.

In particular, the Trump Administration challenged the Clean Power Plan's interpretation of Best System of Emission Reduction under § 111 of the Clean Air Act, which imposes emissions regulations that constitute the "best system of emission reduction" when taking cost and other factors into consideration.²²⁴ Under this statutory authority, the EPA promulgated the Clean Power Plan, which included provisions that would substitute electricity generation produced from coal-fired plants with cleaner energy from natural gas and also substitute energy produced from both coal-fired plants and natural gas with energy produced from renewables.²²⁵ The Trump Administration challenged these provisions, arguing that they were outside the scope of the Clean Air Act because they go beyond regulating a particular source.²²⁶ The Administration claimed that because the Clean Air Act defines "existing source" as "any building, structure, facility, or installation," and that the EPA is only permitted to impose requirements "that can be applied to and achieved by a particular source."²²⁷ In contrast, these provisions can be described as "beyond-the-fenceline" as they regulate more broadly than at the level of a particular source.²²⁸ The Trump Administration also described these provisions as impermissible "generation shifting" in that the only way a

224. Clean Air Act § 111, 42 U.S.C. § 7411.

225. See Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,661, 64,707 (Oct. 23, 2015) (to be codified at 40 C.F.R. 60).

226. Brief for EPA, *supra* note 24, at 64–65.

227. *Id.*

228. See Richard L. Revesz, Denise A. Grab & Jack Lienke, *Familiar Territory: A Survey of Legal Precedents for the Clean Power Plan*, 46 ENV'T L. REP. NEWS & ANALYSIS 10,190 (2016).

coal-fired plant could meet the standard is by decreasing operation while cleaner sources increased operation.²²⁹

As part of its attack, the Trump Administration invoked the major questions doctrine. Discussing the Court's major questions doctrine cases, the Administration argued that "there [could] be no question that EPA's authority to impose 'generation shifting' raise[d] a major question of agency power."²³⁰

But run-of-the-mill environmental regulations ordinarily produce generation shifting. The EPA regularly does this by imposing regulatory costs on dirtier forms of energy production, like coal-burning plants, which creates an incentive for cleaner plants to cover a greater proportion of the electricity demand.²³¹ Recognizing this commonplace feature of environmental regulations, the Trump Administration attempted to distinguish the Clean Power Plan from the EPA's other regulations by drawing a line between intentional and incidental effects.²³² The Trump Administration argued that "generation shifting" was the EPA's "intentional[]" aim in the Clean Power Plan, and was not merely an "incidental" effect.²³³ But the major questions doctrine had always relied on an effects-based inquiry. For example, in *Brown & Williamson*, the Court was not concerned with the FDA's intention; rather, it was concerned with the consequences of an agency asserting jurisdiction, for the first time, over one of the "greatest basic industries of the United States" under a statute that should have required the agency to completely ban tobacco.²³⁴ To take another example, in *UARG*, the Court did not discuss whether the EPA's "enormous and transformative expansion in . . . regulatory authority," which would exponentially increase the number of regulated sources, was intentional or incidental—the Court was only concerned with the effect of this regulation.²³⁵ The Trump Administration added an intent-based prong to the major questions doctrine without even acknowledging the important shift in its theory or providing any support for this consequential move.²³⁶

An intent-based formulation of the major questions doctrine also runs counter to a foundational administrative law principle first articulated in the seminal case

229. Brief for the U.S. Environmental Protection Agency and EPA Administrator Andrew Wheeler, *supra* note 158, at 70.

230. *Id.* at 99.

231. See Revesz, *supra* note 179, at 21–22; Amanda Shafer Berman, *EPA's New Approach to Power Plant GHG Regulation: An "ACE" in the Hole, or EPA Out-foxed?*, AM. BAR ASS'N (Sept. 1, 2019) ("e.g., using the interconnected power grid to shift generation on a fleet-wide basis from coal to natural gas or renewables.").

232. Brief for EPA, *supra* note 24, at 6.

233. *Id.*

234. See *supra* notes 54, 61–62 and accompanying text.

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

236. Brief for EPA, *supra* note 24, at 6–7.

of *Citizens to Preserve Overton Park, Inc. v. Volpe*²³⁷ that “inquiry into the mental processes of administrative decisionmakers is usually to be avoided.”²³⁸ The Trump Administration’s focus on whether the EPA had intended for the Clean Power Plan’s provisions to have generation shifting effects is precisely the type of inquiry that *Overton Park* eschews.

The D.C. Circuit rejected this formulation of the major questions doctrine, emphasizing that the Trump Administration had not even shown that the billions of dollars of cost stemmed from the generation-shifting measures rather than other measures states could choose in order to comply with the emissions limits.²³⁹ Moreover, the Trump Administration did not acknowledge that generation shifting could be less expensive than other methods of reducing greenhouse gas emissions that are implemented at a particular source, which the EPA itself had previously conceded.²⁴⁰

The Court has never cast the major questions doctrine as involving questions of intent. In contrast, it has always cast that doctrine as involving significant economic and political effects. Despite the absence of any precedential support or other justification, the Trump Administration attempted to completely re-shape the doctrine to attack the Clean Power Plan.

E. Public Salience

The Trump Administration also argued that “public interest” in the Clean Power Plan was indicative of the rule’s “political significance” and therefore served as evidence that the rule violated the major questions doctrine.²⁴¹ To this end, the Trump Administration pointed to the number of comments the rule received,²⁴² and the “intense” litigation that involved “nearly every state in the Union,” as well as numerous local or municipal authorities, private parties, interest groups, and many current and former members of Congress.²⁴³ State and industry intervenors supporting the Trump Administration also emphasized the public interest in climate change in their major questions doctrine discussion, writing that “climate change” was “subject to widespread public debate for many years” and constituted a “profound and long-running debate.”²⁴⁴

237. 401 U.S. 402 (1971).

238. *Id.* at 420.

239. *See* Am. Lung Ass’n v. EPA, 985 F.3d 914, 965 (D.C. Cir. 2021).

240. *See id.* at 966 (citing Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,661, 64,727 (Oct. 23, 2015) (to be codified at 40 C.F.R. 60)).

241. Brief for EPA, *supra* note 24, at 104 (citing *UARG*, 573 U.S. at 324).

242. *See supra* Public Comments.

243. Brief for EPA, *supra* note 24, at 104–05.

244. Final Brief of State and Industry Intervenors for Respondent Regarding Clean

Though the Court has never held that public salience is a necessary factor in the major questions inquiry, lower court judges have advanced this argument. While a judge on the D.C. Circuit, Justice Kavanaugh advanced a four-factor test for the “major questions” doctrine inquiry, which included considering “the number of people affected, and the degree of Congressional and public attention to the issue.”²⁴⁵ More recently, Judge Dabney Friedrich of the U.S. District Court for the District of Columbia relied on public interest in her major questions doctrine discussion in *Alabama Ass’n of Realtors v. United States Department of Health & Human Services*.²⁴⁶ At issue in that case was the Center for Disease Control and Prevention’s (CDC’s) eviction moratorium.²⁴⁷ Judge Friedrich wrote that the moratorium violated the major questions doctrine in part because “eviction moratoria have been the subject of ‘earnest and profound debate across the country.’”²⁴⁸

Nowadays, most important environmental rules are both challenged and defended by groups of state attorneys general, environmental organizations, and industry groups on both sides of the case. This means that under the Trump Administration’s standard, most environmental rules of any significance whatsoever would raise major questions problems. For example, in *Michigan v. EPA*, twenty-one states were petitioners, while sixteen states and the District of Columbia were respondents.²⁴⁹ There were also several environmental organization petitioners and industry group respondents, localities and municipalities on both sides, and members of Congress that were involved as amici.²⁵⁰ The same was true in *UARG*, where thirteen states

Power Plan Repeal at 30, *Am. Lung Ass’n v. EPA*, (No. 19-1140), 2020 WL 4731989.

245. *U.S. Telecom Ass’n v. Fed. Commc’ns Comm’n*, 855 F.3d 381, 423 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) (citing *UARG*, 134 S. Ct. at 2443–44; *Gonzales v. Oregon*, 546 U.S. at 267; *Brown & Williamson*, 529 U.S. at 126–27, 133, 143–46; *MCI*, 512 U.S. at 230–231). With regard to the public interest factor, then-Judge Kavanaugh cited *Gonzales v. Oregon*, where the Supreme Court noted that physician-assisted suicide was subject to “earnest and profound debate across the country.” 546 U.S. at 267.

246. 2021 WL 1779282 (D.D.C. May 5, 2021).

247. *Id.* at *33.

248. *Id.* at *40–41 (citing *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006)).

249. *See Michigan v. EPA*, 576 U.S. 743, 744–47 (2015).

250. *See* Brief of Amici Curiae National Congress of American Indians, Federally Recognized Indian Tribes, and Inter-Tribal Fish Commissions in Support of Respondents, *Michigan v. EPA*, 576 U.S. 743 (2015), WL 1004708; Brief of Amici Curiae Experts in Air Pollution Control and Air Quality Regulation in Support of Respondents, *Michigan v. EPA*, 576 U.S. 743 (2015), WL 1057622; Brief of Emission Control Companies as Amici Curiae in Support of Respondents and in Support of Affirmance, *Michigan v. EPA*, 576 U.S. 743 (2015), WL 1048435; Brief of Amici Curiae Health Scientists, Dr. Lynn Goldman et al., In Support of Respondents, *Michigan v. EPA*, 576 U.S. 743 (2015), WL 1048434.

were petitioners and fifteen states were respondents, and several environmental organizations and industry groups were also on involved, on both sides.²⁵¹ This was also the case in *EPA v. EME Homer City Generation*,²⁵² where there were nine states and the District of Columbia intervening on behalf of the petitioners, and fourteen state respondents, as well as environmental organizations and industry groups involved in the case.²⁵³ Throughout the Trump Administration, it became common practice for Democratic Attorneys General to challenge the Administration's rules.²⁵⁴ Now under the Biden Administration, it is likely that Republican Attorneys General will do the same.²⁵⁵

Moreover, requiring courts to consider whether there is public salience in an area to determine whether an agency has statutory authorization to regulate would lead to absurd results. One can imagine a scenario in which there is broad public consensus at the time that Congress enacts a statute, but that over time, public opinion becomes polarized. Under the Trump Administration's proposed standard, agencies would initially have the authority to regulate, but would later lose the authority despite the absence of any subsequent congressional action. This would lead to an ever-changing scope of agency authority depending on shifts in public opinion. And, how would courts figure out, in this scenario, when the public interest crossed a threshold that deprives an agency of a power to regulate that up to that point, it had enjoyed? It is hard to imagine that the courts could develop judicially manageable standards on that question.

This difficulty is illustrated by Judge Friedrich's decision on the eviction moratorium. In her opinion, the Judge admits that forty-three states and the District of Columbia had adopted eviction moratoria at some point during the pandemic, which suggests a level of consensus.²⁵⁶ But she brushes through this observation on the way to her conclusion.²⁵⁷ She does not provide any evidence to support her assertion that the moratorium was subject to "earnest

251. See *Util. Air Reg. Grp. v. EPA*, 573 U.S. 302, 305–06 (2014).

252. 572 U.S. 489 (2014).

253. See *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 493–94 (2014).

254. See Troutman Pepper, *State Watchdogs: As Biden Takes Office, Republican Attorneys General Likely to Challenge Administration on Many Fronts*, J.D. SUPRA (Mar. 5, 2021), <https://www.jdsupra.com/legalnews/state-watchdogs-as-biden-takes-office-7149235>; see also Alan Neuhauser, *State Attorneys General Lead the Charge Against President Donald Trump*, U.S. NEWS (Oct. 27, 2017), <https://www.usnews.com/news/best-states/articles/2017-10-27/state-attorneys-general-lead-the-charge-against-president-donald-trump>.

255. See Troutman Pepper, *supra* note 254.

256. See *Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs.*, No. 20-CV-3377 (DLF), 2021 WL 1779282, at *41 (D.D.C. 2021).

257. *Id.* at *20-21.

and profound debate across the country.”²⁵⁸ As evidenced in *Alabama Ass’n of Realtors*, a standard that hinges on what judges perceive of as the public opinion is far too malleable and leads to incongruous results.

Also, opponents of an agency’s regulatory power could well fund an opposition campaign that would, under the Trump Administration’s approach, result in the loss of an agency’s authority to regulate. This concern is not purely hypothetical. On the day the Clean Power Plan challenge was argued before the D.C. Circuit, a truck drove repeatedly around the courthouse.²⁵⁹ On its side was painted an image of burning Constitutions and the legend “The D.C. Circuit Court of Appeals must stand up for states’ rights. Say NO to the EPA’s Power Plan.”²⁶⁰ And lest one think that a truck driver, not understanding what influences judges in evaluating legal arguments, thought that it would be effective to drive around the courthouse with an image of burning Constitutions, a bottom legend gives the identity of the group behind the ploy: “Call americaspower.org to learn what’s at stake.”²⁶¹ On its website, this group describes itself as “a partnership of the industries involved in producing electricity from coal.”²⁶² So, under the Trump Administration’s approach to the major questions doctrine, a well-funded, sophisticated group, could undertake actions that could then be used as evidence for the intensity of public concern and a reason for striking down a regulatory program.

The Court has never predicated its invocation of the major questions doctrine on the level of public interest in a rulemaking. Yet, the Trump Administration attacked the Clean Power Plan by arguing that public interest in the rule raised a major questions problem. To show this, the Administration pointed to the numerous states, organizations, and members of Congress participating in the litigation over the program’s legality. But these categories and quantity of litigants are commonplace for significant environmental regulations, and the Court has not struck down environmental regulations on these grounds. Moreover, adopting the Trump Administration’s standard would lead to absurd results where agencies could lose the authority to regulate over time regardless of congressional action. And, as Judge Friedrich’s opinion

258. *Id.* (citing *Gonzales*, 546 U.S. at 267).

259. See Jack Lienke, *Here’s Why Supporters of the Clean Power Plan Had a Good Day in Court*, GRIST (Oct. 5, 2016), <https://grist.org/climate-energy/heres-why-supporters-of-the-clean-power-plan-are-feeling-optimistic>; see also Ann Weeks & Jay Duffy, *Clean Power Plan Oral Arguments: After All That—Nothing New*, CLEAN AIR TASK FORCE (Sep. 28, 2016), <https://www.catf.us/2016/09/clean-power-plan-oral-arguments-after-all-that-nothing-new/> (referring to special interest group-financed trucks bearing photos of a burning Constitution circling the courthouse).

260. See Lienke, *supra* note 259.

261. See *id.*

262. AMERICA’S POWER, <https://americaspower.org> (last visited Feb. 20, 2022).

in *Alabama Ass'n of Realtors* demonstrates, it is unclear how courts could develop judicially manageable standards on the threshold for public interest. Finally, adopting the Administration's standard would mean that opponents of regulatory authority could simply fund public campaigns to show opposition to impact the outcome of a case.

Across cases, the Trump Administration weaponized the major questions doctrine against rules it disfavored, using metrics that were completely unsupported by the Court's jurisprudence, which has only invoked the doctrine in the most exceptional of cases. Indeed, the Court never relied on regulatory costs, the number of public comments, the number of beneficiaries, agency intent, or public interest in its five major questions cases. For the reasons explored throughout this Part, none of these factors are a legitimate way of evaluating the major questions doctrine inquiry, and they each create pernicious incentives for agencies and regulatory opponents.

III. TARGETING ENVIRONMENTAL SAFEGUARDS

The Trump Administration's most sustained invocation of the major questions doctrine was in the litigation surrounding its repeal of the Clean Power Plan and promulgation of the far-weaker Affordable Clean Energy Rule. This use of the major questions doctrine was especially problematic given that the Court had held that greenhouse gases are pollutants for the purposes of the Clean Air Act in *Massachusetts v. EPA*,²⁶³ and held that the EPA has authority to regulate greenhouse gas emissions from existing power plants in *American Electric Power Co. v. Connecticut*.²⁶⁴

As discussed in Part II, the Trump Administration advanced various major questions arguments in the Clean Power Plan litigation, all of which were unsupported by the Court's jurisprudence. First, the Trump Administration argued that the annual regulatory costs of the Clean Power Plan raised major questions doctrine concerns.²⁶⁵ The Administration's argument was riddled with inconsistencies, but most importantly, it ignored the fact that many prior rules have had larger compliance costs and have not been challenged on major questions doctrine grounds and failed to grapple with a more accurate metric of rational decisionmaking: net benefits.²⁶⁶ Second, the Trump Administration used the number of comments the Clean Power Plan received to argue that it implicated the major questions doctrine.²⁶⁷ This argument ignored the well-documented abuses of the comment system that make relying on such a metric

263. 549 U.S. 497 (2007).

264. 564 U.S. 410 (2011).

265. See *supra* Regulatory Costs.

266. See *supra* notes 162–171 and accompanying text.

267. See *supra* Public Comments.

untenable.²⁶⁸ Third, the Trump Administration argued that whether an agency action was intentional or incidental was relevant to the major questions doctrine analysis.²⁶⁹ This argument runs counter to the Court's precedent, which has always cast the doctrine as an effects-based inquiry. Finally, the Trump Administration argued that the public interest in the Clean Power Plan raised major questions concerns, as evidenced by the litigation and public debate.²⁷⁰ Such a standard would lead to several absurd results, including that agencies could lose the authority to regulate over time irrespective of congressional action.

The Trump Administration's arguments are part of a broader trend, under which opponents of greenhouse gas regulations attack them by invoking the major questions doctrine. These efforts are particularly unpersuasive because the text and history of the Clean Air Act show that it was written to produce exactly the results that these opponents argue are problematic. This Part focuses on two additional arguments for invoking the major questions doctrine that are made by opponents of greenhouse gas regulation. First, they argue that when Congress enacted the modern version of the Clean Air Act in 1970, it did not contemplate the problem of greenhouse gas emissions. And, second, they maintain that beyond-the-fenceline and generation-shifting approaches, which were a feature of the Clean Power Plan, had broad support from regulated power companies²⁷¹ and might be a feature of future efforts to regulate the greenhouse gas emissions of electricity generation, are a departure from prior EPA regulatory approaches. Sections A and B, respectively, show that each of these arguments lacks merit.

A. *Clean Air Act of 1970 and Greenhouse Gases*

Opponents of greenhouse gas regulation argued that greenhouse gases are excluded from the Clean Air Act's regulatory reach. In the Clean Power Plan litigation, these opponents claimed that the Clean Power Plan constituted a question of "vast economic and political significance," and therefore required explicit statutory authorization, which the Clean Air Act did not provide.²⁷² According to them, Congress in 1970 was focused only on pollutants that have local effects.²⁷³

268. See *supra* Public Comments.

269. See *supra* Agency Intent.

270. See *supra* Public Salience.

271. ENV'T PROT. AGENCY, Legal Memorandum Accompanying Clean Power Plan for Certain Issues 14–18 (2015) (showing power industry comments encouraging the EPA to consider "the role of fuel-switching to natural gas, plant retirements, and growing renewable energy" to reduce CO₂ emissions from the source category).

272. Revesz, *supra* note 179, at 30.

273. For example, in *UARG*, the petitioner, an industry trade association, argued that

In stark contrast to these claims, at the time it enacted the Clean Air Act in 1970, Congress was well aware of and concerned about the effect of greenhouse gases on climate change.²⁷⁴ This awareness and concern are prevalent in the legislative history accompanying the statute's enactment, "including in statements by congressional leaders and other members; testimony by high-ranking administration officials and prominent scientific experts; excerpts from reports submitted to the record by legislators and witnesses; and the full reports from which these excerpts were obtained."²⁷⁵

To take just a few examples, during the hearings regarding the bill that became the Clean Air Act in 1970, both Democratic and Republican congressional leaders made statements about the negative consequences of climate change. Senator Edmund Muskie (D-ME), the manager of the bill and Chair of the Public Works Subcommittee on Air and Water Pollution, which was considering the bill, urged the Senate to pass the bill, emphasizing that pollution would "destroy more plant and animal life, and threaten irreversible atmospheric and climatic changes."²⁷⁶ Senator Caleb Boggs (R-DE), the ranking minority member of the Subcommittee, "entered into the record a portion of the Council on Environmental Quality's First Annual Report, which stated that air pollution 'alters climate and may produce global changes in temperature.'"²⁷⁷ In addition, Senator Boggs also submitted a statement on behalf of Senate minority leader Hugh D. Scott (R-PA) that stated that "scientists tell us we may very well experience irreversible atmospheric and climatic changes capable of producing a snowballing adverse effect to the health and safety of our citizens."²⁷⁸

Statements like these acknowledging and expressing concern over climate change were present throughout the legislative history of the Clean Air Act of 1970, including during the Senate hearings of three predecessor bills and

Congress intended the Clean Air Act to limit only pollutants that "people breathe" in the "ambient air." Brief for Petitioner Utility Air Regulatory Group at 7, *Util. Air Reg. Grp. v. EPA*, 573 U.S. 302 (2014) (No. 12-1146).

274. See Revesz, *supra* note 179, at 33.

275. *Id.* at 34. See also Michael B. Gerrard, *Presidential Progress on Climate Change: Will the Courts Interfere With What Needs to Be Done to Save Our Planet?*, AM. CONST. SOC. (2021), <https://www.acslaw.org/wp-content/uploads/2021/02/Presidential-Progress-On-Climate-Change.pdf> ("As Professor Richard Revesz recently demonstrated, the legislative materials surrounding the passage of the Clean Air Act of 1970 are replete with references to climate change.").

276. Revesz, *supra* note 179, at 38 (citing 116 CONG. REC. 32,901 (1970) (statement of Sen. Edmund Muskie, Chairperson, S. Pub. Works Subcomm. on Air & Water Pollution)).

277. *Id.*

278. Revesz, *supra* note 179, at 39 (citing 116 CONG. REC. 32,901 (1970) (citing 116 CONG. REC. 33,102 (1970) (statement of Sen. Hugh D. Scott, Member, S. Pub. Works Subcomm. on Air & Water Pollution))).

House of Representatives floor debate preceding the passage of the bill.²⁷⁹ Moreover, the legislative history shows that Congress was “exposed to significant testimony that specifically described how greenhouse gases, including carbon dioxide, could cause global warming.”²⁸⁰ These legislative materials include both oral testimony and extensive written materials, including the First Annual Report of the Council on Environmental Quality, which devotes extensive attention to climate change.²⁸¹

B. *Beyond-the-Fenceline and Generation-Shifting Provisions*

As described in Part II.C, the Clean Power Plan included provisions that would substitute electricity generation produced from coal-fired plants with cleaner energy from natural gas, and also substitute energy produced from both coal-fired plants and natural gas with energy produced from renewables.²⁸² Part II.C. shows how the Trump Administration attacked the legality of these provisions of the Clean Power Plan by arguing that the agency’s intent was germane to the major questions doctrine analysis.

The Trump Administration also challenged these provisions by arguing that such provisions, which could be described as beyond-the-fenceline measures since they were not technological improvements that could be done within the polluting source and involved generation shifting from one set of fuel inputs to others, were unprecedented under the Clean Air Act. In particular, the Trump Administration argued that the Clean Power Plan was “the first time the EPA interpreted the [best system of emissions reduction] to authorize measures wholly outside a particular source”²⁸³ which “abandoned EPA’s unbroken practice across some seventy section 7411 rules over nearly forty-five years.”²⁸⁴ States and industry intervenors on behalf of the Trump Administration also argued that “electricity generation shifting” in and of itself was “a question of ‘vast economic and political significance’” triggering the major questions doctrine.²⁸⁵ Unlike the Trump Administration’s major questions analysis, which focused on EPA’s intent to produce generation

279. *Id.* at 39 (citing *Hearing Before the Subcomm. on Air and Water Pollution of the S. Comm. on Pub. Works on S. 3229, S. 3466, S. 3546*, 91st Cong. 1 (1970); *id.* at 42 (citing 116 CONG. REC. 19,210 (1970) (statement of Rep. Rogers)).

280. *Id.* at 44.

281. *Id.* at 48 (citing COUNCIL ON ENV’T QUALITY, FIRST ANN. REP. 1 (1970)).

282. *See supra* notes 224–225 and accompanying text.

283. Brief for EPA, *supra* note 24, at 72, *Am. Lung Ass’n v. EPA*, 985 F.3d 914, 966 (D.C. Cir. 2021) (No. 19-1140) (citing *UARG*, 573 U.S. at 324) (citing ACE Rule, 84 Fed. Reg. at 32,526/3).

284. *Id.*

285. Final Brief of State and Industry Intervenors for Respondent Regarding Clean Power Plan Repeal, *supra* note 244, at 26.

shifting, these intervenors took the position that the generation shifting effects of the Clean Power Plan triggered the major questions doctrine.

The characterization at the core of the intervenors' major questions analysis is a rewriting of the regulatory history.²⁸⁶ The EPA had, in fact, previously promulgated various rules under the Clean Air Act, including under § 111(d), the provision at issue in the Clean Power Plan, that relied on beyond-the-fenceline provisions for emissions reductions.²⁸⁷ Under the George W. Bush Administration, for example, the EPA promulgated the Clean Air Mercury Rule pursuant to § 111 of the Clean Air Act.²⁸⁸ The Mercury Rule set statewide targets for power plant mercury emissions and allowed for intersource and interstate trading of emission allowances, making it a beyond-the-fenceline regulatory scheme.²⁸⁹ In crafting the Mercury Rule, the EPA had determined that emissions trading was part of the "best system of emission reduction" for mercury emissions from power plants.²⁹⁰ The Mercury Rule set more stringent emissions limits based on the understanding that its provisions would result in generation shifting away from high-polluting electricity generators.²⁹¹ The EPA also explained that such an emissions trading scheme was justified under § 111(d) because "the term 'standard of performance' is not explicitly defined to include or exclude an emissions cap and allowance trading program," "[n]or do any other provisions of § 111(d) indicate that the term 'standard of performance' may not be defined to include a cap-and-trade program."²⁹²

The Mercury Rule contradicts the state and industry intervenors' claim that the Clean Power Plan was the first instance in which the EPA interpreted § 111 to permit beyond-the-fenceline, generation-shifting measures.²⁹³ In fact, many of the same intervenors that argued that this approach was

286. See Final Brief of The Institute For Policy Integrity at New York University School of Law as Amicus Curiae in Support of State And Municipal, Public Health And Environmental, Power Company, and Clean Energy Trade Association Petitioners at 5, *Am. Lung Ass'n v. EPA*, 985 F.3d 914, 966 (D.C. Cir. 2021) (No. 19-1140); see also Revesz, Grab & Lienke, *supra* note 228, at 10,190.

287. Revesz, Grab & Lienke, *supra* note 228, at 10,191.

288. Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units, 70 Fed. Reg. 28,606, 28,606 (May 18, 2005) (to be codified at 40 C.F.R. pts. 60, 72, 75).

289. *Id.*

290. *Id.* at 28,607.

291. *Id.* at 28,619.

292. *Id.* at 28,616-17.

293. Final Brief of State and Industry Intervenors for Respondent Regarding Clean Power Plan Repeal, *supra* note 244 at 12 ("Because the [Clean Power Plan] was premised on just such a novel generation-shifting approach, EPA was right to repeal it.").

unlawful in the Clean Power Plan argued the opposite in the litigation over the 2005 Mercury Rule. There, they argued that the EPA provided “compelling legal justifications for a . . . cap-and-trade program” and that emission trading “maximizes [emission] reductions . . . while providing [electric generating units] flexibility to achieve those reductions in a cost effective manner.”²⁹⁴ Though the D.C. Circuit ultimately struck down the Mercury Rule, it did so on grounds completely unrelated to EPA’s interpretation of § 111(d) that allowed for emissions trading as the “best system of emission reduction.”²⁹⁵

The 2005 Mercury Rule was not even the first rule to institute beyond-the-fenceline provisions under § 111(d). During the Clinton Administration, the EPA established two regulatory schemes that relied on beyond-the-fenceline emissions reductions, issued jointly under §§ 111(d) and 129. In 1995, the EPA promulgated regulations concerning large municipal waste combustors which allowed regulated entities to average nitrogen oxides emissions across multiple units within a plant and trade emissions credits with other plants.²⁹⁶ And in 1997, the EPA promulgated regulations concerning medical waste incinerators that required regulated entities to develop waste management programs that included various materials, including “paper, cardboard, plastics, glass, battery, or metal recycling,”²⁹⁷ thereby necessitating an approach that went beyond an individual source.²⁹⁸

The EPA has also previously instituted beyond-the-fenceline strategies under other sections of the Clean Air Act, even where, similarly to § 111(d), those provisions do not expressly call for such an approach. For example, the EPA has on several occasions employed beyond-the-fenceline strategies under § 110(a)(2)(D), commonly known as the Good Neighbor Provision, which prohibits sources located in upwind states from emitting pollution in amounts that “significantly contribute” to a downwind state’s failure to maintain national ambient air quality standards.²⁹⁹ In three rules across three administrations of different parties, the EPA established statewide

294. Joint Brief of State Respondent-Intervenors, Industry Respondent-Intervenors, and State Amicus at 26, *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008) (No. 05–1097), 2007 WL 3231261.

295. *New Jersey v. EPA*, 517 F.3d 574, 578, 583–84 (D.C. Cir. 2008) (stating that the Mercury Rule must fail because the accompanying delisting rule was vacated and the delisting was one of the premises for the Mercury Rule).

296. Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources; Municipal Waste Combustors, 60 Fed. Reg. 65,387, 65,417–18 (Dec. 19, 1995) (to be codified at 40 C.F.R. pt. 60).

297. Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Hospital/Medical/Infectious Waste Incinerators, 62 Fed. Reg. 48,348, 48,359 (Sept. 15, 1997) (to be codified at 40 C.F.R. pt. 60).

298. Revesz, Grab & Lienke, *supra* note 228, at 10,192.

299. *Id.*

emission budgets and trading mechanisms for the power sector.³⁰⁰ These included the 1998 Nitrogen Oxides (NO_x) State Implementation Plan SIP Call, promulgated during the Clinton Administration;³⁰¹ the 2005 Clean Air Interstate Rule, promulgated during the George W. Bush Administration;³⁰² and the 2011 Cross-State Air Pollution Rule, promulgated during the Obama Administration.³⁰³ And, moreover, these rules are particularly pertinent given that § 111(d) directs the EPA Administrator “establish a procedure similar to that provided by section 7410” when working with states to set standards of performance for existing sources.³⁰⁴

In the 2011 Cross-State Air Pollution Rule in particular, the EPA concluded that using a strategy of direct controls at individual sources “would result in fewer emission reductions and higher costs” than the trading program the EPA ultimately adopted.³⁰⁵ The EPA assumed that regulated entities would “increase[] dispatch of lower-emitting generation.”³⁰⁶ In upholding the rule in *EPA v. EME Homer City Generation*, the Court characterized the Cross-State Air Pollution Rule as a “cost-effective allocation of emission reductions” and a “workable[] and equitable interpretation of the Good Neighbor Provision.”³⁰⁷

Therefore, not surprisingly, on January 19, 2021, the last full day of the Trump Administration, the D.C. Circuit rejected the novel argument about beyond-the-fenceline and generation-shifting measures that lies at the core of the major questions attacks on the Clean Power Plan.³⁰⁸ The court determined that these measures did not constitute novel regulatory

300. *Id.*

301. Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone, 63 Fed. Reg. 57,356, 57,356, 57,358, 57,364, 57,456 (Oct. 27, 1998) (to be codified at 40 C.F.R. pts. 51, 72, et al.); *see also* Revesz, Grab & Lienke, *supra* note 228, at 10,192.

302. Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NO_x SIP Call, 70 Fed. Reg. 25,162, 25,162, 25,229 (May 12, 2005) (to be codified at 40 C.F.R. pts. 51, 72, et al.); *see also* Revesz, Grab & Lienke, *supra* note 228, at 10,192.

303. Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, 76 Fed. Reg. 48,208, 48,210 (Aug. 8, 2011); *see also* Revesz, Grab & Lienke, *supra* note 228, at 10,192.

304. 42 U.S.C. § 7411(d)(1).

305. Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, 76 Fed. Reg. 48,208, 48,273 (Aug. 8, 2011) (to be codified at 40 C.F.R. pts. 51, 52, 72, et al.).

306. 76 Fed. Reg. at 48,252.

307. *EPA v. EME Homer City Generation*, L.P., 572 U.S. 489, 524 (2014).

308. *See supra* text accompanying note 296.

approaches to § 111(d), citing as antecedents both the Bush Administration's 2005 Mercury Rule and the Clinton Administration's 1995 Municipal Waste Combustors Rule.³⁰⁹ The D.C. Circuit wrote that “[w]here the characteristics of the source category and the pollutant at issue point to emissions trading programs or production shifts from higher- to lower-emitting sources as components of the ‘best system,’ the EPA has in the past consistently concluded that it had the authority to consider them.”³¹⁰

CONCLUSION

This Article brings to light the ways in which the Trump Administration used the major questions doctrine, in a manner wholly unsupported by Supreme Court precedent, to launch a broadside attack on the administrative state in general and on climate change regulation in particular. The five metrics on which the Trump Administration grounded its arguments not only lack precedent but also would have perverse effects, leading agencies to regulate in a less efficient manner, courts to decide cases in the absence of any judicially manageable standards, and regulatory opponents to act in pernicious ways. The Trump Administration's vision of the major questions doctrine served to give sweeping power to courts to second-guess the work of the politically accountable branches. In advancing its view, the Trump Administration turned the doctrine on its head: while the doctrine was meant to maintain judicial respect for congressional intent, the Administration spun it into a free-wheeling tool for nullifying or hobbling important legislative and administrative actions.

309. See *supra* text accompanying note 296.

310. *Am. Lung Ass'n v. EPA*, 985 F.3d 914, 954 (D.C. Cir. 2021).