MAJOR QUESTIONS HYPOCRISY

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"[W]ere the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for THE JUDGE would then be THE LEGISLATOR." The Federalist No. 47 *(James Madison) (quoting Montesquieu).*

If asked to name some of the core beliefs of the current Supreme Court Justices, one would undoubtedly identify their allegiance to maintaining the separation of powers and to interpretative methods such as textualism, as well as taking an anti-activist approach in their roles as decisionmakers. Yet several of these bedrock principles, especially textualism, have been trumped in several notable recent cases when the Court has invoked the newly-metamorphosized "major questions" doctrine.

The major questions doctrine, as it stands today, requires courts to scrutinize agency action where the agency is attempting to exercise powers of deep economic or political significance or to exercise powers in a way that would effectuate an enormous and transformative expansion of the agency's regulatory authority. Only if the court finds that Congress clearly authorized such power can the court sustain the action.

But this approach is not the way the doctrine had previously functioned in our administrative state. In my 2016 article on the major questions doctrine, I highlighted a significant expansion in how the doctrine had recently been applied in Supreme Court cases at that time. As originally conceived in two early cases, the Court raised the doctrine as part of its Chevron *Step-One analysis to determine whether the statutory language in question was ambiguous. But upon resurrecting the doctrine in 2014 and 2015, the Court invoked the doctrine in other stages of the* Chevron *analysis, including to justify that the* Chevron *analysis should not apply at all.*

Now, in a series of very recent cases, the doctrine has transformed into a much more significant —and perilous —doctrine with respect to how it functions in both our administrative state and in our democracy. The doctrine can now be better regarded as a canon of construction employed to strike down agency action —even in cases where there is statutory textual support for agency's assertion of power and where Congress's underlying grant of

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power to the agency does not effectuate an unconstitutional delegation of legislative power. This presumption against agency power (and the requirement that there be a specific congressional grant) effectively diminishes legislative and executive power. Moreover, it represents a dramatic type of judicial activism that fails to respect accountability principles in our democratic system and the separation of powers.

With this new doctrine now firmly in place, this Article analyzes how the major questions doctrine is incompatible with the Court's fidelity to textualism. The Article concludes that the Court's application of the doctrine also manifests a hypocrisy because although the Court purports to be protecting accountability principles and Congress's power (and more broadly the separation of powers) when it invokes the doctrine, the Court is actually subverting these principles.

INTRODUCTION 772
I. THE MAJOR QUESTIONS DOCTRINE 775
  A. Genesis 776
    1. MCI Telecommunications Corp. v. American Telephone & Telegraph Co. 776
    2. FDA v. Brown & Williamson 778
  B. Rebirth 779
    1. UARG v. EPA 780
    2. King v. Burwell 784
II. MAJOR QUESTIONS HYPOCRISY 787
  A. Metamorphosis and Entrenchment 788
    1. West Virginia v. EPA 788
    2. Biden v. Nebraska 792
  B. The Court's Hypocrisy 797
    1. Textualism Briefly Defined 798
    2. Hypocrisy Explored 800
    3. A Convincing Defense or Two? 805
    4. Hypocrisy 810
CONCLUSION 815

INTRODUCTION

On February 1, 1788, James Madison wrote an article (in what later would become *The Federalist Papers*) to the people of the State of New York, urging the citizens to accept the country's new Constitution. In explaining "[t]he Particular Structure of the New Government and the Distribution of Power Among Its Different Parts," he addressed the critical attribute that it maintains an adequate separation of powers among the branches.[1] The framers

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

of the Constitution, of course, recognized that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self[-]appointed, or elective, may justly be pronounced the very definition of tyranny."[2]

With respect to the separation between the judicial and Legislative Branches, Madison quoted Montesquieu: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the Judge* would then be *the Legislator*."[3] To guard against this encroachment, the Supreme Court enforces the constitutional separation of powers doctrine. The Court also promotes and protects related (and often intertwined) normative values, such as providing for accountability to the public in decisionmaking and fostering other democratic values. Tying these ideals together is the concept of judicial restraint, which "reinforces the basic theory on which our political system is grounded."[4]

But now the Court has developed a new doctrine, the "major questions" doctrine, which, in critical respects, usurps legislative power and executive power, reassigns fundamental policy choices to the Court, and fails to support accountability principles that are crucial to our democracy and our constitutional separation of powers. The doctrine has recently taken center stage in a full range of Supreme Court cases, including ones involving the Biden Administration's response to the COVID-19 pandemic, greenhouse gas regulation, and student debt loan cancellation.[5]

Under the doctrine, courts must examine whether Congress clearly authorized the agency to exercise powers of deep economic or political significance or to exercise powers in a way that would effectuate an enormous and transformative expansion of the agency's regulatory authority. If no clear authorization exists, courts must invalidate the agency's assertion of power. Thus, the doctrine acts as a presumption against agency power—even in the face of statutory textual support for the agency action—and requires a clear statement by Congress.

This newer, bigger, and bolder doctrine bears little resemblance to the major questions doctrine that first developed in the 1990s. In my 2016 article on the major questions doctrine, I highlighted a significant expansion in how the doctrine had been applied in Supreme Court cases at that time.[6] As

2. *Id.*

3. *Id.* (quoting Montesquieu).

4. Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271, 276 (2005).

5. *See* discussion *infra* Sections II.A.1 and II.A.2.

6. Kevin O. Leske, *Major Questions About the "Major Questions" Doctrine*, 5 MICH. J. ENV'T & ADMIN. L. 479 (2016) [hereinafter Leske, *Major Questions About "Major Questions"*].

originally conceived in two early cases, the Court raised the doctrine as part of its *Chevron* Step-One analysis to determine whether the statutory language in question was ambiguous. But upon resurrecting the doctrine in 2014 and 2015, the Court invoked the doctrine in other stages of the *Chevron* analysis, including to justify that the *Chevron* analysis should not apply at all.[7]

Thus, although originally established in early cases as a comparatively mild canon to aid in statutory interpretation, the Court has now expanded the doctrine into dangerous new territory. And in pushing the doctrine past its original function, a majority of Justices have abandoned textualism, a key interpretive tool that they would have normally applied.

Justice Scalia, a leading modern textualist, asserted that textualism "is the only methodology faithful to the rule of law, which requires that legal interpretive rules be stable and that their application be predictable, consistent, objective, and neutral."[8] In his view, "[a] restrained, text-focused judiciary is required by the Constitution's separation of lawmaking authority (Congress), from law implementation (President) and application (Court), and by the Article I, Section 7 process by which statutes are enacted."[9] Because a statute's text "is all that Congress, with the President's approval, may enact, . . . textualism is the method most consistent with the democratic premises of constitutional lawmaking."[10]

The Court's infidelity to textualism when applying the doctrine is compounded by the resulting hypocrisy. Although the Court purports to invoke the major questions doctrine to enforce normative and constitutional values such as accountability and separation of power principles (for instance, to protect Congress's legislative power), the Court has been disloyal to those principles in application.

For example, instead of supporting the separation of powers among the branches, the Court has trumped Congress's will and has taken over decisionmaking authority in major question cases.[11] Rather than respecting the statutory language carefully drafted, negotiated, and ultimately passed by

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7. In *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), the Supreme Court overruled *Chevron* and held that "[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority." But, as discussed, *infra* Part II, the Court had no longer been applying the major questions doctrine within the *Chevron* framework.

8. William N. Eskridge, Jr., Brian G. Slocum & Kevin Tobia, *Textualism's Defining Moment*, 123 COLUM. L. REV. 1611, 1613–14 (2023) (citing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS xxvii-xxx (2012)).

9. *Id.* (citing John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 711–19 (1997)).

10. *Id.* at 1614.

11. *See infra* Part II.B.2.

Congress, the Court has taken it unto itself to block lawful delegations to an agency in contravention to the statutory design. Compounding this usurpation is the relocation of policy power to the constitutional branch that is not accountable to the people.

With these concerns in mind, this Article critiques the Court's newly transformed major questions doctrine. In Part I of this Article, I begin by briefly reviewing the major questions doctrine by introducing the key Supreme Court cases that led to the formation of the doctrine.

In Part II, I first examine the majority opinions in several recent Supreme Court cases that helped transform the doctrine into its present form. Next, I briefly define textualism and show how the major questions doctrine is fundamentally at odds with textualism. Starting with Justice Kagan's pointed dissent in *West Virginia v. Environmental Protection Agency (EPA)*,[12] I detail how the ill-defined contours of the doctrine thrust the Court into engaging in judicial policymaking. I then explain how the major questions doctrine analysis is contrary to core textualist principles, such as textualism's respect for the realities of the legislative process.

Next, I align the major questions doctrine as a clear statement rule with a broader argument that the doctrine is also incompatible with textualism for this reason. Although ultimately unpersuasive, I also set forth defenses raised by members of the Court to reconcile the doctrine's conceded tension with textualism. I conclude by showing how the major questions doctrine goes against many of the principles the Court asserts that it seeks to protect when invoking the doctrine. Specifically, the doctrine diminishes accountability and Congress's power, thereby disrupting the separation of balance among the branches.

I. THE MAJOR QUESTIONS DOCTRINE

Although the contours of the major questions doctrine have evolved dramatically over the years since its inception, some basic features have been constant. The doctrine has been invoked principally in statutory construction cases where the Court determines that a "major"—as opposed to "interstitial"—question is presented that (arguably) implicates significant aspects of an agency's regulatory responsibilities.[13] Thus, the cases where the Court has invoked the doctrine include circumstances where the interpretive question implicates the power or scope of the agency's power under a given statutory scheme, or where the resolution of the interpretive question could effectuate an enormous and transformative expansion in the agency's

12. 142 S. Ct. 2587 (2022).

13. *See* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 231–34, 236–42 (2006) (discussing interstitial and major questions) [hereinafter Sunstein, Chevron *Step Zero*].

regulatory authority.[14] As set forth below, the doctrine's genesis can be traced back to two principal cases—*MCI* and *Brown & Williamson*.

A. Genesis

The Supreme Court first invoked what has become generally referred to as the major questions doctrine in both a 1994 and a 2000 case.[15] As described in more detail below, the Court applied the doctrine within *Chevron's* Step One analysis in these cases.[16] Thus, the major questions doctrine, as first established by the Court, represented a narrow expansion of the *Chevron* framework in the sense that the Court, in its *Chevron* Step One inquiry, determined whether the issue being considered was "major" (i.e., transformative) to help determine whether the statutory language was unambiguous or not.[17]

1. MCI Telecommunications Corp. v. American Telephone & Telegraph Co.

In *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.* (*MCI*),[18] the Court analyzed whether the Federal Communications Commission (FCC) could lawfully construe the statutory term "modify" to excuse certain carriers from filing tariffs under the Communications Act of 1934.[19]

14. The "early" cases bear this out. *See, e.g.*, King v. Burwell, 576 U.S. 473, 485–86 (2015) (applying the doctrine because the question at issue was "of deep 'economic and political significance'" (quoting Util. Air Regul. Grp. (UARG) v. Env't Prot. Agency (EPA), 573 U.S. 302, 324 (2014))); *UARG*, 573 U.S. at 324 (applying the doctrine and rejecting EPA's interpretation because it "would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization" (citing Food & Drug Admin. (FDA) v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000))); MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 231 (1994) (applying the doctrine and finding it "highly unlikely" that Congress would entrust an "essential characteristic" of the statutory scheme to agency discretion).

15. Leske, *Major Questions About "Major Questions," supra* note 6, at 480 n.3 (noting how "the Court itself does not use a particular name to identify the doctrine" in these early cases).

16. In *Brown & Williamson*, the Court stated its holding in *MCI* as being governed by Step One: "We rejected the [Federal Communication Commission's (FCC's)] construction, finding 'not the slightest doubt' that Congress had directly spoken to the question." *Brown & Williamson*, 529 U.S. at 160 (quoting *MCI*, 512 U.S. at 228). The *Brown & Williamson* Court held that the FDA did not have authority over tobacco products because "Congress ha[d] directly spoken to the precise question at issue," which is also a Step One inquiry. *Id.* at 159.

17. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

18. 512 U.S. 218 (1994).

19. *Id.* at 220 ("These cases present the question whether the Commission's decision to make tariff filing optional for all nondominant long-distance carriers is a valid exercise of its modification authority.").

Pursuant to the Act, communications common carriers are normally required to file tariffs with the FCC and then charge customers according to those tariff rates.[20] The Commission, however, could "modify" this requirement "in its discretion and for good cause shown."[21] Acting pursuant to this authority, the FCC issued a series of reports and orders in the 1980s that exempted on-dominant long-distance carriers from filing tariffs, thus leaving only AT&T subject to the filing requirement.[22]

The Court found that "the Commission's permissive detariffing policy can be justified only if it makes a less than radical or fundamental change in the Act's tariff-filing requirement."[23] When it analyzed the FCC regulation, the Court found that "rate filings are . . . the essential characteristic of a rate-regulated industry."[24] Moreover, the filing requirement "was Congress's chosen means of preventing unreasonableness and discrimination in charges"[25] and had "always been considered essential to preventing price discrimination and stabilizing rates."[26]

Because of this, the Court reasoned that it was "highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion."[27] It added that it would be "even more unlikely that it would achieve that through such a subtle device as permission to 'modify' rate-filing requirements."[28]

The Court concluded that the FCC's regulation represented a "fundamental revision of the statute, changing it from a scheme of rate regulation in long-distance common-carrier communications to a scheme of rate

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20. *Id.* at 220.

21. *Id.* at 224 (citing 47 U.S.C. § 203(b)(2) (1988 & Supp. IV)).

22. *See id.* at 221–22 (citing FCC reports and orders).

23. *Id.* at 229.

24. *Id.* at 231.

25. *Id.* at 230 ("There is not only a relation, but an indissoluble unity between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against preferences and discrimination." (alterations incorporated) (quoting Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 440 (1907))).

26. *Id.* at 230 (quoting Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 126 (1990)). The *MCI* Court also relied on a case which found "filing requirements 'render rates definite and certain, and . . . prevent discrimination and other abuses,'" *id.* (quoting *Ariz. Grocery Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, 284 U.S. 370, 384 (1932)), and that the "elimination of filing requirement 'opens the door to the possibility of the very abuses of unequal rates which it was the design of the statute to prohibit and punish.'" *Id.* (quoting Armour Packing Co. v. United States, 209 U.S. 56, 81 (1908)).

27. *Id.* at 231.

28. *Id.*

regulation only where effective competition does not exist."[29] In rejecting the FCC's contrary interpretation, the Court found "not the slightest doubt" concerning Congress's intended meaning in the statute.[30] The Court's analysis, therefore, fit comfortably within the *Chevron* Step One analysis where it assessed but rejected to give deference to the FCC's view because Congress had spoken clearly with respect to the issue in question.

2. FDA v. Brown & Williamson

In 2000, the Court solidified the major questions doctrine as part of the *Chevron* framework in *FDA v. Brown & Williamson*.[31] At issue in the case was whether the Food and Drug Administration (FDA) had the authority to regulate tobacco products.[32] Previously, the FDA had determined that nicotine was a "drug" within the meaning of the Food, Drug, and Cosmetic Act (FDCA) and subsequently promulgated regulations directed at curbing tobacco consumption among children and adolescents.[33] The FDA asserted that its interpretation flowed from FDCA's definition of "drug," which included articles "intended to affect the structure or any function of the body."[34]

First, the Court set forth that the "threshold issue [was to determine] the appropriate framework for analyzing the FDA's assertion of authority to regulate tobacco products."[35] And because the case implicated "an administrative agency's construction of a statute that it administers," the Court found its review was governed by *Chevron* Steps One and Two.[36] Quoting *Chevron*, the Court noted that deference could be appropriate under Step Two because "[t]he responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones."[37]

But the Court further reasoned that before deferring under Step Two, it needed to determine whether the issue was resolved in Step One. And that

29. *Id.* at 231–32.

30. *Id.* at 228.

31. 529 U.S. 120 (2000).

32. *Id.* at 125.

33. *Id.*

34. *Id.* at 126 (quoting 21 U.S.C § 321(g)(1)(C)).

35. *Id.* at 132.

36. *Id.* (reciting *Chevron*'s two-step analysis).

37. *Id.* (quoting Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 866 (1984)). The Court also noted that deference was appropriate based on the "agency's greater familiarity with the ever-changing facts and circumstances surrounding the subjects regulated." *Id.* (citing Rust v. Sullivan, 500 U.S. 173, 187 (1991)).

analysis (i.e., "whether Congress has directly spoken to the precise question at issue") was impacted "by the nature of the question presented."[38] The Court noted that deference under *Chevron* is rooted in the principle that Congress implicitly delegated the agency authority to "fill in the statutory gaps."[39] But, "[i]n extraordinary cases," the Court will not presume that "Congress has intended such an implicit delegation."[40]

The *Brown & Williamson* Court then concluded that the case qualified as an extraordinary case. To justify its holding, the Court pointed out that FDA's assertion of jurisdiction would extend to "a significant portion of the American economy."[41] As support, it observed how "the marketing of tobacco [as] 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."[42]

The Court also noted that its reasoning in *MCI* was "instructive" in this case.[43] Like *MCI*, the Court was "confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[44] Basing its decision under Step One, it concluded that Congress had "directly spoken to the issue and precluded the FDA from regulating tobacco products."[45]

B. Rebirth

The major questions doctrine awoke from its dormancy in a series of cases in two cases decided in 2014 and 2015. But unlike *MCI* and *Brown & Williamson*, where the major questions doctrine was raised during the Court's *Chevron* Step One inquiry, the Court invoked the doctrine in other stages of the *Chevron* analysis.[46] This represented a significant expansion in the doctrine at that time, resulting in increased scrutiny in the academic literature. That said, even with this increased scope, the doctrine was still part of the *Chevron* inquiry rather than the standalone clear-statement substantive canon that it would later become.

38. *Id.* at 159.

39. *Id.* (citing *Chevron*, 467 U.S. at 844).

40. *Id.* (citing Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986) ("A court may also ask whether the legal question is an important one. 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.")).

41. *Id.* ("This is hardly an ordinary case.").

42. *Id.* at 137 (quoting 7 U.S.C. § 1311(a) (1994)).

43. *Id.* at 160.

44. *Id.*

45. *Id.* at 160–61.

46. *See infra* Part I.B.

1. UARG v. EPA

The major questions doctrine took center stage in the Court's decision to reject the Environmental Protection Agency's (EPA's) interpretation of a Clean Air Act (CAA) provision involving the regulation of greenhouse gases (GHGs).[47] In *Utility Air Regulatory Group v. EPA* (*UARG*),[48] the Court was called upon to review challenges to EPA's "cascading series of greenhouse gas-related rules and regulations" issued after the Supreme Court's 2007 determination in *Massachusetts v. EPA*[49] that GHGs can be regulated under the CAA.[50] Following the Court's decision in *Massachusetts v. EPA*, one crucial question needed to be answered: whether EPA's issuance of GHG emission standards for new motor vehicles triggered the requirement for EPA also to regulate certain "stationary sources," including power plants, industrial facilities, and smaller sources, like apartment buildings.[51] And, even if EPA was not required to regulate these stationary sources, was EPA nonetheless permitted to do so under the Clean Air Act?[52]

In a divided and complex decision, the Court answered these questions, invoking a major questions analysis twice.[53] Justice Scalia, joined by Chief Justice Roberts and Justices Thomas, Kennedy, and Alito, characterized the case as presenting "two distinct challenges."[54] First, the Court needed to "decide whether EPA permissibly determined that a source may be subject to [certain CAA] permitting requirements on the *sole* basis of the source's potential to emit greenhouse gases."[55] Second, the Court was required to determine whether EPA "permissibly determined that a source already subject to the [CAA permitting] program because of its emission of conventional pollutants . . . may be required to limit its greenhouse-gas emissions by" installing certain pollution-reducing devices.[56]

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47. *Id.* For a comprehensive examination of the case, see, for example, Kevin O. Leske, *A Step by Step Look at* UARG v. EPA*: A New Layer of Greenhouse Gas Regulation*, 4 ENV'T & EARTH L.J. 3 (2014) [hereinafter Leske, *A Step by Step Look*].

48. 573 U.S. 302 (2014).

49. 549 U.S. 497 (2007).

50. Coal. for Responsible Regul., Inc. v. EPA, 684 F.3d 102, 114 (D.C. Cir. 2012) (citing *Massachusetts*, 549 U.S. at 529).

51. Leske, *A Step by Step Look*, *supra* note 47, at 3.

52. *UARG*, 573 U.S. at 314–15.

53. *Id.* at 324, 332.

54. *Id.* at 314.

55. *Id.* (emphasis added).

56. *Id.*; *see also id.* at 329 (discussing the permissibility of requirements EPA placed on sources already subject to the Clean Air Act (CAA) permitting program).

To analyze the first question, the Court engaged in three separate inquiries: (1) whether EPA's view was compelled by the statute;[57] (2) if not compelled, whether EPA's view was a reasonable construction of the CAA;[58] and (3) if not reasonable, whether EPA's promulgation of a related CAA rule could cure the unreasonable interpretation.[59] This approach was unsurprising since the Court had indicated it would apply the *Chevron* framework.[60] Thus, under *Chevron* Step One, the Court looked to see whether the plain language of the CAA required a source that was not otherwise regulated because it emitted conventional pollutants to be subject to these new permitting requirements based solely on the source's "potential to emit" greenhouse gasses.[61] The Court rejected EPA's position that the CAA was unambiguous and found that the statute did not compel such a result.[62]

Based on its rejection of EPA's plain language argument, the Court proceeded to *Chevron* Step Two to assess whether EPA's interpretation that the CAA could be construed to regulate these so-called "anyway" sources was reasonable.[63] The Court raised the major questions doctrine in this part of their analysis.[64] Although it recognized that *Chevron's* deferential framework permitted EPA to "operate 'within the bounds of reasonable interpretation,'" the Court rejected EPA's construction of the CAA.[65]

The Court reasoned that proper interpretation of an ambiguous statutory term is assisted by "'the specific context in which [that] language is used,' and 'the broader context of the statute as a whole.'"[66] Therefore, "an agency interpretation that is 'inconsisten[t] with the design and structure of the statute as a whole,' does not merit deference."[67] This, we can see in hindsight, was the beginning of the Court's major questions analysis.

57. *Id.* at 315–20 (Part II-A-1).

58. *Id.* at 321–24 (Part II-A-2).

59. *Id.* at 325–28 (Part II-A-3).

60. *Id.* at 315.

61. *Id.* at 314–15. The Court called these "non-anyway sources," in contrast to "anyway sources," which are stationary sources already regulated because of their emissions of conventional pollutants. *Id.*

62. *Id.* at 320 (finding "no insuperable textual barrier" in the CAA preventing EPA from excluding greenhouse gas (GHG) emissions as a permitting trigger).

63. *Id.* at 321.

64. *Id.* at 324.

65. *Id.* at 321 (quoting City of Arlington v. Fed. Commc'n Comm'n (FCC), 569 U.S. 290, 296 (2013)).

66. *Id.* (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997)).

67. *Id.* (alteration in original) (quoting Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 353 (2013)).

Applying these principles, the Court found that EPA's interpretation was "inconsistent with . . . the [Clean Air] Act's structure and design."[68] In fact, the Court pointed out that EPA had "repeatedly acknowledged that applying the [relevant CAA] permitting requirements to greenhouse gases would be inconsistent with—in fact, would overthrow—the Act's structure and design."[69] That EPA's interpretation would result in a dramatic increase in permit applications, billions of dollars in administrative costs, and "decade-long delays" further supported the Court's conclusion.[70]

The Court asserted that including smaller stationary sources would also go against Congress's intent.[71] The Court cited to EPA's own finding that including smaller sources would result in a "complicated, resource-intensive, time-consuming, and sometimes contentious process."[72] The Court construed Congress's intent in this program was to cover "a relative handful of large sources capable of shouldering heavy substantive and procedural burdens."[73] Thus, Congress would not have wanted the program to apply to "tens of thousands of smaller sources."[74]

Next, the Court cited and quoted major questions cases to support its analysis. The Court found that EPA's interpretation that GHG emissions alone could trigger CAA permitting requirements "would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization."[75] The Court also cited both *Brown & Williamson* and *MCI* for the proposition that in circumstances where an

68. *Id.*

69. *Id.*

70. *Id.* at 322. For example, EPA had conceded that applications for Prevention of Significant Deterioration (PSD) permits would balloon from approximately 800 to about 82 thousand each year. *Id.* (citing Tailoring Rule, 75 Fed. Reg. 31,514, 31,557 (June 3, 2010)). Similarly, the administrative costs of the PSD program would skyrocket from $12 million to over $1.5 billion. *Id.* With respect to the Title V program, the Court called the consequences "equally bleak" if sources were required to secure permits based on the potential GHG emissions. *Id.* Permits would be required for over 6 million sources (up from about 15 thousand sources) and administrative costs would rise from $62 million to $21 billion annually. *Id.* (citing Tailoring Rule, 75 Fed. Reg. at 31,562–63). And even more dramatically, "collectively the newly covered sources would face permitting costs of $147 billion." *Id.*

71. *Id.* ("[T]he great majority of additional sources brought into the PSD and title V programs would be small sources that Congress did not expect would need to undergo permitting." (quoting Tailoring Rule, 75 Fed. Reg. at 31,533)).

72. *Id.* at 323 (quoting Tailoring Rule, 74 Fed. Reg. 55,292, 55,304, 55,321–22 (proposed Oct. 27, 2009)).

73. *Id.* at 322.

74. *Id.* at 323 (quoting Tailoring Rule, 74 Fed. Reg. at 55,304, 55,321–22).

75. *Id.* at 323–24.

agency's interpretation impacts "a significant portion of the American economy," courts must be wary of endorsing such an interpretation without clear direction by Congress.[76] EPA's concession that its interpretation would transform the CAA into a statute that would be "unrecognizable to the Congress that designed it" bolstered the Court's conclusion that EPA's view was unreasonable.[77] Thus, the Court concluded that the agency's interpretation fell "comfortably"[78] within the category of interpretations that "do[] not merit deference."[79]

As stated above, the second issue the Court needed to address was whether EPA "permissibly determined that a source already subject to the [CAA permitting] program because of its emission of conventional pollutants (an 'anyway source') may be required to limit its greenhouse-gas emissions," by installing certain pollution-reducing devices.[80] For this question, the Court found that Step One applied in favor of EPA by finding that the provision unambiguously applies to GHG emissions from "anyway sources."[81]

With respect to the major questions doctrine, the Court reasoned that even if the plain text of the provision did not compel the Court's conclusion, there was no practical problem that would render EPA's interpretation unreasonable under *Chevron* Step Two.[82] In other words, because EPA's interpretation was not "so disastrously unworkable" as to "result in such a dramatic expansion of agency authority" or "extend[] EPA jurisdiction over millions of previously unregulated entities," the major questions doctrine did not apply.[83] Thus, the Court twice addressed the major questions doctrine in its *Chevron* Step Two analysis, but with different results.[84]

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76. *Id.* at 324 (first quoting and citing FDA v. Brown & Williamson, 529 U.S. 120, 159–60 (2000); then citing MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 231 (1994); and then citing Indus. Union Dept., AFL–CIO v. Am. Petroleum Inst., 448 U.S. 607, 645–46 (1980) (plurality opinion)).

77. *Id.* at 320, 324 (noting in its *Chevron* Step One analysis that it would have been entirely consistent with the CAA (and the Court's decision in *Massachusetts*) for EPA "to exclude those atypical pollutants that, like greenhouse gases, are emitted in such vast quantities that their inclusion would radically transform those programs and render them unworkable as written").

78. *Id.* at 324.

79. *Id.* at 321.

80. *Id.* at 314; *see also id.* at 329–30 (discussing the permissibility of requirements EPA placed on sources already subject to the CAA permitting program). The provision at issue required that the best available control technology (BACT) be used "for each pollutant subject to regulation" under the CAA. *Id.* at 331 (quoting 42 U.S.C. § 7475(a)(4)).

81. *Id.* at 332.

82. *Id.*

83. *Id.* The Court concluded EPA's interpretation would only "moderately increas[e] the demands EPA (or a state permitting authority) can make of entities already subject to its regulation." *Id.*

84. *Id.* at 333–34.

2. King v. Burwell

The Court invoked the major questions doctrine again the following year in *King v. Burwell*.[85] But, this time, it did so before even starting the *Chevron* analysis, thereby declining to apply the *Chevron* framework altogether.[86] This case, like *UARG*, was an expansion of how the doctrine had been applied in the past.

At issue in *King* was a provision involving tax credits available to individuals under the Patient Protection and Affordable Care Act (ACA).[87] In furtherance of ACA's goal to provide universal health care, the ACA established a series of health insurance reforms applicable to all states.[88] The first reform "barred insurers from denying coverage to any person because of his health" (the "guaranteed issue" requirement) and prohibited "insurers from charging a person higher premiums for the same reason" (the "community rating" requirement).[89] The second reform required that individuals maintain health insurance coverage or incur an Internal Revenue Service (IRS) penalty (the "coverage requirement").[90] The third reform provided tax credits to low-income individuals to make health coverage more affordable.[91] For instance, "individuals with household incomes between 100 percent and 400 percent of the federal poverty line" were eligible for such tax credits and were allowed to use these credits to buy insurance directly from the individual's insurer in advance.[92]

To ensure these reforms were successful, the ACA also required each state to create an "Exchange" for individuals to secure health insurance coverage.[93] In the event a state elected not to establish an Exchange, the Secretary of Health and Human Services (HHS) "shall . . . establish and operate such Exchange within the State."[94]

85. 576 U.S. 473 (2015).

86. *Id.* at 485.

87. *Id.* at 479; Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified at scattered titles and sections of U.S.C.).

88. *King*, 576 U.S. at 478–79.

89. *Id.* at 480–81 ("[E]ach health insurance issuer that offers health insurance coverage in the individual . . . market in a State must accept every . . . individual in the State that applies for such coverage." (quoting 42 U.S.C. § 300gg–1(a) (2012))). The Court found that "[t]he Act also bars insurers from charging higher premiums on the basis of a person's health." *Id.* at 481.

90. *Id.* at 481–82 (citing 26 U.S.C. § 5000A (2012)).

91. *Id.* at 482. (citing 42 U.S.C. §§ 18081, 18082 (2012)).

92. *Id.* at 482 (citing 42 U.S.C. §§ 18081, 18082 (2012)).

93. *Id.* (emphasis in original) (citing 42 U.S.C. § 18031(b)(1) (2012)).

94. *Id.* at 483 (citing 42 U.S.C. § 18041(c)(1) (2012)).

In *King*, the Court was presented with the question of "whether the Act's tax credits [were] available in States that have a Federal Exchange rather than a State Exchange."[95] On one hand, the ACA stated that tax credits "shall be allowed" for any "applicable taxpayer," but on the other hand, it also provided that the tax credit amount depended in part on the taxpayer's enrollment in a health insurance plan through "an Exchange *established by the State* under section 1311 of the [ACA]."[96]

For its part, the IRS interpreted the provision to mean that individuals were eligible for credits when insurance was purchased in either a State or a Federal Exchange.[97] Various parties challenging the IRS interpretation argued that tax credits were not available for individuals who enrolled in insurance plans through a Federal Exchange.[98] Under the statute, they construed a Federal Exchange to not include "an Exchange established by the State under [42 U.S.C. § 18031]."[99]

Relying on the major questions doctrine, the Court found that the *Chevron* framework was not applicable in this case.[100] It did concede that the Court "often" applies the *Chevron* two-step framework, which "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."[101] But, the Court found (quoting *Brown & Williamson*) that "[i]n extraordinary cases . . . there may be reason to hesitate before concluding that Congress has intended such an implicit delegation."[102] In the Court's view, because the issues in *King* were of such "extraordinary" significance, the Court held that Congress had not intended the IRS to receive *Chevron* deference for its interpretation of the ACA.[103]

The Court explained that one of the ACA's principal features was the eligibility for tax credits that would affect "billions of dollars in spending each year," as well as "the price of health insurance for millions of people."[104] Relying on reasoning from *UARG*, the Court determined that securing the credits on the Federal Exchange was "a question of deep 'economic and political

95. *Id.*

96. *Id.* (quoting 26 U.S.C. § 36B(a)–(c) (2012)).

97. *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. pt. 602)).

98. *Id.* at 485.

99. *Id.*

100. *Id.*

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

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

103. *Id.* at 485–86.

104. *Id.* at 485.

significance' that is central to this statutory scheme."[105] Therefore, the Court reasoned that Congress would have expressly indicated if it had wanted an agency to resolve such an important issue.[106]

Instead of considering the IRS's interpretation, the Court, therefore, determined it was up to the Court alone to "determine the correct reading" of the tax credit provision.[107] The Court explained that "[i]f the statutory language is plain, [the Court] must enforce it according to its terms."[108] And to analyze whether the language of the statute answered the question, the Court indicated it would consider the provision's words in context and the "overall statutory scheme."[109] Performing this analysis, the Court held that the ACA "allows tax credits for insurance purchased on any Exchange created under the Act."[110] Thus, the major questions doctrine could now be applied as a "carve out" from the *Chevron* framework.

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As stated above, the Court's invocation of the major questions doctrine had thus far revolved around the *Chevron* framework for judicial review involving statutory construction. In other words, the doctrine was invoked to help determine the weight to give the agency's interpretation of a statute. And it therefore appeared at *Chevron* Steps One and Two or to find that *Chevron's* framework should not apply to the interpretative question such that it was a de novo question for the Court.

But, in a series of cases in recent years, the doctrine underwent a radical transformation into a doctrine unrecognizable from its original form. Accompanying this metamorphosis comes a glaring conflict with the Court's typical unwavering application of textualism. In breaking with this mainstay tool of interpretation, the Court has found itself in a hypocrisy because although it purported to protect principles of accountability and the separation of powers when invoking the major questions doctrine, the result was just the opposite.

105. *Id.* at 485–86 (quoting UARG v. EPA, 573 U.S. 302, 324 (2014)).

106. *Id.* at 486. The Court also opined that it was "especially unlikely that Congress would have delegated this decision to the *IRS*, which has no expertise in crafting health insurance policy of this sort." *Id.* (citing Gonzales v. Oregon, 546 U.S. 243, 266–67 (2006)).

107. *Id.*

108. *Id.* (citing Hardt v. Reliance Standard Life Ins. Co., 560 U.S. 242, 251 (2010)).

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

110. *Id.* at 498.

II. MAJOR QUESTIONS HYPOCRISY

In several cases decided between 2021 and 2023, the Court significantly transformed the doctrine. This Part analyzes the metamorphosis and entrenchment of the major questions doctrine in two key statutory construction cases where the Court was called upon to determine the proper scope of agency power.[111] As demonstrated by the majority opinions in *West Virginia v. EPA*[112] and *Biden v. Nebraska*,[113] as well as several other cases on the Court's so-called "shadow docket," the Court firmly situated the major questions doctrine as a clear-statement substantive canon in statutory construction cases.[114]

Although the precise justifications for and the contours of the doctrine remain undefined, the Court grounded the doctrine in "both separation of powers principles and a practical understanding of legislative intent."[115] In both cases that are discussed, the Court relied on the foundational principles of earlier cases that in "extraordinary cases"—where the "'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion [of that authority], provide a "reason to hesitate before concluding that Congress" meant to confer such authority."[116] But instead of being used as a tool to determine whether to defer

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111. By focusing on the majority opinions in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), and *Biden v. Nebraska*, 143 S. Ct. 2355 (2023), in this section, I do not minimize the concurring opinions and dissents in these cases or the other recent cases involving applications for stays where the Court invoked the doctrine. *See* Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs. (HHS), 141 S. Ct. 2485, 2488–89 (2021) (raising major questions doctrine and granting application to vacate stay of judgment for nationwide moratorium on evictions in certain areas of the country during COVID-19 pandemic); Nat'l Fed'n of Indep. Bus. (NFIB) v. Occupational Health & Safety Admin. (OSHA), 142 S. Ct. 661, 664–65 (2022) (invoking major questions doctrine and granting stay pending judicial review of rule involving Secretary of Labor's emergency temporary standard requiring certain employers to require employees to undergo COVID-19 vaccination or weekly COVID-19 tests); Biden v. Missouri, 142 S. Ct. 647, 655–59 (2022) (Thomas, J., dissenting) (major questions doctrine cited in dissent in case involving the grant of motions to stay preliminary injunctions for rule requiring certain medical facilities to require most of their staff to be vaccinated against COVID-19). Indeed, these opinions are woven into the discussion in Part II.B.

112. 142 S. Ct. 2587 (2022).

113. 143 S. Ct. 2355 (2023).

114. *See West Virginia*, 142 S. Ct. 2587; *Nebraska*, 143 S. Ct. 2355; *Ala. Ass'n of Realtors*, 141 S. Ct. at 2488–89; *NFIB*, 142 S. Ct. at 664–65; *Missouri*, 142 S. Ct. at 655–59.

115. *West Virginia*, 142 S. Ct. at 2609 (citing UARG v. EPA, 573 U.S. 302, 324 (2014)).

116. *Id.* at 2608 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000)); *Nebraska*, 143 S. Ct. at 2372) (first alteration in original) (citing *West Virginia*,142

to the agency's interpretation under the *Chevron* framework, the Court now wields the doctrine as a baseline presumption against agency power, even in the face of statutory textual support for the agency action.

A. Metamorphosis and Entrenchment

1. West Virginia v. EPA

In 2022, the Court invoked the major questions doctrine to nullify a rule addressing carbon dioxide emissions promulgated by the EPA under the CAA.[117] Specifically at issue was EPA's Clean Power Plan rule, which was issued pursuant to § 111(d) of the Act and applied to existing coal-fired and natural-gas-fired power plants.[118] The Court was required to determine whether EPA's expansive view of its authority to require reductions in carbon dioxide emissions for these power plants was allowed under the CAA.[119]

Under § 111 of the CAA, EPA regulates power plants by establishing a "standard of performance" for their emission of certain pollutants into the ambient air.[120] Whether applied to new plants or existing plants, this standard of performance must represent the "best system of emission reduction" (BSER) that EPA has found to be "adequately demonstrated" for a particular category of sources.[121]

In past rules, EPA set performance standards rooted in practices that resulted in a power plant running more cleanly and thereby reducing its pollution.[122] In the Clean Power Plan rule, however, EPA determined that the BSER for existing power plants "included a requirement that such facilities reduce their own production of electricity, or subsidize increased generation by natural gas, wind, or solar sources" elsewhere.[123]

More specifically, the BSER was comprised of three, in EPA's words, "building blocks" (i.e., types of measures) that covered sources could take.[124] The first of these building blocks involved existing coal-fired power plants undertaking practices to burn coal more efficiently.[125] Because these "heat

S. Ct. 2587, which in turn cited *Brown & Williamson*, 529 U.S. at 159–60).

117. *West Virginia*, 142 S. Ct. 2587.

118. *Id.* at 2602 (citing 42 U.S.C. § 7411(d)(1)).

119. *Id.* at 2600.

120. *Id.* at 2599 (citing 42 U.S.C. § 7411(a)(1)).

121. *Id.* (citing 42 U.S.C. § 7411(a)(1), (b)(1), (d)).

122. *Id.*

123. *Id.*

124. *Id.* at 2603 (citing GHG Emissions Standards, 80 Fed. Reg. 64,510, 64,667 (Oct. 23, 2015) (to be codified at 40 C.F.R. pts. 60, 70, 71 & 98)).

125. *Id.*

rate improvements" would "lead to only small emission reductions" due to the already-high efficiency of many coal-fired power plants, EPA determined that "much larger emission reductions [were] needed from [these plants] to address climate change."[126]

The second and third building blocks in the Clean Power Plan rule's BSER were comprised of "generation shifting from higher-emitting to lower-emitting" electricity producers.[127] The second building block, for example, involved shifting electricity production from coal-burning power plants to natural gas-fired plants.[128] This shift would decrease overall carbon dioxide emissions because natural gas-fired plants "'typically [emit] less than half as much' carbon dioxide per unit of electricity created as coal-fired plants."[129] The third building block was similar, but the shift was from both coal- and gas-fired plants to "new low- or zero-carbon generating capacity," such as wind and solar power.[130]

For a regulated plant to make the shift in generation to less polluting sources, EPA suggested three options.[131] First, an operator of a facility could reduce its overall emissions by simply reducing its own electricity production.[132] Second, an operator could construct or invest in a low or zero-carbon generating facility, such as a new natural gas plant, wind farm, or solar installation, and then increase generation at that facility.[133] Third, an operator could participate in a cap-and-trade program where it could buy emissions "allowances" or "credits."[134] In these types of programs, operators who buy credit from another source can use it to meet their own limit on emissions.[135]

Implementation of any of these steps, EPA concluded, would result in sector-wide shift in electricity production from coal to natural gas and renewables.[136] And because the power grid is an integrated web of producers, any choice of the options by a coal-fired plant (i.e., "reducing their own production, subsidizing an increase in production by cleaner sources, or both") would result in a shift to wind, solar, and natural gas for electricity production.[137]

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126. *Id.*

127. *Id.*

128. *Id.* (citing GHG Emissions Standards, 80 Fed. Reg. at 64,728).

129. *Id.*

130. *Id.* (citing GHG Emissions Standards, 80 Fed. Reg. at 64,729, 64,748). EPA stated the application of building blocks two and three were the source of "[m]ost of the CO2 controls." *Id.* (quoting GHG Emissions Standards, 80 Fed. Reg. at 64,728).

131. *Id.* (citing GHG Emissions Standards, 80 Fed. Reg. at 64,731).

132. *Id.*

133. *Id.*

134. *Id.* (citing GHG Emissions Standards, 80 Fed. Reg. at 64,731–32).

135. *Id.*

136. *Id.* (citing GHG Emissions Standards, 80 Fed. Reg. at 64,731).

137. *Id.*

In an opinion by Chief Justice Roberts, joined by Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett, the Court struck down the Clean Power Plan rule, invoking the major questions doctrine in a form that was significantly different from the doctrine's modest beginning in such cases as *MCI* and *Brown & Williamson*.[138] Instead of analyzing the statutory interpretation question under the *Chevron* regime, the Court started (and ended) with an analysis under the major questions doctrine.[139] As set forth in more detail below, the Court first created a presumption against allowing the agency to move forward with the rule if the action qualified as a major question.[140] And, if it were a major question, the Court found that it would require clear congressional authority for the action in order for EPA to move forward.[141]

The Court first stated that when an agency's authority is in question, the analysis should be "shaped, at least in some measure, by the nature of the question presented" to determine whether Congress actually intended to confer the power that the agency now asserts.[142] But it then found that a different approach was necessary in "extraordinary cases" where the "history and the breadth of the authority that [the agency] has asserted" and the "economic and political significance" of its assertion of that authority provide a "reason to hesitate before concluding that Congress" meant to confer such authority.[143]

Canvassing selected cases involving statutory interpretation, the Court pointed out that in the past, it had similarly reviewed assertions of agency authority in these situations. For example, the Court noted in another CAA case it had found that "[e]xtraordinary grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or 'subtle device[s].'"[144] It also quoted *MCI*, where the Court asserted that Congress does not "use oblique or elliptical language to empower an agency to make a 'radical or fundamental change' to a statutory scheme.'"[145]

138. *Id.* at 2615–16. Due in part to a complicated and tortured procedural history, which is not pertinent for the Court's major questions analysis, the Court first discussed that at least one of the petitioners had standing and also that case was not moot. *Id.* at 2606–07.

139. *Id.* at 2600, 2616.

140. *Id.* at 2609 ("We presume that 'Congress intends to make major policy decisions itself, not leave those decisions to agencies.'" (quoting U.S. Telecomm. Ass'n v. FCC, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc))).

141. *Id.* at 2608.

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

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

144. *Id.* at 2609 (alteration in original) (quoting Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001) (Scalia, J., dissenting)).

145. *Id.* (quoting MCI Telecomms. Corp. v. American Tel. & Tel. Co., 512 U.S. 218, 229 (1994)).

To justify its reliance on the major questions doctrine, the Court pointed to "both separation of powers principles and a practical understanding of legislative intent."[146] For the Court to allow an agency to exercise expansive authority in these situations, the agency needed to identify "clear congressional authorization" to do so.[147] The Court then proceeded to explain why, in its view, "this is a major questions case."[148]

The Court found that EPA's unheralded assertion of power under § 111(d) would have enabled it "to substantially restructure the American energy market" in a way that would affect a "transformative expansion in [EPA's] regulatory authority."[149] The Court had further pause because the authority for EPA's newly found power came from a provision characterized as "a gap filler [that] had rarely been used in the preceding decades.[150]

After discussing in more detail why it believed EPA's rule amounted to the assertion "unprecedented power over American industry,"[151] the Court turned to whether EPA had provided "clear congressional authorization" to regulate power plants in this manner.[152] It found EPA's principal argument that the CAA's delegation to EPA to establish emissions caps to be set at a level reflecting "the application of the best system of emission reduction . . . adequately demonstrated" was "vague" and "not close to the sort of clear authorization required by our precedents."[153]

The Court concluded by acknowledging that limiting carbon dioxide emissions in a way that would cause a transition away from using coal to produce electricity might "be a sensible 'solution to the crisis of the day.'"[154]

146. *Id.* (quoting UARG v. EPA, 573 U.S. 302, 324 (2014)).

147. *Id.*

148. *Id.* at 2610.

149. *Id.* (quoting *UARG*, 573 U.S. at 324).

150. *Id.* (citing Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001) (Scalia, J. dissenting)). The Court was also concerned that EPA would be essentially creating "a regulatory program that Congress had conspicuously and repeatedly declined to enact itself." *Id.* (citing FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000); Gonzales v. Oregon, 546 U.S. 243, 267–68 (2006); Ala. Ass'n of Realtors v. HHS, 141 S. Ct., 2485, 2486–87, 2490 (2021)). Under such situations, the Court must "hesitate before concluding that Congress" intended to give EPA this authority under Section 111(d). *Id.* at 2610 (quoting *Brown & Williamson*, 529 U.S. at 159–60).

151. *Id.* at 2612 (quoting Indus. Union Dep't, AFL–CIO v. Am. Petroleum Inst., 448 U.S. 607, 645 (1980) (plurality opinion)).

152. *Id.* at 2596 (quoting *UARG*, 573 U.S. at 324).

153. *Id.* at 2614 (quoting 42 U.S.C. § 7411(a)(1)). The Court also reviewed arguments by EPA and other respondents that grounded EPA's authority in other provisions of the CAA. *See id.* at 2614–15.

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

However, it held that § 111(d) did not give EPA the authority to do so and that "[a] decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body."[155]

2. Biden v. Nebraska

In 2023, the Court invoked the major questions doctrine in *Biden v. Nebraska*.[156] At issue in the case was the validity of a comprehensive student loan forgiveness program, which the Secretary of Education promulgated under the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act).[157] The States of Missouri, Nebraska, Iowa, Arkansas, Kansas, and South Carolina sued, alleging that "the HEROES Act [did] not authorize the loan cancellation plan."[158]

In an opinion by Chief Justice Roberts, joined by Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett, the Court held—relying again on the major questions doctrine—that the Secretary of Education did not have the authority under the HEROES Act to enact the program.[159] Like in *West Virginia v. EPA*, the Court did not analyze the case under the *Chevron* regime for statutory interpretation cases.

The Court began by introducing the statutory scheme, beginning with the Higher Education Act of 1965 (Education Act), which was enacted to, among other things, "assist in making available the benefits of postsecondary education to eligible students . . . in institutions of higher education" by making federal loans available.[160] The Education Act comprehensively covers the conditions and terms for these loans, including "applicable interest rates, loan fees, repayment plans, and consequences of default."[161] The Secretary is also permitted to reduce or cancel loans, provided specified circumstances are met.[162] For example, the Secretary can forgive certain loans carried by public servants, such as teachers, members of the Armed Forces, Peace Corps volunteers, law enforcement and corrections officers, firefighters, nurses, and librarians, provided they have worked in their vocation for a minimum number of years.[163]

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155. *Id.*

156. *See* Biden v. Nebraska, 143 S. Ct. 2355, 2373–74 (2023).

157. *See id.* at 2362.

158. *Id.* at 2361–62.

159. *Id.*

160. *Id.* at 2362–63 (quoting 20 U.S.C. § 1070(a)).

161. *Id.* (citing 20 U.S.C. §§ 1077, 1080, 1087e, 1087dd).

162. *See id.* at 2362–64.

163. *Id.* 2363 (citing 20 U.S.C. §§ 1078–10, 1087j, 1087ee). Under the 2003 version of

Next, the Court discussed Congress's subsequent amendments to the statute, as follows. After the terrorist attacks on September 11, 2001, Congress enacted the Higher Education Relief Opportunities for Students Act of 2001 out of concern for those borrowers in the military who might be affected.[164] The Act gave the Secretary of Education "specific waiver authority to respond to conditions in the national emergency" caused by the attacks.[165] Because the Act's waiver provision was set to terminate on September 30, 2003, Congress elected to extend it in the HEROES Act.[166] In addition to expanding the coverage of the 2001 Act to include any war or national emergency, the HEROES Act provided that the Secretary "may waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under [T]itle IV of the [Education Act] as the Secretary deems necessary in connection with a war or other military operation or national emergency."[167]

In response to the COVID-19 pandemic in 2020, President Trump declared the pandemic a national emergency.[168] Shortly following the declaration, the Secretary indicated that loan repayments and interest accrual for all federally held student loans would be suspended.[169] Congress also responded

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the Act, loans of borrowers who are deceased or who are "'permanently and totally disabled,' such that they cannot 'engage in any substantial gainful activity'" can also be canceled by the Secretary. *Id.* (quoting 20 U.S.C. § 1087(a)(1)). Other examples of circumstances where loans are to be forgiven are for borrowers who are (1) bankrupt; (2) falsely certified by their schools; (3) whose schools close down; and (4) attend schools that fail to pay loan proceeds they owe to lenders. *Id.* (citing 20 U.S.C. § 1087(b)–(c)).

164. *See id.*

165. *Id.* (quoting Higher Education Relief Opportunities for Students Act of 2001, Pub. L. No. 107-122, 115 Stat. 2386).

166. *See id.* (citing Higher Education Relief Opportunities for Students Act of 2003, Pub. L. No. 108-76, 117 Stat. 904).

167. *Id.* (second alteration in original) (quoting 20 U.S.C. § 1098bb(a)(1)). The waiver and modifications, however, were limited to what "may be necessary to ensure" that "recipients of student financial assistance under title IV of the [Education Act] who are affected individuals are not placed in a worse position financially in relation to that financial assistance because of their status as affected individuals." *Id.* (citing 20 U.S.C. § 1098bb(a)(2)(A)). In pertinent part, an "affected individual" is defined, as someone who "resides or is employed in an area that is declared a disaster area by any Federal, State, or local official in connection with a national emergency" or who "suffered direct economic hardship as a direct result of a war or other military operation or national emergency, as determined by the Secretary." *Id.* (citing § 1098ee(2)(C)–(D)). For the purposes of the Act, a "national emergency" is defined as "a national emergency declared by the President of the United States." *Id.* (citing § 1098ee(4)).

168. *Id.* at 2364 (citing Presidential Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 13, 2020)).

169. *Id.*

by passing the Coronavirus Aid, Relief, and Economic Security Act, which required the Secretary to extend the relief suspensions through the end of September 2020.[170] Even before the suspensions expired, the Secretary "extended the suspensions, broadened eligibility for federal financial assistance, and waived certain administrative requirements . . . ."[171]

Apart from maintaining the repayment and interest suspensions, no action was taken with respect to the relief program until late 2022.[172] In October 2022, the Secretary published a new debt cancellation plan to reduce and eliminate student debt under the HEROES Act.[173] Under the plan, "[f]or borrowers with an adjusted gross income below $125,000 in either 2020 or 2021 who have eligible federal loans, the Department of Education [would] discharge the balance of those loans in an amount up to $10,000 per borrower."[174] Borrowers who were former Pell Grant recipients would be eligible to cancel up to $20,000 of their loans.[175] An estimated 43 million borrowers qualify for relief, resulting in a cancellation of $430 billion in debt principal.[176]

After presenting this statutory background and finding that petitioner Missouri had standing, the Court analyzed the statutory provision relied upon by the Secretary to enact the loan forgiveness program under the major

170. *Id.* (citing Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136,134 Stat. 404–05 (2020)).

171. *Id.* (citing Federal Student Aid Programs, 85 Fed. Reg. 79,856 (Dec. 11, 2020); Federal Student Aid Programs, 86 Fed. Reg. 5,008 (Jan. 19, 2021)). The President had previously directed the Secretary, "'[i]n light of the national emergency,' to 'effectuate appropriate waivers of and modifications to' the Education Act to maintain the suspensions . . . through the end of the year.'" *Id.* (quoting Continued Student Loan Payment Relief During the COVID-19 Pandemic, 85 Fed. Reg. 49,585, 49,585 (Aug. 8, 2020)).

172. *Id.*

173. *Id.* (citing Federal Student Aid Programs, 87 Fed. Reg. 61,512, 61,512–14 (Oct. 12, 2022)).

174. *Id.* at 2364–65 (citing 87 Fed. Reg. at 61,514 ("modif[ying] the provisions of" 20 U.S.C. §§ 1087, 1087dd(g); 34 C.F.R. pt. 647, subpt. D (2022); 34 C.F.R. §§ 682.402, 685.212)).

175. *Id.* (citing 87 Fed. Reg. at 61,514). "Eligible loans include 'Direct Loans, [Federal Family Education Loan] loans held by the Department or subject to collection by a guaranty agency, and Perkins Loans held by the Department.'" *Id.* (quoting 87 Fed. Reg. 61,514).

176. *Id.* at 2365 (first citing Joint Appendix at 119, Biden v. Nebraska, 600 U.S. 482 (2023) (Nos. 22-506 and 22-535); and then Letter from Phillip L. Swagel, Dir., Cong. Budget Off., to Richard Burr, Ranking Member, U.S. S. Comm. on Health, Educ., Lab., & Pensions (Sept. 26, 2022), https://www.cbo.gov/system/files/2022-09/58494-Student-Loans.pdf [httpsf//perma.cc/TE5Q-8HFT]).

questions doctrine.[177] The Court noted that the Secretary's authority to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under [T]itle IV of the [Education Act] as the Secretary deems necessary in connection with a war or other military operation or national emergency" was a power that had "limits."[178] Then, quoting the foundational major questions doctrine case of *MCI*, it held that the authority "to 'modify' [did] not authorize 'basic and fundamental changes in the scheme' designed by Congress."[179]

Rather, in its view (again quoting *MCI*), "modify" conveyed "a connotation of increment or limitation" that must be construed to mean "to change moderately or in minor fashion."[180] Thus, the Secretary's authority to "modify" statutes and regulations allowed "modest adjustments and additions to existing provisions, not [to] transform them."[181] The Court then outlined how the Secretary's current "modifications . . . were not 'moderate' [or] 'minor.'"[182] In the Court's view, the proposed changes "created a novel and fundamentally different loan forgiveness program."[183] Again relying on *MCI*, the Court concluded that it was "highly unlikely that Congress authorized such a sweeping loan cancellation program through such a subtle device as permission to 'modify.'"[184]

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177. *Id.* at 2365–68.

178. *Id.* at 2368 (quoting 20 U.S.C. § 1098bb(a)(1)).

179. *Id.* (quoting MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 225 (1994)).

180. *Id.* (quoting 20 U.S.C. § 1098bb(a)(1)). The Court also cited both a dictionary and legal dictionary. *Id.* at 2368–69 (first citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1452 (2002) ("defining 'modify' as 'to make more temperate and less extreme,' 'to limit or restrict the meaning of,' or 'to make minor changes in the form or structure of [or] alter without transforming'"); and then citing *Modify*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("giving the first definition of 'modify' as '"[t]o make somewhat different; to make small changes to,' and the second as '[t]o make more moderate or less sweeping'") (alteration in original)).

181. *Id.* at 2369.

182. *Id.*

183. *Id.* For example, the Court pointed out that under the program the Secretary can "discharge up to $10,000 for every borrower with income below $125,000 and up to $20,000 for every such borrower who has received a Pell Grant." *Id.* (citing Federal Student Aid Programs, 87 Fed. Reg. 61,512, 61,514 (Oct. 12, 2022)). And because the program was estimated to affect 98.5% of all borrowers, the Secretary had effectively "expanded forgiveness to nearly every borrower in the country." *Id.* (citing Press Release, Exec. Off. of the President, Fact Sheet: The Biden Administration's Plan for Student Debt Relief Could Benefit Tens of Millions of Borrowers in All Fifty States (Sept. 20, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/09/20/fact-sheet-the-biden-harris-administrations-plan-for-student-debt-relief-could-benefit-tens-of-millions-of-borrowers-in-all-fifty-states/ [https://perma.cc/2EMK-KKYH]).

184. *Id.* at 2369–70 (internal quotations omitted) (quoting MCI Telecomms. Corp. v.

The Court next relied on its recent decision in *West Virginia v EPA*, which "involved similar concerns over the exercise of administrative power."[185] It analogized the Secretary's debt cancellation plan to that of EPA's plan, which was "to impose a nationwide cap on carbon dioxide emissions."[186] Then, quoting the other formative major questions doctrine case, *Brown & Williamson*, it found that in light of "the 'history and the breadth of the authority that [the agency] ha[d] asserted,' and the 'economic and political significance' of that assertion, [there was] 'reason to hesitate before concluding that Congress' meant to confer such authority."[187]

Similarly, the Court pointed out that the Secretary had never before asserted this quantum of power under the HEROES Act, which would have canceled the obligation to repay $430 billion in student loans.[188] In fact, the Court noted that the Secretary had only once waived or modified a provision with respect to debt cancellation.[189] Thus, the Court found "'[n]o regulation premised on' the HEROES Act 'has even begun to approach the size or scope' of the Secretary's program."[190]

The Court concluded its opinion citing the major questions doctrine: "'The basic and consequential tradeoffs' inherent in a mass debt cancellation program 'are ones that Congress would likely have intended for itself.'"[191] Therefore, to prevail, it was necessary for the Secretary to "point to 'clear congressional authorization' to justify the challenged program."[192] And under the Court's view, the HEROES Act provided no such authority.[193]

Am. Tel. & Tel. Co., 512 U.S. 218, 231 (1994)). For similar reasons, the Court also rejected the Secretary's attempt to rely on the provision allowing the Secretary "to 'waive' legal provisions as well as [']modify['] them." *Id.* at 2370.

185. *Id.* at 2372 (citing West Virginia v. EPA, 142 S. Ct. 2587 (2022)).

186. *Id.*

187. *Id.* (first alteration in original) (quoting *West Virginia*, 142 S. Ct. at 2608).

188. *Id.*

189. *Id.* (citing Federal Student Aid Programs, 68 Fed. Reg. 69,312, 69,317 (Dec. 12, 2003), where, in 2003, the Secretary waived certain requirements under the Education Act's public service discharge provisions).

190. *Id.* 2372–73 (alteration in original) (quoting Ala. Ass'n of Realtors v. HHS, 141 S. Ct. 2485, 2489 (2021) (per curiam)).

191. *Id.* at 2375 (alterations in original) (quoting *West Virginia*, 142 S. Ct. at 2613).

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

193. *Id.* In a footnote, the Court attempted to justify its holding on the basis that "the statutory text alone precludes the Secretary's program" and that its opinion simply "reflect[ed] this Court's familiar practice of providing multiple grounds to support its conclusions." *Id.* at 2375 n.9 (quoting Kucana v. Holder, 558 U.S. 233, 243–52 (2010), which had first interpreted the text of a federal immigration statute, but then had cited the "presumption favoring judicial review of administrative action" as an additional sufficient basis for the Court's decision).

B. The Court's Hypocrisy

There is no serious dispute that the major questions doctrine is now cemented as part of the Court's analytic framework for cases involving statutory construction, especially those cases implicating the scope of agency power flowing from an agency's interpretation of the statute. But when invoking the major questions doctrine, the Court is forced to reject textualism, which had been a bedrock principle for a majority of the Court.[194] Moreover, a hypocrisy emerges because although the Court purports to justify the doctrine to safeguard democratic values and Congress's legislative power, the doctrine protects neither of these principles.

In this section, I explore the tension and the concomitant hypocrisy that transpires as a result of the Court's rejection of textualism and its adoption of the major questions doctrine. I first briefly define textualism and explain how the major questions doctrine is squarely at odds with textualism. Beginning with Justice Kagan's dissent in *West Virginia v. EPA*, I detail how the doctrine is so malleable as to result in judicial policymaking and then elucidate how the Court's analysis is contrary to textualist principles.

Next, I situate the major questions doctrine position as a clear statement rule with a broader argument that such substantive canons are incompatible with textualism. Although ultimately unpersuasive, I also set forth defenses raised by Justice Barrett and Justice Gorsuch to attempt to reconcile and justify the conceded incompatibility between the doctrine and textualism. I conclude by demonstrating how the major questions doctrine goes against some of the principles the Court has stated it seeks to protect when invoking the doctrine. Contrary to the Court's assertions, the doctrine diminishes both democratic accountability and Congress's legislative power.

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194. As scholars have observed:

> The Supreme Court is now dominated by devoted textualists: Justices Clarence Thomas, long an enthusiastic booster of the new textualism; Samuel Alito, whose Burkean jurisprudence has increasingly bent toward textualism; Neil Gorsuch, the boldest heir to Scalia's persistent, uncompromising textualism; Brett Kavanaugh, inspired by Scalia to focus "on the words, context, and appropriate semantic canons of construction"; and Amy Coney Barrett, Scalia's former clerk and sympathetic commentator. In addition, Chief Justice John Roberts presents himself as an umpire, applying statutory text according to established rules of interpretation. In constitutional cases, there are intense debates between these five or six red-blooded textualist Justices and the three true-blue pragmatic Justices on opposing sides in predictable conservative–liberal splits, but in statutory cases, it is textualism all the way down. Typically, the pragmatic minority silently joins a textualist majority or dissenting opinion, or they write their own, very similar, text-based opinions.

Eskridge, Slocum & Tobia, *supra* note 8, at 1614–15 (citations omitted).

1. Textualism Briefly Defined

As a matter of first principles, it is helpful to briefly define what is meant by "textualism." This primer will also help when the next section explores how the major questions doctrine is incompatible with textualist principles. As Professor John F. Manning set forth, legislative intent is regarded as "the touchstone of federal statutory interpretation."[195] And because our "constitutional system [is] predicated upon legislative supremacy (within constitutional boundaries)," courts serve as "faithful agents" of Congress (and by extension, "the people" who exercised their will in charging Congress with enacting statutes through the Article I, Section 7 lawmaking process).[196] Judges are therefore responsible for unearthing, as precisely as they can, what Congress meant when it chose the words that it used in statutory provisions.[197] A problem, however, arises when Congress enacted language that is imprecise, idiosyncratic, or simply too loose for courts to definitively discern.[198]

As a historical matter, for the second half of the twentieth century, courts in these instances would cast aside "a statute's semantic detail, however clear, . . . when it conflicts sharply with the apparent spirit or purpose that inspired its enactment."[199] This principle has been referred to as "classical intentionalism."[200]

At the end of the century, a "competing philosophy" known as textualism developed.[201] Over time, textualism has evaded a precise and enduring

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195. John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 419 (2005) [hereinafter Manning, *Textualism and Legislative Intent*] (citing cases including Philbrook v. Glodgett, 421 U.S. 707, 713 (1975) ("Our objective . . . is to ascertain the congressional intent and give effect to the legislative will.")); *see also* United States v. Am. Trucking Ass'ns, 310 U.S. 534, 542 (1940) ("In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress."); Interstate Com. Comm'n v. Baird, 194 U.S. 25, 38 (1904) ("The object of construction, as has been often said by the courts and writers of authority, is to ascertain the legislative intent, and, if possible, to effectuate the purposes of the lawmakers.").

196. Manning, *Textualism and Legislative Intent*, *supra* note 195, at 419; Chad Squitieri, *Who Determines Majorness?*, 44 HARV. J.L. & PUB. POL'Y 463, 480–81 (2021).

197. Manning, *Textualism and Legislative Intent*, *supra* note 195, at 419.

198. *See id.* at 419–20.

199. *Id.* at 419.

200. *Id.* This principle also applies to situations where judges would "seek clarification, if possible, in the bill's internal legislative history," when the statute was vague or ambiguous. *Id.* Under classical intentionalism, courts would accord a sponsor or committee's "understanding of the bill or the mischiefs at which it was aimed," as "probative evidence of the text's meaning." *Id.*

201. *Id.* at 419–20.

definition, but at its core, textualism "is associated with the basic proposition that judges must seek and abide by the public meaning of the enacted text, understood in context (as all texts must be)."[202] With respect to the weight attributed to a statute's broader purpose, "textualists choose the letter of the statutory text over its spirit."[203]

The fundamental justification for this choice lies with the "intricacy and opacity of the legislative process," which makes it unwise to "ascribe an apparent mismatch between text and purpose to a lapse in legislative expression rather than the ever-present possibility of an awkward legislative compromise."[204] The position of leading voices in modern textualism, including Justice Scalia and Judge Easterbrook of the U.S. Court of Appeals for the Seventh Circuit, go a step further by asserting that "multi-member legislatures do not have an actual but unexpressed 'intent' on *any* materially contested interpretive point."[205] "[J]udges must therefore abandon any pretense of using such an intent as the aim of interpretation."[206]

Thus, as Professor Manning succinctly observed:

> [T]extualists reject perhaps the most important premise of classical intentionalism: the idea that behind most legislation lies some sort of policy judgment that is meaningfully identifiable, shared by a legislative majority, and yet imprecisely expressed in the public meaning of the text that has made its way through Congress's many filters.[207]

This rejection avoids, in a textualist's view, the concern that "efforts to augment or vary the text in the name of serving a genuine but unexpressed legislative intent risks displacing whatever bargain was actually reached

202. *Id.* at 420.

203. *Id.*

204. *Id.* (citing John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 18–21 (2001)).

205. *Id.* (emphasis added) (citing articles by Justice Scalia and Judge Easterbrook); *see, e.g.*, Frank H. Easterbrook, *Some Tasks in Understanding Law Through the Lens of Public Choice*, 12 INT'L REV. L. & ECON. 284, 284 (1992) ("[T]he concept of 'an' intent for a person is fictive and for an institution hilarious. A hunt for this snipe liberates the interpreter, who can attribute to the drafters whatever 'intent' serves purposes derived by other means."); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547 (1983) ("Because legislatures comprise many members, they do not have 'intents' or 'designs,' hidden yet discoverable.").

206. Manning, *Textualism and Legislative Intent*, *supra* note 195, at 420 [hereinafter Easterbrook, *Text, History, and Structure in Statutory Interpretation*] (citing Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 ("[T]he quest for the 'genuine' legislative intent is probably a wild-goose chase"); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 68 (1994) ("Intent is elusive for a natural person, fictive for a collective body.")).

207. Manning, *Textualism and Legislative Intent*, *supra* note 195, at 438.

through the complex and path-dependent legislative process."[208] According to some textualists, this fidelity to the text of a statute can also minimize the appearance (perceived or actual) of the Court's policy preferences in decisionmaking.[209]

With this brief overview of the principal features of textualism most relevant to its intersection with the major questions doctrine, we now turn to an analysis of how the major questions doctrine clashes with textualism.

2. Hypocrisy Explored

As set forth above, this section analyzes precisely how the major questions doctrine is incompatible with textualism. This will set the foundation for how the Court's rejection of textualism through its adoption of the major questions doctrine results in a hypocrisy because it goes against some of the very principles that the Court has stated it seeks to protect when invoking the doctrine (and ironically against the principles of textualism that it abandoned).

As a starting point, perhaps the most pointed (and succinct) criticism regarding the clash between the Court's major questions doctrine and textualism came from several of the Court's liberal Justices. In Justice Kagan's dissent in *West Virginia* (joined by Justice Breyer and Justice Sotomayor), the trio admonished the majority for being "textualist only when being so suits it."[210]

Justice Kagan's assertion is grounded in the view that the analytic framework employed by the Court to determine whether a case presents a "major" question (which would trigger the necessity of an explicit grant of statutory authority for the agency's exercise of power) "is not restrained to a textualist inquiry."[211] Rather, she bemoans that the Court begins "by looking at some panoply of factors, whether agency action presents an 'extraordinary case.'"[212] If so, a search for "clear" congressional authorization is necessary, which further thrusts the Court into what she calls a "statutory interpretation of an unusual kind."[213]

She further faults the Court for failing to engage in a meaningful way with what should be the textualist inquiry: "Does the text of that provision, when

208. *Id.* at 450.

209. *See* Benjamin Eidelson & Matthew C. Stephenson, *The Incompatibility of Substantive Canons and Textualism*, 137 HARV. L. REV. 515, 524 (2023) (citing Easterbrook, *Text, History, and Structure in Statutory Interpretation*, *supra* note 206, at 63).

210. West Virginia v. EPA, 142 S. Ct. 2587, 2641 (2022) (Kagan, J., dissenting).

211. *Id.* at 2633–34 (Kagan, J., dissenting); *see* Kevin Tobia, *We're Not All Textualists Now*, 78 N.Y.U. ANN. SURV. AM. L. 243, 256 (2022).

212. *West Virginia*, 142 S. Ct. at 2364 (Kagan, J., dissenting) (quoting *id.* at 2609 (majority opinion)).

213. *Id.*

read in context and with a common-sense awareness of how Congress delegates, authorize the agency action here?"[214] Instead, the Court has replaced this inquiry with "multiple steps, triggers, [and] special presumptions," all of which lead the Court to rewrite the statute and "substitute[] its own ideas about delegations for Congress's."[215] And by substituting the Court's "own ideas about policymaking for Congress's," Justice Kagan concludes that it is the "Court, rather than Congress [that] will decide how much regulation is too much."[216]

To Justice Kagan, the major questions doctrine is therefore in sharp conflict with textualism for ignoring the core tenet of textualism that the analysis of statutory text must not devolve into "unconstrained policy analysis" which "easily permits the entry of judicial policy goals."[217] In other words, the doctrine substitutes "analysis of the text of the legislative bargain, including its semantic context and level of generality, with judicial policy analysis."[218] In *West Virginia v. EPA*, the Court, in her view, "appoints itself—instead of Congress or the expert agency—the [decisionmaker] on climate policy," which she calls "frightening."[219]

Recently, scholars have reached the same conclusion with respect to the conflict with textualism and the resulting usurpation of policymaking power by the Court. One commentator asked, "Do federal courts have the constitutional authority to definitively determine questions of politics? The answer would appear obvious: [n]o."[220] Another observed that "the doctrine's poorly drawn boundaries led to a standard that is subjective at best, and totally manipulable at worst" and questioned whether "the doctrine was nothing more than a tool to achieve ideological outcomes."[221]

Given these concerns about judicial policymaking (by effectively rewriting the text of statutes), it is therefore not surprising that even when the doctrine was in its nascency, scholars raised concerns. For example, in a 2006 essay addressing the Executive Branch's power to say what the law is, Cass Sunstein asserted that there was "no metric . . . for making the necessary distinctions" between major and minor questions.[222] And Jacob Loshin and Aaron

214. *Id.*

215. *Id.* at 2634, 2643 (Kagan, J., dissenting).

216. *Id.* at 2643 (Kagan, J., dissenting).

217. Tobia, *supra* note 211, at 257.

218. *Id.*

219. *West Virginia*, 142 S. Ct. at 2644 (Kagan, J., dissenting).

220. Squitieri, *supra* note 196, at 464.

221. Wyatt Rex Allred, Note, *OSHA's COVID-19 Vaccine Mandate: Why Justice Gorsuch's Analysis of the Mandate as an Elephant in A Mousehole Misses the Mark*, 48 B.Y.U. L. REV. 2281, 2306 (2023).

222. Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2607 (2006).

Nielson, in a 2010 article, argued that the questions of what makes a question "major," a case 'extraordinary," "[is] in the eye of the beholder."[223] And because "[e]ach case is different, and these lines are impossible to define exactly," the doctrine is flawed from a textualist perspective.[224]

These criticisms further highlight another way in which the major questions doctrine breaks with textualism: determining whether a major question is present quickly devolves into using "strongly purposiv[ist] interpretative techniques," which is regarded as a distinctly nontextualist approach.[225] This departure is especially true when analyzing what precisely Congress's intent was concerning the scope of authority delegated to the agency during the major questions analysis.[226]

"As reflected in the Court's theoretical justifications of textualism, the legislative process is complicated, and in the rough-and-tumble of democratic politics it is not at all unthinkable that Congress does 'alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions.'"[227] Therefore, the very premise of the major questions doctrine clashes with the textualist view of the legislative process.

To unpack this theoretical incompatibility further, the main roadblock is that to determine whether it is an "extraordinary" case, the Court must "posit a statutory purpose and then evaluate whether agency action is consistent with that posited statutory purpose."[228] In other words, determining whether a case presents a major question, i.e., one that involves a question of vast economic and political significance, presupposes that there is, in fact, an "overarching statutory purpose that can explain each specific provision of a statute," which then can inform the determination.[229]

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223. Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19, 45 (2010). The authors called the major questions doctrine by a different name: the "elephants-in-mouseholes" doctrine, which refers to a phrase used by Justice Scalia in *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

224. Nathan Richardson, *Keeping Big Cases from Making Bad Law: The Resurgent "Major Questions" Doctrine*, 49 CONN. L. REV. 355, 381 (2016). Loshin & Nielson also pointed out that the major questions doctrine therefore "raises profound questions about the judicial function: Is it really the Court's place to upend Congress's bargain by reading a statute to mean something other than what Congress understood it to mean, as expressed in the text?" Loshin & Nielson, *supra* note 223, at 63. Accordingly, they concluded the major question doctrine should have been "doomed to incoherence" from the start. *Id.* at 49. Naturally, we know now they were incorrect.

225. Loshin & Nielson, *supra* note 223, at 46 (quoting John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 235 (2001)).

226. *Id.*

227. *Id.* at 63 (emphasis removed) (quoting Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001)).

228. *Id.* at 52.

229. *Id.* at 49.

The very nature of the legislative process, as recognized by Professor John Manning, requires that individual statutory phrases be read and interpreted in isolation, rather than extrapolate to "broad[er] statutory purposes," which the Court must also divine correctly.[230] To do otherwise could "upset or even undermine Congress's precise bargain" to secure passage of the statute, rendering any such conclusion as to the existence of a major question faulty.[231]

Textualists, when pushing for a narrow construction of statutes, assert that "statutes [are] products of innumerable and sometimes hasty and pragmatic compromises,"[232] and the "[a]pplication of 'broad purposes' of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action."[233] Similarly, a broader consideration of the statute, in defining whether a major question exists, thereby subverts congressional intent.[234]

So, to determine whether the agency has tread into new waters such that the change is "fundamental," or it has expanded the scope of its power in a way that would be transformative, the Court is squarely asking a purposivist question that breaks from textualist theory outlined above.[235]

In sum, unless the Court rejects this textualist baseline concerning the assumptions and often realities of the legislative process, namely that "statutes are often the result of compromises," serious tensions are undeniably present with respect to the major questions inquiry:

On what basis can it be said that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions"?[236] How can a court decide what is "fundamental" and what is "ancillary," if there is no one purpose that explains each specific provision of the statute?[237]

Related to the difficulty on how to reconcile textualism with the major questions doctrine's purposivist roots is how the doctrine functions during the interpretive process.[238] Instead of merely being an interpretive aid, the major questions

230. *Id.* (citing Manning, *supra* note 225, at 247–48).

231. *Id.*

232. *Id.* (quoting Abbott Labs. v. Young, 920 F.2d 984, 994 (D.C. Cir. 1990) (Edwards, J., dissenting)).

233. *Id.* (quoting Bd. of Governors of the Fed. Rsrv. Sys. v. Dimension Fin. Corp., 474 U.S. 361, 373–74 (1986)).

234. *Id.*

235. *Id.*

236. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001).

237. Loshin & Neilson, *supra* note 223, at 50–51 (quoting Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001)).

238. *Id.* at 52 (referencing Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 244–45 (2008) (Breyer, J., dissenting)).

doctrine now operates as a clear statement rule and a substantive canon.[239]

This understanding evokes the broader question of whether substantive canons like the major questions doctrine are compatible with textualism. For example, in their recent article in the *Harvard Law Review*, Professors Eidelson and Stephenson persuasively argue that "textualists should either abandon their reliance on substantive canons or else concede that their textualism is not what they have often made it out to be."[240]

To summarize (and to help frame) their argument, they point to a 2010 article by then-Professor Barrett to highlight how textualists have long grappled with this realization:

> Substantive canons are in significant tension with textualism . . . . [When a] judge applying a substantive canon . . . exchanges the best interpretation of a statutory provision for a merely bearable one[,] . . . she abandons not only the usual textualist practice of interpreting a statute as it is most likely to be understood by a skilled user of the language, but also the more fundamental textualist insistence that a faithful agent must adhere to the product of the legislative process, not strain its language to account for abstract intention or commonly held social values.[241]

Indeed, Justice Barrett recognized this tension with respect to the major questions doctrine in her concurring opinion in *Biden v. Nebraska*.[242] Characterizing the doctrine as a "strong-form" canon, she conceded that it is "in significant tension with textualism" because it compels the court "to adopt something other than the statute's most natural meaning."[243] In other words, when engaging in a textualist inquiry, the interpreter normally "hear[s] the words as they would sound in the mind of a skilled, objectively reasonable user of words."[244]

But a strong-form canon, like the major questions doctrine, "load[s] the dice for or against a particular result to serve a value that the Court has designated to specially protect."[245] She concludes (and quotes Justice Scalia)

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239. *See* Biden v. Nebraska, 143 S. Ct. 2355, 2376–78 (2023) (Barrett, J., concurring) (stating "[s]ubstantive canons are rules of construction that advance values external to a statute" and also defining clear statement rules).

240. Eidelson & Stephenson, *supra* note 209, at 516.

241. *Id.* at 537 (first alteration in original) (quoting Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 123–24 (2010)).

242. *See Nebraska*, 143 S. Ct. at 2376 (Barrett, J., concurring).

243. *Id.* at 2376–77 (citing Barrett, *supra* note 241, at 168) (defining strong-form substantive canons as aggressive that "counsels a court to *strain* statutory text to advance a particular value").

244. *Id.* at 2377 (quoting Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 65 (1988)).

245. *Id.* (quoting ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 27 (Amy Gutmann ed., 1997)).

that even though the Court can justify using strong-form canons in some situations, it is indisputable that they pose "a lot of trouble" for "the honest textualist."[246] Justice Barrett's candid concession on the incompatibility of the major questions doctrine with textualism speaks volumes. Nonetheless, there are counterarguments worth presenting, including those by Justice Barrett in one of the key recent major questions doctrine cases.

3. A Convincing Defense or Two?

The most thorough defenses of the major questions doctrine, including whether it is compatible with textualism, comes from Justice Barrett's concurring opinion in *Biden v. Nebraska*[247] and by Justice Gorsuch in his concurring opinion, joined by Justice Alito, in *West Virginia v. EPA*.[248] Their opinions demonstrate slightly divergent views on the basis of the doctrine. Justice Barrett views the doctrine as principally functioning as a tool of statutory construction reflecting "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."[249] Justice Gorsuch on the other hand, views the major questions doctrine as a type of nondelegation canon rooted in separation of powers principles.[250] In any event, neither convincingly reconciles the doctrine's incompatibility with textualism.

In *Biden v. Nebraska*, Justice Barrett wrote separately for herself to answer the State's argument that, under the major questions doctrine, the Court could only uphold the Secretary of Education's loan cancellation program if the Secretary identifies "clear congressional authorization" to enact the program.[251] In her view, ordinary tools of statutory interpretation provided the basis for the Court's holding that the HEROES Act did not authorize the program and thus the major questions doctrine merely "reinforce[d] that conclusion."[252]

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246. *Id.* (quoting SCALIA, *supra* note 245, at 28).

247. *Nebraska*, 143 S. Ct. at 2376–84 (2023) (Barrett, J., concurring).

248. West Virginia v. EPA, 142 S. Ct. 2587, 2616–26 (2022) (Gorsuch, J., concurring).

249. *Nebraska*, 143 S. Ct. at 2378 (Barrett, J., concurring) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 121 (2000)).

250. *See West Virginia*, 142 S. Ct. at 2616–26 (Gorsuch, J., concurring) (stating that the doctrine is rooted in Article I's vesting of "'[a]ll' federal 'legislative powers . . . in Congress'" which means that "important subjects . . . must be entirely regulated by the legislature itself" (first quoting U.S. CONST. art. 1, § 1; and then quoting Wayman v. Southard, 23 U.S. (10 Wheat) 1, 42–43 (1825))).

251. *Nebraska*, 143 S. Ct. at 2376 (Barrett, J., concurring) (quoting *West Virginia*, 142 S. Ct. at 2587).

252. *Id.*

But Justice Barrett took "seriously the charge that the [major questions] doctrine is inconsistent with textualism."[253] She specifically referenced Justice Kagan's dissenting opinion in *West Virginia v. EPA*, where Justice Kagan asserted that when textualism "frustrate broader goals, special canons like the 'major questions doctrine' magically appear as get-out-of-text-free cards."[254] She centered her arguments on the assertion that the major questions doctrine is a substantive canon and, therefore, "should give a textualist pause."[255]

Justice Barrett, in her concurring opinion, admits that the major questions doctrine functions as a "strong-form substantive canon designed to enforce Article I's Vesting Clause."[256] So, whether viewed as a nondelegation canon[257] or a "normative" canon that "is both a presumption against certain kinds of agency interpretations and an instruction to Congress,"[258] the result is the same: this "clear statement" version of the major questions doctrine "loads the dice" against Congress and, by extension, against the agency in a way that is distinctly antitextualist.[259]

She attempts to refute this conclusion as applying to the major questions doctrine by presenting several distinguishing features of the Court's doctrine. She starts by noting that, like other clear statement canons, the major questions doctrine requires that there be "'clear congressional authorization' to support [expansive] agency action."[260] But she argues that in major questions cases the Court has not required "an 'unequivocal declaration' from Congress authorizing the *precise* agency action under review."[261]

253. *Id.*

254. *Id.* (quoting *West Virginia*, 142 S. Ct. at 2641 (Kagan, J., dissenting)).

255. *Id.*

256. *See id.* at 2377 (Barrett, J., concurring).

257. *See, e.g.*, Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475, 482–84 (2021) [hereinafter Sunstein, *Two "Major Questions" Doctrines*].

258. Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 1946–48 (2017).

259. *Nebraska*, 143 S. Ct. at 2378 (Barrett, J., concurring). Justice Barrett quoted a phrase used by Justice Scalia who had asserted these types of "strong-form canon[s] 'load[] the dice for or against a particular result' in order to serve a value that the judiciary has chosen to specially protect." *Id.* at 2377 (Barrett, J., concurring) (first alteration in original) (quoting SCALIA, *supra* note 245, at 27).

260. *Id.* at 2378 (Barrett, J., concurring) (first citing West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022); then citing UARG v. EPA, 573 U.S. 302, 324 (2014); and then citing Ala. Ass'n Realtors v. HHS, 141 S. Ct. 2485, 2487–89 (2021) (per curiam)).

261. *Id.* (citing Fin. Oversight & Mgmt. Bd. P.R. v. Centro De Periodismo Investigativo, Inc., 143 S. Ct. 1176, 1183–84 (2023)). In addition, the observed that the Court has not "depart[ed] from the best interpretation of the text," which she viewed as "the hallmark of a true clear-statement rule." *Id.*

She then explains the reason for this difference. Unlike most clear statement canons, the major questions doctrine stresses the importance of "context" in statutory interpretation.[262] Because "context demonstrating that the agency's interpretation is convincing" could provide the basis for a clear congressional authorization, the doctrine should not be regarded as a clear-statement canon.[263]

Therefore, her main argument that the major questions doctrine is not incompatible with textualism is that she views the doctrine as more of an interpretive device to support "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."[264] In her view, it "is a tool for discerning—not departing from—the text's most natural interpretation."[265] Seen in this light, it seems that she believes the major questions doctrine is thus not subject to the same incompatibility criticisms as other substantive canon and, therefore, reconcilable with textualism. But she does little to otherwise refute the other legitimate tensions with textualism, such as the fundamental differences in textualist theory with making threshold determinations of whether a major question is presented.

Justice Gorsuch's concurring opinion in *West Virginia v. EPA* fares no better in reconciling the conflict with textualism. Although he did not take on the problem head-on like Justice Barrett did in her concurring opinion in *Biden v. Nebraska*, his view on how the major question situates in the statutory interpretation question offers some defenses and also reveals the flaws inherent in the doctrine.[266]

For his part, Justice Gorsuch (joined by Justice Alito) views the major questions doctrines squarely as a "parallel clear-statement rule[]" that "operates to protect foundational constitutional guarantees."[267] And because "Congress means for its laws to operate in congruence with the Constitution rather than test its bounds," the major questions doctrine assists courts in enforcing the Constitution.[268] He, therefore, grounds the doctrine as a way of enforcing the nondelegation doctrine. Quoting Article I, Section 1,[269] and Chief

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262. *Id.*

263. *Id.* at 2381 (Barrett, J., concurring).

264. *Id.* at 2378 (Barrett, J., concurring) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000)).

265. *Id.* at 2376 (Barrett, J., concurring).

266. West Virginia v. EPA, 142 S. Ct. 2587, 2616–26 (2022).

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

268. *Id.*

269. U.S. CONST. art. I, § 1. Interestingly, like Justice Barrett in her concurring opinion in *Biden v. Nebraska*, Justice Gorsuch misstates Article I, Section One, by omitting that the Constitution only assigns all legislative power to Congress that is "herein granted." It is not an unfettered grant of power. *See West Virginia*, 142 S. Ct. at 2617 (Gorsuch, J., concurring).

Justice Marshall that "important subjects . . . must be entirely regulated by the legislature itself,"[270] Justice Gorsuch views the vesting of legislative power to be "vital to the integrity and maintenance of the system of government ordained by the Constitution."[271]

But, as he must, Justice Gorsuch concedes that "[d]oubtless, what qualifies as an important subject and what constitutes a detail may be debated."[272] After outlining "guidance about when an agency action involves a major question for which clear congressional authority is required," which is the first part of the major questions inquiry, he then offers insight on the second part, namely determining "what qualifies as a clear congressional statement authorizing an agency's action."[273]

But much of Justice Gorsuch's discussion on these core inquiries in the Court's major questions doctrine highlights the textualist's Achilles heel when applying the doctrine. As discussed above,[274] under the Court's major questions framework, as elucidated by Justice Gorsuch, the Court applies a "malleable" and distinctly nontextualist analyses.[275] For example, to determine whether a major question is present, the Court seeks to answer such questions as whether the agency is resolving "a matter of great 'political significance,'"[276] "a significant portion of the American economy,"[277] or is "intrud[ing] into an area that is the particular domain of state law."[278]

And when next determining whether there is clear congressional authorization, he asserts the Court should examine (1) the authorizing statutory provisions "with a view to their place in the overall statutory scheme";[279] (2) "the age and focus of the statute the agency invokes in relation to the problem the agency seeks to address"; (3) "the agency's past interpretations of the relevant statute," where "contemporaneous" and "long-held" agency interpretations of a statute are eligible to "some weight";[280] and (4) whether "there is a

270. *Id.* (citing Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825)).

271. *Id.* (quoting Field v. Clark, 143 U.S. 649, 692 (1892)).

272. *Id.* (first citing Gundy v. United States, 139 S. Ct. 2116, 2122–24 (2019) (plurality opinion); and then citing *Gundy*, 139 S. Ct. at 2135–37 (Gorsuch, J., dissenting)).

273. *West Virginia*, 142 S. Ct. at 2620, 2622 (Gorsuch, J., concurring).

274. *See supra* Part I.

275. Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 288 (2022).

276. *West Virginia*, 142 S. Ct. at 2620 (Gorsuch, J., concurring) (quoting NFIB v. OSHA, 142 S. Ct. 661, 665 (2022) (per curiam)).

277. *Id.* at 2621 (quoting UARG v. EPA, 573 U.S. 302, 324 (2014)) (internal quotation marks omitted).

278. *Id.* at 2621.

279. *Id.* at 2622 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000)).

280. *Id.* at 2623 (citing United States v. Philbrick, 120 U.S. 52, 59 (1887)).

'mismatch' between an agency's expertise and its challenged action and its congressionally assigned mission and expertise."[281]

But as one scholar recently observed, this "smorgasbord" and "buffet table" of clues "invite courts to perform exactly the kind of all-things-considered, open-ended inquiry" that textualists should "avoid like the plague."[282] Justice Gorsuch presents nothing in his opinion to rationalize the tension, but perhaps he is unconcerned due to what he might believe are paramount concerns, such as enforcing nondelegation principles.

To this point, there is some merit to the argument that applying a substantive canon such as the major questions doctrine can possibly be defensible as being compatible with textualism in cases where the canon is based on the Constitution itself.[283] If we do conceive textualism as the method by which the Court should best interpret and enforce Congress's lawmaking powers, then applying such canons might not run afoul of textualism because it is based on, as then-Professor Barrett penned, the Court's duty to "act as faithful agents of the Constitution."[284] Indeed, in her concurring opinion in *Biden v. Nebraska*, she noted that "many strong-form [substantive] canons advance constitutional values, which heightens their claim to legitimacy."[285]

With that said, for her part, Justice Barrett conceded that "[w]hether the creation or application of strong-form canons exceeds the 'judicial Power' conferred by Article III" poses "a difficult question."[286] This certainly is a glaring concession that, at the very least, fails to adequately resolve the tension with textualism.

In sum, it is hard to dispute, as then-Judge Kavanaugh conceded, "determining whether a rule constitutes a major rule sometimes has a bit of a 'know it when you see it' quality.'"[287] Thus, despite these spirited defenses to explain away the major questions doctrine's conflict with textualism (by either grounding it as a constitutional uber-canon that takes precedence or by cloaking it in sheep's clothing as a "nothing to see here" interpretive tool), it's hard to get away from the feeling that the major questions doctrine functions as a "get-out-of-text-free card."[288]

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281. *Id.* at 2623 n.4 (Gorsuch, J., concurring).

282. Sohoni, *supra* note 275, at 288.

283. *See* Eidelson & Stephenson, *supra* note 209, at 558–75.

284. Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 169 (2010); Eidelson & Stephenson, *supra* note 209, at 558.

285. Biden v. Nebraska, 143 S. Ct. 2355, 2377 n.2 (2022) (Barrett, J., concurring); *see* Eidelson & Stephenson, *supra* note 209, at 558 n.224.

286. *Nebraska*, 143 S. Ct. at 2377 n.2 (Barrett, J., concurring); *see* Eidelson & Stephenson, *supra* note 209, at 558 n.224.

287. Sohoni, *supra* note 275, at 287–88 (quoting U.S. Telecomm. Ass'n v. FCC, 855 F.3d 381, 423 (D.C. Cir. 2017) (Kavanaugh, J., dissenting)).

288. West Virginia v. EPA, 142 S. Ct. 2587, 2641 (2022) (Kagan, J., dissenting).

4. Hypocrisy

As demonstrated above, *supra* Part II.B, it is difficult to reconcile the major questions doctrine with textualism. Compounding this tension for the Court is that the application of the doctrine in practice manifests a hypocrisy. The Court, in its recent cases, has justified the doctrine rather obliquely, but nonetheless, Justices have asserted that they invoke the doctrine to protect the separation of powers and accountability principles in our democratic system.[289] But, as this section demonstrates, the doctrine safeguards neither in practice. Although, at times, the Court's goals of furthering principles of accountability and the separation of powers are intertwined, I attempt to loosely categorize them in two areas: (1) accountability and (2) safeguarding Congress's power (and the related separation of power concerns).

When defending the major questions doctrine, Justices as far back as *Brown & Williamson* have attempted to rely on a statement Justice Breyer made over forty-five years ago in a law review article that "Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters [for agencies] to answer themselves in the course of the statute's daily administration."[290] And (more recently) "[b]ecause the Constitution vests

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289. *See, e.g.*, *id.* at 2609 (majority opinion) (quoting UARG v. EPA, 573 U.S. 302, 324 (2014) ("[B]oth separation of powers principles and a practical understanding of legislative intent make us 'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking there . . . ."); *Nebraska*, 143 S. Ct. 2355, 2380 (2023) (Barrett, J., concurring) (same). *West Virginia*, 142 S. Ct. at 2620 (Gorsuch, J., concurring) (writing with Justice Alito, stating that doctrine protects "self-government, equality, fair notice, federalism, and the separation of powers"); *see id.* ("The major questions doctrine seeks to protect against 'unintentional, oblique, or otherwise unlikely' intrusions on these interests.") (quoting NFIB v. OSHA, 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring)); *id.* at 2626 (Gorsuch, J., concurring) ("The Court acknowledges only that, under our Constitution, the people's elected representatives in Congress are the decisionmakers here—and they have not clearly granted the agency the authority it claims for itself."); *id.* at 2624 (Gorsuch, J., concurring) ("And while we all agree that administrative agencies have important roles to play in a modern nation, surely none of us wishes to abandon our Republic's promise that the people and their representatives should have a meaningful say in the laws that govern them."); Biden v. Missouri, 142 S. Ct. 647, 659 (2022) (Alito, J., dissenting) (writing with Justice Thomas, Justice Gorsuch and Justice Barrett, Justice Alito asserts that affected parties should have an opportunity to make their views heard through procedural safeguards like the notice-and-comment process); *NFIB*, 142 S. Ct. at 668 (Gorsuch, J., concurring) (writing with Justice Thomas and Justice Alito, Justice Gorsuch states the doctrine "ensures that the national government's power to make the laws that govern us remains where Article I of the Constitution says it belongs—with the people's elected representatives").

290. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000) (quoting Breyer, *supra* note 40, at 370).

Congress with '[a]ll legislative Powers,' . . . a reasonable interpreter would expect it to make the big-time policy calls itself, rather than pawning them off to another branch."[291] Taken together, therefore, by not giving an agency's interpretation deference (in the early major questions cases), not applying the *Chevron* framework (in the cases that followed), and creating a presumption against agency power (especially in the recent cases), the Court believes it is protecting principles of accountability and self-governance by the people.[292]

But applying the doctrine in practice can actually subvert these principles. As renowned scholar Cass Sunstein identified in his 2006 article when he analyzed the emergence of the doctrine within the *Chevron* framework because major questions implicate both agency expertise and policy judgments, it is more likely that Congress *would have* wanted agencies to resolve these questions because of agency expertise and that agencies (unlike courts) are politically accountable.[293] Thus, "there is no reason to think that Congress, and reasonable legislators, seek a judicial rather than administrative judgment" when such provisions are under view.[294] In fact, he pointed out that empirical evidence demonstrates that "often judicial judgments are based on the judge's own policies."[295]

With respect to Justice Breyer's statement being wielded as support that the major questions doctrine supports principles of accountability, Justice Breyer (ironically) responded to the Court's reliance on his words in his dissent in *Brown & Williamson*.[296] He conceded that a "background canon of interpretation" could be applied to support the proposition that certain decisions "should be made by democratically elected Members of Congress rather than by unelected agency administrators."[297] But in situations where

291. *Nebraska*, 143 S. Ct. at 2380 (Barrett, J., concurring).

292. *See supra*, pp. 776–96. Some Justices also view the doctrine as supporting related nondelegation principles. I do not address that contention here and whether it manifests a similar hypocrisy. *See* Sunstein, *Two "Major Questions" Doctrines*, *supra* note 257.

293. Sunstein, Chevron *Step Zero*, *supra* note 13, at 233.

294. *Id.*; *see also* Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2024 (2018) (persuasively arguing that the doctrine subverts democratic values by not respecting the "the deliberative capacities of administrative agencies").

295. Sunstein, Chevron *Step Zero*, *supra* note 13, at n.197 (citing Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823 (2006)).

296. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 190–91 (2000) (Breyer, J., dissenting).

297. *Id.* at 190. Justice Breyer seems to suggest that principally nondelegation principles would support such a doctrine. *Id.*

the Executive Branch "and those politically elected officials who support it, must (and will) take responsibility," this presumption is not necessary.[298]

The sheer importance of these types of actions "as well as its attendant publicity, means that the public is likely to be aware of it and to hold those officials politically accountable."[299] He noted that Presidents, just like Members of Congress, are elected by the public . . . [and] the President and Vice President are the *only* public officials whom the entire Nation elects."[300] And because major agency actions—"one that is important, conspicuous, and controversial"—cannot escape the "kind of public scrutiny that is essential in any democracy," he was confident that Congress or the Executive Branch would be held responsible.[301] Thus, according to Justice Breyer, any accountability interests the Court purports to need the major questions doctrine to support are overblown or even illusory.

Moreover, accountability is actually diminished by the doctrine because by applying the major questions doctrine, the setting of federal policy has now been taken over by the Court, which is "facially less well-suited than Congress to promote democratic forms of participation."[302] If we view the Court's constitutional role as being responsible for adjudicating cases and controversies and safeguarding the rights of individuals, there is no room for the Court "to settle polycentric policy-disputes."[303] Such disputes are better left to the democratic decisionmaking procedures, such as those of the Legislative Branch or executive agencies.[304]

With respect to protecting the Legislative Branch, "the major questions doctrine may not do anything to protect Congress . . . since it does nothing to increase [its] authority . . . ."[305] In fact, the doctrine has quite the opposite effect by cabining Congress in a way that diminishes legislative power. By requiring clear statutory authorization from Congress for major questions, the Court now instructs Congress on *how* it needs to draft "major" legislation if such legislation is to pass judicial scrutiny.

A recent analysis of major questions doctrine cases suggests that the Court seems indifferent to answering what should be the proper interpretive question for triggering the doctrine: whether Congress, in enacting the provision,

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298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.* at 190–91.

302. Emerson, *supra* note 294, at 2084.

303. *Id.* (referencing Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394–404 (1978)).

304. Emerson, *supra* note 294.

305. Richardson, *supra* note 224, at 401.

believed that the agency action in question was "major."[306] Rather, the cases seem to demonstrate that the Court itself determines whether a given action is major or not.[307] But why does this matter?

After all, the result is the same in that under either scenario; a "yes" leads the Court to require that Congress be crystal clear with respect to its delegation. But the shift in analysis on "majorness" from what the current Court thinks about whether the action is major, as opposed to determining what Congress at the time thought the action was major, provides an impermissible justification for this clear authorization requirement.[308]

To properly protect Congress's power, the Court should engage in an analysis to discern and enforce Congress's view on whether the agency is overstepping the delegation. This is the former question above. Instead, the latter formulation of the question uses "a judicial mandate [for Congress] to use particularly clear legislative language" to address policy questions that the *Court* decides are major.[309] This offends the separation of powers by "improperly inserting [the Court] into the Article I, Section 7 lawmaking process" because that section "establishes the exclusive lawmaking procedures within which courts are to play no role."[310] In other words, "although the major questions doctrine is said to speak to whether Congress has delegated authority, in practice, the major questions doctrine is invoked to tell Congress how it may delegate authority."[311]

The doctrine also undercuts Congress's power (and accountability principles) in another hypocritical (and extremely unfair) way. By creating the major questions doctrine, the Court has developed a new interpretive rule that it is applying retroactively. "When the Court applies a new canon retroactively to an old statute, it imposes a cost rather than a benefit on the unsuspecting legislature . . . ."[312] Contrary to protecting Congress's delegations, scholars have called this "a 'bait and switch'"[313] because Congress does not have a "crystal ball" to proactively legislate taking new interpretive regimes into account.[314]

306. Squitieri, *supra* note 196, at 466.

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.* (emphases omitted).

312. Sohoni, *supra* note 275, at 286 (alteration removed) (quoting Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2142 (2002)).

313. *Id.* (quoting William N. Eskridge, Jr., *Textualism, The Unknown Ideal?*, 96 MICH. L. REV. 1509, 1541 n.115 (1998)).

314. *Id.* (citing Heinzerling, *supra* note 258, at 1948).

For example, the statutes that the Court interpreted in many of the recent major questions cases underscore this concern.[315] The underlying statutes were on the books before the major questions doctrine existed, and Congress enacted them in an era where broad exercises of delegations, including those that allowed "[e]xpansive exercises of agency power—even those with major consequences—were regarded as a feature of that regime, not as the system going haywire."[316]

The Court has made clear that it "is of paramount importance . . . that Congress be able to legislate against a background of clear interpretive rules, so that [Congress] may know the effect of the language it adopts."[317] By requiring clear authorizing language for major questions, "the Court has retroactively altered the rules of the road for Congresses that couldn't have anticipated, let alone complied with, such a rule."[318] As Professor Mila Sohoni quipped: "[I]sn't Congress, like everyone else, entitled to fair notice of the law that governs it?"[319] Thus, contrary to the Court's statements, Congress is hindered by the Court's major questions doctrine, not protected by it.[320] And especially when "Congress is not likely to correct the judiciary's interpretation of a major ambiguity, the doctrine functions to empower the courts, rather than Congress."[321]

Stated another way, when the Court invokes the doctrine weakening agency authority, it does so to the benefit of the Judicial Branch—not the Legislative Branch.[322] Its relocation of power from agencies (political bodies) to courts (unelected bodies) not only diminishes accountability that it seeks to protect but also raises separation of powers issues because by augmenting judicial power, it diminishes legislative power.[323]

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315. *Id.* (surveying the statutes at issue in recent major questions cases).

316. *Id.* at 287.

317. *See id.* at 287, 287 n.188 (quoting Finley v. United States, 490 U.S. 545, 556 (1989)).

318. *Id.* at 287.

319. *Id.* As Professor Sohoni notes, the same could be said about the *Chevron* doctrine, but for the fact that the Court's establishment of the test in *Chevron* as we know it developed over time and was "unintentionally revolutionary." *Id.* at 287 n.189 (quoting Kristin E. Hickman, *The (Perhaps) Unintended Consequences of* King v. Burwell, 2015 PEPP. L. REV. 56, 71 (2015)).

320. *Id.* at 276.

321. Emerson, *supra* note 294, at 2084, 2084 n.350 (citing Michael S. Greve & Ashley C. Parrish, *Administrative Law Without Congress*, 22 GEO. MASON L. REV. 501, 502 (2015) ("[T]he modern Congress has increasingly dis-empowered itself. It consistently fails to update or revise old statutes even when those enactments are manifestly outdated or, as actually administered, have assumed contours that the original Congress never contemplated and the current Congress would not countenance . . . .")).

322. Emerson, *supra* note 294, at 2084.

323. *Id.*

Other scholars have noted this troubling consequence: the "transfer of federal policymaking power from the elected branches to an unelected and unaccountable judiciary, which gets to pick which questions are major and which are not" is a major flaw in the doctrine.[324] Because the doctrine "annexes enormous interpretive power to the federal judiciary by enunciating a standard for substantive legitimacy that is so malleable that, at present, it can be said only to mean 'just what [the Court] choose[s] it to mean—neither more nor less.'"[325]

In sum, all these examples are major (no pun intended) defects and hypocrisies in the Court's reliance on the doctrine. Although the major questions doctrine can arguably prevent clashes between the Executive and Legislative Branches in certain circumstances, there is no escaping the conclusion that when the Court invokes the doctrine, it "deviate[s] from convention and assume[s] principal decisionmaking authority in light of political or economic concerns" in a way that is both incompatible with textualism and hypocritical.[326]

CONCLUSION

The major questions doctrine has profoundly impacted our administrative state and constitutional governance. Despite attempts to defend the doctrine on various bases, the Court's major questions doctrine is irreconcilable with textualism. And in justifying the doctrine as a way to protect the separation of powers and accountability principles, the Court finds itself in a hypocrisy as these principles are weakened—not strengthened. Moreover, the irony is that these same interests are key features of modern textualist principles, which the Court has abandoned in adopting the major questions doctrine. While it seems clear that the doctrine is now entrenched in our jurisprudence, the Court should rethink precisely how and when it applies the doctrine if it is going to uphold the ideals that it purports to defend.

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324. Wendy Parmet & Dorit Reiss, *Major Questions About Vaccine Mandates, the Supreme Court, and the Major Questions Doctrine*, BILL OF HEALTH (Jan. 5, 2022), https://blog.petrieflom.law.harvard.edu/2022/01/05/major-questions-vaccine-mandates-supreme-court/ [https://perma.cc/2VXZ-PFDV].

325. Sohoni, *supra* note 275, at 266 (alteration in original) (quoting LEWIS CARROLL, *Through the Looking-Glass and What Alice Found There*, *in* ALICE'S ADVENTURES IN WONDERLAND AND THROUGH THE LOOKING-GLASS 244–45 (Richard Kelly ed., 2015)).

326. Joshua S. Sellers, *"Major Questions" Moderation*, 87 GEO. WASH. L. REV. 930, 948 (2019).