

# MORE MAJOR QUESTIONS HYPOCRISY

KEVIN O. LESKE\*

*From these facts, by which Montesquieu was guided, it may clearly be inferred that, in saying “There can be no liberty where the legislative and executive powers are united in the same person . . . ” he did not mean that these departments ought to have no partial agency in, or no control over, the acts of each other.*

*—James Madison, Federalist No. 47 (quoting Montesquieu)*

*There is little dispute that many current Supreme Court Justices regard safeguarding the constitutional separation of powers as crucially important in their judicial approach. Likewise, they faithfully apply an originalism methodology and reject an activist approach in their roles as decisionmakers. But their creation and application of the major questions doctrine go against these principles.*

*The major questions doctrine requires a court to first determine whether an agency seeks to wield powers of deep economic or political significance or whether an agency’s action would represent a transformative expansion of the agency’s regulatory authority. If so, a court then must find that Congress clearly authorized the agency to act in that manner before the court can uphold the action.*

*But as a principal justification for the major questions doctrine, the Court has rested on a fallacy, resulting in hypocrisy when applying the doctrine. Justices purport to invoke the doctrine to guard against situations where, in their view, there is a potential impermissible delegation of legislative power by Congress. But applying an originalism methodology, on which they typically rely, the major questions doctrine cannot be justified on nondelegation grounds, and, hypocritically, applying the major questions doctrine runs counter to nondelegation principles.*

*As I explained almost a decade ago in Major Questions about the Major Questions Doctrine and then more recently in 2024 in Major Questions Hypocrisy, the Court has radically transformed the doctrine and its application subverts normative*

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\* Professor of Law, University of Dayton School of Law. I am grateful to the editors and staff of the *Administrative Law Review* for their excellent work on this Article. I dedicate this Article to my brother, Dave Leske, for his lifelong support.

democratic values and imperils our administrative state. Effectively, the doctrine now functions as clear statement rule to quash agency action even where Congress has statutorily empowered the agency to act.

In this Article, I expand on the arguments that I set forth in Major Questions Hypocrisy. Here, I show how an originalist view of the Constitution does not support the major questions doctrine’s justification based on Article I concerns. Furthermore, I show that even if the doctrine could be justified on nondelegation grounds, the major questions doctrine does not actually support nondelegation principles that the Justices purport to protect. Hypocritically, the application of the doctrine results in judicial legislation and judicial activism that goes directly against separation of powers and constitutional accountability principles.

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## INTRODUCTION

In Federalist No. 47, *The Particular Structure of the New Government and the Distribution of Power Among Its Different Parts*, James Madison addressed criticism that the proposed Constitution was in “violation of the political maxim, that the legislative, executive, and judiciary departments ought to be separate and distinct.”<sup>1</sup> He agreed that separation was necessary, as asserted by Montesquieu, because “[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.”<sup>2</sup>

But Madison believed that the Constitution was not “really chargeable with the accumulation of power, or with a mixture of powers, having a dangerous tendency to such an accumulation . . . .”<sup>3</sup> He stressed that the true import of what it means for the powers among the branches to be “separate and distinct” had been “totally misconceived and misapplied.”<sup>4</sup> He explained that this separation “did not mean that these departments ought to have no *partial agency* in, or no *control* over, the acts of each other.”<sup>5</sup> The evil identified by Montesquieu arose “where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department.”<sup>6</sup> It is in those circumstances where “the fundamental principles of a free constitution are subverted.”<sup>7</sup>

But now the Court has developed a new doctrine, the major questions doctrine, that in critical respects is incompatible with these ideals set forth by delegates at the Constitutional Convention, like Madison, with respect to the allocation of power among the branches. The major questions doctrine now acts as a clear statement rule that mandates a specific congressional grant of authority when an agency acts in a way that presents a “major” question. Instead of respecting the delegation of power from Congress to a federal agency, the doctrine effectuates a transfer of legislative authority to the Judicial Branch.

In recent years, the doctrine has been invoked to invalidate executive action in watershed cases involving the response to the COVID-19 pandemic, greenhouse gas regulation, and student debt loan cancellation. As I explained in 2016 in *Major Questions about the Major Questions Doctrine*, the doctrine

1. THE FEDERALIST NO. 47, at 245 (James Madison) (Ian Shapiro ed., 2009).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* at 246.

6. *Id.* at 246–47.

7. *Id.*

had been changing dramatically since its inception.<sup>8</sup> But its transformation over the past decade has been even more radical.

More recently, in 2024, I demonstrated in *Major Questions Hypocrisy* how the Court rejected its professed adherence to textualism when applying the doctrine.<sup>9</sup> In doing so, I showed how the Court's application of the doctrine manifests a hypocrisy because although the Court alleged to protect normative democratic principles and Congress's power when it invoked the doctrine, the Court subverted these principles and reassigned fundamental policy choices to the Court.

In this Article, I expand my argument to show how the Court's development of the doctrine rests on a fallacy and demonstrates a further hypocrisy. The majority of the Court, who are all avowed originalists, point to "non-delegation" principles established by Article I of the Constitution to justify the doctrine. But the doctrine cannot be supported on nondelegation grounds—even when applying an originalism methodology. Moreover, even if the nondelegation concerns could help justify the doctrine, the application of the major questions doctrine does not cure any such nondelegation problems theorized by the Court.

In Part I of this Article, I begin by briefly exploring the key Supreme Court major questions doctrine cases from its formation to the establishment of the modern doctrine. This includes introducing one early case that until very recently has been overlooked as a foundational source of the doctrine. In Part II, I explain the Court's misguided attempt (and resulting hypocrisy that transpires) to ground the doctrine in constitutional nondelegation principles. I first briefly describe the nondelegation principles implicated by the doctrine. I then show how the Court's major questions doctrine does not square with the Framers' own conception of delegation at the time of the founding.

I conclude by explaining how the Justices appear to situate the major questions doctrine as a type of nondelegation constitutional avoidance canon. I then argue that although some of these types of canons have utility in our administrative state, the major questions doctrine does not support the principles that such canons seek to protect. Although purporting to protect Article I nondelegation principles when invoking the doctrine, the Court in reality (and hypocritically) fails to promote legislative responsibility and does not result in principled judgment about excessive delegations.

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8. Kevin O. Leske, *Major Questions About the "Major Questions" Doctrine*, 5 MICH. J. ENV'T & ADMIN. L. 479, 480 (2016).

9. Kevin O. Leske, *Major Questions Hypocrisy*, 76 ADMIN. L. REV. 771, 774 (2024).

## I. THE MAJOR QUESTIONS DOCTRINE

The development of the modern major questions doctrine has spanned close to fifty years, starting with an overlooked 1980 case that has been regarded as having laid the “foundations of administrative law.”<sup>10</sup> Since that time, the doctrine has undergone three distinct periods of evolution that resulted in dramatic changes in how the doctrine has functioned in our administrative state. The Court applies the doctrine when it determines that an agency is trying to act in a way that raises a “major” question, i.e., where the statutory question at issue is “of deep ‘economic and political significance’” or where the action being reviewed would result in “an enormous and transformative expansion” in the agency’s authority.<sup>11</sup>

But unlike other doctrines, the founding and subsequent rise of the major questions doctrine went largely unnoticed. Its quiet ascension into the Court’s jurisprudence likely resulted because the Court neither named the doctrine, nor did it clearly justify and explore the basis of the developing doctrine. This Section introduces the principal cases and tracks the development of the doctrine, including its enigmatic justifications.

### A. *The Disparate Roots of the Major Questions Doctrine*

Many scholars pin what has become known as the “major questions” doctrine to two cases: *MCI Telecommunications Corp. v. AT&T Co.*<sup>12</sup> and *FDA v. Brown & Williamson Tobacco Corp.*,<sup>13</sup> which were decided in 1994 and 2000, respectively.<sup>14</sup> But deeper reflections on the doctrine reveal that an earlier case from 1980, *Industrial Union Department, AFL-CIO v. American Petroleum*

10. See *Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst. (The Benzene Case)*, 448 U.S. 607 (1980) (plurality opinion). Cass R. Sunstein, *It All Started with Benzene*, 76 ADMIN. L. REV. 673, 674 (2024).

11. See, e.g., *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 231 (1994) (rejecting agency interpretation because it was “highly unlikely” that Congress would entrust an “essential characteristic” of the statutory scheme to agency discretion); *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000) (rejecting the agency’s interpretation because it “would bring about an enormous and transformative expansion in [its] regulatory authority without clear congressional authorization”). *King v. Burwell*, 576 U.S. 473, 485–86 (2015) (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324) (question was “of deep ‘economic and political significance’”).

12. 512 U.S. 218 (1994).

13. 529 U.S. 120 (2000).

14. Leske, *supra* note 8, at 480 n.3 (observing that “the Court itself does not use a particular name to identify the doctrine” until much later).

*Institute*,<sup>15</sup> must be included.<sup>16</sup> This omission occurred because, as noted above, the doctrine did not have a formal name at its inception and the Justices did not identify a clear and singular basis for the doctrine.

Thus, hindsight now shows that the modern doctrine's requirement that there exists "clear congressional authorization" before an agency can act in a "major" way can arguably be supported by two distinct analytical justifications that the Court offered to support this test.<sup>17</sup> The first justification, which is highlighted in the 1980 case, is based on constitutional nondelegation principles grounded in Article I of the Constitution.<sup>18</sup> The second justification featured in the two cases decided in the mid-1990s is that the doctrine is based on an interpretive presumption applicable in statutory construction cases, which at the time was subject to the deference framework established by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>19</sup>

### 1. *The Benzene Case*

At issue in *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, which became known as "the Benzene Case," was a statutory provision found in the Occupational Safety and Health Act of 1970 ("the Act").<sup>20</sup> The Act's purpose was to "ensur[e] safe and healthful working conditions for every working man and woman in the Nation."<sup>21</sup> The provision empowered "the Secretary of Labor to regulate occupational exposure to benzene," which is "a substance which has been shown to cause cancer at high exposure levels."<sup>22</sup>

Under this authority and scientific showing, the Secretary promulgated a benzene standard, which was challenged on the basis of whether a high-exposure cancer showing was "a sufficient basis" to enact "a standard that

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15. 448 U.S. 607 (1980).

16. See Sunstein, *supra* note 10, at 675 n.7 (observing that "[t]he Benzene Case is singled out in both *Utility Air* and in Justice Gorsuch's elaborate concurring opinion in *West Virginia*."); *Util. Air Regul. Grp.*, 573 U.S. at 324; *West Virginia v. EPA*, 142 S. Ct. 2587, 2619 (2022) (Gorsuch, J., concurring). Justice Barrett also points to the decision. See *Biden v. Nebraska*, 143 S. Ct. 2355, 2376, 2381 (2023) (Barrett, J., concurring). Sunstein, *supra* note 10, at 675 n.7. ("[I]n this light, it seems fair to say that the Benzene Case is broadly recognized as the contemporary foundation of the Major Questions Doctrine.")

17. *Biden v. Nebraska*, 143 S. Ct. at 2375 (citing *West Virginia*, 142 S. Ct. at 2609, 2614 (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324)).

18. *Indus. Union Dep't, AFL-CIO*, 448 U.S. at 685–86 (Rehnquist, J., concurring).

19. 467 U.S. 837, 843–44 (1984).

20. *Indus. Union Dep't, AFL-CIO*, 448 U.S. at 611 (plurality opinion); 29 U.S.C. §§ 651–78 (2023).

21. *Indus. Union Dep't, AFL-CIO*, 448 U.S. at 611 (plurality opinion).

22. *Id.*

places the most stringent limitation on exposure to benzene that is technologically and economically possible.”<sup>23</sup> On its face, the statute granted the Secretary extremely broad powers to eliminate occupational risks based on exposure to toxic materials.<sup>24</sup> The Court therefore analyzed whether the Occupational Safety and Health Administration (OSHA) constituted an unconstitutional delegation of legislative power to the Secretary because of Congress’s failure to provide an intelligible principle to guide and limit the Secretary’s power.<sup>25</sup>

Justice John Paul Stevens, writing for a plurality of the Court, found that OSHA “require[d] the Secretary to find, as a threshold matter, that the toxic substance in question poses a *significant health risk* in the workplace and that a new, lower standard is therefore ‘*reasonably necessary or appropriate* to provide safe or healthful employment and places of employment,’” which the Secretary had not done.<sup>26</sup> Instead, the Secretary had “acted on the basis of the absolute, no-risk policy that it applies to carcinogens,” under a different provision in OSHA, which the Court found was “not a proper substitute for the findings of a significant risk of harm required by the Act.”<sup>27</sup> The Court therefore affirmed the judgment of the U.S. Court of Appeals for the Fifth Circuit, which had remanded the petition for review to the Secretary for further proceedings.<sup>28</sup>

Embedded in both the Court’s opinion and then-Justice William Rehnquist’s concurring opinion were the nondelegation roots of the major

23. *Id.*

24. *Id.*; 29 U.S.C. § 652(8) (2023) (“The term ‘occupational safety and health standard’ means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.”).

The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life. Development of standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws.

29 U.S.C. § 655(b)(5) (2023).

25. *Indus. Union Dep’t, AFL-CIO*, 448 U.S. at 642, 645–46 (plurality opinion).

26. *Id.* at 614–15 (emphases added).

27. *Id.* at 662.

28. *Id.*

questions doctrine. In holding that the Secretary needed to make the requisite finding before promulgating the standard, the Court rejected the Secretary's expansive view of authority granted by the statutory provisions at issue.<sup>29</sup> In the Court's mind, the adoption of the Secretary's view would give the Secretary "unprecedented power over American industry."<sup>30</sup> And the Court concluded that "[i]n the absence of a clear mandate in the Act, it [was] unreasonable to assume that Congress intended to give the Secretary" such power.<sup>31</sup>

The Court supported its reasoning by pointing to previous nondelegation doctrine cases. In *Industrial Union Department, AFL-CIO*, the Court noted that if the Secretary were correct then the Act would effectuate "such a 'sweeping delegation of legislative power' that it might be unconstitutional under the Court's reasoning in *A.L.A. Schechter Poultry Corp. v. United States* and *Panama Refining Co. v. Ryan*."<sup>32</sup> It concluded, therefore, that "[a] construction of the statute that avoids this kind of open-ended grant should certainly be favored."<sup>33</sup>

Then-Justice Rehnquist's concurring opinion elaborated on the nondelegation concerns briefly identified by Justice Stevens in his plurality decision. In Justice Rehnquist's view, the difficulty of the questions presented and "the widely varying positions advanced in the briefs of the parties and in the opinions" of the Justices "demonstrate[s], perhaps better than any other fact, that Congress [was] the governmental body best suited and most obligated to make the choice confronting us in this litigation."<sup>34</sup> And in fashioning the provisions under review, he found that Congress "ha[d] improperly delegated that choice to the Secretary of Labor and, derivatively, to this Court."<sup>35</sup>

After setting forth background principles of the separation of powers and the Court's nondelegation doctrine, he analyzed the Act's provision at issue.<sup>36</sup> Justice Rehnquist concluded that he had no doubt that it "would violate the doctrine against uncanalized delegations of legislative power," i.e., the nondelegation doctrine.<sup>37</sup> He criticized Congress for writing such broad

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29. *Id.* at 644–45.

30. *Id.* at 645.

31. *Id.*; see *West Virginia v. EPA*, 142 S. Ct. 2587, 2619 (2022) (Gorsuch, J., concurring) (citing *Indus. Union Dep't, AFL-CIO*, 448 U.S. at 645) (plurality opinion) ("[T]his Court held it 'unreasonable to assume' that Congress gave an agency 'unprecedented power[s]' in the 'absence of a clear [legislative] mandate.'").

32. *Indus. Union Dep't, AFL-CIO*, 448 U.S. at 646 (plurality opinion).

33. *Id.*

34. *Id.* at 672 (Rehnquist, J., concurring).

35. *Id.*

36. *Id.* at 672–75.

37. *Id.* at 675.

language as a way of “simply avoiding a choice which was both fundamental for purposes of the statute and yet politically so divisive that the necessary decision or compromise was difficult, if not impossible, to hammer out in the legislative forge.”<sup>38</sup>

Thus, both the Court’s plurality opinion and Justice Rehnquist’s concurring opinion identified potential nondelegation violations in the Act’s broad provisions. Significantly, the opinions also laid the foundation for the modern major questions doctrine’s requirement that there be “clear congressional authorization” in situations where agency action could be regarded as “transformative” or “staggering.”<sup>39</sup> But it would be two decades before the Court would strike down agency action citing concerns that Congress needed to be more specific in its statutes involving delegations to agencies.

## 2. MCI Telecommunications Corp. v. AT&T Co.

In *MCI Telecommunications Corp. v. AT&T Co. (MCI)*, the Court was called upon to review a statutory provision in the Communications Act of 1934, and more specifically whether the Federal Communications Commission (FCC) could lawfully construe the statutory term “modify” to excuse certain carriers from filing tariffs under the Act.<sup>40</sup>

Normally, communications common carriers must file tariffs with the FCC and then seek payment from customers according to those tariff rates.<sup>41</sup> However, the FCC can “modify” this requirement “in its discretion and for good cause shown.”<sup>42</sup> The FCC, under this authority, issued a series of reports and orders in the 1980s that exempted certain long-distance carriers from filing tariffs, but AT&T remained subject to the filing requirement.<sup>43</sup>

The Court opined 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.”<sup>44</sup> The Court reviewed the FCC regulation and found that “[r]ate filings are . . . the essential characteristic of a rate-

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38. *Id.* at 687.

39. *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022); *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014); *Biden v. Nebraska*, 143 S. Ct. 2355, 2373, 2375 (2023); Sunstein, *supra* note 10, at 675.

40. *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 220 (1994) (“These cases present the question whether the Commission’s decision to make tariff filing optional for all non-dominant long-distance carriers is a valid exercise of its modification authority.”).

41. *Id.*

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

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

44. *Id.* at 229.

regulated industry.”<sup>45</sup> Of consequence, the Court viewed the filing requirement “was Congress’s chosen means of preventing unreasonableness and discrimination in charges”<sup>46</sup> and had “always been considered essential to preventing price discrimination and stabilizing rates.”<sup>47</sup>

Based on this central relevance, the Court found 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.”<sup>48</sup> It further quipped that it would be “even more unlikely that it would achieve that through such a subtle device as permission to ‘modify’ rate-filing requirements.”<sup>49</sup> Because 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 regulation only where effective competition does not exist,” the Court rejected the FCC’s contrary interpretation.<sup>50</sup>

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

In the 2000 case of *FDA v. Brown & Williamson Tobacco Corp.*, the Court again raised what would be later known as the major questions doctrine.<sup>51</sup> The case raised the question of whether the Food and Drug Administration (FDA) had the authority to regulate tobacco products.<sup>52</sup> FDA asserted that nicotine was a “drug” within the meaning of the Food, Drug, and Cosmetic Act (FDCA) and had established regulations to eliminate tobacco consumption among children and adolescents.<sup>53</sup> FDA maintained that its interpretation was consistent from FDCA’s definition of “drug,” which included

45. *Id.* at 231.

46. *Id.* at 230 (“[T]here 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.” (quoting *Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 440 (1907)) (alteration in original)).

47. *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, T. & S.F. Ry. Co.*, 284 U.S. 370, 384 (1932)). Additionally, 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)).

48. *MCI Telecomms. Corp.*, 512 U.S. at 231.

49. *Id.*

50. *Id.* at 231–32.

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

52. *Id.* at 125.

53. *Id.*

articles “intended to affect the structure or any function of the body.”<sup>54</sup>

The Court recognized that the questions presented implicated “an administrative agency’s construction of a statute that it administers,” so that its review was governed by the deference framework under *Chevron* Steps One and Two.<sup>55</sup> Under *Chevron*, the Court observed 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.”<sup>56</sup>

However, the Court reasoned that it first was required to see whether the issue was resolved under Step One. Under that step, which entailed determining “whether Congress has directly spoken to the precise question at issue,” the Court found its analysis was influenced “by the nature of the question presented.”<sup>57</sup> Although the Court recognized that *Chevron* deference was rooted in the principle that Congress implicitly delegated the agency authority to “fill in the statutory gaps,”<sup>58</sup> the Court found it will not always presume that “Congress has intended such an implicit delegation.”<sup>59</sup>

The Court concluded that this case constituted an “extraordinary case[],” where it would not resolve the questions under Step Two.<sup>60</sup> In support of its decision to resolve the question under Step One, the Court found that FDA’s action would reach “a significant portion of the American economy.”<sup>61</sup> For example, the Court noted that “[t]he 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.”<sup>62</sup>

The Court also reasoned that its analysis in *MCI* was “instructive.”<sup>63</sup> As in *MCI*, the Court was “confident that Congress could not have intended to

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54. *Id.* at 126 (quoting 21 U.S.C. § 321(g)(1)(C) (1994)).

55. *Id.* at 132 (citing *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43, 866 (1984) (using *Chevron*’s two-step analysis)).

56. *Id.* (quoting *Chevron*, 467 U.S. at 866). 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)).

57. *Id.* at 159.

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

59. *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.”)).

60. *Id.*

61. *Id.* (“This is hardly an ordinary case.”).

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

63. *Id.* at 160.

delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”<sup>64</sup> Thus, the Court again relied on the lack of a clear signal from Congress concerning the scope of the agency’s power when faced with this major question.

### B. *The Reemergence of the Major Questions Doctrine*

Despite strong showings in both *MCI* and *Brown & Williamson*, the major questions doctrine slipped into decade-long slumber. But in two cases decided in 2014 and 2015, the doctrine awoke. It was at this time the doctrine began expanding, drawing attention among scholars.<sup>65</sup> In these cases, the focus of the Court’s analysis was not on constitutional nondelegation principles similar to those raised in the Benzene Case. Rather, these cases principally relied on the statutory construction methodology set forth in both *MCI* and *Brown & Williamson* as the guiding precedent to assess the agency action being reviewed.

#### 1. UARG v. EPA

In *Utility Air Regulation Group v. EPA (UARG)*,<sup>66</sup> the Court applied the major questions doctrine to reject the Environmental Protection Agency’s (EPA’s) interpretation of a Clean Air Act (CAA) provision involving the regulation of greenhouse gases (GHGs).<sup>67</sup> At issue in the case were a host of challenges to EPA’s “cascading series of greenhouse gas-related rules and regulations” promulgated after the Supreme Court’s 2007 ruling in *Massachusetts v. EPA*<sup>68</sup> that GHGs can be regulated under the CAA.<sup>69</sup> In the wake of the Court’s decision in *Massachusetts v. EPA*, it was unclear whether EPA’s subsequent issuance of GHG emission standards for new motor vehicles automatically triggered the requirement for EPA to also regulate certain “stationary sources,” including power plants, industrial facilities, and smaller sources,

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64. *Id.*

65. It was at this time that I detailed a shift in the doctrine. Leske, *supra* note 8. See also Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19, 45 (2010) (proposing that the doctrine “cannot be applied in a consistent fashion.”).

66. 573 U.S. 302 (2014).

67. *Id.* at 307, 321. For a detailed analysis of the case, see generally 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, 54 (2014) (arguing that following *UARG*, the Court would “scrutinize future attempts by agencies . . . to expand their regulatory authority beyond their historic limits.”).

68. 549 U.S. 497, 528 (2007).

69. *Coal. for Responsible Regul., Inc. v. EPA*, 684 F.3d 102, 114 (D.C. Cir. 2012) (citing *Massachusetts v. EPA*, 549 U.S. 497 (2007)).

like apartment buildings.<sup>70</sup> Alternatively, even if EPA was not required to regulate these stationary sources, the Court was called to determine whether EPA could choose to do so under the CAA.<sup>71</sup>

In answering these questions, the Court proceeded through a major questions analysis twice.<sup>72</sup> Justice Scalia, joined by Chief Justice Roberts and Justices Thomas, Kennedy, and Alito, viewed the case as involving “two distinct challenges.”<sup>73</sup> The Court, first, 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.”<sup>74</sup> The Court, second, 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.<sup>75</sup>

The Court undertook three distinct analyses to answer the first question, as follows: (1) whether EPA’s view was compelled by the statute;<sup>76</sup> (2) if not compelled, whether EPA’s view was a reasonable construction of the CAA;<sup>77</sup> and (3) if not reasonable, whether EPA’s issuance of a related CAA rule could remedy the unreasonable interpretation.<sup>78</sup> At the time, this approach was unsurprising because the Court had identified that it would apply the *Chevron* framework.<sup>79</sup> Starting with *Chevron* Step One, the Court examined whether the plain language of the CAA required a source that was not otherwise regulated (because of its *actual* emission level of conventional pollutants) must be subject to these new permitting requirements based solely on the source’s “*potential* to emit” greenhouse gasses.<sup>80</sup> The Court rejected EPA’s position that the CAA was unambiguous and found that the statute did not compel such a result.<sup>81</sup>

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70. Leske, *supra* note 67, at 3.

71. 573 U.S. at 314–15.

72. *Id.* at 324, 332.

73. *Id.* at 314.

74. *Id.* (emphasis added).

75. *Id.* at 314–15 (emphasis added); *see also id.* at 329 (discussing the permissibility of requirements EPA placed on sources already subject to the Clean Air Act (CAA) permitting program).

76. *Id.* at 315–20.

77. *Id.* at 321–24.

78. *Id.* at 325–28.

79. *Id.* at 315.

80. *Id.* at 314–15 (emphases added). 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.*

81. *Id.* at 320 (finding “no insuperable textual barrier” in the CAA preventing EPA from

The Court rejected EPA's plain language argument and next undertook a *Chevron* Step Two analysis to determine whether EPA's interpretation that the CAA could be interpreted to regulate these so-called "anyway" sources<sup>82</sup> was reasonable.<sup>83</sup> This was the part of the analysis where the Court raised the major questions doctrine.<sup>84</sup> While acknowledging that *Chevron's* deferential framework allowed EPA to "operate 'within the bounds of reasonable interpretation,'" the Court did not accept EPA's interpretation of the CAA.<sup>85</sup>

The Court explained that the interpretation of an ambiguous statutory term is guided by "'the specific context in which . . . language is used' and 'the broader context of the statute as a whole.'"<sup>86</sup> Accordingly, "an agency interpretation that is 'inconsisten[t] with the design and structure of the statute as a whole,' . . . does not merit deference."<sup>87</sup>

With these principles in mind, the Court found that applying the permitting scheme to smaller stationary sources would contravene Congress's intent.<sup>88</sup> The Court cited to EPA's own finding that the inclusion of smaller sources would result in a "complicated, resource-intensive, time-consuming, and sometimes contentious process."<sup>89</sup> Because Congress's intent in this program was to cover "a relative handful of large sources capable of shouldering heavy substantive and procedural burdens,"<sup>90</sup> the Court concluded that Congress would not have wanted the program to apply to "'tens of thousands of smaller sources."<sup>91</sup>

The Court supported its conclusion with citations and quotations from various major questions cases. For example, the Court found that EPA's interpretation that GHG emissions alone could trigger CAA permitting requirements "would bring about an enormous and transformative expansion

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excluding greenhouse gas emissions as a permitting trigger).

82. *Id.* at 314–15.

83. *Id.* at 321.

84. *Id.* at 324.

85. *Id.* at 321 (quoting *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013)).

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

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

88. *Id.* at 321–22 ("[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 *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. 31,514, 31,533 (June 3, 2010))).

89. *Id.* at 323 (quoting *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 74 Fed. Reg. 55,292, 55,304, 55,321–22 (proposed Oct. 27, 2009)).

90. *Id.* at 322.

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

in EPA's regulatory authority without clear congressional authorization."<sup>92</sup> It also cited language in both *Brown & Williamson* and *MCI* that courts should be cautious to accept interpretations without clear direction by Congress in circumstances where an agency's interpretation impacts "a significant portion of the American economy."<sup>93</sup> Thus, the Court concluded that the agency's interpretation did "not merit deference."<sup>94</sup>

The second question that the Court was required to determine 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.<sup>95</sup>

The Court concluded that the provision unambiguously applies to GHG emissions from "'anyway' sources" under Step One.<sup>96</sup> Applying major questions principles, the Court found 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.<sup>97</sup> 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 to this part of the analysis.<sup>98</sup>

## 2. King v. Burwell

The following year, in *King v. Burwell*,<sup>99</sup> the Court applied the major questions doctrine in a statutory construction case involving tax credits available to individuals under the Patient Protection and Affordable Care Act (ACA).<sup>100</sup> To advance the ACA's goal to offer universal health care, the ACA

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92. *Id.* at 323–24.

93. *Id.* at 324 (first quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000); then citing *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 231 (1994); and then citing *Indus. Union Dep't, AFL–CIO v. Am. Petroleum Inst. (The Benzene Case)*, 448 U.S. 607, 645–46 (1980) (plurality opinion)).

94. *Id.* at 321.

95. *Id.* at 314–15; *see also id.* at 329–30 (discussing the permissibility of requirements placed on sources already subject to the CAA permitting program).

96. *Id.* at 332.

97. *Id.*

98. *See id.* (concluding that 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.>").

99. 576 U.S. 473 (2015).

100. *See id.* at 479 (stating the issue of the applicability of tax credits under the Patient

set up a host of health insurance reforms applicable to all states.<sup>101</sup> 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).<sup>102</sup> The second reform mandated that individuals secure health insurance coverage or face an Internal Revenue Service (IRS) penalty (the “coverage requirement”).<sup>103</sup> The third reform offered tax credits to low-income individuals to make health coverage more affordable.<sup>104</sup>

In order to effectuate these reforms, the ACA mandated each state to create an “Exchange” for individuals to purchase health insurance coverage.<sup>105</sup> For states that declined to provide an Exchange, the Secretary of Health and Human Services (HHS) was directed to “establish and operate such Exchange within the State.”<sup>106</sup> The existence of both State and Federal Exchanges led to the question presented in the case.<sup>107</sup>

The *King* Court needed to determine “whether the Act’s tax credits [were] available in States that have a Federal Exchange rather than a State Exchange.”<sup>108</sup> The ACA stated that tax credits “shall be allowed” for any “applicable taxpayer,” but another provision stated 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].”<sup>109</sup>

The IRS interpretation was that the ACA provision meant that individuals were eligible for credits when insurance was purchased in either a State or a Federal Exchange.<sup>110</sup> Several parties challenged the IRS interpretation and argued that a Federal Exchange did not include “an Exchange established by the State under [42 U.S.C. § 18031].”<sup>111</sup> Therefore, under their

Protection and Affordable Care Act); The 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.).

101. *King*, 576 U.S. at 478–79.

102. *Id.* at 480–81 (quoting 42 U.S.C. § 300gg-1(a) (2012)) (“[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.”).

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

104. *Id.* at 482.

105. *Id.* (citing 42 U.S.C. § 18031(b)(1) (2012)).

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

107. *Id.*

108. *Id.*

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

110. *Id.* (citing Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,378 (May 23, 2012) (to be codified at 26 C.F.R. pt. 602)).

111. *Id.* (alteration in original).

view, tax credits were not available for individuals who enrolled through a Federal Exchange.<sup>112</sup>

To analyze this question, the Court first turned to the major questions doctrine. The Court noted that it generally 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.”<sup>113</sup> But quoting *Brown & Williamson*, the Court noted that “[i]n extraordinary cases . . . there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.”<sup>114</sup> As in *Brown & Williamson*, the Court found the issues in *King* were of such “extraordinary” significance that Congress had not intended the IRS to receive *Chevron* deference for its interpretation of the ACA.<sup>115</sup> Thus, the major questions doctrine was used to take the Court’s analysis out of the *Chevron* framework.

The Court reasoned that a principal program in the ACA was the eligibility for tax credits.<sup>116</sup> Thus, the agency’s interpretation stood to affect “billions of dollars in spending each year,” as well as “the price of health insurance for millions of people.”<sup>117</sup> Quoting *UARG*, the Court found that securing the credits on the Federal Exchange was therefore “a question of deep ‘economic and political significance’ that was central to this statutory scheme.”<sup>118</sup> Because of this major question, the Court explained Congress would have clearly stated if it wanted the IRS to resolve such an important issue.<sup>119</sup>

The Court, therefore, determined it was the Court’s role to “determine the correct reading” of the tax credit provision without aid of the IRS’s interpretation.<sup>120</sup> The Court reasoned that “[i]f the statutory language is plain, [the Court] must enforce it according to its terms.”<sup>121</sup> To do this, the Court stated it would consider the provision’s words in context and the “overall statutory scheme.”<sup>122</sup> The Court ultimately concluded that the ACA “allows tax credits for insurance purchased on any Exchange.”<sup>123</sup>

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112. *Id.* at 485.

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

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

115. *Id.* at 485–86.

116. *Id.* at 485.

117. *Id.* at 485.

118. *Id.* at 485–86 (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

119. *Id.* at 486.

120. *Id.*

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

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

123. *Id.* at 498.

### C. *The New Major Questions Doctrine*

Following cases like *UARG* and *King*, the major questions doctrine transmuted into doctrine that bore little resemblance from its roots.<sup>124</sup> In a series of cases from 2022 to 2023, the Justices repeatedly relied on the doctrine in cases where the Court assessed the permissible scope of agency power. As shown by the majority opinions in *West Virginia v. EPA*<sup>125</sup> and *Biden v. Nebraska*,<sup>126</sup> as well as several other cases on the Court’s “shadow docket,” the Court entrenched the major questions doctrine as a clear-statement interpretive canon that effectively acted as a presumption against agency power.<sup>127</sup> Despite its newly-exalted status in the Court’s interpretive toolkit in statutory construction cases, the Court still failed to comprehensively justify the basis for the doctrine.

#### 1. *West Virginia v. EPA*

The Court’s 2022 decision in *West Virginia* is seen as a watershed moment for the major questions doctrine because it cemented the doctrine as the starting point in the Court’s analytic framework when reviewing the scope of agency power. In *West Virginia*, the Court relied on the doctrine to strike down a rule issued by EPA under the CAA.<sup>128</sup> Under EPA’s Clean Power Plan rule, promulgated under § 111(d) of the CAA, existing coal-fired and natural-gas-fired power plants faced new requirements to significantly limit carbon dioxide emissions.<sup>129</sup> The Court was called upon to review whether EPA’s expansive view of its authority to require reductions in carbon dioxide emissions for these power plants was permissible under the CAA.<sup>130</sup>

Pursuant to § 111 of the CAA, power plants must follow “standard of performance” determined by EPA for their emission of certain pollutants into the ambient air.<sup>131</sup> This standard of performance must be the best system of emission reduction (BSER) that EPA has determined to be “adequately demonstrated” for a given category of sources.<sup>132</sup> In previous rules, EPA

124. *See id.* at 485–86 (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

125. 142 S. Ct. 2587, 2609 (2022).

126. 143 S. Ct. 2355, 2374–75 (2023).

127. *See West Virginia*, 142 S. Ct. at 2614; *Nebraska*, 143 S. Ct. at 2374; Ala. Ass’n. of Realtors v. Dep’t of Health & Hum. Servs., 141 S. Ct. 2485, 2486, 2489 (2021) (per curiam); Nat’l Fed’n of Indep. Bus. v. Occupational Safety & Health Admin., 142 S. Ct. 661, 666 (2022); *Biden v. Missouri*, 142 S. Ct. 647, 658 (2022) (Thomas, J., dissenting).

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

129. *Id.* at 2602 (citing 42 U.S.C. § 7411(d)(1) (2023)).

130. *Id.* at 2600.

131. *Id.* at 2599 (citing 42 U.S.C. § 7411(a)(1) (2023)).

132. These standards apply to both new power plants and existing plants. *Id.* (citing 42

established such standards based on practices that required a power plant to run more cleanly, which would then reduce pollution at the plant.<sup>133</sup> But in the Clean Power Plan rule, EPA found 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” outside the plant.<sup>134</sup>

According to EPA, the BSER in the Clean Power Plan rule was composed of three “building blocks” (i.e., types of measures) for plants to undertake.<sup>135</sup> The first building block set forth to practices for existing coal-fired power plants to burn coal more efficiently.<sup>136</sup> But because these “heat rate improvements” would “lead to only small emission reductions” due to the already high efficiency of many coal-fired power plants, EPA found that “much larger emission reductions [were] needed from [these plants] to address climate change.”<sup>137</sup>

The second and third building blocks involved “generation shifting from higher-emitting to lower-emitting’ producers of electricity.”<sup>138</sup> For instance, the second building block shifted electricity production from coal-burning power plants to natural gas-fired plants.<sup>139</sup> This shift decreased 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.”<sup>140</sup> Similarly, the third building block shifted coal and gas-fired plants to “new low- or zero-carbon generating capacity,” such as wind and solar power.<sup>141</sup>

To aid a regulated plant to undertake the shift in generation to less polluting sources, EPA recommended three options.<sup>142</sup> An operator of a facility

U.S.C. §§ 7411(a)(1), (b)(1), (d) (2023)).

133. *Id.*

134. *Id.*

135. *Id.* at 2603 (citing Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Generating Units, 80 Fed. Reg. 64,661, 64,667 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60)).

136. *Id.*

137. *Id.* (alterations in original).

138. *Id.*

139. *Id.* (citing Carbon Pollution Emission Guidelines for Existing Stationary Sources, 80 Fed. Reg. 64,661, 64,728).

140. *Id.* at 2603.

141. *Id.* (citing Carbon Pollution Emission Guidelines for Existing Stationary Sources, 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 CO<sub>2</sub> controls.” *Id.* (quoting Carbon Pollution Emission Guidelines for Existing Stationary Sources, 80 Fed. Reg. 64,661, 64,728).

142. *Id.* (citing Carbon Pollution Emission Guidelines for Existing Stationary Sources, 80

could lessen its overall emissions by reducing its own electricity production.<sup>143</sup> An operator could also build or invest in a low or zero-carbon generating facility, like a new natural gas plant, wind farm, or solar installation, which would then allow them to increase generation at that facility.<sup>144</sup> Finally, an operator could enter into a cap-and-trade program where it could buy emissions “allowances or credits.”<sup>145</sup> Operators in these types of programs can buy a credit from another source in order to meet their own limit on emissions.<sup>146</sup>

EPA concluded that implementation of any of these steps would lead to a sector-wide shift in electricity production from coal to natural gas and renewables.<sup>147</sup> Moreover, because the power grid is an integrated system of producers, any of the options chosen by coal-fired plants (i.e., “reducing their own production, subsidizing an increase in production by cleaner sources, or both”) would effectuate a shift to wind, solar, and natural gas for electricity production.<sup>148</sup>

Chief Justice Roberts, joined by Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett, applied the major questions doctrine to invalidate the Clean Power Plan rule.<sup>149</sup> In a break from how the Court applied the doctrine in *MCI* and *Brown & Williamson*, the Court did not assess the statutory interpretation question under the *Chevron* framework. Instead, the Court began and finished with a major questions doctrine analysis.<sup>150</sup>

The Court looked to “both separation of powers principles and a practical understanding of legislative intent” to validate its application of the major questions doctrine.<sup>151</sup> The Court explained that for questions involving an agency’s authority, the analysis should be “shaped, at least in some measure, by the nature of the question presented” to assess whether Congress wanted to grant the agency the power that the agency now asserts.<sup>152</sup>

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Fed. Reg. 64,661, 64,731).

143. *Id.*

144. *Id.*

145. *Id.* (citing Carbon Pollution Emission Guidelines for Existing Stationary Sources, 80 Fed. Reg. 64,661, 64,731–32).

146. *Id.*

147. *Id.* (citing Carbon Pollution Emission Guidelines for Existing Stationary Sources, 80 Fed. Reg. 64,661, 64,731).

148. *Id.*

149. *Id.* at 2605, 2616. The Court first found that at least one of the petitioners had standing and also that case was not moot. *Id.* at 2607. Its discussion is not relevant to the Court’s major questions analysis. *Id.*

150. *Id.* at 2609–10.

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

152. *Id.* at 2607–08 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

It then applied a presumption in “extraordinary cases” such that 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.<sup>153</sup> The Court found that in these cases, the agency must affirmatively point to “clear congressional authorization” before undertaking the action.<sup>154</sup> It supported this requirement by quoting *MCI*, where the Court had found that Congress does not “use oblique or elliptical language to empower an agency to make a ‘radical or fundamental change’ to a statutory scheme.”<sup>155</sup>

Next, the Court discussed why it found the case qualified as “a major questions case.”<sup>156</sup> The Court reasoned that EPA’s new and dramatic view of its power under § 111(d) would allow EPA “to substantially restructure the American energy market” in a way that would affect a “transformative expansion in [EPA’s] regulatory authority.”<sup>157</sup> The fact that EPA’s assertion of power stemmed from a provision seen as “a gap filler [that] had rarely been used” in the past, reinforced the Court’s view.<sup>158</sup>

Following a more detailed discussion on why the Court viewed the Clean Power Plan rule as exerting an “unprecedented power over American industry,”<sup>159</sup> the Court addressed whether Congress had granted EPA “clear congressional authorization” to regulate power plants in this manner.<sup>160</sup> It rejected EPA’s main argument that the CAA’s delegation to EPA to establish

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

154. *Id.* at 2609; *see id.* (“We presume that ‘Congress intends to make major policy decisions itself, not leave those decisions to agencies.’” (quoting *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017)) (Kavanaugh, J., dissenting from denial of rehearing en banc)); *id.* (stating that, in CAA cases, “[e]xtraordinary grants of regulatory authority are rarely accomplished through ‘modest words,’ ‘vague terms,’ or ‘subtle device[s]’” (quoting *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001))).

155. *Id.* at 2609 (quoting *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 229 (1994)).

156. *Id.* at 2610.

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

158. *Id.* The Court was also wary because 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. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2486–87, 2490 (2021) (per curiam). Under such situations, the Court must “hesitate before concluding that Congress” intended to give EPA this authority under Section 111(d). *West Virginia v. EPA*, 142 S. Ct. 2599, 2608 (2022) (quoting *Brown & Williamson*, 529 U.S. at 159–60).

159. *Id.* at 2612 (quoting *Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst. (The Benzene Case)*, 448 U.S. 607, 645 (1980) (plurality opinion)).

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

emissions caps to be set at a level reflecting “the application of the best system of emission reduction . . . adequately demonstrated” met the Court’s test.<sup>161</sup> But the Court called this delegation “vague” and “not close to the sort of clear authorization required by our precedents.”<sup>162</sup>

The Court ended by admitting that controlling carbon dioxide emissions to effectuate a transition away from using coal to produce electricity might “be a sensible ‘solution to the crisis of the day.’”<sup>163</sup> But it held that § 111(d) did not empower EPA to do that on its own because “[a] decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body.”<sup>164</sup>

## 2. Biden v. Nebraska

The following year in *Biden v. Nebraska*, the Court again invoked the major questions doctrine.<sup>165</sup> The case involved the propriety of the Biden Administration’s student loan forgiveness program, issued by the Secretary of Education under the Higher Education Relief Opportunities for Students Act of 2023 (HEROES Act).<sup>166</sup> In an identical lineup as in *West Virginia*, Chief Justice Roberts, joined by Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett, found that the Secretary of Education lacked the power under the HEROES Act to enact the program.<sup>167</sup>

The Court first summarized statutory scheme, starting with the Higher Education Act of 1965 (“Education Act”), which “assist[ed] in making available the benefits of postsecondary education to eligible students . . . in institutions of higher education” by making federal loans available.<sup>168</sup> The Education Act addressed the conditions and terms for these loans in detail, including “applicable interest rates, loan fees, repayment plans, and consequences of default.”<sup>169</sup>

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161. *Id.* at 2614 (quoting 42 U.S.C. § 7411(a)(1) (2023)).

162. *Id.* (citing 42 U.S.C. § 7411(a)(1) (2023)). The Court also analyzed assertions by EPA and other respondents that EPA’s authority was supported by other provisions of the CAA. *See id.* at 2614–16.

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

164. *Id.*

165. *See Biden v. Nebraska*, 143 S. Ct. 2355, 2373 (2023).

166. *See id.* at 2362. The states of Missouri, Nebraska, Iowa, Arkansas, Kansas, and South Carolina asserted that “the HEROES Act [did] not authorize the loan cancellation plan.” *Id.*

167. *Id.* at 2362.

168. *Id.* at 2362 (quoting 20 U.S.C. § 1070(a) (2018)).

169. *Id.* (citing 20 U.S.C. §§ 1077, 1080, 1087e, 1087dd (2018)).

Under the Act, the Secretary is also authorized to reduce or cancel loans, if specified criteria are met.<sup>170</sup> For instance, the Secretary is permitted to 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.<sup>171</sup>

The Court then surveyed subsequent amendments to the statute. For example, following the terrorist attacks on September 11, 2001, Congress passed the Higher Education Relief Opportunities for Students Act of 2001 to protect those borrowers in the military who might have been affected.<sup>172</sup> This Act granted the Secretary of Education “specific waiver authority to respond to conditions in the national emergency” caused by the attacks.<sup>173</sup> Due to the waiver provision termination date of September 30, 2003, Congress extended the coverage in the Higher Education Relief Opportunities for Students Act of 2003.<sup>174</sup> The Higher Education Relief Opportunities for Students Act of 2003 also expanded the coverage of the 2001 act to cover any war or national emergency and allowed the Secretary to “waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the [Education Act] as the Secretary deems necessary in connection with a war or other military operation or national emergency.”<sup>175</sup>

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170. *See id.* at 2363.

171. *Id.* (citing 20 U.S.C. §§ 1078-10, 1087j, 1087ee (2018)).

172. *See id.*

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

174. *See id.* (citing Higher Education Relief Opportunities for Students Act of 2003, Pub. L. No. 108-76, 117 Stat. 908).

175. *Id.* (alteration in original) (quoting 20 U.S.C. § 1098bb(a)(1) (2018)). 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.* (alteration in original) (quoting 20 U.S.C. § 1098bb(a)(2)(A) (2018)). 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.* (quoting 20 U.S.C. § 1098ee(2)(C)–(D) (2018)). For the purposes of the Act, a “‘national emergency’” is defined as “‘a national emergency declared by the President of the United States.’” *Id.* (quoting 20 U.S.C. § 1098ee(4) (2018)).

In 2020, President Trump declared the COVID-19 pandemic to be a national emergency.<sup>176</sup> Based on this declaration, the Secretary suspended loan repayments and interest accrual for all federally held student loans.<sup>177</sup> Congress also passed the Coronavirus Aid, Relief, and Economic Security Act, mandating the Secretary to extend the relief suspensions through the end of September 2020.<sup>178</sup> Subsequently, the Secretary “extended the suspensions, broadened eligibility for federal financial assistance, and waived certain administrative requirements.”<sup>179</sup>

No further action occurred with respect to the relief program, apart from maintaining the repayment and interest suspensions, until late 2022.<sup>180</sup> The Secretary in October 2022 promulgated a new debt cancellation plan to lessen and, in some cases, obviate student debt under the HEROES Act.<sup>181</sup> For example, “[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.”<sup>182</sup> Former Pell Grant recipients with loans were also able to cancel up to \$20,000 of their loans.<sup>183</sup> The Court concluded

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

177. *Id.* (citing *Breaking News: Testing Waivers and Student Loan Relief*, ED REVIEW (Dep’t of Educ., Washington, DC), Mar. 20, 2020 (on file with author)).

178. *Id.* (citing Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 3513, 134 Stat. 281, 404–05 (2020)).

179. *Id.* (citing Federal Student Aid Programs (Student Assistance General Provisions, Federal Perkins Loan Program, William D. Ford Federal Direct Loan Program, and Federal-Work Study Programs), 85 Fed. Reg. 79,856, 79,856–63 (Dec. 11, 2020) (to be codified at 34 C.F.R. pts. 600, 602, 668, 673, 674, 682, and 685)); Federal Student Aid Programs (Student Assistance General Provisions, Federal Perkins Loan Program, William D. Ford Federal Direct Loan Program, and Federal-Work Study Programs), 86 Fed. Reg. 5,008 (Jan. 19, 2021) (to be codified at 34 C.F.R. pts. 600, 602, 668, 673, 674, 682, and 685)). 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 in order to maintain the suspensions through the end of the year. *Id.* (alteration in original) (quoting Memorandum on Continued Student Loan Payment Relief During the COVID-19 Pandemic, 2020 DAILY COMP. PRES. DOC. 1 (Aug. 8, 2020)).

180. *Id.*

181. *Id.* at 2364 (citing Federal Student Aid Programs (Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program), 87 Fed. Reg. 61,512, 61,512–14 (Oct. 12, 2022) (to be codified at 34 C.F.R. pts. 674, 682, and 685)).

182. *Id.* at 2364–65 (citing Federal Student Aid Programs, 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 (2022)).

183. *Id.* at 2365 (citing Federal Student Aid Programs, 87 Fed. Reg. at 61,514). “Eligible

its review of the history and statutory background by noting that it was estimated that 43 million borrowers qualified for relief, which would have effectuated a cancellation of \$430 billion in debt principal.<sup>184</sup>

The Court next applied the major questions doctrine to analyze the statutory provision that the Secretary asserted granting him authority to promulgate the loan forgiveness program.<sup>185</sup> The Court found that the Secretary's power to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the [Education Act] as the Secretary deems necessary in connection with a war or other military operation or national emergency" came with "limits."<sup>186</sup> Quoting *MCI*, the Court held that the authority "to 'modify' [did] not authorize 'basic and fundamental changes in the scheme' designed by Congress."<sup>187</sup>

The Court reasoned that "modify" conveyed "a connotation of increment or limitation" that must be construed to mean "to change moderately or in minor fashion."<sup>188</sup> In other words, the Secretary's authority to "modify" statutes and regulations allowed "modest adjustments and additions to existing provisions, not [to] transform them."<sup>189</sup> The Court then explained the way in which the Secretary's latest "modifications" were not "'moderate' or 'minor.'"<sup>190</sup> In the Court's view, the Secretary's interpretation "created a novel and fundamentally different loan forgiveness program."<sup>191</sup> Following the

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loans include 'Direct Loans, [Federal Family Education Loans] loans held by the Department or subject to collection by a guaranty agency, and Perkins Loans held by the Department.'" *Id.*

184. *Id.* (citing Joint Appendix at 119, *Biden v. Nebraska*, 600 U.S. 482 (2023) (Nos. 22-506 & 22-535)); Letter from Phillip L. Swagel, Dir., Cong. Budget Off., to Sen. Richard Burr, Ranking Member, S. Comm. on Health, Educ., Lab., and Pensions and Rep. Virginia Foxx, Ranking Member, H. Comm. on Educ. and Lab. 3 (Sept. 26, 2022), <https://www.cbo.gov/system/files/2022-09/58494-Student-Loans.pdf> [<https://perma.cc/X697-8N6W>].

185. *Biden v. Nebraska*, 143 S. Ct. at 2365–68.

186. *Id.* at 2368 (alteration in original) (quoting 20 U.S.C. § 1098bb(a)(1) (2018)).

187. *Id.* (quoting *MCI Telecomms. Corp. v. AT&T. Co.*, 512 U.S. 218, 225 (1994)).

188. *Id.* The Court also cited both a dictionary and legal dictionary. *Id.* at 2368–69 (alteration in original) (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1452 (2002) ("[D]efining '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.'"); BLACK'S LAW DICTIONARY 1203 (11th ed. 2019) ("[G]iving 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.'")).

189. *Id.* at 2369.

190. *Id.*

191. *Id.* For example, as a result of the program, which was estimated to affect 98.5% of all borrowers, the Secretary had effectively "expanded forgiveness to nearly every borrower

analysis in *MCI*, the Court determined that it was “highly unlikely that Congress authorized such a sweeping loan cancellation program through such a subtle device as permission to ‘modify.’”<sup>192</sup>

The major questions doctrine analysis by the Court continued by analogizing to the decision in *West Virginia*, which “involved similar concerns over the exercise of administrative power.”<sup>193</sup> It compared EPA’s plan in *West Virginia*, which was “to impose a nationwide cap on carbon dioxide emissions” to the Secretary’s debt cancellation plan.<sup>194</sup> Harnessing the language set forth in another foundational major questions doctrine case, *Brown & Williamson*, the Court stated 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.’”<sup>195</sup>

The Court explained that the Secretary’s view of his power under the HEROES Act, which would have canceled the obligation to repay \$430 billion in student loans, was unprecedented.<sup>196</sup> The Court cited that the Secretary had only once waived or modified a provision with respect to debt cancellation.<sup>197</sup> Therefore, the Court concluded that “[n]o regulation premised on’ the HEROES Act ‘has even begun to approach the size or scope’ of the Secretary’s program.”<sup>198</sup>

in the country.” *Id.* (citing Press Release, White House, 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://bidenwhitehouse.archives.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/TG9U-F4B5>]).

192. *Id.* at 2369–70 (internal quotations omitted) (quoting *MCI Telecomms. Corp.*, 512 U.S. at 231). 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.

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

194. *Id.*

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

196. *Id.*

197. *Id.* (citing Federal Student Aid Programs (Student Assistance, General Provisions, Federal Perkins Loan Program, Federal Direct Loan Program, Federal Family Education Loan Program and the Federal Pell Grant Program), 68 Fed. Reg. 69,312, 69,317 (Dec. 12, 2003) (to be codified at 34 C.F.R. pts. 668, 674, 682, and 685) (explaining that in 2003, the Secretary waived certain requirements under the Education Act’s public service discharge provisions)).

198. *Id.* at 2372–73 (alteration in original) (quoting *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam)).

The Court ended its opinion with the new major questions doctrine’s test finding that “[t]he basic and consequential tradeoffs’ inherent in a mass debt cancellation program ‘are ones that Congress would likely have intended for itself.’”<sup>199</sup> As such, the case presented a major question that therefore required the Secretary to “point to ‘clear congressional authorization’” to justify the challenged program.<sup>200</sup> Under the Court’s view, Congress had not supplied such authority in the HEROES Act.<sup>201</sup>

## II. MORE MAJOR QUESTIONS HYPOCRISY

As demonstrated above, the major questions doctrine is now a central feature in the Court’s jurisprudence in cases assessing the breadth of agency power based on a statutory grant by Congress. But despite its entrenchment as an analytical tool in statutory construction cases implicating the scope of agency power, the Court has justified the doctrine rather obliquely. A common thread, however, is that the Justices assert that the doctrine is grounded in the separation of powers and protects related accountability principles in our democratic system.<sup>202</sup>

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

200. *Id.* (citing *West Virginia*, 142 S. Ct. at 2614).

201. *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.

202. *See, e.g., West Virginia*, 142 S. Ct. at 2609 (“[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.” (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014))); *Nebraska*, 143 S. Ct. at 2380 (Barrett, J., concurring); *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 West Virginia*, 142 S. Ct. at 2620 (Gorsuch, J., concurring) (“The major questions doctrine seeks to protect against ‘unintentional, oblique, or otherwise unlikely’ intrusions on these interests.” (quoting *Nat’l Fed’n of Indep. Bus. v. Occupational Safety & Health Admin.*, 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring))); *id.*, 142 S. Ct. at 2626 (“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 (“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); *Nat’l Fed’n of Indep. Bus. v. Occupational*

In *Major Questions Hypocrisy*, I explained how the Court abandoned its reliance on textualism in cases when it applied the doctrine.<sup>203</sup> I then explained how, in doing so, the Court was hypocritical.<sup>204</sup> Although it purported to apply the doctrine in order to protect legislative power and advance normative democratic principles, the Court's invocation of the doctrine failed to support accountability principles and resulted in the transfer of power to the Judicial Branch instead.<sup>205</sup>

Here, I show how the Court's attempt to justify the doctrine on constitutional nondelegation grounds fails, even when applying an originalism analysis. I first briefly describe the nondelegation principles implicated by the doctrine, including the current status of the nondelegation doctrine in the Court's jurisprudence. Next, I demonstrate how the Court's major questions doctrine does not square with the Framers' own conception of delegation at the time of the founding. Wide grants were known and common during this era, so that the Court's creation of the major question doctrine based on nondelegation principles is unsupportable.

I also demonstrate how the Court's invocation results in further hypocrisy. I explain how the Justices appear to justify and situate the major questions doctrine in a class of nondelegation constitutional avoidance canons. I then argue that although some of these types of canons have utility in our administrative state, the major questions doctrine does not support the principles that these canons seek to protect. Although the Court purports to protect Article I nondelegation principles, the Court in actuality (and hypocritically) can create and exacerbate such concerns when invoking the doctrine.

#### A. *The Separation of Powers and the Nondelegation Doctrine*

The Court has maintained that the major questions doctrine is based on “separation of powers principles” coupled with the related “practical understanding of legislative intent.”<sup>206</sup> The principal separation of powers principle identified by Justices is that the major questions doctrine is necessary to safeguard against the unconstitutional delegation of legislative authority to another body. For example, Justice Gorsuch and Justice Alito in *West Virginia* defined the major questions doctrine as a “parallel clear-statement rule[]”

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Safety & Health Admin., 142 S. Ct. 661, 668 (2022) (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.”).

203. Leske, *supra* note 9, at 771.

204. *Id.* at 772.

205. *Id.*

206. *Id.* at 791 (quoting *West Virginia*, 142 S. Ct. at 2609).

that “operates to protect foundational constitutional guarantees.”<sup>207</sup> They opined that 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.<sup>208</sup>

In their view the vesting of legislative power is “vital to the integrity and maintenance of the system of government ordained by the Constitution.”<sup>209</sup> As such (and quoting Article I, § 1,<sup>210</sup> and Chief Justice Marshall), “important subjects . . . must be entirely regulated by the legislature itself.”<sup>211</sup> The majority of Justices seem to have adopted this view.<sup>212</sup>

But before further exploring their misplaced reliance on Article I to justify the major questions doctrine, I briefly turn to what precisely their nondelegation argument is, as well as its current place in the Court’s jurisprudence. This will allow a better understanding of how an originalism analysis fails to support the doctrine and also how the doctrine in actuality runs counter to the nondelegation principles that the Court purports to protect.

As one scholar noted, the nondelegation doctrine lies at the heart of the separation powers principles embodied in the Constitution.<sup>213</sup> As I will discuss shortly in more detail, the Framers of the Constitution wrestled with how to (and whether to) define legislative power in the Constitution. For his part, James Madison had endorsed the “enumeration and definition of powers necessary to be exercised” by Congress.<sup>214</sup> But even with this view,

207. *West Virginia*, 142 S. Ct. at 2616 (Gorsuch, J., concurring). Justice Thomas shares this view. *See Nat’l Fed’n of Indep. Bus.*, 142 S. Ct. at 668 (Gorsuch, J., concurring) (writing with Justice Thomas and Justice Alito and stating 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.”).

208. *West Virginia*, 142 S. Ct. at 2616 (Gorsuch, J., concurring) (citing Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 169 (2010)).

209. *Id.* at 2617 (quoting *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892)).

210. U.S. CONST. art. I, § 1.

211. *West Virginia*, 142 S. Ct. at 2617 (Gorsuch, J., concurring) (citing *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825)).

212. *See id.* at 2617 (Gorsuch, J., concurring) (writing with Justice Alito); *Nat’l Fed’n of Indep. Bus.*, 142 S. Ct. at 668 (Gorsuch, J., concurring) (writing with Justice Thomas and Justice Alito and stating 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.”); *West Virginia*, 142 S. Ct. at 2609 (identifying “both separation of powers principles and a practical understanding of legislative intent” as the justification of the major questions doctrine).

213. Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, 56 GA. L. REV. 81, 91 (2021) (“The nondelegation doctrine reflects a fundamental maxim of separation of powers.”).

214. *Id.* at 92.

Madison doubted whether this could be done in practice and admitted that a definition “of the limits and powers of the federal Legislature . . . could not be done.”<sup>215</sup>

When the Constitution was proposed, there remained textual ambiguity with respect to the definition of legislative power, judicial power, and executive power, as well as the relationship among them.<sup>216</sup> As has been often repeated, Madison observed in Federalist No. 37 that “no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces the legislative, executive, and judiciary.”<sup>217</sup>

Later, in Federalist No. 47, *The Particular Structure of the New Government and the Distribution of Power Among Its Different Parts*, James Madison addressed criticism that the proposed Constitution was in “violation of the political maxim, that the legislative, executive, and judiciary departments ought to be separate and distinct.”<sup>218</sup> Separation was necessary, of course, because “[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.”<sup>219</sup>

Despite this recognition, Article I of the Constitution does not as a textual matter answer (or even help to answer) how to determine which delegations of power from Congress to the Executive Branch would rise to the level of being an unconstitutional transfer of legislative power.<sup>220</sup> For example, as one scholar noted, “[t]here is no ban on delegating an entire [Article I.] Section 8 power or ‘important subjects’ related to such power. Nor is there a requirement that the delegation be limited by an ‘intelligible principle.’”<sup>221</sup> Indeed, another set of scholars concluded the “nondelegation doctrine is not a logically required implication of the bare constitutional text.”<sup>222</sup> Rather, the Supreme Court is responsible for establishing, defining, and shaping the nondelegation doctrine. But the task of doing so has not been an easy one.

Early cases confirm that the Court also recognized that the difficulty of identifying “exclusively legislative” powers from powers that Congress could

215. *Id.* (citing 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 54, 59 (Max Farrand ed., 1911)).

216. *Id.* at 92–93.

217. THE FEDERALIST NO. 37, at 182 (James Madison) (Ian Shapiro ed., 2009).

218. THE FEDERALIST NO. 47, at 245 (James Madison) (Ian Shapiro ed., 2009).

219. *Id.*

220. Chabot, *supra* note 213 (“The nondelegation doctrine reflects a fundamental maxim of separation of powers.”).

221. *Id.* at 96–97.

222. Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 291 (2021); *id.* at 280 (“[T]he Constitution at the Founding contained no discernable, legalized prohibition on delegations of legislative power . . .”).

delegate to other branches.<sup>223</sup> In *Wayman v. Southard*,<sup>224</sup> for example, the Court noted that “[t]he line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made” for other government officials to “fill up the details.”<sup>225</sup> With that said, the outcomes of early cases presenting nondelegation challenges speak volumes. In case after case, the Court upheld congressional delegation, finding no unconstitutional delegation had occurred.<sup>226</sup>

Although the Court did not establish a bright-line test in any of these cases to determine when Congress crossed the line by delegating an “‘exclusively legislative’ power[],” a doctrinal test did emerge.<sup>227</sup> In *J.W. Hampton, Jr., & Co. v. United States*,<sup>228</sup> the Court found that a delegation was acceptable if Congress set forth an “intelligible principle” to guide and limit executive discretion.<sup>229</sup> The cases that followed *J.W. Hampton, Jr., & Co.* showed that meeting the intelligible test was not difficult. Until 1935, Congress seemed to remain free to broadly delegate important policy questions to the Executive Branch.<sup>230</sup>

But in the 1935 watershed case of *A.L.A. Schechter Poultry Corp. v. United States*, the Court invalidated an open-ended delegation of authority to promulgate “codes of fair competition.”<sup>231</sup> And in that same year (and in the only other case where the Court struck down agency action on nondelegation grounds), the Court in *Panama Refining Co. v. Ryan*, similarly found that Congress failed to provide the so-called “intelligible principle.”<sup>232</sup> The Court invalidated a provision of the National Industrial Recovery Act that had empowered the President to prohibit the transportation of any oil extracted above prescribed quotas.<sup>233</sup>

Since these cases, the Court has never found Congress exceeded its constitutional authority by delegating legislative power to the Executive Branch.

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223. Chabot, *supra* note 213, at 97.

224. 23 U.S. (10 Wheat.) 1 (1825).

225. *Id.* at 43.

226. *See* Chabot, *supra* note 213, at 98 (“The Supreme Court’s early validations of federal legislation began a virtually unbroken string of cases in which the Supreme Court validated delegations in other statutes.”).

227. Chabot, *supra* note 213, at 97.

228. 276 U.S. 394 (1928).

229. *Id.* at 409 (Tariff Act of 1922 was not “a forbidden delegation of legislative power” because Congress had established “an intelligible principle” that the Executive Branch was “directed to conform.”).

230. *See* Chabot, *supra* note 213, at 99.

231. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 535, 541–42 (1935).

232. *Panama Refin. Co. v. Ryan*, 293 U.S. 388, 430 (1935).

233. *Id.*

This is true even though scholars, like Professor Cass Sunstein, have observed that there very well may have been “occasions when [the Court] might have found an absence of the requisite ‘intelligible principle.’”<sup>234</sup> For example, as recently as 2001, the Court in an unanimous decision in *Whitman v. American Trucking Associations*<sup>235</sup> held that a “vague legislative standard in the Clean Air Act—‘requisite to protect the public health’—was sufficiently intelligible for purposes of the nondelegation doctrine.”<sup>236</sup>

*B. The Constitution as Originally Understood Does Not Support the Major Questions Doctrine*

As introduced above, a majority of Justices maintain that the major questions doctrine, in Justice Gorsuch’s words, “operates to protect foundational constitutional guarantees” rooted in nondelegation principles.<sup>237</sup> This Section demonstrates how the Constitution as it was originally understood does not justify the major questions doctrine.

The Court’s creation of a clear statement rule requiring clear congressional authorization in “major” cases finds no textual support in the Constitution. The doctrine’s presumption against broad non-specific delegation runs counter to the traditional understanding of legislative delegations at the time of the founding, as well as evidence of the First Congress’s actual delegations to the Executive Branch.

*1. Pre-Ratification Evidence of the Understanding of Legislative Delegations Does Not Support the Major Questions Doctrine*

The lack of originalist support for a major questions doctrine premised on nondelegation concerns is demonstrated by an analysis of pre-ratification evidence of the Founders’ understanding of legislative delegations. Far from

234. Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 318–19 (2000). See generally *Mistretta v. United States*, 488 U.S. 361 (1989); *United States v. Sw. Cable Co.*, 392 U.S. 157 (1968); *Lichter v. United States*, 334 U.S. 742 (1948); *Yakus v. United States*, 321 U.S. 414 (1944).

235. 531 U.S. 457 (2001).

236. *Mortenson & Bagley*, *supra* note 222, at 284–85. See generally *Whitman*, 531 U.S. at 472–76.

237. *West Virginia v. EPA*, 142 S. Ct. 2587, 2616–26 (2022) (Gorsuch, J., concurring); *Nat’l Fed’n of Indep. Bus. v. Occupational Safety & Health Admin.*, 142 S. Ct. 661, 668 (2022) (Gorsuch, J., concurring) (writing with Justice Thomas and Justice Alito, and stating 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.”); *West Virginia*, 142 S. Ct. at 2609 (identifying “both separation of powers principles and a practical understanding of legislative intent” as the justifications of the major questions doctrine).

creating a strong presumption against delegations to agencies (as the major questions doctrine does), the history shows that legislative delegations were viewed as legal and political norms as the Constitution was being formed.

Given his prominence in originalist (and formalist) inquiry, it is especially noteworthy to start with James Madison's understanding of the separation of powers in this context. In *The Federalist*, he responded to concerns that the Constitution was in "violation of the political maxim, that the legislative, executive, and judiciary departments ought to be separate and distinct."<sup>238</sup> In *Federalist No. 47, The Particular Structure of the New Government and the Distribution of Power Among Its Different Parts*, he agreed that separation was necessary, as asserted by Montesquieu, because "[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."<sup>239</sup>

Madison wholeheartedly agreed with the absolute necessity for such separation.<sup>240</sup> He believed, however, that the Constitution was not "really chargeable with the accumulation of power, or with a mixture of powers, having a dangerous tendency to such an accumulation."<sup>241</sup> Madison stressed that true import of what it means for the powers to be "separate and distinct" has been "totally misconceived and misapplied."<sup>242</sup>

He explained that this separation "did not mean that these departments ought to have no *partial agency* in, or no *control* over, the acts of each other."<sup>243</sup> The evil identified by Montesquieu arose "where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department."<sup>244</sup> It is in those circumstances where "the fundamental principles of a free constitution are subverted."<sup>245</sup> So, even where Congress empowers an agency to wield wide general powers of deep economic and political importance does not mean that such a delegation subverts Article I.<sup>246</sup> Thus, the major questions doctrine's justification applying an originalist and formalist view of the separation of powers does not square with James Madison's own views.

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238. THE FEDERALIST NO. 47, at 245 (James Madison) (Ian Shapiro ed., 2009).

239. *Id.*

240. *See id.*

241. *Id.*

242. *Id.*

243. *Id.* at 246.

244. *Id.* at 246–47.

245. *Id.* at 247.

246. *See id.*

Moreover, a broader analysis of “political and legal theory literature on which the Founding generation . . . , as well as evidence of judicial, political, and legal practice during the period leading up to the ratification of the Constitution” convincingly show that these views were not just held by Madison.<sup>247</sup> When the originalist inquiry of what a reasonable lawyer in the colonies would have believed about the permissibility of legislative delegations is applied, the history and established practice at this time “confirm that broad delegations of all kinds of legislative authority were not only constitutionally tolerable, but commonplace.”<sup>248</sup> As Julian Davis Mortenson and Nicholas Bagley succinctly state (and persuasively argue), “the Constitution at the Founding contained no discernable, legalized prohibition on delegations of legislative power . . . .”<sup>249</sup>

The main argument that originalists raise in support of the nondelegation doctrine is based on the descriptive claim that “the public at large in 1789 would generally have understood that legislative power (or perhaps just aspects of it deemed core or essential) could not be delegated.”<sup>250</sup> But a recent analysis shows that legal and political theorists of the time had a different conception of “legislative power.”<sup>251</sup> To them it “simply meant the authority to issue authoritative instructions,” who “agreed that it could be delegated by whoever happened to hold it.”<sup>252</sup> In other words, while they found that power could not *transferred* (i.e., given with no subsequent control by Congress), it could be delegated.

In the eighteenth century, it was therefore commonplace that “competent persons and institutions could delegate their authorities to agents, and that those agents would then exercise those authorities both on behalf and under the ultimate supervision of the original principal.”<sup>253</sup> The “[c]onventional wisdom held that ‘all lawful authority, legislative, and executive, originates from the people.’”<sup>254</sup>

Carrying this concept to the Constitutional Convention, the Founders viewed that the government’s “original legislative power” found in the Constitution had already been delegated.<sup>255</sup> Thus, as Founder and Federalist

247. Mortenson & Bagley, *supra* note 222, at 289–90.

248. *Id.* at 293.

249. *Id.* at 280.

250. *Id.* at 290.

251. *Id.* at 279–80.

252. *Id.* at 290.

253. *Id.* at 295 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES \*453 (“[T]he father . . . may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child, who is then *in loco parentis* . . . .”).

254. *Id.* at 296.

255. Mortenson and Bagley, *supra* note 222, at 296.

(and later Justice) James Wilson stated with respect to constitutional powers, including legislative power:

All these powers and rights, indeed, cannot, in a numerous and extended society, be exercised personally; but they may be exercised by representation. One of those powers and rights is to make laws for the government of the nation. This power and right may be delegated for a certain period, on certain conditions, under certain limitations, and to a certain number of persons.<sup>256</sup>

While this passage does not suggest a limitless ability for Congress to delegate to an agency, it does not support the claim that legislative power was “intrinsically nondelegable” because “[t]he people already delegated it once,” after all.<sup>257</sup>

## 2. *The View and Actions of the First Congress with Respect to Delegations Do Not Support the Major Questions Doctrine*

Another (and more nuanced) argument by supporters of the nondelegation doctrine (that would more directly support the major questions doctrine) is that “certain activities—usually the formulation of coercive and generally applicable rules—could not qualify as a valid exercise of executive power.”<sup>258</sup> In other words, in the major questions doctrine context, when an agency’s action would effectuate an enormous and transformative expansion in the agency’s regulatory authority, the agency is no longer engaging in “executive action,” but rather has begun “legislating” in contravention of Article I.<sup>259</sup>

An example of this concern is suggested in Justice Gorsuch’s concurring opinion in *West Virginia* where he, joined by Justice Alito, stated the vesting of legislative power in Congress (only) is “vital to the integrity and maintenance of the system of government ordained by the Constitution”<sup>260</sup> and as such “important subjects . . . must be entirely regulated by the legislature itself.”<sup>261</sup> Justice Gorsuch, joined by Chief Justice Roberts, more specifically

256. James Wilson, Lectures on Law, in 1 COLLECTED WORKS OF JAMES WILSON 412 (Kermit L. Hall & Mark David Hall eds., Liberty Fund 2007); see Mortenson & Bagley, *supra* note 222, at 296.

257. Mortenson & Bagley, *supra* note 222, at 296.

258. *Id.* at 290.

259. *Id.*; Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 334 (2002) (“[A] statute that leaves to executive (or judicial) discretion matters that are of basic importance to the statutory scheme is not a ‘proper’ executory statute.”).

260. Mortenson & Bagley, *supra* note 222, at 283 n.29 (quoting *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892)).

261. *West Virginia v. EPA*, 142 S. Ct. 2587, 2617 (2022) (Gorsuch, J., concurring) (citing *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825)).

explored this argument in his dissent in *Gundy v. United States*,<sup>262</sup> where he contrasted the implementation of a law “over matters already within the scope of executive power” and a law outside of that scope.<sup>263</sup> As the Court explained in *Panama Refining Co. v. Ryan*, there is a point at which the “breadth of authorized action as essentially to commit to the President the functions of a legislature, rather than those of an executive or administrative officer executing a declared legislative policy.”<sup>264</sup>

But these Justices’ conception of the separation of powers that the Constitution prohibits delegations implicating “coercion of private rights in the domestic sphere,” (but no such prohibitions exist for delegations involving public rights) is not supported by the historical record.<sup>265</sup> First, as Christine Chabot argues a “two-tiered [non-delegation] doctrine is difficult to reconcile with the text of Article I.”<sup>266</sup> As a textual matter, Article I does not distinguish “legislative powers” that affect public rights from those that affect private rights.<sup>267</sup>

Second, when early Congresses were debating the delegation of legislative powers, there was no mention of the distinction between public and private rights.<sup>268</sup> While it was true that the debates mostly concerned “the constitutionality of delegating important public determinations regarding borrowing and post roads,” support for this tiered view of the nondelegation must rest on “a ‘negative inference’ drawn from an understanding that early Congresses delegated broadly with respect to public but not private rights,” as well as the faulty “implicit background understandings from eighteenth-century England,” detailed above.<sup>269</sup>

Moreover, with respect to the scope of delegations during this time, the historical evidence shows that “the theory and practice of delegation in the Founding Era never reflected a particularly high constitutional bar,” where “Congress delegated to officers and agencies in the Executive Branch.”<sup>270</sup>

262. 139 S. Ct. 2116 (2019).

263. *Id.* at 2131–48 (Gorsuch, J., dissenting); Mortenson & Bagley, *supra* note 222, at 280.

264. *Panama Refin. Co. v. Ryan*, 293 U.S. 388, 418–19 (1935).

265. Chabot, *supra* note 213, at 107; Michael B. Rappaport, *The Selective Nondelegation Doctrine and the Line Item Veto: A New Approach to the Nondelegation Doctrine and Its Implications for Clinton v. City of New York*, 76 TUL. L. REV. 265, 317–18, 365 n.341 (2001).

266. Chabot, *supra* note 213, at 108; U.S. CONST. art. I, § 8.

267. Chabot, *supra* note 213, at 108; U.S. CONST. art. I, § 8.

268. Chabot, *supra* note 213, at 107–08.

269. *Id.* at 108 (emphasis omitted) (quoting Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288, 1302 n.49 (2021) (“In general, a negative inference can be drawn . . . if early Congresses refrained from doing the action.”)).

270. *Id.* at 87–88.

And refuting the major questions doctrine's targeting of agency action that involved significant policy determinations, "[e]arly Congresses routinely delegated important policy decisions that required executive officers to go far beyond finding facts and filling up details."<sup>271</sup>

And the First Congress proceeded with such delegations after having first recognizing and exploring whether the delegations were consistent with the Constitution. After weighing "balancing constitutional objections against pressing needs to effectuate key legislative powers . . . Hamilton, Madison, and the First Congress all chose delegation."<sup>272</sup> Executive officers were therefore delegated some of the "Founding Era's most important questions on debt and intellectual property rights."<sup>273</sup>

For example, one of the most significant challenges for the new nation was how to best to "provide a cost-effective means of repaying a potentially insurmountable debt."<sup>274</sup> It is undisputable that this constitutes a "legislative" power vested in Congress because Article I, Section 8 empowers Congress to "pay the Debts" and "borrow Money."<sup>275</sup> Yet the First Congress delegated to President Washington the authority "to borrow up to \$14 million to refinance, purchase, and cover interest payments on U.S. debt," which in 1790 was an astounding sum of money that is comparable today to over \$1 trillion.<sup>276</sup>

Some scholars counter this view by pointing to debates in the Second Congress that demonstrate a greater concern for a nondelegation doctrine. For example, Ilan Wurman highlighted constitutional concerns expressed by Madison and Second Congress members when discussing legislation to establish postal roads (which is another undisputed legislative power).<sup>277</sup> An amendment was proposed that would have delegated the power to establish post roads to the President.<sup>278</sup>

From this episode and other contemporaneous sources, he argues that "the picture the Founding-era history paints is one of a nondelegation doctrine whereby Congress could not delegate to the Executive decisions over

271. *Id.* at 88.

272. *Id.* at 91 (identifying repayment of debt and borrowing).

273. *Id.*

274. *Id.* at 88.

275. U.S. CONST. art. I, § 8.

276. Chabot, *supra* note 213, at 89; Act of Aug. 4, 1790, ch. 34, § 2, 1 Stat. 138, 139 (authorizing the President to borrow sums "not exceeding in the whole twelve million of dollars").

277. Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490, 1506–10 (2021); Chabot, *supra* note 213, at 111; U.S. CONST. art. I, § 8 (Congress has power "[t]o establish Post Offices and post Roads").

278. Wurman, *supra* note 277, at 1506; Chabot, *supra* note 213, at 111; U.S. CONST. art. I, § 8.

‘important subjects.’”<sup>279</sup> But as Christine Chabot succinctly responds “neither a lone piece of legislation from 1792 nor arguments advanced on that occasion prove a historical requirement that Congress resolve all important questions.”<sup>280</sup>

All told, notwithstanding concerns expressed in the Second Congress, the limits that the first Congresses expressed for delegation were not specific and merely required Congress to establish the principle by which the law would be executed.<sup>281</sup> Even “original originalists” did not construe the Constitution to mandate that Congress set all significant policy questions in legislation.<sup>282</sup> And this evidence is especially persuasive because as the Supreme Court has stated, “the practice of the First Congress is strong evidence of the original meaning of the Constitution.”<sup>283</sup>

### C. *The Major Questions Doctrine Does Not Advance Nondelegation Principles*

As shown above, the majority of the Court, who are all avowed originalists, point to “nondelegation” principles established by Article I of the Constitution to justify the major questions doctrine. But, as also shown above, the doctrine cannot be supported on nondelegation grounds—even when applying an originalism methodology. Their reliance on nondelegation grounds also manifests a hypocrisy. Even if the doctrine could be justified based on nondelegation principles, the application of the doctrine in our administrative state does not support such principles.

In this Section, I begin by explaining how the Justices appear to situate the major questions doctrine as a type of nondelegation constitutional avoidance canon. I then argue that although some of these types of canons have utility in our administrative state, the major questions doctrine does not support the principles that these canons seek to protect. Although the Court purports to protect Article I nondelegation principles when invoking the doctrine, the Court in actuality (and hypocritically) fails to promote legislative responsibility and does not result in principled judgment about excessive delegations.

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279. Wurman, *supra* note 277, at 1497; Chabot, *supra* note 213, at 111.

280. Chabot, *supra* note 213, at 147–48.

281. *Id.* at 88.

282. *Id.* at 91 (“[E]ven Thomas Jefferson never raised a constitutional objection to the powers delegated to him, despite his apparent dislike for both the financial policies . . . and the heavy workload imposed on him by the Patent Board.”).

283. *Id.* at 107 & n.138.

1. *The Major Questions Doctrine Is Characterized as a Nondelegation Constitutional Avoidance Canon*

The Court has at its disposal the nondelegation doctrine under which legislative delegations are reviewed to determine whether Congress laid down an “intelligible principle” to guide and cabin the Executive Branch.<sup>284</sup> But in cases raising the scope of agency power, Justices have instead invoked the major questions doctrine, asserting that the doctrine enforces nondelegation principles. In other words, the Court has employed the major questions doctrine to strike down agency action as a substitute for either declaring the empowering statute unconstitutional or even confronting the question of whether the delegation is, in fact, an unconstitutional delegation of legislative power.

With this goal of patrolling the border of impermissible delegations, Justices have situated the doctrine as a type of nondelegation constitutional avoidance canon. To see how these types of canons are intended to function, I briefly discuss the views of respected scholars, such as John Manning and Cass Sunstein, who have explored these canons. This will set up the analysis of why the major questions doctrines fails to support nondelegation principles.

As Professor Manning explored, the Court “has long enforced the nondelegation doctrine by narrowly construing administrative statutes that otherwise risk conferring unconstitutionally excessive agency discretion.”<sup>285</sup> Guarding against unconstitutional delegation is therefore accomplished through interpretive canons “requiring avoidance of serious constitutional questions.”<sup>286</sup>

According to Manning, one basis for these “avoidance canons” is that Congress does not mean “to press ahead into dangerous constitutional thickets in the absence of firm evidence that it courted those perils.”<sup>287</sup> Thus, as observed by Justice Hughes, “if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.”<sup>288</sup> In fact, this tenet was stated by Justice Stevens in his plurality opinion in the *Benzene Case*, a foundational major questions doctrine case.<sup>289</sup>

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284. *Panama Refin. Co. v. Ryan*, 293 U.S. 388, 430 (1935).

285. John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 223.

286. *Id.*

287. *Id.*; *Pub. Citizen v. U.S. Dep’t of Just.*, 491 U.S. 440, 466 (1989).

288. *Crowell v. Benson*, 285 U.S. 22, 62 (1932); see Joshua S. Sellers, “*Major Questions*” *Moderation*, 87 GEO. WASH. L. REV. 930, 948–49 (2019).

289. *Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst. (The Benzene Case)*, 448 U.S. 607, 646 (1980) (holding that “[a] construction of the statute that avoids this kind of open-ended grant should certainly be favored”).

For his part, Cass Sunstein agrees that the nondelegation doctrine is “alive and well” but “renamed and relocated.”<sup>290</sup> Nondelegation principles, in his view, are now protected by federal courts in smaller and more specific doctrines that achieve this end.<sup>291</sup> The major questions doctrine might be such an example, whereby instead of striking down legislation as being too open-ended, federal courts prohibit an agency from acting in certain situations unless Congress has expressly authorized the agency to act in that fashion.<sup>292</sup> This classification is in accord with views set forth by Justices to justify the major questions doctrine; namely that the actions taken should be made “legislatively rather than bureaucratically.”<sup>293</sup> But the question remains whether the application of the major questions doctrine by the Court does, in fact, serve the interests of these nondelegation principles.

2. *Contrary to the Court’s Stated Intent, the Major Questions Doctrine Fails to Promote Legislative Responsibility and Does Not Result in Principled Judgment About Excessive Delegations*

Although the Court purports to invoke the major questions doctrine to prevent a potential or actual unconstitutional delegation of legislative power, the Court’s modern doctrine fails to protect nondelegation principles. And counterintuitively (and hypocritically), the application of the doctrine can create and exacerbate nondelegation concerns.

As discussed above, the Court has situated the major questions doctrine as a type of nondelegation constitutional avoidance canon. In Professor Manning’s view, the Court has done this in an attempt “to reconcile several competing concerns.”<sup>294</sup> Applied properly, these canons can support

290. Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 315 (2000).

291. *Id.*

292. *See id.* at 316. Professor Sunstein gave examples of such canons including: Congress must affirmatively authorize the extraterritorial application of federal law; agencies cannot exercise their ordinary discretion, under an ambiguous statutory provision, so as to apply national law outside of American borders. A clear congressional statement to this effect is required. Administrative agencies are not permitted to construe federal statutes in such a way as to raise serious constitutional questions; if the constitutional question is substantial, Congress must clearly assert its desire to venture into the disputed terrain. When treaties and statutes are ambiguous, they must be construed favorably to Native American tribes; the agency’s own judgment, if it is an exercise of discretion, is irrelevant. . . . [A]gencies [cannot] impose high costs for trivial gains.

*Id.* (footnotes omitted).

293. *Id.*

294. Manning, *supra* note 285, at 223–24; U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States . . .”); U.S. CONST. art. I, § 7.

“important constitutional interests, including the promotion of legislative responsibility for society’s basic policy choices and the preservation of a carefully designed constitutional process for legislation—bicameralism and presentment.”<sup>295</sup> Such canons can also address concern that the Court may “lack[] confidence in its ability to make principled judgments about excessive delegations in the exercise of *Marbury*-style judicial review.”<sup>296</sup> To be sure, these goals of nondelegation constitutional avoidance canons are laudable and worth employing. And, unsurprisingly, they mimic assertions by Justices to justify the doctrine.<sup>297</sup> But the major questions doctrine achieves none of these goals.

First, as Professor Manning pointed out in the wake of the *Brown & Williamson* decision decades ago, the application of the nascent major questions doctrine in that case demonstrates its conceptual weaknesses. Manning posited the following contradiction:

If the nondelegation doctrine seeks to promote legislative responsibility for policy choices and to safeguard the process of bicameralism and presentment, it is odd for the judiciary to implement it through a technique that asserts the prerogative to alter a statute’s conventional meaning and, in so doing, to disturb the apparent lines of compromise produced by the legislative process.<sup>298</sup>

In other words, attempting to use the major questions doctrine as a canon of avoidance to enforce nondelegation principles in reality subverts the constitutional goal of the nondelegation doctrine. By invoking the major questions doctrine to cabin a constitutionally suspect delegation by limiting a broad delegation “in light of an imputed background purpose[, it] threatens to unsettle the [original] legislative choice implicit in adopting a broadly worded statute.”<sup>299</sup>

295. Manning, *supra* note 285, at 223–24; U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States . . .”); U.S. CONST. art. I, § 7 (requiring bicameralism and presentment).

296. Manning, *supra* note 285, at 223–24.

297. *West Virginia v. EPA*, 142 S. Ct. 2587, 2616 (2022) (Gorsuch, J., concurring) (writing with Justice Alito and stating doctrine “operates to protect foundational constitutional guarantees” and because “Congress means for its laws to operate in congruence with the Constitution rather than test its bounds.”); *id.* at 2617 (doctrine is “vital to the integrity and maintenance of the system of government ordained by the Constitution.”); *see also id.* (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” (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825))).

298. Manning, *supra* note 285, at 224. In this respect, this is in accord with normative arguments that I made in *Major Questions Hypocrisy*. *See* Leske, *supra* note 9.

299. Manning, *supra* note 285, at 228. Similarly, this assertion is also in accord with normative arguments that I made in *Major Questions Hypocrisy*. *See* Leske, *supra* note 9.

Because most legislation “reflects the fruits of legislative compromise,” Congress often legislates through broad policies and leaves specification for agencies and courts via judicial review.<sup>300</sup> Because, as Justices assert, a goal of the nondelegation doctrine “is to ensure that Congress makes important statutory policy,” the Court “must respect Congress’s choice to legislate in open-ended terms.”<sup>301</sup> But when the Court invokes the major questions doctrine to strike down an otherwise permissible—albeit broad—grant of authority to an agency, the Court “in effect . . . rewrite[s] the terms of a duly enacted statute” in a way that subverts the nondelegation doctrine.<sup>302</sup> The Court’s invoking of the doctrine can “upend Congress’s bargain by reading a statute to mean something other than what Congress understood it to mean, as expressed in the text.”<sup>303</sup> As other scholars have pointed out, this lack of respect raises profound questions concerning the judicial function.<sup>304</sup>

Relatedly, the major questions doctrine does not foster legislative responsibility for policy choices in another way. Justices have justified the doctrine relying on an assertion that Justice Breyer wrote in a 1986 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 [a] statute’s daily administration.”<sup>305</sup> But as Cass Sunstein argued in a 2006 article, because major questions cases typically involve both agency expertise and policy judgments, it is more likely that Congress *would have* intended agencies to answer these questions.<sup>306</sup> In other words,

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300. Manning, *supra* note 285, at 228.

301. *Id.*; see *West Virginia*, 142 S. Ct. at 2621 (citing *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)); *Nat’l Fed’n of Indep. Bus. v. Occupational Safety & Health Admin.*, 142 S. Ct. 661, 668 (2022) (Gorsuch, J., concurring) (writing with Justice Thomas and Justice Alito and stating the major questions doctrine “ensures that the national government’s power to make the laws that govern us remains where Article I of the Constitution says it belongs—with the people’s elected representatives.”).

302. Manning, *supra* note 282, at 228.

303. Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19, 63 (2010).

304. *Id.* at 64.

305. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) (quoting 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.”)); see also *Biden v. Nebraska*, 143 S. Ct. 2355, 2380 (2023) (Barrett, J., concurring) (“Because the Constitution vests 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.”).

306. Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 233 (2006).

“there is no reason to think that Congress, and reasonable legislators, seek a judicial rather than administrative judgment” when such provisions are being reviewed.<sup>307</sup>

In fact, Justice Breyer addressed the Court’s reliance on his words in his dissent in *Brown & Williamson*.<sup>308</sup> Although he admitted that a “background canon of interpretation” might support a view that certain decisions “be made by democratically elected Members of Congress rather than by unelected agency administrators,” he asserted that this canon is not needed in situations where the Executive Branch “and those politically elected officials who support it, must (and will) take responsibility.”<sup>309</sup>

For “major” questions, “as well as its attendant publicity, means that the public is likely to be aware of it and to hold those officials politically accountable.”<sup>310</sup> He observed 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.”<sup>311</sup> Thus, when an agency action “is important, conspicuous, and controversial,” it cannot evade the “kind of public scrutiny that is essential in any democracy.”<sup>312</sup>

In sum, given the Court’s constitutional role as being responsible for adjudicating cases and controversies, and safeguarding the rights of individuals, the Court should not be trying “to settle polycentric policy-disputes.”<sup>313</sup> These decisions should be addressed by the democratic decisionmaking procedures, such as by the legislative branch or executive agencies.<sup>314</sup> Thus, by invoking the major questions doctrine, the Court “imposes costs on the law-making process” in a way that “poses problems for judicial legitimacy.”<sup>315</sup> Rather than supporting “legislative responsibility for society’s basic policy choices and the preservation of a carefully designed constitutional process for legislation,” the major questions doctrine undercuts them.<sup>316</sup>

307. *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”).

308. See *Brown & Williamson*, 529 U.S. at 190–91 (Breyer, J., dissenting).

309. *Id.* at 190.

310. *Id.*

311. *Id.*

312. *Id.* at 190–91.

313. Emerson, *supra* note 307, at 2084 (citing Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394–404 (1978)).

314. *Id.*

315. Loshin & Nielson, *supra* note 303, at 63.

316. Manning, *supra* note 285, at 223–24 (footnote omitted); U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States . . .”);

Second, the major questions doctrine does not do anything to address the goal of nondelegation constitutional avoidance canons to assuage the Court's concern of "its ability to make principled judgments about excessive delegations . . . ." <sup>317</sup> Just the opposite occurs when the Court applies the doctrine. Rather than shying away from making judgments about the validity of the delegations, the Court has now created a presumption that the delegation is unconstitutional. And the Court is making these determinations in an unbridled and unprincipled way that exacerbates and can even create problematic delegations where there was none.

For example, one commentator observed that this "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. <sup>318</sup> 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." <sup>319</sup>

And 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.'" <sup>320</sup> For example, to see whether a major question is at issue, the Court asks whether the agency is resolving "a matter of great political significance," <sup>321</sup> "a significant portion of the American economy," <sup>322</sup> or is "intrud[ing] into an area that is the particular domain of state law." <sup>323</sup>

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U.S. CONST. art. I, § 7 (requiring bicameralism and presentment).

317. Manning, *supra* note 285, at 223–24.

318. 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/344K-2S45>].

319. 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).

320. Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 266 (2022) (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)).

321. *West Virginia v. EPA*, 142 S. Ct. 2587, 2620 (2022) (Gorsuch, J., concurring) (internal quotation marks omitted) (quoting *Nat'l Fed'n of Indep. Bus. v. Occupational Safety & Health Admin.*, 142 S. Ct. 661, 665 (2022)).

322. *Id.* at 2621 (quoting *Util. Air. Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)) (internal quotation marks omitted).

323. *Id.*

These concerns about judicial legislating (by effectively rewriting the statute) emerged when the doctrine was in its early stages of development. For example, Cass Sunstein in 2006 argued that there was “no metric . . . for making the necessary distinctions” between major and minor questions.<sup>324</sup> And Jacob Loshin and Aaron Nielson, in a 2010 article, asserted that what makes a questions major or case extraordinary “[is] in the eye of the beholder.”<sup>325</sup>

Finally, as discussed, the nondelegation doctrine functions to prevent legislative power from being exercised by another branch. Recently University Professor David Driesen examined the relationship of broader separation of powers principles with the major questions doctrine.<sup>326</sup> His analysis demonstrates how “in effect, that judges exercise legislative authority to the extent they decide major questions in ways that undermine the enacting Congress’s policies.”<sup>327</sup> It can also *create* a nondelegation violation.

He explains that “[t]he major questions doctrine does not force Congress to answer major questions.”<sup>328</sup> Rather, “it authorizes the judiciary to decide major questions.”<sup>329</sup> In other words, by invoking the doctrine to strike down major agency action, the Court is now legislating economic, political, transformative policy in the place of Congress.<sup>330</sup> But “[t]ransferring resolution of policy issues from the executive branch to the judiciary simply relocates quasi-legislative authority, it does not prevent delegation.”<sup>331</sup> In other words, “[j]udicial exercise of legislative authority cannot solve a nondelegation problem because the Constitution does not authorize judicial legislation.”<sup>332</sup>

Cass Sunstein highlighted this problem when he reflected on the Benzene Case and the nondelegation avoidance canon the Court applied (which

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

325. Loshin & Nielson, *supra* note 303, at 45. 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 Associations*, 531 U.S. 457, 468 (2001). *Id.*

326. David M. Driesen, *Does the Separation of Powers Justify the Major Questions Doctrine?*, 2024 *U. ILL. L. REV.* 1177 (2024).

327. *Id.* at 1181.

328. *Id.* at 1216.

329. *Id.*; see Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 *S. CAL. L. REV.* 405, 459 (2008) (explaining that the Court in major questions cases “decided the major questions itself”).

330. Driesen, *supra* note 326, at 1216 (noting that the Court in *West Virginia v. EPA* “thus resolved an economically and socially significant issue when it held that the EPA could not restructure the coal industry by taking generation shifting into account”).

331. *Id.* at 1222.

332. *Id.* at 1185.

would later become the major questions doctrine).<sup>333</sup> He posited: “If a court chooses the interpretation that avoids that problem, how, exactly, is that problem avoided?”<sup>334</sup> He compared a case implicating a potential nondelegation violation with a case involving a potential First Amendment violation. He reasoned:

It is one thing to say that a court should choose an interpretation that avoids a free speech problem. By hypothesis, the relevant choice simply avoids that problem. But a nondelegation problem exists when and because Congress has failed to make relevant policy choices. If it is a court that is making such choices, the nondelegation problem would not be avoided at all.<sup>335</sup>

And Justice Scalia, writing for a unanimous Court in *Whitman* made a similar point in a later nondelegation case.<sup>336</sup> The Court held that an agency cannot use statutory construction to “cure an unlawful delegation of legislative power by adopting . . . a limiting construction of a statute.”<sup>337</sup>

The same holds true for the application of the major questions doctrine. Resolving the question by limiting the scope of the statute “would itself be an exercise of the forbidden legislative authority”<sup>338</sup> because “[t]he nondelegation doctrine presumes that legislative authority belongs exclusively to Congress.”<sup>339</sup> And in some senses the violation of constitutional nondelegation principles is even more poignant because “Congress never delegated any policy making authority to the judiciary.”<sup>340</sup> Thus, far from ameliorating the Court concern for “its ability to make principled judgments about excessive delegations,” the doctrine empowers the Court to effectively judicially legislate in an unprincipled way that can create, rather than solve, a potential nondelegation violation.<sup>341</sup>

## CONCLUSION

The major questions doctrine has quickly entrenched itself into the Court’s jurisprudence. It has significantly altered constitutional governance and our administrative state. Although the Court attempts to justify the

333. See generally Sunstein, *supra* note 10; Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst. (The Benzene Case), 448 U.S. 607 (1980).

334. Sunstein, *supra* note 10, at 679.

335. *Id.*

336. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001); Driesen, *supra* note 326, at 1222.

337. *Whitman*, 531 U.S. at 472.

338. *Id.* at 473; see Driesen, *supra* note 322, at 1222.

339. Driesen, *supra* note 326, at 1222.

340. Driesen, *supra* note 326, at 1223.

341. Manning, *supra* note 285, at 223–24.

doctrine as a way to enforce the prohibition against the delegation of legislative powers, the major questions doctrine cannot be supported by an originalist understanding of the Constitution at the founding. Moreover, despite the Court's proffered goals, the major questions doctrine fails to promote legislative responsibility and does not result in principled judgment about excessive delegations. The Court would be well advised to more comprehensively justify and legitimize the doctrine if the doctrine is to meet the goals the Court seeks to accomplish when invoking the doctrine.