

ARTICLE

LOOKING FOR YOUR FRIENDS AT A COCKTAIL PARTY: THE DUBIOUS ROLE OF REJECTED LEGISLATION AND THE OVERLOOKED POTENTIAL OF THE APPROPRIATIONS PROCESS

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I. INTRODUCTION

Justice Antonin Scalia famously argued that looking at legislative history is like “walking into a crowded cocktail party and looking over the heads of the guests to pick out your friends.”² His point was that relying upon legislative history for statutory interpretation allows judges to select, from a wide range of potentially conflicting materials, those materials that support that judge’s policy preferences. Justice Scalia summed up his view in *Conroy v. Aniskoff*: “[i]f one were to search for an interpretive technique that, *on the whole*, was more likely to confuse than to clarify, one could hardly find a more promising candidate than legislative history.”³ Yet, in announcing and applying the major questions doctrine, today’s Supreme Court may have found that “promising candidate” Justice Scalia mused about: reliance upon “rejected” legislation to determine what Congress thinks is, or is not, an acceptable use of congressionally delegated authority.

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² ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 377 (2012) (repeating a quotation attributed to Judge Harold Leventhal of the United States Court of Appeals for the D.C. Circuit).

³ 507 U.S. 511, 519 (1993) (Scalia, J., concurring).

In *West Virginia v. EPA*, the Supreme Court reviewed the Environmental Protection Agency’s (“EPA”) rules to establish a cap-and-trade, or “generation shifting,” program that applied to greenhouse gas (“GHG”) emissions from power plants pursuant to section 111 of the Clean Air Act.⁴ The Court debuted the major questions doctrine to set aside the EPA’s Clean Power Plan, finding that the EPA lacked the necessary “clear congressional authorization.”⁵

Chief Justice Roberts explained that, in certain extraordinary cases, “both separation of powers principles and a practical understanding of legislative intent make us [r]eluctant to read into ambiguous statutory text[] the delegation claimed to be lurking there.”⁶ In these extraordinary cases, “the ‘history and the breadth of the authority that [the agency] has asserted,’ and the ‘economic and political significance’ of that assertion, provide a ‘reason to hesitate before concluding that Congress’ meant to confer such authority.’”⁷ Accordingly, the Court requires the government to point to clear congressional authorization for the action.⁸ Thus, when an agency is claiming a new and broad authority that will have a vast economic or political effect, the importance of separation of powers calls upon the Court to set aside traditional statutory interpretive techniques and look for clear congressional authorization.⁹

Application of the major questions doctrine raises the important question of how to determine when an executive branch assertion of authority has vast economic and political significance. The Court has suggested that when the executive branch exploits an ambiguity or gap in the law to take an action that Congress would not have agreed to delegate, that may be indicative of political significance. The Court has identified legislation that Congress has “conspicuously and repeatedly declined to enact itself” as an important touchstone for determining what authority Congress would not have agreed to delegate.¹⁰ The Chief Justice pointed to congressional rejection of comprehensive climate change legislation that included an economy-wide cap and trade program as evidence that Congress would be unlikely to support the EPA’s use of its authority to establish a cap-and-trade program, as the EPA had attempted to do under the Clean Air Act.¹¹ The Court similarly drew upon unenacted legislation in the same manner in *Biden v. Nebraska*.¹²

Justice Gorsuch provided a more detailed discussion of the failed-legislation argument in his concurrence in *West Virginia*, arguing that the major questions doctrine prevents the executive branch from intruding into Congress’s

⁴ 597 U.S. 697, 724 (2022).

⁵ *Id.*

⁶ *Id.* (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

⁷ *Id.* at 721 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000)).

⁸ *See id.* at 723.

⁹ *See id.*

¹⁰ *Id.* at 724 (citing *Brown & Williamson*, 529 U.S. at 159–60).

¹¹ *See id.* at 731–32.

¹² 143 S. Ct. 2355, 2373 (2023) (noting that “the Secretary’s assertion of administrative authority has ‘conveniently enabled [him] to enact a program’ that Congress has chosen not to enact itself” and that more than eighty student loan forgiveness bills and other student loan legislation had been considered and rejected by Congress).

constitutionally vested authority to enact laws.¹³ The doctrine supposedly accomplishes this “by ensuring that, when agencies seek to resolve major questions, they at least act with clear congressional authorization and do not ‘exploit some gap, ambiguity, or doubtful expression in Congress’s statutes to assume responsibilities far beyond’ those the people’s representatives actually conferred on them.”¹⁴ In describing the doctrine’s function, Justice Gorsuch cited the Federalist No. 11 to illustrate the goal of preventing a few from determining policy and emphasizing the importance of bicameral action.¹⁵ Justice Gorsuch wrote that “when Congress has considered and rejected bills authorizing something akin to the agency’s proposed course of action”, it “may be a sign that an agency is attempting to work around the legislative process to resolve for itself a question of great political significance.”¹⁶

Opponents of federal regulation are now attempting to capitalize on the failed-legislation argument in litigation challenging an EPA rule that regulates GHG emissions from cars and trucks under the Clean Air Act. Although this EPA rule does not require the sale of electric vehicles, auto manufacturers are likely to comply with the rule by increasing the numbers of electric vehicles that they bring to market. During oral arguments in the D.C. Circuit, petitioners argued that Congress had “rejected a mandate” for electric vehicles “four times in the last five years.”¹⁷ This type of argument encourages courts to accept the notion that when Congress does not enact an introduced bill, Congress has rejected that bill. The petitioners did not identify the specific rejected legislation they were referring to, but as of September 2023, the time of the oral argument, legislation mandating electric vehicle sales had been introduced in several Congresses, but had never advanced in either chamber.¹⁸ In December 2023, months after the oral argument, the House passed legislation revoking the EPA’s authority to promote zero emission vehicles,¹⁹ but that legislation has not advanced in the Senate and is considered unlikely to become law.²⁰ Despite the fact that legislation to block the EPA’s tailpipe emissions rule is unlikely to pass the Senate, opponents are using the failed-legislation argument in the courts in a bid to overturn the regulation with the major questions doctrine.

¹³ See *West Virginia v. EPA*, 597 U.S. 697, 724 (2022) (Gorsuch, J., concurring).

¹⁴ *Id.*

¹⁵ See *id.* at 737 (citing THE FEDERALIST NO. 11, at 85 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

¹⁶ *Id.* at 742 (internal citations omitted).

¹⁷ Oral Argument at 76:29, *Texas v. EPA* (No. 22-1031) (D.C. Cir. argued Sept. 14, 2023), <https://www.courtlistener.com/audio/88082/state-of-texas-v-epa/> [<https://perma.cc/2ZCZ-P7JX>].

¹⁸ See Zero-Emission Vehicles Act of 2022, S. 5263, 117th Cong. (2022); Zero-Emission Vehicles Act of 2022, H.R. 9555, 117th Cong. (2022); Zero-Emission Vehicles Act of 2020, S. 4823, 116th Cong. (2020); Zero-Emission Vehicles Act of 2020, H.R. 8635, 116th Cong. (2020); Zero-Emission Vehicles Act of 2019, S. 1487, 116th Cong. (2019); Zero-Emissions Vehicle Act of 2019, H.R. 2764, 116th Cong. (2019).

¹⁹ Choice in Automobile and Retail Sales Act of 2023, H.R. 4468, 118th Cong. (2023).

²⁰ Nancy Vu, *House Passes Bill to Block Biden Vehicle Emissions Standards*, WASH. EXAM’R (Dec. 6, 2023) (reporting that the legislation faced “long odds” in the Senate), <https://www.washingtonexaminer.com/news/2444953/house-passes-bill-to-block-biden-vehicle-emissions-standards/> [<https://perma.cc/4AHK-VDCC>].

This essay juxtaposes the weakness of “rejected legislation” evidence with details of formal interbranch interactions that funded the development and promulgation of the Clean Power Plan. My goal is not to find a better way to implement the major questions doctrine; the doctrine’s shortcomings cannot be rectified. Rather, I point out a series of bicameral actions that are more relevant to a practical understanding of Congress’s view of a delegated authority than that relied upon by the Supreme Court. This history demonstrates that, while opposition to the Clean Power Plan existed in Congress, that position never prevailed. Congress had ample information about the EPA’s regulatory plans, could review the proposed rule, and had multiple opportunities between fiscal years 2013 through 2015 to stop, limit, or redirect the EPA’s actions. Ultimately, this analysis supports the notion that Congress can stand up for itself and does step in if its prerogatives are at risk. Accordingly, the Court should focus on what Congress *has* done, instead of what it has *not*.

Part II discusses the flaws in the Court’s reliance on rejected legislation in *West Virginia v. EPA*. In Part III, I examine the many interactions between the branches leading up to the promulgation of the Clean Power Plan to reveal that, while some in Congress may have opposed the Clean Power Plan, that view simply did not prevail. Congress ultimately chose to fund completion of the EPA’s rulemaking. To conclude, I argue that if the Court cannot rationalize the analysis applying the major questions doctrine, it must be reconsidered.

II. THE DUBIOUS ROLE OF REJECTED LEGISLATION IN *WEST VIRGINIA V. EPA*

In *West Virginia v. EPA*, the Chief Justice describes the Clean Power Plan as a “program that ... ‘Congress considered and rejected’ multiple times.”²¹ This was a critical point in determining that Congress did not intend to confer authority for the Clean Power Plan when it passed the Clean Air Act of 1970.

The Chief Justice clearly has a broad conception of “considered and rejected,” as he points to the American Clean Energy and Security Act of 2009,²² a comprehensive climate and energy bill which passed the House of Representatives; the Senate companion bill, which was never considered on the Senate Floor; and carbon tax measures which were never taken up for consideration.²³

This broad conception should be challenged. Congress certainly can craft legislation, hold hearings on it, report it from Committee, and then decide to reject it in votes by both the Senate and the House. This would be the most unambiguous example of “considering and rejecting” legislation, but this would be a rare event. Instead, unenacted legislation is unlikely to receive such a clear indication of bicameral consideration and rejection. The carbon tax proposals cited in *West Virginia* certainly did not become law, but Congress arguably never even considered them. The legislation did not advance in Committee and was never voted upon in either chamber of Congress. Similarly, the electric

²¹ 597 U.S. 697, 731 (2022).

²² *Id.*

²³ *Id.* at 731–32.

vehicle mandate bills, discussed above, were never considered by either chamber.²⁴

With far more bills introduced in Congress than could ever be processed, determining which bills have been considered is a difficult and important question. In the 117th Congress, from 2021 through 2022, there were nearly 18,000 bills and resolutions introduced, yet only 365 laws were enacted.²⁵ Congress did not seriously evaluate and substantively reject each of the thousands of unenacted legislative proposals. To do so would have been impossible. Congressional process alone would limit throughput of legislation to some volume well below 18,000.

Even if a rational analysis can be developed to determine when legislation is considered and rejected, reliance on rejected legislation remains problematic. This section explains why reliance on rejected legislation in applying the major questions doctrine is a deeply flawed approach.

A. Reliance on Rejected Legislation Interferes With, Rather than Protects, the Prerogatives of the Legislative Branch.

The majority in *West Virginia* argued that application of the major questions doctrine defends the prerogatives of Congress from executive branch overreach. However, scholars have claimed that the effect of the major questions doctrine is just the opposite: it usurps authority from the legislative branch and transfers it to the judicial branch.²⁶ Reliance on unenacted legislation in applying the doctrine is emblematic of this effect.

Relying on unenacted legislation interferes with the prerogatives of the legislative branch in several ways. First, it allows the views of a subsequent Congress to limit the enactments of a previous Congress.²⁷ In determining that the Clean Power Plan was a major rule, the Court looked to unenacted legislation in 2010 to help understand the scope of section 111, even though that section was enacted in 1970. The intent, motivations, and priorities of Congress in 2010 cannot logically be relied upon to inform what Congress thought about an enactment in 1970. Allowing the views of a contemporary Congress to define the scope of authority in a provision enacted by a previous Congress creates an unreliable, dynamic, and potentially contracting view of the scope of delegated authority.

Second, relying upon unenacted legislation assigns meaning to legislation that legislators themselves may not have intended. Legislators may sponsor

²⁴ See S. 5263, 117th Cong.; H.R. 9555, 117th Cong.; S. 4823, 116th Cong.; H.R. 8635, 116th Cong.; S. 1487, 116th Cong.; H.R. 2764, 116th Cong.

²⁵ 117th Congress (2021–22), CONGRESS.GOV, Congress.gov/browse/117th-congress [https://perma.cc/R6KN-P78G].

²⁶ See Jody Freeman & Matthew C. Stephenson, *The Anti-Democratic Major Questions Doctrine*, 2022 S. CT. REV. 1 (2023); Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97 (2022).

²⁷ The Court itself has at times expressed reluctance about this approach. See *Bostock v. Clayton Cty.*, 590 U.S. 644, 670 (2020) (explaining that post-enactment legislative failures offer a “‘particularly dangerous’ basis on which to rest an interpretation of an existing law a different and earlier Congress did adopt”).

legislation for reasons other than seeking to have it enacted, such as stimulating debate on an issue or building a reputation for being an expert in an issue area.²⁸ Considering unenacted bills as evidence of congressional rejection of the bill's substantive policy risks misconstruing the activities of the legislative branch and chilling legislators' abilities to use their tools the way they have historically.

Third, relying upon unenacted legislation potentially thwarts the legislature's role in a democratic government by empowering a minority of legislators to curb agency power without enacting a law. It invites a "hecklers veto," in which a minority can gin up controversy to thwart an agency action without any of the procedural protections in the administrative or legislative processes.²⁹ Some scholars explain that, rather than channeling issues into the legislative process for resolution, the major questions doctrine allows political parties and others to "create the conditions" that allow for an agency action to be deemed a major question, thus carving out an exception to a broad grant of authority that would otherwise authorize such agency action.³⁰ For example, a political party or trade group could generate controversy around certain regulatory proposals and, with only a minimum number of supporters in Congress, create a record of "rejected legislation" that could support application of the major questions doctrine.

Finally, relying on unenacted legislation ignores how Congress has frequently enacted legislation in the past. It may take many tries over multiple Congresses to pass legislation. For example, comprehensive reauthorization of the Clean Air Act was considered throughout the 1980s until a comprehensive set of amendments was enacted in 1990. Relying on unenacted legislation potentially interferes with this process by signaling to Congress that introduced but unenacted legislation could have the effect of contracting agency authority. This may chill congressional efforts to grant agencies new authority or assign them new duties.

Moreover, because the Court seems to be relying on examples of unenacted legislation as a threshold to application of the major questions doctrine, the chilling effects of the doctrine are multiplied. Actions of the executive branch are chilled because use of broadly delegated authority could trigger the doctrine's application and curtail executive authority. Legislative branch actions are chilled as well because introduced legislation that is not enacted (i.e., some ninety-five percent of legislation) could serve as a basis for applying the doctrine.

B. Inability to Determine Why Legislation Remained Unenacted

It is often impossible to determine why Congress did not act upon an introduced bill. For example, consider the American Clean Energy and Security Act, which was over 1,400 pages long and contained climate- and energy-related

²⁸ See Wendy J. Schiller, *Senators as Political Entrepreneurs: Using Bill Sponsorship to Shape Legislative Agendas*, 39 AM. J. OF POL. SCI. 186, 190 (1995).

²⁹ Freeman & Stephenson, *supra* note 26, at 17.

³⁰ Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1059 (2023).

policies within the jurisdiction of more than eight Congressional Committees.³¹ The bill included tax breaks for low-income families, provisions relating to energy efficiency of buildings, and provisions to finance nuclear reactors, among other things. The reasons for the bill's failure extend far beyond policies arguably similar to the Clean Power Plan. Some opposition related to the bill's potential to reduce demand for oil production³²—something that was not within the Clean Power Plan.³³ The legislation did contain a cap-and-trade program, but it was far different in scope and effect than the Clean Power Plan. The bill's program, if enacted, would have affected the entire economy; raised hundreds of billions of dollars through auctioned allowances, which would have funded a clean energy transition; and required more than an eighty percent reduction in GHG emissions nationwide. None of these key provisions were reflected in the much narrower and less ambitious Clean Power Plan.

Additionally, assuming a bill has been rejected on substantive grounds by Congress because it has not been enacted fails to adequately consider the many internal impediments associated with lawmaking.³⁴ For instance, a single Committee Chair might decide, unilaterally, not to take up consideration of an introduced bill for reasons ranging from differing policy preferences to personal animus to concerns about Committee bandwidth. Courts cannot attribute that Chair's refusal to consider a bill as a Congress-wide view on legislation, let alone the existing authority an agency possesses. It is because of this variety of reasons for legislative inaction that some scholars have deemed legislative inaction as a "weak proxy for 'majority.'"³⁵

C. Difficulty in Rationalizing Legislation that Provides Counter Evidence

The Court's approach to unenacted legislation also fails to address legislative inaction that provides counter evidence to its analysis. For example, Congress in 2011 considered legislation to require additional analysis of the EPA's proposed section 111 rules prior to finalization.³⁶ In 2012, legislation was introduced to prohibit the Administrator of the EPA from finalizing the Clean Power Plan until certain findings were made relating to carbon capture and storage technology.³⁷ In 2014, the House of Representatives passed legislation that would have repealed the EPA's Clean Power Plan proposal and prohibited the EPA from establishing such requirements unless certain demonstrations

³¹ H.R. 2454, 111th Cong. (2009).

³² See Steve Scalise, *Cap-and-Trade Hinders Job Growth*, ROLL CALL (Feb. 4, 2010), <https://rollcall.com/2010/02/04/scalise-cap-and-trade-hinders-job-growth/> [<https://perma.cc/Y6DT-N7EZ>].

³³ 80 Fed. Reg. 64,662 (Oct. 23, 2015).

³⁴ For a discussion of William Eskridge's "vetogates" model that examines Congress' internal processes and the impediments they cause for lawmaking, see William N. Eskridge, *Vetogates, Chevron, Preemption*, 83 NOTRE DAME L. REV. 1441 (2008).

³⁵ Freeman & Stephenson, *supra* note 26, at 16.

³⁶ H.R. 2401, 112th Cong. § 3(e)(2)(A) (2011).

³⁷ H.R. 6172, 112th Cong. (2012).

could be made.³⁸ None of these proposals were enacted. A proponent of the EPA's authority could argue that Congress's failure to enact these legislative proposals indicated approval of the EPA's regulatory course of action. The Court has ignored such counter evidence while offering no rational approach for weighing competing examples of Congress's views on the EPA's authority. For matters of consequence, there will often be legislative proposals on all sides of the issue. The Court should explain a defensible approach to assessing these proposals for lower courts to apply.

III. THE OVERLOOKED POTENTIAL OF THE APPROPRIATIONS PROCESS

Relying on supposedly rejected legislation focuses on what Congress *did not do* to understand Congress's intent, but evidence of what Congress *did do* is likely more probative. The Clean Power Plan did not spring forth unannounced from the executive branch. Instead, it was the culmination of a multi-year process in which Congress was informed of, and indeed was a necessary co-actor in, promulgation of the rule. There were robust formal interactions on this regulatory undertaking in fiscal years 2013, 2014, and 2015. Congress had ample opportunities and familiar tools to stop, delay, or correct executive branch behavior if Congress was concerned that the offending behavior risked usurping the legislature's role or misinterpreting the authority Congress had delegated.

The Congressional Budget and Impoundment Control Act of 1974 (the Budget Act) governs the federal budget process.³⁹ The law formalizes the process, duties, and roles of the branches of government in the federal budgeting process.⁴⁰ Passed by Congress and signed by the President, the Budget Act can be seen as a negotiated agreement on separation of powers that specifies the roles of the legislative and executive branches. The Act requires the President to propose a budget each year.⁴¹ Congress then acts on the budget and passes appropriations bills to fund the executive branch in ways that likely reflect a mix of the President's and Congress's budget priorities.

Congress routinely uses the annual appropriations process to signal its displeasure with agency rulemaking. Each year, Congress's appropriations committees examine agencies' activities, review the President's proposed budget, scrutinize agencies' budget justifications, and often hear testimony from Department heads. It is a natural venue for airing concerns about agency use of delegated authority. Because of the essential and traditionally annual nature of appropriations, it is often easier for Congress to act through appropriations, rather than through Congress's authorizing Committees. For example, while congressional appropriators have in recent years routinely curbed the EPA's actions through appropriations limitations, the authorizing Committees for the laws the EPA implements have been much slower to produce legislation that would amend these landmark laws.

³⁸ H.R. 3826, 113th Cong. (2014).

³⁹ Pub. L. No. 93-344, 88 Stat. 297 (1974).

⁴⁰ See 31 U.S.C. §§ 1101–26.

⁴¹ 31 U.S.C. § 1104.

Congress knows how to show its disapproval in the appropriations process and has a variety of tools to do so. When an agency attempts to take action that Congress feels is inappropriate, a “limitation amendment” can be included in the agency’s funding bill.⁴² A limitation amendment prohibits the agency from using appropriated funds for a specified purpose. These spending limitations provide Congress with a flexible tool to express its concern at a variety of intensities.

Congress has used limitation amendments repeatedly to respond to agency actions. For example, in the EPA’s case, Congress has used these amendments to curb agency rules addressing application of permitting requirements to certain sources;⁴³ governing collection of certain pollution emissions data;⁴⁴ or stalling promulgation of certain drinking water standards.⁴⁵ Congress has also used this tool to prevent leasing of certain areas for oil and gas drilling⁴⁶ and to prevent revisions of fuel economy standards.⁴⁷

A review of the budget and appropriations interactions around the Clean Power Plan demonstrates the branches using their authority as contemplated by the Budget Act. From at least fiscal year 2012 through fiscal year 2015, the executive branch informed Congress about its work to develop the Clean Power Plan and described the legal rationale for a policy that would promote power generation shifting. The plan was developed in fiscal year 2013, proposed in fiscal year 2014, and finalized in fiscal year 2015. Although Congress had tools and opportunities to prohibit or adjust this course of action, it chose to fund the executive branch’s fiscal requests.

A. Congress Funded Development of the Clean Power Plan in Fiscal Year 2013

In the 2012 State of the Union, President Barack Obama acknowledged that the “differences” within and among the branches of government “may be too

⁴² See House Committee on Rules, *Amending Appropriations Bills – A Basic Guide Presented by the Committee on Rules*, COMM. ON RULES, <https://rules.house.gov/publication/amending-appropriation-bills-basic-guide-presented-committee-rules> [<https://perma.cc/TB6W-HVT7>].

⁴³ Interior Department and Further Continuing Appropriations, Fiscal Year 2010, Pub. L. No. 111-88, § 424, 123 Stat. 2904, 2961 (2009); *see also* Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, § 426, 125 Stat. 786, 1046 (2011).

⁴⁴ Interior Department and Further Continuing Appropriations, Fiscal Year 2010, § 425.

⁴⁵ Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1996, Pub. L. No. 104-134, tit. III, § 301, 110 Stat. 1321, 1321-300.

⁴⁶ MARC HUMPHRIES, CONG. RSCH. SERV., RL33493, OUTER CONTINENTAL SHELF: DEBATE OVER OIL AND GAS LEASING AND REVENUE SHARING 6–7 (2009), <https://crsreports.congress.gov/product/pdf/RL/RL33493>. [<https://perma.cc/N25H-DGL8>].

⁴⁷ Department of Transportation and Related Agencies Appropriations Act, 1996, Pub. L. No. 104-50, § 330, 109 Stat. 436 (1995); Department of Transportation and Related Agencies Appropriations Act, 1997, Pub. L. No. 104-205, § 323, 110 Stat. 2951 (1996); Department of Transportation and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-66, § 322, 111 Stat. 1425 (1997); Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriation Act, 1999, Pub. L. No. 105-277, § 322, 112 Stat. 2681 (1998); Department of Transportation and Related Agencies Appropriations Act, 2000, Pub. L. No. 106-69, § 321, 113 Stat. 986 (1999); Department of Transportation Appropriations Act, FY 2001, Pub. L. No. 106-346, § 320, 114 Stat. 1356 (2000).

deep right now to pass a comprehensive plan to fight climate change.”⁴⁸ He proposed a combination of smaller actions by Congress and the executive branch.⁴⁹ Then, in accordance with the Budget Act,⁵⁰ the administration conveyed to Congress the President’s proposed budget for fiscal year 2013. The proposed budget explained that the EPA would use appropriated dollars to “pursu[e] regulatory options” to “reduce GHGs domestically” and that the agency would use “market-based approach[es] ... where permitted under the Clean Air Act.”⁵¹

To provide additional information to congressional appropriators, and pursuant to the Budget Act,⁵² the EPA provided a document justifying its budget request.⁵³ The EPA explained to Congress that in fiscal year 2013, “the EPA will perform analyses and make determinations to address whether regulation of GHG emissions from ... listed source categories is warranted.”⁵⁴ The EPA specifically requested \$1.9 million from Congress so that the agency could devote 13.7 full-time equivalent (“FTE”) employees to “support the development of New Source Performance Standards that address greenhouse gases.”⁵⁵ The EPA Administrator testified in the Senate that appropriations would be “investments to support standards for clean energy.”⁵⁶

Some congressmembers attempted to stop the EPA at this point. In July 2012, the House Appropriations Committee approved legislation to fund the EPA and included a limitation on using any funds to “develop, issue, implement, or enforce any regulation or guidance under section 111 of the Clean Air Act establishing any standard of performance applicable to the emission of any greenhouse gas by any new or existing source that is an electric utility generating unit.”⁵⁷ Journalists at the time noted that the legislation would not be acceptable to Congress more broadly.⁵⁸ Accordingly, the proposal was never brought to a vote on the House Floor and did not become law.

⁴⁸ *Remarks by the President in State of the Union Address*, THE WHITE HOUSE (Jan. 24, 2012), <https://obamawhitehouse.archives.gov/the-press-office/2012/01/24/remarks-president-state-union-address> [<https://perma.cc/8788-83N4>].

⁴⁹ *See id.*

⁵⁰ 31 U.S.C. § 1105(a).

⁵¹ OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2013, APPENDIX 1191 (2012).

⁵² 31 U.S.C. § 1105(i).

⁵³ U.S. ENV’TAL PROT. AGENCY, FISCAL YEAR 2013, JUSTIFICATION OF APPROPRIATION ESTIMATES FOR THE COMM. ON APPROPRIATIONS, EPA-190-R-12-001 (2012).

⁵⁴ *Id.* at 217.

⁵⁵ *Id.* at 219–20.

⁵⁶ *Hearing on the Department of the Interior, Environment, and Related Agencies Appropriations for Fiscal Year 2013 Before the Subcomm. of Interior, Env’t, and Related Agencies Appropriations of the S. Comm. on Appropriations*, 112th Cong. (2012) (statement of Lisa P. Jackson, Administrator, EPA).

⁵⁷ Department of the Interior, Environment, and Related Agencies Appropriations Act, 2013, H.R. 6091, 112th Cong. § 448 (2012).

⁵⁸ *See, e.g.,* Becky Ham, *Congress Remains Deeply Divided on FY 2014 Spending*, AM. ASS’N FOR THE ADVANCEMENT OF SCI. (Sept. 3, 2013), <https://www.aaas.org/news/congress-remains-deeply-divided-fy-2014-spending> [<https://perma.cc/NU9J-9JKK>].

Instead, Congress funded the Administration through continuing resolutions for fiscal year 2013.⁵⁹ This approach essentially funded the EPA at fiscal year 2012 levels with only minor changes.⁶⁰ Although the fiscal year 2013 appropriations bill included by reference funding limitations imposed on the EPA in fiscal year 2012,⁶¹ those limitations included no prohibition on the EPA taking any action with regard to GHG emissions from the power sector.⁶²

With adequate funding, and no express limitation, the EPA was free to continue work on the development of the Clean Power Plan.

B. Congress Funded Continued Work on the Clean Power Plan in Fiscal Year 2014

When President Obama announced his budget priorities for fiscal year 2014 in the State of the Union, he stated, “I will direct my Cabinet to come up with executive actions we can take, now and in the future, to reduce pollution ... and speed the transition to more sustainable sources of energy.”⁶³ The fiscal year 2014 presidential budget proposal stated that it would “Support[] Efforts to Address Climate Change. The President has set a goal to reduce domestic greenhouse gas emissions 17 percent below 2005 levels by 2020.”⁶⁴ The EPA stated that it would continue to explore “cost-effective strategies to reduce greenhouse gas emissions.”⁶⁵

The EPA’s fiscal year 2014 budget justification explained that the EPA requested funding to continue work on regulations establishing GHG emissions standards from industrial sectors, including power plants.⁶⁶ The EPA Administrator testified before the Senate in January 2013 that “the President asked EPA to work with states, utilities and other key stakeholders to develop plans to reduce carbon pollution from future and existing power plants.”⁶⁷ The EPA explained that the Clean Power Plan proposal would allow the states to have great flexibility in meeting emissions reductions goals.⁶⁸

⁵⁹ See Continuing Appropriations Resolution, 2013, Pub. L. No. 112-175, 126 Stat. 1313 (2012); Consolidated and Further Continuing Appropriations Act, 2013, Pub. L. No. 113-6, 127 Stat. 198 (see Division F, making continuing appropriations).

⁶⁰ Pub. L. No. 113-6 extended the funding levels in the Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, 125 Stat. 786 (2011).

⁶¹ Pub. L. No. 113-6 § 1105, 127 Stat. at 413.

⁶² See §§ 401-436, Title IV, Division E, 125 Stat. at 1037-1050.

⁶³ *Remarks by the President in the State of the Union Address*, THE WHITE HOUSE (Feb. 12, 2013), <https://obamawhitehouse.archives.gov/the-press-office/2013/02/12/remarks-president-state-union-address> [<https://perma.cc/UCK8-KHHQ>].

⁶⁴ OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 2014 at 152 (2013).

⁶⁵ *Id.*

⁶⁶ U.S. Environmental Protection Agency, Fiscal Year 2014, Justification of Appropriation Estimates for the Committee on Appropriations, at 16, 407-408, and 841, EPA-190-R-13-003 (2013).

⁶⁷ *Review of the President's Climate Action Plan: Hearing Before the S. Comm. On Env't & Pub. Works*, 133d Cong. 32 (2014) (statement of Regina McCarthy, Administrator, EPA).

⁶⁸ *Id.* at 47.

Again, some in Congress sought to stop the EPA from proposing GHG regulations on power plants. The House Appropriations Committee publicly released a draft appropriations bill that would have included a limitation on the EPA taking action to regulate GHG from power plants.⁶⁹ However, this proposal never advanced.⁷⁰

Instead, Congress funded the EPA for fiscal year 2014 with a continuing resolution and subsequent consolidated appropriations act.⁷¹ In the consolidated appropriations act, Congress included some funding limitations, such as prohibiting the use of funds to establish GHG permitting requirements on livestock production.⁷² However, Congress did not include any limitation on regulating GHG emissions from power plants.

With adequate funds provided by Congress, and a rejected funding limitation, the EPA continued its work to reduce GHG emissions from power plants. In June 2014, the EPA proposed the Clean Power Plan to control and reduce carbon dioxide emissions from existing power plants.⁷³ The EPA stated clearly in their proposal that the Clean Power Plan would encompass generation shifting policies, including those “in which sources may buy and sell mass emission allowances.”⁷⁴

C. Congress Funded Promulgation of the Clean Power Plan Final Rule in Fiscal Year 2015

In discussing his fiscal year 2015 budget priorities with Congress at the State of the Union in 2014, President Obama explained that he had directed his administration “to set new standards on the amount of carbon pollution our power plants are allowed to dump into the air.”⁷⁵ The President’s proposed budget highlighted the effort to “reduce carbon pollution from power plants.”⁷⁶

⁶⁹ Press Release, House Appropriations Committee Republicans, Appropriations Committee Releases Fiscal Year 2014 Interior and Environment Bill (July 22, 2013), <https://appropriations.house.gov/news/press-releases/appropriations-committee-releases-fiscal-year-2014-interior-and-environment-bill> [<https://perma.cc/RXD6-GBWE>]; Department of the Interior, Environment, and Related Agencies Appropriations for Fiscal Year 2014 (draft), U.S. House, 113th Congress § 445 (2013), <https://appropriations.house.gov/sites/evo-subsites/republicans-appropriations.house.gov/files/migrated/UploadedFiles/BILLS-113HR-SC-AP-FY2014-Interior-SubcommitteeDraft.pdf> [<https://perma.cc/8WM3-RHWQ>].

⁷⁰ See CONG. RSCH. SERV., R43142, INTERIOR, ENVIRONMENT, AND RELATED AGENCIES: FY2013 AND FY2014 APPROPRIATIONS (2014).

⁷¹ See Continuing Appropriations Resolution, 2014, Pub. L. No. 113-46, 127 Stat. 558 (2013); Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, 128 Stat. 5.

⁷² Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, § 420, 128 Stat. 5.

⁷³ Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34,830 (June 18, 2014).

⁷⁴ Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34,830, 34,927 (June 18, 2014).

⁷⁵ *President Barack Obama's State of the Union Address*, THE WHITE HOUSE (Jan. 28, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/01/28/president-barack-obamas-state-union-address> [<https://perma.cc/S2WX-5F4M>].

⁷⁶ OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 2015 (2014).

It informed Congress of the administration's continuing intent to set regulatory standards for GHG emissions from power plants.⁷⁷

The EPA's budget justification explained to congressional appropriators that the agency intended to finalize the Clean Power Plan by June 1, 2015.⁷⁸ It thereby informed Congress that the agency intended to use \$10 million and twenty-four FTE employees to carry out the President's climate change agenda, including setting carbon dioxide ("CO₂") standards for power plants.⁷⁹

With the Clean Power Plan proposed, the details of the EPA's flexible generation shifting approach were formalized, fully articulated, and familiar to everyone interested in federal climate policy (and to most members of Congress). As in fiscal years 2013 and 2014, some congressmembers attempted to prevent the EPA from moving forward with the new power plant rules. In July 2014, the House Appropriations Committee reported a bill⁸⁰ to fund the EPA that prohibited using funds for the Clean Power Plan.⁸¹

Once again, a limitation on the EPA's actions was never enacted, as this legislation never advanced for consideration on the House Floor. Instead, Congress funded the EPA with a continuing resolution and consolidated appropriations bill.⁸² While Congress chose to include other funding limitations on certain regulatory activities at the EPA, no limitations regarding regulatory standards for GHG emissions from power plants were included.⁸³

Adequately funded, and with no congressionally imposed limitation on using existing authority to address GHG emissions from power plants, the EPA finalized the Clean Power Plan in August 2015.⁸⁴

This abbreviated history demonstrates the extensive formal interactions between the legislative and executive branches during development and promulgation of the Clean Power Plan. Additionally, as Congress deliberated on whether to continue funding the EPA's regulatory actions, high-profile developments solely within the executive branch,⁸⁵ and public-facing

⁷⁷ *Id.* at 134.

⁷⁸ U.S. Environmental Protection Agency, Fiscal Year 2015, Justification of Appropriation Estimates for the Committee on Appropriations, at 12, 213, EPA-190-R-14-002 (2014).

⁷⁹ *Id.* at iv.

⁸⁰ Department of the Interior, Environment, and Related Agencies Appropriations Act, 2015, H.R. 5171, 113th Cong. (2014).

⁸¹ *See id.* § 435.

⁸² Continuing Appropriations Resolution, 2015, Pub. L. No. 113-164, 128 Stat. 1867 (2014); Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130 (2014).

⁸³ *See* Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, Division F, Title IV, §§ 419-20, 128 Stat. 2130 (2014) (relating to Clean Air Act permits for livestock and greenhouse gas reporting by manure management systems).

⁸⁴ *See* Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015).

⁸⁵ *See Presidential Memorandum – Power Sector Carbon Pollution Standards*, THE WHITE HOUSE (June 25, 2013), <http://www.whitehouse.gov/the-press-office/2013/06/25/presidential-memorandum-power-sector-carbon-pollution-standards> [<https://perma.cc/XQ6A-8S4A>].

communications⁸⁶ served to educate Congress about the ramifications of the EPA regulations.

This history demonstrates that while opposition to the Clean Power Plan existed in Congress, that position never prevailed. Congress had ample information about the EPA's regulatory plans, could review the proposed rule, and had multiple opportunities between fiscal years 2013 through 2015 to stop, limit, or redirect the EPA's actions. The opposition, however, simply had inadequate support for its position. Congress affirmatively funded the EPA's activities without limitation.

IV. CONCLUSION

Understanding what a previous Congress intended by looking at the actions (or inactions) of a subsequent Congress is a fool's errand. Yet, if a court undertakes such an effort, then looking at what a Congress *did* do might be more fruitful than looking at what a Congress *did not* do.

Relying on failed legislation to gauge Congress's views is unreliable at best, and likely interferes with Congress's activities. Examining the appropriations process to gauge Congress's views offers several significant benefits over the failed-legislation argument. Focusing on appropriations allows a court to examine how Congress has responded to the specific executive action being reviewed by the Court; there would be no need for the Court to hunt for "something akin" to that executive action. Furthermore, there would be no need to determine whether unenacted legislation had been substantively rejected by Congress or had just failed to move forward in the process like the vast majority of introduced legislation. Instead, if Congress had the opportunity to understand a proposed executive action, and subsequently decided to support that action through adequate funding, then the Court could see that congressional funding as a bicameral statement on the executive action.

Understanding congressional views of delegated authority by examining decisions to fund executive branch actions would be unconventional compared to traditional statutory interpretation, but the Supreme Court has already taken us to unconventional territory with the major questions doctrine. Unlike the rejected-legislation argument, relying on the appropriations process would better respect separation of powers by examining evidence of positive bicameral actions in multi-year processes shared between the executive and legislative branches. After all, if rejected legislation sheds light on legislative intent, the appropriations process provides equally, if not more compelling, clues. If rejected legislation can guide us to the "practical understanding of legislative intent" that the Chief Justice calls for in *West Virginia*, why would the appropriations process fall short?

⁸⁶ See *EPA's FY 2015 Budget Proposal Focuses on Delivering Core Environmental and Health Protections*, U.S. ENV'T PROT. AGENCY (Mar. 4, 2014), https://www.epa.gov/archive/epapages/newsroom_archive/newsreleases/9309d87b4242f6df85257c91006434b1.html [<https://perma.cc/8F4U-XD52>].

If the Court intends to continue to apply the major questions doctrine, it should answer these questions and provide guidance for lower courts to strengthen predictability for affected parties. If the Court cannot rationalize its analysis, it should rethink the role of failed legislation, and the major questions doctrine more generally. Otherwise, echoing Justice Scalia, the major questions doctrine will be “more likely to confuse than to clarify” as courts weaponize it to “pick out their friends” in the congressional record.