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ARTICLE

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

GREG DOTSON¹

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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.

¹ Associate Professor of Law, University of Oregon School of Law. Thanks to Sierra Deak, Marty Farrell, Jessie Gardner, Todd Newmister, and Brenton Riddle for assistance with research. Thanks to Marissa Medici and Mia Berman for their thoughtful comments and for hosting the Harvard Law School Symposium, Administrative Law After the Major Questions Doctrine and Chevron, where the idea for this essay originated.

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 []reluctant 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 ‘majorness.’”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.

ARTICLE

THE BONFIRE OF THE EQUITIES: JUDICIAL STAYS OF FEDERAL ENVIRONMENTAL REGULATIONS

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I. INTRODUCTION

The Supreme Court’s emergency docket is now a central part of federal environmental law despite being completely absent just ten years ago. As Professor Stephen Vladeck and others have documented, the Court has entertained and granted emergency relief, such as stays or injunctions of regulations and lower court rulings, far more commonly in recent years than at any other time in its history.¹ A notable number of the Court’s recent high-profile emergency docket actions have involved rulemakings by the Environmental Protection Agency (EPA), for instance: the historic order blocking the Obama EPA’s “Clean Power Plan,” devised to fulfill the Agency’s Clean Air Act’s

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¹ See STEPHEN VLADECK, *THE SHADOW DOCKET* 12, 17 (2023). See generally Edward L. Pickup & Hannah L. Templin, *Emergency-Docket Experiments*, 98 NOTRE DAME L. REV. Reflection 1 (2022); *Texas’s Unconstitutional Abortion Ban and the Role of the Shadow Docket: Hearing Before the Senate Comm. on the Judiciary*, 117th Cong. (Sept. 29, 2021) (Testimony of Stephen Vladeck); *The Supreme Court’s Shadow Docket: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the House Comm. on the Judiciary*, 117th Cong. (Feb. 18, 2021) (Testimony of Loren L. AliKhan); Trevor N. McFadden & Vetan Kapoor, *The Precedential Effects of the Supreme Court’s Emergency Stays*, 44 HARV. J.L. & PUB. POL’Y 827 (2021); William Baude, *Foreword: The Supreme Court’s Shadow Docket*, 9 NYU J.L. & LIBERTY 1 (2015).

command to curb climate pollution by fossil-fuel power plants—the Court’s first-ever emergency injunction of a federal rulemaking before any merits decision by a lower court;² the Court’s stay of a district court order vacating the Trump EPA’s controversial revisions of Clean Water Act regulations governing States’ review of projects affecting their waters;³ and, most recently, another Clean Air Act case, *Ohio v. EPA*, in which the Court, after months of considering industry and State applications to halt implementation of the Biden EPA’s “Good Neighbor Rule,” limiting cross-state ozone pollution, decided to hear oral argument⁴—a step the Court has taken only three times in the last half-century.⁵ And beyond these particular disputes, the Court’s greater receptivity to emergency applications seeking to halt federal executive actions implies a looming threat to environmental regulations.⁶ Reading those signals, all the key players in the federal environmental policymaking landscape—from agency staff developing regulations, to regulated entities, advocates seeking to shape agency decisions, reporters covering environmental policy, and students and scholars—now must take into consideration the real possibility that the Supreme Court will block significant national pollution-control and public-health regulations shortly after the ink dries in the Federal Register.

The ascendance of the Supreme Court’s emergency docket in environmental cases is troubling. In general, the Court’s increasing willingness to halt agency action in emergency orders raises constitutional, statutory, judicial-administration, and institutional-legitimacy concerns;⁷ and in the complex rulemaking challenges that characterize much of federal environmental law, basic problems of institutional capacity compound those concerns. Federal environmental cases tend to involve: (1) sprawling records that require substantial time for a reviewing judicial panel to absorb; (2) factual complexities unique to the particular regulatory regime, such as highly technical, industry-specific problems and solution sets, intricate regulatory histories, and abstruse analytical methodologies; (3) a large number of legal issues that often have not previously been addressed by more than one court of appeals; (4) a diversity of interested parties, many of whom are not before the court (including members of the public who stand to benefit from healthier air, water, ecosystems, and products, as well as businesses with high-polluting, underregulated

² *West Virginia v. EPA*, 577 U.S. 1126, 1126 (2016); *see also* Adam Liptak & Coral Davenport, Supreme Court Blocks Obama’s Efforts to Regulate Coal Emissions, N.Y. TIMES (Feb. 9, 2016).

³ *Louisiana v. American Rivers*, 142 S. Ct. 1347, 1347 (2022) (mem.).

⁴ *See Ohio v. EPA*, 144 S. Ct. 538, 539, No. 23A349 (2023) (mem.) (ordering oral argument).

⁵ *See* Stephen Vladeck, *Making Sense of the “Good Neighbor” Applications*, One First (Feb. 19, 2024), <https://stevevladeck.substack.com/p/67-making-sense-of-the-good-neighbor> [<https://perma.cc/9CYT-PUQJ>].

⁶ *See, e.g., Alabama Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 594 U.S. 758, 764 (2021) (per curiam) (granting application to stay pending judicial review nationwide eviction moratorium implemented in response to COVID-19 pandemic); *Nat’l Fed’n of Indep. Bus. v. Occupational Safety & Health Admin.*, 595 U.S. 109, 120–21 (2022) (per curiam) (granting application to stay pending judicial review OSHA’s temporary standard mandating that certain employers require COVID-19 vaccination in certain circumstances).

⁷ *See* VLADECK, *supra* note 1, at 18–25.

competitors); and (5) costs to regulated industry that are readily stated in dollars, but benefits (such as fewer asthma attacks, higher IQ, or lower cancer risk) that, while recognized and valued by Congress, are difficult to value in monetary terms. Because of these features, emergency applications seeking to block important environmental regulatory programs tend to implicate the Supreme Court’s institutional weaknesses.⁸

One response to these challenges might be for the Supreme Court to manage its emergency docket so as to avoid reliance on its own fact-finding. For example, the Court could refuse to award relief not supported by explicit factual findings from a lower court and remand cases for such fact-finding. Or the Court could, in minimalist and passively virtuous fashion, reaffirm that it will seldom disturb lower courts’ rulings on preliminary relief in the absence of a well-defined and important legal issue that likely will warrant a grant of certiorari.⁹ That approach could find support in dozens of in-chambers opinions and merits cases emphasizing the extraordinary character of emergency relief—particularly after a lower court has denied such relief.¹⁰ And one might expect that the Court would, for its own reasons, seek to discourage emergency applications. Among other drawbacks, emergency applications delay regular adjudication of cases in lower courts and take time away from the Court’s principal responsibility: deciding, based on full briefing and argument, the merits of legal questions presented in cases—principally “[f]inal judgments” of federal appellate and state high courts¹¹—that it has accepted for its plenary review docket.¹²

But there are signs that the Court is not trending in that direction. Quite the opposite. The Court appears to be remolding the traditional standard for emergency relief by erasing the requirement that the equities of granting a stay must clearly favor the applicant.¹³ For instance, in Justice Kavanaugh’s recent concurrence in *Labrador v. Poe*,¹⁴ which Justice Barrett joined, he opined that when there are applications to stay “important new laws” like national environmental regulations, the “harms and equities are very weighty on both

⁸ See *infra* Part II.B.

⁹ See generally Note, *The Role of Certiorari in Emergency Relief*, 137 HARV. L. REV. 1951 (2024) (reviewing and contrasting the tests for stays and injunctions in the Supreme Court, and the relevance of certworthiness); see also S. Ct. R. 10 (considerations governing certiorari review). On the Court’s venerable history of controlling its workload through interpretation of jurisdictional grants, see VLADECK, *supra* note 1, at 27–92.

¹⁰ See *infra* notes 33 & 34; see also Note, *Halting Administrative Action in the Supreme Court*, 137 HARV. L. REV. 2016, 2022 n.42 (2024) (collecting cases).

¹¹ 28 U.S.C. § 1257 (state courts certiorari review); see also *id.* § 1254 (courts of appeals certiorari review).

¹² For instance, in recent public remarks, Justices Thomas and Kavanaugh both expressed concern that the recent increase in emergency applications is putting stress on the Court and interfering with management of its merits docket. See Ryan Autullo & Chris Marr, *Kavanaugh, Thomas Raise Concerns Over Shadow Docket Pressure (2)*, Bloomberg Law, May 10, 2024, <https://news.bloomberglaw.com/litigation/kavanaugh-laments-pressure-shadow-docket-puts-on-supreme-court> [<https://perma.cc/4WPE-4DYT>].

¹³ See *infra* Part II.A.

¹⁴ 144 S. Ct. 921 (2024) (mem.).

sides.”¹⁵ “In those cases,” he continued, “this Court has little choice but to decide the emergency application by assessing likelihood of success on the merits.”¹⁶

Such an approach to the equities of emergency applications, if adopted more broadly, could pose a major impediment to the administration of laws that protect the public’s health, safety, and other welfare interests. In many circumstances, it is economically rational for an industry facing regulations that would require new capital expenditures or adversely affect its profit-making to seek preliminary injunctive relief, regardless of the likelihood the challenged rule ultimately will be upheld. If the existence of at least superficially “weighty” harms “on both sides” of a case is enough to warrant a Supreme Court ruling reflecting the Justices’ analysis of the merits, the Court is likely to see emergency applications all the time. For unlike certiorari petitioners, who must overcome long odds to get the Court to exercise its discretion to take up their cases, applicants on the emergency docket can wield a rule’s wide-ranging costs and benefits to force a circuit Justice, or the whole Court, to rule preliminarily on the merits of a suite of legal issues—without regard to the multiplicity of factors that would render cases uncertworthy.¹⁷

Combined with new judicial trends toward non-deferential review of agency decisions,¹⁸ Supreme Court emergency intervention might come to resemble near-automatic merits review of important administrative regulations—and even toward a new norm that no Executive Branch rules implementing statutes are really law until the Supreme Court says so. Such a regime would seem to defy venerable understandings of the relationships among the branches, as well as constitutional and statutory limits on the Court’s jurisdiction. The All Writs Act limits the Court to granting emergency injunctions “in aid of [its *appellate*] jurisdiction” and only if consistent with traditional equitable standards,¹⁹ which limited emergency relief to “extraordinary cases”²⁰ where the likelihood of irreparable harm to the applicant “clearly exceed[s]” harm to others from an injunction.²¹

A regime of preliminary Supreme Court merits review in “important” regulatory cases, available as of right to any party that has failed to secure an

¹⁵ *Id.* at 929 (2024) (Kavanaugh, J., concurring in the grant of stay).

¹⁶ *Id.*

¹⁷ *See* S. Ct. R. 10.

¹⁸ *See, e.g.,* *West Virginia v. EPA*, 597 U.S. 697, 722 (2022) (holding that in certain extraordinary cases, the major questions doctrine requires agencies to point to clear congressional authorization for its action); *Loper Bright Enterprises v. Raimondo*, 143 S. Ct. 2429 (2023) (mem.) (granting certiorari to review the scope of judicial deference to agency statutory interpretations); *Relentless v. Department of Commerce*, 144 S. Ct. 325 (2023) (mem.) (same).

¹⁹ 28 U.S.C. § 1651(a) (authorizing the Court to “issue all writs necessary or appropriate in aid of [its] jurisdiction and agreeable to the usages and principles of law”); *see also* U.S. CONST. art. III, § 2, cl. 2 (excepting the narrow categories of original jurisdiction cases, “the supreme Court shall have appellate Jurisdiction”).

²⁰ *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers) (quoting *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers)).

²¹ *Barnes v. E-Sys., Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1305 (1991) (Scalia, J., in chambers).

injunction from a lower tribunal, also would seem inconsistent with the role of Congress’s designated court of first instance review. Many federal environmental statutes direct challenges to agency regulations to the courts of appeals, and in some instances, to the D.C. Circuit exclusively.²² In some cases, those statutes provide for a highly structured judicial review process that allows all of the parties injured by a rule (and, often, beneficiaries who believe it should have been more far-reaching) to contest it in one consolidated mega-proceeding, subject to limitations designed to protect these massive agency undertakings from being lightly disturbed.²³ Supreme Court intervention before the statutorily designated court has an opportunity to winnow the record and decide the merits would short-circuit this process, especially since a doctrinal shift toward treating the equities as offsetting would mean that a grant or denial of an application is very likely an expression of the Court’s views on the merits.²⁴ A related concern is that the Supreme Court is fundamentally predisposed and conditioned to reach merits questions in cases where it grants review; if the Court is also reflexively deciding more preliminary relief applications with quick “likelihood of success” determinations, it might fail to give attention to mundane but important procedural issues like administrative exhaustion that Congress deemed important, or to take account of the likely final relief—such as whether, even if the applicant were to succeed on the merits, the challenged rule should be remanded without vacatur.²⁵ That regime is not what Congress intended in establishing carefully wrought and detailed judicial-review regimes for environmental laws. Neither does such a regime seem workable for carrying out important statutory programs.

²² *See, e.g.*, 42 U.S.C. § 7607(b), (d) (Clean Air Act judicial review provisions); 33 U.S.C. § 1369(b) (Clean Water Act judicial review provision); 15 U.S.C. § 2618 (Toxic Substances Control Act judicial review provision); 15 U.S.C. § 717r(b), (d) (Natural Gas Act judicial review provisions).

²³ *See, e.g.*, 42 U.S.C. § 7607(b), (d) (in certain challenges to Clean Air Act rulemaking, establishing an administrative exhaustion requirement, barring collateral attacks, limiting the duration of any agency stays pending reconsideration, and setting a strong harmless error standard for procedural errors).

²⁴ Historically, the Court recognized significant distinctions between the Justices’ decisions on preliminary relief and the Court’s merits decisions. *See, e.g.*, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 721 n.10 (2007) (chastising parties for relying on an in-chambers opinion denying a stay application, and distinguishing “[t]he propriety of preliminary relief” from “resolution of the merits”). But recently, the Court has appeared to treat as precedential the analysis of likely merits success in certain of its decisions granting emergency relief by citing those orders in subsequent decisions in other cases, including merits-docket opinions (particularly as to the major questions doctrine). *See, e.g.*, *Biden v. Nebraska*, 143 S. Ct. 2355, 2372–73 (2023) (citing *Alabama Ass’n of Realtors v. DHHS*, 594 U.S. 758, 764 (2021) (per curiam)); *West Virginia v. EPA*, 597 U.S. 697, 700 (2022) (citing opinions regarding emergency relief in *Alabama Ass’n of Realtors* and *NFIB v. OSHA*, 595 U.S. 109 (2022) (per curiam) as “[p]recedent” to support application of the major questions doctrine). *See also* *Labrador v. Poe*, 144 S. Ct. 921, 933–34 (2024) (Kavanaugh, J., concurring in grant of stay) (“A written opinion by this Court assessing likelihood of success on the merits at a preliminary stage can create a lock-in effect because of the opinion’s potential vertical precedential effect (*de jure or de facto*)”).

²⁵ *See, e.g.*, *Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm’n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993) (remand without vacatur standard).

The Supreme Court can still correct course, and we think it should for all the above reasons; but we leave to others to vet the various strategies for persuading it to return to a more restrained approach to emergency relief. Here, we offer some practical thoughts for lower courts, lawmakers, agencies, and other litigants who must adjust to new emergency docket trends in the context of national regulatory programs. First, we review concerning trends in the Court’s approach to the equities of preliminary relief and use examples from federal environmental cases to elucidate the importance of careful equitable balancing.²⁶ Then we offer some initial recommendations on how lower courts could adjust to a regime in which the Court is willing to engage early and aggressively in rulemaking review cases; how advocates might take account of these new realities; and how lawmakers and rule-drafters might address the issue.²⁷

We are hardly disinterested observers. Both of us have been involved in several of the cases we discuss here.²⁸ While our more typical posture has involved defending federal environmental rules against emergency motions from state attorneys general and industry, we have occasionally been in the opposite posture, representing environmental interests seeking to halt agency action.²⁹ We agree that courts’ ability to intervene early in litigation has a place in an orderly and fair system of environmental law. But as we explain here, we think current trends threaten to subvert those ends.

II. THE SUPREME COURT’S EVOLVING APPROACH TO THE EQUITIES OF PRELIMINARY RELIEF

The Supreme Court appears to be changing its approach to consideration of the equities on its emergency docket. The traditional standard requires all federal courts to examine four factors in deciding whether to grant preliminary relief—“(1) whether the stay applicant has made a strong showing that [it] is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other

²⁶ See *infra* Part II.

²⁷ See *infra* Part III.

²⁸ Both of us represent Environmental Defense Fund (EDF), a respondent-intervenor in the pending Good Neighbor Rule cases (*Utah v. EPA*, No. 23-1157 (D.C. Cir.); *Ohio v. EPA*, No. 23A349 (U.S.)); our firm represents respondent-intervenor EDF in the pending Oil and Gas Methane Rule litigation discussed below (*Oklahoma v. EPA*, No. 24-1054 (D.C. Cir.)); and Donahue represented respondent-intervenor EDF throughout the Clean Power Plan litigation, including the stay proceedings, and Herzog represented amici curiae in support of EPA on the merits (*West Virginia v. EPA*, No. 15-1363 (D.C. Cir.); No. 15A773 (U.S.)).

²⁹ See, e.g., Order, *Environmental Defense Fund v. EPA*, No. 18-1190 (D.C. Cir. July 18, 2018), Doc. 1741224 (D.C. Circuit administrative stay blocking challenged “non-enforcement policy” relating to ultra-high-emitting “glider trucks”); Gregory Wallace, *EPA Reverses Pruitt-Era Rule on Glider Truck Emissions*, CNN POLITICS, July 28, 2018, <https://www.cnn.com/2018/07/27/politics/epa-scott-pruitt-glider-trucks/index.html> [<https://perma.cc/4H5T-PZBX>] (noting that agency abandoned non-enforcement policy after court entered administrative stay); *Clean Air Council v. Pruitt*, 862 F.3d 1, 14 (D.C. Cir. 2017) (on motion for stay or summary vacatur, vacating agency-imposed stay of Clean Air Act regulation). Donahue was co-counsel for EDF in these cases.

parties interested in the proceeding; and (4) where the public interest lies.”³⁰ When the government is the opposing party, the final two factors are said to merge.³¹ Preliminary relief is “never awarded as of right;”³² even if a movant faces irreparable injury, a stay is supposed to be “extraordinary” relief.³³ Decades of decisions and in-chambers opinions embraced a particularly demanding standard for emergency relief from the Supreme Court.³⁴

In practice, however, Supreme Court stays are seemingly becoming decreasingly “extraordinary”—especially where the applicant seeks to halt a federal regulatory program.³⁵ Though not the sole cause of this phenomenon, recent shifts in the Court’s approach to analyzing irreparable injury and balancing the equities of a stay appears to be increasing the probability that the Court will stay federal regulations, as well as encouraging, cyclically, more stay applications. This should be a cause for concern for anyone who supports implementation of national regulatory programs—particularly new social-welfare or public-health rules with nationwide scope and broad public benefits.

Here, we discuss two interrelated facets of the problem facing national rulemaking cases on the Court’s emergency docket: (1) the Court’s abruptly evolving approach to balancing the equities of emergency relief, and particularly to comparing alleged harms to applicants, respondents, other parties, and the public, and (2) the Court’s limited institutional capacity for the fact-finding essential to that task.

A. *Vanishing Equities*

Equitable balancing ensures that emergency applications do not regularly turn into preliminary, rushed consideration of the unfiltered merits issues, often with not even a single lower court opinion as a guide.³⁶ This was long the

³⁰ *Nken v. Holder*, 556 U.S. 418, 434 (2009) (affirming lower-court stay standard); *see also* *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008) (affirming substantially similar preliminary injunction standard); *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam) (affirming the Supreme Court’s stay standard, which also includes consideration of certworthiness).

³¹ *Nken*, 556 U.S. at 435.

³² *Winter*, 555 U.S. at 25.

³³ *Williams v. Zbaraz*, 442 U.S. 1309, 1311 (1979) (Stevens, J., in chambers); *see also* *Virginia Petroleum Jobbers Ass’n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) (per curiam).

³⁴ *See, e.g.*, *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (mem.) (Roberts, C.J., concurring in denial of application for injunctive relief) (“emergency relief is appropriate only “where ‘the legal rights at issues are indisputably clear’ and even then, ‘sparingly and only in the most critical and exigent circumstances’”) (quoting STEPHEN M. SHAPIRO ET AL., *SUPREME COURT PRACTICE* § 17.4 (11th ed. 2019)); *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers) (“Denial of ... stay applications is the norm; relief is granted only in ‘extraordinary cases’”) (quoting *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers)).

³⁵ *See generally* VLADECK, *supra* note 1.

³⁶ *Cf.* *Louisiana v. Am. Rivers*, 142 S. Ct. 1347, 1348–49 (2022) (mem.) (Kagan, J., dissenting) (In the absence of “traditionally required” showing of harm, “the Court’s emergency docket ... becomes only another place for merits determinations, except made without full briefing and argument”).

Supreme Court’s default approach to emergency relief.³⁷ But the Court’s response to ever-more-frequent applications to block national regulations appears now to be trending in the opposite direction. In recent emergency docket actions, the Court has signaled that its consideration of irreparable harm allegations and the relative equities is far *less* important than the Court’s evaluation of likely merits success—and perhaps, in practice, little more than a box-checking exercise.

Take, for instance, the highly unusual oral arguments the Court called for on applications to halt the Occupational Safety and Health Administration’s (OSHA) COVID-19 vaccine mandate (*NFIB v. OSHA*)³⁸ and the EPA’s Good Neighbor Rule (*Ohio v. EPA*).³⁹ While in some respects these arguments were a welcome indication that the Court is invested in increasing transparency and procedure on the emergency docket, the arguments also signaled the Court’s unwillingness to engage in robust interrogation of irreparable harm claims in complex agency cases, even where the challenged regulations afford vitally important public health protections. In *NFIB*, for example, the Court’s unsigned order identified the competing equities implicated by staying OSHA’s vaccine rule—economic costs to challengers versus deaths and hospitalizations from a viral pandemic—but then announced that “it is not [the Court’s] role to weigh such tradeoffs.”⁴⁰ This was a striking conclusion considering the centrality of just such weighing to the historic test for granting or denying provisional equitable relief.⁴¹

³⁷ See, e.g., *R.R. Comm’n of Tex. v. Pullman Co.*, 312 U.S. 496, 500 (1941) (“The history of equity jurisdiction is the history of regard for public consequences in employing the extraordinary remedy of the injunction”); *Yakus v. United States*, 321 U.S. 414, 440 (1944) (the Court’s task in considering emergency relief is to “balance[] the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction”); *Hecht Co. v. Bowles*, 321 U.S. 321, 329–30 (1944) (federal courts’ equity practice has “a background of several hundred years of history” in which “equity [is] the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims”); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (“In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction”); *Winter*, 555 U.S. at 32 (“[T]he balance of equities and consideration of the public interest...are pertinent in assessing the propriety of any injunctive relief, preliminary or permanent”); *id.* at 31 n.5 (consideration of the equities alone can serve as the basis for a court’s denial of a request for preliminary injunctive relief “even if plaintiffs are correct on the underlying merits”).

³⁸ 595 U.S. 109, 120–21 (2022) (per curiam) (granting applications to stay OSHA’s COVID vaccine mandate following expedited oral argument).

³⁹ 144 S. Ct. 538, 539 (2023) (mem.) (ordering oral argument on applications to stay the EPA’s Good Neighbor Rule).

⁴⁰ 142 S. Ct. at 666; see also VLADECK, *supra* note 1, at 253 (“This pattern” of the Court disclaiming responsibility to weigh competing equities on its emergency docket “was arguably already clear from the shadow docket rulings in [prior] Trump Administration and COVID cases, but here was the majority finally saying the quiet part out loud”).

⁴¹ See, e.g., *Barnes*, 501 U.S. at 1305 (Scalia, J., in chambers) (In reviewing a stay application, “[i]t is ultimately necessary” for the Court “to balance the equities—to explore the relative

The same theme was reprised at the Good Neighbor Rule oral argument in February 2024.⁴² Multiple States and industry groups filed emergency applications asking the Court to halt implementation of an EPA rule requiring “upwind” States to prevent significant amounts of dangerous smog-forming pollution from flowing across their borders and interfering with “downwind” States’ ability to meet national air quality standards. The D.C. Circuit had denied motions to stay the rule in summary orders with no express findings.⁴³ The Supreme Court was thus presented with undistilled evidentiary declarations expressing claims of harm from, on the one hand, the EPA’s regulation of emissions from power plants and other heavy industry, or on the other, harm from allowing that pollution to continue unabated (or, at the least, abated at vast cost to the downwind states)—and the Court, at least at the argument, showed little interest in sifting through the evidence and weighing the relative magnitudes of the harm.

Justice Kavanaugh, for example, declared at oral argument that “both sides have irreparable harm, so that’s a wash.... [B]oth sides have a strong public interest in my view. So, then the only other factor on which we can decide this under our traditional standard is likelihood of success on the merits.”⁴⁴ However, Justice Kavanaugh offered no explanation for why he believed that the harms to regulated industry from denying a stay canceled out harms to the downwind public and States from granting one (and, in fact, they do not). Instead, it appeared that the mere presence of *some* claimed harm on either side sufficed to take consideration of the relative hardships out of play.

Justice Kavanaugh picked up on the same idea in his concurring opinion in *Labrador*. Much as he had suggested in the Good Neighbor argument that the harm arguments of the applicants and respondents were “a wash,” his concurrence seems to argue for the casting aside laborious irreparable harm and public interest balancing when applicants are seeking to halt “important” national rules:

In those emergency cases, the plaintiffs—including individuals and businesses—often will suffer irreparable harm if

harm to applicant and respondent, as well as the interests of the public at large... The likelihood that denying the stay will permit irreparable harm to the applicant may not clearly exceed the likelihood that granting it will cause irreparable harm to others”) (internal quotation omitted); *Williams v. Zbaraz*, 442 U.S. 1309, 1312 (1979) (Stevens, J., in chambers) (“In addressing the irreparable-injury issue, the task of a judge or Justice is to examine the competing equities, ... a task that involves balancing the injury to one side against the losses that might be suffered by the other”) (cleaned up); *Beame v. Friends of the Earth*, 434 U.S. 1310, 1312 (1977) (in considering a stay motion, “a Circuit Justice should ‘balance the equities’ ... and determine on which side the risk of irreparable injury weighs most heavily”) (quoting *Holtzman v. Schlesinger*, 414 U.S. 1304, 1308–09 (1973) (Marshall, J., in chambers))).

⁴² Orders on applications to stay the Good Neighbor Rule are still pending as of the time of publication.

⁴³ Order, *Utah v. EPA*, No. 23-1157 (D.C. Cir. Sept. 25, 2023), Doc. 2018645; Order, *Utah v. EPA*, No. 23-1157 (D.C. Cir. Oct. 11, 2023), Doc. 2021268.

⁴⁴ Transcript of Oral Argument at 74, *Ohio v. EPA* (U.S. Feb. 21, 2024) (No. 23A349).

the relevant government officials are not enjoined from enforcing the law during that multiyear period. But on the flip side, other parties—including the Federal Government, the States, or other individuals and businesses—often will suffer irreparable harm if the relevant government officials are enjoined from enforcing the law during that multiyear period.

If the moving party has not demonstrated irreparable harm, then this Court can avoid delving into the merits. But not infrequently—especially with important new laws—the harms and equities are very weighty on both sides. In those cases, this Court has little choice but to decide the emergency application by assessing likelihood of success on the merits.⁴⁵

This approach, if accepted, would represent a major transformation. The Court’s usual way of acknowledging the limits of its institutional competence is to deny certiorari.⁴⁶ In cases that entail review of a massive administrative record and factual skirmishes between an agency and regulated industry, the Court will almost invariably refuse to grant review, at least unless the case presents the chance to guide lower courts by announcing some high-level legal principle. But emergency applications demand the Court’s attention—under its current practice, apparently, the Court cannot decline to rule.⁴⁷ The Court thus needs some mechanism to regulate the flow of emergency applications, lest the preliminary-relief come to overtake and dominate normal merits adjudication.

Traditionally, the Court’s *balancing* of the competing equities has largely provided that check—ensuring that Supreme Court emergency relief truly is exceptional, granted only where the applicant faces genuinely irreparable harm, akin to an emergency, and also limited to cases where the public and private harms from *granting* relief are clearly less burdensome.⁴⁸ The notion of a comparative judicial *weighing*—comparing potential harms that granting or denying relief would cause the moving party, the opponent, other parties, and the public—is definitional to courts’ task in ruling on requests for preliminary relief.⁴⁹ Indeed, so integral is the balancing of equities to the traditional emergency relief test that it is questionable whether the Court *could* downgrade its role absent changes to the tradition-oriented statutory provision that authorizes emergency injunctions.⁵⁰ And while the Court has long been mindful of limitations on its ability to be a first-instance fact finder, its members

⁴⁵ *Labrador v. Poe*, 144 S. Ct. 921, 929 (2024) (mem.) (Kavanaugh, J., concurring).

⁴⁶ Or, in the extreme case, the Court may declare a question nonjusticiable. *See, e.g., Rucho v. Common Cause*, 588 U.S. 684 (2019) (holding that partisan gerrymandering claims raised nonjusticiable political questions).

⁴⁷ *See Labrador*, 144 S. Ct. at 928 (Kavanaugh, J., concurring) (“The Court has no authority to reject or turn away emergency filings without deciding them”).

⁴⁸ *See supra* notes 33 & 34.

⁴⁹ *See supra* notes 37 & 41.

⁵⁰ *See All Writs Act*, 28 U.S.C. § 1651(a) (“The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law”).

historically have expressed that recognition by according weight to lower courts' assessments of the competing equities.⁵¹

Sometimes, of course, justice will require a court to provide relief before it has decided that the movant has won the case, but a court should be very reluctant to do that and should hold the movant to a high bar. This is perhaps especially so where applicants are seeking to halt duly adopted regulations that implement congressional commands. Courts should hesitate to disturb rulemakings that are the culmination of elaborate, participatory public processes, reflecting the policy judgments and technical expertise of conscientious Executive Branch officials—sworn, like judges, to uphold the law.

The alternative approach suggested by Justice Kavanaugh's opinion in *Labrador* and by the per curiam Court in *NFIB*—that so long as regulations implicate irreparable harms on both sides, emergency applications should be decided by likelihood-of-success-on-the-merits review—would point in the wrong direction. Such proceedings may also invite parties to advance extreme claims of harm, comfortable that the Court's processes will not involve adversarial testing of those claims (and maybe not even close examination). It would result in the Court's leapfrogging statutory judicial review proceedings and bypassing lower courts' judgments on the equities. That outcome, one would think, also would not be good for the Court in an era of vivid partisan coloration of almost every significant regulatory dispute. But it is where the Court has now positioned itself.

B. The Court's Difficulties in Accounting for Public Benefits and Limited Means to Assess Extravagant Claims of Imminent Harm

The emergency docket pushes the limits of the Court's institutional competence. Three of the four factors of the traditional emergency relief analysis—"whether the applicant will be irreparably injured absent a stay;" "whether issuance of the stay will substantially injure the other parties interested

⁵¹ See, e.g., *Packwood v. Senate Select Comm. on Ethics*, 510 U.S. 1319, 1320, (1994) (Rehnquist, C. J., in chambers) ("Because this matter is pending before the Court of Appeals, and because the Court of Appeals denied his motion for a stay, applicant has an especially heavy burden"); *Fargo Women's Health Organization v. Schafer*, 507 U.S. 1013, 1014 (1993) (O'Connor, J., concurring in denial of stay application) ("When a matter is pending before a court of appeals, it long has been the practice of Members of this Court to grant stay applications only 'upon the weightiest considerations'") (quoting *O'Rourke v. Levine*, 80 S. Ct. 623, 624 (1960) (Harlan, J., in chambers)); *Graves v. Barnes*, 405 U.S. 1201, 1203 (Powell, J., in chambers) ("Stays pending appeal to this Court are granted only in extraordinary circumstances. A lower court judgment, entered by a tribunal that was closer to the facts than the single Justice, is entitled to a presumption of validity"); *Beame v. Friends of the Earth*, 434 U.S. 1310, 1312 (1977) (Marshall, J., in chambers) (a stay applicant's "burden is particularly heavy when ... a stay has been denied by the District Court and by a unanimous panel of the Court of Appeals"); *Certain Named and Unnamed Non-Citizen Children v. Texas*, 448 U.S. 1327, 1331 (1980) (Powell, J., in chambers) ("[I]nterference with an interim order of a court of appeals cannot be justified solely because [a Circuit Justice] disagrees about the harm a party may suffer"); *Doe v. Gonzales*, 546 U.S. 1301, 1308 (2005) (Ginsburg, J., in chambers) ("Respect for the assessment of the Court of Appeals is especially warranted when that court is proceeding to adjudication on the merits with due expedition").

in the proceeding;” and “where the public interest lies”—all turn on facts.⁵² But unlike civil litigation in district courts, defined procedures for eliciting facts from evidence are scant in appellate courts. And for various reasons described below, the Supreme Court is especially ill-suited to engage in fact-finding. This fundamental mismatch is likely to be both contributing to stay orders that appear to devalue consideration of the equities, and prompting, in part, Justice Kavanaugh’s rationale in *Labrador*.

1. Lack of Procedures and Structures to Support Fact-Finding

Supreme Court stay proceedings are very different from the preliminary-injunction proceedings that form a routine part of district courts’ dockets. A district court preliminary injunction proceeding allows for formal adversarialism, often including live testimony, cross-examination, and extensive briefing under the Federal Rules of Evidence. The Federal Rules of Civil Procedure require that a district judge ruling on a motion for a preliminary injunction must explicitly “state the findings and conclusions that support its action,”⁵³ and must explicitly “state the reasons why [the preliminary injunction] issued” as well as describe the terms “specifically” and the relief “[in] detail.”⁵⁴ And, upon an appeal of a grant or denial of a preliminary injunction, it is hornbook law that the trial court’s decision is reviewed deferentially for “abuse of discretion”—in part because of the extensive opportunities to present and test evidence the appealing party had in the district court.⁵⁵

In appellate court stay proceedings, the situation is starkly different. Courts of Appeals often provide no explanation for their decisions on emergency motions.⁵⁶ The Federal Rules of Appellate Procedure provide no right to present live testimony, and even if such testimony is a theoretical possibility, it just is not done. Further, upon Supreme Court consideration of an emergency application, the Court is not formally *reviewing* the district court’s or the appellate court’s decision to grant or deny a stay at all; instead, each application

⁵² *Nken v. Holder*, 556 U.S. 418, 434 (2009).

⁵³ Fed. R. Civ. P. 52(a)(1).

⁵⁴ Fed. R. Civ. P. 65(a).

⁵⁵ *See, e.g., Zervos v. Verizon New York, Inc.*, 252 F.3d 163, 171 (2d Cir. 2001).

⁵⁶ *See, e.g., Labrador v. Poe*, 144 S. Ct. 921, 922 (Gorsuch, J. concurring) (noting that the court of appeals below “denied [movant’s] stay request in a brief unreasoned order”). D.C. Circuit orders on significant EPA Clean Air Act rules have typically contained only conclusory statements as to whether the stay standard had been met, *see, e.g., Order, EME Homer City Generation, LP v. EPA*, No. 11-1302 (D.C. Cir. Dec. 30, 2011), Doc. 1350421 (stating only that petitioners challenging the Cross-State Air Pollution Rule “have satisfied the standards required for a stay pending court review”); *Order, West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Jan. 21, 2016), Doc. 1594951 (stating only that petitioners challenging the Clean Power Plan “have not satisfied the stringent standards for a stay pending court review”); *Order, Utah v. EPA*, No. 23-1157 (D.C. Cir. Oct. 11, 2023), Doc. 2021268 (same for petitioner challenging the Good Neighbor Rule). *Cf. Order, Coalition for Responsible Regulation v. EPA*, No. 09-1322 (D.C. Cir. Dec. 10, 2010), Doc. 1282558 (“Petitioners have not satisfied the stringent standards required for a stay pending court review.... Specifically, with regard to each of the challenged rules, petitioners have not shown that the harms they allege are ‘certain,’ rather than speculative, or that the ‘alleged harm[s] will directly result from the action[s] which the movant[s] seeks to enjoin’”) (citation omitted).

is treated as a brand-new request for the Court to provide interim relief under the All Writs Act.⁵⁷ Despite this, there is little structure to support and guide first-order fact-finding at the Court. The Court has a rigid calendar set by custom, and the Justices do not gather very often. Lengthy hearings of any kind, or any hearings of live testimony, do not fit well with the Court’s traditional toolkit. And fact-finding by multi-member bodies is messy, especially where there are nine people. Indeed, in original-jurisdiction cases where it must perform the nominal role of fact-finder, the Court delegates that task to special masters.⁵⁸ Moreover, the Court is accustomed to deciding only issues that it carefully selects—almost invariably *legal* issues that are clearly presented and that have been elucidated and debated in multiple lower court decisions. The Court is not well equipped to decide preliminary relief motions *ab initio*, particularly when they turn on disputed facts.

2. Difficulties in Giving Fair Weight to Regulatory Beneficiaries Whose Interests May be Affected by a Delay in Implementing Regulations

Even when respective harms and equities implicated by a regulatory challenger’s emergency application are “very weighty,”⁵⁹ it should be the very rare case in which they are actually *equally* weighty.⁶⁰ In the atypical litigation context of challenges to federal environmental rules, the stakes of granting relief can often be particularly large and disruptive. The collateral damage of a stay may extend across the nation and against millions of members of the public who are supposed to be protected from health harms or otherwise benefited (of course, there may be many non-litigants benefited by a stay as well). And the beneficiaries of a regulation should not be given any less solicitude from a court simply because they did not intervene in the lawsuit (assuming a court would have granted intervention⁶¹). Due respect for the laws means that courts should give fair and thorough consideration to the impact of stays on the people that Congress intended to benefit from regulations of the kind under review.

When parties seek to block national rules that agencies have determined will provide large net benefits to millions of people, the equitable balance should not treat that aggregate benefit as a simple checkmark in a binary inquiry that asks only whether the two sides of the case both have some irreparable harms. If the

⁵⁷ See 28 U.S.C. § 1651.

⁵⁸ See generally Anne-Marie C. Carstens, *Lurking in the Shadows of the Judicial Process: Special Masters in the Supreme Court’s Original Jurisdiction Cases*, 86 MINN. L. REV. 625 (2002); see also *Arizona v. California*, 140 S.Ct. 684, 684–85 (2020) (mem.) (Thomas, J. dissenting from denial of motion for leave to file complaint) (criticizing the Court’s reading of Article III’s grant of original jurisdiction over suits between states to be permissive rather than mandatory).

⁵⁹ *Labrador*, 144 S. Ct. at 929 (Kavanaugh, J., concurring).

⁶⁰ Accord Stephen Vladeck, *Justice Kavanaugh’s Defense of the Shadow Docket*, One First (Apr. 18, 2024), <https://stevevladeck.substack.com/p/bonus-76-justice-kavanaughs-defense> [<https://perma.cc/Y8TZ-UZMJ>].

⁶¹ See, e.g., *Massachusetts Sch. of L. at Andover, Inc. v. United States*, 118 F.3d 776, 779–80 (D.C. Cir. 1997) (intervention in appellate court is governed by the same standards as in district court, including Federal Rule of Civil Procedure 24’s requirement that a movant demonstrate their interest is not adequately represented by existing parties).

applicant is seeking a stay or preliminary injunction that will halt implementation of the rule as to anyone, then the entire public cost of the injunctive relief should weigh against the applicant's plea for temporary relief. If, say, a company seeking a stay of a new environmental regulation shows that, for it, compliance will cause significant harm (say, \$2 million in economic losses) over the time it might take for a court to reach a decision on the merits, but the agency can show that the requested relief would sacrifice \$200 million in net benefits, this 100-fold difference in comparative harms should tip any equitable balancing, excepting perhaps some extraordinary legal error.⁶² It would be wrong for a court to deem this a "wash," to use Justice Kavanaugh's phrasing in the Good Neighbor Rule argument,⁶³ and resolve the case as if likelihood of success were the sole outcome-affecting consideration.

3. The Difficulties Inherent in Adequately Probing Parties' Non-Record Allegations Regarding Impacts of Regulation

It is vital as well that the Court do more than simply accept parties' claims of irreparable harm (and this goes for both sides of any litigation, of course). In our experience, stay litigation over environmental regulation has yielded some particularly extreme harm allegations that would benefit from the sort of rigorous adversarial testing that is difficult to come by in stay proceedings as typically conducted.

a. Clean Power Plan

In 2016, the Supreme Court voted 5-4 to stay the Clean Power Plan,⁶⁴ which implemented the EPA's statutory duty under the Clean Air Act to limit climate-warming carbon dioxide emissions from existing (i.e., already built and operating) fossil-fuel power plants.⁶⁵ In the Plan, the EPA determined that a combination of measures were the "best system" for reducing power-plant carbon dioxide emissions, including shifting power generation to less-polluting sources like gas and renewable energy sources.⁶⁶ It is impossible to know what led the Supreme Court majority to vote for a stay, but it is certainly true that the Clean Power Plan's many challengers succeeded in creating surround-sound publicity and court filings warning that the Clean Power Plan was nothing short of a national emergency.

⁶² As noted below, if a stay movant is seeking relief only as to itself or is seeking to enjoin only a portion of the rule, the "costs of a stay" would be correspondingly reduced. *See infra* Part III.B. Note that parties seeking to block environmental and public health rules are virtually never required to post a bond to cover the defendant governmental agencies or other parties' losses from an "erroneous" stay (i.e., one followed by a merits decision for the defendant). *Cf.* Fed. R. Civ. P. 65(c) ("The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained"). The health and environmental harms caused by blocking such regulations are typically irreparable in the sense that no monetary compensation is available.

⁶³ Transcript of Oral Argument at 74, *Ohio v. EPA*, No. 23A349 (U.S. Feb. 21, 2024).

⁶⁴ *West Virginia v. EPA*, 577 U.S. 1126 (2016).

⁶⁵ *See* 80 Fed. Reg. at 64,662 (Oct. 23, 2015); *see also* 42 U.S.C. § 7411(d).

⁶⁶ *See* 80 Fed. Reg. at 64,667.

Challengers to the Clean Power Plan—led by Republican state attorneys general, coal companies, and coal-heavy power companies—immediately moved to stay the rule (indeed, some pursued unsuccessful but tone-setting lawsuits asking courts to block the Plan even before it was finalized).⁶⁷ They placed before the courts reams of declarations asserting massive harms, characterizing the Plan as an enormity that would crush the private economy and state governments alike, and “threaten[] blackouts.”⁶⁸ The agency countered that the Plan was actually in line with where the power sector was already going, and that its generation-shifting approach was favored by many power companies as the cheapest and most realistic way to reduce climate-destabilizing pollution.⁶⁹ But the Plan’s complexities made it difficult for the agency and its supporters to reframe the challengers’ characterization.

One large coal company, Peabody, claimed that the mere announcement of the Clean Power Plan had precipitated a steep decline in the company’s stock value;⁷⁰ would cause “irreparable harm on a massive, multi-state and unprecedented scale” “every day that judicial review is pending;” and would “forc[e] the coal industry to curtail production, idle operations, lay off workers, and close mines.”⁷¹ Coal companies went on to say that the EPA had “condemn[ed] the coal industry to a greatly diminished future” and “ensured immediate irreparable harm.”⁷²

Peabody’s claims were doubtful and, it soon became clear, not shared even by its own executives. When Peabody filed for bankruptcy less than three

⁶⁷ *In re Murray Energy Corp.*, 788 F.3d 330, 335 (D.C. Cir. 2015). The Murray company was represented by Professor Laurence Tribe, who had argued that the Clean Power Plan was so blatantly unlawful and harmful that it warranted a departure from normal finality requirements.

⁶⁸ See *Utility Air Regulatory Group and Public Power Association Motion to Stay*, *West Virginia v. EPA*, No. 15-1363, pp. 14–19 & declarations cited (D.C. Cir. filed Oct. 23, 2015); *State Petitioners’ Motion for Stay*, *West Virginia v. EPA*, No. 15-1363, pp. 15-19 and declarations cited (D.C. Cir. filed Oct. 23, 2015). The reference to blackouts is from the *State Petitioners’ Motion to Stay* (p. 20, citing *Lloyd Decl.* ¶¶ 31, 33, 41–46).

⁶⁹ See, e.g., *Respondent EPA’s Opposition to Motions to Stay Final Rule*, *West Virginia v. EPA*, No. 15-1363 at 2 (D.C. Cir. Filed Dec. 3, 2015) (“Many sources are already implementing the measures discussed in the Rule, at least to some degree, on their own. Contrary to Movants’ position, Congress did not require that EPA, in determining the ‘best system of emission reduction’ for the largest CO₂ sources, disregard the proven strategies these sources are *already* effectively employing, in favor of little or no CO₂ limitation”).

⁷⁰ See *Emergency Renewed Petition for Extraordinary Writ by Intervenor Peabody Energy Corporation* at 7, *Murray Energy Corp. v. EPA*, No. 14-1112 (D.C. Cir. Aug. 13, 2015). See also *Peabody Energy Corp.’s Motion to Stay*, *West Virginia v. EPA*, No. 15-1363, at 18–19 (filed Oct. 23, 2015) (“[f]rom the day before the Rule was announced to the close of the markets the day after the announcement, Peabody’s public shares and bonds lost more than \$90 million in value”) (citing *Galli Decl.* ¶¶ 29–30).

⁷¹ *Peabody Energy Corp.’s Motion for Stay* at 3, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Nov. 5, 2015); *Coal Industry Application for Immediate Stay of Final Agency Action pending Judicial Review* at 32, *Murray Energy Corp. & Peabody Energy Corp. v. EPA*, No. 15A778 (U.S. Jan. 27, 2016).

⁷² *Coal Industry Application for Immediate Stay of Final Agency Action pending Judicial Review* at 33, *Murray Energy Corp. & Peabody Energy Corp. v. EPA*, No. 15A778 (U.S. Jan. 27, 2016).

months after the Supreme Court stayed the Clean Power Plan, its Chief Financial Officer (CFO) explained in a sworn affidavit that Peabody had been harmed by low natural gas prices and the declining value of coal *worldwide*, belying the claim that U.S. environmental regulations caused the downturn.⁷³ The CFO also cited the company’s decision to “finance[] a number of investments with debt” in 2011 and 2012. By 2016, falling coal prices, “coupled with lower volumes, resulted in the Company’s debt burden becoming unsustainable.”⁷⁴ She referenced “increased regulatory hurdles” only in passing, and the Clean Power Plan garnered no mention at all.⁷⁵

Although the Supreme Court’s stay orders contained no reasoning (or even recital of what legal test had been applied), the orders profoundly shaped the ensuing litigation and supercharged the challengers’ narrative that the Plan was a hyperaggressive and statute-ignoring action by the EPA, rather than a relatively modest rule that followed industry trends and largely heeded the industry’s design. The stay orders came only five days after the filing of response briefs—as compared to the six-week period that the D.C. Circuit had considered motions before denying them.⁷⁶ One is left to wonder whether more deliberate scrutiny of the harm assertions advanced by Peabody and other challengers would have led to a different outcome—or at least to a more measured understanding of the Clean Power Plan itself—which in retrospect was not the incipient national emergency claimed at the time.⁷⁷

⁷³ Declaration of Amy B. Schwetz, Executive Vice President & Chief Financial Officer of Debtor Peabody Energy Corporation, in Support of First Day Motions of Debtors and Debtors in Possession ¶¶ 50–54, In re Peabody Energy Corp. et al., No. 16-42529 (Bankr. E.D. Mo. Apr. 13, 2016).

⁷⁴ *Id.* ¶ 11.

⁷⁵ *See id.* ¶ 51. Stay movants submitted other jaw-dropping claims of harm: Peabody and fellow coal company Murray Energy also cited a declaration submitted by the National Black Chamber of Commerce claiming the Rule would cause \$565 billion in increased electric bills, “increase consumer retail electric rates by 12-17%,” “increase African-American poverty numbers by 23% and Hispanic poverty by 26%,” and “lead to the loss of 7 million African-American and 12 million Hispanic jobs.” Peabody Energy Corp.’s Motion for Stay, *supra* note 71, at 20.

⁷⁶ In the D.C. Circuit stay briefing, 10 separate emergency motions were filed in late October and early November 2015; the EPA filed a consolidated response on December 3 and respondent-intervenors on December 8, and replies were filed on December 23. *See* D.C. Circuit Docket, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir.) The panel issued its unanimous Per Curiam Order denying a stay on January 21, 2015. Per Curiam Order, *West Virginia v. EPA*, No. 15-1363, (Doc. 1594951). By contrast, in the Supreme Court, five emergency applications were filed with Chief Justice Roberts as circuit Justice on January 26, 2016; responses were filed on February 4, replies on February 5, the case was formally referred to the full Court on and stay orders issued on Tuesday, February 9, 2016. *See* U.S. S. Ct. Dockets, *West Virginia v. EPA*, No. 15A773 (2016); *Basin Elec. Power Co-op. v. EPA*, No. 15A776 (2016); *Murray Energy Corp. v. EPA*, No. 15A778 (2016); *Chamber of Commerce v. EPA*, No. 15A787 (2016); *North Dakota v. EPA*, No. 15A793 (2016); *see also* *West Virginia v. EPA*, 577 U.S. 1126, 1126–27 (2016) (stay orders).

⁷⁷ When the Trump Administration EPA repealed the never-implemented Clean Power Plan years later, it concluded that repeal offered no economic benefits because market forces had

b. Good Neighbor Rule

Pending applications to stay the EPA’s Good Neighbor Rule⁷⁸ offer another example of irreparable harm claims that require careful review. The Rule’s near-term requirements apply only to power plants and principally entail plants’ turning on controls they have already installed.⁷⁹ There are *no* emissions-reduction requirements for industrial emitters until 2026 or later, and those future requirements, too, reflect proven controls already in use in many regions across the country.⁸⁰ But applicants’ declarations catastrophized about threats to power and heating reliability, national security, consumer pocketbooks, and so on.⁸¹

For example, a set of gas pipeline company applicants claimed that the Rule would pose sweeping gas and electricity reliability problems,⁸² supported in large part by a declaration describing a computer simulation that one company conducted to model the Rule’s impact on two gas pipelines near Chicago.⁸³ On careful reading of the submission, however, the computer simulation raises more questions than it answers. For instance, the company modeled system impacts assuming the retrofits that it “reasonably believe[d] it can accomplish [on time],” and then assumed it would *shut down* any engines where retrofits were not completed⁸⁴—a strange assumption, as the Rule does not require such an outcome and businesses do not usually stop operating profit-making assets. In addition, the company calculated the simulation’s results in terms of the number of homes served with gas, even though it never specifically claimed that the Rule

driven power-sector emissions below the Clean Power Plan’s target even in the absence of federal controls. *See* EPA, REGULATORY IMPACT ANALYSIS FOR THE REPEAL OF THE CLEAN POWER PLAN, AND THE EMISSION GUIDELINES FOR GREENHOUSE GAS EMISSIONS FROM EXISTING ELECTRIC UTILITY GENERATING UNITS 2–5 (2019) (“[T]he EPA believes repeal of the CPP under current and reasonably projected market conditions and regulatory implementation is not anticipated to have a meaningful effect on emissions of CO₂ or other pollutants or regulatory compliance costs”). That the initial projections of the Plan’s costs were soon proven to be wrong by the operation of the market is hardly atypical for environmental regulations. *See, e.g.*, 88 Fed. Reg. 13,956, 13,975–76 (Mar. 6, 2023) (noting that industry’s actual compliance costs with air toxics regulations were under \$3 billion despite initial projections of \$9.6 billion per year); NESCAUM, ENVIRONMENTAL REGULATION AND TECHNOLOGY INNOVATION: CONTROLLING MERCURY EMISSIONS FROM COAL-FIRED BOILERS (Sept. 2000) (collecting case studies in which compliance cost projections were far over stated).

⁷⁸ 88 Fed. Reg. 36,654 (June 5, 2023).

⁷⁹ *See id.* at 36,744, 36,755, 36,758.

⁸⁰ *See id.* at 36,659; *see also generally* EPA, FINAL NON-EGU SECTORS TSD (2023).

⁸¹ *See, e.g.*, Am. Forest & Paper Assoc. et al. Emergency Application at 28, Am. Forest & Paper Assoc. v. EPA, No. 23A351 (U.S. Oct. 13, 2023); U.S. Steel Corp. Emergency Application at 25–26, U.S. Steel Corp. v. EPA, No. 23A384 (U.S. Oct. 26, 2023); State Applicants’ Emergency Application at 25–28, Ohio v. EPA, No. 23A349 (U.S. Oct. 13, 2023).

⁸² *See* Kinder Morgan, Inc. et al. Emergency Application at 23–28, Kinder Morgan, Inc. v. EPA, No. 23A350 (U.S. Oct. 13, 2023).

⁸³ *See id.* at 686a–693a (Declaration of Kenneth W. Grubb).

⁸⁴ *Id.* at 688a.

would result in lost service to those homes.⁸⁵ In general, a particular pipeline facility’s being down would almost certainly *not* mean that homes lose heat.⁸⁶ Upon a cursory read, however, the analytical results framed in terms of 1.7 million impacted homes *seems* alarming.

Another stay applicant, United States Steel Corporation, stated that the Rule has “national security implications” because “sufficient supply of domestic steel is in the public interest.”⁸⁷ But the cited support for this ominous claim was a few paragraphs in a declaration by a U.S. Steel employee stating generally that the steel industry is a “critical infrastructure industry,” and the Rule, in combination with other regulations, “*could* have a material impact.”⁸⁸

c. Oil & Gas Methane Standards

Efforts at winning a stay with superficially eye-grabbing claims of harm continue. In a recent challenge to Clean Air Act limits on emissions of methane from oil and gas operations, a large group of Republican-led states moved for a stay principally on the basis that the EPA’s rules impose undue burdens on state agencies.⁸⁹ West Virginia’s declaration claims that implementing the Rule will require the state to add some 2,708 *full-time employees*.⁹⁰ West Virginia’s co-movant, the State of Utah, by contrast, estimated that implementation will require the work of just one full-time employee, with support from two others.⁹¹ Faced with assertions like this, which would typically invite further investigation in regular litigation, the ability of a court considering motions for preliminary relief to probe harm allegations is important. A court applying the traditional stay test will have to do some fact-finding and party-specific harm quantification, inexact as that science may be.

* * *

Claims raising the specter of Brobdignagian compliance costs or catastrophic damage to vital institutions—the national economy, the power system, national security, state governments—are now commonplace in litigation challenging environmental standards. In the Supreme Court, time

⁸⁵ See, e.g., *id.* at 692a (“there *could* be loss of [electric] service”) (emphasis added); *id.* at 693a (applicant is “greatly concerned about providing reliable service”); *id.* at 25 (describing interruptions in pipeline service that “equates to approximately 1,761,000 homes’ worth of natural gas usage”).

⁸⁶ See Public Interest Respondents’ Response in Opposition to Emergency Applications at 200a–201a, *Ohio v. EPA*, No. 23A349 (U.S. Oct. 30, 2024) (Declaration of Victoria R. Stamper).

⁸⁷ U.S. Steel Corp. Emergency Application at 25, *U.S. Steel Corp. v. EPA*, No. 23A384 (U.S. Oct. 26, 2023).

⁸⁸ *Id.* at App.609–App.610 (Declaration of Alexis Piscitelli in Support of Motion for Stay) (emphasis added).

⁸⁹ Petitioners’ Motion to Stay, *Texas v. EPA*, No. 24-1054 (5th Cir. Apr. 12, 2024) (seeking stay of “Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review,” 89 Fed. Reg. 16,820 (Mar. 8, 2024)).

⁹⁰ Petitioners’ Motion to Stay, *Texas v. EPA*, No. 24-1054 (5th Cir. Apr. 12, 2024) (citing Crowder (WV) Decl. ¶ 10 (Exh. 11)).

⁹¹ Petitioners’ Motion to Stay, *Texas v. EPA*, No. 24-1054 (5th Cir. Apr. 12, 2024) (citing Exh. Bird Decl. ¶ 13 (Exh. 8)).

constraints and institutional limitations make it difficult for the Court to conduct a rigorous evaluation of the evidentiary basis for such claims. The Court has some means to deal with those limitations—such as giving weight to the judgments of lower courts, which typically have more time to dig below the surface of factual claims—but the Court has instead seemed more inclined to lean ever more upon an early-stage assessment of the merits. In effect, the Court is treating its limited competence to evaluate the equities as a basis for granting relief rather than denying it. This is a stark departure from historic practice and is seemingly a poor way to resolve complex administrative law disputes.

III. RECOMMENDATIONS

If the Supreme Court continues to trend toward further devaluation of equitable considerations in its review of emergency applications in administrative rulemaking cases, proponents of national regulatory programs should respond with new strategies. Here we offer a few initial suggestions for courts of appeals, agencies and other litigants, and Congress that we think might ameliorate some of the adverse effects of the Court's current approach.

A. Federal Courts of Appeals

If almost routine Supreme Court emergency applications in administrative rulemaking cases are here to stay, lower courts could take several actions to improve their own chances of not being de facto reversed via emergency-docket rulings, as well as to help address some of the Supreme Court's institutional shortcomings in reviewing emergency applications.

First, in cases where the parties' initial submissions do not seem to fully answer the questions needed to determine where the equities lie, appellate courts have authority to engage in more robust fact-finding. Federal Rule of Appellate Procedure 48 authorizes courts of appeals to appoint a special master to hold hearings and gather evidence, and the All Writs Act authorizes all federal courts to issue orders regarding factual inquiries in aid of their jurisdiction.⁹² Appellate courts might direct or authorize limited discovery to explore key allegations regarding harm caused by the agency's action, or by a potential stay.

Second, appellate courts could provide a more tractable basis for assessing the equities by providing more detail on their own rulings on preliminary relief motions—particularly on fact-intensive matters where they are likely to have some institutional advantages over the Supreme Court. Unlike district courts, appellate courts are not bound by rule to provide an express judicial rationale and factual findings in preliminary relief orders; as noted above, they often resolve important emergency motions by conclusory orders lacking any such explanation.⁹³ That practice has considerable merit; it conserves judicial time and effort to a preliminary phase of litigation and prevents the motion panel from commenting about the merits in ways that might complicate the merits panel's later consideration.

⁹² 28 U.S.C § 1651(a).

⁹³ See *supra* note 56 (citing examples of unexplained orders on emergency motions).

But courts have discretion to provide more fulsome explanation of rulings on stay motions,⁹⁴ and should consider doing so in appropriate cases (e.g., unanimous orders on motions to block federal regulations). In a world in which the Supreme Court’s emergency docket is active and the Court does not seem eager to delve into facts, such explanations are more important. While there may be sound reasons for motions panels to avoid fulsome discussion of the legal merits at a motions stage, specific, detailed *factual* findings—especially concerning the nature and extent of any harms, and of potential impacts of a stay on third parties or the public—would be particularly useful in cases where the lower court has in fact grappled with the record.⁹⁵ While the Supreme Court might not be obligated to defer to those findings, in practice, the Court likely would give them weight—and such findings might persuade the Supreme Court that the large pile of paper on the balance of harms, despite its magnitude, does not, upon close scrutiny, amount to a “wash.” Moreover, merely helping the Court better navigate large factual records through explicit findings would improve any follow-on proceedings in the Court.

B. Federal Agencies and Other Litigants

Below, we briefly enumerate some strategies that federal agencies and other litigants might consider in responding to a shifting approach to equities in the Supreme Court.

- 1) Litigants could affirmatively ask appellate courts to provide some of the procedures mentioned above—for example, specifically asking for the opportunity for discovery or supplemental briefing when opposing parties advance claims of harm (or absence of harm) that seem dubious.
- 2) Litigants could explicitly ask appellate courts to issue reasoned opinions—or at least Federal Rule of Civil Procedure 65-style explanations—with their stay orders, and to include specific fact-finding. As noted above, such explanations might induce greater deference from the Supreme Court, as compared to unexplained orders. They might also help guide the Court toward the parts of the record most salient to the balance of equities.
- 3) Agency counsel and other stay opponents who believe that stay applicants’ irreparable harm claims are without arguable basis could consider filing motions to strike especially egregious claims and/or seeking Federal Rule of Civil Procedure 11-style sanctions under federal

⁹⁴ See, e.g., *In re NTE Connecticut, LLC*, 26 F.4th 980, 992 (D.C. Cir. 2022) (explaining decision to stay FERC order staying company’s authorization to sell electricity from power plants).

⁹⁵ The D.C. Circuit has specified in some instances that it was the absence of sufficient showing on irreparable harm, rather than a merits defect or something else, that prompted a denial of a stay. See, e.g., *Order, District of Columbia v. Exxon*, No. 22-7163 (D.C. Cir. Jan. 30, 2023), Doc. 1983821; *Order, Wynnewood Refining Co. v. EPA*, No. 22-1015, 2022 WL 2761047, at *1 (D.C. Cir. July 11, 2022); *Order, Coalition for Responsible Regulation v. EPA*, No. 09-1322 (D.C. Cir. Dec. 10, 2010), Doc. 1282558. General explanation like that is perhaps marginally useful to the Supreme Court, but specific factual finding, as is the rule for district court preliminary injunction rulings (*see* Fed. R. Civ. P. 65), would be more helpful.

courts' inherent powers.⁹⁶

- 4) Agencies could, as part of rulemakings, make findings specifically directed to the factual issues likely to be most important in potential judicial stay proceedings. For example, the agency could make conspicuous, specific findings regarding the public benefits of the rule during the likely judicial review period (often in the range of 1–2 years), or regarding expected compliance costs or other costs during that particular period. The agency might even invite comment on these findings in its proposed rulemaking. Having agency findings on the record would likely aid rule defense, in part because courts are more skeptical of extra-record submissions, and because stay movants would have to contend with those record findings in advancing harm and public interest claims. In addition, such findings would help prepare the agency and its supporters to swiftly draft oppositions during emergency motion litigation.
- 5) In certain circumstances, agencies issuing rules they know will be challenged could consider administratively staying the rule pending the conclusion of at least first-instance judicial review. For instance, an agency might reasonably conclude that the benefits of self-staying the challenged rule outweigh the costs in situations where emergency motion litigation is likely to sap agency resources and/or result in a rushed presentation of matters that is disadvantageous to an effective defense. The Securities and Exchange Commission (SEC) took this course with respect to its recent rule enhancing and standardizing climate-related disclosures by public companies.⁹⁷ Of course, there needs to be statutory authority for such a stay, and any limitations or prerequisites must be satisfied.⁹⁸ The agency must perform a difficult calculus where the benefits of avoiding the burdens and uncertainties of stay litigation are worth the temporary loss of the advantages the regulation is meant to secure. But, in some circumstances, this approach may be preferable to running the gauntlet of unfavorable preliminary relief scenarios (including spillover merits effects) that now afflict federal environmental litigation.
- 6) Litigants responding to Supreme Court emergency docket applications could consider asking the Supreme Court to employ more procedure—e.g., oral argument or taking more time where appropriate, as Justice Kavanaugh suggests in *Labrador*.⁹⁹ But a word of caution here—argument is no panacea. Oral argument is destined primarily for probing

⁹⁶ *Cf.* *Pirri v. Cheek*, 851 F. App'x 183, 192 (Fed. Cir. 2021) (finding an appeal frivolous and awarding double costs).

⁹⁷ *See* Letter from John R. Rady, Off. of Gen. Counsel, Sec. & Exch. Comm'n to Michael E. Gans, Clerk of Court, *Iowa v. SEC*, No. 24-1522 (8th Cir. Apr. 4, 2024) (enclosing Commission order staying rule).

⁹⁸ *See, e.g.*, 5 U.S.C. § 705 (Administrative Procedure Act provision authorizing agencies to stay rules “pending judicial review” upon “agency find[ing] that justice so requires”).

⁹⁹ *See Labrador v. Poe*, 144 S. Ct. 921, 933 (2024) (Kavanaugh, J., concurring).

lawyers as to the implications of their legal arguments; it is not designed as a means for winnowing, synthesizing, and evaluating evidence from attestors who are not in the courtroom and have never been cross-examined. One might argue that offering the opportunity for oral argument, if it becomes normalized, might provide something of a check against profligate uses of the Court’s emergency super-powers, giving affected parties at least a day (or thirty minutes) in Court. And, to be sure, a public courtroom session does help to bring stay motions out of the shadows. But there remain fundamental and inherent difficulties with a multi-member legal-generalist institution schooled in cases involving well-defined, well-“percolated” legal questions attempting to replicate, *de novo*, but subject to fewer rules, a district judge ruling on a routine preliminary injunction motion.

- 7) Litigants should insist that judicial stays, like other forms of injunctive relief, be no broader than necessary.¹⁰⁰ And just as standing to sue is “not dispensed in gross,”¹⁰¹ a movant that has satisfied the stay standard as to part A of an agency rule is not necessarily entitled to a stay that also enjoins parts B and C.¹⁰² Similarly, just as courts regularly embrace “remand without vacatur” as a remedy after merits review, to avoid unnecessary disruption, courts considering interim remedies should (*a fortiori*) be sensitive to the consequences for stakeholders and the broader public.¹⁰³
- 8) Recent bipartisan calls to limit “nationwide injunctions” certainly

¹⁰⁰ *See, e.g.,* *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (“injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs”) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 222 (1974) (standing requirement that plaintiff demonstrate concrete injury helps to ensure that any relief will be “no broader than required by the precise facts”); *McLendon v. Cont’l Can Co.*, 908 F.2d 1171, 1182 (3d Cir. 1990) (“In granting injunctive relief, the court’s remedy should be no broader than necessary to provide full relief to the aggrieved plaintiff”); *United States v. Miami University*, 294 F.3d 797, 816 (6th Cir. 2002) (“If injunctive relief is proper, it should be no broader than necessary to remedy the harm at issue”).

¹⁰¹ *Davis v. FEC*, 554 U.S. 724, 734 (2008) (quoting *Lewis v. Casey*, 518 U.S. 343, 358, n.6 (1996)).

¹⁰² The Supreme Court majority emphasized this point in staying, in part, a preliminary injunction barring enforcement of a new presidential policy restricting immigration from certain countries. *See Trump v. International Refugee Assistance Project*, 582 U.S. 571, 579–80 (2017) (“Crafting a preliminary injunction is an exercise of discretion and judgment,” and in balancing the equities, “a court need not grant the total relief sought by the applicant” but instead “may, in its discretion, tailor a stay so that it operates with respect to only some portion of the proceeding”) (internal quotations omitted). The majority proceeded to grant the motion to stay in part because the district court’s injunction had swept “much further” than required by the facts before it, and had enjoined the challenged rule with respect to “foreign nationals abroad who have no connection to the United States at all”—a category of plaintiffs as to whom “[t]he equities relied on by the lower courts do not balance the same way in that context.” *Id.* at 581.

¹⁰³ *See Allied-Signal v. Nuclear Regulatory Commission*, 988 F.3d 146 (D.C. Cir. 1993).

should lend support to tailored relief at the motions stage.¹⁰⁴ Limiting the scope of a stay or preliminary injunction—whether by declining to enjoin the entirety of a rule where only certain provisions have been shown to be legally vulnerable or irreparably harmful, or by simply limiting the scope of relief to the particular movant—could actually reduce movants’ burden to obtain relief, since the harms to third parties and the public from staying or otherwise enjoining a rule will often be less for a narrower order.¹⁰⁵

- 9) Litigants should advocate for a heightened standard of review of likely merits success in Supreme Court applications to enjoin agency action. There is currently uncertainty about the standard the Supreme Court should apply when assessing an applicant’s likelihood of success on the merits in an application for an injunction pending appeal.¹⁰⁶ Justices considering emergency applications in chambers often have concluded that an injunction requires an “indisputably clear” showing on the merits,¹⁰⁷ “because, unlike a stay, an injunction ‘does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts.’”¹⁰⁸ But in other cases, the Court has issued injunctions without applying the “indisputably clear” standard or seemingly any heightened standard of review.¹⁰⁹ Then, in support of the Court’s 2021 denial of an application for emergency injunctive relief in *Does 1–3 v. Mills*,¹¹⁰ Justice Barrett, joined by Justice Kavanaugh, suggested that an injunction was not warranted because the case was not certworthy.¹¹¹ This was notable because consideration of certworthiness has traditionally been part of the Court’s test for granting a stay,¹¹² but

¹⁰⁴ For a summary of some of the lead arguments against nationwide injunctions, see *Labrador*, 144 S. Ct. at 921 (Gorsuch, J., concurring).

¹⁰⁵ There is a potential tension between a more modest understanding of reviewing courts’ equitable powers and the doctrine of associational standing, which nominally allows an entire association (such as an industry trade association) to sue based upon the demonstrated injury of a subset of its members (often one or a few). One of the requirements for associational standing—whether the “claim asserted [or] the relief requested requires the participation of individual members,” *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 343 (1977)—might require denial of associational standing where standing could effectively entitle a class of entities to preliminary relief even though only a small subset of those entities could meet the standard for such relief.

¹⁰⁶ See *Halting Administrative Action in the Supreme Court*, *supra* note 10, at 2016.

¹⁰⁷ *Communist Party of Indiana v. Whitcomb*, 409 U.S. 1235, 1235 (1972) (Rehnquist, J., in chambers); see also *Halting Administrative Action in the Supreme Court*, *supra* note 10, at 2022–23; *The Role of Certiorari in Emergency Relief*, *supra* note 9, at 1956.

¹⁰⁸ *Respect Maine PAC v. McKee*, 562 U.S. 996, 996 (2010) (mem.) (quoting *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Reg. Comm’n*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers)).

¹⁰⁹ See *Halting Administrative Action*, *supra* note 10, at 2024 (citing *Tandon v. Newsom*, 141 S. Ct. 1294, 1296–97 (2021) (per curiam); *The Role of Certiorari in Emergency Relief*, *supra* note 9, at 1956 (collecting cases)).

¹¹⁰ 142 S. Ct. 17 (2021) (mem.).

¹¹¹ *Id.* at 18 (Barrett, J. concurring in the denial of application for injunctive relief).

¹¹² See *Hollingsworth*, 558 U.S. at 190.

not its test for injunctions pending appeal.¹¹³ Justices Barrett, Kavanaugh, and Kagan again suggested certworthiness was part of the Court's injunction standard in the recent *Good Neighbor* oral argument.¹¹⁴

We think there are good reasons for the Court to apply a heightened standard of review when applicants seek to prevent a duly promulgated federal rule from taking effect. The likelihood of error in abbreviated review of complex regulatory programs is high, as is the likelihood of disruption from court intervention. And in a hierarchical judiciary, that the Supreme Court (or even a single Justice) has ventured an answer, even if ostensibly provisional, to the ultimate legal questions is quite likely to influence the lower-court proceedings. Moreover, the Supreme Court's merits-evaluation standard and its approach to the equitable factors are intertwined: if the Court both applies an unheightened standard in its assessment of likely merits success *and* adopts a standard where even a modicum of irreparable harm to the applicant suffices to make the "likelihood of success" dispositive, then the Court really would be asserting itself, and at the earliest stage, as the *de facto* decider of cases challenging important regulatory programs. Some of the Court's most complex and consequential actions effectively would be decided on a basis entirely different from the selective, deliberate review model that prevails for virtually all of the Court's other work. And the number of regulatory challenges on the Court's emergency docket would swell.

In the present moment, while the standard that applies to applications for emergency injunctions appears to be in some flux, it would behoove respondents to insist that the Court apply a heightened test for likely merits success.

C. Congress

Congress could exercise its considerable authority to shape how the Supreme Court and other federal courts review motions to block implementation of federal regulations.¹¹⁵ For instance, new legislation could require federal courts to give due consideration to the balance of the equities and the public interest, to grant preliminary relief only where the equities clearly favor the movant, and possibly to consider specific aspects of irreparable harm claims, such as whether any alleged economic harms are especially great and certain. Congress could also codify a heightened standard of review to govern the Supreme Court's

¹¹³ See *The Role of Certiorari in Emergency Relief*, *supra* note 9, at 1958; see also *Nken*, 556 U.S. at 434.

¹¹⁴ See Transcript of Oral Argument at 22, 74, 78–81, *Ohio v. EPA*, No. 23A349 (Feb. 21, 2024).

¹¹⁵ See, e.g., *Dickerson v. United States*, 530 U.S. 428, 437 (2000) ("Congress retains the ultimate authority to modify or set aside any judicially created rules of evidence and procedure that are not required by the Constitution"); see also *VLADÉCK*, *supra* note 1, at 256 ("Congress ... has unquestioned power to prescribe the standards that the justices follow in granting emergency relief").

consideration of likely merits success on applications for emergency injunctions or stays, as discussed above.¹¹⁶

There are admittedly practical limits on what codification of a national standard could achieve, as any workable standard is likely to be somewhat open-ended and subject to some judicial discretion. Indeed, *Nken v. Holder* is already technically binding precedent, and the rules of numerous appellate courts already require stay movants to show irreparable harm and/or that a stay would be in the public interest.¹¹⁷ Nonetheless, courts, including the Supreme Court, continue to defy those standards. As such, an act of Congress could send a stronger signal, and with greater durability, than any judicial rule. Clear direction from Congress could potentially encourage and empower lower courts to invest further in their assessment of the equities. And the impacts of codification of the stay standard could be further amplified if accompanied by other proposed reforms to curtail the related problems of forum-shopping and the proliferation of nationwide injunctions of federal policies—such as proposals designating special forums or panels for parties seeking nationwide injunctive relief from federal regulations.¹¹⁸

In addition, a nationalized stay standard could help correct the troublingly lax approach to irreparable harm by some appellate court panels, which may pair with a merits-ascendent Supreme Court approach. For instance:

- Some appellate courts, like the Supreme Court, have been trending toward heavily weighting the likelihood-of-merits-success factor, effectively erasing the equitable factors.¹¹⁹
- Some have suggested or held that any economic harms that cannot be recovered from federal government respondents due to sovereign immunity are thus irreparable.¹²⁰ In those jurisdictions, courts may not separately require movants to demonstrate that unrecoverable harm is great or severe—theoretically, even one dollar in unrecoverable losses could suffice.
- Some circuits have developed law, based on Supreme Court

¹¹⁶ See *supra* Part III.B.

¹¹⁷ See, e.g., D.C. Cir. R. 18; 11th Cir. R. 27-1(b)(2); 10th Cir. R. 8.1; 5th Cir. R. 27.3.

¹¹⁸ For comprehensive discussion of this topic, see *District Court Reform: Nationwide Injunctions*, 137 HARV. L. REV. 1701 (2024). See also VLADECK, *supra* note 1, at 254–56 (describing some of the avenues available to Congress to reform the Court’s emergency docket practice).

¹¹⁹ Compare, e.g., *White v. Carlucci*, 862 F.2d 1209, 1212 (5th Cir. 1989) (emphasizing that “there is no nexus between the strength and nature of the underlying claim and the element of irreparable harm,” which “must be proven separately and convincingly”), with *Robinson v. Ardoin*, 37 F.4th 208, 227 (5th Cir. 2022) (likelihood of merits success is “arguably the most important factor”) (quoting *Tesfamichael v. Gonzales*, 411 F.3d 169, 176 (5th Cir. 2005)), and *Louisiana v. Becerra*, 20 F.4th 260, 263 (5th Cir. 2021) (other stay factors “will not overcome our holding [regarding] the merits”).

¹²⁰ See, e.g., *Wages & White Lion Invs. v. FDA*, 16 F.4th 1130, 1142 (5th Cir. 2021) (“[C]omplying with [an agency order] later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs”) (quoting *Texas v. EPA*, 829 F.3d 405, 433 (5th Cir. 2016)).

precedent, that the federal government has no interest in enforcing an illegal law, and doing so per se causes irreparable harm and is against the public interest.¹²¹ This circular reasoning effectively erases all traditional stay factors, save for likelihood of merits success.

- Some appellate courts, and some Justices, have taken the position that lower court injunctions that block state laws *ipso facto* constitute irreparable harm to the State’s sovereign interests¹²² (it is unclear whether this same reasoning would extend to federal laws).

Notably, that lower-court patchwork application of the traditional stay factors has other undesirable consequences: it offers hooks for future stay applicants to seek further erosion of equitable considerations across federal courts, it supports appeals to the Supreme Court, and it encourages venue-shopping. A national stay standard might help address these adverse effects.

We note also that there is at least one congressional bill now pending to reform the emergency docket: the “Shadow Docket Sunlight Act of 2024,” led by Senator Blumenthal.¹²³ This legislation would require the Court and individual Justices to “publish[] a written explanation of reasons supporting” any order regarding injunctive relief in appellate-jurisdiction cases and to disclose vote counts.¹²⁴ While transparency requirements like these may well be worthy policy pursuits, they seem unlikely, on their own, to affect the Court’s approach to consideration of the equities of a preliminary injunction. The Court could simply explain, in conclusory fashion, that it deemed harm claims on both sides of a dispute to be sufficiently weighty and thus proceeded to evaluate likely merits success. Transparency requirements could be more impactful if paired with statutory standards to affirm and guide equitable balancing.

IV. CONCLUSION

The Supreme Court’s apparent shift toward more cursory treatment of equitable factors on its emergency docket is troubling. The upshot is that district courts require far more rigor when parties seek a preliminary injunction in private disputes than will the Supreme Court for requests to block (potentially for years) federal regulations designed to effectuate congressional directives and benefit millions of people—sometimes, in the case of important public health and safety standards, with literal life-or-death implications. The Court’s approach seems like a perverse response to an increasing volume of emergency applications—and certainly, there has been no change to the All Writs Act or

¹²¹ See, e.g., *All. for Hippocratic Med. v. FDA*, 78 F.4th 210, 251 (5th Cir. 2023) (“neither [the government] nor the public has any interest in enforcing a regulation that violates federal law”) (citing *Louisiana v. Biden*, 55 F.4th 1017, 1035 (5th Cir. 2022)).

¹²² *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, J., in chambers) (“[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.”) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U. S. 1345, 1351 (1977) (Rehnquist, J., in chambers)); *United States v. Texas*, 97 F.4th 268, 295 (5th Cir. 2024) (quoting same statement).

¹²³ S. 4388, 118th Cong. (2024).

¹²⁴ *Id.* § 2.

the other venerable statutes governing preliminary relief. Moreover, this approach poses concerning risks to important regulatory programs that protect public health and welfare, and to the institutional sustainability of the Court itself.

Instead of retreating further from fact-finding, we think the Court should restore considerations of irreparable harm and the public interest to its traditional prominence in the standard for preliminary relief. And while Supreme Court consideration of an emergency application is not technically an appellate-review proceeding, as decades of Court orders on emergency motions have recognized, the same respect for lower courts' judgment and opportunity to engage with the evidence that merits deferential review in such proceedings, and the same considerations of judicial competence and humility that govern review on certiorari, should inform the Court's emergency docket actions. As suggested above, there are steps that lower courts, agencies, legislators, and others could take now to promote corrective behavior by the Justices and to reduce some of the unfavorable consequences of vanishing equitable considerations.

ARTICLE

MAJOR FLOODGATES: THE INDETERMINATE MAJOR QUESTIONS DOCTRINE INUNDATES LOWER COURTS

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I. INTRODUCTION

It has been two years since the U.S. Supreme Court formally embraced the Major Questions Doctrine (“MQD”) in its groundbreaking decision in *West Virginia v. EPA*.¹ On its face, the doctrine is limited to “extraordinary cases . . . in which the history and the breadth of the authority that the agency has asserted, and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer” the authority for the challenged regulation absent “clear congressional authorization.”² In practice, however, the MQD is an arbitrary doctrine that injects uncertainty into a wide range of administrative law and other cases. Unchecked, the doctrine threatens to overwhelm lower court dockets and disrupt government’s ability to function.

Among the many criticisms of the MQD is the doctrine’s “extreme indeterminacy” due to the “large number of variables of no specified weight.”³

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¹ 597 U.S. 697, 724 (2022).

² *Id.* at 721–23 (citations omitted) (cleaned up). Whether the MQD is a clear statement rule, a substantive or linguistic canon, or something else remains unclear. *See generally, e.g.,* Austin Piatt & Damonta D. Morgan, *The Three Major Questions Doctrines*, 2024 WIS. L. REV. FORWARD 19 (2024); Anita S. Krishnakumar, *What the Major Questions Doctrine is Not*, 92 GEO. WASH. L. REV. (forthcoming 2024), <https://ssrn.com/abstract=4778014> [<https://perma.cc/MJ67-W4T6>].

³ Thomas W. Merrill, *The Major Questions Doctrine: Right Diagnosis, Wrong Remedy*, STANFORD UNIVERSITY, THE HOOVER INSTITUTION CENTER FOR REVITALIZING AMERICAN INSTITUTIONS 13 (2023), https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=5215&context=faculty_sc

Rather than announcing principles that guide consistent application of the doctrine, the Court’s MQD precedents amount to an “I know it when I see it” framework that invites litigants to invoke the doctrine in a growing number of circumstances.⁴ Making matters worse, the Court’s 2023 opinion in *Biden v. Nebraska*⁵ invoked the MQD to invalidate the Biden administration’s student debt relief plan without offering much, if any, clarity on how the doctrine should be applied; to the contrary, Justice Barrett’s concurrence in that case describes the MQD as something demonstrably different than previously-articulated conceptions.⁶

The doctrine’s impact is coming into view. Courts are applying the MQD far beyond high-profile regulations such as the Environmental Protection Agency’s (“EPA”) Clean Power Plan (*West Virginia*) or the Biden administration’s student loan debt relief efforts (*Biden v. Nebraska*). Litigants have raised the doctrine in nearly every conceivable setting, even including a challenge to the criminal prosecution of an alleged participant in the riot at the Capitol on January 6, 2021.⁷ In its current form, there is little to lose when litigants raise the MQD and much to gain. Predictably, the MQD floodgates are wide open in lower courts.

This essay explores the profoundly disruptive nature of the MQD by surveying judicial rationales and litigants’ arguments to demonstrate the breadth and potential impact of the nascent doctrine, as some emerging arguments will likely succeed.⁸ The essay begins with a discussion of how the indeterminate nature of the MQD invites litigants to push the doctrine’s boundaries. It then surveys post-*West Virginia* MQD arguments in lower courts, categorizing both the types of cases in which the arguments arise and the ways in which creative attorneys are attempting to position the MQD, particularly the factor of “vast

holarship [<https://perma.cc/9HK8-UVNU>]; see also Alisa Klein, *Major Questions Doctrine Jujitsu: Using the Doctrine to Rein In District Court Judges*, ADMIN. L. REV. 4 (forthcoming June 2024) (“[A]ny rule that the Supreme Court announces should be clear enough to be consistently applied, lest the outcomes appear political and undermine the legitimacy of the Judiciary.”) (citation omitted); *id.* at 4–5 (“A stronger form of this idea is that indeterminacy yields outcomes that *are* political because they become infected by the policy preferences of federal judges, who by constitutional design are unaccountable politically.”), <https://ssrn.com/abstract=4630449> [<https://perma.cc/U7XM-C24L>].

⁴ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Steward, J., concurring); see also Merrill, *supra* note 4, at 26 n.90 (citing U.S. Telecom Ass’n v. FCC, 855 F.3d 381, 423 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc)); Klein, *supra* note 4, at 6 n.17 (similar).

⁵ 143 S. Ct. 2355, 2384 (2023).

⁶ See generally, e.g., Cass R. Sunstein, *Two Justifications for the Major Questions Doctrine*, 76 FLA. L. REV. 251, 251, 264 (2024) (contrasting Justice Gorsuch’s concurrence in *West Virginia* with Justice Barrett’s concurrence in *Nebraska* and noting that each may lead to different outcomes in specific cases), <https://ssrn.com/abstract=4503583> [<https://perma.cc/YX56-Q86V>]; Piatt & Morgan, *supra* note 3 (similar).

⁷ Motion to Dismiss Counts Three and Five at 16–18, *United States v. Irwin*, No. 1:21cr589 (D.D.C. Nov. 13, 2023), ECF No. 71.

⁸ Other recent scholarship has surveyed lower court opinions regarding the MQD to assess judicial applications on a circuit-by-circuit basis without exploring arguments made by litigants. See generally Sarah A. Schmoyer, Note: “Major” Challenges for Lower Courts: Inconsistent Application of the Major Questions Doctrine in Lower Courts After *West Virginia v. Environmental Protection Agency*, 92 FORDHAM L. REV. 1659 (2024); Natasha Brunstein, *Major Questions in Lower Courts*, 75 ADMIN. L. REV. 661 (2023).

economic and political significance.” The essay concludes with examples of promising, albeit spotty, instances in which lower courts have rejected the MQD in favor of reasonable statutory interpretation that shows that the agency has authority for the challenged action, which we encourage other courts and litigants to follow in the absence of solutions for limiting or eradicating the application of the MQD. In the near-term, we expect that the current flood of MQD arguments in lower court cases of every stripe will lead to the increased application of the doctrine, even if some courts resist it. In turn, this will lead to even broader invocation of the MQD, and, as a result, further application of the doctrine to invalidate regulatory actions, no matter the relative size. This pattern will likely overwhelm lower court dockets and result in the invalidation of many federal regulatory actions that would otherwise survive judicial review.

II. THE INDETERMINATE NATURE OF THE MQD IS PLAYING OUT IN LOWER COURTS

Although the Supreme Court formally endorsed the MQD in *West Virginia*, it has thus far refused to provide workable guidance for litigants and judges to determine when the doctrine applies.⁹ Scholars have attempted to make sense of the new doctrine by identifying three main inquiries to determine whether an agency is acting within the scope of authority that Congress delegated: (1) is the agency action under review “novel,” “unprecedented,” or “unheralded”?; (2) does the agency action transform the scope of the agency’s authority?; and (3) is the agency action one of “vast economic and political significance”?¹⁰

Scholars’ attempts at clarity have provided little help. In practice, courts are all over the map on the MQD factors, as demonstrated in a recent survey of MQD decisions in lower courts:

There is no one major questions doctrine in the lower courts. Judges have taken vastly different approaches to defining and applying the doctrine both within and across circuits. These differences illustrate that many judges may view the doctrine as a little more than a grab bag of factors, which they seem to be choosing from at their discretion. Lower court judges do not appear to be constrained in how they apply the doctrine.¹¹

Inconsistencies among lower courts range from disparate conclusions as to which factors trigger the MQD, to variations in applying the MQD between judges who appear to share similar interpretations of the doctrine, to individual

⁹ See Jonas Monast, *Emerging Technology Governance in the Shadow of the Major Questions Doctrine*, 24 N.C. J.L. & TECH. 1, 8 (2023) (“Although the MQD requires that Congress ‘speak clearly’ . . . the Court has provided little specificity itself.”).

¹⁰ Merrill, *supra* note 4, at 3 (citations omitted); see generally Natasha Brunstein & Donald L. R. Goodson, *Unheralded and Transformative: The Test for Major Questions After West Virginia*, 47 WM. & MARY ENVTL L. & POL’Y REV. 47 (2022). Some courts have recognized the first two factors as the most important. See, e.g., *Sweet v. Cardona*, 641 F. Supp. 3d 814, 824 (N.D. Cal. Nov. 16, 2022) (concluding that the supposedly “representative decisions cited in *West Virginia* considered ‘unusual’ and ‘unheralded’ applications of agency authority”) (quoting *West Virginia*, 597 U.S. 697, 722–24 (2022)), *appeal docketed*, Nos. 23-15049, 23-15050, 23-15051 (9th Cir. Jan. 7, 2023).

¹¹ Brunstein, *supra* note 9, at 663.

judges failing to apply the doctrine consistent with their own stated understandings of it.¹² Further, “[j]udges who relied on the same triggers for the doctrine also differed in terms of the metrics they used to assess the applicability of those triggers.”¹³ Some courts have not even limited themselves to the factors identified in Chief Justice Roberts’s majority opinion in *West Virginia*, instead relying on the factors identified in Justice Gorsuch’s concurrence,¹⁴ which are arguably even less well-defined and could implicate more federal actions than the majority opinion.¹⁵ Courts have even admitted to struggling with the doctrine’s indeterminate nature.¹⁶

Whether styled as doctrinal indeterminacy or judicial inconsistency, the MQD has predictably resulted in conflicting outcomes in lower courts regarding the same federal agency action. For example, the Ninth Circuit found as a categorical matter that the doctrine does not apply to proprietary actions of the President, specifically a COVID-19 vaccine mandate for federal contractors,¹⁷ while the Fifth, Sixth, and Eleventh Circuits reached the opposite conclusion.¹⁸

One reason for these conflicting outcomes is the lack of objective parameters for assessing the factor of “vast economic and political significance.” While the economic impacts in the Court’s MQD cases have generally been \$50 billion or higher,¹⁹ the Court has not identified the case-specific facts from its decisions as

¹² See *id.* at 663–64 (citations omitted).

¹³ *Id.* at 664.

¹⁴ See *id.* at 665 (noting “five decisions—all from district courts in the First, Fourth, and Fifth Circuits—seem to rely partly or exclusively on the reasoning” from Justice Gorsuch’s concurrence in *West Virginia*).

¹⁵ Merrill, *supra* note 4, at 3 (discussing the Gorsuch factors). Justice Gorsuch asks whether the agency: (1) “claims the power to resolve a matter of great ‘political significance,’” (2) “seeks to regulate ‘a significant portion of the American economy,’” or (3) “seek[s] to intrude into an area ‘that is the particular domain of state law.’” *West Virginia*, 597 U.S. at 743–44 (Gorsuch, J., concurring) (citations omitted). If so, Justice Gorsuch asks whether there is clear congressional authorization for the action, examining: (1) “the legislative provisions on which the agency seeks to rely ‘with a view to their place in the overall statutory scheme,’” (2) “the age and focus of the statute the agency invokes in relation to the problem the agency seeks to address,” (3) “the agency’s past interpretations of the relevant statute,” and (4) “when there is a mismatch between an agency’s challenged action and its assigned mission and expertise.” *Id.* at 746–48 (citations omitted).

¹⁶ See, e.g., *United States v. White*, 97 F.4th 532, 540 (7th Cir. 2024) (observing that “the precise contours of the doctrine remain hazy”) (citation omitted); *N.C. Coastal Fisheries Reform Grp. v. Capt. Gaston LLC*, 76 F.4th 291, 296 (4th Cir. 2023) (similar).

¹⁷ See *Mayes v. Biden*, 67 F.4th 921, 932–39 (9th Cir. 2023), *vacated as moot on other grounds*, 89 F.4th 1186, 1188 (9th Cir. 2023).

¹⁸ See *Louisiana v. Biden*, 55 F.4th 1017, 1029–31 (5th Cir. 2022); *Kentucky v. Biden*, 57 F.4th 545, 555 (6th Cir. 2023); *Georgia v. President of the U.S.*, 46 F.4th 1283, 1314 (11th Cir. 2022). There are many examples of conflicting MQD outcomes related to the COVID-19 pandemic. See Klein, *supra* note 4, at 6 (summarizing cases).

¹⁹ See *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 594 U.S. 758, 764 (2021) (concluding that \$50 billion was a “reasonable proxy” of the economic impact of the nationwide eviction moratorium that the Court invalidated under the MQD); see also *Biden v. Nebraska*, 143 S. Ct. 2355, 2369 (2023) (finding \$430 billion in forgiven student loans for forty-three million Americans to be of vast economic and political significance); *West Virginia v. EPA*, 597 U.S. 697, 716 (2022) (finding the \$1 trillion reduction in the U.S. gross domestic product projected to result from the fuel switching required by the Clean Power Plan by 2040 to be of vast economic significance).

criteria to be applied in each case, i.e., that impacts above a certain dollar amount qualify for MQD scrutiny and those below do not. While the Court has identified one flawed-but-concrete example of what may constitute “political significance,”²⁰ it has not clarified what type of information should *not* be considered in this inquiry and has muddied the waters by relying on broad, conclusory language or non-empirical information when evaluating this factor.²¹ As with the doctrine as a whole, lower courts have noted this lack of clarity, conceding that “it is unclear what exactly constitutes ‘vast economic significance.’”²²

Unsurprisingly, multiple district courts adjudicating challenges to the Department of Labor’s (“DOL”) rule²³ increasing the hourly minimum wage paid by federal contractors and subcontractors reached conflicting conclusions on the factor of economic significance.²⁴ The U.S. District Court for the District of Arizona concluded, among other things, that the rule was not sufficiently “major” to trigger the MQD because the estimated economic impact of \$1.7 billion fell well short of identified dollar amounts from Supreme Court cases.²⁵ The U.S. District Court for the District of Colorado likewise rejected an MQD argument because, among other reasons, the assessed \$1.7 billion was “a small economic impact” in the context of the Supreme Court’s MQD cases at the time,²⁶ and would not “have a measurable effect, in macroeconomic terms, on the gross domestic product.”²⁷ The Southern District of Texas, however, reached

²⁰ See *Nebraska*, 143 S. Ct. at 2373 (noting failed congressional student-loan forgiveness efforts); *West Virginia*, 597 U.S. at 731–32 (pointing to failed cap-and-trade bills for carbon dioxide and other greenhouse gases as evidence that the policy “has been the subject of an earnest and profound debate across the country”). The Court has elsewhere explained that post-enactment legislative failures offer a “‘particularly dangerous’ basis on which to rest an interpretation of an existing law” and rejected their use. *Bostock v. Clayton Cnty.*, 590 U.S. 644, 670 (2020).

²¹ See *Nat’l Fed’n of Indep. Bus. v. Dep’t of Labor*, 595 U.S. 109, 117 (2022) (declaring that “[t]here can be little doubt that [the agency’s] mandate qualifies as an exercise of [vast economic and political significance]” because it applied to 84 million Americans, without discussing specific economic impacts or political controversies); *Nebraska*, 143 S. Ct. at 2373–74 (citing a single newspaper article regarding debates about student loan forgiveness as evidence of political significance); see also Klein, *supra* note 4, at 51 (“Given this framing, district court judges can seize on the fact that large numbers of ‘red states’ or ‘blue states’ have challenged a federal policy as evidence that the issue is politically charged enough to trigger the major questions doctrine.”).

²² See *Rest. Law Ctr. v. Dep’t of Labor*, No. 1:21-CV-1106-RP, 2023 U.S. Dist. LEXIS 115630, at *37 (W.D. Tex. July 6, 2023) (“[I]t is unclear what exactly constitutes ‘vast economic significance.’”), *appeal docketed*, No. 23-50562 (5th Cir. Aug. 7, 2023); *Mayfield v. Dep’t of Labor*, No. 1:22-cv-792-RP, 2023 U.S. Dist. LEXIS 168054, at *20 (W.D. Tex. Sept. 20, 2023) (similar), *appeal docketed*, No. 23-50724 (5th Cir. Oct. 11, 2023).

²³ *Increasing the Minimum Wage for Federal Contractors*, 86 Fed. Reg. 67126 (Nov. 24, 2021).

²⁴ See Schmoyer, *supra* note 9, at 1685–86 (discussing some of these cases).

²⁵ *Arizona v. Walsh*, No. 00213-PHX-JJT, 2023 U.S. Dist. LEXIS 2649, at *25–26 (Jan. 6, 2023), *appeal docketed sub nom.*, *Nebraska v. Walsh*, No. 23-15179 (9th Cir. Feb. 9, 2023).

²⁶ *Bradford v. Dep’t of Labor*, 582 F. Supp. 3d 819, 840–41 (D. Colo. Jan. 24, 2022), *affirmed*, No. 22-1023, 2024 U.S. App. LEXIS 10382, at *35 (10th Cir. Apr. 30, 2024) (accepting the agency’s \$1.7 billion assessment of economic impact).

²⁷ *Bradford v. Dep’t of Labor*, No. 21-cv-03283-PAB-STV, 2022 U.S. Dist. LEXIS 16184, at *13 (D. Colo. Jan. 28, 2022).

the opposite conclusion, focusing on uncertainties identified in administrative comments, without deeming the DOL’s response to these comments unreasonable, to extrapolate the economic impact—by a factor of 10—to \$17 billion, and concluded the action was economically significant for MQD purposes.²⁸

The indeterminate nature of the MQD is therefore well-established. Scholars have recognized indeterminacy as one of the general objections to the MQD, and as especially acute for the specific factor of “vast economic and political significance,” and have documented inconsistent application in lower courts. Lower courts have explicitly conceded that they are uncertain about how to apply the MQD, including and especially the determination of economic and political significance. Litigants challenging government actions in lower courts accordingly have much to gain and little to lose from invoking the MQD.

III. THE MQD FLOODGATES ARE OPEN IN LOWER COURTS

The cases that the Supreme Court has identified as forming the MQD have all involved direct challenges to federal agency regulations of national scope.²⁹ Many have involved EPA regulations issued under the Clean Air Act;³⁰ other cases have involved student loan forgiveness and regulatory efforts to address pandemic-related public health or medical issues.³¹ Since *West Virginia*, challengers have invoked the MQD for national regulations enacted under the same or similar statutes as in the Supreme Court’s MQD cases.³² These relatively predictable MQD arguments are the tip of the iceberg.

²⁸ See *Texas v. Biden*, No. 6:22-CV-00004, 2023 U.S. Dist. LEXIS 171265, at *32–33 (Sept. 26, 2023), *appeal docketed*, No. 23-40671 (5th Cir. Nov. 11, 2023). The court’s analysis demonstrates how the MQD gives courts leeway to find vast economic significance as a means to invert the normal review of agency actions. See *Texas*, 2023 U.S. Dist. LEXIS 171265, at *32–33 (noting that “[s]ome commentators criticize” DOL’s methodology and that DOL conceded that some costs could be higher, scolding DOL for not changing its estimate, but failing to address whether DOL’s estimate was reasonable).

²⁹ In *West Virginia v. EPA*, the Court (majority and concurrence) identified previous cases from which the MQD is derived. See 597 U.S. 697, 721–25, 740–45 (2022) (discussing *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 594 U.S. 758, 758 (2021); *King v. Burwell*, 576 U.S. 473, 486 (2015); *Util. Air Reg. Grp. v. EPA*, 573 U.S. 302, 332 (2014); *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006); *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000); *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 229 (1994)).

³⁰ See *West Virginia*, 597 U.S. at 697; *Util. Air Reg. Grp.*, 573 U.S. at 302; *Am. Trucking Ass’ns*, 531 U.S. at 457.

³¹ See generally *Ala. Ass’n of Realtors*, 594 U.S. at 758; *King*, 576 U.S. at 473; *Gonzales*, 546 U.S. at 243.; *Biden v. Nebraska*, 143 S. Ct. 2355, 2369 (2023).

³² For example, challengers have frequently raised MQD challenges to regulations issued under the Clean Air Act. See, e.g., Petitioner’s Motion to Stay the Final Rule of the U.S. Environmental Protection Agency Pending Review at 9–13, *Enbridge (U.S.) Inc. v. EPA*, No. 23-1202 (consol. under No. 23-1157) (D.C. Cir. Aug. 4, 2023), ECF No. 2011121 (raising MQD in challenge to EPA’s “Good Neighbor Rule” for ozone emissions). Similarly, litigants have raised the MQD in multiple challenges to the Biden Administration’s efforts to reduce student debt in the first half of 2024. See, e.g., Memorandum in Support of Plaintiffs’ Motions for a Stay, or in the Alternative, a Temporary Restraining Order and Preliminary

Our tracking efforts show that the breadth of MQD-based challenges to federal regulations knows no bounds. In the labor context, litigants have invoked the MQD to challenge a minimum wage standard for federal contractors,³³ a minimum-salary-test rule for overtime-pay exemptions,³⁴ a rule regarding tips for restaurant workers,³⁵ a requirement for the use of project labor agreements in certain federal construction projects,³⁶ and a recent rule banning most non-compete clauses.³⁷ Challengers to anti-discrimination and diversity-based regulations have raised the MQD against the EPA's disparate-impact regulations issued under Title VI of the Civil Rights Act,³⁸ the Securities and Exchange Commission's ("SEC") efforts to promote diversity among corporate boards,³⁹ and various efforts of the Department of Education and Equal Employment Opportunity Commission.⁴⁰ Indeed almost any issue subject to federal agency regulation has drawn MQD challenges, including, but not limited to, national

Injunction at 29–32, *Missouri v. Biden*, No. 4:24-cv-00520-JAR (E.D. Mo. Apr. 16, 2024), ECF No. 8-1.

³³ See Part II, *supra* notes 24–29 and related text.

³⁴ *Mayfield v. Dep't of Labor*, No. 1:22-cv-792-RP, 2023 U.S. Dist. LEXIS 168054, at *23–24 (W.D. Tex. Sept. 20, 2023) (denying summary judgment and addressing MQD arguments in a challenge to Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 84 Fed. Reg. 51230 (Sept. 27, 2019)).

³⁵ *Rest. Law Ctr. v. Dep't of Labor*, No. 1:21-CV-1106-RP, 2023 U.S. Dist. LEXIS 115630, at *38–39 (W.D. Tex. July 6, 2023) (granting summary judgment, including rejection of MQD argument, in a challenge to Tip Regulations Under the Fair Labor Standards Act (FLSA); Partial Withdrawal, 86 Fed. Reg. 60114 (Oct. 29, 2021)).

³⁶ See Complaint at 34–36, *Associated Builders & Contractors Fla. First Coast Chapter v. Clark*, No. 3:24-cv-00318 (M.D. Fla. Mar. 28, 2024), ECF No. 1 (challenging Exec. Order No. 14063, 87 Fed. Reg. 7363 (Feb. 9, 2022), as implemented by Use of Project Labor Agreements for Federal Construction Projects, 88 Fed. Reg. 88708 (Dec. 22, 2023), and by OFFICE OF MGMT. AND BUDGET, EXEC. OFFICE OF THE PRESIDENT, MEMORANDUM-24-06, USE OF PROJECT LABOR AGREEMENTS FOR FEDERAL CONSTRUCTION PROJECTS (2023)).

³⁷ See Complaint at 16–17, *ATS Tree Servs., LLC v. Fed. Trade Comm'n*, No. 2:24-cv-1743 (E.D. Pa. Apr. 25, 2024), ECF No. 1 (challenging Non-Compete Clause Rule, 89 Fed. Reg. 38342 (May 7, 2024)); Complaint at 9–10, 43–44, *Chamber of Com. v. Fed. Trade Comm'n*, No. 6:24-cv-00148 (E.D. Tex. Apr. 24, 2024), ECF No. 1 (same); Complaint at 3, 16–17, *Ryan v. Fed. Trade Comm'n*, No. 3:24-cv-986 (N.D. Tex. Apr. 23, 2024), ECF No. 1 (same).

³⁸ See *Louisiana v. EPA*, No. 2:23-cv-692, 2024 U.S. Dist. LEXIS 12124, at *80–83 (W.D. La. Jan. 23, 2024) (applying the MQD in granting plaintiff's motion for preliminary injunction in part in a challenge to enforcement of 40 C. F. R. § 7.35(b), (c)).

³⁹ See *All. for Fair Bd. Recruitment v. SEC*, 85 F.4th 226, 256–58 (5th Cir. 2023) (denying petitions for review of Notice of Filing of Proposed Rule Change to Adopt Listing Rules Related to Board Diversity, 85 Fed. Reg. 80472 (Dec. 11, 2020), as adopted by the SEC), *vacated for en banc hearing*, 2024 U.S. App. LEXIS 3805 (5th Cir. Feb. 19, 2024).

⁴⁰ See, e.g., Complaint at 34–35, *Louisiana v. Dep't of Educ.*, No. 3:24-cv-00563 (E.D. La. Apr. 29, 2024), ECF No.1 (challenging Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33474 (Apr. 29, 2024)); Complaint at 38, *Tennessee v. Equal Emp. Opportunity Comm.*, No. 2:24-cv-84 (E.D. Ark. Apr. 25, 2024), ECF No. 1 (challenging the implementation of the Pregnant Workers Fairness Act, 89 Fed. Reg. 29096 (Apr. 19, 2024)).

security,⁴¹ immigration,⁴² guns,⁴³ retirement benefits,⁴⁴ federal loan eligibility,⁴⁵ and sentencing guidelines.⁴⁶

Federal regulations may not even be the limit of the MQD's reach. While courts have suggested that the MQD is limited in application to regulations⁴⁷ and concluded that the MQD does not apply to executive orders,⁴⁸ other courts have applied it to such orders.⁴⁹ In light of these uncertainties (or perhaps because of them), litigants have raised the MQD in challenges to executive branch tariff

⁴¹ See *Kovac v. Wray*, 660 F. Supp. 3d 555, 569 (N.D. Tex. Mar. 9, 2023) (rejecting a challenge to plaintiffs' inclusion on the terrorism watchlist even after concluding that most MQD factors were met), *appeal docketed*, No. 23-10284 (5th Cir. Mar. 22, 2023).

⁴² See *Texas v. United States*, 50 F.4th 498, 526–27 (5th Cir. 2022) (applying MQD cases and principles to invalidate the Department of Homeland Security's rule implementing the Deferred Action for Childhood Arrivals ("DACA") immigration policy); *Arizona v. Garland*, No. 6:22-cv-01130, 2024 U.S. Dist. LEXIS 69561, at *23–25 (E.D. La. Apr. 16, 2024) (holding that the MQD applied in a challenge to a rule establishing a new procedure for adjudicating asylum applications).

⁴³ See *Watterson v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, No. 4:23-cv-00080, 2024 U.S. Dist. LEXIS 35973, at *39–40 (E.D. Tex. Mar. 1, 2024) (addressing the MQD in denying a motion to reconsider an earlier order that denied plaintiffs' request for a preliminary injunction in a challenge to Factoring Criteria for Firearms With Attached "Stabilizing Braces," 88 Fed. Reg. 6478 (Jan. 31, 2023)); *Miller v. Garland*, 674 F. Supp. 3d 296, 311–12 (E.D. Va. May 26, 2023) (rejecting MQD argument in denying plaintiffs' motion for expedited relief in a challenge to the same rule).

⁴⁴ See Opening Brief for Appellants at 36–41, *Utah v. Su*, No. 23-11097 (5th Cir. Jan. 18, 2024), ECF No. 127 (invoking the MQD in a challenge to DOL's 2022 Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights Rule, 87 Fed. Reg. 73882 (Dec. 1, 2022), which clarified the duties of fiduciaries for Employment Retirement Income Security Act (or ERISA) benefit plans).

⁴⁵ See *DACO v. U.S. Small Bus. Ass'n*, No. 6:22-cvV-01444, 2024 U.S. Dist. LEXIS 33763, at *48–50 (W.D. La. Feb. 22, 2024) (rejecting plaintiffs' challenge to eligibility criteria for Paycheck Protection Program ("PPP") loans).

⁴⁶ See *United States v. White*, 97 F.4th 532, 539–41 (7th Cir. 2024) (rejecting MQD challenge to the validity of the career-offender sentencing guidelines in affirming district court's sentence).

⁴⁷ See, e.g., *United States v. Navarro*, No. 23-5062, 2024 U.S. App. LEXIS 7683, at *8 (D.C. Cir. Apr. 1, 2024) (rejecting MQD argument because the case did "not involve an agency's authority to regulate"); *United States v. Eisenberg*, No. 23-cr-10 (AS), 2023 U.S. Dist. LEXIS 225952, at *11 (S.D.N.Y. Dec. 18, 2023) ("[T]he Court is not reviewing the propriety of any agency action, and Eisenberg cites no authority for applying the major-questions doctrine in the context of a single criminal case.").

⁴⁸ See *Mayes v. Biden*, 67 F.4th 921, 932 (9th Cir. 2023) ("There is no relevant agency action here, and the [MQD] does not apply to actions by the President.").

⁴⁹ See generally *Louisiana v. Biden*, 55 F.4th 1017 (5th Cir. 2022); *Kentucky v. Biden*, 57 F.4th 545 (6th Cir. 2023); *Georgia v. President of the U.S.*, 46 F.4th 1283 (11th Cir. 2022).

and trade actions,⁵⁰ agency guidance documents,⁵¹ interpretive rules,⁵² and the settlement of a nationwide class action.⁵³ Litigants have even invoked the MQD in what would normally be considered a preemption setting, i.e., where there is a potential conflict between state and federal law,⁵⁴ and in broader challenges to state laws.⁵⁵ It is increasingly difficult to identify an area of law or type of government action for which the MQD has not been invoked.

⁵⁰ See Petition for Writ of Certiorari, *PrimeSource Bldg. Prods., v. United States*, No. 23-69, 2023 U.S. S. CT. BRIEFS LEXIS 2152, at *10, 31–32, 34–35 (July 21, 2023) (raising the MQD as part of the nondelegation argument in a challenge to President Biden’s claimed authority to legislate tariffs on steel derivatives in Proclamation 9980, Adjusting Imports of Derivative Aluminum Articles and Derivative Steel Articles Into the United States, 85 Fed. Reg. 5281 (Jan. 29, 2020)), *cert. denied*, 144 S. Ct. 345 (Oct. 30, 2023); Corrected Opening Brief of Plaintiff-Appellants HMTX Industries, Halstead New England Corp., Metrofloor Corporation, and Jasco Products Company at 29–30, 55–60, *HMTX Industries LLC v. United States*, No. 23-1891 (Fed. Cir. July 25, 2023), ECF No. 25 (invoking the MQD in a challenge to tariffs imposed on imports from China by the United States Trade Representative).

⁵¹ See *Chamber of Com. v. Consumer Fin. Prot. Bureau*, No. 6:22-cv-00381, 2023 U.S. Dist. LEXIS 159398, at *18–19, 24–25 (E.D. Tex. Sept. 8, 2023) (applying the MQD to invalidate the Consumer Financial Protection Bureau’s manual on examining company activity to determine actionable discrimination), *appeal docketed*, No. 23-40650 (5th Cir. Nov. 8, 2023); Complaint at 29–30, *Stenson Tamasson, LLC v. Internal Revenue Serv.*, No. 2:24-cv-01123-SPL (D. Ariz. May 14, 2024), ECF No. 1 (raising the MQD in an action challenging the validity of IRS guidance documents regarding the Employee Retention Credit under the Coronavirus Aid, Relief, and Economic Security Act of 2020, also known as the CARES Act).

⁵² See *Niblock v. Univ. of Ky.*, No. 5:19-394-KKC, 2023 U.S. Dist. LEXIS 135758, at *8 (E.D. Ky. Aug. 4, 2023) (rejecting MQD arguments in a challenge to an interpretive rule for determining discrimination on the basis of sex in educational programs receiving federal funding).

⁵³ See, e.g., Appellants’ Joint Opening Brief at 2, 25–37, *Sweet v. Everglades College, Inc.*, No. 23-15049 (9th Cir. May 4, 2023).

⁵⁴ See, e.g., *Cal. Trucking Ass’n v. S. Coast Air Quality Mgmt. Dist.*, No. LA CV21-06341 JAK, 2023 U.S. Dist. LEXIS 235286, at *101–02 (C.D. Cal. Dec. 14, 2023) (rejecting MQD argument in grant of summary judgment for defendants in challenge to local air rule); *Genbiopro, Inc. v. Sorsaia*, No. 3:23-0058, 2023 U.S. Dist. LEXIS 149195, at *10–16 (S.D. W. Va. Aug. 24, 2023) (rejecting MQD challenge to federal law that allegedly conflicted with West Virginia’s Unborn Child Protection Act), *appeal docketed sub nom.*, *GenBioPro, Inc. v. Raynes*, No. 23-2194 (4th Cir. Nov. 15, 2023); *Bryant v. Stein*, No. 1:23-cv-77, _ F. Supp. 3d _, at *45–47 (M.D.N.C. Apr. 30, 2024) (rejecting argument that the MQD precludes implied preemption of state law regarding the drug mifepristone); Brief for the Petitioner, *Idaho v. United States*, No. 23-727, 2024 U.S. S. CT. BRIEFS LEXIS 701, at *32–34 (Feb. 20, 2024) (invoking the MQD in a challenge to a preliminary injunction prohibiting enforcement of Idaho Code § 18-6221 (Section 622) that was granted on the sole ground that Section 622 conflicts with the Emergency Medical Treatment and Labor Act (“EMTALA”), 42 U.S.C. § 1395dd).

⁵⁵ See, e.g., *United States v. Navarro*, No. 23-5062, 2024 U.S. App. LEXIS 7683, at *7–8 (D.C. Cir. Apr. 1, 2024) (rejecting a former Trump administration official’s claim that the MQD barred the use of the District of Columbia’s replevin statute to compel the return of presidential records); *Associated Builders v. Dep’t of Tech., Mgmt., & Budget*, No. 363601, 2024 Mich. App. LEXIS 881, at *14–23 (Mich. Ct. App. Feb. 1, 2024) (rejecting MQD challenge to a state agency’s prevailing-wage requirement).

IV. THE BOUNDLESS INQUIRY INTO ECONOMIC AND POLITICAL IMPACTS IN PRACTICE

Through the lack of objective parameters for determining “vast economic and political significance,” the MQD invites litigants to aggregate and extrapolate the direct effects of a relatively discrete government action as a means of demonstrating an impact on a national industry or the triggering of a contested national political issue, no matter how indirect or downstream that impact may be. Nothing in the Court’s MQD cases bars a challenger from arguing toward, or courts from considering, economic impacts outside of the actual effect on the challenger or the assessment in the agency record,⁵⁶ and, as demonstrated below, courts seem to have discretion to assess political significance based on almost anything. Naturally, litigants are taking advantage, and receptive courts are exacerbating the problem.⁵⁷

A Fifth Circuit three-judge panel’s opinion in *Texas v. Nuclear Regulatory Commission*⁵⁸ demonstrates the problem. At issue was the Nuclear Regulatory Commission’s approval of a single temporary waste storage site in Texas.⁵⁹ The United States argued that the action was not of vast economic and political significance because “the license under review is for one facility” with a “primarily localized impact.”⁶⁰ Without addressing this limited impact, the court alluded to generalized political concerns about the storage of radioactive waste in the United States and applied the MQD to invalidate the action.⁶¹

The lack of objective parameters that allowed the Fifth Circuit’s approach has fueled similar arguments in many contexts. For example, a challenger to an administrative law judge’s ruling regarding less than \$3 million in costs under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) for a single cleanup site argued that the case triggered the MQD due to CERCLA’s national scope and the generally high cost of mitigating hazardous waste sites.⁶² While one judge has rejected MQD arguments for

⁵⁶ *But cf.* Bradford v. Dep’t of Labor, No. 22-1023, 2024 U.S. App. LEXIS 10382, at *32 n.5 (10th Cir. Apr. 30, 2024) (“We note that Appellants’ framing of the specific ‘question’ implicating the [MQD] may not be correct. In particular, the primary issue presented on appeal is whether [the statute] grants authority to regulate non-procurement recreational service permittees . . . Yet, in arguing the [MQD] applies, Appellants shift their focus to the economic effects of the broader minimum wage rule. This appears to be in tension with the Supreme Court’s jurisprudence—which focuses on the effects of the challenged action to determine whether it presents a purportedly ‘major’ question . . . If we were instead to frame the ‘major’ question as DOL’s authority to regulate *non-procurement permittees*, that would clearly not pose a question of ‘vast economic and political significance.’ However, because the Appellees do not challenge the Appellants’ framing of the question, we will assume that Appellants’ framing is correct for purposes of resolving this appeal.”) (citations omitted) (cleaned up).

⁵⁷ Some of the opinions discussed herein are also covered briefly in Schmoyer, *supra* note 8, at 1689–93.

⁵⁸ 78 F.4th 827 (5th Cir. 2023), *reh’g denied*, 95 F.4th 935 (5th Cir. Mar. 14, 2024).

⁵⁹ *See id.* at 831.

⁶⁰ Supplemental Brief for Federal Respondents at 5, *Texas*, 78 F.4th 827 (No. 21-60743).

⁶¹ *See Texas*, 78 F.4th at 844 (citations omitted).

⁶² *See* Plaintiff-Appellant’s Response in Opposition to EPA’s Motion to Dismiss at 22–23, August Mack Env’t, Inc. v. EPA, No. 1:23-cv-36 (N.D. W. Va. Oct. 18, 2023), ECF No. 27.

public-lands actions located entirely within the State of Alaska,⁶³ such reasonable limitations have not deterred litigants from raising the MQD against discrete public lands actions located within a single state due to purported national political and economic concerns.⁶⁴ An individual challenging the results of an agency *adjudication* regarding their right to practice medicine in certain contexts extrapolated to impacts on the entire healthcare industry in an attempt to trigger the MQD.⁶⁵ Even the limited, local nature of a single text message received by one person from a local entity did not stop a defendant from arguing that the potential for “high dollar judgments of class action suits” under the relevant statute constituted vast economic significance.⁶⁶

In its most extreme form, extrapolation occurs in enforcement actions and prosecutions against discrete sets of individuals or entities. To be sure, at least one court has indicated that the MQD should not apply in this setting,⁶⁷ and most of the enforcement and prosecution cases to date reject the application of the MQD, even as some cases entertain consideration of industry-wide economic impacts.⁶⁸ Whatever the reason, the increasing trend of invoking the MQD in

⁶³ See *Alaska v. Fed. Subsistence Bd.*, No. 3:20-cv-00195-SLG, 2023 U.S. Dist. LEXIS 198328, at *18–21 (D. Alaska Nov. 3, 2023) (rejecting MQD argument in a challenge to a decision to open an emergency subsistence hunt on federal lands), *appeal docketed*, No. 24-179 (9th Cir. Jan. 10, 2024); *Alaska Indus. Dev. & Exp. Auth. v. Biden*, No. 3:21-cv-00245-SLG, 2023 U.S. Dist. LEXIS 136474, at *25 (D. Alaska Aug. 7, 2023) (rejecting MQD argument because the challenged drilling moratorium “affect[ed] only a total of nine oil and gas leases held by three lessees over a discrete portion of land in northern Alaska, and it is both temporary and limited in nature”), *appeal docketed*, No. 24-2533 (9th Cir. Apr. 22, 2024).

⁶⁴ See, e.g., Brief for Pacific Legal Found. as Amici Curiae Supporting Appellants’ Petition for Rehearing En Banc at 10–12, *Murphy Co. v. Biden*, No. 19-35921 (9th Cir. June 20, 2023) (arguing that MQD applies to challenging Presidential Proclamation 9564, which expanded the Cascade-Siskiyou National Monument in southwestern Oregon); Complaint at 17, *Heaton v. Biden*, No. 3:24-cv-08027 (D. Ariz. Feb. 12, 2024), ECF No. 1 (invoking the MQD in a challenge to President Biden’s designation of land located entirely within the State of Arizona as the Ancestral Footprints National Monument under the Antiquities Act).

⁶⁵ *Baxter v. Becerra*, No. 3:23-cv-92, 2024 U.S. Dist. LEXIS 26276, at *18–21 (E.D. Va. Feb. 14, 2024) (rejecting plaintiff’s appeal of a five-year mandatory exclusion from federally funded health-care programs, concluding that the MQD was not applicable), *appeal docketed*, No. 24-1203 (4th Cir. Mar. 8, 2024).

⁶⁶ *Howard v. Republican Nat’l Comm.*, No. cv-23-00993-PHX-SPL, 2023 U.S. Dist. LEXIS 198558, at *1–2, *6–9 (D. Ariz. Nov. 6, 2023), *appeal docketed*, No. 23-3826 (9th Cir. Nov. 29, 2023).

⁶⁷ *Fed. Trade Comm. v. Kochava Inc.*, 671 F. Supp. 3d 1161, 1180 (D. Idaho 2023) (“[T]he FTC is not flexing its regulatory muscles—it is merely asking a court to interpret and apply a statute enacted by Congress. Accordingly, [the major questions] doctrine . . . is inapplicable.”).

⁶⁸ Compare *Eisenberg*, 2023 U.S. Dist. LEXIS 225952, at *11–12 (rejecting MQD argument and reasoning that “this case does not involve the [Commodity Futures Trading Commission], the scope of its authority, or whether all digital assets should be treated as commodities,” but rather “[i]t involves the specific instruments at issue in this case”), and *United States v. Stratics Networks*, No. 23-cv-0313-BAS-KSC, 2024 U.S. Dist. LEXIS 39520, at *50–51 (S.D. Cal. Mar. 6, 2024) (concluding that the MQD did not apply to “a handful of ringless voicemail providers”) (citations omitted), with *SEC v. Coinbase*, No. 23 Civ. 4738, 2024 U.S. Dist. LEXIS 56994, at *40–45 (S.D.N.Y. Mar. 27, 2024) (rejecting MQD argument because “the cryptocurrency industry cannot compare with those other

these settings demonstrates that litigants are undeterred.⁶⁹ It is very likely that similar extrapolation efforts will persist, and some will succeed.

V. CONCLUSION

Despite the trends described above, promising precedent has emerged from lower courts that could limit MQD application. For example, some courts have concluded as part of an initial query in the MQD analysis that the challenged action was within the discretion that Congress provided to the agency or executive, allowing the court to forego consideration of the MQD factors, or to make short work of them.⁷⁰ Courts have also rejected extrapolation of economic impacts from the action at issue to an entire industry or other aggregated national impact, especially where other MQD factors are not met.⁷¹ At least one judge

industries the Supreme Court has found to trigger the major questions doctrine”) (citations omitted), *and* *United States v. Freeman*, No. 21-cr-41-jl, 2023 U.S. Dist. LEXIS 147548, at *19–31 (D.N.H. Aug. 22, 2023) (rejecting MQD argument overall yet engaging with defendants’ argument that the agency “seeks to regulate a significant portion of the economy through its interpretive guidance because as of November 2021, non-state-issued digital assets had a combined market capitalization of \$3 trillion”) (citation omitted).

⁶⁹ *Defendants Green United, LLC and Wright W. Thurston and Relief Defendants True North United Investment, LLC and Block Brothers, LLC Motion to Dismiss Plaintiff’s Amended Complaint* at 29–31, *SEC v. Green United*, No. 2:23-cv-00159-BSJ (D. Utah Mar. 20, 2024), ECF No. 88 (arguing that “[t]wenty percent of Americans have owned cryptocurrency; thousands of Americans are employed by digital asset companies; the global market value of cryptocurrency is over \$1 trillion; and daily global trading volume is around \$100 billion” (citations omitted)); *Defendants Bam Trading Services Inc. and Bam Management US Holdings Inc.’s Mem. of Law in Support of Motion to Dismiss* at 31–32, *SEC v. Binance Holdings Ltd.*, No. 1:23-cv-01599-ABJ-ZMF (D.D.C. Sept. 21, 2023), ECF No. 117-1 (arguing that “[a]ccepting the SEC’s theory in this case would mean, in essence, that the SEC has regulatory authority over the entire digital asset industry—a nascent, transformative, trillion-dollar industry”).

⁷⁰ *See, e.g., Howard v. Republican Nat’l Comm.*, No. cv-23-00993-PHX-SPL, 2023 U.S. Dist. LEXIS 198558, at *7 (D. Ariz. Nov. 6, 2023), *appeal docketed*, No. 23-3826 (9th Cir. Nov. 29, 2023) (“[R]egardless of how potentially sweeping the agency’s authority might be, it is valid if Congress so intended for it to exist”); *Mayfield v. Dep’t of Labor*, No. 1:22-cv-792-RP, 2023 U.S. Dist. LEXIS 168054, at *23 (W.D. Tex. Sept. 20, 2023) (reasoning that, “[e]ven if there is some argument to be made that the Final Rule’s salary-level test does trigger the major questions doctrine” in terms of its economic impact, “the salary-level test is well within th[e] conferred authority”); *Coin Ctr. v. Yellen*, No. 3:22cv20375-TKW-ZCB, 2023 U.S. Dist. LEXIS 195927, at *20 (N.D. Fla. Oct. 30, 2023) (concluding that there was “nothing ‘extraordinary’ about this case or the regulatory action taken . . . that would implicate the [MQD] because, unlike other recent cases in which the doctrine has been applied,” the agency action at issue fell “squarely within the authority delegated to” to the agency “and is a targeted action directed at a single entity”), *appeal docketed*, No. 23-13698 (11th Cir. Nov. 7, 2023).

⁷¹ *E.g., Howard*, 2023 U.S. Dist. LEXIS 198558, at *8 (“Plaintiff’s arguments about the high dollar judgments of class action suits under the [statute] are immaterial to the potential value judgment of his suit, which is not enough by itself to implicate the doctrine.”); *All. for Fair Bd. Recruitment v. SEC*, 85 F.4th 226, 256–58 (5th Cir. 2023) (rejecting challengers’ MQD argument that the rule “imposes unprecedented demographic quotas and disclosure requirements regarding race, sex, and sexual preference on companies valued at over 20 trillion dollars” based on the nature of the challenged agency action, which was not “unheralded” or “unprecedented” compared with prior actions).

has gone further, openly questioning whether the MQD bears any relation to the separation-of-power concerns that the Supreme Court identified in its opinions.⁷²

While these developments will not, by themselves, stem the MQD tide in lower courts (and indeed some likely will not survive on appeal), they provide reasonable, useful approaches to be applied as a matter of everyday administrative law in the near term. Specifically, courts should employ ordinary tools of statutory interpretation to satisfy themselves that Congress delegated the authority for a given action to the agency *regardless* of the size or scope of the action at issue. Adding an extra layer of scrutiny merely because an action is of allegedly vast economic or political significance does not comport with any specific tenet of separation-of-power principles. Courts have discretion to reject the broad extrapolation of the impact of limited agency actions to broader contexts. Longer-term, these same principles provide scholars, courts, and litigants with useful leads for critical thinking about how to limit the assessment of economic and political significance and whether the Court should ultimately jettison the MQD altogether.

For now, though, the floodgates will remain open. As will become increasingly clear as MQD arguments continue to explode in lower courts, the reach of the doctrine is nearly limitless, and the factors lack objective parameters that would allow litigants and government officials to reasonably predict whether an action will trigger the MQD, let alone survive it. Absent such guardrails, the MQD will overwhelm lower court dockets, increase the frequency with which courts invalidate government actions, and “frustrate the administrative state’s ability to perform the function for which Congress established it: the regulation of the American economy.”⁷³

⁷² See *Kovac v. Wray*, 660 F. Supp. 3d 555, 564 (N.D. Tex. Mar. 9, 2023) (“It’s not clear why the Supreme Court requires clear congressional authorization only for major questions or significant assertions of authority.”), *appeal docketed*, No. 23-10284 (5th Cir. Mar. 23, 2023).

⁷³ *SEC v. Terraform Labs Pte. Ltd.*, No. 23-cv-1346 (JSR), 2023 U.S. Dist. LEXIS 132046, at *24–25 (S.D.N.Y. July 31, 2023).

ARTICLE

DISCRETION IS NOT (CHEVRON) DEFERENCE

DONALD L. R. GOODSON*

Discretion is not deference. Many often confuse the two, but the distinction is important, especially now that the Supreme Court has eliminated the deference doctrine associated with *Chevron U.S.A., Inc. v. Natural Resources Defense Council*.¹ *Chevron* deference concerned ambiguous statutory terms or phrases (and implicit grants of authority²), while discretion often concerns unambiguously broad statutory terms or phrases (and explicit grants of authority³). So even with *Chevron* deference gone, agencies that can point to broad terms or phrases in the statutes they administer will retain wide latitude to carry out their missions. The Supreme Court made this clear in *Loper Bright Enterprises v. Raimondo*, explaining, in juxtaposition to *Chevron* deference, that a “statute’s meaning may well be that the agency is authorized to exercise a degree of discretion,”⁴ and “courts must respect the delegation” of this discretionary authority from Congress.⁵

To see the distinction between discretion and *Chevron* deference, first consider the *Chevron* opinion itself and the deference doctrine embodied in it. That case involved the meaning of “stationary source” as used in the Clean Air Act.⁶ The Supreme Court concluded that the phrase was ambiguous as it could mean a single “pollution-emitting device[,]” “all of the pollution-emitting devices within the same industrial grouping” (also dubbed the “plantwide definition” or “bubble concept”), or “a dual definition that could apply to both the entire ‘bubble’ and its components.”⁷ For various reasons, the *Chevron* Court concluded that these kinds of ambiguous statutory terms or phrases convey an implicit grant of authority to the agency administering the statute, requiring courts to accept the agency’s reasonable interpretations of such ambiguous terms or phrases.⁸ Of course, many have quibbled with those reasons.⁹ But the reasons

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¹ 467 U.S. 837 (1984); see *Loper Bright Enters. v. Raimondo*, 144 S.Ct. 2244, 2273 (2024) (overruling *Chevron*).

² *Chevron*, 467 U.S. at 844.

³ *Loper Bright*, 144 S.Ct. at 2263.

⁴ *Id.*

⁵ *Id.* at 2273.

⁶ *Chevron*, 467 U.S. at 839–40.

⁷ *Id.* at 840, 859.

⁸ *Id.* at 842–45.

⁹ See, e.g., *Loper Bright Enters. v. Raimondo*, 144 S.Ct. 2244, 2263–67 (2024) (cataloguing the majority’s critiques of *Chevron* deference); see also *Michigan v. EPA*, 576 U.S. 743, 760–63 (2015) (Thomas, J., concurring); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149–58 (10th Cir. 2016) (Gorsuch, J., concurring); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2143 (2016); Christopher J. Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 16 GEO. J. L. & PUB. POL’Y, 103 (2018) (surveying criticisms of *Chevron* and *Auer* deference).

and any critiques of them are irrelevant for present purposes; the essential point is that only ambiguous terms or phrases triggered *Chevron* deference. Accordingly, with *Chevron* deference gone, courts are no longer required to defer to agencies' reasonable interpretations of ambiguous statutes; they must instead determine the best reading of such text themselves, guided by any other relevant doctrines.¹⁰

As *Loper Bright* itself explains, discretion, in contrast, arises when statutes “‘expressly delegate[.]’ to an agency the authority to give meaning to a particular statutory term”¹¹ or “‘prescribe rules to ‘fill up the details’ of a statutory scheme.”¹² Often, statutes also “empower an agency . . . to regulate subject to the limits imposed by a term or phrase that ‘leaves agencies with flexibility,’ such as ‘appropriate’ or ‘reasonable.’”¹³ Such broad terms and phrases are incapable of precise definition, but they are not ambiguous; to the contrary, they are unambiguously open-ended. They represent an explicit grant of authority to the agency to choose from a wide range of options that the agency determines are reasonable, appropriate, feasible, practicable, in the public interest, and so on.

Even the *Chevron* opinion itself recognizes the deference-discretion distinction, or at least a flavor of it, explaining that, “[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority for the agency to elucidate a specific provision of the statute by regulation,” but “[s]ometimes the legislative delegation to an agency on a particular question is implicit rather than explicit.”¹⁴ The explicit category overlaps with those broad and capacious terms that convey discretion; the implicit category covers the types of statutory ambiguities or silences so closely associated with *Chevron* deference.¹⁵

Few understand this distinction between discretion and deference better than Justice Kavanaugh, and it is hard to avoid the assumption that he played a role in ensuring the inclusion of key passages on the distinction in *Loper Bright*.

¹⁰ See, e.g., *Loper Bright*, 144 S. Ct. at 2266 (“It . . . makes no sense to speak of a ‘permissible’ interpretation that is not the one the court, after applying all relevant interpretive tools, concludes is best. In the business of statutory interpretation, if it is not the best, it is not permissible”); see also *id.* at 2262 (explaining that “courts must exercise independent judgment in determining the meaning of statutory provisions” but “may . . . seek aid from the interpretations of those responsible for implementing particular statutes”) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

¹¹ *Loper Bright*, 144 S. Ct. at 2263 (noting statute in question “expressly delegated to the [agency] the power to prescribe standards for determining what constitutes ‘unemployment’ for [certain] purposes”) (quoting *Batterton v. Francis*, 432 U.S. 416, 425 (1977)).

¹² *Id.* (quoting *Wayman v. Southard*, 10 Wheat 1, 43 (1825)).

¹³ *Id.* (citations omitted).

¹⁴ *Chevron*, U.S.A., Inc. v. Nat. Resources Def. Council, Inc., 467 U.S. 837, 843–44 (1984).

¹⁵ Justice Stevens, the author of *Chevron*, effectively made this same point in *Morgan Stanley Cap. Grp. v. Pub. Util. Dist. No. 1 of Snohomish Cnty. et al.*, explaining that “Congress . . . used the general words ‘just and reasonable’ because it wanted to give FERC, not the courts, wide latitude in setting policy” and contrasting such explicit gaps for agencies to fill with the types of implicit gaps associated with *Chevron* deference. 554 U.S. 527, 557–58 (2008) (Stevens, J., dissenting).

In a 2016 article reviewing Judge Robert A. Katzmann’s *Judging Statutes*, then-Judge Kavanaugh explained that he was not a fan of *Chevron* deference. Among other things, he thought that the doctrine turned on a nebulous initial finding of ambiguity¹⁶ and that judges were well-equipped to determine the best reading of a statute.¹⁷ Given these views, he contended that, if “an agency is . . . interpreting a specific statutory term or phrase”—say, “stationary source”—“courts should determine whether the agency’s interpretation is the best reading of the statutory text” rather than apply the two-part *Chevron* deference framework.¹⁸ This approach ultimately prevailed in *Loper Bright*. At the same time, and notwithstanding his criticism of *Chevron* deference, then-Judge Kavanaugh also believed that “courts should still defer to agencies in cases involving statutes using broad and open-ended terms like ‘reasonable,’ ‘appropriate,’ ‘feasible,’ or ‘practicable.’”¹⁹

Justice Kavanaugh later repeated the same point in a 2019 concurring opinion in *Kisor v. Wilkie*,²⁰ which addressed the related but separate question whether to eliminate *Auer* deference to agencies’ interpretations of their own ambiguous regulations.²¹ Just as Justice Kavanaugh would have cast *Chevron* deference aside, he would have “formally retired” *Auer* deference because he believed “a judge should engage in appropriately rigorous scrutiny of an agency’s interpretation of a regulation.”²² Again, however, he also believed that a judge should “be appropriately deferential to an agency’s reasonable policy choices within the discretion allowed by regulation.”²³ In fact, Justice Kavanaugh emphasized that *Auer* deference had nothing to do with “cases involving regulations that employ broad and open-ended terms like ‘reasonable,’ ‘appropriate,’ ‘feasible,’ or ‘practicable.’”²⁴ He once more declared that “[t]hose kinds of terms afford agencies broad policy discretion.”²⁵

Although Justice Kavanaugh did not author *Loper Bright*, the majority opinion contains many of the same points, which arguably were unnecessary for

¹⁶ See Kavanaugh, *supra* note 9, at 2118 (“Several substantive principles of interpretation—such as constitutional avoidance, use of legislative history, and *Chevron*—depend on an initial determination of whether a text is clear or ambiguous. But judges often cannot make that initial clarity versus ambiguity decision in a settled, principled, or evenhanded way”).

¹⁷ See *id.* at 2154 (“Judges are trained to [determine whether the agency’s interpretation is the best reading of the statutory text], and it can be done in a neutral and impartial manner in most cases”).

¹⁸ *Id.*

¹⁹ *Id.* at 2153.

²⁰ 588 U.S. 558, 631–33 (2019) (Kavanaugh, J., concurring).

²¹ As the Supreme Court explained in *Kisor*, it “has often deferred to agencies’ reasonable readings of genuinely ambiguous regulations” under “*Auer* deference, or sometimes *Seminole Rock* deference, after two cases” employing that practice. *Id.* at 563 (citing *Auer v. Robbins*, 519 U.S. 452 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945)). *Auer* and *Chevron* deference both apply a similar two-part deference framework; the former applies to agencies’ interpretations of their own regulations, the latter to their interpretations of statutes they administer. See, e.g., *Kisor*, 588 U.S. at 576 (comparing *Auer* and *Chevron* deference).

²² *Id.* at 631, 633.

²³ *Id.* at 633.

²⁴ *Id.* at 632.

²⁵ *Id.*

the holding overruling *Chevron* deference.²⁶ That Justice Kavanaugh felt compelled to repeatedly draw his readers' attention to the distinction between deference and discretion—and that the *Loper Bright* majority also went out of its way to do so—may signal a concern among the Supreme Court's members that scholars, lawyers, and judges often do not understand the distinction between deference and discretion.

New England Power Generators Association v. FERC, a D.C. Circuit case involving the authority of the Federal Energy Regulation Commission (FERC) over interstate transmission and wholesale sales of electricity, provides an apt example of the confusion. In that case, the D.C. Circuit declared that “reasonable agency interpretations of ambiguous statutory terms like ‘just and reasonable’ are already subject to judicial deference under the regime set forth in *Chevron*” because the terms are “obviously incapable of precise judicial definition.”²⁷ These statements make little sense because “just and reasonable” is not ambiguous; it is an intentionally broad, open-ended phrase that unambiguously conveys discretion. *Chevron* deference thus has nothing to do with FERC's authority to determine just and reasonable rates for interstate transmission and wholesale sales of electricity. Despite these confusing statements, the D.C. Circuit went on to correctly observe that “[t]he only question . . . is whether FERC exceeded the bounds of its considerable discretion” in that case to determine whether a particular practice was “just and reasonable.”²⁸ And rather than determine whether FERC's interpretation of “just and reasonable” was itself reasonable (as a court would do under *Chevron*), the D.C. Circuit soundly concluded that FERC's challenged action should be upheld because it was a “reasonable choice within a gap left open by Congress” for FERC to fill.²⁹ The court got to the right result in the end, but it confusingly invoked *Chevron* deference along the way.

Scholars, lawyers, and judges should keep this example in mind when assessing *Loper Bright*'s potential impact. If a past decision upholding an agency action incorrectly referenced or invoked *Chevron* deference when it should have referenced discretion, eliminating *Chevron* deference should not have any effect on the case. (In addition, as the Supreme Court noted, *Loper Bright* itself does not call into question prior opinions that properly relied on *Chevron* deference.³⁰)

²⁶ Most notably, after spending pages explaining that “[t]he APA . . . incorporates the traditional understanding of the judicial function, under which courts must exercise independent judgment in determining the meaning of statutory provisions,” the Supreme Court concluded this portion of the opinion by emphasizing—just as Justice Kavanaugh had—that the best reading of a given statute “may well be that the agency is authorized to exercise a degree of discretion.” 144 S. Ct. at 2262–63; *see also* Kavanaugh, *supra* note 9, at 2152.

²⁷ 707 F.3d 364, 370 (D.C. Cir. 2013).

²⁸ *Id.* at 371.

²⁹ *Id.* (quoting *Chevron, U.S.A., Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837, 866 (1984)).

³⁰ *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024) (explaining that in overruling *Chevron*, the Supreme Court “do[es] not call into question prior cases that relied on the *Chevron* framework”).

One reason for the confusion may be that it is often hard to define discretion without using the term “deference,” as the above examples from Justice Kavanaugh demonstrate. Dictionary definitions can be instructive in pinning down the difference. The verb “defer” means to “submit to another’s wishes, opinion, or governance usu[ally] through deference or respect.”³¹ This definition captures the general idea behind *Chevron* deference: when there is more than one reasonable interpretation of a statutory term or phrase, courts should voluntarily acquiesce to the agency’s opinion on the meaning of that term or phrase based on respect for the agency’s judgment. The noun “discretion,” however, means “power of free decision or latitude of choice within certain legal bounds.”³² In contrast to deference, discretion connotes compulsory accession to the views of another—compulsory because Congress has given this choice to an agency, not the courts.

These dictionary definitions, in conjunction with Justice Kavanaugh’s attempts at distinguishing discretion and deference, may help illuminate the distinction. Open-ended terms like “reasonable,” “appropriate,” “feasible,” and “practicable” afford agencies power of free decision or latitude of choice within certain legal bounds—i.e., discretion. In those settings, Congress has given the agency—not the courts—latitude of choice over certain decisions.³³ So even with *Chevron* deference gone and judges now required to determine whether an agency’s interpretation of ambiguous statutory text is the best reading of that text (again, guided by any other relevant doctrines), judges must still abide by the agency’s policy choices within the agency’s statutorily granted discretion.

To be sure, even when Congress uses broad, open-ended terms or phrases, an agency’s discretion is not limitless—it must, by definition, be “within certain legal bounds.”³⁴ As the Supreme Court explained in *Loper Bright*, the reviewing court’s role when confronted with a congressional grant of discretionary authority is to “fix the boundaries of the delegated authority and ensure the agency has engaged in reasoned decisionmaking within those boundaries.”³⁵

When fixing such boundaries, as the Supreme Court explained in a different case involving FERC’s authority under the Natural Gas Act, “the width of administrative authority must be measured in part by the purposes for which it was conferred.”³⁶ This principle of interpretation applies in equal measure to broad, open-ended terms or phrases that convey discretion.³⁷ Moreover, while even “capacious[.]” terms or phrases conveying broad discretion may also

³¹ *Defer*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2014). Note the circular use of deference even here.

³² *Discretion*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2014).

³³ *Cf.* SEC v. Chenery Corp., 318 U.S. 80, 94 (1943) (“It is not for us to determine independently what is ‘detrimental to the public interest or the interest of investors or consumers’ or ‘fair or equitable’ within the meaning of ... the Public Utility Holding Company Act of 1935”).

³⁴ *Discretion*, *supra* note 32.

³⁵ *Loper Bright*, 144 S. Ct. at 2263 (cleaned up).

³⁶ Fed. Power Comm’n v. Texaco Inc., 417 U.S. 380, 389 (1974).

³⁷ *See, e.g.*, NAACP v. Fed. Power Comm’n, 425 U.S. 662, 669 (1976) (“Thus, in order to give content and meaning to the words ‘public interest’ as used in the Power and Gas Acts, it is necessary to look to the purposes for which the Acts were adopted”).

require agencies to consider “all the relevant factors,”³⁸ they still provide agencies significant room to operate.³⁹

It bears noting that the list of broad, open-ended terms and phrases conveying discretion provided earlier in this essay is not exhaustive.⁴⁰ There are many other terms or phrases that convey similarly broad power of free decision or latitude of choice within certain legal bounds.⁴¹ And there may be other terms or phrases that fall in the gray area between an unambiguously open-ended term or phrase (like reasonable) and an ambiguous one (like stationary source). Context may clarify into which category a term or phrase falls. In addition, as the Supreme Court noted in *Loper Bright*, Congress may delegate discretionary authority to an agency to give meaning to a particular term or “fill up the details.”⁴²

As the above discussion further demonstrates, when an agency is exercising its authority under a discretionary grant of authority—rather than claiming the authority to do so pursuant to ambiguous statutory text—and when the exercise of such discretionary authority aligns with the “purposes for which it was conferred,”⁴³ the agency’s actions should be “given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.”⁴⁴ This is the same standard of review Justice Kavanaugh referred to in his 2016 article when he compared the task courts confront when reviewing agency decisions pursuant to broad, open-ended terms and the “reasoned decisionmaking principle of *State Farm*.”⁴⁵ Here, too, the Supreme Court echoed Justice Kavanaugh in *Loper Bright*, explaining that a reviewing court confronted with an exercise of an agency’s discretionary authority fulfills its judicial “role by recognizing constitutional delegations, ‘fix[ing] the boundaries of [the]

³⁸ *Michigan v. EPA*, 576 U.S. 743, 752 (2015) (quoting *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222, 1266 (D.C. Cir. 2014) (Kavanaugh, J., concurring)). As *Michigan v. EPA* suggests, arbitrary-and-capricious review under the Administrative Procedure Act gives further content to courts’ review of agency exercises of broad discretionary authority.

³⁹ Consider the examples the Supreme Court offered in *Loper Bright*, 144 S. Ct. at 2263 n.6 (providing as examples of discretionary authority 33 U.S.C. § 1312(a) (“requiring establishment of effluent limitations ‘[w]hensoever, in the judgment of the [EPA] Administrator . . . discharges of pollutants from a point source or group of point sources . . . would interfere with the attainment or maintenance of that water quality . . . which shall assure’ various outcomes, such as the ‘protection of public health’ and ‘public water supplies’”) and 42 U.S.C. § 7412(n)(1)(A) (“directing EPA to regulate power plants ‘if the Administrator finds such regulation is appropriate and necessary’”) (alterations in original).

⁴⁰ Justice Kavanaugh acknowledged as much when introducing a similar list with the preposition “like.” Kavanaugh, *supra* note 9, at 2153; *Kisor v. Wilkie*, 588 U.S. 558, 632 (2019) (Kavanaugh, J., concurring).

⁴¹ *See, e.g., Perkins v. Bergland*, 608 F.2d 803, 906 (9th Cir. 1979) (explaining that “such terms as ‘that (which) will best meet the needs of the American people’ . . . ‘breathe[] discretion at every pore’”) (quoting *Strickland v. Morton*, 519 F.2d 467, 469 (9th Cir. 1975)).

⁴² *Loper Bright*, 144 S. Ct. at 2263.

⁴³ *Fed. Power Comm’n v. Texaco, Inc.*, 417 U.S. 380, 389 (1974).

⁴⁴ *Morgan Stanley Cap. Grp. v. Pub. Util. Dist. No. 1 of Snohomish Cnty. et al.*, 554 U.S. 527, 558 (2008) (Stevens, J., dissenting) (quoting *Chevron*, 467 U.S. at 844).

⁴⁵ Kavanaugh, *supra* note 9, at 2154.

delegated authority,’ and ensuring the agency has engaged in reasoned decisionmaking’ within those boundaries.”⁴⁶

The essence of discretion is the power of free decision or latitude of choice. Discretion often finds its source in unambiguously broad and open-ended terms or phrases, while *Chevron* deference turned on ambiguous terms or phrases. *Loper Bright*’s overruling of *Chevron* is accordingly limited to ambiguous statutory terms or phrases. It does not extend to unambiguously broad, open-ended terms or phrases that explicitly convey broad grants of authority to federal agencies.⁴⁷

⁴⁶ *Loper Bright*, 144 S. Ct. at 2263 (citations omitted).

⁴⁷ Some may get to the end of this essay and wonder about the nondelegation doctrine. *Cf.* Kavanaugh, *supra* note 9, at 2154 n.177 (“Excessive delegation may be another problem (at least for some) in the examples”). Others have capably put that argument to rest. *See, e.g.*, Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 284 (2021) (“Already by 1940, the Supreme Court was rejecting a nondelegation challenge to statutory authorization for a commission to set coal prices ‘in the public interest’”).

ARTICLE
TWO TAKES ON ADMINISTRATIVE CHANGE
FROM THE ROBERTS COURT

DANIEL T. DEACON* & LEAH M. LITMAN**

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I. INTRODUCTION

In *Loper Bright Enterprises v. Raimondo*,¹ the Supreme Court finally did what many long hoped (or feared) it would do: overrule *Chevron v. Natural Resources Defense Council*.² *Chevron* instructed courts to defer to an agency’s interpretation of an ambiguous statutory provision, provided the interpretation was reasonable.³ *Chevron*, according to Justice Kagan, had “served as a cornerstone of administrative law” and “the warp and woof of modern government, supporting regulatory efforts of all kinds—to name a few, keeping air and water clean, food and drugs safe, and financial markets honest.”⁴ Not surprisingly, statutes governing such matters contain quite a number of ambiguities. Under *Chevron*, agencies could rely on their expertise and policy views to resolve them. Under the new regime ushered in by *Loper Bright*, courts will resolve ambiguities by determining what the “best” interpretation of the statute is.⁵

In many respects, *Loper Bright* was consistent with emergent patterns in the Roberts Court’s jurisprudence. As Justice Kagan wrote in her dissent, “it is impossible to pretend that today’s decision is a one-off, in either its treatment of agencies or its treatment of precedent.”⁶ *Loper Bright*, like many Roberts Court decisions, illustrated “the Court’s resolve to roll back agency authority, despite

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¹ 144 S. Ct. 2244 (2024).

² 467 U.S. 837 (1984), overruled by *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024).

³ See *Chevron*, 467 U.S. 837.

⁴ *Loper Bright*, 144 S. Ct. at 2294 (Kagan, J., dissenting).

⁵ *Loper Bright* contains two possible caveats—it notes that Congress can delegate policymaking discretion to agencies (rather than legal determinations) and that courts may continue to apply a version of *Skidmore* deference to agencies’ interpretations of statutes. See *Loper Bright*, 144 S. Ct. at 2258–60, 2264–65.

⁶ *Loper Bright*, 144 S. Ct. at 2311 (Kagan, J., dissenting).

congressional direction to the contrary.”⁷ The day before *Loper Bright*, for example, the Court issued a decision holding that the Seventh Amendment prohibited the Securities and Exchange Commission (SEC) from levying civil penalties for securities fraud using the agency’s internal adjudicative processes.⁸ It also issued a decision pausing enforcement of the Environmental Protection Agency’s (EPA) Good Neighbor Rule—designed to combat interstate pollution—by deploying an aggressive form of arbitrary-and-capricious review.⁹ *Loper Bright* also continued the Roberts Court’s pattern of overruling precedent, either formally in an opinion, or effectively doing so by artificially narrowing or cabining previous cases.¹⁰

But in at least one respect, *Loper Bright* marked a departure from a throughline in some of the Roberts Court’s other decisions. In overruling *Chevron*, the Court displayed open skepticism and even hostility to the notion that regulatory agencies could change their interpretations of ambiguous statutory provisions from presidential administration to presidential administration based on differing policy views. Yet in the Court’s presidential removal cases, the Court has insisted that Presidents must have the power to remove agency heads to facilitate the President’s ability to influence agencies’ policy positions and reverse positions with which the new President disagrees. That puts these two lines of decisions in tension with one another: whereas in the removal cases, the Court views itself as ensuring that a President holds broad influence over an agency’s policy positions, *Loper Bright* restricts the degree to which agencies can adapt based on the views of the President. This essay outlines this tension before surveying some possible ways to resolve it.

II. TWO ATTITUDES TOWARD CHANGING AGENCY VIEWS

This Part contrasts the Court’s skeptical posture toward policy-driven regulatory change in *Loper Bright* with the Court’s insistence, in the removal cases, that Presidents enjoy unfettered authority to remove agency officials so that they may maintain influence over policy. In the former context, the Court evinced considerable hostility toward agencies altering their positions in response to changes in administration; in the latter cases, the Court suggested that agencies changing positions across different presidential administrations is a natural and even affirmatively desirable component of democracy and electoral accountability.

⁷ *Id.*

⁸ SEC v. Jarkesy, 144 S. Ct. 2117 (2024). For criticism about how *Jarkesy* and other decisions effectively generate a new substantive due process doctrine based on freewheeling notions of liberty that is being used to refashion the institutions of the administrative state, see Leah M. Litman, *The New Substantive Due Process*, 103 TEX. L. REV. __ (forthcoming 2025).

⁹ Ohio v. EPA, 144 S. Ct. 2040 (2024).

¹⁰ See e.g., *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022); *Edwards v. Vannoy*, 593 U.S. 255 (2021); *Knick v. Twp. of Scott*, 588 U.S. 180 (2019); *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878 (2018); *Jarkesy*, 144 S. Ct. at 2117; *Students for Fair Admissions, Inc. v. Presidents & Fellows of Harvard Coll.*, 600 U.S. 181 (2023); *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507 (2022).

A. *The End of Chevron*

Chevron was the foundational doctrine governing the interpretation of statutes administered by federal agencies. Under *Chevron*, if a court applied the traditional tools of statutory interpretation and concluded that a statute was ambiguous on some point, the court would defer to the agency's reasonable resolution of that ambiguity.¹¹ There were various caveats or exceptions to this rule, such as the major questions doctrine, as well as limitations on the kind of agency determinations that received deference.¹²

Chevron itself involved an interpretive “flip flop” concerning the Clean Air Act. The Reagan EPA had taken the position that the phrase “stationary source” could be interpreted in a somewhat looser way than it had been read by prior administrations, with the effect that some sources of pollution would not be as stringently regulated as before.¹³ In blessing the EPA's new interpretation, the Court wrote that an agency's initial interpretation “is not instantly carved in stone.”¹⁴ And in fact, many early supporters of *Chevron* were conservatives eager to roll back what they perceived as regulatory excess by prior Presidents.¹⁵ After it took hold, *Chevron* structured the relationship between Congress, courts, and agencies for nearly four decades.

But especially over the last eight or so years, the Supreme Court has evinced increasing skepticism of *Chevron*, often by declining to rely on it or by announcing exceptions to it.¹⁶ These efforts culminated in the Court's 2024 decision in *Loper Bright Enterprises v. Raimondo*, which formally overruled *Chevron* and directed courts to render their own best interpretation of statutes administered by agencies, regardless of how ambiguous the statute in question may be.¹⁷ The Court provided two caveats. First, it stated that with respect to some statutes—including those using truly open-ended words such as “appropriate” or “reasonable”—the “best” interpretation of the statute may be that the agency is “authorized to exercise a degree of discretion.”¹⁸ Second, the Court appeared to endorse the approach taken in *Skidmore v. Swift*,¹⁹ under which agencies' proffered interpretations are to be given “respect” to the extent they shed light on statutory meaning.²⁰ Importantly, and as discussed further

¹¹ See *Chevron v. Nat'l Defs. Res. Council*, 467 U.S. 837, 842–43 (1984).

¹² See *West Virginia v. EPA*, 597 U.S. 697 (2022); *United States v. Mead Corp.*, 533 U.S. 218 (2001). For criticisms of these exceptions, see Lisa Schultz Bressman, *How “Mead” Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443 (2005), and Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009 (2023).

¹³ See *Chevron*, 467 U.S. at 839–40.

¹⁴ *Id.* at 863.

¹⁵ See William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1087 (2008) (reporting that, after *Chevron*, “[a]lmost immediately, Reagan Administration officials and appointees proclaimed a ‘Chevron Revolution’”).

¹⁶ See Deacon & Litman, *supra* note 12, at 1019–20.

¹⁷ *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024).

¹⁸ *Id.* at 2263.

¹⁹ 323 U.S. 134 (1944).

²⁰ See *Loper Bright*, 144 S. Ct. at 2259–65.

below, *Skidmore* gives less weight to agency interpretations that are inconsistent with the agency’s prior views.²¹

One important consequence of overruling *Chevron* is that agencies will be much more constrained in their ability to change policy from one administration to the next. Because *Chevron* was based on the view that resolving statutory ambiguity involves an act of policymaking discretion, agencies were allowed to update or alter their interpretations based on their views on public policy.²² And even when courts deemed an agency’s interpretation to be reasonable, that did not bar subsequent agency officials from reinterpreting the statute in a different way, provided that the new interpretation was also reasonable.²³ Not so under *Loper Bright*. Now courts are in charge of all questions of statutory interpretation. And once a court renders its “best” interpretation, the agency is stuck with that interpretation indefinitely, absent a congressional amendment or subsequent judicial decision reversing the earlier one.

In overruling *Chevron*, the Court both understood that consequence and celebrated it. During the oral arguments in the *Chevron* cases, the Republican-appointed Justices repeatedly expressed concern that *Chevron* allowed agencies to flip back and forth between positions across different presidential administrations. Justice Kavanaugh evoked this idea in explaining why *Skidmore* deference might be justified even though *Chevron* is not. During oral argument, he observed that “[a] big difference between *Skidmore* and *Chevron* -- there are others -- is, when the agency changes position every four years, that’s going to still get *Chevron* deference, but *Skidmore*, with respect to that interpretation, would drop out because it’s not been a consistent and contemporaneous -- consistent from the contemporaneous understanding of the statute.”²⁴ Justice Kavanaugh also described *Chevron* as “usher[ing] in shocks to the system every four or eight years when a new administration comes in, whether it’s communications law or securities law or competition law or environmental law, and goes from pillar to post[.]”²⁵ Justice Gorsuch raised similar concerns,²⁶ calling *Chevron* a “recipe for instability” and “a recipe for

²¹ *Id.* at 2259.

²² *See, e.g., Verizon v. FCC*, 740 F.3d 623, 636 (D.C. Cir. 2014) (“[S]o long as an agency ‘adequately explains the reasons for a reversal of policy,’ its new interpretation of a statute [is not to be] rejected simply because it is new”).

²³ *See Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982–83 (2005).

²⁴ Transcript of Oral Argument at 39–40, *Loper Bright*, 144 S. Ct. 2244 (No. 22-451).

²⁵ Transcript of Oral Argument at 96–97, *Relentless, Inc. v. Dep’t of Com.*, 144 S. Ct. 315 (2024) (No. 22-1219). *See also id.* at 97–98 (“I think they’re doing it because they have disagreement with the policy of the prior administration and they’re using what *Chevron* gives them and what they can’t get through Congress to do it themselves, self-help”).

²⁶ *Id.* at 23–24 (Justice Gorsuch: “And I’m struck on that score by the *Brand X* case, which involved broadband, in which this Court said, okay, agency, you automatically win with respect to one interpretation of the Bush administration, I believe it was, and then, of course, the next administration came back and proposed an opposite rule. MR. MARTINEZ: Right. JUSTICE GORSUCH: And then the next administration came back and flipped it back closer to the first. And as I understand it, the present Administration is thinking about going back”).

anti-reliance.”²⁷ Echoing the Justices’ complaints, the advocate challenging *Chevron* described it as “a reliance-destroying doctrine because it facilitates agency flip-flopping.”²⁸

These kinds of concerns were not completely new. Both in the *Chevron* context and outside of it, various Justices had previously expressed disquiet with the executive branch changing positions after the inauguration of a new President.²⁹ And, not surprisingly, the same kind of complaint made its way into the Court’s opinion in *Loper Bright*. There, after explaining why *Chevron* was wrongly decided, the Court proceeded to explain why the doctrine of stare decisis did not compel the Court to retain *Chevron*. “Rather than safeguarding reliance interests,” the Chief Justice wrote, “*Chevron* affirmatively destroys them.”³⁰ That is so, the majority explained, because “[u]nder *Chevron*, a statutory ambiguity ... becomes a license authorizing an agency to change positions as much as it likes.”³¹

That the Court intended to clamp down on agencies changing their positions also came through in the Court’s description of the *Skidmore*-based approach the Court seemed to endorse in place of *Chevron*. *Skidmore* has come to be associated with numerous factors that courts use to judge the amount of respect due an agency’s interpretation.³² In *Loper Bright*, the Court appeared especially eager to emphasize three: the interpretation’s consistency with prior agency views, its longstandingness, and whether or not it was issued contemporaneously with the statute in question. In sharing its understanding of how courts traditionally review agency interpretations, the Court stressed that “respect” for an agency’s interpretation “was thought especially warranted when an Executive Branch interpretation was issued roughly contemporaneously with enactment of the statute and *remained consistent over time*.”³³ Later on, the Court came back to the same theme: “[I]nterpretations issued contemporaneously with the statute

²⁷ *Id.* at 93–94.

²⁸ Oral Argument at 5, *Loper Bright*, 144 S. Ct. 2244 (No. 22-451). *See also id.* at 22–23 (“But that absolutely makes clear that, you know, this is a reliance-destroying doctrine. And, frankly, if you said that *Chevron* is over and all of those step two cases that were decided are going to have stare decisis effect because of the level of generality point I made, you would be giving new stability to the law. It would be improving stability. And that’s an important distinction from *Kisor*. In *Kisor* -- you know, the *Kisor* doctrine -- the *Auer* doctrine, rather, never had its Brand X moment where this Court made clear that the agency could flip 180 degrees. And, indeed, in *Kisor* itself, it suggested the opposite. But, here, with *Chevron*, we know this is a -- a reliance-destroying doctrine”); *id.* at 24–25 (similar).

²⁹ *See* Cristina M. Rodríguez, *Foreword: Regime Change*, 135 HARV. L. REV. 1 (2021) (documenting such concerns and exploring the tension between them and democratic values); *see also* *Buffington v. McDonough*, 143 S. Ct. 14, 20 (2022) (Gorsuch, J., dissenting from denial of certiorari) (“When the law’s meaning is never liquidated by a final independent judicial decision, when executive agents can at any time replace one reasonable interpretation with another, individuals can never be sure of their legal rights and duties”).

³⁰ *Loper Bright*, 144 S. Ct. at 2272.

³¹ *Id.*

³² *See generally* Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235 (2007).

³³ *Loper Bright*, 144 S. Ct. at 2247 (emphasis added).

at issue, and which have remained consistent over time, may be especially useful in determining the statute's meaning."³⁴

B. Presidential Removal

This section contrasts the Court's antipathy toward administrative agencies changing positions in the context of *Chevron* with the Court's acceptance of the same in recent decisions on presidential removal authority. In the course of explaining why presidents generally must have the power to remove the heads of administrative agencies, the Court has emphasized agencies' discretionary authority and the President's right to control the exercise of such authority, including by directing agencies to change their positions. Indeed, the Court has insisted on presidential control over agencies *precisely to enable control sufficient to ensure agencies will change positions based on the views of the current President*. And it has linked electorally driven changes in agencies' positions to various constitutional values including democracy and accountability.

Some of these themes appeared in Justice Scalia's dissenting opinion in *Morrison v. Olson*,³⁵ which is often depicted as foundational in removal debates. In that dissent, Justice Scalia spun out a parade of horrors that might result from upholding the independent counsel statute at issue in *Morrison*. That statute allowed a prosecutor who was not removable at will by the president or the attorney general to investigate and bring charges against members of the executive branch, among other individuals. The parade of horrors Scalia identified resulted from the fact that, with respect to such prosecutors, "there would be no one accountable to the public."³⁶ For Scalia, that threatened to undermine a key safeguard "the Founders envisioned when they established a single Chief Executive accountable to the people: th[at] blame can be assigned to someone who can be punished."³⁷

That people retain power to punish a chief executive for the decisions of their subordinates is, in this view, key to electoral accountability—if voters disagree with decisions made by subordinate officials, they know to blame the president and can vote her out of office. The story necessarily assumes a decisionmaking space in which subordinate officials could arrive at several different decisions within the bounds of the law. In order for the prospect of electoral punishment to be an important safeguard, officials must have made a *choice* which voters can evaluate and approve or disapprove via the ballot box. Moreover, if and when voters punish the president for such choices (by voting her out of office), it must be because they favor someone else inclined to select subordinates who

³⁴ *Id.* at 2262. This standard of review channels the antinovelt elements of the major questions doctrine and the Court's constitutional interpretation in separation of powers cases. See Deacon & Litman, *supra* note 12, at 1069–82; Leah M. Litman, *Debunking Antinovelt*, 66 DUKE L.J. 1407, 1407–08 (2017).

³⁵ 487 U.S. 654 (1988).

³⁶ *Id.* at 731 (Scalia, J., dissenting).

³⁷ *Id.*

would make different choices—i.e., people who would alter the positions of their predecessors.

In *Free Enterprise Fund v. Public Company Accounting Oversight Board*,³⁸ the Court kicked off a trend of tightening the President’s control over the administrative state. That case similarly centered on agencies’ ability to reach different conclusions based on the policy views of the President.³⁹ Echoing Justice Scalia, the majority quoted Alexander Hamilton, writing that “[w]ithout a clear and effective chain of command, the public cannot ‘determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.’”⁴⁰ Subsequent passages in the opinion underscored that presidents possess the power to remove agency heads precisely to allow presidents to force subordinates to do the President’s policy bidding. The majority opined that “[t]he President has been given the power to oversee executive officers; he is not limited, as in Harry Truman’s lament, to ‘persuad[ing]’ his unelected subordinates ‘to do what they ought to do without persuasion.’”⁴¹ The Court added: “Congress cannot reduce the Chief Magistrate to a cajoler-in-chief.”⁴²

Here too, the Court’s insistence that the President must be able to dictate policy outcomes seems to envision the possibility—and the desirability—of presidentially directed policy changes by administrative agencies. The briefing in *Free Enterprise Fund* made the links more explicit, connecting the need for presidential removal to the possibility that elections might force agencies to change policy. The opening brief for the parties challenging the statutory protection from removal argued that “[t]he people can remain sovereign only if they know which branch to hold responsible for unpopular or ineffective government action and policies, and only if they are able to correct those problems through periodic elections.”⁴³ It is important, the brief continued, for “the people” to know who is responsible for executing the laws (and other executive tasks) so that they “would be able to overturn unpopular execution through the ballot box.”⁴⁴ The brief underscored the need for the President to have the “power to ensure that the laws are exercised” in ways “consistent with his enforcement or financial policies.”⁴⁵ The reply brief echoed similar themes.⁴⁶

³⁸ 561 U.S. 477 (2010).

³⁹ *See id.*

⁴⁰ *Id.* at 498 (quoting THE FEDERALIST No. 70, at 476 (Alexander Hamilton) (Jacob Cooke ed., 1961)).

⁴¹ *Id.* at 501–02 (responding to dissent by Breyer, J., 561 U.S. at 524).

⁴² *Id.* at 502.

⁴³ Brief for Petitioners at 13, *Free Enter.*, 561 U.S. 477 (No. 08-861).

⁴⁴ *Id.* at 13–14.

⁴⁵ *Id.* at 40.

⁴⁶ *See* Reply Brief at 1, *Free Enter.*, 561 U.S. 477 (No. 08-861) (“The Board clearly runs afoul of these foundational purposes and this precedent because the democratically accountable President concededly has no direct influence over the Board”); *id.* at 4 (“By so dramatically limiting the group of principal officers who must be appointed through the confirmation process,

*Seila Law LLC v. Consumer Financial Protection Bureau*⁴⁷ (CFPB) doubled down on this reasoning.⁴⁸ *Seila* identified the CFPB Director’s five-year term as uniquely problematic because it could impede the President’s ability to influence the policy and direction of the agency. As the Court stated: “Some Presidents may not have any opportunity to shape its leadership and thereby influence its activities.”⁴⁹ The Court explained, echoing a line of questioning from Justice Kavanaugh at oral argument,⁵⁰ that “an unlucky President might get elected on a consumer-protection platform and enter office only to find herself saddled with a holdover Director from the competing political party who is dead set against that agenda.”⁵¹ Rather than accept that possibility, the Court emphasized the importance of a mechanism to “bring the agency in line with the President’s preferred policies.”⁵² Similar themes ran through oral argument and the briefing, where justices and parties stressed the necessity of protecting a president’s ability to bring agencies in line with the President’s policy preferences in order to ensure a responsive and accountable government.⁵³

Respondents’ analysis eviscerates the Framers’ purpose of ensuring ‘political accountability relative to important Government assignments’); *id.* at 8–9 (“Thus, the President can easily perform his constitutionally assigned functions by directing the inferior officers through a chain of command, just as a general’s ability to control a major is not affected because his orders are conveyed through a colonel. But since, unlike with his alter egos, the President has no power to command the SEC to follow his personnel or policy preferences, he obviously cannot engage in such chain-of-command supervision of the Board through the SEC”).

⁴⁷ 140 S. Ct. 2183 (2020).

⁴⁸ See Transcript of Oral Argument at 75, *Seila L.*, 140 S. Ct. 2183 (No. 19-7) (Justice Kavanaugh: “The next President in 2021 or 2025 or whenever will have to deal with a CFPB director appointed by the prior President potentially for his or her whole term without being able -- given your answer to Justice Alito -- being able to do anything about that difference in policy”).

⁴⁹ *Seila L.*, 140 S. Ct. at 2204 (2020).

⁵⁰ See Transcript of Oral Argument at 36, *Seila L.*, 140 S. Ct. 2183 (No. 19-7) (Justice Kavanaugh: “[H]ow much does it matter that the tenure of the single director continues into the next President’s term? Because I think that’s when the problem really reveals itself, that the next President is going to have to deal for his or her whole term, potentially, with a CFPB director appointed by this President and will not be able to supervise or direct that person, even if that President has a wildly different conception of consumer financial protection?); *id.* at 53–54 (“And here’s -- on the different in kind, just how this will play out if you were to win, it’s really the next President who’s going to face the issue, because a -- the head of this agency will go at least three or four years into the next President’s term, and the next President might have a completely different conception of consumer financial regulatory issues yet will be able to do nothing about it”).

⁵¹ *Seila L.*, 140 S. Ct. at 2204 (emphasis omitted).

⁵² *Id.*

⁵³ See Transcript of Oral Argument at 36, *Seila L.*, 140 S. Ct. 2183 (No. 19-7) (Justice Kavanaugh invoking presidents who may have “wildly different conceptions of consumer financial protection”); *id.* at 53–54 (similar); *id.* at 61 (Justice Alito imagining a president who says “I want to remove you because I think you are too pro-consumer and you’re hurting the economy, or you are not sufficiently protecting consumer interests”); see also Brief for Petitioner at 28, *Seila L.*, 140 S. Ct. 2183 (No. 19-7) (arguing that “[t]he President possesses far less ability to control the single director of the CFPB,” and thereby “retain policy influence,” compared to heads of multi-member commissions); Reply Brief for the Respondent at 1, *Seila L.*, 140 S. Ct. 2183 (No. 19-7) (“[Unrestricted removal authority] ensures that the Executive Branch is responsible to the Chief Executive, who is ultimately responsible to the people”).

Seila Law thus stands in sharp contrast to *Loper Bright*. While the former celebrated Presidents' ability to force changes by agencies, in *Loper Bright* the Court was keen to limit agencies' ability to change their positions based on the views of a new President.

III. EXPLANATIONS

As the above synthesis suggests, the Court has adopted very different orientations toward agencies changing positions in response to switches in presidential administrations. In the *Chevron* context, the Court treated agencies changing positions based on the policy views of the President as a problem. In the context of presidential removal authority, however, the Court has sought to secure presidential control because the Court perceives it as important that a President be able to bring agencies in line with the President's views.

This Part briefly considers three possible explanations for the Court's seemingly different attitude toward administrative change. The first is simply that the Court has a selective commitment to democratic control and democracy. The second is that the Court might be comfortable with change that occurs through the exercise of the executive's enforcement discretion, which is presumably unaffected by *Loper Bright*, but not change that occurs through the issuance of new regulations. It concludes that neither of these two explanations adequately resolve the tension displayed by the Court's cases. A third possibility—that the Court envisions regulatory change occurring solely through the kinds of express or quasi-express delegations referenced in *Loper Bright*—remains, but is difficult to assess at this point.

A. Selective Commitment to Democracy

One possible explanation for the Court's different attitude toward agency change would be that the Court has, at best, a selective commitment to democracy. In the presidential removal cases, the Court seems to view democracy as a virtue—a way to ensure that unpopular policies and officials are subject to disapproval, and a way to ensure that democratically elected officials can influence administrative policy. In the *Chevron* line of cases, however, the Court seems to view democracy as a vice—a difficult and painful cost to regulated parties that is to be avoided.

There are more than a few recent examples of Supreme Court decisions that have been criticized on the ground that they impede democracy, meaning the ability of popular majorities to govern, with all voters capable of casting meaningful votes.⁵⁴ The Court invalidated a key provision of the Voting Rights Act, with the effect of invalidating the preclearance process of the Voting Rights Act.⁵⁵ It narrowly construed another provision of the Voting Rights Act in ways

⁵⁴ See generally Nicholas O. Stephanopoulos, *The Anti-Carolene Court*, 2019 SUP. CT. REV. 111 (2019); Melissa Murray & Katherine Shaw, *Dobbs and Democracy*, 137 HARV. L. REV. 728 (2024).

⁵⁵ *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013). For criticism, see generally Leah M. Litman, *Inventing Equal Sovereignty*, 114 MICH. L. REV. 1207 (2016).

that makes it difficult to challenge preconditions to voting.⁵⁶ It has made it difficult to establish constitutional challenges to districting maps that dilute the power of minority voters.⁵⁷ It has held open the possibility of embracing some version of the independent state legislature theory, which would allow federal courts to override state executive and judicial decisions that expand voting opportunities.⁵⁸ It has held partisan gerrymandering nonjusticiable.⁵⁹ The list goes on. And of course, this jurisprudence has developed at a time when numerous elected Republican officials have expressed doubts about democracy as such.⁶⁰ In that light, perhaps the removal cases are simply an exception to the Court's generally weak commitment to ensuring democratic control. Or, the cases reveal the Court's selective concern for democracy.

Scholars have also detected a selective commitment to democracy within individual cases and between other related areas of law. For example, Melissa Murray and Katherine Shaw have argued that the Court's opinion in *Dobbs v. Jackson Women's Health Organization* is internally inconsistent and wavering in its commitment to democracy.⁶¹ There, the Court emphasized the importance of democracy when insisting that state legislatures be given free rein to regulate and restrict abortion. But the Court discounted the anti-democratic features of those very same state legislatures, features brought about through partisan gerrymandering and enabled by the Court's own decisions. Murray has also explored the Court's selective commitment to democracy in the Court's cases on guns and abortion, where the Court has restricted legislatures' power vis-à-vis guns but expanded their power with respect to abortion.⁶²

Returning to the administrative-law context: If the Court is indeed being selective in its commitment to facilitating democratic control, the question remains—what, if anything, might be put forward to explain such selectivity, i.e., when the Court favors democracy and when it does not? Perhaps some kinds of agency-driven changes are better than others, and the Court means to facilitate

⁵⁶ See *Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647 (2021). For criticism, see Leah M. Litman, *Hey Stephen*, 120 MICH. L. REV. 1109, 1120, 1123 (2022).

⁵⁷ See *Abbott v. Perez*, 583 U.S. 1088 (2018); *Alexander v. South Carolina Conf. of the NAACP*, 602 U.S. ---- (2024).

⁵⁸ *Moore v. Harper*, 600 U.S. 1 (2023). For elaboration, see Leah M. Litman & Katherine Shaw, *The 'Bounds' of Moore: Pluralism and State Judicial Review*, 133 YALE L.J. F. 881 (2024).

⁵⁹ See *Rucho v. Common Cause*, 588 U.S. 684 (2019).

⁶⁰ See, e.g., Glenn Thrush, *'We're not a democracy,' says Mike Lee, a Republican senator. That's a good thing, he adds*, N.Y. Times (Oct. 8, 2020), <https://www.nytimes.com/2020/10/08/us/elections/mike-lee-democracy.html> [<https://perma.cc/84DL-MJ63>]; Zach Beauchamp, *Sen. Mike Lee's tweets against "democracy," explained*, Vox (Oct. 8, 2020), <https://www.vox.com/policy-and-politics/21507713/mike-lee-democracy-republic-trump-2020> [<https://perma.cc/DVP8-AHC6>].

⁶¹ See *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022); Murray et al., *supra* note 54, at 729.

⁶² See Melissa Murray, *Children of Men: The Roberts Court's Jurisprudence of Masculinity*, 60 HOUS. L. REV. 799 (2023). Judge Wilkinson had previously written that the Court's Second Amendment decision in *Heller v. District of Columbia*, 554 U.S. 570 (2008), was the conservative equivalent of *Roe v. Wade*, 410 U.S. 113 (1973). See J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 254 (2009).

democratic control in those areas alone. We turn to such possible explanations next.

B. Regulation vs. Enforcement Discretion

The second possible explanation for the Court's wavering stance toward democratic control of administration is that the *Chevron* cases view changes brought about through the promulgation of binding regulations as problematic, whereas the presidential removal cases mean to celebrate administrative change brought about through the exercise of agencies' enforcement discretion, i.e., agencies' power to set enforcement priorities or decline to enforce the law in particular circumstances. That is, perhaps the Court abandoned *Chevron* because *Chevron* allowed agencies to effect change via regulation, which the Court thinks is uniquely bad as far as stability and reliance go. But the Court in the removal cases does not think the same is true for changes in enforcement policies—and those are the changes the Court has in mind in the removal cases when it celebrates presidential control as a way to change agency policy.

The removal cases, however, do not suggest an exclusive focus on presidentially directed changes to enforcement policies, rather than regulations. Indeed, in the removal cases, the Court has emphasized that the agencies under review have significant regulatory powers as well as enforcement authority—all while emphasizing the necessity of presidents' ability to bring agencies in line through directing change.⁶³ So when the Court has waxed poetic about the importance of facilitating policy-based changes in these agencies, it has been in the context of agencies exercising their regulatory—and not just enforcement—powers.

Nor is it clear that the Court is, or should be, more comfortable with enforcement-based changes than regulation-driven ones, or that enforcement-based changes would be less destabilizing than rule-driven ones. The Court divided evenly over the lawfulness of the Deferred Action for Parents of Americans and Lawful Permanent Residents program, an Obama-era initiative rooted in the executive's enforcement discretion.⁶⁴ And changes that occur through regulation may better serve rule-of-law-type values, and better effectuate accountability and democracy, than changes rooted in enforcement discretion.⁶⁵

C. Policymaking vs. Interpretation

A third possibility brings us back to *Loper Bright*'s suggestion that agencies will still retain discretion—including, presumably, the ability to change positions—where the best interpretation of the statute in question grants

⁶³ See, e.g., *Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2193 (2020) (“Congress authorized the CFPB to implement that broad standard (and the 18 pre-existing statutes placed under the agency’s purview) through binding regulations”).

⁶⁴ See *United States v. Texas*, 579 U.S. 547 (2016).

⁶⁵ See Daniel T. Deacon, Note, *Deregulation Through Nonenforcement*, 85 N.Y.U. L. REV. 795 (2010).

agencies a range of choices.⁶⁶ In other words, the Court appears to envision that courts will set the statutory boundaries that constrain agencies' decisionmaking, but that in some cases those boundaries will be broad enough to sustain a variety of policy outcomes. Perhaps it is in such cases, where Congress has, for example, expressly invested an agency with some policymaking discretion to specify applicable requirements, that the Court imagines the President will be able to effect change. In overruling *Chevron*, the Court may mean to condemn only such agency changes that are "interpretive" in character—where the agency appears to be taking a different position about the meaning of some statute.

This potential explanation is difficult to assess at this point in part because the Court's effort to demarcate the boundaries between permissible exercises of *policymaking* discretion and impermissible attempts to alter statutes' *meaning* was brief and under-developed.⁶⁷ In *Loper Bright*, the Court merely observed that overruling *Chevron* "is not to say that Congress cannot or does not confer discretionary authority on agencies."⁶⁸ The Court did not elaborate on how to determine when agencies have been invested with discretionary policymaking authority by Congress. It did say that such authority may be indicated by the use of broad words like "appropriate," but it may also soon find that Congress's use of such language is constitutionally suspect under the nondelegation doctrine.⁶⁹

The statutory delegation to the CFPB expressly mentioned by *Seila Law* illustrates some of the difficulties courts will confront.⁷⁰ The Consumer Financial Protection Act specifically authorizes the CFPB to "prescribe rules . . . identifying as unlawful unfair, deceptive, or abusive acts or practices" in connection with certain financial transactions.⁷¹ In some ways, that delegation resembles a classic open-ended grant of discretionary authority. But this Court in particular may also be likely to say that each of the words used—"unfair," "deceptive," and "abusive"—have interpretive edges that limit the universe of actions that agencies can classify as, for example, deceptive. *Loper Bright* instructs courts to determine such boundaries using their independent judgment. How judges are to confront cases of this nature remains an open question. We doubt, as a predictive matter, that our current Supreme Court will allow the lower courts to drive a truck through *Loper Bright*'s exceptions. What is clear even now, however, is that *Loper Bright* leaves agencies significantly less discretion to adapt their rules based on the views of the current administration.

Finally, any explanation that suggests agencies have authority to change directions in areas of discretionary policymaking but not interpretation will of course not be satisfying to those who reasonably view the interpretation of

⁶⁶ See *supra* note 18 and accompanying text.

⁶⁷ For a more extensive academic effort, see Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852 (2020).

⁶⁸ *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2268 (2024).

⁶⁹ See Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 285–89 (2021) (documenting resurgence of nondelegation ideas in the Court's jurisprudence).

⁷⁰ See *Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2193 (2020).

⁷¹ 12 U.S.C. § 5531(b).

statutes as calling for some degree of policymaking, at least when the statute's text is susceptible to different meanings. As Justice Kagan wrote in her *Loper Bright* dissent, "*Chevron's* presumption reflects that resolving statutory ambiguities, as Congress well knows, is 'often more a question of policy than of law.'"⁷²

IV. CONCLUSION

This piece has focused on the differing attitudes the Court has displayed toward administrative change in the Court's opinion overruling *Chevron* and in its decisions on presidential removal authority. There are, of course, important similarities between the two lines of cases. Both sets of cases reallocate decisionmaking authority between Congress, courts, and agencies in ways that give more authority to the courts. The presidential removal cases allow courts to second guess Congress's decisions about how to structure administrative bodies, and the decision to overrule *Chevron* transfers power from those decisionmaking bodies to the courts. But it is still worth considering why the Court seems to have taken such different approaches to the prospect of administrative change caused by changeover in control of the presidency.

⁷² *Loper Bright*, 144 S. Ct. at 2299 (Kagan, J., dissenting) (quoting *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696 (1991)); *id.* ("The task is less one of construing a text than of balancing competing goals and values. Consider the statutory directive to achieve 'substantial restoration of the [Grand Canyon's] natural quiet.' Someone is going to have to decide exactly what that statute means for air traffic over the canyon. How many flights, in what places and at what times, are consistent with restoring enough natural quiet on the ground? That is a policy trade-off of a kind familiar to agencies—but peculiarly unsuited to judges").

ARTICLE

TOSSING SAND IN THE REGULATORY GEARS: HURDLES TO POLICY
PROGRESS IN THE SUPREME COURT

NINA A. MENDELSON*

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I. INTRODUCTION

In the last few years, the Supreme Court has been a source of seismic change. In *Dobbs v. Jackson Women’s Health Organization*,¹ the Court overruled *Roe v. Wade*,² which had protected the right to abortion for nearly fifty years. In *Loper Bright Enterprises v. Raimondo*, the Court abandoned so-called *Chevron* deference to particular categories of administrative agency interpretations, a doctrine viewed as bedrock for over forty years.³ *Humphrey’s Executor v. United States*,⁴ the 1935 ruling validating independent multi-member commissions such as the Federal Trade Commission, Securities and Exchange Commission, and

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¹ See 597 U.S. 215, 292 (2022).

² 410 U.S. 113, 154 (1973).

³ See *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024); see also *Kisor v. Wilkie*, 588 U.S. 558, 589–90 (2019) (restricting previous approach of deference to agency interpretations of regulatory language).

⁴ 295 U.S. 602, 631–32 (1935).

Federal Communications Commission, may soon join the others on the chopping block.⁵

But the Court has been far more skeptical when other governmental institutions seek change to address modern problems, whether it is Congress enacting regulatory legislation, or executive branch agencies seeking to exercise statutory authority. Governmental policy change can, of course, be critical to addressing newly significant problems, including climate change, environmental and health risks from widely used per-fluoroalkyl and polyfluoroalkyl substances (PFAS) found in industry and consumer products and other new pollutants, and innovative means of financial fraud. Policy change may also be needed to incorporate new technologies or other new solutions to societal problems or address new implementation issues that have emerged over time.

Particularly in the last five years, the Court has hobbled numerous executive branch agency efforts to address modern challenges with a new interpretive move that, in 2022, it named the major questions doctrine (“MQD”).⁶ While the MQD has drawn controversy and attention, this essay argues that the MQD’s creation is not an isolated judicial move. It is simply the most visible of a suite of alterations to administrative law and statutory interpretation doctrine, of which the Court’s *Loper Bright* ruling is the most recent example.

As discussed in greater detail below, between 2019 and 2024, the Court not only developed the MQD, but altered the landscape of judicial deference to agency interpretations. The Court abandoned an attitude that had tolerated, and even lauded, agency policy change in many interpretive settings, replacing it with across-the-board antagonism to change. This included modifying so-called *Skidmore* deference by significantly strengthening its existing anti-change aspects, making it what we might call *Skidmore 2.0*.⁷ The Court also has strengthened anti-change aspects of arbitrary and capricious review by requiring agencies to consider the unwieldy factor of generalized reliance.⁸ Finally, the Court is developing additional statutory interpretation rules that disfavor regulatory legislation and limit its application, including a potential “private property” canon.⁹

All of these alterations have made the courts an increasingly powerful barrier to both legislative and executive policy change, ultimately impeding governmental institutions from addressing modern societal challenges in a democratically responsive fashion.

⁵ In 2020, a majority of the Court suggested a default rule of unrestricted presidential removal power, against which its ruling in *Humphrey’s Executor* was described weakly as a limited exception, rather than defended. *See, e.g., Seila Law, LLC v. CFPB*, 591 U.S. 197, 204 (2020) (“Our precedents have recognized only two exceptions to the President’s unrestricted removal power”); *id.* at 228 (“[T]he President’s removal power is the rule, not the exception”).

⁶ *West Virginia v. EPA*, 597 U.S. 697, 723 (2022).

⁷ *See infra* text and accompanying notes 93–102.

⁸ *See infra* Section III.

⁹ *See infra* Section V.

II. THE MAJOR QUESTIONS DOCTRINE: THE COURT'S MOST VISIBLE ANTI-CHANGE MOVE

Under the MQD, first named by a majority of the Court in the 2022 decision *West Virginia v. EPA*, the Court held that an agency's assertion of economically or politically significant authority would not be within the scope of an otherwise broad statutory grant of power unless the statute provides "clear congressional authorization."¹⁰ The majority conceded that in major questions cases, the statutory language has often supplied a "colorable textual basis" for the agency's interpretation.¹¹ But, the Court explained that extraordinary circumstances would prompt it to take a different approach, and instead to require a clear statutory statement.¹² As the cases discussed below show, the statutory authorizing language must not only be clear, but *specific*.¹³ Broad language seemingly will not do.

Under the MQD, an agency's claim of significant authority to take action that can be characterized as new or different in kind is particularly vulnerable to challenge. In *West Virginia v. EPA*, the agency had sought to regulate coal-fired power plant greenhouse gas emissions through a "standard of performance" for existing coal-fired power plants known as the Clean Power Plan.¹⁴ Under the statutory provisions the Environmental Protection Agency (EPA) relied upon, it was then up to the states to issue the particular rules achieving those emissions reductions.¹⁵ "Standard of performance" was defined as a "standard for emissions" reflecting the application of the "best system of emission reduction" that has been "adequately demonstrated."¹⁶ As the Court explained, EPA's standard was based on a number of potential measures to reduce emissions, including power plant operators burning coal more cleanly, shifting to cleaner fuels or renewables (so-called generation shifting), or participating in an emissions trading regime with other operators who had succeeded in lowering greenhouse gases, including by generation shifting.¹⁷ The Court conceded that these measures, including generation shifting, could be encompassed within the statute's language as a "system" capable of reducing emissions.¹⁸ Other sections of the Clean Air Act that more narrowly authorized the agency to set "standards

¹⁰ *West Virginia*, 597 U.S. at 723; see *Biden v. Nebraska*, 600 U.S. 477, 507 (2023) ("[O]ur precedent . . . requires that Congress speak clearly before a Department Secretary can unilaterally alter large sections of the American economy").

¹¹ *West Virginia*, 597 U.S. at 722–23 (discussing major questions cases in which each claim to authority "had a colorable textual basis," yet the Court found the action unauthorized).

¹² *Id.* at 724 (explaining that in major questions cases, "there may be reason to hesitate" before accepting a statutory reading that would be upheld under ordinary circumstances) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

¹³ See Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1012 (2023) (explaining that the "new" major questions doctrine requires "explicit and specific congressional authorization for certain agency policies").

¹⁴ Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015).

¹⁵ 42 U.S.C. § 7411(d)(1).

¹⁶ 42 U.S.C. § 7411(a)(1).

¹⁷ *West Virginia*, 597 U.S. at 697–98.

¹⁸ *Id.* at 732 (arguing that context was nonetheless critical to assessing the breadth of the term).

applicable to . . . emission[s],” without referencing a “system,” seemed to confirm the breadth of this particular authority.¹⁹ It is worth emphasizing that the policy’s reliance on the market mechanism of emissions trading was an “unqualified bull’s-eye” in terms of economic efficiency, since it “create[d] economic incentives to have . . . pollution reductions undertaken by those . . . that can do so least expensively,” the kind of regulatory approach also typically “trumpeted by Republican administrations.”²⁰ One might fairly infer that the statutory term “system” had been chosen by Congress not only to enable the agency to respond to technological evolution, but also to evolving thinking on maximizing regulatory effectiveness.

The Court hesitated to read the statute in this way, however, characterizing the Clean Power Plan as the agency asserting a “newfound power” in a “rarely . . . used” provision, because the agency had previously tended to set or call for source-based emissions limits.²¹ Calling the action “novel” was a critical step in the Court’s invocation of the major questions doctrine.²² Using that doctrine, the Court then rejected the broad term “system of emissions reduction” as inadequately specific to authorize the Clean Power Plan.²³

Similarly, in a case decided the previous year on the so-called shadow docket, *Alabama Assn. of Realtors v. Department of Health and Human Services*,²⁴ the Court alluded to the “unprecedented” nature of the Centers for Disease Control’s assertion of statutory authority to institute a nationwide eviction moratorium in response to the COVID-19 pandemic. Again, the statute’s language broadly authorized the agency to adopt measures “necessary to prevent” the spread of disease, but the Court instead focused on the purported newness of the action. Despite evidence of disease transmission among the unhoused, the Court characterized the action as housing-focused, rather than aimed at combatting the spread of disease.²⁵ Again, the newness of the agency action was a key step in the Court’s application of the MQD. The agency ultimately lost its claim that action was authorized for lack of specific statutory language.

In *National Federation of Independent Business v. Occupational Safety and Health Administration*, the Court held that the power of the Occupational Safety and Health Administration (OSHA) over “occupational safety and health standards” did not permit it to require large employers to institute a “vaccine or test” rule during the early years of the COVID-19 pandemic, an action the Court

¹⁹ See, e.g., 42 U.S.C. 7521(a)(1) (automotive emissions limits).

²⁰ Richard J. Lazarus, *The Scalia Court: Environmental Law’s Wrecking Crew within the Supreme Court*, 47 HARV. ENV. L. REV. 407, 415–16 (2023) (mentioning the Reagan Administration as well as both Bush Administrations).

²¹ *West Virginia*, 597 U.S. at 724.

²² *Id.* at 716. The Court also characterized the Clean Power Plan as implicating energy policy, something it viewed as beyond EPA’s expertise. *Id.* at 729.

²³ See *id.* at 733.

²⁴ 594 U.S. 758, 765 (2021) (per curiam); see also *Util. Air Reg. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (declining to apply *Chevron* in part because the agency was claiming “unheralded” regulatory power).

²⁵ See *Alabama*, 594 U.S. at 764 (“This downstream connection between eviction and the interstate spread of disease is markedly different from the direct targeting of disease. . .”).

also found to be unprecedented.²⁶ Although the statute made reference to “occupational . . . health” as well as “safety,” language facially clear enough to authorize a rule aimed at reducing workplace disease transmission, the Court nonetheless invalidated the rule because the statute’s authorization was not sufficiently specific.²⁷ Similarly, in *Biden v. Nebraska*, the Court characterized the agency’s claimed use of its power to “waive or modify” student loans to waive repayment obligations as creating a “novel and fundamentally different loan forgiveness program.”²⁸ It then applied the MQD to strike down the action, finding the statutory language inadequately specific to meet the “clear congressional authorization” requirement.²⁹

The major questions doctrine is deeply problematic because it lacks objective criteria for a “major” question or “significant” economic or political impact, thus conferring substantial discretion on courts and making its application unpredictable.³⁰ It seems hard to justify as a substantive interpretive canon that would effectuate the nondelegation doctrine, since that doctrine does not preclude large delegations to agencies, only unprincipled ones.³¹ The MQD also cannot be justified as an interpretive rule that provides Congress with a stable background for legislation, since, even if the MQD could be considered predictable, a dubious proposition, the MQD has been applied to statutes enacted long before the MQD was created, when Congress could not have anticipated it.³² Finally, the MQD also seems difficult to justify as a “common sense”

²⁶ 595 U.S. 109, 113 (2022) (“OSHA has never before imposed such a mandate”).

²⁷ *Id.* at 117–18 (holding that although the agency was tasked with regulating “occupational” hazards and health of employees, that authority did not extend to COVID-19).

²⁸ 600 U.S. 477, 494, 496 (2023).

²⁹ *Id.* at 506.

³⁰ Nathan Richardson, *Antideference: COVID, Climate, and the Rise of the Major Questions Canon*, 108 VA. L. REV. ONLINE 174, 195 (2022) (“The most prominent critique of the major questions doctrine has been that its boundaries are unclear, unpredictable, and arbitrary”); see also Natasha Brunstein & Richard L. Revesz, *Mangling the Major Questions Doctrine*, 74 ADMIN. L. REV. 217, 253 (2022) (“It is hard to imagine that the courts could develop judicially manageable standards [on the public salience question]”); Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 1983–84 (2017) (critiquing the major questions doctrine as unpredictable, among other things); Ronald M. Levin, *The Major Questions Doctrine: Unfounded, Unbounded, and Confounded*, 112 CAL. L. REV. 899, 927–29 (2024) (“it is too soon to assess how flexibly the Court will implement the major questions doctrine over time”).

³¹ See Daniel E. Walters, *The Major Questions Doctrine at the Boundaries of Interpretive Law*, 109 IOWA L. REV. 465, 517 (2024) (“[T]he Supreme Court has never linked majorness to the nondelegation doctrine”); see also Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 287 (2022); see generally Deacon & Litman, *supra* note 13.

³² See Nina Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court’s First Decade*, 117 MICH. L. REV. 71, 87–88 (2018) (discussing conditions necessary for the substantive canon to function as a stable background and commenting, “Congress obviously cannot anticipate a not-yet-developed canon”); see also Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 117 (2010) (arguing that substantive canons are in significant tension with the role of the judiciary as the faithful agent of the legislature); Walters, *supra* note 31, at 535–37 (“the major questions doctrine’s novelty makes it a difficult fit” for the theory that canons can contribute to a “stable background” for legislative drafters); see generally Deacon & Litman, *supra* note 13, at 1084 (“Congress did not draft most of the important federal regulatory statutes currently in existence with knowledge of the [major questions doctrine]”).

assumption about congressional use of language, a sort of linguistic canon presented by Justice Amy Coney Barrett in her concurrence in *Biden v. Nebraska*.³³ Survey-based research suggests that ordinary people’s understanding of delegations do not typically include significance limitations.³⁴ Congressional drafters and agency counsel also likely understand broad language in a statute to delegate “wide authority” to agency administrators.³⁵

That said, the MQD is here to stay.³⁶ Its inclusion of newness as a factor that could make an issue of agency authority a “major question” is obviously antagonistic to policy change and innovation. It constrains agencies from adapting policy in response to new problems, new advances in knowledge or technology, and unforeseen implementation problems.

The MQD also can be understood as playing “gotcha” with Congress—even when Congress could not have anticipated an MQD-type requirement—by requiring it to have anticipated and spoken to the agency’s specific policy solution to a modern problem. In the cases discussed above, the challenged policies seemed plainly within both the underlying statute’s broad language as well as its purpose, as with the Occupational Safety and Health Act’s instruction to protect workplace “health” in the face of a global pandemic. (The Act was, of course, enacted in 1970, long before the creation of the MQD, so even if members of Congress anticipated its application in a global pandemic, they might have felt no call to include specific language). Again, such broad statutory language seems aimed at empowering implementing agencies to respond to specific issues Congress understands may arise later.³⁷ But in the MQD era, if the Court considers the issue to be “major,” and Congress has not specifically anticipated that particular issue in statutory language, one statute is not good enough for the Court—Congress must legislate a second time. Courts effectively

³³ See 600 U.S. at 511–17 (Barrett, J., concurring) (arguing that major questions doctrine simply reflects “common sense” approach to reading language).

³⁴ Walters, *supra* note 31, at 534–35 (arguing that evidence for congressional preferences supporting a MQD are mixed at best, and almost certainly evolving); see also Kevin Tobia, et al., *Major Questions, Common Sense?* 97 S. CAL. L. REV. __, __ (forthcoming 2024) (draft at 49–50) (finding that vast majority of ordinary people, contrary to Barrett’s argument, did not find major, or significant, actions outside broad, but clear, delegations).

³⁵ Levin, *supra* note 30, at 942.

³⁶ As of writing, the Court has yet to analyze a major questions doctrine argument and find that the statute raised no major question. However, similar arguments were made in *Massachusetts v. EPA* in arguing that whether greenhouse gases qualified as a regulable Clean Air Act “air pollutant” raised a major question. 549 U.S. 497, 512 (2007) (noting EPA’s position that “imposing limitations on greenhouse gases would have even greater economic and political repercussions than regulating tobacco”). The Court’s majority opinion assessed neither significance nor novelty but reasoned simply that greenhouse gases “fit well within the Clean Air Act’s capacious definition of ‘air pollutant.’” *Id.* at 532.

³⁷ See e.g., Levin, *supra* note 30, at 962; *West Virginia v. EPA*, 597 U.S. 697, 756 (2022) (Kagan, J., dissenting) (“A key reason Congress makes broad delegations . . . is so an agency can respond, appropriately and commensurately, to new and big problems”); *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013) (“Congress knows to speak in . . . capacious terms when it wishes to enlarge[] agency discretion”); *Massachusetts*, 549 U.S. at 532 (commenting that in reading the Clean Air Act term “pollutant” to encompass greenhouse gases, Congress knew that “without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete”).

regulating the legislative process in this way seems problematic at any time, but it is particularly cynical in an era of legislative dysfunction.

The MQD is not only anti-change; it is distinctly anti-regulatory. First, as Professors Deacon and Litman have argued, the Court’s focus on “new” agency actions essentially requires agencies to “use it [early on] or lose it.”³⁸ Second, *creating* regulation is particularly vulnerable as “new.” Deregulation—even dramatic deregulation—seems less susceptible to being characterized as “new” because in the case of deregulation, the agency has already plowed that subject-matter ground by regulating in the first place. Finally, the MQD burdens regulation through its legislative process impacts. Losers in a major questions doctrine case must return to Congress to obtain specific authorizing language. As if requiring Congress to legislate a second time weren’t enough, MQD-required specific regulatory language will likely be especially difficult to enact since a specific regulatory proposal will be strongly opposed by regulated industry. As public choice theory predicts, regulated industry is likely to be better organized and better-funded than diffuse public beneficiaries, and thus more effective at defeating even legislation that significantly benefits the public.³⁹ Broad, public-facing legislation has long been understood as vulnerable to this sort of behind-the-scenes resource imbalance; the MQD’s requirement of specific language worsens it by further tilting the scales against regulatory legislation.

The MQD is mainly focused on new agency actions that are economically or politically “significant,” which might seem to limit its scope. But judicial opposition to change is not limited to the MQD. The Court has embedded antipathy to “new” agency actions—even those that might not be deemed so “significant”—through several other doctrinal moves.

III. EARLIER, SUBTLER MOVES TOWARDS AN ANTI-CHANGE REGIME: REQUIREMENTS THAT AGENCIES CONSIDER RELIANCE IN ARBITRARY AND CAPRICIOUS REVIEW

Under the foundational statute governing the federal administrative state, the Administrative Procedure Act, courts are to set aside agency action if they judge it to be “arbitrary, capricious, an abuse of discretion, or otherwise contrary to law.”⁴⁰ While reviewing courts have long demanded reasoned and rational decisions from agencies, the Court also had long indicated its comfort with, and even expectation of, administrative policy flexibility and change.⁴¹

There were, of course, certain limits. In the enforcement setting, fair warning requirements rooted in due process precluded an agency from imposing

³⁸ Deacon & Litman, *supra* note 13, at 1086.

³⁹ William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 285 (1988) (“[T]he market systematically yields too few laws that provide ‘public goods’ [including collective benefits and] too many laws that are ‘rent-seeking’”); *see also id.* at 288–89 (legislation is “unlikely where there is little organized demand (distributed benefits), or where demand is met by strong opposition (because of concentrated costs)”).

⁴⁰ Administrative Procedure Act § 7, 5 U.S.C. § 706(2)(A).

⁴¹ *See infra* text accompanying notes 46–54 (discussing *State Farm*).

liability on an entity based on newly announced regulatory requirements.⁴² The Court also previously suggested that agencies should not be able to act through adjudication (as opposed to rulemaking) if the result might create new liability for regulated entity actions taken in good-faith reliance on previous agency regulations, a similarly targeted notion of reliance.⁴³ Similarly, the Court indicated that Congress might itself create a safe harbor for regulated entities who might have relied on earlier versions of regulations.⁴⁴ One might also infer that the presumption against retroactive applications of statutes incorporates reliance concerns, though such a presumption generally can be readily rebutted by language or some other indication that Congress meant for a statute to apply retroactively.⁴⁵ But crucially, none of this precluded agencies from changing policy or instituting new rules that would apply prospectively and broadly.

For example, the iconic 1984 arbitrary and capricious review case, *Motor Vehicles Manufacturers Association v. State Farm*,⁴⁶ involved regulatory policy change. In 1981, the Reagan Administration repealed a 1977 Carter-era rule that would have required all automotive manufacturers to install passive restraints (automatic seatbelts or airbags) on new cars by automotive model year 1984. The Court established that rule repeals were subject to arbitrary and capricious review,⁴⁷ even though agency inaction might not require justification⁴⁸ or—though the Court did not specifically state this—might not even be subject to judicial review.⁴⁹ The Court noted that an agency’s earlier position should be seen as an “informed judgment” on the best course of implementation, justifying arbitrary and capricious review of a rescission of that judgment.⁵⁰ The *State Farm* Court’s analysis identified the still-leading factors that compose arbitrary and capricious review, including whether the agency has: 1) considered relevant alternatives, 2) considered relevant factors under a statute (and not irrelevant

⁴² See e.g., *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1329–30 (D.C. Cir. 1995).

⁴³ In the 1970s, the Court discussed reliance on previous agency regulations as a defense to an agency enforcement action in *U.S. v. Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655, 675 (1973), and (in dicta) good-faith reliance as a reason not to permit an agency to use adjudication to announce principles and impose new liability for past actions in *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 295 (1974). Both cases were cited in *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 742 (1996), discussed *infra* text accompanying notes 56–59.

⁴⁴ Cf. *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 106 (2015) (noting that Congress often speaks directly to reliance interests by, for example, enacting safe harbor provisions in statutes for reliance on a range of agency documents or statements).

⁴⁵ See e.g., *INS v. St. Cyr*, 533 U.S. 289, 321–23 (2001) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994)) (applying the presumption against retroactivity based upon “familiar considerations of fair notice, reasonable reliance, and settled expectations”).

⁴⁶ 463 U.S. 29 (1983).

⁴⁷ *Id.* at 41.

⁴⁸ *Id.* at 30 (“An agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance”).

⁴⁹ Cf. *Heckler v. Chaney*, 470 U.S. 821, 832–33 (1985) (explaining that agency failure to act is presumptively unreviewable); *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64–65 (2004) (holding that agency failure to act would not be reviewable “action” under the APA unless it was discrete and subject to mandatory requirements).

⁵⁰ *State Farm*, 463 U.S. at 37, 41–42 (quoting *Atchison, T. & S.F.R. Co. v. Wichita Bd. Of Trade*, 412 U.S. 800, 807–08 (1973)).

ones), and 3) articulated a rational connection between the facts it found and the choices it made.⁵¹

The agency's earlier rule requiring passive restraints did, to some extent, shape the Court's review of the rescission in *State Farm*. For example, the agency's requirement of airbags and automatic belts as the 1977 compliance options led the Court to unanimously set aside the 1981 agency action for failure to consider an airbags-only alternative.⁵² Yet, the Court emphasized that an agency must be given "ample latitude" to adapt its rules and policies to changing circumstances,⁵³ and notably, *State Farm* did not mention either manufacturer or consumer reliance on the earlier rule as a consideration for the agency. To the contrary, Justice William Rehnquist, in dissent, famously suggested that the Court should have been even more generous with the agency's rescission decision, stating: "A change in administration . . . is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations [including public resistance and uncertainty], as long as the agency remains within the bounds established by Congress."⁵⁴

Beginning in the 1990s, however, the Court began to embed more anti-change seeds in its arbitrary and capricious rulings. It did so by requiring agencies changing policy to expressly consider reliance.⁵⁵ The Court first flagged reliance as a general concern for agency policy changes in its 1996 decision, *Smiley v. Citibank (South Dakota), N.A.*⁵⁶ In a unanimous opinion authored by Justice Antonin Scalia, the Court upheld an agency interpretation under *Chevron* deference and rejected challenges based on the agency's interpretive change since it found no meaningful change in official position.⁵⁷ The Court reaffirmed that such interpretive change could be ordinary, but—in dicta—identified reliance as an additional factor for an agency to consider. The Court commented, "[C]hange is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency,"⁵⁸ but cautioned that a failure to "take account of legitimate reliance on prior interpretation" could render a decision arbitrary or capricious.⁵⁹

⁵¹ *Id.* at 43–44, 48.

⁵² *Id.* at 51. A five-member majority of the Court also found flawed the agency's conclusion that passive restraints were not worth adopting because of the possibility that people might bypass them, undercutting anticipated safety benefits. That majority said it could not conclude the finding was the "product of reasoned decisionmaking." *Id.* at 52.

⁵³ *Id.* at 42.

⁵⁴ *Id.* at 59.

⁵⁵ See generally Randy J. Kozel, *Precedent and Reliance*, 62 EMORY L.J. 1459, 1478–84 (2013) (discussing complexities inherent in judicial protection of reliance, including encouraging less-than-optimal levels of investment).

⁵⁶ 517 U.S. 735 (1996).

⁵⁷ *Id.* at 742–45.

⁵⁸ *Id.* at 742.

⁵⁹ *Id.*

In 2008, in *FCC v. Fox Television Stations, Inc.*,⁶⁰ the Court, in a majority opinion by Justice Scalia, rejected an arbitrary and capricious challenge⁶¹ to the FCC's decision to abandon a safe broadcasting harbor for fleeting expletives and to treat them instead as indecent. Although the Court's majority stated that an agency has flexibility to change policy, it laid out a more detailed explanatory requirement for the agency, and again affirmed that an agency cannot change policy without considering reliance. The *Fox* Court stated that an agency changing its policy need not demonstrate that a new policy was "better" than the old, but it must display "awareness" that it was changing position and explain (if necessary) why it might disregard "facts and circumstances" associated with the prior policy.⁶² The Court also stated that the agency's consideration must include "serious reliance interests" potentially engendered by the earlier policy.⁶³

In contrast to other requirements for agencies, the reliance requirement has been developed as free-floating judicial common law not specifically rooted in other legal sources or doctrines. The Court has not mentioned fair warning or fair notice concerns, for example. With respect to other relevant factors an agency must consider, the Court generally has felt compelled to anchor its analysis in the agency's underlying authorizing statute. For example, in *Michigan v. EPA*,⁶⁴ the Court set aside an EPA decision as arbitrary and capricious because the agency failed to consider cost in an initial decision that mercury emissions from power plants required regulation.⁶⁵ But it did so only after exhaustively explaining that cost should be understood as an implicitly required factor by the statute's terms "appropriate and necessary."⁶⁶ Although the Court has engaged in no such analysis for reliance, courts nonetheless have set aside new agency policy decisions for failure to consider reliance.⁶⁷

The Court has also been unclear about just which sorts of reliance interests an agency must consider, creating additional opportunities for the courts to nitpick agency policy changes. The cases discussed above implicate economic concerns, and the Court repeatedly mentioned the "significant [economic] reliance interest involved" in setting aside, as inadequately reasoned, an agency's Fair Labor Standards Act regulation interpreting "salesman" to cover service advisors at auto dealerships in *Encino Motorcars v. Navarro* in

⁶⁰ *FCC v. Fox Television Stations*, 556 U.S. 502, 514–16 (2009).

⁶¹ 5 U.S.C. § 706(2)(A) (Administrative Procedure Act provision requiring a court to set aside an agency decision if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"); see *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 37, 52 (1984).

⁶² *Fox Television Stations*, 556 U.S. at 514–16.

⁶³ *Id.* at 515; see also *id.* at 536 (Kennedy, J., concurring) ("Reliance interests in the prior policy may also have weight in the analysis."); *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 106 (2015) (reaffirming position that agency failure to consider reliance in an interpretive rule might be arbitrary and capricious).

⁶⁴ 576 U.S. 743 (2015).

⁶⁵ See *id.* at 760.

⁶⁶ *Id.* at 752–53.

⁶⁷ See, e.g., *infra* notes 69–71 and accompanying text (discussing *Department of Homeland Security v. Regents*, 591 U.S. 1 (2020)); *BNSF Ry. v. Fed. R.R. Admin.*, 105 F.4th 691, 701 (5th Cir. 2024) (setting aside agency decision in part because the "FRA obviously failed to" consider reliance).

2016.⁶⁸ But in 2020, in *Department of Homeland Security v. Regents of the University of California*,⁶⁹ the Court set aside as arbitrary and capricious the Department of Homeland Security’s rescission of the Deferred Action for Childhood Arrivals, or “Dreamers” program, for failure to consider reliance interests in detail.⁷⁰ The Court expanded the list of plausible reliance interests beyond purely economic interests—though without ranking them, evaluating them, or anchoring them in the underlying statute—to include personal decisions to take jobs, marry, purchase houses, or seek education, as well as money invested in employer training and governmental tax revenue.⁷¹ Such a list may be appealing as broadening legitimate reliance concerns beyond the purely economic. Irrespective of its potential appeal, however, courts have developed this requirement in an ad hoc, unpredictable fashion.

Thus, in addition to offering an extensive explanation of why it sees the world differently, an agency seeking to change policy must address a difficult-to-anticipate set of reliance interests. These requirements represent a subtle new set of judicial roadblocks to agency policy changes.

IV. CHANGE ITSELF AS A REASON TO REFUSE DEFERENCE TO AGENCY INTERPRETATIONS ACROSS THE BOARD

Prior to 2019, two of the three general doctrines governing judicial review of agency interpretations of law incorporated considerable scope for agency flexibility and policy change. The doctrine of *Auer*⁷² or *Seminole Rock*⁷³ deference to an agency’s interpretation of its own regulation left space for an agency to change its position. The *Chevron* doctrine, requiring presumptive deference to certain categories of agency interpretations of statutes, also supported flexible interpretation. Only the framework of the 1944 decision *Skidmore v. Swift*⁷⁴ disfavored change by suggesting that other agency statutory interpretations would be more worthy of deference if they were consistently held over time.⁷⁵ But in 2019, in *Kisor v. Wilkie*,⁷⁶ the Court significantly modified *Auer*, and of course in the 2024 decision of *Loper Bright Enterprises v. Raimondo*,⁷⁷ the Court overruled *Chevron* and reinstated the judiciary as the primary decider of legal questions about an agency’s authority.⁷⁸ *Loper Bright*

⁶⁸ See *Encino Motorcars v. Navarro*, 579 U.S. 211, 222 (2016).

⁶⁹ 591 U.S. 1 (2020).

⁷⁰ See *id.* at 33–34.

⁷¹ See *id.* at 31–32 (describing these various concerns as “noteworthy” and supporting the analysis of alternatives). For a thorough discussion of the interests motivating “reliance” analysis in these cases, including an argument to limit them to certain individual, rather than state government interests, see Haiyun Damon-Feng, *Administrative Reliance*, 73 DUKE L.J. 1743, 1812–16 (2024).

⁷² *Auer v. Robbins*, 519 U.S. 452 (1997).

⁷³ *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

⁷⁴ 323 U.S. 134 (1944).

⁷⁵ See *id.* at 140.

⁷⁶ 588 U.S. 558 (2019).

⁷⁷ 144 S. Ct. 2244 (2024).

⁷⁸ See *id.* at 2273.

also modified *Skidmore* deference to strengthen its anti-change tilt.⁷⁹ Thus, change in agency interpretations is now judicially disfavored across the board.

A. *Skidmore and Chevron Prior to Loper Bright*

Before *Chevron*, the Court had long applied the so-called *Skidmore* framework to decide whether deference to an agency interpretation might be warranted.⁸⁰ In *Skidmore*, the Court, in addressing a private employment dispute over pay, followed an agency interpretation of a statute announced in an agency “bulletin.”⁸¹ The open-ended *Skidmore* framework largely left the deference question to a judge’s discretion, though it expressed the notion that some agency interpretations might be especially deserving, and thus a worthy source of guidance to which a court might resort (or not).⁸² The *Skidmore* framework afforded “respect” to the agency’s interpretation of the law based on the “thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.”⁸³ The preference for consistency, of course, disfavored change. Though the *Skidmore* Court did not explain why it chose consistency as a criterion, conceivably a consistently-held interpretation might have been judged relatively well-considered at the start—or perhaps frequent interpretive changes might be deemed disruptive.

By contrast, under the stronger *Chevron* deference framework (in which courts deferred to reasonable agency interpretations of ambiguous authorizing statutes), change was no bar to deference. In *Chevron*,⁸⁴ the Court expressly rejected the notion that change would delegitimize an agency’s legal interpretation, deferring to the agency’s interpretation of a Clean Air Act term even though the agency had changed its interpretation over time. The Court explained: “An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.”⁸⁵ The Court reaffirmed this position—and the agency’s legitimate need to reconsider a policy’s wisdom via reinterpretation of its authority—in *National Cable & Telecommunications Ass’n v. Brand X*, where it stated that change in an agency interpretation, even if contrary to a Court of Appeals ruling, would not render the new agency interpretation ineligible for *Chevron* deference.⁸⁶ The *Brand X* Court reaffirmed the reasons given in Justice Rehnquist’s *State Farm* dissent, commenting that, at most, unexplained inconsistency might prompt a court to find a changed interpretation arbitrary and capricious.⁸⁷

⁷⁹ See *id.* at 2272–73.

⁸⁰ 323 U.S. 134 (1944); see, e.g., *Loper Bright*, 144 S. Ct. at 2259–62.

⁸¹ See *Skidmore v. Swift*, 323 U.S. 134, 138 (1944).

⁸² See *id.* at 140 (agency interpretations might constitute a body of “experience and informed judgment to which courts and litigants may properly resort for guidance”).

⁸³ *Id.*

⁸⁴ *Chevron v. Nat. Res. Def. Council*, 467 U.S. 837 (1984).

⁸⁵ *Id.* at 863–64.

⁸⁶ *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981–82 (2005) (also quoting “wisdom” language from *Chevron*).

⁸⁷ See *id.* at 982.

B. *Chevron's Abandonment in Loper Bright and Skidmore 2.0's Deepened Opposition to Change*

By the time *Loper Bright* was argued in 2024, members of the Court had expressed significant concern regarding change in an agency's interpretation of its own authorizing statute. In a dissent to a 2022 certiorari denial in *Buffington v. McDonough*,⁸⁸ Justice Neil Gorsuch argued that *Chevron* invited executive officials to interpret the law aggressively—and then, during a change in presidential administration, emboldened new officials to “proceed in the opposite direction with equal zeal.”⁸⁹ Gorsuch suggested that *Chevron* facilitated so much change that “individuals can never be sure of their legal rights and duties,” potentially leaving them “caught in the whipsaw” of rule changes.⁹⁰ Similarly, at the *Loper Bright* oral argument, Justice Brett Kavanaugh expressed concern for the prospect that *Chevron* deference might still apply when the “agency changes position every four years,”⁹¹ a sharp contrast to Justice Rehnquist's endorsement of policy change initiated by new presidential administrations in *State Farm*.⁹²

In *Loper Bright*, the Court overruled *Chevron* and returned to *Skidmore* deference for all agency statutory interpretations—but in a way that significantly strengthened *Skidmore's* anti-change tilt. *Skidmore* already incorporated a preference for consistent agency interpretations of statutes so that the announcement of a changed position would apparently be less deserving of deference. The *Loper Bright* Court endorsed this principle in what we might call *Skidmore 2.0*.⁹³

Loper Bright strengthened *Skidmore's* obstacles to change in two ways. First, the Court suggested that respect should be denied not only to changed agency interpretations, but to *new* ones as well. Citing pre-New Deal cases, the Court characterized its historical approach as respectful to agency views when an agency interpretation was not just consistent but was issued “roughly contemporaneously” with a statute's enactment.⁹⁴ It emphasized that in *Skidmore 2.0*, courts should find especially useful “interpretations issued contemporaneously . . . and which have remained consistent over time.”⁹⁵

The Court did not explain its rationale for this additional limit on interpretations. Conceivably, privileging interpretations contemporaneous with enactment might recognize that an agency official had been involved in drafting

⁸⁸ 143 S. Ct. 14 (2022).

⁸⁹ *Id.* at 19 (Gorsuch, J., dissenting from denial of certiorari); *see also* *Baldwin v. United States*, 140 S. Ct. 690, 694 (2020) (Thomas, J., dissenting from denial of certiorari) (arguing that *Chevron* should be reconsidered and noting that it differed from historical practice by requiring deference even when an agency has changed its position).

⁹⁰ *Buffington*, 143 S. Ct. at 21 (Gorsuch, J., dissenting from denial of certiorari).

⁹¹ Transcript of Oral Argument at 40, *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024) (No. 22-451).

⁹² *See supra* notes 53–54 and accompanying text; *see generally* Deacon & Litman, *supra* note 13 (discussing Court's attitudes towards presidential control of agency policy).

⁹³ *See Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2262 (2024).

⁹⁴ *See id.* at 2258. The Court cited three cases for this proposition, all decided in 1920 or earlier, even though *Skidmore* itself was not decided until 1944.

⁹⁵ *Id.* at 2244.

or negotiating the statute, and thus might have particular knowledge of legislative context or congressional goals. Or, perhaps it reflects the possibility that Congress has not had an opportunity to respond to later interpretations, and thus cannot be assumed to have acquiesced. But whatever the justification, the Court's decision means less respect for a later-in-time agency interpretation. Such interpretations can, of course, be important to addressing new problems, new solutions, and new implementation issues that have emerged as a statute has been interpreted. For example, after the Court ruled in 2007 in *Massachusetts v. EPA* that the core 1970 Clean Air Act term "air pollutant" clearly includes greenhouse gases,⁹⁶ the EPA confronted interpretive difficulties from the fact that greenhouse gases are often emitted in more "vast quantities" than other air pollutants regulated under the Clean Air Act.⁹⁷ Any statute may present a host of issues that Congress could not or did not specifically address.

Second, the *Loper Bright* Court set forth a statutory interpretation approach, at least in the setting of agency actions, that seems to leave little room for change over time, even when a statute is phrased broadly. The Court stated, "[E]very statute's meaning is fixed at the time of enactment," expressly rejecting the notion that statutes could have gaps or ambiguities, which in past opinions has warranted deference to agency interpretations.⁹⁸ Over a dissent by Justice Elena Kagan, the majority denied that "Congress's instructions" could "run out" at a particular point in time⁹⁹ and insisted that every statute must have a "single, best meaning" that simply awaits judicial detection.¹⁰⁰ This focus on the time of enactment paves the way for future cases to adopt a particularly time-bound approach to statutes, whether it is by limiting application of a statute to circumstances mentioned in dictionaries at the time, or to those specifically contemplated by members of the enacting Congress. Consider, for example, the use of the term "drug" in the Federal Food, Drug, and Cosmetic Act of 1938, defined to include "articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease . . . [and those] intended to affect the structure or any function of the body"¹⁰¹ Antihistamines for human use were not distributed widely until the 1940s; immunotherapy treatments for cancer were developed far more recently.¹⁰² The statute, aimed at protecting the public from unsafe and ineffective drugs, was clearly meant to encompass such substances

⁹⁶ *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007).

⁹⁷ See *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 320 (2014). The Court characterized greenhouse gases as "atypical pollutants." *Id.* It disagreed with the EPA's proposed interpretive solution for the difficulty in favor of its own in one of the earliest antecedent rulings for the major questions doctrine. *Id.* at 324 (stating that, absent clear language, it would be skeptical of EPA's interpretation as a discovery of an "unheralded power" in a "long-extant statute").

⁹⁸ *Loper Bright*, 144 S. Ct. at 2266 (quoting *Wis. Cent. Ltd. v. United States*, 585 U.S. 274, 284 (2018)).

⁹⁹ *Id.* at 2266.

¹⁰⁰ *Id.* (responding to Justice Kagan's dissent in *Loper Bright*).

¹⁰¹ 21 U.S.C. § 321(g)(1)(B)–(C).

¹⁰² See M. B. Emanuel, *Histamine and the Antiallergic Antihistamines: A History of Their Discoveries*, 29 CLIN. & EXP. ALLERGY, suppl. 3, 1, 8 (1999) ("Antihistamines became widely used in the mid- to late[1940s]"); Paula Dobosz & Tomasz Dzieciatkowski, *The Intriguing History of Cancer Immunotherapy*, FRONTIERS OF IMMUNOLOGY, at 3 (2019) (building on sporadic earlier efforts, the field of immunotherapy "re-emerged" in the 1980s).

even if Congress did not, or could not, specifically anticipate them in 1938. The Court’s approach is in tension with Congress’s deliberate selection of capacious words in regulatory statutes.

In contrast, in other settings with no agency interpretation on offer, the Court has acknowledged that a statute could be properly interpreted to encompass situations not specifically anticipated at the time of enactment. For example, in the 2018 opinion quoted in *Loper Bright* for the proposition that a statute’s meaning is “fixed” at enactment, *Wisconsin Central Ltd. v. United States*,¹⁰³ the Court held that the term “money remuneration” did not include stock options for purposes of the Railroad Retirement Tax Act of 1937.¹⁰⁴ But it also acknowledged in dicta that “electronic transfers of paychecks,” although unknown in 1937, would still qualify as “money remuneration.”¹⁰⁵ Justice Gorsuch wrote for the majority that although “every statute’s *meaning* is fixed at the time of enactment, new *applications* may arise in light of changes in the world.”¹⁰⁶ Whether or not the concept of statutory “meaning” can be convincingly distinguished from “applications,”¹⁰⁷ the *Wisconsin Central* opinion clearly contemplated that a general term can be appropriately interpreted over time to apply to circumstances the drafters did not specifically anticipate. Similarly, in the 2018 decision *Bostock v. Clayton County*,¹⁰⁸ a majority of the Court held that the term “sex” in the Civil Rights Act of 1964’s employment discrimination provisions was properly interpreted to encompass sexual orientation and transgender status, since such discrimination is necessarily “based on sex,”¹⁰⁹ although the majority acknowledged that these particular outcomes “might not have [been] anticipated” at the time.¹¹⁰

Perhaps the *Loper Bright* Court simply forgot to mention that broad statutory terms implemented by agencies could properly apply to circumstances not specifically foreseen at the time of enactment. But it is also conceivable that the Court is laying the groundwork to extend some aspects of the MQD to a much larger class of cases, not just those raising “major” issues. Where a statute authorizes an agency to act, the Court could seek to limit a statute’s scope of authorization just to circumstances specifically addressed in the text or specifically intended at the time of enactment. While the issue is beyond the scope of this essay, this sort of approach is in tension with textualism’s commitments, since it may require looking beyond generally phrased statutory

¹⁰³ 585 U.S. 274 (2018); see *Loper Bright*, 144 S. Ct. at 2266 (“single, best meaning”).

¹⁰⁴ See *Wis. Cent.*, 585 U.S. at 284–85.

¹⁰⁵ See *id.* at 284.

¹⁰⁶ *Id.* (emphasis in original).

¹⁰⁷ See, e.g., Levin, *supra* note 30, at 937 (“Courts must often decide whether a broad enabling statute applies to a particular agency action, and that inquiry can be difficult because the statute is, *in that respect*, ambiguous”) (emphasis in original).

¹⁰⁸ 590 U.S. 644 (2020).

¹⁰⁹ See *id.* at 660 (“based on sex”); *id.* at 682–83.

¹¹⁰ *Id.* at 653 (acknowledging that Act’s drafters likely “weren’t thinking about many of the Act’s consequences that have become apparent over the years” but nonetheless finding sexual orientation and transgender status covered by the text).

text to specific legislative intent, legislative history, or both.¹¹¹ And the Court might apply such an approach even to statutes enacted long before *Loper Bright* was decided, irrespective of whether Congress could have anticipated this interpretive move. As with the MQD, such an interpretive approach could force Congress to legislate again to achieve a desired and appropriate policy response to new problems.

C. Restricting Auer Deference for Changed Agency Interpretations

The Court's shift against change also has extended to its treatment of an agency interpretation of its own regulation. In the 1997 decision *Auer v. Robbins*, the Court reaffirmed a longstanding doctrine announced in a 1945 case, *Bowles v. Seminole Rock*, that an agency's interpretation of its own rules should be accepted as "controlling unless 'plainly erroneous or inconsistent with the regulation.'"¹¹² In *Auer* and in a 2007 decision, *Long Island Care at Home Ltd. v. Coke*, the Court held that *Auer* deference was available for interpretations both in internal memoranda and amicus briefs as long as they created no "unfair surprise" and were not post hoc rationalizations.¹¹³ In *Long Island Care*, the Court specifically held that a change in an agency's interpretation would be no reason to deny deference,¹¹⁴ implying that generalized reliance on previous positions would not bar an agency from adopting a new interpretation. The Court did not amplify the meaning of the sort of "unfair surprise" that would be a reason to deny deference, but did suggest that the use of notice and comment rulemaking to change a policy would be sufficient to eliminate any unfairness.¹¹⁵ Again, the Court's concern seemed limited to the case in which a party faced liability based on a new agency interpretation, something akin to a lack of fair warning required by due process.¹¹⁶

But in *Kisor v. Wilkie*,¹¹⁷ the Court more clearly ruled a far larger class of changed interpretations unworthy of deference. *Kisor* reaffirmed that an agency interpretation of its rule would not warrant *Auer* deference if it created "unfair surprise," but equated that surprise to the "disruption of expectations [that] may occur when an agency substitutes one view of a rule for another."¹¹⁸

¹¹¹ See Mendelson, *supra* note 32, at 74 (noting textualists' strong opposition to such approaches).

¹¹² See *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)) (cleaned up); see also *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (same).

¹¹³ See *Auer*, 519 U.S. at 461 (deferring to interpretation in amicus briefs that was not a post hoc rationalization); *Long Island Care at Home Ltd. v. Coke*, 551 U.S. 158, 170–71 (2007) (deferring to agency interpretation set forth in advisory memorandum and noting the interpretation created no unfair surprise); see also *Auer*, 519 U.S. at 461 (a deferral to an interpretation in amicus briefs, not a post hoc rationalization).

¹¹⁴ *Long Island Care*, 551 U.S. at 171 (deferring to interpretation with which the agency had "struggled" for years).

¹¹⁵ See *id.*

¹¹⁶ See, e.g., *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155–56 (2012) (analogizing potential "massive liability" for pre-interpretation conduct to a lack of fair warning).

¹¹⁷ 588 U.S. 558 (2019).

¹¹⁸ *Id.* at 2418.

The Court added that such disqualifying “upending of reliance” might happen—even if an agency had not previously plowed the interpretive ground—if the agency, through its interpretation, sought to address “longstanding conduct that the agency had never before addressed.”¹¹⁹ If the Court follows through and applies this language as written, it would seem to cover most newly announced agency interpretations of rules, making them ineligible for deference.

Moreover, if this expansive notion of “upending reliance” is extended to other areas in which the Court has decided reliance is relevant, such as in arbitrary and capricious review or review of changed agency interpretations of statutes, it would further impede agency efforts to respond to new problems, technologies, or democratic policy preferences.

V. ANTI-CHANGE STATUTORY INTERPRETATION RULES THAT IMPEDE EFFECTIVE REGULATORY LEGISLATION

Finally, the Court seems to be developing interpretive approaches that would limit the scope and effectiveness of regulatory legislation. A handful of anti-change substantive interpretive canons are already in use, most notably the so-called common law canon, stating that “statutes in derogation of the common law are to be strictly construed.”¹²⁰ The canon includes the notion that enacted words with a settled common law meaning take that “common law soil” along with them.¹²¹ But statutes, of course, are often meant to respond to inadequacies of common law.¹²² The common-law canon can thus blunt a statute’s impact. For example, in *United States v. Bestfoods*,¹²³ the Court narrowly interpreted the Comprehensive Environment, Response, Compensation, and Liability Act (CERCLA) in light of “general principle[s]” of corporate law, which it characterized as common law.¹²⁴ CERCLA imposes strict, joint and several, and retroactive liability for hazardous waste cleanup costs on those responsible for contamination, including facility “operators.”¹²⁵ It was passed in response to environmental disasters, especially abandoned hazardous waste sites, that were not being adequately addressed by common law remedies.¹²⁶ Guided by what it

¹¹⁹ *Id.*

¹²⁰ See, e.g., ANTONIN SCALIA & BRYAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 318–21 (2004) (discussing common law canon and related canon regarding the meaning of undefined terms).

¹²¹ *Id.*

¹²² Cf. *Babbitt v. Sweet Home Chapter*, 515 U.S. 687, 697 n.10 (1995) (arguing that canon should not apply because statute included a definition of the relevant term).

¹²³ 524 U.S. 51 (1998).

¹²⁴ See *id.* at 61.

¹²⁵ See 42 U.S.C. § 9607 (liability provisions of CERCLA).

¹²⁶ Congress enacted the statute after environmental disasters at hazardous waste sites across the country. That included Love Canal in New York, which concerned the consequences of a 16-acre chemical waste disposal site that had been capped in the 1950s. The land was sold to the city, which built an elementary school on top; residences were also built nearby. The cap broke in the mid-1970s, causing widespread chemical contamination throughout the groundwater with carcinogens, mutagens, and fetotoxic and embryotoxic chemicals. Love Canal was evacuated and declared a national disaster in 1978. See generally U.S. GOV’T ACCOUNTABILITY OFF., CED-

characterized as common-law restrictions on “piercing the corporate veil” to impose legal responsibility on corporate shareholders, the Court nonetheless interpreted the statute to almost never impose liability on a corporate shareholder or parent company, even one with complete ownership of a polluting company, and thus the ability to control its operation and environmental impacts.¹²⁷ Such an interpretive approach can be understood as undercutting a statute’s effectiveness, impeding Congress from making meaningful change.

Two of the doctrinal changes discussed above can be understood as adding to the Court’s arsenal of anti-change interpretive rules. Besides serving as a roadblock to agency assertions of authority, the MQD hinders Congress from using clear, but broad, language to create regulatory programs that can effectively address problems arising over time. Meanwhile, the *Loper Bright* Court’s dicta that a statute’s meaning is “fixed at the time of enactment” could hamper the application of many broadly-phrased statutes to later-arising issues, even when no “major questions” are implicated.

Finally, the Court more recently alluded to a nascent “private property” interpretive rule in the 2023 decision of *Sackett v. Environmental Protection Agency*.¹²⁸ In that case, a majority of the Court narrowly interpreted the scope of the central federal water pollution statute, the Clean Water Act. The Court held that the Clean Water Act’s jurisdictional “waters of the United States” language did not cover wetlands other than those with a continuous surface connection to traditionally navigable waters and their tributaries.¹²⁹ It further stated that Congress would have to “enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property.”¹³⁰ While the Court’s reference to the balance of federal and state power seemed to invoke its late-twentieth-century federalism canons,¹³¹ an extra-clear statement rule to protect private property would be wholly new.¹³² Virtually all federal regulation—economic,

81-57, REPORT BY THE COMPTROLLER GENERAL OF THE UNITED STATES: HAZARDOUS WASTE SITES POSE INVESTIGATION, EVALUATION, SCIENTIFIC, AND LEGAL PROBLEMS, at 52–53 (1981) (describing the numerous hazardous waste sites as “ticking time bombs” and summarizing Love Canal events). Commentary at the time explained some of the limits on common law remedies. See, e.g., William R. Ginsberg & Lois Weiss, *Common Law Liability for Toxic Torts: A Phantom Remedy*, 9 HOFSTRA L. REV. 859, 865 (1981) (“victims of hazardous waste disposal will be poorly served by the common law and the judicial process . . . federal legislation creating an administrative remedy should be enacted”).

¹²⁷ See *Bestfoods*, 524 U.S. at 72 (finding parent company liability as “operator” to be appropriate only if parent’s agent acts “alone” and actions are “eccentric under accepted norms of parental oversight”).

¹²⁸ 598 U.S. 651 (2023); see *id.* at 679.

¹²⁹ *Id.* at 678–79 (wetlands must have a “continuous surface connection” with “waters of the United States,” meaning a relatively permanent body of water connected to traditional interstate navigable waters).

¹³⁰ *Id.* at 679.

¹³¹ See Mendelson, *supra* note 32, at 119–20 (summarizing twentieth-century rise of federalism canons).

¹³² *Sackett* quoted dicta in *U.S. Forest Serv. v. Cowpasture River Pres. Ass’n*, 590 U.S. 604, 621–22 (2020), but that case concerned whether the U.S. Forest Service could authorize a pipeline under the Appalachian Trail (roughly speaking) or whether, instead, the Appalachian Trail was

environmental, safety, or health—affects private property in the sense that it aims to improve some parties’ well-being or wealth, and changes the way others spend their resources or use their assets. Thus, such an interpretive rule, if entrenched, could limit the application of a wide array of federal regulatory statutes, old and new, unless Congress is able to see into a crystal ball and address individual issues in a highly specific fashion. Ironically, given this seeding of a new anti-regulatory change canon, in adopting a narrow application of the Clean Water Act, the Court fractured longstanding practice by overruling the position of all eight post-enactment presidential administrations on the Clean Water Act’s coverage.¹³³

VI. CONCLUSION

By requiring not just clear, but specific, statutory authorization language, the Court’s major questions doctrine has unquestionably made it harder both for Congress and agencies to respond to significant modern problems. But in a far less visible way, numerous other doctrinal changes embody the Court’s efforts to restrict the scope of modern government. The Court is instituting large and small doctrinal obstacles to legislative regimes that were designed to respond to entire categories of modern challenges such as environmental pollution, occupational health, product safety, and financial fraud. At the same time, the Court is also hampering agencies—to which Congress has entrusted the implementation of particular programs—from responding to new technical challenges and to evolving democratic preferences. The Court’s lack of democratic accountability, as well as policy and technical expertise, make it a poor institution to impose these barriers. Nonetheless, through ongoing doctrinal changes, the Court is exercising its power to send both Congress and the agencies, time and time again, back to the drawing board, with damaging economic and social welfare consequences.

National Park Service land, in which case, by statute, no pipeline could be built there. Private property did not seem to be implicated. *Sackett*, 598 U.S. at 679; *see also* Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs., 594 U.S. 758, 764 (2021) (also quoting *Cowpasture*, though with reference to intrusion “into an area that is the particular domain of state law”).

¹³³ *See Sackett*, 598 U.S. at 720 (Kavanaugh, J., concurring).