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I. INTRODUCTION

In *West Virginia v. EPA*,[1] the Supreme Court held for the first time that a "major questions doctrine" rather than "routine statutory interpretation" governs judicial review of "economically and politically significant" administrative actions.[2] While scholars had suggested the existence of a major questions doctrine before, it was so inchoate that the D.C. Circuit opinion reviewed in *West Virginia* referred to it as the "*so-called* 'major questions' doctrine."[3]

The *West Virginia* Court not only announced the major questions doctrine's arrival, it also used it to justify constraining EPA "restructuring" of the energy system to address the global climate crisis.[4] The Court thus decided a major

1. 597 U.S. 697 (2022).

2. *See id.* at 721–24 (affirming that the major questions doctrine is "distinct" from "ordinary" or "routine" statutory interpretation); Jody Freeman & Matthew C. Stephenson, *The Anti-Democratic Major Questions Doctrine*, 2022 SUP. CT. REV. 1, 1 (denying that the strong major questions doctrine announced in *West Virginia v. EPA* is based on longstanding precedent).

3. Am. Lung Ass'n v. EPA, 985 F.3d 914, 958 (D.C. Cir. 2021), *rev'd*, *West Virginia*, 597 U.S. 697 (emphasis added).

4. *See West Virginia*, 597 U.S. at 700, 735 (defining issue as whether the EPA has authority to restructure "the Nation's overall mix of electricity generation" and concluding that the EPA violated section 111(d) by forcing a "transition away from the use of coal").

question of environmental policy.[5] It did so in response to a petition asking it (in effect) to review a very odd candidate for a Supreme Court decision: a defunct rule called the Clean Power Plan.[6] Its ruling contravened plain statutory language and disserved statutory goals.[7] It abandoned "routine statutory interpretation"[8] and relied on the "major questions doctrine" to justify what the dissent called an advisory opinion.[9]

In so doing, it clarified the hazy contours of the major questions doctrine in a way that frees federal judges to decide future "major questions" by overcoming rather than implementing congressionally created policies.[10] It announced that it would only accept executive branch power to make extraordinary significant decisions if the decision enjoys "clear congressional authorization," not merely a "plausible textual basis."[11]

The *West Virginia* Court stated that the separation of powers justifies the major questions doctrine, which now requires abandonment of ordinary statutory construction.[12] The Court did not explain why the separation of powers justifies the abandonment of the ordinary approach, which aims to discern the enacting Congress's policies.[13] Statements by Supreme Court Justices insist that Congress must decide major questions, not the executive branch of government. The Justices' pronouncements suggest that when judges decide major questions instead

5. *See id.* at 724 (characterizing *West Virginia* as a "major questions case").

6. *See id.* at 714–18 (explaining why the rule had never been in effect).

7. *See id.* at 755–64 (Kagan, J., dissenting) (showing that the majority's ruling contravened plain statutory language).

8. *See id.* at 724; *see also* Gundy v. United States, 139 S. Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting) (characterizing the major questions doctrine as only "nominally a canon of statutory construction"); Nathan Richardson, *Antideference: Covid, Climate, and the Rise of the Major Questions Canon*, 108 VA. L. REV. ONLINE, 174, 177 (2022) (characterizing the major questions doctrine as "masquerading as a principle of statutory construction").

9. *See West Virginia*, 597 U.S. at 724–31 (majority opinion) (justifying its CAA amendment under the major questions doctrine); *id.* at 755–56 (Kagan, J., dissenting) (characterizing the majority's ruling as an "advisory opinion"); *cf.* Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 1937, 1944 (2017) (suggesting that the major questions canon is so new that it might not be seen as a canon at all); Richardson, *supra* note 8, at 176 (describing the major questions doctrine as "imposing different rules for statutory interpretation in 'major' cases").

10. *See generally* Jonathan H. Adler, West Virginia v. EPA*: Some Answers About Major Questions*, CATO SUP. CT. REV. 37, 39 (2022) (predicting that *West Virginia v. EPA* "will be cited routinely in legal challenges" to regulations).

11. *West Virginia*, 597 U.S. at 723.

12. *Id.* (citing separation of powers and a "practical understanding of legislative intent" as justifying the major questions doctrine).

13. *See* Josh Blackman, *Gridlock*, 130 HARV. L. REV. 241, 265 (2016) (finding no "coherent rationale" for the doctrine); Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777, 780 (2017) (finding that the Court has provided "little guidance" about the values the major questions doctrine serves); *see also* Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2606 (2006) (finding "no sufficient justification for the conclusion that" courts rather than agencies should resolve major questions); *cf.* Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) (per curiam) (vacating a stay) (linking the doctrine to federalism and limiting encroachments on private property).

of letting the executive branch do it, this solves the problem of Congress failing to specifically address a major question arising under a statute.[14]

This Article analyzes the Court's suggestion that the major questions doctrine serves the separation of powers by preserving congressional legislative authority, asking whether the doctrine preserves congressional control over major questions that would otherwise be lacking. This Article shows that the major questions doctrine often disempowers the Congress that enacted the legislation, giving rise to a major question without empowering current or future Congresses. Because Congress legislates precisely to establish policy governing economically, politically, and socially significant questions, this disabling of Congress constitutes a major blow to the separation of powers.

The disempowerment of the enacting Congress occurs when the Court uses the doctrine not to enforce the law's policies but to thwart them.[15] Construction of statutes contrary to their literal language, structure, and stated goals simply contravenes democratically enacted policies. Accordingly, the major questions doctrine can damage both democracy and the rule of law. When the Court shapes the major questions doctrine to thwart implementation of legislation's policies (as it has in *West Virginia* and its most immediate antecedents), it undermines the enacting Congress's work.

The doctrine also does nothing to protect the legislative authority of existing and future Congresses. No matter what the court does when the executive branch decides a major question, Congress remains free to override a particular application of law, either through statutory amendment, an appropriations rider, or a joint resolution under the Congressional Review Act ("CRA")—a statute that authorizes disapproval of agency action by expedited majority vote.[16]

Congress, however, often fails to override very important Supreme Court policy decisions because of the complex legislative process specified in the Constitution, Congress's own decisions about legislative process, and the enormous number of matters clamoring for its attention. A judicial ruling stopping implementation of the enacting Congress's policies amends the law but spares Congress from the political accountability that it should face when Congress makes major decisions. Congress, however, may fail to override a judicial decision

14. *See* Adler, *supra* note 10, at 40 (stating that *West Virginia v. EPA* "put Congress in the policy driver's seat").

15. *See generally* Sunstein, *supra* note 13, at 2607 (pointing out that "it is entirely legitimate for the executive to make 'major' changes . . . through reasonable" statutory interpretation); *cf.* WILLIAM N. ESKRIDGE JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 289 (2016) (finding the major questions doctrine "defensible" because of "a strong presumption of continuity for major policies").

16. 5 U.S.C. § 801(b)(1); *id.* § (b)(2); *id.* § (d)(4); *see* MAEVE P. CAREY & CHRISTOPHER M. DAVIS, CONG. RES. SERV., NO. R43992, THE CONGRESSIONAL REVIEW ACT (CRA): FREQUENTLY ASKED QUESTIONS 16 (2021) (explaining that CRA resolutions can pass with a simple majority because cloture is unnecessary); MAEVE P. CAREY & CHRISTOPHER M. DAVIS, CONG. RES. SERV., NO. IF10023, THE CONGRESSIONAL REVIEW ACT (CRA) (2018) (explaining that during Senate consideration of a CRA joint resolution "[n]o amendments are permitted"); Curtis A. Bradley, *Reassessing the Legislative Veto: The Statutory President, Foreign Affairs, and Congressional Workarounds*, 13 J. LEGAL ANALYSIS 439, 459 (2021) ("Under [the CRA], major federal regulations must be reported to Congress and cannot take effect for sixty days, giving Congress an opportunity to override them, using expedited procedures.").

thwarting the enacting Congress's policy not because of a desire to duck accountability, but because partisan division prevents enactment of any legislation either affirming or rejecting a new judicial policy choice.[17] In either case, the Court's statutory amendments advance the interests of the congressional faction that opposes implementation of the previous law's policy. Thus, the major questions doctrine, at least to the extent it undermines existing law's democratically chosen policies, can make judges into partisans instead of faithful interpreters of statutes. Instead of preserving law as a unifying force, the Court joins the movement to reach politically desirable results from the perspective of law resisters, even when they make up a minority unable to pass statutory amendments, appropriations riders, or a joint resolution reversing an agency action under the CRA. The major questions doctrine, it turns out, empowers unelected judges, not Congress, to decide questions of vast economic and political significance.[18]

Many of the Justices have suggested that the nondelegation doctrine supports the major questions doctrine in concurring and dissenting opinions.[19] The analysis offered in this Article shows, in effect, that judges exercise legislative authority to the extent they decide major questions in ways that undermine the enacting Congress's policies. Judicial legislative decisions cannot cure a nondelegation problem because such decisions defeat the exclusivity of legislative authority justifying the nondelegation doctrine.

Previous scholarship has not given the claim that a clear statement rule for cases involving major questions has a foundation in separation of powers sustained attention.[20] This Article, however, draws on two bodies of scholarship that

17. *See* Blackman, *supra* note 13, at 242 (explaining that "[a]s Congress becomes more polarized, it becomes less able to resolve major questions"); Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 6 (2014) (arguing that "congressional gridlock has reached levels unseen in the last fifty years"); Richard L. Revesz, *Regulation and Distribution*, 93 N.Y.U. L. REV. 1489, 1518–25 (2018) (discussing political gridlock); Nathan Richardson, *Keeping Big Cases from Making Bad Law: The Resurgent "Major Questions" Doctrine*, 49 CONN. L. REV. 355, 359 (2016) (describing Congress as "deadlocked by political polarization").

18. *See* West Virginia v. EPA, 597 U.S. 697, 721 (2022) (characterizing major questions cases as "extraordinary cases" of "economic and political significance").

19. *See id.* at 737–44 (Gorsuch, J., concurring) (linking the major questions doctrine to the nondelegation doctrine); Gundy v. United States, 139 S. Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting) (describing the major questions doctrine as "in service of the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency"); NFIB v. OSHA, 595 U.S. 109, 124 (2022) (Gorsuch, J., concurring) (granting a stay) (characterizing the major questions doctrine as "closely related" to the nondelegation doctrine); U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of hearing en banc) (finding that the major questions doctrine embodies a "presumption against the delegation of major lawmaking authority from Congress to the Executive Branch"). Thus, although Kavanaugh and Roberts linked the major questions doctrine to the nondelegation doctrine in *Gundy* and *Telecom* respectively, they did not join the concurring Justices in doing that in *NFIB*. *See NFIB*, 595 U.S. at 117–18 (per curiam) (invoking the major questions doctrine without reference to the nondelegation doctrine). Perhaps they now understand the theoretical problems in using judicial decisions amending law, or at least narrowly construing statutes, to advance the nondelegation doctrine.

20. *See West Virginia*, 597 U.S. at 723 (claiming that "separation of powers" considerations justify the major questions doctrine); *cf.* Blackman, *supra* note 13, at 243 (arguing that congressional gridlock does not justify augmentation of executive authority and that statutory silence cannot justify executive decision-making

have a bearing on the political dynamics of the Court's separation of powers claim. One body of scholarship discusses the question of how readily and under what circumstances Congress overrides controversial judicial interpretations of statutes.[21] Another focuses on public choice theory, which assumes that legislation and the failure to legislate usually reflect special interest influence, not pursuit of the public good.[22]

This Article's analysis builds upon an important insight from William Buzbee, who argued that federal courts often rely on a "one-Congress fiction"—a counter-factual assumption that Congress is an unchanging entity with fixed views over time.[23] This Article makes headway on the separation of powers questions that the major questions doctrine raises by distinguishing between the Congress that enacts a statute that eventually leads to a major question and current and future Congresses that one might hope would address new major questions.

It also builds upon previous work by John Manning, Lisa Heinzerling, and myself. John Manning and I have shown that statutory construction cannot solve a nondelegation problem.[24] Lisa Heinzerling has emphasized the breadth of the judicial role that the major questions doctrine implies.[25]

on "foundational determinations affecting conscience"); Warren Grimes, *The Major Questions Doctrine: Judicial Activism That Undermines the Democratic Process*, 54 LOY. U. CHI. L.J. 825, 829 (2023) (arguing that the major questions doctrine undermines the legislative process by strictly construing statutes). Josh Blackman does not purport to be justifying the major questions doctrine, but Josh Chafetz reads him as advancing a "theory of administrative law, one in which the 'major questions doctrine' plays an increasingly outsized role." Josh Chafetz, *Gridlock?*, 130 HARV. L. REV. F. 51, 51 (2016). Certainly, Blackman discusses the major questions doctrine and pays some attention to the separation of powers. *Cf. id.* (claiming that Blackman purports to write about gridlock without defining it or explaining how to respond to it). Even if one reads Blackman as giving the political question doctrine's reliance on separation of powers sustained attention, this article provides a very different analysis.

21. *See, e.g.*, RICHARD POSNER, THE FEDERAL COURTS: CRISES AND REFORM 285 (1985) (discussing the practical difficulties limiting Congress's ability to override erroneous judicial construction); Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967-2011*, 92 TEX. L. REV. 1317, 1317–18 (2014); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 333 (1991).

22. *See generally* JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW (1997); Daniel A. Farber & Philip P. Frickey, *Public Choice Revisited*, 96 MICH. L. REV. 1715, 1716 (reviewing MAXWELL K. STEARNS, PUBLIC CHOICE AND PUBLIC LAW: READINGS AND COMMENTARY (1997)); Abner J. Mikva, *Symposium on the Theory of Public Choice*, 74 VA. L. REV. 167 (1988).

23. *See* William W. Buzbee, *The One-Congress Fiction in Statutory Interpretation*, 149 U. PA. L. REV. 171, 173 (2000) (explaining that "the concept of a single Congress producing legislation is . . . a fiction" because of periodic changes in membership and political context).

24. *Accord* Sunstein, *supra* note 13, at 2608 (explaining that giving the judiciary the power to "make judgments of policy" would not "reduce the nondelegation concern"); *see* David M. Driesen, *Loose Canons: Statutory Construction and the New Nondelegation Doctrine*, 64 PITT. L. REV. 1, 38–58 (2002) (explaining why neither courts nor agencies can constitutionally narrow a statute to avoid a nondelegation problem); John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 228 (finding that judicial rewriting of statutes undermines the nondelegation doctrine); *cf.* Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 290–91 (2022) (finding the relationship between the major questions doctrine and the nondelegation doctrine "problematic").

25. *See* Heinzerling, *supra* note 9, at 1940 (noting that the "power canons"—including major questions cases—"enlarge[e] . . . judicial power at the expense of the legislative and executive branches"). *See generally* Lisa Heinzerling, *Nondelegation on Steroids*, 29 N.Y.U. ENV'T L.J. 379 (2021).

This Article's treatment of the major questions doctrine as increasingly generating judicial legislation relies on previous scholarship in some respects, but also pushes back against a central tendency in the literature. It relies on scholars' agreement that judges exercise subjective policy judgment in making decisions about what agency actions present "major questions."[26] Furthermore, I agree with other scholars' recognition that the major questions doctrine's focus on domestic regulatory cases of economic significance reflects a judicial policy judgment.[27] But this Article pushes back on the tendency of the Court and scholars to describe the major questions doctrine as an exception to the *Chevron* doctrine—the rule that the courts defer to reasonable agency resolution of statutory ambiguity.[28] This Article shows that this view of the doctrine understates the doctrine's potential to generate judicial legislation by creating the impression that the Court is simply reclaiming the authority to evaluate the enacting Congress's intentions *de novo* when statutes are ambiguous. This Article shows that the Court uses the doctrine primarily to overcome the plain meaning of clear statutory language, something it came close to acknowledging in *West Virginia*. This mistake is understandable, because the Court itself sometimes claims to be simply crafting an exception to *Chevron* deference and one case, *Gonzales v. Oregon*, is consistent with that idea.[29]

Part II of this Article therefore makes a significant descriptive contribution by analyzing what the Court is doing (rather than only what the Justices say they

26. *See, e.g.*, Freeman & Stephenson, *supra* note 2, at 17 (stating that "the Court has failed to provide anything resembling reasonably definite criteria for distinguishing 'major'" from ordinary questions); Jonas J. Monast, *Major Questions About the Major Questions Doctrine*, 68 ADMIN. L. REV. 445, 489 (2016) (stating that the "lack of clarity" about when the major questions doctrine applies "may undermine the judiciary's authority as an objective arbiter"); Richardson, *supra* note 8, at 178 (explaining that the major questions doctrine's boundaries "appear to . . . match the policy preferences of the judges applying it"); Cass R. Sunstein, *There are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475, 487 (2021) (explaining that the "line between 'major' and 'nonmajor' questions is not exactly obvious"); *cf.* Clinton T. Summers, *Nondelegation of Major Questions*, 74 ARK. L. REV. 83, 109–15 (2021) (positing that economic impact, regulatory scope, political significance, and liberty restriction should determine what questions are major).

27. *See* West Virginia v. EPA, 597 U.S. 697, 721 (2022) (stating that major questions "cases have arisen from all corners of the administrative state" and then citing only regulatory cases); Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1008, 1089 (2023) (providing several examples of areas where the major questions doctrine does not apply); *cf.* Trump v. Hawaii, 585 U.S. 667, 680–83, 710 (2018) (not treating the question of whether to ban all residents from certain Muslim countries from entering the United States as a major question requiring specific statutory authorization). *But see* Mila Sohoni, King*'s Domain*, 93 NOTRE DAME L. REV. 1419, 1425–26 (2018) (pointing out that *King v. Burwell* dealt with "federal spending" rather than regulation).

28. *See, e.g.*, Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Questions*, 102 MINN. L. REV. 2019, 2021 (2018) (calling the major questions an exception to *Chevron* deference); Alison Gocke, Chevron*'s Next Chapter: A Fig Leaf for the Nondelegation Doctrine*, 55 U.C. DAVIS L. REV. 955, 958–61 (2021) (suggesting that the Court has signaled an intention to ground the major questions doctrine in its *Chevron* jurisprudence); Richardson, *supra* note 17, at 358 (calling the major questions doctrine an exception to *Chevron* deference). *But see* Richardson, *supra* note 8, at 176 (characterizing recent cases as going beyond a repudiation of *Chevron*).

29. *See* 546 U.S. 243, 249, 258, 267–68 (2006) (declining to defer to the Attorney General's interpretation of "legitimate medical practice" as excluding physician assistance of suicide); Kristin E. Hickman, *The (Perhaps) Unintended Consequences of* King v. Burwell, 2015 PEPP. L. REV. 56, 57–58 (2015) (discussing the *King* Court's surprising rejection of *Chevron* deference).

disempower the enacting Congress without protecting the authority of existing and future Congresses.[41] It also shows that the doctrine will often fail to produce congressional resolution of major questions, especially during times of partisan division or when Congress wants to duck political accountability for unpopular decisions.[42] Because the doctrine authorizes a small number of judges or even a single judge to amend statutes, it undermines democracy, the rule of law, and the separation of powers.[43]

Finally, Part IV addresses the notion that the major questions doctrine nevertheless serves the nondelegation doctrine.[44] Judicial exercise of legislative authority cannot solve a nondelegation problem because the Constitution does not authorize judicial legislation.[45] This Article concludes that the Court needs to be especially scrupulous about following statutory policy when it decides a major question, because such questions tempt judges to make political rather than legal decisions.[46]

II. UNDERSTANDING THE MAJOR QUESTIONS DOCTRINE

This Part explains the spirit canon through an analysis of the leading case applying it, *Holy Trinity Church v. United States*.[47] It then shows that we can understand the Court's early major questions doctrine cases, beginning with *Food & Drug Administration v. Brown & Williamson Tobacco Corp.*,[48] as implementing the more reputable strand of *Holy Trinity's* reasoning, conforming an overly broad operative statutory provision to the statute's overall structure and goals.[49] Beginning with *Utility Air Regulatory Group (UARG) v. EPA*,[50] the next Subsection explains, the major questions doctrine began to defeat statutory spirit and become, in effect, a justification for judicial statutory amendments.[51] The Court has sought to legitimize judicial statutory amendment through articulation of a clear statement rule disfavoring major regulations.

A. The Spirit Canon

In a famous case, *Holy Trinity Church v. United States*, the Supreme Court announced the spirit canon—that a Court should not heed a statute's literal language when a straightforward application of that language violates the statute's

41. *See* discussion *infra* Sections III.B–C.
42. *See* discussion *infra* Sections III.D–F.
43. *See* Brett Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2120 (2016) (explaining that "when courts apply doctrines that allow them to rewrite the laws . . ., they are encroaching on the legislature's Article I power" in violation of the separation of powers).
44. *See* discussion *infra* Part IV.
45. *See* discussion *infra* Part IV.
46. *See* discussion *infra* Part IV.
47. 143 U.S. 457 (1892); *see* discussion *infra* Section II.A.
48. 529 U.S. 120 (2000).
49. *See* discussion *infra* Section II.B.
50. 573 U.S. 302 (2014).
51. *See* discussion *infra* Section II.C.

The modern Court evinces skepticism of the spirit canon.[65] Indeed, it has become skeptical of the whole idea of purposive construction—the practice of interpreting a statute, if fairly possible, to conform to its goals.[66] Justice Scalia, in particular, had suggested that once judges depart from a statute's plain meaning they tend to interpret the statute to mean what they think it should mean.[67] As a result, the Justices often focuses on the "plain meaning" of the operative statutory language directly applying to a case before them, whilst minimizing the consideration of statutory structure and goals.[68] The Court generally views itself as textualist, although it does invoke statutory purpose and structure at times.[69]

B. The Spirited Major Questions Doctrine

The Justices (and scholars echoing them) usually characterize the major questions doctrine as an exception to the *Chevron* rule, which directs judges to defer to agency construction of an ambiguous statute.[70] But, as we shall see, the Court has regularly used the rule to circumvent the governing statutory provisions' plain meaning, rather than to resolve statutory ambiguity.

Yet, one can read many of the early major questions doctrine cases as heirs to the more reputable strand of *Holy Trinity*, conforming statutory language to the law's overall purpose and design.[71] A good example comes from the case that first suggested that the economic and political significance of an issue might have some bearing on statutory interpretation, *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*[72]

65. *See* Chomsky, *supra* note 33, at 905 (discussing vehement criticisms by Justices Kennedy, Scalia, and Rehnquist); William N. Eskridge, Jr. & Victoria F. Nourse, *Textual Gerrymandering: The Eclipse of Republican Government in an Era of Statutory Populism*, 96 N.Y.U. L. REV. 1718, 1744–45 (2021) (noting that the Court has not cited *Holy Trinity* since *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 454 (1989)); *see, e.g.*, Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* ANTONIN SCALIA: A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 18–23 (Amy Gutman ed., 1997) (criticizing *Holy Trinity Church*).

66. *See, e.g.*, Becerra v. Empire Health Found., for Valley Hosp. Med. Ctr., 597 U.S. 424, 445 (2022) (Kavanaugh, J., dissenting) (accusing the parties of using a "dog's breakfast of arguments about . . . statutory purposes [and] . . . structure").

67. *See* Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 108–09, 117 (2007) (Scalia, J., dissenting).

68. *See* David M. Driesen, *Purposeless Construction*, 48 WAKE FOREST L. REV. 97, 111–12 (2013) (explaining that the Rehnquist Court began to abandon purpose and that the Court has become "increasingly textualist"); Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 64 (2015) (characterizing the Court's statutory jurisprudence as "marked by a targeted focus on a few contested words").

69. *See* Driesen, *supra* note 68, at 97, 99 (stating that the Court increasingly emphasizes "plain language" but discussing examples of reliance on statutory purpose).

70. *See, e.g.*, ESKRIDGE, *supra* note 15, at 288 (describing the major questions canon as "a potentially elastic loophole to" *Chevron* deference); Aaron L. Nielson, *The Minor Questions Doctrine*, 169 U. PA. L. REV. 1181, 1192 (2021) (characterizing the major questions doctrine as "an exception to *Chevron*"). *But see* Heinzerling, *supra* note 9, at 1981 (doubting that the major questions doctrine is primarily about *Chevron*).

71. *See infra* notes 72–104 and accompanying text.

72. 529 U.S. 120 (2000); Coenen & Davis, *supra* note 13, at 787 (finding that the "majorness inquiry first crystallized in" *Brown & Williamson*). Several commentators identify earlier cases with the major questions

enactment history of tobacco legislation as establishing a congressional intent not to allow the FDA to regulate tobacco.[77] In this sense, it went beyond *Holy Trinity Church*, as even the *Holy Trinity* Court had sought to divine the policy of the enacting Congress and did not indulge in the fiction that Congress is an unchanging entity with fixed views over time.[78] The *Brown & Williamson* Court seeded what we now know as the "major questions doctrine" when—at the end of this effort to reject literal construction of a statute as inconsistent with its spirit as manifested in the statute as a whole and the intentions of subsequent congresses—it expressed confidence that "Congress could not have intended to delegate a decision of such vast economic and political significance to an agency in so cryptic a fashion."[79] This statement suggests that the Court remained focused on divining congressional intent, not departing from it. And this language appears as a small part of a broader argument that tobacco regulation was not within the statute's spirit as revealed by the whole statute.[80]

In *Gonzales v. Oregon*, the Court quoted this statement in rejecting Attorney General Gonzales's effort to use the Controlled Substances Act ("CSA") to curtail physician assisted suicide as contrary to the CSA's spirit.[81] The CSA exempts physicians' prescriptions from the scope of its prohibitions if those prescriptions are part of "legitimate medical practice."[82] Gonzales sought to curtail assisted suicide by declaring that assisting suicide was not part of "legitimate medical practice."[83] The *Gonzales* Court refused to defer to Gonzales's interpretation of "legitimate medical practice," instead treating his assumption of authority to prohibit using listed drugs to assist suicide as contrary to the CSA's overall purpose and design.[84] *Gonzales* is the only major questions doctrine case where the statutory language relied upon by the executive branch and considered central by the Court is certainly ambiguous with respect to the issue before the Court.[85]

King v. Burwell also relies on statutory spirit. And it affirms that *Brown & Williamson* functions as what I have called a spirit canon case. *King* cites *Brown & Williamson* for its statement that the "meaning—or ambiguity—of certain words may only be evident when placed in context" thereby suggesting that a

77. *See id.* at 143–44; Bostock v. Clayton Cnty., 590 U.S. 644, 670 (2020) (citation and internal quotation omitted) (finding speculation about why a later Congress failed to pass legislation on a topic a "particularly dangerous basis on which to rest an interpretation of an existing law a different and earlier Congress did adopt"); Buzbee, *supra* note 23, at 195 (noting that *Brown & Williamson* relied on materials "usually shunned by textualists" such as the legislative history of bills considered after Congress enacted the FDCA); Manning, *supra* note 24, at 260–67 (analyzing the Court's use of post-enactment history in detail).

78. *Cf.* Buzbee, *supra* note 23, at 173.

79. *Brown & Williamson*, 529 U.S. at 160.

80. *Id.* at 137.

81. 546 U.S. 243, 267 (2006).

82. *See id.* at 257 (explaining that the regulatory term "legitimate medical purpose" derives from several statutory subsections requiring a legitimate medical purpose to prescribe controlled substances).

83. *Id.* at 249 (explaining that the AG's rule "determines that using controlled substances to assist suicide is not a legitimate medical practice and that . . . prescribing them for this purpose is unlawful . . . .").

84. *See id.* at 258–75.

85. *See Gonzales*, 546 U.S. at 258 (stating that "[a]ll would agree . . . that the phrase 'legitimate medical purpose' is . . . ambiguous"); *cf.* Lisa Schultz Bressman, *Deference and Democracy*, 75 GEO. WASH. L. REV. 761, 779 (2007) (suggesting that the AG "picked sides" on a controversial political issue "by fiat").

court should reject a literal construction if at odds with the statute as a whole.[86] *King* conforms the Affordable Care Act ("ACA") to its purpose by overriding plain statutory language.[87] The ACA uses a scheme of refundable tax credits to enable people with incomes between 100% and 400% of the federal poverty level to afford insurance.[88] As Justice Roberts explained in his majority opinion, these tax credits perform an essential function in ensuring near universal insurance coverage without triggering a "death spiral" of price increases making coverage unaffordable for many.[89] The ACA, however, authorizes tax credits only for those who purchase an insurance plan on an exchange "established by the State."[90] The text's plain meaning indicates that individuals who live in states that fail to establish an exchange and therefore purchase insurance policies on a *federal exchange* cannot receive tax credits.[91] The Court, however, rejected the text's most "natural meaning" to conform the tax credit provision to the ACA's goals.[92] The Court prefaced its analysis of the statute's goals with a statement that the question of tax credit availability in states relying on the federal exchange rate was one of "deep economic and political significance," thereby invoking what we now call the major questions doctrine.[93] But the heart of the decision involved adherence to the ACA's goals, consideration of its structure, and study of the "circumstances of its enactment," in keeping with the more reputable strain of the spirit canon.[94]

While the *King* Court relied on fidelity to statutory goals to overcome plain meaning and affirm the agency decision before it, it framed the major questions doctrine as doing something else. The *King* Court invoked the "economic and political significance" of the tax credit rules to justify fashioning an exception to *Chevron* deference to agency construction of ambiguous statutes.[95] But it does not explain why the executive branch, under the guidance of an elected President, should only get deference when deciding insignificant issues.[96]

86. King v. Burwell, 576 U.S. 473, 486 (2015).

87. *Id.* at 498.

88. *Id.* at 482.

89. *See id.* at 479–81 (explaining that efforts to reform insurance without making it possible for low-income people to buy insurance had led to a "death spiral" of rising premiums and less coverage, which tax credits helped prevent).

90. *See id.* at 486 (citing 42 U.S.C. § 18031).

91. *See id.* at 498–500 (Scalia, J., dissenting).

92. *See id.* at 488 (conceding that the most natural meaning of § 18031 read in isolation supports tax credits only for state exchanges).

93. *See id.* at 485–86.

94. *Accord* Heinzerling, *supra* note 9, at 1954 (characterizing the issue in *King* as pitting "four" statutory words "against the remainder of the statutory language and the avowed purposes and design of the law as a whole").

95. Coenen & Davis, *supra* note 13, at 793 (arguing that the *King* Court claimed that the Court rather than the agency should resolve major questions arising from statutory ambiguity).

96. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865 (1984) (explaining that while "agencies are not directly accountable to the people, the Chief Executive is"); Coenen & Davis, *supra* note 13, at 804 (the *King* Court did not explain "why judges rather than agencies" should resolve statutory ambiguity in major questions cases); Cary Coglianese, Chevron*'s Interstitial Steps*, 85 GEO. WASH. L. REV. 1339, 1357 (2017) (stating that agencies can better address major questions than courts because of their superior expertise and political accountability).

The Court rejected an effort to use the first major questions doctrine case (*Brown & Williamson*)[97] to escape literal language *in keeping with the statute's spirit* in *Massachusetts v. EPA*, holding that the EPA must regulate greenhouse gas emissions under the Clean Air Act ("CAA") if they endanger public health and the environment.[98] In *Massachusetts*, the Court confronted a provision requiring regulation of air pollutants—defined as "any . . . substance . . . emitted into the ambient air."[99] Since the CAA aims to protect public health and the environment, both the operative provision's plain language and the statute's goals clearly required that result.[100] The *Massachusetts* Court rejected an effort to employ the major questions doctrine to avoid application of the statute's plain language and defeat the CAA's spirit.[101] Justice Scalia dissented on behalf of four Justices in that case, but he did not invoke the major questions doctrine.[102] This omission of a reference to the major questions doctrine in an extremely important case where the regulation under review obviously advanced the statute's core purpose suggests that the major questions doctrine (to the extent it existed) functioned as a spirit canon for the administrative state at that time.

C. Breaking the Statutory Spirit: The Emergence of a Clear Statement Rule

In *UARG v. EPA*, the Court began a movement toward using the freedom from plain language it had used in *Brown & Williamson* to undermine rather than reinforce statutory policies.[103] The CAA requires large emitters of "any air pollutant" to use the best available control technology ("BACT") and obtain an operating permit.[104] Although the EPA had already determined that greenhouse gas emissions were "air pollutants" within the meaning of the CAA in response to *Massachusetts v. EPA*, the *UARG* Court rejected the EPA's decision to obey the statutory requirement that all emitters of greenhouse gases eventually use BACT and obtain a permit, unless the EPA eventually decided to provide an exemption

97. Massachusetts v. EPA, 549 U.S. 497, 530–31 (2007).

98. *Id.* at 534–35; *see also* Jody Freeman & Adrian Vermeule, Massachusetts v. EPA*: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 73–74 (2008) (noting that even though the Solicitor General emphasized the major questions doctrine in its brief, it generated little discussion in the oral argument).

99. *Massachusetts*, 549 U.S. at 528–29.

100. *See* 42 U.S.C. §§ 7401(b)(1), 7521(a)(1).

101. *See Massachusetts*, 549 U.S. at 530–31 (rejecting *Brown & Williamson*'s applicability); Brief for the Federal Respondent at *21–22, Massachusetts v. EPA, 549 U.S. 497 (2007) (No. 05-1120) (invoking *Brown & Williamson's* major questions reasoning); *see also* Abigail R. Moncrieff, *Reincarnating the "Major Questions" Exception to* Chevron *Deference as a Doctrine of Noninterference (Or Why* Massachusetts v. EPA *Got It Wrong)*, 60 ADMIN. L. REV. 593, 594, 603 (2008) (suggesting that *Massachusetts v. EPA* killed the major questions doctrine); *cf.* Coenen & Davis, *supra* note 13, at 789–90 (noting that the *Massachusetts* Court invoked the "major environmental consequences of *not* regulating greenhouse gases" as a reason not to construe the CAA narrowly to exclude them).

102. *See Massachusetts*, 549 U.S. at 549–60 (Scalia, J., dissenting) (finding the statute ambiguous).

103. Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 313–14 (2014) (noting that the D.C. Circuit had found the CAA "crystal clear" in requiring that BACT requirements apply to greenhouse gases); *id.* at 339–41 (2014) (Breyer, J., concurring) (explaining that the majority's construction undermines the CAA's purpose); *see* Craig N. Oren, UARG*—Not A Chef D'Oeuvre of Opinion Writing*, 39 HARV. ENV'T L. REV. 51, 53–55 (2015) (explaining why "any air pollutant" refers to any regulated air pollutant, as EPA said).

104. *See Util. Air Regul. Grp.*, 573 U.S. at 308–09.

for very small sources.[105] It did this,[106] even though the CAA constitutes a comprehensive scheme to regulate air pollutants to protect public health and the environment.[107]

Justice Scalia's majority opinion in *UARG* signaled the elevation of major questions reasoning from almost an afterthought in divining a statute's spirit to something of a doctrine empowering the judiciary to undermine statutes, writing:

> When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with some skepticism. We expect Congress to speak clearly if it wishes to assign an agency decisions of vast economic and political significance.[108]

The statement that the Court "expect[s] Congress to speak clearly if it wishes to assign an agency decisions of vast economic and political significance" suggests the formulation of a clear statement rule protecting politically powerful economic interests rather than traditional constitutional values.[109] The term "expects" seems to signal a shift from seeking to discern a statute's meaning to performing the function of establishing a set of expectations for Congress.[110] This articulation of expectations suggests an aim of disciplining Congress rather than divining the meaning of an enacting Congress's pronouncements, which were rather clear in this case.[111]

The Court in this passage and elsewhere openly signals skepticism of significant regulation,[112] even though Congress often legislates precisely in order to effectuate significant change and to control policy respecting future events. But the *UARG* Court's use of the phrase "unheralded power"[113] also suggests skepticism of novel statutory applications, a politically conservative stance.

Even the *UARG* Court, however, also developed rationales congruent with the spirit canon, suggesting that EPA's interpretation of the statute produced absurd results inconsistent with statutory structure.[114] Because of this, some judges

105. *See id.* at 315–24.

106. *Id.*

107. *See id.* at 342–43 (Breyer, J., concurring) (noting the CAA's "broad purpose" to "protect public health and welfare"); West Virginia v. EPA, 597 U.S. 697, 758 (Kagan, J., dissenting) (pointing out that the CAA aims to achieve "comprehensive pollution control"); Oren, *supra* note 103, at 58 (arguing that the *UARG* clear statement rule is inconsistent with the CAA's "protective philosophy").

108. *Util. Air Regul. Grp.*, 573 U.S. at 324 (citations and quotations omitted).

109. *See* Heinzerling, *supra* note 9, at 1988 (noting that the *Brown & Williamson* Court tied its finding of political significance to the tobacco industry's influence, suggesting that the major questions doctrine protects "regulated industries"); Sunstein, *supra* note 26, at 483 (recognizing that *UARG* articulated a clear statement rule allowing "the private sector to operate free from agency control").

110. *See* Heinzerling, *supra* note 9, at 1938 (describing the canons in *King* and *UARG* as "instruct[ing] Congress").

111. *Id.*

112. *Accord id.* at 1945–46 (characterizing *UARG* as having an "antiregulatory tone").

113. *Util. Air Regul. Grp.*, 573 U.S. at 325.

114. The *UARG* Court sought to justify disobeying the statute's literal language by invoking the statute's "structure and design." *See id.* at 321. It listed the requirements that apply to sources obtaining operating permits and comply with BACT, not to show that they are literally incompatible with applying BACT and operating

treated *UARG*'s major questions statements as dicta prior to *West Virginia v. EPA*.[115]

A trio of cases considering emergency stays of various COVID relief measures shows that the clear statement rule suggested in *UARG* and affirmed in *West Virginia* empowers federal courts to overcome clear statutory policies in regulatory cases. In *Alabama Ass'n of Realtors v. Dep't of Health and Human Services*, the Court stymied an eviction moratorium promulgated under a statute authorizing regulations that the Surgeon General deems necessary to prevent the spread of communicable diseases between states.[116] *Alabama Realtors* confirms *UARG*'s turn to judicial hegemony as a means of disabling faithful law execution.

There is little doubt that the statute relied upon by the government reflects a congressional decision to empower the executive branch to do whatever is necessary to limit the interstate spread of infectious diseases.[117] The government relied on a statute authorizing the Surgeon General to "make . . . such regulations as in his judgment are necessary to prevent the . . . spread of communicable diseases . . . from one State . . . into any other State."[118] This provision contains no limitations on the type of regulations that the executive branch may promulgate but does require the Surgeon General to have found adopted measures necessary

permit requirements to greenhouse gases, but as part of recognizing that these requirements would prove burdensome as applied to small sources. *Id.* at 321–24. This argument seems more rooted in the spirit canon's rejection of absurd consequences than in a serious analysis of the congruence of the EPA's interpretation with the whole statute. The EPA, however, had postponed regulation of smaller sources through its tailoring rule, and the D.C. Circuit had found that the polluters challenging that postponement lacked standing to challenge it. *See id.* at 312–14. The Supreme Court did not grant certiorari on the tailoring issue but decided it against EPA anyway. *See id.* at 314, 326. The *UARG* Court gave other reasons for not following the plain statutory language, which have no basis in traditional approaches to discerning congressional intent. It claimed that the EPA had sometimes interpreted the "any pollutant" trigger narrowly, which might mean that it had violated the statute in the past and provides no information about congressional intent. *See id.* at 318. Furthermore, the EPA had postponed regulation of many of the smaller sources that the literal statutory definition of the term "major emitting facility" of the CAA would require it to cover because it viewed regulation of small sources of greenhouse gases as impracticable. *See id.* at 308–09, 312–13 (describing the phasing of regulation and the retention of discretion to omit regulation of very small sources). The Court suggested that this failure to follow statutory language governing the size of regulated sources somehow justified overturning EPA's decision to heed the statutory language demanding that BACT and permitting obligations apply to all pollutants regulated under the CAA. *See id.* at 321–28 (chiding the EPA for maintaining that the statute did not authorize immediate regulation of very small sources whilst asserting the authority to apply BACT and operating permit requirements generally). Still, the overall thrust of the opinion points to concerns about absurd consequences, in keeping with the spirit canon.

115. *See, e.g.*, 597 U.S. 697, 769 (2022) (Kagan, J., dissenting) (characterizing *UARG* as an example of ordinary statutory construction based on the CAA's "structure and design").

116. *See* 141 S. Ct. 2485, 2486–88 (citing 42 U.S.C. § 264(a)). The statute also requires the DHHS secretary to approve the surgeon general's finding. *See* 42 U.S.C. § 264(a). This power has been delegated to the Centers for Disease Control. *See* 40 C.F.R. § 70.2 (2023).

117. *See id.* at 2490–92 (Breyer, J., dissenting) (explaining why the statute authorizes an eviction moratorium and any other measure designed to protect the public from disease outbreaks).

118. *Id.* at 2487 (quoting 42 U.S.C. § 264(a)).

to prevent interstate disease transmission. The government found that evictions would "inevitably" increase the interstate transmission of COVID-19.[119]

The majority used the major questions doctrine to overcome the statute's plain meaning, as it had in *UARG*, *Brown & Williamson*, and *King*.[120] It found that the "sheer scope of the CDC's claimed authority would counsel against the government's interpretation."[121] The Court unconvincingly claimed that the statute was at least ambiguous with respect to an eviction moratorium, but its holding rested on the expectation that "Congress . . . speak[s] clearly when authorizing an agency to exercise powers of vast economic and political significance."[122]

Two subsequent COVID cases—perhaps more starkly than any of the others—show that the Court uses the major questions doctrine to defeat statutory policies when it dislikes the application involved.[123] The Supreme Court issued decisions governing requests for emergency stays of two rules protecting Americans from COVID-19 through vaccination or masking requirements on the same day.[124] Both rules relied on very similar statutory language, which clearly authorized protection from threats to health.[125] Yet, the Court granted an emergency stay in one of these cases and denied it in the other.[126] As such, these two cases have something in common with the more disreputable side of the "spirit canon," the reading of judicial policy judgments into statutes.[127]

The Court in *National Federation of Independent Business ("NFIB") v. Occupational Safety and Health Administration ("OSHA")* held that a statute authorizing rules "necessary" to protect employees from "grave danger from exposure to . . . new hazards" to provide "healthful" employment likely does not authorize a requirement that large employers demand either vaccination or masking and testing to protect workers from COVID-19.[128] But in *Biden v. Missouri*, it held that a statute authorizing "requirements . . . necessary" for the "health and safety" of patients likely authorizes vaccination requirements for hospital workers.[129] The Court could not plausibly argue against either application based on the law's language or Congress's overall goals. It could not and did not dispute the proposition that the "new hazard" of COVID-19 presented a grave danger.[130] Nor did it deny that OSHA's rule for large employers provided a necessary

119. Temporary Halt in Residential Evictions in Communities with Substantial or High Transmission of COVID-19 to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 43244, 43248–49 (Aug. 6, 2021) (finding that evictions "would inevitably increase the interstate spread of COVID-19").

120. *See Ala. Realtors*, 141 S. Ct. at 2491 (Breyer, J., dissenting) (finding that "the statute's plain meaning includes eviction moratoria necessary to stop the spread of diseases like COVID-19").

121. *Id.* at 2489.

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

123. Nat'l Fed'n of Indep. Bus. (NFIB) v. OSHA, 595 U.S. 109, 123 (2022); Biden v. Missouri, 595 U.S. 87, 101 (2022).

124. *NFIB*, 595 U.S. at 123; *Biden*, 595 U.S. at 107.

125. *NFIB*, 595 U.S. at 123; *Biden*, 595 U.S. at 95.

126. *NFIB*, 595 U.S. at 135–36; *Biden*, 595 U.S. at 107.

127. *See supra* Section II.A and accompanying text; *NFIB*, 595 U.S. at 123; *Biden*, 595 U.S. at 95.

128. 595 U.S. at 123.

129. *Biden*, 595 U.S. at 93.

130. *NFIB*, 595 U.S. at 138 (Breyer, J., dissenting).

protection of workers' health.[131] Yet, the Court forbade OSHA from implementing measures "necessary" to protect workers while allowing regulation "necessary" to protect hospital patients to go forward.[132] Both the measure it allowed and the measure it forbade advanced the enacting Congress's policy of health protection.[133] So, the Court decided to forbid following statutory policy in coping with a public health crisis in the one case, but not the other.

In *NFIB*, the Court again relied on the major questions doctrine to defy the law's letter and spirit, stating that "[w]e expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance."[134] But the language in both cases was equally clear. Both statutes authorized protection of health and neither mentioned vaccines (or masking and testing) explicitly. The *Biden* decision, however, handed down on the same day as *NFIB*, does not mention the major questions doctrine.[135]

Biden's and *NFIB*'s disparate holdings under nearly identical statutory language reflect varying understandings of statutory spirit. The Court read the statute governing hospitals literally and accepted the spirit of the statute as aimed at protecting patients' health.[136] The Court, however, read the spirit of the Occupational Safety and Health Act ("OSHAct") as requiring a narrowing, much as the *Holy Trinity* Court read the statute on importing labor.[137] The *NFIB* Court interpreted the statute as applying only to workplace hazards that did not affect the health of the public more generally and suggested, incorrectly, that the administrative history of the statute supported that reading.[138] But the *NFIB* Court's conjuring of spirits does not reflect a serious effort to look at what the enacting Congress intended, because it paid little attention to the statute's purpose, legislative history, and overall structure.[139]

The Court likewise overcame plain language in limiting the EPA's authority to regulate greenhouse gas emissions from electric utilities in *West Virginia*.[140] That case posed the question of whether the EPA may consider emission

131. *Id.* at 118.

132. *See Biden*, 595 U.S. at 93.

133. *NFIB*, 595 U.S. at 130–31 (Breyer, J., dissenting) (showing why the measure it disallowed advances health protection of workers); *Biden*, 595 U.S. at 93.

134. *NFIB*, 595 U.S. at 117.

135. *See Biden*, 595 U.S. at 93–95 (upholding the hospital rule as "neatly fit[ing]" within the statutory language).

136. *Id.*

137. *Cf.* Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892).

138. *NFIB*, 595 U.S. at 118 (suggesting that the statute cannot apply to "dangers that all face"); *cf.* Richardson, *supra* note 8, at 188 (finding *NFIB* "profoundly unpersuasive" because "OSHA has long regulated general risks that appear in the workplace"); Indus. Union Dep't v. Am. Petroleum Inst. (Benzene), 448 U.S. 607, 612–13, 615 (1980) (discussing OSHA's express statutory authority to regulate toxic substances and noting that the entire population is exposed to benzene, the toxic substance regulated in the rule under review).

139. The majority does not mention the statute's goal of affording every worker "healthful working conditions." *Cf. NFIB*, 595 U.S. at 128 (Breyer, J., dissenting) (quoting the goal-setting provision). It says nothing at all about legislative history. *See id.* at 116–17. The majority's references to statutory structure suffer from a failure to consider how the provisions it cites can be construed to serve statutory goals and whether the Court's construction fits the toxics provisions.

140. West Virginia v. EPA, 597 U.S. 697, 700–01 (2022).

reductions realizable by shifting generation of electricity from coal-fired power plants to natural gas plants or renewable sources in establishing emission limits under section 111(d) of the CAA.[141] The *West Virginia* Court asked whether "restructuring the Nation's overall mix of electricity generation . . . can be 'the best system of emission reduction' within the meaning of section 111."[142] The Court did not squarely dispute the dissent's conclusion that the term "system of emission reduction" includes generation shifting in light of the broad meaning of "system" and statutory structure.[143] Instead, it required "clear congressional authorization" for basing emission limitations restructuring the utility industry on generation shifting.[144] Thus, the Justices did not allow the EPA to apply the "best system of emission reductions" because its discretionary judgment about what systems were best had the potential to have consequences that the Justices regarded as significant.[145]

Most recently, the Court undermined the goal of the Higher Education Relief Opportunities for Students Act—to provide educational debt relief for disaster victims—by striking down a rule authorizing forgiveness of up to $20,000 per student for student loan forgiveness for people with incomes below $125,000 as a measure relieving the economic setbacks associated with the COVID pandemic.[146] To reach that result it construed the statute very narrowly and, the dissent argued, unnaturally.[147]

While the pre-*UARG* cases and *King* can plausibly be read as ignoring plain language in order to achieve the statute's goals and limits as revealed by the statute as a whole and (at least in *King*) the circumstances of its enactment, it is hard to read *West Virginia*, *UARG* or the COVID cases that way.[148] The only other

141. *See id.* at 711–16 (explaining the generation shifting issue and its centrality to the decision below).

142. *Id.* at 720.

143. *See id.* at 725 (rooting its reading in EPA's prior interpretation, not the CAA's text); *id.* at 760–62 (Kagan, J., dissenting) (showing that the term "system" enjoys a broad dictionary definition and that Congress used more restrictive language elsewhere to confine EPA's authority).

144. *See id.* at 732 (admitting that "generation shifting can be described as a system" but finding no "clear authorization" for a system based on generation shifting).

145. *See id.*

146. *See* Biden v. Nebraska, 143 S. Ct. 2355, 2362–65 (2023) (describing the loan forgiveness program's terms); *id.* at 2391–94 (Kagan, J., dissenting) (explaining why the majority's ruling defeats the statutory purpose).

147. *Id.* at 2385 (Kagan, J., dissenting) (accusing the majority reading the statute "unnaturally"). The main statutory provision at issue authorized the government to "waive or modify any statutory or regulatory provision" applicable to student loans if necessary to avoid having a disaster put borrowers in a worse financial position than before. *Id.* at 2391. The government relied on that provision to waive statutory conditions limiting its authority to cancel student loan debt. *See id.* at 2363, 2370. It then relied on a provision authorizing it to establish new terms and conditions in lieu of waived or modified provisions to limit the waiver as described above. *Id.* at 2371. The dissent read the authority to waive, modify, and substitute conditions together as indicating an intention to provide broad authority to cope with an emergency. *See id.* at 2392 (Kagan, J., dissenting). The majority read the government's program as a "modification" of statutory conditions and relied on precent defining "modification" narrowly as encompassing only minor changes, not sweeping ones. *See id.* at 2368–71 (citing MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 225 (1994)).

148. *Accord* William W. Buzbee, *Anti-Regulatory Choice and Political Choice in* UARG, 39 HARV. ENV'T L. REV. 63, 70 (2015) (noting the Court's failure to consider the CAA's "goals" or legislative history). That is not to say that all of these cases were necessarily wrongly decided. One can imagine a plausible statutory

ground for departure from plain meaning under the spirit canon is the avoidance of "absurd results."[149]

While it might be hard to characterize the rejected COVID measures or EPA's Clean Power Plan as producing absurd results,[150] these cases and *UARG* create the impression that the Court finds the potential results of the executive branch's statutory interpretation distasteful.[151] Indeed, the Court in several recent major questions doctrine cases relied partly on the possibility that the interpretation the agency advanced would authorize actions that the Court disapproves of in *subsequent* cases, not in the case before it.[152] Elected officials frequently employ such parade-of-horribles reasoning in debating legislation, because they wish to consider the consequences of the rules they might adopt.[153] They choose the rules and need to avoid unintended consequences. The Court likewise sometimes employs parade-of-horribles reasoning in constitutional law cases, where

justification for rejecting the Clean Power Plan in *West Virginia v. EPA*, for example. *See, e.g.*, David M. Driesen, *Cap Without Trade: A Proposal for Resolving the Emissions Trading Problem Under § 111*, 43 ENV'T L. REP. 10555, 10558–61 (2013) (evaluating the statutory arguments respecting emissions trading under section 111(d)); Adler, *supra* note 10, at 55 (noting that the Court "did not make" available statutory arguments against the government's position). But the Court offered no such justification and instead relied on a doctrine that makes the significance of the issue involved, rather than congressional intent, control the outcome. Furthermore, the *West Virginia* Court seems to have defined the issue before it much more broadly than would be appropriate for a bona fide CAA ruling. *See West Virginia*, 597 U.S. at 720 (defining the issue as "whether restructuring the Nation's overall mix of electricity generation, to transition from 38% to 27% coal by 2030 can be the best system of emission reduction within the meaning of section 111").

149. *Cf.* Oren, *supra* note 103, at 55–56 (suggesting that the result the plain language indicated in *UARG* produced an absurdity justifying a departure from the meaning of statutory terms).

150. *See* Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 203 (1819) (the absurdity doctrine avoids results that "that all mankind would . . . unite in rejecting"); United States v. X-Citement Video, Inc., 513 U.S. 64, 82 (1994) (Scalia, J., dissenting) (stating that absurdity must be "absolutely clear" to justify a departure from plain meaning); Pub. Citizen v. U.S. Dep't of Just., 491 U.S. 440, 470–71 (1989) (Kennedy, J., concurring) (insisting that absurdity must be "obvious to most anyone" to provide a legitimate basis for statutory interpretation).

151. *See* NFIB v. OSHA, 595 U.S. 109, 118 (2022) (expressing concern that if OSHA can regulate in response to COVID it could regulate in response to "day-to-day dangers" like "crime, air pollution, [and] . . . communicable diseases"); Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 321–24 (2014) (explaining the negative consequences of applying BACT and permitting requirements to numerous smaller sources of greenhouse gases); *cf.* Note, *Major Question Objections*, 129 HARV. L. REV. 2191, 2192 (2016) (characterizing the major questions doctrine as producing "vaguely equitable intervention" based on the Court's sense of smell); Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. 97, 100 (2022) (stating that the major questions doctrine allows "the Court to reject . . . agency actions" that "the Court doesn't like").

152. *See NFIB*, 595 U.S. at 137; Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) (per curiam) (vacating a stay) (interpreting the CDC's authority to protect public health narrowly, in part because a broad reading might authorize requirements of free grocery delivery to the sick, manufacturers' provision of computers to facilitate work from home, and telecommunications firms providing high-speed internet access to facilitate remote work).

153. *See* Eric Lode, *Slippery Slope Arguments and Legal Reasoning*, 87 CALIF. L. REV. 1469, 1470, 1492 (1999) (finding slippery slope arguments synonymous with "parade of horribles" reasoning and "especially relevant [in] . . . debates concerning legislation and social policy"); David J. Mayo, *The Role of Slippery Slope Arguments in Public Policy Debates*, 21 PHIL. EXCH. 81, 81 (1990) ("[R]easoning which concludes that some . . . unobjectionable actions . . . must . . . be resisted, on the grounds that it is apt to lead . . . to some action, policy or law which is objectionable" plays a "prominent role in debate over . . . public policy."); Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1121–25 (2003) (finding legislators may vote against innocuous proposals for fear these will lead to undesirable political results, particularly in the area of gun control).

it writes the rules.[154] But the Court in the past has not relied, to my knowledge, on parade-of-horribles reasoning in pure APA cases, where it must determine whether the agency action before it is contrary to law, rather than whether an agency action or interpretation produces desirable policy.[155] The Court in the plain statement major questions cases rejects the Court's classic role of determining whether an agency action is contrary to law, in favor of judicial policy judgment.[156]

The Court also often sets aside arbitrary and capricious review and substitutes judicial policy judgment for that of the agency in recent major questions cases.[157] The best example comes from *NFIB*. The *NFIB* Court reviewed OSHA's decision to confine COVID regulation to businesses with 100 or more employees, exempting employees working outside.[158] The *NFIB* Court stated that OSHA could address COVID in especially crowded workplaces, but not in all large businesses.[159] That concession shows that the Court substituted its policy judgment for where the line should be drawn for that of OSHA, thereby circumventing the arbitrary and capricious test under the guise of a contrary to law ruling.[160] Thus, the major questions doctrine threatens the separation of powers by circumventing congressional instructions about how to review agency actions in the APA.[161]

Unlike the *Holy Trinity* Court, the modern Court does not squarely acknowledge that its major questions doctrine produces rulings that disregard

154. *See* Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361, 363–64 (1985) (cataloguing a few areas of constitutional law where parade-of-horribles arguments are common); *see also, e.g.*, NFIB v. Sebelius, 567 U.S. 519, 554 (2012) (arguing that if Congress could regulate inactivity it could order Americans to buy vegetables); United States v. Lopez, 514 U.S. 549, 564 (1995) (construing the Commerce Clause narrowly because otherwise Congress could regulate "all violent crime," "all activities that might lead to violent crime," and "family law"); *cf.* Ruth E. Sternglantz, Note, *Raining on the Parade of Horribles: Of Slippery Slopes, Faux Slopes, and Justice Scalia's Dissent in* Lawrence v. Texas, 153 U. PA. L. REV. 1097, 1098 (2005) (characterizing slippery slopes as a "mainstay of legal reasoning").

155. *See* 5 U.S.C. § 706(2)(A). I had a research assistant look up all administrative law cases decided between 2000 and 2022 and he found no cases with "parade-of-horribles" reasoning except some of the major questions cases.

156. *See* Grimes, *supra* note 20, at 832 (stating that the major questions doctrine invites "opportunistic interpretations").

157. *Cf.* 5 U.S.C. § 706(2)(A); *Major Question Objections*, *supra* note 151, at 2212. In reviewing agency adjudication, courts may also set aside agency action based on a lack of "substantial evidence." 5 U.S.C. § 706(2)I.

158. *See* NFIB v. OSHA, 595 U.S. 109, 113, 127 (2022) (majority and dissenting opinions) (explaining that that the rule applied to all employers with 100 or more employees, excepting employees working out of doors, and that OSHA estimated that the rule would "save over 6,500 lives and prevent over 250,000 hospitalizations in six months' time").

159. *See id.* at 119 (stating that OSHA can regulate "[w]here the virus poses a special danger" such as in "particularly crowded" workplaces).

160. *See* Motor Vehicles Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins., 463 U.S. 29, 43 (1983) (affirming the narrowness of the scope of review under the arbitrary and capricious test and stating that "a court" may not "substitute its judgment for that of the agency").

161. *Cf. Major Question Objections*, *supra* note 151, at 2209–10 (suggesting that the arbitrary and capricious test provides the appropriate home for concerns about majorness).

plain statutory text.[162] But the *West Virginia* Court came close, admitting that the Court's prior major questions cases had rejected regulatory assertions that had a "colorable textual basis" and "textual plausibility."[163] It might be hard for self-identified textualist judges to squarely admit that they override plain meaning in significant cases.

Indeed, in *Bostock v. Clayton County*, the Court specifically rejected the sort of approach to text that it takes in the major questions cases.[164] The *Bostock* Court held that discrimination against gay or transgender employees violates the Civil Rights Act's prohibition on sex discrimination.[165] Justice Gorsuch's majority opinion explains that the Court "has long rejected" the argument that a "new and important" application unexpected by Congress should produce non-enforcement of the law's fairly general text and a referral back to Congress.[166]

Yet the *UARG* Court, having little or no conventional statutory basis for disregarding the operative provisions' plain text, sought to legitimize this practice by suggesting a "clear statement rule" that applies when agencies make major decisions (but apparently not when unelected judges do so).[167] The COVID cases invoking the major questions doctrine echo the claim that the major questions doctrine employs a clear statement rule.[168] And *West Virginia* recharacterizes the entire "doctrine" as embodying the clear statement rule first explicitly suggested in *UARG*.[169]

In practice, this clear statement rule usually functions as what scholars call a super-strong clear statement rule, meaning judges deploy it to refuse to give general terms their ordinary meaning rather than to clarify a genuine ambiguity.[170] *UARG* provides a good example of this. The statute requires the application of BACT and a permit to major sources of "air pollutants" and *Massachusetts v. EPA*, in effect, required the EPA to list greenhouse gases as air pollutants.[171] Thus, the Court ignored the clear import of plain statutory text and

162. *See* West Virginia v. EPA, 597 U.S. 697, 723 (2022) (casting the doctrine as about "reluctan[ce]" to read a delegation into "ambiguous statutory text") (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)); Heinzerling, *supra* note 9, at 1952 (noting that the *UARG* Court cast its holding as a *Chevron* step two decision); Richardson, *supra* note 17, at 370 (noting that formally the *Brown & Williamson* Court cast its holding as a *Chevron* step one decision, where congressional intent is clear).

163. *West Virginia*, 597 U.S. at 722.

164. 590 U.S. 644, 674–75 (2020).

165. *Id.* at 682.

166. *Id.* at 674–75.

167. *See* Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324–25 (2014).

168. NFIB v. OSHA, 595 U.S. 109, 117–18 (2022); Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2487–89 (2021).

169. *See West Virginia*, 596 U.S. 697 at 723 (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324) (refuting the dissent's claim that its prior major questions cases involved ordinary statutory interpretation by identifying "clear congressional authorization" as the "bottom line" requirement in major questions cases).

170. *See* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 611–12 (1992) (characterizing "super-strong clear statement rules" as those which "can be rebutted only through unambiguous statutory text targeted at the specific problem").

171. *See Util. Air Regul. Grp.*, 573 U.S. at 308–09, 316; 42 U.S.C. § 7475(a); Massachusetts v. EPA, 549 U.S. 497, 528–29 (2007).

rewrote the statute in holding that most major sources of greenhouse gas emissions need not employ BACT or obtain a permit.[172]

Even if one regards the statutes interpreted in some of the cases before and after *Gonzales* (the only case I have classified as interpreting ambiguous language) as ambiguous, the Court now uses the clear statement rule to depart from a serious effort to determine statutory meaning.[173] Then-Judge Kavanaugh recognized that the clear statement rule from *UARG* trumps *Chevron* deference in a dissent from a D.C. Circuit opinion approving the net neutrality rule.[174] But this understates the deviance of the clear statement rulings from the norm of courts exercising judicial review as a check to make sure that agency action conforms to the law. Normally, even in the absence of deference, the Court interprets ambiguous legislation to conform it to statutory goals and structure, not to automatically overrule agency action.[175] But as Justice Kavanaugh implicitly admits, the Court abandons serious inquiry into statutory meaning when confronted with ambiguous language governing important agency decisions.[176] When an agency interprets ambiguous statutory language to resolve a major question, the court simply holds the rule "unlawful" according to Kavanaugh.[177]

The (super strong) clear statement rule (now affirmed in *West Virginia*)[178] authorizes judges to give up all serious efforts to compare an executive branch action to congressional policy in significant cases.[179] For it prohibits judges employing it from giving substantial weight to general statutory text, stated legislative purpose, and statutory design to determine whether an executive branch decision is contrary to law.[180] It simply holds that when legislation does not mention the specific action or consequence a judge finds significant, the Court will upend executive branch implementation of the law.[181] The feeble efforts to

172. *See Util. Air Regul. Grp.*, 573 U.S. at 333–34 (holding that the EPA may apply BACT only to facilities that already must hold a permit because of their emissions of other pollutants).

173. *See* Heinzerling, *supra* note 9, at 1938 (noting that the canons used in *UARG* and *King* "came from somewhere outside of the statutes").

174. U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 419–21 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of hearing en banc) (characterizing the *UARG* clear statement rule as an exception to *Chevron* deference).

175. *See, e.g.*, Becerra v. Empire Health Found., for Valley Hosp. Med. Ctr., 597 U.S. 424, 434–45 (2022) (using text and structure to interpret an ambiguous provision of the Medicaid statute without citing *Chevron*). Furthermore, even in the 19th century, courts gave some deference to agency interpretation. *See* Emerson, *supra* note 28, at 2029–30.

176. *U.S. Telecom Ass'n*, 855 F.3d at 419–21 (Kavanaugh, J., dissenting).

177. *Id.* ("If a statute only *ambiguously* supplies authority for the major rule, the rule is unlawful.") (emphasis in original).

178. *See* West Virginia v. EPA, 597 U.S. 697, 699 (2022).

179. William Eskridge suggested before the Court decided the COVID cases that the major questions doctrine might preserve the continuity of major policies. ESKRIDGE, *supra* note 15, at 288–89. But those cases and the CAA cases undermine the major policies of the statutes they purport to interpret.

180. *See* Heinzerling, *supra* note 9, at 1939–40.

181. *Cf.* United States v. Locke, 471 U.S. 84, 96 (1985) (quoting Moore Ice Cream Co. v. Rose, 289 U.S. 373, 379 (1933)) (eschewing the use of clear statement rules to effectuate "disingenuous evasion").

invoke text and structure in the clear statement cases function as window dressing in light of the clear statement rule's power.[182]

Accordingly, the clear statement rule does not function as an interpretive canon—a canon of construction that aims to provide a tool for discerning the enacting Congress' intent. Rather, it serves as a substantive canon of construction, like all other clear statement rules.[183] Clear statement rules reflect judicial value judgments, as William Eskridge and Philip Frickey have explained.[184] *West Virginia*, *UARG*, and the COVID cases implement a judicial policy of striking down regulation that the Court finds unreasonable.[185] The major questions doctrine is a substantive canon of construction masquerading as an interpretive canon of construction.[186]

Judicial value judgments in this context prove more constitutionally problematic than under other clear statement rules. When the Court uses either the avoidance canon or a formal clear statement rule, to limit legislation's infringement of constitutional rights, the values that the clear statement rule protects come from the Constitution.[187] The avoidance canon, for example, tends to encourage free speech,[188] protect criminal defendants,[189] and limit regulation of churches,[190] because of the substantive content of the constitutional provisions underlying the constructions.[191] Justice Gorsuch's concurrence in *West Virginia* claims that the major questions doctrine "works in much the same way" as the clear statement rules respecting waiver of sovereign immunity and retroactive liability.[192] But the Constitution disfavors legislation imposing retroactive liability and liability for state government.[193]

Therefore, the substantive policies that the judicial constructions implement often have roots in constitutional values rather than judicial policy

182. *See, e.g.*, *West Virginia*, 597 U.S. at 766 (Kagan, J., dissenting) (noting that the Court does not seriously discuss the meaning of the CAA "until page 28 of a 31-page opinion"); Adler, *supra* note 10, at 52 (noting that Justice Robert's opinion did not focus on the "intricacies of statutory text," but engaged in "a bit of traditional interpretive throat clearing about how to conduct statutory interpretation in an 'ordinary case'").

183. *Cf.* Biden v. Nebraska, 143 S. Ct. 2355, 2376–83 (2023) (Barrett, J., concurring) (rejecting the "clear statement" view of the major questions doctrine and concluding that the major questions doctrine is an interpretive canon). I have drafted a separate article analyzing this concurrence.

184. Eskridge & Frickey, *supra* note 170, at 595–96.

185. *See supra* notes 86–138 and accompanying text.

186. I am grateful to Jack Beerman for making this point clear.

187. *See* John Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 406–07 (2010); Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 171 (2010).

188. *See, e.g.*, Int'l Ass'n of Machinists v. S.B. Street, 367 U.S. 740, 749–50 (1961).

189. *See, e.g.*, Jones v. United States, 526 U.S. 227, 239–40 (1999).

190. *See, e.g.*, NLRB v. Cath. Bishop of Chi., 440 U.S. 490, 507 (1979) (construing a statute to avoid NLRB jurisdiction over church-operated schools).

191. *See, e.g.*, *id.*

192. *See* West Virginia v. EPA, 597 U.S. 697, 736–37 (2022) (Gorsuch, J., concurring).

193. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54 (1996) (reading the 11th Amendment as confirming that sovereign states are "not . . . amenable to" private lawsuits without their consent); Landgraf v. USI Film Prods., 511 U.S. 244, 266 (1994) (stating that "several provisions of our Constitution" express an "antiretroactivity principle").

decisions lacking constitutional foundation.[194] By contrast, application of the major questions doctrine requires judges to make a policy decision about which consequences of executive branch decisions are important and troubling enough to justify overriding congressional policy.[195] As all commentators have recognized, no standard exists to determine what constitutes a major question.[196] Accordingly, the major questions doctrine functions as a license for judges to impose their policy views on the polity under the guise of statutory interpretation. The Constitution does not disfavor politically and economically significant legislation (except perhaps under the *Lochner* Court's view of the Constitution).[197] Thus, the major questions doctrine, on its face, encourages Congress to attend to conservative Justices' political preference for small government, rather than constitutional values.[198]

Even when using statutory canons to protect constitutional rights, the Court generally insists on plausible constructions of statutes and a substantial doubt about the statute's constitutionality.[199] Without such limitations the judiciary has no remotely plausible defense to John Manning's charge that clear statement rules are unjustifiable because they ignore the constitutional values that impose limits on the scope of constitutional doctrines.[200] For example, the nondelegation doctrine is underenforced because too much enforcement of it would cripple the Article I power of Congress.[201] The major questions cases, by contrast, do not squarely identify a specific constitutional doctrine, let alone justify a finding of serious constitutional doubts.[202]

194. *Cf.* Barrett, *supra* note 187, at 163–64 (stating that courts may never depart from plain text and can only eschew the "best interpretation of a statute" for constitutional reasons).

195. Capozzi, *supra* note 72, at 221.

196. *See, e.g.*, Heinzerling, *supra* note 9, at 1984.

197. *See* David M. Driesen, *Judicial Review of Executive Orders' Rationality*, 98 B.U. L. REV. 1013, 1022–25 (2018) (discussing the *Lochner* Court's activist decisions).

198. *See generally* Eskridge & Frickey, *supra* note 170, at 638 ("[C]lear statement rules . . . permit the Court to override probable congressional preferences . . . in favor of norms and values favored by the Court.").

199. *See* William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 576 (2013) (book review); Eskridge & Frickey, *supra* note 170, at 598–600 (treating the canon of avoidance as a clear statement rule and noting these limitations); *see also, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 471 (2001) (affirming that even in cases "severe" "constitutional doubt" courts can only choose a "reasonably available interpretation[]" of relevant statutory text); Miller v. French, 530 U.S. 327, 341 (2000) (declining to apply the canon of avoidance because the narrowing construction sought was not a "reasonably available" construction); Almendarez-Torres v. United States, 523 U.S. 224, 237–38 (1998) (holding that the avoidance canon only applies when a "serious likelihood" exists that absent a narrowing construction the Court would strike down the statute); United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916) (explaining that the canon of avoidance only applies in cases of "grave doubts" about a statute's constitutionality).

200. *See* John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 404–05 (2010) (arguing that clear statements rules lack constitutional legitimacy because they shred "limits" on "constitutional values" found in the constitutional text).

201. *See* Mistretta v. United States, 488 U.S. 361, 372 (1989) (recognizing that "Congress . . . cannot do its job" without "an ability" to issue "broad general directives").

202. *See* West Virginia v. EPA, 597 U.S. 697, 723 (2022) (referring enigmatically to separation of powers principles); Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J.), *denying cert. to* 718 F. App'x 360 (6th Cir. 2017) (noting that the Court has not adopted a nondelegation principle for major questions); Joshua S. Sellers, "*Major Questions" Moderation*, 87 GEO. WASH. L. REV. 930, 957 (2019) (finding that the canon of

The clear statement rule affirmed in *West Virginia* interferes with future legislative processes to a much greater extent than other clear statement rules, like those respecting retroactivity and sovereign immunity.[203] Congress cannot, even in principle, draft legislation that avoids raising significant unanticipated issues in the future.[204] Nor can it predict which issues future judges will find sufficiently significant and novel as to trigger a demand for extraordinary specificity.[205] A Congress enacting legislation—even if sufficiently unified and well-informed to legislate at a high degree of specificity—cannot prevent the courts from random interference with its policy goals years later through sudden announcements that this or that matter is so significant that Congress must address it with more specificity than it already has. Thus, for example, the Congress that required that pollutants be subject to BACT and operating permit requirements could not anticipate that a Court would find this unacceptable when applied to greenhouse gases, substances that EPA first identified as pollutants almost two decades after the last amendment to the CAA.[206] Nor could Congress know that it should specifically decide what to do about evictions, masking, and vaccination outside of hospital settings when drafting requirements to protect public health from pandemics.[207] In short, the major questions doctrine disempowers Congress by creating an anti-regulatory presumption that Congress cannot readily draft around when crafting new legislation.

Chief Justice Roberts, however, asserted, without any supporting explanation, that the major questions doctrine serves the separation of powers in *West Virginia*.[208] Several of the Justices have suggested that the major questions doctrine serves separation of powers values by making sure that Congress, rather than the executive branch, resolves major policy questions.[209] While the Supreme Court has not explicitly endorsed this or any other explanation for the idea that the major questions doctrine serves the separation of powers, the *West Virginia* Court did "presume" that "Congress intends to make major policy decisions itself" rather than leave them to the executive branch.[210] By positing a general congressional intention to resolve major questions itself, the Court suggests

constitutional avoidance cannot justify the major questions doctrine, because it does not rest on identification of a serious constitutional problem).

203. *See West Virginia*, 597 U.S. at 699.

204. *See* Freeman & Spence, *supra* note 17, at 79 (explaining that "Congress cannot anticipate all of the ways in which an agency must apply its statutory mandate"); Heinzerling, *supra* note 9, at 1948 (noting that under *UARG* Congress "must not only be clear, but also clairvoyant"); McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 LAW & CONTEMP. PROBS. 3, 10 (1994) (noting that scholars "have long recognized that ambiguity about future contingencies is a problem for all legislation").

205. *See* Heinzerling, *supra* note 9, at 1983–84 (internal quotation marks omitted) (discussing the unpredictability of the "major questions idea").

206. Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 308 (2014).

207. *See, e.g.*, Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2486 (2021).

208. *West Virginia*, 597 U.S. at 723.

209. *See id.* at 740 (Gorsuch, J., concurring) (linking the major questions doctrine to preserving legislative control over major questions); U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 419–21 (D.C. Cir. 2017) (Kavanaugh, J., dissenting), *denying reh'g en banc* (linking separation of powers to the idea that Congress should resolve major policy issues).

210. *See West Virginia*, 597 U.S. at 723.

that the major questions doctrine functions as an interpretive canon of statutory interpretation aimed at divining congressional intent.[211] But by linking the doctrine to the separation of powers and suggesting that Congress should decide major questions, the Court implies that the major questions doctrine protects congressional authority to decide major questions from executive branch usurpation.[212] If it does not do that, it becomes difficult to see how it could possibly serve the separation of powers.

III. THE MAJOR QUESTIONS DOCTRINE AND CONGRESSIONAL AUTHORITY

This Part examines the idea that the major questions doctrine serves the separation of powers by protecting congressional legislative authority through an analysis of constitutional structure and the dynamics of the legislative process. It begins with background about the separation of powers, which establishes that the Framers sought to create stable law by making statutes difficult to amend and demanding faithful law execution by the executive branch.[213] Courts support stability in legislatively established policy through judicial review of executive branch decisions designed to make sure that the executive branch implements policies embodied in statutes.[214]

Building on Part I, this Part shows that the major questions doctrine undermines the enacting Congress by undermining its policies' control over future events.[215] It then shows that the major questions doctrine does not protect the legislative authority of current and future Congresses, because Congress remains free to override agency interpretations it disagrees with even if the courts affirm significant novel agency actions.[216]

This Part then argues that the clear statement rule converts the judiciary into an ally of the congressional faction that supports deregulation and allows that faction to achieve its goals without accepting political accountability for outlawing standards that implement policies that enjoy public support.[217] It then considers the possibility that major questions doctrine rulings might catalyze congressional attention to major questions that Congress has failed to specifically address.[218] It shows that constitutional structure, public choice theory, and empirical evidence suggest that major questions rulings will usually fail to catalyze a legislative response.[219] Finally, it explains that a dynamic theory of legislation—which does support judicial updating of statutes—cannot support a doctrine that simply rejects agency actions without engagement with the relevant

211. *Id.*
212. *Id.*
213. *See* discussion *infra* Section III.A.
214. *West Virginia*, 597 U.S. at 735.
215. *See* discussion *infra* Section III.B.
216. *See* discussion *infra* Section III.C.
217. *See* discussion *infra* Section III.D; *cf.* Heinzerling, *supra* note 9, at 1938 (suggesting that the *UARG* clear statement rule "mask[s] a judicial agenda hostile to a robust regulatory state," because it requires clear statements for regulation but not for deregulation).
218. *See* discussion *infra* Section III.E.
219. *See* discussion *infra* Section III.E.

public values.[220] This Part concludes that the major questions doctrine undermines separation of powers, democracy, and the rule of law.[221]

A. The Separation of Powers, Stability, and Amendment

1. Legislation.

The Constitution vests lawmaking power in a Congress of elected representatives.[222] But in an effort to foster deliberation, the Constitution makes legislation difficult to enact.[223] A bill becomes law only upon passage by both houses of Congress and the President's agreement, except when two-thirds majorities in both houses override a presidential veto.[224]

Senate rules augment these difficulties by effectively requiring a 60% majority in the Senate to pass legislation.[225] The legislation the Court interprets under the major questions doctrine enjoyed a high degree of consensus at the time of enactment.[226]

Article I aims to prevent domination of a faction in favor of compromises aiming to serve public interests.[227] The need to obtain the assent of the House (representing the People at large) and the Senate (representing the various states) means that legislation must reflect compromises among the People's representatives embodying common community interests.[228]

The Supreme Court's recent major questions doctrine cases proclaim that the Court "expects Congress to speak clearly" when it wants to authorize agencies to resolve major policy issues.[229] But Congress does not speak at all, because it is a collective body.[230] Nor can it enact legislation as specific as that flowing

220. *See* discussion *infra* Section III.F.

221. *See generally* discussion *infra* Sections III.B–F.

222. *See* U.S. CONST. art. I.

223. *Accord* INS v. Chadha, 462 U.S. 919, 951 (1983) (stating that the constitutional structure provided for "full study and debate" of proposed legislation); *cf.* West Virginia v. EPA, 597 U.S. 697, 738 (Gorsuch, J., concurring) (stating that the "framers deliberately sought to make lawmaking difficult").

224. *Chadha*, 462 U.S. at 951.

225. *See* Blackman, *supra* note 13, at 294–95 (noting that under Senate rules the "minority party" can block a bill enjoying majority support); David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 137 (2000) (noting that a 60% majority is needed to overcome a filibuster in the Senate).

226. The 1970 CAA passed unanimously in the Senate and with only one no vote in the House. 116 CONG. REC. S33,120 (1970); 116 CONG. REC. H19,244 (1970). The OSHAct also passed by large margins. *See* 116 CONG REC. S37,632 (1970); 116 CONG. REC. H38,723 (1970).

227. *See* U.S. CONST. art. I.

228. *Accord West Virginia*, 597 U.S. at 738–39 (Gorsuch, J., concurring) (discussing the "need for compromise inherent" in the requirement for "broad consensus" to pass legislation).

229. *See* Eskridge & Nourse, *supra* note 65, at 1732 (noting that "statutory text may not cleanly address novel fact situations because . . . those facts were not anticipated" or the need to pass legislation "eclipsed" drafting issues).

230. *See generally* Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992).

from the pen of a single enlightened and clairvoyant individual able to imagine all future situations to which the law might apply.[231]

The compromises needed to make a democracy function usually require legislation at a fairly high degree of generality.[232] Often, Congress can agree only on general policies.[233] It must, of necessity, often leave application of policies to the executive branch headed by an elected President with the responsibility to faithfully execute the laws.[234] Hence, general laws often prove essential to having a self-governing democracy.

Legislation usually acts prospectively.[235] That means that it does not usually function like a judicial decision, retroactively resolving a single current controversy.[236] Instead, it contains general principles designed to cover a range of future cases.[237] Nor can Congress anticipate all of the issues that future cases will present.[238] As Justice Kagan explained in her *West Virginia* dissent, Congress cannot "anticipate changing circumstances and the way they will affect regulatory techniques."[239] It often must create general policies to the extent it aims to provide enduring policy.

The Constitution supports broad legislative authority partly because the Constitution is intended to allow society to adapt to the *crises* of human affairs, as Justice Marshall pointed out in *McCullogh v. Maryland*.[240] The Constitution addresses crises in part by enacting general legislation announcing policies that can apply during an emergency as an alternative to arbitrary executive branch decisions.[241] The policy of protecting public health expressed in statutes passed to enable the country to adapt to new health crises furnishes an example.[242] While Congress may adopt specific measures in response to an emergency, legislative processes requiring compromise can be slow and a crisis can sometimes lead to

231. *See* STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 105 (2005) ("No one can foresee all possible applications of a statue.").

232. *See* Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1502 (2015) ("A large multimember body will have many wills and represent different factions and interests in society, making it difficult for members to act collectively."); *see* BREYER, *supra* note 231, at 103 (explaining that administration compliments democracy when it implements "legislatively determined *general* policy objectives") (emphasis added).

233. BREYER, *supra* note 231, at 103.

234. Rao, *supra* note 232, at 1478.

235. *See id.* at 1477–78.

236. *See id.*

237. *See id.*

238. William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 879 (1975) (citing the "limits of human foresight" as a reason to "assure that most legislation will be enacted in a seriously incomplete form").

239. West Virginia v. EPA, 597 U.S. 697, 781 (2022) (Kagan, J., dissenting).

240. 17 U.S. 316, 415 (1819) (upholding legislation establishing a politically controversial and economically significant national bank).

241. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 649–55 (1952) (Jackson, J., concurring) (explaining that legislative control over emergency powers preserves free government).

242. *See* Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2496 (2021); NFIB v. OSHA, 595 U.S. 109, 112 (2022); Biden v. Missouri, 595 U.S. 87, 89 (2022).

dangerous paralysis if Congress is politically divided or at odds with the President.[243]

2. Amendment.

The Constitution also makes laws difficult to amend, for amendment of previously enacted laws likewise must run the gauntlet of bicameralism and presentment of a bill to the President (and the need for a supermajority to pass the Senate).[244] The difficulty of amendment helps create a stable rule of law.[245] The Framers supported stable legal frameworks as an alternative to rapidly changing law and arbitrary decision-making.[246] Thus, the Constitution keeps general laws in place unless and until Congress amends them.

The constitutional structure governing statutory amendments, however, makes it easier to override executive branch actions than judicial decisions reining them in. Under the CRA, Congress can veto an agency rule through a simple majority vote (absent a presidential veto) under expedited procedures and bar promulgation of substantially identical rules in the future.[247] Overruling a judicial decision limiting the scope of legislation, however, usually requires a supermajority in the Senate.[248]

The Constitution's reliance upon elected officials to amend legislation constitutes an essential part of self-government.[249] Elected officials amend the laws, and their decisions tend to reflect their constituents' views. Furthermore, they remain politically accountable to their constituents when voting for unwise amendments or failing to support needed changes.

243. *See, e.g.*, *Ala. Ass'n of Realtors*, 141 S. Ct. at 2486; *NFIB*, 595 U.S. at 112; *Biden*, 595 U.S. at 89.

244. *See* Landes & Posner, *supra* note 238, at 878 (noting that the requirement for majority support and other impediments generates transaction costs making legislation difficult to amend or repeal).

245. *See id.* (noting that transaction costs and the "press of other legislative business" make substantial alteration of law unlikely).

246. *See* NO. 62: THE SENATE (decrying the problem of unstable laws and touting the Senate as a solution), *in* THE FEDERALIST PAPERS 374, 378 (Clinton Rossiter ed. 2003).

247. *See* Safari Club Int'l v. Haaland, 31 F.4th 1157, 1166–70 (9th Cir. 2022) (holding that a baiting restriction for a single wildlife refuge is not "substantially the same" as a CRA-abrogated rule forbidding baiting brown bears in all Alaska wildlife refuges); MAEVE P. CAREY & CHRISTOPHER M. DAVIS, CRS, CONGRESSIONAL REVIEW ACT ISSUES FOR THE 117TH CONGRESS: THE LOOKBACK MECHANISM AND EFFECTS OF DISAPPROVAL (2021) (examining the extent to which congressional disapproval of a rule under the CRA prohibits future agency action); Paul J. Larkin, Jr., *The Trump Administration and the Congressional Review Act*, 16 GEO. J.L. & PUB. POL'Y 505, 508 (2018) ("The [CRA] . . . allows Congress to consider a rule and quickly decide whether to invalidate it without fear of a Senate filibuster.").

248. Christiansen & Eskridge, *supra* note 21, at 1439–40.

249. *See e.g.*, West Virginia v. EPA, 597 U.S. 697, 737–38 (2022) (Gorsuch, J., concurring) (quoting THE FEDERALIST NO. 37, at 227 (James Madison) (Clinton Rossiter ed. 1961)) (discussing the Constitution's aim of making sure that power "would be derived from the people").

3. The Court's Role in Preserving the Rule of Law.

Implementation of law requires adaptation to new circumstances.[250] Accordingly, those implementing the law must make decisions with consequences that the enacting Congress did not contemplate. Therefore, as Justice Scalia put it, "a certain degree of discretion, and thus of lawmaking inheres in most executive or judicial action."[251] The rule of law demands that the executive branch follow the existing law's policies, even though it may accommodate new circumstances in various ways within the framework enacted legislation provides.

The President generally exercises control over executive branch decisions resolving economically and politically significant issues, partly through executive orders providing for White House review of economically significant rules and those creating novel legal issues.[252] The Supreme Court's *Seila Law* decision recognizes that agency decisions tend to reflect presidential policies when the President has authority to remove agency heads.[253] Hence, agency resolution of major questions typically reflects a presidential decision enacted pursuant to his authority to execute the law.[254]

On the other hand, a President promising policies at odds with existing law may seek to improperly implement statutes.[255] In other words, a President may seek to circumvent the amendment process for changing legislation by engaging in maladministration.[256] Bureaucrats and appointed officials also can overreach and make arbitrary decisions.

Accordingly, the judicial branch of government reviews executive branch decisions to make sure that they are non-arbitrary and conform to law.[257] During the *Lochner* era, the Court sometimes substituted its own policy views for those

250. *See* William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1483 (1987) (describing statutory interpretation as the application of an old text "to a present problem").

251. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 475 (2001) (quoting Mistretta v. United States, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting) (emphasis omitted) (unanimous opinion)).

252. *See* Emerson, *supra* note 28, at 2077 (noting that because executive orders require OIRA review of actions costing $100 million or more the White House must approve "most agency interpretations that a court could plausibly construe as implicating a major question"); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2383–84 (2001) (discussing White House control over major rules).

253. Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2197 (2020) (stating that officials remain accountable to the President because he can remove them).

254. *See, e.g.*, *West Virginia*, 597 U.S. at 714 (discussing the White House's involvement in the Clean Power plan); NFIB v. OSHA, 595 U.S. 109, 114–15 (2022) (discussing President Biden's involvement in the OSHA rule); *cf.* Emerson, *supra* note 28, at 2081 (noting that the major questions cases ignore presidential input as a source of democratic authority).

255. *See* Emerson, *supra* note 28, at 2079 (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 655 (Jackson, J., concurring)) (noting that extreme forms of executive control risk substituting the "will of the President" for reasoned decisions under law).

256. *See* Noah A. Rosenblum, *The Antifascist Roots of Presidential Administration*, 122 COLUM. L. REV. 1, 63–64 (2022) (explaining how concern about fascism led those designing the APA to guard against administration becoming a mere extension of presidential "personality").

257. *See* Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 594–95 (1995) (identifying as canonical a view of statutory interpretation as focused on "ascertaining and then effectuating the legislative will").

embodied in the law or in executive branch decisions implementing it.[258] The Supreme Court abandoned Lochnerian decision-making in the administrative realm at about the same time that it repudiated the *Lochner*-era Court's infamous substantive Due Process jurisprudence.[259] Congress enacted the APA in 1946, in part, to codify the Court's retreat from administrative Lochnerism.[260] The APA, however, does not transfer the law amendment function from Congress to the courts. Instead, it provides judges only with the authority to set aside agency policy decisions that are contrary to law or arbitrary and capricious.[261] Thus, the "properly [] limited role of the courts in a democratic society" with respect to government regulation focuses heavily on making sure that the executive branch implements the policies found in statutes.[262]

B. Protecting the Legislative Authority of the Enacting Congress

Because the Constitution and Congress generally intend to create enduring and stable law, judges have traditionally seen themselves as agents of the enacting Congress, making sure that the executive branch implements congressional policies rather than their preferred policies.[263] Courts help preserve the rule of law by ensuring that the executive branch implements policies embodied in legislation. Part II suggested that some of the early major questions doctrine cases can be seen as consistent with the Court's rule of law function.[264] But we have seen that the major questions doctrine as articulated in *West Virginia* authorizes departures from the policies that the enacting Congress established and therefore

258. *See* Driesen, *supra* note 197, at 1022–25 (discussing the application of *Lochner*-era reasonableness review to both legislation and implementing rules).

259. *See* Fed. Power Comm'n v. Hope Nat. Gas Co., 320 U.S. 591, 602 (1944) (stating that the Commission's "expert judgment" triggers a "presumption of validity"); Fed. Power Comm'n v. Nat. Gas Pipeline, 315 U.S. 575, 586 (1942) ("The Constitution does not bind rate-making bodies to the service of any single formula."); *see also* Motor Vehicles Mfr's. Ass'n v. State Farm Mut. Ins., 463 U.S. 29, 43 n.9 (1983) (denying that reasonableness review under the APA mirrors reasonableness review under the substantive due process doctrine).

260. *See* Driesen, *supra* note 197, at 1030–31 (explaining that the APA codified the deferential approach to agencies found in cases like *Hope Gas Co.* and *Natural Gas Pipeline*); *see also Hope Nat. Gas Co.*, 320 U.S. at 602; *Nat. Gas Pipeline Co.*, 315 U.S. at 586.

261. 5 U.S.C. § 706(2)(a); *see also* Driesen, *supra* note 197, at 1030.

262. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 583 (1992) (Stevens, J., concurring) (quoting Warth v. Seldin, 422 U.S. 490, 498–99 (1975)) (citing the properly limited role of courts as justifying standing requirements).

263. *See* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 905 (2013) (stating that "[m]ost practicing judges claim allegiance" to a "faithful agent" model); John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 71–72 (2006) (stating that in "our constitutional system, federal courts act as faithful agents of Congress").

264. *See* discussion *supra* Part II; *cf.* Emerson, *supra* note 28, at 2050 (arguing that "[t]he major questions cases are therefore best understood as a way to reassert the primacy of courts over agencies *as the interpretive agents of Congress*") (emphasis added). This Article, however, establishes that the doctrine announced in *West Virginia* has nothing to do with courts acting as "interpretive agents of Congress." *Id.* The Court has basically abandoned that function. *Cf. id.* at 2051 (making a good case that the *King* Court did act as a congressional agent).

does not protect the authority of Congresses that enact laws to address important issues.[265]

Congress writes legislation to affect the future and expects that the executive branch will pursue the policies it has chosen and announced to the American people.[266] This expectation is probably especially robust with respect to major questions. A huge number of matters compete for legislative attention. The passage of legislation usually reflects a desire to make policy in economically, politically, and socially significant cases above all.[267] Legislation cannot establish policy in significant cases if the Court uses the significance of an application of the legislation as a reason to prevent its implementation. Accordingly, judicial decisions to abandon congressional policies in significant cases interfere with the congressional prerogative to shape the future through generally applicable laws.

The Constitution's impediments to statutory amendments and instructions that the President faithfully execute the law require that the executive branch apply old law to new problems. For law to have stability it must apply to new circumstances. Hence, the major questions doctrine's suspicion of new implementation decisions undermines the separation of powers by preventing faithful execution of the law by elected Presidents.

Furthermore, judges may lack the capacity to distinguish novel from old applications of legal authority, as such a determination requires extraordinarily detailed knowledge of regulatory history over a long period of time.[268] The *NFIB* Court's suggestion that protection from COVID in the workplace is novel because COVID also presents a hazard to the general public provides the best example of this capacity problem.[269] The *NFIB* Court did not discuss a provision of the OSHAct that authorizes regulation of toxic substances, all of which pose risks to both the general public and workers.[270] But the problem goes deeper. Every new rule has some novel and some old aspects, and the decision about

265. *See generally* Barrett, *supra* note 187 (exploring the tension between substantive canons and the faithful agency model).

266. *See* S. DOC. NO. 79-248 at 252 (1946) (affirming that the APA seeks to ensure the administrative "effectuation" of Congress's "declared policies"); *see also* Schaffer Transp. Co. v. United States, 355 U.S. 83, 87–88 (1957) (stating that the ICC must follow the congressional policy embodied in its governing statute); Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation From the Inside: An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 740 (2014) (explaining that committee and members' staff provide legislative counsel with policy bullet points to guide the drafting process); Gluck & Bressman, *supra* note 263, at 971–72 (explaining that legislative counsel use text and legislative history to guide agencies).

267. *See, e.g.*, West Virginia v. EPA, 597 U.S. 697, 756–57 (2022) (Kagan, J., dissenting) (explaining that the CAA was "major legislation designed to deal with a major public policy issue"). *But see* Chad Squitieri, *Who Determines Majorness*, 44 HARV. J.L. & PUB. POL'Y 463, 465 ("[D]ifferent legislators . . . have different understandings of which policy questions are major.").

268. Because of page limitations, a lack of institutional continuity among agency lawyers and staff, and uncertainty about when the major questions doctrine applies, briefing may provide only limited assistance in solving this problem.

269. NFIB v. OSHA, 595 U.S. 109, 119 (2022) (suggesting that OSHA "has never before adopted a broad public health regulation").

270. 29 U.S.C. § 655(b)(5); *see* Indus. Union Dep't v. Am. Petroleum Inst. (Benzene), 448 U.S. 607, 612–13 (1980) (discussing OSHA's express authority to regulate toxic substances).

whether to characterize a rule as novel depends on what aspects judges seize upon as important.[271] Novelty determinations may well reflect judges' political views.

Judicial reluctance to follow past congressional policy decisions in significant cases stands in tension with core tenets of democratic self-government. This tension arises not only when the Court uses a clear statement rule to avoid application of a clear statute but also if it declines to seriously consider statutory policies evident in its structure and goals in resolving statutory ambiguities. I have argued elsewhere that the announced goals of legislation usually reflect a consensus among elected representatives about what the people want.[272] Thus, one frequently finds legislation with the stated goals of protecting public health, safety, or the environment because these goals command widespread public support.[273] By contrast, sometimes statutory details reflect compromises among competing interests, often on matters about which the public has no formed opinion.[274]

While *King* overcame clear statutory language to follow the ACA's goals,[275] the CAA and COVID major questions cases abandon the public health protection goals animating the legislation they purport to interpret. *West Virginia*'s articulation of the major questions doctrine as a clear statement rule maintains that whether a statute is ambiguous or clear, federal judges should not allow general statutory language, goals, or structure to guide their decisions about whether to approve an extraordinarily significant executive branch regulatory decision.[276] Instead, they should simply annul the executive branch's action.[277] This represents a profound repudiation of the principle that the people govern themselves by electing representatives who then collectively establish laws to benefit the community, which the executive branch implements.

While the modern Court occasionally follows the statutory canon favoring construction of legislation to further its goals (as it did in *King*),[278] it often

271. *Compare West Virginia*, 597 U.S. at 727 (characterizing beyond-the-fenceline regulation as novel because EPA had not relied on measures beyond the fenceline before to establish emission limits), *with* Natasha Brunstein & Richard L. Revesz, *Mangling the Major Questions Doctrine*, 74 ADMIN. L. REV. 217, 258–62 (2022) (characterizing beyond-the-fenceline regulation as not novel because previous rules had relied on emissions trading).

272. *See* Driesen, *supra* note 68, at 125–27 (explaining why stated statutory goals usually reflect elected politicians' expert judgment of about what the public values).

273. *See id.* at 125.

274. *See id.* (explaining that the public likely knows that it wants clean air but has no opinion about the amount of emission reductions to demand from coal-fired power plants).

275. *See supra* notes 86–95 and accompanying text.

276. *See supra* notes 178–79 and accompanying text.

277. The *West Virginia* Court seeks to put a veneer of legitimacy around its clear statement rule by beginning its discussion with a recitation of the whole statute rule, counseling contextual reading of a statute's language. *See* West Virginia v. EPA, 597 U.S. 697, 721 (2022). But the clear statement rule it announces makes statutory context irrelevant and it ignores almost all of the structural argument respecting the Clean Power Plan. *Cf. id.* at 760–63 (Kagan, J. dissenting) (considering the language of Section 111 in light of other relevant statutory provisions and accusing the majority of "breez[ing] past" the "congressional choice" not to limit EPA's authority with respect to technological systems revealed by the statute as a whole).

278. *See supra* notes 86–98 and accompanying text.

declines to do so on the ground that statutes reflect compromises, rather than pursuit of a single goal to the exclusion of all else.[279] But the major questions doctrine affirmed in *West Virginia* contemplates abandoning pursuit of congressionally adopted goals and policies even when the Court identifies no relevant statutory limitations on pursuing even stated statutory goals.[280] Under the clear statement rule, judges simply override policies stated in operative provisions and statutory goals statements as insufficient when the consequences of the executive branch statutory interpretation appear too great and judges perceive the application as novel.

If one believes that general legislation reflects a deliberate attempt by Congress to shirk its responsibilities, that might appear to justify not following general statutory language in exceptionally significant cases.[281] Because Congress is a collective body, disentangling elected officials' motives to reliably describe the psychology of an entire branch of government presents enormous challenges.[282] But some of the legislation to which the Court has applied the major questions doctrine seems incompatible with an assumption that generalities in legislation always reflect an effort by members of Congress to avoid responsibility.[283] The CAA, for example, represents one of the most detailed pieces of legislation ever enacted, usually described as the most complex statute other than the Internal Revenue Code.[284] Hence, some statutes that contain general language likely reflect not shirking, but doing the best one can to get legislative consensus respecting difficult problems.

Judges lacking substantial political experience cannot reliably distinguish between legislation ducking accountability from responsible compromises needed to make it possible for a collective democratic body representing diverse constituencies to properly perform their representative function in addressing

279. *See, e.g.*, Rodriguez v. United States, 480 U.S. 522, 525–26 (1987) (per curiam) (explaining that "no legislation pursues its purposes at all costs"); *see also* Bd. of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp., 474 U.S. 361, 373–74 (1986) (suggesting that Congress may not always agree on the means of pursuing its goals).

280. *See supra* notes 178–80 and accompanying text.

281. *See* Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19, 63–64 (2010) (discussing the possibility of congressional shirking); Morris P. Fiorina, *Congressional Control of the Bureaucracy: A Mismatch of Incentives and Capabilities*, *in* CONGRESS RECONSIDERED 332, 340–43 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 2d ed. 1981) (cataloguing incentives for "continued abdication by . . . Congress").

282. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 253–54 (2022) (disapproving of inferring the motives of the entire legislature from statements of some of its members); *cf.* Fiorina, *supra* note 281, at 339–43 (explaining that delegation allows members of Congress to avoid responsibility for hard legislative decisions while taking credit for fixing constituents' problems through oversight).

283. *See generally* David Epstein & Sharyn O'Halloran, *A Theory of Efficient Delegation*, *in* DELEGATION IN CONTEMPORARY DEMOCRACIES 88 (Dietmar Braun & Fabrizio Gilardi eds., 2006) (finding a relationship between the cohesiveness of "politicians' own internal decisionmaking process" and "detailed legislation").

284. *See* Morris P. Fiorina, *Group Concentration and the Delegation of Legislative Authority*, *in* REGULATORY POLICY AND THE SOCIAL SCIENCES 176 (Rodger G. Noll ed. 1985) (citing parts of the Clean Air and Water Acts as examples of "specific mandates"); Oren, *supra* note 103, at 57 (stating that the CAA reflects "a desire by Congress to make the tough decisions to protect the environment" itself).

complex modern problems.[285] Accordingly, as Justice Scalia put it in his opinion for a unanimous Court in *Whitman v. American Trucking Associations, Inc.*, the Justices "have 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those . . . applying the law.'"[286] To the extent that judges decline to implement the general policies Congress adopted, it risks defeating the democratic compromises at the heart of the rule of law envisioned in Article I.

More fundamentally, the Court cannot cure the shirking that may have occurred in the Congress that enacted a "long-extant statute" decades after it passed.[287] Clear statement rules interfere with the authority of Congresses that enacted legislation without knowing about the clear statement rule.[288] When the courts create a new clear statement rule, drafters of older legislation could not have known about it. Hence, the disciplinary aim of the major questions doctrine fails as applied to the enacting Congress.

Perhaps sensing that the major questions doctrine can interfere with legislative policy and violate the separation of powers, the Court casts itself as defending the enacting Congresses' prerogatives by assuming that all Congresses share a general intention not to delegate power over significant new issues through general language.[289] This particular use of the single Congress fiction proceeds without any serious consideration of the policies of the Congress that enacted the legislation the Court is examining.[290] As suggested previously, textualist judges have generally inveighed against far more specific and justifiable applications of purposivism on the grounds that a judge, once freed from statutory text, tends to imagine that a statute must mean what the judge thinks it should mean.[291] That danger seems especially acute for judicial discovery of what amounts to a general meta-intent shared by all Congresses at all times. It seems anachronistic to assume that late twentieth-century Congresses passing the OSHAct and the CAA did not intend to address the social ills they aimed to address rather comprehensively and effectively.[292]

285. *See* David Epstein & Sharyn O'Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 CARDOZO L. REV. 947, 953 (1999) (explaining that delegation may be a sensible response to informational uncertainty and complexity).

286. 531 U.S. 457, 474–75 (2001) (quoting Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)).

287. *Cf.* Util. Air Reg. Grp. v. EPA, 573 U.S. 302, 324 (2014) (identifying discovery of a new power in a "long-extant statute" as the trigger for the major questions doctrine).

288. *Cf.* Heinzerling, *supra* note 9, at 1982 (noting that some Justices have argued that the Court should not apply new interpretive principles to statutes predating their announcement); *Util. Air Regul. Grp.*, 573 U.S. at 324.

289. *See, e.g.*, West Virginia v. EPA, 597 U.S. 697, 721 (2022) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000)) (stating that in "extraordinary cases" the Court "'hesitate[s] before concluding that Congress' meant to confer . . . authority" over major questions).

290. *See also* Squitieri, *supra* note 267, at 465–66 (finding this assumption inconsistent with the Congressional Review Act, which presumes that major rules will take effect unless Congress says otherwise).

291. *See, e.g.*, Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 108–09, 117 (2007) (Scalia, J., dissenting).

292. *Cf.* Freeman & Stephenson, *supra* note 2, at 10 (characterizing the claim that Congress does not intend to delegate power to broad powers to address significant issues "questionable at best").

The Court itself has sometimes acknowledged that Congress intends to authorize adaptation of the law to address major questions.[293] The Court recognized that the CAA envisions adaptation to address new forms of pollution, such as greenhouse gas emissions, in *Massachusetts v. EPA*.[294] Since air pollution control decisions almost always prove economically significant and Congress contemplated shutting down industrial facilities if necessary to achieve clean air, Congress intended the law to adapt to new circumstances that might raise major economic or social issues.[295] Applying the major questions doctrine to statutes designed to address evolving problem simply frustrates congressional intent.

Many statutes, fairly read, contemplate adaptation. For example, the OSHAct authorizes safety and health standards "reasonably necessary or appropriate to provide safe or healthful employment."[296] Congress uses that sort of general language precisely because it cannot implement a policy choice of providing safe and healthful employment by establishing detailed standards of its own for each known hazard to workers.[297] New hazards arise from time to time in the workplace as conditions change. Furthermore, scientific understandings of dangers and techniques for mitigating threats also evolve over time. [298] The OSHAct expressly embraces novel major applications, stating an objective of developing "innovative methods . . . for dealing with occupational health."[299] Similarly, the Public Health Service Act at issue in *Alabama Realtors* aims to protect public health from interstate transmission of diseases, with an expectation that new diseases will present new issues and may require measures not specifically envisioned by Congress.[300] Accordingly, it authorizes the Surgeon General to promulgate and enforce regulations "as in his judgment are necessary" to stop the interstate spread of "communicable diseases."[301] As the Supreme Court

293. *See generally* Am. Trucking Ass'ns v. Atchison, Topeka, & Santa Fe Ry. Co., 387 U.S. 397, 416 (1967) ("Regulatory agencies . . . are supposed . . . to adapt their rules . . . to the Nation's needs in a volatile, changing economy.").

294. *See West Virginia*, 597 U.S. at 764 (Kagan, J., dissenting) (quoting Massachusetts v. EPA, 549 U.S. 497, 532 (2007)) (explaining that Congress "spoke in capacious terms" in the CAA to avoid obsolescence).

295. *See* Union Electric v. EPA, 427 U.S. 246, 259 (1976) (quoting S. REP. NO. 91-1196, at 3 (1970)) (stating that "existing sources of pollution either should meet the standard of the law or be closed down").

296. 29 U.S.C. § 652(8).

297. *Cf.* Sunstein, *supra* note 26, at 489 (arguing that the major questions doctrine should not apply to agency interpretation of broad general terms because these indicate a congressional intent "to adapt to new and unanticipated problems").

298. *See West Virginia*, 597 U.S. at 781 (Kagan, J., dissenting) (pointing out that Congress "can't anticipate changing circumstances and the way they will affect varied regulatory techniques"); Spence & Cross, *supra* note 225, at 135 (citing the size of the federal bureaucracy as evidence that the information costs of legislating with specificity are quite high).

299. 29 U.S.C. § 651(b)(5).

300. Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2488–89 (2021) (per curiam).

301. *Id.* at 2487 (citing 42 U.S.C. § 264(a)). Congress did not list any specific regulations by way of illustration. It did, however, provide a list of measures that the Surgeon general might use to enforce promulgated regulations—"inspection, fumigation, disinfection, sanitation, pest extermination, [and] destruction of animals . . . ." *Id.* But even here, Congress provided for adaptation by also authorizing "other" enforcement measures. *Id.* The *Alabama Realtors* Court read the listed enforcement measures as evincing an unambiguous

explained in its unanimous ruling in *Mistretta v. United States*, "Congress simply cannot do its job without an ability to delegate power under broad general directives," because of modern society's "ever changing and more technical problems."[302] But in the recent major questions cases, the Court assumes that the specific Congresses that passed legislation did not intend to do its job of creating policy designed to cover new and important cases in the teeth of statutory language suggesting that it did.[303]

Then-Judge Kavanaugh in a dissent to a D.C. Circuit denial of rehearing en banc in *United States Telecom Ass'n v. FCC* sought to provide a basis for this assumption of a meta-intent not to delegate significant authority to agencies.[304] He claimed that congressional representatives generally want to resolve major questions themselves, citing a survey of legislative counsel active in Congress in 2011 and 2012.[305] The survey's authors, however, cautioned that the survey cannot be reliably used to assess the knowledge of members of Congress at any time or of staff for other time periods.[306] Even if Kavanaugh is correct, it does not follow that a Congress enacting broad remedial legislation intended to suspend implementation of its express policies whenever a new major question arises.

Kavanaugh's assumption, however, might justify the major questions doctrine if judicial resolution of major questions protected the power of current and future Congresses to decide major questions. I now turn to the question whether the major questions doctrine does that.

C. Protecting the Legislative Authority of Current and Future Congresses

When Congress passes a statute, both the Congress and the Constitution expect it to remain in force until Congress amends or repeals it. And the Constitution demands faithful law implementation, especially in cases with significant consequences.[307] The rule of law has at its core the notion that law remains in place until changed through legislation.[308]

intent to only authorize measures directly, rather than indirectly, halting the spread of disease. Perhaps sensing that this construction contravened the operative language and the precise structure of the sentence, it did away with the need to rely on this reading with major questions reasoning. *See id.* at 2488–89.

302. Mistretta v. United States, 488 U.S. 361, 372 (1989).

303. *See, e.g.*, *Ala. Ass'n of Realtors*, 141 S. Ct. at 2488–89.

304. 855 F.3d 381, 422 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

305. *See id.* at 422 (Kavanaugh J., dissenting) (citing Gluck & Bressman, *supra* note 263, at 1003) (quoting the author's conclusion that drafters of legislation—legislative counsel—do not intend to leave major questions unresolved to support the conclusion that the "major questions doctrine reflects congressional intent").

306. *See* Gluck & Bressman, *supra* note 263, at 923, 1022 (cautioning against making inferences about members of Congress from interviews with legislative counsel and suggesting that the survey results may not be reflective of different time periods).

307. *See* David M. Driesen, *Toward a Duty-Based Theory of Executive Power*, 78 FORDHAM L. REV. 71, 83–87 (2009) (discussing how the Take Care and Oath clauses create executive branch duties to faithfully execute the law).

308. *See* JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT 85 (2001) (noting that law "exists only *over time*" because law implies that after a rule is established it is followed); *cf.* Bressman, *supra* note 85, at 798 (suggesting that the Supreme Court may be trying, at least in *Brown & Williamson*, to limit deference to agency action contrary to "likely" congressional preferences).

Congress, however, may always amend a statute. So, for example, if Congress thinks that effective standards limiting greenhouse gas emissions pose too great a risk of disrupting existing businesses, it can end or limit EPA's authority to pursue that goal. If it thinks that liberty should trump public health during a pandemic, it can repeal legislation commanding or authorizing the executive branch to fight pandemics with public health measures. Similarly, Congress can strengthen the law if it thinks existing law too feeble to adequately protect public health and the environment.

The amendment possibility always exists regardless of what the court or government agencies do. Congress could have overridden President Bush's decision not to seriously regulate greenhouse gases but did not.[309] Similarly, Congress could have overridden President Obama's decisions to regulate greenhouse gases but did not.[310] And when the Supreme Court suggested that EPA must regulate greenhouse gases, Congress could have overridden that decision as well.[311]

So, the major questions doctrine does not preserve congressional authority to address major questions.[312] Congress as a whole always has the authority to address major questions and can overrule executive branch decisions it disagrees with or impose general limits on agency authority.

The major questions doctrine does not force Congress to answer major questions. Instead, it authorizes the judiciary to decide major questions.[313] The *West Virginia* Court issued its extraordinary (advisory) opinion, because it considered the question of whether the EPA could restructure the utility industry by taking generation shifting into account a major question.[314] The Court thus resolved an economically and socially significant issue when it held that the EPA could not restructure the coal industry by taking generation shifting into account.[315] It just resolved the major question in a different way than the EPA had in the Clean Power Plan.[316]

309. *Cf.* Massachusetts v. EPA, 549 U.S. 497, 511–12 (2007) (explaining that EPA refused a petition asking it to regulate greenhouse gas emissions in 2003).

310. *Cf.* West Virginia v. EPA, 597 U.S. 697, 711 (2022) (explaining that EPA enacted limits on carbon dioxide emissions in 2015).

311. *Cf. Massachusetts*, 549 U.S. at 534–35 (reversing EPA's decision not to regulate greenhouse gases).

312. *Cf.* Freeman & Spence, *supra* note 17, at 74 (noting that some describe *Brown & Williamson* as "democracy-forcing").

313. Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 459 (2008) (explaining that the Court in major questions cases "decided the major questions itself"); Richardson, *supra* note 8, at 175 (characterizing the COVID major questions cases as arrogating "broad discretionary power to reject delegations of authority to administrative agencies"); Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 193 (2006) (pointing out that the major questions cases "increase . . . judicial policymaking").

314. *West Virginia*, 597 U.S. at 735.

315. *Id.*

316. *Id.*

D. Judicial Representation of Factional Elite Interests

Major questions rulings serve the interests of the special interests resisting regulation because they halt significant regulation.[317] Partisan division respecting climate policy suggests that about half of the current Congress would want the existing law implemented according to its goals of furthering environmental and health protection and about half would prefer some curtailment of authority under the CAA.[318] Judicial amendment makes the Court, in practice, a strong ally of the anti-regulatory faction in Congress and the special interests it supports.[319]

Justice Gorsuch's *West Virginia* concurrence suggests a rationale for the Court's new role as protector of special interests.[320] He views the Article I process as protecting the rights of "minorities" and "liberty."[321] The minorities the Court has protected in its regulatory major questions cases are special interests with substantial influence in Congress,[322] hardly appropriate recipients of extraordinary judicial protection. The conception of liberty that might support the major questions doctrine is decidedly Lochnerian. *Alabama Realtors* explicitly defends the major questions doctrine in Lochnerian terms—citing the eviction moratorium's alteration of "the power of the government over private property" as justification for demanding "exceedingly clear language."[323] But all government regulation alters the balance between government and private property interests, so grounding the doctrine in those terms makes the validity of government regulation hinge on judges' views of reasonableness—precisely the vice at the heart of Lochnerism.[324] In another blockbuster opinion from the October 2021 Term, *Dobbs v. Jackson Women's Health Organization*, the Court cautioned against interpreting "liberty" to reflect the Justices' "own ardent views about the liberty that Americans should enjoy."[325] It cited *Lochner* as a negative example of an "unprincipled approach" marred by "discredited," "freewheeling judicial policymaking."[326] The scholarly consensus suggesting that the major

317. *See id.* at 717 (noting that Westmoreland Mining Holdings LLC, the North American Coal Companies, and coal states sought review of the Clean Power Plan).

318. *See* 42 U.S.C. § 7401(b)(1).

319. *See* Heinzerling, *supra* note 25, at 401 (finding the Justices' approach "partisan"); *cf.* Freeman & Spence, *supra* note 17, at 75 (explaining that invalidating an agency's plan to address new issues in hopes that Congress will do so is "not neutral").

320. *West Virginia*, 597 U.S. at 738–39 (Gorsuch, J., concurring).

321. *See id.*

322. *See supra* note 319 and accompanying text.

323. *See* Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) (per curiam) (supporting application of a clear statement rule in part by noting that the eviction moratorium changes the balance between government and private property); *see also* Sackett v. EPA, 598 U.S. 651, 679 (2023) (using this same clear statement rule to avoid the conclusion that "adjacent" wetlands includes nearby wetlands); U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 590 U.S. 604, 621–23 (2020) (using this clear statement rule to support authorization of a natural gas pipeline under the Appalachian Trail).

324. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 240 (2022).

325. *Id.* at 216.

326. *Id.* at 240.

questions doctrine reflects freewheeling judicial policymaking might be recast as a recognition that it creates judicial violations of separation of powers.[327]

When judges limit agency authority under a statute in a way that violates its spirit and letter, they amend the statute.[328] They perform a legislative function assigned to Congress in violation of Article I.[329]

E. The Possibility of Catalyzing a Congressional Response

Perhaps the Court imagines that its rulings serve Article I values by catalyzing a congressional response that would not otherwise occur. Unfortunately, federal judges cannot predict which judicial amendments of statutes will catalyze legislation affirming or rejecting a judicial statutory amendment and which will lead to a failure to legislate.[330]

Furthermore, judicial resolution of politically contentious issues seems especially unlikely to trigger a congressional response because legislation requires consensus. Since political significance acts as a trigger for a matter being treated as a major question, the major questions doctrine will tend to lead to freezing judicial policy decisions in place.[331]

The data suggest that "[t]he [Supreme] Court's most dramatic policymaking decisions have remained untouched by Congress" even during an era of bipartisan cooperation.[332] During the 1980s, Congress overrode only 5% of the Court's statutory decisions.[333]

Congress these days rarely overrides Supreme Court decisions.[334] In the environmental area, for example, Congress has not overridden a Supreme Court decision since 1998.[335] And over a longer period of time, "restorative overrides," those that seek to correct a "bad" Supreme Court interpretation constitute only

327. *See* Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 23 (1985).

328. *See id.* at 23–24 (suggesting that the Court amends a statute when it fails to adhere congressional intent).

329. *Id.* (characterizing judicial "lawmaking" as illegitimate) (internal quotations omitted).

330. *See* Johnson v. Transp. Agency, Santa Clara Cnty., Cal., 480 U.S. 616, 671–72 (1987) (Scalia, J., dissenting) (Congress may fail to override a statutory ruling because of agreement, inability to agree upon change, unawareness, indifference, or cowardice); *cf. Dobbs*, 597 U.S. at 292 (explaining that the Justices cannot know how the political system will respond to abolishing the constitutional right to abortion).

331. *See West Virginia*, 597 U.S. at 721 (identifying political significance as a trigger for the major questions doctrine). *But see* Heinzerling, *supra* note 9, at 1988 (suggesting that regulation of industries with political influence may trigger a finding of political significance).

332. *See* Eskridge, *supra* note 21, at 366. This statement was based on data for the period from 1967 to 1990. *Id.* at 336.

333. *Id.* at 377. This may seem like a large percentage, but Professor Eskridge states that the divergence between Supreme Court and congressional views during this period suggests that one might expect more overrides. *See id.* He attributes the failure to override decisions at "several times" the 5% number to conflicts among powerful groups about the decisions. *See id.*

334. Christiansen & Eskridge, *supra* note 21, at 1319 (finding a dramatic decline in overrides after 1998); Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S. CAL. L. REV. 205, 209, 241–42 (2013) (finding that the rate of congressional overrides "has plummeted dramatically" over the last two decades).

335. *See* Christiansen & Eskridge, *supra* note 21, at 1368–69.

about one-fifth of the overrides.[336] Furthermore, in many areas of federal regulation, Congress usually overrides the Supreme Court (even back when it did it more often) only in the context of a large statutory revision, which is something that has not happened in a long time in some areas of law.[337] These revisions might occur infrequently because they require sustained and difficult mobilization of the public. This suggests that in practice judicial misinterpretations of statutes are unlikely to catalyze congressional action.[338]

The constitutional impediments to statutory amendment help explain why Congress rarely corrects judicial misconstruction of statutes.[339] Congress cannot contravene the judicial resolution of a major question unless a supermajority in the Senate, a majority of the House, and the President agree to restore agency authority.[340] Congress faces many additional well documented sub-constitutional obstacles to action. For example, subcommittee chairs sometimes block legislation that the public might favor.[341] Absent a strong consensus, the Court's statutory revision becomes established law even if the majority of voters and legislators in Congress still support the existing law, thus contravening the constitutional principle that law remains in place until legislatively amended.

Congress, however, may fail to address judicial statutory amendments because its members want to shirk their responsibilities.[342] Major questions rulings provide cover for anti-regulatory congressional representatives to get the results they want without having to assume responsibility for the consequences of deregulation by publicly voting to amend statutes enacted to protect safety, public health, and/or the environment.[343] Thus, the major questions doctrine facilitates congressional shirking of responsibility.

But the empirical data suggest that Congress may fail to update a statute when new circumstances arise that counsel an update because partisan division prevents resolution of the issue the new circumstances raise or because other matters crowd it from the agenda.[344] For example, environmental law experts suggest that Congress should update the CAA to better address the global climate

336. *See id.* at 1374.

337. *See id.* at 1385–86.

338. *See id.* at 1369–74 (explaining that most overrides are simply policy updates or efforts to clarify the law); *cf. id.* at 1410–11 (suggesting that an invitation from Justices to override their decision is common in cases that get overridden).

339. *See* Yu Cong Eng v. Trinidad, 271 U.S. 500, 518 (1926) (courts may not substitute statutory amendment for statutory construction)*; cf.* Freeman & Spence, *supra* note 17, at 75 (finding that the notion that the major questions doctrine is democracy-forcing problematic because of the problem of congressional gridlock).

340. *See supra* note 244 and accompanying text.

341. McNollgast, *supra* note 204, at 7 (discussing the powers of subcommittee chairs to act as a "veto gate").

342. *See* Schacter, *supra* note 257, at 605 (explaining that if legislators practice "strategic avoidance" of specific decisions they "will generally be tempted to hide behind, rather than to contest, judicial interpretations of statutory law").

343. *See id.*

344. *See* Christiansen & Eskridge, *supra* note 21, at 1351 (attributing the decline in overrides partly to polarization and partly to a shift in the congressional agenda); Hasen, *supra* note 334, at 209 (finding that partisanship has "strongly diminished the opportunities for bipartisan overrides of Supreme Court cases," but that partisan overrides have occasionally occurred).

crisis.[345] But approximately half of Congress has opposed greenhouse gas legislation, so no comprehensive statutory revision occurred.[346]

Public choice theory suggests that a congressional vote on the wisdom of a judicial policy choice becomes especially unlikely when the Court protects big business.[347] Public choice theorists point out that special interests often pay attention to issues affecting them directly and prove better positioned to organize themselves and lobby for the outcomes they want than the general public.[348] This suggests that when the courts protect business interests from regulation, Congress will face difficulties in overcoming their opposition even if a clear majority of the citizens favor such regulation—a prediction generally borne out empirically in the data on legislative overrides.[349]

Sensible public choice theory does not, however, wholly rule out the possibility of some public regarding statutory amendment in response to a major questions ruling.[350] Nine years after the *Brown & Williamson* decision, Congress amended the FDCA to authorize FDA regulation of tobacco.[351] But public choice theory does suggest that the public victories will come mostly from rare times of sustained public mobilization.[352] In this context, limiting the reach of "long extant" statutes may simply allow special interests to supplant meaningful popular sovereignty.[353]

345. *See, e.g.*, Freeman & Spence, *supra* note 17, at 20 (stating that the CAA is not "especially well designed for controlling" greenhouse gases).

346. *See* David M. Driesen, *Toward a Populist Political Economy of Climate Disruption*, 49 ENV'T L. 379, 388–89 (2019) (discussing explanations for one bill's failure to pass). *But see* Inflation Reduction Act, Pub. L. No. 117-169, 136 Stat. 1818 (2022) (codified as amended mostly in scattered sections of 26 U.S.C.A.).

347. *See* William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 323 (1988) (suggesting that public choice theory would lead one to expect that Congress "may . . . neglect" a public interest statute "over time").

348. *See* Farber & Frickey, *supra* note 22, at 1718 (explaining public choice theory that small groups with great stakes in an issue will have lower transaction costs and therefore organize more successfully to influence outcomes).

349. *See* Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 887 (1987) (explaining that a leading study of interest group influence suggests that special interests are likely to be most influential when they attempt to block rather than obtain legislation). William Eskridge shows that from 1967 to 1990 less than 11% of statutory overrides "reversed losses for groups that include most Americans." *See* Eskridge, *supra* note 21, at 348. Organized labor and business, by contrast, accounted for 26% of the statutory overrides. *Id.* While business groups are not as successful as the federal government in obtaining overrides of decision disfavoring them, they may be more successful in blocking review of decisions favoring them. *See* Christiansen & Eskridge, *supra* note 21, at 1380 n.228 (describing the business record in obtaining overrides as mixed but noting that their findings "do not foreclose the notion that businesses" succeed at preserving "most of their Supreme Court 'wins'").

350. *See* Geoffrey Brennan & James M. Buchanan, *Is Public Choice Immoral? The Case for the Nobel Lie*, 74 VA. L. REV. 179, 181 (1988) (conceding that narrow self-interest is not the sole motive of political agents); Eskridge, *supra* note 347, at 286 (noting that public choice theorists describe their predictions in terms of tendencies and probabilities, not absolute rules).

351. *See* The Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, div. A, 123 Stat. 1776 (2009) (codified in scattered sections of 5, 10, 15, 21 of the United States Code).

352. *See* Spence & Cross, *supra* note 225, at 138 (noting that the public only "intermittently" demands "legislative action to respond to a social problem").

353. *See* Brief of U.S. Senators Sheldon Whitehouse, Richard Blumenthal, Bernie Sanders, and Elizabeth Warren as Amicus Curiae in Support of Respondents at 4, West Virginia v. EPA, 597 U.S. 697 (2022) (No. 20-1530).

Thus, the major questions doctrine allows judges to establish long-lasting rules limiting agency authority to take significant actions, thereby effectively exercising the power of statutory amendment possessed by Congress.[354] Because Congress can always override executive branch decisions, judicial amendments limiting the executive branch's authority do not protect congressional authority.[355]

F. Dynamic Statutory Interpretation

Since Congress often fails to update statutes, one might imagine that a dynamic theory of statutory interpretation, which accepts judicial updating of statutes, might support the major questions doctrine.[356] But the dynamic theory of statutory interpretation suggests that a Court unable to discover a statute's meaning ask what the statute "ought to mean in terms of the needs and goals of society."[357] A clear statement rule does not do this.[358] It simply prevents significant regulation without addressing public values, and it does so even when the statute does provide an answer to the matter at hand (as in the COVID cases).[359] The previous material shows that the doctrine does not serve to update a statute to fit majority views, since it generally protects anti-regulatory minorities.

IV. SERVING THE NONDELEGATION DOCTRINE

Some recent dissenting and concurring opinions have suggested that the major questions doctrine serves the nondelegation doctrine.[360] Once one recognizes that judges' exercise of legislative authority under the guise of a clear

354. *See* Hasen, *supra* note 334, at 224 (stating that the failure of Congress to override a significant number of Supreme Court statutory interpretations "has given the Justices the last word" on statutory meaning). *See generally* Christiansen & Eskridge, *supra* note 21, at 1324 (finding that "[a] moribund override process leaves the Supreme Court with potentially more power to impose its [']libertarian['] values"). In some circumstances, Supreme Court rulings can have profound anti-democratic effects even when temporary. For example, because greenhouse gas emissions remain in the atmosphere for a long time and we face a climate crisis, *West Virginia v. EPA*'s interference with the enacting Congress's general policy may prove serious even if Congress, after a period of time, supersedes the decision.

355. *See* Coenen & Davis, *supra* note 13, at 809–10 (suggesting that Supreme Court resolution of major questions may increase an issue's salience, but noting that it is "unclear" whether judicial review increases salience "in an accountability-promoting manner"); *cf.* Merrill, *supra* note 327, at 22 (citation omitted) (stating that the argument that the legislature can override a judicial decision does not justify "judicial invasion" of the legislative sphere "in the first place").

356. *See generally* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 5–6 (1994); GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 2 (1982) (arguing that judges should have the power to revise obsolete statutes); Eskridge, *supra* note 250, at 1482.

357. *See* Eskridge, *supra* note 250, at 1480 (quoting Arthur W. Phelps, *Factors Influencing Judges in Interpreting Statutes*, 3 VAND. L. REV. 456, 459 (1950) (internal quotation marks omitted)) (asking rhetorically if judges should not ask what a statute "ought to mean" in terms of present society's "needs and goals").

358. *Cf.* Driesen, *supra* note 68, at 143–44 (arguing that even under a dynamic approach judges should look to statutory purpose to encourage them to make decisions tied to public values rather than their own personal preferences).

359. *Id.* at 97.

360. *See* Sohoni, *supra* note 24, at 290–91 (cataloguing Justices' statements linking the major questions doctrine to the nondelegation doctrine).

statement rule does not preserve congressional authority over legislation, it becomes apparent that the major questions doctrine cannot serve the nondelegation doctrine's values. Transferring resolution of policy issues from the executive branch to the judiciary simply relocates quasi-legislative authority, it does not prevent delegation.[361]

Statutory construction, moreover, can never solve a nondelegation problem. While the analysis in Parts II and III is new, this point is not. Harvard Law School Dean (then Professor) John Manning and I have both made this point years ago.[362] Indeed, the Supreme Court itself has recognized that statutory construction cannot cure a nondelegation problem in another context.[363] In *Whitman v. American Trucking Associations*, the Court unanimously held that an agency cannot "cure" an "unlawful delegation of legislative power by adopting . . . a limiting construction of a statute."[364] The resolution of a question "would *itself* be an exercise of the forbidden legislative authority," wrote Justice Scalia.[365] It follows that judicial resolution of a major question cannot cure a nondelegation problem.[366] The Court likewise exercises "forbidden legislative authority" when it limits the scope of a statute for reasons unrelated to its text, structure, and purposes.[367]

The nondelegation doctrine presumes that legislative authority belongs exclusively to Congress.[368] Accordingly, a court commits a constitutional violation when it exercises legislative authority by limiting the scope of a statute without

361. *See* Lemos, *supra* note 313, at 421–22 (explaining that because judges make policy when they interpret "broadly-worded statutes, . . . delegations to courts would seem to raise precisely the same concerns as delegations to agencies").

362. Manning, *supra* note 24, at 224, 228, 247, 256–57 (explaining why judicial construction of a statute cannot resolve nondelegation doctrine concerns); Driesen, *supra* note 24, at 48–58 (same).

363. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001).

364. *Id.* While Justice Stevens declined to join this part of the opinion, he did so because he does not agree that the Constitution contains a nondelegation doctrine. *See id.* at 488–89 (Stevens, J., concurring) ("wholeheartedly" endorsing the Court's reasoning, except in its claim that the Constitution prevents the delegation of legislative power).

365. *Id.* at 473.

366. *Accord* Lemos, *supra* note 313, at 457–59, 436 (stating that *American Trucking*'s point "holds for efforts by courts to cure statutes that delegate excessive authority by adopting a limiting construction" and "the constitutional principles on which the nondelegation doctrine is based apply with full force to delegations to courts"); *see* Wayman v. Southard, 23 U.S. 1, 22 (1825) (noting that Congress may not delegate legislative authority to the courts); *see also* Mistretta v. United States, 488 U.S. 361, 368, 374 (1989) (applying the nondelegation doctrine to a sentencing commission located in the judicial branch).

367. *See* Ilan Wurman, *As-Applied Nondelegation*, 96 TEX. L. REV. 975, 987 (2018) (agreeing with John Manning's rejection of statutory construction to avoid nondelegation problems). Wurman, however, justifies invalidating executive action on nondelegation grounds, because the executive branch must "only execute[] the law and . . . [may] not exercise legislative power." *Id.* at 990. But if the statute authorizes the executive branch action, then the executive branch is executing law and not legislating. Since the nondelegation doctrine only prohibits Congress from delegating legislative power only Congress may violate the nondelegation doctrine. Wurman's elaborate argument constitutes nothing more than a sleight of hand. Of course, if the executive branch seeks to make law without congressional authorization, it violates the separation of powers. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587–89 (1952) (explaining that the President cannot make law by taking an action not sanctioned by statute).

368. *See* West Virginia v. EPA, 597 U.S. 697, 737 (2022) (Gorsuch, J., concurring) (citation omitted) (describing Article I as requiring that "the legislature itself" regulate important subjects).

a grounding in the statute's language, structure, or goals, as it did in *West Virginia*.[369]

A judicial policy decision based on mere silence about specific major consequences of concern to judges requires exercise of legislative authority that the judiciary does not possess.[370] Indeed, the offense to constitutional principle is worse, as Congress never delegated any policy making authority to the judiciary.[371]

The Court has no general law-making authority of its own.[372] Indeed, the Court so strongly disfavors federal judicial policymaking that it has held that both the Clean Air and Water Acts displace traditional federal common law governing interstate pollution disputes, even though both statutes have provisions expressly preserving common law rights.[373] Yet, in *West Virginia* (and some prior cases), the Court assumed an even greater authority than the Court renounced in the displacement cases, the power to write legislative rules limiting how the executive branch exercises its statutory authority in the future. This is contrary to the constitutional principle that the legislative branch, not the judiciary, possesses the right to diminish or augment executive branch authority.[374]

Justice Gorsuch defends the link between the major questions doctrine and the separation of powers by pointing out that executive branch resolution of major questions creates unstable law in violation the stability sought in Article I, because each incoming presidential administration changes policies.[375] This stability problem may well have helped motivate the Court as a whole to adopt the

369. *Id.*

370. *See* David Schoenbrod, *The Delegation Doctrine: Could the Court Give it Substance?*, 83 MICH. L. REV. 1223, 1271 (1985) (explaining that courts construing statutes to avoid nondelegation problem can put "themselves in a legislative role"); *cf.* Lemos, *supra* note 313, at 459 (explaining that the major questions doctrine "aggrandizes the [judicial] power" because of the policy discretion needed to decide which questions are major).

371. *See* Merrill, *supra* note 327, at 22 (explaining that the federal judiciary has no more power than the executive branch to make law on its own absent a delegation by Congress).

372. *See* Nw. Airlines v. Transp. Workers Union of Am., 451 U.S. 77, 95 (1981) ("[T]he federal lawmaking power is vested in the legislative, not the judicial, branch of government."); Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (announcing that the Constitution does not empower federal courts to establish general common law).

373. *See* American Elec. Power Co. v. Connecticut, 564 U.S. 410, 420–29 (2011) (regarding the Clean Air Act); City of Milwaukee v. Illinois, 451 U.S. 304, 312–29 (1981) (citing 33 U.S.C. § 1365) (regarding the Clean Water Act).

374. *See* William Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the "Sweeping Clause,"* 36 OHIO STATE L.J. 788, 793–94 (1975).

375. *Cf.* West Virginia v. EPA, 597 U.S. 697, 739 (2022) (Gorsuch, J., concurring) (stating that delegation of legislative power would destroy stability by making "vast numbers of laws" change "with every new presidential administration"); Becerra v. Empire Health Found., for Valley Hosp. Med. Ctr., 597 U.S. 424, 428 (2022) (upholding an agency interpretation of the Medicaid statutes which had varied over time without citing *Chevron*); Coenen & Davis, *supra* note 13, at 811–12 (explaining that Supreme Court resolution of issues can provide more stability than agency resolution of issues).

major questions doctrine, as policy instability is much evident in many major questions cases.[376]

But the major questions doctrine increases instability by authorizing federal judges to shuck plain meaning.[377] The major questions doctrine now counsels random judicial disruption of established statutory policy when an application appears too novel and significant to a federal judge. By contrast, the "ordinary" statutory construction approach has checked presidential administration aimed at subverting statutory policies, as the Trump Administration's high loss rate in environmental and immigration cases shows.[378] The traditional approach does have resources for checking policy instability, at least when it transgresses the law.[379]

None of this necessarily defends *Chevron* deference. *Chevron* contributes to legal instability because it authorizes changes in policy where statutes are ambiguous even in the face of contrary judicial rulings.[380] But sidelining *Chevron* does not require the Court to abandon plain (albeit general) statutory language or statutory goals and structure. In other words, the Court could abandon *Chevron* and remain true to the Founders' intent that judges remain faithful to the [enacting] legislators' will.[381]

The major questions doctrine does not substitute conventional statutory interpretation for politically inflected executive branch decision-making. It substitutes judicial policymaking for statutory construction aimed at discerning the legislative will.

The problem of unelected judges usurping congressional prerogatives appears especially acute when judges confront executive branch actions that have major economic and political consequences. Such cases, as Alexander Bickel suggested more than half a century ago, tend to unbalance judicial judgment.[382] The temptation to legislate from the bench becomes very great, if perhaps subconscious, when a judge confronts decisions having significant consequences that she finds disturbing. It is precisely in such cases that adherence to statutory language, goals, and structure becomes most important. The traditional approach

376. *See, e.g.*, *West Virginia*, 597 U.S. at 755–56 (recounting the Obama, Trump, and Biden administrations' actions with respect to electric utilities' greenhouse gas emissions); Gonzales v. Oregon, 546 U.S. 243, 252–54 (2006) (showing that President Clinton's Attorney General read the Controlled Substances Act as not authorizing regulation of physician-assisted suicide, but President Bush's Attorney General reached the opposite conclusion).

377. *Cf.* Adler, *supra* note 10, at 57 (explaining that discarding "traditional methods of statutory interpretation" does not aid "consistent and principled [interpretation]").

378. *See* David M. Driesen, *The Unitary Executive Theory in Comparative Context*, 72 HASTINGS L.J. 1, 18 (2020) (noting that President Trump lost 91% of his regulatory cases through June 25, 2020); Bethany A. Davis Noll, *"Tired of Winning": Judicial Review of Regulatory Policy in the Trump Era*, 73 ADMIN. L. REV. 353, 390 (2021) (showing that the Trump administration lost 90% of its immigration cases in federal court).

379. *See, e.g.*, Driesen, *supra* note 378, at 18 (explaining that the federal courts very frequently overruled President Trump's efforts to destabilize the law).

380. *See* Lemos, *supra* note 313, at 429–30.

381. *See* BREYER, *supra* note 231, at 86 (stating that the "founding generation . . . expected that judges . . . would remain faithful to the legislators' will").

382. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 184 (2d ed. 1986) (noting that the "sheer momentousness of" some issues "tends to unbalance judicial judgment").

to statutory interpretation, which focuses on discerning the enacting Congress's policies, helps judges avoid the temptation to enact their prejudices into law.[383] This approach encourages judges to act in accordance with the policy of a Congress that might have very different views than the judges have.[384] Such an approach tends to preserve democracy and the rule of law.

Once we see that the major questions doctrine does not so much protect congressional authority as switch implementation decisions from the executive branch to the judiciary, another separation of powers point becomes clear. The problem of judicial policymaking displacing executive branch policymaking proves especially acute when major questions arise. We elect Presidents, in part, to ensure political control over significant implementation decisions.

V. CONCLUSION

Separation of powers concerns do not support the major questions doctrine. The *West Virginia* clear statement rule supersedes not only deference to agencies, but also serious effort to discern the implication of legislative policies. The new doctrine undermines rather than protects congressional legislative authority, prevents faithful execution of law by the executive branch, and aggrandizes undemocratic judicial power. When judges issue rulings violating the letter and spirit of statutes, they assume a legislative authority to amend statutes when implementing them has significant consequences that strike them as novel and, presumably, distasteful. Judicial amendment of statutes cannot cure a nondelegation doctrine problem if one exists.

383. *See* Susan Bandes, Erie *and the History of the One True Federalism*, 110 YALE L.J. 829, 833 n.21 (2001) (reviewing EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA) (identifying *Lochner* with problem of judges enacting their prejudices into law). *See* Lemos, *supra* note 313, at 430–31 (an assumption that the Court is engaged in figuring out "what Congress most likely intended" provides the best argument for judicial statutory interpretation not being like agency policymaking).

384. *See* Eskridge & Nourse, *supra* note 65, at 1738, 1792 (suggesting that considering "legislative evidence allows judges to consider the perspectives of the actors who authored the statute" and checks "interpretive bias").