THE HIROSHIMA COURT, PART I: USURPING THE AUTHORITY OF THE ELECTED BRANCHES

Samuel A. Marcosson*

In the last several Terms, the Supreme Court has issued a series of remarkable decisions that collectively have created the greatest shift in the constitutional legal landscape in nearly a century. It is unlikely that our legal world will ever be the same after the Court is done refashioning constitutional law. In that sense, we are seeing what this Article will argue is the "Hiroshima Court" in action, for just as dropping the atomic bomb on Hiroshima changed the world forever by beginning the nuclear age, the Court's decisions will permanently change our understanding of constitutional meaning and the rights the Constitution protects. This Article—intended to be the first in a series—examines the Court's decisions creating vast, unprecedented limits on the administrative state, including creating the major questions doctrine, foreshadowing the revival of the nondelegation doctrine, and overruling the decision in Chevron v. NRDC *that courts defer to reasonable interpretations by administrative agencies of ambiguous statutory provisions. This assault on the administrative state is critical to understanding the new world the Court is creating before our very eyes.*

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* Professor of Law, University of Louisville Brandeis School of Law. Many thanks to my colleagues at the law school with whom I shared the ideas that formed the basis for this piece, as well as Daniel Aaron of the University of Utah S.J. Quinney School of Law for similar conversations. Thanks also to my research assistant, Alex Gardner, for his stellar work on this project.

INTRODUCTION

August 6, 1945, has been called the "day in August that changed the world."[1] When the United States dropped an atomic bomb on the Japanese city of Hiroshima, the atomic age began, and nothing would ever be the same. The post-World War II world was shaped in countless ways by the existence of the bomb, including the perceived urgency of other nations to "catch up,"[2] the shape of the Cold War, and the threat of a nuclear exchange creating cultural moments like fallout shelters[3] and air raid drills[4] in schools.

While it is always risky in the moment to proclaim that the U.S. Supreme Court has created a "Hiroshima moment"—an epochal change in the legal realm that defines the future in a way fundamentally different from the prior status quo—the October 2021 Term was the beginning of such a moment. Not since 1937 has the

1. *See* Richard Werly, *Hiroshima 1945: A Day in August That Changed the World*, INT'L COMM. OF THE RED CROSS (Aug. 14, 2003), http://web.archive.org/web/20220127104315/https://www.icrc.org/en/doc/resources/documents/article/other/5rxjr5.htm [https://perma.cc/P3FA-SHFK] (reprinting original Switzerland article).

2. For an examination of the nuclear proliferation issue that began with the end of World War II, see *Nuclear Proliferation, (1949-Present)*, U.S. DEP'T OF ENERGY, https://www.osti.gov/opennet/manhattan-project-history/Events/1945-present/proliferation.htm [https://perma.cc/ZDD8-32CQ] (last visited Mar. 7, 2025).

3. *See* Thomas Bishop, *Digging up the History of the Nuclear Fallout Shelter*, SMITHSONIAN MAG. (Apr. 25, 2022), https://www.smithsonianmag.com/history/digging-up-the-history-of-the-nuclear-fallout-shelter-180979956/ [https://perma.cc/5ZVE-T8FG].

4. *See* Sarah Pruitt, *How 'Duck-and-Cover' Drills Channeled America's Cold War Anxiety*, HIST. (Mar. 26, 2019), https://www.history.com/news/duck-cover-drills-cold-war-arms-race [https://perma.cc/6L9J-HJU6].

Court pivoted so decisively. More important, the Court has taken these shifts even further in both the October 2022 Term and the recently concluded October 2023 Term. At the risk of taking the Hiroshima metaphor too far, the Court has not put the atomic genie back in the bottle. It has moved from the atomic bomb to the hydrogen bomb.

This is the first in a planned series of articles exploring the many fronts where the Court has embarked on this transformative project[5] and changed the legal world more than at any time in nearly a century (and perhaps in the Court's history). Our focus here will be on the Court's determined push to strip powers from Congress and the executive branch[6] by dictating how Congress must exercise its powers and, in turn, narrowing the scope of executive powers delegated from Congress. The justices have defended their decisions in this realm by claiming that they are preserving the separation of powers and enforcing critical limits on the legislative branch, but the truth is that the Court has simply arrogated power to itself in violation of the separation of powers.

In Part I, I will discuss *West Virginia v. EPA*,[7] where the Court took unto itself the power to dictate to Congress how it may use its Article I legislative powers to accomplish purposes that are unquestionably within its purview, and—at the same time—prevent the executive branch from exercising authority delegated to it by Congress. Even though the majority in *West Virginia* vigorously denied that it was upsetting established precedent, the decision was the most profound exercise of judicial activism and overreach by the Court when it comes to its relationship with the other branches since the *Lochner* Era ended in 1937.

Next, Part II will address the Court's decision in *Biden v. Nebraska*,[8] where the Court doubled down on *West Virginia* by striking down the student loan forgiveness plan proposed (but never implemented) by the Biden Administration. The ruling in *Nebraska* was particularly troublesome because Congress had plainly—even undeniably—delegated to the executive branch authority to do exactly what the Biden Administration did. Taken together, *West Virginia* and *Nebraska* demonstrate the Court's hostility to the idea of delegated power based not on any real quarrel with the clarity of the delegation, but simply on a generalized

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5. Future articles will explore the momentous changes in the law of privacy and in how the Court interprets the Religion Clauses (especially the Establishment Clause) of the First Amendment.

6. Although this Article is not about the Court's 2024 decision conferring broad immunity from prosecution on Presidents for the "official acts" they take while in office, *Trump v. United States*, 603 U.S. 593, 642 (2024), there is a deep and troubling connection between the cases I will discuss and the ruling in *Trump*. The overarching theme of the Court's decision in *Trump* was the perceived constitutional concern favoring "energetic, vigorous, decisive, and speedy execution of the laws," *id.* at 610, and then extrapolating from that principle the conclusion that immunity from post-presidency prosecution was essential to that goal. And yet, the animating theme in the run of decisions I address in this Article is a deep distrust of a too-energetic, too-vigorous, and too-decisive Executive whose administration must be reined in. The tension between the immunity decision and the line of cases limiting the Executive is palpable, even if they are not in direct conflict.

7. 597 U.S. 697 (2022).

8. 600 U.S. 477 (2023).

antipathy to government authority. There is no more warrant for the Court to act on its own policy views than there was in the *Lochner* Era, but that has not deterred the Court from its path.

Part III will demonstrate how the Court took the decimation of the administrative state even further in the October 2023 Term. In *Loper Bright Enterprises, Inc. v. Raimondo*,[9] the Court overruled *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[10] putting an end to decades of deference to executive branch interpretations of statutes. The decision in *Loper Bright* was based on the fundamentally unsound claim that deferring to an administrative agency's reasonable interpretation of an ambiguous statutory provision that the agency has been charged with enforcing somehow abdicates the judicial role of saying what the law is.[11] In truth, *Chevron* deference did not mean the courts ceded their authority. It was instead a tool for courts to use in exercising the judicial function, a tool that reflected rather than violated the separation of powers. *Loper Bright* thus constituted an extension of the Court's determined campaign to upset the balance of power among the branches by taking authority from the democratic branches.

Finally, Part IV will assess the Court's work in these cases within the "constitutional moment" framework established by Professor Bruce Ackerman.[12] Ackerman's thesis is that momentous constitutional transformation has occurred on numerous occasions via means other than the amendment process set forth in Article V[13] of the Constitution.[14] In Ackerman's telling, these constitutional moments represent times when "We the People" have engaged in higher lawmaking, overriding the lesser law enacted by representative government or by the courts.[15] I will argue in Part IV that the troubling reality about the current moment is that the Court is engaged in a campaign of massive constitutional transformation without the underlying legitimacy provided by signals that the people have validated the move into higher lawmaking. Instead, the Court has been exercising raw judicial power afforded by a misuse of the confirmation process, which effectively allowed one political party to pack the Court without actually expanding it.

These decisions, in other words, mark a rank politicization of the Court, with its decisions reaching results that are difficult to explain on any rationale other than their alignment with one general goal of a standard Republican Party platform (to dismantle the modern administrative state[16]), and more specific goals relating to the subject matter of the cases—e.g., taking sides in the disputes over environmental

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9. 603 U.S. 369 (2024).
10. 467 U.S. 837 (1984).
11. *See Loper Bright*, 603 U.S. at 398–400.
12. *See* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 6–7, 3–33 (1991).
13. U.S. CONST. art. V (setting forth the processes that constitutional amendments may be proposed—either by Congress or a constitutional convention—and ratified by the states).
14. *See* ACKERMAN, *supra* note 12, at 622–94.
15. *Id.* at 7.
16. *See* Eric Berger, *Constitutional Conceits in Statutory Interpretation*, 75 ADMIN. L. REV. 479, 502 (2023) (arguing that in the Court's "major questions" cases, "textual analysis took a backseat to the Court's crusade against what it sees as excessive federal power").

policy and student loan forgiveness. It would be difficult to overstate the harm done to the Supreme Court itself of the perception—and the reality—that it has become a partisan institution instead of a legal one, but there is little reason to believe that this will lead the justices who have dictated the outcomes—when it comes to issues of congressional and, in turn, executive power—to alter course.

I. THE RISE OF THE MAJOR QUESTIONS DOCTRINE: A JUDICIAL POWER GRAB THREATENING THE SEPARATION OF POWERS

The fundamental truth of the Court's decision in *West Virginia v. EPA*, in which the Court formally adopted what it termed the "major questions" doctrine, is that it repeated the core flaw of the *Lochner* Era decisions the Court repudiated in 1937: it imposed artificial limits on Congress's Article I powers. By "artificial," I mean that the limits are nowhere to be found in the Constitution's text or structure. If anything, the distortion of the constitutional framework is more troubling this time around because the Court should have been able to draw on the lessons of the *Lochner* Era to avoid repeating its historical missteps.

A. The Lessons of Lochner*: Imposing Limits on Congress Found Nowhere in the Constitution (Then)*

There were many problems with the Court's exercise of its judicial review authority during the *Lochner* Era, but one stands out above the others: the Court limited Congress's authority in ways (and on grounds) that had no basis in the Constitution itself.[17] The legitimate basis that judicial review is predicated upon, is that the Court has not only the right, but the *obligation*, to apply the Constitution to a case before it.[18] If an act of Congress transgresses the Constitution, then that act is not "law" that the Court can enforce or apply. However, if the Court strikes down an act on a ground not found in the Constitution, then it is the Court—not Congress—that is acting lawlessly.

This point was illustrated in *Lochner v. New York* itself, where the Court struck down a New York statute limiting the number of hours bakers could work on the ground that it interfered with the right conferred by the Due Process Clause of the Fourteenth Amendment for two parties to contract with one another as they wished.[19] Justice Holmes's dissent famously explained the extent to which the Court concocted the constitutional basis for this "right":

> This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. . . . The 14th Amendment does not enact Mr. Herbert Spencer's Social

17. *See* David A. Strauss, *Why Was* Lochner *Wrong?*, 70 U. CHI. L. REV. 373, 374 (2003) (footnote omitted) (noting one of the grounds posited for *Lochner* being wrong is "because it enforced a right—'the right of contract between the employer and employees'—that is not expressed in or fairly inferred from the text of the Constitution").

18. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177–78 (1803).

19. 198 U.S. 45, 53 (1905) (citing Allgeyer v. Louisiana, 165 U.S. 578 (1897)).

> Statics. . . . [A] Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.[20]

Of course, *Lochner* concerned a state statute rather than one enacted by Congress, but the Court did parallel harm to the constitutional framework—and its own legitimacy—by making up illusory constraints on Congress's power to enact economic regulations under the Commerce Clause.[21] Specifically, the Court created an artificial distinction between manufacturing and commerce (prohibiting Congress from regulating the former under its authority to regulate the latter)[22] and took upon itself the power to dictate the *purposes* Congress could seek to achieve even if it was inarguably regulating interstate commerce.[23]

The Court justified imposing these limits on the ground that Congress would otherwise be free to regulate so expansively that it would intrude into state prerogatives.[24] The irony of this justification should be obvious: at the same time, it was proclaiming itself the protector of the states' police power, the Court was striking down the states' own exercises of that power in cases like *Lochner*. Put another way, the Court protected the states from an allegedly overreaching Congress, but nothing protected the states from an overreaching Court.

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20. *See id.* at 75–76 (Holmes, J., dissenting).

21. U.S. CONST. art. I, § 8, cl. 3.

22. United States v. E.C. Knight Co., 156 U.S. 1, 12 (1895) ("Commerce succeeds to manufacture, and is not a part of it."); Carter v. Carter Coal Co., 298 U.S. 238, 308 (1936) (holding that miners subject to wage and working condition rules established by Bituminous Coal Conservation Act of 1935 are "exclusively in producing a commodity," and such production is not itself commerce).

23. Hammer v. Dagenhart, 247 U.S. 251, 271–72 (1918) ("The thing intended to be accomplished by this statute is the denial of the facilities of interstate commerce to those manufacturers in the states who employ children within the prohibited ages. The act in its effect does not regulate transportation among the states, but aims to standardize the ages at which children may be employed in mining and manufacturing within the states."). The statute the Court struck down in *Hammer* indisputably regulated commerce: it prohibited the transportation of certain goods across state lines. The only ground that the Court could find it impermissible was by claiming the authority to examine Congress's underlying reasons for enacting the law. *Id.* at 272 (focusing on Congress's "aim[]" in passing the contested regulation).

24. *Id.* at 273–74 ("The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the states in their exercise of the police power over local trade and manufacture. The grant of authority over a purely federal matter was not intended to destroy the local power always existing and carefully reserved to the states in the Tenth Amendment to the Constitution."); *E.C. Knight*, 156 U.S. at 13 ("It is vital that the independence of the commercial power and of the police power, and the delimitation between them, . . . should always be recognized and observed, for, while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the states as required by our dual form of government.").

At the same time, the Court was striking down regulatory statutes at both the state and federal level, it also limited Congress in another way critical to the current moment. The "nondelegation doctrine" was as much a creation of the Court's campaign to impose artificial limits on Congress's power as anything else it did in the pre-1937 era. In *A.L.A. Schechter Poultry Corp. v. United States*,[25] the Court dealt with the "Live Poultry Code," which was promulgated by a business group that had been delegated the authority to do so by the National Industrial Recovery Act.[26] Among other grounds for invalidating the Code, the Court held that the enabling statute went too far in impermissibly delegating to the executive branch the authority to "establish[] the standards of legal obligation," which the Court termed Congress's "essential legislative function."[27] Along with its earlier decision in *Panama Refining Co. v. Ryan*,[28] *Schechter Poultry* established the notion that the Court could and should police the limits of Congress's power to delegate implementing authority to executive branch agencies.[29]

Almost as quickly as the Court asserted this power, however, it retreated.[30] Not once since *Schechter Poultry* has the Court utilized the nondelegation doctrine to strike down an act of Congress as lacking sufficient guardrails to limit executive discretion. Instead of overruling the doctrine, the Court has simply applied it in such a way as to render it meaningless. Under the modern—i.e., post-1937 version of the nondelegation doctrine—all that Congress must do is provide an "intelligible principle" to guide the executive branch's application of the law.[31]

This deferential approach, however, has come under increasing challenge. Indeed, the writing is on the wall that the current Court is virtually certain to revive the non-deferential version of the nondelegation doctrine that produced rulings striking down statutes vesting discretion in executive branch agencies.[32] The 2019 decision in *Gundy v. United States*[33] demonstrates that the return to a more intrusive doctrine is only a matter of time. While the Court narrowly upheld the delegation at issue in *Gundy*, it was based on an unusual alignment of the justices. Justice Kagan's opinion delivering the judgment of the Court commanded only a plurality (the first sign that the broad approach of the last 80 years is vulnerable), joined by only three

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25. 295 U.S. 495 (1935).
26. *Id.* at 521–23.
27. *Id.* at 530.
28. 293 U.S. 388 (1935).
29. *See* Richard J. Pierce, Jr., *The Remedies for Constitutional Flaws Have Major Flaws*, 18 DUKE J. CONST. L. & PUB. POL'Y 105, 111 (2023) (discussing development of the nondelegation doctrine).
30. *Id.* at 112.
31. *See* Gundy v. United States, 588 U.S. 128, 135 (2019) (plurality opinion) (alteration in original) ("So we have held, time and again, that a statutory delegation is constitutional as long as Congress 'lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.'" (first quoting Mistretta v. United States, 488 U.S. 361, 372 (1989); and then quoting J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928))).
32. Pierce, *supra* note 29, at 112.
33. 588 U.S. 128.

other justices: Ginsburg, Breyer, and Sotomayor. Justice Alito supplied a fifth vote when he concurred only in the judgment:

> The Constitution confers on Congress certain "legislative [p]owers," and does not permit Congress to delegate them to another branch of the Government. Nevertheless, since 1935, the Court has uniformly rejected nondelegation arguments and has upheld provisions that authorized agencies to adopt important rules pursuant to extraordinarily capacious standards.
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> If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort. But because a majority is not willing to do that, it would be freakish to single out the provision at issue here for special treatment.
>
> Because I cannot say that the statute lacks a discernable standard that is adequate *under the approach this Court has taken for many years*, I vote to affirm.[34]

As of 2019, when *Gundy* was decided, there were only four justices who sat on that case willing to revamp the Court's approach to nondelegation issues: Justice Alito and the three dissenters in *Gundy* (Chief Justice Roberts and Justices Thomas and Gorsuch). Justice Alito believed, however, that it didn't make sense to take that step until and unless a majority of the Court favored doing so.

And now there is every reason to believe that such a majority exists. First, Justice Kavanaugh did not participate in *Gundy* because he joined the Court after oral argument in the case. Shortly thereafter, however, he signaled his wish to explore the issue in a future case based on Justice Gorsuch's dissent in *Gundy*.[35] In addition, Justice Barrett has since replaced Justice Ginsburg, and there are strong indications from her writing that she shares the views expressed in Justice Gorsuch's *Gundy* dissent about the need to limit legislative delegations.[36]

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34. *Id.* at 148–49 (Alito, J., concurring in the judgment) (emphasis added) (first citing U.S. CONST. art. I, § 1; and then citing Whitman v. Am. Trucking Ass'ns., 531 U.S. 457, 472 (2001)).

35. Paul v. United States, 140 S. Ct. 342, 342 (2019) (mem.) (Kavanaugh, J., respecting the denial of cert.) ("I agree with the denial of certiorari because this case ultimately raises the same statutory interpretation issue that the Court resolved last Term in *Gundy v. United States*, 588 U.S. 128 (2019). I write separately because Justice GORSUCH's scholarly analysis of the Constitution's nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases.").

36. *See* Jonathan H. Adler, *Amy Coney Barrett's "Suspension and Delegation"*, REASON: VOLOKH CONSPIRACY (Oct. 18, 2020, 7:32 PM), https://reason.com/volokh/2020/10/18/amy-coney-barretts-suspension-and-delegation [https://perma.cc/JR9P-WLAL] (discussing 2014 law review article where Barrett argued that many of Congress's delegations to the President of the power to suspend habeas corpus were unconstitutional and that Congress must make the essential findings required by the Constitution to support a suspension).

B. Lochner *Redux: The Major Questions Doctrine and Imposing Limits on Congress Found Nowhere in the Constitution (Now)*

If *Gundy* sent signals of the Court's intent to sharply shift away from deference to congressional delegations of authority to the executive branch, *West Virginia v. EPA* made those signals unmistakable. The case arose from a challenge to the Clean Power Plan ("CPP") promulgated by the Environmental Protection Agency ("EPA") in 2015,[37] during the Obama Administration. The CPP sought to use § 111(d) of the Clean Air Act ("CAA"), employing "generation shifting" prongs as the best system of reduction to require shifts in power generation away from coal-fired plants to either natural gas plants or solar or wind generation (renewables).[38] The EPA provided three means by which an operator could accomplish this shift:

> First, . . . simply reduce the regulated plant's own production of electricity. Second, it could build a new natural gas plant, wind farm, or solar installation, or invest in someone else's existing facility and then increase generation there. Finally, . . . purchase emission allowances or credits as part of a cap-and-trade regime. Under such a scheme, sources that achieve a reduction in their emissions can sell a credit representing the value of that reduction to others, who are able to count it toward their own emissions caps.[39]

EPA projected that by 2030, its plan would result in coal providing 27% of national electricity generation, down from 38% in 2014.[40] Other analysts "project[ed] that the rule would cause retail electricity prices to remain persistently 10% higher in many States and would reduce GDP by at least a trillion 2009 dollars by 2040."[41]

In defense of its authority to enact the CPP, the EPA pointed to the language in § 111(d) of the CAA that directs the EPA "to list 'categories of stationary sources' that it determines 'cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.'"[42] As to such sources, the EPA must then: (1) determine the "*best system of emission reduction* which . . . has been adequately demonstrated," (2) ascertain the "degree of emission limitation achievable through the application" of that system, and (3) "impose an emissions limit on new stationary sources that 'reflects' that amount."[43]

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37. *See* Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64510, 64511 (Oct. 23, 2015) (codified at 40 C.F.R. pts. 60, 70, 71, 98) ("In this final action the EPA is establishing standards that limit greenhouse gas (GHG) emissions from newly constructed, modified, and reconstructed fossil fuel-fired electric utility steam generating units and stationary combustion turbines.").

38. West Virginia v. EPA, 597 U.S. 697, 711–18 (2022).

39. *Id.* at 713 (citations omitted).

40. *Id.* at 714.

41. *Id.* at 715.

42. *Id.* at 709 (alteration in original).

43. *Id.* (omission in original) (emphasis added).

Chief Justice Roberts, writing for the Court, rejected this textual argument. He began by asserting the unremarkable proposition that statutory interpretation must be contextual.[44] But instead of applying that canon of construction in a way that took account of § 111(d)'s place within the structure of the CAA, the Court took account of a sort of *external* context: what Chief Justice Roberts called the "extraordinary" authority the EPA was asserting[45]—to make massive shifts in the economy and how electricity is generated. This extraordinary breadth, he asserted, is reason to "hesitate" before concluding that Congress intended to confer such power on the agency.[46]

That "hesitancy" takes the form of a clear statement rule for what the Court termed major questions.[47] When an executive branch agency purports to exercise authority over a major question of economic or other policy, it must be especially clear from the statute that Congress was conferring such authority:

> Extraordinary grants of regulatory authority are rarely accomplished through "modest words," "vague terms," or "subtle device[s]." Nor does Congress typically use oblique or elliptical language to empower an agency to make a "radical or fundamental change" to a statutory scheme. Agencies have only those powers given to them by Congress, and "enabling legislation" is generally not an "open book to which the agency [may] add pages and change the plot line." *We presume that "Congress intends to make major policy decisions itself, not leave those decisions to agencies."*
>
> Thus, in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us "reluctant to read into ambiguous statutory text" the delegation claimed to be lurking there. *To convince us otherwise, something more than a merely* plausible *textual basis for the agency action is necessary. The agency instead must point to "clear congressional authorization" for the power it claims*.[48]

Keep in mind what this means in practice: after *West Virginia*, the exact same language in one statute might be sufficiently clear to delegate authority, but not enough in another statute. Or the language in a particular provision could be sufficient to empower an agency to enact the exact same regulation when it applies to a non-major question, but not when it would apply to a major question. The sufficiency of a delegation hence turns not on the language of the statute, but instead on the subject matter or scope of the exercise of that authority. Chief Justice Roberts made this explicit: "'In extraordinary cases . . . there may be reason to hesitate' before accepting a reading of a statute *that would, under more 'ordinary' circumstances, be upheld*."[49]

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44. *Id.* at 721 (citing Davis v. Mich. Dep't of Treasury, 489 U.S. 803, 809 (1989)).
45. *See id.*
46. *Id.*
47. *Id.* at 723.
48. *Id.* (alterations in original) (emphasis added) (citations omitted).
49. *Id.* at 723–24 (omission in original) (emphasis added) (quoting FDA v. Brown & Williamson Tobacco Co., 529 U.S. 120, 159 (2000)).

This major questions doctrine cut deeply into the normal deference the Court gave for decades to administrative agency interpretations of the statutes they are charged with enforcing,[50] making *West Virginia* an ominous precursor to the Court's decision two years later in *Loper Bright*.[51] In announcing this change, the Court thus altered the norms of separation of powers, aggrandizing power to itself to dictate to Congress how it must legislate and to the executive branch how it may use delegated authority.[52] *West Virginia* is the antithesis of judicial modesty.

If there were any doubt about this, we need only take Chief Justice Roberts at his word. Notice what he added by way of justification (in response to the dissent). He called the major questions doctrine "an identifiable body of law that has developed over a series of significant cases all addressing *a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted*."[53] In other words, there is a clear presumption inherent in the major questions doctrine that "highly consequential power" is a *problem*, so much so that even if the agency's action would be upheld under *normal* statutory interpretation (never mind the deferential approach required by *Chevron*), the Court will strike it down anyway.[54]

The consequences of this shift in the Court's approach to issues of delegation and executive power are on display in how the Court applied the major questions doctrine in *West Virginia* itself. Its approach to § 111(d) of the CAA demonstrates how much it will demand going forward. In finding that Congress had not provided a clear statement that it was delegating the power the EPA had purported to exercise, Chief Justice Roberts wrote that the "[EPA] located that newfound power in the vague language of an 'ancillary provision[]' of the Act, one that was designed to function as a gap filler and had rarely been used in the preceding decades."[55]

It must be said that virtually all of that constitutes a hollow attack on the statute rather than a genuine attempt to discern its "clear" meaning. Calling § 111(d) "ancillary" has no bearing on its meaning; it is simply a way for the Court to dismiss its importance in the statutory scheme—surely an inappropriate way for the Court to conduct statutory analysis. Similarly, the frequency of use of a provision should not serve to limit its reach. And if § 111(d) was a "gap filler," the real question

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50. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984), *overruled by* Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024).

51. 603 U.S. 369 (2024).

52. *See* Allen C. Sumrall, *Nondelegation and Judicial Aggrandizement*, 15 ELON L. REV. 1, 5 (2023) (arguing that "a robust nondelegation doctrine would only empower courts at Congress's expense"); Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 97 (2022) ("The common denominator across multiple opinions in the last two years [including those limiting the administrative state] is that they concentrate power in one place: the Supreme Court.").

53. *West Virginia*, 597 U.S. at 724 (emphasis added).

54. *See* Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1013 (2023) ("The consequence is that 'major' agency policies now require 'clear congressional authorization'—even broadly worded, otherwise unambiguous statutes may not do.").

55. *West Virginia*, 597 U.S. at 724 (alteration in original) (citation omitted).

should have been whether there was a "gap" EPA was trying to fill that met the terms of the provision when it formulated the CPP.

It is important to note that the Court *admitted* in *West Virginia* that emissions caps and generation shifting can be seen as a "system of emission reduction,"[56] which is *precisely* the authority the statute vests in the EPA. But for some reason, the majority saw this as vague—demonstrating the rigor of the "clear statement" rule and what it requires of Congress.

For her part, Justice Kagan (writing for herself along with Justices Breyer and Sotomayor) argued that the Court mistook *breadth* for *vagueness*.[57] In fact, Kagan pointed out that *no one disputed*—including the majority—that the breadth of the CPP is necessary to achieve the sort of reduction in emissions that will have the impact Congress named in the CAA. As Justice Kagan put it:

> The majority says it is simply "not plausible" that Congress enabled EPA to regulate power plants' emissions through generation shifting. But that is just what Congress did when it broadly authorized EPA in Section 111 to select the "best system of emission reduction" for power plants. The "best system" full stop—no ifs, ands, or buts . . . .[58]

Equally importantly, the dissent expressed a certain view of the nature of Congress's authority under Article I of the Constitution:

> A key reason Congress makes broad delegations like Section 111 is so an agency can respond, appropriately and commensurately, to new and big problems. Congress knows what it doesn't and can't know when it drafts a statute; and Congress therefore gives an expert agency the power to address issues—even significant ones—as and when they arise.[59]

To the dissenters, Congress can and does legislate broadly *in an area* (like clean air) and may do so in a way that vests in the executive branch the flexible authority to deal with specific (even very big) problems within that broad area. To the majority, if it is a big area—i.e., a major question—Congress must essentially legislate anew if a new problem (even a crisis) arises, because a pre-existing delegation will rarely be clear enough in how and whether it applies to the new action taken by the agency.[60] The majority in *West Virginia* created a default rule against delegations and their application to new problems. The Court limited the authority of both

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56. *Id.* at 732.
57. *Id.* at 759 (Kagan, J., dissenting).
58. *Id.* at 756 (citations omitted).
59. *Id.*
60. *See* Lemley, *supra* note 52, at 99 (footnotes omitted) ("Indeed, the facts of *West Virginia v. EPA* involve individual decisions about how to account for carbon emissions from a variety of different polluters, decisions which must be made in response to constantly changing conditions; it is impossible to imagine Congress making those decisions itself on an ongoing basis. So the practical effect of the decision is to make it impossible for the EPA to regulate carbon emissions by coal plants and to drastically limit its power to handle climate change more generally.").

elected branches in a way unseen since the *Lochner* Era—and with as little basis in the Constitution.[61]

C. Interfering with and Distorting the Relationship Between the Elected Branches

The major questions doctrine is almost certain to distort the relationship between the legislative and executive branches in deeply harmful ways. This is especially inevitable because there is every indication that the doctrine is going to be applied in a way that makes it the rule rather than the exception, despite the language repeatedly used by Chief Justice Roberts in *West Virginia* that it is meant for "extraordinary cases."[62] In response to the decision, lower courts have used it with a vengeance to strike down actions taken by federal agencies that are hardly "extraordinary," do not involve questions with anything like the economic significance of the EPA's CPP, and where the statutory interpretation is strained at best and unfathomable at worst.

For example, in 2022, the Fifth and Eleventh Circuits affirmed district court rulings granting preliminary injunctions to block the Executive Order issued by President Biden that imposed a COVID-19 vaccination mandate on federal contractors.[63] For the first time, these courts used the major questions doctrine to block action by the President himself rather than by a federal agency.[64] Moreover, the authorizing statute that Biden invoked to support his Executive Order, the Procurement Act,[65] had often been used in the past by Presidents to issue executive orders that were upheld by the courts and were no more "clearly" authorized by the Act.[66] That is because the Procurement Act paints in broad strokes; it "states that '[t]he President may prescribe policies and directives that the President considers necessary' to ensure the 'economical and efficient administration and completion of Federal Government contracts.'"[67] There should have been little question that a COVID-19 vaccine mandate is supported by this broad authorization. As the majority in *Louisiana v. Biden* recounted, pursuant to and as required by the President's Executive Order: "[T]he OMB Director issued a short finding that the Task Force guidance 'will improve economy and efficiency by reducing

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61. *Id.* at 100 ("The 'major questions' doctrine the Court employed is a recent judicial invention, one that has no basis in the Constitution or congressional mandate.").

62. 597 U.S. at 721–24 (quoting FDA v. Brown & Williamson Tobacco Co., 529 U.S. 120, 159 (2000)). Chief Justice Roberts quoted *Brown & Williamson* three times for the proposition that the clear statement rule applies to "extraordinary cases." *Id.*

63. Louisiana v. Biden, 55 F.4th 1017, 1035 (5th Cir. 2022); Georgia v. President of the U.S., 46 F.4th 1283, 1308 (11th Cir. 2022) (using the major questions doctrine to affirm trial courts' preliminary injunctions blocking the President's COVID vaccination mandate for federal contractors).

64. *Louisiana*, 55 F.4th at 1028–30; *Georgia*, 46 F.4th at 1295–96.

65. *See* 40 U.S.C. §§ 101, 121.

66. *Louisiana*, 55 F.4th at 1035–37 (Graves, J., dissenting) (listing executive orders going back more than 50 years in which Presidents imposed non-discrimination requirements, informational mandates, and sick leave requirements on federal contractors, among others).

67. *Id.* at 1036 (alteration in original) (first citing 40 U.S.C. § 121(a); and then citing Exec. Order No. 12,954, § 1, 60 Fed. Reg. 13023 (1995), *reprinted as amended in* § 121 app.).

absenteeism and decreasing labor costs for contractors and subcontractors working on or in connection with a Federal Government contract.'"[68]

The Office of Management and Budget ("OMB") Director's finding establishes an undeniable connection between a vaccine mandate and the economical and efficient administration and completion of federal contracts. The only way that the mandate would not be sustainable under the Procurement Act is if the Act must be explicit as to what actions Congress intended the President to be able to take—a position belied by decades of precedent. That is the extent to which the major questions doctrine and its clear statement rule are upending the relationship between the legislative and executive branches.

D. The Court's Own Legitimacy as a Decision Driver: Now You See It, Now You Don't

The majority opinion in *West Virginia* was marked by the dog that didn't bark[69]: the Court never addressed the challenge that interfering with the actions of the elected branches poses for the Court's own legitimacy. As noted above,[70] the Court must be deeply concerned about the constitutional legitimacy of its actions any time it embarks on a course that involves imposing substantial limits on the elected branches. If those limits are based on no discernible constitutional principle or text, then there is no basis for the Court to impose them. Thus, explaining the constitutional basis for the major questions doctrine is essential to the Court's own legitimacy—and Chief Justice Roberts failed to provide the explanation.

Instead, the Court offered a mirage built on the false premise that "courts 'expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance.'"[71] If there is any basis in the Constitution either for this expectation about how Congress acts or to impose it as a requirement about how Congress must act or to transform it into a constitutional limitation on the executive branch's authority to act utilizing delegated power, the Court certainly has not explained what that basis is. This is especially true because the Court has essentially acknowledged that under normal methods of statutory interpretation, the

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68. *Id.* at 1020 & n.5 (quoting Determination of the Promotion of Economy and Efficiency in Federal Contracting Pursuant to Executive Order No. 14,042, 86 Fed. Reg. 53691, 53692 (Sept. 28, 2021)).

69. *See* Mike Skotnicki, *"The Dog that Didn't Bark:" What We Can Learn from Sir Arthur Conan Doyle About Using the Absence of Expected Facts*, BRIEFLY WRITING (July 25, 2012), https://brieflywriting.com/2012/07/25/the-dog-that-didnt-bark-what-we-can-learn-from-sir-arthur-conan-doyle-about-using-the-absence-of-expected-facts [https://perma.cc/4XJF-5MYE] (discussing Sir Arthur Conan Doyle's Sherlock Holmes story *Silver Blaze* where Holmes "solves the mystery in part by recognizing that no one he spoke to in his investigation remarked that they had heard barking from the watchdog during the night").

70. *See supra* text accompanying notes 37–61 (discussing major questions doctrine as revival of the mistakes of the *Lochner* Era).

71. West Virginia v. EPA, 597 U.S. 697, 716 (2022) (citing Utility Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

statutes involved in cases like *West Virginia* would properly be understood to authorize the executive actions at issue.[72]

The Court has—in both the major questions doctrine cases and in overruling *Chevron*, as I will discuss in Part III—pointed to generalized, vague notions about the separation of powers.[73] The difficulty with this approach is that it takes a well-established constitutional principle and uses it to craft doctrines that are not actually in the Constitution. To put the point another way, no one can doubt that the Constitution calls for separating powers among the branches. But it does so with concrete, specific provisions that separate powers: Congress (the Senate, specifically) has the power to confirm presidential nominees, impeach federal officials, and so on. But the Court should not be in the business of extrapolating rules from the general principle that limits the powers of the other branches when the Framers *did not include those rules* in the Constitution as part of the separation of powers.

Beyond the lack of a constitutional basis for the Court's expectation, the truth is that expectations about how Congress legislates ought to be exactly the opposite of those the Court imposed in *West Virginia*. In areas of law that are undeniably major in their economic and political significance,[74] Congress has enacted statutes using broad, sweeping terms and entrusted executive branch agencies to enforce them in ways consistent with the statutory provisions.[75] Critically, Congress has done so with the understanding (since at least 1937) that the

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72. *See id.* at 722–23 (noting that in the cases the Court had purportedly required a clear statement of congressional intent because the context involved a major question, each of the "regulatory assertions had a colorable textual basis"). It follows that if the asserted regulatory authority had a colorable basis, it was reasonable—and if the Court had not regarded it as involving a major question, the agency's interpretation would have been entitled to deference under *Chevron*, which had not yet been overruled at that point.

73. *See, e.g.*, *id.* at 723 ("Thus, in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us 'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking there." (quoting Utility Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014))); Biden v. Nebraska, 600 U.S. 477, 503 (2023) ("The dissent is correct that this is a case about one branch of government arrogating to itself power belonging to another. But it is the Executive seizing the power of the Legislature."); Loper Bright Enters. v. Raimondo, 603 U.S. 369, 385 (2024) (citing *Marbury* to assert that, under the proper allocation of powers among the branches, it is "emphatically the province and duty of the judicial department to say what the law is").

74. Ironically, these statutes include the CAA itself. In 2001, the Court *rejected* a claim that the Act did not contain a sufficiently intelligible principle to permit the EPA to set ambient air quality standards to protect public health. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472, 486 (2001). While the intelligible principle standard set forth under the nondelegation doctrine is not identical to the clear statement rule established in *West Virginia* for "major questions," the underlying themes are closely related: that Congress must be sufficiently clear in delegating authority to executive branch agencies.

75. *See* Berger, *supra* note 16, at 503 (noting that in cases including *West Virginia* where the Court has used the major questions doctrine, the "statutes at issue were all broad," and "Congress wanted to deal with [the underlying issues] in ways that would not require future Congresses to pass new legislation when new problems in those areas arose"). In other words, the presumption about how Congress operates should rightly be exactly the opposite of the one engaged in by the Court.

Court will grant substantial deference to the legitimacy of its delegations to the executive branch[76] and similar deference to executive branch actions taken pursuant to legislative delegations.[77] There is simply no basis for the Court to have any expectation that Congress will legislate in the way that the major questions doctrine presumes it will.[78] In essence, the approach announced in *West Virginia* constitutes an attempt to wind the clock back to an era before Congress—with the ample assistance of the Court's decisions—created the modern administrative state.

If the major questions doctrine cannot be justified on the basis that it offers an accurate description of Congress's actual behavior,[79] we must look elsewhere for its true foundation. When the majority in *West Virginia* said that it would expect Congress to legislate in a certain way despite the simple reality that Congress does not in fact legislate that way, the truth is that the Court was offering a normative vision of how it thinks Congress *ought to legislate*. The Court used its power to interpret statutes to force Congress into the sort of legislative behavior that the Court prefers. It is a massive understatement to note that nothing in Article III of the Constitution even hints that the Court has the authority to dictate to Congress how it utilizes Article I.

Justice Gorsuch's concurrence, joined by Justice Alito, offered the only real argument in *West Virginia* that the major questions doctrine has constitutional

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76. *See* Gundy v. United States, 588 U.S. 128, 162–66 (2019) (Gorsuch, J., dissenting) (acknowledging—while harshly criticizing—the highly deferential "intelligible principle" doctrine that the Court has employed for decades to uphold executive branch actions against challenges based on the nondelegation doctrine); *see also* Gary Lawson, *Delegation and Original Meaning*, 99 VA. L. REV. 327, 328 (2002) (footnotes omitted) ("The Supreme Court has resoundingly rejected literally every nondelegation challenge that it has considered since 1935, including challenges to statutes that instruct agencies to regulate based on 'the "public interest, convenience, or necessity"' and to set 'fair and equitable' prices."); David Schoenbrod, *The Delegation Doctrine: Could the Court Give it Substance?*, 83 MICH. L. REV. 1223, 1233–34 (1984) (noting the Court's "inattention" to delegation issues, to the point that a "leading commentator flatly advised attorneys in 1958 that delegation claims were so farfetched that making them would discredit one's other claims").

77. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865 (1984), *overruled by* Loper Bright Enters., Inc. v. Raimondo, 603 U.S. 369 (2024).

78. *See* Berger, *supra* note 16, at 513 (noting that in Congress's creation of the modern administrative state, "[d]elegations have been not only plentiful but also broad").

79. Nor, it should be noted, can the assumption about how Congress either does or should behave be justified on the basis of the original meaning of Article I. To the contrary:

> From the very beginning, Congress delegated rulemaking authority. The First Congress delegated legislative authority in a variety of areas including the administration of federal territories; the articulation of standards for the granting of patents; the regulation of commerce with indigenous tribes; the rules surrounding pensions for Revolutionary War veterans; the strategy for restructuring the nation's sizable foreign debt; the assessment and enforcement of taxes; naturalization standards; and more. Perhaps most famously, when it created the First Bank of the United States, Congress delegated substantial authority to the Bank's directors (some private, some public) to adopt regulations.

Id. at 518 (footnotes omitted).

foundations.[80] The problem is that while Justice Gorsuch claimed the high ground of protecting "foundational constitutional guarantees" as the basis for the clear statement requirement imposed on so-called major questions, he failed to identify in any concrete fashion the guarantees he had in mind.[81]

Consider first an example that Justice Gorsuch gave of a parallel clear statement rule, offered as support for the major questions doctrine. He pointed to the Court's long-standing rule that anything other than the prospective application of a statute requires a clear statement from Congress.[82] This rule is designed to give life to the constitutional prohibition on "various types of retroactive liability."[83] Similarly, Justice Gorsuch pointed to the clear statement rule that applies to congressional enactments meant to abrogate state sovereign immunity; since such immunity has a clear constitutional basis in the Eleventh Amendment, Congress must be unusually clear when it uses its authority to abrogate such immunity (and then only when it is acting pursuant to authority under which abrogation is permissible).[84]

But when it came to the major questions doctrine, the best Justice Gorsuch could offer was that it is necessary to "protect the Constitution's separation of powers,"[85] on the theory that if Congress delegates too much authority to the executive branch, then the latter is exercising *legislative powers* that belong to Congress.[86] This rationale might well be a valid basis for some limitations on congressional delegations—e.g., those that go to the *scope* of the delegation—to ensure that the executive branch is not exercising legislative authority. It is thus no coincidence that Justice Gorsuch cited the plurality opinion (and his own dissent) in *Gundy*,[87] a case dealing with the nondelegation doctrine rather than the major questions doctrine. The nondelegation doctrine is meant to limit how *much* discretion can be vested in the executive branch; it is because of its potential to do so that several of the justices have advocated reviving it, so it can serve that purpose.[88]

The same cannot be said of the major questions doctrine, however. It does nothing to limit how much authority Congress can give to executive branch agencies; it merely requires that Congress be clear in doing so. Take *West Virginia* itself. Nothing in the Court's decision even hinted that Congress could not amend the CAA to authorize the EPA to enact a plan identical to the CPP. It is therefore

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80. West Virginia v. EPA, 597 U.S.697, 735 (2022) (Gorsuch, J., concurring) ("Like many parallel clear-statement rules in our law, this one operates to protect foundational constitutional guarantees.").

81. *See id.*

82. *Id.* at 736 (citing United States v. Heth, 7 U.S. (3 Cranch) 399, 413 (1806)).

83. *See id.* (first citing U.S. CONST. art. I, § 9, cl. 3; and then citing Landgraf v. USI Film Prods., 511 U.S. 244, 265–66 (1994)).

84. *See id.* at 736–37.

85. *Id.* at 737.

86. *Id.* (first citing Wayman v. Southard, 23 U.S. (10 Wheat) 1, 42–43 (1825); and then citing Marshall Field & Co. v. Clark, 143 U.S. 649, 692 (1892)).

87. *See id.*

88. *See supra* notes 20–36 and accompanying text (discussing the campaign to reinvigorate the nondelegation doctrine).

difficult to see how the major questions doctrine does anything at all to limit congressional power or to safeguard the separation of powers by limiting delegations. Put another way: the nondelegation doctrine does the work that Justice Gorsuch tried to assign to the major questions doctrine, leaving no real constitutional basis for the latter. Tellingly, Justice Gorsuch responded to Justice Kagan's dissent on the question of whether the major questions doctrine protected the separation of powers by citing *Gundy*—a nondelegation doctrine case.[89] The concurrence never explained what additional, and necessary, purpose the major questions doctrine plays in preserving the separation of powers.

Rather than being supported by a foundation in protecting constitutional text or structure, the major questions doctrine is simply an exercise in a political preference to limit regulatory initiatives by agencies of the federal government. Justice Gorsuch's opinion—perhaps inadvertently—demonstrated this anti-regulatory agenda as the true motivation behind the doctrine.[90] He pointed to two distinct inquiries the Court must undertake: the preliminary question of whether the case raises a major question[91] and the ultimate question of whether the statute at issue contains the requisite clear statement.[92] The factors that he pointed to on each of these points put a weighty thumb on the scales either in favor of finding that a case raises a major question or against finding that Congress had clearly delegated the authority the agency purported to exercise. For example, on the initial issue of whether a case involves a major question, the first factor Justice Gorsuch noted was whether an "agency claims the power to resolve a matter of great 'political significance,' or end an 'earnest and profound debate across the country.'"[93] That description of what makes a question "major" is so sweeping that it would encompass almost any issue on which a federal agency might seek to regulate. This would transform countless questions on which the Court traditionally deferred to an agency's interpretation of its statutory mandate under *Chevron* into questions that the Court will demand a clear statement from Congress demonstrating the agency's regulatory authority.

Similarly, Justice Gorsuch "found it telling when Congress has 'considered and rejected' bills authorizing something akin to the agency's proposed course of action."[94] It is difficult to see exactly why Congress's consideration of legislation is relevant to the conclusion that a question is "major" because bills are introduced in Congress to deal with matters large and small. Again, the effect of this factor would

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89. *West Virginia*, 597 U.S. at 749–50 (Gorsuch, J., concurring) (citing Gundy v. United States, 588 U.S. 128, 135 (2019) (plurality opinion)).

90. *See* Emily Joshi-Powell, *Cracks in the Clean Air Act: Fixing the Foundation of U.S. Climate Policy*, 88 BROOK. L. REV. 379, 406 (2022) (noting that even before the decision in *West Virginia*, "[t]he EPA must have known this was possible given that Justices Kavanaugh, Alito, Thomas, and Gorsuch have already made their antiregulation views apparent").

91. *West Virginia*, 597 U.S. at 742–46 (Gorsuch, J., concurring).

92. *Id.* at 745–50.

93. *Id.* at 743 (citations omitted).

94. *Id.* (some internal quotation marks omitted) (quoting *id.* at 731 (majority opinion)).

be to render almost everything a major question—demonstrating the anti-regulatory agenda at work.

No less revealing of Justice Gorsuch's view of federal regulations was his discussion of how to determine whether Congress has provided a sufficiently clear statement under the major questions doctrine. He ruled out what he termed "oblique or elliptical language,"[95] or "broad or general language."[96] In effect, this approach tells Congress that it cannot rely on broad delegations encompassing major policy areas but must instead enact pinpoint statutes making particular policy choices—as if the Court's authority includes telling Congress how broadly or narrowly it must exercise its Article I legislative powers.

The expansion of judicial power beyond its proper scope inherent in Justice Gorsuch's vision was even more palpable in the virtual expiration date he imposed on long-existing statutes even if Congress has never repealed them. He opined that a statutory mandate will not satisfy the clear statement rule if it involves "an agency's attempt to deploy an old statute focused on one problem to solve a new and different problem,"[97] even though, as he conceded, "[S]ometimes old statutes may be written in ways that apply to new and previously unanticipated situations."[98] If Congress writes statutes—as Justice Gorsuch conceded it does—in "ways that apply to new and previously unanticipated situations," it is a mystery how the Court has the power to ignore what Congress has written when an administrative agency seeks to act on the very authority Congress gave it to address those new problems.

In addition, Justice Gorsuch's "old statute, new problem" formulation failed to glean the import of the Court's decision in *Sedima, S.P.R.L. v. Imrex Co.*, where it made very clear that the application of a general statute to new problems is not a basis for the courts to question the statute. Instead, the Court's job is to simply apply the statute and leave to Congress the decision of whether to narrow or change it. In *Sedima*, the Court held that the Racketeer Influenced and Corrupt Organizations Act was being used to bring civil actions not "against mobsters and organized criminals," but instead against "respected and legitimate enterprises."[99] Nevertheless, the Court said, if this was outside Congress's intent, "its correction must lie with Congress."[100] If the Court had applied the major questions or clear statement rule in *Sedima*, it almost assuredly would have found that the issue of how to deal with organized crime was a major question and that the statute did not clearly apply as it was being used by the plaintiffs in that case.

Consider the problem from this perspective. If the majority, and Justice Gorsuch, were correct that the major questions doctrine is a meaningful and necessary tool to avoid encroachments on the separation of powers, then presumably there must be a significant number of cases where the clear statement requirement

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95. *See id.* at 746 (alteration omitted) (citing *id.* at 723 (majority opinion)).

96. *See id.* (quoting Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119, 139 (2005) (plurality opinion)).

97. *See id.* at 747.

98. *Id.* (citing Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985)).

99. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985)) (internal quotation marks omitted).

100. *Id.*

makes a difference. That is, ordinary methods of statutory interpretation (of the sort described by Justice Kagan in her dissent)[101] would result in the Court finding that Congress *had* delegated the authority asserted by the administrative agency, but the application of the clear statement rule produces a finding that the agency lacks the delegated power. If that is not so—if there are not a substantial number of cases where the major questions doctrine produces a different outcome—then the only conclusion possible is that the clear statement rule imposed by the Court in *West Virginia* is unnecessary to protect the separation of powers. On the other hand, if there *are* a significant number of cases where the new rule will result in striking down agency action that would have survived normal statutory interpretation, then the only possible conclusion is that the Court has arrogated to itself the authority to impose on Congress a special rule dictating how it must go about exercising its Article I legislative powers. Far from being the guardian of the separation of powers the *West Virginia* Court supposed itself to be, the majority set itself up as the threat to the separation of powers by exceeding the limits of judicial authority.[102]

II. *BIDEN V. NEBRASKA*: DOUBLING DOWN ON THE *WEST VIRGINIA* MISTAKE

If *West Virginia* left any genuine doubts about the determination of the Court's conservative majority to wind the clock back to a time when judicial review was used to interfere with the policy choices of the elected branches rather than to enforce constitutional text and norms, they were removed exactly a year later by the 2023 decision in *Biden v. Nebraska*.[103] There, the Court again deployed the major questions doctrine to strike down an executive branch policy. But this time, the policy at issue (cancellation of student loan debt) was even more undeniably authorized by the plain text of a statute than had been the case in *West Virginia*.

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101. *West Virginia*, 597 U.S. at 764 (Kagan, J., dissenting) (arguing that the cases in which the Court purported to find a "clear statement" rule for "major" or "certain extraordinary cases," actually "do normal statutory interpretation: In them, the Court simply insisted that the text of a broad delegation, like any other statute, should be read in context, and with a modicum of common sense").

102. In a related context, Justice Jackson made a similar point in her concurrence in *Consumer Financial Protection Bureau v. Community Financial Services Ass'n of America*, when she observed that if the Court imposes limitations of the powers of the elected branches that appear nowhere in the Constitution while purporting to protect the separation of powers, it is the Court that treads on that separation. 601 U.S. 416, 445–46 (2024) (Jackson, J., concurring) ("When the Constitution's text does not provide a limit to a coordinate branch's power, we should not lightly assume that Article III implicitly directs the Judiciary to find one. . . . An essential aspect of the Constitution's endurance is that it empowers the elected branches to address new challenges by enacting new laws and policies—without undue interference by courts. To that end, we have made clear in cases too numerous to count that nothing in the Constitution gives federal courts 'some amorphous general supervision of the operations of government.' Put another way, the principle of separation of powers manifested in the Constitution's text applies with just as much force to the Judiciary as it does to Congress and the Executive." (first quoting Raines v. Byrd, 521 U.S. 811, 829 (1997); and then citing Pub. Workers v. Mitchell, 330 U.S. 75, 90–91 (1947))).

103. 600 U.S. 477 (2023).

A. The HEROES Act and Student Loan Relief: The (Apparent) Perfect Fit Between Legislative Language and Executive Branch Policy

In 2003, Congress passed the Higher Education Relief Opportunities for Students Act of 2003 ("HEROES Act"),[104] which made permanent an earlier temporary version Congress had enacted after the terrorist attacks of September 11, 2001.[105] The HEROES Act authorizes the Secretary of Education to "'waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the [Education Act] as the Secretary deems necessary in connection with a war or other military operation or national emergency.'"[106] As the government argued in its brief to the Supreme Court, "The provisions governing student-loan repayment obligations, cancellation, and discharge are unquestionably 'statutory or regulatory provision[s] applicable to the student financial assistance programs under title IV.'"[107] In short, the HEROES Act gives the Secretary authority to waive or modify the provisions governing repayment obligations of student loans, and this authority may be exercised to the extent "necessary to ensure that recipients of student financial assistance . . . who are affected individuals [by a national emergency] are not placed in a worse position financially in relation to that financial assistance because of their status as affected individuals."[108]

Based on these provisions, a reasonable summary of the HEROES Act is that a national emergency authorizes the Secretary of Education to alter the obligations owed by recipients of federal student loan assistance so that they are not placed in a worse position with respect to their ability to repay their loans by reason of the national emergency. Importantly, the HEROES Act also specifically states, "The Secretary is not required to exercise the waiver or modification authority under this section on a case-by-case basis."[109] Thus, nothing in the HEROES Act requires the Secretary to limit relief to those borrowers who can demonstrate their individual need. Instead, Congress determined that implementing the HEROES Act by providing waivers and modifications to groups of borrowers as a class was an option that might be necessary and appropriate in the case of some national emergencies.

For example, consider the original emergency that led Congress to pass the HEROES Act in 2001: the aftermath of the September 11 terrorist attacks. As Chief Justice Roberts explained, "Shortly after the September 11 terrorist attacks, Congress became concerned that borrowers affected by the crisis—particularly those who served in the military—would need additional assistance."[110] If a reservist were called up to active duty, she might be leaving a lucrative job that enabled her to repay their student loans comfortably and be placed in a situation where she was unable to do so. In that situation, the HEROES Act, by its terms, authorizes the

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104. Pub. L. No. 108–76, 117 Stat. 904 (codified at 20 U.S.C. § 1098bb).
105. *Nebraska*, 600 U.S. at 485.
106. *Id.* (alteration in original) (quoting 20 U.S.C. § 1098bb(a)(1)).
107. Brief for the Petitioners at 36, *Nebraska*, 600 U.S. 477 (No. 22-506) (alteration in original) (citing 20 U.S.C. § 1098bb(a)(1)).
108. 20 U.S.C. § 1098bb(a)(2)(A).
109. *Id.* § 1098bb(b)(3).
110. *Nebraska*, 600 U.S. at 485.

Secretary of Education to take steps to "waive or modify" the requirements of the student loan program because the reservist is plainly affected by the national emergency that led to the call-up.

In short, the HEROES Act vests in the Secretary of Education wide discretion to "waive or modify" a student loan borrower's obligation to ameliorate or erase the impact of a national emergency on any and all affected borrowers. Nothing in the language of the HEROES Act even suggests the Secretary can make only "minor" modifications; if anything, the fact that the statute explicitly says the Secretary need not make case-by-case determinations of a borrower's need or eligibility for relief indicates broad discretion to respond to the general impact of an emergency on affected borrowers. This conclusion is also supported by the statute's use of the phrase "waive or modify." This language vests in the Secretary two distinct powers: to either waive repayments or modify them. As we will see, the Court's decision collapsed the distinction between these options.

B. The Court's Decision in Nebraska*: Ignoring Plain Meaning in Favor of Judicial Policymaking*

Instead of reading the statutory term "waive or modify" in a way consistent with its plain meaning, the Court read it in the most crabbed way possible. According to the majority, modify "carries 'a connotation of increment or limitation,' and must be read to mean 'to change moderately or in minor fashion.'"[111] One of Chief Justice Roberts's objections to the modifications was that they were not tied in any way to a particular borrower's needs,[112] even though the HEROES Act explicitly states that the Secretary's authority to modify student loan obligations need not be exercised on a case-by-case basis.

Even worse was the way that the Court dismissed the separate power delegated to the Secretary to "waive" student loan obligations. The only basis on which the Court asserted that the authority to "waive" does not include the power to, well, waive was that "the Secretary's invocation of the waiver power here does not remotely resemble how it has been used on prior occasions."[113] What was "different" was that the Secretary did not point to a specific provision of the Education Act that he was waiving[114]—as if a student's obligation to repay her loan is not a provision of the Act. But as Justice Kagan explained in dissent, the Secretary "could 'waive or modify any statutory or regulatory provision' applying to federal student-loan programs, including provisions relating to loan repayment and forgiveness. And in so doing, he could replace the old provisions with new 'terms and conditions.'"[115]

In fact, the decision in *Nebraska* represented a substantial expansion of the major questions doctrine announced in *West Virginia*. For example, the Court

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111. *Id.* at 494 (citing MCI Telecomm. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 225 (1994)).

112. *Id.* at 496 ("[E]very borrower within the specified income cap automatically qualifies for debt cancellation, no matter their circumstances.").

113. *Id.* at 497.

114. *See id.*

115. *Id.* at 522 (Kagan, J., dissenting) (citing 20 U.S.C. § 1098bb(a)(1), (b)(2)).

stressed that the Department of Education's plan involved a major question because it would cost more than $400 billion[116] and because Congress had been vigorously debating bills involving student loan relief.[117] On both counts, this constitutes a vast expansion of the major questions doctrine compared to *West Virginia*. Consider the Court's summary of the scope of the CPP's impact in *West Virginia*:

> EPA's own modeling concluded that the rule would entail billions of dollars in compliance costs (to be paid in the form of higher energy prices), require the retirement of dozens of coal-fired plants, and eliminate tens of thousands of jobs across various sectors. The Energy Information Administration reached similar conclusions, projecting that the rule would cause retail electricity prices to remain persistently 10% higher in many States, and would reduce GDP by at least a trillion 2009 dollars by 2040.[118]

By any measure, the economic impact of bringing about a fundamental shift in the way the nation generates electricity dwarfs the impact of a single round of limited student loan relief restricted to a narrow set of borrowers.[119] With each decision applying the major questions doctrine, it seems, the Court expands the universe of questions that are "major" and thus narrows the scope of permissible executive action pursuant to legislative delegation.

The expansion of the major questions doctrine was inevitable because the Court is adopting it in pursuit of the agenda of taming the administrative state, not because it has any genuine basis in the Constitution. If it were grounded in the Constitution, it might be possible to define its contours. But since it is about a policy-based agenda, and expanding it serves that agenda, the move from *West Virginia* to *Nebraska* should be no surprise.

The policymaking that lies at the heart of the major questions doctrine is revealed not just by its expanding scope. It is also laid bare by the lengths that the Court has gone to ignore the statutory language by claiming that it is not sufficiently clear to support the action of the executive branch. As Justice Kagan put it in dissent in *Nebraska*, for example:

> The Secretary, that is, could give the relief that was needed, in the form he deemed most appropriate, to counteract the effects of a national emergency on borrowers' capacity to repay. That may have

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116. *Id.* at 502 (majority opinion).

117. *Id.* at 502–03.

118. West Virginia v. EPA, 597 U.S. 697, 714–15 (2022) (first citing U.S. ENV'T PROT. AGENCY, REGULATORY IMPACT ANALYSIS FOR THE CLEAN POWER PLAN FINAL RULE 3-22, 3-30, 3-33, 6-24 to -25 (2015), https://www3.epa.gov/ttnecas1/docs/ria/utilities_ria_final-clean-power-plan-existing-units_2015-08.pdf [https://perma.cc/GFS7-QSH4]; and then citing U.S. DEP'T OF ENERGY, ANALYSIS OF THE IMPACTS OF THE CLEAN POWER PLAN 21, 63–64 (2015), https://www.eia.gov/analysis/requests/powerplants/cleanplan/pdf/powerplant.pdf [https://perma.cc/H3QN-7ZXN].

119. The debt cancellation ordered by the Secretary of Education was limited to borrowers with a federal gross adjusted income below $125,000 (or $250,000 for borrowers filing jointly). *Nebraska*, 600 U.S. at 487–88, 488 n.2. This substantially limited the class of borrowers eligible for HEROES Act relief.

> been a good idea, or it may have been a bad idea. Either way, it was what Congress said.[120]

But in the brave new world of the major questions doctrine, the Court is uninterested in what Congress said. What matters is ignoring what Congress said in the service of taming the perceived excesses of the administrative state.

Nor is it just the generalized bias against administrative agency authority. It is also antipathy to the particular policy choices made by the agencies. Even a cursory reading of the oral argument transcript in *Nebraska* demonstrates the hostility that some of the justices in the majority had towards the substantive decision to provide even the modest student loan relief afforded by the Biden plan. Chief Justice Roberts, for example, referred repeatedly to the cumulative amount of money in loan obligations that would be eliminated ("half a trillion dollars"),[121] as if the amount of debt relief being enacted has any relevance to the authority of the Secretary of Education under the statute.

C. Trump II: Anticipating the Court's Application of the Major Questions Doctrine During Donald Trump's Second Term

It is a substantial understatement to say that Donald Trump has pledged major—one might fairly say tectonic—changes to the federal government and its policies during his second term, which began on January 20, 2025. Of course, he might seek to implement some of those by convincing Congress to pass legislation. Such legislative action would not raise questions about whether the major questions doctrine would be an obstacle, since its whole point is to ensure that the executive branch does not implement policies on major economic and political issues by means that intrude on Congress's legislative authority.

But Trump has started to implement policies across a broad swath of policy areas via executive orders.[122] The major questions doctrine may operate as a substantial obstacle to those plans and, at the same time, provide an important hypocrisy test for the Court. If the justices who established the major questions doctrine provide a green light to some of Trump's initiatives without requiring a clear statement from Congress, which the doctrine demands, they will give credence to the suspicion that their actual purpose is to oppose items from the progressive agenda of a Democratic President rather than to impose an even-handed test for administrative action regardless of the political slant involved.

For example, on January 20, 2025, President Trump entered the Executive Order entitled, "Restoring Accountability to Policy-Influencing Positions Within the

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120. *Id.* at 522 (Kagan, J., dissenting).

121. *See, e.g.*, Transcript of Oral Argument at 7, 10, *Nebraska*, 600 U.S. 477 (No. 22-506).

122. *See Trump Executive Orders Target Climate, Immigration Policy, Federal Employees*, REUTERS, https://www.reuters.com/world/us/heres-what-we-know-about-trumps-planned-executive-orders-so-far-2024-12-17 [https://perma.cc/V29Q-GC72] (Jan. 21, 2025, 12:15 AM) (discussing executive orders signed by Trump early in his second term covering immigration, energy production and climate, tariffs, and pardons).

Federal Workforce."[123] This order "reinstated"[124] the plan initiated by President Trump late in his first term,[125] only to see it quickly rescinded by President Biden upon his taking office in January 2021.[126] The so-called Schedule F plan would allow the President to reclassify tens of thousands of federal workers out of the civil service, exempting those positions from competitive hiring rules[127] and rules governing "adverse action procedures,"[128] allowing the President to easily replace them with political loyalists.

According to the 2020 Executive Order, the creation of the Schedule F classification was based on authority Congress conferred in 5 U.S.C. § 3302, which provides: "The President may prescribe rules governing the competitive service. The rules shall provide, as nearly as conditions of good administration warrant, for necessary exceptions of positions from the competitive service."[129] At first glance, Congress's broad grant of authority to the President to make "necessary" exceptions for the sake of "good administration" might seem to provide the basis needed for the President to create Schedule F. Indeed, the original 2020 Executive Order was replete with claims of the necessity of creating greater flexibility in the hiring and firing of federal employees.[130]

But that is where the major questions doctrine comes in. If the Court meant what it said in *West Virginia* and *Nebraska*, the ordinary methods of statutory interpretation that might apply to § 3302 would not apply, and its terms do not

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123. *See* Exec. Order No. 14,171, 90 Fed. Reg. 8625, 8625 (Jan. 31, 2025).

124. *Id.* § 2, 90 Fed. Reg. at 8625 ("Reinstatement of Prior Administration Policy. Executive Order 13,957 of October 21, 2020 (Creating Schedule F in the Excepted Service), is hereby immediately reinstated with full force and effect.").

125. *See* Creating Schedule F in the Excepted Service, Exec. Order No. 13,957, 85 Fed. Reg. 67631, 67631 (Oct. 26, 2020); *see also* Nicole Ogrysko, *New Executive Order Could Strip Civil Service Protections From 'Wide Swaths' of Federal Workforce*, FED. NEWS NETWORK (Oct. 22, 2020, 4:24 PM), https://federalnewsnetwork.com/workforce/2020/10/new-executive-order-may-reclassify-wide-swaths-of-career-positions-as-political-appointees [https://perma.cc/XS5D-U9RB].

126. *See* Nicole Ogrysko, *Biden Repeals Schedule F, Overturns Trump Workforce Policies With New Executive Order*, FED. NEWS NETWORK (Jan. 22, 2021, 9:45 AM), https://federalnewsnetwork.com/workforce/2021/01/biden-to-repeal-schedule-f-overturn-trump-workforce-policies-with-new-executive-order [https://perma.cc/5L8D-DG8L].

127. *See* Exec. Order No. 13,957, § 1, 85 Fed. Reg. at 67631 ("I find that conditions of good administration make necessary an exception to the competitive hiring rules and examinations for career positions in the Federal service of a confidential, policy-determining, policy-making, or policy-advocating character.").

128. *Id.* § 1, 85 Fed. Reg. at 67632 ("Conditions of good administration similarly make necessary excepting such positions from the adverse action procedures set forth in chapter 75 of title 5, United States Code [which] requires agencies to comply with extensive procedures before taking adverse action against an employee.").

129. 5 U.S.C. § 3302(1).

130. Exec. Order No. 13,957, § 1, 85 Fed. Reg. at 67631–32 (citing "the need to provide agency heads with additional flexibility to assess prospective appointees without the limitations imposed by competitive service selection procedures," to "mitigate undue limitations on their selection," and "give agencies greater ability and discretion to assess critical qualities in applicants to fill these positions, such as work ethic, judgment, and ability to meet the particular needs of the agency").

supply the clear statement the doctrine requires. The first inquiry is whether the issue involves a major question. It would be difficult—at best—for the Trump Administration to claim that the reclassification of at least 50,000 federal employees (and perhaps hundreds of thousands more)[131] does not represent a major question in how the federal government operates. Had the Court not dramatically expanded what constitutes a "major" question when it decided *Nebraska*, it might perhaps be arguable that the rule adopted in *West Virginia* truly applies only to a limited class of cases of extraordinary significance, such as how to deal with the global climate-change crisis. But then the Court held that waiving student loan repayments, which amounted to a drop in the proverbial bucket in the federal budget, was a major question justifying a departure from normal rules of statutory interpretation. This created for the Court a far more difficult task to distinguish *any* question of even moderate significance—which the lawfulness of creating Schedule F surely is.

The problem of distinguishing the major questions cases is even stickier when it comes to the application of the clear statement rule. While the sheer breadth of § 3302 might seem to provide a strong case that it clearly supports the Executive Order, the delegations were at least as broad in the statutes invoked in *West Virginia* and *Nebraska*. Yet in those cases, the Court found that a broad delegation was not sufficient, leading Justice Kagan in her dissent in *West Virginia* to observe that the Court mistook breadth for vagueness.[132] The only reasonable reading of the Court's major questions decisions to date is that Congress must be *specific* in giving the executive branch the authority it asserts, not merely broad.

Other aspects of the major questions decisions point sharply against the constitutionality of creating Schedule F. The Court pointed out in both *West Virginia* and *Nebraska* that the authority being asserted by the government was a sharp break from prior practice under the statute.[133] Similarly, the creation of Schedule F would be an unprecedented use of § 3302.[134] In addition, the core purpose of the Civil Service Reform Act was to create a professional civil service, in part by giving those professionals protections from political pressure or retribution as they carry out their

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131. *See* Drew Friedman, *Trump's Promise to Revive Schedule F Could Become a "Prompt" Reality*, FED. NEWS NETWORK (Nov. 8, 2024, 1:33 PM), https://federalnewsnetwork.com/workforce/2024/11/trumps-promise-to-revive-schedule-f-could-become-a-prompt-reality [https://perma.cc/WLQ6-LEZ5] (noting estimates that the original Executive Order promulgated by President Trump in 2020 would have applied to 50,000 federal workers, but that "by more recent estimates, Schedule F could have extended to hundreds of thousands of positions").

132. West Virginia v. EPA, 597 U.S. 697, 759 (2022) (Kagan, J., dissenting).

133. *Id.* at 724 (majority opinion); Biden v. Nebraska, 600 U.S. 477, 496–97 (2023).

134. *See* GOVERNING FOR IMPACT, DEPLOYING THE MAJOR QUESTIONS DOCTRINE TO THWART PROJECT 2025, at 9–10 (2024) (footnotes omitted), https://governingforimpact.org/wp-content/uploads/2024/12/MQD-Claims-Primer-Templated-Major-Questions-final-11_26_2024s-2.pdf [https://perma.cc/ZVG8-9L2C] (noting that the number of federal employees exempted from civil service protections by presidential use of § 3302 has "remained relatively steady, at around 1,500, over the last 70 years," and that "[p]ast presidential uses of the § 3302 authority to move competitive service positions into the excepted service appear to be both rare and, with one exception, narrowly tailored to address recruiting problems within specific agencies").

duties.[135] While § 3302 recognizes the need for the President to be able to craft narrow exceptions to this principle, "Schedule F would abuse that authority to create exceptions large enough to bend the federal bureaucracy to the President's whims, the precise outcome that the drafters of Title 5 sought to avoid with the enactment of the Civil Service Reform Act."[136] Indeed, the Court was explicit in *West Virginia* that the executive branch cannot invoke general language to take such steps.[137]

In short, the creation of the Schedule F classification, and the resulting transformation of a vast swath of the federal workforce it would bring about, is precisely the sort of major question that the Court has now told us must be justified by a particularly clear statement that Congress delegated to the executive branch the authority being asserted. Faithful application of the clear statement rule calls the validity of Schedule F deeply into question—meaning that the inevitable constitutional challenge to the reinstated Executive Order will be a significant test for the Court.

III. THE OCTOBER 2023 TERM: *LOPER BRIGHT* AND CONFIRMATION OF THE HIROSHIMA HYPOTHESIS

From the outset, the development of the major questions doctrine was deeply intertwined with the fate of *Chevron*. As I noted earlier,[138] in any case where the Court decides that a major question is involved and thus requires Congress to provide a clear statement of its intent to delegate the power at issue to the administrative agency enforcing the statute, the Court will *not* be deferring to the agency's assertion that it possesses the power. This is true even if the agency's claim represents a reasonable reading of the statute since an interpretation can (and often will) fill the space between being reasonable and not being supported by clear congressional language.

In other words, by using *West Virginia*'s major questions doctrine—and by expanding it to cover even routine cases on the pretense that they involve a "major" question, a process the Court began in *Nebraska*—the Court could have simply left *Chevron* in its nominal place. It would be a virtual dead letter applicable only to the rare inconsequential situation not involving a major question, so the agency

135. *See* U.S. MERIT SYS. PROT. BD., WHAT IS DUE PROCESS IN FEDERAL CIVIL SERVICE EMPLOYMENT? A REPORT TO THE PRESIDENT AND THE CONGRESS OF THE UNITED STATES 10 (2015), https://www.mspb.gov/studies/studies/What_is_Due_Process_in_Federal_Civil_Service_Employment_1166935.pdf [https://perma.cc/V2NZ-G2U2] (describing the core purpose of the Civil Service Reform Act of 1978, to codify "the employee's right to: (1) notice of the charges; (2) a reasonable opportunity to respond to the deciding official; and (3) an appeal to a neutral body after the adverse action takes effect").

136. GOVERNING FOR IMPACT, *supra* note 134, at 10.

137. 597 U.S. at 723 ("Nor does Congress typically use oblique or elliptical language to empower an agency to make a 'radical or fundamental change' to a statutory scheme." (citing MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 229 (1994))); *see also* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

138. *See supra* text accompanying notes 37–56.

wouldn't need a clear statement from Congress and could act upon a reasonable interpretation of the authorizing statute.

But this wasn't sufficient for a Court determined to decimate the administrative state. In *Loper Bright*,[139] the Court did away with what was left of *Chevron* deference, once again aggrandizing power to itself at the expense of the elected branches. Critics of *Chevron*—including the *Loper Bright* Court[140]—have argued that its core principle represents an abdication by the Court of its authority (and duty) to say what the law is,[141] because the Court instead defers to what an administrative agency says the law is.[142]

To read Chief Justice Roberts's opinion in *Loper Bright*, you would almost believe *Chevron* was the equivalent of stripping the courts of jurisdiction to hear cases challenging administrative agencies' interpretations of the statutes they enforce.[143] But of course *Chevron* did nothing like that. It preserved the vital role of courts to determine the reasonableness of an agency's interpretation—clearly leaving with courts the final role of ensuring that the executive branch does not stray from Congress's design in writing a statute.[144]

The claims against *Chevron* misunderstand both *Chevron* and the Court's proper role. Contrary to the claims of its critics,[145] *Chevron* never purported to transfer the Court's authority to say what the law is. It simply set forth what ought to have been the uncontroversial proposition that when the Court says what the law

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139. 603 U.S. 369 (2024).

140. *Id.* at 402 (arguing that *Chevron* erred because it was based on the premise that administrative agencies rather than courts may "authoritatively interpret" statutes).

141. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

142. *See Loper Bright*, 603 U.S. at 414 (Thomas, J., concurring) ("*Chevron* compels judges to abdicate their Article III 'judicial Power.'" (citing U.S. CONST. art. III, § 1)); Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 26–28 (1983) (discussing, but rejecting, the claim that deference to administrative agency interpretations of federal law is inconsistent with the Court's Article III authority as defined in *Marbury*); *see also* Philip Hamburger, Chevron *Bias*, 84 GEO. WASH. L. REV. 1187, 1209 (2016) (claiming that under *Chevron*, judges "abandon[] their very office as judges"); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 456 (1989) (seeing *Chevron* deference as "seductive but treacherous").

143. *Cf.* U.S. CONST. art. III, § 2, cl. 2 ("In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."). The so-called Exceptions Clause has been held out as permitting Congress to prevent the Court from exercising jurisdiction over classes of cases by enacting a statute defining them as falling outside the Court's appellate jurisdiction.

144. *See Loper Bright*, 603 U.S. at 455 (Kagan, J., dissenting) (describing the courts' role as serving as a "backstop to make sure the agency makes a reasonable choice among the possible readings").

145. *See, e.g.*, Hamburger, *supra* note 142, at 1234 ("[I]n deferring to the judgment of the executive about what the law is [under *Chevron*], judges alter the real structure of government, shifting the judicial power back into the executive.").

is, it should give substantial weight to the agency charged by Congress with enforcing that law.[146]

Take, for example, the case Chief Justice Roberts said in *Loper Bright* was the "most recent occasion"[147] that the Court deferred to an agency under *Chevron*. In *Cuozzo Speed Technologies v. Commerce for Intellectual Property*,[148] the Court undertook a careful analysis of the statute at issue, the Leahy–Smith America Invents Act,[149] to determine the validity of the regulation issued by the U.S. Patent and Trademark Office ("USPTO") governing *inter partes* review of patent claims. While the section of Justice Breyer's opinion upholding the regulation began with *Chevron* and noted that the statute didn't point definitively to one standard or the other,[150] the Court used that only as a starting point. The opinion explained why, as a matter of interpretation, the statutory provision at issue was not limited in the way suggested by some of the lower court judges,[151] thus opening the door to the conclusion that the USPTO's broad regulation was permissible. In other words, any court operating under *Chevron* nevertheless had to do what the Court did in *Cuozzo*: engage in statutory analysis. It is thus, at best, a gross exaggeration to claim that under *Chevron*, courts failed to perform the task of saying what the law is.

Critics of *Chevron* respond that there will inevitably be cases in which deference translates into abdication of judicial authority. There is, after all, one *best* interpretation of a statute.[152] If a court instead gives to that statute a meaning other than that "best meaning" simply because the administrative agency takes that sub-optimal view and it is reasonable, the court is ceding to the agency the ultimate power to give meaning to the statute.

This response is unpersuasive and unrealistic. Statutes operate in the real world of application and enforcement. There will often not be one "best" meaning,[153] but different best meanings depending on the context where the statute is being

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146. Chief Justice Roberts's opinion for the Court in *Loper Bright* sought to draw a distinction between improper "deference" to an administrative agency and "respect" for its interpretation of the law. *See Loper Bright*, 603 U.S. at 387 ("'Respect,' though, was just that. The views of the Executive Branch could inform the judgment of the Judiciary, but did not supersede it."). This reveals the flaw in the majority's view of *Chevron*: that "deference" means that the courts' judgment has been "superseded."

147. *Id.* at 406.

148. 579 U.S. 261, 280 (2016).

149. Pub. L. No. 112-29, § 6 (2011) (codified at 35 U.S.C. § 314).

150. *Cuozzo*, 579 U.S. at 276–77 ("The statute contains such a gap: No statutory provision unambiguously directs the agency to use one standard or the other.").

151. *Id.* at 277 (distinguishing the statute at issue from the provision before the Federal Circuit in *Cooper Technologies Co. v. Dudas*, 536 F.3d 1330, 1336 (Fed. Cir. 2008), because the grant of authority to issue regulations was different).

152. *Loper Bright*, 603 U.S. at 400 (arguing that even if a statute is ambiguous, "there is a best reading all the same").

153. *Id.* at 454 (Kagan, J., dissenting) ("[A] statutory phrase has more than one reasonable reading. And Congress has not chosen among them: It has not, in any real-world sense, 'fixed' the 'single, best meaning' at 'the time of enactment'" (citing *id.* at 400 (majority opinion))).

applied and the policy goals and priorities of the administration enforcing the law.[154] In other words, there is room for differences of opinion about how statutes *should* be applied, differences that are on display as administrations with opposing views replace one another. It is hardly surprising that in almost every significant area of the administrative state—environmental law, immigration, regulation of financial markets, discrimination—enforcement of statutes changes when an election hands the keys to the administrative state from one party to the other. Indeed, presidential candidates run on platforms that promise exactly such a shift in how statutes are enforced. The premise underlying this system is that statutes vest discretion in the executive branch—which is to say, there is no one fixed meaning. *Chevron* allowed courts to defer to multiple readings of a statute—as long as the administration did not stray beyond a reasonable interpretation.

In this respect, the flaws in the major questions doctrine and the case for overruling *Chevron* overlap. Both the majority opinion and Justice Gorsuch's concurrence in *West Virginia* argued that the EPA's attempt to use the CAA to justify the CPP foundered because the regulation was inconsistent with prior administrations' understanding of the scope of the CAA.[155] But that should not be surprising or the basis for intervention by the Court. Enforcement priorities change, as do circumstances that give rise to new challenges to the effectiveness of a statutory scheme. The mere fact that a statute hasn't been used by prior administrations in a particular way doesn't mean the statute cannot be reasonably read to permit that use. The CPP was a response to the new challenge presented by climate change.[156] The fact that the EPA had not used the CAA to introduce anything like the CPP before the evidence of climate change was so clear, or before the time frame to deal with it was understood to be dramatically short, tells us nothing about whether the courts ought to require a clear statement of Congress's intent or whether they should defer to the EPA.

It is also important to note, as Justice Kagan did,[157] that the reasons Congress used its Article I power to delegate that authority to the agency also counsel judicial deference. Administrative agencies develop expertise in the areas

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154. *Id.* at 449 ("Agencies report to a President, who in turn answers to the public for his policy calls; courts have no such accountability and no proper basis for making policy.").

155. West Virginia v. EPA, 597 U.S. 697, 725 (2022) (arguing that "[p]rior to 2015," the EPA had never exercised its authority under § 111 as it was purporting to with the CPP); *id.* at 747–49 (Gorsuch, J., concurring) ("Nor has the agency previously interpreted the relevant provision to confer on it such vast authority; there is no original, longstanding, and consistent interpretation meriting judicial respect.").

156. *Id.* at 753–54 (Kagan, J., dissenting).

157. *Loper Bright*, 603 U.S. at 449 (Kagan, J., dissenting) ("This Court has long understood *Chevron* deference to reflect what Congress would want, and so to be rooted in a presumption of legislative intent. Congress knows that it does not—in fact cannot—write perfectly complete regulatory statutes. It knows that those statutes will inevitably contain ambiguities that some other actor will have to resolve, and gaps that some other actor will have to fill. And it would usually prefer that actor to be the responsible agency, not a court.").

within their enforcement authority.[158] More importantly, deference to the agency is a form of deference to Congress, which (wisely or not) chose to vest authority in that agency. The essential task of interpreting a statute necessarily falls on the agency that must enforce that statute. In almost every instance, that means the agency will interpret the law it enforces before a court ever does so. Once a court gets involved, its refusal to give weight to the agency's views shows disregard for both Congress and the agency.

And, it must be said, *Chevron* operated only in situations where the statute's meaning was ambiguous and the agency's interpretation was reasonable. If a statute is clear on its face, then the agency receives no deference. Either the agency's interpretation is consistent with that clear language and no deference is required, or it is inconsistent with that language and the interpretation is unreasonable and would not benefit from *Chevron* deference anyway.

In *Loper Bright*, however, the Court refused to see *Chevron*'s limits as an important virtue. Instead, it imagined into existence a version of *Chevron* deference that bore no resemblance to reality. The Court found *Chevron* deference to be inconsistent with the terms of the Administrative Procedure Act ("APA"),[159] which "directs that '[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.'"[160] But deferring to an agency's interpretation does not mean a reviewing court is failing either to follow *Marbury v. Madison*'s edict that it is the province of the judiciary to "say what the law is" or the APA's mandate to "decide all relevant questions of law." Put simply, *Chevron* constituted a framework developed by the Court for *how* it would go about the task of deciding "all relevant questions of law," rather than a declaration that it would not decide them.

Once the limits of *Chevron* are recognized and understood, the idea of deference is an exercise in judicial humility.[161] It recognized that courts are not always in the best position to resolve ambiguity in the meaning of a statute, as Justice Kagan's *Loper Bright* dissent explained.[162] There, she pointed to the issues raised in specific cases where *Chevron* was applied to illustrate why administrative agencies are often in a better position to interpret ambiguous statutes:

> Consider, for example, [*Teva Pharmaceuticals USA, Inc. v. FDA*[163]]. When does an alpha amino acid polymer qualify as a "protein"? I

158. *Id.* ("Some interpretive issues arising in the regulatory context involve scientific or technical subject matter. Agencies have expertise in those areas; courts do not. Some demand a detailed understanding of complex and interdependent regulatory programs. Agencies know those programs inside-out; again, courts do not.").

159. *Id.* at 396 (majority opinion) ("The deference that *Chevron* requires of courts reviewing agency action cannot be squared with the APA.").

160. *Id.* at 391 (citing 5 U.S.C. § 706).

161. *Id.* at 450 (Kagan, J., dissenting) ("A rule of judicial humility gives way to a rule of judicial hubris.").

162. *Id.* at 456 ("[A]gencies often know things about a statute's subject matter that courts could not hope to. The point is especially stark when the statute is of a 'scientific or technical nature.'" (quoting Kisor v. Wilkie, 588 U.S. 558, 571 (2019) (plurality opinion))).

163. 514 F. Supp. 3d 66 (D.D.C. 2020).

> don't know many judges who would feel confident resolving that issue. (First question: What even *is* an alpha amino acid polymer?) But the FDA likely has scores of scientists on staff who can think intelligently about it, maybe collaborate with each other on its finer points, and arrive at a sensible answer. Or take [*Northwest Ecosystem Alliance v. U.S. Fish & Wildlife Service*[164]], involving the Endangered Species Act. Deciding when one squirrel population is "distinct" from another (and thus warrants protection) requires knowing about species more than it does consulting a dictionary. How much variation of what kind—geographic, genetic, morphological, or behavioral—should be required? A court could, if forced to, muddle through that issue and announce a result. But wouldn't the Fish and Wildlife Service, with all its specialized expertise, do a better job of the task—of saying what, in the context of species protection, the open-ended term "distinct" means? One idea behind the *Chevron* presumption is that Congress—the same Congress that charged the Service with implementing the Act—would answer that question with a resounding "yes."[165]

Cases like these—where *Chevron* was applied because it made sense to defer to the genuine expertise of the agencies entrusted by Congress with enforcing a statute—demonstrate its considerable virtues in the real world. Ending the *Chevron* regime did not restore the Court's authority. It defied common sense.

IV. THE COURT'S MOVES IN CONTEXT: CONSTITUTIONAL MOMENT OR MODEST COURSE CORRECTION?

My thesis is that the Court's recent decisions relating to the exercise of executive power (and what Congress must do to delegate such power) marked a generational transformation in the world of American constitutional law, and that world will never be the same. Another way to put the point might be to say that we are experiencing a "constitutional moment" evocative of the framework advanced by Professor Bruce Ackerman.[166] Ackerman suggests that constitutional transformation has periodically occurred outside the Article V process, which I argue is exactly what the Hiroshima Court has done. This raises two important questions. Are the transformations the Court has brought about thus far comparable in impact to the historical "moments" in Ackerman's narrative? And if so, have these changes been justified by indications that "We the People" are engaged in the higher lawmaking that Ackerman posits is necessary to justify constitutional transformation outside Article V? I address these questions in turn.

A. The Constitutional Seismograph: How Big Has the Earthquake Been?

When the Court in *West Virginia* and *Nebraska* changed the rules governing the ability of administrative agencies to wield authority delegated to them by Congress, and especially when it dramatically upped the ante in *Loper Bright*, it transformed the relationship between all three branches. The result was to reduce the power of the elected branches and increasing the Court's own power. In effect,

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164. 475 F.3d 1136 (9th Cir. 2007).
165. *Loper Bright*, 603 U.S. at 456 (Kagan, J., dissenting) (citations omitted).
166. *See* ACKERMAN, *supra* note 12, at 3–33.

it marked the initial foray into the Court's upsetting a balance that has been maintained since the "switch in time" in 1937.[167] That alone would be enormously important—seismic, as it were. But even more to the point: when this shift is placed within the broader context of the other cases in these Terms where the Court has overruled longstanding precedents,[168] it should be clear that the ongoing constitutional earthquake is among the most powerful in our history.

As I argued earlier, the Court's shift to acceptance of the New Deal and the subsequent growth of the administrative state represented a recognition on its part that it had grievously erred during the *Lochner* Era by interfering with Congress's authority in the absence of any basis in the Constitution to do so.[169] Even beyond the problematic substance of the major questions doctrine itself—and beyond the validity of the general campaign to reign in the administrative state[170]—the more fundamental issue with the Court's moves is that the justices have forgotten the lessons about the limits of their own role and authority.[171] These points make what the Court did in *West Virginia*, *Nebraska*, and *Loper Bright* critically important.

There are relatively few things the Court can do with its rulings more consequential than altering the balance of power between the branches of the federal government. That, after all, is the lesson of the Court's decisions in 1937,[172] and in

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167. *See* Daniel Ho & Kevin Quinn, *Did A Switch in Time Save Nine?*, 2 J. LEGAL ANALYSIS 69, 70–71 (2010) (outlining the controversy surrounding the popular narrative that Justice Owen Roberts shifted his vote from his prior position striking down New Deal legislation to upholding such programs in order to defuse President Franklin Roosevelt's proposal to expand the Court).

168. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022), *overruling* Roe v. Wade, 410 U.S. 113 (1973); Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 523 (2022), *abrogating* Lemon v. Kurtzman, 403 U.S. 602 (1971), *as recognized in* Groff v. DeJoy, 600 U.S. 447 (2023); Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023) (overruling *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Fisher v. Univ. of Texas*, 570 U.S. 297 (2013), to the extent that they recognized diversity in higher education as a compelling interest that could justify consideration of race in admissions).

169. *See supra* text accompanying notes 17–24.

170. *See, e.g.*, Richard A. Epstein, *Why the Modern Administrative State Is Inconsistent with the Rule of Law*, 3 N.Y.U. J.L. & LIBERTY 491, 495 (2008) (arguing that "the strong structural protections found in the original Constitution should not have been swapped out for a mess of administrative porridge"); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 544–45, 582 (1994) (defending the "unitary executive" theory of Article II of the Constitution, pursuant to which the creation of independent administrative agencies violates the President's authority to execute the laws).

171. It is telling that the Court has strayed so far back into Lochneresque error. It has not been that long since, as Bruce Ackerman noted, "For a modern judge, one of the worse insults is that she is reenacting the sin originally committed by the pre-New Deal Court in cases like *Lochner v. New York*." ACKERMAN, *supra* note 12, at 40. Now, what was insulting has become the core of the contemporary Court's jurisprudence.

172. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937) (upholding the National Labor Relations Act because the Commerce Clause empowers Congress to regulate even local activities if they place a burden on the flow of commerce).

the years that followed,[173] allowing Congress much more regulatory leeway under the Commerce Clause and more flexibility in empowering federal agencies to enforce the regulations Congress passed. There is a reason Professor Edwin Corwin, one of the leading constitutional scholars of the mid-twentieth century, labeled the Court's decisions in the late 1930s a "constitutional revolution" in the title of his seminal work on the era,[174] and Professor Ackerman cited this as one of the critical "constitutional moments" in our history.[175] Precisely to the extent that the Court reverses that revolution, it is plainly another constitutional moment.

The distribution of powers among the branches was among the most critical elements of the design crafted at the Constitutional Convention in 1787. The new Constitution was, of course, intended to substantially increase the powers of the federal government compared to the relatively meager authority held at the national level under the Articles of Confederation.[176] It was thus essential to craft limits on those powers if supporters of ratification were going to successfully fend off the criticism that the Constitution once again exposed the new nation to the tyranny of central authority that had existed under British rule.[177] The Framers said as much. In *Federalist No. 47*, James Madison wrote:

> The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny. Were the federal constitution therefore really chargeable with this accumulation of power or with a mixture of powers having a dangerous tendency to such an accumulation, no

173. *See* Wickard v. Filburn, 317 U.S. 111, 124 (1942) (expansively applying the substantial effects test to hold that Congress could regulate production of home-grown wheat not intended for interstate sale because of the effect it could have on the interstate market for wheat).

174. *See* EDWARD S. CORWIN, CONSTITUTIONAL REVOLUTION, LTD. 112–14 (Am. Offset Printers rev. ed. 1946) (1941).

175. *See* ACKERMAN, *supra* note 12, at 114–15.

176. *See* Calvin H. Johnson, *Madison's Denial: Three Lives of James Madison: Genius, Partisan, President*, 34 CONST. COMMENT. 193, 197–98 (2019) (book review) (discussing Madison's position that the weakness of the national government under the Articles required that it be strengthened).

177. *See* Jennifer Nedelsky, *Confining Democratic Politics: Anti-Federalists, Federalists, and the Constitution*, 96 HARV. L. REV. 340, 345–46 (1982) (book review) (footnote omitted) ("For the Anti-Federalists, the proposed Constitution did not meet these objectives. Because the political values discussed above could be realized only in a relatively small community, the Constitution made a fundamental mistake in shifting the locus of power from the states, where genuine republican government was possible, to a central government, where it was not. The Federalists claimed that the central government required extensive powers and that the great advantage of the new Constitution was that it would structure the necessary power to make it safe. The Anti-Federalists were unconvinced: not only was the power assigned to the federal government dangerously misplaced, but the proposed structure itself was a threat to republican liberty.").

> further arguments would be necessary to inspire a universal reprobation of the system.[178]

Given the centrality of the distribution of powers among the branches to the purpose of the Constitutional Convention and to its outcome, it is as critical as anything the Supreme Court does that it respects the powers of each branch—including the judiciary. If the Court artificially and without basis in the Constitution limits the authority of another branch (or branches), it is necessarily exceeding its own power.[179]

And that is precisely what the Court did in *West Virginia*, *Nebraska*, and *Loper Bright*. It invalidated executive branch actions authorized by statutes passed by Congress on the dubious theory that it—the Court—has the authority to dictate to Congress *how* it must delegate. This, inevitably, constituted a serious intrusion into the constitutional order. While these cases did not make the headlines that resulted from the Court's decision to overrule *Roe v. Wade* in *Dobbs v. Jackson Women's Health Organization*[180]—nor did they create a similar political tidal wave[181]—they were actually a far more substantial overreach by the Court. Whereas *Dobbs* can arguably be defended as the Court deferring to democratic decision-making,[182] the major questions cases, and ending *Chevron* deference, did the opposite.

B. The Illegitimacy of This "Constitutional Moment": Naked Judicial Power v. Higher Lawmaking

The problem with what the Court has done is that while it has created change of a magnitude consistent with a true constitutional moment—what Professor Ackerman described as "a fundamental reworking of the status quo"[183]—none of the conditions Ackerman described for the exercise of "dualist democracy" have been met. Constitutional change outside Article V should occur, according to Ackerman, when "mobilized masses of ordinary citizens . . . finally organize their

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178. THE FEDERALIST NO. 47, at 324 (James Madison) (Jacob Ernest Cooke ed., 1961).

179. Indeed, this is the heart of what Alexander Bickel famously called the "counter-majoritarian difficulty"—there is a serious problem with an unelected Supreme Court striking down the decisions of the elected branches, and thus its actions must be firmly grounded in the Constitution. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16–23 (1962).

180. 597 U.S. 215 (2022).

181. *See* Tamara Keith, *One Year After the* Dobbs *Ruling, Abortion Has Changed the Political Landscape*, NPR NEWS (June 23, 2023, 5:00 AM), https://www.npr.org/2023/06/23/1183830459/one-year-after-the-dobbs-ruling-abortion-has-changed-the-political-landscape [https://perma.cc/NH68-84AA] ("One year ago this week, the Supreme Court issued its *Dobbs* decision, which meant that millions of Americans no longer had guaranteed access to abortion care. It was a political earthquake, and in many ways the ground is still shaking.").

182. *Dobbs*, 597 U.S. at 269 ("The Court short-circuited the democratic process by closing it to the large number of Americans who dissented in any respect from *Roe*.").

183. ACKERMAN, *supra* note 12, at 31.

political will with sufficient clarity to lay down the law to those who speak in their name on a daily basis in Washington, D.C."[184]

Ackerman pointed to two examples of the kind of higher lawmaking that justify a shift in the constitutional order: the elections of 1866 and 1936. On both occasions, voters were presented with "institutional deadlock in Washington"[185] between reformers and conservatives who "publicly appealed to the People to decisively reject the dangerous innovations proposed by the reformers."[186] In the Postbellum Era leading up to the election of 1866, it was congressional Republicans who "took on the mantle of reform leadership," opposed by Lincoln's successor to the presidency, Andrew Johnson.[187] During the New Deal, it was President Franklin Roosevelt who led the reform cause while the Supreme Court represented the conservative opposition.[188] In the key elections of 1866 and 1936, "the reformers returned to Washington with a clear victory at the polls," and were proclaimed to provide a "mandate from the People" that justified an end to the opposition from the conservative branches.[189] The decisive elections were not sufficient; however, they were followed by reformers challenging their opponents in the conservative branches if they refused to stand down.[190] Ultimately, in both instances, the conservatives ceased their opposition, and the reformers chose not to carry out their threats.[191]

From these examples, Ackerman constructed a schema to define periods of higher lawmaking by "We the People":

> Interbranch Impasse → Decisive Election → Reformist Challenge to Conservative Branches → Switch in Time[192]

It requires no great insight, nor an extended discussion of contemporary events, to conclude that there is nothing resembling these historical examples that could justify the Court's imposition of constitutional change commensurate with a constitutional moment. First, the changes I have discussed in this Article involve the relationship between the executive and legislative branches.[193] Far from an

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184. *Id.* at 20.
185. *Id.* at 48.
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. In the case of the 1866 election, the challenge came in the form of the threat to impeach and remove from office President Johnson. In 1936, it was President Roosevelt's proposal to add justices so that he could change the balance on the Court so that it would approve rather than strike down New Deal legislation. *Id.* at 48–49.
191. *Id.* at 49 (arguing that once President Johnson ended his opposition to the Fourteenth Amendment the Republicans refused to convict him, and that once the Court began to validate the New Deal, the court packing plan was dropped).
192. *Id.*
193. I will discuss in subsequent articles whether the shifts in the Court's jurisprudence in other areas, which are part of the same constitutional revolution, involve interbranch conflict of the sort Ackerman identified. For now, suffice it to say that neither the decision to overturn *Roe v. Wade* nor the gutting of the Establishment Clause, are a response to interbranch conflict over these issues.

interbranch "impasse," the Court is responding to interbranch *cooperation* as the Executive utilizes authority delegated by Congress with the manifest approval of the Court itself for decades.

We should also note that Ackerman points to *failed* constitutional moments, and these moments are instructive when it comes to the Court's current behavior. In the 1980s, the Reagan Administration "used the Presidency as the institutional focus for their effort to lead the American people to revise their constitutional identity."[194] This effort took the form of an attempt to "appoint new Justices to the Supreme Court who would give hard doctrinal shape to the new constitutional ideals"[195] being promoted by Republicans. This effort succeeded in part with the confirmation of Antonin Scalia to the Court in 1986,[196] but 13 months later, the attempt to solidify a doctrinal revolution on the Court was thwarted by the Senate's rejection of President Reagan's nomination of Robert Bork.[197]

If we see the Bork nomination as a failed constitutional moment, it happened in significant part because President Reagan lacked the transformative electoral mandate that President Franklin Roosevelt obtained in 1936. Although Reagan won one of the most sweeping landslide victories in American history in 1984,[198] Democrats actually trimmed the Republican Senate majority from 55–45 to 53–47.[199] Even more dramatically, in 1986, the Democrats made sweeping gains, retaking the Senate with a 55–45 majority[200]—an election that took place between the successful Scalia nomination and the failed Bork nomination. There is no basis in those results to claim a popular mandate for constitutional transformation, even though President Reagan attempted to further that transformation with the Bork nomination.

Even a cursory glance at the current landscape demonstrates that there has been no decisive election pitting reformers and resisters seeking a mandate from "We the People" for the contemporary Court's actions. To the contrary, President Donald Trump—whose appointments of Justices Neil Gorsuch in 2017, Brett

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194. ACKERMAN, *supra* note 12, at 50–51.

195. *Id.* at 51.

196. *See PN 1193—Antonin Scalia—The Judiciary*, CONGRESS.GOV (Sept. 17, 1986), https://www.congress.gov/nomination/99th-congress/1193 [https://perma.cc/BX63-BLCX] (recording Scalia's confirmation by a vote of 98-0).

197. ACKERMAN, *supra* note 12, at 51–52.

198. *See 1984 Presidential Election*, 270TOWIN, https://www.270towin.com/1984-election/ [https://perma.cc/9C7E-K6AS] (last visited Apr. 7, 2025) (reporting that "Reagan carried 49 of the 50 states, becoming only the second presidential candidate to do so," and that Reagan's "525 electoral votes (out of 538) is the highest total ever received by a presidential candidate").

199. Three seats that had previously been held by Republican Senators (in Tennessee, Iowa, and Illinois) were won by Democrats, while a seat in Kentucky that had been occupied by a Democrat was won by a Republican, for a net Democratic gain of two seats. *See* FED. ELECTIONS COMM'N, FEDERAL ELECTIONS 84, at 20, 23 (1985), https://www.fec.gov/resources/cms-content/documents/federalelections84.pdf [https://perma.cc/8AV3-JC4Q].

200. *See* E.J. Dionne, Jr., *Democrats Gain Control of Senate, Drawing Votes of Reagan's Backers*, N.Y. TIMES, Nov. 5, 1986, at A1, A26 (reporting Democratic gains to take control of the Senate).

Kavanaugh in 2018, and Amy Coney Barrett in 2020 were critical events in shifting the balance on the Court to create the majority that has been imposing its will on constitutional interpretation—lost his reelection bid in 2020.[201] As important, the construction of the "Trump Court" was not built on a foundation of a decisive electoral statement from the People; even in 2016, Trump lost the popular vote to Hillary Clinton.[202] While of course the presidency is won via the Electoral College and not the popular vote, a powerful statement of popular democratic decision-making requires both.

Further, the Trump Court in its present form would not have been possible without political manipulation of the confirmation process by Senate Republicans, led by then-Majority Leader Mitch McConnell. The seat Trump eventually filled with Neil Gorsuch remained open only because the Republican-held Senate simply refused to even consider President Obama's nomination of Merrick Garland to the seat, in "an unprecedented violation of norms"[203] by the Senate. Since the turn of the twentieth century, 12 Supreme Court seats have come open while a Republican controlled the White House and Democrats controlled the Senate. All 12 openings were filled by those Republican Presidents, their nominees confirmed by those Democratic-controlled Senates.[204] Ignoring this norm, the McConnell-led Republicans rejected a Democratic President's nominee the very first time one sought to fill a seat while Republicans controlled the Senate.[205]

Senate Republicans proclaimed loudly during the months the Garland nomination languished that filling the seat should await the results of the 2016 presidential election; as Senator McConnell put it, "The American people are perfectly capable of having their say on this issue, so let's give them a voice."[206] McConnell's initial declaration of the Senate's unwillingness to even hold hearings on President Obama's nominee came more than six months before the 2016 election.[207] Yet four years later, when another opening was created far closer to the

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201. Of course, President Trump retook the presidency in the 2024 elections. This does not alter the core point, however, that he was unable to win the 2020 race, the one that could have allowed him to claim a mandate from the People validating the constitutional course his appointments helped set the Court on.

202. *See* FED. ELECTION COMM'N, FEDERAL ELECTIONS 2016, at 5 (2016), https://www.fec.gov/resources/cms-content/documents/federalelections2016.pdf [https://perma.cc/9LGD-YNTX] (data showing that Clinton won approximately 2.87 million more votes than Trump).

203. Jacob Bronsther & Guha Krishnamurthi, *The Iron Rule*, 42 CARDOZO L. REV. 2889, 2892–93 (2021).

204. *Id.* at 2893.

205. *Id.*

206. Amita Kelly, *McConnell: Blocking Supreme Court Nomination 'About A Principle, Not A Person*', NPR NEWS (Mar. 16, 2016, 12:31 PM), https://www.npr.org/2016/03/16/470664561/mcconnell-blocking-supreme-court-nomination-about-a-principle-not-a-person [https://perma.cc/L53S-YPTQ].

207. Susan Davis, *Senate Republicans Agree to Block Obama's Supreme Court Nominee*, NPR NEWS (Feb. 23, 2016, 6:28 PM), https://www.npr.org/2016/02/23/467860960/senate-republicans-agree-to-block-obamas-supreme-court-nominee [https://perma.cc/7B9V-CF6E].

2020 election by the death of Justice Ginsburg on September 18, 2020,[208] Senate Republicans suddenly saw no virtue in giving the American people a "voice" as they headed to the polls to elect a President less than two months later. Instead, they rushed through the confirmation of Amy Coney Barrett in just over a month, with the 52–48 party-line vote taking place on October 26, 2020[209]—eight days before the presidential election where Joe Biden defeated Donald Trump.

Their explanation for the obvious inconsistency? Senate Republicans suddenly reimagined what had happened when Merrick Garland's nomination was stymied: no longer had it been to give the American people a voice with their choice in the 2016 election. Instead, it was the exercise of the authority of a Senate majority held by the party opposite that of the President—a circumstance that didn't exist in 2020, when the Senate was held by the same party as the President.[210] The importance of this shift cannot be overstated. The first, and obvious, point is the fundamental inconsistency of the Senate Republicans' justifications. Consider what Senator Lindsey Graham said about the Republicans' rationale for their actions towards Merrick Garland *at the time* and in the years thereafter:

> If an opening comes in the last year of President Trump's term, and the primary process has started, *we'll wait till the next election*.[211]
>
> I want you to use my words against me. If there's a Republican president in 2016 and a vacancy occurs in the last year of the first term, you can say Lindsey Graham said, "Let's let the next president, whoever it might be, make that nomination," . . . . And you could use my words against me and you'd be absolutely right.[212]

The second point is perhaps even more important. If we take the Republicans at their word that confirmation of Supreme Court justices ought to turn on the partisan control of the Senate (relative to the presidency), they have established beyond dispute that the merits of a nomination are, at best, secondary—and perhaps even irrelevant.

All of this means that the current Supreme Court majority cannot claim a mandate from "We the People," operating in the higher lawmaking capacity

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208. Nina Totenberg, *Ruth Bader Ginsburg, Champion of Gender Equality, Dies at 87*, NPR NEWS (Sept. 18, 2020, 7:28 PM), https://www.npr.org/2020/09/18/100306972/justice-ruth-bader-ginsburg-champion-of-gender-equality-dies-at-87 [https://perma.cc/CAF4-GETX].

209. *See Roll Call Vote 116th Congress–2nd Session*, U.S. SENATE (Oct. 26, 2020, 7:52 PM), https://www.senate.gov/legislative/LIS/roll_call_votes/vote1162/vote_116_2_00224.htm [https://perma.cc/UU3Q-7P23] (recording Senate vote to confirm Justice Barrett's nomination on October 26, 2020).

210. *See* Bronsther & Krishnamurthi, *supra* note 203, at 2895 (alteration in original) (describing letter sent by Senator Lindsay Graham to Senate Democrats proclaiming a principle that "no Senate ha[d] confirmed an opposite-party president's Supreme Court nominee during an election year").

211. Matthew S. Schwartz, '*Use My Words Against Me': Lindsey Graham's Shifting Position on Court Vacancies*, NPR NEWS (Sept. 19, 2020, 12:56 PM) (emphasis added) (some internal quotation marks omitted), https://www.npr.org/914774433 [https://perma.cc/6FDK-DJKH].

212. *Id.*

described by Ackerman, to overturn the constitutional order that has prevailed for almost a century.[213] Instead, we are seeing an exercise of raw power by government officials imposing change on the Constitution's meaning without utilizing the amendment process set forth in Article V *or* the higher lawmaking power of the sovereign people to validate their project.

CONCLUSION

For those who care about the Constitution and the Supreme Court's role in giving it meaning, the current moment is a critical occasion. The Court is engaged in an activist project to reshape constitutional meaning, a project it is able to undertake as a result of the exercise of partisan power unjustified in any way by a mandate for higher lawmaking granted by "We the People." The attack on the modern administrative state is one piece of that project. And because it inherently involves stripping power from the elected branches and adding to its own, the decisions have a self-perpetuating quality that will allow the empowered Court to not only continue its campaign but accelerate it. We will be living in the era of the Hiroshima Court for years to come.

213. In the decisions I will discuss in subsequent articles, the time frame varies. *Roe v. Wade*, of course, was 49 years old when the Court overruled it in *Dobbs*, and the Religion Clause jurisprudence the Court has turned on its head was crafted, for the most part, in the 1970s and 1980s. But in each area, the Court either has, or is in the process of, reversing decades of settled law.