"MAJOR QUESTIONS" ABOUT PREEMPTION: FAREWELL TO FEDERAL SUPREMACY?

Kamaile A. N. Turčan[1]

15-page Segment for Review:
Introduction (pp.2-3); Part II.B & II.C (pp.24-29); Part III.C (pp.38-45); Conclusion (pp.45-46)

[1] Associate Professor, University of Hawai'i William S. Richardson School of Law.

INTRODUCTION

Emerging during the last two Supreme Court terms is the "major questions doctrine," used first to strike down agency action in the October Term 2021 case *West Virginia v. Environmental Protection Agency*.[2] Disregarding the familiar *Chevron* framework for deference owed to an agency's interpretation of its statutory authority, the Court majority announced that agency actions implicating major questions are inherently suspect. Now, if any court perceives a "major question" in the challenged agency action—including but not limited to whether the action is economically or politically significant or novel—Congress's general statutory grant of authority to the agency is insufficient to protect that agency action from legal challenge. In these major questions cases, a court must find a clear statement in the statutory language that Congress intended to delegate authority for the precise conduct taken by the agency.[3]

The major questions doctrine and the related nondelegation doctrine advanced in the *West Virginia* concurrence reflects the current Court's deregulatory impulses and deep skepticism of congressional grants of rulemaking authority to federal agencies. In their application, these doctrines are profoundly disruptive of the function of the federal government and its interbranch relationships: they disturb the relative authority of our federal executive, congressional, and judicial branches.[4]

By extension, these doctrines confound the question of preemption. Previously, by express or implied preemption federal laws displaced state laws that would interfere with the operation of those federal laws, thereby shifting the regulatory burden from the state to federal level. Now, state law litigants can use the major questions doctrine to invalidate a federal agency's authority so that the federal law has no preemptive effect. Thus, the major questions doctrine becomes a "Step Zero" in preemption cases as parties litigate the relative authority of state and federal law.[5]

This article exposes the results of this Step Zero analysis. Part I shows how the malleable nature of the major questions doctrine destroys agency deference while driving unpredictable outcomes.[6] Part II demonstrates how the major questions doctrine effectively becomes a Step Zero for state-law advocates to challenge a federal agency's statutory authority in the first instance, before even reaching the relevant preemption dispute.[7] Part III comparatively examines the major questions doctrine's Step Zero impact on preemption disputes in the abortion, net neutrality, and climate change arenas.[8] Each scenario represents a microcosm of the new legal landscape, revealing a few of the many possible results as state and federal law collide under these doctrines: a patchwork of new state laws; market pressures that render one state's laws the new national regulator; and complete avoidance when entrenched litigation positions disfavor major questions challenges.[9]

---

[2] *West Virginia v. EPA*, 142 S. Ct. 2587 (2022).
[3] *See infra* Part I.
[4] *See infra* Part I.
[5] *See infra* Part II.
[6] *See infra* Part I.
[7] *See infra* Part II.
[8] *See infra* Part III.
[9] *See infra* Part III.

More broadly, the major questions versus preemption clash adds a new dimension to our continuing national conversation about the relative authority of the federal executive, congressional, and judicial branches, and, consequently, state law. With litigants in both state and federal courts challenging any federal agency action, federal presence can retract substantially across countless arenas. With this retraction, states can expand their realms of authority and profoundly alter the balance between state and federal power in our federalist system of government. Boundaries are tested. Uncertainty prevails. Businesses, governments, individuals, and the lower courts may find themselves in a litigation free-for-all.[10]

I. THE MAJOR QUESTIONS DOCTRINE UPENDS STATUTORY DELEGATIONS OF POWER

The rise of the major questions doctrine reflects a fundamental shift in how the Supreme Court perceives congressional delegations of power and agency exercise of power—and the Court's own role in policing that power.[11] The major questions doctrine constrains a federal agency's authority by requiring clearly stated, intentional congressional authorization before the agency may act on what the Supreme Court considers to be a major question. Even where an agency's exercise of authority has "a colorable textual basis" in statute,[12] in "extraordinary cases"[13] the Court will nevertheless look with "skepticism" at the agency's assertion of statutory power.[14] The textual basis for the agency action must be "something more than merely plausible"; the agency must be able to "point to clear congressional authorization for the power it claims."[15]

Chief Justice Roberts, joined by Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett, describes the major questions doctrine as having been developed to address "agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted" to them.[16] "Under that doctrine's terms, administrative agencies must identify 'clear congressional authorization' when they claim the power to make decisions of vast 'economic and political significance.'"[17] In these extraordinary cases, the majority explains, separation of powers principles require a clear statement that Congress intended to delegate authority for the precise conduct taken by the agency.[18] Justice Gorsuch in his concurrence writes that the major questions doctrine rests on the broader nondelegation doctrine, and the "foundational" separation of powers

---

[10] *See infra* Part III.

[11] *See infra.* The major questions doctrine as currently deployed by the Supreme Court focuses on the rulemaking aspect of administrative law, distinct from agency adjudicative action. Agency adjudication (*i.e.*, the agency's authority to adjudicate disputes through Article II courts) poses its own interesting set of legal implications separate and apart from the preemption concerns that are the focus of this piece. *See generally* Adam B. Cox & Emma Kaufman, *The Adjudicative State*, 132 Yale L.J. 1769, 1803 (2023) (distinguishing the Roberts Court's deregulatory efforts in federal regulation from federal agency adjudication).

[12] *West Virginia*, 142 S. Ct. at 2609.

[13] *Id.*

[14] *Id.* (internal citation omitted).

[15] *Id.* (internal quotations omitted).

[16] *Id.*

[17] *Id.* at 2616 (Gorsuch, J., concurring).

[18] *Id.* at 2609.

concerns inherent there.[19]

The major questions doctrine—however ill-defined it remains at this early stage of its existence—is a powerful tool for the Court to impose its own assessment of the relative authorities of the executive and congressional branches. This article does not challenge the origins of the major questions doctrine; others have and will continue to dispute its historical basis as well its characterization as either substantive cannon or linguistic tool.[20] Taking the *West Virginia* majority at its word that certain federal regulatory schemes are hereafter heavily scrutinized, there are troubling indicators that the malleable nature of the major questions doctrine drives unpredictable and arbitrary outcomes not only in cases directly attacking federal agency authority, but also in their downstream impacts to state authority via preemption disputes.[21]

A. The Doctrine Destroys Agency Deference

It is no accident that the major questions doctrine has risen in prominence concurrently with the decline of *Chevron* deference. *Chevron* deference to administrative statutory interpretations was at one point the keystone of administrative law jurisprudence, but in the last several Supreme Court terms it has receded to the point of invisibility.[22] The wax and wane of these two doctrines evidenced by *West Virginia* is emblematic of the Court's shifting approach toward agency authority and separation-of-powers concepts generally.

---

[19] *Id.* at 2616 (Gorsuch, J., concurring).

[20] *See, e.g., West Virginia*, 142 S. Ct.. at 2633 (Kagan, J., dissenting); *Biden v. Nebraska*, 143 S. Ct. 2355, 2376 (2023) (Barrett, J., concurring) (describing the major questions doctrine as a linguistic cannon); Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021) (challenging the historical basis for the nondelegation doctrine); Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 Va. L. Rev. 1009 (2023); Catherine M. Sharkey, *The Administrative State and the Common Law: Regulatory Substitutes or Complements?*, 65 EMORY L.J. 1705, 1715 & n.4 (2016) (referring to the nondelegation doctrine as "largely defunct"); Ilan Wurman, Importance and Interpretive Questions, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4381708 (evaluating the major questions doctrine as a linguistics canon); C. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 Admin. L. Rev. 475, 483–484 (2021) (asserting that recent cases apply the major questions doctrine as "a nondelegation canon"); C. Sunstein, *Two Justifications for the Major Questions Doctrine*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4503583 (evaluating the textualist basis of the major questions doctrine); Chad Squitieri, *Placing Legal Context in Context*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4610078 (advocating the major questions doctrine be conceptualized as a substantive canon); Natasha Brunstein & Richard L. Revesz, *Mangling the Major Questions Doctrine*, 74 Admin. L. Rev. 217, 235-40 (2022) (investigating the inherent difficulties with estimating the comparative costs and benefits associated with new energy-efficient technology for a major questions analysis).

[21] *See infra* Parts I.C, II.B-C.

[22] *See infra*; *see also* Thomas B. Griffith & Haley N. Proctor, *Deference, Delegation, and Divination: Justice Breyer and the Future of the Major Questions Doctrine*, https://www.yalelawjournal.org/forum/deference-delegation-and-divination#_ftnref1.

As described by the Court's majority, the issue in *West Virgnia* was whether Section 111 of the Clean Air Act authorized the U.S. Environmental Protection Agency (EPA) as part of its Clean Power Plan to require (as one part of a larger regulatory scheme) coal-fired power plants to engage in "generation-shifting" methods that would ultimately shift production to other, cleaner sources of energy such as wind or solar.[23] Section 111 directs the EPA to set standards of performance for existing pollution sources, where the term "standard of performance" means "a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the *best system of emission reduction* which . . . the Administrator determines has been adequately demonstrated.[24] Once so framed, this was "a major questions case."[25] Because the EPA had never before set emissions standards based on generation shifting, this was an "extraordinary case" calling for a "different approach" from the ordinary method of statutory interpretation.[26]

Established in *Massachusetts v. EPA*[27]—and unchallenged in *West Virginia*—was the principle that Congress empowered the EPA to regulate greenhouse gas emissions as air pollutants. But in *West Virginia*, the Court held that the emissions limits adopted by the EPA exceeded the agency's authority.[28] Essentially, the EPA cannot set existing power plant emissions standards predicated on gas and renewables replacing coal as the power source. Instead, Section 111 directed the EPA to regulate emissions at only a pollutant-by-pollutant, source-specific level, meaning the EPA could identify measures that individual buildings can take to reduce their own emissions so long as the agency allowed the operators to continue with the same type of power generation (such as coal).[29] Under this theory, the agency's authority would be limited to solving technical engineering problems, such as how to minimize the emissions of an existing coal power plant. Petitioners criticized the EPA as expanding its narrow authority for technical fixes to broader policy questions such as whether the coal industry should be phased out and transitioned to solar or wind farms.

Justice Kagan's dissent, joined by Justices Breyer and Sotomayor, rejected what she described as the majority's departure from textualism and routine statutory interpretation. In unusually stark language, she criticized the current Court as being "textualist only when being so suits it" and

---

[23] *West Virginia*, 142 S. Ct. at 2603.

[24] 42 U.S.C. § 7411(a)(1), (d)(1) (emphasis added).

[25] *West Virginia*, 142 S. Ct. at 2610.

[26] *Id.* at 2608.

[27] *Massachusetts v. EPA*, 549 U.S. 497 (2007).

[28] *West Virginia*, 142 S. Ct. at 2612-16. There were justiciability issues also at play, which are not relevant here except insofar as they make plain the Court was very interested in taking this case and announcing the major questions doctrine. The procedural history of the case is complex, with the Supreme Court staying the Clean Power Plan before it went into effect and the Trump Administration announcing it would replace the Plan. The Plan never went into effect, and one of the arguments below was that the case was moot. While perhaps technically not moot, *id*. at 2627-28 (Kagan, J., dissenting), the Court was undoubtedly reaching to exercise its discretionary power to take this case.

[29] *See* Transcript, Lindsay S. See, at 4, https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/20-1530_p8k0.pdf.

described the major questions doctrine as a "get-out-of-text free" card.[30] The dissent would locate the EPA's authority to encourage the shift in energy generation squarely within the broad language (emphasizing "broad," not "vague") in Section 111 to select the "best system of emission reduction" for power plants.[31] The majority, in her view, departed from ordinary principles of statutory construction to identify, first, whether agency action presents an extraordinary case and if so, to then impose a more stringent set of rules to strike down what otherwise "falls within EPA's wheelhouse."[32]

So what, then, is the major questions doctrine's analytical framework as applied to agency action? It helps to start with what it apparently is not: *Chevron* deference.[33]

Under the *Chevron* framework derived from the 1984 case and long familiar to students of administrative law, a court reviews an agency's interpretation of a statute it administers in a two-step process. First, using traditional tools of statutory construction a court asks whether Congress has clearly and unambiguously addressed the precise issue before the court. If so, the court will give effect to Congress's stated intent. But if the statute is silent or ambiguous, then a court proceeds to step two: a court will generally defer to an agency's interpretation of the statute so long as that interpretation is reasonable and the matter is within the agency's area of expertise.[34]

Chevron "Step Zero" developed a bit later, asking whether the *Chevron* framework applied to agency action at all.[35] Step Zero case law is widely recognized as an erratic bundle, but broadly speaking, a court would not apply *Chevron* if the agency action lacks the force of law or is outside the realm of formal rulemaking, or if a court determines that the agency is acting beyond the reach of the enabling statute.[36] The latter question—whether the agency is working within the scope of

---

[30] *West Virginia*, 142 S. Ct. at 2641 (Kagan, J., dissenting).

[31] *Id.* at 2628 (Kagan, J., dissenting).

[32] *Id.* at 2633 (Kagan, J., dissenting).

[33] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc*., 467 U.S. 837 (1984). This article does not evaluate *Auer* deference, the doctrine by which a court may defer to an agency's interpretation of its own (ambiguous) promulgated regulations. *See Bowles v. Seminole Rock & Sand Co*., 325 U. S. 410 (1945); *Auer v. Robbins*, 519 U. S. 452 (1997); *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019). Some on the Court have also signaled interest in revisiting *Auer* deference. While this skepticism is consistent with the general themes discussed here, it does not implicate the same type of interbranch separation of powers and congressional delegation issues which are the focus of this article. *See, e.g, Decker v. Nw. Env't Def. Ctr.*, 568 U.S. 597, 615 (2013) (Roberts, C.J., concurring) (noting "serious questions about the principle" from *Auer* and observing "[i]t may be appropriate to reconsider that principle in an appropriate case." (citations omitted)); *Perez*, 575 U.S. at 112 (Thomas, J., concurring in the judgment) (writing separately to "question the legitimacy of [the Court's] precedents requiring deference to administrative interpretations of regulations").

[34] *Chevron*, 467 U.S. at 842-43.

[35] *See, e.g.*, *United States v. Mead*, 533 U.S. 218 (2001); *see generally* Thomas W. Merrill and Kristin E. Hickman, Chevron's *Domain*, 89 Geo. L.J. 833, 836 (2001); Cass R. Sunstein, Chevron *Step Zero*, 92 Va. L. Rev. 187 (2006).

[36] Sunstein, Chevron *Step Zero*, *supra* note ___.

its delegated authority—bears a striking resemblance to what is now formally the major questions doctrine, but was not characterized as such by the Court in traditional *Chevron* cases.[37]

The question before the Court in *West Virginia*—the meaning of "best system of emission reduction" in the context of the statute—would seem to fall within *Chevron's* ambit. During oral argument the Court did not ask a single question about whether the EPA regulation would be upheld under *Chevron*,[38] and the majority opinion did not discuss it.[39] *Chevron*, one of the most important cases in administrative law and cited in literally thousands of cases on agency action over the last 40 years,[40] was simply nowhere to be found.

This is not a fluke, and is indeed part of a trend observed earlier and emerging with force in the COVID-19 cases, when the Court disposed of statutory ambiguity arguments without applying *Chevron* and instead relied on major questions doctrine principles.[41] In the summer of 2021, the Supreme Court decided *Alabama Association of Realtors v. Department of Health & Human Services*,[42] granting an emergency application to vacate a stay of a lower court ruling that had invalidated the Center of Disease Control and Prevention's (CDC) nationwide eviction moratorium for residential rental properties in response to the COVID-19 pandemic. The Court, per curiam, held first that the text of the Public Health Service Act was clear, and the authority it granted to the CDC to implement public health measures like fumigation and pest extermination did not give the CDC broad authority to control the spread of COVID-19.[43]

The Court concluded that *even if* the statutory text were ambiguous (formerly the trigger for a *Chevron* analysis), the eviction moratorium went too far. Applying major questions doctrine principles (though not by name), the Court concluded "the sheer scope of the CDC's claimed authority under § 361(a) would counsel against the Government's interpretation."[44] The Court stated it "expect[s] Congress to speak clearly when authorizing an agency to exercise powers of

---

[37] Sunstein, Chevron *Step Zero*, *supra* note ___at 232-33. And some observed that an agency's specialized fact-finding competence would be very relevant to even "major" issues. *Id.*

[38] *See generally* Transcript, https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/20-1530_p8k0.pdf.

[39] Justice Kagan's dissent did mention *Chevron* in passing but seemed to concede that the major questions doctrine would supplant *Chevron* when applicable. *West Virginia*, 142 S. Ct. at 2635 (Kagan, J., dissenting).

[40] A simple citation search on Westlaw produces nearly 18,000 case citations.

[41] In *King v. Burwell*, for instance, the Chief Justice's majority opinion upholding the IRS's rule implementing the premium tax credit provision of Patient Protection and Affordable Care Act and joined by Justices Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan, dedicated only a sentence to *Chevron*, stating that a *Chevron*-esq analysis would be inappropriate in a case implicating questions of such "deep 'economic and political significance' importance." 135 S. Ct. 2480, 2488-89 (2015). *See generally* Joshua S. Sellers, "*Major Questions" Moderation*, 87 Geo. Wash. L. Rev. 930, 946 (2019) (describing certain major question "exceptions" to *Chevron*).

[42] *Ala. Ass'n of Realtors v. Dep't Health & Human Serv's*,141 S. Ct. 2485, 2486-90 (2021).

[43] *Id.*

[44] *Id.* at 2489.

"vast 'economic and political significance.'"[45] Thus, without expressly invoking the major questions doctrine, the Court rebuffed deference to agency interpretation. And while the dissent would have allowed the stay pending appeal to remain on the basis that the lower court did not clearly err under this procedural posture, the dissent did not invoke *Chevron*, either.

Then in *National Federation of Independent Businesses v. Occupational Safety & Health Administration*[46] [*NFIB*], various states, businesses, and other groups filed applications seeking emergency relief from the Court, challenging the Occupational Safety and Health Administration (OSHA) emergency temporary standards which mandated that employers with more than 100 employees require the employees to undergo COVID-19 vaccination or take weekly COVID-19 tests at their own expense and wear a mask in the workplace. In a per curiam opinion, the Court stayed OSHA's rule pending disposition of the applicants' petitions for review in the Court of Appeals for the Sixth Circuit, holding that the applicants were likely to succeed on their claim that OSHA's mandate exceeded its statutory authority and was therefore unlawful.[47] The opinion concluded that the Act did not "plainly authorize" the mandate because COVID-19 was not strictly a workplace health issue. The Court observed there was "little doubt" that the mandate represented an agency exercising "powers of vast economic and political significance."[48] Nowhere did the opinion reference *Chevron* or apply a traditional statutory interpretation analysis to the scope of OSHA's authority. Justice Breyer's dissent, which disagreed that OSHA's mandate did not encompass addressing COVID-19 in the workplace, also did not mention *Chevron*.

By October Term 2022, Chief Justice Roberts used the now-fully fledged major questions doctrine to strike down the Biden Administration's student loan forgiveness program under the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act) in *Biden v. Nebraska*.[49] The HEROES Act authorizes the Secretary to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs . . . as the Secretary deems necessary in connection with a war or other military operation or *national emergency*,"[50] and the Secretary of Education interpreted that Act to authorize student loan forgiveness during the Covid-19 pandemic national emergency. Not so, the Court ruled: loan forgiveness was a major question, a power not previously claimed by the Secretary, with great economic and political significance, and not clearly delegated to the agency by Congress by the terms of the HEROES Act. Once again, the Court ruled without reference to *Chevron*. Rebuffing Justice Kagan's lament in dissent that the Court was arrogating to itself power belonging to another branch, the majority opinion concluded instead that "it [was] the Executive seizing the power of the Legislature."[51]

The dueling majority, concurring, and dissenting opinions in *Biden v. Nebraska* expose that the line-drawing and conceptual justification for the major questions doctrine are developing in real

---

[45] *Id.*

[46] *Nat'l Fed. of Independent Bus. v. Occupat. Safety & Health Adm'n* 142 S. Ct. 661, 662, 665–67 (2022) [*NFIB*].

[47] *Id.* at 663-64, 666-67.

[48] *Id.* at 665 (citing *Ala Assn. of Realtors,* 141 S. Ct. at 2486–90).

[49] *Biden v. Nebraska*, 143 S. Ct. 2355 (2023).

[50] *Id.* at 2368 (citing 20 U.S.C. § 1098bb(a)(1) (emphasis added)).

[51] *Id.* at 2373.

time, even while application of the evolving doctrine erases agency authority.

Concurring, Justice Barrett addressed the various articulations to-date of the major questions doctrine and acknowledged the ongoing conversation within the academic community about the doctrine. Writing alone, she "t[ook] seriously the charge that the doctrine is inconsistent with textualism,"[52] and noted that she joined the majority opinion in full but interpreted the major questions doctrine as only reinforcing the same conclusion reached by ordinary tools of statutory construction. She refrained from treating the doctrine as a substantive cannon and instead found its use in the importance of context to discern the statutory text's "most natural interpretation."[53] Context should not be found exclusively within the four corners of a statute but would include background legal conventions and what she described as "commonsense principles of communication."[54]

Again in dissent, Justice Kagan wrote an opinion joined by Justices Sotomayor and Jackson which decried that the Court majority "exceed[ed] its proper, limited role in our Nation's governance." Congress drafted a broad statute giving the Secretary wide discretion during emergencies to offer relief to student borrowers, and that should be enough. Justice Kagan criticize[d] the majority for "put[ting] its own heavyweight thumb on the scales" to prohibit the Secretary from using his admittedly broad authorization to resolve a "significant" and "important" issue.[55] This stance, she warned, "prevents Congress from doing its policy-making job in the way it thinks best," including through legislative delegation.[56] As applied by the majority opinion, the major questions doctrine works not to better understand legislative delegation, "but instead to trump" that delegation.[57]

Made clear by this cross talk within the opinions is that the major questions doctrine is very much a work in progress. Nonetheless, it packs quite a punch. The doctrine destroys agency deference.

After *NFIB*, *Alabama Association of Realtors*, *West Virginia*, and *Biden v. Nebraska*, when faced with what the Court considers a major question, the Court will jettison *Chevron* altogether.[58] *Chevron*, and the corresponding deference to agency expertise or interpretation of its statutory authorities, is abandoned.[59] In other words, if the Court decides a case presents a major question

---

[52] *Id.* at 2376 (Barrett, J., concurring).

[53] *Id.*

[54] *Id.* at 2380.

[55] *Id*. at 2396 (Kagan, J., concurring).

[56] *Id.* at 2397.

[57] *Id.*

[58] In October Term 2023, the Court granted certiorari in *Loper Bright*, and will rule on petitioners' request to formally overrule the *Chevron* doctrine. *See infra* Conclusion.

[59] Many others have commented on this trend, too many to recount here. *See, e.g.*, Michael Herz, *Chevron Is Dead; Long Live Chevron*, 115 COLUM. L. REV. 1867, 1868-69 (2015) (describing the retraction of *Chevron* and including comment on its applicability to major questions); Sharkey, *Administrative State*, *supra* note __ at 1722 & n.79; Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 Harv. L. Rev. 1, 26 (2017) (describing earlier attacks on *Chevron*).

of "vast 'economic and political significance,'"[60] an agency may no longer argue that its authority to act is based on a reasonable interpretation of broad statutory authorities, but must instead point to an explicit delegation of "clear congressional authorization."[61] General grants of authority to the agency to engage in rulemaking in a given arena are insufficient if the Court concludes the agency action, even if otherwise unimpeachable, implicates a major question. So while typically the "nature of the question presented" to the agency is largely irrelevant to a court's statutory analysis, in "extraordinary cases," the Court uses a "different approach."[62]

Whether praised or condemned as "the Supreme Court's most important administrative law decision in decades," the impact of *West Virginia* is undeniable.[63] Agency interpretations of their governing statutes that trigger "major questions" are not simply denied *Chevron* deference: the interpretations are, in the view of a majority on the Court antagonistic to agency authority and delegated congressional power, inherently suspect.[64] The Supreme Court is signaling to lower courts that there *should be* a decline in the administrative state. Courts have permission to take a "different approach" to typical statutory interpretation principles, but pushing in one direction—toward nondelegation and deregulation. The catch, of course, is that this is context-specific. Courts may pick and choose when to apply this approach, based on the external perceived significance of an action.

Instead of *Chevron*, now there is a new two-step inquiry. The first question asks whether the agency action invokes the major questions doctrine. If yes, the second question asks whether the agency can identify clear congressional authorization for the power it claims.[65]

What is a major questions case at the first step? One may glean various indicia from the Court's

---

To be sure, the Court has before declined to show deference to agencies traipsing into areas of significance, albeit not by labeling its analytical approach as a separate major questions doctrine. *See, e.g.*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (FDA authority over drugs and devices does not extend to the tobacco industry); *Witman v. American Trucking Ass'ns*, 531 U.S. 457 (2001) (evaluating whether EPA's authority to set national ambient air quality standards including authority to consider costs); *Gonzalez v. Oregon*, 546 U.S. 243 (2006) (Attorney General's authority over controlled substances does not include regulation of assisted suicide drugs); *Burwell*, 576 U.S. 473 (not affording IRS authority for interpretation of Patient Protection and Affordable Care Act). Jody Freeman and Matthew Stephenson's work offers an evaluation of the nuanced ways the major questions doctrine may be considered either a part of or separate from *Chevron* deference. *See* Jody Freeman, Matthew C. Stephenson, *The Anti-Democratic Major Questions Doctrine*, 2022 Sup. Ct. Rev. 1, 5 (2022).

[60] *West Virginia*, 142 S. Ct. at 2616 (Gorsuch, J., concurring).

[61] *Id.* at 2609.

[62] *Id.* at 2608.

[63] Freeman & Stephenson, *The Anti-Democratic Major Questions Doctrine*, *supra* note ___ at 1, 20-46 (analyzing the impact of this doctrine "on the policymaking process, focusing in particular on democratic accountability").

[64] *See, e.g.,* Nathan Richardson, *Antideference: Covid, Climate, and the Rise of the Major Questions Canon*, 108 VA. L. REV. ONLINE 174 (2022).

[65] *See West Virginia*, 142 S. Ct. at 2634 (Kagan, J., dissenting).

opinions, but even those are malleable, indeterminant, and apparently not exhaustive.[66] With this list, one may question what type of national regulatory policy does *not* pose a major question. For example, politically significant agency policies may indicate an "extraordinary case" presenting the Court with a major question.[67] The novelty of an agency rule (that the rule is never before pursued by the agency) is another possible signal.[68] The breadth and financial burden of the regulation, unrelated to the rule's subject matter, may itself trigger a major question if it would regulate "a significant portion of the American economy" or "require billions of dollars in spending by private persons or entities."[69] If the agency locates its authority in what the Court views as an "ancillary," "gap-filler," or rarely used provision in the statute, the action may be suspect.[70] The doctrine may apply when an agency would "intrud[e] into an area that is the particular domain of state law."[71]

At the second step, how clear must the Congressional authorization be in order for a court to uphold agency action in a major questions case?[72] In *West Virginia*, the EPA's position was at least plausible: that when Congress authorized EPA in Section 111(d) to select the "best system of emission reduction," that authority encompassed a system based on shifting energy generation away from coal-fired plants to gas, wind, or solar.[73] Plausible was not enough.[74] The majority looked for something more from Congress. What may suffice is elusive because the *West Virginia* majority does not say.[75]

---

[66] *See id*. at 2621 (Gorsuch, J., concurring) (noting the "list of triggers may not be exclusive"); Richardson, *supra* note___.

[67] *West Virginia*, 142 S. Ct. at 2608 (identifying "'extraordinary cases' that call for a different approach—cases in which the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion"); *id.* at 2620 (Gorsuch, J., concurring) (identifying robust debate as one possible indicia); *NFIB*, 142 S. Ct. at 665 (applying the doctrine before "authorizing an agency to exercise powers of vast economic and political significance").

[68] *West Virginia*, 142 S. Ct. at 2610-12 (describing the "unprecedented" nature of EPA's rulemaking); *See* Deacon & Litman, *supra* note ___ at 1013-14; *see generally* Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407 (2017).

[69] *West Virginia*, 142 S. Ct. at 2621 (Gorsuch, J., concurring) (citations omitted) (collecting cases).

[70] *Id.* at 2601-02; *id.* at 2629 (Kagan, J., dissenting) (criticizing majority's characterization of the statutory provision as an ancillary gap-filler).

[71] *Id.* at 2621 (Gorsuch, J., concurring).

[72] *Id.* at 2609 (requiring an agency "point to 'clear congressional authorization' for the power it claims").

[73] *Id.*

[74] *Id.*

[75] Justice Gorsuch's concurrence touches on what may qualify as a clear congressional statement. Courts would "look to the legislative provisions . . . with a view to their place in the scheme," but cannot rely on "elliptical," or "cryptic" language. *Id.* at 2622 (Gorsuch, J., concurring). Courts may "examine the age and focus of the statute the agency invokes in relation to the problems the agency seeks to address." *Id.* Courts may compare the "agency's past interpretations of the relevant statute" with what the agency seeks to do in current times. *Id.* And

The major questions doctrine thus emerges as a clear statement rule.[76] But more than that, the major questions doctrine is, at its core, an expression of this Court's skepticism toward administrative authority and predilection for federal deregulation. The heightened review applies when agencies activate broad grants of statutory authority to take on important problems—problems that the Court thinks Congress should take on itself or authorize "pursuant to a clear delegation from that representative body."[77]

In this, the major questions doctrine has been described as the nondelegation doctrine in disguise.[78] True, the two doctrines share certain principles, but as applied by this Court there is at least one key difference. Whereas the nondelegation doctrine may apply to all delegations of congressional authority, the major questions doctrine is context-specific by design. It is a clear statement rule for upholding agency action, but only in certain, *court-identified* circumstances based on the perceived significance of the agency action.

B. The Doctrine is Hostile to Congressionally Delegated Agency Authority

Proponents of the nondelegation doctrine ground it—like the major questions doctrine—in separation of powers concerns.[79] The doctrine presupposes, in simplest terms, that Congress cannot delegate its legislative power. Congress makes the laws, not federal agencies. The concept derives from Article I of the Constitution, which provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States."[80] While not definite in either formulation or application, the nondelegation doctrine essentially asks whether Congress has impermissibly delegated its legislative power to the executive branch by entrusting too much rulemaking power to a federal agency.[81]

Even under this theory, however, courts generally recognize that Congress cannot function at a practical level if it cannot confer any authority to other bodies to implement federal law and work out details beyond congressional expertise.[82] So the doctrine is (or was) understood to mean that a statutory delegation of authority to a federal agency is constitutional "as long as Congress lays down by legislative act an *intelligible principle* to which the person or body authority to exercise the delegated authority is directed to conform."[83] Stated differently, "a delegation is permissible if Congress has made clear to the delegee the general policy he must pursue and the boundaries of

---

"skepticism may be merited when there is a mismatch between an agency's challenged action and its congressionally assigned mission and expertise." *Id.*

[76] *See* Deacon & Litman, *supra* note __, at __.

[77] *West Virginia*, 142 S. Ct. at 2616.

[78] Richardson, *supra* note __; Adam B. Cox, Emma Kaufman, *The Adjudicative State*, 132 Yale L.J. 1769, 1777 (2023).

[79] *See generally Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (describing the nondelegation doctrine).

[80] U.S. Const. art. I, § 1.

[81] *Id.*

[82] *Gundy*, 139 S. Ct. at 2123.

[83] *Id.* (cleaned up) (emphasis added).

his authority."[84]

The "intelligible principle" delegation standard was upheld recently in the October Term 2018 case *Gundy v. United States*.[85] In *Gundy*, the Court held that a provision in the federal Sex Offender Registration and Notification Act (SORNA) that authorized the Attorney General to determine applicability of certain registration requirements to convicted sex offenders did not violate the nondelegation doctrine.[86] The plurality opinion, written by Justice Kagan and joined by Justices Ginsburg, Breyer, and Sotomayor, disagreed with petitioner Gundy that the statutory provision at issue gave the Attorney General "unguided" and "unchecked" authority.[87] Instead, the text of the statute (considered along with its context, purpose, and history) sufficiently limited the Attorney General's discretion respecting when SORNA's registration requirements would apply to pre-Act offenders. The second-guessing courts would have to do to invalidate Congress's decisions regarding delegations, the plurality explained, would essentially undermine the functioning of the federal government because Congress must "give discretion to executive officials to implement its programs."[88]

As Justice Blackmun explained some 30 years earlier when upholding the constitutionality of the Sentencing Guidelines promulgated by the United States Sentencing Commission, "Congress simply cannot do its job absent an ability to delegate power under broad general directives."[89] And so, in a potentially prescient conclusion, Justice Kagan wrote that "if SORNA's delegation is unconstitutional, then most of Government is unconstitutional."[90]

The concurring and dissenting opinions in *Gundy* offered a clear signal that, as with the major questions doctrine, there was a willingness on the Court to revisit the nondelegation doctrine. Justice Alito concurred in the judgment only and expressed a willingness to reconsider the approach to delegation issues in a future case.[91] Justice Gorsuch, joined by Chief Justice Roberts and Justice Thomas, dissented. Justice Gorsuch would reformulate the delegation inquiry to a standard stricter than an "intelligible principle" to, in his view, protect the constitutional separation of powers between the legislative, executive, and judicial branches.[92] The primary guiding principle, he explained, is that when regulating private conduct, "Congress must set forth standards sufficiently definite and precise to enable Congress, the courts, and the public to ascertain whether Congress's guidance has been followed."[93] This means that while Congress must make the policy decisions, a federal agency may only "fill up the details."[94] It is the Court, under Justice Gorsuch's dissent, that would decide whether Congress has impermissibly delegated policymaking discretion

[84] *Id.* at 2129 (cleaned up).
[85] *Id.* at 2130.
[86] *Id.* at 2121.
[87] *Id.* at 2123.
[88] *Id.* at 2130.
[89] *Mistretta v. United States*, 488 U.S. 361, 372 (1989).
[90] *Gundy*, 139 S. Ct. at 2130.
[91] *Id.* at 2130 (Alito, J., concurring).
[92] *Id.* at 2136-37, 2139 (Gorsuch, J., dissenting).
[93] *Id.* at 2136 (Gorsuch, J., dissenting) (citation omitted).
[94] *Id.* (Gorsuch, J., dissenting).

or simply allowed the executive branch (i.e., federal agency) to fill up the details of a broader statutory scheme.

Then, in his October Term 2021 concurrence to *West Virginia*, Justice Gorsuch, joined by Justice Alito, asserted that the major questions doctrine "rests" on the nondelegation doctrine.[95] Both the major questions doctrine and the nondelegation doctrine, he explained, protect the separations of powers by mandating that "'important subjects . . . must be entirely regulated by the legislature itself,' even if Congress may leave the Executive 'to act under such general provisions to fill up the details.'"[96] His chief concern was that allowing too much delegation to administrative agencies results in a "ruling class of largely unaccountable 'ministers.'"[97]

Justice Gorsuch did concede that "what qualifies as an important subject and what constitutes a detail may be debated."[98] But when airing concerns about unaccountable agency ministers, he did not opine on what implications may flow from housing the decision-making authority with federal judges with life tenure. Ultimately, because in his view the Clean Air Act did not clearly authorize the EPA to implement a "generation shifting approach," the agency action violated the constitutional separation of powers invoked by the major questions and nondelegation doctrines.[99]

The general hostility to administrative regulation present in the *West Virginia* majority and concurrence and in the *Gundy* dissent is reminiscent of the tone of earlier writings critical of delegation. Justice Thomas signaled over twenty years ago his interest in revising the nondelegation doctrine, raising concern that the intelligible principle is too permissive of delegations. "Although this Court since 1928 has treated the 'intelligible principle' requirement as the only constitutional limit on congressional grants of power to administrative agencies," he asserted, "the Constitution does not speak of 'intelligible principles.' Rather, it speaks in much simpler terms: '*All* legislative Powers herein granted shall be vested in a Congress.'"[100] More recently Justice Thomas criticized what he perceived as a move from "the individualism that had long characterized American society to the concept of a society organized for collective action" by "usher[ing] in significant expansions of the administrative state" spurred by a "belief that bureaucrats might more effectively govern the country than the American people."[101] Justice Scalia similarly worried that "[t]oo many important decisions of the Federal Government are made nowadays by unelected agency officials exercising broad lawmaking authority, rather than by the people's representatives in Congress."[102] Chief Justice Roberts expressed concern about "the danger posed by the growing power of the administrative state," which involves "hundreds of

[95] *West Virginia*, 142 S. Ct. at 2616 (Gorsuch, J., concurring).

[96] *Id.* at 2617 (Gorsuch, J., concurring).

[97] *Id.* (Gorsuch, J., concurring).

[98] *Id.* at 2622 (Gorsuch, J., concurring).

[99] *Id.* at 2626 (Gorsuch, J., concurring).

[100] *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 487 (2001) (Thomas, J., concurring) (emphasis in original) (Clean Air Act case affirming in part and reversing in part EPA's action).

[101] *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1223 n.6 (2015) (Thomas, J., concurring in the judgment).

[102] *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1610 (2014) (Scalia, J., dissenting).

federal agencies poking into every nook and cranny of daily life."[103]

Insofar as this constitutional cousin of the major questions doctrine gains traction among some on the Court, it underscores the Roberts Court's valence toward deregulation and a pared-down administrative state. Under a robust major questions doctrine, an agency cannot act on significant questions absent a clear delegation from Congress, but under a robust nondelegation doctrine, Congress cannot delegate on significant questions at all.

C. The Doctrine Drives Unpredictable Outcomes

Paradoxically, both the major questions and nondelegation doctrines are motivated by a separation of powers concern that too much delegation to administrative agencies results in a "ruling class of largely unaccountable 'ministers.'"[104] But the unelected federal judges with life tenure who would make the decisions to cabin Congress's authority are themselves entirely unaccountable. If the Court will not exercise its judicial authority modestly, as the *West Virginia* dissent cautioned,[105] then at the very least the Court should present unambiguous factors that put Congress, the Executive Branch, the regulated community, and litigants on notice of what suffices as a permissible congressional delegation of authority to federal agencies. The current major questions and nondelegation frameworks do not.

The doctrines both impose heightened scrutiny of regulatory action, but in application, the major questions doctrine is more selective in its imposition of scrutiny. It is a context-specific application of heightened scrutiny to particular types of delegations to agencies. The criteria identified by the Court as indicative of a major question are indeterminate and malleable.[106] They include such ill-defined criteria as: economically significant; politically significant; novel; imposing great financial burden; derived from a rarely used provision; or intruding on what is traditionally an area of state law.[107] The more robust version of the nondelegation doctrine pressed in the *West Virginia* concurrence is similarly ill-defined. Whereas formerly agencies had authority so long as there was some intelligible principle guiding their efforts, now important subjects would be regulated solely by Congress, with agencies only filling in minor details.[108]

Notably, these major questions criteria are not limited to evaluating the significance of an agency action within the context of the enabling statute itself, which might hue closer to a textualist

---

[103] *City of Arlington v. FCC*, 133 S. Ct. 1863, 1879 (2013) (Roberts, C.J., dissenting).

[104] *West Virginia*, 142 S. Ct. at 2617 (Gorsuch, J., concurring).

[105] *Id.* at 2632-33 (Kagan, J., dissenting) ("[W]hen Congress uses 'expansive language' to authorize agency action, courts generally may not 'impos[e] limits on [the] agency's discretion.' That constraint on judicial authority—that insistence on judicial modesty—should resolve this case.").

[106] *See Deacon & Litman*, *supra* note ___, at 1014 & n.23 (collecting articles).

[107] *See supra* Part I.A.

[108] *West Virginia*, 142 S. Ct. at 2617 (Gorsuch, J., concurring) (citation omitted); *see supra* Part I.B.

approach.[109] Here, as Judge Griffith and others have noted,[110] the Court is taking a normative approach—how "major" the agency's action is perceived to be out in the world external from its relation to the controlling statute. So untethered from its relation to the statute itself, the doctrine becomes malleable, subjective, and arbitrary.

The "political significance" criterion is particularly troublesome. What does politically significant mean, and how does political controversy weigh in the analysis? It does not necessarily follow that how political or controversial something is should impact the bounds of Congress's authority to delegate. Controversial or no, Congress is making a decision to broadly frame its delegation to the agency with the relevant expertise in that area. This criterion also asks, controversial amongst whom? If a sizable minority of the population believes something to be controversial, is that sufficient to forestall agency action? If a few or a majority of Justices think it is controversial? How controversial? Would a single lawsuit objecting to agency action be an indicator of controversy, so that the mere filing of a complaint stalls federal governance? And so on. All issues being dealt with at the national level either are or have the potential to be "political," "controversial," or "significant." They are important enough, after all, to capture the attention of Congress or a federal agency.

When it comes to identifying a "major question," how one frames the scope of the question will determine the answer. The COVID-19 vaccine litigation provides an apt example. The outcome in *NFIB* is not intuitive, although the majority approached it as though the outcome were obvious. At what level of generality is a court to evaluate the political significance or novel aspect of an agency rule requiring vaccines or testing? While vaccinations for the new COVID-19 pandemic might be novel, the concept of vaccinations is certainly not. Indeed, years before COVID-19 arrived on the scene it was (and is) routine for public and private educational institutions to require children be vaccinated against certain communicable diseases as a condition for school attendance.[111] Vaccines and vaccine manufacturing are so prevalent in society that years ago Congress passed the National Childhood Vaccine Injury Act to expressly protect manufacturers from civil liability:

> No vaccine manufacturer shall be liable in a civil action for damages arising from a vaccine-related injury or death associated with the administration of a vaccine . . . if the injury or death resulted from side effects that were unavoidable even though the vaccine was properly prepared and was accompanied by proper directions and warnings.[112]

---

[109] *See supra* Part I.A; *see also West Virginia*, 142 S. Ct. at 2636 (Kagan, J., dissenting); *Biden* 143 S. Ct. at 2376 (Barrett, J., concurring).

[110] *E.g.*, Griffith & Proctor, *supra* note ___.

[111] *See* Center for Disease Control and Prevention, State School Immunization Requirements and Vaccine Exemption Laws, https://www.cdc.gov/phlp/docs/school-vaccinations.pdf.

[112] 42 U.S.C.A. § 300aa-22(b)(1); *see Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 243 (2011) (holding that the Act preempts all design-defect claims against vaccine manufacturers brought by plaintiffs who seek compensation for injury or death caused by vaccine side effects); *see also* Catherine M. Sharkey, *Against Categorical Preemption: Vaccines and the Compensation Piece of the Preemption Puzzle*, 61 DEPAUL L. REV. 643, 647 (2012) (discussing same); *see infra* Part II.

It was utterly unpredictable that a vaccinate-or-test rule in 2021 would be singled out as unprecedented agency action requiring explicit congressional approval.

The regulations at issue in *West Virginia* present a similar scope-of-question conundrum. If one views the EPA's regulations as a sea change in the economic and energy structure of the United States, then maybe the case does present a major question; if one views them as a natural extension of evolving information about the science and technology surrounding greenhouse gas emissions, applied by the agency charged with having the relevant expertise in that field, then maybe not. Even if the action does pose a major question, it is *not*, as noted by the *West Virginia* dissent, a forgone conclusion that Congress has *not already delegated* the power to deal with major questions to the EPA via the Clean Air Act.[113] At what level of granularity must Congress speak to make "clear" it wishes to endow the EPA with authority to act? Unsettled, for instance, is whether the Court would have upheld the challenged rules in *West Virginia* if the Clean Air Act expressly but generally charged the EPA with authority to encourage generation shifting, or if the Court would require the statute itself to identify specific technologies, timetables, and end goals. And finally, even if Congress had spoken clearly enough to satisfy the major questions doctrine, would the delegation nevertheless fail under the nondelegation doctrine as too "important" for Congress to leave to the EPA?[114]

Compare the majority's skepticism of broad, general grants of authority in *NFIB* and *West Virginia* with its more accommodating approach just two years prior in *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*.[115] In *Little Sisters*, the Court decided whether to uphold certain exemptions from agency regulations that implemented the Patient Protection and Affordable Care Act of 2010 (ACA, also known as Obamacare) to require employers to provide contraceptive coverage to their employees through group health care plans as part of ACA's preventive care mandate.[116] ACA does not define "preventive care," and Congress delegated decision making about the scope of care coverage to an agency of the Department of Health and Human Services (HHS). Several nonprofits and other entities challenged the rules, including the Little Sisters of the Poor. Little Sisters, a Catholic organization that operates homes for the elderly poor, objected to providing contraception coverage for their employees and even to engaging in the administrative certification process to seek an exemption, as contrary to their faith.[117] After much inter-agency back-and-forth and rounds of litigation, ultimately three departments (HHS, Labor, and the Treasury), exempted certain employers with religious objections from the contraceptive mandate.[118] The government also removed the self-certification requirement from the rules, and then several states challenged the new rules as invalid under the Administrative Procedure Act.

---

[113] *West Virginia*, 142 S. Ct. at 2628 (Kagan, J., dissenting) (observing Congress "broadly authorized EPA in Section 111 to select the 'best system of emission reduction' for power plants").

[114] *See id.*, 142 S. Ct. at 2617 (Gorsuch, J., concurring).

[115] *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020).

[116] *Id.* at 2373.

[117] *Id.* at 2376.

[118] *Id.* at 2374.

Upon granting certiorari, the Court took up whether the departments lacked statutory authority to promulgate the rules and exemptions under 42 U.S.C. § 300gg-13(a)(4). The statutory language at issue stated that "with respect to women," group health plans "shall" provide preventive care and screenings "as provided for" in agency guidelines.[119] The Court held that it was within the discretion of the departments to exempt those with religious objection to providing contraceptive coverage in their health insurance plans.[120]

The majority opinion, written by Justice Thomas and with the Chief Justice and Justices Alito, Gorsuch, and Kavanaugh joining (and Justices Breyer and Kagan concurring only in the judgment), conceded the delegation of authority was broad, and sweeping, and left the contours of preventive care entirely up to agency regulation and guidelines. There was no clear instruction from Congress; on the contrary, the statute was "completely silent" on what was included under the scope of the statute.[121] Indeed, the Court concluded that the pivotal phrase in the statute—"as provided for"—granted "sweeping authority" to the agency to "craft a set of standards defining the preventive care that applicable health plans must cover."[122] But the Court declined to impose "limits on an agency's discretion that are not supported by the text," and ACA left to the exclusive discretion of federal agency whether preventive care includes contraceptive mandates and religious and moral exemptions to those mandates.[123] Thus, under ACA, agencies had authority both to define the scope of preventive care mandated under the statute and to provide exemptions from those mandates.[124]

There was no dearth of controversy or matters of political and societal significance in this case. As the dissent noted, the exemptions rendered made it significantly harder for women to obtain access to contraception coverage without cost through their employers.[125] The case weighed religious preferences against other countervailing rights, including full access to federally mandated health coverage, and found in favor of the former.[126] Both the underlying subject matter and statutory text would seem to implicate the major questions and nondelegation doctrines.

Those Justices joining the *Little Sisters* majority opinion were not so accommodating of broad agency discretion two years later in *West Virginia*. How would *Little Sisters* fare under the major questions doctrine, in the absence of any clear statement from Congress? Or, would the Court

[119] *Id.* at 2379-80.
[120] *Id.* at 2386.
[121] *Id*.
[122] *Id*.
[123] *Id.* at 2381.
[124] The Court observed that no parties pressed a nondelegation challenge, and did not address the potential constitutional issue *sua sponte*. *Id.* at 2382.
[125] *See id.* at 2400 (Ginsburg, J., dissenting).
[126] The Court also evaluated whether the Departments appropriately considered the Religious Freedom Restoration Act, not directly relevant to this article. *See id.* at 2383.

conclude the major questions doctrine approach does not apply to this case at all, despite ostensibly meeting some of the *West Virginia* major questions criteria?[127]

As it stands, there is a relatively small sample of cases from which to pull trends or themes from these criteria. It nevertheless seems plain that, in the administrative law context, one motivating factor is "less": less government, less federal regulation. But not across the board; the major questions doctrine pushes "less" of only certain types of regulation. So there is a real concern that the major question doctrine is—by accident or design—prone to disguising policy preferences as judicial judgments.

The handful of cases so far do little to assuage initial concerns that the malleable criteria will lead to arbitrary results.[128] Expanding on early scholarship respecting the unpredictable nature of the doctrine,[129] Part II evaluates how the uncertainty fomented by the major questions doctrine will present itself in lawsuits about the preemptive scope of federal agency action.[130]

II. MAJOR QUESTIONS AND PREEMPTION COLLIDE

What qualifies as a major questions case is so flexible under current criteria that the doctrine can, with the right argument, encompass nearly every federal regulatory action. For that reason, the major questions doctrine will substantially impact state law litigation through the preemption doctrine. When parties litigate the preemptive effect of a federal regulation to the exclusion of state law, the argument naturally revolves around whether the federal rule (either expressly or by implication) extends to the arena purportedly governed by the state law at issue.[131] Now state law advocates can oppose the preemptive effects of federal rules on the basis that they are themselves *ultra vires* in the first instance under the major questions doctrine. The major questions doctrine thus becomes a "Step Zero" for preemption litigation.

A. The Old Preemption Landscape: Federal Law is Supreme

Unlike the major questions doctrine, the preemption doctrine brings with it a considerable body of case law. When preemption occurs, federal statutes or regulations replace other regulatory burdens at the state and local level. Federal law may also displace state common lawsuits that would

---

[127] To say *West Virginia* had not been penned yet is not a satisfactory answer, because (according to the *West Virginia* majority) the major questions doctrine had roots in earlier cases, including in *King v. Burwell*, 135 S. Ct. 2480, *supra* note ___.

[128] Deacon & Litman, *supra* note ___, at 1014-15 & n.23-n.24; Richardson, *supra* note ___, at 195 ("The most prominent critique of the major questions doctrine has been that its boundaries are unclear, unpredictable, and arbitrary.").

[129] *See, e.g.,* Natasha Brunstein, Taking Stock of *West Virginia* on its One-Year Anniversary, Notice & Comment Yale J. on Reg., https://www.yalejreg.com/nc/taking-stock-of-west-virginia-on-its-one-year-anniversary-by-natasha-brunstein/ (noting that "lower courts do not feel constrained in how they apply the doctrine" and that "many judges view the doctrine as little more than a grab bag of factors at their disposal").

[130] *See infra* Part II.

[131] *See infra* Part II.A.

interfere with the operation of that federal law. Preemption arguments are usually raised early in the course of litigation, either as a defense against state-law liability or as an offensive effort to invalidate a disfavored state law.[132]

The preemption doctrine is derived from the Supremacy Clause of the U.S. Constitution, which declares the Constitution and federal laws "the supreme Law of the Land."[133] Thus, while operating in the sphere of authority delegated to it by the Constitution, federal law is supreme.[134] While superior, this grant of federal authority is limited. The Tenth Amendment reserves to the States, or the people, all other powers not delegated to the United States.[135] Because states are "independent sovereigns" in the federal system, "'[t]he exercise of federal supremacy is not lightly to be presumed," and Congress "should manifest its intention [to preempt state and local laws] clearly."[136] These federalism principles thereby recognize a certain balance of power between the federal and state governments.[137] The Supreme Court has recognized a presumption against preemption in fields of law that are traditionally occupied by the States,[138] although scholars have noted that the Court's fealty to this presumption has waxed and waned over time.[139]

The "ultimate touchstone" of a court's preemption inquiry is congressional intent, or, rather, what a court understands Congress's intent to have been.[140] To discern congressional intent, a court will look to the language of the statute, the structure and purpose of the statute, and the court's "reasoned understanding of the way in which Congress intended the statute and its surrounding

---

[132] Typically, a defendant argues that it is not liable for state-law claims because those claims are preempted by federal law. This argument may be raised in a motion to dismiss filed shortly after being served with the plaintiff's complaint, in a motion for judgment on the pleadings, in a motion for summary judgment, and as an affirmative defense pleaded in the Answer. *See, e.g., Sickle v. Torres Advanced Enter. Sols., LLC,* 884 F.3d 338, 345 & n.3 (D.C. Cir. 2018). Preemption is therefore most often a defense on the merits, not a jurisdictional argument, except insofar as a defendant may be arguing for removal to a federal forum under extremely narrow circumstances. *See infra* Part III.C.

Preemption is also sometimes wielded affirmatively by a plaintiff in its complaint, seeking a court judgment that a state law is invalid. *See infra* Part II.C (describing a civil suit challenging a state abortion law as preempted by federal law); *see also e.g.*, *Arizona*, 567 U.S. 387 (suit by the United States to enjoin a state law as preempted).

[133] U.S. Const. art. VI, cl. 2.

[134] *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) (concerning the need for federal regulation of waterways).

[135] U.S. Const. am. X.

[136] *New York State Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405, 413 (1973) (quotation omitted); *see also Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

[137] *See Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) ("[A] healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.").

[138] *See Wyeth v. Levine*, 555 U.S. 555, 565 (2009).

[139] *See, e.g.,* Mary J. Davis, *The "New" Presumption against Preemption*, 61 Hastings L.J. 1217 (2010); Sharkey, *Against Categorical Preemption*, *supra* note ___.

[140] *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001).

regulatory scheme to affect business, consumers, and the law."[141] Not only statutes have preemptive effect; the Supreme Court also has "held repeatedly that state laws can be pre-empted by federal *regulations* as well as by federal statutes."[142]

The Supreme Court has identified different preemption categories, or tests. These categories are generally divided into express preemption and implied preemption, with implied preemption sometimes further subdivided into conflict preemption and field preemption.[143] Although conceptualized as separate preemption tests, they are not "rigidly distinct."[144]

Express preemption occurs when a federal law contains language that explicitly displaces state authority in a given area. One example is the Airline Deregulation Act, which prohibits States or their political subdivisions from "enact[ing] or enforce[ing] a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart."[145] Another example is the Employee Retirement Income Security Act of 1974 (ERISA), which states that it "supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA.[146] A third example is the National Childhood Vaccine Injury Act of 1986, described above, which expressly forecloses "liab[ility] in a civil action" against vaccine manufacturers and so preempts state law design-defect claims against vaccine manufacturers for damages arising from certain vaccine-related injuries.[147]

Implied preemption occurs under less defined circumstances, and categorizing a particular scenario as giving rise to either conflict or field preemption can be difficult. Sometimes a scenario gives rise to both because the boundary between the two categories is porous. In broad terms, conflict preemption occurs when complying with both state and federal law "is a physical impossibility,"[148] or when the state law "stands as an obstacle"[149] to the achievement of the federal objectives. Field preemption occurs when the federal interest in the subject is "so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."[150] Under implied preemption, even if Congress or the agency has not spoken directly to preemption,

---

[141] *Medtronic*, 518 U.S. at 486.

[142] *Hillsborough County v. Automated Med. Labs., Inc*., 471 U.S. 707, 713 (1985) (emphasis added) (evaluating whether county regulations governing blood plasma centers were preempted by FDA regulations).

[143] *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992); *Kurns v. Railroad Friction Prods. Corp.*, 565 U.S. 625, 630-631 (2012). Conflict preemption is sometimes further divided into "impossibility" or "obstacle" preemption, *see infra*; *see Arizona*, 567 U.S. at 399-400.

[144] *See, e.g., English v. Gen. Elec. Co*., 496 U.S. 72, 79 n.5 (1990).

[145] 49 U.S.C. § 41713(b)(1).

[146] 29 U.S.C. § 1144(a).

[147] *See Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 243 (2011); 42 U.S.C. § 300aa-22(b)(1).

[148] *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

[149] *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

[150] *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 204 (1983); *see also* Sharkey, *Against Categorical Preemption*, *supra* note ___ (discussing the various categories of preemption).

"[t]he intent to displace state law altogether can be inferred from a framework of regulation so pervasive ... that Congress left no room for the States to supplement it."[151]

There is no "infallible constitutional test" or "distinctly marked formula" for courts to apply to their preemption analysis.[152] Courts must consider whether the application of state law would skew the balance sought by the federal scheme.[153] A state law is preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[154]

For example, competing state and federal laws respecting employment of undocumented immigrants were at issue in *Arizona v. United States*.[155] In *Arizona*, the Supreme Court held that federal immigration laws preempted an Arizona statute that made it a crime for an "unauthorized alien to knowingly apply for work."[156] Although federal statutes made it illegal for *employers* to knowingly hire unauthorized workers, that "comprehensive framework [did] not impose federal criminal sanctions on the *employee* side," an omission reflecting "a considered judgment that making criminals out of aliens engaged in unauthorized work . . . would be inconsistent with federal policy and objectives."[157] The Court reasoned that the Arizona statute "conflict[ed]" with "the method of enforcement established in the federal statute" because under the federal system, the burden of the law fell on the employer, but the state law placed the burden on the employee.[158] This type of enforcement conflict "can be fully as disruptive to the system Congress erected as conflict in overt policy."[159] Because the state statute "would interfere with the careful balance struck by Congress with respect to unauthorized employment of aliens" by presenting "an obstacle to the regulatory system Congress chose," the Court concluded it was "preempted by federal law."[160]

In another example, *Gade v. National Solid Wastes Management Association*,[161] the Court reviewed the Illinois Environmental Protection Agency's enforcement of Illinois laws providing for training, testing, and licensing of hazardous waste site workers. The Court determined that those laws were impliedly preempted and in conflict with the purposes and objectives of the federal Occupational Safety and Health Act, under which the Secretary of Labor had promulgated detailed employee hazardous waste training regulations.[162] Because the state regulations addressed issues for which a federal standard had been established, they were precluded.[163]

---

[151] *Arizona v. United States*, 567 U.S. 387, 399 (2012) (internal quotes omitted) (distinguishing implied preemption from conflict and express preemption).

[152] *Hines*, 312 U.S. at 67.

[153] *See, e.g.*, *Buckman Co v. Plaintiffs' Legal Comm*., 531 U.S. 341, 348 (2001).

[154] *Arizona*, 567 U.S. at 399.

[155] *Id.* at 387.

[156] *Id*. at 403 (citation omitted).

[157] *Id*. at 404-05 (emphasis added).

[158] *Id*. at 406 (citation omitted).

[159] *Id*. (citation omitted).

[160] *Id*. at 406-07.

[161] *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88 (1992).

[162] *Id.* at 108.

[163] *Id.* at 102.

Implied preemption issues also frequently arise in the medical device and pharmaceutical spheres. In *PLIVA, Inc. v. Mensing*, for example, the Court held that federal law preempted state laws imposing a duty on generic drug manufacturers to modify a drug's warning label for consumer safety.[164] In two consolidated cases, consumers had filed suits under Minnesota tort law and a Louisiana products liability statute against generic drug manufacturers, alleging that long-term use of a medication used to treat digestive track conditions had caused neurological disorders. Because the Food and Drug Administration (FDA) heavily regulated generic drug labeling, the consumers' failure-to-warn claims were preempted. The state claims would conflict with the complex regulations governing drug labeling requirements; once a warning label is approved by the FDA, parties cannot force generic drug manufacturers to subsequently change that label via lawsuit. Because it would be impossible for the manufacturers to comply with both state and federal laws, federal law prevailed.[165] Two years prior in *Wyeth v. Levine*, however, the Court held that a state law failure-to-warn claim against manufacturer of antihistamine that was used to treat nausea intravenously but resulted in gangrene and amputation of the patient's arm was *not* preempted by federal law.[166] Even though the FDA's preamble to its own rules asserted that its labeling approvals preempted contrary state law, the Court determined that the history of the governing statute revealed that Congress had not intended to preempt state-law failure-to-warn actions in this context, where name-brand manufacturers had the flexibility to add protections beyond what was required by federal law.[167] So, whether an individual had a state law failure-to-warn claim relating to injuries from taking medication would turn on whether the individual had taken a generic or name-brand version of the same medication.[168]

And in *CSX Transportation, Inc. v. Easterwood*,[169] the Court evaluated whether federal regulations adopted by the Secretary of Transportation under the Federal Railroad Safety Act so "substantially subsume[d] the subject matter of the relevant state law" that they preempted a common law negligence suit filed by the widow of a truck driver who was struck and killed by a train.[170] Demonstrating the nuance and discretion involved in such a preemption inquiry, the Court analyzed the language and context of the numerous federal regulations and concluded that (1) because federal regulations set maximum allowable operating speeds for trains, they *did* preempt the state-law negligence action insofar as it asserted the train was travelling at excessive speed,

---

[164] *PLIVA, Inc. v. Mensing*, 564 U.S. 604 (2011) (FDA regulations, applying *Auer* deference).

[165] *Id.* at 617-18.

[166] *Wyeth v. Levine*, 555 U.S. 555 (2009).

[167] *Id.* at 576-81 (declining to accord deference to an agency's opinion as to preemption) (citing *United States v. Mead Corp*., 533 U.S. 218, 234–235 (2001), and *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

[168] The Supreme Court's complicated history with preemption in the pharmaceutical realm is well documented, with the Court's general acceptance of federal preemption of state tort claims against drug manufacturers being in tension with the Court's general hostility to the administrative state. *See, e.g.,* Catherine M. Sharkey, *The Anti-Deference Pro-Preemption Paradox at the U.S. Supreme Court: The Business Community Weighs In*, 67 Case W. Rsrv. L. Rev. 805 (2017) (focusing on *Auer* deference),
available at https://scholarlycommons.law.case.edu/caselrev/vol67/iss3/12.

[169] *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993).

[170] *Id.* at 664-65.

but (2) because the rail crossing safety regulations had sufficiently left to the states the authority to make decisions about the best way to use funds dedicated to crossing safety, they did *not* preempt allegations of negligence for failure to maintain adequate warning devices.[171] In a single suit, a plaintiff's state common law claim for the same injury was preempted, or not, depending on the theory of negligence liability and particular federal regulations implicated.

This brief list of examples shows that it can be difficult to anticipate when a certain area of law will be preempted, especially in the implied preemption context.[172] There are typically any of number of arguments (and case precedents) supporting either side of a preemption dispute.

B. The New Preemption Landscape: Federal Supremacy is in Doubt

Presented with preemption arguments under either a defensive or offensive posture, courts must decide at the outset of litigation how pervasively a federal regulatory scheme occupies an area of law to the preclusion of state laws on the same subject.[173] Now, with the arrival of an ambiguous major questions doctrine, the legal landscape in which that analysis takes place is considerably altered.

Prior to *West Virginia*, the conventional understanding was that Congress may operate through broad delegations of authority to agencies to assist in and implement Congress's policy directives.[174] It was simply how Congress was understood to work. Senators and Representatives are not technocrats, and they necessarily look to others for expertise in carrying out their policy goals. Similarly, for years under *Chevron*, it was understood that agencies have that expertise: scientists, resource managers, and others, informed by the public through notice and comment required by the Administrative Procedure Act,[175] would craft regulations that were flexible to particular circumstances.

Now, the specter of a major questions challenge will chill agency action that previously would have responded "to new and big problems"[176] under broad delegations.[177] This chilling effect will

---

[171] *Id.* at 665-76.

[172] Others have documented the lengthy list of state law preemption cases. *See, e.g.,* Sharkey, *Administrative State*, *supra* note ___, at 1729; Robert L. Rabin, *Reflections on Tort and the Administrative State*, 61 DEPAUL L. REV. 239, 269 (2012).

[173] *See supra* Part II.A.

[174] *See, e.g., W. Virginia*, 142 S. Ct. at 2630 (Kagan, J., dissenting) (observing Congress delegated authority to the EPA in typically broad terms); *Gundy*, 139 S. Ct. at 2123 ("Congress may 'obtain[ ] the assistance of its coordinate Branches'—and in particular, may confer substantial discretion on executive agencies to implement and enforce the laws.").

[175] 5 U.S.C. § 551 *et seq*.

[176] *West Virginia*, 142 S. Ct. at 2628 (Kagan, J., dissenting).

[177] *See generally* Jody Freeman & Richard Lazarus, Jody Freeman and Richard Lazarus on West Virginia v. EPA—March 31, 2022, HARV. L. ENV'T. L. PROGRAM: CLEAN L. at 18 (Mar. 31, 2022), https://eelp.law.harvard.edu/wp-content/uploads/Jody-and-Richard-WV-v-EPA-transcript_.pdf; Andrew J. Twinamatsiko & Katie Keith, Unpacking West Virginia v. EPA And Its Impact on Health Policy, O'NEILL INST. GEO. L. (July 13, 2022),

alter preemption arguments or rulings, either because there are fewer federal regulations issued, because agencies are more inclined to settle cases or otherwise resolve regulatory issues outside the court to avoid a court judgment undermining their statutory authority to act, or because courts interpret federal agency power narrowly to avoid a major questions doctrine dispute. Post-*West Virginia*, litigants can wield the major questions doctrine—again, with criteria as vague as "politically or economically significant"—to ask a court to either invalidate an agency's authority or so narrowly interpret it that there is little work for a preemption analysis to do.

With a federal judiciary hostile to delegated rulemaking authority, a critical question now is: will regulatory preemption survive in the new legal landscape?

Take, for example, the preemption holding in *CSX Transportation*, discussed above.[178] There the Supreme Court ruled that the Department of Transportation's speed regulations preempted state-law negligence actions based on allegations of excessive speed. "Understood in the context of the overall structure of the regulations," the Court explained, "the speed limits must be read as not only establishing a ceiling, but also precluding additional state regulation of the sort that respondent seeks to impose on petitioner."[179] But if this case were to arise post-*West Virginia*, plaintiffs would have a new argument for opposing dismissal of their state negligence claim. Is it a question of vast political and economic significance to foreclose tort suits in all 50 states, when protecting the health and safety of citizens is traditionally the purview of state law? The Railroad Safety Act does not direct the DOT to preempt state tort law, the argument would go, and (taking a cue from the *West Virginia* ruling on merely "technical" climate change emissions standards) in fact the speed limits authorized by statute can be characterized as mere technical assessments of maximum speeds on tracks to avoid derailing. Surely it is politically significant to say that the historic police powers of the state are usurped by technical speed regulations. Indeed, Justice Thomas's partial dissent in *CSX Transportation*, years before the official appearance of the major questions doctrine, raised similar concerns when he worried that preemption of state law occurred via "administrative fiat rather than by congressional edict."[180]

Perhaps, then, concerns previously raised about broadly preemptive federal law find a new home in the new—and more potent—major questions doctrine. Looking to Justice Thomas again, for example, in the failure-to-warn drug manufacturer case *Wyeth v. Levine*, he concurred only in the judgment and wrote separately to note he was "increasingly skeptical" of the Court's approach to "routinely invalidate[] state laws based on perceived conflicts with broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not embodied within the text of federal law."[181] He had become "increasing[ly] reluctan[t] to expand federal statutes beyond their terms through doctrines of implied pre-emption."[182] Citing back to *CSX Transportation*, he cautioned that "'[e]vidence of pre-emptive purpose [must be] sought in the text

---

https://oneill.law.georgetown.edu/unpacking-west-virginia-v-epa-and-its-impact-on-health-policy/.

[178] *See supra* Part II.A.

[179] *CSX Transp*., 507 U.S. at 674.

[180] *Id.* at 679 (Thomas, J., concurring).

[181] *Wyeth v. Levine*, 129 S.Ct. 1187,1205 (Thomas, J., concurring).

[182] *Id.* at 1207 (Thomas, J., concurring) (alterations in original).

and structure of the [provision] at issue' to comply with the Constitution."[183] While raised in the context of preemption, those concerns from *Wyeth* and *CSX Transportation* could be lifted and pasted directly into a major questions brief or judicial opinion.

C. The Uncertain "Step Zero" for Preemption Cases

Now there is a major questions Step Zero for the preemption analysis in certain cases, whereby courts evaluate the viability of federal regulations under the major questions doctrine in the first instance. But, unlike the *Chevron* Step Zero from which the name is borrowed, the major questions Step Zero will be triggered by a court-perceived external significance of the agency action rather than by a routine textual analysis. This requires litigants to develop the art of divination as they shape their case strategy.

Although we do not yet have precedential rulings in the relatively short period of time since *West Virginia*, an early case out of the Southern District of West Virginia concerning the medication abortion drug mifepristone signals how parties may employ these two doctrines in opposition to each other. Mifepristone is a medication approved and regulated by the Food and Drug Administration (FDA) under authority granted by the Food, Drug, and Cosmetic Act (FDCA) and prescribed as part of a two-step medication abortion regime.[184] Following the Supreme Court's *Dobbs* decision which "return[ed] the issue of abortion to the people and their elected representatives,"[185] the state of West Virginia passed the Unborn Child Protection Act and made illegal, subject to limited exception, abortions performed or induced via medicine or drug.[186]

GenBioPro, a manufacturer of mifepristone, sued West Virginia state and county officials and argued that the FDA's approval of mifepristone preempted state laws that would impact the drug's use or sale. The FDA's drug safety program (knows as REMS, for Risk Evaluation and Mitigation Strategy) was designed to ensure that a drug's benefits outweigh its risks assuring safe usage.[187] With respect to mifepristone, the FDA authorized prescription by heath care providers within a certain pregnancy timeframe, in response to "overwhelming evidence of the safety and efficacy of" the drug.[188]

Defendants filed motions to dismiss the complaint, arguing, *inter alia*, that the state statute was not preempted and, moreover and in the first instance, the major questions doctrine doomed the

---

[183] *Id.* (citing *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (Thomas, J., concurring)). Justice Thomas offered similar concerns in the *Chevron* context. *See, e.g.*, *Baldwin v. United States*, 140 S. Ct. 690, 695 (2020) (mem.) (Thomas, J., dissenting from the denial of certiorari) (cautioning that the Court's acceptance of a then-robust *Chevron* deference had "taken this Court to the precipice of administrative absolutism").

[184] *GenBioPro, Inc. v. Sorsaia*, No. CV 3:23-0058, 2023 WL 5490179, at *1 (S.D.W. Va. Aug. 24, 2023).

[185] *Dobbs*, 142 S. Ct. at 2279.

[186] *GenBioPro, Inc. v. Sorsaia*, 2023 WL 5490179, at *1 (S.D.W. Va. Aug. 24, 2023).

[187] 21 U.S.C. §§ 355-1, 355-1(e)-(f).

[188] Order, 2023 WL 5490179, at *3 (S.D.W. Va. Aug. 24, 2023).

case from the start.[189] Under the major questions doctrine, defendants argued, it was not enough that the FDA was authorized to regulate and approve this category of medicine; the doctrine required "clear congressional authorization empowering the FDA to mandate matters of medical practice, including nationwide abortion."[190] Defendants asserted what the agency was technically authorized to do via statute should, indeed must, fail in light of the normative significance of what the drug is used for: in this case, abortion. "Thus, before this Court need even address GBP's preemption claim, it must first confront a more fundamental question of agency power: 'whether Congress in fact meant to confer the power the agency has asserted.'"[191] Congress had not, defendants argued, delegated to the FDA authority to mandate nationwide abortion access.[192] Rather, the regulations set a federal floor on the approval of the drug, allowing complementary state regulations.[193] In this case, those state regulations would make use of the drug illegal in nearly all instances.

The district court ultimately rejected defendants' major questions doctrine argument, but in doing so it accepted the premise that the major questions doctrine is a necessary first-step inquiry before reaching a preemption argument. The analysis portion of the court's order begins with the statement, "In his Motion to Dismiss, Defendant Morrisey argues that this is a major questions case."[194] The court then proceeded to evaluate whether "Congress did not intend to delegate authority to the FDA to decide access issues for mifepristone."[195]

On the merits of the major questions issue, the district court framed the question narrowly and concluded the federal law did not trigger a major questions inquiry.[196] While the court did not disagree with defendants that abortion is a major policy decision, it viewed the case as a drug-approval matter rather than an abortion matter. Framed that way, the scope of the question before the court was limited. FDA was following Congress's instruction to promulgate REMS for a list of approved drugs, of which mifepristone was just one.[197] The court further disagreed that the FDA's regulations were a novel interpretation of authority like in *West Virginia* or an action to reconfigure large aspects of the economy like in *Biden v. Nebraska*.[198] The court disagreed with defendants that the fact that Congress did not mention abortion was significant, because the act did not address any particular application of the various drugs in the schedule.[199] Then, the court continued on the matter of delegation overall, and instructed defendants to "find standing to bring another suit" if they wished to bring a delegation challenge.[200]

---

[189] Brief in Support of Motion to Dismiss, No. 3:32-0058, *GenBioPro, Inc. v. Sorsaia*, 2023 WL 3045395 (S.D.W.Va.).

[190] *Id*.

[191] *Id*.

[192] *Id*.

[193] *Id*.

[194] Order, 2023 WL 5490179, at *3 (S.D.W. Va. Aug. 24, 2023).

[195] *Id.*

[196] *Id.* at *4.

[197] *Id.* at *4.

[198] *Id.* at *4.

[199] *Id.* at *4.

[200] *Id.* at *4.

The district court concluded that "this [was] not a major questions case, and therefore "the major questions doctrine [did] not bar Plaintiff's arguments as to preemption."[201] In so ruling, the district court was engaging in the type of line drawing exercise courts across the country will soon be doing. Whereas this court found the answer to fall on one side of the major question line based on its framing of the question—drug approvals, not abortion—the major questions criteria are malleable enough that in the hands of a different district judge (or appellate court) the outcome may very well be different. With a different major questions framing, there would be no preemption issue to decide.

On the merits of the preemption question, the court continued its narrow read of the federal law and upheld the West Virginia law. Applying conflict preemption principles, the court concluded West Virginia's law banning mifepristone use in most circumstances was not in conflict with the federal statute.[202] Although the federal law concerned safe access for patients to drugs with known risks while "assuring access" and "minimizing burden," the court interpreted this language narrowly to mean the statute is a limitation on the FDA's restrictions on a drug, rather than an instruction that the FDA assure access for patients.[203] In other words, Congress intended to ensure *the FDA* would not implement regulations unduly burdensome to patients but was silent as to a *state's* burden on access to that same drug. The state law, the court concluded, was "a restriction on the incidence of abortion, rather than a state directive in direct conflict with the logistical REMS regulations. . . . West Virginia's UCPA has limited *when* an abortion may be performed, without touching *how* medication abortion is to be performed."[204] The court similarly rejected plaintiff's field preemption arguments. Relying on a presumption against preemption in a field traditionally occupied by the states, which the court identified here as health and medicine, implied preemption is disfavored absent a conflict (which the court had already decided did not exist).[205]

There is room to quibble with the district court's preemption conclusions. For instance, early commentators note that insofar as congressional intent is key to a preemption analysis, accessibility to the very drugs approved under a national review system would be incorporated into the statute itself.[206] Additional restrictions on those drugs that are subject to a complex balancing of multiple considerations would be an obstacle to FDA's ability to satisfy congressional objectives.[207] Moreover, the path to a medication's FDA approval is lengthy and expensive, with a successful result being approval to sell the medication throughout the country and an

[201] *Id.* at *4.
[202] *Id.* at *6.
[203] *Id.* at *6.
[204] *Id.* at *8.
[205] *Id.* at *9. The court did rule that a telemedicine restriction also at issue in the case was preempted by the REMS, which requires that if and when mifepristone is allowed to be prescribed, it may be prescribed via telemedicine. The court also went on to analyze Dormant Commerce Clause issues outside the scope of this Article.
[206] *See* David S. Cohen, Greer Donley & Rachel Rebouche, *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 59 (2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4032931.
[207] *Id.*

unsuccessful result meaning the drug cannot be sold anywhere.[208] Surely a state-specific ban (or effective ban) on that same medication undercuts that same process. Indeed, in other drug contexts, such as *PLIVA, Inc. v. Mensing* and *Mutual Pharmaceutical Co. v. Bartlett*, the Supreme Court expressly rejected the idea that manufacturers could comply with both state and federal law by simply not selling their products.[209]

Putting aside whether the preemption outcome was right or wrong or will survive appeal, the notable dynamic here is the overlay of the major questions doctrine in a way that suggests this is the new normal for preemption cases. Before getting to the preemption analysis, litigants will have to pass through the major questions gate, a new Step Zero.

III. THE MAJOR QUESTIONS "STEP ZERO" SHAKES UP STATE-FEDERAL PREEMPTION LITIGATION

The Supreme Court majority's skepticism of broad grants of regulatory authority casts doubt on the preemptive effect of any regulatory scheme. As noted above, a litigant may argue that federal law preempts state law when the operative federal law contains explicit preemptive language, or by implication when complying with both state and federal law is a physical impossibility, when the state law stands as an obstacle to the achievement of the federal objectives, or when a federal regulatory framework is pervasive.[210] Now, a federal agency's very authority to act *at all* is under heavy scrutiny, unless its action is *in*significant, *un*controversial, *not* novel, imposes *no* great financial burden, is derived from a *commonly used* provision, and does *not* intrude on an area of traditionally state law.[211] It is difficult to envision a robust regulatory scheme that would satisfy all these major questions criteria or was delegated with the requisite clear authority from Congress, which may be the Court's intention.

But this retraction in agency authority in certain areas, and a corresponding retraction of preemptive regulations, does not necessarily lead to a reduced burden on the regulated community across the board. Instead, this retraction may herald a shift in the *source* of regulation, be it state law, local ordinance, or state common law. Recall that one result of preemption is to allow a single regulator—the federal government—to occupy an area of law and strike a balance between enforcing rules and encouraging lawful conduct.[212] Preemption fosters uniformity under a "single legal regime" operating nationwide in lieu of "a patchwork of inconsistent standards."[213] If there is a federal regulatory void, then there is room for different types of regulation. By extension, state and local laws that either are, or were considered likely to be, preempted by federal laws may survive to become points of contention in legal disputes.

Case by case, the state-federal power balance will be reinvented through the juxtaposition of the

---

[208] *Id.* at 60-61.

[209] *Id.* at 61-62; *see Mutual Pharmaceutical Co. v. Bartlett*, 570 U.S. 472, 475-76 (2013); *see supra* Part II.A.

[210] *See supra* Part II.A.

[211] *See supra* Part I.A.

[212] *See supra* Part II.A.

[213] Lyons, at 945.

preemption and major questions doctrines. Three areas of law exemplify the turbulent transformation: abortion, net neutrality, and climate change. Their newly uncertain preemption landscapes destroy predictability and stability for individuals, the regulated community, governments, the courts, and society writ large.

A. Example: Abortion

As the mifepristone case out of West Virginia previews,[214] the overruling of *Roe v. Wade* in *Dobbs v. Jackson Women's Health Organization*[215] to return abortion law to the states will result in high-stakes litigation implicating the preemption and major questions doctrines as various states take different approaches to reproductive health care and conflicts arise across state borders and between state and federal regulators. Early scholarship from both the legal and biomedical fields has begun to catalog how the fallout from *Dobbs* will "create a novel world of complex, interjurisdictional legal conflicts over abortion."[216] The fundamental question is whether federal policies about pregnant patients' access to medication and medical care preempt a state's general ban on abortion.

Two particularly notable suits precipitated by President Biden's July 2022 federal executive order to protect access to abortion care in response to *Dobbs*[217] have the potential to tee up a major question versus preemption issue to the Supreme Court. Executive Order 14,076 requires Health and Human Services (HHS) to "identify[ ] potential actions ... to protect and expand access to abortion" and to "identify[ ] steps to ensure that ... pregnant women ... receive the full protections for emergency medical care afforded under the law, including by considering updates to current guidance on obligations specific to emergency conditions and stabilizing care under [EMTALA]."[218]

First, in *Texas v. Becerra*, Texas Attorney General Ken Paxton filed a lawsuit challenging federal agency guidance that outlined states' obligations to pregnant patients seeking emergency care at a

---

[214] *See supra* Part II.C.

[215] 597 U.S. ___, 2022 WL 2276808 (June 24, 2022), *overruling Roe v. Wade*, 410 U.S. 113 (1973).

[216] *See New Abortion Battleground*, *supra* note__ at 1, 60; *see* Patricia J. Zettler, et. al., *Mifepristone, Preemption, and Public Health Federalism*, 9 J.L. & Biosciences 1 (2022).

[217] Fact Sheet: President Biden to Sign Executive Order Protecting Access to Reproductive Health Care Services, The White House (July 8, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/07/08/factsheet-president-biden-to-sign-executive-order-protecting-access-to-reproductive-health-careservices/ [https://perma.cc/ERE2-X5BP]; *see also* Shira Stein, Fiona Rutherford, and Celine Castronuovo, *White House Touts Abortion Pill As Answer To* Roe *Reversal But FDA Rules Limit Use*, Bloomberg (June 30, 2022), https://www.bloomberg.com/news/articles/2022-06-30/white-house-touts-abortionpill-as-answer-to-roe-reversal-but-fda-rules-limit-use;
Dan Diamond & Rachel Roubein, *Biden official vows action on abortion following 'despicable' ruling*, Washington Post (June 28, 2022), https://www.washingtonpost.com/health/2022/06/28/abortion-access-becerra/.

[218] 87 Fed. Reg. 42,053 (July 8, 2022)

hospital.[219] The federal statute at issue, the Emergency Medical Treatment and Labor Act (EMTALA), requires Medicare-participating hospitals with emergency departments to screen and stabilize all patients experiencing a health care emergency.[220] With respect to pregnant patients, EMTALA defines "emergency medical condition" as "a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in placing the health of . . . the woman or her unborn child . . . in serious jeopardy," or result in "serious impairment to bodily functions," or "serious dysfunction of any bodily organ or part."[221] The statute includes a preemption provision, which provides that the statute's provisions "do not preempt any State or local law requirement, except to the extent that the requirement directly conflicts with a requirement of this section."[222]

HHS issued guidance on July 11, 2022 to "remind hospitals of their existing obligation to comply with EMTALA" with respect to pregnant patients.[223] The memorandum states that if a pregnant patient "is experiencing an emergency medical condition as defined by EMTALA, and that abortion is the stabilizing treatment necessary to resolve that condition, *the physician must provide that treatment*. When a state law prohibits abortion and does not include an exception for the life of the pregnant person—or *draws the exception more narrowly than EMTALA's emergency medical condition definition*—that state law is *preempted*."[224]

Texas challenged the HHS guidance as exceeding HHS's statutory authority and not a permissible construction of EMTALA, and sought a preliminary injunction.[225] The district court agreed. The court concluded the federal statute imposed equal obligations to the "health of the woman or her unborn child" and left to the states to decide how to handle a conflict between those equal obligations.[226] Texas's Human Life Protection Act, a "trigger law" that took effect upon the overruling of *Roe*, prohibits abortion unless the pregnant patient has a life-threatening physical condition or faces serious risk of substantial impairment and the abortion is performed in a manner that provides the best opportunity for the unborn child to survive unless the manner would create a greater risk of the pregnant patient's death or serious risk of substantial impairment of a major bodily function.[227] Violating this law is a felony offense, and violators are also subject to a civil penalty of not less than $100,000 per violation and revocation of their license.[228] And so while the federal statute "provides no roadmap for doctors when their duty to a pregnant woman and her unborn child may conflict," the Texas law "filled that void."[229]

---

[219] *Texas v. Becerra*, 623 F.Supp.3d 696 (N.D.Tex. 2022).

[220] 42 U.S.C. § 1395dd(b).

[221] 42 U.S.C.A. § 1395dd(e)(1)(A).

[222] 42 U.S.C.A. § 1395dd(f).

[223] Dep't Health & Human Serv's, Reinforcement of EMTALA Obligations specific to Patients who are Pregnant or are Experiencing Pregnancy Loss, at 1, *available at* https://www.cms.gov/files/document/qso-22-22-hospitals.pdf.

[224] *Id.*

[225] *Texas v. Becerra*, 623 F.Supp.3d 696 (N.D. Tex. 2022).

[226] *Id.* at 726 (citing 42 U.S.C. § 1395dd(e)(1)(A)(i)).

[227] *Id.* at 705-06.

[228] Tex. Health & Safety Code §§ 170A.004, -.005, -.007.

[229] *Texas*, 623 F.Supp.3d at 725.

HSS's guidance, according to the court, went further than EMTALA and impermissibly resolved the conflict in favor of the pregnant woman irrespective of either the unborn child's health or state law.[230] And because the agency guidance was invalid, Texas law was consistent with EMTALA and was not preempted. Because EMTALA's preemption provision includes a presumption *against* preemption unless the state or local requirement "directly conflicts" with EMTALA, and because EMTALA does not itself resolve situations where both a pregnant woman and the unborn child face emergencies, Texas's law addressing that situation survived the preemption analysis.[231] The court granted Texas's motion for preliminary injunction, enjoining application of the guidance against Texas's law.[232] Acknowledging concurrent EMTALA litigation pending in a federal court in Idaho, the court declined Texas's request to issue a nationwide injunction.[233] Oral argument on Texas's appeal to the Fifth Circuit was heard on November 7, 2023.[234]

Second, in *United States v. Idaho*, the Department of Justice filed a declaratory judgment action against the State of Idaho, arguing that its near-absolute ban on abortion is invalid to the extent that it conflicts with EMTALA.[235] Idaho's trigger law bans *all* abortions and makes providing abortions a crime, but allows physicians who violate the law to offer an affirmative defense: that the abortion was necessary to prevent the death of the pregnant patient.[236] Physicians who violate the law commit a felony, punishable by between two and five years in prison and suspension or revocation of their license.[237] Idaho law also authorizes civil suits by certain family members against abortion providers.[238]

The District of Idaho issued a preliminary injunction of Idaho's criminal abortion law.[239] Complying with both the Idaho statute and EMTALA was impossible, and the court ruled the Idaho statute was preempted because pregnant patients in Medicare-funded hospitals requiring treatment for an emergency medical condition would not receive needed stabilizing abortion care when Idaho's statute makes abortions a crime. The Idaho statute's affirmative defense "d[id] not cure the impossibility," because that is a defense that the jury may not find exists and, in any event, defendants not being legally blameless for a crime after a jury trial does not change the fact that Idaho law makes conduct authorized, in fact required, under federal law a crime.[240] It is also impossible to comply with both because EMTALA requires abortion care to prevent injuries more

---

[230] *Id.* at 723. Interestingly, in conducting this analysis, the court applied *Chevron*. *Id.*

[231] *Id.* at 727 (citing 42 U.S.C § 1395dd(f)).

[232] *See* Order Denying Motion for Clarification, *Texas v. Becerra*, No. 5:22-CV-185-H, 2022 WL 18034483, at *2 (N.D. Tex. Nov. 15, 2022) (reiterating that "[t]he defendants may not enforce the Guidance and Letter's interpretation that Texas abortion laws are preempted by EMTALA.").

[233] *Texas*, 623 F.Supp.3d at 739.

[234] *See* Docket, *Texas v. Becerra*, No. 23-10246 (5th Cir.).

[235] Complaint, *United States v. Idaho*, Case No. 22-cv-00329-BLW, 2022 WL 3137290 (D. Idaho Aug. 2, 2022).

[236] *United States v. Idaho*, 623 F.Supp.3d 1096, 1101-02 (D. Idaho 2022); Idaho Code § 18-622.

[237] Idaho Code § 18-622.

[238] *Id.* § 18-618.

[239] *Idaho*, 623 F.Supp.3d 1096.

[240] *Id.* at 1109.

wide-ranging than death.[241] Moreover, under obstacle (or conflict) preemption, Idaho law also "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," which was to provide a bare minimum of emergency care. [242]

Idaho appealed the district court's injunction. The state initially succeeded before a sympathetic Ninth Circuit Panel.[243] Judge VanDyke wrote for a unanimous panel that it was not impossible to comply with both EMTALA and Idaho's law, that Idaho was likely to succeed on the merits, and granted Idaho's motion to stay the case pending appeal.[244] The Ninth Circuit thereafter voted to rehear the matter *en banc*, vacated the Panel's stay pending appeal, and denied Idaho's motion to stay the injunction pending appeal. Oral argument on the merits of the injunction appeal is scheduled for the week of January 22, 2024.[245] On November 20, 2023, Idaho filed with the Supreme Court an emergency application requesting a stay pending appeal or, alternatively, certiorari before judgment.[246]

These competing decisions on the scope of EMTALA and the preemptive effect of HHS's guidance could present a circuit split (in the Fifth and Ninth Circuits) ripe for Supreme Court resolution. If so, the stakes are high: The major questions Step Zero in these EMTALA cases would ask the Court to decide whether the scope of EMTALA's statutory language requiring federally funded hospitals to stabilize patients experiencing emergency medical conditions, including the comparative weight physicians may place on the safety of the pregnant patient or the unborn child, qualifies as a "major question" under the *West Virginia* criteria. Further, if it does, then whether Congress through EMTALA gave HHS sufficiently clear instruction to make that decision in favor of the pregnant person's health and require that abortion remain a health care option. If Congress did speak clearly enough to delegate that authority, then abortion advocates retain their argument that federal law preempts state laws that would eliminate abortion care. If Congress did not speak clearly enough to satisfy the Supreme Court, then HHS guidance requiring that abortion remain one of the stabilizing treatments available for an emergency medical condition becomes invalid, and there is no preemption analysis at all; the state laws stand. The result would be dramatically different emergency health care options for pregnant people, depending on where in the country they happen to be at the time of that emergency.

---

[241] *Id.*

[242] *Id.* at 1111.

[243] *United States v. Idaho*, as 83 F.4th 1130 (9th Cir. 2023), *reh'g en banc granted, opinion vacated*, 82 F.4th 1296 (9th Cir. 2023).

[244] *Id.* at 1133-34.

[245] *United States v. Idaho*, 82 F.4th 1296 (9th Cir. 2023); *see also* https://storage.courtlistener.com/recap/gov.uscourts.ca9.344312/gov.uscourts.ca9.344312.73.0_1.pdf. Chris Geitner provides an in-depth review of the procedural and substantive implications of these dueling orders. https://www.lawdork.com/p/ninth-circuit-abortion-trump-appointees.

[246] Application pending. *See* https://adfmedialegalfiles.blob.core.windows.net/files/IdahoMotionToStayPendingAppeal.pdf.

B. Example: Net Neutrality

Net neutrality represents an altogether different scenario resulting from a reduced federal regulatory presence: one where a state's laws fill that void and become the standard across the country. For this example, the Federal Communications Commission (FCC) regulates interstate and international communications by radio, television, wire, satellite, and cable in all U.S. states and territories.[247] Its enabling statute, the Communications Act of 1934,[248] sets up a dual system of federal and state regulation of communication system, preserving some state authority to act in these areas.[249] While some communications such as telephone service are (or were, for much of the statute's history) predominantly intrastate in nature and traditionally subject to state public utility regulation, more recent technologies such as the Internet are (arguably) jurisdictionally interstate in nature.[250] This dual regulatory system can produce preemption disputes, such as in the context of net neutrality rules.

The FCC has been assessing its approach to net neutrality for over a decade.[251] Net neutrality is the principle that internet service providers must treat all internet traffic the same. For example, net neutrality rules would prohibit a broadband provider like Comcast from inhibiting the internet user's access to one news website (such as The New York Times) while favoring access to competitor websites (like The Washington Post).[252] Nor may Comcast slow or bar access to Netflix to favor cable television service.

The FCC's authority to impose anti-discrimination regulations on internet service providers turns on whether the FCC classifies broadband service as an information service or a telecommunications service under the Communications Act of 1934,[253] with telecommunications being subject to common carrier regulations that would encompass net neutrality rules.[254] Under the Obama Administration, the FCC's 2015 Open Internet Order imposed net neutrality by classifying broadband as a telecommunications service, thereby prohibiting broadband providers from blocking access to legal internet content or impairing or degrading lawful internet traffic on the basis of content.

---

[247] *See* https://www.fcc.gov/about/overview; 47 U.S.C. § 151 *et seq*.

[248] 47 U.S.C. § 151 *et seq*.

[249] *See, e.g.*, 47 U.S.C. § 152(b) ("[N]othing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . . .").

[250] *See generally* Daniel A. Lyons, *State Net Neutrality*, 80 U. Pitt. L. Rev. 905 (2019). For a discussion of the practical realities borne of the physical infrastructure required for internet access and implications for the "interstate" nature of the internet, *see* Christopher Witteman, *Net Neutrality from the Ground Up*, 55 Loy. L.A. L. Rev. 65 (2022).

[251] *See generally U.S. Telecom Ass'n v. Fed. Commc'ns Comm'n*, 825 F.3d 674, 689 (D.C. Cir. 2016) (describing history).

[252] *See id.*

[253] 47 U.S.C. § 151 *et seq*.; *see* https://www.fcc.gov/about/overview.

[254] *See U.S. Telecom Ass'n*, 825 F.3d at 689.

In 2016, the DC Circuit upheld that rule.[255] But then-Judge Kavanaugh dissented from denial of rehearing en banc and signaled an interest in net neutrality's overlap with what he at that time termed a "major rules doctrine," remarking that:

> [t]he FCC's 2015 net neutrality rule is one of the most consequential regulations ever issued by any executive or independent agency in the history of the United States. The rule transforms the Internet by imposing common-carrier obligations on Internet service providers and thereby prohibiting Internet service providers from exercising editorial control over the content they transmit to consumers. The rule will affect every Internet service provider, every Internet content provider, and every Internet consumer. *The economic and political significance of the rule is vast*.[256]

Judge Kavanaugh would have vacated the 2015 net neutrality rule because Congress did not "clearly authorize[]" the FCC to impose common-carrier obligations on internet service providers. Judge Kavanaugh observed that Congress had debated net neutrality for years, considering but never passing a law on this subject.[257] His dissent distinguished "ordinary agency rules" from "a narrow class of cases involving major agency rules of great economic and political significance."[258] The ordinary rules would be afforded *Chevron* deference to agency interpretations of statutes, following the familiar two-step process depending on whether the statutory authority is clear or ambiguous.[259] But in circumstances involving significant rules, Congress must clearly authorize an agency to issue a major rule. This would comport with "a separation of powers-based presumption against the delegation of major lawmaking authority from Congress to the Executive Branch" and "a presumption that Congress intends to make major policy decisions itself, not leave those decisions to agencies."[260] Judge Kavanaugh observed that net neutrality rules "fundamentally transform[] the Internet" and "wrest[] control of the Internet from the people and private Internet services providers and give[] control to the Government."[261] For these and other reasons, Judge Kavanaugh would have vacated the net neutrality rule.

The FCC changed its approach during the Trump Administration, and in a January 2018 order (the "Restoring Internet Freedom Order"), reclassified broadband internet as an *information* service.[262] The agency thereby *exempted* service providers from common carriage treatment and *dismantled* rules that would prohibit providers from blocking websites or charging for higher-quality service or certain content. By this deregulatory rule, "the agency pursued a market-based, 'light-touch' policy for governing the Internet."[263]

---

[255] *Id.* at 744.

[256] *See United States Telecom Ass'n v. Fed. Commc'ns Comm'n*, 855 F.3d 381, 417 (D.C. Cir. 2017) (Kavanugh, J., dissenting from denial of rehearing en banc) (emphasis added).

[257] *Id.* at 423 (Kavanaugh, J., dissenting).

[258] *Id.* at 419.

[259] *Id.*

[260] *Id.*

[261] *Id.* at 423

[262] *See Mozilla Corp. v. Fed. Commc'ns Comm'n*, 940 F.3d 1, 18 (D.C. Cir. 2019).

[263] *Id.* at 17.

After yet another legal challenge, the DC Circuit again deferred to the agency in substantial part but disagreed on the new rule's preemptive effect. The court upheld the substance of the January 2018 order, but it vacated the portion of the order that expressly preempted "any state or local requirements that are inconsistent with [its] deregulatory approach," as not grounded in adequate statutory authority.[264] If the agency reclassified broadband internet service as an information service outside the agency's regulatory jurisdiction, the court reasoned, then as a consequence it also did not have authority to preempt states laws in that same area.[265] By ruling the Trump Administration FCC's January 2018 order lacked express preemption effect, the court left an opening for states to impose their own net neutrality requirements. But the court's opinion also left open the possibility that implied preemption principles (namely, conflict preemption) could preempt state laws on a case-by-case basis.[266]

Since the DC Circuit upheld the FCC's 2018 decision to deregulate the internet service provider industry, many states passed some version of their own net neutrality rules either through executive order or legislation.[267] The most significant of these is California's Internet Consumer Protection and Net Neutrality Act of 2018, which essentially codified the rescinded federal net neutrality rules and was the subject of high-profile litigation.[268] After a group of industry trade associations representing internet service providers sued to enjoin the California law as preempted by federal law,[269] in 2022 the Ninth Circuit agreed with the DC Circuit's earlier ruling that the FCC's 2018 rule did not preempt state law because the FCC, by its own application of its enabling act, lacked the requisite regulatory authority to do so.[270] Preemption by nonregulation is—at least in these Circuits—a nonstarter. The associations subsequently dropped their suit again California's net neutrality law.[271]

---

[264] *Id.* at 74.

[265] *Id.*

[266] *Id.* at 74-76, 85.

[267] *See* Kathryn J. Kline, Nat'l Reg. Res. Inst. STATE RESPONSES TO NET NEUTRALITY (2018), *available at* https://pubs.naruc.org/pub/45ACE3A2-AAEA-417D-2416-B6862C9D4435; Lyons, *supra* note __ at 922-28.

[268] S.B. 822, 2017-2018 Reg. Sess. (Cal. 2018); *ACA Connects v. Bonta*, 24 F.4th 1233, 1236 (9th Cir. 2022) (citing Cal. Stats. 2018, ch. 976).

[269] *Id*. The Justice Department, led by then-Attorney General Jeff Sessions, also sued over the California law, *see United States v. California*, Compl. No. 2:18-at-01539 (E.D. Cal. Sept. 30, 2018), but in 2021 and after a switch in Administrations, withdrew from the case, *see* Barbara van Schewick, *ISPs Drop Legal Fight Against California Net Neutrality Law* (May 5, 2022), https://law.stanford.edu/2022/05/05/isps-drop-legal-fight-against-california-net-neutrality-law/.

[270] *ACA Connects*, 24 F.4th at 1248.

[271] *See* Joint Stipulation of Dismissal Without Prejudice, Doc. 110, Case No. 18-cv-02684JAM (E.D. Cal. May 5, 2022),
available at https://www.courtlistener.com/docket/7987167/110/american-cable-association-v-becerra/; *see also* David Shepardson, Internet providers end challenge to California net neutrality law, Reuters, May 5, 2022, https://www.reuters.com/technology/internet-providers-end-challenge-california-net-neutrality-law-2022-05-05/.

Once the internet service providers dropped their preemption suit against California's net neutrality law, the balance of regulatory authority shifted in favor of California and—by reason of California's oversized impact on this market—net neutrality across the country. What this suggests is that, for practical economic reasons including a desire for uniformity and predictability, corporations may opt to avoid a patchwork of state policies and follow one net neutrality approach.[272] In this instance, market pressures favoring the 800-pound gorilla (California) mean that one state's law serves—for now—as the cohesive national standard.[273]

Preemption and major questions issues linger, however. On the state side, abortion disputes present themselves once again, this time in the context of internet oversight. In 2023, Texas lawmakers introduced House Bill 2690, which would not only prevent the sale and distribution of abortion pills like mifepristone in Texas but would also restrict Internet access to *information* about medical abortion.[274] As of November 26, 2023, the bill is in committee and is not yet in effect,[275] but the fact that this bill is being proposed threatens the type of piecemeal approach to net neutrality that a federal agency would want to address, triggering yet another round of major questions and preemption disputes.

On the federal side, FCC Chairwoman Rosenworcel proposed the FCC begin the process to reclassify mobile broadband service as an essential telecommunications service to "reassert the FCC's role as the country's leading communications watchdog over national security and public safety on our broadband networks."[276] At its October 19, 2023 meeting, the FCC adopted a Notice of Proposed Rulemaking to reclassify broadband internet access service as a telecommunications service to allow the Commission to safeguard the open Internet.[277] Highlighting the potential conflict to come, FCC Commissioner Carr dissented from the proposed rulemaking on the basis that the rule was unnecessary and, moreover, likely to be "struck down by the Supreme Court

---

[272] *See* Shepardson, *supra* note __, https://www.reuters.com/technology/internet-providers-end-challenge-california-net-neutrality-law-2022-05-05/; *See* Lyons, *supra* note ___, at 947.

[273] This raises interesting Dormant Commerce Clause issues, outside the scope of this article. But there will doubtless be much ink spilt on this question following the Supreme Court's decision upholding California's pork product animal-welfare law in *Ross*, which rejected a per se rule against state laws with extraterritorial effects and splitting over application of a *Pike* balancing test for a law's economic burdens against its noneconomic benefits. *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356 (2023).

[274] 2023 TX H.B. 2690 (TX 88th Leg.); *see* https://www.eff.org/deeplinks/2023/03/texas-bill-would-systematically-silence-anyone-who-dares-talk-about-abortion-pills#:~:text=House%20Bill%20(HB)%202690%20seeks,being%20aware%20of%20their%20existence;
https://gizmodo.com/texas-abortion-websites-bill-internet-service-providers-1850178991.

[275] *See* https://capitol.texas.gov/BillLookup/Actions.aspx?LegSess=88R&Bill=HB2690.

[276] https://www.fcc.gov/news-events/notes/2023/09/27/october-2023-open-meeting-agenda; see also Statement https://docs.fcc.gov/public/attachments/DOC-397235A1.pdf .

[277] https://docs.fcc.gov/public/attachments/FCC-23-83A1.pdf. The comment period extends through January 17, 2024. Safeguarding and Securing the Open Internet, 88 FR 76048-01 (Nov. 3, 2023).

under the major questions doctrine."[278] He cautioned any federal net neutrality rule would be overturned by the courts, by Congress, or by a future FCC.[279]

With respect to Congress's role, it seems unlikely the legislative branch will offer solutions anytime soon. In July 2022 Senator Markey (D-MA) introduced S.B. 4676, the ''Net Neutrality and Broadband Justice Act of 2022," which would amend the Communications Act to classify broadband as a telecommunications service and expressly authorize the FCC to reinstate net neutrality protections.[280] But as of September 2023, this bill is stalled in committee.[281]

In sum, net neutrality is representative of the federal-state conflict and legislative-executive branch tension in the preemption and major questions doctrines. At first, in the absence of federal regulation, California's net neutrality law seemed to create its own stabilizing status quo. But Texas's restrictive internet bill (even if it never passes) reveals the uncertain promise of a single unifying state law. The FCC has now moved to reassert federal control over net neutrality issues. The agency's authority to do so is shaky at best, with at least one sitting Justice having already signaled he disfavors federal net neutrality regulations and would be receptive to a major question challenge to invalidate those regulations. Around and around we go, unless Congress passes a statute with language endowing the FCC with clear authority sufficient to survive the major questions challenge.

C. Example: Climate Change

Justice Kagan referred to the "bogeyman of environmental regulation" in her *West Viriginia* dissent, voicing a perspective that environmental regulations writ large are uniquely disfavored by the Roberts Court.[282] But it is not entirely clear what deregulation means in the climate change litigation context once one considers the cross pressures from preemption.

State law-based greenhouse gas litigation is born of a long tradition of environmental tort suits dating back hundreds of years, when before the advent of federal environmental regulation, litigants could apply the English common law doctrines of nuisance and trespass to protect against environmental harms.[283] Later, but still before the federal regulation age, states and local governments passed statutes and ordinances to protect their citizenry against environmental

---

[278] https://docs.fcc.gov/public/attachments/FCC-23-83A1.pdf at 142 (internal quotations omitted).

[279] *Id.* at 143. Commissioner Simington also dissented because, among other reasons, "an agency constantly changing its mind without any evidence of a problem is classic arbitrary and capricious behavior." https://docs.fcc.gov/public/attachments/FCC-23-83A5.pdf at 2.

[280] *See* S.B. 4676, 117th Cong. (2022) (revising the definition of "telecommunications service" in 47 U.S.C. § 153(53) to include broadband internet service).

[281] https://www.congress.gov/bill/117th-congress/senate-bill/4676/all-actions?s=1&r=1&overview=closed.

[282] *West Virginia*, 142 S. Ct. at 2630 (Kagan, J., dissenting).

[283] For an insightful summary of this history, *see* Jonathan H. Adler, *Displacement and Preemption of Climate Nuisance Claims*, 17 J.L. Econ. & Pol'y 217, 224-33 (2022).

harms.[284] Because of this history, in the environmental context, preemption by federal regulation often has the effect of streamlining the regulatory burden on the regulated industry.[285] One possible result of a shrinking federal presence could therefore be a shift in regulation rather than deregulation, with the regulatory center returning to state laws or common law suits imposing their own state-by-state compliance burden on the energy industry.[286]

Lower courts have been grappling with preemption issues in the climate change arena for years, with no resolution at the Supreme Court so far. The closest that Court came to addressing this preemption question was in 2011, when in *American Electric Power Co. v. Connecticut* [*AEP*][287] it ruled that the Clean Air Act displaced *federal* common law nuisance actions for curtailment of greenhouse gas emissions, but left open the question whether the statute preempted *state* nuisance laws.[288]

Since the Supreme Court's 2011 ruling in *AEP*, the prevailing understanding is that there *is* room for state nuisance, consumer protection, deceptive trade practices, and failure-to-warn lawsuits (among others) against oil and gas corporations, so long as those suits are regulating in-state conduct.[289] Relying on a Supreme Court case interpreting an analogous Clean Water Act provision, *International Paper Co. v. Ouellette*,[290] federal courts generally hold that the Clean Air

---

[284] *Id.*

[285] For example, the Clean Air Act generally prohibits, with limited exception, any state from adopting motor vehicle emission controls. *See* Adler, *Displacement and Preemption*, 17 J.L. Econ. & Pol'y 217 at 243.

[286] *See generally* David A. Dana and Michael Barsa, *The Major Questions Doctrine's Upside for Combatting Climate Change* (February 22, 2023), Northwestern Public Law Research Paper No. 23-08, *available at* http://dx.doi.org/10.2139/ssrn.4367619 (observing that the major questions may be a tool to buttress public nuisance-based climate litigation); Adler, *Displacement and Preemption*, 17 J.L. Econ. & Pol'y at 242 ("[P]reemption generally operates to reduce aggregate regulatory burden."); Hank Herren, *Climate Torts Belong in A Number of Hands: Loosening the Federal Grip of Preemption, Administrative Control, and Dilatory Procedure*, 8 Oil & Gas, Nat. Resources & Energy J. 171, 193 (2022) (observing that weakened *Chevron* deference inversely strengthens state climate tort suits).

[287] 564 U.S. 410 (2011).

[288] *Id.* at 429. None of the parties briefed preemption or the availability of a state law nuisance claim before the Court because the Second Circuit held that federal common law governed and did not reach the state law claim. *Id.*

[289] *Bell v. Cheswick Generating Station*, 734 F.3d 188, 196 (3d Cir. 2013) (on a motion to dismiss) (collecting cases from Third, Fourth, and Sixth Circuits); *see Little v. Louisville Gas & Elec. Co*., 805 F.3d 695 (6th Cir. 2015) (Clean Air Act does not preemption state common law nuisance claims over dust and coal ash emissions on property); *Merrick v. Diageo Americas Supply, Inc*., 805 F.3d 685 (6th Cir. 2015) (Clean Air Act does not preempt common law claims against whiskey operators for fungus growth in nearby homes); *In re Volkswagen*, 959 F.3d 1201 (9th Cir. 2020) (with respect to moto vehicles, distinguishing preemption of pre-sale versus post-sale vehicles); *see also Freeman v. Grain Processing Corp*., 848 N.W.2d 58 (Iowa 2014) (neither federal nor state statutes preempted common law suits respecting odors from corn mill facility).

[290] 479 U.S. 481 (1987).

Act would preempt cross-boundary state suits that would impose liability under the *affected* state law but would not preempt state suits that would impose liability under the *source* state laws. States affected by climate change, in other words, may not extend their own laws to regulate conduct taking place in other states.

These appellate court rulings allowing state claims to proceed on the merits largely track a body of case law in the removal context,[291] where courts have frequently rebuffed the efforts of oil and gas defendants to have the state-law-based climate change suits heard in federal court under federal question removal.[292] Courts apply different standards for ordinary preemption defenses and

[291] A thorough review of removal doctrine is outside the scope of this article. Generally speaking, in a typical removal scenario, a plaintiff sues a defendant in state court relying ostensibly on state law, such as a nuisance or failure-to-warn suit. The defendant, even before mounting a defense on the merits, may disagree that state court is the proper forum to hear the case and so remove the action to federal court under the general removal statutes. 28 U.S.C. §§ 1441, 1446. Federal question removal—removal based on federal courts' original jurisdiction over federal questions under 28 U.S.C. § 1331—is most relevant here. Referred to as "arising under" jurisdiction, a state claim may be removed to federal court "if 'a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law.'" *Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 689-90 (2006) (citation omitted).

The idea is that a plaintiff may not circumvent federal court jurisdiction by artfully (mis)characterizing a claim based on federal law as a state law claim. Referred to as "*Grable*" jurisdiction after the case of the same name, the Supreme Court has instructed that "federal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn v. Minton*, 568 U.S. 251, 258 (2013); *see also Grable*, 545 U.S. at 314 (identifying the same four factors in *Gunn*). In this *Grable* jurisdiction scenario involving a substantial federal issue, removal is thought to be appropriate because "vindication of a right under state law necessarily turn[s] on some construction of federal law," *Merrell Dow*, 478 U.S. at 808–09; *Gully v. First Nat'l Bank*, 299 U.S. 109, 112 (1936), and "there is a 'serious federal interest in claiming the advantages thought to be inherent in a federal forum.'" *Gunn*, 568 U.S. at 258. As relevant here, the removal question is whether state claims such as nuisance, consumer protection, etc., necessarily raise federal common or statutory law.

[292] Currently, a majority of removal cases to reach the appellate courts (including the First, Second, Third, Fourth, Ninth, and Tenth) have concluded that—assuming there is such a state claim—state court is the appropriate venue because the state claims could be adjudicated without reaching any issue of federal law. *See, e.g., Delaware ex rel. Jennings v. BP Am. Inc*., No. CV 20-1429-LPS, 2022 WL 605822, at *1-2 (D. Del. Feb. 8, 2022) (collecting appellate cases); *City of Hoboken v. Chevron Corp*., 45 F.4th 699, 707-09 (3d Cir. 2022), cert. denied sub nom. *Chevron Corp. v. City of Hoboken*, 143 S. Ct. 483 (2023) (remanding to state court the City of Hoboken and the Attorney General of Delaware's state-based suits including for nuisance, trespass, negligence, negligent failure to warn, and fraud); *Bell v. Cheswick Generating Station*, 734 F.3d 188, 196 (3d Cir. 2013) (on a motion to dismiss) (collecting cases); *Connecticut ex rel Tong v. Exxon Mobile Corp.*, Case No. 21-1446 (2d Cir.) (remanding Connecticut's consumer protection suit); *Rhode*

removals, but despite their different procedural postures these cases present the same fundamental questions: whether to characterize greenhouse gas suits as state or federal in nature and, by extension, whether regulatory authority is properly housed in federal or state law.

In 2021, however, the Second Circuit took a more restrictive view of an ostensibly state-law based suit. Affirming a district court's grant of a motion to dismiss, the Second Circuit ruled in *City of New York v. Chevron Corp.* that "[g]lobal warming presents a uniquely international problem of national concern" that is "not well-suited to the application of state law."[293] On the merits, the court rejected the City's framing of its complaint for damages under nuisance and trespass laws as limited to the production and sale of fossil fuels *within* New York, and instead characterized the suit as attempting to regulate *worldwide* greenhouse gas emissions.[294] On this basis, it held that New York City's claims against oil companies must be brought under federal common law.[295] And the Clean Air Act, in turn, displaced the federal common law claim with respect to greenhouse gas emissions under *AEP*'s controlling precedent.[296] The court affirmed the district court's dismissal of New York City's complaint.[297] Under the Second Circuit's theory, if the Clean Air Act doesn't preempt state common law directly, then defendants can achieve the same result by arguing first that federal common law trumps state common law, and second that the Clean Air Act has displaced that federal common law, leaving no avenue for relief. Still available under the Second Circuit's ruling is the limited *Ouellette* exception for lawsuits based on laws of the source state, but given how broadly the Second Circuit characterized these types of claims to reach greenhouse gas emission generally, it is unclear how much daylight there is between the cases the court would allow and those it would dismiss.[298]

So where does that leave greenhouse gas preemption litigation? A case out of the State of Hawai'i exemplifies the current landscape. In *City & County of Honolulu v. Sunoco LP*, the City and County of Honolulu and the Honolulu Board of Water Supply sued national energy companies under state nuisance, trespass, and failure-to-warn theories for harm caused by the effects of climate change.[299] As characterized by the Court, plaintiffs' suit alleged that defendants misled the public about the environmental impact from fossil fuels and engaged in a disinformation campaign that caused property and infrastructure damage in Hawai'i.[300]

Island v. Shell Oil Prod. Co., 35 F.4th 44 (1st Cir. 2022); *Mayor & City Council of Baltimore v. BP P.L.C.*, 31 F.4th 178 (4th Cir. 2022).

[293] *City of New York v. Chevron Corp*., 993 F.3d 81, 85-86 (2d Cir. 2021).

[294] *Id.* at 91.

[295] *Id.* at 94.

[296] *Id.* at 95 (citing *AEP*). The court also looked to the Ninth Circuit's ruling in *Kivalina*, in which that court followed *AEP* to conclude that the CAA displaced suits for damages for past emissions in addition to future abatement of transboundary emissions. *Id.* at 96 (citing *Native Vill. of Kivalina v. ExxonMobil Corp*., 696 F.3d 849 (9th Cir. 2012)).

[297] *City of New York*, 993 F.3d at 100, 103.

[298] *See generally* Jonathan H. Adler, Displacement and Preemption of Climate Nuisance Claims, 17 J.L. Econ. & Pol'y 217, 251 (2022), for a critique of the *City of New York* opinion.

[299] *City & County of Honolulu v. Sunoco LP*, Slip Op. 22-0000429 (Oct. 31, 2023), *available at* https://www.courts.state.hi.us/wp-content/uploads/2023/10/SCAP-22-0000429.pdf.

[300] Slip op. at 2-3.

Defendants moved to dismiss the complaint on the basis that, among other reasons, the nominally state-law tort claims were necessarily federal claims.[301] On appeal following denial of their motion to dismiss, defendants relied on the Second Circuit's *City of New York v. Chevron Corp.* opinion.[302] These types of claims are necessarily based on the transboundary emission of greenhouse gases, they argued, and require a federal rule of decision.[303] Even if plaintiffs' claims could be brought under state law, defendants continued, they would be preempted by the Clean Air Act "because they seek state-law remedies for alleged injuries from out-of-state sources of greenhouse gas emissions."[304] Because plaintiffs sought to apply Hawai'i state law to out-of-state conduct, the theory went, the claims are preempted.

Plaintiffs supported the merits of their claims on several grounds. First, they relied on cases ruling against federal court *removal* to argue that federal law does not exclusively govern this field.[305] Looking solely at the federal common law of interstate pollution, that body of law does not apply to plaintiffs' case because plaintiffs' claims are squarely questions of state law, such as failure to warn claims aimed at a core state interest to ensure the accuracy of commercial information in the marketplace.[306] Second, plaintiffs explained, the federal common law of interstate pollution no longer exists and has been displaced by the CAA.[307] Plaintiffs urged the Hawai'i Supreme Court to reject the Second Circuit's approach in *City of New York v. Chevron Corp.*, which held state law precluded by federal common law and then federal common law displaced by the CAA, resulting in no avenue for relief. Turning to preemption, plaintiffs' argument boiled down to a rejection of Defendants' framing of their case as regulating interstate pollution.[308]

The Supreme Court of Hawai'i agreed with plaintiffs' framing of their case and held that their suit was not preempted. Distinguishing plaintiffs' case from *City of New York*, the Court reasoned that plaintiffs did not seek to regulate emissions and did not seek damages for interstate emissions.[309] The Court concluded first that federal common law of nuisance governing transboundary air pollution suits had been displaced by the Clear Air Act, and therefore federal common law could not preempt state common law.[310] Even if federal common law somehow still had some preemptive effect, it would not here, because defendants' liability under plaintiffs' complaint was

[301] Appellants' Opening Brief, at 1 (on file with author)
[302] *Id*. at 2.
[303] *Id*. at 23.
[304] *Id*. at 2.
[305] Appellees' Answering Brief, at 15-16 (on file with author)
[306] *Id*. at 17.
[307] *Id.* at 16-17.
[308] The State of California has just filed a similar complaint against energy companies, asserting they deceived the public on climate impacts from fossil fuels and seeking funds for climate change-related storm damage. *See* Compl., *available at* https://www.gov.ca.gov/wp-content/uploads/2023/09/FINAL-9-15-COMPLAINT.pdf.
[309] The Court also agreed with Plaintiffs that the Hawai'i courts properly exercised personal jurisdiction over Defendants. *See Sunoco LP*, Slip Op. at 23-44.
[310] Slip Op. at 45.

tied to their failure to warn and deceptive promotion, not their emission of greenhouse gases.[311] Nor did the Clean Air Act preempt the state law claims under either an express or implied (field or conflict) preemption theory, for similar reasons.[312] The Clean Air Act does not expressly preempt state law, but instead has a savings clause preserving state common law.[313] And not only does the statute not entirely occupy the field of emissions regulation, but because plaintiffs' claims did not themselves aim to regulate emissions, plaintiffs' suit was not in conflict with the statute.[314] The federal statute "does not bar [d]efendants from warning consumers about the dangers of using their fossil fuel products," and defendant could simultaneously adhere to the Clean Air Act and abide by Hawai'i's laws prohibiting deceptive conduct.[315] Whether other courts follow the Supreme Court of Hawai'i's example remains to be seen, but this suit represents the suite of arguments to be pressed by the parties.

Interestingly, neither side made a major questions doctrine Step Zero argument to undermine the EPA's authority to regulate greenhouse gas emissions in the first instance. Why might this be? To be sure, *Massachusetts v. EPA* declared greenhouse gas emissions generally within the EPA's purview, but the current U.S. Supreme Court is not reluctant to overrule its own precedent (*see Dobbs*).[316]

The reason likely comes down to entrenched litigation positions. Industry defendants here rely primarily on a federal common law argument to avoid state liability, but they also have kept a preemption argument in their back pocket. For purposes of this lawsuit, they have no interest in challenging EPA's general authority to regulate greenhouse gases. Doing so would only open the industry to an explosion of state lawsuits on that front. The U.S. Supreme Court has yet to weigh in on whether these types of suits really are state-law based (and not preempted), as the Hawai'i Supreme Court concluded, or fundamentally federal in nature (and preempted), as the Second Circuit ruled. Also still to be decided is the status of federal common law, and its corresponding preemptive effect, if the EPA's authority to regulate greenhouse gas emissions were overturned by a major questions challenge.[317]

There is simply too much uncertainty in a major questions challenge for that approach to make sense for industry litigants at this point. And for their part, state government plaintiffs presumably would prefer to win on the basis that their claims are fundamentally state law in character rather

---

[311] *Id.* at 60.

[312] *Id.* at 67-79.

[313] *Id.*

[314] *Id.*

[315] Slip Op. at 78.

[316] Three Justices on the current court, the Chief Justice and Justices Thomas and Alito, dissented from the majority's ruling in *Massachusetts* on the basis that the case was a nonjusticiable political issue. *Massachusetts v. E.P.A.*, 549 U.S. 497, 535 (2007).

[317] *See City of Milwaukee v. Illinois & Michigan* [*Milwaukee II*], 451 U.S. 304, 313 (1981) (holding the Federal Water Pollution Act displaced federal common law). "When Congress has not spoken to a particular issue . . . and when there exists a 'significant conflict between some federal policy or interest and the use of state law,' the Court has found it necessary . . . to develop federal common law." *Id.*

than attacking federal law outright, for many reasons including optics in a political atmosphere where their constituency supports climate change regulation.

This is not to say, however, that *West Virginia* is the last we'll hear of major questions challenges in the climate change arena; quite the contrary. For one, litigants will continue to directly challenge in federal court supposed novel extensions of law by federal environmental agencies over matters that states have not traditionally regulated. In these scenarios, the new federal rule would be a true expansion of the regulatory state without necessarily triggering a downstream preemption issue. One such example of this is the 2023 D.C. Court of Appeals case, *Texas v. EPA*, in which a group of states challenged EPA's revised greenhouse gas emissions standards for light-duty vehicles respecting the industry shift toward electric vehicles.[318]

For climate change litigants and scholars alert to major questions challenges that do potentially implicate downstream preemption disputes, the likely scenario will come from the Biden Administration's "whole-of-government effort" to involve "every sector of the economy" to reduce greenhouse gas emissions, accelerate clean energy production, and create new jobs.[319] The breadth of this executive effort means that there will be a new offering of agency actions, even by agencies not traditionally involved in the environmental arena.

One recent illustrative action by the Securities and Exchange Commission (SEC) would require US publicly traded companies to disclose how their businesses are assessing, measuring, and managing climate-related risks, including disclosure of greenhouse gas emissions.[320] The proposed rule has two broad goals: (1) require companies not already self-reporting their greenhouse gas emission to do so, and (2) standardize how reporting is conducted to allow for greater transparency to the public.[321] Such a federal rule is a natural target for a major questions doctrine challenge. At a minimum, this type of rule is arguably a novel expansion of the SEC's traditional role: "protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation."[322] Indeed, some in Congress have already referenced *West Virginia* in their concerns about the legal authority for the SEC's "radical regulatory agenda."[323]

A natural target though the SEC's action may be, a recent law from the State of California on the same topic complicates a major questions challenge. The Climate Corporate Data Accountability Act approved by the Governor in October 2023 requires the State Air Resources Board to adopt regulations by January 1, 2025 requiring specified business entities with total annual revenues in

---

[318] https://eelp.law.harvard.edu/2023/08/texas-v-epa-quick-take/. Oral argument was in September 2023.

[319] https://www.whitehouse.gov/climate/.

[320] *See* https://www.federalregister.gov/documents/2022/04/11/2022-06342/the-enhancement-and-standardization-of-climate-related-disclosures-for-investors.

[321] https://www.sec.gov/files/33-11042-fact-sheet.pdf

[322] https://www.sec.gov/about/mission.

[323] *See* Soyoung Ho, Thomson Reuters, *SEC Delays Climate Change Disclosure Rulemaking*, https://tax.thomsonreuters.com/news/sec-delays-climate-change-disclosure-rulemaking/ (last visited Nov. 19, 2023); *see also* Climate Change Disclosure, View Rule, https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202304&RIN=3235-AM87.

excess of $1,000,000,000 and that do business in California to publicly disclose their greenhouse gas emissions.[324]

Should the SEC finalize its own greenhouse gas reporting requirements, California's own requirements may be subject to a preemption challenge. So, like the slew of greenhouse gas tort suits coming before and continuing to wind their way through the courts, it appears a new wave of lawsuits concerning greenhouse gas disclosure requirements courts will present a similar major questions-preemption conundrum for industry litigants. In this way, climate change litigation serves as a stress-test for the major questions doctrine and reveals its end-result orientation. When there is no obvious motivation for a major questions challenge to agency authority because the downstream impact on preemption disputes could open up the industry to an explosion of state law regulation, entrenched litigation positions favor avoidance.

CONCLUSION

In the Supreme Court's October 2023 term, petitioners in *Loper Bright Enterprises v. Raimondo* ask the Court to officially overrule the *Chevron* doctrine of judicial deference to administrative statutory interpretations.[325] The Court's decision to take on this *Chevron* question, so soon after *West Virginia*, is emblematic of the Court's aggressive push to redefine the structure and function of the federal government. Within this judicially envisioned (re)structure, through the major questions doctrine the Court has anointed itself arbiter of the relative power exercised by the Executive and Legislative branches and adopted a malleable list of criteria through which to do so on a case-by-case basis. But this is not simply an inter-branch dispute in Washington, DC.

These abortion, net neutrality, and climate change examples hint at the seismic shift the major questions doctrine heralds for preemption litigation and, by extension, state authority. Abortion disputes reveal the chaos spurred by the collision of these two doctrines, as the rifts between the various states grow wider in the absence of federal law. Net neutrality represents how, without congressional action, market pressures may force one state's laws to national prominence. Climate change exposes the unstable and unpredictable boundaries of the new doctrine, when entrenched

---

[324] SB 253, https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240SB253&utm_source=longmontleader&utm_campaign=longmontleader%3A%20outbound&utm_medium=referral; *see* Cal. Health and Safety Code § 38532.

[325] *See Brief for Petitioners* at i, Loper Bright Enter. v. Raimondo, No. 22-451 (U.S. 2023), https://www.supremecourt.gov/DocketPDF/22/22-451/272199/20230717152715108_2023-07-17%20Loper%20Bright%20Opening%20Brief%20FINAL.pdf. The question presented in *Loper Bright* does not squarely raise the major questions doctrine, but some amici have correctly noted its implication. As one *amicus* brief urging the Court to preserve *Chevron* notes, overruling *Chevron* is unnecessary if the major question doctrine already precludes *Chevron* deference in scenarios where an agency "seeks to regulate certain major policy questions without clear congressional authorization." Amicus brief by Kent Barnett and Christopher Walker Brief at 4. https://www.supremecourt.gov/DocketPDF/22/22-451/272644/20230724120452117_Barnett%20Walker%20Amicus%20Brief%20Loper%20Bright%20as%20filed%207.24.2023.pdf.

litigation positions drive its case-specific application. All three show the major questions analysis turns on how a court frames the question before it.

In the end, it may not really matter whether the Court officially overrules *Chevron* deference to agencies; on decisions of court-perceived significance, the major questions doctrine is already here to do that work. The real question now is whether and how state laws may move in to fill this regulatory void.