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## THE ANTI-INNOVATION SUPREME COURT: MAJOR QUESTIONS, DELEGATION, *CHEVRON*, AND MORE

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### ABSTRACT

*The Supreme Court of the United States has generally been a very aggressive enforcer of legal limitations on governmental power. In various periods in its history, the Court has gone far beyond enforcing clearly expressed and easily ascertainable constitutional and statutory provisions and has suppressed innovation by the other branches that do not necessarily transgress widely held social norms. Novel assertions of legislative power, novel interpretations of federal statutes, statutes that are in tension with well-established common law rules, and state laws adopted by only a few states are suspect simply because they are novel or rub up against tradition. In periods*

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*of governmental innovation and assertions of expanded authority, this aggression becomes evident and perhaps more robust.*

*In recent years, the Court has created new barriers to government innovation even as government is confronted with serious threats to the health and welfare of mankind. Chief among this new set of limitations on the power of federal administrative agencies is an interpretive device that has become known as the Major Questions Doctrine (MQD). This doctrine purports to be based on a traditional view of legislative intent and judicial role, but in reality it resonates more with conservative anti-regulatory political views. Under this new doctrine, the Court rejects agency assertions of regulatory authority when it finds that the agency's action would have major social and economic effects and lacks crystal clear congressional authorization. Ironically, because the MQD has no basis in the Administrative Procedure Act or prior law, the Court has in effect created a major new doctrine of administrative law severely limiting agency authority without clear authorization from Congress.*

*The Court has also suppressed agency innovation by confining Chevron deference to unimportant issues of statutory construction. Chevron, for all of its faults, has the virtue of validating agency policy innovation so long as Congress had not clearly denied agency authority. This reform to Chevron, together with the creation and application of the Major Questions Doctrine, in effect accomplishes the aim of some Justices to impose a more robust nondelegation doctrine, making agency innovation even more difficult. In addition, the Court has worked to prevent innovation in other areas of law, such as agency structure, gun control, and the spending power, preventing the state and federal governments from taking action to deal with pressing social problems. The current Court has truly become an anti-innovation Court.*

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## INTRODUCTION

It should not be surprising that when federal courts enforce statutory and constitutional provisions, they suppress innovation by the other branches of the federal government and the states. In constitutional law and administrative law, that is the point of judicial review and the rule of law. The role of the courts is to preserve the legitimacy of the state—including the administrative state—by preventing the other branches—and in a federal system, subordinate governmental entities—from transgressing constitutional and statutory limitations on their power and violating rights enshrined in law.<sup>1</sup> It is intuitively sensible that when a governmental entity does something it has never done before—in other words, when the government innovates—the government’s action is more likely to be challenged and more likely to be rejected in court than when the government continues a longstanding practice. The interesting questions concern how courts should determine the meaning of constitutional and statutory norms and how aggressively they should enforce them. How much power should relatively unaccountable courts assert to restrain the other branches?

The Supreme Court of the United States has generally been a very aggressive creator and enforcer of legal limitations on governmental power. In various periods in its history, the Court has gone far beyond enforcing clearly expressed and easily ascertainable constitutional and statutory provisions and has suppressed innovative actions by the other branches that do not necessarily transgress clear law or widely held social norms. Novel assertions of legislative power, novel interpretations of federal statutes, statutes that are in tension with well-established common law rules, and state laws adopted by only a few states are characterized as suspect simply because they are novel or rub up against tradition.<sup>2</sup> In periods of

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1. See Mila Sohoni, *The Administrative Constitution in Exile*, 57 WM. & MARY L. REV. 923, 940-42 (2016).

2. It is important to note that this is not inevitably an attack on conservative legal doctrines. Some doctrines favored by liberals have built-in innovation suppressing elements that move the law in a liberal direction. For example, the Court’s standard for determining whether a criminal punishment violates the Eighth Amendment incorporates “evolving standards of decency” and the consensus among the states as to the consistency of a particular

social unrest and resulting governmental innovation and assertions of altered or expanded authority, judicial aggression becomes evident and perhaps more robust.

The clearest historical examples of judicial suppression of innovation in periods of social unrest in the United States involve civil rights and workers' rights.<sup>3</sup> In the aftermath of the Civil War, the Court actively prevented Congress, and in some instances the states, from creating and enforcing civil rights.<sup>4</sup> And in the late nineteenth and early twentieth centuries, the Court suppressed innovation in labor protections and market regulation more generally, although perhaps not as completely as some accounts might suggest.<sup>5</sup> Currently, it seems that the Court has become hyperaggressive once again, discerning and creating new limitations on governmental power and creatively building anti-innovation norms into the law, frustrating the efforts of federal and state

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punishment with those standards. See *Moore v. Texas*, 581 U.S. 1, 12 (2017). Application of these standards would force outlier states to move toward the mean and potentially invalidate a state's determination to employ a punishment that has been rejected by most other states due to a concern over cruelty. See *id.* at 27-28.

3. Of course, the common law has always been somewhat anti-innovation with, for example, its system of precedent designed to make legal change more difficult and the canon requiring that statutes in derogation of common law be strictly construed. But determined judges have also always been able to facilitate innovation or innovate themselves by, for example, subtly changing the meaning or application of common law doctrines, overruling prior cases, and applying counter canons of construction, such as the canon in favor of broadly construing remedial statutes, which applies to statutes in derogation of common law that are supposed to be strictly construed. For further information on the canons, see Karl Llewellyn's classic *Remarks on the Theory of Appellate Decision and the Rules or Canons of About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401-05 (1950).

4. See Jack M. Beermann, *The Unhappy History of Civil Rights Legislation: Fifty Years Later*, 34 CONN. L. REV. 981, 987-90 (2002); Jack M. Beermann, *The Supreme Common Law Court of the United States*, 18 B.U. PUB. INT. L.J. 119, 131-35 (2008). See generally JACK M. BEERMANN, *THE JOURNEY TO SEPARATE BUT EQUAL: MADAME DECUIR'S QUEST FOR RACIAL JUSTICE IN THE RECONSTRUCTION ERA* (2021).

5. See Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383, 1393-95 (2001); Stephen A. Siegel, *Understanding the Lochner Era: Lessons from the Controversy over Railroad and Utility Rate Regulation*, 70 VA. L. REV. 187, 213 (1984). The Court upheld the vast majority of statutes it reviewed during the *Lochner* era, which casts some doubt on whether it is fair to characterize it as a hyperaggressive period in the Court's history; see Keith E. Whittington, *Congress Before the Lochner Court*, 85 B.U. L. REV. 821, 830-32 (2005) and Charles Warren, *The Progressiveness of the United States Supreme Court*, 13 COLUM. L. REV. 294, 294-95 (1913), both cited in David M. Driesen, *Regulatory Reform: The New Lochnerism?*, 36 ENV'T L. REV. 603, 612 n.54 (2006).

governmental entities to address important social problems, especially newly recognized problems where creative solutions might be called for. The current period of hyperaggression seems to be directed against assertions of regulatory authority related to health and safety, including areas such as pollution control, public health, and less obviously related areas such as gun control.<sup>6</sup>

In 2008, I characterized the Court as “the Supreme Common Law Court of the United States,” pointing out that the Court constitutionalizes areas of state and federal law and seizes control over them as if part of its mission were to oversee the entire American legal system.<sup>7</sup> Although the Court has behaved this way throughout its history, because the current Court’s actions are highly politically salient and are the product of a new, very conservative supermajority, others have begun to notice this aspect of the Court’s actions.<sup>8</sup> Because of the political salience of the issues in several recent Court decisions, it appears to be taking sides in partisan conflicts. When the Court intervenes on issues of political salience, the Court’s decisions, in effect if not by intention, advance the views of one of the major political parties and reject the views of the other. With a supermajority of Republican appointees, the current Court’s actions coincide with important elements of Republican Party political positions.<sup>9</sup> While this may be an appropriate cause for

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6. The American Public Health Association and the American Medical Association, among others, identify gun violence as a public health issue. See *Gun Violence*, AM. PUB. HEALTH ASS’N, <https://www.apha.org/topics-and-issues/gun-violence> [<https://perma.cc/8LGX-2E4V>]; *AMA Adopts New Policies on Firearm Violence*, AM. MED. ASS’N (June 14, 2023), <https://www.ama-assn.org/press-center/press-releases/ama-adopts-new-policies-firearm-violence-0> [<https://perma.cc/JQN2-HQME>].

7. See Beermann, *The Supreme Common Law Court of the United States*, *supra* note 4, at 119-20.

8. See Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 97 (2022). The first sentence of Professor Lemley’s article says it all: “The past few years have marked the emergence of the imperial Supreme Court.” *Id.* I agree with everything except the word “years.” I would substitute “centuries.” Whether due to the social importance of some of the Court’s recent decisions or the emergence of the highly partisan twenty-four hour news cycle, the Court’s decisions seem to attract more criticism than ever before, although the moves to impeach Supreme Court Justices in the Court’s early decades and the Impeach Earl Warren movement of the 1950s reaffirmed that this reaction to the Court’s behavior is nothing new. See PETER IRONS, *A PEOPLE’S HISTORY OF THE SUPREME COURT* 108-10 (1999); Brett Bethune, *Influence Without Impeachment: How the Impeach Earl Warren Movement Began, Faltered, But Avoided Irrelevance*, 47 J. SUP. CT. HIST. 142, 154 (2022).

9. I do not mean to suggest that decisions by liberal Supreme Court majorities have not

concern for those focused on the legitimacy of the Court's actions and the judicial role more generally, it is important to recognize that there is nothing new or exceptional about the Supreme Court taking sides along or in parallel with partisan political lines.<sup>10</sup> Regardless of whether the Framers of the Constitution expected it to be so, the appointment of Supreme Court Justices has long been political, and Presidents and their supporters hope and expect their party's Justices to make legal decisions that coincide with the party's political program.<sup>11</sup> Often they do, and when they do not, the appointment is often considered a mistake and the President's party feels disappointed and even betrayed.<sup>12</sup>

What unites every period of heightened judicial aggression is the deployment of apparently neutral legal principles to create new legal doctrines in the pursuit of political ends.<sup>13</sup> In the nineteenth century, the state action doctrine, allegedly required by the language of the Fourteenth Amendment, served to legitimate the Court's rejection of major aspects of Congress's attempt to legislate racial justice in the wake of the Civil War.<sup>14</sup> Later, liberty of contract, allegedly enshrined in the Due Process Clauses of the Fifth and Fourteenth Amendments, served the same purpose with regard to state and federal efforts to protect and empower workers and regulate markets during the burgeoning labor movement of the late nineteenth and early twentieth centuries.<sup>15</sup> Today, the Court's

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often coincided with the political positions of the Democratic Party.

10. See Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. 301, 331 (2017).

11. See *id.*

12. Examples include Republicans Earl Warren, David Souter, and Anthony Kennedy, who all disappointed their Republican supporters, the former by leading the most liberal Supreme Court in the nation's history and the latter two by failing to live up to expectations that they would be reliable conservative voices on the Court, especially on abortion rights and related issues such as same sex marriage. See generally Christopher E. Smith & Kimberly A. Beuger, *Clouds in the Crystal Ball: Presidential Expectations and the Unpredictable Behavior of Supreme Court Appointees*, 27 AKRON L. REV. 115 (1993).

13. Of course, this view depends on an understanding of law as not constraining judicial behavior; those who believe that judges and Justices are actually constrained by law in the controversial cases that come before them are unlikely to be convinced that aggressive judicial supervision of the other branches is problematic. Rather, it would be viewed as a triumph for the rule of law.

14. See *Civil Rights Cases*, 109 U.S. 3, 10-11, 13-15 (1883); *United States v. Harris*, 106 U.S. 629, 637-40 (1883).

15. See, e.g., *Lochner v. New York*, 198 U.S. 45, 53-57 (1905); *Allgeyer v. Louisiana*, 165

predominant anti-regulatory tool in administrative law is what has become known as the Major Questions Doctrine (MQD), under which the Court rejects agency assertions of regulatory authority when it finds that the agency's action would have major social and economic effects and lacks crystal clear congressional authorization.<sup>16</sup> While the doctrine is drawn from an interpretive methodology that resonates with important constitutional values, it is a new judicial creation designed to suppress regulatory innovation. Ironically, then, because the MQD has no basis in the Administrative Procedure Act (APA) or prior law under it,<sup>17</sup> the Court has in effect created a major new doctrine of administrative law severely limiting agency authority without clear authorization from Congress. Innovation is good, apparently, only when done by the federal judiciary. In operation, the MQD has hindered agencies in their efforts to act against two of the twenty-first century's most pressing threats to public health and welfare, climate change and the COVID-19 pandemic.<sup>18</sup>

In conjunction with the development and application of the MQD, the Court has suppressed agency innovation by confining the *Chevron* doctrine to unimportant issues of statutory construction. *Chevron*, for all of its faults, had the virtue of validating agency policy innovation. The Court's application of the major questions and related doctrines serves to confine agency discretion to innovate on important matters of public policy even more severely than under pre-*Chevron* law.<sup>19</sup>

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U.S. 578, 593 (1897).

16. See Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 263-64 (2022).

17. Although Justice Gorsuch claims otherwise, the MQD is not required by the constitutional doctrine of separation of powers. See David M. Driesen, *Does the Separation of Powers Justify the Major Questions Doctrine?*, 2024 U. ILL. L. REV. (forthcoming), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4200508](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4200508) [<https://perma.cc/JF8P-7HC9>]; see also Daniel E. Walters, *The Major Questions Doctrine at the Boundaries of Interpretive Law*, 109 IOWA L. REV. 465, 522 (2024) (characterizing the MQD as "combin[ing] theoretically unbounded applicability with extremely weak or nonexistent connections to authoritative constitutional law").

18. See Driesen, *supra* note 17, at 19.

19. See Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 788, 795 (2010) (discussing the failings of the *Chevron* doctrine, including its apparent inconsistency with the Administrative Procedure Act, diminution of judicial authority, and tension with separation of powers, among other issues).



Relatedly, this Article also explores the connections between the MQD and some Justices' recent expressions of concern over the nondelegation doctrine, which purports to limit Congress's power to delegate policymaking authority to the Executive Branch. A more robust nondelegation doctrine as envisioned by some members of the Court would make agency innovation more difficult in two ways. First, congressional grants of power to agencies would have to be narrow and clear (or would be read narrowly by reviewing courts) to satisfy the more muscular nondelegation doctrine.<sup>20</sup> Second, because Congress is less likely to agree on specifics than to agree to grant discretion over implementation to an agency, delegations that might once have been politically acceptable will simply not be made.<sup>21</sup> The application of the MQD thus appears to be part of an effort to tighten up on congressional delegation of authority to agencies.

This Article's primary focus is about the ways in which the Supreme Court has, in very short order, transformed administrative law from a field which validated and even encouraged agency innovation into one in which innovation and expansion of regulatory authority are inherently suspect and subject to statutory justifications never before required in the post-New Deal, APA era.<sup>22</sup> This Article also briefly discusses how the Court's separation of powers decisions concerning agency structure may affect the government's ability to innovate. However, in order to place this in a more general context, this Article goes beyond administrative law to show that the Court has created additional anti-innovation tools in other doctrinal areas. Many of the Court's neutral-sounding doctrines across numerous substantive areas are designed to steer the law away from progressive reform and innovative responses to serious social problems.<sup>23</sup> The idea is thus both to explain and analyze the transformation of administrative law that has occurred and to

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20. See Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 335 (2000).

21. See *id.* at 325-26.

22. See generally ADRIAN VERMEULE, *LAW'S ABNEGATION: FROM LAW'S EMPIRE TO THE ADMINISTRATIVE STATE* (2016) (describing administrative law's transformation, which has seen courts become highly deferential to the administrative state).

23. See Gillian E. Metzger, *Appointments, Innovation, and the Judicial-Political Divide*, 64 DUKE L.J. 1607, 1609-10 (2015).

understand how this transformation fits within the Court's project of enshrining its conservative values into law.

"Innovation" as used in this Article includes actions by government entities including legislatures, agencies, and, in some instances, even courts that employ new approaches to deal with social problems.<sup>24</sup> This might involve a novel understanding of an agency's statutory authority, a novel regulatory or technological approach to an issue, or even a determination that deregulation is the best approach to dealing with the social problem involved.<sup>25</sup> I also assume that innovation is a good faith attempt by government to advance social welfare, however that is measured or understood. Even though the government often acts at the behest of powerful special interests, sometimes to the detriment of social welfare, without evidence that innovative government action is generally harmful to social welfare or that the Supreme Court is better at advancing social welfare than the branches of government entrusted with crafting and executing governmental policy, my critique must proceed on the assumption that the Court's suppression of innovation is likely to frustrate attempts to advance social welfare.

If constitutional and statutory limitations were clear and easily ascertainable, and represented a strong social consensus, the Court's actions might be considered heroic, enforcing the law against deviant political forces attempting to employ governmental power in ways contrary to law and tradition.<sup>26</sup> In fact, that is exactly how the Court is viewed by those who support its efforts to rein in regulation.<sup>27</sup> They believe the Court is restoring what has been lost since the New Deal and related social movements revolutionized the role of government regulation.<sup>28</sup> Those who take the contrary view consider the Court's interventions as illegitimate meddling in the political process without a firm basis in preexisting legal norms or

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24. *See id.* at 1610.

25. *See* Jack M. Beermann, *Congressional Administration*, 43 *SAN DIEGO L. REV.* 61, 62-63 (2006).

26. There are credible arguments to the contrary; there might be good reasons sounding in democracy and accountability for courts to refrain from enforcing even easily ascertainable constitutional and statutory limitations on governmental powers. But at a minimum, enforcement seems most appropriate when legal requirements are clear. *See* Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *YALE L.J.* 1346, 1353, 1376, 1406 (2006).

27. *See* Metzger, *supra* note 23, at 1610.

28. *See id.*

social welfare.<sup>29</sup> In my view, lurking behind all of the talk of judicial philosophy and judicial roles is a focus on the merits of judicial decisions, rooted more in consequentialist concerns than doctrinal or constitutional ones. Judicial activism is applauded or condemned based on the critic's views of the merits of the Court's decisions rather than on an overriding set of principles regarding the proper judicial role.

Legal scholars are sometimes criticized for straying too far from methodological legal analysis into substantive discussions. In my view, such criticism is justified only when the scholar disguises substantive views as methodological critique.<sup>30</sup> In this Article, I engage in both, and I hope that it is clear when my analysis is driven by substantive concerns, which is admittedly most of the time. In reality, this entire project is driven by a single substantive concern that, when the Court uses its power to suppress innovative government actions, it tends to exacerbate serious social problems in favor of those whose narrow interests are advanced by preserving the status quo. In my view, the common law and other traditions of 1789, and even more recent understandings of statutes enacted in the 1960s and 1970s—when our understanding of the scope of environmental and other problems was undeveloped as compared to today—are not sufficient to deal with problems like pandemics, climate change, and gun violence. And insofar as apparently neutral legal principles support the Court's decisions, those principles ought not be followed, given that there are always competing legal principles that would affirm the government's innovative actions.

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29. *See id.* at 1610-11.

30. There are reasons to doubt that the distinction between methodological analysis and substantive critique can ever actually be maintained. As Friedrich Nietzsche proclaimed, [P]hilosophers ... all pose as though their real opinions had been discovered and attained through the self-evolving of a cold, pure, divinely indifferent dialectic (in contrast to all sorts of mystics, who, fairer and foolisher, talk of "inspiration"), whereas, in fact, a prejudiced proposition, idea, or "suggestion," which is generally their heart's desire abstracted and refined, is defended by them with arguments sought out after the event.

FRIEDRICH NIETZSCHE, *BEYOND GOOD AND EVIL* ch. 1, para. 5 (Helen Zimmern trans. 1906) (1886). This is similar to John Dewey's view of legal opinions: "It is quite conceivable that if no one had ever had to account to others for his decisions, logical operations would never have developed, but men would use exclusively methods of inarticulate intuition and impression, feeling." John Dewey, *Logical Method and Law*, 10 *CORNELL L.Q.* 17, 24 (1924).

This Article proceeds as follows. In Part I, I address how the abandonment of *Chevron* might affect the ability of government to innovate when necessary to address pressing social problems. In Part II, I explore the rise of the MQD and the relationship between the nondelegation doctrine and the MQD, again with a focus on the effects on the ability of government to innovate. In Part III, I discuss some examples of innovation suppressing doctrines drawn from outside of administrative law including gun control, the spending power, and the Court's denigration of innovation more generally. Part IV concludes with observations about the role of the Supreme Court in government and society.

## I. INNOVATION IN ADMINISTRATIVE LAW: *CHEVRON* AND *SKIDMORE*

Professor Adrian Vermeule introduced his 2016 survey of American administrative law, *Law's Abnegation*, by observing that "the long arc of the law has bent steadily toward deference."<sup>31</sup> Whether that was an accurate portrayal of administrative law when those words were published may be subject to disagreement, but in my view, since that time, the law has reassumed what Vermeule termed its "imperial pretensions."<sup>32</sup> The current Supreme Court has used its authority at the acme of the legal system to reduce the ability of federal agencies to institute new and innovative measures to address serious social problems. It has done this primarily by abandoning what is purported to be the most deferential element of administrative law, *Chevron* deference, and replacing it with a clear statement principle known as the Major Questions Doctrine. This Part discusses *Chevron*; the next Part discusses the Major Questions Doctrine.

### A. Agency Innovation Under Chevron

The legendary *Chevron* decision involved the Environmental Protection Agency's (EPA) definition of "stationary source" in the Clean Air Act (CAA).<sup>33</sup> The question was whether each individual

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31. VERMEULE, *supra* note 22, at 1.

32. *Id.*

33. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 840 (1984).

point of emissions must be regulated as a unique stationary source or whether the EPA could look at a plant as a whole and regulate based on the total emissions from numerous points within a plant.<sup>34</sup> Measuring emissions from multiple sources as a whole increases flexibility by allowing increased emissions from one smokestack to be offset by decreases from another.<sup>35</sup> This approach is often referred to as the “bubble concept” because it regulates as if the entire plant is encased in a bubble.<sup>36</sup> In 1979, during the Carter administration, which partnered with Congress to accomplish substantial deregulation of the economy,<sup>37</sup> the EPA expanded the circumstances under which it would employ a plant-wide definition of stationary source.<sup>38</sup> Then, in 1980, Carter’s EPA reversed itself and prescribed regulation of each individual source of emissions.<sup>39</sup> However, in 1981, after President Ronald Reagan took office and initiated a review of regulatory burdens, the EPA reversed itself once again and re-expanded the circumstances under which it would employ the plant-wide definition.<sup>40</sup> This was understood as a way to ease what the Reagan administration viewed as unreasonable regulatory burdens.<sup>41</sup>

When a challenge to the EPA’s action reached the Supreme Court, it presented largely as a challenge to the EPA’s construction of the term “stationary source” in the CAA rather than an argument that using the bubble concept was arbitrary or capricious as a matter of policy. In the course of approving the EPA’s new policy, the Court created what appeared to be a new, highly deferential, standard of judicial review of federal agency constructions of the statutes they administer. The *Chevron* opinion described judicial review of agency statutory construction decisions as comprising two inquiries: First, does the statute speak directly “to the precise question at issue[?]”<sup>42</sup> If so, “that is the end of the matter; for the court, as well as the

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34. *Id.*

35. *See id.* at 860-61.

36. *Id.* at 861.

37. *See* PHILLIP J. COOPER, THE WAR AGAINST REGULATION: FROM JIMMY CARTER TO GEORGE W. BUSH 14-17 (2009).

38. *See* 44 Fed. Reg. 3276 (Jan. 16, 1979).

39. *See* 45 Fed. Reg. 52697 (Aug. 7, 1980).

40. *See* 46 Fed. Reg. 16281 (Mar. 12, 1981).

41. *See id.*

42. *See Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

agency, must give effect to the unambiguously expressed intent of Congress.”<sup>43</sup> Second, assuming the intent of Congress is not clear, that is, Congress did not speak directly to the precise question at issue and the statute is either silent on the matter or ambiguous, then the reviewing court should defer to the agency’s reasonable (or permissible) construction, even if it would have read the statute differently.<sup>44</sup> This two-step inquiry is the dominant understanding of the *Chevron* standard, which I refer to in the remainder of this Article as “conventional *Chevron*.”

Although, as I have detailed elsewhere, on close examination, and in light of subsequent developments, the *Chevron* standard was virtually incoherent,<sup>45</sup> the conventional understanding of it was that courts were to be very deferential in reviewing agency constructions both of ambiguous statutes and statutes that explicitly delegated interpretive authority to an agency.<sup>46</sup> Further, ambiguity meant not only unclear language but also situations in which a statute was silent on a matter arguably within an agency’s regulatory jurisdiction.<sup>47</sup> Conventional *Chevron* thus portended very relaxed judicial review of many agency decisions involving statutory construction, including matters of agency jurisdiction, and it did so in response to innovative agency action designed to more efficiently and effectively accomplish the agency’s statutory mission.<sup>48</sup>

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43. *Id.* at 842-43.

44. *Id.* at 843-44.

45. See Beermann, *supra* note 19, at 782-85; Jack M. Beermann, *Chevron Is a Rorschach Test Ink Blot*, 32 J.L. & POL. 305, 309-10 (2017). It is also important to understand that the Supreme Court never truly gave agencies the leeway that the *Chevron* opinion’s text and conventional *Chevron* implied. This was manifested partly in how the Court applied the *Chevron* standard and partly because the Supreme Court always ignored *Chevron* in a high percentage of statutory construction decisions to which it might have been applied. In terms of the Court’s application of *Chevron*, the biggest early development was the Court’s invocation of what it called the “traditional tools of statutory construction” to determine whether Congress’s intent was clear. See Beermann, *supra* note 19, at 817-21 (quoting *Chevron*, 467 U.S. at 843 n.9). The importation of the traditional tools of statutory interpretation into *Chevron* step one made it much more likely that the reviewing court would find clear congressional intent, obviating the possibility of deference to the agency’s views, and it made many cases applying *Chevron* virtually indistinguishable from non-*Chevron* cases. *Id.*

46. For the best overview of conventional *Chevron*, see generally THOMAS W. MERRILL, *THE CHEVRON DOCTRINE: ITS RISE AND FALL, AND THE FUTURE OF THE ADMINISTRATIVE STATE* (2022).

47. *Chevron*, 467 U.S. at 843.

48. See *City of Arlington v. FCC*, 569 U.S. 290, 296-98 (2013) (holding that *Chevron*

For all of its faults, conventional *Chevron* had one important virtue: it allowed agencies to innovate by adjusting their constructions of statutes in light of new developments or changes in policy.<sup>49</sup> It should be obvious that deferential judicial review under the arbitrary or capricious test, which governs review of agency policies not involving statutory construction, also leaves space for agency innovation.<sup>50</sup> Greater flexibility, policy expertise, and the ability to adapt quickly without waiting for Congress to act have been long cited as reasons for allocating important matters to agencies, and conventional *Chevron* reinforced those virtues.<sup>51</sup> This flexibility was reinforced by two additional Supreme Court decisions. First, in the *Brand X* case, Justice Clarence Thomas's opinion for the Court held that agencies were free to change their constructions of the statutes they administer even after an earlier construction had been upheld on deferential judicial review.<sup>52</sup> In fact, that is exactly what happened in *Chevron* itself when the Court allowed the EPA to alter its construction of "stationary source."<sup>53</sup> Second, in the *Fox Television* case, the Court rejected the argument that agency policy changes required greater justification and should receive less deferential judicial review than initial decisions on the same matter.<sup>54</sup>

The Court's forgiving attitude toward agency changes of statutory construction and policy stood in contrast with prior principles under which such changes would be viewed as less authoritative than initial and longstanding agency determinations.<sup>55</sup> *Chevron* appeared

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deference applies to issues involving agency jurisdiction).

49. See Cass R. Sunstein, *Zombie Chevron: A Celebration*, 82 OHIO ST. L.J. 565, 571 (2021) (finding expertise-based argument for *Chevron* convincing).

50. See 5 U.S.C. § 706(2).

51. See Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 81 (2014).

52. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 967 (2005); see *id.* at 981-82. Agencies could change their views on a statute after judicial review only if the agency's prior construction had been upheld under *Chevron* step two or an equivalent pre-*Chevron* deferential understanding that the agency's interpretation was reasonable, but perhaps not the only reasonable construction. See *id.* at 986.

53. See *supra* notes 33-41 and accompanying text.

54. FCC v. Fox Television Stations, Inc., 556 U.S. 502, 505 (2009). The only additional requirement the Court imposed in cases involving judicial review of agency changes of policy is that the agency must acknowledge that it is departing from its prior views. The agency need not establish that the new policy is superior to the old policy. See *id.* at 514-15.

55. For example, in the pre-APA case of *Skidmore v. Swift & Co.*, the Court noted that an agency legal interpretation would be more worthy of judicial deference based on "its

contrary to the understanding, which was admittedly not uniform,<sup>56</sup> that longstanding agency constructions of statutes, especially those adopted at or near the time when the statute was passed, were entitled to substantially more deference than changed understandings and those adopted long after a statute's passage.<sup>57</sup> But this aspect of *Chevron* was well-suited to the current reality of daunting policy challenges, accelerating scientific advances, and rapid technological change.

Once the meaning of conventional *Chevron* became widely understood, it was attacked as contrary to principles of separation of powers under which the courts have primary authority over statutory interpretation.<sup>58</sup> Professor Cynthia Farina connected this criticism to the nondelegation doctrine, noting that conventional *Chevron* seems to allocate lawmaking power to federal agencies, contrary to the Constitution's allocation of the legislative power to Congress.<sup>59</sup> Initially, criticism of *Chevron* came from liberal-leaning scholars and judges, such as Professor Farina and D.C. Circuit Judge Harry Edwards, perhaps because *Chevron* was created to validate deregulatory changes wrought by the Reagan administration.<sup>60</sup> This divide was mirrored on the Supreme Court, where the most vocal supporters of *Chevron* deference were conservative Justices such as Antonin Scalia.<sup>61</sup> However, when *Chevron* deference gained

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consistency with earlier and later pronouncements," implying that a new and different interpretation would be less worthy of deference. 323 U.S. 134, 140 (1944).

56. See Anita S. Krishnakumar, *Longstanding Agency Interpretations*, 83 FORDHAM L. REV. 1823, 1879 (2015). As I have previously observed, *Chevron* was foreshadowed in other opinions, most notably *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37-39 (1981), discussed in Beermann, *supra* note 19, at 793 n.48.

57. See *Skidmore*, 323 U.S. at 140; Krishnakumar, *supra* note 56, at 1826 nn.6-8 (citing cases); Richard W. Murphy, *Judicial Deference, Agency Commitment, and Force of Law*, 66 OHIO ST. L.J. 1013, 1046 (2005).

58. See, e.g., *CSX Transp. v. United States*, 867 F.2d 1439, 1445 (D.C. Cir. 1989) (Edwards, J., dissenting) (arguing that *Chevron* is contrary to separation of powers and traditional judicial role); Clark Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of Chevron's Step Two*, 2 ADMIN. L.J. 255, 261 (1988) (arguing that *Chevron's* presumption that silence or ambiguity delegates interpretive authority to an agency violates separation of powers).

59. Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 478-79 (1989).

60. See *id.* at 456; *CSX Transp.*, 867 F.2d at 1445 (Edwards, J., dissenting); *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 840-41 (1984).

61. See Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833,



political salience, sometime during the administration of President Barack Obama, that political divide in Congress and on the Court flipped, perhaps due to discomfort with deference to regulatory (as opposed to deregulatory) agency action.<sup>62</sup> The ripples set off by this political change have been felt at the Supreme Court ever since, but have only just begun to register in the Federal Courts of Appeals, where, as is explained below, *Chevron* continues to be applied almost as if nothing has changed.<sup>63</sup>

### *B. The Demise of Chevron in the Supreme Court*

The high court has not deferred under *Chevron* to an agency interpretation of a statute since 2016,<sup>64</sup> and it rarely mentions *Chevron* in majority opinions, even neglecting to mention it at all in a 2022 decision that was briefed and argued as posing the question of whether the agency interpretation at issue should receive deference under *Chevron*.<sup>65</sup> Although the Court as a whole has not

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838, 860 (2001) (identifying Justice Scalia as *Chevron*'s strongest defender). While consistently extolling the virtues of deference to agency statutory construction, Justice Scalia actually afforded them less deference than any other member of the Court, at least in cases in which *Chevron* was cited. See Jack M. Beerbaum, *Chevron at the Roberts Court: Still Failing After All These Years*, 83 *FORDHAM L. REV.* 731, 735-36 (2014).

62. See *infra* Part I.B.

63. See *infra* Part I.B.

64. *Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261, 280 (2016).

65. See *Am. Hosp. Ass'n v. Becerra*, 142 S. Ct. 1896 (2022). One of the questions over which the Court granted review was "[w]hether *Chevron* deference permits HHS to set reimbursement rates based on acquisition cost and vary such rates by hospital group if HHS has not collected required hospital acquisition cost survey data." See Brief for the Petitioners at i, *Am. Hosp. Ass'n*, 142 S. Ct. 1896 (No. 20-1114). At oral argument, *Chevron* was mentioned forty-nine times, including twice by Justice Kavanaugh, who wrote the Court's opinion rejecting the agency's statutory construction without mentioning *Chevron*. See Transcript of Oral Argument, *Am. Hosp. Ass'n*, 142 S. Ct. 1896 (No. 20-1114). In 2023, the Court granted certiorari in two cases in which the petitioner argues for overruling *Chevron*, but it remains to be seen whether the Court does so or has anything else significant to say about *Chevron*'s future. See *Loper Bright Enters. v. Raimondo*, 143 S. Ct. 2429 (2023); Brief for Petitioners at i, *Loper Bright Enters.*, 143 S. Ct. 2429 (No. 22-451); *Relentless, Inc. v. Dep't of Com.*, 144 S. Ct. 325 (2023); Brief for Petitioners at i, *Relentless, Inc.* (No. 22-1219). Oral argument in the two cases revealed general hostility toward *Chevron* among the Court's conservative Justices but it remains to be seen whether the Court overrules it or clarifies and confines it in a manner similar to what the Court did concerning deference to agency interpretations of its own rules in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019). See generally Transcript of Oral Argument, *Relentless, Inc.*, 144 S. Ct. 325 (No. 22-1219); Transcript of Oral Argument, *Loper Bright Enters.*, 143 S. Ct. 2429 (No. 22-451).

commented on the continued vitality of *Chevron* deference, Justice Neil Gorsuch, in a dissent from the denial of certiorari in a case decided by the Federal Circuit under *Chevron*, attacked what he termed “maximalist” *Chevron*:

Not only does [*Chevron*] call on courts to depart from the terms of the APA and our longstanding and never-overruled precedent. It also turns out to pose a serious threat to some of our most fundamental commitments as judges and courts.... We should acknowledge forthrightly that *Chevron* did not undo, and could not have undone, the judicial duty to provide an independent judgment of the law’s meaning in the cases that come before the Nation’s courts. Someday soon I hope we might.<sup>66</sup>

Twenty-first century Republican congressional opposition to *Chevron* has manifested in the form of proposed legislation entitled “The Separation of Powers Restoration Acts” of 2016, 2017, 2019, and 2023.<sup>67</sup> The bill, which passed the House in 2023, “would require federal courts conducting judicial review of agency action to decide ‘de novo all relevant questions of law, including the interpretation of constitutional and statutory provisions and rules.’”<sup>68</sup> In effect, *Chevron* and all other doctrines under which federal courts defer to agency statutory construction would be overruled. The bill passed the Republican-majority House in 2016 and died in the Senate.<sup>69</sup> In 2023, it passed in the Republican-controlled House again, but it remains unlikely to pass in the Senate where Demo-

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66. *Buffington v. McDonough*, 143 S. Ct. 14, 18-19, 22 (2022) (Gorsuch, J., dissenting from the denial of certiorari).

67. The 2023 version is H.R. 288, 118th Cong. (2023). This bill should not be confused with the “Separation of Powers Restoration Act of 2021” proposed by Republican Representative Paul Gosar in 2021 to limit the effect of presidential orders, repeal provisions authorizing the President to declare states of emergency, and repeal the War Powers Resolution, which requires the President to consult with Congress over the deployment of the armed forces of the United States. See H.R. 4317, 117th Cong. (2021).

68. Jack M. Beermann, *The Proposed Separation of Powers Restoration Act Goes Too Far*, 41 ADMIN. & REGUL. L. NEWS 7, 7 (2016). The 2019 version was introduced as H.R. 1927, 116th Cong. (2019).

69. H.R. 4668—*Separation of Powers Restoration Act of 2016*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/house-bill/4768> [<https://perma.cc/GF7A-YWVL>]; *Separation of Powers Restoration Act of 2023*, H.R. 288, 118th Cong. (2023).

crats currently have a majority and are unlikely to fall below the filibuster threshold in the near future.<sup>70</sup>

Further, the push to legislatively overrule *Chevron* may be muted and mooted by the Supreme Court's recent treatment of *Chevron*, including Justice Gorsuch's proclamation that "the aggressive reading of *Chevron* has more or less fallen into desuetude."<sup>71</sup> But contrary to Justice Gorsuch's apparently wishful thinking, conventional *Chevron* has continued vitality in the lower federal courts,<sup>72</sup> and thus the Supreme Court's apparent abandonment of it may not halt the efforts in Congress to overrule it legislatively. But it might, because the Supreme Court is much more visible than the lower courts. Further, the Supreme Court has narrowed the circumstances in which conventional *Chevron* deference applies in the lower courts, most importantly by authorizing them (if not yet clearly instructing them) to apply traditional tools of statutory interpretation to determine whether a statute is ambiguous<sup>73</sup> and by confining *Chevron* to statutory construction arrived at in "relatively formal" agency proceedings such as rulemaking and formal adjudication.<sup>74</sup> Further, the anti-*Chevron* rumblings in some of the

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70. See Olivia Munson, *Who Controls the Senate? Breaking Down the Party Division in the 118th US Congress*, USA TODAY (Feb. 14, 2024, 3:01 PM), <https://www.usatoday.com/story/news/politics/2023/05/01/who-controls-senate-helping-understand-balance-power/11229238002/> [https://perma.cc/R9EV-3RUC]. Further, President Biden has promised to veto the bill if it is presented to him. OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY H.R. 288 - SEPARATION OF POWERS RESTORATION ACT OF 2023 (2023), <https://www.whitehouse.gov/wp-content/uploads/2023/06/SAP-H.R.-288.docx.pdf> [https://perma.cc/ACY9-F7HQ].

71. *Buffington*, 143 S. Ct. at 22 (Gorsuch, J., dissenting from the denial of certiorari).

72. See, e.g., *Solar Energy Indus. Ass'n v. FERC*, 59 F.4th 1287, 1292 (D.C. Cir. 2023) (applying *Chevron* to approve the agency's construction of an ambiguous statute). Judge Justin Walker dissented from this decision, criticizing his colleagues for "mak[ing] a beeline to agency deference—before any inquiry into statutory structure, cross-references, context, precedents, dictionaries, or canons of construction. Then, they use the tools of statutory interpretation not to find the best reading of the text but instead to test whether the agency's interpretation is 'reasonable.'" *Id.* at 1297-98 (Walker, J., dissenting) (citation omitted); see also Isaiah McKinney, *The Chevron Ball Ended at Midnight, but the Circuits Are Still Two-Stepping by Themselves*, YALE J. REGUL. NOTICE & COMMENT BLOG (Dec. 18, 2022), <https://www.yalejreg.com/nc/chevron-ended/> [https://perma.cc/V4AD-B8KW].

73. See *Immigr. & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 446-48 (1987); *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 35-36 (1990); *Voigt v. EPA*, 46 F.4th 895, 900-01 (8th Cir. 2022).

74. See *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001); *Sanofi Aventis U.S. LLC v. U.S. Dep't of Health & Hum. Servs.*, 58 F.4th 696, 703 (3d Cir. 2023) (holding that *Chevron*

lower courts may satisfy *Chevron*'s opponents in Congress that the courts have restored their vision of separation of powers, meaning that the Separation of Powers Restoration Act is no longer needed.<sup>75</sup> This all makes it less likely that lower court decisions will provoke a major legislative effort.

If the Court overrules *Chevron*, it might reinstall *Skidmore*'s factors as the standard for determining how much reviewing courts should defer to agency statutory construction.<sup>76</sup> That is what it did in the *Mead* case after determining that *Chevron* did not apply to informally-rendered decentralized agency decisions.<sup>77</sup> This may seem to be an odd conclusion because currently, when the Court ignores *Chevron*, it does not mention deference at all and simply conducts traditional statutory interpretation without regard to the agency's views.<sup>78</sup> However, with *Chevron* still "on the books," the Court could not invoke the *Skidmore* factors without first explaining why *Chevron* did not apply, which it has been unwilling to do. Of course, if the Court overrules *Chevron* based on a finding that deference to agency statutory interpretation is unconstitutional or inconsistent with the APA, then it might not revive *Skidmore* and would instead instruct federal courts to afford no deference at all to agency statutory construction. That is possible, even though it

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does not apply to agency advisory opinions).

75. See *supra* note 72 and accompanying text.

76. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

77. See *United States v. Mead Corp.*, 533 U.S. 218, 221, 234-35 (2001). In *Mead*, the Court endorsed *Skidmore* deference as the substitute for *Chevron* deference in cases in which *Chevron* does not apply. See *id.* More recently, Justice Gorsuch endorsed *Skidmore* as more "faithfully" following the APA's judicial review provisions than *Chevron*. *Buffington v. McDonough*, 143 S. Ct. 14, 17 (2022) (Gorsuch, J., dissenting from the denial of certiorari) ("After the APA's passage, courts more or less followed this mandate faithfully for decades. As Justice Robert H. Jackson—himself an ardent New Dealer before joining the bench—explained, courts would respectfully consider Executive Branch interpretations of the law, but the weight courts afforded them 'depend[ed] upon the[ir] thoroughness ..., [their] consistency with earlier and later pronouncements, and all those factors which g[i]ve [them] power to persuade.' *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 ... (1944).") (first alteration in original) (emphasis omitted). Regarding the *Skidmore* revival, Ronald Cass has noted that "[a]s Justice Scalia predicted at the time, the result has been less clarity in the law and more opportunity for judicial decisions to respond to judges' personal sense of what agencies should do." Ronald A. Cass, *Vive la Deference?: Rethinking the Balance Between Administrative and Judicial Discretion*, 83 GEO. WASH. L. REV. 1294, 1322 (2015).

78. See, e.g., *Am. Hosp. Ass'n v. Becerra*, 142 S. Ct. 1896 (2022).

would contradict eighty years of precedent and practice.<sup>79</sup> This result would also hold if Congress passes a variant of the Separation of Powers Restoration Act.<sup>80</sup>

Under *Skidmore*, although courts would make final decisions on questions of statutory construction, reviewing courts might defer to agency interpretations based on “the[ir] thoroughness ..., [their] consistency with earlier and later pronouncements, and all those factors which g[i]ve [them] power to persuade.”<sup>81</sup> Justice Scalia criticized *Skidmore* on multiple grounds, including that it was too vague and thus left too much to the judicial imagination.<sup>82</sup> Another point he made was that *Skidmore* deprived agencies of the flexibility to alter their interpretations based on changes in policy or conditions, which as noted is afforded by *Chevron*’s approval of sequential reasonable or permissible agency interpretations.<sup>83</sup> But that is not a necessary implication: “There is nothing ... in the nature of *Skidmore* deference or deference under pre-APA practice that makes this so. A court could pronounce an interpretation as within the range of possible interpretations without precluding the agency from adopting another interpretation.”<sup>84</sup> In fact, with *Chevron* lurking only in the distant background, by definitively resolving all issues of statutory interpretation either under *Chevron* step one or without any discussion of deference at all, the Court cuts off the possibility that an agency might change its construction based on changed circumstances or altered policy views. Reviving *Skidmore* might increase the potential for agency innovation as compared to the current state of affairs in which the Court is silent on the deference question.<sup>85</sup>

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79. See *Skidmore*, 323 U.S. at 140; *Solar Energy Indus. Ass’n v. FERC*, 59 F.4th 1287, 1290 (D.C. Cir. 2023).

80. See *supra* note 68 and accompanying text.

81. *Buffington*, 143 S. Ct. at 17 (Gorsuch, J., dissenting from the denial of certiorari) (quoting *Skidmore*, 323 U.S. at 140) (alteration in original).

82. See *Mead Corp.*, 533 U.S. at 247, 250 (Scalia, J., dissenting).

83. See *id.* at 247. For a discussion of *Skidmore* as an alternative to *Chevron*, see Beermann, *supra* note 19, at 849-50. See also Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore*, 54 ADMIN. L. REV. 735, 742-43 (2002).

84. Beermann, *supra* note 19, at 849-50, n.260 (citing Richard Murphy, *A New Counter-Marbury: Reconciling Skidmore Deference and Agency Interpretive Freedom*, 56 ADMIN. L. REV. 1, 7 (2004)).

85. This understanding of *Skidmore* would preserve *Chevron*’s greatest virtue, deferring

Deferential judicial review of agency action leaves more space for innovation, whether in reaction to changed circumstances, improved understanding of social problems, or alterations in policy. Review under conventional *Chevron* can be highly deferential to agencies' understandings of their statutory authority, which allows agencies to employ innovative measures that Congress might not have contemplated when delegating authority. Further, agency power to innovate is augmented by the *Brand X* decision, which allows agencies to freely alter their interpretations of their enabling statutes to new interpretations within the zone of reasonableness.<sup>86</sup> This is contrary to the traditional skepticism reviewing courts had shown to changes in agency statutory constructions. If the Court actually overruled *Chevron*, or significantly limits its application in the lower federal courts without explicitly overruling it, agencies will be forced to look to Congress for fresh statutory permission to take innovative action against serious social problems.

## II. DELEGATION AND MAJOR QUESTIONS

The Court's lax application of the nondelegation doctrine presents a similar separation of powers issue to those some find in the *Chevron* doctrine, that is, preserving Congress as the sole lawmaking body in the United States government. But this time the culprits are Congress and the Executive Branch, not the courts. Congress has for more than a century delegated substantial prescriptive authority to federal agencies and officials, and federal agencies have exercised that authority to create binding norms across the entire spectrum of federal law and policy.<sup>87</sup> Whatever your view of the propriety of agency power to create binding law—subject, of course, to judicial review for legality—there is no serious doubt that Congress has delegated to agencies and other executive actors, including the

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to agency expertise rather than allowing judges to import their non-expert ideological views into important regulatory statutes. See Sunstein, *supra* note 49, at 571, 575.

86. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981, 1000 (2005).

87. See Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379, 383, 417, 423 (2017).

President, the power to do so even in important areas of federal policy.<sup>88</sup>

*A. The Delegation Basis for the Major Questions Doctrine*

In my view, the MQD is best understood as a non-constitutional method for addressing the concerns underlying the nondelegation doctrine.<sup>89</sup> There are two primary criticisms of delegation, one sounding directly in constitutional law and one combining constitutional and policy concerns. The constitutional criticism of delegation is that the Constitution, particularly Article I's first clause vesting

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88. Justice Scalia, a champion of separation of powers, thought that executive power to create binding norms was a natural and acceptable attribute of the power to enforce the law and that when Congress empowers agencies to do so, it is not delegating legislative power. *See Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 472 (2001); *Mistretta v. United States*, 488 U.S. 361, 416-18 (Scalia, J., dissenting). Justice Stevens, representing a more pragmatic and perhaps flexible point of view, thought that agency creation of binding legal norms is constitutionally appropriate even if it was better characterized as delegation of legislative power, so long as the degree of legislative power delegated was relatively modest. *See Whitman*, 531 U.S. at 488-89. Whichever characterization is appropriate, there has never been a strictly enforced constitutional ban on congressional delegation to agencies of the power to create binding legal norms. *See Whittington & Iuliano, supra* note 87, at 381. It is not even clear that judicial review of agency rules is constitutionally required. *See* Jack M. Beermann, *The Never-Ending Assault on the Administrative State*, 93 NOTRE DAME L. REV. 1599, 1608 (2018). It may be sufficient to provide judicial review only in defense of agency orders and then only when constitutionally protected interests in life, liberty, or property are at stake. *See* Jack M. Beermann, *Administrative Adjudication and Adjudicators*, 26 GEO. MASON L. REV. 861, 884-85 (2018). In such cases, the illegality of the rule would be a defense to the enforcement of the agency rule, but there may be no constitutional requirement that courts have the power to review rules themselves or even to declare them generally unlawful. *See id.* at 884-93.

89. Cass Sunstein has identified delegation concerns as one of the two bases for the MQD, the other being a more textualist understanding that grants of authority should be read with the understanding that it is unlikely that Congress means to delegate authority to resolve major questions unless it says so in plain terms. Cass R. Sunstein, *Two Justifications for the Major Questions Doctrine*, 76 FLA. L. REV. 251, 252-54 (2024). Professor Sunstein associates the delegation basis for the MQD with Justice Gorsuch's opinions, for example, *West Virginia v. EPA*, 142 S. Ct. 2587, 2616 (2022) (Gorsuch, J., concurring), and the interpretive basis for the MQD with Justice Barrett's opinion in *Biden v. Nebraska*, 143 S. Ct. 2355, 2378-84 (2023) (Barrett, J., concurring). I find Justice Gorsuch's approach much more persuasive, especially in light of Chief Justice Roberts's recognition that in each of the Court's MQD decisions rejecting agency power, the agency's action was supported by a "colorable textual basis." *West Virginia v. EPA*, 142 S. Ct. at 2609. In my view, the MQD is best understood as embodying substantive separation of powers concerns and not, as Justice Barrett argues, as a textualist understanding of statutory language in context. It seems that Justice Barrett simply does not want to admit that she has signed on to a novel and important non-textualist methodology.

the legislative power in Congress, prohibits the exercise of lawmaking power outside of Congress.<sup>90</sup> Related to this is concern for the loss of democratic accountability over the making of federal law.<sup>91</sup> The more overtly policy-oriented critique of delegation is that it makes lawmaking too easy, increasing the volume of unnecessary and burdensome federal regulation often for the benefit of narrow interests.<sup>92</sup> This connects with the separation of powers critique because proponents argue that the lawmaking process set forth in the Constitution was the Framers' attempt to preserve liberty by making it difficult for the federal government to make law.<sup>93</sup>

Republicans in Congress have mounted an attack on delegation of lawmaking authority to agencies that is responsive to the separation of powers concerns outlined above. They have introduced the Regulations from the Executive in Need of Scrutiny Act in every Congress since 2013.<sup>94</sup> This awkward title was designed to facilitate the acronym "the REINS Act," invoking the metaphor of Congress reining in excessive executive lawmaking. In the 118th Congress, it garnered approximately 170 Republican co-sponsors in the House of Representatives,<sup>95</sup> more than ever before, and was introduced in the Senate by Senator Rand Paul with more than twenty co-sponsors there.<sup>96</sup> The REINS Act would require congressional approval before any "major rule" may go into effect.<sup>97</sup> It makes sense for the critics to focus on major rules since that is where constitutional concerns are felt most acutely, and deliberation and accountability are most important. Non-major rules would go into

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90. See Sunstein, *supra* note 89, at 252-54.

91. See Beermann, *supra* note 88, at 1600.

92. See *id.*

93. See *id.* at 1601.

94. See Regulations from the Executive in Need of Scrutiny Act, S.15, 113th Cong. (2013).

95. Regulations from the Executive in Need of Scrutiny Act, H.R. 277, 118th Cong. (2013); *Cosponsors—H.R. 277*, CONGRESS.GOV, <https://www.congress.gov/bill/118th-congress/house-bill/277?s=9&r=1> [<https://perma.cc/37UX-24GS>].

96. Regulations from the Executive in Need of Scrutiny Act, S. 184, 118th Cong. (2023); *Cosponsors—S. 184*, CONGRESS.GOV, <https://www.congress.gov/bill/118th-congress/senate-bill/184?s=1&r=1> [<https://perma.cc/CXQ9-PGK5>].

97. "Major rule" is defined as any rule likely to have an annual economic effect of \$100 million or more, cause major cost or price increases for consumers, industries or government entities or significant adverse effects on competition, employment, investment or productivity. Regulations from the Executive in Need of Scrutiny Act, H.R. 277, 118th Cong. (2013). The determination of whether a rule is major is delegated to the agency promulgating it. *Id.*



effect without Congress's approval, but they would still be subject to disapproval under the Congressional Review Act.<sup>98</sup>

While this proposal would not eliminate executive exercise of delegated authority, it would confine it to relatively unimportant rules and forfeit the advantages inherent in relatively quick agency action based on agency expertise and administration policy. Of course, by converting major agency rules to proposals for legislation by Congress, accountability and deliberation would increase, and it would preserve Article I's assignment of lawmaking authority to Congress, at least where the most important actions are concerned. Justice Gorsuch, joined by Chief Justice Roberts and Justice Thomas, recently argued for a strict delegation doctrine along similar lines proposed by Republicans in the REINS Act. In dissent in *Gundy v. United States*, Justice Gorsuch decried the allocation to the Attorney General of a "controversial issue with major policy significance and practical ramifications for states."<sup>99</sup> The issue delegated by statute to the Attorney General was whether the federal Sex Offender Registration and Notification Act (SORNA, or the Act) would apply retroactively to offenders convicted before the Act was passed, and if so, how—although, to save the statute from the delegation doctrine attack, the Court read it to require retroactivity and apply the Act to pre-passage offenders "as soon as feasible."<sup>100</sup> Justice Gorsuch, perhaps subconsciously invoking the REINS Act, read the statute as giving "the Attorney General free rein to write the rules for virtually the entire existing sex offender population in this country."<sup>101</sup>

Justice Gorsuch argued more generally that the Court should strike down delegations that go beyond assignment of the power to "fill up the details" or find the facts upon which agency action is contingent.<sup>102</sup> Focusing on his use of the phrase "fill up the details,"

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98. See 5 U.S.C. § 801.

99. 139 S. Ct. 2116, 2131-32 (2019) (Gorsuch, J., dissenting) (quoting Wayne A. Logan, *The Adam Walsh Act and the Failed Promise of Administrative Federalism*, 78 GEO. WASH. L. REV. 993, 999-1000 (2010)).

100. *Id.* at 2128-29. The statute's terms granted the Attorney General "the authority to specify the applicability of the requirements of this [Act] to sex offenders convicted before the enactment of this chapter." 34 U.S.C. § 20913(d). The Court, looking at the statute as a whole, read this as a congressional preference for as much retroactive application as feasible.

101. *Gundy*, 139 S. Ct. at 2132 (Gorsuch, J., dissenting) (emphasis added).

102. *Id.* at 2136.

which has a lengthy constitutional pedigree, it becomes clear that for Justice Gorsuch this is a test not of the nature of agency lawmaking but of its importance.<sup>103</sup> Although he concedes that it may be permissible in some contexts for Congress to “allow federal agencies to resolve even highly consequential details,”<sup>104</sup> he invokes the scope of the Attorney General’s power over the estimated “500,000 pre-Act offenders”<sup>105</sup> and quotes Chief Justice Marshall’s identification of “important subjects, which must be entirely regulated by the legislature itself,”<sup>106</sup> and he concluded that “[i]f the separation of powers means anything, it must mean that Congress cannot give the executive branch a blank check to write a code of conduct governing private conduct for a half-million people.”<sup>107</sup>

Presidents and agencies are sometimes criticized for acting after the administration fails to convince Congress to explicitly authorize a reform,<sup>108</sup> such as President Obama’s deferred action immigration programs which were put in place after the proposed DREAM Act failed in Congress,<sup>109</sup> and—most famously—President Truman’s order to seize the country’s steel mills during the Korean War.<sup>110</sup> The Court’s creation of the MQD and its reforms to *Chevron* might be viewed in much the same way. Republicans in Congress have been trying for years to convince their colleagues to require congressional authorization for major rules and legislatively override *Chevron*.<sup>111</sup> The Court’s actions have obviated the need for this legislation, in effect enacting the REINS Act and the Separation of

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103. *See id.* at 2136-42.

104. *Id.* at 2143.

105. *Id.*

106. *Id.* at 2136 (quoting *Wayman v. Southard*, 23 U.S. 1 (1825)).

107. *Id.* at 2144.

108. *See generally* PHILLIP J. COOPER, BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION 3 (2002).

109. *See* Remarks by the President on Immigration, WHITEHOUSE.GOV (June 15, 2012), <https://obamawhitehouse.archives.gov/the-press-office/2012/06/15/remarks-president-immigration> [<https://perma.cc/GQ3T-C4DT>]. The title of the proposal was the Development, Relief, and Education for Alien Minors Act of 2011 or the “DREAM Act of 2011” which is an obvious example of a title designed to fit an acronym. *See* S. 952, 112th Cong. (2011).

110. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585-86, 589 (1952) (determining that Congress’s refusal to authorize industry seizures during strikes implicitly rejected such authority; President Truman’s seizure of steel mills thus directly controverted congressional intent).

111. *See* Regulations from the Executive in Need of Scrutiny Act, H.R. 277, 118th Cong. (2013).

Powers Restoration Act, just as President Obama arguably put the DREAM Act into effect without convincing Congress. Perhaps the Court should have awaited action by Congress before making avulsive changes to administrative law.<sup>112</sup>

While it remains to be seen whether the Court follows through and actually invalidates delegation of important matters to administrative agencies on constitutional separation of powers grounds, with its newly-minted Major Questions Doctrine, it has taken a different route to much the same goal in a way that resonates with the concerns underlying the REINS Act. The creation of the MQD was a multi-year effort that began with a modest exception to the application of *Chevron* deference and has evolved into a potentially enormous change to conventional views about the scope of agency authority.<sup>113</sup> In the MQD, the Court claims the power to narrow the scope of agency power based on the Court's subjective judgment of the importance of a power an agency asserts it has been granted by the language of its enabling Act.<sup>114</sup> And it has applied this doctrine just when agency authority is needed the most, that is, in situations involving serious threats to national welfare that require agency expertise where direct congressional action is unlikely due to the vicissitudes of politics. In other words, the MQD rejects the normative bases for the administrative state just as it limits agencies' ability to take innovate steps to address serious social problems.

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112. Judicial reform to *Chevron* deference might not seem illegitimate since the *Chevron* doctrine was created by the Court without much attention to the language of the governing statute, the judicial review provision of the Clean Air Act, 42 U.S.C. § 7607, and it was applied in cases governed by the APA's judicial review provision, again without much attention to the statutory language, 5 U.S.C. § 706. See Beermann, *supra* note 19, at 782, 788-89. However, the Court's primary basis for *Chevron* was congressional intent, which means the Court in *Chevron* was interpreting the judicial review provisions. *Id.* at 781, 783. In statutory cases, *stare decisis* is at its strongest, and the Court should explain why it finds it appropriate to abandon its prior readings of the relevant statutes. The MQD is an especially significant revision of judicial construction of judicial review statutes, and the Court has not explained why it no longer feels bound by precedent in this area.

113. See Sohoni, *supra* note 16, at 269-71.

114. See Beermann, *supra* note 19, at 782, 788-89.

### B. Tracing the Creation of the Major Questions Doctrine

As others have recounted,<sup>115</sup> the Court's construction of the modern Major Questions Doctrine took place in the roughly twenty-year period between its 2000 decision denying the Food and Drug Administration (FDA) authority to regulate tobacco marketing<sup>116</sup> and its 2022 decision invalidating the Environmental Protection Agency's (EPA) Clean Power Plan,<sup>117</sup> in which for the first time it used the phrase "major questions doctrine."<sup>118</sup> As with many revolutionary changes in the law, the MQD is built on a familiar doctrinal foundation<sup>119</sup> that belies its novelty and lack of congruence with prior law. It evolved from what was known as the "extraordinary cases" exception to *Chevron*.<sup>120</sup> This doctrine was created by the Court in an opinion by Justice Sandra Day O'Connor in *FDA v.*

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115. The MQD is the new *Chevron* in the sense that virtually every American administrative law scholar has or will publish something about it. See, e.g., Sohoni, *supra* note 16, at 267-69, 272-75; Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777, 787-89 (2017); Daniel M. Deacon & Leah Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1017, 1022-23 (2023).

116. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125-26 (2000).

117. *West Virginia v. EPA*, 142 S. Ct. 2587, 2610, 2616 (2022).

118. *Id.* at 2609; see Sohoni, *supra* note 16, at 275.

119. In the best defense of the MQD that I have seen, Louis Capozzi traces the origins of the doctrine to an 1897 decision in which the Court held that the Interstate Commerce Commission lacked authority to prescribe railroad rates. See Louis J. Capozzi III, *The Past and Future of the Major Questions Doctrine*, 84 OHIO ST. L.J. 191, 196 & n.23, 197 (2023) (citing *ICC v. Cincinnati, New Orleans & Tex. Pac. Ry. Co. (The Queen and Crescent Case)*, 167 U.S. 479, 511 (1897)). In my view, *The Queen and Crescent Case* opinion reflects an outmoded approach to administrative law which, for good reason, was replaced by a much more hospitable attitude toward agency power and innovation beginning at least with the 1944 decisions in *Hearst* and *Skidmore*. *NLRB v. Hearst Publ'ns, Inc.*, 322 U.S. 111, 123, 130 (1944); *Skidmore v. Swift & Co.*, 323 U.S. 134, 137, 140 (1944). The modern decisions, until very recently, were more in step with social needs and expectations concerning the role of government agencies in protecting the health and welfare of members of society. Of course, the Court has never stopped turning away agency assertions of power over matters great and small, but as Ron Levin explains, Capozzi and others overstate the degree to which the Court's decisions were based on major questions reasoning as opposed to ordinary principles of administrative law. See Ronald M. Levin, *The Major Questions Doctrine: Unfounded, Unbounded, and Confounded*, WASH. U. ST. LOUIS LEGAL STUD. RSCH. PAPER, Paper No. 22-10-02, 1, 60-61 (Sept. 2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4304404](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4304404) [<https://perma.cc/JC6T-9LPB>]; see also Capozzi, *supra* note 119, at 210-12 (attributing, inter alia, the Court's decision in the *Benzene* case to the MQD rather than concerns over delegation and other principles of statutory construction).

120. See Coenen & Davis, *supra* note 115, at 781, 793, 799.

*Brown & Williamson*, a case asking whether the FDA had the authority under the Federal Food, Drug, and Cosmetic Act (FDCA) to regulate the marketing of tobacco products.<sup>121</sup> The language of the FDCA was broad enough to cover tobacco as a drug and cigarettes, inter alia, as “drug delivery devices.”<sup>122</sup> No provision of the FDCA addressed whether the FDA had authority to regulate tobacco marketing, which, under conventional *Chevron*, the Court acknowledged, was at least the starting point for its review and would counsel deference to the FDA’s construction.<sup>123</sup> The Court enumerated several reasons for doubting that Congress meant to delegate authority over tobacco products to the FDA, including the structural problem that if the FDA had jurisdiction, it would be statutorily obligated to ban the sale of tobacco products, which would have been inconsistent with other aspects of federal law.<sup>124</sup> The Court also relied upon another familiar argument, that after the FDCA was enacted, Congress had passed multiple statutes concerning tobacco marketing during a period in which the FDA disavowed jurisdiction and all of which were premised on the lack of FDA authority to regulate, much less ban, tobacco.<sup>125</sup>

These arguments may have been sufficient support for a decision rejecting FDA authority over tobacco marketing, but the Court had to get back to where it started: *Chevron*’s application to the case.<sup>126</sup>

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121. *Brown & Williamson Tobacco Corp.*, 529 U.S. at 125, 159.

122. *Id.* at 127.

123. *Id.* at 132 (“Because this case involves an administrative agency’s construction of a statute that it administers, our analysis is governed by *Chevron* .... If Congress has not specifically addressed the question, a reviewing court must respect the agency’s construction of the statute so long as it is permissible.”) (citations omitted).

124. This is consistent with numerous cases in which courts have rejected a proposed interpretation of a statute because it would be incongruous with other aspects of the statutory scheme. A good example is *Dole v. United Steelworkers of America*, 494 U.S. 26 (1990). In that case, the Supreme Court held that disclosure rules, under which regulated private parties are required to make disclosures to other private parties, are not “information collection requests” within the meaning of the Paperwork Reduction Act, 44 U.S.C. § 3501, in part because the Act’s remedies address only the consequences of failure to provide the government with requested information and have no application to the failure to disclose information to a third party. *See Dole*, 494 U.S. at 28. The Court’s opinion in *Dole* is unclear on whether it decided the case using traditional tools of statutory construction under *Chevron* step one, or whether it simply ignored *Chevron* altogether and applied pre-*Chevron* interpretive practices. *See id.*

125. *See Brown & Williamson Tobacco Corp.*, 529 U.S. at 125, 146 (O’Connor, J., concurring).

126. The application of *Chevron* was also the issue in *MCI Telecomms. Corp. v. AT&T*, 512

Here the Court said something new, that in “extraordinary cases” there is reason to doubt that statutory silence or ambiguity “constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps.”<sup>127</sup> The Court found that this was no “ordinary case” because the agency was asserting power it had disclaimed for nearly ninety years over a matter “constituting a significant portion of the American economy” where “Congress, for better or for worse, has created a distinct regulatory scheme[,] ... squarely rejected proposals to give the FDA jurisdiction over tobacco, and repeatedly acted to preclude any agency from exercising significant policy-making authority.”<sup>128</sup>

This language was interpreted at the time to be directed to whether *Chevron* deference applied, not to the more general question of whether Congress had delegated the claimed authority to the agency. With hindsight, it is clear that there were hints that something more significant might be on the horizon. In language foreshadowing the current MQD, the Court also observed that “we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”<sup>129</sup> But then the Court returned to *Chevron*’s familiar step one, concluding that “[i]t is therefore clear, based on the FDCA’s overall regulatory scheme and the subsequent tobacco legislation, that Congress has directly spoken to the question at issue and precluded the FDA from regulating tobacco products.”<sup>130</sup>

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U.S. 218 (1994), which the Court characterized as a precursor to today’s “major questions doctrine.” See *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022). The “extraordinary cases” interpretation of *MCI Telecomms. v. AT&T* has some support in *King v. Burwell*, 576 U.S. 473, 486 (2015), where the Court relied on the centrality of the matter to the statutory scheme as one reason for not applying *Chevron*, but the Court did not cite *MCI* in that opinion.

127. See *Brown & Williamson Tobacco Corp.*, 529 U.S. at 159. In truth, there is reason to doubt that silence or ambiguity *ever* implies the delegation of interpretive authority to an agency. See Beermann, *supra* note 19, at 796 & n.64 (citing Lisa Schultz Bressman, *Chevron’s Mistake*, 58 DUKE L.J. 549, 562 (2009), among other scholars).

128. See *Brown & Williamson Tobacco Corp.*, 529 U.S. at 123, 159-60.

129. *Id.* at 160. The Court also quoted “major questions” language from an article by Justice Stephen Breyer (“A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute’s daily administration.” (quoting Stephen Breyer: *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986))).

130. *Id.* at 160-61.

*Brown & Williamson* left the basis for the “extraordinary cases” exception to *Chevron* unclear.<sup>131</sup> Was it based on Congress’s concentrated attention to tobacco regulation or on the economic and social importance of the question? The language of the opinion might have leaned toward the former, but some passages supported both understandings.<sup>132</sup> Seven years later, the Court, at least temporarily, confirmed that Congress’s special treatment of tobacco was the predominant factor. When the State of Massachusetts petitioned the EPA to regulate greenhouse gas emissions from motor vehicles, the EPA, invoking *Brown & Williamson*, disclaimed authority to do so, relying both on greenhouse gases’ unique political history and on the fact that “imposing emission limitations on greenhouse gases would have even greater economic and political repercussions than regulating tobacco.”<sup>133</sup> What may have escaped notice at the time was that this invocation of the “extraordinary cases” doctrine was not designed to take the case out of the *Chevron* framework but to deny agency authority altogether. When judicial review of the EPA’s action denying the petition reached the Supreme Court, the Court, in an opinion written by Justice John Paul Stevens—the author of *Chevron*—rejected this argument and characterized the “extraordinary cases” aspect of *Brown & Williamson* as based on the fact that with jurisdiction, the FDA would have been required to ban tobacco products and the “unbroken series of congressional enactments that made sense only if adopted ‘against the backdrop of the FDA’s consistent and repeated statements that it lacked authority under the FDCA to regulate tobacco.’”<sup>134</sup> The Court found no parallels to these factors regarding greenhouse gases.

The Court’s next invocation of the “extraordinary cases” idea reinforced the notion that the doctrine was about determining whether *Chevron* deference applies, but it redirected the inquiry toward political, social, and economic significance and away from concentrated attention in Congress. In *King v. Burwell*, the Court reviewed the Internal Revenue Service’s (IRS) reading of a provision of the Affordable Care Act that provides subsidies to purchasers of

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131. *See id.*

132. *See id.*

133. *See Massachusetts v. EPA*, 549 U.S. 497, 512 (2007).

134. *Id.* at 531 (quoting *Brown & Williamson*, 529 U.S. at 144).

health insurance policies on “an Exchange established by the State” to allow identical subsidies for purchasers of health insurance on exchanges operated by the federal government.<sup>135</sup> The IRS argued that the statute’s reference to “an Exchange established by the State” clearly included federal exchanges, but it also argued, in the alternative and without ever conceding that the statute might be ambiguous, that “the traditional tools of statutory interpretation confirm that Treasury’s reading is at least a reasonable one warranting deference under *Chevron*.”<sup>136</sup>

The Supreme Court, in an opinion by Chief Justice Roberts, agreed with the IRS that the statute provided subsidies for insurance purchased on federal exchanges, but it rejected the application of *Chevron* deference.<sup>137</sup> In fact, the opinion characterized *Chevron* as optional, stating that in statutory interpretation cases “we often apply the two-step framework announced in *Chevron*.”<sup>138</sup> This is strikingly different from the Court’s statement in *Brown & Williamson* that the analysis in such cases “is governed by *Chevron*.”<sup>139</sup> Characterizing *Chevron* deference as founded upon an implicit delegation of interpretive authority by Congress to the administering agency, the Court then quoted *Brown & Williamson*’s observation that “[i]n extraordinary cases ... there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.”<sup>140</sup> The Court then determined that Congress would not have implicitly delegated to the IRS the question whether purchases on federal exchanges were entitled to the subsidy because the issue involves billions of dollars per year and insurance costs for millions of people.<sup>141</sup> It is thus of “deep ‘economic and political significance’ that is central to the statutory scheme .... It is especially unlikely

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135. 576 U.S. 473, 483-85 (2015). The IRS had provided for such subsidies in a rule. See 26 CFR § 1.36B-2; see also 45 CFR § 155.20.

136. Brief for Respondents at 55, *King v. Burwell*, 576 U.S. 473 (2015) (No. 14-114), 2015 WL 349885; see also 26 U.S.C. § 36B(b)(2)(a).

137. See *King*, 576 U.S. at 492.

138. *Id.* at 485.

139. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) (emphasis added).

140. *King*, 576 U.S. at 485 (quoting *Brown & Williamson*, 529 U.S. at 159).

141. See *id.* at 486.



that Congress would have delegated this decision to the *IRS*, which has no expertise in crafting health insurance policy of this sort.”<sup>142</sup>

Notice that when discussing the importance of the agency’s action, the Court’s focus remained on the question of delegation of interpretive authority, not on the ultimate question of whether the agency’s reading of the statute was correct. In fact, despite its determination that *Chevron* did not apply, the Court agreed with the agency’s view, finding on non-deferential review that the statute was ambiguous,<sup>143</sup> and that the best reading of it, in light of its overall structure and policy, was that purchasers of health insurance on any exchange, state or federal, were entitled to the subsidy.<sup>144</sup> *King* may be unique in that it relied on the “extraordinary cases” doctrine to reject applying *Chevron* while ultimately upholding the agency’s interpretation. In light of subsequent developments, this may never happen again.

### *C. Major Questions, No Delegation, and No Chevron*

The Supreme Court has not applied the major questions doctrine to take a case out of the *Chevron* framework since *King v. Burwell*, partly because it no longer applies *Chevron* but also because now, when the MQD applies, it is employed to deny agency authority altogether. The next time the doctrine was mentioned at the Court, it was in Justice Gorsuch’s well-known dissent in *Gundy v. United States*.<sup>145</sup> There, for the first time in a Supreme Court opinion, foreshadowing later developments, Justice Gorsuch connected the MQD to nondelegation norms, implying that the doctrine should not only direct the Court away from *Chevron* but rather it should militate against finding agency authority to act as it proposes.<sup>146</sup> Justice

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142. *Id.* at 485-86 (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

143. *See id.* at 489-90.

144. *See id.* at 492-98.

145. *See* 139 S. Ct. 2116, 2131-48 (2019) (Gorsuch, J., dissenting).

146. *See id.* at 2141-42 (“Although it is nominally a canon of statutory construction, we apply the major questions doctrine in service of the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency.”). In this context, “transfer” is clearly another word for “delegate.” Justice Gorsuch characterized *Utility Air Regulatory Group v. EPA* as applying the major questions doctrine to deny deference to the EPA’s construction of a provision of the Clean Air Act in that case, but the Court’s opinion does not mention the doctrine in either its “major questions” or “extraordinary

Gorsuch suggested that the “majorness” of a question should militate against a finding that Congress has delegated the power at all.<sup>147</sup>

Justice Gorsuch’s suggestion was soon taken up by the Court’s conservative supermajority to reject agency authority in two extremely important regulatory areas: the regulation of greenhouse gas emissions from stationary sources and the power to force employers to require that their employees either be vaccinated against the COVID-19 virus or wear face coverings at work and submit to weekly testing. Similar reasoning was employed in a prior case to invalidate a freeze on evictions prescribed by the Centers for Disease Control and Prevention, and although evictions were a serious problem during the pandemic, they did not present the same existential challenges as greenhouse gases and immunity from COVID-19, from which numerous Americans continue to die.<sup>148</sup> The new MQD means that agency authority to regulate in an area of major economic and political significance will be rejected unless Congress’s delegation is clear, perhaps explicit.<sup>149</sup> This is the strictest standard ever applied in the law of the United States to agency claims of authority. Further, it reverses the presumption upon which *Chevron* deference is based, that silence or ambiguity implies delegation of interpretive authority to the administering agency. Now, silence or ambiguity no longer implies deference to the agency, it implies rejection of agency authority. And it skips the intermediate, and

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cases” form. *See Gundy*, 139 S. Ct. at 2141-42. Rather, the Court rejected the EPA’s construction because it was too inconsistent with the text and structure of the CAA to constitute a permissible reading of it. *See Util. Air Regul. Grp.*, 573 U.S. 302, 325 (2014) (“We conclude that EPA’s rewriting of the statutory thresholds was impermissible and therefore could not validate the Agency’s interpretation .... An agency has no power to ‘tailor’ legislation to bureaucratic policy goals by rewriting unambiguous statutory terms.”). Although the Court used the term “impermissible,” its subsequent statement and the remainder of the paragraph appear to reject the agency’s view in *Chevron* step one rather than step two, but it is not completely clear, as the Court did not structure the opinion around the *Chevron* two-step framework. *See id.*

147. *Gundy*, 139 S. Ct. at 2141-42 (Gorsuch, J., dissenting).

148. *See Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam). When the words in text were first written, the number of COVID-19 related deaths was measured in the hundreds per day. Mercifully, by September 2023, the number of daily COVID-19 deaths had fallen into the double digits. *See COVID Data Tracker*, CTRS. FOR DISEASE CONTROL AND PREVENTION, [https://covid.cdc.gov/covid-data-tracker/#trends\\_weeklydeaths\\_select\\_00](https://covid.cdc.gov/covid-data-tracker/#trends_weeklydeaths_select_00) [<https://perma.cc/EW4Z-MV6L>].

149. *See West Virginia v. EPA*, 142 S. Ct. 2587, 2607-08 (2022).

more traditional, possibility that a court, applying traditional tools of interpretation, might construe the statute to allow agency authority. Without explicitly acknowledging it, the Court has abandoned—but not overruled—conventional *Chevron*.

In the vaccinate or test case, the Court’s per curiam opinion staying the enforcement of the rule did not expressly invoke the MQD, but its meaning was clear: “We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance.’ There can be little doubt that OSHA’s mandate qualifies as an exercise of such authority.”<sup>150</sup> It was Justice Gorsuch, in a concurring opinion joined by Justices Thomas and Alito, who expressly invoked the MQD in his characterization of the Court’s decision on the vaccination requirement: “The Court rightly applies the major questions doctrine and concludes that this lone statutory subsection does not clearly authorize OSHA’s mandate.”<sup>151</sup> And once again, Justice Gorsuch expressly connected the MQD to the separation of powers concern over delegations by Congress to agencies.<sup>152</sup>

In *West Virginia v. EPA*, the Court, for the first time in a majority opinion, expressly invoked the MQD in its decision, rejecting the agency’s regulatory effort to address greenhouse gas emissions from stationary sources.<sup>153</sup> There, the Court characterized the MQD as referring “to an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted.”<sup>154</sup> The phrase “highly consequential power” is new, but the Court also used the phrases “economic and political significance” and “extraordinary cases” to support its determination that EPA lacked the power it claimed.<sup>155</sup> These appear to be alternative verbal formulations of the same concept.

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150. See *NFIB v. Dep’t of Labor*, 142 S. Ct. 661, 665 (2022) (quoting *Ala. Ass’n of Realtors*, 141 S. Ct. at 2489).

151. See *id.* at 688 (Gorsuch, J., concurring).

152. See *id.*

153. 142 S. Ct. 2587, 2609 (2022).

154. *Id.*

155. *Id.* at 2608-09.

In the Clean Power Plan, the EPA was attempting to fulfill its statutory obligation under the Clean Air Act to prescribe emissions standards for power plants using the “best system of emission reduction” (BSER).<sup>156</sup> The EPA promulgated the Clean Power Plan (the Plan) in 2015 during the Obama administration.<sup>157</sup> Numerous parties, including coal companies, other energy producers, states, other businesses, and business organizations challenged the Plan in court even before it was issued.<sup>158</sup> They claimed that the proposed rule was ripe for review even before it was finalized because “they [were] already incurring costs in preparing for the anticipated final rule ... [and] the Court will not be able to fully remedy that injury if [it did] not hear the case at [that] time.”<sup>159</sup> The D.C. Circuit turned away this challenge as premature in an opinion written by then-Judge Kavanaugh.<sup>160</sup> After the final rule was issued, it was challenged again, and after the D.C. Circuit refused to prevent it from going into effect, the Supreme Court issued a stay pending judicial review by a 5-4 vote with no explanation.<sup>161</sup>

Judicial review of the 2015 rule was never completed because in 2019, the EPA, under President Trump, reversed course and revoked the rule, claiming it was unauthorized by the Clean Air Act.<sup>162</sup> The EPA itself invoked the MQD, reasoning that “a clear statement was necessary to conclude that Congress intended to delegate authority ‘of this breadth to regulate a fundamental sector of the economy.’”<sup>163</sup> The agency also invoked the language of *Chevron* step one, stating that “Congress has directly spoken to this precise question and precluded” generation shifting as a BSER.<sup>164</sup> This is one of the oddities of deregulatory agency decisions; the agency

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156. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64662, 64663 (Oct. 23, 2015) (repealed 2019); 42 U.S.C. § 7411(a)(1), (b)(1)(B).

157. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64662, 64663 (repealed 2019).

158. *In re Murray Energy Corp.*, 788 F.3d 330, 332-34 (D.C. Cir. 2015).

159. *Id.* at 335.

160. *Id.* at 334.

161. *West Virginia v. EPA*, 577 U.S. 1126 (2016) (order granting stay).

162. *West Virginia v. EPA*, 142 S. Ct. 2587, 2604 (2022) (citing Repeal of the Clean Power Plan, 84 Fed. Reg. 32523 (July 8, 2019)).

163. *Id.* at 2605 (quoting Repeal of the Clean Power Plan, 84 Fed. Reg. 32529).

164. *Id.* (quoting Repeal of the Clean Power Plan, 84 Fed. Reg. 32529).

itself often adopts arguments more typically made by challengers, that it lacks the power to take more stringent regulatory action. On January 19, 2021, the day before President Biden took office, the D.C. Circuit overturned the EPA's revocation of the Clean Power Plan.<sup>165</sup> That court rejected application of the MQD and disagreed with the agency's reading of the Clean Air Act,<sup>166</sup> which the D.C. Circuit concluded "could reasonably be read to encompass generation shifting."<sup>167</sup> The EPA then began considering whether to reinstitute the 2015 rule or take some other similar action, and the Supreme Court granted certiorari to review the D.C. Circuit's decision.<sup>168</sup>

As noted above, the Supreme Court invoked the MQD and held that the Clean Power Plan exceeded the EPA's authority under the Clean Air Act. The Court relied upon the following factors in concluding that the MQD applied: The rule would "substantially restructure the American energy market," it was contrary to a "consistent understanding" under which the "EPA had always set emissions limits" through pollution reductions systems aimed at making polluting installations operate more cleanly, and that it was "unprecedented" and "effected a 'fundamental revision of the statute.'"<sup>169</sup> Read in light of prior cases, these factors can be summarized as follows: A question is major if it involves a new form of regulation that is substantially different from prior regulatory approaches, reflects a novel understanding of a statute, and will have a major economic or social impact over an important industry in a politically charged policy arena. But nothing in the doctrine or the cases assures us that all questions that partake of these factors will be considered "major" or even makes clear exactly what each of these

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165. *Am. Lung Ass'n v. EPA*, 985 F.3d 914, 995 (D.C. Cir. 2021) (per curiam).

166. *Id.* at 959, 995.

167. *West Virginia*, 142 S. Ct. at 2605 (discussing D.C. Circuit's conclusion).

168. *Id.* at 2606; *West Virginia v. EPA*, 142 S. Ct. 420 (2021) (mem.) (order granting certiorari).

169. *West Virginia*, 142 S. Ct. at 2610-12 (quoting *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 219, 231 (1994)). There is a certain irony in the Court's use of prior agency practice as a basis for narrowing the agency's range of current options. On what basis is the agency's prior practice privileged? This also appears to be inconsistent with the Court's declaration that agencies are allowed to alter their policies without establishing that the new policy is superior to the old policy. See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

factors means in various contexts.<sup>170</sup> As Dick Pierce has stated, “every important executive action is now a candidate for rejection” through application of the MQD.<sup>171</sup>

The Court’s primary justification for the MQD is democracy; important policy decisions should be made by Congress, not a relatively unaccountable executive branch.<sup>172</sup> Further, the Court is certainly aware that the current Congress is unlikely to respond forcefully to the Court’s invitation to take responsibility for major regulatory initiatives,<sup>173</sup> making the MQD more about deregulation and preserving earlier regulatory strategies than about democracy. Further, the MQD was created by an unaccountable Court without Congress’s input, and thus does not truly reflect a preference for democratic control of administrative policymaking.

Another element that contributes to the characterization of an assertion of agency power as a major question is that it constitutes an agency’s novel reading of its enabling act, deviating from a longstanding construction to the contrary.<sup>174</sup> In *FDA v. Brown & Williamson Tobacco Corp.*, the Court noted that the FDA was asserting authority to regulate tobacco products “after having expressly disavowed any such authority since its inception” and that the assertion of authority was “[c]ontrary to its representations to Congress since 1914.”<sup>175</sup> This factor is not always mentioned, but it

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170. Professor Daniel Walters has characterized the MQD as “unbounded.” Daniel E. Walters, *The Major Questions Doctrine at the Boundaries of Interpretive Law*, 109 IOWA L. REV. 465, 522 (2024).

171. Richard J. Pierce, Jr., *How Should the Court Respond to the Combination of Political Parity, Legislative Impotence, and Executive Branch Overreach?*, 127 PENN ST. L. REV. 627, 632 (2023).

172. See *West Virginia*, 142 S. Ct. at 2616 (“A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body.”). As Jed Shugerman and Jodi Short have pointed out, the Court’s baseline, that only Congress is sufficiently politically accountable to make major decisions, is inconsistent with the Court’s stress on the political accountability of the President in its decisions invalidating Congress’s restrictions on removal of agency officials, and in fact is inconsistent with the Court’s willingness to invalidate important structural decisions that were made by Congress. See Jodi L. Short & Jed H. Shugerman, *Major Questions About Presidentialism: Untangling the “Chain of Dependence” Across Administrative Law*, 65 B.C. L. REV. 511, 513-18 (2024).

173. See Levin, *supra* note 119, at 60-61.

174. For a discussion of novelty as a basis for characterizing an agency policy as major, see Deacon & Litman, *supra* note 115, at 1069-78.

175. 529 U.S. 120, 125, 159 (2000).

is usually present because a challenge under the MQD is unlikely to be made to a longstanding agency practice, especially one that dates back to passage of the statute under which the agency asserts power. In such cases, the agency practice is likely to have been challenged and upheld previously, before the invention of the MQD.

I do not mean to imply that the Court's cases invoking the MQD to deny agency power provide a clear roadmap for agencies or other courts. Despite Louis Capozzi's insistence that "the Court's precedents and other sources offer substantial guidance on how to draw the lines moving forward,"<sup>176</sup> just what "major" means is unclear, which should not be surprising given that the doctrine is of such recent vintage. One federal district judge has observed that while "[i]t is unclear what exactly constitutes 'vast economic significance[.]' ... courts have generally considered an agency action to be of vast economic significance if it requires 'billions of dollars in spending.'"<sup>177</sup> In another case, the Fourth Circuit relied on the MQD to reject a citizens' suit brought against commercial fishing operations alleging that they were violating the Clean Water Act by throwing bycatch overboard and disturbing sediment with the nets they use to trawl for shrimp.<sup>178</sup> One of the bases for this conclusion was that under the plaintiffs' view of the Act, the EPA would have authority to require a permit for every person who throws fish they do not want back into a body of water and would even reach the

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176. Capozzi, *supra* note 119, at 228. The full passage provides support for my sense that the MQD is more about suppressing regulation and vindicating the nondelegation doctrine than preserving Congress's authority:

Even if some "line-drawing" will be required, the Court's precedents and other sources offer substantial guidance on how to draw the lines moving forward. And for borderline calls, courts can adopt a tiebreaking rule against agency authority, consistent with Article I's rule that a government wish is not law until it goes through bicameralism and presentment.

*Id.* (footnote omitted). Capozzi is arguing for an augmented MQD under which a court with doubts about whether the MQD's requirement of congressional specificity has been met should presume that it has not been even if under its best reading of the statute it would affirm the agency's action. *See id.*

177. *Brown v. U.S. Dep't of Educ.*, 640 F. Supp. 3d 644, 664 (N.D. Tex. 2022) (quoting *King v. Burwell*, 576 U.S. 473, 485 (2015)). In *Brown*, a federal district judge issued a preliminary injunction delaying implementation of President Biden's loan forgiveness program on major questions grounds. *Id.* at 652. The Supreme Court reversed, holding the plaintiffs in that case lacked standing to sue. *Dep't of Educ. v. Brown*, 143 S. Ct. 2343, 2348 (2023).

178. *N.C. Coastal Fisheries Reform Grp. v. Capt. Gaston LLC*, 76 F.4th 291, 294, 297 (4th Cir. 2023).

judge's daughter when she uses a minnow as bait.<sup>179</sup> Whether return of bycatch by commercial fishing operations or stirring up sediment by trawling for shrimp causes significant environmental harm was irrelevant.<sup>180</sup> With regard to political significance, Justice Gorsuch, in his concurring opinion in *West Virginia*, observed that in prior cases the Court found such significance when Congress and state legislatures were engaged in "earnest," "robust," and "profound" debate over an issue.<sup>181</sup> But what does seem clear is that the MQD, in the hands of a Court majority and lower courts that are skeptical of government regulation generally, may prove to be a more effective deregulatory tool than anything that could be reasonably accomplished by the political branches.<sup>182</sup>

Even though the roots of the MQD lie in more traditional statutory interpretation understandings,<sup>183</sup> the differences are significant enough to conclude that the MQD is a novel basis for denying regulatory authority to agencies. In *Brown & Williamson* and *King v. Burwell*, the Court invoked many of the reasons underlying the MQD not to deny agency power but to negate deference to agency

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179. The court found that "whether returning bycatch qualifies as a 'discharge' of a 'pollutant' under the Act is a major question" because bycatch is governed by a "distinct regulatory scheme," the EPA does not believe that it has the authority to regulate bycatch, and "[i]nterpreting the Act to require the EPA to regulate bycatch would give it power over 'a significant portion of the American economy'" because it would apply to every person fishing, even the judge's daughter who fishes with minnows. *Id.* at 297-300 (quoting *Brown & Williamson*, 529 U.S. at 143-46, 159).

180. *See id.* at 300.

181. *West Virginia v. EPA*, 142 S. Ct. 2587, 2620-21 (2022) (Gorsuch, J., concurring); *Brown*, 640 F. Supp. 3d at 664 (citing *West Virginia*, 142 S. Ct. at 2620-21 (Gorsuch, J., concurring)).

182. Lower federal courts have employed the MQD to deny agency and presidential authority in a number of cases, including in *Louisiana v. Biden*, 55 F.4th 1017, 1019 (5th Cir. 2022), in which the court invalidated the Biden administration's requirement that employees of federal government contractors be vaccinated against COVID-19. I am aware of only one instance in which the Supreme Court has disagreed with lower courts' use of the MQD to invalidate federal action, that of the Biden administration's rule requiring health care workers to be vaccinated against COVID-19. *See Biden v. Missouri*, 595 U.S. 87, 89, 97 (2022). One of the two courts whose stays of the rule were under review in *Biden v. Missouri* invoked the MQD to support its finding that the agency lacked the power to impose the vaccination requirement. *See Louisiana v. Becerra*, 571 F. Supp. 3d 516, 536-37 (2021). At least one additional federal district court relied on the MQD to reach the same conclusion. *See Texas v. Becerra*, 575 F. Supp. 3d 701, 716-17 (N.D. Tex. 2021).

183. Professor Ronald Levin has concluded that the cases relied on by the Court do not provide adequate support for the MQD as the Court has developed it in recent cases. *See Levin, supra* note 119, at 4-5.



statutory interpretation.<sup>184</sup> When a court rejects deference to the agency's views, it next engages in an independent examination of the text, context, structure, and history of the regulatory statute to determine whether the agency's understanding is correct according to the court's understanding of the statute. Had a doctrine like today's MQD existed at the time the Court decided those cases, the Court would have skipped the references to deference and simply denied agency authority to regulate in the circumstances. Under current law, if the MQD applies, the inevitable result is a rejection of the agency's claim to regulatory authority. *King v. Burwell*, in which the Court applied the MQD to reject deference but then agreed with the agency's construction of the statute,<sup>185</sup> can never happen again. Courts have relied on factors like those in the MQD in the past when reviewing novel assertions of agency power. But the confluence of these factors into a power-denying doctrine represents an important and questionable development in administrative law.

The MQD is also another step toward abandoning the innovation-facilitating aspect of *Chevron* without expressly overruling it. Recall that the basis for *Chevron* deference is an assumption that silence or ambiguity in a statute signals congressional delegation of interpretive authority to the agency.<sup>186</sup> As the Court stated in *West Virginia* when referring to the cases it found to be precedent for the MQD,

[a]ll of these regulatory assertions had a colorable textual basis. And yet, in each case, given the various circumstances, “common sense as to the manner in which Congress [would have been] likely to delegate” such power to the agency at issue, made it very unlikely that Congress had actually done so.<sup>187</sup>

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184. See discussion *supra* Part II.B regarding *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), and *King v. Burwell*, 576 U.S. 473 (2015).

185. 576 U.S. at 485-86.

186. *Brown & Williamson*, 529 U.S. at 159 (citing *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)).

187. *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (second alteration in original) (citation omitted).

As previously noted, under conventional *Chevron*, this would signal delegation to the agency, while under the MQD, it points in the opposite direction: when a statute is unclear (silent or ambiguous) on a major question, it signals denial of regulatory power rather than delegation of the issue to the agency. The MQD thus disables agencies just when they are needed most, when pressing problems demand creative agency action based on new policy understandings. There is something perverse about disabling government from addressing major questions; one would hope that government would not spend much time or energy on trivial matters and instead focus on the important ones. This is an especially dangerous development in a period of political paralysis when Congress has arguably virtually abdicated its traditional legislative role.

In light of the prevalence of the traditional tools of statutory construction in *Chevron* step one, and the Court's concession that its MQD decisions reject agency authority even when the agency has a colorable (read "plausible") statutory basis for its authority, judicial review of agency statutory construction is perhaps best understood now as a four step process as follows:<sup>188</sup> Step 1: the Court should determine how important the issue is in political, social, or economic terms. If it is important enough to be considered "major," then Step 2: the Court should determine whether the statute clearly supports the agency's assertion of authority. If yes, then the Court should rule in favor of the agency; if no, the agency loses. If the issue is not "major," then Step 3: the Court should employ the traditional tools of statutory construction to determine the meaning of the statute, and either deny or affirm the agency's authority. If the Court, using the traditional tools, cannot determine the meaning of the statute and the issue is not major, then Step 4: the Court should defer to a reasonable agency construction, that is, one that is at least a plausible understanding of the statutory language in light of the policy underlying the statute. If the agency's interpretation is not reasonable or "permissible," then the court should deny the agency's authority.<sup>189</sup> This has important implications for *Chevron* skeptics

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188. I am omitting the inquiry into formality of agency procedures known as *Chevron* step zero, mandated by *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).

189. See *Brown & Williamson*, 529 U.S. at 132.

like Justice Gorsuch: there is no need to overrule *Chevron*, since in important cases, it no longer applies.

The MQD also obviates the need to tighten up on the nondelegation doctrine. Under the lenient understanding of the nondelegation doctrine that has predominated for decades, the existence of a “colorable” statutory basis for agency action was likely enough to save the statute from a nondelegation challenge, since, logically, a statute must contain an intelligible principle to provide a “colorable textual basis” for an agency’s claim of authority.<sup>190</sup> Under current law, virtually any statutory attention to an issue has been sufficient to satisfy the doctrine’s intelligible principle requirement. Vague standards certainly are sufficient,<sup>191</sup> and even when the statute lacks an intelligible standard, the Court has been more than willing to create one to save a statute from unconstitutionality.<sup>192</sup> Now, only clear, perhaps crystal clear, delegations will be read to delegate agency authority to implement “major” policies. Thus, with the MQD, the Court may have killed two birds with one stone, *Chevron* and the lenient nondelegation doctrine, at least when the agency claims interpretive authority or delegated power over an important issue of regulatory policy. And it rendered efforts by Republicans in Congress to accomplish the same ends unnecessary.<sup>193</sup>

Further, even with *Chevron* still on the books, the Court could have reached the same result in many of the cases in which the doctrine has been invoked without it. The easiest case to illustrate

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190. See *West Virginia*, 142 S. Ct. at 2609.

191. See *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 474-75 (2001) (“In short, we have ‘almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.’”) (citations omitted).

192. For example, in *Gundy v. United States*, 139 S. Ct. 2116 (2019), the Court interpreted the Attorney General’s statutory authority to “[s]pecify the applicability” to pre-Act offenders of the federal statute requiring sex offenders to register as requiring the Attorney General to “order their registration as soon as feasible.” The Court implied that the statute might violate the nondelegation doctrine if it gave the Attorney General complete discretion over *whether* pre-Act offenders were required to register at all. See *generally* Sunstein, *supra* note 20. David Driesen has argued that judicial implication of an intelligible principle to save a statute from a nondelegation challenge is inappropriate because if the statute itself lacks an intelligible principle, judicial implication of one involves “unconstrained judicial ... lawmaking.” David M. Driesen, *Loose Canons: Statutory Construction and the New Nondelegation Doctrine*, 64 U. PITT. L. REV. 1, 10 (2002).

193. See *e.g.*, Separation of Powers Restoration Act, H.R. 288, 118th Cong. (2023).

this is *UARG*, which addressed whether greenhouse gas emissions from stationary sources were subject to a permitting requirement that, by statute, applies to sources that emit either 25 or 100 tons of covered air pollutants.<sup>194</sup> The problem is that greenhouse gases are emitted in much greater quantities than other air pollutants such that applying the 25 and 100 ton thresholds to them would result in a massive increase in the number of sources subject to the permitting requirement and would be unadministrable.<sup>195</sup> Requiring permits for greenhouse gas emissions is simply incompatible with the structure of the statutory permitting scheme.<sup>196</sup> Rather than abandon the effort to bring greenhouse gas emissions into the permitting regime, the EPA instead “tailor[ed]” the thresholds to a range from 50,000 tons to 100,000 tons per year.<sup>197</sup> Regardless of the importance of this regulatory scheme to the future of mankind in light of the dangers of global warming, there is no traditional method of statutory construction of which I am aware that would allow the EPA to convert, through statutory construction, a 25 or 100 ton threshold into a threshold ranging from 50,000 to 100,000 tons. “Tailoring” turns out to be a euphemism for altering a statute, which, of course, EPA lacks authority to do.<sup>198</sup> Even rounding up does not allow for differences of this magnitude.

*MCI v. AT&T* also illustrates that the MQD is not necessary to reject agency initiatives that the Court finds to stray too far from

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194. *See generally* *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302 (2014).

195. *See id.* at 322.

196. As the Court observed, the EPA conceded that applying the Act’s 25 and 100 ton thresholds to the greenhouse gases would be impossible:

Under the PSD program, annual permit applications would jump from about 800 to nearly 82,000; annual administrative costs would swell from \$12 million to over \$1.5 billion; and decade-long delays in issuing permits would become common, causing construction projects to grind to a halt nationwide. Tailoring Rule 31557. The picture under Title V was equally bleak: The number of sources required to have permits would jump from fewer than 15,000 to about 6.1 million; annual administrative costs would balloon from \$62 million to \$21 billion; and collectively the newly covered sources would face permitting costs of \$147 billion.

*Id.* *See generally* *Dole v. United Steelworkers of Am.*, 494 U.S. 26 (1990) (holding that OMB does not have the authority to apply it to disclosure rules because structure of the Paperwork Reduction Act indicates that it applies only to rules requiring provision of information to the government, not to rules requiring the disclosure of information to third parties).

197. *See Util. Air Regul. Grp.*, 573 U.S. at 312-13.

198. *See id.* at 328.

statutory authorization. In that case, the FCC invoked its statutory authority to “‘modify’ any requirement” under 47 U.S.C. § 203(a) to allow non-dominant long distance carriers (everyone but AT&T) to stop filing tariffs with the agency.<sup>199</sup> Finding tariff-filing to be the heart of the regulatory scheme, the Court held that de-tariffing non-dominant carriers was not the sort of moderate change to statutory requirements that Congress authorized with the term “modify.”<sup>200</sup> Because, in the Court’s view, the agency’s interpretation was “beyond the meaning the statute can bear,” it refused to defer to it under *Chevron* and rejected it outright.<sup>201</sup> It did not discuss whether de-tariffing presented major political or social issues or would result in the restructuring of a major industry, just that it was out of step with the enacted regulatory regime.<sup>202</sup> In my view, the best reading of the *MCI* decision is that the agency’s construction was rejected at *Chevron* step one or step two, not taken out of *Chevron* altogether because of the importance of the question and certainly not because it was a major question of vast social, political, or economic significance.<sup>203</sup> But for present purposes, the point is that pre-MQD law provides ample tools for dealing with what the Court views as aberrant agency statutory construction. Further, the earlier cases do not provide a strong basis for the MQD. As Ron Levin has stated, “the Court repeatedly used overstatements of the holdings of those prior cases as something of a substitute for the need to justify the clear statement rule as an original proposition.”<sup>204</sup>

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199. *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 219 (1994).

200. *See id.* at 226-29.

201. *See id.* at 229.

202. I recognize that some commentators view *MCI v. AT&T* as a major questions case. *See, e.g.*, Cass R. Sunstein, *There Are Two “Major Questions” Doctrines*, 77 ADMIN. L. REV. 475, 486 n.73 (2021). I see the similarity, but I disagree. In my view, characterizing an agency’s action as aimed at the heart of a regulatory regime does not necessarily imply that the agency is acting in an area of vast economic or political significance. Even under traditional statutory construction standards, agencies lack authority to make fundamental changes to unimportant areas of government policy without Congress’s authorization.

203. *See supra* notes 176-82 and accompanying text.

204. Levin, *supra* note 119, at 5.

*D. Major Questions Doctrine Lookback*

There are some cases, however, in which the results under the MQD might have been different from the results under conventional *Chevron*. These cases reinforce the understanding that a primary vice of the MQD is that it tends to suppress the government's ability to innovate as the understanding of a policy problem evolves. And insofar as the MQD is attentive to the political saliency of an issue, it prevents agency action when agencies are needed most, that is, when expertise and insulation from politics contribute to the value of agency action.

Consider *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*.<sup>205</sup> In *Babbitt*, the issue was whether the Endangered Species Act's (ESA) prohibition on taking endangered species regulates the modification or degradation of their habitat.<sup>206</sup> The ESA makes it unlawful to "take" an endangered species.<sup>207</sup> "Take" is defined as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."<sup>208</sup> Although, as Justice Scalia explained in his *Babbitt* dissent, the traditional understanding of what it means to take an animal includes only action directed at the animal itself,<sup>209</sup> the Department of the Interior, in a regulation issued in 1975, interpreted the word "harm" to include detrimental habitat modification.<sup>210</sup> Even though the word "harm" provides a "colorable" statutory basis for the agency's conclusion, under the MQD, the regulation could be characterized as a dramatic expansion of the government's authority under the ESA, transforming it from a provision primarily regulating hunters and trappers into a potential federal land use code that allows the federal government to intervene wherever an endangered species might appear.<sup>211</sup> The Court found the agency's interpretation "reasonable" and approved it under *Chevron* step two without deciding whether it was actually

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205. 515 U.S. 687 (1995).

206. *Id.* at 690.

207. 16 U.S.C. § 1538.

208. *Id.* § 1532(19).

209. 515 U.S. at 718 (Scalia, J., dissenting).

210. *See* 50 C.F.R. § 17.3 (1975).

211. *See* *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022).

the only permissible interpretation of the statute under *Chevron* step one.<sup>212</sup> It explained that “[t]he latitude the ESA gives the Secretary in enforcing the statute, together with the degree of regulatory expertise necessary to its enforcement, establishes that we owe some degree of deference to the Secretary’s reasonable interpretation.”<sup>213</sup>

*Babbitt* exemplifies agency adaptation to increased understanding of a social problem. The role of habitat destruction in the threat to endangered and threatened species may not have been appreciated at the time the ESA was passed, or Congress’s attention may not have been focused on the issue. Today, habitat protection may be even more important to the fate of threatened and endangered species than direct regulation of harm to animals.<sup>214</sup> Whether Congress would adopt an amendment to the ESA to take habitat destruction into account is at best highly uncertain, and that is exactly when agency expertise and flexibility are needed to advance social welfare. However, if this same case arose today, there is a good chance that the Court would reject the agency’s interpretation under the MQD as a radical expansion of agency authority without clear statutory authorization.<sup>215</sup>

Similarly, today’s Court might revisit the rejection of applying the MQD to the EPA’s jurisdiction to regulate greenhouse gas emissions from mobile sources.<sup>216</sup> It would fit right into the MQD mold for the Court to say that even though the statutory grant of EPA authority to regulate “air pollutants” provides a “colorable” statutory basis for jurisdiction over greenhouse gases, such power would amount to a dramatic expansion of EPA’s authority. Previously, air pollutants were understood to be substances that foul the air in the area of emission and perhaps downwind, not things that cause harm due to

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212. See *Babbitt*, 515 U.S. at 696-704.

213. *Id.* at 703-04. The expansion of agency authority over land use might also have led the Court to declare *Babbitt* an “extraordinary case” under *Brown & Williamson*, and denied deference.

214. See NAT’L RSCH COUNCIL, SCIENCE AND THE ENDANGERED SPECIES ACT 7 (1995).

215. This would be similar to the Fourth Circuit’s decision that the MQD applies to the claim that the Clean Water Act reaches the return of bycatch and the stirring of sediment by trawling. See generally *N.C. Coastal Fisheries Reform Grp. v. Capt. Gaston LLC*, 76 F.4th 291 (4th Cir. 2023).

216. See *Massachusetts v. EPA*, 549 U.S. 497, 530-31 (2007) (distinguishing *Brown & Williamson*).

worldwide concentrations. Further, as illustrated by the UARG case,<sup>217</sup> EPA authority would result in a substantial increase in the number of sources subject to EPA permitting requirements, and it would also require the EPA to venture into regulation of automobile mileage, something that it had never done before and that was assigned by Congress to the Department of Transportation.<sup>218</sup> Climate change may present today's most pressing threat to human welfare, but today's Court majority would likely seize on the factors enumerated above to decide that, absent explicit authorization from Congress, the EPA has no authority to address it just as it limited the EPA's authority in *West Virginia*.

### *E. Suppressing Innovation*

The MQD's greatest vice is that it suppresses agency innovation just when it is needed most, when a new social problem arises either naturally or due to technological innovation, or when new understandings point to a regulatory strategy that might not have been contemplated when Congress enacted an agency's enabling act or when the agency launched its regulatory program under a new statute.<sup>219</sup> I am aware that the Court has disclaimed consequentialist decision-making,<sup>220</sup> and many legal scholars agree that courts should follow the law regardless of consequences,<sup>221</sup> that is, that it is for the political branches of government to make policy decisions concerning the consequences of legal rules and standards. There is also the old saying, *fiat justitia ruat coelum* ("let justice be done though the heavens descend"), that is, follow the law regardless of the consequences. In my view, the notion that courts follow the law to the exclusion of the judges' conceptions of social welfare is inaccurate on both scores. Since the realist revolution, it has been

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217. See *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302 (2014).

218. This was one of EPA's arguments in support of its claim that it lacked jurisdiction over greenhouse gases. See *Massachusetts*, 549 U.S. at 531-32.

219. Elissa Gentry and Kip Viscusi reach a similar conclusion in Elissa Gentry & W. Kip Viscusi, *The Misapplication of the Major Questions Doctrine to Emerging Risks*, 61 HOUS. L. REV. 469, 509-11 (2024).

220. See *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1486 (2021) (cited in Aaron Tang, *Consequences and the Supreme Court*, 117 NW. U. L. REV. 971, 972 (2023)).

221. See, e.g., David E. Pozen & Adam M. Samaha, *Anti-Modalities*, 119 MICH. L. REV. 729, 739-40 (2021).



clear to anyone paying attention that in hard cases courts are rarely constrained by law in any meaningful sense, and in the zone of freedom, courts apply ideologically-fueled conceptions of social welfare, often disguised as law.

Agencies have long gone beyond the limits of the plain words of their statutory authority to advance social welfare or (if you are a cynic) to expand their authority for the benefit of agency officials and politically favored interests. The Federal Communication Commission's (FCC) regulation of cable television is an excellent illustration of agency expansion of authority in light of unanticipated developments. In 1959, when cable television was in its infancy, the FCC disclaimed jurisdiction over it, reasoning that cable TV did not fall within the agency's jurisdiction over broadcasters and common carriers.<sup>222</sup> The FCC referred the matter to Congress, which declined to legislate in favor of FCC authority. Concurrent with another failed attempt to convince Congress to legislatively grant it authority over cable, the agency asserted increasing levels of regulatory authority over cable, culminating in a 1966 rule asserting jurisdiction over all forms of cable television and imposing restrictions on cable systems.<sup>223</sup> After the Ninth Circuit rejected the FCC's claim of authority,<sup>224</sup> the Supreme Court reversed, approving FCC power to regulate to the extent "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."<sup>225</sup> This forgiving attitude toward agency power in an "area of rapid and significant change"<sup>226</sup> is the antithesis of the Court's current attitude as reflected in the MQD and the "extraordinary cases" doctrine.

The current Court's willingness to limit agency authority to deal with serious threats to social welfare is illustrated well by the Court's reactions to agency efforts to deal with the COVID-19 pandemic, which involved both major questions rhetoric and increased constitutional protection for religious practice. Although there have

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222. See Report and Order, In the Matter of Inquiry into the Impact of Community Antenna Systems, TV Translators, TV "Satellite" Stations, and TV "Repeaters" on the Orderly Development of Television Broadcasting, 26 F.C.C. 403, 427-29 (1959).

223. See Second Report and Order, 2 F.C.C.2d 725 (adopted Mar. 4, 1966).

224. *Sw. Cable Co. v. United States*, 378 F.2d 118 (9th Cir. 1967).

225. *United States v. Sw. Cable Co.*, 392 U.S. 157, 178 (1968).

226. *Id.* at 180.

been pandemics throughout human history, the United States was not prepared for the COVID-19 outbreak in 2020. In the early days of this pandemic, the President invoked his statutory authority to suspend entry of classes of aliens, and in some circumstances U.S. citizens, into the United States to halt travel from China.<sup>227</sup> Although it appears that there was also an effort or at least an intention to quarantine some people upon their arrival from China, that apparently did not occur, and soon after, thousands of travelers from China reached the United States even with the travel ban in force; without effective monitoring or quarantine, COVID-19 began to spread uncontrolled.<sup>228</sup>

Due to the decentralized nature of governmental authority in the United States, some of the most important efforts to minimize the spread of COVID-19 were put in place by state and local authorities, and many of these were subjected to legal challenges.<sup>229</sup> With lower courts issuing or refusing preliminary injunctive relief in relatively short order, cases quickly reached the Supreme Court, and there the conservative wing of the Court stood ready to invalidate measures it found disagreeable on one ground or another.<sup>230</sup> Rather than recognize the unprecedented nature of the COVID-19 pandemic,

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227. See Proclamation on Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Pose a Risk of Transmitting 2019 Novel Coronavirus and Other Appropriate Measures to Address This Risk, Proclamation No. 9984, 3 C.F.R. 34 (2021); 8 U.S.C. § 1182(f). The President invoked 8 U.S.C. § 1185(a) as authority for suspending travel of U.S. citizens from China to the United States, but the language of the statute does not appear to support this assertion of authority. See Michael Corkery & Annie Karni, *Trump Administration Restricts Entry into U.S. from China*, N.Y. TIMES (Feb. 10, 2020), <https://www.nytimes.com/2020/01/31/business/china-travel-coronavirus.html> [<https://perma.cc/R9CA-MFHK>].

228. On April 4, 2020, the New York Times reported that nearly 40,000 Americans had traveled from China to the United States, “many with spotty screening.” Steve Eder, Henry Fountain, Michael H. Keller, Muyi Xiao & Alexandra Stevenson, *430,000 People Have Traveled from China to U.S. Since Coronavirus Surfaced*, N.Y. TIMES (Sept. 21, 2021), <https://www.nytimes.com/2020/04/04/us/coronavirus-china-travel-restrictions.html> [<https://perma.cc/8EDL-HHMR>].

229. See Grace Hauck & Chris Woodyard, *New Coronavirus Restrictions: Here’s What Your State Is Doing to Combat Rising Cases and Deaths*, USA TODAY (Dec. 8, 2020, 12:39 AM), <https://www.usatoday.com/story/news/nation/2020/11/13/covid-restrictions-state-list-orders-lockdowns/3761230001/> [<https://perma.cc/FC77-KRRB>].

230. Many of the cases appeared on what has been called the Court’s “shadow docket” which consists of cases that reach the Court on requests for stays of lower court rulings and preliminary injunctive relief that the lower courts refused. See Kristen E. Parnigoni, Note, *Shades of Scrutiny: Standards for Emergency Relief in the Shadow Docket Era*, 63 B.C. L. REV. 2743 (2022).

which each day was killing hundreds or thousands of people in the United States, the Court seemed suspicious of government action, as conspiracy theories claimed that the pandemic was concocted by an oppressive government to strip Americans of their basic freedoms.<sup>231</sup>

One of the most worrisome decisions came in a case challenging New York State's restrictions on gatherings as applied to houses of worship.<sup>232</sup> Depending on the prevalence of COVID-19 in an area, the order restricted attendance at religious services to 10 or 25 persons.<sup>233</sup> Other similar places such as theaters, concert venues and sporting arenas were required to close completely, while religious institutions were treated more leniently than places where people gather in similar configurations.<sup>234</sup> The Court, in a short per curiam opinion, enjoined enforcement of the order pending the submission of and decision on a petition for certiorari, concluding that the order violated the First Amendment's Free Exercise Clause.<sup>235</sup> The basis for the Court's decision was that attendance at religious services was restricted while a wide range of "businesses categorized as 'essential' may admit as many persons as they wish."<sup>236</sup> The Court held that strict scrutiny applied because the restrictions were not neutral and of general applicability, and although it agreed with New York that preventing the spread of COVID-19 is a compelling interest, it found that the rules were not narrowly tailored because they were

far more restrictive than any COVID-related regulations that have previously come before the Court, much tighter than those adopted by many other jurisdictions hard-hit by the pandemic, and far more severe than has been shown to be required to prevent the spread of the virus at the applicants' services.<sup>237</sup>

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231. See Mark Lynas, *COVID: Top 10 Current Conspiracy Theories*, ALLIANCE FOR SCI. (Apr. 20, 2020), <https://allianceforscience.org/blog/2020/04/covid-top-10-current-conspiracy-theories/> [<https://perma.cc/D3VA-FHUT>].

232. Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020).

233. *Id.* at 67.

234. *Id.* at 80.

235. *Id.* at 66.

236. *Id.*

237. *Id.* at 67 (citation omitted).

In plain words, the Court's determination that the rule was not narrowly tailored amounted to an assertion that it was better able to determine what measures are truly necessary to prevent the spread of a deadly disease than the public health authorities of the State of New York.

Two aspects of this decision are particularly troubling. First is the Court's observation that New York's rules were "much tighter than those adopted" elsewhere.<sup>238</sup> This comment is contrary to one of the primary virtues ascribed to American federalism, that it allows experimentation among jurisdictions with the expectation that variation will lead to better overall results as states see what works and what does not.<sup>239</sup> Further, it denies to a state like New York the right to be extra cautious in the face of potentially deadly uncertainty.<sup>240</sup> Again, this seems inconsistent with the theory of federalism.

Second is the Court's decision to compare the regulation of houses of worship to the regulation of substantially different institutions such as retail stores, medical offices, and manufacturing facilities and ignore the treatment of more comparable institutions such as theaters, sports arenas, and lecture halls.<sup>241</sup> Justice Kavanaugh, in a concurrence, echoed the Court's characterization of New York's rules as "much more severe than most other States' restrictions" and noted that

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238. *Id.*

239. "One of federalism's chief virtues, of course, is that it promotes innovation by allowing for the possibility that 'a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.'" *Gonzales v. Raich*, 545 U.S. 1, 42 (2005) (O'Connor, J., dissenting) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). "[T]he theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring). To be fair, the Court has disclaimed the notion that the federalism interest in experimentation among the states is relevant in cases involving constitutional rights, but it also has been invoked in such cases. See *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2260 (2020) ("Our federal system prizes state experimentation, but not 'state experimentation in the suppression of free speech,' and the same goes for the free exercise of religion." (quoting *Boy Scouts of America v. Dale*, 530 U.S. 640, 660 (2000))); see also Michael W. McConnell, *Federalism: Evaluating the Founders' Designs*, 54 U. CHI. L. REV. 1484, 1493-1500 (1987) (detailing Framers' views on the advantages of decentralization including "that state and local governmental units will have greater opportunity and incentive to pioneer useful changes").

240. The Court has done this in other cases, that is, pointed out that a challenged practice has been adopted in a minority of jurisdictions as a reason to be suspicious of its legality. See, e.g., *Connecticut v. Doehr*, 501 U.S. 1, 17 (1991) ("Connecticut's statute appears even more suspect in light of current practice. A survey of state attachment provisions reveals that nearly every State requires either a preattachment hearing, a showing of some exigent circumstance, or both, before permitting an attachment to take place.").

241. *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 66-67.

[i]n a red zone, for example, a church or synagogue must adhere to a 10-person attendance cap, while a grocery store, pet store, or big-box store down the street does not face the same restriction. In an orange zone, the discrimination against religion is even starker: Essential businesses and many non-essential businesses are subject to no attendance caps at all.<sup>242</sup>

Justice Kavanaugh dismissed as irrelevant the fact that under the challenged rule “some secular businesses such as movie theaters must remain closed and are thus treated less favorably than houses of worship.”<sup>243</sup> Neither he nor the per curiam opinion addressed the district court’s finding that New York’s distinctions among different business and other institutions were “crafted based on science and for epidemiological purposes.”<sup>244</sup> Apparently, the Supreme Court majority believed that it knew more about the relative risks of COVID-19 transmission in various places open to the public than New York’s policymakers, and it thought that houses of worship were more analogous to grocery stores than movie theaters.

It might be argued that these criticisms are beside the point since the case was decided on First Amendment grounds.<sup>245</sup> Should criticism of the decision not center on whether the Court’s understanding and application of the Free Exercise Clause is correct? The answer is an easy “no” because the text and history of the Free Exercise Clause provide virtually no guidance on how it should be applied, either generally or specifically to the question whether in a pandemic a house of worship must be treated like a retail store and not like a theater, classroom, or lecture hall.<sup>246</sup> First Amendment doctrine is completely judge-made, and thus when the

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242. *Id.* at 73 (Kavanaugh, J., concurring).

243. *Id.* The district court found, and the dissenters pointed out, that the rules treated “religious gatherings ... more favorably than similar gatherings’ with comparable risks, such as ‘public lectures, concerts or theatrical performances.’” *Id.* at 76 (Breyer, J., dissenting) (quoting *Roman Cath. Diocese of Brooklyn v. Cuomo*, 495 F. Supp. 3d 118, 129 (E.D.N.Y. 2020)).

244. *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 76 (Breyer J., dissenting) (quoting *Roman Cath. Diocese of Brooklyn v. Cuomo*, 495 F. Supp. 3d at 131).

245. *Id.* at 66.

246. Jack M. Beermann, *The Immorality of Originalism*, 72 CATH. U. L. REV. 445, 461, 476 (2023).

Supreme Court confronts questions like these, it ought to be highly attentive to policy concerns.<sup>247</sup>

The Court took a similarly dismissive attitude toward federal government efforts to combat the pandemic and ameliorate its effects. In January 2022, a month in which approximately 60,000 people died of COVID-19 in the United States,<sup>248</sup> the Court, in a per curiam opinion, enjoined enforcement of the Occupational Safety and Health Administration's (OSHA) rule mandating vaccination or masking and testing of employees in firms with at least 100 employees.<sup>249</sup> OSHA, an agency within the Department of Labor, had promulgated the rule as an "emergency temporary standard" (ETS) which allows OSHA to issue a rule before notice and comment; after the emergency standard is issued, the agency must conduct a notice and comment proceeding and promulgate a final rule within six months.<sup>250</sup> Exhibiting its hostility to decisive and innovative action in emergencies right off the bat, the Court pointed out that OSHA had used its emergency authority only nine times in its history, and "never to issue a rule as broad as this one," and "six [uses] were challenged in court, and only one of those was upheld in full."<sup>251</sup> In my view, that says more about the courts than OSHA, which appears to have used its emergency power sparingly, only to be greeted with hostility by reviewing courts. Of course, there is always the possibility that Presidents or agencies will abuse emergency powers to take actions that Congress would not authorize, but ordinary administrative law ought to be sufficient to constrain this potential abuse.<sup>252</sup>

In reviewing OSHA's ETS, although the Court did not use the phrase Major Questions Doctrine, the Court applied the reasoning

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247. *See id.* at 448, 450, 476 (discussing impossibility of taking an originalist approach to the First Amendment and morality of placing social welfare ahead of ideology in constitutional decision-making).

248. *COVID Data Tracker*, *supra* note 148.

249. *NFIB v. Dep't of Lab.*, 142 S. Ct. 661, 662 (2022).

250. 29 U.S.C. § 655(c).

251. *NFIB*, 142 S. Ct. at 663.

252. For example, such potential abuses include the Trump border wall and the Truman Steel Seizure. *See* Peter Baker, *Trump Declares a National Emergency, and Provokes a Constitutional Clash*, N.Y. TIMES (Feb. 15, 2019), <https://www.nytimes.com/2019/02/15/us/politics/national-emergency-trump.html> [<https://perma.cc/YZ6B-DCVE>]; *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-89 (1952).

of the MQD, characterizing the rule as a “significant encroachment into the lives—and health—of a vast number of employees” which requires “Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance.”<sup>253</sup> Because the Court in effect categorized the case as falling under the MQD, the legal question of agency authority was presented as “whether the Act plainly authorizes the Secretary’s mandate”<sup>254</sup> rather than what the Court might have asked under conventional *Chevron* or in a simple statutory construction decision before the advent of the MQD, which was whether the Act clearly precluded the agency’s interpretation.<sup>255</sup>

On the merits, the Occupational Safety and Health (OSH) Act instructs the agency to ensure that workers enjoy “safe and healthful working conditions”<sup>256</sup> by adopting standards that are “reasonably necessary or appropriate to provide safe or healthful employment.”<sup>257</sup> OSHA may adopt an emergency temporary standard without notice and comment if the agency determines “(A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger.”<sup>258</sup> OSHA determined that the COVID-19 virus is a toxic material, harmful physical agent, and a new hazard that, in the workplace, exposes employees to grave danger and that immediate action was necessary to reduce that danger.<sup>259</sup> The notice of issuance of the ETS documents the scientific bases for these determinations.<sup>260</sup>

Without confronting the agency’s legal understanding that communicable viruses are “toxic substances” or “harmful physical agents” under the OSH Act, the Supreme Court disputed the

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253. *NFIB*, 142 S. Ct. at 665 (quoting *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021), the case in which the Court rejected an eviction moratorium imposed by the Centers for Disease Control and Prevention).

254. *Id.*

255. *Chevron U.S.A., Inc. v. Nat’l Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984).

256. 29 U.S.C. § 651(b).

257. *Id.* § 652(8).

258. *Id.* § 655(c)(1).

259. *See* COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61402 (Nov. 5, 2021).

260. *Id.*

scientific basis for OSHA's action, again asserting that it knew more about the risk and prevalence of workplace COVID-19 transmission than OSHA's scientists and the public health authorities OSHA consulted during the process of formulating the ETS.<sup>261</sup> The Court characterized the ETS as addressing a general public health issue, beyond the scope of OSHA's authority over workplace health and safety, without a nod to the ETS's extensive discussion of the particular dangers posed by COVID-19 in workplaces.<sup>262</sup> OSHA examined numerous studies and voluminous data from across the United States and concluded that:

The documentation of so many workplace clusters suggests that exposures to SARS-CoV-2 occur regularly in workplaces where employees come into contact with others. This prevalence of clusters, combined with some evidence that many infections occurred within the 14-day incubation period for SARS-CoV-2 and that exposures to infected persons outside the workplace were frequently ruled out, supports the proposition that exposures to and transmission of SARS-CoV-2 occur frequently at work. Multiple studies demonstrate high rates of COVID infections, illnesses, and fatalities in the wide range of occupations that require frequent or prolonged close contact with other people, indoor work, and work in crowded and/or poorly ventilated areas[.] The large numbers of infected employees suggest that SARS-CoV-2 is likely to be present in a wide variety of workplaces, placing unvaccinated workers at risk of serious and potentially fatal health effects.<sup>263</sup>

Invoking its general suspicious attitude toward innovative agency action even in a deadly public health emergency, the Court noted that “[i]t is telling that OSHA, in its half century of existence, has never before adopted a broad public health regulation of this

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261. *Id.* at 61406, 61408. Whether viruses are a life form has long been a subject of scientific inquiry. Most biologists do not consider viruses to be alive. See Luis P. Villarreal, *Are Viruses Alive?*, SCI. AM. 103 (2004) (“[V]iruses, though not fully alive, may be thought of as being more than inert matter: they verge on life.”).

262. *NFIB v. Dep’t of Lab.*, 142 S. Ct. 661, 665 (2022). For OSHA’s discussion of the risk of workplace exposure to COVID-19, see COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. at 61412-17.

263. COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. at 61417.



kind—addressing a threat that is untethered, in any causal sense, from the workplace.”<sup>264</sup>

Besides observing that once again the Court simply ignored OSHA’s evidence on the workplace threat posed by the virus, it might also be noted that there has never been a pandemic that was killing hundreds of people, including workers, per day for a sustained period in the time since OSHA was established.<sup>265</sup> As a different Court majority stated in its per curiam opinion staying an injunction against the Biden administration’s rule, promulgated by the Department of Health and Human Services that required health care workers to be vaccinated, “the vaccine mandate goes further than what the Secretary has done in the past to implement infection control. But he has never had to address an infection problem of this scale and scope before.”<sup>266</sup> Justices Thomas, Alito, Gorsuch, and Barrett, invoking MQD reasoning, dissented from this decision; they would have denied the federal government authority to require healthcare workers to be vaccinated against a communicable disease that was killing hundreds of their patients and coworkers each day.<sup>267</sup>

One might wonder why the Court did not credit the scientific bases for the COVID-related rules imposed at the federal, state, and local levels. Perhaps part of the problem was the skepticism concerning the need for severe measures and the efficacy of vaccines that was rampant on the news and in social media.<sup>268</sup> Further, the Justices may not have considered a fundamental difference between scientific research and the legal research with which they are much more familiar. If a scientist runs multiple experiments and all but one undercuts her thesis, she violates accepted practices if she ignores all but the favorable experiment and claims to have proven her thesis. In legal research, if one finds only a single favorable authority among a sea of unfavorable decisions, it is not out of the

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264. *NFIB*, 142 S. Ct. at 666.

265. See *Covid Data Tracker*, *supra* note 148.

266. *Biden v. Missouri*, 595 U.S. 87, 95 (2022).

267. See *id.* at 105 (Alito, J., dissenting).

268. James F. Smith, *Research Study: People Who Don’t Trust Vaccines Often Get COVID-19 Information from Facebook as Well as Conservative Media*, HARV. KENNEDY SCH. (July 5, 2023), <https://www.hks.harvard.edu/faculty-research/policy-topics/health/research-study-people-who-dont-trust-vaccines-often-get-covid> [<https://perma.cc/UJP2-ZADN>].

ordinary for a lawyer or judge to advance a conclusion based on the single, outnumbered authority. Great judges are capable of making fundamental changes in the law while plausibly pretending that what they are doing is implicit in preexisting legal principles, as the Court majority has done when creating the MQD. Perhaps the Justices assume that scientists and public health authorities treat scientific evidence the way they and other lawyers treat legal precedent.

In the OSHA case, the Court further explained why it did not consider combatting workplace exposure to COVID-19 to be within the scope of OSHA's mission:

Although COVID-19 is a risk that occurs in many workplaces, it is not an *occupational* hazard in most. COVID-19 can and does spread at home, in schools, during sporting events, and everywhere else that people gather. That kind of universal risk is no different from the day-to-day dangers that all face from crime, air pollution, or any number of communicable diseases. Permitting OSHA to regulate the hazards of daily life—simply because most Americans have jobs and face those same risks while on the clock—would significantly expand OSHA's regulatory authority without clear congressional authorization.<sup>269</sup>

No scientific knowledge is necessary to see the fallacies in this aspect of the Court's analysis. For one, the fact that a workplace danger is also present outside of workplaces has no bearing on OSHA's authority.<sup>270</sup> A dangerous ladder is dangerous whether used at work to help in painting an airplane fuselage or at home to clean the leaves out of the gutters. That does not mean OSHA cannot regulate the safety of ladders used in workplaces. Similarly, loud noises are dangerous inside workplaces and at home or in places of entertainment like concert halls, but OSHA has the authority to regulate workplace exposure to dangerous levels of noise.<sup>271</sup>

Second, and more fundamentally, common sense tells us that people have much less control over exposure to COVID-19 in their

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269. *NFIB*, 142 S. Ct. at 665.

270. *See id.*

271. *See* 29 U.S.C. § 655(c).

workplaces than they do in other settings. During the early months of the pandemic, millions of Americans did not have the luxury to work at home or the resources to stop working altogether.<sup>272</sup> People can avoid crowded places like sporting events and restaurants, and they can minimize their visits to other places of likely exposure such as food stores, pharmacies, and doctors' offices. They can even home school their children, and many colleges and universities were already requiring all students, faculty, and staff to be vaccinated before coming to campus and tested regularly once there. In a sense, the Court's attitude minimizes the heroism of the people who risked their lives in some of the lowest paying jobs in the economy to make sure that essential goods and services were available despite the pandemic.<sup>273</sup> Perhaps the majority Justices' collective life experiences did not include spending time in crowded workplaces during the pandemic where, as OSHA amply documented, the risk of exposure to COVID-19 was high.<sup>274</sup> The Supreme Court operated remotely for more than a year, hearing arguments by telephone while workers in places like grocery stores, factories, pharmacies, and restaurants had no opportunity for remote work. The fact that the Court upheld the vaccination requirement for health care workers whom they might encounter in close quarters during medical appointments adds to the sense that the Justices' life experiences might have contributed to their dismissive attitude toward the need for vaccination or masking in other workplaces.<sup>275</sup>

This analysis is not intended to relitigate the case or repeat arguments made by the dissenters. Rather, the intent is to demonstrate the Court's dismissive attitude toward science and innovation. The Court arrogates to itself the competence to judge whether

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272. See Rakesh Kochhar & Stella Sechopoulos, *COVID-19 Pandemic Pinches Finances of America's Lower- and Middle- Income Families*, PEWRSCH. CTR. (Apr. 20, 2022), <https://www.pewresearch.org/social-trends/2022/04/20/covid-19-pandemic-pinches-finances-of-americas-lower-and-middle-income-families/> [<https://perma.cc/G8V3-WH9H>].

273. See *id.*

274. Guidance on Preparing Workplaces for COVID-19, OSHA, Worker Exposure Risk to COVID-19 (2020).

275. See *Biden v. Missouri*, 595 U.S. 87, 93-94 (2002). The Justices are more likely to have encountered health care workers in crowded medical facilities than workers crowded together in other workplaces such as meat packing operations, manufacturing plants, or warehouses. At those medical facilities, the Justices would have observed masked and gloved professionals working in close contact with each other and with their patients.

an agency's scientific judgment is supported by a record that, for all appearances, it might not have actually read or considered in full. And it views innovation as suspicious even when an agency's unprecedented action is in reaction to an unprecedented situation.

The Court purports to be acting in the name of preserving Congress's authority, but allowing agencies to take bold steps in the face of emergency situations in no way diminishes Congress's control. Congress granted OSHA the power to issue Emergency Temporary Standards.<sup>276</sup> When the Court points out that ETSs, though rarely promulgated, have rarely survived judicial review, it confirms that the courts are frustrating, not advancing, Congress's intent. Further, if Congress does not approve of agency action, it has many tools to prevent or overturn it, ranging from legislation such as appropriations riders<sup>277</sup> and more durable funding restrictions,<sup>278</sup> which have long been used by Congress to prevent agencies from acting contrary to its wishes, to legislation altering the substance of agency authority. Congress could even legislate changes to standards of judicial review of agency action, either in specific situations or more broadly.<sup>279</sup>

The notion that the Court's attitude toward agency innovation is motivated by a desire to preserve Congress's authority is also belied by the fact that the Court sometimes disparages Congress's own efforts to innovate when it finds a new statute unprecedented. As Professor Leah Litman, writing in 2017, has explained in the context of separation of powers and federalism, "[e]very Justice on the Supreme Court has joined an opinion promoting the idea that legislative novelty is evidence of a constitutional defect, and this rhetoric has appeared in at least one majority opinion in each of the

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276. 29 U.S.C. § 655(c).

277. *See, e.g.*, Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-34, § 102, 110 Stat. 1321, 1321-220 (1996) (appropriations rider preventing OSHA from developing President Clinton's ergonomics rule); Consolidated Appropriations Act of 2022, Pub. L. No. 117-103, §§ 506-507, 136 Stat. 49, 496 (2022) ("Hyde Amendment" enacted every year to prevent federal funding for abortions).

278. *See* Beermann, *supra* note 25, at 84-90 (discussing Congress's power of the purse in relation to executive branch actions).

279. For example, when Congress ratified the Federal Trade Commission's power to promulgate trade regulation rules, it provided for enhanced procedures and review of rules under the substantial evidence standard when the arbitrary, capricious test would otherwise likely apply. *See* 15 U.S.C. § 57a(e)(3)(A).

last six terms.”<sup>280</sup> While she acknowledges that different considerations might apply to novel assertions of congressional power that limit individual rights,<sup>281</sup> it seems to me that her reasons for rejecting novelty as a basis for suspicion of statutes implicating separation of powers and federalism apply with equal force to assertions of federal regulatory power, and not only because at bottom all such statutes implicate the federalism concern of allocation of regulatory authority between state and federal governments. When the Court casts suspicion on a statute because it is novel, the Court devalues progress, research, and political evolution. This seems contrary to the role of courts in a democratic society.

The Court has taken a similar attitude toward the federal government’s efforts to combat climate change through reduction of greenhouse gas emissions. We have seen that the Court expressly invoked the MQD for the first time in *West Virginia v. EPA*, its decision rejecting the EPA’s effort to reduce greenhouse gas emissions.<sup>282</sup> As noted, the Court’s primary stated reason for rejecting the Clean Power Plan was its view that forcing power plants to shift away from coal to cleaner sources of energy was not authorized by the Clean Air Act’s requirement that the agency prescribe the “best system of emission reduction.”<sup>283</sup> As the Court acknowledged, the EPA determined that the threat of climate change required it to move beyond more traditional anti-pollution methods: “Rather than focus on improving the performance of individual sources, it would ‘improve the *overall power system* by lowering the carbon intensity of power generation.’ And it would do that by forcing a shift throughout the power grid from one type of energy source to another.”<sup>284</sup>

In rejecting the EPA’s authority, the Court mused about the unlikelihood that Congress would vest such significant authority in

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280. Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407, 1411-12 (2017); see also Metzger, *supra* note 23, at 1638-40 (discussing the Court’s antinovelty doctrines as applied to congressional statutes).

281. Litman, *supra* note 280, at 1413-14.

282. 142 S. Ct. 2587, 2615-16 (2022).

283. 42 U.S.C. § 7411(a)(1).

284. *West Virginia v. EPA*, 142 S. Ct. at 2611-12 (citation omitted) (quoting Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64662, 64703 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60)).

the agency through “‘vague language’ in ‘a long-extant statute.’”<sup>285</sup> The Court also highlighted the fact that the EPA’s approach to greenhouse gas emissions is innovative; the EPA has never before gone beyond measures that require power plants to burn their fuels more cleanly into regulation requiring reconsideration of the fuels themselves.<sup>286</sup> The Court barely mentioned either the serious threat climate change presents to the United States and the world or the EPA’s scientific basis for constructing its new regulatory system. Whether this is within the bounds of traditional legal controls on agency action or not, it exhibits an aggressive judicial intervention into the regulatory process based on judicial suspicion of agency expertise and innovation, with potentially disastrous consequences.

At bottom, the Court’s current applications of the MQD and the demise of conventional *Chevron* deference denies agencies the power to address newly-understood serious social problems or adapt their regulatory programs to improved understandings and technology.<sup>287</sup> One of the ironies of the MQD is the Court’s insistence that it is necessary to preserve Congress’s authority over major policy decisions. This is directly contrary to the Court’s justification of *Chevron* deference: that it was necessary to effectuate Congress’s delegation of interpretive authority to agencies and make sure that courts do not impose their own views on decisions better left to the political branches.<sup>288</sup> Meanwhile, as we shall see, the Court is not shy about rejecting some of Congress’s most important policy decisions on shaky constitutional and logical grounds.

#### *F. Limiting Structural Innovation*

This Section briefly addresses how the Court has also employed constitutional appointment and removal doctrine in its effort to suppress government innovation, in two ways.<sup>289</sup> First, in the name of separation of powers, the Court has been hostile toward innovative agency structures, making it more difficult for Congress to structure

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285. *Id.* at 2623 (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2018)).

286. *Id.* at 2611-12.

287. See Freeman & Spence, *supra* note 51, at 4-5.

288. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865-66 (1984).

289. See Metzger, *supra* note 23, at 1610-11.

agencies for maximum effectiveness. Second, the Court has exacerbated the effects of gridlock in the Senate that prevents the President from appointing important federal officers when the Senate refuses to confirm appointees. While some of the decisions have clear bases in constitutional text and precedent, the Court has also created new understandings that stymie agency and presidential action. The key point here is that when the Court overturns Congress's or the President's structural innovations, it prevents the other branches from employing what, in their view, is the most effective structure for achieving their policy goals.

Consider first the Court's creation of the ban on single-headed independent agencies<sup>290</sup> and the ban on double for cause protections from removal for independent agency officials.<sup>291</sup> When Congress created the Consumer Finance Protection Bureau, it created an unusual independent agency in that it was headed by a single director, removable by the President only for cause.<sup>292</sup> This structure would allow for energetic and expedited enforcement of the numerous laws and regulations that were assigned to the Bureau because the director would not have to employ potentially lengthy and expensive proceedings to convince colleagues on a multi-member board either to bring enforcement actions or find that a target had committed a violation. And protection from removal would ensure that the director would not have to be overly concerned about the views of a President who might disapprove not only of the director's actions but of the purposes and policies embodied in the statute itself. The check on the director would be judicial review of final agency rules and orders, as is typical for all regulatory agencies, independent or not.

The Supreme Court found this arrangement unconstitutional because it unduly hampered the President's power to oversee execution of the law.<sup>293</sup> Prominent in the Court's reasoning was the novelty of the single-headed directorship of the agency; the Court noted that "[p]erhaps the most telling indication of [a] severe constitutional problem' with an executive entity 'is [a] lack of historical

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290. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2192 (2020).

291. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 484 (2010).

292. 12 U.S.C. § 5491(b)(1).

293. *Seila Law*, 140 S. Ct. at 2203-04.

precedent' to support it. An agency with a structure like that of the CFPB is almost wholly unprecedented."<sup>294</sup> The remedy was excision of the director's protections from removal, which in effect allows the President to substitute his or her policy preferences for those embodied in the financial statutes and regulations that were considered vital to prevent another debacle along the lines of the 2008 financial crisis.<sup>295</sup> Rather than facilitating democratic decision-making by Congress as the Court claims it is doing in MQD cases,<sup>296</sup> the Court rejected Congress's policy and political judgment that a single-headed agency was the best vehicle for accomplishing its regulatory policy.<sup>297</sup> A similar story can be told about the Court's creation of the ban on two layers of for cause protection for officers within independent agencies; rather than accept the most democratic branch's decision regarding optimal agency structure, the Court substituted its own undemocratic judgment, that having two levels of for cause protection unduly restricts the President's ability to supervise agency action.<sup>298</sup>

The second category involves the Court's recently announced limitations on the President's ability to make temporary appointments to fill vacant positions in independent agencies.<sup>299</sup> Independent agency heads are considered principal officers of the United States who must be appointed by the President with the advice and consent of the Senate.<sup>300</sup> The Constitution also provides that when the Senate is in recess, the President may make temporary appointments to "fill up all Vacancies that may happen during the Recess" without the Senate's advice and consent.<sup>301</sup> Those appointments expire at the end of the Senate's next session.<sup>302</sup>

A simple refusal by the Senate to confirm appointments to federal agencies can prevent agencies from fulfilling their responsibilities by depriving them of the quorum legally required to act. This is

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294. *Id.* at 2201 (citation omitted) (quoting *Free Enter. Fund*, 561 U.S. at 505).

295. *Id.* at 2211.

296. *See, e.g.*, *West Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022).

297. *Seila Law*, 140 S. Ct. at 2193, 2211.

298. *See Free Enter. Fund*, 561 U.S. at 514.

299. *See generally* *NLRB v. Noel Canning*, 573 U.S. 513 (2014).

300. *See* U.S. CONST. art. II, § 2, cl. 2.

301. *See id.* at § 2, cl. 3.

302. *Id.*



most likely when the Senate majority is not held by the President's party.<sup>303</sup> This happened to the National Labor Relations Board during the Obama administration when the Republican Senate refused to confirm nominees to the Board.<sup>304</sup> President Obama reacted by making enough recess appointments to restore the Board's quorum, but the Supreme Court held the appointments were constitutionally invalid because even though the Senate was not functioning and most Senators were not in Washington, the Senate was holding pro-forma sessions every three days, which, according to the Court, meant that the Senate was not in recess long enough for the President to make recess appointments.<sup>305</sup> The Court cited historical practice to support its conclusion that a three day break was not long enough, noting that although

[t]here are a few historical examples of recess appointments made during inter-session recesses shorter than 10 days.... [W]hen considered against 200 years of settled practice, we regard these few scattered examples as anomalies. We therefore conclude, in light of historical practice, that a recess of more than 3 days but less than 10 days is presumptively too short to fall within the Clause.<sup>306</sup>

In other words, innovation “bad,” historical practice—even if not universal—“good.” And adherence to a mostly observed constitutional norm is more important than ensuring that Congress's statutes are enforced.

In short, the Court's appointment and removal jurisprudence crushes innovation and makes execution of the law more difficult. And contrary to the democracy-supporting justification for the MQD, the Court's aggression here replaces Congress's decisions with the Court's notion of optimal agency structure based on its preference for more presidential control.

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303. See, e.g., Sheryl Gay Stolberg, *Obama Bypasses Senate Process, Filling 15 Posts*, N.Y. TIMES (Mar. 27, 2010), <https://www.nytimes.com/2010/03/28/politics/28recess.html> [<https://perma.cc/L2WP-UPVN>].

304. *Id.*; see *NLRB v. Noel Canning*, 573 U.S. 513, 520 (2014).

305. *Noel Canning*, 573 U.S. at 520-21, 536.

306. *Id.* at 537-38.

### III. NON-ADMINISTRATIVE LAW ANTI-INNOVATION DOCTRINES

Beyond administrative law, there are a number of doctrines of relatively recent vintage that share important characteristics with those discussed above: although they claim to be built on neutral principles of law, they incorporate built-in limits on government innovation and thus prevent government entities from enacting and enforcing innovative policies designed to deal with new, worsened, or newly understood social problems. These doctrines often render policy irrelevant by imposing binding legal norms that are not sensitive to social welfare.<sup>307</sup> In my view, this is an inappropriate use of government power by federal judges, including Supreme Court Justices. All of federal law should be at least somewhat sensitive to the welfare of the people governed by it.<sup>308</sup>

In this Part, I discuss two non-administrative law areas in which the Court has created doctrines that explicitly suppress innovation without explicit regard to the social welfare consequences of its doctrines. The areas are gun control and limits on the power to spend for the general welfare. In a final Part, I briefly discuss examples of the Court suppressing innovation by characterizing state efforts to address problems as the minority view, implying that innovative solutions by state and local governments are constitutionally suspect simply because they are in the minority, a notion that is contrary to conventional accounts of the value of diversity inherent in the federal system.

#### A. *Gun Control*

Although it is not an agency regulatory matter, another area in which the Court has constructed an explicitly anti-innovation jurisprudence involves gun control. Gun violence is considered by leading authorities to be a serious public health issue in the United States.<sup>309</sup> The United States is a world leader in many areas, of which it is rightly proud, but the fact that there are more deaths per

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307. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008).

308. See Beermann, *supra* note 246, at 447.

309. See *Gun Violence*, *supra* note 6.

capita due to gun violence not involving warfare than any other developed country is not one of them.<sup>310</sup>

Things are currently so bad that as of this Article's writing in late July 2023, there were more mass shootings (420) than days in the year thus far (212), with 465 people killed and 1208 injured.<sup>311</sup> After more than 100 years of denying that the Second Amendment applied to the states,<sup>312</sup> or that it created a right to carry a firearm for any purpose other than state militia service,<sup>313</sup> the Court has over the last three decades created and applied a fundamental right to own firearms.<sup>314</sup> It has frozen this right in accordance with eighteenth-century law and made this right immune to means-ends analysis.<sup>315</sup> Together, these new features of Second Amendment law mean that no matter how bad the gun violence problem gets in the United States, unless the Court reverses itself or the Second Amendment is itself amended—both exceedingly unlikely occurrences—the Court has rendered the federal and state governments virtually powerless to do anything about it.

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310. Kara Fox, Krystina Shveda, Natalie Croker, & Marco Chacon, *How US Gun Culture Stacks Up with the World*, CNN (Apr. 10, 2023, 10:40 AM), <https://www.cnn.com/2021/11/26/world/us-gun-culture-world-comparison-intl-cmd/index.html> [<https://perma.cc/J2R9-CDZC>].

311. *Mass Shootings in 2023*, GUN VIOLENCE ARCHIVE, <https://www.gunviolencearchive.org/reports/mass-shooting> [<https://perma.cc/UVT4-E56N>]. There were fifty-four mass shootings in January 2023. *Id.* “Mass shooting” is defined as any shooting incident in which four or more people are shot. *General Methodology*, GUN VIOLENCE ARCHIVE, <https://www.gunviolencearchive.org/methodology> [<https://perma.cc/8NEZ-L6A5>].

312. *United States v. Cruikshank*, 92 U.S. 542, 542 (1875); *Presser v. Illinois*, 116 U.S. 252, 265 (1886). I recognize that the Court's pronouncements in *Cruikshank* and *Presser* that the Second Amendment does not apply to the states were long before the Court began selectively incorporating the Bill of Rights into the Fourteenth Amendment and applying those rights against the states. However, the Second Amendment is different in kind from the remainder of the rights-granting provisions of the Bill of Rights in that it is directed at preserving state authority rather than recognizing a substantive right. In that regard, it is most analogous to the Tenth Amendment. *See McDonald v. City of Chicago*, 561 U.S. 742, 896-97 (2010) (Stevens, J., dissenting).

313. *United States v. Miller*, 307 U.S. 174, 178 (1939) (“In the absence of any evidence tending to show that possession or use of a ‘shotgun having a barrel of less than eighteen inches in length’ at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.” (citation omitted)); *Lewis v. United States*, 445 U.S. 55, 65-66 n.8 (1980).

314. *See generally* *District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald*, 561 U.S. at 742.

315. *See* *N.Y. State Rifle & Pistol Ass'n, Inc., v. Bruen*, 142 S. Ct. 2111, 2127 (2022).

The Court's creation of the right to bear arms for self-defense began in 2008 in *District of Columbia v. Heller*.<sup>316</sup> In that case, the Court, by a vote of five to four, struck down both the District's ban on possession of handguns and its requirement that any legally-possessed weapon in the home be rendered inoperable.<sup>317</sup> Relying on a hotly disputed historical record,<sup>318</sup> in the face of the Second Amendment's textual reference to "[a] well regulated Militia," and with no support in more than 200 years of caselaw, the Court held that the Second Amendment created (or recognized a preexisting) fundamental right to possess a handgun for self-defense in the home.<sup>319</sup>

Notably, the Court's opinion provided little specific guidance on how the right would be applied to the broad range of gun control measures in place across the country. The Court allowed that the right "is not unlimited" and might not apply to "sensitive places" where guns have traditionally been excluded.<sup>320</sup> Without endorsing the concept, the Court also noted that "the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues."<sup>321</sup> It also suggested that the right applied to the "the sorts of weapons ... 'in common use at the time'" in keeping with "the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'"<sup>322</sup> However, the Court also characterized as "bordering on the frivolous" any argument that the Second Amendment applied only to weapons in existence at the time

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316. *See generally* 554 U.S. 570 (2008).

317. *Id.* at 574-76, 636. Washington D.C.'s regulation would allow possession of a hunting rifle in the home that could be made operable for the hunting expedition. *Id.* at 710 (Breyer, J., dissenting).

318. *See id.* at 661-62 (Stevens, J., dissenting). In *Heller* and *McDonald*, dissenters disputed the Court's view of the original intent behind the Second Amendment with powerful historical evidence. *Id.*; *McDonald*, 561 U.S. at 896-97 (Stevens, J., dissenting). At a minimum, both sides were able to marshal history to support their views of the proper reading of the Second Amendment. *Heller*, 554 U.S. at 598, 661-62 (Stevens, J., dissenting); *McDonald*, 561 U.S. at 768, 896-97 (Stevens, J., dissenting).

319. *Heller*, 554 U.S. at 636.

320. *Id.* at 626.

321. *Id.*

322. *Id.* at 627 (first quoting *United States v. Miller*, 307 U.S. 174, 179 (1939); then quoting 4 WILLIAM BLACKSTONE, COMMENTARIES \*148-149 (1769)).

of the framing.<sup>323</sup> In its earliest cases recognizing the right, other than noting these traditional limitations, which implies that history would be key in future cases, the Court did not specify a standard of review of gun control measures that lower courts should apply.<sup>324</sup>

The Court's reference to "dangerous and unusual" weapons raises one of the two central problems with the Court's historical approach to gun control: the fundamental differences between firearms of the eighteenth century and firearms today. Even assuming the Framers intended to create or recognize a right to own firearms for self-defense purposes, it is fanciful to imagine that they would have come up with the virtually unlimited right the Court is imposing today had they known about the revolution in weapons technology that would take place in the future. Freezing gun control in 1789 makes about as much sense as applying traffic regulations developed in the era of horse and buggy to automobiles or former understandings of air rights over property to the age of the airplane, where the Takings and Due Process clauses would protect property owners' rights to prevent airplanes from flying over their land no matter how high.<sup>325</sup> Just as property rights evolved in recognition of technological advances, so too could gun rights.<sup>326</sup> Is there any chance that the Framers imagined a world of easily available, powerful, and concealable handguns and semi-automatic rifles, all with large magazines?

The second central problem with the Court's historical approach is that it takes no account for social change in the intervening 230-plus years. A predominantly urban society with high crime rates presents significantly different social problems than those the Framers confronted in 1789. The Court majority is apparently not interested in social welfare. In response to Justice Breyer's

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323. *Id.* at 582. Solidifying this point, the Court later rejected the Massachusetts Supreme Judicial Court's determination that the Second Amendment did not protect the right to own stun guns because "they 'were not in common use at the time of the Second Amendment's enactment,'" explaining that it had rejected this limitation in *Heller*. *Caetano v. Massachusetts*, 577 U.S. 411, 411-12 (2016) (per curiam) (quoting *Commonwealth v. Caltoro*, 740 Mass. 774, 781 (2015)).

324. *See, e.g.*, *United States v. Cruikshank*, 92 U.S. 542, 559 (1875).

325. *See, e.g.*, *Branning v. United States*, 654 F.2d 88, 91, 103 (Ct. Cl. 1981).

326. *See* Vivek Wadhwa, *Laws and Ethics Can't Keep Pace with Technology*, MIT TECH. REV. (Apr. 15, 2014), <https://www.technologyreview.com/2014/04/15/172377/laws-and-ethics-cant-keep-pace-with-technology/> [<https://perma.cc/8Z7G-SELU>].

complaint that the Court had failed to establish a level of scrutiny for gun regulations, the Court rejected the idea of levels of scrutiny in language that applies to all of the provisions of the Bill of Rights: “The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting upon.”<sup>327</sup> This is truly revolutionary, casting doubt on numerous decisions allowing restrictions on speech, assembly, and religious exercise among other constitutional rights when necessary to further an overriding governmental interest. It reinforces a central effect of the Court’s recent decisions in a number of areas of law, that the Court is not interested in nor concerned about the damage its decisions might do to the country or the world.

The closest the Court came to looking beyond the purely historical basis of the Second Amendment right is contained in its observations regarding the popularity and utility of handguns for self-defense:

[T]he American people have considered the handgun to be the quintessential self-defense weapon. There are many reasons that a citizen may prefer a handgun for home defense: It is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper-body strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police. Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.<sup>328</sup>

In my view, the utility of handguns for self-defense is a much better basis for the Court’s decision than the fact that in 1789 the law might have protected the right to own handguns. Although there is little case law on the issue, I have always assumed that the right to self-defense is protected by substantive due process. The paucity of case law on the subject is likely due to the fact that no government in the United States would abolish self-defense in criminal cases,

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327. *Heller*, 554 U.S. at 634 (emphasis omitted).

328. *Id.* at 629.

and I do not believe that a state could constitutionally abolish self-defense as defense to a homicide or battery charge.<sup>329</sup> Imagine the reaction to law that required innocent persons to submit to being killed or seriously injured at risk of incarceration for murder.<sup>330</sup>

As another ground for suspicion regarding the law at issue in *Heller*, the Court noted that “[f]ew laws in the history of our Nation have come close to the severe restriction of the District’s handgun ban.”<sup>331</sup> This is consistent with the Court’s denigration of innovation by state and local governments in their attempts to deal with pressing social issues in many different areas of law. We love federalism because of the diversity it allows, except, apparently, when that diversity produces policy with which we do not agree.

After the Court created the right to possess handguns in the home for self-defense, the lower courts were left to elaborate on the contours of the right. Because the District of Columbia is a federal enclave, *Heller* left a threshold issue of whether the Second Amendment applies to state and local gun control measures.<sup>332</sup> This was a live issue because unlike the other rights-granting provisions of the Bill of Rights, the Second Amendment’s text and history point to federalism concerns including potential federal interference with the state militia and the fear of a federal standing army, which was

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329. *See, e.g., id.* at 599; *McDonald v. City of Chicago*, 561 U.S. 742, 749-50 (2010).

330. The Seventh Circuit has upheld the denial of a self-defense right to inmates in prison disciplinary cases, meaning that prisoners must submit to violent assaults by other inmates if they want to avoid discipline. *See Rowe v. DeBruyn*, 17 F.3d 1047, 1054 (7th Cir. 1994). Judge Ripple dissented, but he conceded that “no court has ruled directly on whether the state may, consistent with the due process clause, impose, as a matter of absolute liability, a sanction for protecting oneself from death or bodily harm.” *Id.* at 1054 (Ripple, J., dissenting). More recently, an appellate court in New Jersey rejected the Seventh Circuit’s view and held that prisoners have a constitutional right to raise self-defense in disciplinary hearings. *See DeCamp v. N.J. Dep’t of Corr.*, 902 A.2d 357, 362 (N.J. Super. Ct. App. Div. 2006). The Washington Court of Appeals, in an unpublished opinion, recognized a constitutional right to self-defense in an animal cruelty case where the defendant was charged with shooting a dog that “showed its teeth, jumped on him, and came at him again when he tried to push it back.” *See Washington v. Hull*, No. 31078-7-III, 2014 WL 7231496, at \*1, 5-6 (Wash. Ct. App. 2014). Such a right might imply that the government may not prohibit the use of readily available means of self-defense. It would not imply, however, that the government may not prohibit the use of any conceivable weapon, and it is likely constitutional for the government to punish the use of an illegally possessed weapon that happened to be used in self-defense even if it must honor the defense in the primary criminal case. *See generally Eugene Volokh, State Constitutional Rights of Self-Defense and Defense of Property*, 11 TEX. REV. L. & POL. 399 (2007).

331. *Heller*, 554 U.S. at 629.

332. *See id.* at 636-37, 639 (Stevens, J., dissenting).

very controversial at the Framing.<sup>333</sup> Two years after its landmark decision in *Heller*, in *McDonald v. City of Chicago*, the Court, again by a five to four vote, held that the Second Amendment applies fully to state and local gun control regulations.<sup>334</sup> This conclusion was based on the Court's simple characterization of the right to "individual self-defense [as] 'the central component' of the Second Amendment right."<sup>335</sup> The Court rejected several arguments for limiting the Second Amendment's application to federal regulation or to apply a less stringent version of the Second Amendment to state and local law.<sup>336</sup>

As noted, these decisions provided little guidance on the standards courts would apply to gun control measures going forward.<sup>337</sup> Despite its explicit refusal to specify or apply a level of scrutiny in *Heller*, the lower federal courts apparently began evaluating gun control laws under a two-step approach which included assessment of "how close the law comes to the core of the Second Amendment right and the severity of the law's burden on that right."<sup>338</sup> Other courts employed more straightforward versions of strict and intermediate scrutiny which weigh restrictions of a right against the government's reasons for imposing them.<sup>339</sup> The Court, in *New York Rifle & Pistol Association, Inc. v. Bruen*, responded by reiterating emphatically that "*Heller* and *McDonald* do not support applying means-end scrutiny in the Second Amendment context."<sup>340</sup> Instead,

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333. *See id.* at 598 (majority opinion) ("During the 1788 ratification debates, the fear that the Federal Government would disarm the people in order to impose rule through a standing army or select militia was pervasive in Antifederalist rhetoric."). The dissenters argued that this history indicates that the Framers were concerned only with militia service, not with an individual right to bear arms for self-defense. *See id.* at 646-68 (Breyer, J., dissenting).

334. 561 U.S. 742, 750 (2010).

335. *Id.* at 767 (emphasis omitted) (quoting *Heller*, 554 U.S. at 599).

336. *See id.* at 758, 778-80.

337. *See supra* notes 320-24 and accompanying text.

338. *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2126 (2022) (quoting *Kanter v. Barr*, 919 F.3d 437, 441 (7th Cir. 2019)).

339. *See id.* (citing *Kolbe v. Hogan*, 849 F.3d 114, 133 (4th Cir. 2017)) (strict scrutiny); *Kachalsky v. County of Westchester*, 701 F.3d 81, 96 (2d Cir. 2021) (intermediate scrutiny)). Justice Breyer, in dissent in *Heller*, cited Adam Winkler's article which demonstrated that state courts across the country have applied means-ends analysis to their constitutions' protections of the right to bear arms under a "reasonable regulation" standard. Apparently none applied strict scrutiny. 554 U.S. at 691 (Breyer, J., dissenting); *see* Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 686, 716-17 (2007).

340. For a comprehensive critique of the use of history in *Bruen*, see generally Albert W.



the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms.”<sup>341</sup> The Court went on to hold that the Second Amendment grants a universal right for law-abiding citizens to carry weapons in all public places except those that have historically been understood to be “sensitive places” where guns might be banned, and possibly additional spaces that are sufficiently similar to those historically recognized.<sup>342</sup>

The Court also emphatically rejected the argument that the proper time frame for evaluating the historical basis for the Second Amendment’s application to state and local governments is the period surrounding the ratification of the Fourteenth Amendment rather than the period of the Framing of the Bill of Rights.<sup>343</sup> In the Court’s view, this distinction was not relevant to the outcome in *Bruen* because “the public understanding of the right to keep and bear arms in both 1791 and 1868 was, for all relevant purposes, the same with respect to public carry.”<sup>344</sup> But this decision cut off two possible avenues of innovation regarding gun control, changed views, and circumstances in the years between the adoption of the Bill of Rights and the end of the Civil War and differences between expectations regarding federal regulation of firearms and state and local measures in the same area. This latter possibility is especially likely with regard to the Second Amendment for two reasons: first, because state and local governments have primary responsibility for regulating crimes and torts that might involve firearms, and second, due to the roots of the Second Amendment in federalism concerns over preservation of state authority over the militia.

As discussed above, the Court’s suggestion that means-ends analysis is inappropriate when applying provisions of the Bill of Rights is inconsistent with a great deal of constitutional law and reflects Justice Thomas’s strong commitment to an exclusively

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Alschuler, *Twilight-Zone Originalism: The Supreme Court’s Peculiar Reasoning in New York State Pistol & Rifle Association v. Bruen*, 32 WM. & MARY BILL RTS. J. 1 (2023).

341. *Bruen*, 142 S. Ct. at 2127.

342. *Id.* at 2133-34.

343. *Id.* at 2137 (“[T]he scope of the protection applicable to the Federal Government and States is pegged to the public understanding of the right when the Bill of Rights was adopted in 1791.”).

344. *Id.* at 2138.

historical methodology.<sup>345</sup> In *Bruen*, Justice Thomas quoted *Heller*'s justification for rejecting means-ends analysis:

[In *Heller*, we] declined to engage in means-end scrutiny because “[t]he very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.” We then concluded: “A constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all.”<sup>346</sup>

No matter how many times the Court repeats this incorrect characterization of the way the Bill of Rights is applied, it will not be accurate unless and until the Court transforms its entire constitutional rights jurisprudence into something that would be unrecognizable today. Cases in which the Court has applied a means-ends analysis to restrictions on speech, exercise of religion, due process, and equal protection are too numerous to count.<sup>347</sup> Justice Thomas’s insistence that means-ends analysis does not apply to enumerated provisions of the Bill of Rights is simply wrong as a matter of precedent, and it is hard to imagine the Court abandoning means-ends analysis in speech, press, and religion cases where numerous restrictions on the rights have been approved despite the First Amendment’s seemingly absolute language. The most puzzling aspect of this element of the Court’s analysis is that Justices who

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345. *See supra* notes 337-42 and accompanying text. The possible spillover effect of *Bruen*'s rejection of means-ends analysis for First Amendment doctrine has been recognized by Clay Calvert and Mary-Rose Papandrea in *The End of Balancing? Text, History & Tradition in First Amendment Speech Cases after Bruen*, 18 DUKE J. CONST. L. & POL'Y 59 (2023). In my view, the paucity of legislative history concerning the First Amendment distinguishes it from Second Amendment jurisprudence, although I suppose the Court could produce a historical basis for eliminating means-ends analysis in the First Amendment area as well.

346. *Bruen*, 142 S. Ct. at 2129 (quoting *Heller*, 554 U.S. 570, 634 (2008)) (second alteration in original).

347. *See, e.g.*, *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 437-38, 455 (2015) (upholding Florida's ban on solicitation of campaign donations by candidates for elected judicial offices as “narrowly tailored” to accomplish Florida's interest in preserving public confidence in the judiciary); *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 65-68 (2020) (applying strict scrutiny to restrictions on attendance at houses of worship during COVID-19 pandemic and concluding that New York's rule was not narrowly tailored to serve a compelling state interest).

routinely write or join opinions applying means-ends analysis in other cases signed on to this analysis without qualification.<sup>348</sup>

*Bruen* thus strongly confirms the Court's determination to disallow innovative government responses to a serious social problem that seems to become worse as time goes by.<sup>349</sup> It may well be that the two men challenging New York's licensing scheme were treated unfairly and should have received their licenses. It may also be the case that Washington D.C.'s total ban on handgun possession is an unwise and counterproductive measure. But I find it difficult to overstate the oddity (to use as mild a word as possible) of the reality concerning gun control in the United States. More than 230 years after the adoption of the Second Amendment, when gun violence barely merited public notice except perhaps with regard to rare cases of dueling, a handful of unaccountable government officers, relying on history to the exclusion of good policy, have rendered governments across a nation of more than 300 million people powerless to determine the best way to address the widespread problem of gun violence that exists virtually everywhere in the country, rural and urban, north and south, east and west. And these very same officials limit government action on similarly serious problems in the name of protecting democracy. There is something seriously out of whack here. What rational person would choose a legal system that ignores both the law's social effects and the will of the people?<sup>350</sup>

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348. In a concurring opinion, Justice Alito endorsed the banishment of means-ends analysis from Second Amendment jurisprudence, which he based exclusively on the precedent of *Heller*. See *Bruen*, 142 S. Ct. at 2160-61 (Alito, J., concurring).

349. Justice Kavanaugh noted in a concurring opinion that New York's gun licensing scheme which only allows but does not require local governments to grant licenses to qualified applicants is shared by only a few other states, while the vast majority, forty-three, require licenses to be granted to qualified applicants. *Id.* at 2161-62 (Kavanaugh, J., concurring) ("Going forward, therefore, the 43 States that employ objective shall-issue licensing regimes for carrying handguns for self-defense may continue to do so. Likewise, the 6 States including New York potentially affected by today's decision may continue to require licenses for carrying handguns for self-defense so long as those States employ objective licensing requirements like those used by the 43 shall-issue States."). Once again, innovation is suspect and disparaged.

350. See Beermann, *supra* note 246, at 476-77.

*B. The Spending Power and Coercion*

Perhaps the most striking recent example of the Court imposing its will over that of Congress is its rejection of the Medicaid expansion in the Affordable Care Act under its Spending Power jurisprudence, which is a purely judicial invention designed to limit innovation by Congress.<sup>351</sup> In one of the most monumental pieces of legislation passed in decades, Congress required states participating in the Medicaid program to dramatically expand eligibility “by 2014 to cover all individuals under the age of 65 with incomes below 133 percent of the federal poverty line.”<sup>352</sup> The federal government would pay 90 percent of the increased costs, with states required to pay the remaining ten percent.<sup>353</sup> This was a central feature of one of President Barack Obama’s signature programs, designed to expand access to health insurance by requiring all Americans either to purchase health insurance or pay a penalty which would be used to subsidize government-provided healthcare.<sup>354</sup>

The Medicaid expansion was immediately challenged as beyond Congress’s constitutional power to collect taxes and spend for the “general Welfare,” granted in Article I of the Constitution.<sup>355</sup> It is well-established that the purposes for which Congress may appropriate funds are not limited to the enumerated powers that follow in Article I and elsewhere in the Constitution.<sup>356</sup> It is also well-established that Congress may place conditions on the receipt of federal funds that it lacks the power to impose directly.<sup>357</sup> For example, although Congress might not have the power to impose a nationwide speed limit or a nationwide drinking age, it can deny a

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351. See *NFIB v. Sebelius*, 567 U.S. 519, 588 (2012). On the Medicaid expansion, see generally Nicole Huberfeld, Elizabeth Weeks Leonard & Kevin Outterson, *Plunging into Endless Difficulties: Medicaid and Coercion in National Federation of Independent Business v. Sebelius*, 93 B.U. L. REV. 1 (2013); Jack M. Beermann, *NFIB v. Sebelius and the Right to Health Care: Government’s Obligation to Provide for the Health, Safety, and Welfare of Its Citizens*, 18 N.Y.U. J. LEGIS. & PUB. POL’Y 277 (2015).

352. *Sebelius*, 567 U.S. at 576 (emphasis omitted) (citing 42 U.S.C. § 1396a(a)(10)(A)(I) (VIII)).

353. See *id.*

354. See *id.* at 539.

355. U.S. CONST. art. I, § 8, cl. 1.

356. See Beermann, *supra* note 351, at 284 nn. 28-31 (citing *South Dakota v. Dole*, 483 U.S. 203 (1987); *United States v. Butler*, 297 U.S. 1 (1936)).

357. See *id.* at 285.

portion of federal highway funds to states that do not follow federal speed limit and drinking age guidelines.<sup>358</sup> In the Medicaid program, what this means is that although Congress cannot require states to provide free health care to anyone, Congress may condition grants to states for health care spending on state compliance with federal eligibility standards.

Over the years, the Supreme Court has placed four limitations on federal imposition of conditions for receipt of federal funds, the application of one of which is a pure innovation crusher.<sup>359</sup> First, the condition must be clear so that states know what they are agreeing to when they accept federal funds.<sup>360</sup> Second, the condition must be related to the program being funded.<sup>361</sup> Third, the condition must not itself be unconstitutional, for example, by requiring states to limit speech critical of the federal government.<sup>362</sup> Fourth, the state must not be coerced into accepting the condition.<sup>363</sup> It is this final limitation that is most problematic, as we shall see by examining the Court's treatment of the Medicaid expansion.

There are numerous problems with the coercion element of spending power analysis. First, the Court has failed to provide a clear standard to guide Congress, the lower courts, and the states on when a condition on the receipt of federal funds will be found to be coercive.<sup>364</sup> Second, and related to the first problem, under current conditions of a heavy federal tax burden and state constitutional balanced budget requirements, many conditions on federal funding

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358. See *South Dakota v. Dole*, 483 U.S. 203, 206, 211-12 (1987) (drinking age); *Nevada v. Skinner*, 884 F.2d 445, 446, 454 (9th Cir. 1989) (speed limit). The Ninth Circuit also noted that Congress's power to regulate interstate commerce supported the imposition of a national speed limit on interstate highways. *Id.* at 454.

359. See Beermann, *supra* note 351, at 285. I have omitted the requirement that the spending be for the "general Welfare" because that applies to all federal spending, not only spending with conditions.

360. *Id.* at 286.

361. *Id.*

362. *Id.*

363. *Id.*

364. See Huberfeld et al., *supra* note 351, at 46-75; Megan Ix, Note, *National Federation of Independent Business v. Sebelius: The Misguided Application and Perpetuation of an Amorphous Coercion Theory*, 72 MD. L. REV. 1415, 1448, 1450 (2013) (suggesting "real choice" of participation in the federal program as a clearer standard than what the Court has provided).

might be realistically viewed as coercive.<sup>365</sup> In a sense, the federal government has become a massively coercive machine, if only because the federal tax burden leaves less room for states to create and fund their own programs.<sup>366</sup> States have, unsurprisingly, become dependent on federal funding for many essential services, including road building and maintenance, public transportation, and public education, to name a few.<sup>367</sup> The expansion of federal funding into these areas has allowed the federal government to vastly increase the reach of federal law.<sup>368</sup> The way the Court avoids the conclusion that all conditions are potentially coercive is by finding coercion only when changes to a preexisting program make it exceedingly difficult for the states to reject federal funding to avoid the new condition.<sup>369</sup> In other words, the coercion prohibition is transgressed only when Congress determines that innovation is necessary, whether due to changed conditions or changed policies.

The most fundamental logical problem with applying the coercion element of the Court's spending power jurisprudence to invalidate changes to existing programs is the undeniable power of Congress to repeal any federal program altogether any time. As I have previously explained, no one denied, as Justice Ginsburg pointed out in her dissent in *National Federation of Independent Business v. Sebelius*, that Congress was free to repeal the Medicaid program and replace it with a new program, let's call it Medicaid Version 2, which contained the eligibility standards of the Affordable Care Act.<sup>370</sup> Viewing the imposition of new conditions on an existing program as coercive is another example of the Court casting suspicion on innovation by Congress. There is no possibility that Medicaid would have been unconstitutional if it contained the

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365. See TAX POL'Y CTR., BRIEFING BOOK (2020), <https://www.taxpolicycenter.org/briefing-book/what-are-state-balanced-budget-requirements-and-how-do-they-work> [<https://perma.cc/3H7A-4TT6>].

366. All but two of the states are required by law to balance their budgets, most by constitutional provision but a few by statute. See *id.* In operation the stringency of enforcement of balanced budget requirements varies among the states. *Id.* By contrast, the federal government is free to spend as much as Congress appropriates regardless of revenue. U.S. CONST. art. I, § 8, cl. 1.

367. See, e.g., Beermann, *supra* note 351, at 284-85.

368. See *id.*

369. See, e.g., NFIB v. Sebelius, 467 U.S. 519, 588 (2012).

370. 467 U.S. at 636 (Ginsburg, J., dissenting); see Beermann, *supra* note 351, at 286-87.

Affordable Care Act's range of coverage and state contribution levels when it was initially established.<sup>371</sup> The coercion element attacks only innovation, that is, alterations to preexisting programs. Congress may innovate due to changed conditions, changed political alignments, or an altered social consensus, and the Court has no legitimate reason to prevent statutory evolution when it would have upheld the revised statute in the first place.<sup>372</sup>

I do not mean to deny that state officials may feel great pressure to accept new, more onerous financial or other conditions on participation in longstanding federal programs. Large cooperative federal/state spending programs spawn expectations among members of the public and create barriers to alternative methods of providing the services involved. For example, without Medicaid, it is highly likely that a large network of state and privately funded charity hospitals would fill at least some of the space currently occupied by that federal program. And, as I have noted previously, “[t]he expectation that government will provide medical care for those who cannot afford it is so ingrained in the mind[s] of Americans that while adjustments can be made in light of changing policy and available resources, wholesale abandonment of the duty is unthinkable.”<sup>373</sup> But I find it difficult to perceive a constitutional basis for disabling Congress from making changes it finds desirable, whether for reasons of social welfare or out of politically-related policy concerns. The coercion element of the Court's spending power jurisprudence is designed and implemented to suppress innovation without a firm constitutional basis.

Finally, the coercion restriction on Congress's power to “provide for the general welfare” is decidedly non-textualist and non-originalist,<sup>374</sup> making it inconsistent with the Court's general commitment to those methods of construing the Constitution. There is no textual basis in the Spending Clause itself for the Court to strike

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371. See Beermann, *supra* note 350, at 286-87.

372. In my view, the only logical basis for the Court's rejection of the Medicaid expansion is that states are constitutionally obligated to provide health care to those that cannot afford it, which means that they would be constitutionally coerced into accepting the federal government's new eligibility standards. See *id.* at 287. Either that, or the Court majority simply disapproved of the Medicaid expansion on unstated policy or political grounds.

373. Beermann, *supra* note 351, at 287.

374. U.S. CONST. art. I, § 8, cl. 1.

down a funding provision that relates to the welfare of the United States; any constitutional limitation on that power must be found elsewhere in the Constitution or be based on a normative theory of constitutional construction.<sup>375</sup>

### *C. Denigrating Novelty*

Another rhetorical tool that the Court uses to suppress innovation is to denigrate a state or local practice as uncommon or aberrant as compared to that of other jurisdictions.<sup>376</sup> We have seen this already in the Court's characterization of New York's COVID-19 measures as "much tighter than those adopted by many other jurisdictions hard-hit by the pandemic" as among the reasons for finding them insufficiently narrowly tailored to be applied constitutionally to restrict gatherings in houses of worship.<sup>377</sup> Across a number of substantive areas, the Court's denigration of novelty amounts to an absurd claim that "majority rules" is a valid argument regarding the constitutionality of a practice.

A good example is the Court's 1991 decision in *Connecticut v. Doehr* in which it struck down a Connecticut statute that allowed tort plaintiffs to attach defendants' real property upon filing a lawsuit, subject to a probable cause hearing.<sup>378</sup> It is no secret that plaintiffs in civil litigation are often unable to collect their judgments because defendants can hide or otherwise shield assets during the potentially long pendency of a lawsuit. Apparently, the Connecticut legislature viewed this as a problem that warranted a

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375. For example, it would be perfectly appropriate for the Court to invalidate conditions included in a spending power provision that violate rights protected by the First Amendment's free speech clause or the Fifth Amendment's due process clause. But the text of the Spending Clause itself does not suggest any limitation on Congress other than the expenditure must be for the "general welfare." See *id.*; Beermann, *supra* note 246, at 463-64.

376. See Beermann, *The Supreme Common Law Court of the United States*, *supra* note 4, at 164.

377. See *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2022).

378. 501 U.S. 1, 4, 6 (1991) (footnote omitted). I have pointed out that on the day that this case was argued, argument was also heard in *County of Riverside v. McLaughlin*, 500 U.S. 44, 44, 58-59 (1991), in which the Court later held that a criminal suspect arrested without a warrant could be held for up to 48 hours without being brought before a judge for a probable cause hearing. See Jack M. Beermann, Barbara A. Melamed & Hugh F. Hall, *The Supreme Court's Tilt to the Property Right: Procedural Due Process Protections of Liberty and Property Interests*, 3 B.U. PUB. INT. L.J. 9, 9-10 (1993).



legislative solution.<sup>379</sup> But the Court disagreed with the Connecticut legislature's judgment, finding that "the interests in favor of an *ex parte* attachment, particularly the interests of the plaintiff, are too minimal" to outweigh the harm to the defendant that might result from the attachment in light of the risk of an erroneous attachment.<sup>380</sup>

For present purposes, the most important aspect of the Court's analysis relates to the fact that Connecticut's scheme was apparently innovative, since most states were content to require advance notice to defendants. After minimizing the state's interest in ensuring that victorious plaintiffs can collect their judgments and relating historical practice, the court observed that "Connecticut's statute appears even more suspect in light of current practice. A survey of state attachment provisions reveals that nearly every State requires either a preattachment hearing, a showing of some exigent circumstance, or both, before permitting an attachment to take place."<sup>381</sup> After the decision, the Connecticut courts continued issuing attachments, but only after adversarial hearings,<sup>382</sup> and the legislature responded to the decision by codifying that requirement and adding a requirement, suggested in the Supreme Court's opinion, that the plaintiff show some exigency for a prejudgment attachment.<sup>383</sup>

The Court also used the fact that a state's rule was contrary to that of the majority of other states in *Santosky v. Kramer*, a case about the proper standard of proof that applies in proceedings to terminate parental rights.<sup>384</sup> In *Santosky*, the Court rejected New York state's statute allowing termination of parental rights based on a finding by a "fair preponderance of the evidence" that a child

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379. For numerous reasons, defendants in complete control of their assets may also be less likely to be in a hurry to end litigation through settlement than plaintiffs. Connecticut's statute may have evened the parties' bargaining power to an extent.

380. *Doehr*, 501 U.S. at 16.

381. *Id.* at 17.

382. See Elizabeth A. Alquist, Comment, *Balancing the Checklist: Connecticut's Legislative Response to Connecticut v. Doehr*, 26 CONN. L. REV. 721, 740-41 (1994) (discussing Calfee v. Usman, 224 Conn. 29 (1992)).

383. 1993 Conn. Acts 1743 § 3 (Reg. Sess.) (codified at CONN. GEN. STAT. § 52-278e (2023) (discussed in Alquist, *supra* note 382, at 742)).

384. 455 U.S. 745, 747, 749 (1982).

is “permanently neglected.”<sup>385</sup> The Court concluded that due process requires a higher standard of proof, at least clear and convincing evidence.<sup>386</sup> The Court based this decision on the “fundamental liberty interest of natural parents in the care, custody, and management of their child.”<sup>387</sup> There is no question that the interest of parents in preserving their familial relationship with their children is one of the most weighty ever encountered in law, perhaps exceeded only in cases involving capital punishment, where the litigant’s very life is at stake.<sup>388</sup> Thus, it is not surprising that the Court would demand a more reliable standard of proof than the “fair preponderance” standard, which, according to the Court “indicates both society’s ‘minimal concern with the outcome,’ and a conclusion that the litigants should ‘share the risk of error in roughly equal fashion.”<sup>389</sup>

So far, so good. But one aspect of the Court’s analysis is troubling. The Court noted that 38 of 53 American jurisdictions require a higher standard of proof than New York:

New York permits its officials to establish “permanent neglect” with less proof than most States require. Thirty-five States, the District of Columbia, and the Virgin Islands currently specify a higher standard of proof, in parental rights termination proceedings, than a “fair preponderance of the evidence.” The only analogous federal statute of which we are aware permits termination of parental rights solely upon “evidence beyond a reasonable doubt.”<sup>390</sup>

As with the other instances of such reasoning discussed in this Article, the Court’s reliance on the variance between New York’s rule and that of other jurisdictions is an attack on innovation. Perhaps

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385. *Id.* at 747.

386. *Id.* at 747-48.

387. *Id.* at 753.

388. *See id.*

389. *Id.* at 755 (quoting *Addington v. Texas*, 441 U.S. 418, 423 (1979)).

390. *Id.* at 749-50 (citing the Indian Child Welfare Act of 1978, 25 U.S.C. § 1912(f)) (footnote omitted). More recently, in *Tyler v. Hennepin County*, 143 S. Ct. 1369, 1378 (2023), the Court noted that Minnesota was among a minority of fourteen states that do not “require that excess value to be returned to the taxpayer” whose property is sold to satisfy outstanding tax debt. It may violate federal law to not require the return of excess value to taxpayers after a tax sale but the fact that it is a minority practice should be irrelevant to that determination.

New York and the other fifteen jurisdictions in which the preponderance standard applies better understand the social problem of child neglect than the majority of jurisdictions. Although I tend to agree with the Court's decision that more than a mere preponderance of the evidence ought to be required before a parent's relationship with their biological child is legally terminated, in my view the tally of jurisdictions is, and should be, irrelevant.

The Court's denigration of novelty and innovation by the states is corrosive of one of the signal aspects of American federalism. There are great variations in legal, political, social, and economic culture among the states.<sup>391</sup> Contrary to federal constitutional law, some states recognize constitutional positive rights to things such as education,<sup>392</sup> open space,<sup>393</sup> environmental protection,<sup>394</sup> and protection of workers,<sup>395</sup> to name the most prominent examples. Longstanding theory supports the notion that freedom to innovate among the states is highly protective of liberty because citizens with sufficient resources can relocate to jurisdictions more in keeping with their values or more protective of their interests.<sup>396</sup> Citizens who lack sufficient political power to change their state or local laws can vote with their feet and relocate to a jurisdiction with laws they prefer.<sup>397</sup> The Court's denigration of novelty is a sort of legal imperialism, denying states and localities the ability to provide a social environment more aligned with the preferences and values of their citizens and residents.

## CONCLUSION

The Supreme Court has almost always been the most conservative branch of the United States government. It has taken sides in many of the nation's most hotly contested social issues, such as civil

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391. See generally McConnell, *supra* note 239.

392. *E.g.*, MICH. CONST. art. VIII, § 2.

393. *E.g.*, CAL. CONST. art. XXVIII, § 1.

394. *E.g.*, PA. CONST. art. I, § 27.

395. *E.g.*, FLA. CONST. art. X, § 24.

396. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418 (1956).

397. *Id.* at 418.

rights creation and enforcement,<sup>398</sup> protection of workers' safety and bargaining rights,<sup>399</sup> abortion rights,<sup>400</sup> and gun control.<sup>401</sup> In the line of MQD cases discussed in the bulk of this article, the Court has set about to render agencies powerless to act against some of the most pressing problems facing mankind, including climate change and a pandemic that is known to have killed more than one million people in the United States and over seven million people worldwide.<sup>402</sup>

The Court's primary stated basis for constructing and applying this novel doctrine is to preserve Congress's authority over federal law. But the Justices are well aware that due to extreme partisan political polarization, Congress is unlikely to take the action necessary to satisfy the Court's newly-minted limitations on agency authority. If the Justices truly believe that Congress is in a position to act regarding agency power, it would be just as logical to allow agencies to go forward whenever, as the Chief Justice put it, an agency asserts authority with a "colorable" basis in the text of a federal statute, and leave it to Congress to disagree, through legislative changes such as appropriations riders.<sup>403</sup> If the legislative power, including the power of the purse, is not a sufficient check on agencies overstepping the bounds of their authority, then the Court's reliance on the preservation of Congress's authority is similarly unconvincing. Agencies are politically accountable through the President who appoints Executive Branch agency heads and has tools to bring pressure to bear on heads of independent agencies, even those with a majority appointed by the current President's predecessors. Congress is accountable to the people. The Supreme Court's Justices, once appointed, are accountable only to themselves and the judgment of history.

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398. See Beermann, *supra* note 4, at 1034-35.

399. See, e.g., *Janus v. AFSCME*, Council 31, 138 S. Ct. 2448, 2460 (2018).

400. See, e.g., *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022).

401. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

402. *COVID-19 Coronavirus Pandemic*, WORLDOMETER, <https://www.worldometers.info/coronavirus/> [<https://perma.cc/97UE-LS59>].

403. *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022).