NONDELEGATION BY ANY OTHER NAME: THE MAJOR QUESTIONS DOCTRINE AND THE ADMINISTRATIVE STATE

INTRODUCTION

It has been nearly a century since the United States Supreme Court last struck down a delegation of congressional power to the President.[1] Over that time, however, the federal administrative state has vastly grown in importance and authority. And this growth appears even starker when contrasted with the increasingly atrophied role of Congress.[2] This status quo, when confronted with a Supreme Court inclined towards a formalistic view of separation of

1. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 542 (1935).

2. *See* Robert L. Glicksman & Richard E. Levy, *The New Separation of Powers Formalism and Administrative Adjudication*, 90 GEO. WASH. L. REV. 1088, 1106 (2022).

powers, has necessarily given way to renewed conflict over the scope of the President's power to act in Congress's absence.[3] The Court's mode of choice for resolving that conflict has been the major questions doctrine.[4]

That doctrine has not wanted for critics. Among the most strident are those claiming that the major questions doctrine is an anti-textual vector for minority rule.[5] This criticism unsurprisingly echoes those laid at the feet of the Court's previous attempts to rein in congressional delegations of authority: namely, that such efforts are indistinguishable from the contemporaneous overreaches of substantive due process.[6] This Comment argues that these consanguinity arguments are a sleight of hand, allowing critics of the Roberts Court's slow unwinding of almost a century of unconstitutional overreach by Congress and administrative agencies to avoid squarely addressing the nondelegation principles inherent in the Constitution's original public meaning.

Part I of this Comment examines the Court's landmark New Deal era nondelegation cases, *Panama Refining Co. v. Ryan*[7] and *A.L.A. Schechter Poultry Corp. v. United States*,[8] and the Court's subsequent abandonment of this robust approach to the separation of powers. Part II considers the development of the major questions doctrine from the 1990s to the present. In particular, Part II evaluates the apparent dual nature of the major questions doctrine and the implications of that dual nature. Part III compares these jurisprudential eras and proposes that the modern major questions doctrine has filled the gap left by the Court's failure to re-embrace a robust form of the nondelegation doctrine. Ultimately, this Comment concludes that the major questions doctrine has been a necessary step towards restoring the equilibration and separation of powers to the state understood by the founding generation.

I. HERE TODAY, GONE TOMORROW: NONDELEGATION WITH BITE UNDER *PANAMA REFINING* AND *SCHECHTER POULTRY*

For some time, the nondelegation doctrine—the principle that the branches of government violate the separation of powers when they transfer their power to another branch[9]—was an object of

3. *Id.* at 1105–07.

4. *Id.* at 1120–22.

5. *See, e.g.*, Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1050–51 (2023).

6. *See* Fed. Power Comm'n v. New Eng. Power Co., 415 U.S. 345, 352–53 (1974) (Marshall, J., concurring in part and dissenting in part) ("[Nondelegation] is surely as moribund as the substantive due process approach of the same era . . . .").

7. 293 U.S. 388 (1935).

8. 295 U.S. 495 (1935).

9. *See Nondelegation Doctrine*, BLACK'S LAW DICTIONARY (11th ed. 2019).

inconsequence and derision eclipsed only by the substantive due process doctrine of the *Lochner* era.[10] Understanding this phenomenon requires consideration of the cases that defined the nondelegation doctrine of the New Deal era, as well as the broader political context that ultimately brought an untimely end to that doctrine.

A. Panama Refining Co. v. Ryan

The case that marked the beginning of this short-lived era of nondelegation was *Panama Refining Co. v. Ryan*.[11] In *Panama Refining*, the Court considered, inter alia, the constitutionality of § 9(c) of the National Industrial Recovery Act of 1933.[12] Section 9(c) permitted the President to prohibit the production and transportation of petroleum and petroleum products in excess of limits set by state governments.[13] It did not, however, provide any guidance as to how the President should select the state policies to enforce.[14] "So far as this section is concerned, it gives to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit."[15] The Court deemed this grant of authority to be an unconstitutional delegation of legislative authority.[16]

This holding was grounded in the lack of any limiting principle in § 9(c).[17] Such a rigid formulation of the nondelegation doctrine is consistent with a formalistic view of the separation of powers.[18] As Chief Justice Hughes explained,

> The question whether such a delegation of legislative power is permitted by the Constitution is not answered by the argument that it should be assumed that the President has acted, and will act, for what he believes to be the public good. The point is not one of motives but of constitutional authority, for which the best of motives is not a substitute.[19]

Even within this formalistic framework, however, the Court recognized what has never been seriously doubted by proponents of a robust nondelegation doctrine: Congress may authorize the executive to act

---

10. *See Fed. Power Comm'n*, 415 U.S. at 352–54 (Marshall, J., concurring in part and dissenting in part).
11. 293 U.S. 388 (1935).
12. *Id.* at 414.
13. National Industrial Recovery Act, ch. 90, § 9(c), 48 Stat. 195, 200 (1933).
14. *See id.*
15. *Pan. Refin. Co.*, 293 U.S. at 415.
16. *Id.* at 430.
17. *Id.* at 420.
18. *See* Glicksman & Levy, *supra* note 2, at 1098–102 (explaining the distinctive features of the formalist approach to separation of powers doctrine).
19. *Pan. Refin. Co.*, 293 U.S. at 420.

with flexibility in implementing Congress's stated legislative policies.[20] Accordingly, Congress may delegate responsibility for administering a statute only to the extent that boundaries are provided for the executive to administer within.[21] These boundaries ensure that it is ultimately Congress that retains the Article I legislative power and that courts have a benchmark for judging when that power is being arrogated.

Proponents of the nondelegation status quo point to the "intelligible principle" test as providing that benchmark.[22] Under that test, a delegation of congressional authority passes constitutional muster when it provides "an 'intelligible principle' to guide the delegee's exercise of authority."[23] In other words, "a delegation is permissible if Congress has made clear to the delegee 'the general policy' he must pursue and the 'boundaries of [his] authority.'"[24] But there are serious reasons to doubt that the modern incarnation of the intelligible principle test, as explained in *Lichter v. United States*,[25] is actually consistent with the case that originally announced that phrasing, *J.W. Hampton, Jr., & Co v. United States*.[26] Chief among those reasons is *Schechter Poultry*.

B. A.L.A. Schechter Poultry Corp. v. United States

Some four months after its decision in *Panama Refining*, the Court again invoked the nondelegation doctrine to invalidate portions of the National Industrial Recovery Act in *Schechter Poultry*.[27] Section 3 of the Act empowered the President to create codes of fair competition upon the request of trade groups or on his own motion.[28] But neither § 3 nor any other provision of the Act provided a standard for assessing whether the President was implementing the law Congress had passed or whether he was in fact creating new law

---

20. *Id.* at 421 ("The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply."); *accord* Gundy v. United States, 139 S. Ct. 2116, 2135–38 (2019) (Gorsuch, J., dissenting) (cataloging the ways in which Congress may empower administrative entities without running afoul of the separation of powers).

21. *Pan. Refin. Co.*, 293 U.S. at 421.

22. *See* Glicksman & Levy, *supra* note 2, at 1106–07.

23. *Gundy*, 139 S. Ct. at 2129 (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)).

24. *Id.* at 146 (alteration in original) (quoting Am. Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946)).

25. 334 U.S. 742, 785 (1948).

26. 276 U.S. 394, 409 (1928).

27. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935).

28. National Industrial Recovery Act, ch. 90, § 3, 48 Stat. 195, 196–97 (1933).

himself.[29] Chief Justice Hughes, again writing for the majority, questioned:

> What is meant by "fair competition" as the term is used in the Act? Does it refer to a category established in the law, and is the authority to make codes limited accordingly? Or is it used as a convenient designation for whatever set of laws the formulators of a code for a particular trade or industry may propose and the President may approve (subject to certain restrictions), or the President may himself prescribe, as being wise and beneficent provisions for the government of the trade or industry in order to accomplish the broad purposes of rehabilitation, correction and expansion which are stated in the first section of Title I?[30]

Surprisingly—perhaps even inexplicably for believers in the provenance of the intelligible principle test—the words "intelligible principle" are nowhere to be found in Chief Justice Hughes's majority opinion or even in Justice Cardozo's concurrence, despite the Court having decided *Hampton & Co.* nearly a decade earlier than *Schechter Poultry*.[31] The natural conclusion to draw then is that the Court did not view the intelligible principle test as the guiding light of nondelegation it would come to be.

C. The Death of Nondelegation and the Birth of the Modern Administrative State

The cat and mouse competition between the nascent administrative state of the New Deal era and the nondelegation doctrine was decisively over by the end of the 1940s. Just as Justice Owen Roberts's fateful "switch in time"[32] in *West Coast Hotel Co. v. Parrish*[33] brought an end to the *Lochner* era of substantive due process, so too did *Lichter v. United States*[34] end the era of the robust, formalistic nondelegation doctrine.[35] In its place would stand the intelligible principle test, to regrettable effect.

Congress came to realize it could evade the pesky need to put itself in the political line of fire by legislating on the pressing issues

---

29. *Schechter Poultry*, 295 U.S. at 541–42.

30. *Id.* at 531.

31. *See id.* at 519–51; *id.* at 551–55 (Cardozo, J., concurring). While the Court cites *Hampton & Co.*, 276 U.S. 394, it does so only to contrast the robustness of the legislative scheme at issue in that case with the complete paucity of limiting principles present in § 3. *See id.* at 541.

32. *See* John Q. Barrett, *Attribution Time: Cal Tinney's 1937 Quip, "A Switch in Time'll Save Nine,"* 73 OKLA. L. REV. 229, 233 (2021).

33. 300 U.S. 379, 380 (1937).

34. 334 U.S. 742, 742 (1948).

35. For further discussion of the dubious assertion that the modern form of the intelligible principle test originated in Justice Taft's opinion in *Hampton & Co.*, see *Gundy v. United States*, 139 S. Ct. 2116, 2138–41 (2019) (Gorsuch, J., dissenting).

of the day if it instead empowered an executive branch agency to take the bullet for it.[36] It is invariably easier and safer "to vote in favor of a bill calling for safe cars, clean air, or nondiscrimination, and to leave to others the chore of fleshing out what such a mandate might mean."[37] The broader implications of this change are beyond the scope of this Comment. But suffice it to say that one result of the seemingly endless proliferation of three-letter agencies has been a political power shift away from a directly elected branch, Congress, to an indirectly elected branch, the executive.[38] This shift undermines the separation of powers intended by the Framers.[39] So, given the gradual originalist takeover of the Supreme Court, the renewed interest in restoring the intended separation of powers is hardly shocking.[40]

II. ORIGINALISM COMES CALLING, BUT WILL THE MAJOR QUESTIONS DOCTRINE ANSWER?

Perhaps the most logical way for the Court's originalist Justices to address the delegation problem would have been to simply call for the resurrection of the *Panama Refining* and *Schechter Poultry* era nondelegation doctrine. And while of late there have been rumblings of willingness to reconsider the intelligible principle standard—indeed, as recently as 2019, Chief Justice Roberts and Justices Thomas, Alito, and Gorsuch signaled their willingness to reconsider the nondelegation doctrine[41]—it must be remembered that when originalism started gaining traction in the 1980s, it was a minority view.[42] Cracking the nondelegation door back open has, therefore, been a gradual process, and a process that could only be achieved by avoiding association with the attainted precedents of the New Deal era.[43] The solution? The major questions doctrine.

---

36. *See* JOHN H. ELY, DEMOCRACY AND DISTRUST 131 (1980).

37. *Id.*

38. *See id.* at 131–32. *Compare* U.S. CONST. art. I, § 2 (direct election of representatives), *and id.* amend. XVII (direct election of senators), *with id.* art. II, § 1, cl. 2 (indirect election of president).

39. *See generally* THE FEDERALIST NOS. 39, 47, 51 (James Madison).

40. *See* John O. McGinnis & Xiaorui Yang, *The Counter-Reformation of American Administrative Law*, 58 WAKE FOREST L. REV. 387, 390 (2023).

41. *See* Gundy v. United States, 139 S. Ct. 2116, 2131, 2137 (2019) (Gorsuch, J., dissenting); *id.* at 2131 (Alito, J., concurring) ("If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort. But because a majority is not willing to do that, it would be freakish to single out the provision at issue here for special treatment."). It seems quite likely that the only reason the intelligible principle test received a stay of execution in *Gundy* was the fact that Justice Kavanaugh did not participate in the case. *See id.* at 2120 (plurality opinion).

42. *See* Bret Boyce, *Originalism and the Fourteenth Amendment*, 33 WAKE FOREST L. REV. 909, 910–11 (1998).

43. *See* ELY, *supra* note 36, at 133 (lamenting the nondelegation doctrine's "death by association").

A. The Modern Doctrine Emerges: MCI

The precise origins of the major questions doctrine are a matter of debate amongst judges and scholars. Some point to cases as early as the 1897 case *ICC v. Cincinnati, New Orleans & Texas Pacific Railway Co.*[44] Others point to the 2000 case *FDA v. Brown & Williamson Tobacco Corp.*[45] And others still claim the modern incarnation of the doctrine began with the 1980 case *Industrial Union Department, AFL-CIO v. American Petroleum Institute.*[46] This Comment, however, will examine the doctrine beginning with *MCI Telecommunications Corp. v. AT&T Co.*[47]

The reason for this choice is that *MCI* is the earliest case exemplifying the core principles of the major questions doctrine, as it is applied by the modern Court. First, unlike *American Petroleum Institute*, in which Justice Stevens relied heavily on legislative history to determine the scope of the relevant delegation, *MCI* was resolved using textualist principles of statutory interpretation.[48] And second, *American Petroleum Institute* turned on OSHA's failure to make a predicate factual finding before issuing the challenged rule, whereas *MCI* examined whether Congress had given the FCC the authority to promulgate the challenged rule at all, regardless of its soundness as a matter of policy.[49]

For a case that set in motion such important jurisprudential changes, *MCI* could hardly have involved drier subject matter. The Court examined a telephone tariff filing rule issued by the FCC in 1983 that eliminated the requirement for MCI to file its long-distance rates with the FCC.[50] AT&T challenged the regulation, asserting that it was beyond the statutory authority of the FCC to eliminate the

---

44. *E.g.*, West Virginia v. EPA, 142 S. Ct. 2587, 2619 (2022) (Gorsuch, J., concurring) (citing ICC v. Cincinnati, New Orleans, & Tex. Pac. Ry. Co., 167 U.S. 479, 499 (1897)).

45. *E.g.*, Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475, 481 (2021) (citing FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)).

46. *E.g.*, Louis J. Capozzi III, *The Past and Future of the Major Questions Doctrine*, 84 OHIO ST. L.J. 191, 211 (2023) (citing Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 611, 615–16 (1980)).

47. 512 U.S. 218 (1994). The Court's opinion in *ICC*, 167 U.S. at 494–95, discusses similar principles to those that would later embody the major questions doctrine, but the administrative apparatus of the Gilded Age bears such little resemblance to that of the post-New Deal and APA era as to make efforts to connect administrative law precedents from the former era with the latter tenuous at best.

48. *Compare Am. Petroleum Inst.*, 448 U.S. at 646–52 (grounding the Court's decision in the statute's "legislative history"), *with MCI*, 512 U.S. at 225–28 (grounding the Court's decision in an argument about the meaning of the word "modify" within the statute).

49. *Am. Petroleum Inst.*, 448 U.S. at 662; *MCI*, 512 U.S. at 234.

50. *MCI*, 512 U.S. at 220–23.

filing requirement that § 203 of the Communications Act of 1934 mandated.[51] The Supreme Court, with Justice Scalia writing for the majority, agreed with AT&T that the FCC's power to "modify any requirement" of § 203 did not give the FCC the power to make "basic and fundamental changes" to the statute's scheme.[52] Using language that would later be quoted in part by Chief Justice Roberts's majority opinion in *Biden v. Nebraska*,[53] Justice Scalia noted:

> "Modify," in [the Court's] view, connotes moderate change. It might be good English to say that the French Revolution "modified" the status of the French nobility—but only because there is a figure of speech called understatement and a literary device known as sarcasm. And it might be unsurprising to discover a 1972 White House press release saying that "the Administration is modifying its position with regard to prosecution of the war in Vietnam"—but only because press agents tend to impart what is nowadays called "spin."[54]

It is notable that at the time he wrote the Court's opinion in *MCI*, Justice Scalia was also the Court's greatest backer of the *Chevron* doctrine.[55] In his dissent, Justice Stevens (author of *American Petroleum Institute*, a fact that further undermines that decision's claim to being the birthplace of the major questions doctrine) made the argument that the word "modify" was at least ambiguous enough to satisfy *Chevron* step one.[56] Squaring Justice Scalia's zealous contemporary advocacy for *Chevron* with the outcome of *MCI*, therefore, requires recognition that the major questions doctrine is

---

51. *Id.* at 222–23.

52. *Id.* at 225.

53. 143 S. Ct. 2355, 2369 (2023).

54. *MCI*, 512 U.S. at 228.

55. *See* William N. Eskridge et al., *Textualism's Defining Moment*, 123 COLUM. L. REV. 1611, 1673 (2023). The *Chevron* doctrine was the two-step process used by reviewing courts to assess whether to defer to an agency's interpretation of a statute. *See, e.g.*, Loper Bright Enters. v. Raimondo, 45 F.4th 359, 365 (D.C. Cir. 2022) ("At *Chevron* Step One, the court, 'employing traditional tools of statutory interpretation,' evaluates 'whether Congress has directly spoken to the precise question at issue.' 'If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" (citations omitted) (quoting Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 & n.9 (1984))), *rev'd*, 144 S. Ct. 2244. "If the statute considered as a whole is ambiguous, then at *Chevron* Step Two the court defers to any 'permissible construction of the statute' adopted by the agency." *Id.* (quoting Cigar Ass'n Am. v. FDA, 5 F.4th 68, 77 (D.C. Cir. 2021)). This approach fell out of favor at the Court and was ultimately abandoned in *Loper Bright Enterprises v. Raimondo*. 144 S. Ct. 2244, 2273 (2024) ("*Chevron* is overruled.").

56. *MCI*, 512 U.S. at 241–42, 245 (Stevens, J., dissenting).

not, as some have postulated, fundamentally *Chevron* step zero.[57] It is instead a distinct doctrine. *Chevron* deference was based on the premise that Congress had implicitly delegated interpretive authority to agencies.[58] The major questions doctrine addresses an issue that therefore underlaid *Chevron* deference: the extent to which Congress *can* implicitly delegate the authority to fill gaps in statutory language.[59]

B. The Major Questions Doctrine Finds Both of Its Feet: Brown & Williamson *and* Utility Air

The final years of the Rehnquist Court would see the major questions doctrine shift from being an obscure answer to obscure questions like those posed in *MCI* to a doctrine used to address agency action on pressing societal issues like the health effects of tobacco and the economic costs and benefits of regulating air pollution.[60] But the doctrine would also split into two distinct branches whose jurisprudential progeny remain estranged to the present day.

In *FDA v. Brown & Williamson Tobacco Corp.*,[61] the Court considered a 1996 FDA rule that pronounced the agency's authority to regulate nicotine and tobacco products as "drugs" and "drug delivery devices."[62] Writing for the majority, Justice O'Connor's formulation of the then-still-unnamed major questions doctrine departed from the one used in *MCI*. In *MCI*, the ultimate question was whether Congress could pass a law that effectively enabled an agency to "modify" a statute by disposing of the statute as drafted by Congress and replacing it with the agency's own design.[63] Given how such a law would violate not only the language of Article I, Section 1 but also almost certainly Article I, Section 7, the answer in *MCI* was a resounding no.[64] In *Brown & Williamson*, however, Justice O'Connor seemed to contemplate that it was merely the particular language of the statute at issue that foreclosed the FDA from assuming jurisdiction over new regulatory frontiers, stating that "[courts] must be guided to a degree by common sense as to the manner in which Congress is *likely* to delegate a policy decision of such economic and political magnitude to an administrative agency."[65]

---

57. *See* Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777, 787–88 (2017).

58. *Loper Bright*, 144 S. Ct. at 2282 (Gorsuch, J., concurring).

59. Coenen & Davis, *supra* note 57, at 806; *see Chevron*, 467 U.S. at 843–44.

60. *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 125 (2000); Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 307 (2014).

61. 529 U.S. 120 (2000).

62. *Id.* at 127.

63. *See* MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 225 (1994).

64. *See id.* at 234.

65. *Brown & Williamson*, 529 U.S. at 133 (emphasis added).

In contrast to *Brown & Williamson* stands *Utility Air Regulatory Group v. EPA*.[66] The *Utility Air* Court was returning to an issue that had seemingly already been decided in *Massachusetts v. EPA*[67]: the EPA's jurisdiction to regulate greenhouse gas emissions.[68] Writing for one five-vote majority in Parts I through II.B.1 of his opinion and a separate, seven-vote majority in Part II.B.2, Justice Scalia went to great lengths to attempt to distinguish *Massachusetts v. EPA*.[69] To do so, in Part II.A.1, Justice Scalia explained that the term "air pollutant," despite the Clean Air Act providing the term with only a single definition, a single definition the Court in *Massachusetts v. EPA* held included greenhouse gases, is susceptible to multiple meanings within the Clean Air Act.[70] Such verbal gymnastics should rightly leave committed textualists feeling somewhat uneasy.[71]

The explanation for Justice Scalia's apparent departure from the tenets of textualism in Part II.A.1 of *Utility Air* can be found, at least implicitly, in Part II.A.3 of his opinion. There, Justice Scalia addresses the EPA's decision to increase the statutorily defined regulatory emission threshold from 100 or 250 tons per year to 100,000 tons per year for greenhouse gases.[72] In its decision below, the D.C. Circuit had not reached the issue of the legality of that change, as it had held that the EPA was compelled to uniformly abide by the expanded statutory definition of "air pollutant" in the wake of *Massachusetts v. EPA*, and as a result, the regulated entities lacked standing to challenge the increased threshold, since they only stood to benefit from it.[73] But from an originalist perspective, the EPA's complete rewrite of the Clean Air Act's regulatory trigger via its "Tailoring Rule" flew in the face of fundamental separation of powers concerns.[74]

The only way to reach that issue and preserve the separation of powers was, therefore, to invoke the major questions doctrine in Part II.A.2.[75] By applying the major questions doctrine to the EPA's asserted authority to regulate greenhouse gas emissions through the Clean Air Act, Justice Scalia was able to sidestep the *Chevron* deference the EPA could have otherwise relied on to buttress its interpretation that "air pollutant" in the relevant sections of the

66. 573 U.S. 302 (2014).
67. 549 U.S. 497 (2007).
68. *See id.* at 497; *Util. Air*, 573 U.S. at 302.
69. *Util. Air*, 573 U.S. at 315–20.
70. *Id.* at 318–20.
71. *See, e.g.*, *id.* at 343–44 (Alito, J., concurring in part and dissenting in part) (discussing why "wrongly decid[ing]" *Massachusetts v. EPA* had forced the Court into a two-wrongs-make-a-right situation).
72. *Id.* at 325 (majority opinion).
73. *Id.*
74. *Id.* at 327–28.
75. *Id.* at 324.

Clean Air Act included greenhouse gas emissions.[76] But the major questions doctrine applied in *Utility Air* is unquestionably an enhanced, more robust form of the doctrine than the one used in *Brown & Williamson*. Justice Scalia explained:

> The power to require permits for the construction and modification of tens of thousands, and the operation of millions, of small sources nationwide falls comfortably within the class of authorizations that we have been reluctant to read into ambiguous statutory text. *Moreover*, in EPA's assertion of that authority, we confront a singular situation: an agency laying claim to extravagant statutory power over the national economy while at the same time strenuously asserting that the authority claimed would render the statute "unrecognizable to the Congress that designed" it.[77]

This bifurcated view of the major questions doctrine is not novel, having been previously proposed by authors such as Professor Cass Sunstein.[78] But Sunstein's analysis ultimately draws the lines in the wrong places.[79] Cases such as *Brown & Williamson* exemplify the weak form of the major questions doctrine, not the strong form.[80] Professor Sunstein is correct, however, to classify cases like *King v. Burwell*[81] in the weak form category,[82] since that case turned on the issue of whether Congress had delegated the particular authority in question (the weak form), not whether reading the agency's interpretation of the relevant statute fell within the bounds of Article I, Section 1 (the strong form).[83] Other observers of this phenomenon, such as Louis Capozzi, wrote on it before the Court's decision in *Biden v. Nebraska* and Justice Barrett's illuminating concurrence, which advocated for the weak form of the major questions doctrine.[84] As a result, they perceived *West Virginia v. EPA* to be the final word on the dueling visions of the major questions doctrine. For now, however, that seems to have been a false dawn.

---

76. *Id.* at 321–22.

77. *Id.* at 324 (emphasis added).

78. *See* Sunstein, *supra* note 45, at 484 (distinguishing between the "strong" version of major questions doctrine that requires clear congressional authorization before power is delegated to an agency and the "weak" version that permits delegation even when congressional authorization is ambiguous).

79. *See id.*

80. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

81. 576 U.S. 473 (2015).

82. Sunstein, *supra* note 45, at 488–89.

83. *See King*, 576 U.S. at 485–86 ("It is especially unlikely that Congress *would* have delegated this decision to the *IRS* . . . .") (first emphasis added).

84. Capozzi, *supra* note 46, at 191.

C. Almost Heaven for Nondelegation: From Gundy v. United States *to* West Virginia v. EPA

The Supreme Court recently had two clear-cut opportunities to address nondelegation. The first, in 2019, was *Gundy v. United States*.[85] And the second, in 2022, was *West Virginia v. EPA*.[86] But in both instances, the Court ultimately gave unsatisfactory answers.[87]

Gundy presented the clearest chance since the late 1940s to return to the robust nondelegation doctrine that *Panama Refining* and *Schechter Poultry* exemplified.[88] The Court considered whether 34 U.S.C. § 20913(d), part of the Sex Offender Registration and Notification Act, violated the nondelegation doctrine.[89] Section 20913(d) reads:

> The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this [Act] or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with [§ 20913(b)].[90]

This capacious language certainly makes the statute an edge case under the intelligible principle test, as it is not readily apparent from the statute what principles should guide the Attorney General's applicability determination. In this sense, the statute seems like a strong vehicle for reconsidering the nondelegation doctrine.

On the other hand, however, the general subject matter of the Sex Offender Registration and Notification Act made it a poor vehicle for reconsidering nondelegation. By addressing nondelegation through a challenge brought by a convicted sex offender, the odds of convincing one of the nondelegation-skeptical Justices of joining a majority opinion reinvigorating the doctrine surely dropped.

Even if Justice Alito's vote to affirm had no effect on the outcome of the case besides converting it from an affirmance by an equally divided court into a plurality affirmance,[91] *Gundy* represents a

---

85. 139 S. Ct. 2116 (2019).

86. 142 S. Ct. 2587 (2022).

87. The Court has also dodged the issue of nondelegation by deciding cases on other grounds when such alternative avenues, even alternative constitutional avenues, were available. *See, e.g.*, SEC v. Jarkesy, 144 S. Ct. 2117, 2127–28 (2024) ("Since the answer to the [Seventh Amendment] jury trial question resolves this case, we do not reach the nondelegation or removal issues.").

88. *See supra* Part I.

89. *Gundy*, 139 S. Ct. at 2121.

90. 34 U.S.C. § 20913(d).

91. *See Gundy*, 139 S. Ct. at 2130–31 (Alito, J., concurring in the judgment); *see also id.* at 2131 (Gorsuch, dissenting) (criticizing Justice Alito for "suppl[ying]

misstep and a missed opportunity. The absence of Justice Kavanaugh,[92] whose appointment to the Court would not be confirmed by the Senate until four days after *Gundy* was argued,[93] ultimately doomed reconsideration of the nondelegation doctrine and the intelligible principle test in the short term. The failure to address nondelegation in *Gundy* seems to have put direct consideration of the issue on the Court's back burner for the time being, as the Court has not decided a case on the issue in the subsequent five years.[94] It is ironic, therefore, that just after the Court passed the buck on nondelegation in *Gundy*, external events would force the Justices to once again evaluate the scope of agency power.

The COVID-19 pandemic would see government of all levels faced with unprecedented public policy issues. And yet, on the federal level, it would be the executive branch, through the administrative state, that would take the most high-profile actions in response to the pandemic and the societal fallout that it entailed.

Two pandemic-related cases from the Court's emergency docket would raise serious questions about the degree of control administrative agencies could exercise over society. Having failed to address nondelegation head-on in *Gundy*, the Court was forced to breathe new life into the major questions doctrine that had remained undisturbed by the Supreme Court since *King v. Burwell*.[95]

The first such case was *Alabama Ass'n of Realtors v. HHS*.[96] In the early weeks of the pandemic, Congress passed a limited-scale 120-day eviction moratorium.[97] When that moratorium lapsed without renewal, the CDC stepped in to take the reins by imposing a nationwide eviction moratorium on all residential properties.[98] Its basis for promulgating that sweeping moratorium? Section 361(a) of the Public Health Service Act, which states:

> The Surgeon General, with the approval of the [Secretary of Health and Human Services], is authorized to make and enforce such regulations as in his judgment are necessary to prevent

---

the fifth vote" but "not join[ing] the plurality's constitutionality or statutory analysis").

92. *Id.* at 2120 (plurality opinion).

93. *See* Emily Knapp et al., *Kavanaugh confirmed: Here's how senators voted*, POLITICO (OCT. 6, 2018, 4:02 PM), https://www.politico.com/interactives/2018/brett-kavanaugh-senate-confirmation-vote-count/; *Gundy*, 139 S. Ct. at 2120.

94. Andy Kriha et al., *U.S. Supreme Court Agrees to Hear Nondelegation Cases*, HOLLAND & KNIGHT (July 5, 2023), https://www.hklaw.com/en/insights/publications/2023/07/us-supreme-court-agrees-to-hear-nondelegation-case.

95. *See* Capozzi, *supra* note 46, at 215.

96. 141 S. Ct. 2485 (2021) (per curiam).

97. *Id.* at 2486.

98. *Id.* at 2486–87.

> the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession. For purposes of carrying out and enforcing such regulation, the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary.[99]

Predictably, the Court was not convinced that the "wafer-thin reed" of § 361(a) was sufficient to bear the weight of an unprecedented imposition on property rights across the United States.[100]

The Court's per curiam decision relied decidedly on the strong form of the major questions doctrine. Indeed, for the language of the doctrine itself, "We expect Congress to speak clearly when authorizing an agency to exercise powers of 'vast "economic and political significance,"'" the Court cited *Utility Air*, the ur-case of the strong form of the major questions doctrine.[101] And the discussion of the implausibility—arguably impossibility—of the CDC's interpretation of § 361(a) further highlights the connection between the strong form of the major questions doctrine and the nondelegation doctrine: "[T]he Government's read . . . would give the CDC a breathtaking amount of authority. It is hard to see what measures this interpretation would place outside the CDC's reach, and the Government has identified no limit . . . beyond the requirement that the CDC deem a measure 'necessary.'"[102]

Justice Breyer's dissent, joined by Justices Sotomayor and Kagan, asserted the necessity of a broad reading of the CDC's authority, in light of the prevailing circumstances of the pandemic.[103] The per curiam opinion in *Alabama Ass'n of Realtors* could perhaps have rejoined with Chief Justice Hughes's words from *Panama Refining*, which rang just as true during the COVID-19 pandemic as they did nearly a century earlier during the Great Depression: "The point is not one of motives but of constitutional authority, for which the best of motives is not a substitute."[104]

Just a few months after *Alabama Ass'n of Realtors*, the Court once again found itself faced with a problem of the same model: a challenge to regulatory action taken by the executive branch in the absence of legislative action by Congress, in *National Federation of*

---

99. 42 U.S.C. § 264(a).
100. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489.
101. *Id.* (citing Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).
102. *Id.* (citing 42 U.S.C. § 264(a)).
103. *Id.* at 2490–92.
104. Pan. Ref. Co. v. Ryan, 293 U.S. 388, 420 (1935).

Independent Business v. OSHA (*NIFB*).[105] In *NFIB*, that model took the form of a COVID-19 vaccine mandate.[106]

Following the September 2021 announcement of the planned mandate, in November 2021, OSHA issued an emergency workplace standard.[107] This rule required all employers with at least 100 employees to require their workers to either prove they were vaccinated against COVID-19 or show a negative COVID-19 test at least once a week.[108] OSHA's statutory justification for the rule was its organic statute, the Occupational Safety and Health Act of 1970.[109] That Act gives the Secretary of Labor the authority to issue workplace safety standards that mitigate the risks of occupational hazards.[110]

The per curiam in *NFIB* disagreed with OSHA's assessment that COVID-19 was an occupational hazard within the scope of the Occupational Safety and Health Act.[111] Unlike the dangers historically regulated by OSHA, the risks of COVID-19 are pervasive in society, and in most workplaces the disease spreads just as well in the work environment as it does outside it.[112] Along the same lines as the Court's decision in *Alabama Ass'n of Realtors*, the per curiam opinion found compelling that, "in its half century of existence, [OSHA had] never before adopted a broad public health regulation of this kind—addressing a threat that is untethered, in any causal sense, from the workplace."[113] Essentially invoking the strong form of the major questions doctrine, which examines whether an agency's action falls within the scope of authority that Congress can delegate without violating Article I, Section 1, the Court concluded that the responsibility of implementing a nationwide vaccine mandate was unambiguously the responsibility of Congress.[114]

Since the outcome of *NFIB* followed so logically from *Alabama Ass'n of Realtors*, perhaps the most interesting aspect of the case for the purposes of this Comment is Justice Gorsuch's forceful concurrence. Writing separately, and joined by Justices Thomas and

105. 142 S. Ct. 661 (2022) (per curiam).

106. *Id.* at 662; *see also* Ian Millhiser, *Yes, Covid-19 Vaccine Mandates are Legal*, VOX (July 30, 2021, 7:30 AM), https://www.vox.com/22599791/covid-vaccine-mandate-legal-joe-biden-supreme-court-jacobson-massachusetts-boss-employer (proposing a number of ways in which Congress could in practice mandate vaccination within the confines of its Article I powers).

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

108. *Id.*

109. *Id.*

110. *Id.* at 665.

111. *Id.*

112. *Id.*

113. *Id.* at 666.

114. *See id.* ("It is not our role to weigh [the] tradeoffs [of a vaccine mandate]. In our system of government, that is the responsibility of those chosen by the people through democratic processes.").

Alito, Justice Gorsuch lays out his case for the major questions doctrine as an augmentation of the nondelegation doctrine:

> [T]he major questions doctrine is closely related to what is sometimes called the nondelegation doctrine. Indeed, for decades courts have cited the nondelegation doctrine as a reason for applying the major questions doctrine. Both are designed to protect the separation of powers and ensure that any new laws governing the lives of Americans are subject to the robust democratic processes the Constitution demands.[115]

Justice Gorsuch would reiterate this view of the doctrine shortly thereafter in *West Virginia v. EPA*.[116]

Following in the footsteps of *Utility Air*, the Court's decision in *West Virginia* once again applied the major questions doctrine to invalidate an effort (although a different effort) by the EPA to reduce greenhouse gas emissions.[117] In the eyes of some, *West Virginia* decided the contest between the strong and weak forms of the major questions doctrine in favor of the strong form.[118] That view was backed up by Justice Gorsuch's concurrence, which delighted in the apparent victory of the strong form.[119] The settled major questions doctrine that emerged from *West Virginia* was effectively a clear statement rule, along the lines of those applied to waivers of sovereign immunity.[120] But that view of the major questions doctrine has since been cast into doubt.

D. The Return of Uncertainty: Biden v. Nebraska

After dealing with three major questions cases in rapid-fire succession, the Supreme Court would make it a fourth with *Biden v. Nebraska*.[121] The Court's ultimate decision to strike down President Biden's and the Department of Education's student loan forgiveness plan[122] was, like the COVID-19 era decisions in *Alabama Ass'n of Realtors* and *NFIB*, entirely unsurprising.[123] What was more surprising was the content of Justice Barrett's concurrence. Justice Barrett framed her concurrence as a direct response to Justice

115. *Id.* at 668–69 (citation omitted).
116. 142 S. Ct. 2587, 2587 (2022).
117. *See id.* at 2616.
118. *See, e.g.*, Capozzi, *supra* note 46, at 223–24.
119. *See West Virginia*, 142 S. Ct. at 2617, 2626 (Gorsuch, J., concurring).
120. *Id.* at 2609 (majority opinion); *see also id.* at 2616–17 (Gorsuch, J., concurring).
121. 143 S. Ct. 2355 (2023).
122. *See id.* at 2362.
123. *See* Jonathan H. Adler, *Looking Back on the Supreme Court's 2022–23 Term*, VOLOKH CONSPIRACY (July 1, 2023, 5:31 PM), https://reason.com/volokh/2023/07/01/looking-back-on-the-supreme-courts-2022-23-term/.

Kagan's dissent in *West Virginia*, which had accused the majority of abandoning textualist principles in pursuit of their desired, anti-administrative state outcome.[124] By implication, her concurrence also directed a degree of criticism toward Justice Gorsuch's concurrence in *West Virginia* and the strong form of the major questions doctrine generally.

In contrast to Justice Gorsuch's view of the major questions doctrine as a clear statement rule,[125] Justice Barrett frames the doctrine as merely an extension of generally applicable textualist principles of statutory interpretation.[126] This divergence of opinion is made all the more ironic by the fact that Justice Gorsuch had cited then-Professor Barrett's 2010 article on substantive canons of statutory interpretation to support the compatibility of the strong form with textualism.[127] What is clear from Justice Barrett's concurrence is that she remains a steadfast disciple of the weak form, as exemplified in *Brown & Williamson*.[128] So the apparent victory of the strong form in *West Virginia* may in fact have been illusory.

III. OUT WITH THE NEW, IN WITH THE OLD: THE MAJOR QUESTIONS DOCTRINE AS A PATHWAY BACK TO A ROBUST NONDELEGATION DOCTRINE

The major questions doctrine has, to an imperfect extent, filled the place of the dormant nondelegation doctrine embodied in *Panama Refining* and *Schechter Poultry*. But like the nondelegation doctrine, the major questions doctrine has also been fundamentally misunderstood by its critics.

The New Deal ushered in an era of technocratic governance theretofore unprecedented in American history in terms of both scale and authority.[129] Hardly any living American can remember a time before the administrative state. The existence of that apparatus is taken as a given. Attempts to reform it are derided as attacks on the fundamental institutions and norms of American government. It is therefore unsurprising that efforts to reform the administrative state have faced a slow, uphill battle. But perhaps the light at the end of the tunnel is coming into view.

---

124. *See Nebraska*, 143 S. Ct. at 2376 (Barrett, J., concurring).

125. *West Virginia*, 142 S. Ct. at 2616 (Gorsuch, J., concurring).

126. *See Nebraska*, 143 S. Ct. at 2376 (Barrett, J., concurring).

127. *See West Virginia*, 142 S. Ct. at 2616, 2620 & n.3 (Gorsuch, J., concurring) (citing Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109 (2010)).

128. *See supra* Subpart II.B.

129. *See supra* Subpart I.C.

A. Continued Criticisms of the Nondelegation Doctrine

Backed by nearly a century of institutional inertia, the rump nondelegation doctrine that is the intelligible principle test has no shortage of supporters. Broadly speaking, however, supporters of the status quo can be classified into one of two camps. The first are those who see nondelegation as an anachronism that cannot cope with the realities of government in a continent-spanning, developed, twenty-first century state.[130] The second are those who see nondelegation as a misreading of history that strays from the original public meaning of the Constitution.[131] Both criticisms are, however, misplaced.

The former group perceives the intelligible principle test as striking the right balance between keeping political power *at least vaguely* in the hands of the elected branches of government without forcing the judiciary to apply an "indefinite constitutional standard" to every perceived delegation.[132] But this critique of the robust nondelegation doctrine exemplified by *Panama Refining* and *Schechter Poultry* misses the mark.

To the extent that a formalistic approach to the separation of powers is consistent with the original public meaning of the Constitution, the ease of implementing that approach is irrelevant to whether courts must abide by it. A helpful example is the recent change in how the federal judiciary approaches firearms regulations. Prior to *New York State Rifle & Pistol Ass'n v. Bruen*,[133] the federal courts of appeals relied on a tiers-of-scrutiny approach when considering challenges to such regulations.[134] While unquestionably a more manageable standard for judges asked to apply it, means-ends balancing tests are incompatible with faithful adherence to the text of the Constitution because "enumeration of [a] 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."[135] And so, even if obedience to original public meaning is hard work, it is no less than the Constitution demands.

Returning to the context of nondelegation, it is no argument at all to assert that it would be burdensome on the judiciary to decide, on a case-by-case basis, whether Congress had delegated its Article I legislative powers. The same can be said of the argument that such a

---

130. *See* Jamey Anderson, Comment, *The Nondelegation Schism: Originalism Versus Conservatism*, 2021 WIS. L. REV. 853, 861 (2021).

131. *See* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 282 (2021).

132. *See* Anderson, *supra* note 130, at 861.

133. 142 S. Ct. 2111 (2022).

134. *See id.* at 2174–75 (Breyer, J., dissenting).

135. District of Columbia v. Heller, 554 U.S. 570, 634 (2008); *see also* United States v. Rahimi, 144 S. Ct. 1889, 1909 (2024) (Gorsuch, J., concurring) ("Faithful adherence to the Constitution's original meaning may be an imperfect guide, but I can think of no more perfect one for us to follow.").

disruptive shift in approach to nondelegation would severely undermine the reliance interests of not only the administrative agencies themselves but also an American public that has grown accustomed to administrative state status quo.[136] As the Supreme Court has demonstrated repeatedly of late, reliance is no obstacle to giving effect to the dictates of the Constitution.[137]

The argument of the latter camp of critics comes closer to creating doubts about the wisdom of breathing new life into the nondelegation doctrine, but it too ultimately comes up short. This group argues that the nondelegation doctrine of *Panama Refining* and *Schechter Poultry* is itself incompatible with an originalist view of the Constitution.[138] The scholarship on this topic is thoughtfully considered and demonstrates the vibrancy of debate within the originalist movement.[139] And given the current composition of the Supreme Court,[140] it is incumbent on those seeking to influence jurisprudence at the high court to present their arguments in originalist terms. However, as Aaron Gordon and Professor Ilan Wurman forcefully assert, the argument that nondelegation is inconsistent with the original public meaning of the Constitution picks small cherries from the founding era while ignoring the orchard of contrary evidence.[141] And a majority of the Justices have at least signaled their support for the originalist case for nondelegation.[142]

B. Misplaced Criticisms of the Major Questions Doctrine

The American administrative state finds itself on the downward slope of a technocratic cycle that began with the New Deal.[143] The

136. *See* Anderson, *supra* note 130, at 854–55 (cataloging criticisms of returning to a robust nondelegation doctrine).

137. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2276–77 (2022); Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2259 (2023) (Sotomayor, J., dissenting) (noting the majority's failure to address reliance interests when overturning precedent).

138. *See, e.g.*, Mortenson & Bagley, *supra* note 131, at 283–85.

139. *See* Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490, 1494 (2021).

140. *See* Mike Rappaport, *The Year in Originalism*, L. & LIBERTY (Mar. 24, 2021), https://lawliberty.org/the-year-in-originalism/ (noting that "four avowed originalists" sit on the court).

141. *See* Aaron Gordon, *Nondelegation Misinformation: A Reply to the Skeptics*, 75 BAYLOR L. REV. 152, 192–93 (2023); Wurman, *supra* note 139, at 1526.

142. *See* Gundy v. United States, 139 S. Ct. 2116, 2130–31 (2019) (Alito, J., concurring); *id.* at 2131 (Gorsuch, J., dissenting) (joined by Chief Justice Roberts and Justice Thomas); Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., discussing the denial of certiorari).

143. *See* Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487, 1495–500 (1983) (discussing the history of American technocratic cycles).

changing landscape of administrative law has inevitably produced a great deal of skepticism of the reform movement.[144] The major questions doctrine, particularly after the Supreme Court administrative law decisions of the pandemic era, has come to embody that reform movement and has therefore borne the brunt of the critiques posed by supporters of the status quo.[145]

While these criticisms have ranged from questioning to scathing, one of particular salience is the claim that the major questions doctrine is an "anti-textual mechanism of altering statutes [that] may exacerbate several known pathologies in the political process."[146]

This criticism largely echoes those leveled at the original nondelegation doctrine of the New Deal era.[147] That era's formalistic separation of powers doctrine has been derided as corrupted by the same ideological motives as the all-but universally decried *Lochner* era.[148] But this critique is both inapt and well-refuted.

Both the nondelegation doctrine of *Panama Refining* and *Schechter Poultry* and the modern major questions doctrine are rooted in textualist, originalist analyses of the Constitution's separation of powers framework. They give meaningful force to the Vesting Clauses of Articles I,[149] II,[150] and III[151] and comply with the Framers' intent to keep the legislative power locked firmly within the halls of Congress.[152] Contrastingly, courts applying substantive due process analyses frequently ignored the text, history, and tradition of the Constitution.[153] These guilt-by-association arguments against the major questions doctrine, like those leveled at the nondelegation doctrine before it,[154] fail to speak to originalists on originalist terms. As a result, these critics are doomed to fail in their efforts to persuade originalists who support the major questions doctrine and the revitalization of the nondelegation doctrine.

---

144. *See, e.g.*, McGinnis & Yang, *supra* note 40, at 403–04.

145. *See* Deacon & Litman, *supra* note 5, at 1050; Jonas J. Monast, *Major Questions about the Major Questions Doctrine*, 68 ADMIN. L. REV. 445, 469 (2016); Marla D. Tortorice, *Nondelegation and the Major Questions Doctrine: Displacing Interpretive Power*, 67 BUFF. L. REV. 1075, 1077–78 (2019).

146. Deacon & Litman, *supra* note 5, at 1051.

147. *See* Fed. Power Comm'n v. New Eng. Power Co., 415 U.S. 345, 352–54 (1974) (Marshall, J., concurring in part and dissenting in part).

148. Sandra B. Zellmer, *The Devil, the Details, and the Dawn of the 21st Century Administrative State: Beyond the New Deal*, 32 ARIZ. ST. L.J. 941, 943 (2000).

149. U.S. CONST. art. I, § 1.

150. *Id.* art. II, § 1.

151. *Id.* art. III, § 1.

152. *See* Wurman, *supra* note 139, at 1500–01.

153. *See* Obergefell v. Hodges, 576 U.S. 644, 697–99 (2015) (Roberts, C.J., dissenting); *see also id.* at 721–22 (Thomas, J., dissenting) (arguing further that substantive due process is never compatible with the text of the Constitution).

154. *See supra* note 6 and accompanying text.

C. The Questionable Future of the Major Questions Doctrine

As discussed above in Subparts II.B and II.C, two distinct versions of the major questions doctrine have emerged over the past thirty years.[155] The strong form has served effectively as a roundabout if incomplete approach to the same ends as the robust nondelegation doctrine.[156] The weak form functioned as a mechanism for courts to scrutinize agency interpretations of statutes in spite of the command of *Chevron*.[157] If the day should come when the Supreme Court fully embraces a return to the robust nondelegation doctrine of *Panama Refining* and *Schechter Poultry*, the future utility of the major questions doctrine would certainly be cast into doubt.

The strong form appears to be the most obvious victim of such a shift. That form of the doctrine interrogates the nondelegation issue from the agency side by asking whether the agency's action falls within the scope of authority Congress has delegated, while setting the limits of that inquiry with reference to the degree of authority Congress *can* delegate without violating Article I, Section 1.[158] The robust nondelegation doctrine would render this inquiry redundant, as that doctrine only considers whether Congress could have delegated the questioned authority in the first instance.[159]

The weak form's days also appear inevitably numbered. With the Court having finally driven a stake through the head of what remained of the zombified *Chevron*-doctrine at the end of the October 2023 term,[160] the weak form of the major questions doctrine has likewise become redundant, since courts will no longer need it as a predicate for de novo interpretation of organic statutes.[161]

---

155. *See* Sunstein, *supra* note 45, at 484.

156. *Id.* at 489–90.

157. *Id.* at 477–78 (describing the doctrine as "a kind of 'carve-out' from *Chevron* deference when a major question is involved").

158. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022) ("[I]n certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent makes us 'reluctant to read into ambiguous text' the delegation claimed to be lurking there." (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014))).

159. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 541–42 (1935) ("In view of the scope of that broad declaration . . . [w]e think that the code-making authority thus conferred is an unconstitutional delegation of legislative power."). The nondelegation doctrine approach also remedies the (perhaps abstract and inconsequential) unfairness of the strong form of the major questions doctrine pointing the finger at the agency for violating separation of powers principles when, at least according to critics of the major questions doctrine, agencies are often acting in perfect compliance with the broad authority Congress has delegated to them.

160. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024).

161. *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132–33 (2000); *see also Loper Bright*, 144 S. Ct. at 2261 (explaining that the plain text of

As such, it seems the major questions doctrine is destined to be relegated to the status of historical footnote. In essence, the doctrine has served as an effective stepping stone towards achieving loftier aims. But its value should not be discounted because of its bit part in the larger drama of constitutional law. The major questions doctrine has enabled the Supreme Court to enhance the law's respect for the separation of powers and has renewed interest among scholars, both supporting and opposing the doctrine, in that long-underappreciated area of constitutional law.[162]

CONCLUSION

Over the past three terms, the Supreme Court has greatly changed the landscape of major areas of American law.[163] With those issues addressed in seemingly final manners, the next area of law primed for major, arguably necessary, tumult is administrative law. And the Court has already signaled its willingness to rein in the administrative state when its actions run afoul of statutory and constitutional limits.[164] But even if the October 2023 term comes to be reflected on as *the* administrative law term, the reform of the administrative state has been a long-term project of the Court.[165]

That project's beginnings can be traced to the start of the modern administrative state with the New Deal. Initially, the Court put up a strong fight against legislative schemes that abdicated the responsibilities of Congress to the executive branch and ultimately to unelected bureaucrats.[166] But that resistance could not be maintained as the sheer, overwhelming political momentum behind the administrative state forced the Justices to concede increasingly vast powers to agencies and administrators.[167] By the end of 1940s, the Court had seen its role change from opposing bulwark to enfeebled accomplice.[168] By the 1970s, the doctrine of nondelegation had been

---

5 U.S.C. § 706 "makes clear that agency interpretations of statutes . . . are *not* entitled to deference").

162. *See, e.g.*, McGinnis & Yang, *supra* note 40, at 388–98.

163. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (abortion); N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022) (firearms); Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141 (2023) (affirmative action).

164. *See, e.g.*, *Loper Bright*, 144 S. Ct. at 2257; SEC v. Jarkesy, 144 S. Ct. 2117, 2127 (2024). Indeed, the number of administrative law cases already or ultimately bound for 1 First Street seems to only be multiplying. *E.g.*, San Francisco v. EPA, 144 S. Ct. 2578 (2024); Garland v. VanDerStok, 144 S. Ct. 1390 (2024); Kansas v. Dep't of Educ., No. 24-4041-JWB, 2024 WL 3273285 (D. Kan. July 2, 2024), *appeal docketed*, No. 24-3097 (10th Cir. July 11, 2024); Consumers' Rsch. v. FCC, 109 F.4th 743 (5th Cir. 2024) (en banc).

165. McGinnis & Yang, *supra* note 40, at 460–61.

166. *See supra* Subparts I.B, I.C.

167. *See supra* Subpart I.C.

168. *See supra* Subpart I.C.

declared a relic of a bygone era.[169] And by the 1980s, the courts had even abdicated their role as arbiters of statutory meaning.[170]

Just as the Supreme Court's willingness to police the administrative state reached its nadir in *Chevron*, however, the major questions doctrine emerged to once again begin enforcing the constitutional limits of agency authority.[171] While there remain important questions about the definition of that doctrine and the situations in which it should be applied, it has nevertheless played a significant part in revitalizing the conversation about the importance of separation of powers principles. And in doing so, the major questions doctrine has opened the doors for the return of the robust nondelegation doctrine the Constitution demands.

Critics of the major questions doctrine and the nondelegation doctrine assert that these doctrines are politically motivated exercises in judicial activism.[172] But at least since the days of *Marbury v. Madison*,[173] it has definitively been the role of the judiciary to interpret laws and the Constitution.[174] Efforts to impugn the nondelegation doctrine on account of its temporal association with substantive due process must fall on deaf ears. The same goes for attempts to undermine the major questions doctrine by claiming that it too is fruit of the poisonous tree. The recent technocratic age that has so changed the face and structure of American government must finally turn and face the music.

Colin T. Ridgell[*]

169. *See* Fed. Power Comm'n v. New Eng. Power Co., 415 U.S. 345, 352–54 (1974) (Marshall, J., concurring in part and dissenting in part).

170. *See* Baldwin v. United States, 140 S. Ct. 690, 691–92 (2020) (Thomas, J., dissenting from the denial of certiorari).

171. *See supra* Subpart II.A.

172. *See* Deacon & Litman, *supra* note 5, at 1051.

173. 5 U.S. (1 Cranch) 137 (1803).

174. *Id.* at 177.

* J.D. Candidate, 2025, Wake Forest University School of Law. I am forever grateful for the support of my family and friends, without whom my law school journey would not have been possible. Special thanks to Sam Kiehl for his ever-thoughtful feedback and guidance in drafting this Comment.