"MAJOR" CHALLENGES FOR LOWER COURTS: INCONSISTENT APPLICATIONS OF THE MAJOR QUESTIONS DOCTRINE IN LOWER COURTS AFTER *WEST VIRGINIA V. ENVIRONMENTAL PROTECTION AGENCY*

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Under the major questions doctrine, an agency requires clear congressional authorization to regulate on an issue of major national significance. Although a version of the doctrine has existed for several years, its rise in importance is recent. The U.S. Supreme Court invoked the doctrine by name for the first time in 2022 in West Virginia v. Environmental Protection Agency*, warning that in certain "extraordinary cases," the "history and the breadth" and the "economic and political significance" of the agency action may "provide a reason to hesitate" before accepting the agency's authority.* West Virginia *has since inspired a wave of scholarship addressing the major questions doctrine's scope, its theoretical foundations, and its role in administrative law.*

After West Virginia, *federal district and circuit courts are also deciding major questions cases. This Note examines lower court applications of the major questions doctrine by comparing cases from the U.S. Courts of Appeals for the Fifth and Ninth Circuits. Ultimately, this Note argues that* West Virginia *enables inconsistency. Since* West Virginia, *courts in the Fifth Circuit have identified eight agency actions that triggered the major questions doctrine, whereas courts in the Ninth Circuit have identified only one. A circuit split also emerged between the Fifth and Ninth Circuits on whether the doctrine applies to presidential action under the Procurement Act. Moreover, courts are generally inconsistent in how and when they find a major question.*

To increase consistency and predictability of the doctrine, this Note proposes that all lower courts apply a two-step test from West Virginia. *First, courts should consider whether the agency action is economically and politically significant and, second, courts should consider whether the action*

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is an unheralded or transformative exercise of authority. An affirmative answer to both inquiries should be necessary to find a major question. This test will bring greater consistency to the major questions doctrine in lower courts and encourage courts to carefully assess whether the doctrine applies.

INTRODUCTION

"Sometimes . . . agencies 'defy Congressional limits' and aggrandize powers to themselves that Congress never granted. Thankfully, a judicial bulwark helps hobble administrative power grabs . . . ."[1] That judicial bulwark is the major questions doctrine, an administrative law doctrine asserting that when an agency seeks to regulate on an issue of major national significance, the regulation must be supported by clear congressional authorization.[2] Yet, what agency actions reach a level of significance to trigger this doctrine? A federal contractor vaccine mandate?[3] Or what about a terrorist watchlist,[4] a license for a temporary nuclear waste storage facility,[5] or a federal contractor minimum wage increase?[6] According to some circuit and district courts, all of the above implicate the major questions doctrine.[7]

The U.S. Supreme Court invoked the major questions doctrine by name for the first time in *West Virginia v. Environmental Protection Agency*.[8] But the Court had long recognized a special category of cases in which the normal rules of *Chevron* deference, the longstanding doctrine established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[9] may not apply.[10] As early as 2000, the Court signaled that in certain "extraordinary cases" it would "hesitate" before deferring to an agency on questions of statutory interpretation.[11] However, years passed before the justices canonized this language as part of an official Supreme Court doctrine in the 2022 *West Virginia* decision.[12]

In *West Virginia*, the Court considered whether the Environmental Protection Agency (EPA) had the authority to implement its Clean Power Plan regulation under the Clean Air Act,[13] which instructs the agency to determine the "best system of emissions reduction."[14] The Clean Power Plan included a "generation shifting" scheme, which required existing power

1. Kovac v. Wray, 660 F. Supp. 3d 555, 564 (N.D. Tex. 2023) (footnote omitted) (quoting Chamber of Com. v. U.S. Dep't of Labor, 885 F.3d 360, 387 (5th Cir. 2018)).

2. *See* KATE R. BOWERS, CONG. RSCH. SERV., IF12077, THE MAJOR QUESTIONS DOCTRINE (2022).

3. *See generally* Louisiana v. Biden, 55 F.4th 1017 (5th Cir. 2022).

4. *See generally Kovac*, 660 F. Supp. 3d 555.

5. *See generally* Texas v. Nuclear Regul. Comm'n, 78 F.4th 827 (5th Cir. 2023).

6. *See generally* Texas v. Biden, No. 22-CV-00004, 2023 U.S. Dist. LEXIS 171265 (S.D. Tex. Sept. 26, 2023).

7. *See infra* Part II.B.1.a.

8. 142 S. Ct. 2587 (2022).

9. 467 U.S. 837 (1984); *see also infra* Part I.A (describing the test for *Chevron* deference).

10. *See infra* Part I.B.

11. *See* Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000).

12. *See* Daniel T. Deacon & Leah Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1011–12 (2023) (noting that although the doctrine's roots extend back to at least 2000, the Court did not use the phrase "major questions doctrine" until *West Virginia*).

13. 42 U.S.C. §§ 7401–7671q.

14. *See* West Virginia v. Env't Prot. Agency, 142 S. Ct. 2587, 2599 (2022) (quoting 42 U.S.C. § 7411).

plants to shift to sources of lower greenhouse gas emissions or to otherwise subsidize other plants willing to do so.[15] A number of parties brought challenges against this exercise of authority.[16]

In the majority opinion written by Chief Justice Roberts, the Court admitted that the generation shifting scheme could, technically speaking, be considered a system under the statute's text.[17] Under *Chevron*, a finding of ambiguous statutory language capable of multiple meanings triggers deference to the agency interpretation.[18] Yet rather than follow *Chevron*, the Court invoked a different test.[19]

First, the Court emphasized that increased attention is warranted for "extraordinary cases," in which the "history and the breadth of the authority that [the agency] has asserted" and the "economic and political significance" of the action provide a "reason to hesitate" before deferring to the agency.[20] These broad exercises of agency power, the Court explained, trigger the major questions doctrine.[21] Second, when the Court finds a major question, "a merely plausible textual basis for the agency action" is insufficient.[22] Instead, the agency must point to "clear congressional authorization" for the regulation.[23] Applying this test to the Clean Power Plan, the Court found a major question and no clear congressional authorization; it therefore declared the Clean Power Plan impermissible.[24]

In a decision about statutory ambiguity, the Court was, well, ambiguous. What exactly is a major question? How should courts assess economic and political significance? Is there an objective set of criteria to apply, or should courts be on guard for, as Justice Roberts described, agency actions that "raise[] an eyebrow?"[25] Additionally, once a Court finds a major question, what satisfies clear congressional authorization? And how does the doctrine fit with *Chevron*? Major questions remain regarding the major questions doctrine.

Although the Supreme Court can selectively consider administrative law cases and refine the major questions doctrine over time, lower courts cannot do the same. Federal district and circuit court judges are routinely tasked with faithfully applying Supreme Court precedent to questions of agency statutory interpretation. Yet, can lower courts effectively and consistently apply the major questions doctrine, in its current form, to administrative law

15. *See id.* at 2603.
16. *See id.* at 2604.
17. *See id.* at 2614 ("But of course almost anything could constitute such a 'system' . . . .").
18. *See infra* notes 32–34 and accompanying text.
19. *See West Virginia*, 142 S. Ct. at 2610.
20. *Id.* at 2608 (alteration in original) (quoting Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000)).
21. *See id.* at 2609.
22. *Id.*
23. *Id.* (quoting Util. Air Regul. Grp. v. Env't Prot. Agency, 573 U.S. 302, 324 (2014)).
24. *See id.* at 2614–16.
25. *Id.* at 2613 (quoting *id.* at 2636 (Kagan, J., dissenting)).

cases? Does *West Virginia* provide a sufficiently defined framework for courts to cohesively apply? This Note explores these questions.

To evaluate lower court applications of the major questions doctrine, this Note compares how the U.S. Courts of Appeals for the Fifth and Ninth Circuits have applied the doctrine after *West Virginia*. Part I provides the necessary background to understand the major questions doctrine by describing *Chevron* deference, the doctrine's development in the Supreme Court, the landmark *West Virginia* decision, and the future of the major questions doctrine. Part II explores how the doctrine functions in lower courts, first by canvassing the debate on lower court applications and, second by discussing Fifth and Ninth Circuit major questions cases. Part II includes a broad survey of cases from the Fifth and Ninth Circuits and a more detailed discussion of a circuit split concerning the major questions doctrine. Finally, Part III argues that the Fifth and Ninth Circuit cases reveal inconsistent applications of the doctrine under *West Virginia*. Further, Part III urges lower courts to apply a consistent major questions doctrine test. To find a major question, courts should first determine whether the agency action is economically and politically significant and, second, whether the action is an unheralded or transformative exercise of authority. This two-step test will encourage courts to carefully consider whether a regulation triggers the major questions doctrine.

I. DEVELOPING THE MAJOR QUESTIONS DOCTRINE: BACKGROUND, HISTORY, AND KEY CASES

This part traces the development of the major questions doctrine. Part I.A discusses *Chevron* deference, a judicial tool for evaluating challenges to agency statutory interpretation.[26] Part I.B details the history of the major questions doctrine in the Supreme Court. Part I.C describes *West Virginia*, the leading major questions doctrine case. Finally, Part I.D discusses the major questions doctrine after *West Virginia* and contemplates its potential future.

A. Chevron*'s Test for Judicial Deference to Agencies*

The major questions doctrine emerged as part of administrative law jurisprudence addressing an often-faced question: how much deference should courts give to an agency's interpretation of the statute it administers?[27] The Supreme Court famously provided an answer in the 1984 case *Chevron*.[28]

26. However, the Supreme Court is considering whether to overturn the *Chevron* deference test in a case this term. *See infra* notes 139–40.

27. *See* Jonathan R. Siegel, *The Constitutional Case for* Chevron *Deference*, 71 VAND. L. REV. 937, 943 (2018).

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

In *Chevron*, the Court set out a two-step test to determine whether courts must award deference to an agency's interpretation.[29] Under step one, using "traditional tools of statutory interpretation," the court considers whether Congress has spoken directly to the "precise question at issue."[30] If Congress has, the court and the agency are both bound by Congress's intent.[31] However, if Congress has not spoken directly to the issue at hand, meaning that the statute is "silent or ambiguous," the court proceeds to step two and considers whether the agency interpretation is a permissible one.[32] If permissible, the court defers to the agency interpretation.[33] At this stage, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."[34] Under *Chevron*, ambiguous language indicates that Congress implicitly delegated interpretive power to the agency and that the agency, as a subject matter expert, is best suited to interpret the text in a way that effectuates its purpose.[35]

The Supreme Court has since cut back on *Chevron*'s application.[36] For example, in *United States v. Mead Corp.*,[37] the Court held that *Chevron* only applies to agency interpretations made pursuant to the "force of law."[38] However, even if *Chevron* does not apply, a court may still award a degree of lesser deference established in the pre-*Chevron* case *Skidmore v. Swift & Co.*,[39] referred to as *Skidmore* deference.[40] The Supreme Court has also applied *Chevron* less frequently in recent years.[41] Instead, the Court invoked limitations and exceptions to *Chevron*—most notably the major questions

29. *See id.* at 842–43; *see also* Kent Barnett, Christina L. Boyd & Christopher J. Walker, *Administrative Law's Political Dynamics*, 71 VAND. L. REV. 1463, 1471–72 (2018).

30. *Chevron*, 467 U.S. at 842–43, 843 n.9.

31. *See id.* at 842–43.

32. *Id.* at 843.

33. *See id.*; *see also* Siegel, *supra* note 27, at 944–45.

34. *Chevron*, 467 U.S. at 844.

35. *See* Thomas O. McGarity, *The Major Questions Wrecking Ball*, 41 VA. ENV'T L.J. 1, 5 (2023). Additionally, deference is justified because agencies are more politically accountable than judges. *See id.*

36. *See generally* Siegel, *supra* note 27, at 945–46.

37. 533 U.S. 218 (2001).

38. *See id.* at 226–27. An agency action is promulgated pursuant to the "force of law" if the agency has authority to issue binding rules and has exercised that authority accordingly. *See* Dan Farber, *Everything You Always Wanted to Know About the* Chevron *Doctrine*, YALE J. ON REGUL.: NOTICE & COMMENT (Oct. 23, 2017), https://www.yalejreg.com/nc/everything-you-always-wanted-to-know-about-the-chevron-doctrine-by-dan-farber/ [https://perma.cc/4PSX-JP3L]. Determining whether an agency has acted pursuant to the "force of law" is often referred to as *Chevron* step zero. *See id.*

39. 323 U.S. 134 (1944).

40. *See* Farber, *supra* note 38. Under *Skidmore*, a court may award respect to an agency's interpretation because of that agency's technical expertise, but unlike under *Chevron*, deference is not automatic. *See id.*

41. *See* Gary Lawson, The Ghosts of Chevron Present and Future 3–4 (Feb. 22, 2023) (unpublished manuscript), https://scholarship.law.bu.edu/faculty_scholarship/3424 [https://perma.cc/UQ83-HGWT]; *see also* Nathan D. Richardson, *Deference Is Dead, (Long Live* Chevron*)*, 73 RUTGERS U. L. REV. 441, 486–95 (2021).

doctrine—and resolved agency interpretation challenges on other grounds.[42] As will be discussed in Part I.D.1, the Court will soon decide whether to overturn *Chevron*.[43]

B. The History of the Major Questions Doctrine's Development in the Supreme Court

The current major questions doctrine is the result of over two decades of language in judicial opinions, culminating in the *West Virginia* decision, suggesting that in certain cases the ordinary rules of *Chevron* deference may not apply. This section discusses the development of the major questions doctrine in the Supreme Court. Part I.B.1 details the early history of the doctrine, beginning in 1994. Part I.B.2 describes how the doctrine evolved during the Court's October 2020 and 2021 terms.

1. The Early Cases

The major questions doctrine story typically begins with the 1994 Supreme Court case *MCI Telecommunications Corp. v. American Telephone & Telegraph Co*.[44] In *MCI Telecommunications*, the Court considered whether the Federal Communications Commission could exempt certain telephone companies from complying with rate-filing requirements under its statutory authority to "modify any requirement."[45] After analyzing the statute and looking to dictionary definitions, the Court concluded that the word "modify" encompasses only moderate changes, not major changes to the statutory scheme.[46] Finding the statute unambiguous and thus declining to award *Chevron* deference, the Court penned some notable language: it was "highly unlikely" that Congress left the decision of whether to rate-regulate an industry, an issue of "*enormous importance*," to agency discretion, especially through "such a subtle device as permission to 'modify' rate-filing requirements."[47]

The Court considered the "importance" of an agency action again in *Food & Drug Administration v. Brown & Williamson Tobacco Corp.*[48] In that case, the Court held that the U.S. Food and Drug Administration's statutory

42. *See* Lawson, *supra* note 41.

43. *See infra* Part I.D.1.

44. 512 U.S. 218 (1994); *see* Chad Squitieri, *Who Determines Majorness?*, 44 HARV. J.L. & PUB. POL'Y 463, 473 (2021); *see also* Natasha Brunstein & Donald L. R. Goodson, *Unheralded and Transformative: The Test for Major Questions After* West Virginia, 47 WM. & MARY ENV'T L. & POL'Y REV. 47, 51–52 (2022). *But see* Louis J. Capozzi III, *The Past and Future of the Major Questions Doctrine*, 84 OHIO ST. L.J. 191, 195–96 (2023) (arguing that the major questions doctrine's history is longer than generally acknowledged and that the Court has invoked a major questions rule since as early as 1897).

45. *See* 47 U.S.C. § 203; *MCI Telecomms. Corp.*, 512 U.S. at 220; *see also* Squitieri, *supra* note 44, at 473; Brunstein & Goodson, *supra* note 44, at 52.

46. *See* Squitieri, *supra* note 44, at 473–74; *see also* Brunstein & Goodson, *supra* note 44, at 52–53.

47. *MCI Telecomms. Corp.*, 512 U.S. at 231 (emphasis added); *see* Squitieri, *supra* note 44, at 474; *see also* Brunstein & Goodson, *supra* note 44, at 53.

48. 529 U.S. 120 (2000).

authority to regulate "drugs" and "devices" did not extend to regulating tobacco.[49] Although acknowledging the role of *Chevron* deference in statutory interpretation cases, the Court explained that in "*extraordinary cases* . . . there may be reason to hesitate" before assuming that Congress intended for an agency to fill in certain statutory gaps.[50] Furthermore, Congress would "not have intended to delegate a decision of such *economic and political significance* to an agency in so cryptic a fashion."[51]

Over the next twenty years, the Court sporadically invoked similar language. For example, in *Utility Air Regulatory Group v. Environmental Protection Agency*,[52] the Court rejected the EPA's reading of a statute that "[brought] about an enormous and *transformative expansion*" of the agency's authority.[53] In *King v. Burwell*,[54] the Court declined to defer to the statutory interpretation of the Internal Revenue Service (IRS) because of the significance of the question at issue.[55] Yet, these cases neither referred to a doctrine by name nor acknowledged the existence of a cohesive, defined analysis.[56] The Court's application also lacked a clear pattern. For example, the Court variably invoked the doctrine at *Chevron* steps zero, one, or two from case to case.[57] For scholars tracking the case law, it seemed that in certain cases in which the Court identified an important issue, *Chevron* would not apply, or at least it would operate in tandem with an inquiry into the significance of the agency action.[58]

2. The Later Cases

The 2020 and 2021 Supreme Court terms were turning points in the doctrine's development. The years were marked by the COVID-19 pandemic, during which President Joseph R. Biden's administration instructed agencies to promulgate certain regulations—some controversial—

49. *See id.* at 125, 160.

50. *Id.* at 159 (emphasis added).

51. *Id.* at 160 (emphasis added); *see* Squitieri, *supra* note 44, at 474; *see also* Brunstein & Goodson, *supra* note 44, at 54–55.

52. 573 U.S. 302 (2014).

53. *See id.* at 324 (emphasis added); *see* Squitieri, *supra* note 44, at 475; *see also* Brunstein & Goodson, *supra* note 44, at 60–62.

54. 576 U.S. 473 (2015).

55. *See id.* at 485–86.

56. *See* Brunstein & Goodson, *supra* note 44, at 65.

57. *See* Squitieri, *supra* note 44, at 473–76; *see also* Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777, 791 (2017) (arguing that before *King*, the cases all dealt with the "majorness" inquiry from within the *Chevron* framework).

58. *See* Deacon & Litman, *supra* note 12, at 1020–21 ("In [this] set of cases, the Court has suggested either that an issue should not be analyzed using the *Chevron* framework because Congress did not authorize agencies to resolve the issue due to its majorness, or that the *Chevron* analysis operates differently because the agency policy is a major one."); *see also* Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 271 (2022) ("[T]he common thread connecting these cases is that if the Court regarded a major question to be implicated, the agency's interpretation of the statute would not receive *Chevron* deference.").

to respond to the pandemic.[59] Robust legal challenges followed, leading the Supreme Court to invoke a stronger and more powerful version of the major questions doctrine.[60]

First, in *Alabama Ass'n of Realtors v. Department of Health & Human Services*,[61] the Court examined the statutory authority of the Centers for Disease Control and Prevention (CDC).[62] The CDC had invoked its power to promulgate regulations that "are necessary to prevent the introduction, transmission, or spread of communicable diseases" to place a nationwide moratorium on evictions during the COVID-19 pandemic.[63] In a per curiam 6-3 decision, the Court held that the statute did not grant the CDC authority for the moratorium.[64] After discussing the statutory text in just one paragraph, the Court proceeded to the impermissible "majorness" of the rule as an alternative justification for its textual holding.[65] The Court described substantive reasons for avoiding the CDC's statutory interpretation, including "the sheer scope of the CDC's claimed authority," the "vast economic and political significance" of the moratorium, and the "financial burden[s] on landlords."[66] Thus, the Court's skepticism of the significance of the agency action seemed to motivate the decision at least in part.[67]

The Court considered a second COVID-19 policy in *National Federation of Independent Business v. Department of Labor, Occupational Safety & Health Administration*,[68] in which the Court heard a challenge to the statutory authority of the Occupational Safety and Health Administration (OSHA).[69] The Court evaluated whether the provision allowing OSHA to set "occupational safety and health standards" permitted the agency to issue an emergency temporary standard requiring certain workplaces to adopt mandatory vaccination policies or testing and masking requirements.[70] In another 6-3 per curiam opinion, the Court rejected the regulation as exceeding OSHA's authority.[71] For the first time, the Court framed its

59. *See, e.g.*, Paul Wiseman, *Small Agency, Big Job: Biden Tasks OSHA With Vaccine Mandate*, APNEWS (Sept. 16, 2021, 2:55 PM), https://apnews.com/article/joe-biden-business-health-coronavirus-pandemic-henry-mcmaster-f33acd986ad5045e48088a832c6f9903 [https://perma.cc/XW7W-KSD5].

60. *See* Deacon & Litman, *supra* note 12, at 1011.

61. 141 S. Ct. 2485 (2021).

62. *See id.*; 42 U.S.C. § 264(a).

63. *See Ala. Ass'n of Realtors*, 141 S. Ct. at 2486–87 (quoting 42 U.S.C. § 264(a)); *see also* Deacon & Litman, *supra* note 12, at 1024.

64. *See Ala. Ass'n of Realtors*, 141 S. Ct. at 2486; *see also* Deacon & Litman, *supra* note 12, at 1024.

65. *See Ala. Ass'n of Realtors*, 141 S. Ct. at 2488; *see also* Deacon & Litman, *supra* note 12, at 1024–25 (describing how the court relied on the novelty of the moratorium as an indication of its "majorness").

66. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489; *see also* Deacon & Litman, *supra* note 12, at 1025.

67. *See* Deacon & Litman, *supra* note 12, at 1026.

68. 142 S. Ct. 661 (2022).

69. *Id.*; *see also* 29 U.S.C. § 651.

70. *See NFIB*, 142 S. Ct. at 663–64 (quoting 29 U.S.C. § 655(b)); *see also* Deacon & Litman, *supra* note 12, at 1026.

71. *See NFIB*, 142 S. Ct. at 664–65; *see also* Deacon & Litman, *supra* note 12, at 1026.

decision entirely on a major questions analysis.[72] The Court, concerned about the "significant encroachment into the lives . . . of a vast number of employees,"[73] explained that it expects Congress to "speak clearly when authorizing an agency to exercise powers of 'vast economic and political significance.'"[74]

The Court turned to the statutory text as a secondary consideration.[75] Although the Secretary of Labor has the statutory authority to set "*occupational* safety and health standards," the Court found that this (and related language) granted OSHA power to set only "workplace safety standards, not broad public health measures."[76] Although the text appeared broad, in the absence of language explicitly conferring the contested authority, the Court read the statute to implicitly restrict the agency's power.[77] The Court concluded that OSHA can only regulate on "dangers uniquely prevalent in the workplace," which does not include COVID-19, a "day-to-day danger."[78]

C. The Current Major Questions Doctrine Under West Virginia

Shortly after *Alabama Ass'n of Realtors* and *National Federation of Independent Business* (*NFIB*), the Supreme Court decided *West Virginia*, its third case targeting agency power within a year but its first case to identify the major questions doctrine by name. Although legal scholars had already identified a common line of major questions cases,[79] the Court had yet to explicitly acknowledge that it was doing something different from its normal application of *Chevron*.

West Virginia's procedural history is complex.[80] After the EPA promulgated the Clean Power Plan, the Supreme Court issued a stay on the regulation before it could go into effect.[81] Following a change in presidential administrations, the EPA rescinded the Clean Power Plan, arguing that the EPA lacked statutory authority to implement the plan, and replaced it with a new regulation.[82] When the issue reached the Supreme Court in *West Virginia*, it was to review a U.S. Court of Appeals for the D.C. Circuit

72. *See* Deacon & Litman, *supra* note 12, at 1027.
73. *NFIB*, 142 S. Ct. at 665.
74. *Id.* (quoting Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021)).
75. *See* Deacon & Litman, *supra* note 12, at 1028.
76. *NFIB*, 142 S. Ct. at 665 (citing 29 U.S.C. § 655(b)).
77. *See* Deacon & Litman, *supra* note 12, at 1029.
78. *NFIB*, 142 S. Ct. at 665, 668 (2022); *see also* Deacon & Litman, *supra* note 12, at 1029 (arguing that after *NFIB*, "the onus is on Congress to explicitly grant authority in its particulars").
79. *See, e.g.*, Squitieri, *supra* note 44, at 472 (describing the major questions doctrine, before *West Virginia*, as a statutory canon used to determine whether Congress delegated authority to agencies to decide major questions).
80. *See* Deacon & Litman, *supra* note 12, at 1031.
81. *See* West Virginia v. Env't Prot. Agency, 142 S. Ct. 2587, 2604 (2022).
82. *See id.* at 2604–05.

decision vacating both the recission and the new regulation.[83] The Court therefore reviewed the merits of a regulation that had never gone into effect.[84]

The regulation itself was equally complicated. Section 111 of the Clean Air Act directs the EPA to create "standards of performance" for new stationary sources that contribute to air pollution.[85] The Clean Air Act defines a "standard of performance" as one that "reflects . . . the best system of emission reduction."[86] After establishing a new source standard, § 111(d) instructs the EPA to establish regulations for "any existing source" that is not already covered under other provisions.[87] Pursuant to that authority, the EPA promulgated the Clean Power Plan to regulate emissions for existing sources.[88] The Clean Power Plan included a "generation shifting" requirement, in which stationary sources would shift from "higher-emitting to lower-emitting" carbon dioxide sources of energy production.[89] In *West Virginia*, the Court considered whether a "generation shifting" scheme could be a "system of emission reduction."[90]

The Court's analysis focused entirely on the major questions doctrine.[91] Writing for the majority,[92] Chief Justice Roberts reminded readers that certain "'extraordinary cases' . . . call for a different approach."[93] Such cases are those "in which the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority."[94] The Court summarized its earlier cases and highlighted factors that had previously indicated a major question.[95] Although each of the past contested regulatory actions "had a colorable textual basis," common sense would give pause before "'read[ing] into ambiguous statutory text' the delegation claimed to be lurking there."[96] In

83. *See id.* The D.C. Circuit had held that the EPA's legal premise for rescinding the Clean Power Plan was incorrect. *See id.*

84. *See West Virginia*, 142 S. Ct. at 2607 (rejecting the Government's argument that the Court lacked Article III standing).

85. 42 U.S.C. § 7411(b)(1)(B).

86. *Id.* § 7411(a)(1).

87. *Id.* § 7411(d)(1)(A).

88. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64662 (Oct. 23, 2015).

89. *Id.* at 64728.

90. *See* West Virginia v. Env't Prot. Agency, 142 S. Ct. 2587, 2599–600 (2022).

91. *See* Deacon & Litman, *supra* note 12, at 1032.

92. Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett joined the majority. *See West Virginia*, 142 S. Ct. at 2598.

93. *Id.* at 2608 (quoting Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)).

94. *Id.* (quoting *Brown & Williamson Tobacco Corp.*, 529 U.S. at 159–60).

95. *See id.* For example, the Court previously found a major question because of the "'sheer scope of the CDC's claimed authority,'" and "its 'unprecedented' nature." *Id.* (quoting Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021)). Additionally, the doctrine had applied to the "EPA's claim of 'unheralded' regulatory power over 'a significant portion of the American economy.'" *Id.* (quoting Util. Air Regul. Grp. v. Env't Prot. Agency, 573 U.S. 302, 324 (2014)).

96. *Id.* at 2609 (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324).

such cases, "something more than a merely plausible textual basis for the agency action is necessary"—rather, the agency must point to "clear congressional authorization."[97]

The Court declared that this too was a major questions case.[98] The Court articulated several reasons for reaching this conclusion. To begin, the EPA had used § 111(d), a "gap filler" provision, to "substantially restructure the American energy market."[99] This was an "'*unheralded power*' representing a '*transformative* expansion in [the agency's] regulatory authority.'"[100] Congress itself had also considered and rejected enacting a similar program.[101] Furthermore, the EPA historically used § 111(d) to establish physical control mechanisms at the individual plant level, not to create a regulatory scheme aimed at restructuring the national electricity generation market.[102] Finally, the Court took issue with the EPA's lack of expertise on system-wide energy trends and reasoned that Congress likely would not leave such an important policy decision to an agency.[103]

According to the Court, finding a major question triggers skepticism toward the agency's assertion of power.[104] Under the major questions doctrine, the agency must "point to 'clear congressional authorization'" to overcome that skepticism and promulgate such a regulation.[105] Although a generation shifting scheme could conceivably be a "system," the Court found that "almost anything could constitute such a 'system'" and without context, the word is an "empty vessel."[106] Vague language is not sufficiently clear authorization.[107]

In a concurrence, Justice Gorsuch articulated a different perspective on the major questions doctrine.[108] For Justice Gorsuch, the focus is on the Constitution. The major questions doctrine addresses not only the problem of overreaching agencies, but also speaks to "constitutional guarantees" about the separation of powers.[109] In fact, agency lawmaking itself is suspect because Congress is the constitutionally proper legislative body.[110] Justice Gorsuch's version of the major questions doctrine is therefore closely tied to the nondelegation doctrine, another administrative law doctrine that is

97. *Id.* (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324).
98. *See id.* at 2610.
99. *Id.*
100. *Id.* (emphasis added) (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324).
101. *Id.* at 2610, 2614 (acknowledging that Congress itself had rejected proposals to amend the Clean Air Act to include a cap-and-trade scheme similar to the Clean Power Plan).
102. *Id.* at 2610–12.
103. *Id.* at 2612–13; *id.* at 2613 ("The basic and consequential tradeoffs involved in such a choice are ones that Congress would likely have intended for itself.").
104. *Id.* at 2614.
105. *Id.* (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324).
106. *Id.*
107. *Id.* at 2615 ("But just because a cap-and-trade 'system' can be used to reduce emissions does not mean that it is the kind of 'system of emission reduction' referred to in Section 111.").
108. *Id.* at 2616 (Gorsuch, J., concurring).
109. *Id.*; *see also* Deacon & Litman, *supra* note 12, at 1033–34.
110. *West Virginia*, 142 S. Ct. at 2616–18 (Gorsuch, J., concurring).

particularly persuasive for several sitting justices.[111] According to Justice Gorsuch, the major questions doctrine also functions as a clear statement rule that "ensure[s] that the government does 'not inadvertently cross constitutional lines.'"[112]

Justice Gorsuch also provided a synopsis of when, in his view, the doctrine applies. Although he did not provide an exhaustive list of triggers, he suggested that a major question exists in the following three scenarios: (1) "when an agency claims the power to resolve a matter of great 'political significance' . . . or end an 'earnest and profound debate across the country,'"[113] (2) when an agency "seeks to regulate a 'significant portion of the American economy,'"[114] and (3) when an agency "seeks to 'intrud[e] into an area that is the particular domain of state law.'"[115] He similarly listed factors for courts to consider when looking for clear congressional authorization.[116] This, according to Justice Gorsuch, was a "relatively easy case"—power plant operation is a politically important and debated issue, Congress declined to pass similar legislation, and the electric power industry has a major impact on the U.S. economy.[117]

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111. *Id.* at 2624. The nondelegation doctrine asserts that it is constitutionally impermissible for Congress to delegate its Article I legislative powers, including to administrative agencies. *See* Squitieri, *supra* note 44, at 469. However, under current law, delegation to agencies is constitutionally permissible as long as Congress cabins the delegation with an "intelligible principle," an easy requirement to satisfy. *Id.* At least one scholar has argued that, for textualists interested in strengthening the nondelegation doctrine, strengthening the major questions doctrine may be an ill-advised way to do so. *See id.* at 514; *see also* Marla D. Tortorice, *Nondelegation and the Major Questions Doctrine: Displacing Interpretive Power*, 67 BUFF. L. REV. 1075 (2019) (arguing that the nondelegation doctrine does not support the major questions doctrine because the Court is only rerouting delegation to itself).

112. *West Virginia*, 142 S. Ct. at 2620 (Gorsuch, J., concurring) (quoting Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 175 (2010)). Clear statement rules apply to certain statutory interpretation questions, in which courts look for absolutely unambiguous and specific language from Congress before interpreting a statute in such a way that causes tension with the Constitution. *See* Ilan Wurman, *Importance and Interpretive Questions*, 110 VA. L. REV. (forthcoming 2024) (manuscript at 25), https://ssrn.com/abstract=4381708. A majority of scholars argue that the *West Virginia* major questions doctrine, even as articulated in the majority opinion, functions as a clear statement rule. *See infra* note 145 and accompanying text.

113. *West Virginia*, 142 S. Ct. at 2620 (Gorsuch, J., concurring) (first quoting Nat'l Fed. of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 665 (2022); then quoting Gonzales v. Oregon, 546 U.S. 243, 267 (2006)).

114. *Id.* at 2621 (quoting Util. Air Regul. Grp. v. Env't Prot. Agency, 573 U.S. 302, 324 (2014)).

115. *Id.* (quoting Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021)).

116. *Id.* at 2622–23. First, courts should consider the contested language's place in the overall statutory scheme, staying alert to agency attempts to hide "elephants in mouseholes" or to assert power in "'cryptic' statutory provision[s]." *Id.* (first quoting Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001); then quoting Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000)). Second, courts may look at the age and focus of the statute to ensure that agencies do not use old statutes enacted for one purpose to address new problems. *See id.* at 2623. Third, courts may look at past agency interpretations of the contested statute. *See id.* Fourth, there may be cause for skepticism if there is a "mismatch" between the regulation and the agency's expertise. *Id.*

117. *Id.* at 2621.

Justice Kagan, joined by Justices Breyer and Sotomayor, vigorously dissented, describing the major questions doctrine as a "get-out-of-text-free card[]."[118] According to the dissent, "[t]he majority's decision rests on one claim alone: that generation shifting is just too new and too big a deal for Congress to have authorized it in . . . general terms."[119] However, Congress delegates in broad terms for the very purpose of giving expert agencies the power to respond to new problems—"even significant ones."[120] Here, "Section 111, most naturally read, authorizes the EPA to develop the Clean Power Plan" and decide that generation shifting is the "best system of emission reduction."[121] Yet, the dissenters accused the majority of "announc[ing] the arrival" of the major questions doctrine instead of following the text, replacing "normal text-in-context statutory interpretation with some tougher-to-satisfy set of rules."[122]

Justice Kagan's dissent expressed uncertainty about the major questions doctrine. Despite the majority's efforts to formally bring the major questions doctrine into the Court's jurisprudence, *West Virginia* seemed to leave the contours of the doctrine undefined.[123] Nearly two years after the decision, the major questions doctrine and its role in administrative law are still actively developing in the Supreme Court.[124]

D. The Major Questions Doctrine After West Virginia

This section discusses the legal landscape after *West Virginia*. Part I.D.1 describes *Biden v. Nebraska*,[125] the first and only Supreme Court major questions doctrine case after *West Virginia*. Part I.D.1 also highlights two upcoming cases, *Loper Bright Enterprises v. Raimondo*[126] and *Relentless, Inc. v. Department of Commerce*,[127] in which the Court will decide whether to overturn *Chevron*. Finally, Part I.D.2 briefly discusses scholarship on future applications of the major questions doctrine under *West Virginia*.

118. *Id.* at 2641 (Kagan, J., dissenting).
119. *Id.* at 2628.
120. *Id.*
121. *Id.* at 2643.
122. *Id.* at 2634–35.
123. *See, e.g.*, Richard L. Revesz, *SCOTUS Ruling in* West Virginia v. EPA *Threatens All Regulation*, BLOOMBERG L. (July 8, 2022, 4:00 AM), https://news.bloomberglaw.com/environment-and-energy/scotus-ruling-in-west-virginia-v-epa-threatens-all-regulation [https://perma.cc/BPU3-XMTD] (noting that terms such as "economic and political significance" and "unheralded power . . . could mean virtually anything").
124. *See infra* Part I.D.1.
125. 143 S. Ct. 2355 (2023).
126. Loper Bright Enters. v. Raimondo, 45 F.4th 359 (D.C. Cir. 2022), *argued*, No. 22-451 (Jan. 17, 2024).
127. Relentless, Inc. v. U.S. Dep't of Com., 62 F.4th 621 (1st Cir. 2023), *argued*, No. 22-1219 (Jan. 17, 2024).

1. New Supreme Court Cases Evaluating the Major Questions Doctrine and *Chevron*

Exactly one year after *West Virginia*, the Supreme Court applied the major questions doctrine again in *Biden v. Nebraska*. The Court considered the U.S. Secretary of Education's student loan relief plan, through which the U.S. Department of Education planned to cancel up to $10,000 or $20,000 in student loans for qualified borrowers to alleviate the economic effects of the COVID-19 pandemic.[128] The U.S. Secretary of Education invoked the Higher Education Relief Opportunities for Students Act of 2003[129] (HEROES Act), which permits the Secretary of Education to "waive or modify" regulations related to student financial aid that the Secretary of Education "deems necessary in connection with . . . a national emergency."[130]

With Justice Roberts again writing for the majority, the Court held that the Secretary of Education lacked authority for the student loan relief plan under the HEROES Act.[131] First, the Court determined that the statute's "waive or modify" language did not support a comprehensive debt cancellation plan.[132] Second, the Court invoked the major questions doctrine to provide a supplementary rationale for rejecting the plan and to address the Government's argument that the plan fit Congress's purpose for the HEROES Act.[133]

Justice Barrett independently concurred to respond to criticism that the major questions doctrine is inconsistent with textualism.[134] In Justice Barrett's view, the doctrine "emphasize[s] the importance of *context* when a court interprets a delegation to an administrative agency" and therefore "is a tool for discerning—not departing from—the text's most natural

128. *Nebraska*, 143 S. Ct. at 2364–65. As will be discussed in Part II.B.1.a, a district court in the Fifth Circuit had previously analyzed the relief plan under the major questions doctrine, but the Supreme Court vacated that decision for lack of standing. *See* Brown v. U.S. Dep't of Educ., 640 F. Supp. 3d 644 (N.D. Tex. 2022), *vacated*, 143 S. Ct. 2343 (2023). *See generally* Part II.B.1.a.

129. 20 U.S.C. §§ 1098aa–1098ee.

130. *Nebraska*, 143 S. Ct. at 2362. The relevant portion of the HEROES Act, passed in the wake of the September 11 terrorist attacks, states in full that the Secretary of Education "may waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under Title IV of the [Education Act] as the Secretary deems necessary in connection with a war or other military operation or national emergency." *Id.* at 2363 (quoting 20 U.S.C. § 1098bb(a)(1)).

131. *See id.* at 2368.

132. *See id.* at 2371.

133. *See id.* at 2372. Under the major questions analysis, the Court highlighted that the Secretary of Education had never invoked such a power under the HEROES Act and that the Government's interpretation would create expansive power for the Secretary of Education. *See id.* at 2372–73. Additionally, the plan had "staggering" economic and political significance because it would cost taxpayers between $469 and $519 billion, and student debt relief is a "sharp[ly]" debated topic. *Id.* at 2373–74.

134. *See id.* at 2376 (Barrett, J., concurring).

interpretation."[135] Justice Kagan dissented to criticize the majority's reliance on the major questions doctrine.[136] Echoing her *West Virginia* dissent, she expressed concern that "the new major-questions doctrine works not to better understand—but instead to trump—the scope of legislative delegation."[137]

Nebraska did not offer substantial new guidance on how to apply the major questions doctrine.[138] Although questions remain about the doctrine, the Supreme Court is set to decide two administrative law cases this term, *Loper Bright Enterprises* and *Relentless*, in which the Court will decide whether to overturn *Chevron*.[139] The Court heard oral argument for both cases on January 17, 2024.[140] Should the Court overturn *Chevron*, the future of judicial deference to agencies and the role of the major questions doctrine are unknown.

2. Future Applications of the Major Questions Doctrine

It remains unclear what types of agency actions the Supreme Court will apply the doctrine to in the future.[141] Additionally, there are open questions on how the doctrine functions with *Chevron* and statutory interpretation in general.[142] Although the Court stressed that only major agency actions

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135. *Id.* Justice Barrett described the major questions doctrine as a substantive canon, which can serve as a "tie-breaking rule," but not a strong-form substantive canon, which can "counsel a court to *strain* statutory text to advance a particular value." *Id.* at 2376, 2378. *But see* Squitieri, *supra* note 44 (criticizing the major questions doctrine as inconsistent with textualism, from both a theoretical and practical perspective); Kevin Tobia, Daniel E. Walters & Brian Slocum, Major Questions, Common Sense? (July 26, 2023) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4520697 (arguing that the major questions doctrine fails as a linguistic canon based on empirical studies).

136. *See Nebraska*, 143 S. Ct. at 2396 (Kagan, J., dissenting). Justices Sotomayor and Jackson joined the dissent. *See id.*

137. *Id.* at 2397.

138. *See, e.g.*, Erin Webb, Biden v. Nebraska *Leaves Major Questions Unanswered*, BLOOMBERG L. ANALYSIS (Sept. 14, 2023), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-biden-v-nebraska-leaves-major-questions-unanswered [https://perma.cc/AL38-N8Q9]; *see also* Cary Coglianese, *Questions Remain on Major Questions Doctrine*, PENN CAREY L. (June 30, 2023), https://www.law.upenn.edu/live/news/15982-questions-remain-on-major-questions-doctrine [https://perma.cc/37Q2-5BU5].

139. *See* Loper Bright Enters. v. Raimondo, 45 F.4th 359 (D.C. Cir. 2022), *argued*, No. 22-451 (Jan. 17, 2024); Relentless, Inc. v. U.S. Dep't of Com., 62 F.4th 621 (1st Cir. 2023), *argued*, No. 22-1219 (Jan. 17, 2024); *see also* Amy Howe, *Justices Grant Four New Cases, Including* Chevron *Companion Case*, SCOTUSBLOG (Oct. 13, 2023, 3:16 PM), https://www.scotusblog.com/2023/10/justices-grant-four-new-cases-including-chevron-companion-case/ [https://perma.cc/SNM2-K9TV].

140. Oral Argument, Loper Bright Enters. v. Raimondo, No. 22-451 (Jan. 17, 2024), https://www.oyez.org/cases/2023/22-451 [https://perma.cc/YDC3-8EFG]; Oral Argument, Relentless, Inc. v. U.S. Dep't of Com., No. 22-1219 (Jan. 17, 2024), https://www.oyez.org/cases/2023/22-1219 [https://perma.cc/R6MY-FJT7].

141. *See* Todd Phillips & Beau Baumann, *The Major Questions Doctrine's Domain*, 89 BROOK. L. REV. (forthcoming 2024) (manuscript at 28–29), https://ssrn.com/abstract=4504304 (noting that all major questions cases have involved agency actions that alter the rights of regulated parties with the force of law).

142. *See* Sohoni, *supra* note 58, at 281 ("[N]owhere in the [recent cases] did the Court discuss how the major questions doctrine relates to *Chevron* . . . . [T]he new major questions

implicate the doctrine, what exactly makes an action major is unknown.[143] One common reading of *West Virginia* is that finding a major question requires two triggers: (1) that the action implicates a "question of deep economic and political significance" and (2) that the agency action is somehow "exceptional" because it is an "unheralded" or "transformative" exercise of power.[144]

Furthermore, the majority of scholars argue that the major questions doctrine now functions as a strong clear statement rule, requiring an agency to show that it had express statutory authority—sometimes beyond the plain meaning of the text—for its action.[145] A minority of scholars argue that the doctrine imposes only a weak clear statement rule, requiring only that the text is not ambiguous or vague.[146] Although the Supreme Court may provide further clarity on these points in future cases, for now it is lower courts, as the rest of this Note will discuss, that will decide the contours of the major questions doctrine.[147]

II. THE MAJOR QUESTIONS DOCTRINE IN LOWER COURTS

This part discusses circuit and district court applications of the major questions doctrine. Part II.A canvasses scholarship on lower court applications of the doctrine both before and after *West Virginia*. Part II.B discusses cases from the Fifth and Ninth Circuits that applied the major questions doctrine after *West Virginia*.

A. The Debate Surrounding Lower Court Applications

This section surveys scholarship on lower court applications of the major questions doctrine. Part II.A.1 considers whether Supreme Court precedent

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doctrine does not begin with *Chevron*. The new major questions doctrine does not operate as a factor within the *Chevron* framework.")

143. *See* Phillips & Baumann, *supra* note 141 (manuscript at 20).

144. *Id.* (manuscript at 20–21) (quoting West Virginia v. Env't Prot. Agency, 142 S. Ct. 2587, 2622, 2610 (2022)). *But see* Brunstein & Goodson, *supra* note 44, at 49 (arguing that the doctrine is triggered exclusively when the action is "unheralded" and "transformative").

145. *See* Phillips & Baumann, *supra* note 141 (manuscript at 22); *see also* Sohoni, *supra* note 58, at 275 (arguing that the new major questions doctrine no longer prompts de novo review of the statute by courts, but instead is a clear statement rule requiring an express statutory statement). The following analogy helps to explain how the major questions doctrine would function as a strong clear statement rule: "If a majority of justices determine that eating an ice cream cone is a major question, then it is not enough that Congress has empowered the agency to 'eat any dessert it chooses.' It must legislate that the agency can 'eat any dessert it chooses, including ice cream cones.' But Congress has no way of knowing whether eating an ice cream cone is major until it sees what a majority of justices have to say about it." Josh Chafetz, *The First Name of a Supreme Court Justice Is Not Justice*, N.Y. TIMES (June 2, 2023), https://www.nytimes.com/2023/06/02/opinion/supreme-court-john-roberts-contempt.html [https://perma.cc/RFS5-YRFD].

146. *See* Phillips & Baumann, *supra* note 141, at 22.

147. For a major questions doctrine reading list, see generally Beau J. Baumann, *The Major Questions Doctrine Reading List*, YALE J. ON REGUL.: NOTICE & COMMENT (Aug. 14, 2023), https://www.yalejreg.com/nc/volume-iv-of-the-major-questions-doctrine-reading-list-by-beau-j-baumann/ [https://perma.cc/PK39-NBQN].

before *West Virginia* granted sufficient guidance to lower courts. Part II.A.2 discusses scholarly predictions regarding *West Virginia*'s impact on lower court decisions.

1. Lower Courts Before *West Virginia*

Lower courts have applied a version of the major questions doctrine since at least as early as *King*.[148] Although lower courts generally followed *Chevron*, some judges recognized that they could deviate from the typical *Chevron* analysis in certain cases.[149] In this period before *West Virginia*, Professors Michael Coenen and Seth Davis argued that *King* provided insufficient guidance to lower courts and that lower courts should not apply the major questions "exception."[150] Instead, they proposed that only the Supreme Court should ever invoke the exception by equating the "majorness" determination with a certiorari grant.[151]

Professors Coenen and Davis argued that the potential benefits of the major questions "exception"—such as faithfully applying congressional intent, enforcing constitutional limits on legislative delegations of power, and promoting stability of the law—do not extend to lower court majorness determinations.[152] In addition to unrealized benefits, lower court application is costly.[153] Judges and litigants may struggle to apply a vague test that rests on discretion and instinct, and courts may incorrectly apply the doctrine if it is not sufficiently clear.[154] For those reasons, Professors Coenen and Davis proposed that the major questions "exception" should exclusively be the domain of the Supreme Court.[155]

In response to Professors Coenen and Davis's proposal, Associate Dean Kent Barnett and Professor Christopher J. Walker argued that lower courts should apply the major questions doctrine—despite the absence of clear

148. *See* Coenen & Davis, *supra* note 57, at 779 (explaining that although the Supreme Court did not discuss the major questions "exception" for several years after *King*, it did not "[lie] dormant in the courts below").

149. *See id.* at 796–97. For example, in a Fifth Circuit decision, *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016), the court upheld a preliminary injunction against the Deferred Action for Parents of Americans program after determining that it implicated a major question under *King*. *See id.* at 797.

150. *See* Coenen & Davis, *supra* note 57, at 779.

151. *See id.* at 779–80.

152. *See id.* at 803–12. For example, to the extent that Congress may prefer the Supreme Court to resolve major questions over agencies, Congress might not prefer every district and circuit court to enjoy interpretive primacy over agencies. *See id.* at 803–05.

153. *See id.* at 812.

154. *See id.* at 812–20 (arguing that lower courts avoiding the exception would at worst over-defer to agencies, and "[b]y definition, these errors will involve statutory questions that the Court itself would regard as 'major'" and take up to review regardless).

155. *See id.* at 820. Coenen and Davis argued that their proposal would not upset tradition nor require lower court disobedience on the grounds that vertical "disuniformity" is already part of the federal court tradition and that the Supreme Court has not explicitly instructed lower courts to find new major questions. *See id.* at 823–27.

guidance from *King*, and perhaps because of that absence.[156] First, they argued that applying the doctrine is consistent with *Chevron*'s theoretical foundations.[157] Since *Chevron* deference is grounded on a theory of implied delegation, the major questions doctrine is useful to determine whether Congress actually intended to delegate authority to an agency on a specific issue.[158] Second, lower court percolation is valuable because circuit courts serve as "jurisprudential laboratories" to refine the legal standard.[159] Percolation is particularly useful for the major questions doctrine, which "speaks in broader, less-defined terms than a legal *rule*[] and requires case-by-case application to give it meaning."[160] Therefore, lower courts should take an active role in shaping the doctrine.[161]

2. Lower Courts After *West Virginia*

West Virginia marked a significant step in the major questions doctrine's development. Although scholarship primarily focuses on the Supreme Court's jurisprudence,[162] scholars are beginning to consider how lower courts will apply the doctrine. For example, Natasha Brunstein and Donald R. Goodson argue that *West Virginia*, unlike its predecessor cases, provides new and sufficient guidance for lower courts to follow.[163] They explain that *West Virginia* adopts a two-prong framework for finding a major question that is easily transferable to lower courts.[164] First, courts should consider whether an agency action is "unheralded" or unprecedented and, second, whether the action is a "transformative" change in the agency's authority.[165] Both prongs are required to find a major question, which then triggers judicial skepticism and the search for "clear congressional authorization."[166]

156. Kent Barnett & Christopher J. Walker, *Short-Circuiting the New Major Questions Doctrine*, 70 VAND. L. REV. EN BANC 147, 149 (2017).

157. *See id.* at 154. Thus, lower courts faithfully exercise their judicial review role when they apply the doctrine. *See id.*

158. *See id.* at 156–57.

159. *Id.* at 154, 159–62.

160. *See id.* at 160 (emphasis in original).

161. *See id.* at 163.

162. *See supra* Part I.D.2.

163. *See* Brunstein & Goodson, *supra* note 44, at 50. However, Brunstein has since acknowledged that the doctrine "is far from a model of clarity." *See* Natasha Brunstein, *Major Questions in Lower Courts*, 75 ADMIN. L. REV. 661, 662 (2023).

164. *See* Brunstein & Goodson, *supra* note 44, at 49.

165. *See id.* at 49–50 (quoting West Virginia v. Env't Prot. Agency, 142 S. Ct. 2587, 2610 (2022)). Brunstein and Goodson argue that the *West Virginia* Court intentionally declined to create a multifactor test focused on economic and political significance. *See id.* at 74.

166. *See id.* at 83 (quoting *West Virginia*, 142 S. Ct. at 2614). Brunstein and Goodson further argue that the majority did not endorse a clear statement rule. *See id.* at 95. Although Justice Gorsuch's concurrence "emphatically" endorsed a clear statement rule, in fact using the phrase seventeen times, the majority never used the phrase "clear statement," only "clear congressional authorization." *Id.* at 97. *But see supra* note 145 and accompanying text.

Although Brunstein and Goodson argue that *West Virginia* provides a clear test for lower courts to apply,[167] other scholars disagree. For example, one article argues that *West Virginia* fails to provide sufficient guidance to lower courts because the Court created a "one-off escape hatch" based on majorness rather than articulating a holistic inquiry based on statutory interpretation.[168] Other scholars argue that even after *Nebraska*, the major questions doctrine test is unclear[169] and that lower courts will "struggle" to apply the doctrine.[170]

B. Fifth and Ninth Circuit Applications of the Major Questions Doctrine After West Virginia

Nearly two years have passed since *West Virginia*, during which litigants have raised major questions challenges in lower courts. To understand trends in lower court applications thus far, this section explores the major questions doctrine in two courts of appeals, the Fifth Circuit and the Ninth Circuit.[171] First, Part II.B.1 looks at all cases as of December 31, 2023 from the two circuits that analyzed whether an agency action triggers the major questions doctrine after *West Virginia*.[172] Second, Part II.B.2 describes in greater detail a major questions doctrine circuit split in the Fifth and Ninth Circuits over presidential action and a vaccine mandate.

1. The Major Questions Doctrine in the Fifth and Ninth Circuits

Courts in the Fifth Circuit have identified major questions in eight cases after *West Virginia.* In the Ninth Circuit, only one district court has identified a major question. Part II.B.1.a describes Fifth Circuit cases and Part II.B.1.b describes Ninth Circuit cases in which courts addressed a major questions challenge. Both sections consider the following themes: the subject matter of the contested agency action, the economic and political significance of the action, the unheralded or transformative nature of the action, the doctrine's

167. Another scholar argues that Supreme Court precedent provides sufficient guidance to lower courts, but that "there are at least two primary categories of 'major' questions: political and economic questions." *See* Capozzi III, *supra* note 44, at 228.

168. *See* Jonathan H. Adler, West Virginia v. EPA*: Some Answers about Major Questions*, 2022 CATO SUP. CT. REV. 37, 38–39, 61–62 (arguing that *West Virginia* failed to provide sufficient guidance on how the major questions doctrine should inform statutory interpretation).

169. *See generally supra* Part I.D.

170. *See* Webb, *supra* note 138.

171. The Fifth and Ninth Circuits are known for their political leanings, with the Fifth Circuit recognized as the most conservative circuit and the Ninth Circuit as the most liberal circuit. *See* Nadin R. Linthorst, *Entering the Political Thicket with Nationwide Injunctions*, 125 PENN ST. L. REV. 67, 86–87 (2020). However, alleged politicization of the major questions doctrine is beyond the scope of this Note.

172. In a recent article, Brunstein also surveyed how courts in the Fifth and Ninth Circuits have applied the major questions doctrine. *See* Brunstein, *supra* note 163, at 662. However, this Note's research and discussion of lower court cases were conducted independently. Additionally, although Brunstein reaches a similar conclusion on the doctrine's inconsistency in lower courts, this Note proposes its own path forward for lower courts to improve consistency. *See infra* Part III.B.

role in statutory interpretation, the clear congressional authorization inquiry, and the popularity of Justice Gorsuch's *West Virginia* concurrence factors.

a. The Fifth Circuit

District and circuit court judges in the Fifth Circuit have identified a major question in eight cases after *West Virginia*. These courts found that agency actions triggered the doctrine in a variety of contexts. The courts held that a temporary nuclear waste storage license,[173] the Deferred Action for Childhood Arrivals (DACA) program,[174] a federal contractor minimum wage increase,[175] a regulation on discrimination in the consumer-debt industry,[176] a terrorist watchlist,[177] a nationwide student loan relief program,[178] and vaccine mandates[179] all triggered the major questions doctrine.

To assess whether an agency action involved a major question, six of the eight cases focused primarily on the economic and political significance of the action.[180] The courts found an issue of economic significance when the action cost more than $400 billion;[181] created millions of dollars in compliance costs;[182] or resulted in regulatory familiarization costs,

173. *See* Texas v. Nuclear Regul. Comm'n, 78 F.4th 827, 840 (5th Cir. 2023) (evaluating the Nuclear Regulatory Commission's authority to grant licenses for temporary nuclear waste storage facilities under the Atomic Energy Act).

174. *See* Texas v. United States, 50 F.4th 498, 524 (5th Cir. 2022) (evaluating the Secretary of the Department of Homeland Security's authority to create DACA under the Immigration and Nationality Act).

175. *See* Texas v. Biden, No. 22-CV-00004, 2023 U.S. Dist. LEXIS 171265, at *13 (S.D. Tex. Sept. 26, 2023) (assessing President Biden's authority to raise the federal contractor minimum wage under the Procurement Act).

176. *See* Chamber of Com. v. Consumer Fin. Prot. Bureau, No. 22-CV-00381, 2023 U.S. Dist. LEXIS 159398, at *17 (E.D. Tex. Sept. 8, 2023) (evaluating the Consumer Financial Protection Bureau's authority to prohibit discrimination under its mandate to regulate "unfair, deceptive, or abusive acts or practices").

177. *See* Kovac v. Wray, 660 F. Supp. 3d 555, 563 (N.D. Tex. 2023) (assessing the Terrorist Screening Center's authority and the Federal Bureau of Investigation's authority to create a terrorist watchlist under 18 U.S.C. § 44904(a) and other statutory provisions).

178. *See* Brown v. U.S. Dep't of Educ., 640 F. Supp. 3d 644, 663 (N.D. Tex. 2022) (considering the Department of Education's authority to create a student loan forgiveness program under the HEROES Act), *vacated*, 143 S. Ct. 2343 (2023).

179. *See* Louisiana v. Becerra, 629 F. Supp. 3d 477, 489 (W.D. La. 2022), *vacated in part as moot*, No. 22-30748, 2023 U.S. App. LEXIS 32280 (5th Cir. Aug. 29, 2023) (evaluating the authority of the U.S. Department of Health and Human Services (HHS) to impose a vaccine mandate on the Head Start program); Louisiana v. Biden, 55 F.4th 1017 (5th Cir. 2022) (assessing President Biden's authority to impose a vaccine mandate on federal contractors).

180. *See* Texas v. United States, 50 F.4th 498, 526 (5th Cir. 2022); *Kovac*, 660 F. Supp. 3d at 564; *Brown*, 640 F. Supp. 3d at 644; Texas v. Nuclear Regul. Comm'n, 78 F.4th 827, 844 (5th Cir. 2023); *Chamber of Com.*, 2023 U.S. Dist. LEXIS 159398, at *19; *Biden*, 2023 U.S. Dist. LEXIS 171265, at *19.

181. *See Brown*, 640 F. Supp. 3d at 664 (finding the student loans program economically significant because it cost $400 billion, which is twenty times more than the amount implicated in *Alabama Ass'n of Realtors*).

182. *See Chamber of Com.*, 2023 U.S. Dist. LEXIS 159398, at *19 (determining that the nondiscrimination policy is economically significant because it costs the financial-service industry millions of dollars to comply with).

implementation costs, and transfer payments.[183] One court found that the contested action was of enormous economic significance because the national Gross Domestic Product would *decrease* without it.[184] Courts found a politically significant issue when the agency action affected over one million people and intruded on personal liberty,[185] paralleled bills robustly debated and rejected in Congress,[186] was "hotly" contested,[187] or affected state and federal power significantly.[188] In each case, the court found that the economic or political significance of the contested action triggered the major questions doctrine. On the other hand, only one court considered whether the agency had exercised an unheralded or transformative power to find a major question.[189] Two courts discussed the history of the agency's power under the relevant statute, but they did so to assess clear congressional authorization, not to find a major question.[190]

Additionally, courts considered the major questions challenge at different points of discussing the permissibility of the agency's statutory interpretation. Only one court began by applying *Chevron*.[191] Three courts evaluated the statute de novo outside the *Chevron* framework—one court finding the statute ambiguous and two courts finding the statute unambiguous—before proceeding to a major questions analysis.[192] Another

183. *See Biden*, 2023 U.S. Dist. LEXIS 171265, at *31 (concluding that the federal contractor minimum wage policy would result in $13.4 million in regulatory familiarization costs and $3.8 million in transfer costs, but also $1.7 billion in annual transfer payments to the 327,300 workers earning below the minimum wage).

184. *See Texas*, 50 F.4th at 527 (noting that the "national GDP may contract by as much as $460 billion without DACA").

185. *See Kovac*, 660 F. Supp. 3d at 565 (holding that a terrorist watchlist is an action of vast political significance because the list contains over a million people and leads to significant liberty intrusions, such as the collection of identifying information and full body searches).

186. *See Brown*, 640 F. Supp. 3d at 664–65 (citing West Virginia v. Env't Prot. Agency, 142 S. Ct. 2587, 2620–21 (2022) (Gorsuch, J., concurring)) (finding that the student loans forgiveness program is a policy with vast political significance because Congress considered and failed to enact similar legislation on student loan debt).

187. *See* Texas v. Nuclear Regul. Comm'n, 78 F.4th 827, 844 (5th Cir. 2023) (finding a major question because storing nuclear waste is "hotly politically contested" and a "major subject[] of public concern").

188. *See* Chamber of Com. v. Consumer Fin. Prot. Bureau, No. 22-CV-00381, 2023 U.S. Dist. LEXIS 159398, at *20 (E.D. Tex. Sept. 8, 2023) (holding that regulating discrimination in financial-service companies displaces state authority to do so and asserts a power typically exercised by the legislature only after "delicate negotiations requiring compromises or tradeoffs").

189. *See* Louisiana v. Biden, 55 F.4th 1017, 1029–31 (5th Cir. 2022).

190. *See Kovac*, 660 F. Supp. 3d at 567–68; Louisiana v. Becerra, 629 F. Supp. 3d 477, 492 (W.D. La. 2022), *vacated in part as moot*, No. 22-30748, 2023 U.S. App. LEXIS 32280 (5th Cir. Aug. 29, 2023).

191. *See* Texas v. United States, 50 F.4th 498, 525 (5th Cir. 2022). The court first found that the agency action failed at step one of *Chevron*. *See id.* at 526. The court then determined that the agency would also fail at step two because it had relied on an "unreasonable interpretation" of the statute. *Id.* The court invoked the major questions doctrine to explain why the interpretation was unreasonable. *See id.*

192. *See* Becerra, 629 F. Supp. at 489; *Nuclear Regul. Comm'n*, 78 F.4th at 840; Texas v. Biden, No. 22-CV-00004, 2023 U.S. Dist. LEXIS 171265, at *15 (S.D. Tex. Sept. 26, 2023).

court thoroughly discussed the history of the statute before proceeding to the major questions analysis.[193] Finally, three courts declared the agency action impermissible solely on the basis of the major questions doctrine without separate statutory interpretation.[194]

Furthermore, two courts cited to Justice Gorsuch's multifactor tests from *West Virginia* to either evaluate economic and political significance or clear congressional authorization.[195] Like Justice Gorsuch, three courts expressed concern over the separation of powers issues implicated when an agency regulates on a major question.[196] One court noted that "[i]t's not clear why the Supreme Court requires clear congressional authorization only for *major* questions or *significant* assertions of authority . . . [when] it seems like the separation of legislative power in Article I from executive power in Article II . . . means that agencies should always have clear congressional authorization."[197]

To find clear congressional authorization, most courts considered the statute's language, statutory context, history, and purpose.[198] Thus, courts considered information beyond the plain text of the statute, such as earlier agency interpretations and any mismatch between the agency's action and its expertise—information that could also suggest a transformative or

193. *See Louisiana*, 55 F.4th at 1023.

194. *See Kovac*, 660 F. Supp. 3d at 563; Brown v. U.S. Dep't of Educ., 640 F. Supp. 3d 644, 644 (N.D. Tex. 2022), *vacated*, 143 S. Ct. 2343 (2023); Chamber of Com. v. Consumer Fin. Prot. Bureau, No. 22-CV-00381, 2023 U.S. Dist. LEXIS 159398, at *19 (E.D. Tex. Sept. 8, 2023).

195. *See, e.g.*, *Becerra*, 629 F. Supp. 3d at 492; *Brown*, 640 F. Supp. 3d at 666; *see also supra* notes 113–16 and accompanying text.

196. *See Kovac*, 660 F. Supp. 3d at 564; *Becerra*, 629 F. Supp. 3d at 494; *Biden*, 2023 U.S. Dist. LEXIS 171265, at *2.

197. *Kovac*, 660 F. Supp. 3d at 564. Although the above discussion includes all cases that applied a major questions analysis and found a major question, at least one case is omitted that cites *West Virginia* favorably but does not apply a major questions analysis. *See* Tesla, Inc. v. Nat'l Lab. Rels. Bd., No. 22-60493, 2023 U.S. App. LEXIS 30319, at *18–19 n.19 (5th Cir. Nov. 14, 2023) (noting that Congress likely would not have intended the agency action without clear statutory authority and citing *West Virginia* for support). Two other cases are omitted in which the court found that an agency lacked statutory authority under *Chevron* but briefly discussed the major questions doctrine in a footnote. *See* Texas v. Becerra, No. 21-CV-300, 2023 U.S. Dist. LEXIS 56119, at *54 n.14 (N.D. Tex. Mar. 31, 2023); Utah v. Walsh, No. 23-CV-016, 2023 U.S. Dist. LEXIS 168696, at *14 n.3 (N.D. Tex. Sep. 21, 2023). Finally, one case is omitted that cites to *West Virginia* to assert that an agency generally requires clear congressional authorization for regulations but does not conduct a major questions analysis. *See* Vanderstok v. Garland, 86 F.4th 179, 188 (5th Cir. 2023).

198. *See, e.g.*, *Chamber of Com.*, 2023 U.S. Dist. LEXIS 159398, at *20. The court in *Chamber of Commerce* noted that because the word "and" separates the agency's mandate to protect consumers from "unfair, deceptive, or abusive acts or practices" and its mandate to protect consumers from "discrimination," these are two separate authorities. *Id.* at 21. Additionally, even if the statute was ambiguous, the history of the provision does not "refute its ambiguity." *Id.* at 24. The court in *Texas v. Biden* applied the major questions doctrine after analyzing the statute de novo and determining that the Procurement Act's "text, history, and purpose" do not permit the President to exercise "broad policy-making power to set the minimum wage." *Biden*, 2023 U.S. Dist. LEXIS 171265, at *26. Thus, Congress had not "clearly spoken." *Id.* at *34.

unheralded exercise of power.[199] Although seven of the courts found no clear congressional authorization, the U.S. District Court for the Northern District of Texas held in *Kovac v. Wray*[200] that although creation of a terrorist watchlist is a major question, there is clear congressional authorization.[201]

These eight cases are notable as some of the first lower court decisions to find a major question after *West Virginia*. However, other courts from the Fifth Circuit declined to find a major question.[202] These cases also involved agency actions covering a range of issues. Courts considered regulations on wages for tipped employees,[203] oil disposal records and hazardous conditions on vessels,[204] overtime pay exemptions for salaried employees,[205] and disclosure requirements for companies listed on the stock exchange.[206] When applying the major questions doctrine, at least three courts determined that the agency action was not economically or politically significant—particularly in comparison to Supreme Court precedent[207]—and that the

199. *See, e.g.*, *Becerra*, 629 F. Supp. 3d at 493. For example, the court in *Louisiana v. Becerra* considered past public health requirements that HHS had imposed on the Head Start program, but ultimately concluded that the requirements did not go so far as to require specific medical treatments of participants. *See id.*; *see also Brown*, 640 F. Supp. at 666 (finding no clear congressional authorization because the HEORES Act had never been invoked for mass cancellation of student loans).

200. 660 F. Supp. 3d 555 (N.D. Tex. 2023).

201. *See id.* at 565. After finding that a terrorist watchlist implicated a major question, the court determined that Congress clearly authorized such a list. *See id.* at *19. Although the statutory text does not mention a watchlist, the text does grant authority to "assess current and potential threats to the domestic air transportation system" and to "decide on and carry out the most effective method for continuous analysis and monitoring of [those] security threats." *Id.* at *13–14 (alteration in original) (quoting 49 U.S.C. § 44904(a)). The court explained that "the test isn't whether the Government adopted Congress's preferred nomenclature in labeling its terrorism apparatuses," but rather whether Congress generally authorized the power at issue. *Id.* at *15.

202. The discussion below includes only cases that applied a major questions analysis and excludes cases that cite to *West Virginia* without further elaboration. For an example of a case omitted from the discussion, see Midship Pipeline Co. v. Fed. Energy Regul. Comm'n, 45 F.4th 867 (5th Cir. 2022).

203. *See* Rest. L. Ctr. v. U.S. Dep't of Lab., No. 21-CV-1106, 2023 WL 4375518, at *12 (W.D. Tex. July 6, 2023) (holding that a Department of Labor regulation on employee wages does not trigger the major questions doctrine).

204. *See* United States v. Empire Bulkers Ltd., No. 21-126, 2022 U.S. Dist. LEXIS 151817, at *3, *8 (E.D. La. Aug. 24, 2022) (rejecting a major questions doctrine challenge to requirements to maintain a record of oil disposal on oceangoing ships and to notify the Coast Guard when a hazardous condition appears on a vessel).

205. *See* Mayfield v. U.S. Dep't of Lab., 22-CV-792, 2023 U.S. Dist. LEXIS 168054, at *20 (W.D. Tex. Sept. 20, 2023) (finding that the major questions doctrine does not apply to a Department of Labor rule that uses a salary level test to determine an employee's exempt status from overtime pay).

206. *See* All. for Fair Bd. Recruitment v. Sec. Exch. Comm'n, 85 F.4th 226, 256 (5th Cir. 2023) (rejecting a major questions doctrine challenge to a Securities and Exchange Commission (SEC) rule requiring companies listed on the Nasdaq Stock Market to disclose information about board of directors' diversity and providing access to a board recruiting service).

207. *See, e.g.*, *Rest. L. Ctr.*, 2023 WL 4375518, at *13 (finding that unlike Supreme Court cases in which the agency action required billions of dollars in spending, the contested rule cost only $183.6 million annually). One court noted: "While it is not clear exactly when a case is one of 'vast economic and political significance,' this case certainty is not." *Mayfield*,

agency action was not an unheralded or transformative exercise of power because the agency did not assert a new power.[208] Of these decisions, two cases applied *Chevron*[209] and two analyzed the statute de novo.[210] Finally, although finding no major question, two courts noted that even if there was a major question, there was clear textual support for the agency action.[211]

One of these cases, *Alliance for Fair Board Recruitment v. Securities & Exchange Commission*,[212] is the first from the Fifth Circuit Court of Appeals to consider a major questions challenge and decline to find one after *West Virginia*.[213] The court found that a Securities and Exchange Commission (SEC) rule requiring companies listed on the stock exchange to disclose diversity information about their board of directors and provide access to a board recruiting service did not trigger a major question.[214] According to the court, the history and breadth of the SEC's actions were "unremarkable"[215] and the rule was not economically or politically significant.[216] However, even if the SEC action did trigger the major questions doctrine, the regulation's "authorization [was] plain on the face" of the statute.[217] The petitioners to the case have since filed for en banc review.[218]

b. The Ninth Circuit

One court from the Ninth Circuit has found a major question since *West Virginia*. In *Kaweah Delta Health Care District v. Becerra*,[219] the U.S.

2023 U.S. Dist. LEXIS 168054, at *20; *see id.* at *22 (finding that the economic effects do not compare to other major questions cases and that the agency "does not seek to regulate 'vast swaths of American life'" (quoting West Virginia v. Env't Prot. Agency, 142 S. Ct. 2587, 2621 (2022)).

208. *See, e.g.*, *All. for Fair Bd. Recruitment*, 85 F.4th at 256 (describing the SEC authority as "unremarkable"); *Empire Bulkers Ltd.*, 2022 U.S. Dist. LEXIS 151817, at *11 (noting with minimal analysis that the regulation "does not exceed Congress's clear grant of authority" and "comports with the central mandate" of the statute).

209. *See Rest. L. Ctr.*, 2023 WL 4375518, at *5; *Mayfield*, 2023 U.S. Dist. LEXIS 168054, at *11.

210. *See Empire Bulkers Ltd.*, 2022 U.S. Dist. LEXIS 151817, at *1; *All. for Fair Bd. Recruitment*, 85 F.4th at 248.

211. *See Mayfield*, 2023 U.S. Dist. LEXIS 168054, at *23; *All. for Fair Bd. Recruitment*, 85 F.4th at 257.

212. 85 F.4th 226 (5th Cir. 2023).

213. *See id.* at 256.

214. *See id.* at 237.

215. *Id.* at 256–57 (explaining that the SEC regularly approves disclosure rules as part of its authority to promote full disclosure).

216. *Id.* at 257 (noting that the rule only affects companies that voluntarily list on the stock exchange).

217. *Id.* at 258 (explaining that the SEC "shall" approve disclosure requirements that are "consistent with the requirements of [the Exchange Act]" (quoting 15 U.S.C. § 78(s)(b)(2)(C)(i))).

218. See *Diversity in the Boardroom: Fifth Circuit Rejects Challenge to the SEC Nasdaq Board Diversity Rules; En Banc Petition Quickly Filed*, KRAMER LEVIN (Oct. 30, 2023), https://www.kramerlevin.com/en/perspectives-search/diversity-in-the-boardroom-fifth-circuit-rejects-challenge-to-the-sec-nasdaq-board-diversity-rules-en-banc-petition-quickly-filed.html [https://perma.cc/DS7C-P5GV].

219. No. CV 20-6564, 2022 U.S. Dist. LEXIS 232097 (C.D. Cal. Dec. 22, 2022).

District Court for the Central District of California considered the decision of the U.S. Department of Health and Human Services (HHS) to adjust the hospital wage index values used to determine Medicare reimbursement quantities.[220] HHS invoked the Medicare Act[221] as the supporting authority, which permits the U.S. Secretary of Health and Human Services to provide for "exceptions and adjustments to . . . payment[s] . . . as [he] deems appropriate."[222] First, the court determined that the "plain language" does not grant the Secretary of Health and Human Services authority to adjust the wage index in the way he did.[223] Second, although the statute's language is broad, courts "presume that Congress intends to make major policy decisions itself."[224] Without invoking the major questions doctrine by name, the court determined that this was a "'major policy decision' and a 'fundamental' change to the manner in which wage indexes are calculated."[225] Briefly quoting only the Secretary of Health and Human Services's rationale for the policy and offering no further analysis on the major questions doctrine, the court determined that the agency lacked authority.[226] The court did not separately look for clear congressional authorization.[227]

Yet in most cases, courts in the Ninth Circuit declined to find a major question. Courts heard regulatory challenges against a vaccine mandate for federal contractors,[228] a provision of the Federal Trade Commission Act,[229] a federal contractor minimum wage increase,[230] a temporary moratorium on an oil and gas leasing program,[231] a class action settlement,[232] an emergency

220. *See id.* at *6–7. This had the effect of increasing payments to low wage hospitals and reducing payments to other hospitals. *See id.*

221. 42 U.S.C. §§ 1395–1395*lll*.

222. *Id.*

223. *Kaweah Delta Health Care Dist.*, 2022 U.S. Dist. LEXIS 232097, at *29.

224. *See id.* at *31 (quoting West Virginia v. Env't Prot. Agency, 142 S. Ct. 2587, 2609 (2022)).

225. *Id.* at *33 (quoting *West Virginia*, 142 S. Ct. at 2609).

226. *See id.* at *34.

227. *See id.*

228. *See* Mayes v. Biden, 67 F.4th 921, 932 (9th Cir. 2023), *vacated as moot*, No. 11-15518, U.S. App. LEXIS 34405 (9th Cir. Dec. 28, 2023) (evaluating President Biden's authority to impose a federal contractor vaccine mandate under the Procurement Act).

229. 15 U.S.C. §§ 41–58; *see* Fed. Trade Comm'n v. Kochava Inc., No. 22-CV-00377, 2023 WL 3249809, at *13 (D. Idaho May 4, 2023) (concluding that § 5(a) of the Federal Trade Commission Act is not unconstitutional under the nondelegation doctrine nor under the major questions doctrine).

230. *See* Arizona v. Walsh, No. CV-22-00213, 2023 WL 120966, at *7 (D. Ariz. Jan. 6, 2023) (rejecting a major questions doctrine challenge to President Biden's Executive Order and the Department of Labor's subsequent rule raising the federal contractor minimum wage under the Procurement Act).

231. *See* Alaska Indus. Dev. & Exp. Auth. v. Biden, No. 21-CV-00245, 2023 WL 5021555, at *11 (D. Alaska Aug. 7, 2023) (finding no major questions issue in imposing a temporary moratorium on an oil and gas leasing program in Alaska).

232. *See* Sweet v. Cardona, 641 F. Supp. 3d 814, 819 (N.D. Cal. 2022) (rejecting a major questions doctrine challenge to the Secretary of Education's authority to enter a settlement with a class of student loan borrowers).

authorization to hunt for sustenance in remote Alaska,[233] and robocalls.[234] Most of the cases limited the major questions discussion to only a few sentences.[235] Four courts focused on economic and political significance, emphasizing that the contested actions were limited in scope compared to Supreme Court major questions cases.[236] Additionally, four courts discussed whether the action was unheralded or transformative, although not always invoking that exact language.[237] Three courts applied *Chevron*, but only after first disposing of the major questions challenge,[238] and four resolved the case on de novo statutory review.[239]

In *Arizona v. Walsh*,[240] the U.S. District Court for the District of Arizona considered a major questions challenge to a U.S. Department of Labor (DOL) regulation raising the federal contractor minimum wage, the same regulation rejected by the U.S. District Court for the Southern District of Texas in *Texas v. Biden*.[241] Unlike the *Biden* court, the *Walsh* court found that the major questions doctrine did not apply.[242] After noting that the agency did not rely on "an ancillary statutory provision," the *Walsh* court discussed the number of people that the action affected and its economic impact, just as the *Biden* court had.[243] Yet, the *Walsh* court found that the very same factors that the

233. *See* Alaska, Dep't of Fish & Game v. Fed. Subsistence Bd., No. 20-CV-00195, 2023 U.S. Dist. LEXIS 198328, at *18 (D. Alaska Nov. 3, 2023) (determining that the major questions doctrine does not apply to the Federal Subsistence Board's approval of a limited hunting authorization for remote Alaskan communities during the COVID-19 pandemic).

234. *See* Howard v. Republican Nat'l Comm., No. CV-23-00993, 2023 U.S. Dist. LEXIS 198558, at *4 (D. Ariz. Nov. 3, 2023) (finding that the major questions doctrine does not apply to the Federal Communications Commission's power to carve out exceptions to the Telephone Consumer Protection Act for certain robocalls); Crawford v. Nat'l Rifle Ass'n of Am., No. CV-23-00903, 2023 U.S. Dist. LEXIS 198549, at *4 (D. Ariz. Nov. 3, 2023) (applying an analysis identical to *Howard* to a similar robocall).

235. *See, e.g.*, Fed. Trade Comm'n v. Kochava Inc., No. 22-CV-00377, 2023 WL 3249809, at *7 (D. Idaho May 4, 2023); *Alaska Indus. Dev. & Exp. Auth.*, 2023 WL 5021555, at *11; *Sweet*, 641 F. Supp. 3d at 824–25.

236. *See* Arizona v. Walsh, No. CV-22-00213, 2023 WL 120966, at *11 (D. Ariz. Jan. 6, 2023); *Alaska Indus. Dev. & Exp. Auth.*, 2023 WL 5021555, at *11 (noting that the moratorium affects only nine oil and gas leases held by three lessees in Alaska); *Sweet*, 641 F. Supp. 3d at 824 (finding that although the settlement will discharge over $6 billion in loans, "*West Virginia* made clear that determining whether a case contains a major question is not merely an exercise in checking the bottom line"); *Alaska, Dep't of Fish & Game*, 2023 U.S. Dist. LEXIS 198328, at *20 (noting that the agency decision does not impact millions of people nationwide).

237. *See* Mayes v. Biden, 67 F.4th 921, 934 (9th Cir. 2023), *vacated as moot*, No. 11-15518, U.S. App. LEXIS 34405 (9th Cir. Dec. 28, 2023); *Walsh*, 2023 WL 120966, at *8; *Sweet*, 641 F. Supp. 3d at 824; *Howard*, 2023 U.S. Dist. LEXIS 198558, at *8.

238. *See Alaska, Dep't of Fish & Game*, 2023 U.S. Dist. LEXIS 198328, at *22; *Howard*, 2023 U.S. Dist. LEXIS 198558, at *5; *Crawford*, 2023 U.S. Dist. LEXIS 198549, at *4.

239. *See Mayes*, 67 F.4th at 939; *Fed. Trade Comm'n*, 2023 WL 3249809, at *3; *Walsh*, 2023 WL 120966, at *5; *Alaska Indus. Dev. & Exp. Auth.*, 2023 WL 5021555, at *9; *Sweet*, 641 F. Supp. 3d at 822.

240. No. CV-22-00213, 2023 WL 120966, at *7 (D. Ariz. Jan. 6, 2023).

241. No. 22-CV-00004, 2023 U.S. Dist. LEXIS 171265, at *27 (S.D. Tex. Sept. 26, 2023).

242. *Compare Walsh*, 2023 WL 120966, at *7, *with Biden*, 2023 U.S. Dist. LEXIS 171265, at *27.

243. *Compare Walsh*, 2023 WL 120966, at *7–8, *with Biden*, 2023 U.S. Dist. LEXIS 171265, at *29, *and supra* note 183 and accompanying text.

Biden court had relied on to find a major question, including the $1.7 billion annual transfer from employers to employees, cut in favor of finding no major question.[244]

These Fifth and Ninth Circuit cases demonstrate that major questions challenges arise in a variety of contexts. Additionally, the analysis differs case to case. Of the cases discussed, two are particularly notable because they resulted in a circuit split. Thus, the circuit split cases are worth comparing in greater detail to understand how different courts apply the doctrine.

2. A Major Questions Doctrine Circuit Split

In 2022, the Fifth and Ninth Circuit Courts of Appeals considered the same issue: did President Biden have authority under the Federal Property and Administrative Services Act[245] ("Procurement Act") to create the "Contractor Mandate," which directed federal agencies to require COVID-19 vaccinations for contractor employees?[246] The Procurement Act exists to "provide the Federal Government with an economical and efficient system for . . . contracting."[247] It provides that "[t]he President may prescribe policies and directives that the President considers necessary to carry out" the Procurement Act.[248] During the COVID-19 pandemic, President Biden invoked his Procurement Act authority to support the vaccination requirement.[249]

In addition to deciding whether the mandate triggered the major questions doctrine, both courts first had to decide a threshold question of whether the doctrine applies to presidential actions at all. The two circuits reached opposite conclusions.[250] In *Louisiana v. Biden*,[251] the Fifth Circuit found that the major questions doctrine does apply to presidential action and that the Contractor Mandate was impermissible under the doctrine.[252] In *Mayes v. Biden*,[253] the Ninth Circuit found that the major questions doctrine does not apply to presidential action and that even if it did, it did not preclude the Contractor Mandate.[254]

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244. *Compare Walsh*, 2023 WL 120966, at *8, *with Biden*, 2023 U.S. Dist. LEXIS 171265, at *29.

245. Pub. L. No. 81-152, 63 Stat. 377 (codified as amended in scattered sections of the U.S.C.).

246. *See* Mayes v. Biden, 67 F.4th 921, 932 (9th Cir. 2023), *vacated as moot*, No. 11-15518, U.S. App. LEXIS 34405 (9th Cir. Dec. 28, 2023); Louisiana v. Biden, 55 F.4th 1017, 1022 (5th Cir. 2022).

247. 40 U.S.C. § 101.

248. *Id.* § 121(a).

249. *Mayes*, 67 F.4th at 926. President Biden argued that mandatory vaccination would reduce absenteeism, lower cost overruns, and prevent delays on government projects. *Id.*

250. *See Mayes*, 67 F.4th at 942; *Louisiana*, 55 F.4th at 1033.

251. 55 F.4th 1017 (5th Cir. 2022).

252. *Id.* at 1033.

253. 67 F.4th 921 (9th Cir. 2023), *vacated as moot*, No. 11-15518, U.S. App. LEXIS 34405 (9th Cir. Dec. 28, 2023).

254. *Id.* at 934.

The Fifth Circuit began with the history of the Procurement Act.[255] During its early years, the Procurement Act was used to place antidiscrimination requirements on federal contractors,[256] and in recent times, "the Procurement Act has been utilized by multiple presidents in a manner not dissimilar to that of President Biden."[257] However, the Fifth Circuit took issue with the President's "nearly unlimited authority to introduce requirements" pursuant to a "statute [that] introduces no serious limits on the President's authority and, in fact, places discernment explicitly in the President's hands."[258] Finding that the Procurement Act itself grants broad power, the court questioned "whether there are other extra-statutory limitations on the President's authority."[259] Accordingly, the court looked to *NFIB*, another vaccine mandate case, in which the Supreme Court limited the agency's power through the "so-called 'Major Questions Doctrine.'"[260]

Applying the major questions doctrine, the Fifth Circuit found that the Contractor Mandate was "neither a straight-forward nor predictable example of procurement regulations."[261] Furthermore, it is "[a]t best . . . questionable . . . whether the historical record supports the Government's contention that this mandate is within the longstanding practice and construction of the President's Procurement Act authority."[262] Even President Barack Obama's sick leave policy, a historical example in which the President used the Procurement Act to "advance policy positions," was "dramatic[ally] differen[t]" from the vaccine mandate.[263] Thus, without explicitly declaring that the mandate implicated a major question but finding an "enormous and transformative expansion"[264] of the President's power, the court concluded that it could not permit the mandate "absent a clear statement from Congress that it wishes to endow the presidency with such power."[265]

The Fifth Circuit expanded on the boundless scope of the President's power under the Procurement Act.[266] According to the court, a "once-in-a-century" pandemic does not "justify such an enormous transformative expansion of presidential authority."[267] For a president to use

255. *Louisiana*, 55 F.4th at 1023.
256. *Id.*
257. *Id.* at 1026. For example, President Barack Obama issued an executive order requiring paid sick leave for federal contractors under the Procurement Act, although "it appears that the order was never challenged in federal court." *Id.* at 1027.
258. *Id.* at 1027–28.
259. *Id.* at 1028 (emphasis added).
260. *Id.* at 1028–29. However, the majority opinion did not cite to *West Virginia* at any point. *See generally id.* at 1029.
261. *Id.* at 1029.
262. *Id.* at 1030.
263. *Id.* The court highlighted that vaccine mandates are different from sick leave and nondiscrimination policies because vaccines cannot be undone, and they affect individual healthcare decisions. *Id.*
264. *Id.* at 1031 (quoting Util. Air Regul. Grp. v. Env't Prot. Agency, 573 U.S. 302, 324 (2014)).
265. *Id.*
266. *Id.*
267. *Id.* at 1032.

procurement regulations "to force obligations on *individual employees* is truly unprecedent[ed]" and thus unlawful.[268] However, one judge on the panel dissented, finding the majority's reliance on the major questions doctrine "misplaced."[269]

When the Contractor Mandate debate later appeared before the Ninth Circuit in *Mayes*, the court began by discussing the major questions doctrine.[270] First, the court found that the doctrine does not apply to presidential action.[271] According to the Ninth Circuit, the major questions doctrine "in its current form . . . requires 'Congress to speak clearly if it wishes to assign *an agency* decisions of vast economic and political significance.'"[272] Simply put, there was "no relevant agency action."[273]

After concluding that the major questions doctrine does not apply to presidential action, the Ninth Circuit explained that even if the doctrine did apply, it would not preclude the Contractor Mandate.[274] Most importantly, the Contractor Mandate was not a transformative expansion of authority.[275] Just as the Fifth Circuit did, the Ninth Circuit traced the history of the Procurement Act and described its use for antidiscrimination, labor rights, and paid sick leave policies.[276] Given this history, "[i]t is not a 'transformative expansion' of that same authority to require federal contractors . . . to take vaccination-related steps . . . that promote economy and efficiency by reducing absenteeism, project delays, and cost overruns."[277] Thus, because the Contractor Mandate fit within the Procurement Act's historical applications, this was not a transformative expansion of presidential authority.[278]

After finding that the major questions doctrine did not apply, the court returned to the text of the statute and ultimately concluded that the Contractor Mandate was within the Procurement Act authority.[279] The statutory language, directing the President to "prescribe policies"[280] to ensure "an economical and efficient system,"[281] leaves room for the President to impose

268. *Id.* at 1033 (alteration in original). The court made only one reference to the distinction between presidents and agencies: "Nor are we blind to the effect of political accountability on a president's decisions." *Id.*

269. *Id.* at 1038 (Graves, J., dissenting).

270. *See* Mayes v. Biden, 67 F.4th 921, 932 (9th Cir. 2023), *vacated as moot*, No. 11-15518, U.S. App. LEXIS 34405 (9th Cir. Dec. 28, 2023).

271. *See id.* at 934.

272. *Id.* at 932–33 (alteration in original) (quoting Util. Air Regul. Grp. v. Env't Prot. Agency, 573 U.S. 302, 324 (2014)).

273. *Id.* at 933 (arguing that the major questions doctrine's justifications are not implicated when a president makes the decision). The court acknowledged that three other circuits, including the Fifth Circuit, found that the doctrine does apply to presidential action. *See id.*

274. *See id.* at 934.

275. *See id.*

276. *See id.* at 935–38.

277. *Id.* at 938.

278. *See id.* at 939.

279. *Id.* at 940.

280. 40 U.S.C. § 121(a).

281. *Id.* § 101.

requirements on contractors' operations.[282] Finally, in rejecting the Fifth Circuit's "slippery-slope" concern that the President could assert boundless power, the court noted that the statute's text sufficiently limits the President on its own.[283]

III. *WEST VIRGINIA* ENABLES INCONSISTENT APPLICATIONS OF THE MAJOR QUESTIONS DOCTRINE, BUT LOWER COURTS SHOULD STRIVE FOR GREATER CONSISTENCY

This part seeks to accomplish two goals. First, Part III.A concludes that *West Virginia* fails to provide a sufficiently defined framework for lower courts to apply and, as a result, tolerates inconsistent applications of the major questions doctrine in lower courts. Second, Part III.B urges lower courts to strive for greater consistency in applying the doctrine. To increase consistency, this Note recommends that lower courts apply a two-step test from *West Virginia* to find major questions. This test first asks courts to consider whether the agency action is economically and politically significant and, second, to consider whether the action is an unheralded or transformative exercise of an agency's power.

A. Lower Courts Inconsistently Apply West Virginia

The cases from the Fifth and Ninth Circuits show that *West Virginia* does not provide a defined framework for lower courts to apply and thus facilitates inconsistency. As a result, there is no one version of the major questions doctrine in lower courts.[284] The cases reveal five general ways in which lower courts have inconsistently applied the doctrine.

First, at least between the Fifth and Ninth circuits, lower courts found major questions at inconsistent rates. Thus far, courts in the Fifth Circuit have identified eight major questions since *West Virginia*, whereas courts in the Ninth Circuit have identified only one.[285] Although the timeframe is short, the difference is significant, as is the fact that the courts have twice evaluated the same action and reached opposite conclusions on whether the major questions doctrine applies.[286]

Second, lower courts found major questions even when the agency action failed to reach a majorness level consistent with agency actions rejected in the Supreme Court. Some lower court cases were consistent with Supreme Court precedent. For example, Fifth Circuit courts rejected vaccine mandates

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282. *Mayes*, 67 F.4th at 941 (citing the Merriam-Webster definition of "system" to argue that the definition "encompasses *how* the contractors' services are to be rendered").

283. *See id.* at 942.

284. *See* Brunstein, *supra* note 163, at 663.

285. *See supra* Part II.B. The Fifth and Ninth Circuits are known for their political leanings. *See* Linthorst, *supra* note 171, at 86–87. Scholars have argued that the major questions doctrine is tied to partisan politics. *See, e.g.*, Deacon & Litman, *supra* note 12, at 1065 (arguing that the major questions doctrine enables federal judges to "render politically and ideologically infused judgements about the proper scope of an agency's authority"). However, partisanship of the major questions doctrine is outside the scope of this Note.

286. *See supra* notes 241–44; *supra* Part II.B.2.

like the one in *NFIB*, which involved a vaccine mandate in the workplace.[287] Additionally, both a Fifth Circuit court and the Supreme Court rejected the same student loan relief plan under the major questions doctrine.[288] Yet in comparison, the majority of lower court cases that found major questions involved narrower agency actions, such as a license for nuclear waste, a federal contractor minimum wage increase, a regulation on discrimination in the consumer-debt industry, and a terrorist watchlist.[289] These actions had a limited scope and effect compared to the nationwide legislative agency actions rejected by the Supreme Court.[290] There was, essentially, nothing "extraordinary" about the regulations.[291] *West Virginia* framed the major questions inquiry as involving a degree of common sense.[292] Does common sense suggest that issuing one temporary license to store nuclear waste in a Texas county is as major as canceling about $430 billion in nationwide student debt?[293]

Third, courts applied inconsistent tests from *West Virginia*. Some courts evaluated the economic and political significance of the action, some courts the unheralded or transformative nature of the action, and others both.[294] Of the eight cases from the Fifth Circuit that found a major question, six focused on economic and political significance, and only one addressed whether the action was unheralded or transformative.[295] In the Ninth Circuit, the Central District of California found a "major policy decision" because of the "fundamental" change in wage index calculation but offered minimal other

287. Both Fifth Circuit vaccine cases involved mandates targeting a discrete group—members of the Head Start Program and federal contractors—in contrast to *NFIB*, which targeted employers with 100 or more employees. *Compare* Louisiana v. Becerra, 629 F. Supp. 3d 477, 484 (W.D. La. 2022), *vacated in part as moot*, No. 22-30748, 2023 U.S. App. LEXIS 32280 (5th Cir. Aug. 29, 2023), *and* Louisiana v. Biden, 55 F.4th 1017, 1019 (5th Cir. 2022), *with* Nat'l Fed. of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 663 (2022).

288. *Compare* Brown v. U.S. Dep't of Educ., 640 F. Supp. 3d 664, 654 (N.D. Tex. 2022), *vacated*, 600 U.S. 551 (2023), *with* Biden v. Nebraska, 143 S. Ct. 2355, 2376 (2023).

289. *See supra* notes 173, 175–77.

290. *See supra* note 141 and accompanying text.

291. In rejecting a major questions challenge to a federal contractor minimum wage increase, the same Executive Branch action that triggered a major questions finding in *Biden*, the *Walsh* court found that there was nothing "breathtaking" about the scope of asserted authority. *See* Arizona v. Walsh, No. CV-22-00213, 2023 WL 120966, at *7 (D. Ariz. Jan. 6, 2023).

292. *See* West Virginia v. Env't Prot. Agency, 142 S. Ct. 2587, 2609 (2022) (describing the common thread in past major questions cases to be that although the "regulatory assertions had a colorable textual basis . . . '*common sense* as to the manner in which Congress [would have been] likely to delegate' . . . made it very unlikely that Congress had actually done so" (second alteration in original) (emphasis added) (quoting Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000))).

293. *Compare* Texas v. Nuclear Regul. Comm'n, 78 F.4th 827 (5th Cir. 2023), *with Nebraska*, 143 S. Ct. at 2372–75; *see also* Alaska, Dep't of Fish & Game v. Fed. Subsistence Bd., No. 20-CV-00195, 2023 U.S. Dist. LEXIS 198328, at *19–20 (D. Alaska Nov. 3, 2023) (contrasting the "extraordinary cases" described in *West Virginia* and the "broad scope" of those regulations with the "narrow" scope of the contested agency action before the court).

294. *See supra* Part II.B.

295. *See supra* notes 180, 189 and accompanying text.

explanation.[296] On the other hand, the courts that rejected a major questions challenge applied mixed approaches but were more likely to focus on both economic and political significance *and* the unheralded or transformative nature of the agency action.[297] Meaning, courts that found a major question favored the economic and political significance inquiry, and courts that declined to find a major question generally considered both inquiries. This finding suggests that not only are courts extrapolating different tests from *West Virginia*, but that the choice of which test to apply may affect the holding.[298]

Fourth, even when applying the same test, courts assessed the economic and political significance or the unheralded or transformative nature in different ways. The circuit split discussed in Part II.B.2 illustrates this point. Both circuit courts considered whether the vaccine mandate was an unheralded or transformative exercise of power by comparing the mandate to historical presidential Procurement Act authority.[299] Yet, even when assessing the same historical record, the courts reached opposite conclusions on whether the president had exercised an enormous and transformative power.[300] Courts also evaluated economic and political significance inconsistently.[301] For example, although the *Texas* court found that a $1.7 billion annual transfer from employers to employees was economically significant, the *Walsh* court found that the same $1.7 billion was not economically significant.[302]

Fifth, courts invoked the major questions doctrine during their statutory interpretation analyses in inconsistent ways. Of the courts that found a major question, three from the Fifth Circuit found the agency action impermissible

296. *See* Kaweah Delta Health Care Dist. v. Becerra, No. CV 20-6564, 2022 U.S. Dist. LEXIS 232097, at *33 (C.D. Cal. Dec. 22, 2022).

297. Of the courts within the Fifth Circuit that did not find a major question, three courts considered both economic and political significance *and* whether the action was unheralded or transformative. *See supra* notes 213–14 and accompanying text. Of the courts within the Ninth Circuit that did not find a major question, four courts considered economic and political significance and four courts considered whether the action was unheralded or transformative, with two of those courts considering both inquires. *See supra* notes 242–43.

298. For example, compare the federal contractor minimum wage cases, in which the courts reached opposite conclusions. The Fifth Circuit evaluated only economic and political significance, whereas the Ninth Circuit looked at both economic and political significance and the history of executive power under the Procurement Act. *Compare* Texas v. Biden, No. 22-CV-00004, 2023 U.S. Dist. LEXIS 171265 (S.D. Tex. Sept. 26, 2023), *with* Arizona v. Walsh, No. CV-22-00213, 2023 WL 120966 (D. Ariz. Jan. 6, 2023).

299. *See supra* notes 260–62 and accompanying text; *supra* note 279 and accompanying text.

300. *Compare* Louisiana v. Biden, 55 F.4th 1017, 1030–33 (5th Cir. 2022) (finding an "enormous and transformative expansion of presidential authority" because of the "dramatic difference" from historical applications of the Procurement Act), *with* Mayes v. Biden, 67 F.4th 921, 938 (9th Cir. 2023), *vacated as moot*, No. 11-15518, U.S. App. LEXIS 34405 (9th Cir. Dec. 28, 2023) (finding that the vaccine mandate was not a "transformative expansion" of the President's authority based on history).

301. *See supra* notes 181–83 (describing how courts within the Fifth Circuit evaluated economic and political significance to find a major question).

302. *Compare Biden*, 2023 U.S. Dist. LEXIS 171265, at *31, *with Walsh*, 2023 WL 120966, at *8.

solely under the major questions doctrine.[303] Three other Fifth Circuit courts analyzed the statutory text first: two invoked the doctrine to confirm that the statute unambiguously did not support the agency action[304] and one invoked the doctrine to resolve an ambiguous statute.[305] The court from the Ninth Circuit considered the majorness of the agency action and the statutory text simultaneously.[306] On the other hand, the courts that rejected a major questions finding decided the issue on *Chevron* grounds or de novo review of the statute.[307] Inconsistency in how courts paired the major questions doctrine with *Chevron* analysis and statutory interpretation is unsurprising given *Chevron*'s uncertain future.[308] Courts and scholars await the *Loper Bright Enterprises* and *Relentless* decisions for clarification on how the major questions doctrine fits with challenges to agency statutory interpretation.[309]

The cases also reveal one way in which courts were generally consistent: courts that found a major question consistently applied a strong clear statement rule to look for clear congressional authorization.[310] *Texas v. Nuclear Regulatory Commission*,[311] a decision from the Fifth Circuit Court of Appeals, provides a good example. In that case, the court took issue with the Atomic Energy Act of 1954's[312] failure to use explicit language authorizing the Nuclear Regulatory Commission to issue licenses to store away-from-reactor spent nuclear fuel.[313] *Louisiana* provides another example, in which the court found that the Procurement Act grants the

303. *See* Kovac v. Wray, 660 F. Supp. 3d 555, 563 (N.D. Tex. 2023); Brown v. U.S. Dep't of Educ., 640 F. Supp. 3d 644, 664–65 (N.D. Tex. 2022), *vacated*, 143 S. Ct. 2343 (2023); Chamber of Com. v. Consumer Fin. Prot. Bureau, No. 22-CV-00381, 2023 U.S. Dist. LEXIS 159398, at *18–19 (E.D. Tex. Sept. 8, 2023).

304. *See* Texas v. Nuclear Regul. Comm'n, 78 F.4th 827, 840 (5th Cir. 2023); *Biden*, 2023 U.S. Dist. LEXIS 171265, at *15. This matches the Supreme Court's approach in *Nebraska*, in which the Court rejected the student loan relief plan under de novo review of the HEROES Act and then applied the major questions doctrine to confirm the conclusion. *See* Biden v. Nebraska, 143 S. Ct. 2355, 2371, 2372 (2023).

305. *See* Louisiana v. Becerra, 629 F. Supp. 3d 447, 489 (W.D. La. 2022), *vacated in part as moot*, No. 22-30748, 2023 U.S. App. LEXIS 32280 (5th Cir. Aug. 29, 2023).

306. *See* Kaweah Delta Health Care Dist. v. Becerra, No. CV 20-6564, 2022 U.S. Dist. LEXIS 232097, at *28 (C.D. Cal. Dec. 22, 2022).

307. *See supra* notes 215–16, 243–44.

308. *See supra* notes 139–40 and accompanying text.

309. *See supra* notes 139–40.

310. *See supra* notes 145–46 (describing the debate in scholarship over whether the major questions doctrine is a strong clear statement rule—requiring an express statutory grant beyond the plain meaning of the text—or a weak clear statement rule—requiring only that the text is unambiguous).

311. 78 F.4th 827 (2023).

312. 42 U.S.C. §§ 2011 to 2297g-4.

313. *See Nuclear Regul. Comm'n*, 76 F.4th at 841–42. One subsection of the act grants the Nuclear Regulatory Commission authority to issue licenses that it "determines to be appropriate to carry out the purposes of th[e] chapter." *Id.* (alteration in original) (quoting 42 U.S.C. § 2073(a)(4)). However, the court held that the contested license was impermissible when reading the statute in context. *See id.* For example, although the commission can issue licenses for the storage of the radioactive material radium-226 and other materials that would "pose a significant threat" comparable to radium-226, the radioactive isotopes in spent nuclear fuel have longer half-lives and are thus distinguishable. *See id.* at 841.

President broad power, yet—absent a "clear statement by Congress"—that is not enough.[314] Furthermore, two Fifth Circuit cases cited to Justice Gorsuch's concurrence—which explicitly describes the major questions doctrine as a clear statement rule[315]—suggesting that those courts are receptive to that version of clear congressional authorization.[316] In contrast, only *Kovac* obviously applied a weak clear statement rule, in which the court found that although a major question was at issue, there was clear congressional authorization for the agency action.[317]

Finally, this section must address a baseline question: is inconsistency in lower courts problematic? Although lower court percolation is valuable to refine the doctrine,[318] the above discussion reveals that lower courts are creating divergent versions of the doctrine rather than refining it. Furthermore, when each court adds its own gloss on the doctrine, emphasizing certain elements of the *West Virginia* decision and deemphasizing others,[319] litigants must predict what strategy to adopt with each new case, even within the same circuit.[320]

The cases also reveal that lower courts lack clarity on what exactly a major question is and when an agency action triggers the doctrine. As the above discussion shows, courts can selectively use *West Virginia*'s language to decide how the doctrine functions case-by-case. Thus, *West Virginia* fails to provide clarity on the major questions doctrine's framework and enables inconsistent lower court applications. Courts are unconstrained and permitted to find a major question regardless of how "extraordinary" the agency action truly is. Therefore, inconsistent applications of the major questions doctrine in lower courts is problematic.

B. Lower Courts Should Apply a Consistent Two-Step Test to Find Major Questions

As Part III.A reveals, *West Virginia* facilitates inconsistent versions of the major questions doctrine. In the absence of further guidance from the Supreme Court, lower courts should strive to apply a more consistent major questions doctrine. To do so, this Note proposes that courts adopt a two-step test from *West Virginia* to find major questions. First, courts should determine whether the agency action is economically and politically significant and, second, courts should determine whether the agency action

314. *See* Louisiana v. Biden, 55 F.4th 1017, 1027–28, 1031 (5th Cir. 2022) (taking issue with a "statute [that] introduces no serious limits on the President's authority and, in fact, places discernment explicitly in the President's hands").

315. *See supra* note 116.

316. *See* Brown v. U.S. Dep't of Educ., 640 F. Supp. 3d 644, 665 (N.D. Tex. 2022), *vacated*, 143 S. Ct. 2343 (2023); Louisiana v. Becerra, 629 F. Supp. 3d 477, 492 (W.D. La. 2022), *vacated in part as moot*, No. 22-30748, 2023 U.S. App. LEXIS 32280 (5th Cir. Aug. 29, 2023).

317. *See* Kovac v. Wray, 660 F. Supp. 3d 555, 565–69 (N.D. Tex. 2023) (finding clear congressional authorization, despite no explicit mention of authority to create a watchlist).

318. *See supra* note 159.

319. *See supra* Part II.B.

320. *See* Webb, *supra* note 138.

is an unheralded or transformative exercise of power.[321] Both triggers should be necessary to find a major question, after which a court may proceed to the search for clear congressional authorization. This test is consistent with *West Virginia* and with scholarship on the major questions doctrine,[322] and yet courts from the Fifth and Ninth Circuit that found a major question generally assessed only one of the two triggers.[323]

Additionally, lower courts should not rely on Justice Gorsuch's majorness factors[324] or clear statement factors from his *West Virginia* concurrence.[325] Justice Gorsuch, unlike the majority, articulated defined factors for courts to apply in major questions cases.[326] However, his concurrence also advanced constitutional separation of powers and non-delegation doctrine rationales for the major questions doctrine,[327] which the majority of justices have not signed on to.

Applying the two-step test will bring greater structure and consistency to lower court major questions cases. The test may also generate more consistent results between courts. For example, the *Biden* court may have reached a different holding under this two-step test.[328] Although the *Biden* court found that raising the federal contractor minimum wage had vast economic and political significance, the court did not consider whether the action—in that case, a presidential action—was unheralded or transformative.[329] When the *Walsh* court considered the same minimum wage increase, it found that the presidential action failed to reach a sufficient level of economic and political significance to trigger the doctrine.[330] However, the *Walsh* court additionally determined that a minimum wage increase was not an unheralded or transformative exercise of power.[331] If the *Biden* court had also assessed the unheralded or transformative nature of the action, it may have concluded, like the *Walsh* court, that there was nothing "breathtaking" about the authority asserted.[332] Thus, finding one of the triggers not satisfied, the *Biden* court would join the *Walsh* court in rejecting the major questions doctrine challenge.

Nevertheless, courts should apply this two-step test to increase consistency in the doctrine's application, regardless of whether it leads to consistent results. If the *Louisiana* and *Mayes* courts had both applied the two-step test,

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321. *See supra* note 144 and accompanying text (describing a common reading of *West Virginia* to require that two triggers are satisfied before finding a major question).

322. *See supra* notes 93–102, 144 and accompanying text.

323. *See supra* notes 295–96 and accompanying text.

324. *See supra* notes 113–15 and accompanying text.

325. *See supra* note 117 and accompanying text.

326. *See supra* notes 113–16 and accompanying text.

327. *See supra* notes 110–11.

328. *See* Texas v. Biden, No. 22-CV-00004, 2023 U.S. Dist. LEXIS 171265, at *29 (S.D. Tex. Sept. 26, 2023).

329. *See id.* at *26–34.

330. *See* Arizona v. Walsh, No. CV-22-00213, 2023 WL 120966, at *8 (D. Ariz. Jan. 6, 2023).

331. *See id.* at *7 (noting that past presidents also issued orders on minimum wage requirements).

332. *See id.*

they may still have reached inconsistent results.[333] In other words, if both courts had considered economic and political significance, they might have found the action significant under Supreme Court precedent in *NFIB*.[334] Although the economic and political significance inquiry would confirm *Louisiana*'s holding that the doctrine does apply,[335] the *Mayes* court would still find that the doctrine does not apply without the other trigger met.[336] Yet, in applying the same test, the courts would bring greater clarity and predictability to the doctrine. Despite the potential for different conclusions, applying this two-step test will help to refine the doctrine to a more consistent version among lower courts.[337]

Additionally, the two-step test may have a constraining effect. This Note does not take a position on whether finding a major question is a desirable or undesirable result. However, the Supreme Court has consistently emphasized that the major questions doctrine applies only to "extraordinary cases."[338] Yet, several lower courts found a major question even when the agency action fell short of the majorness level of regulations rejected in the Supreme Court.[339] Thus, this Note urges lower courts to limit the doctrine to regulations that provide a "reason to hesitate" and are truly "extraordinary."[340] No lower court decision discussed in Part II.B found a major question after assessing both economic and political significance *and* the unheralded or transformative nature of the agency action.[341] On the other hand, the majority of courts that rejected a major questions challenge considered both triggers.[342] Thus, applying the two-step test may encourage courts to more fully grapple with the major questions doctrine and to restrict the doctrine to truly "extraordinary cases."

Whether the two-step approach would have changed the majorness determinations in the cases discussed in Part II.B depends on how courts would assess each step. Perhaps a court such as the *Nuclear Regulatory Commission* court would reach a different holding after considering the unheralded or transformative nature of the action, in addition to the economic and political significance.[343] Yet at a minimum, the two-step test will encourage courts to carefully consider whether the doctrine applies.

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333. *Compare* Louisiana v. Biden, 55 F.4th 1017 (5th Cir. 2022), *with* Mayes v. Biden, 67 F.4th 921 (9th Cir. 2023), *vacated as moot*, No. 11-15518, U.S. App. LEXIS 34405 (9th Cir. Dec. 28, 2023).

334. *See* Nat'l Fed. Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 663 (2022).

335. *See Louisiana*, 55 F.4th at 1029.

336. *See Mayes*, 67 F.4th at 934.

337. *See supra* note 159.

338. *See* West Virginia v. Env't Prot. Agency, 142 S. Ct. 2587, 2608 (2022) (quoting Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)).

339. *See supra* notes 289–93.

340. *West Virginia*, 142 S. Ct. at 2608 (quoting *Brown & Williamson Tobacco Corp.*, 529 U.S. at 159).

341. *See supra* notes 295–96.

342. *See supra* note 297 and accompanying text.

343. *See supra* Part II.B.

Finally, this Note welcomes further clarification from the Supreme Court on the scope of the major questions doctrine and how lower courts should apply it. The Court should clarify whether there is a two-step test and what courts should look for to satisfy each step. However, as lower courts continue deciding agency statutory interpretation cases in the interim, those courts should aim to apply a consistent version of the major questions doctrine.

CONCLUSION

The Supreme Court invoked the major questions doctrine by name for the first time in the landmark decision *West Virginia*.[344] Under the major questions doctrine, certain "extraordinary" agency actions provide a "reason to hesitate" before assuming that Congress intended to confer authority to that agency.[345] In such cases, the agency must point to clear congressional authorization to regulate on an issue of major national significance.[346] However, *West Virginia* left major questions unanswered on how the doctrine applies.[347] Although audiences wait for further clarification from the Supreme Court, lower courts are left to determine how to best apply the doctrine.

This Note explores lower court applications of the major questions doctrine after *West Virginia* by focusing on courts from two circuits.[348] Ultimately, this Note concludes that *West Virginia* fails to provide a defined framework for lower courts to apply and, as a result, facilitates inconsistent applications of the major questions doctrine in lower courts.[349] This Note therefore urges lower courts to adopt a consistent two-step test from *West Virginia*. Courts should first determine whether the agency action is economically and politically significant and, second whether the agency action is an unheralded or transformative exercise of power.[350] This two-step test will encourage greater consistency in when courts find major questions, how courts find major questions, and the majorness level required to find a major question.

344. *See supra* Part I.C.
345. *See supra* notes 93–94 and accompanying text.
346. *See supra* notes 96–97 and accompanying text.
347. *See supra* Part I.D.2.
348. *See supra* Part II.B.
349. *See supra* Part III.A.
350. *See supra* Part III.B.