SMOKE AND MIRRORS: THE AMBIGUOUS NATURE OF THE MAJOR QUESTIONS DOCTRINE AS A REFLECTION OF THE INTELLIGIBLE PRINCIPLE TEST

I. INTRODUCTION

Article I of the United States Constitution states that "[a]ll legislative power herein granted shall be vested in a Congress . . . ."[1] However, the legislative branch, being composed of a mere 535 members, simply does not have the expertise nor the time to regulate each minute detail of the enormous number of increasingly complex tasks entrusted to it.[2] To compensate for this imbalance Congress has adopted the practice of delegating authority, limited by an intelligible principle, to executive branch agencies allowing them to write regulations for vast areas of law.[3] The intelligible principle test requires that legislative delegations of power provide an 'intelligible principle' that provides direction for the executive branch to follow when carrying out their duties.[4] Without such an intelligible principle a delegation of legislative power is forbidden.[5] However, a majority of members of the Supreme Court appear to have lost faith in the power of the intelligible principle test to effectively curtail administrative overreach.[6]

In a series of controversial decisions, the Supreme Court has adopted the major questions doctrine purportedly to cabin administrative actions of vast economic and political significance, giving the Court considerable power in the process.[7] The doctrine creates a two-part analysis: first the Court determines whether the means an agency wants to implement create a major question, then, if a question is major, the Court then looks to the statutory delegation of power for a

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1. U.S. CONST. ART. I, § 1.

2. *See* Mistretta v. United States, 488 U.S. 361, 379 (1989) (discussing the merits of delegating experts' regulatory authority over "intricate, labor-intensive task[s]" instead of requiring Congress to write each and every rule); *see also* Gundy v. United States, 139 S. Ct. 2116, 2123 (2019) (quoting Mistretta v. United States, 488 U. S. 361, 372 (1989)) (discussing the need for delegations of power in an "'increasingly complex society'"); *see also* Lichter v. United States, 334 U.S. 742, 785 (1948) (quoting Panama Refining Co. v. Ryan, 293 U.S. 388, 421 (1935)) (stating that "legislation must often be adapted to complex conditions involving a host of details with which the national legislature cannot deal directly.").

3. *See* J.W. Hampton Jr. & Co. v. United States, 276 U.S. 394, 409 (1928) (introducing the phrase 'intelligible principal'); *see also, Gundy*, 139 S. Ct. 2116, 2130 (applying the intelligible principal test).

4. *See J.W. Hampton Jr. & Co.*, 276 U.S. at 409.

5. *Id.*

6. *See* Gundy v. United States, 139 S. Ct. 2116, 2141 (Gorsuch, J., dissenting) (featuring Justice Gorsuch, joined by Justice Thomas and The Chief Justice, discusses the failings of the intelligible principal test); *and Gundy*, 139 S. Ct. at 2130 (Alito J. Concurrence) (2019) (expressing openness to modifying the intelligible principal test); *and* Paul v. United States, 140 S. Ct. 342, 342 (2019) (featuring Justice Kavanaugh who approvingly discussed Justice Gorsuch's *Gundy* opinion).

7. *See e.g.,* Ala. Ass'n of Realtors v. HHS, 141 S. Ct. 2485 (2021); Nat'l Fed'n of Indep. Bus. v. DOL, OSHA, 142 S. Ct. 661 (2022); Biden v. Mo., 142 S. Ct. 647 (2022); West Virginia v. EPA, 142 S. Ct. 2587 (2022) (showcasing the development and implementation of the major questions doctrine in recent cases).

clear statement granting the agency authority for the means chosen.[8] This leads to the obvious inquiry: what is a major question? The answer to this is a non-exhaustive multifactor test where necessity and sufficiency are very unclear, making it hard for those on the sidelines to determine when and where the doctrine will pop up.[9]

The major questions doctrine is the Supreme Court's attempt to compensate for the in-practice nominal limitation that the intelligible principle test places on agency delegation.[10] However, the doctrine is hard to predict and can have equally profound impacts on policy as the decisions made by agencies in the executive branch.[11] Because the intelligible principle test has proved to be mostly an illusory limitation, leading to the creation of the major question doctrine, it must be modified to prevent the need for the doctrine.[12] By requiring Congress to provide a statement of illustrative examples when they delegate using self-fulfilling language, language that allows an agency charged with interpreting a delegation to guide its scope, the Supreme Court can ensure that agencies do not overstep their delegations while simultaneously avoiding the need for the problematic major questions doctrine.[13]

The administrative state functions as the executive branch's arms through an elaborate organization of bureaucratic agencies, often holding a substantial degree of authority to regulate different areas of law.[14] The major questions doctrine puts the administrative state on notice that without direct authorization some means are off limits to agencies, without telling us how to determine when those limits apply.[15] Absent clear limitations to the doctrine, every novel interpretation of a delegation of authority may potentially become the target of a major

8. W. Va. v. EPA, 142 S. Ct. 2587, 2614 (2022).

9. *West Virginia*, 142 S. Ct. at 2621 (Gorsuch, J., concurring) (considering factors such as political significance, the portion of the economy regulated, and the encroachment on state law as a nonexclusive list of potential triggers for the major questions doctrine).

10. *Gundy*, 139 S. Ct. at 2141 (Gorsuch, J., dissenting) (expressing disappointment with the intelligible principal test and noting a potential pivot towards the major questions doctrine to provide meaningful limits to delegations).

11. *West Virginia*, 142 S. Ct. at 2634 (Kagan, J., dissenting) (describing the majorities confusing methodology in a decision that impacted national policy by deciding what cannot be done by an administrative agency).

12. *See infra* notes 278–322 and accompanying text.

13. *See infra* notes 292–303 and accompanying text.

14. *Gundy*, 139 S. Ct. at 2130.

15. Mila Sohoni, *The Major Question Quartet*, 136 HARV. L. REV. 262, 316 (2022) (stating that "what the Court has said [about the major questions doctrine], and all that it has said, is that in some set of cases, and presumably for some set of reasons, Congress must speak clearly").

questions controversy.[16] This opens the door to frivolous litigation that prevents executive agencies from operating while also creating questions about the legitimacy of any given decision.[17] Judicial doctrines, and the decisions they produce, should provide a clear rationale and answer rather than a black box spitting out a result after some indiscernible process.[18]

This Note begins by tracing the intelligible principle test's history.[19] Then, this Note then discusses the Supreme Court's dissatisfaction for the intelligible principal test as a protection of the separation of powers.[20] Finally, this Note analyzes the major questions cases to provide insight on the doctrine's utility and the Supreme Court's concerns with administrative overreach.[21] This Note argues that the major questions doctrine is an unworkable judicial doctrine that reflects the nature of the intelligible principal test.[22] It also argues that coupling the intelligible principal test with a statement of available powers for self-fulfilling delegations can remedy the Supreme Courts concerns with test without casting vast areas of administrative law into doubt.[23] Finally, this Note concludes that the Supreme Court should retire the major questions doctrine and instead compare novel interpretations of a self-fulfilling delegation to the examples enumerated and do a similarity analysis on the rights impacted.[24]

II. BACKGROUND

A. The Origins of the Intelligible Principle Test which Prevents Delegations of Power from Violating the Vesting Clause and the Separation of Powers

Article I of the Constitution vests all legislative power in Congress, giving Congress the sole power to write laws.[25] This vesting and the organization of other powers across the three branches of government

16. *Compare Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 666 (2022) (featuring OSHA's attempt to enforce a vaccine requirement that the Supreme Court considered 'untethered' from the workplace and lacking historical precedent); *and West Virginia*, 142 S. Ct. at 2616 (overruling the EPA's attempt to employ a novel interpretation of the term "best system of emissions reduction" instead of its historical interpretation); *with* Biden v. Missouri, 142 S. Ct. at 653 (acknowledging vaccine requirements as a common requirement for healthcare workers).

17. Sohoni, *supra* note 15, at 287 (discussing the difficulty of predicting the result of a major questions case because of its confusing methodology).

18. *Id.* at 316 (discussing previous judicial doctrines that suffered from vagueness).

19. *See infra* notes 25–61 and accompanying text.

20. *See infra* notes 62–125 and accompanying text.

21. *See infra* notes 126–208 and accompanying text.

22. *See infra* notes 219–77 and accompanying text.

23. *See infra* notes 278–322 and accompanying text.

24. *See infra* notes 323–30 and accompanying text.

25. U.S. Const. art. I, § 1.

highlight the Constitution's integration of the separation of powers into its governmental structure.[26] This separation of powers led to the idea that the legislative branch should not delegate its authority to other branches of government; that idea became known as the nondelegation doctrine.[27] However, the separation of powers is not absolute, and it is recognized that the legislative branch can utilize the other government branches to assist it in achieving its goals.[28] The lack of absolute separation has developed into an intricate system where the legislature has delegated different parts of the executive branch the authority to write an enormous number of regulations wielding the force of law.[29] This apparent violation of the separation of powers is considered constitutional when it satisfies the intelligible principle test simply requiring that the congressionally delegated authority is tethered to an intelligible principle, which may be a term as elusive as the concept of "public interest," to which the delegee must conform.[30]

1. J. W. Hampton, Jr., & Company v. United States: *The Origin of the Term Intelligible Principle*

This intelligible principle test was derived from the Supreme Court's opinion in *J.W. Hampton Jr. & Company v. United States.*[31]

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26. Mistretta v. United States, 488 U.S. 361, 371 (1989) ("[T]he principle of separation of powers [is one] that underlies our tripartite system of Government").

27. *Id.*

28. *Id*. at 372 (acknowledging that the nondelegation doctrine does not prevent the legislative branch from utilizing the other branches of government); *see also* THE FEDERALIST NO. 47 (James Madison) (discussing the practical necessity that the branches of government to engage with each other and share some responsibilities).

29. Gundy v. United States, 139 S. Ct. 2116, 2130 (2019) (showing that the majority acknowledged that most of the rules produced by the government originate in the executive branch bureaucracies); *see* FCC v. Schreiber, 381 U.S. 279, 290 (1965) (acknowledging "the congressional determination that administrative agencies and administrators will be familiar with the industries which they regulate and will be in a better position than federal courts or Congress itself to design procedural rules adapted to the peculiarities of the industry and the tasks of the agency involved").

30. *Gundy,* 139 S. Ct. at 2129 (stating the intelligible principle test: "a delegation is constitutional so long as Congress has set out an 'intelligible principle' to guide the delegee's exercise of authority"); *see also* Nat'l Broadcasting Co. v. United States, 319 U. S., at 216, 63 (1943) (upholding a delegation limited by the intelligible principle of "public interest"). This leaves the actual boundaries of authority open to serious debate, resulting in major questions cases. *See* W. Va. v. EPA, 142 S. Ct. 2587, 2601 (2022) (where the "best system of emission reduction. . . that the [EPA] Administrator determine[d] has been adequately demonstrated," a generation shifting tactic, was outside of the scope of authority that the EPA was actually entitled, even though the administrator thought their tactic "best").

31. 276 U.S. 394, 409 (1928) (stating that "if Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power"). This test was later expanded from its initial focus on rate making to all delegations of power. *See Gundy,* 139 S. Ct. at 2129 (stating that "a delegation is constitutional so long as Congress has set out an 'intelligible principle' to guide the delegee's exercise of authority").

In *J.W. Hampton*, the Court wrestled with a challenge to § 315 of Title III in the 1922 Tariff Act.[32] Section 315 gave the president the power to equalize costs between local and imported goods of the same character.[33] The legislature empowered the President to equalize the cost of production between imported goods and those locally produced.[34] The challengers, J.W. Hampton, Jr. and Co. ("Hampton"), imported barium dioxide at a tariff rate of six cents a pound, two cents higher than that statutorily prescribed rate.[35] In response to this discrepancy Hampton challenged the Tariff Act statute that gave the President the power to adjust tariff rates.[36] This challenge came before the United States Customs Court who found the act constitutional.[37] The challengers then appealed to the United States Court of Customs Appeals who affirmed the Custom Court's decision, before being fast tracked to the Supreme Court on the Attorney General's recommendation.[38]

Hampton did not question that Congress could delegate the power to make regulations which wield the force of law to the executive branch.[39] Instead, Hampton tried to distinguish delegating the power to tax and fix customs rates from other delegations of authority.[40] The Court disagreed with that characterization, holding that there was no fundamental difference between delegating the taxing and rate adjusting powers from delegations of other powers.[41] It reasoned that the source of authority that gave Congress the ability to create a rule governing tariff rates also gave it the ability to create a rate fixing body, provided that the rate fixing body had an intelligible principle to conform to while carrying out its duties.[42] In making this decision the Hampton Court did not specify a particular part of the statute as an intelligible principle, but instead used the term to describe the entire document.[43]

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32. J.W. Hampton Jr. & Co. v. United States, 276 U.S. 394, 400 (1928).
33. *Id*.
34. *Id.* at 401. The statute in question required that the President find a difference in the cost of production between foreign and local goods and provided them with several factors to consider determining what the disparity in cost of production actually is. *Id*.
35. *Id*. at 400.
36. *Id.*
37. *Id*.
38. *Id*.
39. *Id*. at 409.
40. *Id.*
41. *Id.* The Court discussed how its precedents made no distinction between the different types of power that Congress could delegate, only that they could not delegate the ability to legislate. *Id.* It also pointed out how a previous constitutional delegation case allowed the President to adjust tariff rates on a small handful of goods without any factfinding body. *Id*. *See also* Marshall Field & Co. v. Clark, 143 U.S. 649, 680 (1892) (The tariff power delegating precedent discussed in *J.W. Hampton*).
42. *J.W. Hampton Jr. & Co.*, 276 U.S. at 409.
43. *Id.*

The *Hampton* Court did not purport to establish a new doctrine for determining when a legislative delegation should be considered constitutional.[44] Again, that was not the focus of the opinion.[45] Yet somehow this case, and the phrase that it coined to describe the traditional analysis of delegations, spawned an entirely new doctrine of constitutional law regulating the manner in which delegations of power are analyzed.[46]

2. The Intelligible Principle Test Becomes the Standard that all Delegations of Power are Measured Against

This new doctrine did not race out of the gate as a fully-fledged intelligible principle test.[47] For nearly two decades the phrase 'intelligible principle' was treated as a mere description of a broader concept about how the separation of powers functions and was totally absent in some notable delegation cases.[48] It wasn't until 1948 in the case *Lichter v. United States*[49] that the phrase took on a life of its own to become the intelligible principle test.[50] *Lichter* consolidated the complaints of three separate plaintiffs who challenged the constitutionality of the Renegotiation Act.[51] The Renegotiation Act allowed the Under Secretary of War, and later a dedicated board, to determine that the government had paid a contractor excessive profits and to reclaim them.[52] The plaintiffs were military contractors who had some of these excessive profits reclaimed after a unilateral government decision.[53] They challenged the Renegotiation Act on the grounds that the delegation of power was too loose to govern the executive administration determinations of excessive profits, a legislative act.[54]

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44. *Id. See also Gundy*, 139 S. Ct. at 2139 (2019) (Gorsuch, J. dissenting) (pointing out that after the phrase 'intelligible principle' was introduced in *J.W. Hampton* it did not alter the constitutional analysis of delegation in subsequent cases for several decades).

45. *Hampton Jr. & Co.*, 276 U.S. at 409.

46. *Gundy,* 139 S. Ct. at 2139 (Gorsuch, J., dissenting) (discussing the proliferation of the intelligible principle test); *see, e.g.* Touby v. United States, 500 U.S. 160 (1991) (one of many cases applying the intelligible principle test).

47. *Compare* A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (invalidating a delegation of power to the executive branch without using the intelligible principle test several years after the *J.W. Hampton* decision); *with Gundy*, 139 S. Ct. at 2130 (upholding a delegation of power because the Court found an intelligible principle).

48. *See* Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) (quoting the term intelligible to illustrate the concept that Congress cannot delegate legislative power, merely discretion to execute the policy laid out by the legislature); *see also Schechter Poultry,* 295 U.S. 495 (1935) (invalidating a delegation of power without mentioning the term intelligible principle).

49. 334 U.S. 742, 783 (1948).

50. Lichter v. United States, 334 U.S. 742, 785 (1948).

51. *Lichter*, 334 U.S. at 746.

52. *Id*.

53. *Id*. at 747, 749, 751.

54. *Id.* at 774.

The Court reasoned that in light of the context of the Renegotiation Act the term "excessive profits" was definite enough to operate as a intelligible principle.[55] The Court framed their decision in the light of the wartime powers conferred on the government by the Constitution, pointing out that Congress had the authority to conscript citizens of the United States for wartime efforts, a sacrifice greater than the return of excessive profits.[56] Then further elaborated that this reclamation was a part of Congress' obligation to furnish materials to those it conscripted.[57] Finally, the *Lichter* Court compared the Renegotiation Act to other standards of administrative action to conclude that it was constitutional.[58]

From this point on the intelligible principle test became the standard method of evaluating delegations of power.[59] This doctrine has been criticized as an underperforming standard that allows for open ended delegations that enable the executive branch to enact legislation.[60] This is the perspective shared by a majority of the current Supreme Court, who have started to move away from the doctrine as a way to moderate delegation of power.[61]

B. How the Intelligible Principle Test Failed to Protect the Separation of Powers Leading to the Creation of the Major Questions Doctrine

1. Chevron, U.S.A., Inc. v. National Resource Defense Counsel, Inc.: *Agencies Tell the Court what the Law is*

Under modern precedents agencies have the first right to interpret the laws that grant them authority, and courts give these

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55. *Id.* at 783.
56. *Id*. at 755–56.
57. *Id.*
58. *Id*. at 784.
59. Mark Chenoweth & Richard Samp, *Reinvigorating Nondelegation with Core Legislative Power in* The Administrative State Before The Supreme Court: Perspectives on the Nondelegation Doctrine 89 n. 32 (Peter Wallison, John Yoo ed., 2022) (citing *Lichter* as an early example of the modern intelligible principle doctrine); *Gundy*, 139 S. Ct. at 2139 (Gorsuch, J., dissenting) (pointing out *Lichter* for the same reasons).
60. Chenoweth & Samp, *supra* note 59, at 89 (comparing the intelligible principle test to rubber band that loosens with repeated use); *see also Mistretta*, 488 U. S. at 416 (Scalia, J., dissenting) (questioning whether any delegation can be considered too vague and therefore unconstitutional under the intelligible principle standard).
61. DOT v. Ass'n of Am. R.R., 575 U.S. 43 (2015) (Thomas, J., concurring) (indicating his opinion that the current state of the intelligible principle test does not satisfy nondelegation concerns); *Gundy*, 139 S. Ct. at 2139–40 (Gorsuch J. Dissent) (discussing the failings of the intelligible principle test, Justice Gorsuch is joined by Justice Thomas and The Chief Justice,); *Gundy*, 139 S. Ct. at 2130–31 (Alito, J., concurring) (expressing openness to modifying the intelligible principle test); Paul v. United States, 140 S. Ct. 342, 342 (2019) (featuring Justice Kavanaugh express openness to exploring Justice Gorsuch's *Gundy* opinion).

interpretations considerable deference.[62] This process was explored in *Chevron U.S.A. Inc. v. National Resources Defense Council Inc.*[63] where the Supreme Court dealt with an ambiguous statute, requiring it to determine whether the EPA's plantwide definition of a stationary source of emissions was reasonable.[64] The controversy stems from the term "stationary source" and its applicability to two parts of the Clean Air Act: one providing emission standards to maintain air quality, and another setting standards to improve air quality.[65] In October 1981, an EPA interpretative ruling promulgated a plantwide definition of the term.[66] The proposed definition would compile multiple emission sources as one larger bubble source provided they were in the same industrial group, for both sections of the act.[67] This definition was challenged in the Court of Appeals for the District of Columbia who found the definition was ambiguous and that Congress had not demonstrated a specific intention regarding the plantwide, bubble concept.[68] It held that the plantwide definition was mandatory for regulations maintaining air quality, but improper for those designed to improve air quality.[69]

Granting certiorari, the Supreme Court elaborated on the principle of statutory construction they had developed for analyzing an agency's interpretation of a statute.[70] If the Court finds that Congress spoke clearly, then both the agency and the Court were bound by the terms of the statute.[71] However, if the Court finds the statute ambiguous, then they must defer to the agency's interpretation under the statute, provided it is a reasonable construction of the statute.[72] Under

62. Chevron U.S.A. Inc. v. NRDC Inc., 467 U.S. 845 (1984); *See also* Justin Walker, *The Kavanaugh Court and the Schechter-to-Chevron Spectrum: How the New Supreme Court Will Make the Administrative State More Democratically Accountable*, 95 IND. L. J. 923, 933 (2020) (stating that *Chevron* "allows [] agenc[ies] to promulgate almost any regulation unless Congress has clearly prohibited it").

63. 467 U.S. 837 (1984).

64. *Chevron*, 467 U.S. at 839.

65. *Id*. at 840–41. Section 110 of the Act told the EPA to set National Ambient Air Quality Standards for the States and required that States implement permit plans to meet those standards within specified deadlines. *Id*. at 845. Section 111 of the Act directed the EPA to describe categories of pollution sources and to set New Source Performance Standards that prospective sources must conform to before they could operate. *Id.*

66. *Id*.

67. *Id*. at 840. Under this definition an emitting plant could modify itself without obtaining a new permit under the stringent new or modified plant requirements, as long as the alteration did not increase the sources total emissions. *Id.*

68. *Id.* at 841.

69. *Id*. The Court of Appeals reasoned that a definition allowing plants to maintain the same level of emissions was counterproductive to the purpose of regulations that intend to improve air quality. *Id*. at 842.

70. *Id.*

71. *Id.* at 842–43.

72. *Id.* at 843. The Court also defers to the agency where Congress has explicitly granted the agency decision making powers the Court will only step in if the agency's regulation is manifestly contrary to the statute's purposes. *Id*. at 845.

these principals, the Supreme Court declared that the Court of Appeals was mistaken in holding that the EPA's definition was improper in the general context of programs to improve air quality.[73] Instead, it should have considered whether the definition was reasonable in the context of the specific program the EPA was enacting.[74]

The Supreme Court began its analysis by looking at the statutory language of Section 111 of the Clean Air Act to determine whether there was a clear preference for restricting the EPA's plantwide definition to a particular program.[75] The section provided standards for new sources and included a definition for the term "stationary sources," leading the Court to conclude that the definition expressly applied to such programs.[76] The Court found no other textual basis defining the term 'stationary source' but determined that the definition's language seemed to encourage a broader perspective of the concept.[77]

The Court then examined the legislative history and found it unhelpful in illuminating whether Congress intended to restrict the plantwide definition to air quality maintenance programs.[78] They determined that it had not directly discussed the specific issue before them.[79] However, Congress had debated extensively about the competing policy issues: the allowance of economic development, and mitigating environmental damage.[80] It recognized validity in the EPA's argument that the proposed plantwide definition of stationary source was consistent with the first policy, and reasonably could be seen to promote the second as well.[81] This was then compared to the various definitions adopted by the EPA over the years, none of which were congressionally altered, leading the Court to conclude that Congress approved of a flexible, dynamic interpretation of the statute.[82] For these reasons the Supreme Court determined that the EPA's plantwide definition was a reasonable interpretation of the term 'stationary source' and was therefore entitled to deference.[83] After coming to this conclusion, the Court declined to make its own interpretation based on

73. *Id.*
74. *Id*.
75. *Id*. at 859–60.
76. *Id.* The definition from Section 111(a): "'stationary source' means any building, structure, facility, or installation which emits or may emit any air pollutant." *Id*. at 846.
77. *Id*. at 862. The petitioners asked the Court to limit the permit programs to the definition of a 'major stationary source' from section 302(j), but the Court determined that the text of the statute requested did nothing to compel a specific definition of stationary source. *Id*. at 860.
78. *Id*. at 862.
79. *Id*. at 845.
80. *Id.*
81. *Id.*
82. *Id.* at 863–64.
83. *Id.* at 866.

different policy arguments and reversed the Court of Appeals allowing the plantwide definition to apply to both air improvement and maintenance programs.[84]

This case spawned a doctrine now known as *Chevron* deference which requires courts to yield to agency interpretations of an ambiguous statute provided it is reasonable.[85] The doctrine has been criticized for exacerbating the problem of unconstitutional delegations and seeming to contradict the Court's responsibility to interpret the law under *Marbury v. Madison*.[86]

2. Gundy v. United States: *Members of the Court Air Their Grievances with the Status Quo*

Before the major questions doctrine made its formal debut as the new trend in administrative law, some members of the Court had been broadcasting a desire to change the status quo for quite some time.[87] In *Gundy v. United States*,[88] the members of the Court dissatisfied with the intelligible principle test signaled that they were ready to change something.[89] *Gundy* was a close decision, which Justice Kavanaugh, a proponent of the major questions doctrine, did not participate in.[90] The Supreme Court was tasked with determining whether 34 U.S.C.S. § 20913(d), a provision of the Sex Offender Registration and Notification Act ("SORNA") providing for the registration or pre-act sex offenders, was an unconstitutional delegation of legislative power.[91] The case arrived in the Supreme Court after Gundy, a sex offender who was

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84. *Id.* at 865–66. "[W]hen a challenge to an agency construction of a statutory provision . . . centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail." *Id*.

85. *Id.* at 844–45.

86. Mich. v. EPA, 567 U.S. 743, 761 (2015) (Thomas, J., concurring) (featuring Justice Thomas discuss how the *Chevron* doctrine takes interpretative power of the law away from Courts and hands it to agencies giving agency interpretations force of law); Walker, *supra* note 62, at 953 ("Chevron. . . 'wrests from Courts the ultimate interpretative authority to "say what the law is," and hands it over to the Executive.'"); Marbury v. Madison, 5 U.S. 137, 177 (1803) ("[I]t is emphatically the province and duty of the judicial department to say what the law is.").

87. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 487 (2001) (Thomas, J., concurring) (expressing concerns about the intelligible principle test's ability to prevent the delegation of legislative power).

88. 139 S. Ct. 2116 (2019).

89. Gundy v. United States, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J. dissenting).

90. *Gundy*, 139 S. Ct. at 2116.

91. *Id.* The provision in question had been analyzed by the Supreme Court several years earlier in the case *Reynolds v. United States* and was upheld by a seven to two vote. 565 U.S. 432 (2012). Chief justice Roberts, Justice Thomas (who dissented in the *Gundy* decision) and Justice Alito (who concurred) all upheld the statute. *Id.* In *Reynolds* the Court read the provision to mean that the Attorney General must register sex offenders under SORNA registration requirements as quickly as feasible, with the term feasible being the intelligible principle though it was not found within the statute. *Id*. at 442–43. *See also* 34 U.S.C.S. § 20913(d).

convicted of failing to register, challenged the statutes' validity on non-delegation grounds.[92] Both the New York District Court and Second Circuit Court of Appeals rejected Gundy's claims.[93]

The Court disagreed with Gundy's characterization of the statute as one that allowed the Attorney General the unchecked discretion to determine the applicability, or lack thereof, of the registration requirements to pre-act offenders.[94] Instead it asserted the Court's conclusion on the same issue in the case *Reynolds v. United States*, holding that the Attorney General had to implement the registration requirements as soon as feasible, was correct.[95] The Court then reviewed the *Reynolds* Courts' logic starting from the premise that because Congress included a provision for the registration of pre-act sex offenders, they intended to have them registered.[96] Thus, the Attorney General could not refuse to apply SORNA to pre act offenders.[97] SORNA requires sex offenders to register before their imprisonment expires.[98] However, Pre-act offenders may have already finished their sentences before SORNA came into effect.[99] Therefore, the *Reynolds* Court reasoned that the Attorney General had the responsibility of figuring out how to register released sex offenders.[100] Realizing that it would be impossible to register the sex offenders instantly, the Court determined that the Attorney General was supposed to act as soon as feasible.[101]

The Court then contributed some of its own rationale to support this conclusion.[102] First it looked to SORNA's declaration of purpose concluding it was intended to be a comprehensive registration requirement of all sex offenders.[103] The Court then reasoned that at the time SORNA was enacted most sex offenders would have been pre-act offenders and leaving them out would frustrate SORNA's purpose.[104] This brought the Court back to their conclusion that 34 U.S.C.S. § 20913(d) intended to have pre-act offenders registered as soon as

92. *Gundy,* 139 S. Ct. 2116, 2122.
93. *Id.*
94. *Id.* at 2123.
95. *Gundy,* 139 S. Ct. at 2125; *See also* Reynolds v. United States, 565 U.S. 432, 440 (2012).
96. *Gundy*, 139 S. Ct. at 2124.
97. *Id*. at 2125.
98. 34 U.S.C.S. § 20913(b).
99. *Gundy*, 139 S. Ct. at 2125.
100. *Id.*
101. *Id.*
102. *Id.* at 2126.
103. *Id*. *See also* 34 U.S.C.S. § 20901(a) (SORNA's declaration of purpose).
104. *Gundy*, 139 S. Ct. at 2127. The court then considered that the language of the statute was in the past tense implying it was supposed to be applied to anyone ever convicted of a sex offense. *Id*.

feasible.[105] After this the Court held that the delegation was constitutional because many delegations with limitations much broader than the term "feasible" had been upheld.[106]

In his concurrence with the plurality's judgment, Justice Alito stated that under the current intelligible principle test the delegation under 34 U.S.C.S. § 20913(d) was constitutional.[107] He then signaled that he would be willing to modify the intelligible principle test provided a majority of the Court were in favor of it.[108]

Before focusing on the immediate controversy, *Gundy's* dissent began by discussing the principles behind the separation of powers.[109] It brought up the significance of the idea that sovereignty belongs to the people, and how this was reflected in Article I's vesting clause where the people delegate the legislature the power and responsibility to make decisions for them.[110] It then discussed the nature of the legislative power and how the structure of the Constitution was organized to make the power of creating laws difficult because of the inherent danger that unjust laws pose to liberty.[111] In addition to preventing unjust legislation this difficult design was also supposed to encourage thoughtful deliberation about the content of the laws.[112]

The *Gundy* dissent also discussed how giving the legislature carte blanche to delegate their power to write rules would nullify the careful organization of the legislature.[113] Further, by delegating the power to make laws to independent agencies rules could be made without the checks and balances that protect minority rights in the traditional legislative process.[114] The dissent asserted that maintaining the balance of the separation of powers was a part of the duty of the judicial branch, and that failing to do so put the people's constitutional liberties at risk.[115]

The *Gundy* dissent admitted that though the Court is responsible for maintaining the balance of powers, moderating these constitutional

105. *Id.* at 2129.

106. *Id.* at 2129–30. The court pointed out delegations as broad as in the "public interest," "fair and equitable," and "just and reasonable" had been upheld. *Id*. *See* Nat'l Broadcasting Co. v. United States, 319 U.S. 190 (1943) (upholding a delegation in the "public interest"); Yakus v. United States, 321 U.S. 414, 427 (1944) (upholding a delegation to set "just and reasonable" rates).

107. *Gundy*, 139 S. Ct. 2116, 2131 (Alito, J. concurring).

108. *Id.*

109. *Gundy*, 139 S. Ct. 2116, 2133 (Gorsuch, J. dissenting).

110. *Id*.

111. *Id.* at 2134; Brown v. Bd. of Educ., 347 U.S. 483, 487–88 (1954) (discussing the constitutionality of state statutes that required the segregation of public schools).

112. *Gundy*, 139 S. Ct. at 2134.

113. *Id.* at 2135.

114. *Id.*

115. *Id.*

boundaries is not a straightforward task.[116] However it suggested that the framers provided three guiding principles for Courts to use: first, that Congress must make the policy decisions, though the executive could regulate the minute details; second, that Congress may make a rule depend on specific executive fact finding before application; and finally that Congress may assign the executive and judicial branches non-legislative responsibilities.[117] The dissent then described the only two cases where the Court had struck down delegations of power: one providing the president the power to write a code of fair competition in the market, the other enabling the president to place limits on the interstate transmission of petroleum in excess of state quotas.[118] It noted that it was rare for the Court to strike down a delegation of power, partially attributing that to the intelligible principle test.[119]

It argued that the intelligible principle test had mutated into a meaningless threshold that had been manipulated into allowing unconstitutional delegations of legislative power.[120] It asserted that to truly do an intelligible principle analysis a court had to ask several categorical questions based on the guiding principles left behind by the founders.[121] However, It noted that using the guiding principles was not a possible avenue, then they could use other judicial doctrines (notable the major questions doctrine) to achieve the same goal of limiting unconstitutional delegations.[122]

Then dissent returned to the case before them and began to analyze 34 U.S.C.S. § 20913(b) finding that the statute gave the Attorney General the unchecked power claimed by Gundy.[123] Similar to the plurality, it returned to the *Reynolds* case, however the *Gundy* dissent focused on the Government's claim that SORNA allowed the Attorney General total discretion in its application.[124] Due to the fact that 34 U.S.C.S. § 20913(b) was silent about feasibility, it considered this theoretical grant of power comparable to the President's capacity to write a code of fair competition, making it an unconstitutional delegation.[125]

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116. *Id.*
117. *Id.* at 2135–37.
118. *Id. See* Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935) (the petroleum case); *see also* A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (the fair competition case).
119. *Gundy*, 139 S. Ct. 2116, 2141 (Gorsuch, J. dissenting).
120. *Id.* at 2139–40.
121. *Id.* at 2135–36, 2141.
122. *Id*. at 2141. It also discussed the possibility of analyzing delegation problems through the lens of vagueness. *Id.* at 2142.
123. *Id.* at 2143.
124. *Id.*
125. *Id*. at 2144.

C. The Major Questions Cases

After *Gundy v. United States,*[126] several commentators saw what was coming and were waiting for the other shoe to drop ending an era of agency discretion under *Chevron.*[127] This change began taking place in the backdrop of the COVID-19 pandemic, which saw agencies taking on considerable responsibility to try and mitigate the virus' effects.[128] The Supreme Court viewed some of these administrative actions as executive overreach and turned to the major questions doctrine to clamp down on them.[129] The doctrine requires that when an agency attempts to act in a way that creates a question of vast political or economic significance (a major question), they must have direct, Congressional authorization to proceed.[130]

1. Alabama Association of Realtors v. HHS: *A Self-Fulfilling Delegation Creates a Major Question*

Alabama Association of Realtors v. HHS[131] marks the first case where the Supreme Court used the major questions doctrine to push back against administrative attempts to solve problems independently.[132] Early in 2020, Congress approved the Coronavirus Aid, Relief,

126. 139 S. Ct. 2116 (2019).

127. Sohoni, *supra* note 15, at 264 (stating that to "anyone who was paying any attention whatsoever to recent developments in administrative law . . . this new clear statement rule would not have come as a surprise"); Walker, *supra* note 62, at 975 (predicting that the Supreme Court will take steps to limit the power of the administrative state).

128. Ala. Ass'n of Realtors v. HHS, 141 S. Ct. 2485 (2021) (featuring the CDC asserting the authority to extend an eviction moratorium on qualifying tenants in areas with a high concentration of COVID-19); Biden v. Mo., 142 S. Ct. 647 (2022) (featuring the Secretary of Health and Human Services enforce a Covid vaccine requirement on the employees of facilities receiving Medicare or Medicaid funding); Nat'l Fed'n of Indep. Bus. v. DOL, OSHA, 142 S. Ct. 661, (2022) (featuring OSHA asserting the authority to enforce a vaccine requirement on employees of qualifying businesses with more than 100 employees).

129. *See Ala. Ass'n of Realtors*, 141 S. Ct. at 2490; *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 661 (invalidating administrative actions taken to ease the effects of COVID-19 on the population).

130. W. Va. v. EPA, 142 S. Ct. 2587, 2620 (Gorsuch, J., concurring) (stating that "when agencies seek to resolve major questions, they [should] at least act with clear congressional authorization and do not 'exploit some gap, ambiguity, or doubtful expression in Congress's statutes'"); Biden v. Neb., 143 S. Ct. 2355, 2373 (2023) (concerning the economic and political significance of the Secretary of Educations student loan relief plan).

131. 141 S. Ct. 2485 (2021)

132. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2486. Though not called a major questions doctrine case in its text, this case was the first one to employ the two-part major questions framework of vast economic and political significance and clear authorization. Id. at 2489.

and Economic Security Act ("Coronavirus Act").[133] One of its provisions enacted a 120-day eviction moratorium which prevented properties benefiting from federal assistance from evicting their tenants.[134] After the established period ended, Congress declined to extend the moratorium.[135] Believing that a longer moratorium would help slow the virus' spread, the CDC decided to enact their own moratorium relying on their authority under 42 U.S.C.S. § 264 which enables the Surgeon General to enact measures "as in [their] judgment may be necessary" to prevent the spread of disease.[136] In response to this the Alabama Association of Realtors (and other plaintiffs) challenged the validity of the agency's action in the District Court of the District of Columbia who vacated it as unlawful but stayed its ruling while the Government appealed.[137]

The Government argued that the face of the statute granted it the power to use any means it determined to be necessary for preventing the spread of contagious diseases, therefore, the moratorium was within the scope of its authority.[138] The Supreme Court disagreed with the Government's interpretation, holding that the text unambiguously limited the CDC's authority to measures directly preventing the spread of disease, with which the CDC's moratorium had an indirect relationship.[139] It then asserted that even if the statute were ambiguous the Government's interpretation would still be unreasonable due to the massive amount of unchecked power it claimed.[140] The Court reasoned that when an agency wants to take an action with vast economic and political significance it must have clear authorization from Congress to do so.[141] It then placed the CDC's extension of the eviction moratorium into this category of major questions, and found no clear authorization from Congress for the CDC to utilize a nationwide

133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.* 42 U.S.C.S. § 264(a). *See also* 42 C.F.R. § 70.2 (2020) (granting the CDC this authority).
137. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2486. The challenge actually went through the District Court and to the Supreme Court twice. *Id.* at 2487. The first time the Supreme Court reviewed the statute it declined to vacate the stay, with several justices dissenting, as the moratorium was ending within several weeks. *Id*. at 2487–88. However, after that moratorium ended the CDC reinstated another nearly indistinguishable moratorium leading to the current challenge. *Id*. at 2488.
138. *Id.* at 2488. It is worth noting that theoretically anything can be considered necessary given the perspective of the one making the decisions. *Id*. at 2489.
139. *Id*. The Court pointed out the measures listed in the second sentence (inspection, fumigation, disinfection ect.) and said that the logical interpretation of the statute limited the CDC to measures of similar character. *Id*.
140. *Id.* at 2489.
141. *Id.* (citations omitted) (stating that "We expect Congress to speak clearly when authorizing an agency to exercise powers of 'vast "economic and political significance."'"). *Id.*

moratorium.[142] The Court found several details important when deciding that the CDC's actions created a major question. Firstly, it found that the Government's interpretation of the statute gave the CDC a blank check to exert power of unprecedented scope.[143] Secondly, the Government had never implemented an action of such weight through 42 U.S.C.S. § 264 since its inception in 1944.[144] And finally, that the link between the moratorium and stopping the interstate spread of disease was tenuous.[145]

2. National Federation of Independent Businesses v. DOL, OSHA: *A Self-Fulfilling Delegation Creates a Major Question*

The next case in the development of the major questions doctrine was *National Federation of Independent Businesses. v. DOL, OSHA*.[146] This case was brought by a number of states, nonprofit organizations, and businesses against Occupational Safety and Health Administration ("OSHA") who implemented a rule requiring roughly 84 million workers to receive a COVID-19 vaccine.[147] Initially the Fifth Circuit stayed OSHA's order, but the various cases were consolidated in the Sixth Circuit who lifted that stay believing OSHA would likely succeed on the merits of their argument.[148] The plaintiffs then appealed to the Supreme Court seeking emergency relief.[149]

OSHA believed that the requirement was necessary to protect employees from the grave danger that COVID-19 posed.[150] The agency argued that the emergency standards provision 29 U.S.C.S. § 655(c), which allows them to implement rules without the traditional processes of notice, comment, and opportunity for public hearing, gave them the authority to implement the vaccine requirement in such circumstances.[151] The Supreme Court disagreed.[152] It considered the requirement a move with vast economic and political significance making it a major

142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.* at 2488.
146. 142 S. Ct. 661 (2022).
147. *Nat'l Fed'n of Indep. Bus*, 142 S. Ct. at 662. There was an exception to the vaccine requirement where workers would be exempt if they, at their own expense, took weekly COVID-19 tests and wore masks at work. *Id.*
148. *Id.* at 663.
149. *Id.*
150. *Id.* In order to implement emergency standards, the Secretary of Labor (OSHA's supervisory secretary) must show that they are necessary to protect employees from a grave danger of a new hazard. 29 U.S.C.S. § 655(c).
151. *Id. and* 29 U.S.C.S. § 655(c). The vaccine requirement would demand the removal of employees who did not comply and had very few exceptions. *Nat'l Fed'n of Indep. Bus.* 142 S. Ct. at 663–64. In addition, noncompliant employers were subject to steep fines. *Id.* at 664.
152. *Id.* at 664–65.

question.[153] In turn, it looked to the statute to determine whether Congress had clearly authorized OSHA to implement such a broad measure and concluded that they had not.[154] After stating that conclusion, the Court noted that COVID-19 was not an occupational hazard, but a risk implicit in everyday life placing it outside of OSHA's traditional authority.[155] Further, unlike other traditional regulations, vaccination is not reversible and cannot be left at work after the employee's work day finishes.[156] In addition to this, the Court found it telling that the Senate had denied to pass a proposal suggesting a vaccine requirement and that OSHA had never passed such a broad measure to manage a threat that was causally unrelated to most workplaces.[157] After this analysis, the Court granted the stay requested by the plaintiffs.[158]

3. Biden v. Missouri: *Skirting the Limits of the Major Questions Doctrine*

Decided on the same day as *Nat'l Fed'n of Indep. Bus. v. DOL, OSHA*, *Biden v. Missouri* threw a wrench into the major questions narrative, coming to the seemingly opposite result as its twin.[159] The Secretary of Health and Human Services announced an interim rule requiring employees, volunteers, and contractors in healthcare facilities to receive a COVID-19 vaccination in order to receive Medicare or Medicaid funding.[160] The Secretary claimed authority to do so under 42 U.S.C § 1395x(e)(9) which authorizes them to place conditions that participating facilities must meet in order to receive Medicare or Medicaid funding.[161] Two groups of states challenged the Secretary's decision in the Eastern District of Missouri and the Western District of Louisiana, both of whom entered a preliminary injunction against enforcement.[162] The Government appealed seeking a stay of both decisions which were summarily denied in both appellate courts.[163]

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153. *Id*. at 667.
154. *Id*
155. *Id.* at 665. The Court also noted that COVID-19 could potentially be considered a workplace hazard in certain settings where the virus is particularly present as a part of one's job. *Id*.
156. *Id.*
157. *Id.* at 666.
158. *Id.*
159. 142 S. Ct. 647 (2022). *Compare* Nat'l Fed'n of Indep. Bus. 142 S. Ct. at 666–67 (invalidating an agency's action that would require employees to take a COVID-19 vaccine); *with* Biden v. Mo., 142 S. Ct. 647, 653 (upholding a requirement for healthcare workers to obtain a COVID-19 vaccine).
160. *Biden*, 142 S. Ct. at 650.
161. *Id*. at 652. *See also* 42 U. S. C. § 1395x(e)(9) (authorizing "the Secretary [of Health and Human Services to adopt measures they] find[] necessary in the interest of the health and safety of individuals who are furnished [Medicare or Medicaid] services").
162. *Biden*, 142 S. Ct. at 651.
163. *Id.*

In a shocking turn of events, the Court agreed with the Secretary.[164] It concluded that because the Secretary had determined that a vaccine requirement was necessary to protect patients, his interim rule was within the statute's boundaries.[165] The Court discussed the history of requiring Medicare and Medicaid participating facilities to comply with administratively imposed conditions including following infection prevention protocols.[166] It recognized that a vaccine requirement was a heavier prevention protocol than the Secretary had previously implemented, but contended that the circumstances were also of a larger scope than previously addressed by the Secretary.[167] The Court also compared the novelty of the new administratively enacted vaccine requirement to the regular practice of requiring vaccines in healthcare settings.[168] The Court then tied this back to the statute's aim of protecting the health and safety of patients, reasoning that a vaccine requirement would reduce the potential that healthcare workers spread COVID-19 to their patients.[169] Following this analysis the Court stayed the preliminary injunctions granted by the district courts.[170]

4. West Virginia v. Environmental Protection Agency: *A Self-Fulfilling Delegation Creates a Major Question*

West Virginia v. EPA[171] is unique among the major questions cases for two reasons: first, it is the only case dealing with executive rulemaking over several administrations; and second, it is the only major questions case that calls itself such in the majority opinion.[172] The controversy of the case extends back to the Obama administration's interpretation of 42 U.S.C. § 7411(a)(1).[173] A provision of the Clean Air Act enabling the Environmental Protection Agency ("EPA") to reduce power plant emissions by setting a "standard of performance" for the plants based on the "best system of emissions reduction" the agency's Administrator believes to be "adequately demonstrated."[174] Under the

164. *Id.* at 652. However, four members of the Court dissented from this opinion believing the government's action to be a major question of vast political and economic significance that Congress gave no clear authorization to pursue, showing some disagreement among the founding members of the major questions doctrine as to what a major question actually is. *Biden*, 142 S. Ct. at 658 (Thomas, J., dissenting).
165. *Id*. at 652.
166. *Id.*
167. *Id.* at 653.
168. *Id.*
169. *Id.*
170. *Id*. at 655.
171. 142 S. Ct. 2587 (2022).
172. W. Va. v. EPA, 142 S. Ct. 2587 (2022).
173. *West Virginia*, 142 S. Ct. at 2587.
174. 42 U.S.C. § 7411(a)(1).

Obama administration the EPA considered the best system of emissions reduction was a three part plan that coal power plants could follow to reduce their carbon dioxide output, a technological improvement and generation shifting by converting to either natural gas or renewable energy sources.[175]

After that determination was made and the EPA tried to act upon it through a Clean Power Plan, they were challenged over the plan's constitutionality.[176] Before the courts could reach a decision, the Trump administration replaced the Obama administration and the new EPA administrators rejected the Obama administration's interpretations.[177] The Trump EPA applied the major questions doctrine to the Obama administration's plan concluding that the generation shifting tactic was a major question that it did not have the clear Congressional authorization to enact.[178] Instead the Trump EPA viewed 42 U.S.C. § 7411(a)(1) as only giving the EPA the authority to determine a best system of emissions reduction that could be employed at any given power plant and repealed the Clean Power Plan, mooting the previous petitions.[179]

The Trump administration's EPA then created its own plan, called the Affordable Clean Energy Rule, to reduce emissions which was immediately challenged in the D.C. Circuit who's Court of Appeals consolidated all of the challenges into one action.[180] The Court of Appeals held that the Trump EPA misinterpreted 42 U.S.C. § 7411(a)(1), it ruled that the generation shifting was not a major question, and that therefore, the EPA possessed the authority to enact the Clean Power Plan.[181] Then the Circuit Court vacated the Trump EPA's action to repeal the Clean Power Plan and remanded the case for further consideration.[182] After that decision there was yet another change in the presidential administration; the Biden administration's EPA asked for a partial stay so it could make a determination about how to move forward.[183] Parties in support of the Trump administration's repeal of the Clean Power Plan petitioned to the Supreme Court who granted certiorari.[184]

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175. *West Virginia*, 142 S. Ct. at 2603. The agency suggested three generation shifting could be achieved in three ways: first, reduce the generation of electricity; second, build new natural gas or renewable energy plants and operate them or invest in existing plants; and third, a cap-and-trade scheme focused on carbon dioxide. *Id.*
176. *Id*. at 2604.
177. *Id.*
178. *Id*. at 2605.
179. *Id*.
180. *Id.*
181. *Id.* at 2605–06.
182. *Id.* at 2606.
183. *Id.*
184. *Id*.

The Supreme Court rejected the Circuit Court's conclusion that this was not a major questions case.[185] It first compared the Clean Power Plan to other emissions regulations enacted under 42 U.S.C. § 7411(a)(1), all of which were related to directly reducing the pollution emitted by the regulated source.[186] The Supreme Court then made the distinction that no modification of coal power plants could enable them to achieve the level of emissions required by the Clean Power Plan.[187] The Court then discussed the manner previous EPA administrators had described the systems of emission reduction as a technology based standard.[188] The Clean Power Plan was a departure from that line of reasoning where the EPA pivoted from looking at individual sources to considering how to optimize the entire energy production system.[189]

The Court considered that pivot to be an unprecedented shift in perspective which dramatically changed the scope of authority claimed by the EPA.[190] It speculated that under the EPA's interpretation of 42 U.S.C. § 7411(a)(1), the director could determine the best system of emissions reduction for coal power plants would be to shift all of their power generation to other sources, unilaterally manipulating the national market.[191] The Court found it troubling that this degree of authority was being claimed through a statute with a meek history of application, especially considering that no other provision of the Clean Air Act conferred similar broad authority.[192] Lastly, the EPA suddenly claiming authority to regulate carbon dioxide in this manner despite decades of active congressional disagreement on the topic raised even more suspicion about the boundaries of the delegation.[193]

Given the combination of these features the Court concluded that the Clean Power Plan was of vast economic and political significance, requiring clear, Congressional authorization to enact.[194] The Government argued that the generation shifting tactic was a possible definition of the word "system" as provided in 42 U.S.C. § 7411(a)(1).[195] The Court determined that "system" could describe any number of possible methods.[196] From this the Court concluded there was no clear

185. *Id.* at 2610.
186. *Id.* at 2610–12.
187. *Id.* at 2610.
188. *Id.*
189. *Id.* at 2612.
190. *Id.*
191. *Id.* The Court relied on the EPA's own admission that the area they were claiming authority over required expertise of subjects outside of their traditional regulatory scope. *Id.*
192. *Id.*
193. *Id.* at 2614.
194. *Id.*
195. *Id.*
196. *Id.*

Congressional authorization to enact a generation shifting policy under 42 U.S.C. § 7411(a)(1), and reversed the Court of Appeals.[197]

5. Biden v. Nebraska: *A Self-Fulfilling Delegation Creates a Major Question*

The most recent major questions case, *Biden v. Nebraska*[198] dealt with whether the Secretary of Education had the authority to implement a student loan forgiveness program that would cancel around 430 billion dollars of debt during the COVID-19 pandemic.[199] They claimed this authority under 20 U.S.C. § 1098bb(a)(1) of the Higher Education Relief Opportunities for Students Act of 2003 (HEROS Act) which provided that the Secretary "may waive or modify any statutory or regulatory provision applicable to the student financial assistance programs. . . as the Secretary deems necessary in connection with a war or other military operation or national emergency."[200] The Secretary's plan would reduce student loans by forgiving up to $10,000 of the loan balance for borrowers with an income below $125,000.[201]

The Supreme Court's analysis started with the text of 20 U.S.C. § 1098bb(a)(1) providing that the Secretary may "waive or modify any statutory or regulatory provision. . . as the Secretary deems necessary."[202] They observed that the term "modify" generally implies minor changes, and that the Secretary's plan was creating a fundamentally new statutory regime.[203] They then explained that the term "waiver" was limited to existing statutory and regulatory structure.[204] They asserted that the combination of waiving statutory provisions barring the Secretary's plan and the addition of the novel debt forgiveness plan was more authority than what 20 U.S.C. § 1098bb(a)(1) was intended to delegate.[205]

The Government then argued that the HEROS Act emergency designation authority under 20 U.S.C. § 1098bb(a)(1) was deliberately vague in order to authorize the use of power comparable to the scale of any unforeseen emergency.[206] The Court replied that given the economic and political significance of the authority claimed, being a $430 billion program, the Secretary of Education would need to act

197. *Id.* at 2615.
198. 143 S. Ct. 2355 (2023).
199. Biden v. Neb., 143 S. Ct. 2355, 2362 (2023).
200. *Nebraska,* 143 S. Ct. at 2368; 20 U.S.C. § 1098bb(a)(1).
201. *Id.* at 236–65.
202. *Id.* at 2368–70.
203. *Id.* at 2369.
204. *Id.* at 2370.
205. *Id.* at 2370–71.
206. *Id.* at 2372.

pursuant to a clear delegation to wield it.[207] The Court found no such delegation rendering the program beyond the scope of the Secretary's authority.[208]

III. ARGUMENT

The major questions doctrine has become the primary methodology for examining the relationship between the boundaries of a delegation of power and the delegee entrusted with the responsibility of carrying it out.[209] This methodology is controversial and the Supreme Court has not explained exactly why or how something becomes a major question of vast economic and political significance which it is authorized to curtail.[210] This is because the relationship between delegations of power and methodologies for containing those delegations possess a fundamental correlation: the clearer the limits of a delegation of power, the easier it is for courts to determine when an agency oversteps those boundaries.[211]

The major questions doctrine reflects the open-ended and unrestrained nature of delegations under the intelligible principle test.[212] It has created an open-ended and uncontained analysis to determine what constitutes an instance of vast economic and political significance.[213] We will be stuck with the major questions doctrine, or some

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207. *Id.* at 2373–74.

208. *Id.* at 2375.

209. *See* W. Va. v. EPA, 142 S. Ct. 2587, 2607–08 (2022) (discussing the use of the major questions doctrine to investigate the scope authority Congress intended to delegate).

210. *See* Sohoni, *supra* note 15, at 287–88 (discussing the difficulty in determining whether an agency action becomes one of vast economic and political significance).

211. *Compare* J.W. Hampton Jr. & Co. v. United States, 276 U.S. 394, 401 (1928) (featuring a delegation to the President to equalize the costs of foreign and local goods by adjusting tariff rates), *with West Virginia*, 142 S. Ct. at 2587, 2601 (featuring a delegation to the administrator of the EPA to determine and enact the "best system of emissions reduction" for reducing carbon dioxide). The statute granting the President the power to equalize costs in *JW Hampton* clearly distinguished how the President may equalize the cost of goods making it easy for a court to determine if he has followed his orders. *Hampton Jr. & Co.*, 276 U.S. 394, 401. On the other hand, in *West Virginia* any system of emission reduction determined to be the best by the administrator appears automatically authorized by the statute making it impossible for courts to challenge the scope of an agency action using only statutory text, unless the EPA's determination was manifestly contrary to the goals of the delegation. *West Virginia*, 142 S. Ct. at 2587, 2601.

212. *Compare* Nat'l Fed'n of Indep. Bus. v. DOL, OSHA, 142 S. Ct. 661 (2022) (featuring a statute that enabled the Secretary of OSHA to take any approach they deem necessary to protect employees from a grave danger); *with West Virginia*, 142 S. Ct. at 2620–21 (Gorsuch, J., concurring) (discussing some of the factors relevant to the determination of whether something is a major question, adding that the list was not exclusive).

213. *See* Sohoni, *supra* note 15, at 288 (discussing the factors listed in major questions cases as malleable and non-exhaustive allowing courts to participate in an open-ended inquiry).

other equally abstract doctrine, until we modify the intelligible principle test to provide clearer limits to delegations of power.[214] Without clear limits to delegations of power, courts will be left to, and are willing to use, their own devices to define what those limits are.[215]

This argument begins by framing how the intelligible principle test laid the foundations for a major questions doctrine.[216] Then it discusses the constitutional issues created by the intelligible principle test and the major questions doctrine, and how modifying the intelligible principle test can remedy those concerns at both ends of a delegation.[217] Finally, it asserts that changes should be made to the intelligible principle test in order to provide the structure necessary for courts to police the boundaries of delegations without the appearance of judicial impropriety.[218]

A. The Major Questions Doctrine Moderates Delegations with Abstract and Disorienting Analysis Because it was Created to Counteract a Delegation Doctrine that Permits Immeasurable Delegations, the Intelligible Principle Test

The major questions doctrine is not a new interpretation of the nondelegation doctrine, though they are closely related.[219] Where the nondelegation doctrine is concerned with whether a delegation is constitutional, the major questions doctrine is supposed to look at whether the delegee has stayed within the boundaries of their delegation.[220] The major questions doctrine represents the current Supreme Court's acceptance that Congress will continue to delegate as much legislative authority as possible and determine that it is their responsibility to draw an outer boundary for those delegations if Congress will not.[221] The major questions doctrine indicates to agencies that when operating under vague power delegations their authority does not extend to

214. *See infra* notes 225–39 and accompanying text.

215. *Cf.* Nat'l Fed'n of Indep. Bus. v. DOL, OSHA, 142 S. Ct. 661, 667 (2022) (applying the major questions doctrine to regulate a delegation).

216. *See infra* notes 219–77 and accompanying text.

217. *See infra* notes 278–322 and accompanying text.

218. *See infra* notes 323–30 and accompanying text.

219. *See Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 667–68 (Gorsuch, J., concurring) (discussing the relationship between the major questions doctrine and the nondelegation doctrine).

220. *Compare* Gundy v. United States, 139 S. Ct. 2116, 2121 (2022) (stating that "the nondelegation doctrine bars Congress from transferring legislative power to another branch of Government"); *with* Ala. Ass'n of Realtors v. HHS, 141 S. Ct. 2485, 2489 (2021) (applying the major questions doctrine to an agency to determine if it was within the boundaries of the authority delegated).

221. *Cf. Gundy*, 139 S. Ct. at 2141 (Gorsuch, J., concurring) (discussing disappointment with the intelligible principle test and noting a potential pivot towards the major questions doctrine to accomplish the purposes the test was supposed to serve).

actions of vast economic and political significance, a standard whose own boundaries are difficult to discern.[222] Under this new doctrine, agencies appear to retain their *Chevron* deference when pursuing a delegation.[223] But when those actions exceed the doctrines' new ambiguous standard, the Court has the ability to step in and say what the law delegates, or more importantly, what the law does not.[224]

1. The Clarity of a Methodology for Moderating the Boundaries of a Delegation is Directly Dependent on the Observable Boundaries of the Grant of Authority it Moderates

When Congress delegates a specific responsibility and delineates the circumstances under which the responsibility must be undertaken, it is relatively easy to tell when the delegee has properly followed the limits of their delegation.[225] When Congress grants the delegee broad discretion it becomes more difficult to discern what actions are within the scope of delegated authority from those that surpass that boundary.[226] Each approach has its own benefits and downsides.[227] Clearer boundaries are easier for the delegees to interpret and for courts to moderate.[228] However, rigid, clear terms and specific requirements do not allow the delegee to operate with flexibility.[229] Additionally, delegations which provide for specific means and detailed boundary requirements are harder to write and take constant legislative review

222. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489. "We expect Congress to speak clearly when authorizing an agency to exercise powers of 'vast economic and political significance.'"

223. *Id*. The doctrine's clear statement requirement only activates for actions of vast economic and political significance, meaning agency actions that do not exceed that standard are presumably still subject to *Chevron*. *Id*.

224. *Cf. West Virginia,* 142 S. Ct. at 2587, 2614–16 (applying the major questions doctrine to strike down the EPA's clean power plan). *See also* Sohoni, *supra* note 15, at 288 (discussing the difficulty in determining whether an agency action becomes one of vast economic and political significance).

225. *Cf. J. W. Hampton, Jr., & Co.*, 276 U.S. at 401 (featuring a statute with specific requirements for the President to follow).

226. *West Virginia*, 142 S. Ct. at 2599–600 (discussing the boundaries of a delegation that granted the EPA the authority to implement whatever system of admissions reduction the administrator determined best).

227. *Compare Gundy*, 139 S. Ct. at 2133–35 (Gorsuch, J., dissenting) (discussing the utility of limited delegations for promoting political accountability), *with* Mistretta v. United States, 488 U.S. 361, 372 (1989) (discussing the necessity of utilizing broad delegations in order for our government to keep up with increasing complexity).

228. Todd Gaziano & Ethan Belvins, *The Nondelegation Test Hiding in Plain Sight: The Void for Vagueness Standard Gets the Job Done in* THE ADMINISTRATIVE STATE BEFORE THE SUPREME COURT: PERSPECTIVES ON THE NONDELEGATION DOCTRINE 45–80 (Peter Wallison, John Yoo ed., 2022) (arguing to nullify delegations whose boundaries are too vague for courts to apply).

229. *West Virginia*, 142 S. Ct. at 2640 (Kagan, J., dissenting) (discussing the need for regulatory flexibility so that regulators can adapt to changing circumstances).

and approval, a difficult hurdle for our gridlocked Congress.[230] This combined with the small scope of granted authority makes detailed delegating a time consuming and inefficient task.[231] Considering the breadth of complexity that legislators are faced with navigating, requiring direct, clear authorization for every agency action is asking the legislature to undertake an unachievable task.[232]

Delegations granting vast discretion allow Congress to hand responsibility for ongoing and complicated problems to an agency who can act flexibly and adapt their responses to developing circumstances without needing constant legislative approval.[233] However, this approach also emboldens the delegee to take the largest view of their authority possible, especially where there is no specific line to determine when an action they undertake is beyond their scope of authority.[234] This becomes an issue when the scope of that delegation becomes the subject of debate and only arbitrary limits can be placed on the delegees scope of authority.[235]

Our current standard for measuring delegations, the intelligible principle test, falls on the broader side of the spectrum.[236] It allows the legislature to pass off considerable responsibility for important tasks without providing specific details about the permissible methodology, size, or scope of actions taken in furtherance of that goal.[237] Because of that, the Supreme Court, charged with moderating the boundaries of delegations, set an arbitrary boundary, using the major questions doctrine for that purpose.[238] The standards of that boundary appear ambiguous and unclear reflecting the expansive nature of delegations under the intelligible principle test.[239]

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230. Sohoni, *supra* note 15, at 293 n. 235 (discussing the difficulty of formal law making in the current political environment).

231. *Cf. Mistretta*, 488 U.S. at 372 (stating that due to our increasingly complex society "Congress simply cannot do its job absent an ability to delegate power under broad general directives").

232. *Cf. id*.

233. *West Virginia*, 142 S. Ct. at 2640 (Kagan, J., dissenting).

234. *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 668 (Gorsuch, J., concurring) (discussing OSHA's belief that it has "almost unlimited discretion" to set emergency standards).

235. *Id.* at 665 (applying the major questions doctrine to limit the scope of OSHA's emergency standard authority).

236. *Mistretta*, 488 U.S. at 373.

237. *West Virginia*, 142 S. Ct. at 2601 (featuring a statute authorizing the EPA to implement the "best system of emission reduction . . . that the [EPA] Administrator determine[d] has been adequately demonstrated," the scope of which was the main controversy of the case).

238. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489.

239. Sohoni, *supra* note 15, at 288 (discussing the difficulty in determining whether an agency action becomes one of vast economic and political significance).

2. The Intelligible Principle Test Provides an Incredibly Lax Standard that Allows Congress to Make Open-ended Delegations Without Observable Boundaries

The intelligible principle test does not prevent the delegation of legislative power from the legislative branch to the executive branch.[240] This is exemplified by the way the test allows an administrator to determine that something is necessary and enables them to implement that determination without any review by a higher rulemaking authority.[241] This creates a kind of self-fulfilling delegation, where the same grant of authority that gives the delegee the unconstrained power to decide how to solve a problem also provides for the delegee's determination to guide the scope of their authority.[242] The problem with these kinds of delegations is not necessarily that they delegate too much authority, but the fact that there is no way for a court to determine the authority has not been delegated.[243] Take for example, the delegation conferred in the case *West Virginia v. EPA*, concerning the power to employ the best system of emissions reduction as determined by the EPA administrator.[244] This is a self-fulfilling delegation, once the EPA administrator determines something is the best system of emissions reduction, the statute's text automatically renders that determination within the scope of authority granted.[245]

This kind of broad delegation gives agencies the ability to modify their responses to the specific contours of the technical issues in front of them that Congress does not have the expertise to predict or adequately respond to.[246] However, this kind of grant of authority creates

240. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 489 (2001) (Stevens, J., concurring) (stating that "it would be both wiser and more faithful to what we have actually done in delegation cases to admit that agency rulemaking authority is "'legislative power'").

241. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2487; *see also* Nat'l Fed'n of Indep. Bus. v. DOL, OSHA, 142 S. Ct. 661, 669 (2022).

242. *Compare* J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 401 (1935) (limiting the President's power to equalizing the cost of good via a tariff); *with West Virginia*, 142 S. Ct. at 2601 (authorizing the EPA to implement the "best system of emission reduction. . . that the [EPA] Administrator determine[d] has been adequately demonstrated").

243. Gaziano & Blevins, *supra* note 228, at 51 (discussing the difficulty of moderating delegations under the "broad and vague grants of legislative power").

244. *West Virginia*, 142 S. Ct. at 2601 (featuring 42 U.S.C. § 7411(a)(1) which authorized the EPA to implement the "best system of emission reduction. . . that the [EPA] Administrator determine[d] has been adequately demonstrated"").

245. *Id*.

246. *See* FCC v. Schreiber, 381 U.S. 279, 290 (1965) (noting "the congressional determination that administrative agencies and administrators will be familiar with the industries which they regulate and will be in a better position than federal courts or Congress itself to design procedural rules adapted to the peculiarities of the industry and the tasks of the agency involved").

a delegation moderation issue.[247] It is functionally impossible for a court to place meaningful limits on self-fulfilling delegations without the appearance of judicial overreach.[248] Any limits that the judiciary applies to a self-fulfilling delegation come from their own creation because such delegations are nearly impossible to confine based off of their text, provided they are not manifestly contrary to the delegations purpose.[249] If the agency can simply determine that something is necessary, or best without any guidance, and that alone places it within a statute's scope of authority, then the agency has been given power to determine the scope of its own delegation.[250] This is the functional equivalent of providing the agency with legislative authority.[251] For those who believe the legislative power is vested in the legislative branch and cannot be constitutionally delegated, this creates cause for concern.[252]

3. The Major Questions Doctrines Analysis is so Obscure Because it Moderates Delegations Under the Intelligible Principle Test which Provides Courts Little Guidance to Discern the Boundaries of a Delegation

A court's ability to moderate the boundaries of a delegation is directly informed by the statute granting the authority in question.[253] Under the intelligible principle test all Congress has to do to constitutionally delegate power is to tie the delegation to an identifiable, and possibly ambiguous, phrase.[254] Because there is so little information required for a delegation to be constitutional under the intelligible principle test, courts are left without a useful framework for measuring the scope of a delegation.[255] As a result, the Supreme Court has

247. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2487 (featuring a self-fulfilling delegation).

248. Biden v. Neb., 143 S. Ct. 2355, 2400 (2023) (Kagan, J., dissenting) (considering the majority opinions application of the major questions doctrine judicial overreach).

249. *Cf. Ala. Ass'n of Realtors*, 141 S. Ct. at 2489.

250. *Whitman*, 531 U.S. at 488–89 (Stevens, J., concurring) (discussing how if binding rules written by an agency were enacted by Congress, they would undoubtedly be legislative in nature, and that an act itself, not the body performing it, determines its nature).

251. *Id.*

252. *Gundy*, 139 S. Ct. at 2135 (Gorsuch, J., dissenting).

253. *West Virginia*, 142 S. Ct. at 2607–08 (framing delegation moderation as a form of statutory construction).

254. *Gundy*, 139 S. Ct. at 2129 (discussing how the court has approved "very broad delegations").

255. *Compare Mistretta,* 488 U.S. at 372–73 (noting that the intelligible principle test requires the inclusion of boundaries for the delegated authority); *with* 42 U.S.C.S. § 264 (enabling the Surgeon General to enact measures "as in [their] judgment may be necessary" to prevent the spread of disease).

taken matters into its own hands creating their own boundary for delegations where no other is apparent.[256]

The major questions doctrine employs the standard of vast economic and political significance.[257] It effectively provides a default boundary for delegations whose dimensions cannot be determined from their statutory text.[258] The standard acts as the gateway to the major questions doctrine and can be applied to every action taken under a delegation of power.[259] If an action does not implicate questions of "vast economic and political significance," then it is not a major question, and the regulating body may proceed.[260] The difficulty comes in defining that phrase.[261] What qualifies as an action of vast economic and political significance depends heavily on the decision maker's perception.[262] This opens the door for subjective personal preferences to determine the scope of authority rather than the true meaning of a given statute.[263]

To muddy the waters even further the metrics used to measure when agency actions cross the threshold into the arena of vast economic and political significance are confusing.[264] Measuring economic significance is fairly straightforward, it appears that an agency action requiring the expenditure of billions of dollars will suffice.[265] For political significance, things become more complex.[266] The Court has provided some factors to measure political significance, but not any

256. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489 (introducing the framework of the major questions doctrine).

257. *Id*. (stating that "[w]e expect Congress to speak clearly when authorizing an agency to exercise powers of 'vast "economic and political significance"'").

258. *West Virginia*, 142 S. Ct. at 2614–16 (using the major questions doctrine to limit what systems of emissions reduction the EPA may consider best under 42 U.S.C. § 7411(a)(1)); *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 665 (using the major questions doctrine to limit what measures OHSA may determine as necessary under 29 U.S.C.S. § 655(c)).

259. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489.

260. *Id.*

261. Sohoni, *supra* note 15, at 288 (discussing the difficulty in determining whether an agency action is one of vast economic and political significance).

262. *Compare* Biden v. Mo., 142 S. Ct. 647, 650 (2022) (featuring a thin majority, including two of the six justices who pioneered the major questions doctrine, determining that the case did not implicate the major questions doctrine), *with* Biden v. Missouri, 142 S. Ct. 647 (Thomas, J., dissenting) (featuring four of the six justices who pioneered the major questions doctrine asserting that the agency action was of vast political and economic significance and should be analyzed using the major questions framework).

263. *West Virginia*, 142 S. Ct. at 2643–44 (Kagan, J., dissenting) (framing the majority decision as the Court stepping in and deciding policy according to their preferences).

264. Sohoni, *supra* note 15, at 314.

265. *See West Virginia*, 142 S. Ct. at 2621 (Gorsuch, J., concurring) (stating that clear congressional authorization is essential for regulations of "a significant portion of the American economy. . .'" or requir[ing] 'billions of dollars in spending' by private persons or entities").

266. *Id*. at 2620 (discussing political significance).

guidance on how to determine which other factors may be relevant.[267] Further, the doctrine also demands that Congress predict which issues will be considered of vast economic and political significance to know when to supply a clear statement of authorization.[268] This an impossible standard to impose on delegations that may end up being decades old; Congress simply cannot predict the future.[269] Instead, to make such delegations effectively, the Court would essentially require Congress to wait for these major questions to arrive, to correctly identify them (a technique the Court has not mastered itself),[270] and to reach a decision on how to address them with a degree of clarity that satisfies the Supreme Court.[271] A tall order for our polarized and gridlocked legislature.[272]

Basically, the major questions doctrine's boundaries are as ambiguous and as sweeping as the delegations it aims to curtail.[273] This ambiguity allows the Court to adapt the doctrine to any delegation they deem problematic, similar to the way agencies can adapt their response to changing circumstances under vague delegations.[274] Unfortunately, this results in the major questions doctrine having similarly problematic characteristics to the delegations it polices.[275] Like those

267. *Id*. (discussing some factors such as when an action has been "considered and rejected" by Congress or appears to "end an 'earnest and profound debate across the country'").

268. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489 (stating, "We expect Congress to speak clearly when authorizing an agency to exercise powers of 'vast "economic and political significance"'").

269. *Nat'l Fed'n of Indep. Bus*, 142 S. Ct. at 675 (Kagan, J., dissenting).

270. *Compare* Biden v. Mo., 142 S. Ct. 647, 650 (2022) (featuring a thin majority, including two of the six justices who pioneered the major questions doctrine, determining that the case did not implicate the major questions doctrine), *with* Biden v. Mo., 142 S. Ct. 647 (Thomas, J., dissenting) (featuring four of the six justices who pioneered the major questions doctrine asserting that the agency action was of vast political and economic significance and should be analyzed using the major questions framework).

271. *Compare Nat'l Fed'n of Indep. Bus*, 142 S. Ct. at 675 (Kagan, J., dissenting) (discussing how a previous Congress could not delegate OSHA the specific power they wanted to use in response to COVID-19 because they cannot predict the future), *with Ala. Ass'n of Realtors*, 141 S. Ct. at 2489 (stating that "We expect Congress to speak clearly when authorizing an agency to exercise powers of 'vast "economic and political significance"'").

272. Sohoni, *supra* note 15, at 266.

273. *Compare Nat'l Fed'n of Indep. Bus*, 142 S. Ct. at 665 (applying the vast economic and political significance standard); *with* 42 U.S.C. § 7411(a)(1) (authorizing the EPA to implement the "best system of emission reduction. . . that the [EPA] Administrator determine[d] has been adequately demonstrated"').

274. *Compare Nat'l Fed'n of Indep. Bus*, 142 S. Ct. at 665 (applying the major questions doctrine to a self-fulfilling delegation), *and* Biden v. Mo., 142 S. Ct. 647, 650 (choosing not to apply the major questions doctrine to a self-fulfilling delegation), *with West Virginia*, 142 S. Ct. at 2640 (Kagan, J., dissenting) (discussing the concept of regulatory flexibility).

275. *Compare* Sohoni, *supra* note 15, at 315 (discussing how the major questions doctrine gives the Supreme Court the power to freely choose when to strike down agency actions giving them undue power over policy), *with Mistretta*, 488 U.S. at 414–17

acting under vague delegations, it is hard to tell whether the application of the major questions doctrine is faithful to defined principles or merely operates at the whim of those wielding it.[276] This creates a concern for political accountability, similar to the concern that prompted the creation of the doctrine in the first place.[277]

B. The Intelligible Principle Test can be Modified to Provide the Boundaries Required for Meaningful Structure in a Delegation Moderation Analysis, Nullifying the Need for a Major Questions Doctrine

If the intelligible principle test's open-ended delegations are responsible for the creation of the major questions doctrine,[278] and we wish to moderate delegations with consistency and accountability,[279] then we must require something more concrete from the initial delegation.[280] The trouble is doing this without destabilizing the foundation of administrative law and scores of regulations enacted under the previous delegation regime.[281] By sliding the scale slightly towards more concrete delegations we can ground the moderation to tangible standards peculiar to each delegation rather than a universal, ambiguous one.[282]

(discussing how the majority opinion allows the delegation of policy making legislative power under the intelligible principle test).

276. *Compare West Virginia*, 142 S. Ct. at 2602–04 (featuring the EPA take different positions on the scope of their authority depending on the administration in charge), *with* Sohoni, *supra* note 15, at 314 (discussing how the major questions doctrine's "inchoate theory of nondelegation" allows the Court to freely apply the major questions doctrine as they desire).

277. *Compare* Biden v. Neb., 143 S. Ct. 2355, 2400 (2023) (Kagan, J., dissenting) (discussing the Supreme Courts lack of political accountability), *with Gundy*, 139 S. Ct. at 2134–35 (Gorsuch, J., dissenting) (discussing how passing off legislative power to the executive branch insulates legislators from political accountability).

278. W. Va. v. EPA, 142 S. Ct. 2587, 2607–08 (2022) (framing delegation moderation as a form of statutory construction); Gaziano & Blevins, *supra* note 228, at 45 (discussing the problem with vagueness under the current delegation standards).

279. Biden v. Neb., 143 S. Ct. 2355, 2400 (2023) (Kagan, J., dissenting) (discussing the Supreme Court's lack of political accountability when deciding major questions cases).

280. *Compare Hampton Jr. & Co.*, 276 U.S. at 404 (deciding unanimously to affirm the constitutionality of a delegation where congressional intent was clear due to the detail included in the delegating statute), *with West Virginia*, 142 S. Ct. at 2616 (determining that the EPA has exceeded its authority under a self-fulfilling delegation), *and West Virginia*, 142 S. Ct. at 2643 (Kagan, J., dissenting) (disagreeing with the majority and holding that the EPA was within its delegated authority).

281. *See* Gundy v. United States, 139 S. Ct. 2116, 2130 (2019) (discussing how a stricter view of the intelligible principle test risks making most of our government unconstitutional).

282. *Compare* 42 U.S.C.S. § 264 (enumerating a non-exhaustive list of potential methodologies that the surgeon General could implement to prevent the spread of disease that a court could compare proposed actions to); *with* 42 U.S.C. § 7411(a)(1) (allowing the EPA administrator to implement whatever system of emissions reduction they deemed best without elaborating on what that entailed).

1. The Intelligible Principle Test can be Modified to Prevent Executive and Judicial Overreach that Results from the Difficulty of Measuring Self-Fulfilling Delegations

Major questions cases deal with the fundamental issue of determining what the judiciary's role should be and moderating the separation of powers.[283] Previous iterations of the Supreme Court have taken a hands-off approach, preferring to allow sweeping delegations under the theory that it is not their role to determine how much policy making power Congress should delegate.[284] The Roberts Court, however, has taken a more involved approach and attempts to define how much policy making discretion a vague delegation may authorize.[285] The Court perceives executive overreach, namely the use of legislative power, resulting from the lax standards that guide delegations in the era of the intelligible principle test.[286] In response to this overreach, the textualist Supreme Court created their own tool for moderating the boundaries of delegations and preventing the unconstitutional proliferation of legislative power—the major questions doctrine—a tool that can ignore plausible interpretations of statutory text in favor of the Court's own reasoning.[287]

The determination that Congress has been delegating legislative power is not a new one, though not all justices have had the same concern about the phenomenon.[288] However, instead of attacking the vehicle by which Congress makes these delegations, the Court has decided to try and backdoor the problem by striking down specific agency actions rather than the delegations themselves.[289] This approach avoids the source of concern and opens the judiciary to questions about the legitimacy of their decisions.[290] By focusing on the intelligible principle itself, we can include enough information at the beginning to hold

283. Sohoni, *supra* note 15, at 263 (stating that major questions cases "are[] separation of powers cases").

284. Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting).

285. Ala. Ass'n of Realtors v. HHS, 141 S. Ct. 2485, 2489 (2021).

286. Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 487 (2001) (Thomas, J., concurring) (expressing the belief that there are cases where there is intelligible principle, but that Congress has still delegated legislative power).

287. *West Virginia*, 142 S. Ct. at 2610.

288. *Compare Whitman*, 531 U.S. at 487–90 (Stevens, J., concurring) (expressing the view that Congress has been delegating legislative power but that it is constitutional to delegate such power because the constitution does not bar delegations)*; with Mistretta,* 488 U.S. at 421 (Scalia, J., dissenting) (believing that a delegating the responsibility to promulgate sentencing guidelines to a commission of judges was an unconstitutional delegation of legislative power).

289. *West Virginia*, 142 S. Ct. at 2616 (invalidating an agency action but not the delegation that plausibly authorized it).

290. Biden v. Neb., 143 S. Ct. 2355, 2400 (2023) (Kagan, J., dissenting) (considering the majority opinion a case of judicial overreach).

delegees accountable while also making the moderation of delegations a manageable task.[291]

The Constitution serves as a vehicle for protecting individual rights.[292] therefore, the most appropriate concern when moderating delegations is whether agencies have been authorized to impact an individual's rights in the way that they are attempting.[293] To do this, the Court could simply require that when Congress wants to delegate using self-fulfilling language that it also provide a non-exhaustive list of illustrative examples and analyze how those examples impact an individual's rights.[294] This is an achievable goal and provides a textual reference for Courts to measure unenumerated means against.[295] Instead of looking at the scope and scale of an agency action, courts would then be able to look at the nature of new agency actions and consider whether the impact to an individual's rights is similar to the enumerated methodologies.[296] This approach would limit the scope of the judicial inquiry to the statutory text and contains delegations without unduly hindering administrative experimentation.[297] This approach could have been employed in *Alabama. Association of Realtors v. Health and Human Services* where the delegating statue listed "inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings" as potential methodologies that the Surgeon General could chose to employ among "other measures, as in [their] judgment may be necessary."[298]

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291. *Compare West Virginia*, 142 S. Ct. at 2616 (invalidating an agency action but not the delegation that plausibly authorized it), *with Mistretta,* 488 U.S. at 372–73 (noting that the intelligible principle test requires the inclusion of boundaries for the delegated authority).

292. *Gundy*, 139 S. Ct. at 2135 (Gorsuch, J., dissenting).

293. *Id.*

294. 42 U.S.C.S. § 264(a) (including such a list).

295. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489 (featuring 42 USCS § 264(a) which lists different ways the agency could use their authority which the Courts major questions analysis only lightly touches upon).

296. *Compare Nat'l Fed'n of Indep. Bus*, 142 S. Ct. at 665–66 (analyzing the standard of vast economic and political significance to other kinds of standards promulgated by OSHA that are not implicated in the relevant statutory text); *with Ala. Ass'n of Realtors*, 141 S. Ct. at 2489 (utilizing different methodologies enumerated in the delegating statute as a limited part of its vast economic and political significance analysis).

297. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489 (discussing how the Court differentiated the methodologies listed in 42 U.S.C.S. § 264(a) from the proposed moratorium because they directly targeted the spread of disease, opening up the door to the idea that other methodologies directly targeting disease may be acceptable).

298. *Id.* at 2489 (featuring 42 USCS § 264(a) which lists different ways the agency could use their authority which the Court's major questions analysis only lightly touches upon).

This mechanism would, of course, create some tension with statutes granting self-fulfilling delegations that predate the new rule, but not every delegation under the intelligible principle test is self-fulfilling.[299] Any change to the intelligible principle would have to face a similar hurdle.[300] But, failing to solve a problem because a solution will cause growing pains is hardly justification for letting it continue.[301] Self-fulfilling delegations predating this rule that do not include a list of potential methodologies (or explanatory commentary) could be moderated using their historical scope.[302] This would reach conclusions similar to those of the major questions doctrine, but in a more straightforward way that informs agencies of what powers are available to them so that they, and Congress, could act accordingly.[303]

2. Preventing Executive and Judicial Overreach is Essential to Maintaining the Separation of Powers Enshrined in the Constitution

The whole delegation debate, and its major questions chapter, are downstream of the separation of powers.[304] The concept is fundamental to the United States' structure and is characterized by organizing the legislative, judicial, and executive powers in different parts of the government.[305] This intentional separation led to the concept of the nondelegation doctrine, which reasons that since the powers of law were intentionally separated the government should not be able to disrupt that separation by allowing the delegation of legislative powers.[306] This leads to the eventual issue of trying to determine what exactly is legislative power, a debate that has not been easy to resolve.[307]

This concern for the separation of power extends to the other governmental branches, including the judicial and executive.[308] Overreach in general is usually characterized by one branch of government

299. *See Gundy*, 139 S. Ct. at 2140 (Gorsuch, J., dissenting) (discussing how some delegations under the intelligible principle test do not implicate separation of powers questions).

300. *Cf. Gundy*, 139 S. Ct. at 2130 (discussing how most of the government relies on the current state of the intelligible principle).

301. *Cf.* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (desegregating public schools in spite of the hardships accompanying that process).

302. *Cf. West Virginia*, 142 S. Ct. at 2610 (utilizing prior agency interpretations to limit the scope of a delegation in their vast economic and political significance analysis).

303. *Cf. Id.*

304. *Gundy*, 139 S. Ct. at 2140 (Gorsuch, J., dissenting) (discussing how the intelligible principle test, and its delegation ramifications, impact the separation of powers).

305. U.S. CONST. ART. I, § 1; U.S. CONST. ART. II, § 1; U.S. CONST. ART. I, § 1. *See Gundy*, 139 S. Ct. at 2133–35 (Gorsuch, J., dissenting) (discussing the importance of the separation of powers for protecting liberty).

306. Mistretta v. United States, 488 U.S. 361, 370–71 (1989).

307. *Gundy*, 139 S. Ct. at 2135 (Gorsuch, J., dissenting).

308. Sohoni, *supra* note 15, at 316 (discussing the potent power of judicial interpretation); *and* Biden v. Neb., 143 S. Ct. 2355, 2385 (2023) (Kagan J. Dissent) (considering the majority opinion to be an example of judicial overreach).

attempting to wield the powers of another branch of government, but it may also be the result of improperly using one's own power.[309] Judicial overreach can take many shapes; in the context of the major questions doctrine, it appears to be improperly deciding policy issues.[310] This is ironic for a doctrine that attempts to protect the separation of powers from executive overreach, where agencies extend their power into policy areas beyond their scope of delegated authority.[311]

Addressing these concerns is an important challenge as society continues to become increasingly complex and even more responsibility is given to agencies to handle the ever changing regulatory landscape.[312] Because there are no bright line rules to determine exactly when a government action falls under a specific power of law, the effort to maintain that separation will always be an arduous task.[313] But the separation of powers is still a fundamental characteristic of our government and our courts have a responsibility to preserve it.[314] However, as the referees in this political game, the courts also have to be self-aware enough to recognize when their own behavior is inconsistent with their position as the moderator.[315]

3. Therefore, the Intelligible Principle Test Should be Modified to Require Congress to Include Illustrative Examples when it wants to Utilize Self-Fulfilling Delegations

All of the major questions cases deal with statutes granting self-fulfilling delegations giving agencies the discretion to unilaterally determine what is 'necessary' or what is 'best' and to enact such determinations.[316] For most of these statutes, with the notable exception of 42 U.S.C.S. § 264(a) from the CDC moratorium case, the agencies are

309. Biden v. Neb., 143 S. Ct. 2355, 2400 (2023) (Kagan, J., dissenting).

310. *Biden*, 143 S. Ct. at 2400.

311. *Gundy*, 139 S. Ct. at 2141–42 (Gorsuch, J., dissenting) (discussing the purpose of the major questions doctrine).

312. *Mistretta*, 488 U.S. at 422 (Scalia, J., dissenting) (discussing the danger of becoming too comfortable with delegating responsibility over difficult political issues to bodies of experts).

313. *Gundy*, 139 S. Ct. at 2135 (Gorsuch, J., dissenting).

314. *Id.* at 2135–36.

315. *Biden*, 143 S. Ct. at 2400 (Kagan, J., dissenting).

316. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2487 (moderating 42 U.S.C. § 264(a) which authorized the Secretary of Health and Human Services to "to make and enforce such regulations as in his judgment are necessary"); Biden v. Mo., 142 S. Ct. 647, 652 (2022) (moderating 42 U.S.C. § 1395x(e)(9) which authorized "the Secretary [of Health and Human Services to adopt measures they] find[] necessary in the interest of the health and safety of individuals who are furnished [Medicare or Medicaid] services"); *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 663 (moderating 29 U.S.C. § 655(c) which granted OSHA the authority to implement necessary measures to protect employees from grave danger); *West Virginia*, 142 S. Ct. at 2601 (moderating 42 U.S.C. § 7411(a)(1) allowing the EPA administrator to decide and implement the "best system of emissions reduction").

given very little guidance to compare their measures to other than their own previous interpretations.[317] This also leaves courts with very little to reference when trying to ascertain the delegation's boundaries.[318] These self-fulfilling delegations encourage the broadest view of one's authority because theoretically, any measure may be determined necessary or best depending on the decision maker's perspective.[319] This may provide the agency with considerable practical utility, but it is a far cry from the boundaries the intelligible principle test is supposed to supply.[320] Further this lack of clarity may frustrate the purpose of a delegation when different administrations cannot agree on the basis of their authority.[321] Remedying this by giving self-fulfilling delegations something concrete for agencies and courts to compare unenumerated measures to would mitigate the possibility that either steps beyond the boundaries of their authority by taking advantage of the ambiguity to justify their decision.[322]

C. Therefore, the Intelligible Principle Test Should be Modified to Create the Necessary Structure for a Delegation Moderation Doctrine Tethered Enough to Statutory Text that it Preserves Judicial Legitimacy

In light of the expansive nature of self-fulfilling delegations under the intelligible principle test, and the difficulty of moderating those delegations with consistent rationale, it is apparent that we have reached a constitutional impasse.[323] Congress delegates authority in

317. *Compare Ala. Ass'n of Realtors*, 141 S. Ct. at 2487 (moderating 42 U.S.C. § 264(a) which lists potential methodologies for application) *with* Biden v. Mo., 142 S. Ct. 647, 652 (2022) (moderating 42 U.S.C. § 1395x(e)(9) which does not list potential methodologies) *and Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 663 (moderating 29 U.S.C. § 655(c) which does not list potential methodologies)) *and West Virginia*, 142 S. Ct. at, 2607–08 (moderating 42 U.S.C. § 7411(a)(1) which does not list potential methodologies).

318. *Compare West Virginia*, 142 S. Ct. at 2614–16 (moderating the boundaries of a delegation without using its text) *with Ala. Ass'n of Realtors*, 141 S. Ct. at 2487 (moderating the boundaries of a delegation, partially with the use of its text).

319. *West Virginia,* 142 S. Ct. at 2604 (featuring several different administrators in charge of the EPA whose views of their authority were very different).

320. *Mistretta,* 488 U.S. at 373 (discussing the requirements of the intelligible principle doctrine as including the boundaries of the delegated authority).

321. *West Virginia*, 142 S. Ct. at 2604 (discussing how the Obama administration's Clean Power Plan never went into effect because of litigation and revocation by the subsequent administration).

322. *Compare Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 668 (Gorsuch, J., concurring) (discussing OSHA's belief that it has "'almost unlimited discretion'" to set emergency standards) *with* Biden v. Neb., 143 S. Ct. 2355, 2400 (2023) (Kagan, J., dissenting) (discussing the apparent judicial overreach of the major questions doctrine).

323. *Compare* Gundy v. United States, 139 S. Ct. 2116, 2121 (2022) (stating that "the nondelegation doctrine bars Congress from transferring legislative power to another branch of Government") *with* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 489 (2001) (Stevens, J., concurring) (stating that "it would be both wiser and more faithful to what

exceedingly broad terms, agencies claim as much authority as possible, and the Supreme Court provides arbitrary limits to that power where it sees fit.[324] This is an untenable situation casting the governmental branches into a hostile relationship with each other as they jostle to enact their disparate agendas.[325]

Establishing a uniform structure for moderating self-fulfilling delegations will inform all of the branches of government what the expectations are for future delegations and reduce the confusion surrounding their moderation.[326] This in turn will make it easier for agencies and Congress to predict what is necessary in order to achieve the desirable delegation outcomes.[327] This is incredibly important as agencies represent the majority of government action and the major questions doctrine makes it harder for them to carry out their essential functions.[328]

By requiring Congress to provide a list of illustrative examples similar to the one in 42 U.S.C.S. § 264(a) when it wants to use self-fulfilling delegations, the Court and agencies can gain a concrete basis for measuring their scope.[329] This will help maintain the separation of powers by holding both the judicial and executive branches to a statute which gives them a textual resource to make arguments about what Congress intended.[330]

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we have actually done in delegation cases to admit that agency rulemaking authority is "'legislative power'").

324. *Compare* NBC v. United States, 319 U. S., at 216, 63 (1943) (upholding a delegation limited by the intelligible principle of "public interest") *with* Nat'l Fed'n of Indep. Bus. v. DOL, OSHA, 142 S. Ct. 661, 665 (2022) (applying the major questions doctrine to regulate a delegation).

325. *Compare Nat'l Fed'n of Indep. Bus.*, 142 S. Ct at 665 (applying the major questions doctrine to reign in an executive branch agency) *and* Mich. v. EPA, 576 U.S. 743, 761; (2015) (Thomas, J., concurring) (discussing how the *Chevron* doctrine takes interpretative power of the law away from Courts and hands it to agencies, giving their interpretations force of law) *with Nat'l Fed'n of Indep. Bus.,* 142 S. Ct. at 668 (Gorsuch, J., concurring) (discussing OSHA's belief that it has "'almost unlimited discretion'" to set emergency standards).

326. W. Va. v. E.P.A., 142 S. Ct. 2587, 2634 (2022) (Kagan, J., dissenting) (describing the majorities confusing methodology in a decision that impacted national policy by deciding what cannot be done by an administrative agency).

327. *West Virginia*, 142 S. Ct. at 2607–08 (framing delegation moderation as a form of statutory construction).

328. *Compare Gundy*, 139 S. Ct. at 2130 (discussing how most of the government action comes from agencies) *with* Sohoni, *supra* note 15, at 316 (stating that "what the Court has said [about the major questions doctrine], and all that it has said, is that in some set of cases, and presumably for some set of reasons, Congress must speak clearly").

329. *See West Virginia*, 142 S. Ct. at 2607–08 (framing delegation moderation as a form of statutory construction).

330. *Id*.

IV. CONCLUSION

The major questions doctrine is a confusing way to moderate delegations and the intelligible principle test does little to provide guidance for that effort. Each doctrine provides such a degree of latitude in its application that their boundaries are impossible to produce out of anything but thin air. Until delegations are created with enough information for courts to moderate them easily the controversy that results from applying arbitrary limits for their moderation will continually resurface. So, by going back to the source of the problem, the nature of self-fulfilling delegations under the intelligible principle test, and making them comprehensible courts, Congress, and agencies can gain the textual traction required for meaningful discussions about the scope of a delegation.

To paraphrase Justice Stevens, when it comes to preventing the delegation of legislative power, the cat is already out of the bag.[331] Instead of pretending that it is not, we should adapt to the reality of delegations and create rules that help us interpret how much legislative power Congress actually wants to delegate. Ultimately, the major question is whether we let Congress continue to delegate to its hearts content and let the courts draw the lines; or require finer precision from Congress to give them something meaningful to work with, providing enough structure so that it can be fairly applied when trying to maintain the separation of powers.

–David McGuire, '24†

331. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 489 (2001) (Stevens, J., concurring) (stating "[I]t would be both wiser and more faithful to what we have actually done in delegation cases to admit that agency rulemaking authority is 'legislative power.'").

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