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INTRODUCTION

In one of the recent term's most controversial decisions with long-term ramifications, the Supreme Court unveiled what it called the "major questions" doctrine in *West Virginia v. EPA*.[1] Although no prior Supreme Court decision had used this term, the divided Court saw this doctrine as rooted in past decisions that addressed a recurring problem: "agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted."[2]

Although masquerading as a doctrine that preserves separation of powers and congressional authority, in operation, it undermines both values. The major questions doctrine cripples the legislative process and congressional authority to make broad delegations to agencies. It shifts decision-making from the democratically elected branches to unelected judges. The doctrine is a tool for judicial activism that operates in one direction only. It will be invoked only when a court wishes to overturn the decision of an elected official or an agency answerable to that official. Unpredictable in its application, the doctrine is wholly unnecessary to preserve legitimate judicial review of agency actions. Perversely, the

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1. West Virginia v. Env't Prot. Agency, No. 20-1530 (U.S. June 30, 2022).
2. *Id.* at 20.

doctrine imposes stricter scrutiny on general delegations of authority to a politically accountable agency than would conventionally apply to an implicit delegation of authority to less politically accountable courts.

Part I describes the underlying case and the majority, concurring, and dissenting opinions addressing the major questions doctrine. In Part II, I explain how the doctrine undermines the legislative process and, in so doing, violates separation of powers principles. Part III explores the delegation choices that Congress makes and, using antitrust law as an example, explains why delegation to a politically accountable expert agency is often preferred to delegation to the courts. Part IV explains how the major questions doctrine invites extra-constitutional judicial activism. A short conclusion follows.

I. *WEST VIRGINIA V. EPA* AND THE MAJOR QUESTIONS DOCTRINE

The context for the Court's decision in *West Virginia v. EPA* was a proposed rule implementing the Clean Air Act, which authorized the Environmental Protection Agency ("EPA") to set a "standard of performance" for power plants' emission of certain pollutants into the air.[3] Under the Act, both new and existing plants can be required to adopt the "best system of emission reduction" that the EPA has determined to be "adequately demonstrated" for the particular category.[4]

During the Obama presidency, the EPA had proposed a rule (referred to as the Clean Power Plan) that would limit carbon dioxide emissions from power plants.[5] The proposed rule never went into effect. Some state attorneys general and the coal industry quickly brought suits to challenge the rule. With the litigation still pending, the EPA, under the Trump administration, revoked the rule in favor of its own proposed rule.[6] Under President Biden, the EPA dropped the Trump-era proposal and asked for a stay of the litigation while it developed its own proposal.[7]

Ample grounds existed for the Supreme Court to decline to review a rule that no one was proposing to implement. The importance of EPA action on carbon dioxide emissions to address climate change, as highlighted in Justice Kagan's dissent,[8] was beyond dispute. Postponing judicial review pending a concrete proposal from the EPA would benefit orderly completion of the administrative process and, at worst, cause minimal likely injury to the plaintiff states and coal industry. In the face

3. Clean Air Act, Pub. L. No. 91-604, 84 Stat. 1683; 42 U.S.C. § 7411(a)(1).
4. 42 U.S.C. §§ 7411(a)(1)–(d).
5. *West Virginia*, slip op. at 6.
6. *Id.* at 11.
7. *Id.* at 7–15.
8. *Id.* at 1 *et seq.* (Kagan, J. dissenting).

of these facts, the Court nonetheless forged ahead.[9]

Reaching the merits, the Court found that the EPA's assertion of authority was insufficiently supported by the language of the Clean Air Act. The rule, designed to reduce carbon dioxide emissions from electricity generation, was, in the Court's view, novel and "generation shifting" because it forced electric utilities to shift the source of some of their power generation from coal-fired plants to other power sources that emitted substantially less carbon dioxide (natural gas, solar, or wind).[10] The Court stressed that prior to 2015, the EPA had used Section 111 to require reduction of pollution "by causing the regulated source to operate more cleanly."[11] It had not looked to a "system" that would reduce air pollution by shifting power generation "from dirtier to cleaner sources."[12]

In a key paragraph that defined and defended the major questions doctrine, Chief Justice Roberts wrote that in "extraordinary cases, both separation of powers principles and a practical understanding of legislative intent" made the Court reluctant to find authority in "ambiguous statutory text."[13] "[S]omething more than a merely plausible textual basis for the agency action" was required.[14] The EPA had to point to "clear congressional authorization" for its asserted power.[15] The Court concluded that a "decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body."[16]

Although the label "major questions doctrine" had not been used in previous Supreme Court opinions, the ideas and reasoning behind it had appeared in prior Court opinions and in academic scholarship.[17] In a concurring opinion, Justice Gorsuch (joined by Justice Alito) treated the doctrine as well-established.[18] The opinion traced the doctrine to much

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9. *Id.* at 13–16.
10. *West Virginia*, slip op. at 16, 20–21.
11. *Id.* at 5.
12. *Id.*
13. *Id.* at 19.
14. *Id.*
15. *West Virginia*, slip op. at 19 (citing and quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).
16. *Id.* at 31.
17. For an overview of these earlier decisions and a critique, see Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475 (2021). Other scholarship addressing the major questions doctrine includes Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933 (2017); Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts*, 129 HARV. L. REV. 62, 93–96 (2015); Abigail R. Moncrieff, *Reincarnating the "Major Questions" Exception to* Chevron *Deference as a Doctrine of Non-Interference (Or Why* Massachusetts v. EPA *Got it Wrong*), 60 ADMIN. L. REV. 593 (2008).
18. *West Virginia*, slip op. at 1 (Gorsuch, J., concurring).

older holdings, linking it to Chief Justice Marshall's statement that "important subjects . . . must be entirely regulated by the legislature itself, even if Congress may leave the Executive to act under such general provisions to fill up the details."[19]

Justice Kagan's lengthy dissent (joined by Justices Breyer and Sotomayor) stressed the urgency of an EPA rule addressing emissions.[20] For the dissent, Section 111 of the Clean Air Act provided a clear delegation to the EPA to regulate emissions of any substance that "causes, or contributes significantly to, air pollution and that may reasonably be anticipated to endanger public health or welfare."[21] According to the dissent, that is exactly what the EPA rule would have done, selecting the "best system of emission reduction" for power plants.[22] The dissent also took issue with the separation of powers rationale for limiting Congress's delegation powers. As Justice Kagan put it, "Congress makes broad delegations like Section 111 . . . so an agency can respond, appropriately and commensurately, to new and big problems."[23] Justice Kagan also questioned the majority's commitment to textualist interpretation. When that approach pushed toward undesired results, "special canons like the 'major questions doctrine' magically appear as get-out-of-text-free cards."[24] Finally, the dissent stressed the value of respecting the interpretation of an agency with expertise rather than making the Court the "decision-maker on climate policy."[25] Justice Kagan concluded: "I cannot think of many things more frightening."[26]

II. THE MAJOR QUESTIONS DOCTRINE UNDERMINES THE LEGISLATIVE PROCESS

Justice Kagan's dissent did not fully mine the perverse and undemocratic effects of a major questions doctrine. In requiring a "clear delegation" from Congress,[27] the Court might simply be addressing a grievance that generations of judges have voiced—that legislation is often drafted in frustratingly imprecise or ambiguous language. Generations of judicial complaints, however, have done nothing to change the fundamentals of legislating.

While there is no excuse for sloppy legislative drafting, legislatures,

19. *Id.* at 3 (alteration in original) (quoting Wayman v. Southard, 10 Wheat. 1, 42–43 (1825)).
20. *Id.* at 1 (Kagan, J., dissenting).
21. *Id.* at 2 (citing 42 U.S.C. §7411(b)(1)(A)).
22. *Id.* at 4 (citing 42 U.S.C. §7411(a)(1)).
23. *West Virginia*, slip op. at 5 (Kagan, J., dissenting).
24. *Id.* at 28 (Kagan, J., dissenting).
25. *Id.* at 33 (Kagan, J., dissenting).
26. *Id.* (Kagan, J., dissenting).
27. *Id.* at 31.

for sound reasons related to the lawmaking process, often turn to general, open-ended, or even ambiguous language. Broad delegations of power are wise choices when a legislature wishes to defer to an agency's expertise or fears evasions of a regulatory statute. Absent an expansive delegation, more specific language may invite manipulation by those subject to a legislative mandate[28] or, as Justice Kagan noted, it may leave the agency powerless to deal with new and unexpected problems.[29]

There can be another compelling reason for choosing ambiguous language. When counting the votes needed for passage, legislators often finesse: they opt for general or ambiguous language that garners additional votes from legislators who cannot agree on more precise language, leaving details of interpretation for an agency or a court to resolve.[30] The major questions doctrine undermines a fundamental choice of legislators: whether or not to provide a general or open-ended delegation to an executive agency. The doctrine is, simply put, an invitation for judicial activism that will be extended to any litigant who does not like an agency's policy interpretation of a general delegation.

The major questions doctrine may be viewed as this judicial generation's reincarnation of the canon that statutes in derogation of the common law are to be strictly construed. That widely criticized canon was seen by many as rooted in the early twentieth-century judiciary's disdain for the growing body of statutes that displaced common law.[31] The major questions doctrine has a narrower focus, but might aptly be rephrased as a supplement to the derogation canon: statutes that broadly delegate to administrative agencies are to be strictly construed. Both of

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28. *See* WILLIAM N. ESKRIDGE JR., ABBE R. GLUCK & VICTORIA F. NOURSE, STATUTES, REGULATION AND INTERPRETATION, LEGISLATION AND ADMINISTRATION IN THE REPUBLIC OF STATUTES 24 (2014) (legislators find delegation to an agency "practically necessary" because legislators will not know all the "facts and issues" during the drafting of a statute); ABNER J. MIKVA, ERIC LANE & MICHAEL J. GERHARDT, LEGISLATIVE PROCESS 111–12 (2nd ed. 2002) ("[L]egislatures sometimes use general language, contemplating that it will be defined by administrative agencies").

29. *West Virginia*, slip op. at 4 (Kagan, J., dissenting).

30. MIKVA ET AL., *supra* note 28, at 112 ("[S]ometimes statutes are unclear because legislative compromises are struck to secure votes for the enactment of a statute."); ESKRIDGE ET AL., *supra* note 28, at 24 ("Legislators hate making hard choices . . . [that] tend to anger one or more groups that legislators want to have on their side. . . . [D]elegation [may] keep the enacting coalition from fracturing . . . ."); *see also* Chevron U.S.A. Inc. v. Nat. Resources Def. Council, Inc., 467 U.S. 837, 865 (1984) ("[P]erhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency.").

31. Jefferson B. Fordham & J. Russell Leach, *Interpretation of Statutes in Derogation of the Common Law*, 3 VAND. L. REV. 438, 452 (1950) ("[C]riticisms of the derogation canon and the enactment of legislation to discard or modify it have been directed more at the attitude of hostility to legislation reflected in the canon . . . ."); Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383–84 (1908) ("It is fashionable . . . to declare that there are things that legislatures cannot do . . . and to preach the superiority of judge-made law.").

these interpretive rules reflect judicial discomfort with a world of statutes, albeit the twenty-first century version focuses on statutory delegations to administrative agencies. Both invite disregard or disrespect for legislative intent and the lawmaking process.

Justice Stevens, a self-proclaimed "judicial conservative," defined this term as someone "who submerges his or her own views of sound policy to respect those decisions by the people who have to make them."[32] In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, Justice Stevens wrote for a unanimous Court that policy arguments not resolved by a statute "are more properly addressed to legislators or administrators, not to judges."[33] Addressing another EPA Clean Air Act regulation, this one adopted by the Reagan EPA to relax emission standards, the *Chevron* Court held that an agency interpretation of its own enabling legislation was entitled to deference.[34] Among other factors, the Court noted the agency's expertise in dealing with the underlying issues.[35]

Inherent in the *Chevron* doctrine is acceptance of the dynamics of lawmaking in a democracy. When a new president is elected, the agencies that the president directs may, in the pre-*Chevron* words of Justice Rehnquist, reappraise "the costs and benefits of its programs and regulations."[36] The *Chevron* Court applied its deference in defense of the Reagan administration's more relaxed interpretation of the Clean Air Act. Had the major questions doctrine been enshrined in 1984, the environmental organizations that brought the case could have used the doctrine to attack the Reagan administration's relaxed rule that was favorable to the industry. While the doctrine is content neutral, it invites objecting litigants to invoke it against politically accountable agencies that wish to pursue change in any direction, even if that change responds to voter preference.

Chevron does not allow an agency to alter the underlying statutory mandate. It simply held that when an open-ended or perhaps ambiguous delegation has occurred, the Court should defer to a reasonable interpretation by the agency, even when that results in an abrupt change from the policy under a prior administration.[37]

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32. Jeffrey Rosen, *The Dissenter, Justice John Paul Stevens*, THE NEW YORK TIMES MAGAZINE (Sept. 27, 2007), available at <https://nytimes.com/2007/09/23stevens-t.html> (quoting Justice Stevens).

33. *Chevron*, 467 U.S. at 864 (1984).

34. *Id.* at 865.

35. *Id.*

36. Motor Vehicle Mfrs. Assn of United States, Inc. v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 59 (1983) (Rehnquist J., concurring in part and dissenting in part).

37. Sunstein wrote that deference to agency interpretations "is based on a recognition of the

The *Chevron* doctrine has been under attack by those who favor more express authorizations for agency action.[38] There are a multitude of examples of agency missteps based on regulatory capture or ineptitude. Frank Easterbrook's interpretive framework would call for a strict construction approach to special interest legislation, and this reasoning might apply to some delegations to a regulatory agency.[39] A general delegation of agency power, however, is less likely to have been dictated by special interests. The majority in *West Virginia* regarded the Obama EPA's interpretation of the Clean Air Act as an overreach but did not suggest the rule served a narrow special interest.[40] Indeed, public utilities who were to be directly subject to the proposed rule generally were strongly supportive.[41] Those challenging the proposed rule were coal companies and state attorneys general, often from states in which the coal industry was active.[42] If there were special interests threatening to undermine the public interest in this case, they were those who opposed the EPA's proposed rule.

Under a traditional approach to judicial review, an agency's overreaching interpretation of delegated authority can and should be struck down.[43] The Court, however, described the EPA's reading of Section 111 as plausible.[44] Chief Justice Roberts wrote for the Court that mere plausibility was insufficient; "clear congressional authorization" was required.[45] A clear authorization, however, is impossible for unknown or unexpected future events. The Court's holding makes it much more difficult and riskier for Congress to use a general delegation to empower an agency to deal with unforeseen future developments.

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superior democratic accountability and fact-finding capacity of the agency and the corresponding belief that courts ought to treat agency decisions with a fair degree of respect." Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 476 (1989).

38. *See* Sunstein, *supra* note 17, at 476–80 (summarizing some of the criticism of *Chevron* and judicial responses to the case).

39. *See generally* Frank H. Easterbrook, *The Supreme Court, 1983 Term: Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 15 (1984).

40. *See* West Virginia v. Env't Prot. Agency, No. 20-1530, slip op. at 30–31 (U.S. June 30, 2022). (the majority left unanswered whether the EPA's proposed rule was the "best system of emission reduction," ruling only on the question of the EPA's authority).

41. *Id.* at 23–24 (Kagan J., dissenting) ("[T]he power industry overwhelmingly supports EPA in this case. . . . [T]he rule aimed to achieve what most power companies also want: substantial reductions in carbon dioxide emissions accomplished in a cost-effective way . . . .").

42. *See id.* at 12 (listing the challenging parties as including West Virginia, North Dakota, Westmoreland Mining Holdings, LLC, and the North American Coal Corporation).

43. *Chevron*, 467 U.S. at 842–43 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.")

44. *West Virginia*, slip op. at 19.

45. *Id.*

Chevron deference has little connection with corrupt or inept agency conduct, but much to do with respect for the lawmaking process and the need for Congress to delegate minor, and sometimes major, decisions to an expert agency. The *Chevron* doctrine is also consistent with Cass Sunstein's view that canons of interpretation should promote political accountability.[46] The major questions doctrine does the opposite: it undermines accountability by inviting unelected judges, largely insulated from oversight or discipline by either the executive or legislative branches, to make opportunistic interpretations.

In his concurring opinion in *West Virginia*, Justice Gorsuch defended the major questions doctrine, citing the expanding reach of the administrative state and the possibility that policy changes could fall under the radar of the president or responsible elected officials.[47] That argument should be challenged. If the Court really meant that the doctrine would be confined to major issues, there is small likelihood that such issues would be unnoticed by the president or other responsible elected officials. Even in cases where the president may be unaware or less than fully informed about an issue, the solution under the major questions doctrine is that unelected judges make the ultimate interpretive decision. That makes sense when the agency is clearly acting beyond its delegated authority but is troublesome when it invites courts to second guess an ambiguous or open-ended statutory grant of authority to an expert agency.

The timing of the judicial intervention can also be problematic. Typically, the doctrine would be imposed after the agency has already addressed a regulatory issue through a proposed rule. The *West Virginia* holding changed the ground rules of statutory interpretation after Congress had granted general authority and after the Obama administration EPA had worked through legal and technical issues in a proposed rule.[48] As Lisa Heinzerling points out, this upsets the reliance of the other branches of government and sets uncertain ground rules for both the Congress and the agency to start anew.[49]

While conventional judicial review may routinely impose these costs, the efficiency and workability of the governing process is subject to

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46. Sunstein, *supra* note 37, at 477 ("Courts should construe statutes so that those who are politically accountable and highly visible will make regulatory decisions.").

47. *West Virginia*, slip op. at 5 (Gorsuch, J. concurring) ("[A]gencies could churn out new laws more or less at whim.").

48. In this case, the timing of the judicial review was arguably even more problematic. The Court chose to review a rule that the Biden administration was not proposing to implement and while the Biden EPA was considering its own proposed rule. Interruption of ongoing rulemaking contravenes the exhaustion of remedies doctrine.

49. Heinzerling, *supra* note 17, at 1999.

unjustified higher burdens under the major questions doctrine. The subjectivity inherent in deciding what issues are "major" issues exacerbates this problem.[50] It is unclear how the EPA can come up with a rule that will push utilities away from coal-fired plants, the heaviest emitters of carbon dioxide, without running squarely into the same "major questions" that triggered the *West Virginia* result. In theory, Congress can quickly resolve the problem by passing legislation that expressly favors lower carbon dioxide emitting power sources. That is easily said, but problematic in execution. The more specific the legislation is, the more difficult it can be to obtain consensus among legislators. The major questions doctrine perversely undermines the ability of Congress to employ a venerable and valuable lawmaking tool: use of ambiguous or open-ended language that transfers difficult decisions to an expert but still politically accountable agency.

III. THE DELEGATION CHOICE

A. Delegation to an Expert Agency or to the Courts

On each occasion that Congress chooses to use general or open-ended language in a statute, it is expressly or implicitly making a delegation. If Congress makes no delegation to an agency, the courts would assume the responsibility of interpreting and applying the general language. Examples of an implicit delegation include the Sherman Antitrust Act[51] or voting rights legislation.[52] While government agencies may offer opinions about a preferred interpretation, there is no formal role for a government agency in the interpretive process when the courts receive this implicit delegation.

Instead of an implicit delegation to the courts, Congress can, and frequently does, use general language to delegate to a politically accountable expert agency. As the late Justice Antonin Scalia wrote, "[b]road delegation to the Executive is the hallmark of the modern administrative state."[53] That would describe the EPA's role under the Clean Air Act. Another simple example would be Section 10(b) of the Securities and Exchange Act of 1934 which prohibits fraud or deception

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50. Sunstein, *supra* note 17, at 487 ("[C]ourts have no simple way to separate major from nonmajor questions.").

51. The Sherman Antitrust Act, as amended, 15 U.S.C. §§1–7 (enforcement responsibilities to the Justice Department and private plaintiffs, but interpretation left to courts).

52. *E.g.*, The Voting Rights Act of 1965, as amended, 52 U.S.C.A. § 10301 et seq. (assigned some enforcement tasks to the Department of Justice, but interpretation was left to courts).

53. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516.

in connection with the purchase or sale of securities.[54] The statute expressly grants the Securities and Exchange Commission ("SEC") authority to issue rules that clarify what constitutes prohibited conduct.[55]

A primary reason to delegate the initial interpretive decision to an agency is that the agency has expertise that a generalized court would not have. Delegation also promotes accountability—an agency head must answer to an elected executive and to legislative oversight for questionable decisions.[56] Delegation to an agency also promotes a uniform rule in a way that, absent a Supreme Court ruling, delegation to the courts often does not. Finally, agencies also have flexibility that a court, bound by stare decisis, does not (or should not) have.[57] The Supreme Court can overturn precedent, but stare decisis commands respect even from the high Court. An agency, while it may favor consistency in its decisions, is not bound by stare decisis. It can change an interpretation of enabling legislation based on changed circumstances, a change in political leadership, new economic learning, or simply because it has changed its mind. The major questions doctrine, however, has the potential to take away much of the agency's flexibility whenever an opportunistic court, wary of the agency's change in policy, chooses to invoke the doctrine.

Former Justice Scalia addressed some of these issues, noting that when a court resolved an ambiguity, the resolution was "for ever and ever," allowing only a statutory amendment to produce a change.[58] Scalia favored allowing the agency to adjust "to the times," noting that the agency was accountable to "direct political pressures" from the Executive and "indirect political pressure" through congressional oversight.[59]

B. The Antitrust Example

The federal antitrust laws provide instructive illustrations of these delegation issues raised by the major questions doctrine. The Sherman Antitrust Act, by using general language such as "restraint of trade,"[60]

54. 15 U.S.C. §78j.
55. *Id.*
56. ESKRIDGE ET AL., *supra* note 28, at 24.
57. *See* Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L. Q. 351, 374 (1994) (agency discretion is justified by political accountability, specialized knowledge, flexibility, and national uniformity that judges cannot duplicate); *see also* Frank H. Easterbrook, *Judicial Discretion in Statutory Interpretation*, 57 OKLA. L. REV. 1, 7–10 (2004) (describing reasons to prefer delegation to an agency, including uniformity of interpretation, ability to change a decision, and political accountability).
58. Scalia, *supra* note 53, at 517–18.
59. *Id.*
60. Section 1 of the Sherman Act, 15 U.S.C. §1.

has delegated to the courts a major task of separating lawful from unlawful restraints. In theory, a court could decline to exercise the delegated task on the ground that Congress failed to make a clear statement as to its application. For antitrust, that has not happened. Whatever the Court's opinion of the wisdom of such broad delegations, it has not hesitated to offer its interpretations of the Sherman Act and, in some cases, to reverse course in major ways.

A bit more than two decades after enacting the Sherman Act, Congress, dissatisfied with judicial decisions applying the Sherman Act, passed the Federal Trade Commission Act.[61] That Act again used very general language ("unfair methods of competition") but this time assigned enforcement and initial interpretive functions to an administrative agency that would develop expertise in the field.[62] This pattern has been followed in numerous other instances as Congress has established other expert agencies, including the Securities and Exchange Commission, the Federal Communications Commission, and the National Labor Relations Board. Each of these agencies was given enforcement and initial interpretive authority for its enabling legislation. The delegation of interpretive authority could be inherent in the agency's enforcement responsibilities but can sometimes be express.[63]

In interpretations of the Sherman Act, the Supreme Court has, notwithstanding stare decisis, made abrupt and major changes in the law over the past few decades. For example, in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, a divided Court overturned the long-standing per se rule that prohibited resale price maintenance.[64] One of the arguments against changing this rule was that such a change should require the action of Congress, which, within the preceding two decades, had offered support for the per se rule.[65] The Court's majority holding

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61. ELEANOR M. FOX & DANIEL A. CRANE, CASES AND MATERIALS ON U.S. ANTITRUST IN GLOBAL CONTEXT, 47–48 (4th ed. 2020).

62. Federal Trade Commission Act § 5, 15 U.S.C. §45.

63. For example, the SEC was granted express authority to issue a rule defining prohibited manipulative or deceptive conduct. *See supra* note 54.

64. Leegin Creative Leather Prods., Inc., v. PSKS, Inc., 551 U.S. 877 (2007) (Breyer, J. dissenting). The Supreme Court issued another five-to-four decision that abruptly struck down a venerable Sherman Act precedent in Pacific Bell Tel. Co. v. LinkLine Commc'ns, 555 U.S. 438 (2009) (holding that a price squeeze claim is not a cognizable claim under Section 2 of the Sherman Act). Both *Leegin* and *Pacific Bell* have been criticized as objectionable judicial activism. *See* Warren S. Grimes, *Judicial Activism in the First Decade of the Roberts Court: Six Activism Measures Applied*, 48 SW. U. L. REV. 37, 62–67 (2019) (criticizing *Leegin* and *Pacific Bell* as objectionable judicial activism).

65. The majority opinion acknowledged but did not accept this argument. *Leegin*, 551 U.S. at 905–07. In his dissent, Justice Breyer wrote that when Congress enacted major legislation "premised upon the existence of that [per se] rule," this strengthened arguments for retaining the venerable precedent. *Id.* at 918–20.

paid no heed to this argument.

If the current Court were genuinely concerned about protecting congressional authority under separation of powers, it should guard that authority against infringements by both executive and judicial power. The major questions doctrine works only against perceived executive overreach. Broad or ambiguous language can be part of an express delegation to the executive branch or an implied delegation to the courts. Are there principled reasons for treating abrupt and substantial interpretive changes more leniently when the courts have been implicitly delegated interpretive powers? In support of a distinction, one might argue that implicit delegations to the courts suggest a reduced level of congressional interest or concern. But areas such as antitrust and voting rights are closely monitored by the House and Senate Judiciary Committees and are subjects of active oversight and legislative hearings by those committees. In these and many other areas in which authority has been implicitly delegated to the courts, there will still be many major issues, especially when authority has been delegated with general or open-ended language.

IV. AN INVITATION FOR JUDICIAL ACTIVISM

A salient definition of judicial activism should be anchored to the separation of powers doctrine and the principle of democratic accountability. Objectionable judicial activism most often involves Court decisions that assert judicial power over matters that are properly the domain of elected and more politically responsive branches of government.[66] This measure can be applied to three categories of Supreme Court decisions: (1) decisions interpreting the Constitution; (2) decisions interpreting a statute in which there is no delegation to an agency; and (3) decisions interpreting a statute that delegates interpretive and enforcement authority to an agency.[67]

In the first category, subject to sensitivity to interpretations of the Constitution by coordinate branches,[68] the Court has final interpretive authority. The Court, however, is still constrained by its Article III

66. Grimes, *supra* note 64, at 38–39 (judicial activism described as a Court decision that "unnecessarily infringes on the powers of the democratically elected coordinate branches").

67. Distinguishing between the second and third categories can sometimes be difficult. In category two cases, the government, through its enforcement role, may often express views on how a statute should be interpreted.

68. Larry Kramer has argued that constitutional interpretation has traditionally not been, and should not be, the exclusive province of the Court. Larry D. Kramer, *Judicial Supremacy and the End of Judicial Restraint*, 100 CAL. L. REV. 621, 622–34 (2021) (tracing the evolution of the Court's role as an interpreter of the Constitution).

Constitutional assignment to decide "cases" or "controversies,"[69] implicitly favoring narrow rulings that do not go beyond what is needed to decide a case.[70] Narrow holdings are less likely to intrude on the powers of the elected branches to govern. The Court should further be constrained by the doctrine of stare decisis, counseling incremental rather than drastic change. When the Court deviates from these principles, as on occasion may be warranted, it should seek consensus, as in its unanimous ruling in *Brown v. Board of Education*.[71] Consensus rulings are more likely to be narrow and to maintain the credibility of the Court in the face of judicial activism claims.

When interpreting a statute for which interpretive authority has been delegated to the courts, the Supreme Court lacks both the democratic accountability and the expertise of an agency. Courts should be cabined by the same principles that apply to constitutional interpretation. While paying attention to legislative intent, moving incrementally remains a critical restraint. Abrupt or substantial changes in interpretation are more likely to be seen as harmful judicial activism. While the legislature is free to step in to nullify an objectionable ruling, contemporary experience with legislative paralysis suggests this often may be difficult. This leaves the door open for activist judges to exploit interpretive powers undisciplined by democratic accountability.[72]

In the third area, maximum interpretive discretion should be accorded to expert agencies. Such agencies have three advantages that courts lack: expertise, flexibility to change, and democratic accountability from oversight of the executive and the legislative branches. The agency should be accorded the benefit of *Chevron* deference even when (or especially when) there is a major change in agency interpretation. Interference with this process by less democratically accountable judges undermines the democratic process. Unelected judges are insulated from oversight in ways that agencies are not and may be tempted to stray from political consensus.[73] It would follow that a judge's exercise of interpretive authority implicitly delegated to the courts should be subject

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69. U.S. CONST. art. III, §2.

70. For a discussion of why narrow rulings are most compatible with Article III jurisdiction, see Grimes, *supra* note 64, at 44–48.

71. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

72. The Court's decisions narrowly interpreting voting rights legislation are examples of this potential abuse. *See* Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321 (2021) (Arizona voting restrictions did not violate voting rights legislation); *see also* Shelby Cnty. v. Holder, 570 U.S. 529 (2013) (striking down the preclearance procedure in voting rights legislation). For criticism of the activist features of Shelby County, see Grimes, *supra* note 6464, at 70–72.

73. Easterbrook, *supra* note 57, at 8–9 ("Judges are more tempted to stray [from political consensus] because there are fewer tools for reigning them in; essentially the only tool is a new statute, which may be impossible . . . .").

to greater, not less, discipline when compared to a delegation to an expert agency.

In *West Virginia v. EPA*, the Court rejected a statutory delegation that three of its members viewed as clear and the other six members viewed as "merely plausible."[74] Six unelected justices, largely insulated from accountability and the democratic polity, imposed their views over those of an agency accountable to both the president and the Congress. In so doing, the Court announced a major questions doctrine that makes it more difficult for Congress to make necessary and appropriate general delegations to expert administrative agencies. The administrative state is an imperfect governance tool. But substituting relatively accountable administrative decisions for less accountable decisions of unelected judges is not an improvement; it undermines legislative authority and invites judicial autocracy.

One might hope that this new doctrine will be rarely (if opportunistically) invoked. At any level of use, the major questions doctrine represents a dangerous and autocratic assertion of the Court's power over the democratically elected coordinate branches of government.[75] In the current Court session, states challenging the administration's proposed debt relief for education loans have relied heavily on the major questions doctrine.[76] As long as the doctrine remains, litigants unhappy with agency actions will invoke it.

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74. West Virginia v. Env't Prot. Agency, No. 20-1530, slip op. at 19 (U.S. June 30, 2022).

75. Heinzerling, *supra* note 17, at 1940 (the major questions doctrine and related power canons "undermine the public values of separation of powers and deliberation by enlarging the judicial power at the expense of the legislative and executive branches and by leaning hard against one side of the debate over the scope of regulatory power.").

76. On January 28, 2023, the Supreme Court heard oral argument in two related cases challenging the Biden Administration's proposal to waive up to $20,000 in student debt. Biden v. Nebraska, 143 S. Ct. 477 (2022); Dep't of Educ. v. Brown, 143 S. Ct. 541 (2022). Although the cases may be dismissed on standing grounds, arguments on the merits focused heavily on the major questions doctrine. *See* Transcript of Oral Argument at 11–14, 31–36, 97–99, 108–09, 126–27, Biden v. Nebraska, 143 S. Ct. 477 (2022), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/22-506_5426.pdf [https://perma.cc/DGX6-QFPE]; Transcript of Oral Argument at 28, Dept of Educ. v. Brown, 143 S. Ct. 541 (2022), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/22-535_ba7d.pdf [https://perma.cc/7M7E-5TY5].

In May of 2023, the Court once again ruled against the EPA's interpretation of enabling legislation, this time the Clean Water Act, 86 Stat. 816, as amended, 33 U. S. C. §1251 et seq. Sackett v. Env't Prot. Agency, No. 21-454 (U.S. May 25, 2023). While not relying on the major questions doctrine, the majority's very narrow interpretation of the statutory delegation to the EPA drew the opposition of four concurring Justices, who protested that the majority's interpretation ignored congressional intent as expressed in the ordinary meaning of the statute's text. *Id.* (Kagan, J., concurring) (Kavanaugh, J., concurring).

CONCLUSION

The decision whether to give an expert agency or the courts the lead in fleshing out the details of a generally worded mandate is for the Congress to make. An activist Supreme Court, through aggressive application of the major questions doctrine, should not undermine an agency acting in good faith to carry out its mandate. The doctrine is most likely to be invoked against general delegations of power to an agency. Such delegations with relatively open-ended language are both common and necessary: necessary because the Congress wishes to confer sufficiently broad authority to deal with the unexpected or to prevent evasions by special interests; or necessary because the Congress, in seeking a consensus, has consciously chosen ambiguous language that will be left open for expert agency interpretation. These general delegations are not an invitation for agency excess. Agencies, unlike judges, are subject to accountability to the president and to Congress. And agencies are subject to traditional judicial review for actions that are unconstitutional or clearly beyond agency authority.

Purposeful delegations of Congress should not be subject to a judicial doctrine that gives the expert agencies less deference than that accorded to a court when open-ended statutory language invites judicial development of the law. The major questions doctrine is an undemocratic prescription that makes democratic governance more difficult and opens the door for opportunistic abuse by an activist Court with minimal accountability to the elected branches of government.