MAJOR QUESTIONS AVOIDANCE AND ANTI-AVOIDANCE

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ABSTRACT

In recent years, the Supreme Court has articulated a new "major questions" doctrine that prescribes a heightened standard of judicial scrutiny for regulations that address questions of vast economic and political significance. This jurisprudential innovation incentivizes—indeed, practically invites—strategically minded agencies to engage in "major questions avoidance": to modify their regulatory approaches in order to skirt the major questions doctrine's consequences. This Article is the first to name the phenomenon of major questions avoidance and to develop a taxonomy of avoidance tactics. It identifies four broad categories of major questions avoidance: "slicing" a single rule into a series of smaller rules; "lumping" together regulations under different statutory authorities to achieve a common, far-reaching objective; "glossing" over a major rule in technocratic language that downplays its economic and political significance; and "bypassing" the rulemaking process via guidance documents, administrative adjudications, and enforcement actions. Agencies appear to be deploying various major questions avoidance tactics already—openly in some cases and subtly in others. Although each of these avoidance tactics is costly to pursue, agencies are likely to engage in major questions avoidance—at least some of the time—as long as the major questions doctrine remains a salient feature of the administrative law landscape.

The nascent phenomenon of major questions avoidance presents both normative and jurisprudential puzzles. Different normative theories of administrative state legitimacy lead to contrasting conclusions regarding the desirability of major questions avoidance. If major questions avoidance is a

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problem, courts could—in theory—try to solve it by developing new doctrines of "major questions anti-avoidance." Yet these anti-avoidance doctrines will face their own set of logical and logistical challenges—challenges that underscore the limits of judicial power in the cat-and-mouse game between courts and strategically minded agencies. Ultimately, a clear conceptual mapping of major questions avoidance and anti-avoidance can shed new light not only on the major questions doctrine itself but also on the justifications for, constraints on, and adaptability of the modern administrative state.

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INTRODUCTION

One of the first lessons that students learn in law school is the concept of "question size elasticity." Law school instructors rarely (if ever) use the term "question size elasticity," but they almost inevitably illustrate the concept starting on Day One. For example, when teaching *Vosburg v. Putney*,[1] the first case in many torts casebooks,[2] professors often divide the central question—whether intent to harm should be a required element of the tort of battery—into a series of sub-questions (for example, whether intent to harm should be a required element when the alleged battery occurs in a touch football game, or on a crowded subway, or—as in *Vosburg*—in a seventh-grade classroom).[3] Going in the opposite direction, professors often show how a seemingly self-contained doctrinal question such as the question presented in *Vosburg* implicates much larger questions about the structure of society (for example, how to mediate between conflicting interests in economic efficiency and bodily autonomy). By the end of their 3L year, students may not remember the particulars of the cases that they read as 1Ls, but if they were paying even a modicum of attention, they will have learned how to slice a big question into lots of littler ones and how to transform a superficially small question into a much more expansive inquiry.

The concept of question size elasticity, applicable in many legal contexts,[4] takes on particular relevance in the context of the "major questions" doctrine, possibly the most consequential new doctrine to emerge in U.S. administrative law so far this century.[5] The doctrine—which

1. Vosburg v. Putney, 50 N.W. 403 (Wis. 1891).

2. *See* James A. Henderson Jr., *Preface - Why* Vosburg *Comes First*, 1992 WIS. L. REV. 853, 854–60 (1992) (discussing and justifying *Vosburg*'s frontal placement in many torts casebooks).

3. *See* Zigurds L. Zile, Vosburg v. Putney - *A Centennial Story*, 1992 WIS. L. REV. 877, 883 (1992).

4. For example, Federal Rules of Civil Procedure section 23(a)(2) requires class action plaintiffs to demonstrate that "there are questions of law or fact common to the class." What constitutes a "common" question—as opposed to a series of distinct questions—is itself a hotly contested question. *See*, *e.g.*, Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011); Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion, Wal-Mart v. Dukes, *and* Turner v. Rogers, 125 HARV. L. REV. 78, 148–54 (2011). For another example, the "claim-splitting" doctrine seeks to prevent a plaintiff from splitting a single cause of action into several suits in order to avoid the effects of res judicata and claim preclusion. What makes a "single cause of action" is, unsurprisingly, not always obvious. *See*, *e.g.*, Scholz v. United States, 18 F.4th 941, 951–52 (7th Cir. 2021) (examining claim-splitting doctrine). For yet another example, the rule against "piecemealing" under the National Environmental Policy Act seeks to prevent agencies from understating the environmental effects of their actions by "segmenting an overall plan into smaller parts involving action with less significant environmental effects." Protect Our Parks, Inc. v. Buttigieg, 10 F.4th 758, 763 (7th Cir. 2021). On the challenges of determining when different actions must be considered cumulatively, see Terence L. Thatcher, *Understanding Interdependence in the Natural Environment: Some Thoughts on Cumulative Impact Assessment Under the National Environmental Policy Act*, 20 ENV'T. L. 611 (1990).

5. Michael Coenen and Seth Davis write that, although the major questions doctrine had "precursors" in pre-2000 case law, "the majorness inquiry first crystallized in *FDA v. Brown &*

prescribes a heightened standard of judicial scrutiny for agency rules that implicate questions of particular economic and political significance—played a central role in four blockbuster Supreme Court cases during the Biden presidency. These four decisions—in which the Court overturned a nearly nationwide eviction moratorium,[6] struck down a COVID-19 vaccine mandate for more than 80 million U.S. workers,[7] stripped the Environmental Protection Agency of authority to carry out its Clean Power Plan,[8] and blocked the Department of Education from forgiving $430 billion in federal student debt[9]—affect broad swaths of the American population and American life.[10] The doctrine continues to rear its head in dozens of lower court cases and is almost certain to return to the Supreme Court soon, likely leading to the invalidation of additional agency actions.[11]

When applied to the major questions doctrine, the concept of question size elasticity generates a number of, well, major questions. First, as a predictive matter: if a major question can be split into a series of minor questions, will agencies seek to avoid the doctrine's consequences by slicing what would otherwise be "major" rules into smaller bits and pieces? We might call this slicing method—along with other tactics to evade the major

Williamson Tobacco Corp." Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777, 787 (2017); *see* Food and Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000). As 2000 was—technically—the last year of the last century, one might argue that the major questions doctrine is not truly a 21st century phenomenon, though, as we shall see, the doctrine has evolved since 2000, making it almost unrecognizable from the *Brown & Williamson* version. For an exploration of the doctrine's roots in earlier caselaw, see Rachel Rothschild, *The Origins of the Major Questions Doctrine*, 100 IND. L.J. 57 (2024).

6. Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2484 (2021) (per curiam).

7. Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 662–63 (2022) (per curiam). The "vaccine mandate" framing was arguably misleading, as the rule also could be satisfied by having employees show a negative COVID-19 test each week. Thus, the rule could have been described as a "testing mandate" instead. For an experimental evaluation of the public opinion effects of these alternative frames, *see* Christopher Buccafusco & Daniel J. Hemel, *Framing Vaccine Mandates: Messenger and Message Effects*, J.L. & BIOSCIENCES, Jan.–June 2022, at 1 (2022).

8. West Virginia v. EPA, 142 S. Ct. 2587, 2615–16 (2022).

9. Biden v. Nebraska, 143 S. Ct. 2355, 2362 (2023).

10. In a comment in the Harvard Law Review's Supreme Court issue published before the student loan decision, Mila Sohoni describes the first three cases, plus the Supreme Court's decision in *Biden v. Missouri*, as "the major questions quartet." Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 262 (2022); *see* Biden v. Missouri, 142 S. Ct. 647 (2022) (per curiam). Unlike the student loan decision in *Biden v. Nebraska*, the Biden administration prevailed in *Biden v. Missouri*, in which it defended a challenge to the Department of Health and Human Services' COVID-19 vaccine mandate for employees of Medicare- and Medicaid-funded hospitals. Biden v. Missouri, 142 S. Ct. at 650. The dissent, but not the majority, concluded that the mandate implicated a question of "vast economic and political significance." *Id.* at 658 (Thomas, J., dissenting).

11. *See* Natasha Brunstein, *Major Questions in Lower Courts*, 75 ADMIN. L. REV. 661, 669–92 (2024); Erin Webb, *Analysis: More Major Questions Doctrine Decisions Are Coming*, BLOOMBERG LAW: BLOOMBERG LAW ANALYSIS (Nov. 5, 2023, 6:00 PM), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-more-major-questions-doctrine-decisions-are-coming [https://perma.cc/X5FT-HEW6].

question doctrine's reach—"major questions avoidance." Second, as a normative matter: if some agencies do engage in major questions avoidance at least some of the time, should we, as citizens, applaud those agencies' avoidance tactics? Put another way, is major questions avoidance a salutary phenomenon—either as a desirable "workaround"[12] to circumvent an otherwise undesirable doctrine or as exactly the sort of agency behavior that the major questions doctrine is supposed to incentivize? Or, to the contrary, is major questions avoidance a pernicious administrative tactic that agencies ought to eschew for the public good? And third, as a jurisprudential matter: to the extent that major questions avoidance is undesirable, how—if at all—should courts police the practice? Should courts construct a doctrine of major questions anti-avoidance in administrative law, just as courts have—for example—developed anti-avoidance doctrines to defend the integrity of federal tax law? And if so, what shape might a doctrine of major questions anti-avoidance take?

Rigorously thinking through the relationship between major questions avoidance and anti-avoidance can provide fresh perspectives on the major questions doctrine itself—and, more broadly, about the relationship between the judiciary and the administrative state. According to one view, well expressed by the legal scholar Blake Emerson, the Supreme Court's invocation of the major questions doctrine "is not legal interpretation at all, but rather an exercise of raw political power."[13] In a similar vein, Josh Chafetz characterizes the major questions doctrine as a central element of what he calls "the new judicial power grab."[14] This Article—though agnostic about the desirability of the doctrine[15]—suggests another possible slant on the doctrine's power implications. When we consider potential agency responses to the major questions doctrine—along with the enormous difficulties that courts will face in policing those workarounds—our takeaway may be that the doctrine, if a judicial power grab, is one with surprisingly infirm grip. In other words, the major questions doctrine—though cited by critics as a signal example of creeping "juristocracy"[16]—

12. *See* Daniel A. Farber, Jonathan S. Gould & Matthew C. Stephenson, *Workarounds in American Public Law*, 103 TEX. L. REV. 503, 513 (2025).

13. *See* Blake Emerson, *The Binary Executive*, 132 YALE L.J.F. 756, 772 (2022).

14. Josh Chafetz, *The New Judicial Power Grab*, 67 ST. LOUIS U. L.J. 635, 648–52 (2023).

15. The academic literature is overwhelmingly critical of the Court's latest iteration of the major questions doctrine. For an important exception, see Brian Chen & Samuel Estreicher, *The New Nondelegation*, 102 TEX. L. REV. 539 (2024).

16. David M. Driesen, *Major Questions and Juristocracy*, REG. REV. (Jan. 31, 2022), https://www.theregreview.org/2022/01/31/driesen-major-questions-juristocracy [https://perma.cc/VDV7-2XFH]; *see* Nathan Richardson, *Antideference: Covid, Climate, and the Rise of the Major Questions Canon*, 108 VA. L. REV. ONLINE 174, 206 (2022) (warning of "[t]he danger of major questions juristocracy").

may, at the end of the day, reveal as much about judicial power's limits as about its reach.

Part I of this Article provides a brief overview of the major questions doctrine and defines the concept of major questions avoidance. Part II considers whether, when, and why agencies may (or may not) choose to engage in major questions avoidance. Part III evaluates major questions avoidance from a normative perspective, showing how four different theories of the administrative state's legitimacy lead to very different conclusions regarding major questions avoidance. Part IV looks forward to the next move in the chess game between agencies and courts, asking whether and how courts can construct a doctrine of major questions anti-avoidance. Along the way, the analysis highlights the difficulties that even an ideologically motivated judiciary will face if it seeks to prevent administrative agencies from resolving questions of vast economic and political significance.

I. THE MAJOR QUESTIONS DOCTRINE AND MAJOR QUESTIONS AVOIDANCE

A. THE MAJOR QUESTIONS DOCTRINE(S)

For years, a popular parlor game among administrative law scholars involved counting the number of *Chevron* steps. As formulated by Justice Stevens in the 1984 case that gave the *Chevron* doctrine its name, judicial review of agency statutory interpretation is a two-step process: is the statute ambiguous (Step One) and, if so, has the agency adopted a "permissible construction of the statute" (Step Two)?[17] Thomas Merrill and Kristin Hickman later argued that in practice, an additional step precedes Steps One and Two—*Chevron* "Step Zero"—at which courts determine whether an agency's statutory interpretation is even eligible for *Chevron* deference.[18] William Jordan interpreted the Supreme Court's decision in *United States v. Mead Corp.*[19] as "erect[ing] a new four step test to replace what we once knew as the *Chevron* two step."[20] Matthew Stephenson and Adrian Vermeule responded with an article provocatively titled: "*Chevron* Has Only One Step."[21] Aaron Nielson and I argued that courts have created a half-step

17. *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–44 (1984).

18. *See* Thomas W. Merrill & Kristin E. Hickman, Chevron's *Domain*, 89 GEO. L.J. 833, 836 (2001); *see also* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 191 & n.19 (2006) (attributing the term "*Chevron* Step Zero" to Merrill and Hickman).

19. United States v. Mead Corp., 533 U.S. 218 (2001).

20. William S. Jordan, III, *Judicial Review of Informal Statutory Interpretations: The Answer Is* Chevron *Step Two, Not* Christensen *or* Mead, 54 ADMIN. L. REV. 719, 725 (2002).

21. *See* Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV.

between Steps One and Two—what we called "*Chevron* Step One-and-a-Half."[22] Judges got in on the *Chevron* step-counting exercise, too.[23] Much fun was had by all.

With the *Chevron* doctrine now dead[24]—or at least, "mostly dead"[25]—counting the versions of the major questions doctrine is the newest administrative law numbers game. Cass Sunstein has argued that there are actually two major questions doctrines.[26] Jody Freeman and Matthew Stephenson count three different iterations.[27] Louis Capozzi writes that after *West Virginia v. EPA*, the 2022 Clean Power Plan case, "[t]here is one version of the major questions doctrine" still standing.[28]

In all of its iterations, the major questions doctrine applies more searching judicial review to "agency decisions of vast 'economic and political significance.' "[29] The various versions of the major questions doctrine differ in what that more searching review entails. In one version, the "majorness" of an agency's assertion of statutory authority is a factor weighing against that reading.[30] This version of the major questions doctrine evokes Justice Scalia's statement that Congress "does not . . . hide elephants in mouseholes"[31]—that an interpretation of a statute is less plausible if it ascribes extraordinary consequences to "vague terms or ancillary provisions."[32] In a second version, the majorness of an agency decision was a reason for courts to deny *Chevron* deference and interpret the relevant

597, 597–98 (2009).

22. Daniel J. Hemel & Aaron L. Nielson, Chevron *Step One-and-a-Half*, 84 U. CHI. L. REV. 757, 759–61 (2017).

23. *See*, *e.g.*, Ali v. Barr, 951 F.3d 275, 279 (5th Cir. 2020) (referring to "*Chevron* Step Zero" and attributing the term to "[a]dministrative-law wonks"); Conservation L. Found., Inc. v. Longwood Venues & Destinations, Inc., 422 F. Supp. 3d 435, 454 (D. Mass. 2019) (adopting the "*Chevron* Step One-and-a-Half" terminology).

24. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024) ("*Chevron* is overruled.").

25. *See* Adrian Vermeule, Chevron *by Any Other Name*, THE NEW DIGEST (June 28, 2024), https://thenewdigest.substack.com/p/chevron-by-any-other-name [https://perma.cc/HKR4-6CVN] (arguing that "much or most" of *Chevron* deference may be "recreated under a different label: '*Loper Bright* delegation' "). *Cf.* WILLIAM GOLDMAN, THE PRINCESS BRIDE 313 (First Harvest International ed., Harcourt Inc. 2007) (1973) (" 'You see,' Max explained . . . , 'there's different kinds of dead: there's sort of dead, mostly dead, and all dead.' ").

26. Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475, 477 (2021).

27. *See* Jody Freeman & Matthew C. Stephenson, *The Anti-Democratic Major Questions Doctrine*, 2022 SUP. CT. REV. 1, 5 (2022) ("We can discern in the case law three different versions of the MQD . . . .").

28. Louis J. Capozzi III, *The Past and Future of the Major Questions Doctrine*, 84 OHIO ST. L.J. 191, 223 (2023).

29. Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000)).

30. *See* Freeman & Stephenson, *supra* note 27, at 5–6.

31. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001).

32. *Id.*

statute de novo. This version[33]—which was on clearest display in the Supreme Court's 2015 *King v. Burwell* decision[34]—faces an uncertain future in a post-*Chevron* world.[35] In a third version, majorness is a reason to reject an agency's interpretation of a statute unless Congress has issued a "clear statement" authorizing the agency's assertion of power.[36] Freeman and Stephenson describe this third, "most aggressive" version of the major questions doctrine as a "novel judicial innovation" that had not been embraced by the Supreme Court until *West Virginia v. EPA* in 2022.[37]

All of these versions require courts to somehow distinguish major questions from minor ones. None of the Supreme Court's cases give concrete guidance on the ingredients of majorness, though they do provide potentially instructive examples. In cases where it has found a question to be major, the Court has cited—among other factors—the population of people affected,[38] the amount of money at stake,[39] the rule's geographic reach,[40] and the number of sectors that could be affected by the agency's interpretation.[41] Other factors cited by the Court in major questions cases include whether the

33. *See* Freeman & Stephenson, *supra* note 27, at 6.

34. *See* King v. Burwell, 576 U.S. 473, 485–86 (2015).

35. The Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, which formally overruled *Chevron*, leaves open the possibility that "the best reading of a statute is that it delegates discretionary authority to an agency." Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2249 (2024); *see* Vermeule, *supra* note 25 (explaining that the major questions doctrine may remain relevant in determining whether an agency is acting within or beyond the bounds of its discretionary authority).

36. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2614 (2022) (stating that the requirement of "clear congressional authorization" distinguishes the "major questions doctrine"); *see id.* at 2616 (Gorsuch, J., concurring) (describing the major questions doctrine as a "clear statement" rule).

37. Freeman & Stephenson, *supra* note 27, at 20.

38. *See* Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 665 (2022) (per curiam) (finding that OSHA's vaccine mandate implicated a major question when the agency "has ordered 84 million Americans to either obtain a COVID-19 vaccine or undergo weekly medical testing at their own expense").

39. *See* Biden v. Nebraska, 143 S. Ct. 2355, 2373 (2023) (finding that the Department of Education's forgiveness of student debt implicated a major question when the program was estimated to cost taxpayers "between $469 billion and $519 billion").

40. *See* Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2486, 2488 (2021) (per curiam).

41. *See* Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 311 (2014).

rule finds precedent in past agency practice[42] and whether the rule lies within the agency's "sphere of expertise."[43]

The emphasis in major questions cases on the *scope* of the challenged regulation raises a possibility that scholarship has only begun to probe: if the majorness of an agency interpretation depends, in part, on the number of people, industries, or regions affected by the relevant rule or by the rule's dollar-denominated costs, can an agency duck the major questions doctrine by slicing a larger rule into smaller bits and pieces?[44] Although the Court has never stipulated a specific population threshold, dollar threshold, or other numerical criterion for majorness, its major questions cases so far indicate—and common sense would suggest as well—that smaller-in-scope rules are less major than larger rules. And in the major questions doctrine era, rules that do not implicate the major questions doctrine would seem to have a better chance of surviving judicial scrutiny than rules that do.

B. MAJOR QUESTIONS AVOIDANCE

Just as the major questions doctrine comes in multiple flavors, major questions avoidance does too. Broadly, "major questions avoidance" refers to any tactic by which an agency changes the form or substance of its regulations in order to avoid the application of the major questions doctrine while achieving similar—though not necessarily identical—results. We can divide the broad category of major questions avoidance into at least four subcategories: "slicing," "lumping,"[45] "glossing," and "bypassing." This Section considers each in turn.

42. *See*, *e.g.*, West Virginia v. EPA, 142 S. Ct. 2587, 2608 (2022); *see also* Richard L. Revesz & Max Sarinsky, *Regulatory Antecedents and the Major Questions Doctrine*, 36 GEO. ENV'T L. REV. 1, 6–13 (2023) (discussing the role of "regulatory novelty" in major questions cases); *cf.* Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407, 1407 (2017) (identifying a similar bias against "legislative novelty" in Roberts Court cases). Beau Baumann suggests a "two-step" framing of the major questions doctrine "requiring (1) economic or political significance and (2) an extraordinary assertion of agency power." According to this view, the scope of the challenged regulation would enter the analysis at step one; novelty would be a factor considered at step two. *See* Beau J. Baumann, *Volume IV of The Major Questions Doctrine Reading List*, YALE J. ON REGUL. (Aug. 14, 2023), https://www.yale jreg.com/nc/volume-iv-of-the-major-questions-doctrine-reading-list-by-beau-j-baumann [https://perma.cc/3RYS-KSUM].

43. *See*, *e.g.*, *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 665.

44. The phrase "major questions avoidance" is original to this Article, though as discussed later in this Section, other scholars have anticipated some of the ways in which agencies might circumvent the major questions doctrine, and some agencies appear to have engaged in forms of major questions avoidance already.

45. I borrow the "slicing" and "lumping" terminology from Lee Fennell. *See* LEE ANNE FENNELL, SLICES AND LUMPS: DIVISION AND AGGREGATION IN LAW AND LIFE (2019).

1. "Slicing"

"Slicing" refers to a type of major questions avoidance in which an agency divides a larger rule into several smaller ones. For example, when the Centers for Disease Control and Prevention ("CDC") restricted evictions during the COVID-19 crisis, the agency engaged in a form of temporal slicing: it issued a series of time-limited eviction prohibitions with durations of one,[46] two,[47] three,[48] and four[49] months. It was only after the fifth iteration of the CDC's moratorium that the Supreme Court struck down the agency's action, stating that "the sheer scope of the CDC's claimed authority" required a clear authorization from Congress.[50]

Time is not the only dimension along which agencies might "slice." Agencies also might slice geographically. For example, instead of issuing a single rule for the entire country, the CDC could have promulgated a series of geographically limited, temporally overlapping moratoria with a combined effect approaching—if not equaling—a nationwide rule.[51] Alternatively, agencies might slice by industry. For example, the Occupational Safety and Health Administration—instead of issuing a vaccination and testing rule for nearly all private employers with at least one hundred employees[52]—could have issued a series of industry-specific rules that, in the aggregate, reach most or all sectors of the economy. The Environmental Protection Agency ("EPA") arguably engaged in a form of industry slicing in early 2024 when it split its greenhouse gas emissions limits for existing coal-fired and natural gas-fired power plants into two rules—proceeding immediately with the rule for existing coal plants while

46. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 34010, 34010 (June 28, 2021).

47. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 8020, 8021 (Feb. 3, 2021); Temporary Halt in Residential Evictions in Communities with Substantial or High Transmission of COVID-19 to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 43244, 43244 (Aug. 6, 2021).

48. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 16731, 16734 (Mar. 31, 2021).

49. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55292, 55292 (Sept. 4, 2020).

50. *See* Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) (per curiam).

51. The final version of the CDC eviction moratorium applied to eighty percent of U.S. counties—those with "substantial" or "high" levels of community COVID-19 transmission. *See* Temporary Halt in Residential Evictions in Communities with Substantial or High Transmission of COVID-19 to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 43244, 43246 (Aug. 6, 2021). Approximately ninety percent of the U.S. population lived in the covered counties. *See* Kaitlan Collins, Phil Mattingly, Kevin Liptak, John Harwood & Maggie Fox, *CDC Announces Limited, Targeted Eviction Moratorium Until Early October*, CNN (Aug. 3, 2021, 6:23 PM), https://www.cnn.com/2021/08/03/politics/eviction-moratorium-high-covid-spread/index.html [https://perma.cc/J6XA-LZ4X].

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

stating that it would delay the rule for existing gas plants for at least several more months.[53]

Slicing can theoretically result in total or partial avoidance of the major questions doctrine. Imagine, for example, that an agency wishes to apply a single rule, R, to twenty-six industries labeled A through Z. Total avoidance would occur if the agency issues twenty-six identical versions of rule R, each for a single industry, and all pursuant to the same statutory authority. Partial avoidance could occur if the agency modifies the rule for each industry such that rule R_a applies to industry A, R_b applies to industry B, and so on, all the way through R_z for industry Z, where all of these industry-specific rules are substantively similar but none are carbon copies of each other. Partial avoidance also might occur if the agency applies rule R to some subset of industries—perhaps to A, C, and E but not B, D, and F—with the upshot that a large slice but not all of the economy is covered by R. Thus, partial avoidance allows an agency to achieve much of—though not all of—what it would have sought to achieve in the absence of the major questions doctrine.

Concededly, the slicing subcategory is blurry around the edges. At what point does an agency's response to the major questions doctrine cease to be "avoidance via slicing" and simply become a downsizing of the relevant rule? For example, if an agency wishes to impose rule R on industries A through Z but—fearing the major questions doctrine—settles on applying rule R to industry A alone, then the agency has not "avoided" the major questions doctrine at all; the agency has been thwarted. There is no clear line between A and Z at which frustration turns into partial avoidance. In this respect, major questions avoidance is as fuzzy as the majorness element of the major questions doctrine itself.

Even though slicing—at least when it results in partial avoidance—may be difficult to distinguish from frustration, slicing still can be a useful concept. For our purposes, "slicing" occurs when an agency issues a series of narrower rules pursuant to the same statutory authority. As we shall see, this feature—multiple rules pursuant to the same authority—serves to distinguish slicing from its closest cousin: "lumping." The import of the distinction between slicing and lumping—though it may seem pedantic at this juncture—will become clearer when we consider potential judicial countertactics in Part IV.

53. *See* Jean Chemnick, *Biden's EPA Postponing Major Piece of Power Plant Climate Rule*, POLITICO (Feb. 29, 2024, 6:56 PM), https://www.politico.com/news/2024/02/29/epa-weakens-gas-power-plant-climate-rule-00144309 [https://perma.cc/JT6E-D8SD]. The carveout applied only to existing natural gas plants—new gas plants are subject to the limits. See *id.*; New Source Performance Standards for Greenhouse Gas Emissions from New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units, 89 Fed. Reg. 39798, 39798 (May 9, 2024).

2. "Lumping"

"Lumping" refers to a type of major questions avoidance in which an agency promulgates multiple rules pursuant to different statutory authorities to reproduce the effect of a single rule that, if it had been issued on its own, would or could have implicated the major questions doctrine. In other words, the agency "lumps" together several different regulations under different statutory delegations to achieve a common policy goal that—if pursued in a single rule under a single statutory authority—would have risen to the level of majorness. Lumping, as we will see, is a strategy that agencies undoubtedly pursued to circumvent the major questions doctrine under the Biden administration. Whether it will continue under the second Trump administration is—as of this writing in early 2025—not yet clear, as all except the most obvious cases of lumping will be very difficult to detect.

The clearest example of lumping from the Biden years is the Department of Education's response to the Supreme Court decision to block the cancellation of $430 billion in student loan debt.[54] In its first stab at large-scale debt cancellation—the effort thwarted by the Court's 2023 decision—the department relied on language in the Higher Education Relief Opportunities for Students Act of 2003 ("HEROES Act") authorizing the Secretary of Education to "waive or modify" the provisions of several federal student loan programs in order to protect recipients from the financial consequences of a "national emergency."[55] The Department of Education argued that the COVID-19 pandemic—undoubtedly a national emergency—justified the invocation of its HEROES Act authority. Invoking the major questions doctrine, the Court held that "[h]owever broad the meaning of 'waive or modify,' that language cannot authorize the kind of exhaustive rewriting of the statute that has taken place here."[56]

Thwarted in its effort to use the Department of Education's "waive or modify" authority under the HEROES Act, the Biden administration vowed to find other statutory means of relieving student debt.[57] Just eleven months after the Supreme Court's ruling, the administration announced that without relying on the HEROES Act, it had successfully canceled $167 billion in student debt for 4.75 million borrowers through a series of smaller rules

54. *See* Biden v. Nebraska, 143 S. Ct. 2355, 2358–59 (2023).

55. Higher Education Relief Opportunities for Students Act of 2003, Pub. L. No. 108–76, § 2(a), 117 Stat. 904, 904–05 (2003).

56. Biden v. Nebraska, 143 S. Ct. at 2370–71.

57. Press Release, President Joe Biden, Statement from President Joe Biden on Supreme Court Decision on Student Loan Debt Relief (June 30, 2023), https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2023/06/30/statement-from-president-joe-biden-on-supreme-court-decision-on-student-loan-debt-relief [https://perma.cc/4YX3-3PR5].

under different statutory authorities.[58] Furthermore, the administration averred, there were still additional loan forgiveness measures to come. "President Biden will not stop fighting to cancel more student debt for as many Americans as possible," the White House declared.[59] (Some of those measures were subsequently blocked by the Eighth Circuit.)[60]

The Biden administration's response to the Court's Clean Power Plan decision offers a somewhat less overt example of major questions avoidance. Promulgated under President Obama and then rescinded during President Trump's first term, the Clean Power Plan leveraged the EPA's authority under section 111 of the Clean Air Act to set emissions standards at the level achievable through the "best system of emission reduction" that has been satisfactorily demonstrated.[61] The EPA interpreted that language to authorize it to prescribe "generation shifting": the nation's electricity grids would be required to replace high-emitting coal plants with increased electricity generation from natural gas plants and renewable sources such as wind and solar.[62] The "best system," in other words, involved taking coal plants out of commission and substituting cleaner energy. The Court in *West Virginia v. EPA* rejected that reading of the statute: "As a matter of 'definitional possibilities,' generation shifting can be described as a 'system,' " Chief Justice Roberts wrote for the Court, but "a vague statutory grant is not close to the sort of clear authorization required by our precedents" for a rule as "major" as the EPA's.[63]

In the wake of the *West Virginia* decision, the Biden administration—which had never actually tried to reinstate the Obama administration's Clean Power Plan—pursued a series of coal-related rulemakings that did not rely on its predecessor's contentious reading of section 111 as allowing "generation shifting." These efforts culminated in April 2024 when the EPA Administrator announced a "suite of final rules" to reduce coal power plant

58. *See* Press Release, Biden-Harris Administration Announces Additional $7.7 Billion in Approved Student Debt Relief for 160,000 Borrowers (May 22, 2024), https://www.ed.gov/news/press-releases/biden-harris-administration-announces-additional-77-billion-approved-student-debt-relief-160000-borrowers [https://web.archive.org/web/20250116075000/https://www.ed.gov/about/news/press-release/biden-harris-administration-announces-additional-77-billion-approved].

59. Press Release, The White House, President Joe Biden Outlines New Plans to Deliver Student Debt Relief to Over 30 Million Americans Under the Biden-Harris Administration (Apr. 8, 2024), https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2024/04/08/president-joe-biden-outlines-new-plans-to-deliver-student-debt-relief-to-over-30-million-americans-under-the-biden-harris-administration [https://perma.cc/W8RJ-6GR2].

60. *See* Missouri v. Biden, 738 F. Supp. 3d 1113, 1124 (E.D. Mo. 2024).

61. Standards of Performance for New Stationary Sources, 42 U.S.C. § 7411(a)(1).

62. West Virgina v. EPA, 142 S. Ct. 2587, 2593 (2022) (citation omitted).

63. *Id.* at 2614.

emissions.[64] One of these rules, mentioned above in the context of slicing,[65] requires existing coal power plants to install carbon capture and storage systems—a more traditional interpretation of the "best system" language in section 111 than the Clean Power Plan.[66] A second rule, promulgated under section 112 of the Clean Air Act rather than section 111, sets new limits on emissions of mercury and other air toxics from coal facilities.[67] A third rule relies on the EPA's authority under an entirely different statute—the Clean Water Act—to impose more stringent restrictions on water discharges from coal plants.[68] "Taken together," observed a *New York Times* news analysis, "the regulations could deliver a death blow in the United States to coal."[69] Put another way, the suite of regulations seeks to accomplish the same ultimate goal that the Clean Power Plan pursued: to force a shift away from coal and toward cleaner energy sources across the U.S. electric grid.[70]

One factor that distinguishes the coal case from the student loan case is that in the student loan case, we *know* that the Department of Education adopted its lumping strategy in response to the major questions doctrine. We know that because the Department of Education tried to implement its student debt cancellation plan pursuant to the HEROES Act and then shifted to other statutory authorities only after the Supreme Court blocked the HEROES Act effort on major questions grounds. In the coal case, by contrast, we do not know whether, in the absence of the *West Virginia* decision, the Biden administration EPA would have updated its

64. Press Release, EPA, Biden-Harris Administration Finalizes Suite of Standards to Reduce Pollution from Fossil Fuel–Fired Power Plants (Apr. 25, 2024), https://www.epa.gov/newsreleases/biden-harris-administration-finalizes-suite-standards-reduce-pollution-fossil-fuel [https://perma.cc/KT5V-VRX9].

65. *See supra* note 53 and accompanying text.

66. New Source Performance Standards for Greenhouse Gas Emissions from New, Modified, and Reconstructed Fossil Fuel–Fired Electric Generating Units, 89 Fed. Reg. 39798, 39799 (May 9, 2024).

67. National Emission Standards for Hazardous Air Pollutants, 89 Fed. Reg. 38508, 38508 (May 7, 2024).

68. Supplemental Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 89 Fed. Reg. 40198, 40199 (May 9, 2024).

69. Lisa Friedman & Coral Davenport, *E.P.A. Severely Limits Pollution from Coal-Burning Power Plants*, N.Y. TIMES (Apr. 25, 2024), https://www.nytimes.com/2024/04/25/climate/biden-power-plants-pollution.html [https://perma.cc/482W-YQJ2].

70. Whether these new rules will survive judicial review remains an open question. *See* Niina H. Farah & Lesley Clark, *Lawsuits Mount Against Biden Power Plant Rule*, E&E NEWS BY POLITICO (May 13, 2024, 1:38 PM), https://www.eenews.net/articles/lawsuits-mount-against-biden-power-plant-rule [https://perma.cc/Y7HC-LVTE]; Niina H. Farah & Lesley Clark, *5 Takeaways from the Biden Carbon Rule's Big Day at the DC Circuit*, E&E NEWS BY POLITICO (Dec. 9, 2024, 6:15 AM), https://www.eenews.net/articles/5-takeaways-from-the-biden-carbon-rules-big-day-at-the-dc-circuit [https://perma.cc/9WTV-EMLN]. As of this writing, it was not yet clear whether a second Trump administration would seek to rescind the rules. *See* Jean Chemnick, *New Option for Trump: Repeal, but Not Replace, Climate Rules*, E&E NEWS BY POLITICO (Feb. 5, 2025, 6:09 AM), https://www.eenews.net/articles/new-option-for-trump-repeal-but-not-replace-climate-rules [https://perma.cc/2KHZ-YTCN].

predecessor's Clean Power Plan—adopting the same reading of section 111 as authorizing generation shifting—or whether in the first instance the Biden EPA would have promulgated a potpourri of rules under both the Clean Air Act and the Clean Water Act. What we can say is that when the major questions doctrine foreclosed one possible regulatory approach to coal, the Biden administration chose another.

As examples of lumping, the series of student debt cancellations and coal-focused EPA rules are arguably more alike than different. What makes them alike—and different from many other potential cases of lumping—is that they came after, not in anticipation of, a court ruling that blocked an alternate regulatory route on major questions grounds. In other cases, major questions avoidance via lumping may occur more subtly. One or more agencies may issue a series of rules in service of a common goal without first trying and failing to achieve the same objective through a larger rule pursuant to a single statutory authority. We might never know whether this series of rules reflects major questions avoidance because we cannot observe the counterfactual world without the major questions doctrine hanging overhead. Even the administration officials involved in the decision to pursue the series of rules might not be able to say definitively that the strategy reflects major questions avoidance: fear of the major questions doctrine may have been one among several factors favoring the more incremental approach, and no single policymaker may know for sure whether the major questions doctrine was outcome-determinative.

This last point regarding the difficulty of detecting lumping will become particularly significant to the analysis in Part IV, when we consider whether the courts can combat avoidance through a doctrine of major questions anti-avoidance. If major questions avoidance is difficult to detect, it also may be difficult to deter. Thus, while lumping may be a less obvious example of avoidance than slicing, the non-obviousness of lumping may turn out to be exactly what makes it such an effective avoidance strategy.

3. "Glossing"

Whereas slicing and lumping entail changes to the scope and substance of agency regulations, "glossing" affects rules only on the surface. Glossing occurs when agency officials or others within the administration describe a rule in terms tailored to downplay its majorness. Even before the Court's quartet of major questions decisions starting in 2021, Blake Emerson observed that the major questions doctrine alters agencies' rhetorical incentives. "Because the doctrine generally forbids agencies from making decisions of great economic and political significance," Emerson wrote, "it encourages agencies to explain themselves in technocratic terms, even if

significant questions of value are at issue." Emerson added: "If agencies know that courts will decline to defer to them if they detect agency consideration of important questions of political value, they will invariably explain their interpretations of statutory ambiguities in a way that makes them appear purely technical."[71] They will, to use this Article's terminology, "gloss."

Although glossing is a potential response to the major questions doctrine, it may not be—as Emerson suggests—an "invariabl[e]" response. Jody Freeman and Matthew Stephenson agree with Emerson that "executive branch lawyers might well start advising agencies to make their rules seem smaller in scope, more incremental, and more technocratic, and suggesting that the President, agency officials, and other supporters avoid talking about how these rules contribute to some larger policy agenda or help address some big national problem."[72] But Freeman and Stephenson add that "this advice goes against the grain, since most political appointees are eager to tout their regulatory accomplishments, and presidents want to demonstrate strong leadership by publicizing and claiming credit for what their agencies are doing."[73] Whether the litigation-driven incentive to gloss will outweigh the political incentive to trumpet the majorness of a regulatory initiative may depend on—among other factors—the distance to the next election, the relative influence of an agency's general counsel vis-à-vis other officials, and the career ambitions of the agency head who promulgates the relevant rule.

So far, we have seen some examples of glossing and some examples of administration officials issuing statements that defy the rhetorical incentives generated by the major questions doctrine. As a possible example of glossing, then-CDC Director Rochelle Walensky said on National Public Radio in August 2021—when announcing an additional two-month extension of the agency's eviction moratorium—that the "new, tailored order" was focused specifically on "areas of highest transmission" that faced the "most public health challenges."[74] In fact, the August 2021 moratorium—though slightly narrower in geographic scope than the

71. Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2085 (2018); *see also* BLAKE EMERSON, THE PUBLIC'S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE DEMOCRACY 180 (2019) ("If courts may deprive agencies of their deliberative discretion whenever they think the issue is a significant one, agencies will have strong incentives to treat every regulatory matter as clerical and noncontroversial.").

72. Freeman & Stephenson, *supra* note 27, at 32.

73. *Id.* at 32–33.

74. Mary Louise Kelly, Courtney Dorning & Lauren Hodges, *CDC Director On Global Vaccine Deliveries, Variants, Masks and Mass Eviction Threats*, NPR (Aug. 3, 2021, 4:26 PM), https://www.npr.org/2021/08/03/1024338498/cdc-director-on-global-vaccine-deliveries-variants-masks-and-mass-eviction-threa [https://perma.cc/Q555-FR79].

previous nationwide eviction prohibition—still covered ninety percent of the U.S. population.[75] President Biden's unbridled celebration of his administration's student debt forgiveness efforts offers a contrary example of "anti-glossing": an administration official—here, the highest-ranking administration official—explicitly emphasizing that an agency initiative represents an end–run around the major questions doctrine. "[T]he Supreme Court blocked us," President Biden told an audience at a college in Wisconsin in May 2024, but "that didn't stop us. . . . We continue to find alternative paths to reduce student debt payments . . . that are not challengeable."[76] Republican Attorneys General from seven states did, indeed, seek to block those "alternative paths," alleging that the Biden administration's approach still violated the major questions doctrine.[77] And as noted, that challenge succeeded in delaying some—though not all—of the Biden administration's student debt relief measures.[78]

4. "Bypassing"

A fourth form of major questions anti-avoidance is "bypassing," whereby an agency sidesteps the rulemaking process altogether by pursuing its objectives through guidance documents, administrative adjudications, or enforcement actions. I borrow the "bypass" label from Jennifer Nou, who applies it in a different context to refer to similar tactics—including guidance, adjudication, and enforcement—that agencies use to insulate themselves from review by the Office of Information and Regulatory Affairs within the White House Office of Management and Budget.[79] Here, the impetus to use guidance documents, adjudications, and enforcement actions is not to escape White House review but to reduce the probability that judicial review will result in invalidation under the major questions doctrine.

A possible example of bypassing is the Department of Health and Human Services' response to the Supreme Court's 2022 ruling in *Dobbs v. Jackson Women's Health Organization*, which overturned fifty years of precedent and withdrew constitutional protections for induced abortion.[80] Following that ruling, the Department of Health and Human Services issued

75. *See id.*; *see supra* note 51.

76. President Joe Biden, Remarks by President Biden on His Student Loan Debt Relief Plan for Tens of Millions of Americans | Madison, Wisconsin (Apr. 8, 2024, 1:26 PM), https://bidenwhitehouse.archives.gov/briefing-room/speeches-remarks/2024/04/08/remarks-by-president-biden-on-his-student-loan-debt-relief-plan-for-tens-of-millions-of-americans-madison-wisconsin [https://perma.cc/E6QS-4N4A].

77. Missouri v. Biden, 738 F. Supp. 3d 1113, 1123, 1134 (E.D. Mo. 2024).

78. *See supra* note 60 and accompanying text.

79. Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755, 1782–90 (2013).

80. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

a guidance document stating that the federal Emergency Medical Treatment and Labor Act ("EMTALA"), which applies to virtually all hospitals in the United States, requires physicians at covered hospitals to perform abortions in cases where abortion is necessary to resolve an emergency medical condition.[81] The guidance added that "[w]hen a state law prohibits abortion and does not include an exception for the life of the pregnant person—or draws the exception more narrowly than EMTALA's emergency medical condition definition—that state law is preempted."[82] Unlike other interpretations of EMTALA that have taken the form of regulations,[83] the Department declined to initiate a rulemaking process with respect to its abortion interpretation.

Undeterred by the fact that the Department's interpretation came in the form of a guidance document rather than a rule, the Texas Attorney General—along with two groups of pro-life physicians—challenged the interpretation in federal district court, arguing among other points that the Department's guidance ran headlong into the major questions doctrine because it resolved an "issue of vast policy and political significance" without clear authorization from Congress.[84] The Department responded that unlike the rules struck down by courts in earlier major questions cases, the EMTALA guidance was "not final agency action subject to judicial review" because it merely interpreted the statute and did not determine the rights or obligations of any party.[85] Both the federal district court and the Fifth Circuit rejected the Department's finality argument, concluding that the guidance document reflected a new policy with concrete legal consequences that had all the indicia of final agency action.[86] In compliance with the district court injunction, the Department is not enforcing its EMTALA guidance in the state of Texas or against members of the two pro-life physicians' groups while it seeks Supreme Court review, though it is continuing to enforce the guidance throughout the rest of the country.[87]

81. Memorandum from the Dirs., Quality, Safety & Oversight Grp. & Surv. et al., to the State Surv. Agency Dirs., Reinforcement of EMTALA Obligations Specific to Patients Who Are Pregnant or Are Experiencing Pregnancy Loss (QSO-21-22-Hospitals—Updated July 2022), at 1 (July 11, 2022), https://www.cms.gov/files/document/qso-22-22-hospitals.pdf [https://perma.cc/DBA3-LCH5].

82. *Id.*

83. *See, e.g.*, Medicare Program; Hospital Responsibility for Emergency Care, 59 Fed. Reg. 32086, 32120 (June 22, 1994); Medicare Program; Rural Emergency Hospitals, 87 Fed. Reg. 71748, 72309 (Nov. 23, 2022). The full compilation of EMTALA rules is at 42 C.F.R. 489.24 (2025).

84. Plaintiffs' Brief in Support of Motion for Temporary Restraining Order & Preliminary Injunction at 19, Texas v. Becerra, 623 F. Supp. 3d 696 (N.D. Tex. 2022) (No. 5:22-CV-00185-H).

85. Defendants' Brief in Support of Their Motion to Dismiss at 23, Texas v. Becerra, 623 F. Supp. 3d 696 (No. 22-00185-H).

86. *See* Texas v. Becerra, 89 F.4th 529, 538–41 (5th Cir. 2024); Texas v. Becerra, 623 F. Supp. 3d at 720–24.

87. Press Release, U.S. Dep't of Health & Hum. Servs., Biden-Harris Administration Reaffirms

Time will tell whether bypass via guidance document can succeed in other circumstances. As Ronald Levin observes, case law regarding the rule/guidance distinction is in a state of "general disarray."[88] We will return in Section II.C to the questions of when and whether bypass via guidance may be a viable legal strategy. Importantly, though, guidance is not the only means of effectuating bypass: agencies also can seek to skirt the major questions doctrine by pursuing their policy goals through enforcement actions.[89]

One arguable example of bypass via enforcement is the Securities and Exchange Commission's ongoing effort to police the cryptocurrency industry. The Commission has argued in a series of enforcement actions that certain cryptocurrency offerings are "securities" subject to the registration requirements of the Securities Act of 1933. Some commentators have argued that the Commission's assertion of jurisdiction over the cryptocurrency industry violates the major questions doctrine because "the cryptocurrency market has vast economic and political significance" and the Commission "has not clearly been empowered by Congress to regulate that market."[90] The cryptocurrency exchange Coinbase road-tested this argument in federal district court in the Southern District of New York, where Judge Katherine Polk Failla swatted it away. "Simply put, the cryptocurrency industry cannot compare with those other industries the Supreme Court has found to trigger the major questions doctrine," Judge Failla wrote.[91] Stymied in the Southern District of New York, cryptocurrency firms have recently filed suits in the Northern and Western Districts of Texas to challenge the Commission's interpretation of the term "security."[92]

Whereas Judge Failla rejected Coinbase's major questions argument on grounds specific to cryptocurrency and the structure of the securities laws,

Commitment to EMTALA Enforcement, at n.3 (July 2, 2024), https://www.hhs.gov/about/news/2024/07/02/biden-harris-administration-reaffirms-commitment-emtala-enforcement.html [https://perma.cc/5KER-PJYZ]. The Supreme Court dismissed a separate challenge to the EMTALA guidance arising out of Idaho in *Moyle v. United States*, 144 S. Ct. 2015, 2016 (2024).

88. Ronald M. Levin, *Rulemaking and the Guidance Exemption*, 70 ADMIN. L. REV. 263, 286 (2018).

89. On the motivations for, costs, and benefits of policymaking via enforcement, see generally Chris Brummer, Yesha Yadav & David Zaring, *Regulation by Enforcement*, 96 S. CAL. L. REV. 1297 (2024).

90. Jerry W. Markham, *Securities and Exchange Commission vs. Kim Kardashian, Cryptocurrencies and the "Major Questions Doctrine,"* 14 WM. & MARY BUS. L. REV. 515, 522 (2023); *accord* Megan Daye & J.W. Verret, *A Mosaic Approach for Challenging SEC Crypto Regulation: The Major Questions Doctrine and Staff Accounting Bulletin 121*, 15 WM. & MARY BUS. L. REV. 553 (2024).

91. SEC v. Coinbase, Inc., 726 F. Supp. 3d 260, 283 (S.D.N.Y. 2024).

92. *See* Matthew Bultman, *Crypto Firms Take SEC Fight to Texas, With Eye on Supreme Court*, BLOOMBERG LAW (Apr. 5, 2024, 2:00 AM), https://www.bloomberglaw.com/bloomberglawnews/securities-law/X5C93SVC000000 [https://perma.cc/237Y-K3JN].

Todd Phillips and Beau Baumann have argued that the major questions doctrine should *never* apply to enforcement actions "when courts, not agencies, interpret statutes in the first instance."[93] Phillips and Baumann acknowledge that a categorical exception from the major questions doctrine for agency enforcement actions in federal court would incentivize agencies to bypass the rulemaking process altogether—another instance of scholarship anticipating major questions avoidance, though the authors do not use that term.[94] Nonetheless, they argue, an enforcement action is "less major" than a legislative rule "because it does not sweep in an entire industry,"[95] and enforcement actions brought in federal court should lie outside the major questions doctrine's "domain."[96]

If courts take up Phillips and Baumann's suggestion, then bypass via enforcement is likely to become a frequent means of major questions avoidance, at least for agencies such as the Securities and Exchange Commission with authority to bring judicial enforcement actions on their own.[97] Even if courts do not carve out a categorical exception for enforcement actions, bypass via enforcement may become attractive to agencies seeking to reduce—though not eliminate—the risk of a major questions setback. But as we will see in the next part, the incentives for major questions avoidance—via bypass or via slicing, lumping, or glossing—sometimes can come into conflict with considerations of administrative efficiency, litigation strategy, and political advantage. Major questions avoidance will be an enticing option for agencies in some circumstances, but not in all.

II. THE BENEFITS AND COSTS OF MAJOR QUESTIONS AVOIDANCE

A. BENEFITS

On first glance, major questions avoidance may seem like it brings obvious benefits to an administration or agency seeking to advance a regulatory agenda, at least when a rule might otherwise run aground on the major question doctrine's shoals. As a general matter, the stricter standard of

93. Todd Phillips & Beau J. Baumann, *The Major Questions Doctrine's Domain*, 89 BROOK. L. REV. 747, 758 (2024).

94. *Id.* at 800.

95. *Id.*

96. See *id*. at 758–59.

97. Phillips and Baumann focus on enforcement actions in court, rather than enforcement actions brought before administrative law judges in agency proceedings. The Supreme Court's recent ruling in *SEC v. Jarkesy*, 144 S. Ct. 2117 (2024)—which held that the SEC's claims for monetary relief in an agency adjudication implicated an investment adviser's Seventh Amendment right to a jury trial—raises doubts about the viability of out-of-court enforcement as a bypass route. *Id.* at 2126–27.

scrutiny associated with the major questions doctrine—whether in the form of the elephants-in-the-mouseholes canon or the denial of *Chevron* deference or *West Virginia v. EPA*'s clear statement requirement—reduces a rule's survival probability. As a result, major questions avoidance will typically bring a benefit—a lower chance of judicial reversal—that agency and administration officials must weigh against the costs of avoidance.

But before leaving the benefits side of the ledger, it is important to acknowledge that agency and administration officials may not always see major questions avoidance as a benefit. First, sometimes an agency may promulgate a rule not because officials at the agency or the White House think the rule is a good idea but because they are responding to political pressure from outside groups. For example, when the CDC announced a two-month extension to its eviction moratorium in August 2021, the *Washington Post* described the action as "a move that bent to intense pressure from liberal House Democrats."[98] According to the *Post*, President Biden did not want to extend the moratorium—evidently because he believed that it overstepped the constitutional bounds on executive power—but "House Democrats responded angrily" to the administration's position.[99] One progressive Democrat, Representative Cori Bush of Missouri, staged what the *New York Times* described as "a round-the-clock sit-in on the steps of the United States Capitol that galvanized a full-on progressive revolt," camping there for four days and nights "in rain, cold and brutal summer heat."[100] From the perspective of Biden administration officials, issuing the moratorium and then having it be struck down by the Supreme Court may have been exactly the outcome that they needed to get progressives off their backs.

Second, even when administration and agency officials support the policy behind a rule, they still may see a political benefit in having the rule be struck down by the courts—and especially by the Supreme Court. For example, in the case of student debt forgiveness, President Biden arguably stood to gain electorally from his clash with the Court's conservatives. In a March 2024 poll, seventy percent of young voters, seventy-two percent of Black voters, and sixty-eight percent of Hispanic voters said that student debt

98. *See* Jeff Stein, Tyler Pager, Seung Min Kim & Tony Romm, *Biden Administration Moves To Block Evictions in Most of U.S. Following Liberal Backlash*, WASH. POST (Aug. 3, 2021, 8:25 PM), https://www.washingtonpost.com/us-policy/2021/08/03/white-house-evictions-democrats [https://web.archive.org/web/20210804050243/https://www.washingtonpost.com/us-policy/2021/08/03/white-house-evictions-democrats].

99. *Id.*

100. *See* Nicholas Fandos, *With Capitol Sit-In, Cori Bush Galvanized a Progressive Revolt Over Evictions*, N.Y. TIMES (Aug. 4, 2021), https://www.nytimes.com/2021/08/04/us/politics/cori-bush-eviction-moratorium.html [https://perma.cc/9NFX-YSCB].

cancellation was an "important" issue to them in the upcoming election.[101] White House officials might have anticipated that the student debt issue would give a boost to President Biden in his then-anticipated rematch with Donald Trump, whose three appointees to the Supreme Court supplied critical votes against the debt relief rule. (That electoral rematch—of course—never ultimately happened.)

Third and finally, a court decision invoking the major questions doctrine may be useful to an administration that seeks to entrench its policy position. For example, the Supreme Court's major questions holding in *King v. Burwell*—in which the Court ruled that the availability of premium tax credits on federally established health insurance exchanges was a "question of deep 'economic and political significance' " beyond the discretion of the Internal Revenue Service[102]—prevented the Trump administration from denying credits to exchange participants after the end of the Obama presidency. Notably, the version of the major questions doctrine that was applied in *King v. Burwell* simply denied *Chevron* deference to the Internal Revenue Service's interpretation of the Affordable Care Act; the agency still could—and indeed did—persuade the Court that its interpretation of the statute was correct as a matter of first principles.[103] Still, the *King v. Burwell* episode illustrates the more general point that when agencies are thinking about threats to their regulatory policies, they are thinking about threats not only from the judiciary but also from the next administration.[104] For policy entrenchment reasons—as well as for the above-mentioned reasons related to interest group pressure and electoral opportunity—a judicial determination of majorness may not always be a net-negative for the current occupants of the executive branch.

B. COSTS

Notwithstanding the caveats in the previous Section, high-ranking officials at agencies and across the administration generally will not want the courts to classify their regulatory initiatives as implicating the major questions doctrine. Still, they must weigh the benefits of major questions avoidance against the considerable costs. This Section focuses on three

101. *See* Annie Nova, *Almost Half of Voters Say Student Loan Forgiveness Is a Key Issue in 2024 Election, Survey Finds*, CNBC (Mar. 26, 2024, 9:30 AM), https://www.cnbc.com/2024/03/26/canceling-student-loan-debt-a-key-issue-ahead-of-election-survey.html [https://perma.cc/65BR-39NV].

102. King v. Burwell, 576 U.S. 473, 485–86 (2015) (citation omitted).

103. *See id.* at 485, 498.

104. On the benefits of judicial entrenchment as a guard against reversal by subsequent administrations, see Jonathan Masur, *Judicial Deference and the Credibility of Agency Commitments*, 60 VAND. L. REV. 1021, 1037–60 (2007).

especially significant costs of major questions avoidance: administrative burdens, litigation risks, and political costs.

1. Administrative Burdens

Major questions avoidance—especially when it takes the form of slicing or lumping—is likely to increase the total burden on agency officials responsible for drafting and promulgating rules. As Jennifer Nou and Jed Stiglitz observe, agencies incur certain "fixed production costs" whenever they issue a new rule: they must establish a docket, write language that goes into every rule, complete internal paperwork, and—for non-independent agencies—secure sign-off from the Office of Information and Regulatory Affairs within the White House.[105] Nou and Stiglitz note that "[t]he presence of fixed production costs generally encourages regulatory bundling"—in other words, encourages agencies to cover more ground in a single rule rather than splitting one rule into several.[106] Slicing—along with the related phenomenon of lumping (in which agencies issue a series of rules under different statutory authorities)—both cut against the incentive to minimize regulatory production costs.

The extent to which regulatory production costs deter avoidance will vary across agencies and across time. First, some agencies are much more adept at issuing rules than others. For example, according to data from Regulations.gov, the EPA issued 384 rules in 2023, while the Equal Employment Opportunity Commission ("EEOC") issued only three (one of which was a technical amendment to correct a typographical error in an earlier rule and one of which adjusted certain figures for inflation).[107] For an agency that churns out rules like they are cars coming off an assembly line, the costs of a few additional rulemakings may be manageable. For an agency like the EEOC that exercises its rulemaking muscles on rare occasions, the prospect of issuing several rules rather than a single rule may be more daunting.

Second, administrative burden of bypass via enforcement is likely to depend on whether an agency has independent litigation authority. Some agencies—such as the Securities and Exchange Commission and the Consumer Financial Protection Bureau—have authority to initiate litigation

105. *See* Jennifer Nou & Edward H. Stiglitz, *Regulatory Bundling*, 128 YALE L.J. 1174, 1202–03, 1206–08, 1206 n.138 (2019).

106. *See id.* at 1202.

107. For data based on searches of Regulations.gov for rules posted from January 1, 2023, through December 31, 2023, see *Documents*, REGULATIONS.GOV, https://www.regulations.gov/search [https://perma.cc/S8W4-LWV5].

in federal court on their own.[108] Others—such as the Department of Health and Human Services—must rely on the Justice Department to bring enforcement actions in federal court.[109] As Kirti Datla and Ricky Revesz note, "the Environmental Protection Agency has independent litigation authority over only a few discrete violations of the Toxic Substances Control Act."[110] Otherwise, the EPA's ability to enforce the environmental laws in federal court depends on the cooperation of Justice Department attorneys.

Even when Justice Department attorneys are ideologically aligned with an agency's policy agenda, bypass via enforcement is likely to be more burdensome for agencies without independent litigation authority. Every substantive filing in a case will require coordination—and potentially negotiation—between agency officials and Justice Department counterparts. As a result, we might hypothesize that agencies with independent litigation authority will be more likely to pursue bypass via enforcement than agencies without. Returning to the EPA/EEOC comparison, the EPA may be more likely to pursue slicing or lumping as an avoidance tactic because it is quite adept at issuing rules but lacks independent litigation authority; the EEOC may be more likely to pursue bypass via enforcement because it lacks the EPA's well-practiced rulemaking infrastructure, but possesses independent litigation authority at the district court and circuit court level.[111]

Finally, the administrative burden of avoidance is likely to be more salient near the end of a presidential term. This is because administrative burden results not only in a costlier regulatory process but also a slower process. The need for speed is greatest in an administration's final days: executive branch turnover on January 20 of every fourth or eighth year means that regulatory projects not completed before that date are likely to die if the next administration does not support the effort, leading to the familiar phenomenon of "midnight rulemaking."[112] Even when the President hands the baton to a successor of the same party—something that has happened outside the context of resignation or death only once since World War II—rulemaking activity may accelerate at an administration's end. According to one account, the Reagan administration rushed in its waning

108. *See* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 800 tbl.5 (2013); *see also* 12 U.S.C. § 5564; 15 U.S.C. §§ 78aa, 78u, 78u-1, 78u-3, 78y.

109. *See* Datla & Revesz, *supra* note 108, at 800 tbl.5.

110. *Id.* at 799.

111. The EEOC lacks independent litigation authority before the Supreme Court. *See* 42 U.S.C. § 2000e-4(b). There, the Commission is represented by the Solicitor General. *Id.*

112. *See* Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 892 (2008); *see also id.* at 957 (finding that "agencies complete more rulemaking actions in the final three months of a President's administration than in any other year's final quarter").

days to finalize regulations that were deemed "too hot to handle" during the 1988 presidential campaign, "hoping to minimize the divisive controversy George Bush might otherwise face" if those issues were resolved before the general election or after Bush's inauguration.[113] If time is of the essence—either because the next administration has different policy priorities or because the current administration wants to shield a politically aligned successor from blowback—then major questions avoidance via slicing, lumping, or bypassing will be less viable strategies.

Speed also matters at an earlier juncture in an administration's final year because of the Congressional Review Act, which allows Congress to block a regulation from taking effect by enacting a joint resolution.[114] If a rule is finalized within the last sixty Senate "session" days or sixty House "legislative" days before Congress adjourns, the next Congress will have an opportunity to block the rule—and, importantly, the joint resolution will be immune from a Senate filibuster.[115] Because a House "legislative day" can span multiple calendar days—and because both the House and Senate may adjourn earlier or later than expected—the deadline for finalizing a rule in order to avoid fast-track review by the next Congress is variable. In an election year, it may fall anywhere from the spring to the late summer.[116]

Joint resolutions of disapproval under the Congressional Review Act are still subject to presidential veto, so absent a change in administration or an extremely unpopular rule that is opposed by a veto-proof supermajority of Congress, the Congressional Review Act does not pose a significant threat to agency action in most years. But in the last year of a presidential administration, agencies have strong incentives to finalize controversial rules early enough that the next Congress and the next President cannot use the Congressional Review Act to undo the agencies' handiwork. Almost certainly for that reason, April 2024—which was thought to be the last month before Biden administration rules became subject to the fast-track disapproval procedure in the next Congress—was "the busiest month on record" for major regulations, with the Office of Information and Regulatory Affairs reviewing more than eight times as many economically significant

113. Ronald A. Taylor, Ted Gest, Joseph P. Shapiro, Joanne Silberner, William J. Cook, William F. Allman & Joseph L. Galloway, *Here Come Ronald Reagan's 'Midnight' Regs*, U.S. NEWS & WORLD REP., Nov. 28, 1988, at 11.

114. 5 U.S.C. § 801.

115. *See* MAEVE P. CAREY & CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., IF10023, THE CONGRESSIONAL REVIEW ACT (CRA): A BRIEF OVERVIEW (2024), https://crsreports.congress.gov/product/pdf/IF/IF10023 [https://perma.cc/FB6C-YN8T].

116. *See* Kevin Bogardus, *Murky Deadline Looms for Biden's Regs*, E&E NEWS BY POLITICO (Mar. 21, 2024, 1:21 PM), https://www.eenews.net/articles/murky-deadline-looms-for-bidens-regs [https://perma.cc/E8Z2-EU4Q].

final rules as in the typical month.[117] One might describe this phenomenon as "8 p.m. rulemaking"—rather than "midnight rulemaking"—because it occurs roughly five-sixths of the way through a President's term (just as 8 p.m. strikes five-sixths of the way through the day). As the 8 o'clock hour approaches, the efficiency drawbacks of slicing and lumping increase because delay raises the risk of reversal under the Congressional Review Act. In that timeframe, agencies must weigh the benefits of major questions avoidance against the benefits of Congressional Review Act avoidance.

2. Litigation Risks

So far, the analysis in this Part has proceeded under the guiding assumption that major questions avoidance raises the probability that a regulation will survive judicial review. That assumption is probably accurate most of the time—but not all of the time. In at least three scenarios, certain forms of major questions avoidance may increase an agency's litigation risk.

First, when an agency slices a single rule into several smaller rules issued sequentially, it may expose itself to challenges asserting that the distinctions it has drawn (for example, among industries or among regions) are arbitrary and capricious. As the D.C. Circuit put it, "[t]he great principle that like cases must receive like treatment" is "black letter administrative law."[118] A regulatory scheme may fail in court both because it is "overinclusive" and "underinclusive."[119] The merits of any underinclusivity challenge to a sliced rule will depend on the details, but it would be an overgeneralization to say that smaller rules always fare better in court than larger ones.

Second, to the extent that an agency engages in avoidance via glossing, it may open itself to attack under the *State Farm* doctrine, according to which a rule may be set aside as arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem."[120] As the D.C. Circuit has put it, administrative law's "reasoned decision-making" standard "requir[es] the agency to focus on the values served by its decision."[121]

117. *See* Susan E. Dudley, *A Rush To Regulate*, FORBES (May 7, 2024, 4:41 PM), https://www.forbes.com/sites/susandudley/2024/05/07/a-rush-to-regulate [https://perma.cc/EC33-RBZH]. In fact, the Senate Parliamentarian later determined that the Congressional Review Act cutoff date for Biden administration rules was August 16, 2024. *See* Maggi Lazarus & John "Jack" O'Rourke, *Congressional Review Act: A Legislative Tool to Overturn Late-Term Regulations*, BARNES & THORNBURG LLP (Feb. 7, 2025), https://btlaw.com/en/insights/alerts/2025/congressional-review-act-a-legislative-tool-to-overturn-late-term-regulations [https://perma.cc/T84T-KAV3].

118. Grayscale Invs., LLC v. SEC, 82 F.4th 1239, 1245 (D.C. Cir. 2023) (citation omitted).

119. *See* Carlin Commc'ns, Inc. v. FCC, 749 F.2d 113, 121 (2d Cir. 1984).

120. Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

121. Greater Bos. Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970).

Courts will—on occasion—strike down an agency rule because the agency explained itself in entirely technical or legalistic terms when its decision required a substantive value judgment.[122] To be sure, courts typically grade agency explanations on a generous curve: an agency usually won't have to say all that much to satisfy *State Farm*.[123] But an agency that engages in hyperaggressive glossing—denying or significantly downplaying the economic, political, or ethical stakes of its decision—may leave itself vulnerable on the *State Farm* flank even as it seeks to shield itself from the major questions doctrine.

Finally, when an agency pursues bypass via guidance document, it may reduce the risk that its pronouncement will be deemed a final agency action subject to judicial review but raise the risk that the guidance document will be deemed a "legislative rule" in disguise that ought to have gone through a notice-and-comment process. Many more regulatory initiatives have failed on notice-and-comment grounds than on major questions grounds: as Ronald Levin observes, "the question of whether a supposedly informal pronouncement of an administrative agency is actually a rule that should have been adopted through notice-and-comment procedure may well be the single most frequently litigated and important issue of rulemaking procedure before the federal courts today."[124] Note that the notice-and-comment concern does not apply to avoidance via slicing and lumping provided that the sliced or lumped-together rules each go through notice and comment. But, returning to the regulatory-production-costs point above, the rigamarole of multiple notice-and-comment procedures—necessary to insulate sliced and lumped-together rules against litigation risk—further raises the administrative burden of avoidance.

3. Political Costs

Along with its administrative burdens and litigation risks, major questions avoidance potentially comes with significant political drawbacks. Presidents want credit from voters for their regulatory achievements. Agency heads with ambitions for higher office want the world to notice their accomplishments. These outcomes are more likely when agency actions generate media attention, and the media is much more likely to cover rules that are larger in scope. Thus, even when the major questions doctrine

122. For examples, see Hemel & Nielson, *supra* note 22, at 783–88.

123. *See, e.g.*, Madison Gas & Elec. Co. v EPA, 25 F.3d 526, 529 (7th Cir. 1994) (describing the *State Farm* standard as "undemanding"). For an arguable counterexample, in which a majority of the Supreme Court appeared to demand much more from an agency in the notice-and-comment process, *see* Ohio v. EPA, 144 S. Ct. 2040 (2024). *See also id.* at 2067–68 (Barrett, J., dissenting) (arguing that the majority ventured far beyond the typical scope of *State Farm* review).

124. *See* Levin, *supra* note 88, at 265.

discourages agencies from issuing broad rules, political incentives may push in the opposite direction.

The political costs of major questions avoidance will vary across time, across agency, and across subject matter. Electoral incentives are likely to be most salient in the last year of an administration—roughly around the same time that the costs of regulatory delay reach their peak. Meanwhile, career incentives do not affect all agency heads equally. Although it is often said that "every senator looks in the mirror and sees a future president,"[125] the CDC Director may look in the mirror and see no one other than the CDC Director. For some agency heads without further political ambitions, staying out of the spotlight may be an added benefit of major questions avoidance. Moreover, in some cases, an administration may—for electoral reasons—want to minimize attention to a controversial rule. For example, Biden administration officials may have been happy to regulate coal through a series of smaller rules because coal regulation—though popular among environmentalists—carries electoral risks in the swing state of Pennsylvania, the third largest coal-producing state in the country.[126] In those instances, major questions avoidance and electoral politics may work hand in hand.

Finally, agencies and administration officials may be able to capture both the benefits of major questions avoidance and the political benefits of larger regulatory initiatives by emphasizing the combined effect of several smaller rules. President Biden's "anti-glossing" approach to student debt forgiveness is arguably a case in point: by touting the combined effect of several different student loan relief initiatives, President Biden successfully vaulted his series of smaller debt cancellations onto the front page of the *New York Times* and into the national spotlight.[127] Still, a drawback of major questions avoidance is that even when the combined effects of multiple rules, guidance documents, administrative adjudications, or enforcement actions are far-reaching, the consequences will typically be more difficult to explain to the average voter than a single sweeping rule. Thus, the political cost of major questions avoidance may be not only that avoidance leads to less attention but also that it engenders lower comprehension.

125. THOMAS DASCHLE & CHARLES ROBBINS, THE U.S. SENATE: FUNDAMENTALS OF AMERICAN GOVERNMENT 48 (2013).

126. *Frequently Asked Questions (FAQs): Which States Produce the Most Coal?,* U.S. ENERGY INFO. ADMIN. (Oct. 20, 2023), https://www.eia.gov/tools/faqs/faq.php?id=69 [https://perma.cc/HZT5-WVDQ].

127. *See* Michael D. Shear, *Biden Announces Student Debt Relief for Millions in Swing-State Pitch*, N.Y. TIMES. (Apr. 8, 2024) https://www.nytimes.com/2024/04/08/us/politics/biden-student-loans-debt-relief.html [https://web.archive.org/web/20250601034621/https://www.nytimes.com/2024/04/08/us/politics/biden-student-loans-debt-relief.html].

Ultimately, whether the political costs of major questions avoidance outweigh the benefits depends on a question much larger than the major questions doctrine itself: what motivates regulators? Perhaps counterintuitively, major questions avoidance may be more likely if the "public interest" theory of regulation applies: if regulators are "benevolent . . . , trustworthy, disinterested, and public-spirited experts who produce rules that ensure general economic efficiency and maximum welfare for society."[128] If agency and administration officials respond more strongly to personal or partisan motives, then the political costs of major questions avoidance may outweigh the benefits from those officials' self-interested perspective. To be sure, this conclusion comes with caveats. Regulators motivated by private interests may embrace avoidance if—for example—they are responsive to inducements from sophisticated interest groups that will appreciate the combined effects of several sliced or lumped rules. And public-interested regulators may eschew avoidance if they conclude—perhaps after weighing the considerations laid out in the next part—that major questions avoidance has a corrosive effect on the legitimacy of the administrative state.

III. MAJOR QUESTIONS AVOIDANCE AND THE LEGITIMACY OF THE ADMINISTRATIVE STATE

So far our analysis has been primarily positive and predictive: how—and how often—will agencies modify their regulatory strategies to avoid the major questions doctrine? This Part shifts into a normative gear, asking what the phenomenon of major questions avoidance means for the legitimacy of the modern administrative state. Following Richard Fallon's tripartite classification of legitimacy claims into sociological, legal, and moral categories, I use the term "legitimacy" here in the moral sense: "legitimacy inheres in the moral justification, if any, for claims of authority asserted in the name of the law."[129] As we shall see, different theories of administrative state legitimacy lead to different implications for major questions avoidance. This Part focuses on four prominent theories, which vary based on the source to which they ascribe the administrative state's legitimacy: (1) presidential legitimacy, (2) legislative legitimacy, (3) expert legitimacy, and (4) participatory legitimacy.

128. Walter Mattli & Ngaire Woods, *In Whose Benefit? Explaining Regulatory Change in Global Politics*, *in* THE POLITICS OF GLOBAL REGULATION 1, 9 (Walter Mattli & Ngaire Woods eds., 2009).

129. Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1790–91 (2005).

A. PRESIDENTIAL LEGITIMACY

Probably the most prominent normative theory of the administrative state in American legal thought today locates the source of agency legitimacy in the presidency.[130] The leading exponent of the presidential legitimacy theory in the legal academy—before she became Solicitor General and then Associate Justice of the Supreme Court—was Professor and Dean Elena Kagan.[131] As then-Professor Kagan observed in an enormously influential 2001 *Harvard Law Review* article, "Presidents . . . are the only governmental officials elected by a national constituency in votes focused on general, rather than local, policy issues."[132] Paraphrasing the earlier work of administrative law scholar Jerry Mashaw, Kagan wrote that bureaucratic action thus "turns out to have a democratic pedigree purer even than Congress's in our system of government."[133]

Kagan's arguments regarding the democratic bona fides of presidential administration are both backward-looking and forward-looking. From a backward-looking perspective, "a President has won a national election," and "this election, exactly because it was national in scope, probably focused on broad policy questions, conveying at least some information to the public about the future President's attitude toward regulation."[134] But in Kagan's view, the "more important point is prospective." As she puts it:

> [B]ecause the President has a national constituency, he is likely to consider, in setting the direction of administrative policy on an ongoing basis, the preferences of the general public, rather than merely parochial interests. . . . In his first term, the desire for reelection alone provides a reason to do so, including through the adoption of policies favored by a majority of the voting public. And even in his second term, a President retains strong incentives to consider carefully the public's views as to all manner of issues—incentives here related to his ambition for achievement, and beyond that for a chosen successor or historical legacy.[135]

This theory of "presidential legitimacy"—whereby the exercise of executive power derives its democratic justification from the relationship between the President and "the People"—also bears implications for the

130. *See* Brian D. Feinstein, *Presidential Administration and the Accountability Illusion*, 74 DUKE L.J. 1791, 1796–1800 (2025) (documenting the phenomenon of "presidential preeminence" in legal scholarship and jurisprudence).

131. *See* Adrian Vermeule, *Bureaucracy and Distrust: Landis, Jaffe, and Kagan on the Administrative State*, 130 HARV. L. REV. 2463, 2478 (2017).

132. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2334 (2001).

133. *Id.* (citing Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 95 (1985)).

134. *Id.* at 2334.

135. *Id.* at 2335.

relationship between the President and the agencies. According to Kagan's theory of presidential legitimacy, "enhanced presidential control of administration serves democratic norms."[136] This conclusion counsels for a more robust presidential role in regulatory decision-making.[137] It also favors a forthright acknowledgement that agency decisions emanate from the President. In Kagan's words, "[t]o the extent that presidential supervision of agencies remains hidden from public scrutiny, the President will have greater freedom to play to parochial interests."[138] By contrast, "[i]t is when presidential control of administrative action is most visible that it most will reflect presidential reliance on and responsiveness to broad public sentiment."[139]

From a presidential legitimacy perspective, the major questions doctrine seems 180-degrees backwards. Agency decisions of vast economic and political significance are the most likely to involve—and to be perceived by the public as emanating from—the President. Yet as Jodi Short and Jed Shugerman observe, the Court's decisions in its major questions cases all focus on the role of "unaccountable bureaucrats"—a phenomenon that the authors describe as "presidential erasure."[140] As Short and Shugerman write, the President "actively supported" and "took public responsibility for" each of the policies at issue in the Court's major questions cases, and each of these policies provoked "vigorous" national debates.[141] Nonetheless, "despite the special national democratic character of presidential involvement in policies that have been struck down in MQD cases, the President is virtually invisible in these opinions."[142]

Indeed, from a presidential legitimacy perspective, it is arguably "minor questions," not major ones, that ought to trigger the most stringent judicial scrutiny.[143] Regulations that address minor questions are the least likely to reach the President's desk, least likely to generate media coverage, and least likely to swing votes in a general election. Those rules are probably the most

136. *Id.* at 2339.
137. *See id.* at 2377.
138. *Id.* at 2337.
139. *Id.*
140. Jodi L. Short & Jed H. Shugerman, *Major Questions about Presidentialism: Untangling the "Chain of Dependence" Across Administrative Law*, 65 B.C. L. REV. 511, 515, 575 (2024).
141. *Id.* at 514.
142. *Id.* Justice Kagan's dissent in *Biden v. Nebraska* marks a notable exception. In that case, Justice Kagan emphasized that "the President would have been accountable for [the] success or failure" of the Department of Education's student loan forgiveness plan, and the agency officials who formally promulgated the program "serve a President with the broadest of all political constituencies." Biden v. Nebraska, 143 S. Ct. 2355, 2385, 2397 (2023) (Kagan, J., dissenting).
143. For a related suggestion, *see* Aaron L. Nielson, *The Minor Questions Doctrine*, 169 U. PA. L. REV. 1181, 1218–19 (2021).

likely to advance the private objectives of special interest groups rather than the greater good of the public at large. Yet under current doctrine, regulations that address minor questions escape the searching judicial review that applies to high-profile rules that already have been approved by the President and are likely to be vetted by voters.

Given that the major questions doctrine makes little sense from a presidential legitimacy perspective, one might think that adherents to the presidential legitimacy theory would embrace major questions avoidance. As Daniel Farber, Jonathan Gould, and Matthew Stephenson argue, "if a legal rule produces undesirable effects, a workaround will generally be a welcome corrective."[144] Major questions avoidance offers a possible exception to this general rule. Sliced rules under the same statutory authority, smaller rules under different statutory authorities, guidance documents, administrative adjudications, and enforcement actions all come with the democratic disadvantages of "minor questions": they are less likely to reach the presidential level and less likely to garner media and voter attention. As Freeman and Stephenson write, "[i]f agencies downplay the real reasons for their rules, segment actions to make them seem more innocuous, or try to portray significant policy changes as technocratic, it becomes more difficult for the public to know what the executive branch is doing (and why), and therefore harder to hold the President to account for it."[145] Thus, while the major questions doctrine is undesirable from a presidential legitimacy perspective, major questions avoidance is also undesirable from a presidential legitimacy perspective. Indeed, major questions avoidance may be particularly pernicious because—in Freeman and Stephenson's telling—it redounds to the advantage of "[s]ophisticated, well-organized interest groups," who are "more likely than ordinary citizens to understand how a collection of seemingly technocratic, incremental regulations contribute to some larger policy agenda."[146] For presidential legitimacy theorists who value presidential administration precisely because it makes agencies accountable to a national electorate, major questions avoidance may be a cure even worse than the disease.

B. LEGISLATIVE LEGITIMACY

Whereas the presidential legitimacy account locates the justification for administrative power in the executive (in other words, Article II), the legislative legitimacy account shifts focus to Article I: Congress. Members

144. *See* Farber et al., *supra* note 12, at 512.
145. Freeman & Stephenson, *supra* note 27, at 34.
146. *Id.* at 35.

of the House and—for the last century[147]—the Senate are the only national officials who are elected *directly* by the people. Ordinary citizens face a much higher chance of having their concerns heard by their Congressmember or home-state Senators than by the President. And, of course, the Constitution assigns all lawmaking powers to Congress[148]—a fact that matters more to formalists than to functionalists but still may matter to functionalists who see some value in achieving "fit" between the constitutional framework and the practical reality of the modern administrative state.

The major questions doctrine fares better from a legislative legitimacy perspective than from a presidential legitimacy perspective. Given the scope and complexity of a modern state, it would be impossible for the legislature to weigh in on every policy choice, but policy choices of vast economic and political significance should be made by officials who are accountable to voters through direct elections—or so the argument goes. Risk-averse lawmakers who are concerned about their own reelection may be tempted to pass the buck for controversial decisions to administrative agencies,[149] but the major questions doctrine prevents legislators from sloughing off responsibility for those choices. Seen in this light, the major questions doctrine reflects the not-altogether-unreasonable proposition that Congressmembers must not be allowed to escape responsibility for important and controversial questions of climate change, public health, student debt, and so on—or if Congressmembers do pass the buck, they should have to fess up to it.

But while the legislative legitimacy theory leads to greater sympathy toward the major questions doctrine, it also—like the presidential legitimacy theory—engenders antipathy toward major questions avoidance. Sliced rules, lumped-together rules, guidance documents, administrative adjudications, and enforcement actions are not only more likely to escape presidential attention but also more likely to evade legislative oversight. Congressional committee hearings are an important mechanism through which the legislature regulates the administrative state: when members of the House and Senate have questions about an agency's policies or performance, they can summon agency officials to appear before committees and—if dissatisfied with the officials' responses—can restrict or condition funding, hold up appointments, or potentially amend the relevant statutes.[150] But these

147. U.S. CONST. amend. XVII.
148. U.S. CONST. art. I, § 1.
149. *See* R. Kent Weaver, *The Politics of Blame Avoidance*, 6 J. PUB. POL'Y 371, 371 (1986).
150. On Congress's practical power to influence agencies through oversight, see generally Brian D. Feinstein, *Congress in the Administrative State*, 95 WASH. U. L. REV. 1189 (2018).

accountability mechanisms are less likely to operate when incremental regulatory actions fly below Congress's radar.

From a legislative legitimacy perspective, then, the relationship between the major questions doctrine and major questions avoidance conforms to the general relationship between first-order rules and workarounds identified by Farber et al.: when the first-order rule (here, the major questions doctrine) "tends to produce desirable effects," then "a workaround will generally be undesirable."[151] In this case, though, the undesirability of the workaround also calls into question the wisdom of the first-order rule. Insofar as the major questions doctrine results in agencies effectuating their policies through incremental regulations, guidance documents, administrative adjudications, and enforcement actions that escape legislative oversight, the upshot may be that the House and Senate will exert even less influence over the questions of vast economic and political significance that—according to legislative legitimacy theorists—ought to remain within the province of Congress. Thus, for legislative legitimacy theorists who are sympathetic to the major questions doctrine *ab initio*, the possibility of major questions avoidance should lead to reconsideration—and perhaps revision—of that initial view.

C. EXPERT LEGITIMACY

A third normative theory of the administrative state—which emerges most clearly in the academic writing of former Supreme Court Justice Stephen Breyer[152]—focuses on the role of expertise as a legitimating force. In Breyer's view, neither the public nor Congress is well-suited to understand and respond to health and safety risks.[153] For Breyer, the only hope for effective risk regulation lies with an expert bureaucracy. As he put it in *Breaking the Vicious Circle*, his last book on administrative law before joining the Supreme Court:

> A bureaucracy's rationalizing tendencies match the need for consistency through system-building and prioritizing; a bureaucracy's use of expertise matches the need for technically related regulatory improvement; a bureaucracy's insulation matches the need for protection from the vicissitudes of public opinion based on a single substance or on a single issue; and a successful bureaucracy can begin to build public confidence in its systems, thereby making its results more authoritative.[154]

151. *See* Farber et al., *supra* note 12, at 512.

152. *See* Vermeule, *supra* note 131, at 2467–68 (distinguishing Breyer's "technocratic approach" from its antecedents).

153. *See* STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 10, 33–42 (1993).

154. *Id.* at 67–68.

According to this view, the justification for the administrative state's claim to authority rests not only in the technical qualifications of individual bureaucrats but also in the institutional structure through which bureaucratic expertise is developed and deployed.

Some version of the major questions doctrine might be justifiable under an expert legitimacy account. Indeed, the doctrine's name traces back to a line in a 1986 law review article by then-First Circuit Judge Breyer: "Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration."[155] Judge Breyer made this point in the context of *Chevron* and congressional intent: a statutory ambiguity is less likely to reflect an implicit delegation to an agency when the relevant issue is major.[156] But the major questions doctrine arguably also fits within Breyer's larger theory of expert legitimacy. If an issue is non-technical—if it implicates substantive value judgments with respect to which expert agencies enjoy no particular advantage—then the case for shifting authority from Congress to the bureaucracy is relatively weak. The major questions doctrine potentially serves to sort between the issues on which Congress can be trusted to channel public values and the issues that require depoliticized bureaucratic management.

An expert legitimacy version of the major questions doctrine might differ from the version adopted by the current Court. Rather than emphasizing the economic or political significance of an issue, the expert legitimacy version might focus on whether the relevant regulation implicates the agency's experience and expertise. Framed this way, some of the Court's major questions decisions might be better understood as what Jody Freeman has called "wrong agency" cases: cases in which the Court denies deference to an agency because the regulation at issue lies within a different agency's bailiwick.[157] Moreover, adherents to the expert legitimacy account might conclude that some of the Court's major questions cases were wrongly decided on the facts.[158] But the major questions doctrine is not as anathema

155. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986).

156. *See id.* 368–71.

157. *See* Matthew Oakes, Donald Verrilli, Richard Pierce & Jody Freeman, *The Future of Administrative Law*, 47 ENVTL. L. REP. 10186, 10196 (2017) (transcript of panel discussion); *see also, e.g.*, Gonzales v. Oregon, 546 U.S. 243, 265–69 (2006) (denying *Chevron* deference to a Justice Department interpretative rule regarding assisted suicide because the rule relied on a "medical judgment" that lay beyond the Attorney General's "expertise").

158. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 676–77 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting) (disputing majority's assertion that the Occupational Safety and Health Administration lacked public-health expertise relevant to workplace vaccine mandate).

from an expert legitimacy perspective as it might be from a presidential legitimacy perspective.

What about major questions avoidance? The possibility that agencies might split their rules into smaller pieces that fly below the radar of the President and Congress is less disturbing from an expert legitimacy perspective than from a presidential or legislative legitimacy perspective. As Jody Freeman and Adrian Vermeule observe, the Court's decision in *Massachusetts v. EPA*,[159] arguably the jurisprudential apogee of expert legitimacy theory, is motivated by a concern about White House meddling in agency scientific judgments.[160] For expert legitimacy theorists, keeping certain regulatory issues off the President's desk is a desirable feature, not a bug, of major questions avoidance. So, too, with respect to Congress: "Congress is highly responsive to public opinion, as it ought to be," Breyer wrote in *Breaking the Vicious Circle*.[161] "This means, however, that if the public finds it difficult to order risk priorities, Congress is also likely to find it difficult."[162] At least for risk regulation decisions such as the choices related to cigarettes, climate change, and COVID-19 transmission at issue in some of the Court's major questions cases, major questions avoidance—insofar as it also leads to avoidance of presidential and congressional oversight—is not an entirely unwelcome outcome.

From an expert legitimacy perspective, major questions avoidance may bring ancillary benefits beyond simply keeping certain issues away from the President and Congress. When an agency slices a broad rule R into a series of smaller rules R_a, R_b, R_c, and so on for industries A, B, C, and so forth, the agency may be more likely to leverage industry-specific expertise—from its own ranks or from the ranks of other agencies—in crafting each of the smaller rules. Drafting a regulation for a single industry focuses the bureaucratic apparatus on the particular characteristics of that industry—characteristics that might be ignored in an omnibus rulemaking. Moreover, if the agency proceeds sequentially—for example, promulgating rule R_a for industry A before it applies rule R_b to industry B—then the agency may gain on-the-ground knowledge from its experience with industry A that allows it to design a better rule for industry B. And by the time the agency reaches industry Z, cumulative knowledge from earlier efforts may allow the agency to craft a significantly superior regulatory regime.

159. Massachusetts v. EPA, 549 U.S. 497 (2007).

160. *See* Jody Freeman & Adrian Vermeule, Massachusetts v. EPA: *From Politics to Expertise*, 2007 SUP. CT. REV. 51, 52 (2007).

161. Breyer, *supra* note 153, at 42.

162. *Id.*

This conclusion comes with qualifications. First, the types of rules to which an expert legitimacy theorist may wish to apply the major questions doctrine—nontechnical rules of vast economic and political significance—are not the same rules that they may wish to see sliced into a series of sub-rules. From an expert legitimacy perspective, major questions avoidance is most beneficial with respect to technical regulations that are likely to escape the major questions doctrine in the first place. And second, the benefits of slicing from an expert legitimacy perspective do not necessarily carry over to other forms of avoidance. For example, expert legitimacy theorists might not welcome bypass via enforcement if enforcement shifts influence toward generalist litigators in the agency's enforcement division or at the Justice Department. In those instances, major questions avoidance—rather than empowering subject-matter experts within an agency—may relegate them to the regulatory sidelines.

D. PARTICIPATORY LEGITIMACY

A fourth normative theory of the administrative state locates the legitimacy of agency authority in public participation. This theory of participatory legitimacy draws inspiration from the work of John Dewey, a prominent figure in early twentieth century pragmatist and progressive thought. In Dewey's words:

> No government by experts in which the masses do not have the chance to inform the experts as to their needs can be anything but an oligarchy managed in the interests of the few. And the enlightenment must proceed in ways which force the administrative specialists to take account of the needs.[163]

Blake Emerson, the leading exponent of participatory legitimacy theory in the American legal academy today, has identified elements of Dewey's vision across the modern administrative state. According to Emerson, the notice-and-comment process "institutionalizes the Progressive concern for public participation in agency policymaking."[164] As Emerson continues, "Courts then police this process to ensure that agencies draw reasonable conclusions from the comments they receive, address all significant comments, and ensure that all major policy choices are sufficiently ventilated."[165] The result is democratic legitimation of a different sort from what is contemplated by Kagan's presidentialist account—a form of democratic legitimation that depends less on votes than on voice.

163. JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS: AN ESSAY IN POLITICAL INQUIRY 173 (Melvin L. Rogers ed., Ohio Univ. Press 2016) (1927).

164. Emerson, *supra* note 71, at 2081.

165. *Id*. at 2081–82 (internal quotation marks omitted).

For Emerson, both the major questions doctrine and major questions avoidance are normatively problematic. "The problem with the [major questions] doctrine," Emerson writes, is "that it discounts and short-circuits rational public deliberation between administrative officials and the public at large."[166] The problem with major questions avoidance is even more acute. In particular, Emerson anticipates that the doctrine will lead agencies to gloss—to explain their decisions on questions of vast economic and political significance in highly technical terms. "This retreat into technocracy will further imperil democratic transparency," according to Emerson, "because important value choices will be kept from public view, and dressed up in the supposedly neutral language of expertise."[167]

Participatory legitimacy theory—though it takes a dim view of glossing—may reach different normative conclusions regarding other avoidance strategies. Arguably, participatory legitimacy theorists should welcome slicing. From a participatory legitimacy perspective, smaller rules may be preferable to larger rules. While individuals have the formal opportunity to participate in the notice-and-comment process for all rules regardless of scope, any single individual's voice is more likely to be heard in a smaller rulemaking than a larger rulemaking, since in the latter case, hundreds of thousands of other individual and organizational commenters are likely to drown out a lone voice. This participatory legitimacy argument for smaller rules runs parallel to the classic argument in the federalism literature for smaller jurisdictions: that "thicker forms of participation" such as contacting officials and attending civic meetings increase as jurisdictional size decreases.[168] On this account, the problem with major rules—like the problem with national governments—is that their scope is too broad, whether in subject-matter or geographic terms, to facilitate efficacious individual participation in their design.

Not all participatory legitimacy theorists are likely to be convinced by this argument, and this argument does not apply to all other forms of major questions avoidance. A possible participatory benefit of larger rules is that they are more likely to generate media coverage and debate, facilitating the "value-oriented process of public engagement" that, per Emerson, is key to participatory legitimation.[169] The benefit of greater opportunities for individual voice in the small-rule context must be weighed against the

166. *Id.* at 2083.

167. *Id.* at 2085–86.

168. For a review, see Roderick M. Hills, Jr., *Federalism and Public Choice*, *in* RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 207, 216–17 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010). For canonical contributions, see ROBERT A. DAHL & EDWARD R. TUFTE, SIZE AND DEMOCRACY (1973); and J. ERIC OLIVER, DEMOCRACY IN SUBURBIA (2001).

169. *See* Emerson, *supra* note 71, at 2097.

benefit of greater public attention for larger rules. Moreover, the tentative argument for slicing on participatory legitimacy grounds does not apply to bypass: guidance documents—if they do not go through notice-and-comment—as well as administrative adjudications and enforcement actions deprive the public of the participatory opportunities that notice-and-comment rulemaking allows. So, participatory legitimacy theory's verdict on both the major questions doctrine and major questions avoidance appears to be mixed: a doctrine that incentivizes agencies to slice their larger rules into smaller pieces may yield some participatory benefits, but other responses to the major questions doctrine generate participatory costs. The justification for the first-order rule may thus depend on which workaround predominates.

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Summing up so far: We have sought in this Part to answer a relatively narrow normative question: is major questions avoidance desirable? Attempting to answer that narrow question requires a broader normative theory of administrative state legitimacy. Different normative theories of administrative state legitimacy bear very different implications both for the major questions doctrine and for major questions avoidance. Moreover, thinking through the phenomenon of major questions avoidance from multiple normative perspectives yields fresh insights regarding the relationship between first-order rules and workarounds in public law.

The next (and final) Part shifts focus from the administrative state to the judicial branch: how should courts respond to major questions avoidance? For presidential legitimacy theorists, the answer is easy: the major questions doctrine should be eliminated, in which case we would not need to worry about major questions avoidance. Meanwhile, expert legitimacy theorists and participatory legitimacy theorists may not necessarily see major questions avoidance as a problem to be solved—at least when avoidance takes the form of slicing (and in a similar vein, lumping). But for legislative legitimacy theorists, major questions avoidance poses a genuine dilemma: avoidance has the potential to undermine the benefits that legislative legitimacy theorists ascribe to the major questions doctrine. Indeed, the major questions doctrine—to the extent that it incentivizes avoidance—may be counterproductive to legislative legitimacy theory's larger goals. Yet, as we will see in the next part, crafting an effective judicial response to major questions avoidance will prove to be a Herculean—and perhaps Sisyphean—challenge.

IV. MAJOR QUESTIONS ANTI-AVOIDANCE

Anti-avoidance rules abound in American law. For example, the Bank Secrecy Act's anti-avoidance rule prohibits individuals from splitting larger cash transactions into smaller ones to evade the Act's $10,000 reporting threshold—a practice colloquially known as "smurfing."[170] Anti-avoidance rules in bankruptcy law such as the fraudulent conveyance and fraudulent transfer provisions prevent debtors from evading creditors' efforts to enforce valid claims.[171] Tax law—in particular—is replete with anti-avoidance rules, including the economic substance doctrine,[172] the substance-over-form doctrine,[173] and the step transaction doctrine.[174]

Courts typically apply anti-avoidance rules ex post—after all, the relevant avoidance actions have occurred. For example, under the step transaction doctrine, a court or the IRS will look retrospectively and wholistically at a series of completed steps and assess the federal tax consequences based "on a realistic view of the entire transaction."[175] Theoretically, a major questions anti-avoidance rule could be applied ex post or ex ante. In the ex post version, the court would consider whether sequential regulatory actions, taken together, resolve a question of vast economic and political significance. In the ex ante version, the court would seek to intervene at the beginning of the sequence. As we shall see, both the ex ante and ex post versions lie within the bounds of imagination, but courts that seek to instantiate either strategy in the real world will encounter formidable challenges.

A. EX ANTE ANTI-AVOIDANCE

Ex ante anti-avoidance is easiest to conceptualize in the context of slicing. Imagine that an agency applies rule R_a to industry A and that the single-industry rule would not itself trigger the major questions doctrine. Now imagine that the same statutory theory that justifies the application of rule R_a to industry A also would authorize the application of R_b to industry B, R_c to industry C, and so on, all the way to industry Z, and that rules R_a through R_z would have a combined effect of vast economic or political significance. An ex ante version of major questions anti-avoidance would

170. 31 U.S.C. § 5324; *see* United States v. Beaumont, 972 F.2d 91, 94 n.9 (5th Cir. 1992).

171. 11 U.S.C. § 548. These provisions are sometimes described as "avoiding powers"—as they allow the debtor in possession or trustee to "avoid" certain transactions—though they also can be described as "anti-avoidance" doctrines insofar as they combat attempts by a pre-petition debtor to avoid collection. *See* Thomas H. Jackson, *Avoiding Powers in Bankruptcy*, 36 STAN. L. REV. 725, 726 (1984).

172. I.R.C. § 7701(o).

173. *See* Frank Lyon Co. v. United States, 435 U.S. 561, 572–73 (1978).

174. *See* Comm'r v. Clark, 489 U.S. 726, 738 (1989).

175. *See id.*

allow a regulated party in industry A to challenge rule R_a on major questions grounds, even though the sequence of rules might not cross the majorness threshold until much later down the line.

An ex ante version of major questions anti-avoidance would encounter serious difficulties in practice. First, the ex ante version would require courts to anticipate all—or at least many—of the possible regulations that follow logically from the statutory interpretation that justifies R_a. Only then could courts begin to evaluate whether these regulations, considered cumulatively, rise to the level of majorness. Many commentators have observed that this latter step—the determination of majorness—is itself an unmanageable inquiry.[176] As Ronald Levin writes, "criticisms of this sort should be taken with a grain of salt" because "[m]any administrative law doctrines implicate judgment calls," but "[i]n this instance," the manageability critique "is well founded."[177] An ex ante major questions avoidance doctrine would be doubly difficult from a judicial manageability perspective—perhaps much more than doubly, because the first step (conjuring up regulations that do not yet exist) places a much heavier tax on the judicial imagination than determining whether an already-existing regulation implicates a major question. The difficulty is especially daunting when avoidance takes the form of lumping rather than splitting: judges will have to imagine not only the possible applications of a single statute but also possible similar uses of other statutes that the agency has not yet invoked.

To be sure, a court that is dead set on advancing a deregulatory agenda may be tempted to test out an ex ante anti-avoidance doctrine anyway. But judges—even deeply ideological judges—still usually assign some weight to other values, such as predictability and judicial economy. Even for judges with strong conservative or libertarian leanings, an unpredictable and unmanageable ex ante avoidance doctrine may prove to be a game not worth the candle.

Along with judges, regulated parties may shy away from an ex ante version of major questions anti-avoidance. Consider the dilemma facing a regulated party challenging the application of rule R_a to industry A. To prevail on an ex ante anti-avoidance theory, the challenger would have to make two showings: (1) that the same statutory interpretation that justifies the application of rule R_a to industry A also would justify the application of R_b to industry B, R_c to industry C, all the way through R_z for industry Z; and (2) that rules R_a through R_z rise to the level of majorness when assessed in

176. *See* Capozzi, *supra* note 28, at 227 & n.281 (compiling fifteen citations to this effect).

177. Ronald M. Levin, *The Major Questions Doctrine: Unfounded, Unbounded, and Confounded*, 122 CALIF. L. REV. 899, 966 (2024).

the aggregate. If the challenger wins at the first step but not the second—if the court (1) agrees with the challenger that the agency's authority to apply rule R_a to industry A also implies its power to promulgate similar rules for B through Z but (2) disagrees with the challenger's claim that the resulting regulatory bundle would reach the majorness threshold—then the challenger will have blazed a path for much more extensive regulation in the future. And given how amorphous the majorness standard is,[178] litigants can rarely be confident at the outset of the first step that they will prevail if they reach step two.

Granted, a firm in industry A may not care about throwing its counterparts in industries B through Z under the bus. The calculus could change, though, if the firm is a multi-sector conglomerate with subsidiaries not only in industry A but also sprinkled across the rest of the alphabet. Likewise, a firm may be reluctant to press an ex ante avoidance argument if A, B, C, and so forth—instead of representing different industries—represent different products made by the same factory, different pollutants emitted by the same facility, or different trade practices of the same company. In those cases, winning a half-victory in an ex ante anti-avoidance case amounts to scoring on one's own goal.

None of this is to say that litigants will never raise ex ante anti-avoidance arguments or that these arguments will never succeed. At least debatably, *Utility Air Regulatory Group v. EPA* presents a real-world example of ex ante anti-avoidance. In that case, the EPA argued that the Clean Air Act authorized it to regulate carbon dioxide and other greenhouse gas emissions from stationary sources that release 100,000 tons or more of carbon dioxide equivalent units each year.[179] The Supreme Court, in a majority opinion by Justice Scalia, observed that the same statutory theory would allow—indeed, would require—the EPA to regulate emissions from units that release just 100 to 250 tons of carbon dioxide equivalent units each year, which would sweep in "millions[] of small sources nationwide."[180] The Court held that the more expansive rule would trigger the major questions doctrine even though the EPA had not yet (and probably never would) assert such far-reaching authority. "EPA's interpretation . . . would bring about an enormous and transformative expansion in EPA's regulatory authority

178. *See* Natasha Brunstein & Richard L. Revesz, *Mangling the Major Questions Doctrine*, 74 ADMIN. L. REV. 317, 318 (2022) ("What constitutes a major question is as unclear today as it was when Justice Breyer wrote those words in 1986."); Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1014 & n.23 (2023) (compiling sources that characterize the doctrine as "radically indeterminate").

179. Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 313 (2014).

180. *Id.* at 324.

without clear congressional authorization," the Court stated.[181] "We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.' "[182]

Utility Air is an unusual case. There, the EPA explicitly acknowledged that its statutory interpretation would open the door to the regulation of millions more facilities.[183] In other words, the agency connected the dots from Rule R_a to R_z itself. *Utility Air* thus did not require litigants to make the highly risky move of arguing for a more expansive understanding of an agency's authority, nor did it require courts to embark on an unguided imaginative journey into the land of regulatory hypotheticals. These unusual features of *Utility Air* help to account for the willingness of industry litigants and Justices to travel down the ex ante anti-avoidance path. In other cases, the difficulties of ex ante anti-avoidance from both a judicial-management and litigation-strategy perspective are likely to encourage a greater emphasis on the ex post alternative.[184]

B. EX POST ANTI-AVOIDANCE

Whereas ex ante anti-avoidance requires a court to anticipate what future regulations might follow from an agency's interpretation of a statute, ex post anti-avoidance allows courts to adopt a wait-and-see approach. Consider again the example of an agency sequentially applying a series of rules (R_a, R_b, R_c, and so forth) to different industries. Ex post anti-avoidance would let a litigant challenge a later rule in the sequence (say, R_z) on the ground that rules R_a through R_z—in combination—trigger the major questions doctrine. Thus, ex post anti-avoidance averts two of the major difficulties facing ex ante anti-avoidance: (1) ex post anti-avoidance does not require litigants to argue for a more expansive understanding of agency authority, and (2) ex post anti-avoidance does not require courts to conjure up rules that do not yet exist.

For these reasons, major questions anti-avoidance—to the extent that it ever takes shape—is likelier to crystallize in ex post rather than ex ante form. Still, ex post anti-avoidance encounters difficulties of its own. The first is

181. *Id.*

182. *Id.* (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000)).

183. *Id.* at 322.

184. The manageability challenge inherent in ex ante avoidance implicates not only the ability of courts to manage their own dockets but also the ability of the Supreme Court to oversee lower courts. When judicial standards are ambiguous or ill-formed, the Supreme Court will face greater difficulty policing lower-court discretion. I thank Sarah Seo and Barry Friedman for both raising this point independently. For examples of this phenomenon from the Second Amendment context, *see* Brannon P. Denning & Glenn H. Reynolds, *Trouble's* Bruen*: The Lower Courts Respond*, 108 MINN. L. REV. 3187, 3196–3220 (2024).

jurisdictional: even if a court concludes on a challenge to rule R_z that the combination of rules R_a through R_z trigger the major questions doctrine, regulated actors in industry A may not be party to the case involving Z. Moreover, the court's anti-avoidance decision in the Z case may have uncertain implications for A, B, and C, as the agency may have additional area-specific rationales for its rules in those industries that require individualized adjudication. Thus, the class action mechanism may be a poor fit for ex post anti-avoidance cases,[185] requiring a flood of follow-on cases in order to wipe the regulatory slate clean.

Aside from the jurisdictional challenges (which may turn into docket management challenges if an ex post anti-avoidance decision for industry Z sets off a deluge of follow-on suits from regulated parties subject to earlier rules in the sequence), ex post anti-avoidance confronts courts with the challenge of determining which rules are sufficiently similar that they should be considered as part of the aggregate that is analyzed for majorness. Not all regulatory sequences will announce themselves as clearly as the alphabetical examples in this Article. And the aggregation challenge will prove particularly burdensome in the lumping context, where aggregation requires a comparison of regulations promulgated under different statutory authorities. Granted, courts make difficult determinations of similarity in other settings—ranging from anti-discrimination law to antitrust law—though, in many of those settings, courts struggle with the similarity inquiry.[186] What we can say with confidence is that while ex post avoidance may not be impossible, it will place new doctrinal-development demands on the judiciary.

Finally, the most significant challenge for ex post anti-avoidance is that it may come too late to change on-the-ground realities. Most of the Court's major questions cases—including the COVID-19 vaccine mandate case,[187] the Clean Power Plan case,[188] and the student loan case[189]—reached the Court in a pre-enforcement posture. Once a rule has gone into effect and parties have begun to comply—once vaccine doses have gone into arms or scrubbers have been installed on power plants—those regulatory consequences are difficult to undo. That was the rationale for the Court's *Abbott Labs* doctrine favoring pre-enforcement review of regulatory action: if a court decision was to shield regulated parties from a rule's consequences,

185. *See* FED. R. CIV. P. 23(a)(3) (typicality requirement for class actions).

186. *See, e.g.*, United States v. Bailey, No. 20-5951, 2021 U.S. App. LEXIS 24771, at *9 n.7 (6th Cir. Aug. 17, 2021) (observing, in the context of the federal criminal supervised release statute, that "[d]efining what counts as sufficiently 'similar' to warrant . . . comparison is no easy task").

187. Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 664 (2022).

188. West Virginia v. EPA, 142 S. Ct. 2587, 2604 (2022).

189. Biden v. Nebraska, 143 S. Ct. 2355, 2365 (2023).

the decision ought to come before parties "change[d] all their labels, advertisements, and promotional materials," "destroy[ed] stocks," and "invest[ed] heavily in . . . new supplies."[190] With ex post anti-avoidance, by contrast, rule R_a might remain in force for industry A for several months or years before a court concludes in an industry Z case that the agency's sequence of rules R_a through R_z trigger major questions scrutiny. Thus, even if courts can overcome the judicial manageability challenges of ex post anti-avoidance, agencies still will have opportunities to reshape entire industries before ex post anti-avoidance cuts off their regulatory efforts.

CONCLUSION

Major questions avoidance illustrates the concept of question size elasticity in both directions. Not only can a larger regulatory question be subdivided into several smaller ones, but the seemingly self-contained topic of major questions avoidance also inspires much larger theoretical and empirical inquiries that go to the heart and soul of the modern administrative state. Predicting the probability of major questions avoidance required us to delve deeply into the motives of agency officials. Evaluating the normative desirability of avoidance necessitated a broader theory of administrative state legitimacy. And playing out the chess match of anti-avoidance highlighted the limits of judicial power: when agencies respond strategically to new administrative law doctrines, courts will struggle to counter the agencies' moves—especially when the clock is running and regulations that are in force only temporarily can have permanent practical effects.

With respect to all the major questions raised by major questions avoidance and anti-avoidance, our answers at this early stage are—and can be—only tentative. What already seems clear, though, is that careful and critical reflection on the empirical, normative, and jurisprudential dimensions of major questions avoidance and anti-avoidance can generate insights that travel far beyond the major question doctrine's domain. Mapping and exploring the terrain of major questions avoidance and anti-avoidance can give us a clearer view of the theories that justify agency power and the extent to which that power can be constrained by the judiciary. In the end, major questions avoidance and anti-avoidance—whether or not they are desirable developments—have the virtue of offering us a new, richer, and more nuanced perspective on both the legitimacy and the adaptability of the modern administrative state.

190. *See* Abbott Labs. v. Gardner, 387 U.S. 136, 152–53 (1967).