Essay

Drawing a Line: How Energy Law Can Provide a Practical Boundary for the Rapidly Expanding Major Questions Doctrine

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Abstract

Administrative agencies must respond to innovation in their field of expertise to keep their regulatory approach efficient and effective. However, the recent expansion of the major questions doctrine threatens to undermine agency capacity to respond to new technology and new practices. Recently, the Supreme Court has endorsed what scholars have referred to as a strong version of the major questions doctrine. Two of the key components of this version of the doctrine are a demanding clear statement rule and an unprecedented skepticism toward new applications of long-standing statutes. This Essay begins by tracing the development of those two components of the doctrine and describing the threat they pose to agencies tasked with regulating rapidly changing sectors of the economy. It then proposes a judicial method to ensure that agencies can respond to these changes. Specifically, it recommends that the Court draw on its own jurisprudence in energy law and related areas to craft a purposivist limit to the major questions doctrine where it collides with agency capacity to respond to innovation.

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Introduction

Administrative agencies face a difficult task when confronting innovations—like new technology or evolving practices—in the fields they regulate.[1] Regulating such innovations is critical to the efficacy of the regulatory scheme an agency is charged with implementing, but the very same innovations can pose thorny jurisdictional questions for would-be regulators.[2]

One particularly concerning problem for an agency in this position is that if it interprets a preexisting statute to allow them to regulate a

1 *See* Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 Admin. L. Rev. 475, 478–79 (2021) (discussing the Federal Trade Commission's contemplation of how the immunity granted by the Communications Decency Act can or should apply to social media platforms).

2 *See id.*

significant new technology or practice, they are likely to run up against the major questions doctrine.[3] This doctrine has become a favorite method of the Supreme Court to reduce the deference afforded to agencies in these situations.[4] The major questions doctrine was originally developed to protect the separation of powers precept embedded in our Constitution by reinforcing the nondelegation doctrine.[5] As a more recent development in the Court's administrative law jurisprudence, however, the outer bounds of the major questions doctrine have not been clearly delineated.[6]

This Essay proposes that the Supreme Court's energy jurisprudence demonstrates a purposivist approach—sometimes also referred to as a "functionalist"[7] approach—to determining the boundaries of an agency's delegated authority, and that this approach can be adopted to appropriately restrain application of the major questions doctrine to scenarios where there are genuine nondelegation and separation of powers issues. With this tempering, the major questions doctrine can fulfill its original purpose without stifling the ability of agencies to respond to innovation. The Court's energy jurisprudence shows that courts evaluating agency efforts to regulate new technology need not seek explicit Congressional statements authorizing regulation of that new technology. Rather, to find a clear statement, the Court can employ the purposivist approach it endorsed in cases like *FERC v. Electric Power Supply Ass'n*.[8] That approach centers on effectuating the broad statutory purpose Congress drafted to delegate a field of authority to an agency.[9] This Essay also suggests that where courts employ this approach and give effect to broad statutory purpose, it would be inconsistent with that purpose to look skeptically at agency assertions of authority that, while new, are clearly within that broad purpose. Using these recommendations, the Essay seeks to establish a principled boundary for application of the major questions doctrine.

This Essay proceeds in four primary sections. First, it will briefly survey both the origins of the major questions doctrine and recent

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3 *See id.*

4 *See id.* at 476–77 (noting that many justices are skeptical of giving deference to agency interpretations, and that "[a] primary manifestation of the Court's skepticism is the 'major questions doctrine,' which is a clear effort to . . . depriv[e] agencies of . . . deference in a certain set of cases").

5 *See id.* at 483, 491.

6 *See* Harvey L. Reiter, *Would FERC's Landmark Decisions Have Survived Review Under the Supreme Court's Expanding "Major Questions Doctrine" and Could the Doctrine Stifle New Regulatory Initiatives?*, 3 Energy Bar Ass'n Brief 1, 3 (2022) (emphasizing that recent Supreme Court decisions "appear to announce a significant expansion of the doctrine").

7 *See* Matthew R. Christiansen, FERC v. EPSA*: Functionalism and the Electricity Industry of the Future*, 68 Stan. L. Rev. Online 100, 101 (2016).

8 577 U.S. 260 (2016).

9 *See* Christiansen, *supra* note 7, at 106.

developments in the field. This will provide the necessary fundamentals and explain two key trends in the recent case law: (1) a requirement of clear statements from Congress to overcome the Court's skepticism in major questions cases and (2) an increase in that skepticism where the agency's asserted power is a new one.[10] Next, it will describe how the Supreme Court's energy jurisprudence offers a compelling purposivist approach that enables courts to (1) find that Congress has spoken clearly where it has delegated broad, flexible authority and (2) recognize that some new agency powers can fit within that broad delegation.[11] Specifically, it will outline the Court's emphasis on broad statutory purpose in foundational energy law cases that involved major questions of "deep 'economic and political significance,'" albeit before those terms came into popularity.[12] Then, it will demonstrate how this approach is bolstered by other areas of law such as field preemption and Spending Clause cases.[13] Finally, this Essay will conclude by providing recommendations for the Court to incorporate these lessons when hearing cases that involve agency efforts to regulate innovations pursuant to broadly drafted enabling statutes.[14]

I. Developments in the Major Questions Doctrine

A. Origins and Early Development

The major questions doctrine originally arose as an exception to *Chevron* deference.[15] Although the nuanced details of *Chevron* are not germane to this Essay, its key holding is foundational to the discussion that follows. In *Chevron*, the Court considered whether the EPA's construction of the Clean Air Act Amendments of 1977 was permissible.[16] The Court held that when reviewing an agency construction of a statute administered by that agency, courts must first ask whether "Congress has directly spoken to the precise question at issue."[17] If ambiguity remains, courts proceed by asking whether the agency's construction of the statute is a permissible one.[18] If the agency's construction is reasonable, courts are to defer to that interpretation of the statute even if they

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10 *See infra* Part I.

11 *See infra* Part II.

12 King v. Burwell, 576 U.S. 473, 486 (2015) (quoting Util. Air. Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

13 *See infra* Part III.

14 *See infra* Part IV.

15 *See* Reiter, *supra* note 6, at 2. *See generally* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

16 *See Chevron*, 467 U.S. at 839–40.

17 *Id.* at 842.

18 *See id.* at 843.

would have reached a different interpretation.[19] These steps form the well-known doctrine of *Chevron* deference.

Although *Chevron* has long been controversial and subject to criticisms about its disregard for the Court's Article III powers or its interplay with the limits of Congress's Article I powers, it survived with little to no exception for decades.[20] By the turn of the century, however, the Court had grown wary of these possible criticisms and began carving out an exception to *Chevron* deference in the form of the major questions doctrine.[21] The following cases trace the roots of the doctrine and examine how it was originally applied.

1. FDA v. Brown & Williamson Tobacco Corp.

Within the Supreme Court, the development of the major questions doctrine began with *FDA v. Brown & Williamson Tobacco Corp.*[22] In this case, the Court considered the Food and Drug Administration's ("FDA") interpretation of the Food, Drug, and Cosmetic Act ("FDCA").[23] That Act gave the FDA authority to regulate "drug[s]" and "device[s] . . . intended to affect the structure or any function of the body."[24] At issue was the FDA's interpretation of this statutory language; they asserted that it authorized the agency to regulate nicotine and cigarettes.[25] Ultimately, the Court found the agency's assertion of jurisdiction impermissible.[26] The Court reasoned that Congress had "directly spoken to the issue" and that the FDA's interpretation clearly contravened Congress's intent.[27] To reach that latter conclusion, the Court relied on the congressional history of addressing tobacco separately from the FDCA.[28] Moreover, the Court emphasized the FDCA's "core objectives" as evidenced by the Act as a whole.[29] Thus, one of the Court's earliest considerations of the major questions doctrine, and of what Congress had authorized an agency to do in relation to a major

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19 *See id.* at 845.

20 *See* Sunstein, *supra* note 1, at 476 ("For more than two decades, these objections did not seem to have much of an impact on the Supreme Court.").

21 *See id.* at 476–77.

22 *See* 529 U.S. 120 (2000).

23 *See id.* at 120. *See generally* 21 U.S.C. §§ 301–399.

24 21 U.S.C. § 321(g)–(h).

25 *See Brown & Williamson*, 529 U.S. at 127.

26 *See id.* at 142.

27 *Id.* at 132–33.

28 *See id.* at 134–35.

29 *Id.* at 121, 133, 142 ("Considering the FDCA as a whole, it is clear that Congress intended to exclude tobacco products from the FDA's jurisdiction. A fundamental precept of the FDCA is that any product regulated by the FDA that remains on the market must be safe and effective for its intended use.").

question, focused on an inquiry into the overarching purpose of the statute at hand.[30]

Having found that Congress had spoken clearly, and that the FDA's interpretation contravened congressional intent and statutory purpose, the Court had arguably resolved the case without reference to the major questions doctrine. However, the Court concluded by noting that it was "confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[31] While this early mention of the foundations of the major questions doctrine is arguably dicta, subsequent cases cited the proposition authoritatively, giving it undeniable legal effect.[32]

2. Utility Air Regulatory Group v. EPA

In 2014, the Court took up *Utility Air Regulatory Group v. EPA*,[33] where the Court ultimately adopted a significant new understanding of the major questions doctrine. At issue in the case was "whether it was permissible for [the Environmental Protection Agency ("EPA")] to determine that its motor-vehicle greenhouse-gas regulations automatically triggered permitting requirements under the Act for stationary sources that emit greenhouse gases."[34] The Court's analysis of this issue began by announcing that it would examine the EPA's determinations by applying *Chevron*.[35] The Court determined that the EPA's interpretation was incompatible with the statutory scheme and unreasonable because it "would place plainly excessive demands on limited governmental resources."[36] Critically, the opinion continues past these conclusions adding that the "EPA's interpretation is also unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization."[37] In this portion of its analysis, the court explained that it would meet agency announcements of "enormous and transformative"[38] powers with skepticism, and would demand clear statements to evince congressional intent to delegate powers of "vast 'economic and political significance'" to an agency.[39] Thus, the Court rested the final position of the opinion squarely on the major questions doctrine.

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30 *See id.* at 133–34, 142.

31 *Id.* at 160.

32 *See, e.g.*, Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014).

33 *Id.*

34 *Id.* at 307.

35 *Id.* at 315.

36 *Id.* at 323–24.

37 *Id.* at 324.

38 *Id.*

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

The importance of this opinion in the development of the doctrine lies in the subtle language of the opinion. As Professor Cass R. Sunstein noted, in this case the Court did not hold that it would interpret the statute independently because the EPA's interpretation of the statute was unreasonable.[40] Rather, the Court said that "[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,'"[41] the Court will view that claim with skepticism and "expect Congress to speak clearly" if it wishes to confer such authority.[42] Professor Sunstein characterized this as a clear statement rule.[43] Accordingly, he categorized this interpretation of the major questions doctrine into what he calls the "strong" version of the doctrine.[44] Application of the strong version of the doctrine does not lead to the reviewing court interpreting the statute for itself, which is what the doctrine originally purported to do as an exception to *Chevron* deference.[45] Instead, the reviewing court strikes the agency action down unless a clear statement from Congress is present.[46] Thus, in *Utility Air Regulatory Group*, the Court articulated a new and more impactful version of the major questions doctrine—the so-called strong version—that goes beyond independently resolving questions of statutory interpretation, instead tipping the scales against agency authority in these cases.

3. King v. Burwell

Utility Air Regulatory Group embraced a new, stronger version of the major questions doctrine, but this distinction was not explicit in the Court's opinion.[47] The Court did not discuss the different formulations of the doctrine and did not explicitly hold that the strong version was to be applied going forward.[48] This left the door open to other approaches. In 2015 the court heard *King v. Burwell*.[49] This case concerned the Internal Revenue Service's ("IRS") interpretation of certain provisions in the Affordable Care Act ("ACA").[50] In it, the Court applied—and thereby reaffirmed the legitimacy of—the original approach to the major questions doctrine.[51] Under that approach, statutory ambiguity

40 *See* Sunstein, *supra* note 1, at 483.

41 Util. Air, 573 U.S. at 324 (quoting Brown & Williamson, 529 U.S. at 159).

42 *Id.*

43 Sunstein, *supra* note 1, at 483.

44 *Id.* at 484.

45 *See id.* at 483.

46 *See id.* at 477, 489–93.

47 *See* Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014).

48 *See id.*

49 576 U.S. 473 (2015).

50 *See id.* at 473–74.

51 *See id.* at 474.

around major questions does not mean the Court will require a clear statement, but that it will resolve the ambiguity independently.[52] Here, the Court found that Congress could not have intended to implicitly delegate authority to the IRS in the ACA to independently resolve issues as important as whether the Act's tax provisions apply equally in states using federally established healthcare exchanges.[53] However, the Court did not conclude that the agency interpretation was per se inadmissible and that Congress must act to clarify.[54] Rather, it interpreted the statute de novo.[55] In fact, the Court ultimately reached the same interpretation as the agency.[56] Thus, as Professor Sunstein keenly observed, following *King v. Burwell* and at least up to his article in 2021, two versions of the major questions doctrine survived simultaneously.[57] The most recent developments, however, suggest that the strong version may be ascending to primacy.[58]

B. Recent Developments

The major questions doctrine has been an active area of litigation before the Supreme Court in 2021 and 2022.[59] As the following cases in this section demonstrate, the Court has repeatedly affirmed the primacy of the strong version of the major questions doctrine, underscored the clear statement rule at the heart of this version, and begun to amplify their skepticism toward agency assertions of new or previously unclaimed authority.[60]

1. Alabama Association of Realtors v. Department of Health & Human Services

In *Alabama Association of Realtors v. Department of Health & Human Services*,[61] petitioner realtors challenged the Centers for Disease

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52 *See id.* at 474; *see also* Reiter, *supra* note 6, at 3.

53 *See King*, 576 U.S. at 485–86.

54 *See id.*

55 *See id.* (applying the *Chevron* framework to investigate whether the agency's interpretation was reasonable).

56 *See id.* at 492, 497–98.

57 *See* Sunstein, *supra* note 1, at 475.

58 *See id.* at 480; *see also infra* Section II.B (describing how in cases heard in 2021 and 2022 the Supreme Court seems to have moved away from the original or weak version of the major questions doctrine in favor of the strong version).

59 *See* Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021); Nat'l Fed'n of Indep. Bus. v. OSHA, 142 S. Ct. 661, 665 (2022); West Virginia v. EPA, 142 S. Ct. 2587, 2614 (2022).

60 *See Ala. Ass'n of Realtors*, 141 S. Ct. at 2489; *Nat'l Fed'n of Indep. Bus. v. OSHA*, 142 S. Ct. at 664–65.

61 141 S. Ct. 2485 (2021).

Control and Prevention's ("CDC") extension of a COVID-19 eviction moratorium.[62] The CDC had interpreted § 361 of the Public Health Service Act as providing it the necessary authority to "promulgate and extend the eviction moratorium."[63] The petitioners, however, argued that the CDC lacked statutory authority and had exceeded the authority granted under § 361.[64] The Court's analysis first looked to the text of the statute at issue, finding that "it is a stretch to maintain that § 361(a) gives the CDC the authority to impose this eviction moratorium."[65] The Court then added that "[e]ven if the text were ambiguous, the sheer scope of the CDC's claimed authority under § 361(a) would counsel against the Government's interpretation."[66] It also noted that the Court would "expect Congress to speak clearly when authorizing an agency to exercise powers of 'vast economic and political significance.'"[67] Thus, the Court relied on the major questions doctrine to resolve this case adversely against the agency. Specifically, by demanding that Congress "speak clearly," the Court definitively endorsed the strong version of the major questions doctrine and reiterated the clear statement rule as a component of the doctrine.[68]

As Professor Harvey Reiter noted in his Spring 2022 Energy Bar Association Brief, the Supreme Court's analysis in *Alabama Association of Realtors* also emphasized a new justification for judicial skepticism under the major questions doctrine—the newness of the agency's asserted authority.[69] The Court noted that the CDC's emergency powers under the Public Health Service Act had "rarely been invoked" and "never before [been used] to justify an eviction moratorium."[70] This language implied that newness in the agency application of an enabling statute, or the assertion of a previously unclaimed authority, was cause for increased judicial skepticism.[71] The Court only briefly discussed its cynicism toward the newness of the agency's asserted authority, leaving ambiguity in this element of the doctrine.[72] It did not clarify whether the skepticism would apply with equal force if, rather than extending the eviction moratorium, the CDC had been addressing an issue that was novel, yet germane to their expertise and the field delegated to them under the Public Health Service Act, such as fumigation, disinfection, or

62 *See id.* at 2487.

63 *Id.*

64 *See id.*

65 *Id.* at 2488.

66 *Id.* at 2489.

67 *Id.* (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014) (quotation omitted)).

68 *See id.*; Sunstein, *supra* note 1, at 483; Reiter, *supra* note 6, at 5.

69 *See* Reiter, *supra* note 6, at 8.

70 *Ala. Ass'n of Realtors*, 141 S. Ct. at 2487.

71 *See* Reiter, *supra* note 6, at 8.

72 *See Ala. Ass'n of Realtors*, 141 S. Ct. at 2487.

sanitation.[73] This is an important distinction when considering the ability of an agency to respond to new technology or practices that arise in the field they work with.[74] If the skepticism applies equally to agencies asserting authority over innovations that naturally arise within their fields of expertise, then the doctrine threatens to undermine the ability of agencies to keep their regulations relevant and effective. Despite the cursory discussion of this element in *Alabama Association of Realtors*, the idea that assertions of new power are cause for increased doubt would come to be affirmed in subsequent cases.[75]

2. National Federation of Independent Business v. Department of Labor, OSHA

The Court continued to demonstrate the rise of the strong version of the major questions doctrine in *National Federation of Independent Business v. Department of Labor, OSHA*.[76] This case concerned OSHA's adoption of a temporary rule mandating workplaces to require their employees to get vaccinated against COVID-19 or to get tested and wear a mask each day.[77] The rule was issued under OSHA's emergency authority under § 655(c)(1) of the Occupational Safety and Health Act of 1970.[78] It was challenged by the National Federation of Independent Business and other petitioners on the grounds that it was beyond the powers Congress delegated to the agency in that Act.[79] In their analysis, the Court quoted the major questions portion of the *Alabama Association of Realtors* opinion, elevating the strong form of the doctrine from what was plausibly dicta to a central holding and thus valid precedent.[80] The Court specifically held that the Occupational Safety and Health Act of 1970 did not authorize OSHA to promulgate the rule at issue, in part because "no provision of the Act addresses public health more generally, which falls outside of OSHA's sphere of expertise."[81] The Court reached this holding despite the connection between the employers addressed by the regulation and the workplaces OSHA ordinarily regulates.[82] Therefore, it seems that the Court would have required

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73 *See id.* (discussing the unprecedented nature of the assertion by the CDC in just one paragraph).

74 *See infra* Section IV.B.

75 *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., OSHA, 142 S. Ct. 661, 666 (2022) [hereinafter *Nat'l Fed'n of Indep. Bus. v. OSHA*].

76 *Id.*

77 *Id.* at 663–64.

78 *Id.*

79 *Id.* at 663–65.

80 *See id.* at 664–65 (quoting Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021)); Reiter, *supra* note 6, at 6.

81 *Nat'l Fed'n of Indep. Bus. v. OSHA*, 142 S. Ct. at 665.

82 *See id.* at 665–66.

OSHA to point to a very clear statement by Congress that the agency was authorized to regulate hazards that presented themselves both in and out of the workplace.[83] This is in line with the clear statement rule that has become a hallmark of the strong version of the major questions doctrine.[84]

Furthermore, the Court embraced the emphasis on newness suggested in *Alabama Association of Realtors*.[85] It noted that it was "telling that OSHA, in its half century of existence, ha[d] never before adopted a broad public health regulation of this kind."[86] Just as with *Alabama Association of Realtors* above, scholars and commentators have noted that this aspect of the case may pose issues for administrative agencies. As Professor Harvey Reiter noted in a discussion of the two cases, "[a] standard . . . that triggers the [major questions] doctrine whenever an agency adopts a new or novel interpretation of even broadly worded statutory authority would have significant implications."[87] Unlike in *Alabama Association of Realtors*, though, in this case the Court hinted at some grounds for limiting the use of newness in an agency assertion of authority to trigger enhanced skepticism under the major questions doctrine. The Court noted that "[w]here the virus poses a special danger because of the particular features of an employee's job or workplace, targeted regulations are plainly permissible."[88] But by striking down a regulation that imposed requirements on employers in relation to their workforces, the Court left the line between a permissible and impermissible agency assertion of authority to handle new issues unclear.

Ultimately, this case continued the Court's shift toward the strong version of the major questions doctrine. It demanded that the agency point to very specific and clear language from Congress delegating the asserted authority and enhanced its judicial skepticism toward such claims considering the newness of that authority. As such, it served as precedent for the Supreme Court's most recent application of the major questions doctrine, as discussed below.

3. West Virginia v. EPA

Most recently, the Court continued to endorse the strong version of the major questions doctrine in *West Virginia v. EPA*.[89] This

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83 *See id.* (finding that "[p]ermitting OSHA to regulate the hazards of daily life—simply because most Americans have jobs and face those same risks while on the clock—would significantly expand OSHA's regulatory authority without clear congressional authorization").

84 *See* Sunstein, *supra* note 1, at 477.

85 *See Nat'l Fed'n of Indep. Bus. v. OSHA*, 142 S. Ct. at 666; Reiter, *supra* note 6, at 8.

86 *Nat'l Fed'n of Indep. Bus. v. OSHA*, 142 S. Ct. at 666.

87 Reiter, *supra* note 6, at 8.

88 *Nat'l Fed'n of Indep. Bus. v. OSHA*, 142 S. Ct. at 665–66.

89 142 S. Ct. 2587 (2022).

case centered on challenges to the EPA's 2015 effort to require coal plants to either reduce their emissions by reducing their total electric generation or subsidize increased generation by natural gas, wind, or solar resources.[90] In framing the question of the case, the Court stated that "[t]he issue here is whether restructuring the Nation's overall mix of electricity generation, to transition from 38% coal to 27% coal by 2030, can be the 'best system of emission reduction' within the meaning of Section 111 [of the Clean Air Act]."[91] Once again, to resolve this question the Court applied the strong version of the major questions doctrine—although they did not refer to it as such. The Court required the agency to point to a clear statement of delegated authority from Congress to exercise a power of deep economic and political significance.[92] It held that the government failed to point to such a clear statement from Congress authorizing them to take the approach to emissions regulation at issue in the case.[93] Thus, the Court struck down the agency action as unlawful. In doing so, the Court cast another vote in favor of incorporating a demanding clear statement rule—one that seeks explicit congressional authorization—as a central part of the major questions doctrine.

Furthermore, much like *Alabama Association of Realtors* and *National Federation of Independent Business v. OSHA* before it, this opinion took issue with the newness of the powers the EPA was asserting. The Court described the authority the EPA claimed as "unheralded."[94] It also noted skeptically that the "newfound power" was drawn from "the vague language of an 'ancillary provision[]' of the Act."[95] Pairing these observations with remarks on legislative history that preceded and surrounded the Clean Air Act, the Court determined that it should "'hesitate before concluding that Congress' meant to confer on [the] EPA the authority it claim[ed] . . . ."[96] Here too, however, the Court declined to clearly define when agency assertions of new powers are cause for concern. The Court did not explain whether it was concerning for the agency to "discover in a long-extant statute an unheralded power" solely because the power here was arguably outside the field of authority traditionally recognized under the Clean Air Act, or if the problem would persist if the EPA asserted authority to handle a new

90 *Id.* at 2599.

91 *Id.* at 2607 (quoting 42 U.S.C. § 7411(a)(1)).

92 *Id.* at 2609 ("The agency instead must point to 'clear congressional authorization' for the power it claims." (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014))); *see also* Sunstein, *supra* note 1, at 483.

93 *West Virginia v. EPA*, 142 S. Ct. at 2614.

94 *Id.* at 2610 (quoting *Util. Air*, 573 U.S. at 324).

95 *Id.* (quoting Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 468 (2001)).

96 *Id.* (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)).

issue within its traditionally recognized powers, such as the regulation of newly recognized criteria air pollutants.[97]

Ultimately, the aforementioned cases illustrate a shift in the modern court away from interpreting ambiguous statutes themselves when confronted with major questions, and toward skepticism of any new exercise of agency authority in these cases unless the agency can point to a clear statement from Congress delegating that authority. This raises two important questions: (1) what is a clear statement in this context and (2) when should assertions of new authority be cause for concern? Taking these cases into account, we can see that the Court has begun to require explicit congressional delegation of the exact authority at issue, but the Court leaves the latter question on newness unanswered. The sections that follow propose that the Court draw on lessons from its energy jurisprudence to resolve these questions.

II. Energy Jurisprudence and The Purposivist Approach

The Court has been tasked with identifying the boundaries of an agency's delegated authority many times, both prior to and since the advent of the major questions doctrine. While not all cases concerning the boundaries of an agency's delegated authority speak directly to the major questions doctrine, they all grapple with the same challenge of interpreting congressional intent in statutory language. The Court has confronted this issue routinely in its energy jurisprudence—perhaps because it is a rapidly evolving industry governed by statutes that are nearly a century old, so agencies in the space often have to challenge the status quo. Unlike in the major questions doctrine cases discussed above, in its energy jurisprudence the Court has rarely balked at agency assertions of authority just because they were new, or because the Court was concerned about whether Congress foresaw the agency tackling the precise issue at hand. Rather, as the cases below will demonstrate, the Court has taken a purposivist approach to determining the scope of congressional authorization in its energy jurisprudence. Where Congress has delegated broad authority to agencies in the energy field, the Court has often given effect to such delegations by allowing agencies to regulate unforeseen innovations that fit within the field of delegated authority and the substantive expertise of the agency.

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97 *Id.*; *see also* Jonathan H. Adler, West Virginia v. EPA*: Some Answers About Major Questions*, 2022 Cato Sup. Ct. Rev. 37, 38–39 (noting that the opinion in *West Virginia v. EPA* "left substantial questions about the major questions doctrine unanswered.").

A. FPC v. Florida Power & Light Co.

FPC v. Florida Power & Light Co. is one of the seminal cases in the Supreme Court's energy and electricity jurisprudence.[98] This case concerned regulation by the Federal Power Commission ("FPC")—predecessor to the Federal Energy Regulatory Commission ("FERC")—under authority that they argued Congress had delegated to them in the Federal Power Act ("FPA").[99] Specifically, the Court considered whether the FPC had exceeded its authority over "the transmission of electric energy in interstate commerce"[100] and "the sale of [electric] energy at wholesale in interstate commerce"[101] when it determined that the Florida Power and Light Company had engaged in activities within the Commission's jurisdiction by participating in the interstate market for electric energy. The Commission had reached this determination because, while Florida Power and Light was selling energy to another utility within Florida, that second utility subsequently sold electricity to a Georgia utility. The Court ultimately agreed with the Commission. They reasoned that the energy provided by Florida Power and Light had "commingled" with that of the utility they sold to in Florida and was then transmitted in interstate commerce bringing the entirety of the system within the Commission's jurisdiction.[102] This was a significant holding. It clarified that the Commission's jurisdiction was not limited to transactions that directly involved the sale or transmission of electricity across state lines; rather, its jurisdiction extended to transactions carried out using nearly every transmission system in the lower forty-eight states.[103]

Despite this significance, because the case was decided in 1972, the decision was not couched in the language of the major questions doctrine. When viewed through the lens of these administrative law concepts, however, two lessons become apparent. First, it seems clear that the case would raise major questions concerns if heard before the Supreme Court today.[104] It is a case of "deep economic and political significance" as it affects the operation of nearly all electricity providers in the United States.[105] Second, even if Congress expected to regulate

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98 FPC v. Florida Power & Light Co., 404 U.S. 453 (1972).

99 *Id.* at 454–55.

100 *Id.* at 454.

101 *Id.*

102 *Id.* at 453.

103 *See* Reiter, *supra* note 6, at 9 ("The Supreme Court's opinion in *FPC v. Florida Power & Light* upholding the Commission's jurisdictional claim effectively—and virtually overnight—brought nearly every transmission arrangement within the 48 contiguous states under federal jurisdiction." (internal footnotes omitted)).

104 *Id.* at 19 n.101.

105 King v. Burwell, 576 U.S. 473, 486 (2015) (citation omitted).

transactions between utilities located in the same state, they could not have foreseen the breadth of the impact that this delegation would have. In 1934, when Congress was considering the legislation that would become the FPA, the total installed capacity of the U.S. electrical grid was just forty-five million kilowatts.[106] Today, there is more than 1.1 billion kilowatts of utility-scale capacity on the U.S. grid.[107] Furthermore, when drafting the FPA Congress could not have foreseen in the complex technicalities of how electricity flows through the modern grid today.[108] Despite Congress's inability to foresee the precise scale and nature of this question though, the Court did not tell Congress they had failed to effectuate their goals for failure to draft legislation specifically targeted at these technicalities. Nor did they find fault in the newness of the Commission's claimed powers. Rather, they gave effect to the broad but clear statutory purpose of the FPA—to vest authority in the Commission over all interstate transmission of electricity and all sales of electricity at wholesale.[109] The Court then agreed with the Commission that the transactions at issue fit within that field of delegated authority under the FPA, and that authority over such transactions was necessary to effectuate the purpose of the Act.[110] Therefore, the Court affirmed the agency determination.[111] Thus, the Court's seminal case in the field of energy law affirmed the validity of a purpose-focused approach to defining the boundaries of agency authority under broad delegations of power from Congress.

B. FERC v. Electric Power Supply Association

In *FERC v. Electric Power Supply Association*, the Supreme Court considered whether FERC had the authority, as it claimed, to regulate wholesale market operators' compensation for demand response.[112] Demand response was a rapidly growing practice at the time, and FERC's regulation thereof represented a new authority for the Commission. Moreover, that new authority did not clearly fit

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106 Dozier A. DeVane, *Highlights of Legislative History of the Federal Power Act of 1935 and the Natural Gas Act of 1938*, 14 Geo. Wash. L. Rev. 30, 30 (1945).

107 *Electricity Explained: Electricity Generation, Capacity, and Sales in the United* States, U.S. Energy Info. Admin. (July 15, 2022), https://www.eia.gov/energyexplained/electricity/electricity-in-the-us-generation-capacity-and-sales.php [https://perma.cc/W6X8-YSQ6].

108 FERC, Reliability Primer: An Overview of the Federal Energy Regulatory Commission's Role in Overseeing the Reliable Operation of the Nation's Bulk Power System 10 (2016) (describing how electrical grids were smaller, independent systems at the time the FPA was enacted and only began to interconnect on a national scale after World War II).

109 *Id.*; 16 U.S.C. § 824(b).

110 FPC v. Florida Power & Light Co., 404 U.S. 453, 461–63 (1972).

111 *Id.*

112 FERC v. Elec. Power Supply Ass'n, 577 U.S. 260, 276 (2016).

within previously recognized "bright lines" regarding the interstate-intrastate and wholesale-retail boundaries between federal and state regulation, respectively, of the electrical grid.[113] Nevertheless, the Court ultimately held that the FPA authorized the Commission to regulate demand response as it had done.[114] To reach this holding, Justice Kagan's majority opinion emphasized the need to assess the scope of authority delegated to FERC under the FPA in light of the statute's "core purpose[]."[115] The Court concluded its analysis of whether FERC was right to assert newfound jurisdiction over this consequential practice as follows: "We will not read the FPA, against its clear terms, to halt a practice that so evidently enables the Commission to fulfill its statutory duties of holding down prices and enhancing reliability in the wholesale energy market."[116]

It is worth noting the Court's use of the words "clear terms" here.[117] The Court in this case did not defer to the agency interpretation of an ambiguous statute. Rather, it found that Congress had spoken clearly. But to reach that conclusion, the Court did not concern itself with whether Congress had drafted the FPA to specifically address demand response, nor did it view the Commission's assertion of authority with skepticism simply because FERC was asserting a new power to respond to innovative practices in the field it regulates.[118] Rather, the Court exercised the judicial interpretation that has been its core function since *Marbury v. Madison* to interpret the clear, albeit broad, statutory purpose in the FPA.[119] From there it simply asked whether the Commission's asserted authority fit within the field of authority delegated under the FPA in light of that purpose.[120]

Other scholars and practitioners have observed the purposivist approach adopted by the Court in *FERC v. Electric Power Supply Association*,[121] but its connection to the major questions doctrine warrants further explanation. This purposivist approach, if employed in the context of the major questions doctrine, can delineate a reasonable boundary for application of the doctrine. By giving effect to clear but

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113 *See* Christiansen, *supra* note 7, at 106; *see also* Robert R. Nordhaus, *The Hazy "Bright Line": Defining Federal and State Regulation of Today's Electric Grid*, 36 ENERGY L.J. 203, 204 (2015).

114 *Elec. Power Supply Ass'n*, 577 U.S. at 261.

115 *Id.* at 277.

116 *Id.* at 291.

117 *Id.*

118 *See id.* at 277 n.5.

119 *See id.*; *see also* Marbury v. Madison, 5 U.S. 137 (1803).

120 FERC v. Elec. Power Supply Ass'n, 577 U.S. at 290–91 (discussing how wholesale demand response helps FERC achieve the broad regulatory goals like protecting "against excessive prices" that the Commission is charged with under the Federal Power Act) (citation omitted).

121 *See* Heidi Marie Werntz, *Counting On* Chevron*?*, 38 ENERGY L.J. 297, 307 (2017). *See generally* Christiansen, *supra* note 7.

broadly written statutes, the Court can afford agencies the flexibility to adapt to innovations in their field when Congress intended, while still preventing agencies from legislating on major questions outside the area delegated by Congress.

Additionally, this purposivist delineation of the doctrine appropriately balances the various separation of powers concerns that surround the major questions doctrine. It does not require the Court to cede its Article III powers of interpretation to the agencies; rather, the Court retain the final say on whether or not Congress intended to grant broad enough authority to enable an agency to respond to an innovation.[122] Nor does it require the Court to allow Congress to delegate away their Article I powers, as it simply adheres to the longstanding "intelligible principle" test.[123] And finally, unlike some of the extreme reaches of the expanding major questions doctrine, it does not undermine Congress's ability to exercise its Article I powers by imposing a clear statement rule that requires an impractical level of precision and foresight from Congress if they wish to empower an agency to respond to change and innovation. Other commentators have critiqued other "clear statement rules" that operate similarly to the strong version of the major questions doctrine for similar intrusions upon legislative prerogatives.[124] These critiques have argued that clear statement rules are intrusive upon Congress's legislative powers because, as in the context of the avoidance canon's clear statement rule, they strain the interpretation of statutory language away from its most natural reading.[125] By contrast, the clear statement component of the major questions doctrine intrudes upon Congress's legislative powers by imposing an undue burden upon Congress to be hyper-specific, and perhaps even clairvoyant, if they wish to allow agencies to adapt to changing circumstances as practicality so often requires. The purposivist approach taken by the Court in *FERC v. Electric Power Supply Association*,[126] if adopted in the major questions context, could alleviate this burden and the separation of powers issues it brings. Therefore, this approach can provide a guiding principle for application of the major questions doctrine that allows the doctrine to serve its intended function—ensuring that courts, not agencies, say what the law is—while enabling Congress to delegate the task of responding

122 *See generally* Werntz, *supra* note 121, at 308 (describing how the Court's analysis in cases like *FERC v. Electric Power Supply Ass'n* demonstrate that the Court is increasingly seeking to affirm its constitutional position as the final word on the scope of authority Congress has delegated to an agency by statute).

123 Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 472 (2001).

124 *See* John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 418–19 (2010); *see also* Sunstein, *supra* note 1, at 475.

125 *See generally* Sunstein, *supra* note 1, at 475.

126 *See supra* notes 110–16 and accompanying text.

to innovation in a rapidly changing economy to the agencies with relevant expertise.

C. West Virginia v. EPA

As discussed above, *West Virginia v. EPA* involved challenges to the EPA's efforts to regulate coal plant emissions.[127] While the majority opinion contributed to the preeminence of clear statements and skepticism toward newness in the modern major questions doctrine,[128] the dissent merits some discussion here. In her dissent, Justice Kagan emphasized the possibility of broad delegations from Congress and the importance of the Court acknowledging these delegations in accordance with the statutory purpose and legislative intent.[129] In this case, Justice Kagan's dissenting opinion recognized yet another "broadly framed" delegation of power from Congress to an agency in the realm of energy, this time in section 111 of the Clean Air Act.[130] She noted that Congress frequently makes such broad delegations of power where they fall within the receiving agency's "wheelhouse."[131] She argued that, accordingly, an agency exercising a newfound power that comports with their expertise and the general aims of the statute warrants less judicial skepticism about whether the action is aligned with the aims of Congress.[132]

Justice Kagan's dissent in *West Virginia v. EPA* also notes that the Court's apparent shift toward a skeptical focus on newness is problematic. The majority's decision rests on one claim alone: that generation shifting is just too new and too big a deal for Congress to have authorized it in section 111's general terms. But that is wrong. A key reason Congress makes broad delegations like section 111 is so an agency can respond, appropriately and commensurately, to new and big problems. Congress knows what it does not and cannot know when it drafts a statute, and Congress therefore gives an expert

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127 *See* West Virginia v. EPA, 142 S. Ct. 2587 (2022); *see supra* Section I.B.3.

128 *See supra* Section I.B.3.

129 West Virginia v. EPA, 142 S. Ct. at 2628 (Kagan, J., dissenting) ("But that is just what Congress did when it broadly authorized EPA in Section 111 to select the 'best system of emission reduction' for power plants." (internal citation omitted)).

130 *Id.* at 2633.

131 *Id.*

132 *Id.* ("To decide whether an agency action goes beyond what Congress wanted, courts must assess (among other potentially relevant factors) the nature of the regulation, the nature of the agency, and the relationship of the two to each other. In particular, we have understood, Congress does not usually grant agencies the authority to decide significant issues on which they have no particular expertise. So when there is a mismatch between the agency's usual portfolio and a given assertion of power, courts have reason to question whether Congress intended a delegation to go so far." (internal citation omitted)).

agency the power to address issues—even significant ones—as and when they arise.[133]

In essence, Justice Kagan argues that when Congress makes a broad delegation of authority it often intends to afford an agency the ability to deal with the exact kinds of new and unforeseeable issues that the majority seems to take issue with.[134] Overall, the dissent does not contend that the case presents something less than a major question. Nor does it contend that the statute is ambiguous or that EPA's interpretation thereof is entitled to deference under *Chevron*. Rather, Justice Kagan finds that Congress did speak clearly in the Clean Air Act by crafting a statute with broad but intelligible objectives and leaving the technical decisions therein to the experts they delegated the field to.[135]

While this argument did not prevail in the context of the EPA's attempt to impose new restrictions on coal power plant operations, its persuasive effect is stronger in the context of an agency confronting innovative new technology or practices. In such situations, the agency's expertise in the field is critical to maintaining a consistent approach to regulation. Furthermore, the argument that Congress intended to delegate with such flexibility is forceful in these situations because the agency asserting power over innovations within their wheelhouse is not using the statutory flexibility to push the outer bounds of their authority, but rather to adapt to changing circumstances squarely within the field of their authority. Thus, while this approach is merely a dissent in the context of the EPA and the Clean Air Act, it may still hold water in future major questions cases concerning agency adaptation to innovation.

Ultimately, these cases in the court's energy jurisprudence demonstrate the benefits of a purposivist approach to identifying the boundaries of an agency's statutorily delegated authority. Such a purposivist approach can give proper effect to congressional efforts to delegate broad authority and enable agencies to respond to innovations in their field. In doing so, it carefully balances the separation of powers issues at stake in any case concerning the delegation of power between branches, including major questions doctrine cases. Finally, it mitigates the problems with a skeptical eye toward newness of agency power that Justice Kagan noted in *West Virginia v. EPA*, which would be especially

133 *Id.*

134 *Id.*

135 *Id.* at 2642 ("First, Members of Congress often don't know enough—and know they don't know enough—to regulate sensibly on an issue. Of course, Members can and do provide overall direction. But then they rely, as all of us rely in our daily lives, on people with greater expertise and experience. Those people are found in agencies. Congress looks to them to make specific judgments about how to achieve its more general objectives. And it does so especially, though by no means exclusively, when an issue has a scientific or technical dimension.").

problematic if applied to an agency responding to new technology or practices within their field of regulatory authority.[136] The benefits of such an approach to the major questions doctrine can be further illuminated by examining other areas of law.

III. Drawing Support From Other Areas of Law

The Court's energy and electricity jurisprudence, although a valuable example, is not the only stronghold of a purposivist approach to finding clear statements. Nor is it the only area of law where we see prominent critiques of overdemanding versions of clear statement rules. As the following sections demonstrate, commentators and courts alike have noted a suite of problems with hypertextualist approaches to clear statement rules in other areas of the law and adopted or retained more purposivist alternatives in other areas still.

A. Clear Statements in Other Areas of Law

The Court's recent movement toward requiring agencies to point to a very clear statement from Congress delegating authority to regulate or address major questions is reminiscent of clear statement principles in other areas of law. In his article, Harvard Law professor John F. Manning noted that clear statement rules have been employed by the court (1) in the context of federalism, creating a presumption that Congress did not intend to displace state law unless they explicitly stated so, (2) to create a presumption of nonretroactivity, even in civil cases, arising from the Ex Post Facto Clause's analogous prohibition on retroactive penal legislation among other constitutional provisions concerning retroactivity, and (3) to create a presumption of reviewability of administrative action.[137] Professor Manning persuasively argued that these clear statement rules do a poor job of defining, and of protecting, the constitutional values their proponents argue they stand for.[138] He noted that they can impose a burdensome "judicial tax" upon legislation,[139] and effectively argued that they are coarse tools for protecting constitutional values that do not exist in the abstract but are carefully delineated in the text of the Constitution as the result of compromise.[140]

These critiques are also applicable to a clear statement rule crafted to protect the nondelegation and separation of powers norms that the major questions doctrine purports to protect. These constitutional norms do not exist in the abstract. They are the result of a careful

136 *Id.*

137 Manning, *supra* note 124, at 407–13.

138 *Id.* at 449–50.

139 *Id.* at 425.

140 *See, e.g.*, *id.* at 449–50.

allocation between the branches in Articles I, II, and III. But just as Professor Manning noted of the Federalism canon, the nondelegation doctrine—upon which the major questions doctrine rests—threatens to become a restriction on congressional power that exceeds the limitations explicitly imposed by the constitutional enumerations from which the doctrines were derived.[141] This underscores the argument discussed further below that an unlimited major questions doctrine threatens to dispense of the intelligible principle limitation on nondelegation doctrine.[142]

Furthermore, some commentators have proposed that the clear statement rule emerging in the major questions doctrine goes beyond other clear statement rules and acts as a "super-strong clear statement rule."[143] Eskridge and Frickey first coined the term "super-strong clear statement rules," which they defined as clear statement rules that "establish very strong presumptions of statutory meaning that can be rebutted only through unambiguous statutory text *targeted at the specific problem*."[144] The clear statement rule in the major questions doctrine seems to be moving in this direction as the Court, in cases like *West Virginia v. EPA*, has declined to recognize broad or implicit congressional delegations and sought very direct language.[145] Whatever term we apply to this rule, the countermajoritarian concerns Eskridge and Frickey noted about such rules are troubling in the context of major questions cases concerning agency response to innovations within the field they already regulate.[146] As they noted, "super-strong clear statement rules are extraordinarily countermajoritarian: they not only pose the possibility of ignoring legislative expectations, but they also make it quite hard for Congress to express its expectations even when it is focusing on the issue."[147] This is particularly true when Congress wishes to grant an agency the authority to handle new innovations as they arise, because it may be impossible for Congress to predict these innovations with precision.

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141 *Id.* at 410 (arguing that in certain federalism cases, the Court extrapolated a "restriction on federal power" that "exceeded the particular limitations prescribed by the enumeration from which the value was derived").

142 *See infra* note 143 and accompanying text.

143 Marla D. Tortorice, *Nondelegation and the Major Questions Doctrine: Displacing Interpretive Power*, 67 BUFF. L. REV. 1075, 1125 n.231 (2019) (suggesting that the major questions doctrine may function as a "super-strong clear statement rule," a term first defined by William Eskridge and Philip Frickey). *See* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 612 (1992).

144 Eskridge & Frickey, *supra* note 143, at 612 (emphasis added).

145 *See supra* Section II.C.

146 *See* Eskridge & Frickey, *supra* note 143, at 637.

147 *Id.* at 638.

Thus, a clear statement rule in the major questions doctrine that demands too much foresight and precision within a statute burdens both Congress and administrative agencies. However, a clear statement rule guided by a focus on statutory purpose may be a more workable approach. This notion gains support from approaches focused on statutory purpose in other areas of law, as discussed below.

B. Where Statutory Purpose Still Prevails

Despite the emphasis on statutory text often used to justify clear statement rules and push back against invocations of legislative intent, the discipline of interpreting statutory purpose has not disappeared from the Supreme Court's jurisprudence. There are multiple areas of the law that still employ, or even emphasize, the search for statutory purpose among the Court's primary roles. These areas include Field Preemption and Spending Clause cases, among others.

1. Field Preemption

Field preemption is a doctrine of law by which Congress may "foreclose any state regulation in [an] *area*."[148] Recognizing this effect of federal law requires a court to delineate the boundaries of the "area" a federal law implicitly occupies.[149] That is, even where the precise object of a state law differs from the corresponding federal law, it may still impermissibly intrude upon the federally regulated field,[150] but this can only be determined by first discerning what that field is. While this may seem like a ripe area for the careful analysis of the words Congress chose, the courts have continued to place statutory purpose at the forefront of their analysis in field preemption cases. This principle is evident in *Oneok, Inc. v. Learjet, Inc.*, another case from the Court's energy jurisprudence.[151]

Oneok concerned plaintiff-respondents who purchased natural gas directly from interstate pipelines.[152] The respondents alleged that they were made to overpay because the interstate pipelines had colluded to manipulate natural gas indices. Pursuant to this belief, the respondents brought state law antitrust claims against the interstate pipeline companies.[153] The defendant pipelines argued that the Natural Gas Act preempted the application of state antitrust law to the facts of this

148 Oneok, Inc. v. Learjet, Inc., 575 U.S. 373, 377 (2015) (emphasis in original) (quoting Arizona v. United States, 567 U.S. 387, 401 (2012)).

149 *See id.*

150 *See* Arizona v. United States, 567 U.S. at 402–03.

151 *Oneok, Inc.*, 575 U.S. at 376.

152 *Id.*

153 *Id.* at 384.

case.[154] Thus, the Court confronted the issue of preemption, and noted that field preemption rather than conflict preemption was applicable here because "[n]o one [had claimed] that any relevant federal statute expressly pre-empts state antitrust lawsuits."[155] The Court noted that "even where, as here, a statute does not refer expressly to pre-emption, Congress may implicitly pre-empt a state law, rule, or other state action."[156]

In their analysis, the *Oneok* Court had to determine what field or area Congress had occupied through the Natural Gas Act.[157] In other words, they had to determine what area of authority Congress had delegated to FERC.[158] By definition though, the discussion of field preemption is predicated on the fact that Congress had not explicitly stated what the preempted area was.[159] Therefore, where a field preemption case deals with an enabling act like the Natural Gas Act, the Court's analysis must find and recognize implicit delegations of authority from Congress. So in *Oneok*, with weighty federalism principles at stake, the Court looked to the clear statutory purpose of the Natural Gas Act.[160] They determined that while the Natural Gas Act was aimed at delegating authority over interstate transportation of natural gas to the Commission, it also included a clear objective of preserving state regulation of other areas.[161] The Court then determined that the state antitrust laws at issue were not aimed at the same statutory purpose as the Natural Gas Act and that the Act itself did not include among its purposes the objective of precluding state laws like the ones at issue.[162] Thus, they held that the Act did not preempt the respondents state law claims.[163] They reached this conclusion without pointing to any explicit statement to that effect in the statutory language, having focused instead on the broad objectives of the statutory scheme read as a whole.

2. *Spending Clause*

Purposivist statutory interpretation also survives in areas of the Court's modern jurisprudence beyond its efforts to interpret the scope of agency authority. For example, the Court has employed purposivism

154 *Id.* at 383.
155 *Id.* at 377.
156 *Id.* at 376–77.
157 *See id.* at 376.
158 *See id.*
159 *See id.*
160 *Id.* at 378.
161 *See id.* at 385–86.
162 *See id.*
163 *See id.* at 390–91.

to give effect to Congress's clear intent in Spending Clause cases such as *National Federation of Independent Business v. Sebelius*.[164] In that case the Court considered the Patient Protection and Affordable Care Act. The case presented, among others, the question of whether the Act's individual mandate provision could be upheld as a constitutional exercise of Congress's power to "lay and collect Taxes."[165] The Court concluded that it could.[166]

To reach this conclusion, the Court had to confront the argument from the states that it was not possible to uphold this provision as a tax because "Congress did not 'frame' it as such."[167] In other words, the states argued that Congress had not spoken with sufficient clarity to indicate that this provision was indeed a tax. In response, the Court elevated the purpose and operation of the statute over its form. It reasoned that interpreting the law to be a tax despite use of the word "penalty" was not "judicial legislation," but merely gave "practical effect to the Legislature's enactment."[168] It is important to note the context in which this "functional" approach appears—in an issue of constitutional law, concerning the boundaries of Congress's powers.[169] Yet, the court did not demand extremely precise language from Congress that was perfectly tailored to every future objection or dilemma. To do so would have created a new separation of powers problem wherein the Article III branch begins to impede on Congress's exercise of its Article I powers. Instead, the Court avoided this dilemma by giving effect to the clear, albeit broad, purpose of the legislation.

The Court's field preemption and Spending Clause jurisprudence amplify the objective and benefits of the purposivist approach demonstrated in the discussion of the Court's energy jurisprudence above.[170] As the preceding cases show, such an approach can help courts give effect to the legislative objectives Congress intended while balancing separation of powers and related constitutional concerns. The Court should implement these lessons in the application of the major questions doctrine going forward to assess when Congress has spoken clearly, and to delineate between agency attempts to respond to innovation in their field on one hand and agency attempts to enter entirely new fields on the other.

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164 *See* 567 U.S. 519 (2012).

165 *See id.* at 537; *see also* U.S. Const. art. I, § 8, cl. 1.

166 *Sebelius*, 567 U.S. at 575.

167 *Id.* at 569 (internal citation omitted).

168 *Id.* at 569–70; *see also* Kiel Brennan-Marquez, *Magic Words*, 23 Wm. & Mary Bill Rts. J. 759, 762–65 (2015) (characterizing this opinion as a "functional approach," in contrast to an emphasis on "magic words").

169 *See* Brennan-Marquez, *supra* note 168, at 762.

170 *See supra* Part II.

IV. Implementing These Lessons in the Case of New Technologies and Innovative Practices

Both the energy and nonenergy examples above illustrate the virtues of an approach to statutory interpretation that gives effect to broad and flexible statutory objectives. Considering the lessons from those cases, the Court should adopt two default rules when confronted with a major questions case involving broadly drafted delegations of agency authority. First, the Court should recognize that finding a clear statement from Congress delegating such authority does not require the presence of specific words relating to the new technology or practice at issue. Rather, a broad and flexible statutory purpose can serve as a clear statement that Congress intended to afford an agency the ability to respond to a range of shifting circumstances in the field they regulate. And second, the Court should distinguish between an agency entering an entirely new field based on a long-extant statute, which warrants judicial skepticism, and an agency responding to new innovations within their field, which does not. Under these two default rules, courts should generally affirm agency efforts to regulate new technology or new practices so long as the regulations fall within the field of delegated authority under a broad enough statute, as well as within the apparent expertise of the agency.

A. Article III Courts May Discern "Clear Statements" in Statutory Language, even in the Absence of "Magic Words," by Emphasizing Statutory Purpose

Recently, the Court has leaned toward a version of the major questions doctrine that would require agencies wishing to regulate any area deemed to be a major question to first point out clear authorization from Congress.[171] Moreover, the Court seems to be searching for explicit statements from Congress directing the agency to address the exact matter at issue in order to meet this bar.[172] Such an interpretation of the major questions doctrine is concerning. It threatens to waive the judicial responsibility of saying what the law says and risks letting the nondelegation principle expand unfettered by the intelligible principle as it searches for what some commentators have called "magic words."[173]

This "magic words" critique derives, in part, from Justice Robert's comments in the *National Federation of Independent Business v. Sebelius* case.[174] In *Sebelius*, the Chief Justice cited to *Quill Corp. v. North*

171 *See supra* Section I.B.

172 *See id.*

173 *See* Brennan-Marquez, *supra* note 168, at 760–61.

174 Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 565 (2012).

Dakota, a 1992 case in which the Court discussed previous holdings and stated that "[m]agic words or labels should not disable an otherwise constitutional levy."[175] Applying the Court's rejection of a "magic words" requirement to the context of agency authority under a broadly drafted enabling statute suggests that if the delegation of such authority would be constitutional if explicitly stated, then the delegation should not be struck down merely for failure to incant the "magic words."[176] A counterargument may be offered that a more demanding clear statement rule in the major questions doctrine is motivated by a desire to protect certain norms, like the separation of powers embedded in the Constitution.[177] However, recognizing that a broad and flexible statutory purpose can serve as a clear statement of congressional intent to authorize adaptation by the agency reflects a commendable compromise. Specifically, it reflects a compromise between separation of powers concerns about Congress giving away its Article I powers and separation of powers concerns about courts exceeding their Article III powers by denying the clear Congressional intent.

It is important to note that this approach would only enable agency regulation within the field of authority that was the clear objective of Congress's legislation, as bounded by an "intelligible principle."[178] There are certainly statutes which have narrow enough delegations of power that they would not comfortably bear an assertion by the relevant agency of jurisdiction over new, adjacent technologies. In fact, all statutes have a judicially discoverable outer limit that can be discerned from the level of generality in the words Congress chose to use.[179] To take another example from the world of energy law, the Natural Gas Act cannot support the regulation of pure hydrogen interstate pipelines without amendment.[180] This is true even though hydrogen, as a gaseous fuel, shares many of the same transportation and use-case characteristics as natural gas, and despite the strong policy arguments for FERC

175 *Id.* (quoting Quill Corp. v. North Dakota, 504 U.S. 298, 310 (1992)).

176 *Id.*; *see also* Brennan-Marquez, *supra* note 168, at 763.

177 *See* John F. Manning, *Clear Statement Rules and the Constitution*, 110 Colum. L. Rev. 399, 399, 403, 417 (2010).

178 Whitman v. American Trucking Ass'ns, Inc., 531 U.S. 457, 472 (2001); *see also* Reiter, *supra* note 6, at 4 (expressing concerns that the expanding, stronger form of the major questions doctrine threatens to endorse a version of the nondelegation doctrine "*without* the limiting, i.e., 'intelligible principle' exception").

179 *See* City of Arlington v. FCC, 569 U.S. 290, 296 (2013) ("Congress knows [how] to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion.").

180 *See* William G. Bolgiano, *FERC's Authority to Regulate Hydrogen Pipelines Under the Interstate Commerce Act*, 43 Energy L.J. 1, 62–63 (2022). *But see* Michael Diamond, *Jurisdiction Over Hydrogen Pipelines and Pathways to an Effective Regulatory Regime*, 3 Energy Bar Ass'n Brief 2 (2022) (noting that, while susceptible to judicial challenges, there are some counterarguments to suggest that FERC could assert authority over hydrogen under the Natural Gas Act).

to be in charge of hydrogen pipelines based on their expertise.[181] This is because Congress chose to draft the Natural Gas Act with narrow, resource-specific language.[182] Conversely, the Federal Power Act's language was drafted in a resource-agnostic manner that can support broad regulation of disparate technologies like solar, wind, gas, and coal, as well as new practices on the grid like demand response and distributed generation.[183] Thus, the purposivist approach still adheres to the intelligible principle test and does not allow Congress to exceed its Article I powers. Ultimately, the Court can achieve a better balance of the presiding constitutional concerns by giving effect to broad but intelligible statutory purpose rather than demanding hyperspecificity from Congress.

B. The Court Should Refine its Inquiry into "Newness" in Major Questions Doctrine Cases

The recent major questions doctrine cases have also highlighted a trend toward doubling down on judicial skepticism where the agency regulation at issue is new.[184] This trend is concerning because, as of yet, the Court has not distinguished between agencies attempting to enter entirely new fields and agencies asserting authority over new innovations within their longstanding fields of expertise.[185] Furthermore, an overly broad application of this skepticism toward newness threatens to undermine agency capacity to respond to new technology and practices in its field, and cuts against decades of longstanding precedent, as described below.[186] Therefore, the Court should adopt a default rule under which the newness of an agency assertion of authority only yields enhanced skepticism where it constitutes entry into a new field by the agency. Agencies asserting authority over new issues within their established fields of authority should be exempt from such skepticism.

In his Energy Bar Association Brief, Professor Harvey Reiter noted two cases from the Supreme Court that emphasized the importance of flexibility in the judicial interpretation of enabling acts so that agencies can respond to innovations or other changes in the fields they regulate.[187] In *National Broadcasting Co. v. United States*,[188] the Court acknowledged that Congress had given the FCC "expansive powers" in the 1934 Communications Act, and that those powers were broad and flexible enough to accommodate the FCC's chain broadcasting

181 *See* Bolgiano, *supra* note 180, at 62–63.

182 *See generally id.*

183 *See supra* notes 106–09 and accompanying text.

184 *See supra* Sections I.B.1–.2.

185 *See supra* notes 73, 94–97 and accompanying text.

186 *See* Reiter, *supra* note 6, at 9–10.

187 *Id.*

188 Nat'l Broad. Co. v. United States, 319 U.S. 190 (1943).

regulations even though such regulation was not explicitly contemplated in the statutory language.[189] The Court acknowledged that in enacting this legislation, "Congress was acting in a field of regulation which was both new and dynamic."[190] It emphasized that "attempting an itemized catalogue of the specific manifestations" of the power it was delegating to the FCC would frustrate the purpose of the Act.[191] Therefore, the Court determined that Congress had delegated authority over "broad areas for regulation," giving the agency the flexibility to respond to changes that may come.[192] This holding affirmed the principle that Congress cannot be expected to foresee every detail of a rapidly evolving field of enterprise, so courts must afford agencies the flexibility to respond to new innovations in their fields if Congress has delegated broad authority with the intent of enabling the agency to do so.[193]

More than two decades later the Court again affirmed the importance of this kind of flexibility. In *American Trucking Associations v. Atchison, Topeka & Santa Fe Railway Co.*,[194] the Court affirmed the Interstate Commerce Commission's ("ICC") authority to promulgate regulations that required railroads to offer certain services.[195] In this case, the Court confronted challenges from the appellees.[196] The appellees asserted that the ICC did not have the authority to promulgate such rules and regulations, and specifically that the Commerce Act the ICC had relied upon did not grant this authority.[197] The Court ultimately determined that the regulations at issue were within the ICC's delegated authority.[198] In doing so, the Court noted that

> [r]egulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday.[199]

Thus, the Court once again affirmed the importance of flexible delegations of authority for agencies addressing dynamic sectors of our economy.

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189 *Id.* at 219; *see also* Reiter, *supra* note 6, at 9.

190 *Nat'l Broad. Co.*, 319 U.S. at 219.

191 *Id.*

192 *See id.* at 219–20.

193 *See id.*

194 Am. Trucking Ass'ns, Inc. v. Atchison, Topeka & Santa Fe Ry. Co., 387 U.S. 397 (1967).

195 *Id.* at 422.

196 *Id.* at 400.

197 *Id.*

198 *See id.* at 405.

199 *Id.* at 416.

These cases militate in favor of flexible delegations—if agencies are to "adapt their rules and practices to the Nation's needs in a volatile, changing economy," it is axiomatic that they cannot be prohibited from promulgating rules in response to such changes simply because they are new.[200] A close reading of their language, however, indicates that this flexibility was never intended to be unlimited. The Court in *National Broadcasting Co. v. United States* spoke of Congress delegating "broad areas for regulation," yet they recognized that there were still exercises of power outside these delegated areas.[201] Specifically, they held that "[g]eneralities unrelated to the living problems of radio communication of course cannot justify exercises of power by the Commission."[202] Similarly, the Court in *American Trucking Associations, Inc. v. Atchison, Topeka & Santa Fe Railway Co.* held that agencies are only supposed to adapt to changing circumstances "within the limits of the law."[203] These caveats to the general message of the importance of administrative flexibility in these cases support drawing a distinction within the Court's skepticism toward newness in major questions cases: such skepticism should be applied where agencies surpass the area of delegated authority by intruding upon new fields, but is not warranted when agencies attempt to address new issues within broad areas of delegated authority.

This approach is supported by the Court's energy jurisprudence as well, as a comparison of *FERC v. Electric Power Supply Ass'n* and *West Virginia v. EPA* demonstrates.[204] In *FERC v. Electric Power Supply Ass'n*, the challenged assertion of authority was FERC's effort to regulate the prices for demand response.[205] Although regulating demand response was a new exercise of authority for FERC, it fell within the scope of the Commission's delegated "statutory duties" under the Federal Power Act.[206] It was, therefore, appropriate for the Court to refrain from applying enhanced skepticism toward the newness of this component of FERC's regulatory quiver. By contrast, although the EPA's authority to regulate pollutants under the Clean Air Act is longstanding good law, and although many of those pollutants come from electric generating facilities, it strains the language of the Clean Air Act to claim that it enables the EPA to direct the mix of energy resources on

200 *See id.*

201 *Nat'l Broad. Co.*, 319 U.S. at 220.

202 *Id.* at 219.

203 *Am. Trucking*, 387 U.S. at 416.

204 *See* FERC v. Elec. Power Supply Ass'n, 577 U.S. 260, 291 (2016); West Virginia v. EPA, 142 S. Ct. 2587, 2610 (2022).

205 *See supra* note 112 and accompanying text; *see also* FERC v. Elec. Power Supply Ass'n, 577 U.S. at 261.

206 *Elec. Power Supply Ass'n*, 577 U.S. at 291.

the grid.[207] This was one of the key reasons for the judicial skepticism in that case, which ultimately led the Court to strike down the EPA's regulation.[208]

However, the Court has not yet clearly drawn this distinction in its major questions jurisprudence.[209] Going forward, to properly balance the concerns of exceeding delegated authority with the importance of administrative flexibility noted in the cases above, the Court should clarify that agency claims of new power warrant skepticism only where they arise beyond the field of authority Congress has delegated to an agency. This rule should not, however, apply to agency assertions of new power to address novel technology or practices within their recognized fields of authority. This distinction plays a key role in ensuring that the major questions doctrine appropriately restrains agencies from usurping Congress's legislative powers, while affording agencies the flexibility they need to keep their regulations relevant and functional.

Conclusion

While the major questions doctrine, as an exception to *Chevron* deference, serves a legitimate purpose of protecting the constitutionally prescribed separation of powers, its modern expansion threatens to undermine the ability of administrative agencies to fully and properly execute the law handed down by Congress. The danger of the modern major questions doctrine lies primarily in two developments: the emergence of an exceptionally demanding clear statement rule within the doctrine and broadly applied skepticism toward the exercise of new powers by agencies. As this Essay has described, the Supreme Court's energy jurisprudence demonstrates that the Court need not enforce a strict clear statement rule within the doctrine because the Court is capable of discerning when Congress has clearly conferred a broad and flexible delegation of authority upon an agency.

The Supreme Court should also refine its focus on newness within the doctrine to apply enhanced skepticism only to agency assertions of new power outside the field of authority Congress has delegated to them. To do otherwise contradicts the Court's precedent regarding the importance of agency flexibility and undermines Congress's intended delegations. These adjustments are especially important for the Court to adopt in the context of new technology or new practices enabled by such technology. Agency attempts to respond to such innovation may include seemingly new powers, but in fact they generally remain

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207 *See West Virginia v. EPA*, 142 S. Ct. at 2610 (holding that the power the EPA claimed to discover was "transformative" to scope of authority (quoting Util. Air. Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014))).

208 *See id.* at 2616.

209 *See supra* notes 73, 94–97 and accompanying text.

within the intelligible principle of the authority delegated by Congress. In many cases, Congress could not have foreseen these innovations but nevertheless intended to enable an agency to respond to such changes within its field of expertise. By adopting the approach described above, the Court can continue to safeguard the separation of powers, while keeping the administrative state effective and efficient rather than bureaucratic and slow.