

Major Questions in Crisis Governance

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ABSTRACT

What do student loan forgiveness, a vaccine-or-test mandate, and a nationwide eviction moratorium all have in common? They are all federal administrative crisis governance measures, issued under statutory emergency authorization during the COVID-19 pandemic, that were invalidated by the Supreme Court under the major questions doctrine.

The major questions doctrine bars agencies from regulating “major” issues without express prior statutory authorization from Congress. But this is fatal to administrative crisis governance. For as the German legal theorist Carl Schmitt observed, a true emergency will always engender the unexpected, and ex ante legislation will inevitably fall short. Congress cannot see emergencies coming and, for each unique crisis, issue specific instructions to administrative agencies in advance. Yet, this is what the Supreme Court expects when it applies the major questions doctrine to administrative emergency regulations. Thus, the doctrine in its current form contains a major flaw: by denying agencies sufficient flexibility, it effectively prohibits the rapid public crisis responses that administrative agencies are uniquely equipped to supply. This is no mere bureaucratic inconvenience, but a serious threat to public safety and welfare in states of emergency.

This Article presents a solution to this problem. It is the first to propose a retheorization of the major questions doctrine as rooted in presidential plebiscitary legitimacy, drawing on the work of Schmitt and Max Weber. It then argues that if courts apply this retheorization when reviewing administrative responses to emergencies, the fact that an emergency regulation addresses a “major question” will no longer be a death blow to administrative

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crisis governance. Instead, this modified major questions doctrine will be capable of upholding the administrative ability to respond effectively to unprecedented, rapidly-evolving emergencies, while also preventing overreach by meaningfully cabining executive power.

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INTRODUCTION

The major questions doctrine prohibits federal administrative agencies from regulating matters of “vast economic and political significance” without express statutory authorization.¹ It harkens back to the Supreme Court’s 2000 decision in *FDA v. Brown & Williamson Tobacco Corp.*, which held that the Food and Drug Administration (“FDA”) lacked authority to regulate tobacco products, since the tobacco industry was a “significant portion of the American economy,” and the Food, Drug, and Cosmetic Act did not contain clear authorization for the FDA to regulate it.² This doctrine thus forms a presumption against the delegation of major regulatory authority to administrative agencies: the idea is that if Congress wants an agency to regulate a major question, it must “speak clearly.”³

But the major questions doctrine runs into significant problems in the area of administrative crisis governance: regulatory measures taken by administrative agencies to address ongoing emergencies. Statutory authority will always lag behind the exigencies of crises, as Eric Posner and Adrian Vermeule have argued, drawing on the work of the German legal theorist Carl Schmitt.⁴ The congressional legislative process is long and slow, and ill-equipped to respond rapidly to emergencies,⁵ because, as Schmitt noted, emergencies are fundamentally and inherently unprecedented.⁶ Congress cannot possibly prescribe, *ex ante*,

¹ *West Virginia v. EPA*, 142 S. Ct. 2587, 2605 (2022) (quoting *Utility Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

² *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

³ *Utility Air*, 573 U.S. at 324.

⁴ See Eric Posner & Adrian Vermeule, *Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008*, 76 U. CHI. L. REV. 1613, 1614 (2009).

⁵ See *id.* at 1641 (reading Carl Schmitt as describing courts and legislatures as “continually behind the pace of events in the administrative state”).

⁶ See CARL SCHMITT, *POLITICAL THEOLOGY* 6 (George Schwab trans., University of Chicago Press 2005) (1922) (observing that the “state of exception” cannot be “circumscribed factually and made to conform to a preformed law”).

detailed statutory directions for how agencies should act in specific crisis situations that were not contemplated at the time of a statute's enactment. But emergencies nonetheless present major and urgent problems to which administrative agencies could respond with quick, informed administrative measures—if it were not for the major questions doctrine's impossible demand that such actions, even in a state of emergency, have express prior statutory authorization. This demand is simply unworkable, because statutes will inevitably “come too late” to effectively address crises, as Posner and Vermeule have noted.⁷ Administrative agencies thus have the upper hand over Congress when it comes to effective crisis governance, but the major questions doctrine in its current form presents a complete roadblock.

For example, consider the fate of two recent, high-profile administrative crisis governance measures. Faced with an unprecedented crisis in the form of the rapidly-spreading and highly-contagious COVID-19 pandemic, the Court employed the major questions doctrine to invalidate both the Occupational Safety and Health Administration's (“OSHA”) vaccine-or-test mandate for workplaces with more than 100 employees, and the Centers for Disease Control and Prevention's (“CDC”) nationwide eviction moratorium.

In *Alabama Ass'n of Realtors v. Department of Health and Human Services*, a “shadow docket”⁸ case, the Court vacated a stay of judgment, rendering a lower court's judgment against the CDC's COVID-19 eviction moratorium enforceable. The majority declared, “We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance,”⁹ noted that “[a]t least 80% of the country, including between 6 and 17 million tenants at risk of eviction, [fell] within the moratorium,” and determined that Congress had not authorized the CDC to exercise “such sweeping power.”¹⁰

⁷ Posner & Vermeule, *supra* note 4, at 1640.

⁸ See William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1 (2015), for the origin of the term “shadow docket” to describe non-merits opinions. See Stephen I. Vladeck, *Essay: The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123 (2019), for a discussion of how the Supreme Court's recent shadow docket decisions are increasingly resembling merits determinations.

⁹ *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (per curiam) (first quoting *Utility Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014); then *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)).

¹⁰ *Id.*

Similarly, the major questions doctrine was applied in *NFIB v. Department of Labor*, staying the OSHA emergency temporary standard (ETS) that workplaces of at least 100 employees require their workforces to be fully vaccinated or test for COVID-19 at least once a week.¹¹ There, the Court held that because the OSHA mandate was “a significant encroachment into the lives—and health—of a vast number of employees,” it was exercising “powers of vast economic and political significance” that were not “plainly authorize[d]” by the Occupational Health and Safety Act (“OSH Act”).¹² And like its fellow COVID-19 shadow docket decision, *Alabama Ass’n of Realtors*, it was later cited in *West Virginia v. Environmental Protection Agency* as precedential authority for the application of the major questions doctrine.

The Court’s position is that these COVID-19 major questions decisions implicated the major questions doctrine in exactly the same way as major questions cases that did not involve administrative crisis governance measures, with all of them constituting “an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted.”¹³ From the majority’s jurisprudential perspective, the Court merely conducted routine major questions analyses of the two COVID-19 cases and determined the agency actions in each to be impermissible because of a lack of clear congressional authorization.¹⁴ But what the Court’s major questions jurisprudence fails to recognize is that these cases were different—not because they were shadow docket decisions, but because effective crisis governance requires a flexible administrative apparatus that can rapidly respond to urgent, rapidly-evolving crises. Thus, the major questions doctrine in its current form is wholly unsuitable for judicial review of emergency agency actions, unless it undergoes a considerable theoretical and practical modification.

This Article provides that modification. Scholars have long debated the unique exigencies of judicial review in states of

¹¹ *See Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab.*, 142 S.Ct. 661 (2022).

¹² *Id.* at 665.

¹³ *West Virginia v. EPA*, 597 U.S. 697, 722 (2022).

¹⁴ *See generally id.*

emergency,¹⁵ and the major questions doctrine has been widely criticized as lacking in theoretical justification,¹⁶ or being “made-up,”¹⁷ but these two lines of scholarship have not yet been brought together to investigate the major questions doctrine’s harmful implications for administrative crisis governance.¹⁸ This Article is thus the first to fill this gap in the literature by retheorizing the major questions doctrine and showing that this retheorization solves the problem of the doctrine’s incompatibility with emergencies. In it, I argue that there is a yet to be articulated theory underlying the Court’s recent major questions jurisprudence: that of plebiscitary legitimacy. This retheorization is important because, while it does not necessarily change the outcome of most major questions cases arising in normal circumstances, it radically alters the effect of judicial review on major regulations issued by federal administrative agencies responding to an ongoing emergency. Further, I propose a specific method of incorporating a plebiscitary legitimacy factor into the judicial review of such regulations that empowers agencies to respond to emergencies effectively and swiftly, while also limiting the potential for executive overreach.

This Article proceeds in four parts. Part I highlights the classic jurisprudential question of decisional sovereignty in emergency, most famously posed by Carl Schmitt and raised by

¹⁵ See, e.g., David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565 (2003); Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011 (2003); Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029 (2004); Laurence H. Tribe & Patrick O. Gudridge, *The Anti-Emergency Constitution*, 113 YALE L.J. 1801 (2004); Sanford Levinson & Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 MINN. L. REV. 1789 (2010); Amanda Tyler, *Judicial Review in Times of Emergency: From the Founding Through the COVID-19 Pandemic*, 109 VA. L. REV. 489, 496 (2023).

¹⁶ See Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 266, 315 (“To inflict a consequence of this scale on the political branches demands a *justification* from the Court, not a rain check. Yet a rain check is all we got.”); Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777, 780 (2017) (“The Court has provided little guidance about the values that justify the [major questions doctrine].”); Josh Blackman, *Gridlock*, 130 HARV. L. REV. 241, 265 (2016) (quoting Note, *Major Question Objections*, 129 HARV. L. REV. 2191, 2197 (2016)) (“The Court’s major question jurisprudence ‘has never been justified by any coherent ‘rationale.’”).

¹⁷ *Biden v. Nebraska*, 600 U.S. 477, 549 (2023) (Kagan, J., dissenting).

¹⁸ See, e.g., Jed H. Shugerman, *Major Questions and an Emergency Question Doctrine: The Biden Student Debt Case Study in the Pretextual Abuse of Emergency Powers* 4 (Fordham L. Sch. Working Paper, Paper No. 4345019, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4345019 [<https://perma.cc/LD5D-TXUB>] (observing that the major questions doctrine impedes emergency administrative action, but not addressing the doctrine’s lack of theoretical justification).

the Supreme Court in *NFIB v. Department of Labor*. It considers *NFIB* as a particularly illustrative example of the unique pressures that emergencies place on normal judicial review of administrative action, and of two different approaches to those pressures: the clear-statement domestication model and the deferential suspension model. It then draws on the work of Eric Posner and Adrian Vermeule, who have argued for a Schmittian understanding of administrative crisis governance,¹⁹ to provide a theoretical framework for approaching the issue of emergency judicial deference to administrative agencies. Part II describes scholarly and judicial rationales that have been offered for the major questions doctrine, and, employing theories of legitimacy advanced by Schmitt and Max Weber, introduces plebiscitary legitimacy as a new and more convincing justification. Part III presents a retheorization of the major questions doctrine that incorporates presidential plebiscitary legitimacy. It argues that plebiscitary legitimacy for major-question regulation is best sourced in the President, rather than Congress. It also identifies indicators of presidential plebiscitary legitimacy and explains why such legitimacy is particularly implicated in emergencies, and thus bears special benefits for crisis governance cases. Then, it delineates its approach to preventing executive overreach. Finally, Part IV sets forth precisely how the retheorized major questions doctrine should be applied by courts evaluating administrative responses to emergencies.

I. EMERGENCIES AND JUDICIAL DEFERENCE TO ADMINISTRATIVE AGENCIES

A. *NFIB v. Department of Labor* and the Question of Emergency Decisional Sovereignty

“Sovereign is he who decides on the exception,”²⁰ Carl Schmitt’s *Political Theology* famously begins. Schmitt goes on to describe the exception as something that cannot be “codified in the existing legal order”²¹ or “circumscribed factually and made to conform to a preformed law.”²² No one can plan ahead for an

¹⁹ See Posner & Vermeule, *supra* note 4, at 1614.

²⁰ SCHMITT, *supra* note 6, at 5.

²¹ *Id.* at 6.

²² *Id.*

exception, or spell out what it constitutes or how to address it.²³ So the question that then arises for Schmitt is: “[W]ho can act?”²⁴ Who has the authority to deal with the exception?

The Supreme Court raised this exact question in *NFIB v. Department of Labor*, which stayed OSHA’s emergency rule mandating that employers with at least 100 employees require either vaccination against COVID-19 or weekly COVID-19 testing.²⁵ The decision cited the major questions doctrine, arguing that the rule involved “powers of vast economic and political significance,”²⁶ and was not clearly authorized by the OSH Act.²⁷ The emergency rule, the Court decided, fell outside the scope of the Act, because it attempted to regulate public health rather than narrowly confine itself to specific workplace dangers.²⁸

NFIB was not a full opinion on the merits,²⁹ and the per curiam opinion was accordingly terse. However, the concurrence, authored by Justice Gorsuch and joined by Justices Thomas and Alito, and the dissent, authored by Justices Breyer, Sotomayor, and Kagan, warrant particular attention as apt illustrations of emergency pressure points. They both explicitly invoked the Schmittian question of “Who decides?”³⁰ and they reveal two contrasting approaches to conceptualizing judicial review in emergencies.

Justice Gorsuch wrote of the OSHA mandate’s unconstitutional aggrandizement of both federal and state

²³ See *id.* at 6–7.

²⁴ *Id.* at 7.

²⁵ See Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab., 142 S.Ct. 661 (2022).

²⁶ *Id.* at 665, (citing Ala. Assn. of Realtors v. Dep’t of Health and & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) (*per curiam*)).

²⁷ See *id.*

²⁸ See *id.*

²⁹ However, note that the Court ordered oral argument in *NFIB*. See Amy Howe, *Justices Will Hear Arguments on Jan. 7 in Challenges to Biden Vaccine Policies*, SCOTUSBLOG (Dec. 22, 2021, 8:55 PM), <https://www.scotusblog.com/2021/12/justices-will-hear-arguments-on-jan-7-in-challenges-to-biden-vaccine-policies> [<https://perma.cc/A3F6-8F28>]. Oral argument proceeded for more than two hours. See Transcript of Oral Argument, Nat’l Fed’n. of Indep. Bus. V. Dep’t of Lab., OSHA, 142 S. Ct. 661 (2022) (Nos. 21A244 & 21A247) (noting that argument commenced at 10:00 am and ended at 12:09 pm). Even the issuance of a per curiam opinion, concurrence, and dissent, as in *NFIB*, is atypical for a “shadow docket” ruling, which usually features no reasoning or opinion at all. See *Texas’s Unconstitutional Abortion Ban and the Role of the Shadow Docket: Hearing Before the S. Comm. on the Judiciary 2*, 117th Cong. 2 (2021) (Testimony of Stephen I. Vladeck, Charles Alan Wright Chair in Federal Courts, University of Texas School of Law). Therefore, *NFIB* seems to warrant a closer reading than one might ordinarily give non-merits opinions.

³⁰ See *NFIB*, 142 S. Ct. at 667 (Gorsuch, J., concurring); *id.* at 676 (Breyer, Sotomayor, & Kagan, JJ., dissenting).

legislative power.³¹ He cautioned that “[t]he question before us is not how to respond to the pandemic, but who holds the power to do so”³² and warned against emergency suspensions of constitutional norms, concluding that “if this Court were to abide [the law’s demands] only in more tranquil conditions, declarations of emergencies would never end and the liberties our Constitution’s separation of powers seeks to preserve would amount to little.”³³ According to this view, Congress is the only proper sovereign in this situation.

The dissent argued that COVID-19 is a workplace danger, that the mandate was clearly authorized by the Act, and that the Court failed to show appropriate deference to the fact-finding and expertise of the agency.³⁴ It described the majority as having imposed an extra-textual, judicially-created limitation on the emergency regulatory powers explicitly granted to OSHA by statute,³⁵ and noted that the Court had “substitute[d] judicial diktat for reasoned policymaking.”³⁶ And it asked:

Underlying everything else in this dispute is a single, simple question: Who decides how much protection, and of what kind, American workers need from COVID-19? An agency with expertise in workplace health and safety, acting as Congress and the President authorized? Or a court, lacking any knowledge of how to safeguard workplaces, and insulated from responsibility for any damage it causes?³⁷

The dissent concluded, “When we are wise, we know not to displace the judgments of experts, acting within the sphere Congress marked out and under Presidential control, to deal with emergency conditions. Today, we are not wise.”³⁸ This is the specter of the Schmittian question once again: Who decides in the state of emergency? The dissent appears to suggest that in this case, the Supreme Court, not Congress or the President, took upon itself the role of decisional sovereign.

Yet, a precise characterization of the legal nature of the COVID-19 emergency requires further explication. While COVID-19 undisputedly presented an emergency that required quick

³¹ See *id.* at 667 (Gorsuch, J., concurring).

³² *Id.* at 670 (Gorsuch, J., concurring).

³³ *Id.*

³⁴ See *id.* at 676 (Breyer, Sotomayor, and Kagan, JJ., dissenting).

³⁵ See *id.* at 673 (Breyer, Sotomayor, and Kagan, JJ., dissenting).

³⁶ *Id.* at 674 (Breyer, Sotomayor, and Kagan, JJ., dissenting).

³⁷ *Id.* at 676 (Breyer, Sotomayor, and Kagan, JJ., dissenting).

³⁸ *Id.*

decisions to be made, with only the identity of the proper decisionmaker being disputed in *NFIB v. Department of Labor*, was it truly a pure form of the Schmittian exception? Could it be domesticated and decided within the “existing legal order,”³⁹ or did it at any time require stepping wholly outside the bounds of our constitutional and legal system? The *NFIB* concurrence suggests that it indeed posed a serious threat to our constitutional and legal system—that absent the restraining power of the Supreme Court, the OSHA mandate would have led to the erosion and ultimate destruction of our constitutional liberties.⁴⁰ Under this view, we stood on the brink of a truly Schmittian situation in which the executive attempted to suspend the constitutional separation of powers in order to effectively address the pandemic. Yet the fact that OSHA withdrew its emergency temporary standard thirteen days after the Supreme Court decided *NFIB v. Department of Labor*⁴¹ demonstrates that as much of an emergency as the COVID-19 pandemic presented, it was never as much of a full-on Schmittian threat to the existing legal regime as the concurrence suggested. The executive branch might disagree with the Supreme Court’s decision, but it did not challenge the Court’s right to be the ultimate arbiter of the constitutionality of measures enacted in response to the pandemic. Constitutional suspension was never in question—and because of that, the emergency did not exist wholly outside the law.

But Schmitt observed that the question of decisional sovereignty is present even in states of emergency that fall short of calling into question the entire existing legal order,⁴² and the COVID-19 pandemic thus remained an emergency with Schmittian implications in the form of the unprecedented questions it raised about the allocation of the authority to decide. The dissent rightly pointed out that the pandemic, “an infectious disease that ha[d] already killed hundreds of thousands and

³⁹ SCHMITT, *supra* note 6, at 6.

⁴⁰ See *NFIB*, 142 S. Ct. at 670 (Gorsuch, J., concurring).

⁴¹ COVID-19 Vaccination and Testing; Emergency Temporary Standard, 87 Fed. Reg. 3928 (Jan. 26, 2022) (to be codified at 29 C.F.R. pt. 1910).

⁴² SCHMITT, *supra* note 6, at 12 (“If measures undertaken in an exception could be circumscribed by mutual control, by imposing a time limit, or finally, as in the liberal constitutional procedure governing a state of siege, by enumerating extraordinary powers, the question of sovereignty would then be considered less significant but would certainly not be eliminated.”).

sickened millions,”⁴³ posed a nationwide “emergency unprecedented in [OSHA’s] history.”⁴⁴ Indeed, the COVID-19 pandemic posed an emergency unprecedented in the entire history of the modern administrative state. The only other pandemic to approach COVID-19’s death toll in the United States was the 1918 influenza outbreak,⁴⁵ well before the post-New Deal proliferation of administrative agencies. Thus, the Schmittian exceptionalism of the COVID-19 pandemic is contained in the fact that it required extraordinary solutions within legal frameworks created many years before that had never been contemplated and could not specifically encompass the actions necessary to combat this particular emergency. As Justices Breyer, Sotomayor, and Kagan wrote, “[t]he enacting Congress of course did not tell the agency to issue this Standard in response to this COVID-19 pandemic—because that Congress could not predict the future.”⁴⁶

NFIB v. Department of Labor thus lies at the conceptual crossroads of the Schmittian state of exception and “ordinary jurisprudence.”⁴⁷ Because the Biden administration never questioned the authority of the Supreme Court to decide the constitutionality of the OSHA emergency temporary standard, and because it never laid claim to unchecked, unlimited emergency authority, the existing legal order remained preeminent and unchallenged. For that reason, OSHA’s response to the COVID-19 pandemic did not represent a Schmittian exception in its pure form, which Schmitt described as a situation in which the “state remains, whereas law recedes.”⁴⁸ However, “the question of sovereignty” was indeed “not ... eliminated.”⁴⁹ It remained in the form of the allocation of decisional authority, and the divided Court, exercising its ordinary jurisprudence, was hard-pressed to grapple with it. The per curiam opinion tersely deemed the OSHA vaccine-or-test mandate a major question and proffered only a thin and tenuous argument that COVID-19 represented a public health

⁴³ *NFIB*, 142 S. Ct. at 675 (Breyer, Sotomayor, & Kagan, JJ., dissenting).

⁴⁴ *Id.*

⁴⁵ See Helen Branswell, *COVID-19 Overtakes 1918 Spanish Flu as Deadliest Disease in American History*, STAT (Sept. 20, 2021), <https://www.statnews.com/2021/09/20/COVID-19-set-to-overtake-1918-spanish-flu-as-deadliest-disease-in-american-history/> [<https://perma.cc/4FDY-SJL4>].

⁴⁶ *NFIB*, 142 S. Ct. at 674 (Breyer, Sotomayor, & Kagan, JJ., dissenting).

⁴⁷ See *id.*

⁴⁸ SCHMITT, *supra* note 6, at 12.

⁴⁹ *Id.*

hazard, not a workplace one.⁵⁰ The concurrence feared that upholding the OSHA mandate would lead to a complete and unending state of exception in which the executive would be unchecked and left free to seize unlimited authority.⁵¹ The dissent argued for reading the OSH Act “in the ordinary way,” which it believed would authorize the emergency standard,⁵² but also stressed the importance of judicial deference to the judgment of experts during an emergency.⁵³

The per curiam opinion and the concurrence, therefore, feared what the emergency might do to the existing legal order, with the concurrence in particular opining that OSHA was asking for nothing less than “almost unlimited discretion”⁵⁴ and that but for the Court’s application of the major questions doctrine, the executive branch’s emergency powers would effectively result in the nullification of the Constitution.⁵⁵ This is the view that the OSHA mandate could not and should not be treated differently because of its status as a crisis governance measure, that the major questions doctrine is simply a “clear statement rule” requiring specific and explicit congressional authorization,⁵⁶ and that no special deference is due administrative agencies in a state of emergency. I will call this “clear-statement domestication” because it represents the position that an emergency is of no legal significance and must be domesticated to fit within the everyday legal order.

On the other hand, the dissent believed that although ordinary statutory interpretation of the OSH Act would suffice to uphold the vaccine-or-test mandate, the COVID-19 pandemic was an emergency situation that called for particular deference to OSHA’s expertise.⁵⁷ This is the view that quickly and effectively

⁵⁰ See *NFIB*, 142 S. Ct. at 665 (per curiam).

⁵¹ See *id.* at 669–670 (Gorsuch, J., concurring).

⁵² *Id.* at 673 (Breyer, Sotomayor, & Kagan, JJ., dissenting).

⁵³ See *id.* at 676.

⁵⁴ *Id.* at 668 (Gorsuch, J., concurring).

⁵⁵ *Id.* at 670 (“Respecting [the law’s] demands may be trying in times of stress. But if this Court were to abide them only in more tranquil conditions, declarations of emergencies would never end and the liberties our Constitution’s separation of powers seeks to preserve would amount to little.”).

⁵⁶ See Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1012 (2023) (manuscript at 3) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4165724), (citing *West Virginia v. EPA*, 597 U.S. 697, 735 (2022) (Gorsuch, J., concurring)).

⁵⁷ See *NFIB*, 142 S. Ct. at 676 (Breyer, Sotomayor, & Kagan, JJ., dissenting).

responding to crises requires generalist judges to be restrained in reviewing the actions of administrative agencies that possess expert knowledge and specialized competence. I will refer to this as “deferential suspension” because it is the position that in emergency situations involving crisis governance, ordinary judicial review must be tempered with respect for superior administrative subject-matter expertise, which results in the ordinary legal regime being slightly suspended, by way of greater judicial deference than would normally be granted.

B. Madisonian Versus Schmittian Approaches to Congressional Emergency Responses

Eric Posner and Adrian Vermeule have argued that there are two ways of viewing Congress’s role in responding to emergencies: a “Madisonian view” and a “Schmittian” view.⁵⁸ The Madisonian view is essentially what Justice Gorsuch advocated in the *NFIB* concurrence: the understanding that whatever the crisis, Congress is the “deliberative institution par excellence,” and the executive may not act without clear congressional authorization, to be followed by judicial review.⁵⁹ But Posner and Vermeule suggest that this is “hopelessly optimistic in times of crisis,” declaring that under the Schmittian view, “the deliberative aspirations of classical parliamentary democracy” no longer function according to Madisonian ideals but are rather “a transparent sham under modern conditions of party discipline, interest-group conflict, and a rapidly changing economic and technical environment.”⁶⁰ Caught up in partisan politics, legislatures do not have the motivation to pass crisis legislation in advance, even if they could foresee such crises ahead of time,⁶¹ and in the moment of crisis itself, legislatures “can rarely act swiftly and decisively as events unfold.”⁶²

Posner and Vermeule observe that under the Schmittian view, legislatures and courts inevitably “come too late” to emergencies.⁶³ Drawing on Schmitt’s observation that the Montesquieuan separation of powers creates a situation in which legislation can never be more than abstract rules or general norms that are

⁵⁸ See Posner & Vermeule, *supra* note 4, at 1642.

⁵⁹ *Id.*

⁶⁰ *Id.* at 1643.

⁶¹ See *id.* at 1643–44.

⁶² *Id.* at 1645.

⁶³ *Id.* at 1640.

fundamentally retrospective, and in which courts are likewise bound to the past and backward-looking,⁶⁴ they note that legislatures and courts will always lag temporally behind the “pace of events in the administrative state.”⁶⁵ In crises, therefore, Posner and Vermeule believe administrative agencies will be first responders, legislatures will likely be asked to grant them new delegations of authority *ex post*, and the exigent nature of the crisis will ensure that legislators will “give the executive much of what it asks for.”⁶⁶ As for courts, Posner and Vermeule are convinced that they will come even later to the crisis, be minimally involved or not at all, “and essentially do mop-up work after the main administrative programs and responses have solved the crisis, or not.”⁶⁷

Posner and Vermeule then examine 9/11 and the 2008 financial crisis as paradigmatic examples of this Schmittian approach to administrative crisis governance. With respect to both crises, they find that the executive did not wait for Congress to pass specific authorizing legislation before they responded to the crisis unfolding in real-time: the Treasury and Federal Reserve employed a “strained reading” of a 1932 statute to bail out AIG in 2008, and the Bush administration relied on a 1977 statute with a wholly different legislative purpose to restrict al Qaeda’s funding after 9/11.⁶⁸ Courts likewise played a minimal role. Post-9/11, courts dealing with administrative law cases have tended more towards deference than searching review,⁶⁹ and the judicial review provisions in the Emergency Economic Stabilization Act (“EESA”) of 2008 effectively preclude injunctive or any other form of equitable relief except for constitutional violations.⁷⁰

There is, of course, a difference between the self-imposed judicial deference of the post-9/11 national security cases and the

⁶⁴ Carl Schmitt, *Die Rechtswissenschaft im Führerstaat*, 7 ZEITSCHRIFT DER AKADEMIE FÜR DEUTSCHES RECHT 438–39 (1935).

⁶⁵ Posner & Vermeule, *supra* note 4, at 1641.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *See id.* at 1646.

⁶⁹ *See* Cass Sunstein, *Judging National Security Post-9/11: An Empirical Investigation*, 2008 SUP. CT. REV. 269, 280–82 (2008); *see also* Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1143–45 (2009).

⁷⁰ Emergency Economic Stabilization Act § 119(a)(2)(A) (2008); *see also* Archit Shah, *Emergency Economic Stabilization Act of 2008*, 46 HARV. J. ON LEGIS. 569, 579 (2009); William Perdue, Note, *Administering Crisis: The Success of Alternative Accountability Mechanisms in the Capital Purchase Program*, 29 YALE L. & POL. REV. 295, 312 (2010).

congressionally-imposed judicial deference required by the EESA. But Posner and Vermeule believe that judicial deference to administrative agencies in crisis situations is the norm rather than the exception because lower courts will be loath to challenge executive decisions, the Supreme Court will find the issues raised too numerous and too fact-bound,⁷¹ and searching judicial review would likely impair the effectiveness of crisis responses.⁷² Posner and Vermeule present the fundamental problem as one of legitimacy: courts, they argue, certainly may have strong legal grounds for reviewing agency action in emergencies, but they “lack the political legitimacy needed to invalidate” emergency regulations, and therefore “pull in their horns.”⁷³

The Madisonian view is indeed not well-suited to crisis governance, and courts and legislatures do inevitably address emergencies too late. The Schmittian view of the administrative state is far more cognizant of the practical reality of administrative crisis governance: that administrative agencies will inevitably be the first to respond because they do not suffer from the time lags structurally inherent in Congress and the judiciary. But Posner and Vermeule’s assumption that courts would show increased deference, for reasons of pragmatism and political legitimacy, has been disproven by the Supreme Court’s major questions jurisprudence during the COVID-19 emergency. The Court now insists that whatever the practical costs of invalidating administrative agency action, there is no substitute for clear-statement congressional authorization.⁷⁴ And it does not appear troubled by its lack of political legitimacy because it does not appear to consider its major question decisions to be “invalidations” of agency regulations as much as “passive-virtue”⁷⁵ decisions to return the matter to Congress, which possesses the politically legitimating quality of being a democratically-elected

⁷¹ See Posner & Vermeule, *supra* note 4, at 1657.

⁷² See *id.* at 1658.

⁷³ *Id.* at 1659.

⁷⁴ See *Ala. Assn. of Realtors v. Dep’t of Health and Hum. Servs.*, 141 S. Ct. 2485, 2490 (2021) (“It is indisputable that the public has a strong interest in combating the spread of the COVID–19 Delta variant. But our system does not permit agencies to act unlawfully even in pursuit of desirable ends It is up to Congress, not the CDC, to decide whether the public interest merits further action here.”).

⁷⁵ See Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (coining the term).

body—unlike administrative agencies.⁷⁶ Political legitimacy has thus become an indispensable requirement for agency regulation, and in the Court’s view, it can have no other source than clear and specific congressional authorization.

Thus, Posner and Vermeule’s hypothesis that courts are reluctant to strike down emergency agency actions on political legitimacy grounds simply does not survive in the face of the major questions doctrine as deployed in *Alabama Ass’n of Realtors* and *NFIB v. Department of Labor*. Political legitimacy is indeed a critically important consideration in the Supreme Court’s major questions jurisprudence, but not in the way Posner and Vermeule think: it is not a reason for increased judicial deference to agency action in states of emergency, but instead provides the basis for increased *scrutiny*.

II. THE MAJOR QUESTIONS DOCTRINE AND ITS RATIONALES

A. The Major Questions Doctrine

In its 2022 *West Virginia v. EPA* decision, the Supreme Court applied the “major questions doctrine” to strike down the Environmental Protection Agency’s Clean Power Plan, a regulation that required existing coal-fired power plants to either decrease their electricity production or “generation shift” to cleaner energy sources.⁷⁷ It was the first time the Supreme Court explicitly referred to the doctrine by that name in a merits opinion,⁷⁸ and the dissent characterized the majority opinion as “announc[ing] the arrival of this ‘major questions doctrine.’”⁷⁹

But the major questions doctrine—the judicial requirement that for questions of great political or economic significance, administrative agency action must be grounded in express congressional authorization—predates *West Virginia v. EPA*. As the majority in *West Virginia* observed, the idea of decreased

⁷⁶ See *NFIB v. Dep’t of Lab.*, 142 S. Ct. 661, 668 (2022) (Gorsuch, J., concurring) (highlighting the importance of the major questions doctrine in ensuring governance by “the people’s elected representatives”); see also *West Virginia v. EPA*, 597 U.S. 697, 749 (2022) (Gorsuch, J., concurring) (“[W]hile we all agree that administrative agencies have important roles to play in a modern nation, surely none of us wishes to abandon our Republic’s promise that the people and their representatives should have a meaningful say in the laws that govern them.”).

⁷⁷ *West Virginia*, 597 U.S. at 697.

⁷⁸ Deacon & Litman, *supra* note 56, at 4.

⁷⁹ *West Virginia*, 597 U.S. at 763–64.

deference to agencies in major questions was clearly stated in *FDA v. Brown & Williamson Tobacco Corp.*, in which the Court ruled that the FDA lacked authority to regulate tobacco products, since the Food, Drug, and Cosmetic Act did not contain clear authorization for the FDA to do so.⁸⁰ The FDA had argued that the Act did authorize it to regulate tobacco, and the Court noted that in reviewing an administrative agency's interpretation of a congressional statute, it must be governed by *Chevron* deference.⁸¹ First, it must ask whether Congress has "directly spoken to the precise question at issue," in which case it must defer to congressional intent. But if the court determined that the statute does not directly speak to the issue, then the court must "respect the agency's construction of the statute so long as it is permissible."⁸² The Court ultimately found that Congress had spoken directly to the issue, and that it had not authorized the FDA to regulate tobacco products.⁸³ But in doing so, the Court acknowledged that it had not applied the normal *Chevron* analysis, but modified its inquiry, "at least in some measure," because of "the nature of the question presented."⁸⁴ It explained that normal *Chevron* deference assumed a congressional delegation to the agency to fill in the gaps of ambiguous statutes, but that in "extraordinary cases, . . . there may be reason to hesitate before concluding that Congress has intended such an implicit delegation."⁸⁵ And *FDA v. Brown & Williamson*, the Court reasoned, was an extraordinary case because the tobacco industry "constitut[ed] a significant portion of the American economy."⁸⁶

As the majority in *West Virginia* put it, the Court's decision in *FDA v. Brown & Williamson* emphasized the jurisprudential approach that in extraordinary cases, courts may decide not to accept a reading that "would, under more 'ordinary' circumstances, be upheld."⁸⁷ *West Virginia* also approvingly cited to language in *Utility Air Regulatory Group v. EPA* to support the proposition that the Supreme Court "'typically greet[s]' assertions

⁸⁰ *Id.* at 722.

⁸¹ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000).

⁸² *Id.*

⁸³ *Id.* at 133.

⁸⁴ *Id.* at 159.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *West Virginia*, 597 U.S. at 722.

of ‘extravagant statutory power over the national economy’ with ‘skepticism.’⁸⁸ In *Utility Air*, the Supreme Court applied *Chevron* analysis to strike down the EPA’s interpretation of the Clean Air Act as allowing it to include greenhouse gases in two statutory permitting requirements. The Court found the statute ambiguous, but rejected the EPA’s interpretation at *Chevron* step two, saying that the EPA’s interpretation was unreasonable, because it was “laying claim to extravagant statutory power over the national economy.”⁸⁹ The Court used a form of the major questions doctrine to explain its rationale: “We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast ‘economic and political significance.’”⁹⁰

Consequently, the Court announced in *West Virginia*, it was not plausible that Congress had given the EPA the authority to issue the Clean Power Plan.⁹¹ The Plan was “[a] decision of such magnitude and consequence” that it could be made only by Congress or “an agency acting pursuant to a clear delegation from that representative body.”⁹² Absent a clearer statement of congressional delegation, therefore, the Court found it entirely impermissible for an administrative agency to regulate such a major issue.

B. Scholarly Variations on Nondelegation

Scholarship has proffered a number of rationales for the major questions doctrine. Most center around the nondelegation doctrine, which is the principle that Congress may not delegate its Article I lawmaking power to others.⁹³ One such rationale has been referred to as “implied nondelegation”—the idea that if a statute is ambiguous, Congress may have intended an implied delegation to the administrative agency, but not if the legal question at issue

⁸⁸ *Id.*, (citing *Utility Air Regul. Group v. EPA*, 573 U.S. 302, 324 (2014)).

⁸⁹ *Utility Air*, 573 U.S. at 324; see also Cass R. Sunstein, *There Are Two “Major Question” Doctrines*, 73 ADMIN. L. REV. 475, 477 (2021) (arguing—pre-*West Virginia*—that there were two different forms of the major questions doctrine that interacted with *Chevron* in different ways).

⁹⁰ *Utility Air*, 573 U.S. at 324 (citing *Brown & Williamson*, 529 U.S. at 160).

⁹¹ See *West Virginia*, 597 U.S. at 735.

⁹² *Id.*

⁹³ See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935) (“Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is . . . vested.”).

is of great significance.⁹⁴ The Supreme Court’s decisions have frequently followed this line of reasoning in explaining its applications of the major questions doctrine,⁹⁵ and the Court invoked this approach again in *West Virginia v. EPA*, stating, “We presume that Congress intends to make major policy decisions itself, not leave those decisions to agencies[]”⁹⁶—but without providing much theoretical grounding for this presumption.⁹⁷ Instead, the Court simply pointed to its previous major questions decisions, ranging from *MCI* to *Brown & Williamson*, and stated that they all shared the “common thread[]” of “agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted,”⁹⁸ and concluded without much further explication that only Congress or an agency with a “clear delegation” from Congress could make such major decisions.⁹⁹

Another explanation for the implied nondelegation theory is that Congress writes legislation with the major questions doctrine in mind and that the Court is, therefore, right to infer that if Congress wanted to delegate a major question to an agency, it would have clearly stated that in the organic statute.¹⁰⁰ There is some empirical support for this theory: a 2013 study by Abbe Gluck and Lisa Schultz Bressman found that 60% of the congressional drafters they interviewed corroborated the assumption that “drafters intend for Congress, not agencies, to resolve [major] questions.”¹⁰¹ However, this assumes that Congress can identify, *ex ante*, the gaps courts will later find in its

⁹⁴ See Nathan Richardson, *Keeping Big Cases from Making Bad Law: The Resurgent “Major Questions” Doctrine*, 49 CONN. L. REV. 355, 364 (2016) (citing *Mayburg v. Sec’y of Health and Hum. Servs.*, 740 F.2d 100, 106 (1st Cir. 1984)).

⁹⁵ See *id.* at 390 (citing *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994); then *FDA v. Brown & Williamson*, 529 U.S. at 159; and then *King v. Burwell*, 576 U.S. 473, 485 (2015)).

⁹⁶ *West Virginia*, 597 U.S. at 722 (quoting *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (en banc) (Kavanaugh, J., dissenting) (internal quotation marks omitted)).

⁹⁷ See Ilan Wurman, *Importance and Interpretive Questions*, 110 VA. L. REV. (forthcoming 2024) (manuscript at 35), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4381708 [<https://perma.cc/3C27-SV2K>] (“[A]s the [major questions] doctrine now stands, if it is indeed a clear-statement rule, and even if it might be justifiable, it remains significantly undertheorized and underdeveloped.”).

⁹⁸ *West Virginia*, 597 U.S. at 722.

⁹⁹ *Id.* at 735.

¹⁰⁰ See Richardson, *supra* note 94, at 392.

¹⁰¹ Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 1003 (2013).

statute,¹⁰² which may not always be possible, particularly with respect to the inevitable major gaps that necessarily arise from unprecedented states of emergency.

Another view, the “nondelegation canon” theory, posits that no matter what Congress intended in its statute, it cannot constitutionally delegate authority to regulate major questions to agencies.¹⁰³ Yet “[a]gencies administer large sectors of the economy on a regular basis, often larger than those at issue in the major questions cases.”¹⁰⁴ And even if the nondelegation canon theory is merely read as limiting an agency’s discretion to interpret ambiguous statutes, it seems to protect the judiciary’s primacy as interpreter of statutes rather than Congress’s primacy as legislator.¹⁰⁵

Blake Emerson has suggested a different theory. He also believes the nondelegation doctrine underlies the major questions doctrine but suggests that the real justification for it is democratic legitimacy. The animating concern here, he argues, is first and foremost the idea that “legislation itself . . . [has] special democratic credentials.”¹⁰⁶ For Emerson, Congress is “the preeminent voice of the people as a whole,” and thus has the unique normative authority to make value-based decisions that direct regulatory policy.¹⁰⁷ He suggests, therefore, that the major questions doctrine is motivated by the desire to “protect and . . . strengthen the connection between the people and governmental action by presuming that a popular and deliberative process settles major questions of policy.”¹⁰⁸ He argues that this has “constitutional, institutional, and discursive dimensions:”¹⁰⁹ “the people’s constitutional choice to vest legislative power primarily in Congress must be preserved; Congress’s special institutional competencies to represent electoral constituencies and investigate

¹⁰² See Richardson, *supra* note 94, at 392.

¹⁰³ See *id.* at 394 (citing Cass R. Sunstein, *Beyond Marbury: The Executive’s Power to Say What the Law Is*, 115 YALE L.J. 2580, 2607–08 (2006); then Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 316 (2000); and then Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 245 (2006)).

¹⁰⁴ *Id.* at 395.

¹⁰⁵ See *id.* at 395–96.

¹⁰⁶ Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2045 (2018).

¹⁰⁷ *Id.* at 2046.

¹⁰⁸ *Id.* at 2048.

¹⁰⁹ *Id.*

social problems must be respected; and the People's ongoing engagement with the government in the form of public debate and interbranch dialogue must be fostered."¹¹⁰

Emerson also adds that insofar as the major questions doctrine requires courts, rather than agencies, to resolve statutory ambiguity, this is because administrative agencies are traditionally seen as Weberian technocrats who should not have the authority to determine major questions, which implicate political values.¹¹¹ Only the legislature is thought to have the power to make these political value choices, and the courts ensure that Congress does not delegate this responsibility to agencies.¹¹²

The democratic-legitimacy rationale for the major questions doctrine thus rests on the idea that major questions are political, and that political decisions of significance must be made by Congress, the democratically-elected deliberative body *par excellence*. But while the political nature of major questions cannot be denied, it is not deliberation in itself that is key to the Supreme Court's modern major questions jurisprudence. Rather, the Court cares about popular sovereignty—it appears to hold a belief in the people's ability to direct their government's decisions with respect to the regulation of politically significant questions. The modern major questions doctrine is not, in fact, about what Congress thinks, but about what the people think. It is not merely an expression of democratic legitimacy, but of a specifically plebiscitary form of that legitimacy. It is for this reason, as I will demonstrate, that the Supreme Court's most recent major questions arguments about the separation of powers, elections, and congressional accountability are analytically weak and full of logical inconsistencies. For what they implicitly express but have thus far not explicitly identified is a plebiscitary legitimacy rationale for the major questions doctrine.

C. The Judicial Struggle to Explain the Major Questions Doctrine

While majority opinions have largely declined to theoretically justify the major questions doctrine, concurring members of the Court have offered a variety of explanations for the Supreme Court's recent applications of the doctrine. Justice Gorsuch

¹¹⁰ *Id.*

¹¹¹ *See id.* at 2048–59.

¹¹² *See id.* at 2059.

asserted in the *NFIB* concurrence that the major questions doctrine protected Article I's vesting of the legislative power in the hands of Congress, "the people's elected representatives."¹¹³ The concurrence likened the major questions doctrine to the nondelegation doctrine, which it claimed preserves democratic accountability and avoids legislative responsibility-shirking by prohibiting lawmakers from foisting unpopular decisions onto unelected bureaucrats.¹¹⁴ Justice Gorsuch then argued that the OSH Act did not provide clear authorization for OSHA to issue a vaccine mandate, but that even if the Act had provided such authorization, that would likely have been an unconstitutional delegation of legislative authority from Congress to the agency.¹¹⁵ The point of the major questions doctrine, the concurrence declared, was to preserve "government by the people," as opposed to "government by bureaucracy."¹¹⁶

Yet as the *NFIB* dissent pointed out, OSHA had not issued a vaccine mandate, but a vaccine-or-test mandate.¹¹⁷ The per curiam opinion, while invoking the major questions doctrine, had strangely failed to note this, arguing that the majorness of OSHA's action was premised in part on the fact that a "vaccination . . . cannot be undone at the end of the workday."¹¹⁸ Indeed, it closed by stating that "[r]equiring" the vaccination of 84 million Americans¹¹⁹ was *too major* a question to fit into OSHA's statutory authority. But the mischaracterization of the ETS as a mandate exclusively requiring vaccination, when it in fact provided a testing alternative, reveals what exactly the Court found *major* about the agency action at issue here, namely its scope: it reached 84 million Americans. The Court was thinking about "the people," concerned that this might be precisely one of the scenarios Justice Gorsuch described, in which bureaucrats—allegedly undemocratic, unaccountable, and unelected—imposed potentially unpopular measures on a significant part of the citizenry.

¹¹³ Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., OSHA, 595 U.S. 109, 124 (2022) (Gorsuch, J., concurring).

¹¹⁴ See *id.* (citing Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J. L. & PUB. POL'Y 147, 154 (2016)).

¹¹⁵ *Id.* at 125–26.

¹¹⁶ *Id.* at 125 (citing Antonin Scalia, *A Note on the Benzene Case*, AM. ENTER. INST., J. ON GOV'T & SOC'Y, July–Aug. 1980, at 25, 27).

¹¹⁷ *Id.* at 136 (Breyer, Sotomayor, & Kagan, JJ., dissenting).

¹¹⁸ *Id.* at 118 (per curiam) (quoting *In re MCP No. 165*, 20 F.4th 264, 274 (6th Cir. 2021)).

¹¹⁹ *Id.* at 120 (per curiam).

But the strange irony of this view is that, as the dissent again articulated, bureaucrats are not unaccountable; they are a part of the executive branch, which is headed by the President.¹²⁰ The ETS, wrote Justices Breyer, Sotomayor, and Kagan, had not only expertise to recommend it, but also “political accountability:” “OSHA is responsible to the President, and the President is responsible to—and can be held to account by—the American public.”¹²¹ And even more strangely, the dissenting Justices observed, the accountability rhetoric chimed discordantly against the reality that, by invoking the major questions doctrine to invalidate the ETS, the Court, itself an unelected, unaccountable body, was displacing an accountable agency’s judgment for its own.¹²²

The Court then spoke again in *West Virginia*, fleshing out and doubling down on the structure it had laid out in *NFIB*. The majority opinion declared that it could not uphold the EPA’s Clean Power Plan because “[a] decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body.”¹²³ Note again the emphasis on the idea that Congress is a *representative* body, and that only a body that represents the people may authorize a decision of such political “magnitude and consequence.”¹²⁴ Furthermore, Justice Gorsuch again wrote separately, joined in his concurrence by Justice Alito, to develop the theoretical justifications for the Court’s major questions doctrine in its current form. As in *NFIB*, he linked it to the nondelegation doctrine, stating that the major questions doctrine serves to “protect the Constitution’s separation of powers” by ensuring that the executive may only limit itself to filling the gaps in existing congressional regulatory schemes.¹²⁵

The theory behind this is ultimately one of accountability to the public: “It is vital because the framers believed that a republic—a thing of the people—would be more likely to enact just laws than a regime administered by a ruling class of largely unaccountable ‘ministers.’”¹²⁶ Justice Gorsuch then described the

¹²⁰ *Id.* at 138 (Breyer, Sotomayor, & Kagan, JJ., dissenting).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *West Virginia v. EPA*, 597 U.S. 697, 735 (2022).

¹²⁴ *Id.*

¹²⁵ *Id.* at 737 (Gorsuch, J., concurring).

¹²⁶ *Id.* (citing THE FEDERALIST No. 11, at 85 (C. Rossiter ed., 1961)).

parade of horrors that the major questions doctrine is intended to prevent: legislation “becoming nothing more than the will of the current President, or, worse yet, the will of unelected officials barely responsive to [them;]”¹²⁷ administrative agencies regulating areas that should be left to state governments, which are likely to be “more local and more accountable[;]”¹²⁸ and administrative encroachment onto the “lawmaking power [of] the people’s elected representatives.”¹²⁹

Then, in *Biden v. Nebraska*, the Supreme Court again invoked the major questions doctrine in striking down the Biden administration’s attempt to ameliorate some of the financial impact of the COVID-19 emergency by forgiving student loans, in the amount of \$10,000 per borrower, under the Higher Education Relief Opportunities for Students Act of 2003 (“HEROES Act”).¹³⁰ The Court declared, “[t]he question here is not whether something should be done; it is who has the authority to do it.”¹³¹ And citing *West Virginia*, the Court argued that since the Secretary of Education had never before invoked the HEROES Act to exercise “powers of this magnitude,” defined as “the authority, on his own, to release 43 million borrowers from their obligations to repay \$430 billion in student loans,” the HEROES Act did not support such a reading.¹³² *Biden v. Nebraska* also noted that the estimated economic impact of the student loan forgiveness plan was “ten times the ‘economic impact’ . . . we found significant in concluding that an eviction moratorium implemented by the Centers for Disease Control and Prevention triggered analysis under the major questions doctrine.”¹³³ But while *Biden v. Nebraska* attempted to ground its holding in analysis of the statutory text,¹³⁴ it only served as further illustration of what Justice Gorsuch’s *NFIB* and *West Virginia* concurrences indicated—namely, that the major questions doctrine serves more as an expression of the Court’s vision of the separation of powers than textual interpretation. Justice Barrett addressed this in her *Biden v. Nebraska* concurrence, admitting that the “clear statement’

¹²⁷ *Id.* at 739.

¹²⁸ *Id.* (citing *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012)).

¹²⁹ *Id.* at 737–38.

¹³⁰ *Biden v. Nebraska*, 143 S. Ct. 2355, 2362 (2023).

¹³¹ *Id.* at 2372.

¹³² *Id.*

¹³³ *Id.* at 2373.

¹³⁴ *See id.* at 2368–70.

version of the major questions doctrine ‘loads the dice’ so that a plausible antidelegation interpretation wins even if the agency’s interpretation is better,”¹³⁵ and dedicating her analysis to an attempt to construct a more plausibly textual justification of the major questions doctrine. She argued that the major questions doctrine was a textualist “tool for discerning—not departing from—the text’s most natural interpretation.”¹³⁶ She also described the doctrine as “situat[ing] text in context,” and that context “includes common sense,” as opposed to textual “literalism.”¹³⁷ But Justice Barrett wrote alone, joined by no other member of the Court.¹³⁸ And as Vermeule has observed, this approach is “untenable,” since “[t]he very maxims that Justice Barrett wants to describe as common-sensical ‘historical and governmental context’ or ‘background legal conventions’ are indistinguishable from the ones she wants to describe as problematic substantive ‘values external to the statute.’”¹³⁹ This interpretive indeterminacy in fact led Justice Kagan to suggest that it might better support the dissenting position than the majority.¹⁴⁰

But while these concurrences are unsatisfying as theoretical justifications for the major questions doctrine, we can nonetheless discern from them that a majority of the Court in recent cases appears to be less concerned with its inconsistent textual arguments regarding the textual limits of a given statutory delegation, than with the structural question of who has the constitutional authority to decide a question deemed to be major. As the *Biden v. Nebraska* majority explicitly stated, “this is a case about one branch of government arrogating to itself power belonging to another,” namely, “the Executive seizing the power of the Legislature.”¹⁴¹ Yet what is curious is that the separation of powers and accountability to “the people” have merged in the

¹³⁵ *Id.* at 2378 (Barrett, J., concurring).

¹³⁶ *Id.* at 2376.

¹³⁷ *Id.* at 2378–79.

¹³⁸ *See id.* at 2376.

¹³⁹ Adrian Vermeule, *Text and “Context”*, YALE J. ON REGUL. (July 13, 2023), <https://www.yalejreg.com/nc/text-and-context-by-adrian-vermeule/> [<https://perma.cc/N3L5-UWE9>]. See also Kevin Tobia, Daniel E. Walters & Brian G. Slocum, *Major Questions, Common Sense?*, 97 S. CAL. L. REV. ____ (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4520697 [<https://perma.cc/6JQX-QUL6>], for another critical view of Justice Barrett’s description of the major questions doctrine as “common sense” textualism.

¹⁴⁰ *Biden*, 143 S. Ct. at 2398 n.3 (Kagan, J., dissenting) (“I could practically rest my case on Justice Barrett’s reasoning.”).

¹⁴¹ *Id.* at 2373 (majority opinion).

Court's major questions jurisprudence. No one questions that the text of Article I vests all federal lawmaking power in Congress, but the separation of powers argument on its own does not answer the question of why agencies may regulate minor questions but not major ones—even assuming the Court's determination of majorness could be objectively fixed. If the major questions doctrine assumes that agency regulation of "major" questions is tantamount to unconstitutional lawmaking, how is that constitutional separation of powers concern obviated when agencies regulate smaller matters? As Nathan Richardson has observed, "[a]gencies administer large sectors of the economy on a regular basis, often larger than those at issue in the major questions cases."¹⁴² And Mila Sohoni has suggested that the major questions doctrine appears to be selectively enforcing the nondelegation principle without actually fully committing to it by declining to invalidate minor delegations that "fill up the details."¹⁴³ The Court has applied this doctrine,¹⁴⁴ instead of "articulating a rule-like nondelegation principle that would logically apply across *all* statutory delegations to *all* agencies."¹⁴⁵

The reality behind the Court's separation of powers gloss is that it does not reflect a formalist structural concern about an idealized tripartite system. Rather, its concern is a pragmatic one, illustrated by the *West Virginia* majority's acknowledgement that "in certain extraordinary cases, *both* separation of powers principles *and* a practical understanding of legislative intent make us 'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking there."¹⁴⁶ Principles are rhetorically contrasted with practicality because strictly formalist separation of powers principles do not in fact motivate the analysis at all. Rather, the Court is once again tying its practical concerns to the nondelegation doctrine and using the major questions doctrine as a vehicle because it is fundamentally concerned about "the people," and whether the will of the governed is being reflected in the regulation of major issues.

¹⁴² Richardson, *supra* note 94, at 395.

¹⁴³ Sohoni, *supra* note 16, at 295 (citing *Gundy v. United States*, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting)).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 294–95.

¹⁴⁶ *West Virginia v. EPA*, 597 U.S. 697, 723 (2022) (emphasis added) (citing *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

For as much respect as the Court gives to Congress as an elected body that represents the people, as quick as Justice Gorsuch is to articulate popular sovereignty rationales for the major questions doctrine, and as often as political accountability is repeatedly invoked, these analyses are grounded neither in the text of the congressional statutes at issue nor in special solicitude for historical congressional practices.¹⁴⁷ Instead, they are a judicially created revival of the nondelegation doctrine, which has been dormant since 1935¹⁴⁸ and on whose continued weakness as legal grounds for statutory invalidation Congress may well have learned to rely. These analyses have ignored the fact that in the OSH Act, Congress explicitly gave OSHA the authorization to develop emergency temporary standards in order to react quickly to emerging new dangers.¹⁴⁹ And they have disregarded normal statutory interpretation in favor of extratextual major questions invalidation—an approach that carries with it a strong flavor of policy rather than law. The major questions doctrine after *West Virginia* is no longer the simple exception to *Chevron* deference it once was, in which judges merely interpreted statutes with fresh eyes and without special deference to the agency’s interpretation.¹⁵⁰ Rather, it is now distancing itself from textual analysis altogether: the *West Virginia* dissent noted that the majority did not begin to discuss the meaning of the statutory provision at issue until the last few pages of the opinion,¹⁵¹ and the majority itself acknowledged that its “approach under the major questions doctrine is distinct.”¹⁵²

¹⁴⁷ See *id.* at 782 (Kagan, J., dissenting) (noting that Congress has had a long history of delegating broad authority to administrative agencies, and that that delegation “helped to build a modern Nation” by enabling agencies to “fill[] in—rule by rule by rule—Congress’s policy outlines”); see also Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 *passim* (2021); Nicholas Parillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288 *passim* (2021).

¹⁴⁸ The Supreme Court has not invalidated any act of Congress on nondelegation grounds since *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). See *Gundy v. United States*, 139 S. Ct. 2116, 2130–31 (2019) (Alito, J., concurring).

¹⁴⁹ See 29 U.S.C. § 655(c)(1).

¹⁵⁰ See Cass R. Sunstein, *There Are Two “Major Questions” Doctrines*, 73 ADMIN. L. REV. 475, 482 (2021) (“[T]he *Chevron* carve-out theory of the major questions doctrine . . . insists that courts, and not agencies, should interpret ambiguous provisions in ‘extraordinary cases’ . . . [This] does not necessarily mean that the agency will lose; it means only that the question of law will be resolved independently by courts.”).

¹⁵¹ *West Virginia*, 597 U.S. at 766 (Kagan, J., dissenting).

¹⁵² *Id.* at 724 (majority opinion).

Why are major questions so different? There are legal and logical holes in every justification members of the Court have thus far offered for its strangely policy-oriented, atextual major questions jurisprudence. The Justices speak of nondelegation, of the separation of powers, of accountability and elections. But it is all rhetoric; there is no clear or consistent principle that unites all these threads, except for “the people,” to whom these justifications inevitably return. The Court seems unable to articulate the major questions doctrine as anything but an exception to its normal textualist approach to statutes. It also seems to struggle to locate its rationale in anything but a vague concern that decisions of major political import have closer ties to “the people” than administrative agencies are thought to possess. The reason for all this is, at its core, political rather than strictly legal: the major questions doctrine is rooted in the Court’s consideration of political legitimacy.

D. Legality and Plebiscitary Legitimacy

Carl Schmitt provided a particularly apt distinction between legality and legitimacy. He described the former as the basis of the legislature, a representative, elected body, and contrasted it with the plebiscitary-democratic legitimacy of “the people,” realized in the Weimar Constitution through direct-democratic measures such as referenda.¹⁵³ The elected legislature, he noted, is based on indirect democracy and must therefore be considered democratically inferior to direct democracy, rendering the people “an extraordinary, superior lawmaker,” while the legislature is an “ordinary, subordinate one.”¹⁵⁴ The people as “lawmaker” thus “give expression to *voluntas*, not *ratio*, demanding legitimacy and not legality.”¹⁵⁵

Yet modern administrative agencies in the United States are creatures of expertise and technocratic specialization, and are frequently characterized as embodiments of the Weberian rational bureaucratic type of legality.¹⁵⁶ For Weber, bureaucracy obtains its legitimacy through its reliance on the formal legality of statutory authority¹⁵⁷ and the impersonality, precision, and rationality of its

¹⁵³ See CARL SCHMITT, LEGALITY AND LEGITIMACY 59–66 (Jeffrey Seitzer ed. & trans., 2004) (1932).

¹⁵⁴ *Id.* at 59.

¹⁵⁵ *Id.* at 62.

¹⁵⁶ See Emerson, *supra* note 106, at 2052–53.

¹⁵⁷ See MAX WEBER, ECONOMY AND SOCIETY 341–42 (Keith Tribe ed. & trans., 2019) (1921).

application of that authority.¹⁵⁸ But rule-bound and rational bureaucracy is contrasted with what Weber referred to as charismatic authority, which he believed to be “specifically irrational since it is alien to all rules.”¹⁵⁹ Weber noted that charismatic authority, though “authoritarian in principle,” could be refashioned into anti-authoritarian democratic legitimacy.¹⁶⁰ In particular, he described plebiscitary democracy as a “a form of charismatic rule concealed by the formality that legitimacy is derived from the will of the ruled, and is only by virtue of this capable of being sustained.”¹⁶¹ However, Weber was careful to note that plebiscitary legitimacy’s derivation from the consent of the governed might not actually reflect “an expression of popular will.”¹⁶² Rather, the importance of the plebiscite is that it provides the legitimating basis for charismatic rule.¹⁶³

Within this framework, the bureaucratic administrative state can fairly be seen as encapsulating rational rule and the application of formal legality with statutes and regulations. But, of course, it is not an elected body of government. The Supreme Court has called out the unelected nature of the administrative state in numerous ways,¹⁶⁴ but its only solution in major questions cases has been to hand over the matter to Congress in the name of being accountable to “the people.”¹⁶⁵

Yet accountability itself is only a proxy for a more fundamental concern underlying the major questions doctrine. At

¹⁵⁸ *See id.* at 343–51.

¹⁵⁹ *Id.* at 376–77.

¹⁶⁰ *Id.* at 405.

¹⁶¹ *Id.* at 407 (emphasis omitted).

¹⁶² *Id.* at 406.

¹⁶³ *Id.*

¹⁶⁴ *See, e.g.,* *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2203 (2020) (“The [CFPB] Director is neither elected by the people nor meaningfully controlled (through the threat of removal) by someone who is.”); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 499 (2010) (“Our Constitution was adopted to enable the people to govern themselves, through their elected leaders. The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive’s control, and thus from that of the people.”); *West Virginia v. EPA*, 597 U.S. 697, 735 (2022) (“[I]t is not plausible that Congress gave EPA the authority to adopt on its own such a regulatory scheme in Section 111(d). A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that *representative* body.”) (emphasis added); *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab., OSHA*, 595 U.S. 109, 120 (2022) (emphasizing that it is not the Court’s or OSHA’s role to weigh the costs and benefits of the OSHA vaccine-or-test mandate, but that of “those chosen by the people through democratic processes”).

¹⁶⁵ *West Virginia*, 597 U.S. at 737–38 (Gorsuch, J., concurring).

its core, the Court's concern with accountability to the people is not as much about "accountability" as it is about "the people." The major questions doctrine rests on the understanding that democratic lawmaking must be sourced in the people as a legitimating entity. In other words, the Supreme Court's insistence on congressional clear statement authorization for agency regulation of major questions is fundamentally about plebiscitary legitimacy. For as Justice Gorsuch's *West Virginia* paean to Congress indicates, the major questions doctrine is justified by federal legislation's plebiscitary value:

[B]y vesting the lawmaking power in the people's elected representatives, the Constitution sought to ensure "not only that all power [w]ould be derived from the people," but also "that those [e]ntrusted with it should be kept in dependence on the people" The Constitution, too, placed its trust not in the hands of "a few, but [in] a number of hands," so that those who make our laws would better reflect the diversity of the people they represent and have an "immediate dependence on, and an intimate sympathy with, the people." Today, some might describe the Constitution as having designed the federal lawmaking process to capture the wisdom of the masses.¹⁶⁶

Yet this does not reflect the reality of the democratic legislative process. Schmitt correctly observed that legislatures in a democratic system are only indirectly democratic: they may be valued for their deliberative processes involving "discussion and openness,"¹⁶⁷ but they do not solve the question of legitimacy. Rather, the legislature's authority might well be described as charismatic in the Weberian sense but legal in the Schmittian sense. Legislators are elected and they claim legitimacy from that fact, but the exercise of their authority is the passing of statutes, a formal, slow process that involves the distinctly non-direct-democratic elements of lobbying, partisan conflict, and interest group capture—in recent years to an increasingly dysfunctional degree.¹⁶⁸ In fact, it is the perfect example of Weber's distinction

¹⁶⁶ *Id.* (second, third, and fourth alteration in original) (citations omitted).

¹⁶⁷ SCHMITT, *supra* note 153, at 64.

¹⁶⁸ See, e.g., UNIV. CHI. PRESS, CONGRESS OVERWHELMED: THE DECLINE IN CONGRESSIONAL CAPACITY AND PROSPECTS FOR REFORM 2 (Timothy M. LaPira et al. eds., 2020) (describing Congress as unable to keep up with increasingly complex policy and growing demands from lobbyists and special interest groups, as well as from constituents); LEE DRUTMAN, THE BUSINESS OF AMERICA IS LOBBYING: HOW CORPORATIONS BECAME POLITICIZED AND POLITICS BECAME MORE CORPORATE 1–3 (2015) (describing the growth of the congressional corporate lobby since the 1970s); THOMAS E. MANN & NORMAN J. ORNSTEIN, THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT

between the plebiscite as the basis for legitimacy and the actual expression of popular will. Congress does not have direct democratic processes and does not at all represent Schmittian plebiscitary democracy, but in the *West Virginia* concurrence's view,¹⁶⁹ it nonetheless may lay claim to Weberian plebiscitary authority because its members are elected. Thus, the assertion that "the people" are "intimate[ly]" connected with Congress, that congressional legislation is "derived from the people," and that the federal lawmaking process "capture[s] the wisdom of the masses"¹⁷⁰ relies on a somewhat contorted fiction of plebiscitary legitimacy.

This fiction is all the more doubtful because under the Weberian view, individual members of Congress may well have plebiscitary legitimacy, but that is unlikely to extend to Congress as a whole. The defining feature of Weberian charismatic authority, of which plebiscitary democracy is one form,¹⁷¹ is that it is fundamentally personal: an individual has charismatic authority if others see some extraordinary personal quality in him that renders him a leader they are willing to follow.¹⁷² In keeping with this view, political scientists have observed that representatives' perceived personal qualities are of particular importance to voters evaluating them,¹⁷³ but also that public approval of Congress tends to be substantially lower than constituents' approval of their own elected representatives.¹⁷⁴ Thus, while it may well be accurate to say that individual members of Congress enjoy a localized form of plebiscitary legitimacy through the process by which they are elected, this cannot be said to reach Congress itself in the same way. Congress is the sum of multiple mini-plebiscitary processes that lend legitimacy to individuals, but Weberian plebiscitary legitimacy is not something that survives aggregation into a collective body. Nor does Congress involve Schmittian plebiscitary legitimacy in the form of direct democracy for essentially the same reasons.

BACK ON TRACK 13, 216 (2006) (describing extreme partisanship as having "broken" the modern Congress and led to a "decline in the quantity and quality of [its] deliberation").

¹⁶⁹ See *West Virginia*, 597 U.S. at 737–38 (Gorsuch, J., concurring).

¹⁷⁰ *Id.*

¹⁷¹ WEBER, *supra* note 157, at 407.

¹⁷² *Id.* at 374, 376–77.

¹⁷³ Glenn R. Parker, "Can Congress Ever Be a Popular Institution?", in *THE HOUSE AT WORK* 31, 41 (Joseph Cooper & G. Calvin Mackenzie eds., 1981).

¹⁷⁴ See Robert H. Durr et al., *Explaining Congressional Approval*, 41 AM. J. POL. SCI. 175, 176 (1997); Parker, *supra* note 173, at 33.

Congress as a whole is elected in bits and pieces that, added together, are said to represent the people of the entire nation, but it has no institutional structures. Furthermore, no electoral claims to represent the will of the plebiscite, because as a body, conceptually distinguished from its individual members, it is not popularly elected, it does not run on any platform of any particular set of issues, and it legislates through compromises that are largely inscrutable, if not invisible, to the very people whose electoral choice to follow certain representatives lent them legitimacy.

But the major questions doctrine's reliance on the fiction of Congress's plebiscitary legitimacy, while theoretically unsound, is not necessarily practically fatal under ordinary circumstances. It is not controversial to assert that the legitimacy of laws in a democracy should rely on the consent of the governed. While consent to government by a particular Congress may be substantially different from consent to government by a particular representative, the major questions doctrine could do worse than ground itself in a sense of plebiscitary legitimacy, even a vague and contorted version of it.¹⁷⁵ And even if the lawmaking process is an imperfect reflection of the popular will, this is not necessarily a bad thing if the procedural complexities and slowness of its deliberative, compromise-prone nature encourage "reason and moderation,"¹⁷⁶ rather than unreasoned and imprudent legislative action in the heat of the moment. The realities of a Madisonian government thus work together with a Weberian plebiscitary legitimacy rationale to create the Supreme Court's current major questions jurisprudence.

Yet the plebiscitary legitimacy justification for the major questions doctrine overlooks another critically important source of such legitimacy, namely the President. The major questions cases suggest that the Supreme Court is presented with a choice between upholding rule by unelected bureaucrats or rule by elected congressional representatives. When Congress is not deemed to have clearly authorized agency regulation on a major issue, the choice is simple: unelected bureaucrats lack plebiscitary legitimacy, so the Supreme Court invalidates the administrative rule. But what is difficult to comprehend is why the Court does not

¹⁷⁵ See Emerson, *supra* note 106, at 2021, for another discussion of the major questions doctrine's roots in democratic legitimacy.

¹⁷⁶ SCHMITT, *supra* note 153, at 64.

acknowledge that the President has an even greater claim to plebiscitary legitimacy than Congress, and that since administrative agencies are under the control of the executive branch, this legitimacy must filter down to their actions as well. The agencies are not unaccountable—they are generally accountable to the President,¹⁷⁷ who is alone an elected official with Weberian charismatic-plebiscitary authority. Why does this not satisfy the Court in its application of the major questions doctrine? Indeed, why does the major questions doctrine “ignor[e] presidential influence altogether”?¹⁷⁸

III. PRESIDENTIAL PLEBISCITARY LEGITIMACY

A. Presidential Plebiscitary Legitimacy and the Separation of Powers

It has been suggested that a plebiscitary presidency is, “if anything[,] too weak a description of the executive in the administrative state.”¹⁷⁹ Citing the extent of congressional delegations of power to the executive, Posner and Vermeule have argued that the separation of powers has been substantially eroded, and that this is nothing to fear: the president is sufficiently restrained by public opinion.¹⁸⁰

Public opinion is indeed an important plebiscitary constraint on elected officials such as the president. But Posner and Vermeule’s position here would place a dangerous amount of authority in the hands of a single charismatic-plebiscitary leader. In addition to Schmitt’s well-known assertions that such a leader could wield essentially unlimited authority in states of exception,¹⁸¹ Weber noted that authoritarianism is the underlying principle of charismatic legitimacy, if not reinterpreted as democratic legitimacy.¹⁸²

These perils are well illustrated by Schmitt’s pro-authoritarian critique of *A.L.A. Schechter Poultry Corp. v. United*

¹⁷⁷ Independent agencies are an exception, as discussed below in Part IV.D. There is also a vast literature on the presidential theory of agency accountability. See *infra* note 219 and accompanying text.

¹⁷⁸ Emerson, *supra* note 106, at 2080.

¹⁷⁹ ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 204–05 (Oxford Univ. Press ed., 2010).

¹⁸⁰ *Id.* at 209.

¹⁸¹ See SCHMITT, *supra* note 6, at 11–12.

¹⁸² See WEBER, *supra* note 157, at 405–06.

States as a paradigmatic example of the problem with liberal constitutional concepts of law.¹⁸³ In *Schechter Poultry*, the Supreme Court struck down a provision of the National Industrial Recovery Act that authorized the President to approve fair competition codes for certain industries, declaring it unconstitutional on nondelegation grounds.¹⁸⁴ For Schmitt, this was the perfect example of separation of powers-based jurisprudence being not only tied to the past, but also opposed to any large-scale social and economic plan adaptable to a changing situation.¹⁸⁵ “Plan-opposed” (*planfeindlich*), Schmitt called such a concept of law, arguing that whatever emergency or executive-strengthening measures Montesquieuan separation-of-powers constitutionalism might create to obviate the problems of inadaptability and retrospectivity, only the complete collapse of the legislative and executive powers into each other could support the governmental “plans” necessary to meet the challenges of the modern state.¹⁸⁶ What this meant in concrete terms, Schmitt said, was an executive government that arrogated the entire legislative function to itself—specifically, a Nazi *Führerstaat* in which “law is the plan and will of the *Führer*.”¹⁸⁷

This is the logical end of the uncabined, unrestrained embrace of plebiscitary legitimacy as all-sufficient. And it is precisely this type of unlimited executive power that the major questions doctrine seems designed to prevent.¹⁸⁸ For this reason, a democratic-constitutional, anti-authoritarian solution to the major questions doctrine’s crisis-situation shortcomings must not

¹⁸³ Carl Schmitt, *Die Rechtswissenschaft im Führerstaat*, 2 ZEITSCHRIFT DER AKADEMIE FÜR DEUTSCHES RECHT 435, 439 (1935) (“*Die berühmte Entscheidung des höchsten Gerichtshofes der Vereinigten Staaten vom 27. Mai 1935, die das ganze Gesetzeswerk des National Recovery Act für verfassungswidrig erklärt, ist ein geradezu schulmäßiges Paradigma dieses vergangenheitsbezogenen, rückwärts gerichteten Gesetzesdenkens.*”) (“The famous decision of the United States Supreme Court on May 27, 1935, which declared the entire National Recovery Act to be unconstitutional, is a virtually textbook example of this past-oriented, backward way of thinking about law.”).

¹⁸⁴ *A.L.A. Schechter Poultry Corp., v. United States*, 295 U.S. 495, 541–42 (1935).

¹⁸⁵ Schmitt, *supra* note 183, at 439.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* (“*Gesetz ist für uns nicht mehr eine abstrakte, auf einen vergangenen Willen bezogenen Norm; Gesetz ist Plan und Wille des Führers.*”) (“Law is, for us, no longer an abstract norm oriented towards a past intention; law is the plan and will of the *Führer*.”).

¹⁸⁸ See *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab., OSHA*, 595 U.S. 109, 124–25 (2022) (Gorsuch, J., concurring) (“[T]he doctrine is ‘a vital check on expansive and aggressive assertions of executive authority.’” (citing *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 417 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc))).

give up on the structural integrity of the separation of powers altogether, but instead remain committed to the project of finding an approach to robust judicial review that recognizes presidential plebiscitary legitimacy while also upholding the integrity of our tripartite constitutional structure.

On the other end of the scale from Posner and Vermeule, Emerson envisions a deliberative role for the President, recognizing them as a “spokesperson for public opinion to guide administrative implementation of statutory mandates.”¹⁸⁹ This proposal is careful to note that it does not consider presidential control of administration to constitute democratic legitimacy,¹⁹⁰ and that the President’s input should influence but not bind agencies.¹⁹¹ But this falls into the same trap as the major questions doctrine—that of effectively ignoring the President’s claim to plebiscitary legitimacy. A theory of executive power in which the President has merely a discourse-fostering function in the administrative state impales itself on the opposite horn of the separation of powers dilemma Schmitt raised: it weakens the presidential role so substantially and elevates an independent bureaucracy so greatly that it subordinates the major questions doctrine’s search for legitimacy rooted in the people. Rather, it effectively creates an administrative state that has the power to regulate issues of major political significance without either the President’s plebiscitary or Congress’s indirect-democratic sources of legitimacy.

What is needed, then, is a limiting principle for involving presidential plebiscitary legitimacy in the major questions doctrine that falls between placing too much faith in structurally unbridled executive power and effectively neutralizing the President’s authority over their own administration’s regulatory policy. The questions we must ask in fashioning such a principle are: What value and practical advantages can presidential legitimacy add that congressional legitimacy cannot, and how can we determine if the plebiscite has spoken on a major question?

¹⁸⁹ Emerson, *supra* note 106, at 2076.

¹⁹⁰ *Id.* at 2078.

¹⁹¹ *Id.* at 2079.

B. The President's Plebiscitary Advantages Over Congress

The President has a better claim than Congress to plebiscitary legitimacy in both the Weberian and Schmittian forms. As I have discussed above, Congress's claim to plebiscitary legitimacy is tenuous at best and simply inaccurate at worst, but even individual members of Congress lack a connection between the body of voters who elect them and the laws they enact. This is because the mini-plebiscite of the particular district or state that elects them is not the entirety of the nation for which they subsequently legislate. Therefore, even if plebiscitary legitimacy could somehow be extended to Congress as a whole from its members as individuals, there would still be a gaping chasm between the national plebiscite and the nationwide scope of Congress's legislation.

But the President is uniquely positioned to close this gap, because they are elected as an individual, by voters across the nation, to govern in matters of nationwide scope.¹⁹² It is true that because of the Electoral College system, the President's claim to plebiscitary legitimacy in its most direct, Schmittian form is still imperfect,¹⁹³ but the claim nonetheless remains far stronger than Congress's. For despite the Electoral College and the fact that we do not have referenda or similar direct democratic measures in the federal system, the President can lay effective claim to Schmittian plebiscitary legitimacy because there is no more direct way for the national plebiscite to express its views on national matters than through the election of the President. And in keeping with the Weberian view, the President is a leader for whom charismatic authority is critical to election: voters' views of the President's personal characteristics are critically important in presidential

¹⁹² See, e.g., Jud Mathews, *Minimally Democratic Administrative Law*, 68 ADMIN. L. REV. 605, 630 (2016) (describing presidential elections as "plebiscites, in which the electorate chooses a leader based on [their] personal qualities and the political program that he offers"). See also *infra* notes 213 and 219 for further literature discussing presidential elections and administrative action.

¹⁹³ See, e.g., Sidney A. Shapiro, *Rulemaking Inaction and the Failure of Administrative Law*, 68 DUKE L.J. 1805, 1832–33 (2019) (observing that "[b]ecause of the electoral college, a nominee can win the presidency and still lose the popular vote"); Akhil Reed Amar, *A Constitutional Accident Waiting to Happen*, 12 CONST. COMMENT. 143, 143, 145 (1995) (describing the "dreaded specter of a clear popular loser becoming the electoral college winner" as a "constitutional accident waiting to happen").

elections¹⁹⁴ and for presidential approval.¹⁹⁵ It has been observed that the President is unique as “the one figure who draws together the people’s hopes and fears for the political future.”¹⁹⁶ The President is an individual who is elected because of personal characteristics the plebiscite decides render them worthy of being followed,¹⁹⁷ and the President provides the best and highest-profile example of charismatic-plebiscitary authority in the American political system.

The President, therefore, has clear plebiscitary legitimacy advantages over Congress. But in the context of the administrative state, we run into a problem similar to that we encountered with Congress as a whole versus Congress’s individual members—namely, the problem of trickle-down plebiscitary legitimacy and the impossibility of aggregating it. Does the President’s authority, derived from the people, extend to the actions of administrative agencies with respect to major questions?

For similar reasons as with Congress, it is hard to make a sweeping claim that administrative agencies possess plebiscitary legitimacy through the President. Yet agencies, unlike Congress, are not an aggregation of elected individual leaders, but are instead controlled and supervised by one. So we are faced with the trickle-down form of the problem. And unlike the aggregate form, it is not insuperable. The critical factors in determining whether plebiscitary legitimacy may extend to the regulation of major questions are public visibility and presidential control.

C. Incorporating Presidential Plebiscitary Legitimacy into the Major Questions Doctrine

The nature of a major question—the fact that it is an issue of great political or economic significance—renders it far more likely to attract public interest than the bulk of administrative regulation. But for plebiscitary legitimacy to come into the calculus at all, there must at least be some match between the substantial public interest in the issue and the visibility given to

¹⁹⁴ See Scott Clifford, *Reassessing the Structure of Presidential Character*, 54 *ELECTORAL STUD.* 240, 242–43 (2018).

¹⁹⁵ See Steven Greene, *The Role of Character Assessments in Presidential Approval*, 29 *AM. POL. RSCH.* 196, 196 (2001).

¹⁹⁶ JAMES DAVID BARBER, *THE PRESIDENTIAL CHARACTER: PREDICTING PERFORMANCE IN THE WHITE HOUSE 2* (Routledge ed., 5th ed. 2020).

¹⁹⁷ Mathews, *supra* note 192.

it in the administrative agency's regulatory process. In other words, is the public aware that the executive branch is regulating the major question? And can the plebiscite reasonably be thought to have expressed a view on that?

1. Visibility, Fair Notice, and Public Engagement

- a. The Inadequacy of Notice-and-Comment

It has been argued that administrative rulemaking is a deliberative process, in which the public has ample opportunity to participate through notice-and-comment.¹⁹⁸ Yet this has also been criticized as an overly idealistic view of public participation: too often public comments are not particularly well-informed; commenters form a very small, self-selected group with a particular interest in the topic that may not be representative of the larger public; and ordinary citizens tend not to have the technical knowledge or resources to write comments as thorough and well-researched as those of corporations and other special interest groups.¹⁹⁹ Moreover, in an era in which interest groups increasingly encourage supportive members of the public to utilize form letters and mass emails during notice-and-comment, it has

¹⁹⁸ See, e.g., Emerson, *supra* note 106, at 2081–82 (describing notice-and-comment as “creating a deliberative process between agency officials and the affected public” and serving a “democratic function”); KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 65–66 (La. State Univ. Press ed., 1969) (lauding notice-and-comment as “one of the greatest inventions of modern government,” in part because of its democratic value in allowing all interested parties to participate); Donald J. Kochan, *The Commenting Power: Agency Accountability through Public Participation*, 70 OKLA. L. REV. 601, 601 (2018) (describing the public's ability to participate in notice-and-comment as “critical in our democratic republic,” giving “ordinary citizens, as much as sophisticated interest groups, opportunities to participate in and have opinions heard on the development of regulations”).

¹⁹⁹ See, e.g., Susan Webb Yackee, *Sweet-Talking the Fourth Branch: The Influence of Interest Group Comments on Federal Agency Rulemaking*, 16 J. PUB. ADMIN. RSCH. & THEORY 103, 119 (2006) (discussing an empirical study finding that agency regulations are often changed after notice-and-comment to accommodate preferences expressed in interest group comments); Marissa Martino Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?*, 8 J. PUB. ADMIN. RSCH. & THEORY 245, 265 (1998) (discussing an empirical study finding significant business and interest group participation but a “virtual absence of actual citizen participation” in notice-and-comment processes); Thomas A. Bryer, *Public Participation in Regulatory Decision-Making: Cases from Regulations.gov*, 37 PUB. PERFORMANCE & MGMT. REV. 263, 263 (2013) (analyzing citizen comments on regulations.gov and finding them to be generally uninformed and of poor quality); Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 137 (2006) (observing that business commenters have more influence than non-business commenters on the final versions of agency rules, and that “business comments contain higher quality information than comments from other kinds of rule-making participants”).

become increasingly easy to submit large numbers of cursory and superficial comments that add little deliberative-democratic value.²⁰⁰ And the regulatory understanding of the notice-and-comment process is that it is a means of ventilating relevant and novel issues not previously raised.²⁰¹ It is fundamentally not a plebiscitary undertaking in which each voice has inherent participatory weight.²⁰²

And as unsatisfactory as notice-and-comment is in ordinary times, it is extremely unsuited for states of emergency. It will inevitably lag far behind the emergency, leaving the administration's hands completely tied and unable to respond to the rapidly developing crisis, while providing no deliberative advantage at all beyond a number of comments that cannot be fairly said to represent a broad swathe of the public's view on anything. Notice-and-comment, therefore, is both too slow and too poor a form of deliberative public engagement to provide an adequate forum for public participation in the emergency regulation of a major issue.

b. The Required Platform: A Presidential Election

Particularly because the issue is major, and its regulation is therefore likely to affect “the daily lives and liberties of millions of Americans,”²⁰³ millions of Americans must also have had a fair opportunity to engage with the idea of such regulation if it is to lay claim to plebiscitary legitimacy. If we want the major questions doctrine to enable the capturing of the “wisdom of the masses,”²⁰⁴ insisting on clear-statement congressional authorization is not the only way of achieving that. Rather, there is a more direct way of consulting the public on a major issue: ventilating it during a presidential election.

Prominent ventilation is closely linked to fairness under this plan. The presidential candidate should do more than briefly mention their interest in regulating the major issue a few times throughout his campaign. Rather, the major regulatory question

²⁰⁰ See Stuart W. Shulman, *The Case Against Mass E-mails: Perverse Incentives and Low Quality Public Participation in U.S. Federal Rulemaking*, 1 POL'Y & INTERNET 23, 25–28 (2009).

²⁰¹ *Id.* at 34.

²⁰² *Id.*

²⁰³ Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., OSHA, 595 U.S. 109, 124 (2022) (Gorsuch, J., concurring).

²⁰⁴ West Virginia v. EPA, 597 U.S. 697, 738 (2022) (Gorsuch, J., concurring).

should be a high-profile, easily visible, and frequently-reiterated part of the President's policy platform. However, the candidate need not imitate the notice-and-comment process and release a draft rule. On the contrary, because the average voter is unlikely to possess the technical knowledge, interest, or time necessary to read the entirety of a jargon-filled, abstruse proposed regulation that may well extend to hundreds of pages, releasing a draft rule may in fact serve to obfuscate and conceal the candidate's regulatory aims from the public. For this reason, it should be considered fair notice to the public if the presidential candidate talks about their regulatory goals in some level of generality, as long as they are clear about how the proposed regulations will impact voters' "daily lives and liberties."²⁰⁵ For example, under this view, a general statement about wanting to lessen the impact of the COVID-19 pandemic would not be considered fair notice of the vaccine-or-test mandate at issue in *NFIB*, but frequent discussions about the need for robust federal regulatory action to limit transmission of the virus could well be understood as fair notice of the candidate's regulatory interest in such a mandate. Ultimately, what is of critical importance is whether the presidential candidate gave fair warning that they planned to regulate in the area of a major question, and whether voters could reasonably infer that some substantial effect on their "daily lives and liberties"²⁰⁶ would likely result. If these criteria are satisfied, voters should be considered to have had an opportunity to weigh in, decide whether they wanted that regulatory agenda or not, and give a plebiscitary stamp of approval or rejection accordingly.

It is true that there are several issues with using a presidential election to obtain plebiscitary legitimacy for the regulation of a major issue. Firstly, the President, because of the plebiscitary-charismatic nature of their authority, may be judged by some voters primarily on their personal characteristics, rather than their policies. Yet a presidential candidate's issue competence has been shown to be a significant factor in elections as well,²⁰⁷ and it may even be intertwined with voters' perceptions of the candidate's moral character.²⁰⁸ So the plebiscitary

²⁰⁵ *Nat'l Fed'n of Indep. Bus.*, 595 U.S. at 124 (Gorsuch, J., concurring).

²⁰⁶ *Id.*

²⁰⁷ See, e.g., Clifford, *supra* note 194, at 240–46; Carolyn L. Funk, *Bringing the Candidate into Models of Candidate Evaluation*, 61 J. POL. 700, 700–01 (1999).

²⁰⁸ Clifford, *supra* note 194, at 245.

legitimacy of the President cannot be wholly divorced from the issues on which they run, and their positions on those issues may in fact be part of the personal characteristics that win them followers in the Weberian charismatic model.

But it could happen that the presidential candidate did not clearly state their position on the major issue until after the election. In the latter case, the President would have no claim to plebiscitary legitimacy to regulate the matter: the President would be taking advantage of underinformed voters and their campaign's lack of forthrightness to effectively "hide elephants in mouseholes."²⁰⁹ This would be a mendacious abuse of the President's claim to political legitimacy that the major questions doctrine would do well to prevent.²¹⁰

Another problem would arise if voters did not sufficiently appreciate the majorness of the issue before voting. It has been observed that voters are not always well-informed about the issues before them.²¹¹ And voters may always fall short of an idealized deliberative-democratic Habermasian view of the public sphere.²¹² Yet this has never been enough to settle the debate over optimal political input into administrative agencies. Scholarship remains divided over the normative desirability of agency responsiveness to the positions of voters,²¹³ and I do not attempt to relitigate that

²⁰⁹ *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

²¹⁰ *Id.*

²¹¹ Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2079 (2005).

²¹² See generally JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE* (Mass. Inst. of Tech. Press ed., Thomas Burger & Frederick Lawrence trans., 1989) (1962) (describing a deliberative "public sphere" in which private citizens engage in rational discussions with each other on matters of public concern).

²¹³ See, e.g., Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 56–57, 59–60, 63 (2008). See generally Lloyd N. Cutler & David R. Johnson, *Regulation and the Political Process*, 84 YALE L.J. 1395, 1399 (1975) (discussing regulatory "failure"); Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 520 (1985) (applying "comparative institutional analysis"); Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 183 (1986) (discussing President Reagan's approach to regulatory bodies); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 103 (1994) (discussing the original constitutional view of policymaking authority); Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 463–64 (2003) (exploring the "presidential control model"); Thomas O. Sargentich, *The Emphasis on the Presidency in U.S. Public Law: An Essay Critiquing Presidential Administration*, 59 ADMIN. L. REV. 1, 29–32 (2007) (discussing the role of the President); Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161, 200 (1995) (comparing Congress and the President).

here. Instead, I will only note that the question of whether voters are sufficiently informed is linked to the question of fair, prominent ventilation, and grasping the majorness of an issue does not require a perfect grasp of its full technical complexity.

But there is also a bundling problem in elections. Because there are usually two viable candidates to choose from (the nominees of the Democratic and Republican parties), and because each candidate is running on a platform that is a bundle of different policy issues, it is hard to tell what exactly voters are voting for, and their vote cannot necessarily be translated into support for every issue in a particular bundle.²¹⁴ However, while the bundling problem may well be a serious objection to a President claiming plebiscitary authority to regulate in obscure areas of administrative law, the calculus is different for a sufficiently major question. The nature of a major question is that the issue is high-profile: politically and economically significant, and capable of directly and practically impacting the daily lives of millions of Americans. For that reason, it should be difficult for a presidential candidate with a particular major-question regulatory goal to hide that issue in a bundle. Likewise, the majorness of the issue should render it of particular importance in voter decision-making. If voters agree that the issue is major enough to affect their daily lives on the scale described by the major questions doctrine, that can reasonably be supposed to weigh heavily against the assumption that they adamantly disapproved of this key issue in the bundle yet voted for the bundle anyway.

However, even if plebiscitary legitimacy indicators are difficult to measure in normal circumstances, this is not true of emergencies to the same extent. It could happen that every “normal,” non-emergency major questions case under this retheorized major questions doctrine reaches the same result as under the current major questions doctrine because clear congressional authorization is still needed in the absence of indicators that voters recognized the question at issue to be major and gave it an electoral stamp of presidential plebiscitary

²¹⁴ See, e.g., Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 998 (1997) (“In order to get the policy ‘sticks’ they value most highly, voters have to take whatever other sticks come in the bundle. Thus, progressives voting in 1996 got stuck with Clinton’s support of welfare ‘reform,’ just as many who voted for Reagan or Bush got stuck with a more extreme position on abortion than they personally espoused.”).

approval. But plebiscitary legitimacy for major-question regulation is far easier to locate in presidential elections conducted during ongoing emergencies. The COVID-19 pandemic again provides an illustrative example: a massive event resulting in 8 million cases and over 220,000 deaths by the November 2020 presidential election, it changed the course of the political narrative, ultimately costing the incumbent President the election.²¹⁵ Because of the “physical, economic, and psychological threats [it] posed to millions of voters,”²¹⁶ the pandemic was the “dominant issue on many voters’ minds.”²¹⁷ And as Posner and Vermeule observed with respect to the 9/11 security and 2008 economic crises, in emergencies, “the public . . . demands that *something* be done.”²¹⁸

The nature of an emergency is simply such that it dominates other political issues. It poses such grave dangers to the public that it cannot help but be a major issue in a presidential election that takes place while it is ongoing—and not merely one major issue among many, or a major issue that the public fails to notice, but a genuinely pressing matter of such urgency that it becomes politically predominant. Plebiscitary legitimacy, therefore, is particularly strongly and clearly implicated when the major question is one of crisis.

2. Applications to Emergencies

Thus, the plebiscitary legitimacy model of deriving major questions regulatory authority from a presidential election bears the most novel potential for application in emergencies. Because Congress cannot act swiftly enough to deal with rapidly-unfolding crises, the executive branch will inevitably be the first to respond. This is a source of major discomfort for the major questions doctrine as it currently exists. For ignoring presidential plebiscitary legitimacy as it does, it cannot comprehend the reality that Congress is not structurally suited to react swiftly to emergencies, and thus it is wholly unequipped to address crisis governance. In contrast, the executive branch is not subject to

²¹⁵ Leonardo Baccini et al., *The COVID-19 Pandemic and the 2020 US Presidential Election*, 34 J. POPULATION ECON. 739, 740–41 (2021).

²¹⁶ Harold Clarke et al., *Did Covid-19 Kill Trump Politically? The Pandemic and Voting in the 2020 Presidential Election*, 102 SOC. SCI. Q. 2194, 2197 (2021).

²¹⁷ *Id.* at 2206.

²¹⁸ Posner & Vermeule, *supra* note 4, at 1649.

partisan bickering and haggling, benefits from the significant particularized expertise of administrative agencies, and provides an easily identifiable symbol of political accountability to the public: the President.²¹⁹

But if we view the major questions doctrine through the proper lens of its search for plebiscitary legitimacy in the regulation of major questions, and if we understand that plebiscitary legitimacy is more readily sourced in the President than Congress, the major questions doctrine no longer cripples crisis governance but facilitates it while remaining true to its underlying value of locating authority in “the people.”

Jed Shugerman has proposed an “emergency questions doctrine” that is not grounded in any particular theoretical conceptualization of the major questions doctrine, but he shares the concern that the major questions doctrine may result in “weakening the executive’s capacity to address emergencies.”²²⁰ Consequently, he suggests that courts reviewing administrative

²¹⁹ See, for example, Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2332 (2001), for an argument that “presidential leadership establishes an electoral link between the public and the bureaucracy, increasing the latter’s responsiveness to the former,” and that “[t]he Presidency’s unitary power structure, its visibility, and its ‘personality’ all render the office peculiarly apt to exercise power in ways that the public can identify and evaluate.” See also Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 95 (1985), for a description of the unique nature of presidential elections: “[I]ssues of national scope and the candidates’ positions on those issues are the essence of presidential politics. Citizens vote for a president based almost wholly on a perception of the difference that one or another candidate might make to general governmental policies.” Mashaw argues that this supports broad delegations to administrative agencies because such delegations are well-suited to “facilitat[e] responsiveness [sic] to voter preferences expressed in presidential elections.” *Id.* at 95–96. Kagan discusses this argument and is not entirely convinced by it, briefly noting, for instance, that it can be difficult to tell which policy preferences voters have articulated in an election. Kagan, *supra*, at 2334. She suggests, alternatively, that the President, because of [their] national constituency, prospectively considers the policy “preferences of the general public, rather than merely parochial interests.” *Id.* at 2335. But ultimately she acknowledges that while both concepts of presidential responsiveness to voter policy preferences have their weaknesses, the President is still the most politically accountable figure we have on a national level:

Take the President out of the equation and what remains are individuals and entities with a far more tenuous connection to national majoritarian preferences and interests: administrative officials selected by the President []; staff of the permanent bureaucracy; leaders of interest groups, which whether labeled “special” or “public” represent select and often small constituencies; and members of congressional committees and subcommittees almost guaranteed by their composition and associated incentive structure to be *unrepresentative* of national interests.

Id. at 2336 (footnote omitted).

²²⁰ Shugerman, *supra* note 18, at 1.

actions that invoke emergency authorization do three things: (1) look to “congressional context and purpose,” rather than “superficial open-ended textualism” to discern “whether Congress had delegated measures for the imponderable” emergency at hand,²²¹ (2) dispense with *Chevron* deference,²²² and (3) avoid “clear statement” rules and instead “focus on whether the means fit the emergency ends as a check on pretextual uses or overbroad abuses.”²²³

Yet while Shugerman senses that the current major questions doctrine cannot in any way effectively cope with emergencies, his solution does not offer a real remedy, as is further discussed in Part IV, *infra*. The purposive approach he suggests, with its overdependence on the congressional intent and legislative context behind a particular emergency-granting clause in a federal statute, may well be an effective check on executive interpretive overreach, but it does not alter the fact that any focus on the particular circumstances of a statute’s enactment will inevitably fail to encompass the utterly novel, unprecedented Schmittian emergency. Congress simply cannot explicitly stipulate in advance what Congress did not anticipate—and a real Schmittian emergency is never fully anticipated. Thus, Shugerman’s approach, while identifying the major questions doctrine’s incompatibility with effective crisis governance, ultimately joins the Supreme Court’s current approach in choosing to domesticate the emergency instead of fully confronting it.

My proposed plebiscitary-legitimacy approach to the major questions doctrine confronts the unprecedented nature of emergencies directly and avoids the domestication trap. It is unquestionably true, however, that any such proposal must also avoid the constitutional suspension Schmitt notoriously advocated.²²⁴ A wholly Schmittian approach simply renders the risk of a presidential dictatorship, echoing the concerns of the *NFIB* concurrence,²²⁵ too great. We do not want a President who takes advantage of an emergency to exercise unconstrained and unlawful power. Nor do I even suggest what I have termed

²²¹ *Id.* at 7.

²²² *Id.* at 2.

²²³ *Id.*

²²⁴ SCHMITT, *supra* note 6, at 12.

²²⁵ Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab., OSHA, 595 U.S. 109, 126 (2022) (Gorsuch, J., concurring).

“deferential suspension,” the approach the *NFIB* dissent favored, in which judges defer to the superior specialized expertise of administrative agencies in crisis situations.²²⁶ Indeed, I do not argue for any form of “suspension” at all. On the contrary, I argue below that the plebiscitary-legitimacy understanding of the major questions doctrine makes suspension unnecessary: it enables quick and effective administrative agency responses to ongoing emergencies, while remaining faithful to rigorous judicial review in the tradition of *Youngstown Sheet & Tube Co. v. Sawyer*.

3. The *Youngstown* Framework and Forms of Emergency Judicial Review

The issue in *Youngstown* was whether the President might “take possession of and operate most of the Nation’s steel mills” during wartime.²²⁷ The Court in *Youngstown* held that such a seizure was not authorized either by the Constitution or by congressional statute.²²⁸ And Justice Jackson’s famous concurrence delineated three zones of Presidential authority, relative to that authority’s sourcing in congressional authorization.²²⁹ The President’s authority is deemed to be at its maximum when they are acting “pursuant to an express or implied authorization of Congress.”²³⁰ It is at its minimum when the President “takes measures incompatible with the expressed or implied will of Congress.”²³¹ And in between are situations in which the President acts solely on their own independent powers, when Congress is silent and has neither denied nor granted the President authority.²³² In this “zone of twilight,” “any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.”²³³

Perhaps this was a high watermark of judicial scrutiny, in which the Court was particularly firm in its refusal to allow the prospect of a crisis, in this case a steelworker strike during the Korean War, to alter its determination that the President lacked

²²⁶ See *id.* at 138 (Breyer, Sotomayor, and Kagan, JJ., dissenting).

²²⁷ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582 (1952).

²²⁸ *Id.* at 585.

²²⁹ *Id.* at 635 (Jackson, J., concurring).

²³⁰ *Id.*

²³¹ *Id.* at 637.

²³² *Id.*

²³³ *Id.*

the authority to seize the steel mills. And perhaps judicial scrutiny of executive crisis governance has been less searching in the recent past than it was in *Youngstown*. Posner and Vermeule have found courts to be exceedingly deferential to administrative action in recent national security and economic crises.²³⁴ Amanda Tyler has also observed that “it is the rare exception that witnesses the Court apply rigorous judicial scrutiny in . . . times [of war and emergency].”²³⁵ Yet the COVID-19 emergency has reinvigorated judicial “anti-deference,”²³⁶ and after the Supreme Court’s decisions in *NFIB* and *Alabama Ass’n of Realtors*, it can no longer be said that the judiciary allows the executive free rein in matters of crisis governance. Rather, it is more accurate to say that we have returned to a *Youngstown*-type model, in which emergencies do not trigger any form of suspension, deferential or otherwise.²³⁷

One might view this as an appropriate approach to ensuring the rule of law even in crisis situations, and it has been argued that COVID-19, and emergencies in general, should not be a reason for courts to suspend rigorous judicial review.²³⁸ And it is the infamous case of *Korematsu v. United States*, in which the Supreme Court upheld the internment of Japanese Americans during World War II, that is invariably invoked as the paradigmatic example of the danger such judicial deference poses to civil liberties.²³⁹ With respect to the COVID-19 pandemic in particular, Lindsay Wiley and Stephen Vladeck have, for example, drawn on *Korematsu* to argue that if the judiciary abdicates its independent role in an emergency, courts may “sustain gross violations of civil rights because they are either unwilling or unable to meaningfully look behind the government’s purported

²³⁴ See Posner & Vermeule, *supra* note 4, at 1642; see generally POSNER & VERMEULE, *supra* note 179.

²³⁵ Tyler, *supra* note 15, at 496.

²³⁶ Nathan Richardson, Essay, *Antideference: COVID, Climate, and the Rise of the Major Questions Canon*, 108 VA. L. REV. ONLINE 174, 177 (2022).

²³⁷ See *Ala. Ass’n of Realtors v. Dep’t of Health and Hum. Servs.*, 141 S. Ct. 2485, 2490 (2021) (Gorsuch, J., concurring) (describing the *Youngstown* Court as “concluding that even the Government’s belief that its action ‘was necessary to avert a national catastrophe’ could not overcome a lack of congressional authorization”) (citing *Youngstown*, 343 U.S. 579 at 585–86).

²³⁸ See Lindsay F. Wiley & Stephen I. Vladeck, Essay, *Coronavirus, Civil Liberties, and the Courts: The Case Against “Suspending” Judicial Review*, 133 HARV. L. REV. F. 179, 182 (2020).

²³⁹ See, e.g., Laurence H. Tribe and Patrick O. Gudridge, *The Anti-Emergency Constitution*, 113 YALE L.J. 1801, 1801 (2004); Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES L. 1, 20–21 (2004); Ackerman, *supra* note 15, at 1042; Wiley & Vladeck, *supra* note 238, at 183.

claims of exigency.”²⁴⁰ This is similar to the concern Justice Gorsuch articulated in his *NFIB* concurrence, and in theory, what the application of the major questions doctrine in that case was said to prevent.²⁴¹

But the problems of *Korematsu* extend far beyond the major questions doctrine’s prophylactic capacities. One might think of the internment of Japanese Americans as a case of purely executive infringement on civil liberties—but what is missing from this picture is the fact that Congress itself, in passing “the Act of March 21, 1942, ratified and confirmed Executive Order No. 9066,” which the President relied on as authority for his program of relocation and internment.²⁴² Indeed, in upholding both the Act and the Executive Order in *Hirabayashi v. United States*, the Supreme Court gave great weight to the fact that Congress had explicitly contemplated the purpose of the Act as being the “regulation of citizen and alien Japanese alike.”²⁴³ The wrong of Japanese internment, therefore, is far from being a violation of constitutional liberties solely to be laid at the door of executive overreach, but rather falls squarely into the first *Youngstown* zone, when presidential authority is supposed to be at its maximum, because the President is acting with authorization from Congress. As the *Hirabayashi* Court noted, the case did not involve a nondelegation issue: “[t]he question . . . is not one of Congressional power to delegate to the President the promulgation of the Executive Order, but whether, *acting in cooperation*, Congress and the Executive have constitutional authority to impose the curfew restriction here complained of.”²⁴⁴

Thus, insofar as the major questions doctrine is viewed as a judicial check on executive action without clear-statement congressional authorization, it is important to realize that, had it existed in 1943, it would have been ineffectual against the internment of Japanese Americans, which Congress clearly authorized. The separation of powers is by no means a magic wand that prevents constitutional wrongs, and the major questions doctrine in its current form would do nothing at all to prevent

²⁴⁰ Wiley & Vladeck, *supra* note 238, at 183.

²⁴¹ Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab., OSHA, 595 U.S. 109, 126 (2022) (Gorsuch, J., concurring).

²⁴² *Hirabayashi v. United States*, 320 U.S. 81, 91 (1943).

²⁴³ *Id.*

²⁴⁴ *Id.* at 91–92 (emphasis added).

another *Korematsu* or *Hirabayashi*. Thus, while the suspension model of emergency judicial review should indeed be rejected, the major questions doctrine in its current form is completely inadequate to prevent the violation of liberties that the *NFIB* concurrence fears.

In addition, normal judicial review of constitutional rights is far superior to the major questions doctrine as a way of checking any potential executive overreach in states of emergency. The major questions doctrine is fundamentally about an administrative agency's *authorization* to enact a certain regulation; it says nothing about whether or not the *substance* of that regulation is in fact constitutional. The latter inquiry should not be suspended simply because the regulation passes the muster of the major questions doctrine; and conversely, the mere fact that a regulation does not run afoul of the major questions doctrine should not automatically be taken to mean that it is constitutionally permissible. And a constitutional challenge to a regulation need not implicate the major questions doctrine at all. Extending the *Korematsu* analogy, suppose a federal administrative agency were to attempt to intern all Chinese Americans, offering the rationale that since the COVID-19 virus was first detected in Wuhan, China,²⁴⁵ such internment camps would lessen the risk of contagion within the United States. This would properly be struck down under an equal protection challenge. The major questions doctrine might well also be implicated, but as *Hirabayashi* has shown, it cannot and should not be relied upon to be a "silver bullet" that safeguards executive overreach into the constitutional rights of individuals and protected classes. Indeed, the current Supreme Court has set good precedent for such challenges by clearly demonstrating, in several religious liberty cases arising during the COVID-19 pandemic, that judicial review should be searching and skeptical, rather than deferential, in matters involving governmental emergency measures that affect constitutionally protected rights.²⁴⁶

²⁴⁵ See Archived: WHO Timeline – COVID-19, WORLD HEALTH ORG., <https://www.who.int/news/item/27-04-2020-who-timeline---covid-19> [<https://perma.cc/P3T4-W768>] (last visited Mar. 18, 2024).

²⁴⁶ See, e.g., *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021); *Harvest Rock Church v. Newsom*, 141 S. Ct. 889 (2020); *Gish v. Newsom*, 141 S. Ct. 1290 (2021); *Tandon v. Newsom*, 593 U.S. 61 (2021); *Gateway City Church v. Newsom*, 141 S. Ct. 1460 (2021). See also Cass R. Sunstein, *Our Anti-Korematsu*, 1 AM. J. L. & EQUALITY 221, 222 (2021).

But on the level of federal administrative law and the major questions doctrine, considering merely the statutory *authority* of federal agencies to enact certain regulations in states of emergencies, a more nuanced approach is required. While the deferential suspension of judicial review is not the ideal model, neither is the “actively hostile” anti-deference²⁴⁷ of *NFIB* and *Alabama Ass’n of Realtors*, which renders impossible any rapid, meaningful administrative response to nationwide crises. Rather, the major questions doctrine will naturally prove itself both applicable and effective in emergency situations if it embraces its underlying value of plebiscitary legitimacy, understands that this can come through the President even more directly than through Congress, and recognizes that the highly specific type of congressional clear-statement authorization currently demanded is not only impossible in emergencies but also unnecessary—all without requiring that the judiciary abandon its *Youngstown* commitment to searching review of agency action even in times of crisis.

IV. THE JUDICIAL APPLICATION OF THE MAJOR QUESTIONS DOCTRINE TO EMERGENCY REGULATIONS

If an agency emergency regulation implicating a major question comes before the judiciary, and if Congress has not given clear, explicit statutory authorization to the agency to issue the regulation, courts should exercise neither clear-statement domestication nor deferential suspension. On the contrary, they should inquire (1) whether the organic statute gives emergency powers to the agency; (2) whether the regulation is time-limited and of temporary substantive impact; (3) whether the regulation falls within the agency’s area of expertise; and, critically, (4) whether there is plebiscitary legitimacy for the measure. In determining the fourth factor, courts should consider whether the regulation implicates a matter over which there has been recent “earnest and profound debate”²⁴⁸ across the nation, and whether the plebiscite has had a fair opportunity to declare its views on that matter.

(arguing a similar point with respect to the Court’s decision in *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020), which Sunstein describes as an “anti-*Korematsu*”).

²⁴⁷ Richardson, *supra* note 236, at 177.

²⁴⁸ *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997)).

A. Does the Organic Statute Give Emergency Powers to the Agency?

An emergency regulation, like the vaccine-or-test mandate in *NFIB*, should be authorized by a specific statutory provision granting the agency the power to issue such regulations.²⁴⁹ This serves to ensure that the President’s authority will be at its *Youngstown* maximum, that the legislative function of Congress remains inviolate, and that the judiciary does not allow the President to become a wholly Schmittian sovereign who “susp[en]ds . . . the entire existing order.”²⁵⁰

Yet at the same time, a simple grant of temporary emergency authority to an agency, as in the OSH Act,²⁵¹ should be sufficient. The Supreme Court currently favors an anti-novelty principle with respect to the major questions doctrine, suggesting that if an agency has never issued a similar major regulation in the past, this strongly suggests the agency lacks the statutory authority to do so.²⁵² But if the anti-novelty principle constrains agencies’ adaptability under normal circumstances, it renders them altogether ineffective in emergencies. It is a complete

²⁴⁹ See 29 U.S.C. § 655(c)(1) (“The Secretary shall provide, without regard to the requirements of chapter 5 of title 5, for an emergency temporary standard to take immediate effect upon publication in the Federal Register if he determines (A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger.”).

²⁵⁰ SCHMITT, *supra* note 20, at 12.

²⁵¹ 29 U.S.C. § 655(c)(1).

²⁵² See, e.g., *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab., OSHA*, 595 U.S. 109, 120 (2022) (per curiam) (“It is telling that OSHA, in its half century of existence, has never before adopted a broad public health regulation of this kind—addressing a threat that is untethered, in any causal sense, from the workplace. This ‘lack of historical precedent,’ coupled with the breadth of authority that the Secretary now claims, is a ‘telling indication’ that the mandate extends beyond the agency’s legitimate reach.” (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 505 (2010))); *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2487 (2021) (per curiam) (“Originally passed in 1944, this provision has rarely been invoked—and never before to justify an eviction moratorium. Regulations under this authority have generally been limited to quarantining infected individuals and prohibiting the import or sale of animals known to transmit disease.”); *West Virginia v. EPA*, 597 U.S. 697, 701 (2022) (“Prior to 2015, EPA had always set emissions limits under Section 111 based on the application of measures that would reduce pollution by causing the regulated source to operate more cleanly. It had never devised a cap by looking to a ‘system’ that would reduce pollution simply by ‘shifting’ polluting activity ‘from dirtier to cleaner sources.’”) (citations omitted); see also Deacon & Litman, *supra* note 56, at 1070–71 (noting that, to the Supreme Court, “the” novelty of an agency’s regulatory approach is an indication that the policy is major and therefore likely not authorized by statute,” and observing that the regulatory anti-novelty principle “has now hardened into a central principle guiding the application of the [major questions] doctrine”).

misunderstanding of the nature of states of emergency to think that they can be specifically prepared for ex ante via statute—that Congress must anticipate every unprecedented catastrophe in the future in order for agencies to be allowed to respond to them in real time. What the anti-novelty principle thus creates is a complete vacuum in government. Because legislators will inevitably “come too late” to the crisis, as Posner and Vermeule have noted,²⁵³ and because the major questions doctrine now ties the hands of any agency response that is not clearly authorized by a statute predating the emergency, which is essentially impossible, the crisis must be allowed to run effectively unchecked, as there is no judicially-sanctioned emergency responder other than Congress—slow-acting both by institutional design and development. The anti-novelty conception must thus be rejected and simple congressional grants of temporary emergency authority must be accepted for what they are if the major questions doctrine is to be made suitable for crisis governance.

B. Is the Regulation Time-Limited and of Temporary Substantive Impact?

It is worth emphasizing that such statutory grants of emergency authority must be temporary in two senses: they must be limited in duration and of temporary substantive impact. The OSH Act again provides a useful model with respect to duration: it allows an emergency temporary standard to take effect immediately upon publication in the Federal Register, but it is only valid for a maximum of six months.²⁵⁴ Meanwhile, the emergency standard serves as a proposed permanent rule subject to normal notice-and-comment procedures, and the agency must decide by the end of the six-month period whether to formally promulgate it as a rule or not.²⁵⁵ It is entirely possible that by the end of those six months, the emergency might cease to exist or be substantially mitigated, rendering a permanent rule unnecessary. More importantly, the OSH Act’s time limit on emergency authority does not allow the agency to indefinitely arrogate emergency powers to itself. Rather, the only special emergency prerogative granted by statute is the ability to have the emergency standard take effect immediately without the inherent

²⁵³ Posner & Vermeule, *supra* note 4, at 1640.

²⁵⁴ 29 U.S.C. § 655(c)(1)–(3).

²⁵⁵ *Id.*

deliberative delay of the ordinary notice-and-comment process²⁵⁶—a prerogative that is carefully circumscribed by the fact that it may last no longer than six months at most.²⁵⁷

Furthermore, because the emergency standard, once published in the Federal Register, is simultaneously a proposed permanent rule,²⁵⁸ it invites notice-and-comment at the same time it goes into effect.²⁵⁹ For thirty days thereafter, any interested person may submit comments²⁶⁰ or file objections and request a public hearing,²⁶¹ thus ensuring that the emergency temporary standard is not wholly hidden from public view without some opportunity for public participation.

But public comments and objections do not, of course, stay the actual enforcement of the emergency standard, which was issued without the public's input. For this reason, the *substantive* impact of the regulation must also be temporary. Had OSHA, in *NFIB*, actually issued the vaccine-only mandate the per curiam opinion accused it of issuing (instead of the vaccine-or-test mandate it *did* issue), this would indeed have been problematic under this temporariness factor. The regulation would not have included a testing alternative to vaccination, and vaccines, as the Court pointed out, cannot be “undone” once injected.²⁶² Thus, the ETS's impact would have lasted long beyond the six-month shelf life granted it by statute; and the temporariness of the mandate would have had little practical meaning, as there would be no way of reversing its effects at the end of the statutory period. One might well describe such regulations as limited in duration but permanent in effect, which gives a troubling amount of unilateral discretion to the executive. Similarly, the student loan forgiveness plan at issue in *Biden v. Nebraska*, unlike previous agency forbearance, measures freezing student loan interest and suspending repayments during the COVID-19 pandemic.²⁶³ It was proposed to not merely pause existing financial obligations, but

²⁵⁶ See *supra* Section III.C.1.a.

²⁵⁷ 29 U.S.C. § 655(e)(1)–(3).

²⁵⁸ *Id.* § 655(c)(3).

²⁵⁹ *Id.* § 655(b)(2).

²⁶⁰ *Id.*

²⁶¹ *Id.* § 655(b)(3).

²⁶² Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., OSHA, 595 U.S. 109, 118 (2022) (per curiam) (quoting *In re MCP No. 165*, 20 F.4th 264, 274 (6th Cir. 2021) (Sutton, C.J., dissenting)).

²⁶³ *Biden v. Nebraska*, 600 U.S. 477, 486–87 (2023).

also to eliminate up to \$10,000 per borrower²⁶⁴—an action whose effects would also not be reversed at the end of the emergency period.

Fundamentally, preventing executive abuse of simple, non-specific statutory grants of emergency authority requires that any administrative crisis governance measure enacted pursuant to that authority be temporary—both by being time-limited, and by being capable of being substantively “undone”²⁶⁵ at the end of the crisis period. Emergency regulatory changes enacted under emergency authority cannot last forever. For if they do, they run the risk of becoming policy overhauls that use the cloak of crisis governance to enact permanent changes to non-emergency and emergency conditions alike, rather than responses carefully crafted by administrative expertise to address rapidly-evolving, time-sensitive crises.

Consequently, the grant of statutory authority to issue a temporary emergency regulation does not alone obviate every concern about the legitimacy of such a rule, particularly when it regulates a major issue. Thus, in considering how to apply the major questions doctrine to emergencies, courts should be particularly careful in their consideration of this proposed second factor: whether the emergency regulation is both time-limited and of temporary substantive impact. Then, courts should proceed to the third and fourth factors: whether the emergency regulation falls within the expertise of the agency, and whether the emergency regulation has plebiscitary legitimacy.

C. Does the Emergency Regulation Fall Within the Expertise of the Agency?

Gonzales v. Oregon, cited in *West Virginia* and *Biden v. Nebraska*, was a 2006 Supreme Court decision invalidating a Department of Justice (“DOJ”) interpretive rule in which the Attorney General asserted the authority under the Controlled Substances Act to deregister physicians who prescribed controlled substances for assisted suicide, even in states where that was legal.²⁶⁶ The rule relied on the Attorney General’s determination

²⁶⁴ *Id.* at 488.

²⁶⁵ *Nat’l Fed’n of Indep. Bus.*, 595 U.S. at 118 (quoting *In re MCP No. 165*, 20 F.4th at 274 (Sutton, C.J., dissenting)).

²⁶⁶ *West Virginia v. EPA*, 597 U.S. 697, 722 (2022) (citing *Gonzales v. Oregon*, 546 U.S. 243 (2006)).

that assisted suicide was not “a ‘legitimate medical purpose.’”²⁶⁷ However, the Court found that the Attorney General was improperly attempting to make medical judgments that were “both beyond his expertise and incongruous with the statutory purposes and design.”²⁶⁸

While *Gonzales* was not explicitly decided on major questions grounds, *West Virginia* describes it as an example of a major questions case and cites it as support for the proposition that where an agency lacks comparative expertise to make a policy judgment, Congress presumably did not authorize it to do so.²⁶⁹ And *Biden v. Nebraska* follows *West Virginia*’s reasoning, arguing that because the student loan forgiveness program would have “sweeping and unprecedented impact,” “it would seem more accurate to describe the program as being in the ‘wheelhouse’ of the House and Senate Committees on Appropriations.”²⁷⁰

Gonzales did not deal with a state of emergency, but its emphasis on the specific competence of the agency issuing the regulation is a particularly important principle that must be applied in an emergency case because it provides an important way of ensuring that agencies do not abuse their position as first responders to exceed the bounds of their competence.²⁷¹ Furthermore, an oft-cited comparative advantage of administrative regulation is the specialized subject-matter expertise agencies have at their disposal.²⁷² Indeed, Weber

²⁶⁷ *Gonzales*, 546 U.S. at 254 (quoting Dispensing of Controlled Substances To Assist Suicide, 66 Fed. Reg. 56607, 56608 (Nov. 9, 2001)).

²⁶⁸ *Id.* at 267.

²⁶⁹ *West Virginia*, 597 U.S. at 729 (quoting *Kisor v. Wilkie*, 139 S. Ct. 2400, 2417 (2019)).

²⁷⁰ *Biden v. Nebraska*, 600 U.S. 477, 504 (2023). Justice Barrett’s concurrence also noted:

Another telltale sign that an agency may have transgressed its statutory authority is when it regulates outside its wheelhouse. For instance, in *Gonzales v. Oregon*, we rebuffed an interpretive rule from the Attorney General that restricted the use of controlled substances in physician-assisted suicide. This judgment, we explained, was a medical one that lay beyond the Attorney General’s expertise, and so a sturdier source of statutory authority than an “implicit delegation” was required.

Id. at 518 (Barrett, J., concurring) (citations omitted).

²⁷¹ See *Gonzales*, 126 S. Ct. at 267.

²⁷² See, e.g., William N. Eskridge Jr., *Expanding Chevron’s Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes*, 2013 WIS. L. REV. 411, 420–23 (2013); Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore*, 54 ADMIN. L. REV. 735, 739–41 (2002); Emily Hammond Mezell, *Presidential Control, Expertise, and the Deference Dilemma*, 61 DUKE L.J. 1763, 1771–74 (2012).

described rational legitimacy as exemplified in bureaucratic administration's uniquely specialized knowledge and technical competence.²⁷³ But the expertise advantage, and thus the administrative claim to legitimacy, is severely reduced or even negated if agencies attempt to regulate matters wholly outside the area in which they specialize. But courts should also refrain from interpreting an agency's area of expertise so narrowly that they make distinctions without a difference. For instance, regulating workplace health risks, as OSHA attempted to do in *NFIB*, should not be summarily dismissed as "a broad public health measure[],"²⁷⁴ when OSHA did not assert the authority to regulate outside of the workplace environment traditionally falling within its remit. In contrast, while the *West Virginia* concurrence equates OSHA's mandate in *NFIB* with the CDC's eviction moratorium in *Alabama Ass'n of Realtors*,²⁷⁵ the latter, unlike the former, was a regulatory foray into housing and the landlord-tenant relationship, outside the CDC's particular area of expertise, because it lacked an immediately apparent public health dimension, as I discuss further below.

It has been suggested that the Supreme Court's jurisprudence in these cases forms a coherent "emergency question doctrine," by virtue of their "focus[] on the match between congressional purposes for the delegation of an emergency power and the executive branch's invocation and application of the emergency power."²⁷⁶ This view supports the Court's conclusion that the eviction moratorium in *Alabama Ass'n of Realtors* was problematic because of the "breathtaking amount of authority" it gave the CDC,²⁷⁷ and that the vaccine-or-test mandate in *NFIB* was a public health rather than workplace safety measure, which therefore "create[d] a risk of using the emergency for a policy goal beyond the statute's purpose."²⁷⁸ This implies that the mandate was pretextual: it was not part of the federal government's plan to make workplaces safer, but rather an attempt to increase the

²⁷³ Weber, *supra* note 157, at 341, 350–52.

²⁷⁴ Nat'l Fed. of Indep. Bus. v. Dep't of Lab., OSHA, 595 U.S. 109, 142 (2022); *see also West Virginia v. EPA*, 142 S. Ct. at 2623 (Gorsuch, J., concurring).

²⁷⁵ *West Virginia v. EPA*, 142 S. Ct. at 2623 (Gorsuch, J., concurring).

²⁷⁶ Shugerman, *supra* note 18, at 7.

²⁷⁷ *Id.* (quoting *Alabama Ass'n. of Realtors v. Dept. of Health and Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021)).

²⁷⁸ *Id.*

national vaccination rate.²⁷⁹ But this argument, like the per curiam opinion, overlooks the fact that the mandate included a testing alternative to vaccination; and it declines to precisely address why the mandate can so readily be declared overbroad. Nor does it answer the question of how, when “the priorities [of workplace safety and increasing vaccination] had a significant overlap,” the per curiam position on overbreadth can be justified without specifying how, in cases involving such substantial “overlap,”²⁸⁰ courts should distinguish between a purpose that is appropriate for agency regulation and a purpose that is not.

It is true that there must not be a “[m]eans-[e]nds [m]ismatch” between the agency action and the authorizing statute.²⁸¹ But this is not new: it has long been the Court’s practice to evaluate “the fit between the power claimed, the agency claiming it, and the broader statutory design.”²⁸² The test, as the *West Virginia* dissent described it, is a rather straightforward, “common-sensical . . . eyebrow-raise.”²⁸³ And the majority has not disclaimed the “eyebrow-raise” label,²⁸⁴ but rather explained by way of example:

We would not expect the Department of Homeland Security to make trade or foreign policy even though doing so could decrease illegal immigration. And no one would consider generation shifting a “tool” in OSHA’s “toolbox,” . . . even though reducing generation at coal plants would reduce workplace illness and injury from coal dust.²⁸⁵

Yet these examples demonstrate the *West Virginia* majority’s misapplications of its own test: they display the Court’s confusion between the scope and subject matter area of the agency regulation at issue. If the Department of Homeland Security (“DHS”) were to regulate foreign policy or trade, that would be an area clearly outside its expertise, as suggested by the fact that there are other agencies with subject-matter specialization more obviously suited to the task, such as the Department of State or the Office of the U.S. Trade Representative. It would be asserting

²⁷⁹ *Id.* at 9–10.

²⁸⁰ *Id.* at 10.

²⁸¹ *Id.* at 9–10.

²⁸² *West Virginia v. EPA*, 142 S. Ct. 2587, 2634 (2022) (Kagan, J., dissenting); see generally *Gonzales v. Oregon*, 546 U.S. 243 (2006); *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302 (2014); *Alabama Ass’n. of Realtors*, 141 S. Ct. at 2488–89.

²⁸³ *West Virginia v. EPA*, 142 S. Ct. at 2634, 2636 (Kagan, J., dissenting).

²⁸⁴ *Id.* at 2613, 2636 (“Forbidding evictions may slow the spread of disease, but the CDC’s ordering such a measure certainly ‘raise[s] an eyebrow.’”).

²⁸⁵ *Id.* at 2613.

authority over a new subject matter area in order to achieve certain goals within its own. And the important question is not one of scope—the issue is one of comparative expertise, skill, knowledge, and competence, not of whether the agency has issued a regulation affecting too many people.²⁸⁶

The limited utility of a scope-centered analysis is again illustrated by the *West Virginia* majority's assertion that "no one would consider generation shifting a 'tool' in OSHA's 'toolbox.'"²⁸⁷ The Court noted that OSHA does not have the subject matter expertise to order changes in energy production simply because that might have effects in certain workplaces. But it begged the real question at issue in the case, which was whether the EPA, specifically tasked with protecting the environment, could require generation shifting as a proper exercise of expertise-based administration. Instead, the Court used a scope-based argument to justify its holding that the EPA did not possess that authority, holding that the regulatory change's "magnitude and consequence" was simply too great.²⁸⁸

²⁸⁶ Shugerman presents a different view of scope. He argues that "if the policy is broader in scope than the emergency ... the agency has gone beyond the congressional delegation from that statute." Shugerman, *supra* note 18, at 10. He appears to define scope as the emergency for which a particular statute was defined. For instance, he believes the Biden administration's student loan forgiveness plan lacked sufficient statutory authorization under the HEROES Act of 2003 because that statute was enacted in the context of "the September 11 terrorist attacks and the subsequent wars in Afghanistan and Iraq." *Id.* at 11. Given that these were the crises contemplated at the time of the statute's enactment, Shugerman is convinced that the Act should not be read to authorize emergency actions that do not arise out of "active" emergency situations "comparable to post-9/11 and the military action that followed." *Id.* at 12. But even if scope were understood not in the sense of persons affected but in Shugerman's sense of specific events in the background of the authorizing statute's enactment, courts should still focus instead on agency subject matter expertise, for no administrative emergency regulation can survive the "comparable emergency" test, as that approach is itself an anti-novelty principle akin to that Shugerman decries. *Id.* at 3 (criticizing the Supreme Court's post-2022 major questions jurisprudence). It denies the essence of the Schmittian emergency, which is that the statute will inevitably "come too late." Posner & Vermeule, *supra* note 4, at 1640. We cannot legislate for emergencies in advance, because emergencies are unprecedented by their very nature. And what if there was no specific, contemporaneous crisis in the background of a statute's enactment? The comparable-scope inquiry is not applicable to non-emergency statutes like the OSH Act that nonetheless contain emergency provisions.

²⁸⁷ *West Virginia v. EPA*, 142 S. Ct. at 2613.

²⁸⁸ *Id.* at 2616 ("Capping carbon dioxide emissions at a level that will force a nationwide transition away from the use of coal to generate electricity may be a sensible 'solution to the crisis of the day.' *New York v. United States*, 505 U.S. 144, 187, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992). But it is not plausible that Congress gave EPA the authority to adopt on its own such a regulatory scheme in Section 111(d). A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body.").

The Court likewise confused scope and subject matter area in *NFIB*, claiming that the vaccine-or-test mandate was too “broad”²⁸⁹ to be a workplace-safety regulation within OSHA’s area of expertise.²⁹⁰ There, the Court raised the concern that the regulation affected too many people—that it improperly “impos[ed] a vaccine mandate on 84 million Americans”²⁹¹ and was insufficiently “targeted”²⁹² to be a valid exercise of OSHA’s authority. The majority neglected to mention that the mandate had a testing option as well as a vaccination option; but even leaving that important distinction aside, the real question the majority should have asked was whether OSHA possessed the expertise to regulate health risks within workplaces of 100 or more employees. OSHA did not attempt to require that every person in the United States be vaccinated or tested, although that would certainly have reduced the risk of COVID-19 transmission to employees falling under OSHA’s remit; and the mere fact that 84 million Americans were affected by the regulation is a question of scope rather than subject matter expertise. Rather, OSHA in this case is more fairly characterized as regulating workplace safety risks occurring specifically within the workplace in the form of employee-to-employee contact and transmission, rather than attempting to set overarching public health goals for a large number of Americans who happened to have contact with the working population.

The Court’s analysis was more cursory but also more fortunate in *Alabama Ass’n of Realtors*. In evaluating the CDC’s eviction moratorium, the majority considered scope,²⁹³ but did not reach the question of subject matter expertise, merely noting briefly that “[t]he moratorium intrudes into ... the landlord-tenant relationship.”²⁹⁴ But that implicates an important point: an agency with expertise in public health reached into the area of housing regulation in order to achieve the vague public health goal of “facilitat[ing] self-isolation [and self-quarantine] by people who

²⁸⁹ Nat’l Fed. of Indep. Bus. v. Dep’t of Lab., OSHA, 595 U.S. 109, 117, 119 (2022).

²⁹⁰ *Id.* at 118.

²⁹¹ *Id.*

²⁹² *Id.* at 119.

²⁹³ Ala. Ass’n of Realtors v. Dept. of Health and Hum. Servs., 141 S. Ct. 2485, 2489 (2021) (“This claim of expansive authority under § 361(a) is unprecedented. Since that provision’s enactment in 1944, no regulation premised on it has even begun to approach the size or scope of the eviction moratorium.”).

²⁹⁴ *Id.*

become ill or who are at risk [of transmitting COVID-19].”²⁹⁵ The CDC thus did not issue a public health regulation, but a housing regulation that would have positive effects in the public health arena. This agency action, therefore, properly fails the “raised-eyebrow” test articulated in *West Virginia*: it reaches outside of its area of subject matter expertise to regulate in another area, hoping for a causal effect that will benefit its area of competence. That, as the *West Virginia* majority’s hypothetical DHS and OSHA examples show, places no limiting principle on the agency’s claims to regulatory authority, and may even intrude upon the regulatory authority of other administrative agencies. For those reasons, the CDC’s eviction moratorium was properly struck down. While the Court should not have relied on a scope rather than subject matter rationale, the moratorium would also have failed the inquiry of whether the CDC possessed subject matter expertise sufficient to regulate in this area.

But the confusion between scope and subject matter becomes even more apparent—and more problematic—in *Biden v. Nebraska*. Here, the Court insisted that the student loan forgiveness program was too major to conceivably fall within the HEROES Act’s statutory delegation to the Secretary of Education. The majority described the program as “staggering,”²⁹⁶ “sweeping and unprecedented,”²⁹⁷ and benefitting “[p]ractically every student borrower . . . regardless of circumstances.”²⁹⁸ The majority also did not find it plausible that Congress would have authorized the Secretary to “abolish \$430 billion in student loans, completely canceling loan balances for 20 million borrowers,”²⁹⁹ and rejected the idea that the Secretary of Education could “unilaterally alter large sections of the American economy”³⁰⁰ without clearer congressional authorization. The emphasis, for the majority, thus fell squarely on scope: not merely the sheer monetary amount implicated by the program, but its inclusion of every student loan borrower in the country. It covered too many people, which made it too “staggering”³⁰¹ to fall within an administrative agency’s

²⁹⁵ 85 Fed. Reg. 55292 (Sept. 4, 2020).

²⁹⁶ *Biden v. Nebraska*, 143 S. Ct. 2355, 2373 (2023).

²⁹⁷ *Id.* at 2374.

²⁹⁸ *Id.* at 2373.

²⁹⁹ *Id.* at 2374.

³⁰⁰ *Id.* at 2375.

³⁰¹ *Id.* at 2373.

“wheelhouse,” as opposed to “the ‘wheelhouse’ of the House and Senate Committees on Appropriations.”³⁰²

But scope was again the incorrect focus. Justice Barrett seems to have noticed the incongruence of the majority, citing *Gonzales* to support an expertise-based inquiry while employing a scope-based one. Justice Barrett’s concurrence acknowledges that “this is not a case where the agency is operating entirely outside its usual domain.”³⁰³ The HEROES Act did in fact authorize the Secretary of Education to “waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the Act as the Secretary deems necessary in connection with a war or other military operation or national emergency.”³⁰⁴ And the Department of Education, as the dissent pointed out, clearly is the agency generally tasked with exercising expertise in the matter of student financial assistance, while the HEROES Act explicitly delegated some emergency flexibility to the Secretary to use in the service of that expertise-based administration.³⁰⁵ But Justice Barrett’s admission of the scope versus subject-matter expertise problem goes no further than the statement that a loan forgiveness program was not “entirely outside [the agency’s] usual domain.”³⁰⁶ Instead, her concurrence, like the majority opinion, elides the distinction by relying once again on scope and asserting that it is only “common sense” to understand that the program’s “economic and political magnitude”³⁰⁷ was too great to have been delegated to the agency by the statutory provision at issue.

It is one thing to say that the Department of Education may not issue a regulation of such scope, but to cloak a scope-based analysis in the *Gonzales* subject-matter expertise rationale is entirely another. Here, it is implausible, as Justices Barrett and Kagan both observed, to think that the Department of Education did not have the necessary expertise to issue an emergency regulation affecting student loans. Had the CDC attempted to do such a thing, that would properly have failed the “raised-eyebrow”

³⁰² *Id.* at 2374.

³⁰³ *Id.* at 2384 (Barrett, J., concurring).

³⁰⁴ 20 U.S.C. § 1098bb(a)(1).

³⁰⁵ *Biden v. Nebraska*, 143 S. Ct. at 2384, 2391–93, 2397 (Kagan, J., dissenting).

³⁰⁶ *Id.* at 2384 (Barrett, J., concurring).

³⁰⁷ *Id.* at 2378–79 (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)).

test of *West Virginia*, just as its attempt to regulate housing did in *Alabama Ass'n of Realtors*. But here, there is no other agency with more expertise-based competence and experience in the subject matter area of student financial assistance. That lies at the core of the Department of Education's remit, and the HEROES Act by its own terms tasked the Department with authority in that specialized area. In short, "[s]tudent loans are in the Secretary's wheelhouse"³⁰⁸—a point the majority does not rebut but rather evades by turning to the red herring of scope.

It is important to note that scope is inevitably a part of the major questions doctrine, and should not be altogether discarded. It fundamentally implicates the question of plebiscitary legitimacy, as I have discussed above, and is an important factor in determining whether or not the issue at hand is a major question. But in determining whether an agency has the *expertise* to regulate an issue, particularly a novel one raised by an emergency, the question cannot turn on whether Congress has explicitly stated or contemplated that the agency may regulate on precisely such an issue because Congress cannot detail the particular exigencies of a crisis *ex ante*. Rather, a reviewing court should acknowledge that when it has determined that the major questions doctrine applies, and when the organic statute predating the emergency is ambiguous about whether or not an agency may issue a certain regulation, the question of whether the agency has permissibly exercised its subject-matter expertise must come into play. And the inquiry should be one that passes the "raised-eyebrow" test applied straightforwardly—which is to say that it should not join *West Virginia* and *Biden v. Nebraska* in drawing strained parallels between agencies with different regulatory purposes (such as comparing generation-shifting by OSHA and the EPA), confusing scope with subject matter expertise, or otherwise evading the question. Rather, once the court has considered scope as part of its determination that the major questions doctrine applies, it must very simply ask whether the *subject-matter* of the agency's regulation veers significantly outside of its area of expertise. If it does, that must invalidate the measure; but if it does not, the court must then consider whether the agency action at issue has plebiscitary legitimacy.

³⁰⁸ *Id.* at 2398 (Kagan, J., dissenting).

D. Does the Agency Action Have Plebiscitary Legitimacy?

Plebiscitary legitimacy should be the ultimate deciding factor in any analysis of whether to uphold an agency's emergency regulation of an issue of "vast 'economic and political significance.'"³⁰⁹ To decide this question, courts should consider whether the emergency issue "has been the subject of an 'earnest and profound debate' across the country,"³¹⁰ and whether the plebiscite has had a fair opportunity to declare its views on it. As I have discussed above, the simplest and best way of satisfying this test is a recent presidential election in which differing approaches to addressing the emergency were prominently pitted against each other.

The 2020 presidential election provides an excellent example of this. Empirical studies have shown that public disapproval of the incumbent President's pandemic response played a decisive role in costing him reelection.³¹¹ The issue of pandemic management and each candidate's approach to it were particularly well-ventilated by Trump's frequent public statements downplaying the COVID-19 risk, suggesting that it amounted to little more than a political "hoax," and criticizing mask-wearing.³¹² In addition, Trump indicated that his approach would leave the states, rather than the federal government, as the primary responders to the COVID-19 pandemic, with his administration acting only as a "back-up" and "supplier of last resort."³¹³ Biden, in contrast, advocated for a more robust federal administrative

³⁰⁹ Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014) (citing *Brown & Williamson*, 529 U.S. at 160).

³¹⁰ *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006) (citing *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997)).

³¹¹ See, e.g., Leonardo Baccini et al., *The COVID-19 Pandemic and the 2020 US Presidential Election*, 34 J. POPULATION ECON. 739 (2021), <https://link.springer.com/article/10.1007/s00148-020-00820-3> [<https://perma.cc/XV93-8SXZ>]; see also Harold Clarke et al., *Did COVID-19 Kill Trump Politically? The Pandemic and Voting in the 2020 Presidential Election*, 102 SOC. SCI. QUARTERLY 2194 (2021), <https://onlinelibrary.wiley.com/doi/epdf/10.1111/ssqu.12992> [<https://perma.cc/ENM9-9LRR>]; Anja Neundorff & Sergi Pardos-Prado, *The Impact of COVID-19 on Trump's Electoral Demise: The Role of Economic and Democratic Accountability*, 20 PERSPECTIVES ON POL. 170 (2022), <https://www.cambridge.org/core/journals/perspectives-on-politics/article/abs/impact-of-covid19-on-trumps-electoral-demise-the-role-of-economic-and-democratic-accountability/9EE4FE61B2AFB3F7548C5F0AA657B2CC> [<https://perma.cc/LFH7-E6EP>].

³¹² Toby Bolsen & Risa Palm, *Politicization and COVID-19 Vaccine Resistance in the U.S.*, 188 PROGRESS IN MOLECULAR BIOLOGY & TRANSLATIONAL SCI. 81, 83–84 (2022), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8577882/> [<https://perma.cc/L55H-KSV6>].

³¹³ Jennifer Kates et al., *Comparing Trump and Biden on COVID-19*, KAISER FAMILY FOUND. (Sept. 11, 2020), <https://www.kff.org/coronavirus-COVID-19/issue-brief/comparing-trump-and-biden-on-COVID-19/> [<https://perma.cc/5VVH-G9SJ>].

response. He posited that the federal government “must act swiftly and aggressively,”³¹⁴ that it, rather than the states, should assume primary responsibility for the nation’s COVID-19 response, and that such a response should involve mask mandates, increased testing and contact tracing, and strong nationwide standard setting.³¹⁵

It has been suggested that because COVID-19 posed “physical, economic, and psychological threats . . . to millions of voters,”³¹⁶ it was a particularly prominent “valence issue”; there was broad agreement that the pandemic must be managed, with political debate centering around the best approach to doing so.³¹⁷ And in the five months preceding the 2020 election, polls showed that the percentage of Americans disapproving of Trump’s pandemic management remained relatively stable at about 60%.³¹⁸

Consequently, it is reasonable to say that in the 2020 election, the plebiscite had an opportunity to vote on two different, well-ventilated approaches to the COVID-19 pandemic. And the nature of the pandemic as a particularly pressing emergency and high-profile valence issue provides theoretical backing for the empirical findings that pandemic management was a central concern for voters. It did not get lost in a bundling problem, because it was, quite simply, too major an issue, of too great political and economic significance, to play anything other than a dispositive role in voters’ decision making.

This is why the bundling argument does not work for emergency major questions and why the major questions doctrine must consider plebiscitary legitimacy in crisis governance situations. Unlike many issues that are regulated by administrative agencies, emergency major questions, by definition, are not niche matters of marginal or even insignificant public interest. Rather, they are questions that address pressing matters such as how best to respond to the COVID-19 pandemic. Any answers to such questions must consider what the public has said on the issue, which is a more direct, high-profile, and

³¹⁴ Press Release, Joseph R. Biden, President of the United States, The Biden Plan to Combat Coronavirus (COVID-19) and Prepare for Future Global Health Threats (Mar. 12, 2020), <https://www.presidency.ucsb.edu/documents/biden-campaign-press-release-the-biden-plan-combat-coronavirus-covid-19-and-prepare-for> [https://perma.cc/4724-5YJ6].

³¹⁵ See Kates et al., *supra* note 313.

³¹⁶ Clarke et al., *supra* note 311, at 2197.

³¹⁷ *Id.*

³¹⁸ Baccini, *supra* note 311, at 743.

plebiscitarily legitimate method of public engagement than ordinary notice-and-comment procedures or even the congressional legislative process.

What a court applying the major questions doctrine to OSHA's emergency temporary standard should have derived from the 2020 presidential election is that the measure did have plebiscitary legitimacy because the plebiscite had voted for a presidential administration that made it very clear it envisioned a robust role for administrative agencies in leading a nationwide response that would involve "aggressive[]"³¹⁹ federal standard-setting.³²⁰ The election afforded voters a clear and well-publicized opportunity to choose a very different approach—one in which the federal government would employ light-touch regulation, largely deferring to the states.³²¹ But that is exactly what the plebiscite rejected: in an election in which pandemic management was a particularly hotly-debated issue, and one at the forefront of voters' minds,³²² voters across the nation chose a presidential candidate who promised a stronger, more aggressively regulatory role for the federal government in responding to the unfolding emergency.

In such a situation, the current major questions doctrine as employed by the Supreme Court in *NFIB* does not preserve "government by the people," as opposed to "government by bureaucracy."³²³ What happens to the primacy of "the people" when the plebiscite sends a strong signal that it wants a pressing emergency to be addressed through a strong federal administrative response? The simple answer is the correct one: it must be respected. And courts should be loath to employ the major questions doctrine to strike down emergency regulations issued under that plebiscitary mandate.

But there are, of course, several objections that might be raised to this approach: some regarding feasibility and others regarding comparative optimality. Turning first to feasibility, it is true that presidential elections and major emergencies will not always occur contemporaneously, as they did in 2020. Specifically,

³¹⁹ Kates et al., *supra* note 313.

³²⁰ *Id.*

³²¹ *See id.*

³²² *See* Clarke et al., *supra* note 311, at 2197.

³²³ *Nat'l Fed. of Indep. Bus. v. Dep't of Lab., OSHA*, 595 U.S. 109, 125 (2022) (Gorsuch, J., concurring) (citing Antonin Scalia, *A Note on the Benzene Case*, AM. ENTER. INST., J. ON GOV'T & SOC'Y 25, 27, (1980)).

there are two situations that might particularly complicate the application of the plebiscitary legitimacy factor. Firstly, suppose an emergency arises several years before or after the nearest presidential election. How, then, should courts determine the plebiscitary legitimacy of a given emergency administrative measure when it was never debated in the course of a presidential election? Secondly, suppose the emergency arises during a presidential election year and approaches to it are prominently litigated during the course of the presidential campaign season, but both candidates share roughly similar ideas with respect to the administrative measures best suited to combat the emergency, affording voters little meaningful choice with respect to a preferred mode of crisis governance. Can plebiscitary legitimacy still be inferred when voters had essentially only one option?

Some might argue that the first situation presents a stronger case for straightforwardly applying the ordinary, clear-statement version of the major questions doctrine, since, in the absence of a presidential election as a platform for debating potential emergency responses, there is unlikely to be a viable method of registering whether or not there is plebiscitary legitimacy for the emergency regulation the President plans to enact. However, courts should still resist the temptation to default to domesticating the emergency through the clear-statement rule. Rather, in conducting a major questions analysis of the emergency regulation in such a case, courts should acknowledge that when the plebiscitary legitimacy factor absolutely cannot be established as weighing one way or another in the case at hand, the other three factors should control: whether the organic statute gives emergency powers to the agency, whether the regulation is time-limited in effect and duration, and whether the regulation falls clearly within the agency's particular area of expertise.

However, courts should not be too quick to dismiss the plebiscitary legitimacy factor merely because the emergency had not yet occurred at the time of the most recent presidential election. Depending on the constellation of events, plebiscitary legitimacy might not entirely disappear from the table. Consider Bruce Ackerman's example of the 1936 presidential and congressional elections in which Franklin D. Roosevelt and the New Deal Congress won "the greatest victory in American

[electoral] history.”³²⁴ For Ackerman, this electoral victory was a resounding plebiscitary endorsement of the New Deal’s massive new administrative regime—of a President’s plan to achieve “freedom ... through democratic control of the marketplace.”³²⁵ It was “decisive support” by “the People.”³²⁶ It is possibly expecting too much to suggest that an electoral indication of similarly overwhelming plebiscitary support for a given regulatory program might occur in the near future. And I will not attempt to draw direct parallels between the relationship between the New Deal and the 1936 elections on the one hand and the modern regulatory state and contemporary presidential elections on the other. However, there is an important kernel of guidance to extract from Ackerman’s example. If a very robust administrative state is prominently advocated by one presidential candidate, for instance in the most recent presidential election before an emergency, and a lighter approach to federal regulation is prominently advocated by the other, and if subsequent empirical evidence reveals that the candidates’ varying positions on this issue was in fact significant to the outcome of the election, this should weigh into a court’s determination of plebiscitary legitimacy. While it is certainly preferable for voters to have had the opportunity to debate approaches to specifically *emergency* administration, as opposed to general, non-crisis approaches to regulation, a clear indication of electoral preferences with regard to the latter can and should bear some weight in the court’s analysis of whether or not the emergency regulation at issue satisfies the plebiscitary legitimacy factor.

With respect to the second situation raised above, if the emergency was well-litigated during a presidential election, but the presidential candidates shared a similar approach to it, it is not inaccurate to say that voters were not afforded a particularly meaningful choice, and this may well give rise once again to the bundling argument that voters were forced to take their policy bundles as they found them. They could not select a mode of crisis governance that was not offered by either candidate. On the other hand, however, plebiscitary legitimacy does not entirely disappear in this situation either. If the major question regulation is on a particularly prominent issue, as approaches to administering

³²⁴ BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 310 (1998).

³²⁵ *Id.*

³²⁶ *Id.* at 311.

ongoing crises are likely to be, it is not unreasonable to infer that candidates may have adopted a consensus position because it is not controversial to the public. The question of how best to address a major ongoing emergency is unlikely to fall beneath the public radar, and in applying the major questions doctrine to such an emergency regulation, courts should consider that the plebiscitary pressure of a presidential election is such that two candidates from opposing parties are unlikely to adopt the same position if it is broadly unpopular. Posner and Vermeule apply their argument about plebiscitary checks and balances based on public opinion to presidents already in office,³²⁷ but it bears even better application to presidential candidates. In an inherently plebiscitary contest between two candidates vying for a claim to Weberian plebiscitary legitimacy as the basis for the exercise of presidential authority, the power of public opinion to shape policy positions should not be underestimated. If the two major presidential candidates kept the same position on a high-priority issue, such as an ongoing emergency, that is likely to factor strongly in voters' choices and be well-ventilated throughout the campaign. It may not be unreasonable for courts to assume that voters were not particularly opposed to that position. So while plebiscitary legitimacy will never be as clearly indicated in this scenario as it would have been if the two candidates had differing approaches to the emergency, it should not be altogether discounted. The stamp of plebiscitary legitimacy is not explicitly bright and clear in this case, but neither is it altogether absent, and courts should consider that the public's disinclination to express significant disapproval of that common position suggests some modest degree of plebiscitary legitimacy, even if only in the form of mild tacit approval. In such circumstances, courts should naturally give greater weight to the three other factors of my proposed test, but the plebiscitary legitimacy factor should still be an important and possibly outcome-determinative part of the analysis.

Turning next to comparative optimality, one may well ask whether it is desirable for a president's plebiscitary authority, rather than a bureaucrat's expertise-based rational authority, to control the actions of administrative agencies' crisis governance measures. What if the President's favored approach is technically suboptimal and based on an unsophisticated understanding of the

³²⁷ See POSNER & VERMEULE, *supra* note 179, at 209.

crisis, rather than the technical rigor a bureaucrat might be able to provide? And what about independent agencies, such as the Securities and Exchange Commission, which are purposely designed by Congress in such a way as to be insulated from presidential control?

Independent agencies are commonly understood as those governed by heads that are not subject to at-will removal by the President.³²⁸ These heads are frequently multi-member commissions, often statutorily required to be bipartisan in composition.³²⁹ Sometimes they have funding sources separate from congressional appropriations and executive budgets.³³⁰ As Lisa Schultz Bressman and Robert Thompson have pointed out, “[a]t the broadest level, the structural characteristics of independent agencies are aimed at insulating them, to some degree, from politics.”³³¹ Some agencies are thus designed by Congress so as to be insulated from political pressure. The work they do is, by the terms of their organic statutes, in some way unsuitable for the more common model of a single political appointee directing the agency according to the wishes of the President, and removable by the President at will.

Independent agencies, therefore, are in the unique position of not being particularly appropriate subjects of plebiscitary legitimacy inquiries. They are, by congressional design, not structurally intended to be responsive to the vicissitudes of partisan politics and national elections, but rather to pursue a nonpartisan, expertise-informed course of action governed by a comparatively technocratic body that can, in general, only be removed for “inefficiency, neglect of duty, or malfeasance in office.”³³² Simply put, the President is not supposed to exercise the type of political control over an independent agency that the structure of other agencies permits. From this, we may infer two things. Firstly, independent agencies should be excluded from analysis under the plebiscitary legitimacy factor I laid out above. They are structurally not intended to be fast-moving reflections of

³²⁸ See Cass R. Sunstein & Adrian Vermeule, *Presidential Review: The President's Statutory Authority Over Independent Agencies*, 109 GEO. L.J. 637, 638 n.1 (2021).

³²⁹ See Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 610 (2010).

³³⁰ See *id.* at 611.

³³¹ *Id.*

³³² Sunstein & Vermeule, *supra* note 328, at 640 (citations omitted).

plebiscitary will or Presidential vision at any time, including times of crisis. Thus, if they undertake to issue emergency regulations that are properly evaluated under the major questions doctrine, courts should still apply the first three factors of my proposed test, namely: (1) whether the applicable statute gives emergency powers to the agency; (2) whether the regulation is time-limited in both duration and substantive effect; and (3) whether the regulation falls within the agency's wheelhouse of expertise. But the fourth factor, whether there is plebiscitary legitimacy for the emergency measure, should not apply to agencies that Congress expressly shielded from political and electoral influence.

However, the second inference to be made from the structure of independent agencies is that because ordinary "non-independent" agencies are *not* expressly shielded from political and Presidential influence and control, their emergency regulations are rightly subject to analysis under the plebiscitary legitimacy factor. The nature of their statutory structure is such that the work with which they are tasked by Congress is not deemed to require special solicitude in the matter of political independence and insulation from Presidential control. They do not have separate funding sources, their heads are not protected by special removal protections, and the political nature of their leadership is clear. The President may appoint an agency head of their choosing, whom they are free to remove at will. This is an implicit recognition of the fact that such agencies are fundamentally political creatures and that this is not improper. On the contrary, the structure of these agencies is designed to be particularly responsive to electoral considerations. If the President is elected on a promise to have an ordinary, "non-independent" agency take a particular regulatory approach to an issue, that agency is statutorily structured so that it will be able and well-suited to do exactly that—and this is the case both in crises and in ordinary times. The lack of special provisions for the agency's political independence is an acknowledgment of that agency's political foundation.

Such a structure mandates that presidential control take priority over bureaucratic expertise. This does not mean that under my proposed major questions analysis for crisis governance measures, courts should allow an agency, under the direction of the President, to issue emergency regulations that infringe upon the constitutional rights of individuals or protected classes. As I

have argued above,³³³ the major questions doctrine does not alone determine the constitutionality of an emergency administrative regulation. But if a President directs the agency to issue an emergency regulation that is otherwise constitutional and that satisfies my proposed four-factor test for applying the major questions doctrine to crisis governance measures, the courts should uphold that regulation, even if it is not ideal in a strictly technocratic sense.

This does not mean that the President will automatically be free to respond to emergencies by enacting patently absurd and irrational regulations in the name of plebiscitary legitimacy. Recall that the plebiscitary legitimacy factor requires not only that the presidential candidate proposing such regulations be elected (and that the proposals be prominently ventilated during the campaign), but also that there be evidence to support the fact that voters specifically approved the candidate's position on the emergency. It is highly unlikely that a genuinely irrational proposal would win sufficient support to satisfy either of those requirements. A presidential candidate suggesting, for instance, that their administration will address the COVID-19 pandemic by requiring healthcare workers to dress in green is likely to raise concerns about their competence and fitness for office. Even if they were nonetheless elected to the presidency, empirical results would be unlikely to show that voter approval of that proposal played a significant role in his election. But even supposing they did, there is still another safeguard.

As Anya Bernstein and Cristina Rodríguez have shown, “political[] [appointees] and career[] [civil servants] must consistently present and defend their ideas to one another.”³³⁴ Within this discursive network, the President must find an agency head willing to issue the irrational regulation, and the agency head, although a political appointee, must be able to justify this to the career civil servants whose rational, technical expertise support their leadership. Within such a dialogic accountability framework mingling expertise and political influence, it is unlikely that the irrational regulation would survive. Rather, the Weberian rational legitimacy that is bureaucracy's chief comparative

³³³ See *supra* Part III.C.3.

³³⁴ Anya Bernstein & Cristina Rodríguez, *The Accountable Bureaucrat*, 132 YALE L.J. 1600, 1628 (2023).

advantage should come into play to discourage and prevent the promulgation of absurdities. But absurdities should be understood to mean the genuinely irrational and logically unjustifiable, not merely approaches that strike some experts as somewhat suboptimal in comparison with measures recommended by a larger proportion of expert voices. On the contrary, when such a comparison arises in an agency that is structurally designed to be political rather than “independent,”³³⁵ the President’s plebiscitarily legitimate, not-irrational measure should prevail and be upheld by courts under the major questions doctrine as applied to administrative crisis governance.

One might object that the crisis governance version of the major questions doctrine will allow highly suboptimal emergency regulations to stand, whereas in ordinary times such suboptimal regulations would be invalidated under the regular version of the major questions doctrine, and that this will lead to objectively worse administrative decisionmaking in emergency situations (seen from the rational-technical standpoint of a bureaucratic subject-matter expert). However, recall that the major questions doctrine in its ordinary form does not evaluate the relative technical optimality of one regulatory approach versus another. On the contrary, it merely looks at (1) the “majorness” of the regulated issue and (2) the agency’s authority to issue such a major regulation. Thus, whether the regulation is enacted during an emergency or during ordinary times, its substance will be subject to the same agency-internal dialogic accountability framework Bernstein and Rodríguez describe.³³⁶ And the major questions doctrine itself, no matter what version, will not act to substantively validate one regulatory approach over another. That is the task of Congress and administrative agencies, not the courts.³³⁷ But even assuming *arguendo* that the agency-internal accountability framework did not work, and that a regulation issued as crisis governance was substantively more suboptimal than it would have been if issued in ordinary times, a notable benefit of the retheorized major questions doctrine as applied to crisis governance is that it requires temporariness: the emergency regulation, unlike an ordinary regulation, must be both time-

³³⁵ Sunstein, *supra* note 328.

³³⁶ Bernstein & Rodríguez, *supra* note 334 at 1628.

³³⁷ *E.g.*, Biden v. Nebraska, 143, S. Ct. 2355, 2372 (2023) (“The question here is not whether something should be done; it is who has the authority to do it.”).

limited and of temporary substantive impact. Thus, even in the unlikely event that a uniquely substantively suboptimal emergency regulation is upheld that would have been struck down under major questions analysis in normal circumstances, any negative impact will be both temporary and easily reversible.

This does not mean, of course, that courts should rely so heavily on the time-limitation and plebiscitary legitimacy factors of my proposed approach that they adopt the deferential suspension model of washing their hands of the major questions inquiry altogether and reflexively deferring to agency action. On the contrary, precisely because the major questions doctrine is best understood as rooted in plebiscitary legitimacy, applying the doctrine to emergency situations in a responsibly circumscribed way should involve the recognition that where an emergency regulation at issue reflects a plebiscitary mandate and meets the criteria of the four-factor test laid out above, it should be upheld. This is not deference in the sense that the judiciary is required to engage in interpretative subordination to the agency. Nor is it a judgment by the judiciary on the technical, scientific, or policy merits of a given regulation. Rather, my four-factor proposal serves the principle that courts nondeferentially examine the question of the agency's authority to issue the regulation, but with the added understanding that when the judiciary invokes the major questions doctrine, it is not guarding its own primacy or that of any particular branch of government, but rather that of the voting public who have a direct plebiscitary voice, as well as an indirect congressional one, that should be respected.

CONCLUSION

Ultimately, both the deferential suspension and clear-statement domestication models of judicial review are theoretically unsatisfactory and practically ineffective approaches to a major emergency regulation issued by an administrative agency. We do not need the major questions doctrine in its current form, which comprehends neither the nature of an emergency for which detailed statutory rules cannot be prescribed *ex ante*, nor the existence of plebiscitary legitimacy outside of an indirect congressional version. But neither do we need to suspend judicial inquiry in the name of deference to superior agency expertise when an issue of significant import to daily lives across the nation is being regulated. Rather, the major questions doctrine can be made

both coherent and effective for crisis governance purposes by recognizing that the roots of the doctrine are plebiscitary and that it is possible to constrain administrative power and prevent full-on Schmittian executive overreach without depriving agencies of their essential, structurally-inherent ability to respond quickly to complex, rapidly-unfolding emergencies within their areas of specialized competence.

A plebiscitary legitimacy rationale for the major questions doctrine, as incorporated into the four-factor analysis I have proposed, is thus the first theoretically coherent and democratically responsible proposal for evaluating administrative crisis governance measures that avoids the twin pitfalls of judicially sanctioning excessive deference at the potential cost of bureaucratic overreach and judicially disclaiming responsibility for practical consequences while tying the hands of the very agencies best equipped to deal with crises. By acknowledging that the major questions doctrine serves an important plebiscitary purpose, that congressional legislation is an imperfect vehicle of plebiscitary legitimacy and that a plebiscitary voice can be heard through presidential elections, particularly during ongoing emergencies, the major questions doctrine can be both theoretically and practically modified to enhance its crisis-situation ability to deliver on its most fundamental underlying value. In this way, emergency agency regulations of major issues will no longer depend exclusively on impossibly specific *ex ante* authorization by a representative body in “intimate sympathy with . . . the people,”³³⁸ but may draw carefully delimited authorization from the plebiscitary voice of “the people”³³⁹ themselves.

³³⁸ *West Virginia v. EPA*, 142 S. Ct. 2587, 2617 (2022) (Gorsuch, J., concurring) (citing THE FEDERALIST NO. 52, at 327 (James Madison) (Clinton Rossiter ed., 1961)).

³³⁹ *Id.*