THE NATIONAL LABOR RELATIONS ACT, THE MAJOR QUESTIONS DOCTRINE, AND LABOR PEACE IN THE MODERN WORKPLACE

FRED B. JACOB

THE NATIONAL LABOR RELATIONS ACT, THE MAJOR QUESTIONS DOCTRINE, AND LABOR PEACE IN THE MODERN WORKPLACE

FRED B. JACOB*

Abstract: We are living in a time of labor unrest, and the National Labor Relations Board's ("NLRB" or "the Board") ability to address new sources of strife in the modern workplace is imperiled. The U.S. Supreme Court's major questions doctrine has already struck down agency actions involving the environment and student loans—and labor could be next. As articulated in *West Virginia v. EPA* and *Biden v. Nebraska*, the Court's robust version of the major questions doctrine jettisons *Chevron* deference. Instead, it requires clear congressional authorization before an agency addresses "extraordinary" economic or politically significant matters that the agency has not previously regulated under its statute. The malleable indicia on which the Court has relied to determine the existence of a major question—history, breadth, economic significance, and political controversy—often occur in NLRB policy making. Congress, however, granted the NLRB broad power to eliminate obstructions to economic productivity caused by strikes, violence, and other disruptive forms of worker protest, well-aware that the Board would confront sources of conflict that did not exist in 1935. If the new major questions doctrine prevents the NLRB from exercising the powers Congress conferred upon it to help quell the current spate of labor unrest, the Court will undermine legislative intent and economic stability in one fell swoop.

This Article proposes that courts should apply the major questions doctrine to federal agencies modestly and to the NLRB rarely, if at all. The NLRB and its sister agencies should incorporate major questions concerns into their processes to avoid triggering the doctrine unintentionally. And the courts should find major questions only when indicia exist conjunctively and are qualitatively major. Further, the NLRB's distinct history, adjudicative structure, and statutory entitlement to judicial deference demand that the courts respect the Board's policy making, even if it implicates so-called major questions. In this way, courts will honor

* Solicitor of the National Labor Relations Board and Professorial Lecturer in Law at George Washington University Law (GW Law) School. The author thanks Anne Lofaso, Jeffrey Hirsch, Erin Carroll, Joan Flynn, and David Schwartz for their helpful comments and insight, and Aram Gavoor and GW Law School for their encouragement and support. Special thanks to the talented and eagle-eyed staff of the *Boston College Law Review* for their editorial insight. The views expressed in this post are solely those of the author and not those of the National Labor Relations Board or the United States Government.

Congress's decision to empower an expert adjudicative agency, rather than the judiciary, to protect labor peace.

> *"[T]he Labor Board, though it has become highly respectable, has never become stuffy or bogged down in a groove."*
>
> —J. Warren Madden, first Chairman of the NLRB, 1967[1]

INTRODUCTION

Organizing a labor union is difficult and dangerous, even at companies known for their progressive social values. In the last several years, unions have embarked on daring and trailblazing campaigns to organize some of the corporate sector's sexiest social-influencer workplaces—Starbucks, Amazon, Apple, and Tesla. At each, union organizers allege that employees paid a price. Starbucks has been accused of firing almost three hundred employees nationwide for supporting a union.[2] After workers at an Amazon warehouse on Staten Island voted for representation by the independent Amazon Labor Union (ALU), union representatives charged that Amazon claimed a property right to prohibit off-duty employees from entering the warehouse to talk to union representatives.[3] They also claimed Amazon discharged warehouse workers for supporting the ALU and put its Chief Executive Officer on CNBC to threaten employees that their relationships with managers would suffer if they selected union representation.[4] At an Apple Store in Atlanta, organizing employees claim that Apple forced them to attend mandatory "captive audience" meetings to hear anti-union rhetoric that the union derided as "not only union-busting, but an example of psychological warfare."[5] An organizing campaign at Tesla devolved into a flame war between employees and founder Elon Musk, whose conversation-ending tweet to his then-twenty-two million plus followers threatened employees that, if they unionized, they would "pay union dues [and] give up stock options for nothing[.]"[6]

---

[1] J. Warren Madden, *Origin and Early Years of the National Labor Relations Act*, 18 HASTINGS L.J. 571, 582 (1967).

[2] Greg Jaffe, *Lexi Rizzo Fought to Unionize Her Starbucks. Now She's Out of a Job. Her Struggle Is Just Beginning.*, WASH. POST (June 17, 2023), https://www.washingtonpost.com/business/interactive/2023/starbucks-union-fired-worker/ [https://perma.cc/6HAB-XZ59].

[3] Josh Eidelson, *Amazon Covid Changes, CEO Comments Broke Law, NLRB Alleges*, BLOOMBERG L. (May 23, 2023), https://news.bloomberglaw.com/daily-labor-report/amazon-ceos-anti-union-comments-broke-law-labor-board-alleges [https://perma.cc/72YB-MVA7].

[4] *Id.*

[5] Josh Eidelson, *Apple's Labor Tactics in Atlanta Deemed Illegal by the NLRB*, BLOOMBERG L. (Dec. 5, 2022), https://news.bloomberglaw.com/daily-labor-report/apples-labor-tactics-in-atlanta-deemed-illegal-by-us-officials [https://perma.cc/6KHM-HTXV].

[6] Tesla, Inc., 370 N.L.R.B. No. 101, 2021 WL 1171743, at *50 (Mar. 25, 2021).

Labor-management strife is not new. In 1935, Congress enacted the National Labor Relations Act ("NLRA" or "the Act") and vested an independent adjudicative agency, the National Labor Relations Board ("NLRB" or "the Board"), with the power to resolve labor conflicts that impede the free flow of commerce.[7] The Act embraced collective bargaining and industrial democracy to establish a peaceful mechanism for settling workplace disputes instead of strikes and violence.[8] It also granted workers the right to self-association, to form a union, or to simply pool together their collective economic power.[9] To guarantee American workers their right to engage in collective bargaining, the Act prevents interference with associational rights, prohibits discrimination, and imposes a duty on employers and unions to bargain in good faith.[10] Congress charged the Board with interpreting, applying, and enforcing these statutory provisions to whatever workplace trouble the public brings to it.[11] It also gave the Board broad and discretionary jurisdiction co-extensive with the full reach of the Commerce Clause, regulating almost all private-sector employers and labor organizations.[12]

In carrying out this statutory mission, the Board, like all administrative agencies, exercises delegated legislative authority. When engaging in judicial review of agency action, the *Chevron* doctrine generally requires courts to defer to an agency's reasonable interpretation of its organic statute.[13] In its march to narrow *Chevron,*[14] the U.S. Supreme Court, first in 2022 in *West Virginia v. EPA* and then in 2023 in *Biden v. Nebraska*, applied a new "major questions doctrine" in which courts demand evidence of clear congressional authorization when an agency claims power to regulate significant economic or political activity.[15] If the agency action concerns such a major question, *Chevron* defer-

---

[7] National Labor Relations Act, 29 U.S.C. §§ 151–169.

[8] *See* PHILIP DRAY, THERE IS POWER IN A UNION 227 (2010) (defining industrial democracy as "the idea that the democratic principles and basic civil and political rights embedded in the Constitution and its post Civil War amendments should apply to the issues of labor and industry as much as they informed the nation's political system") (internal quotations omitted).

[9] 29 U.S.C. § 157.

[10] *Id.* § 158.

[11] *Id.* §§ 158–160.

[12] *Id.* § 160(a) ("The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice . . . affecting commerce."). For further discussion on the NLRB's jurisdiction, see *infra* notes 211–227 and accompanying text.

[13] *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–44 (1984) (providing for judicial deference to agencies when their action is "based on a permissible construction of the statute").

[14] *See infra* notes 53–71, 83–86, and accompanying text (explaining the application of the *Chevron* doctrine and considering the recent state of the *Chevron* doctrine).

[15] *See* Biden v. Nebraska,143 S. Ct. 2355, 2375 (2023) (noting the Court's previous application of the clear congressional authorization requirement); West Virginia v. EPA, 142 S. Ct. 2587, 2609

ence does not come into play, and the Court seemingly looks for unambiguous statutory language to sustain the agency's authority.[16] For older statutes, clear authorization to fix new problems may be hard to find.

The Act is particularly susceptible to frustration by an expansive major questions doctrine. The language of the Act is deliberately general, and the Board's decisions often implicate matters of expansive jurisdiction, reversals of old precedent, economic significance, and political controversy—all of which the Court has cited as signs of a major question.[17] The workplace continues to throw curve balls at the Board, like discrimination via tweet or property rights in the face of evolving Takings Clause jurisprudence.[18] The Board has a responsibility to adapt the provisions of the Act to a shifting twenty-first century workplace and to shifting twenty-first century problems. Courts could impede this mission if they decide that the Board regulated a "major question" and demand clear congressional authorization as a prerequisite to the Board's routine exercise of regulatory power. At the very least, the Court's easy-to-claim and hard-to-rebut formulation of its new doctrine has empowered litigants to slow down administrative processes by alleging a "major question" in NLRB cases, forcing the agency to expend time and resources marshalling a response.[19]

This Article contends that courts should employ the major questions doctrine modestly. Agencies should carefully construct and roll out their regulatory programs to avoid inadvertently triggering major questions concerns. Further, if we are to take the Court at its word, only the most "extraordinary" of cases implicate the doctrine.[20] The Article proposes two guidelines to prevent courts from applying it to the merely routine. First, extraordinary rules implicate all four indicia of majorness—unheralded and ahistorical assertions of power, breadth and transformative effect on the regulated community, economic significance, and political controversy. A conjunctive analysis tracks the

(2022) (stating that "[t]he agency instead must point to 'clear congressional authorization' for the power it claims" (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014))).

[16] *See West Virginia v. EPA*, 142 S. Ct. at 2609 (imposing a requirement for "clear congressional authorization" (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324)).

[17] *See infra* notes 39–42, 206–289, and accompanying text (analyzing the text of the Act, the major questions indicia, and Board decisions).

[18] *See* Editorial, *The NLRB's Union Assault on Amazon*, WALL ST. J., https://www.wsj.com/articles/national-labor-relations-board-amazon-jennifer-abruzzo-andy-jassy-nlrb-unions-biden-administration-da583d2b [https://perma.cc/6HA4-566J] (June 16, 2023) ("Amazon last week argued in a response [to the NLRB General Counsel's complaint] that [her proposed] order violates its First and Fifth Amendment rights.").

[19] *See infra* notes 179–194 and accompanying text (analyzing the effect of *West Virginia* on NLRB decisions).

[20] *See West Virginia v. EPA*, 142 S. Ct. at 2609 (noting that the major questions doctrine is necessary in "certain extraordinary cases").

Court's major questions cases, and it prevents judges from cherry picking individual considerations like economic cost or overruled precedent to deny agencies traditional *Chevron* deference. Second, extraordinary rules are of concern beyond the regulated community. A rule only of interest to the people whom it regulates is necessarily ordinary.

As for the Board, this Article contends that the major questions doctrine should apply to the NLRB rarely, if at all. The Board's adjudicative process implicates few of the dangers of overreach the Court has identified in its major questions cases. Further, by design, Congress charged the Board with creating a common law of labor relations to ensure industrial peace. Congress has repeatedly reaffirmed that statutory design by expanding the Board's jurisdiction since the Act's initial passage, amending the Act to enhance the Board's judicial role, providing judicial oversight to ensure that Article I adjudication is not unchecked, and failing to upset that statutory scheme through legislative action.[21] Finally, deference to the Board's policy making is not dependent on *Chevron* or, by extension, on *West Virginia*.[22] Rather, it emanates from the Act itself and Congress's intentional decision to entrust national labor policy to an administrative agency instead of the courts, which had demonstrated marked hostility to labor interests in the decades before the Act's enactment in 1935.

Part I discusses the NLRA, its reach, and its administration.[23] Part II addresses the *Chevron* doctrine and how deference to administrative agencies allows nimble effectuation of legislative policy to the benefit of public stakeholders.[24] Part III analyzes the ascendent major questions doctrine.[25] Part IV lays out the pitfalls that a broadly applied major questions doctrine could present for the NLRA.[26] Part V discusses how a narrowly applied major questions doctrine will preserve the ability of agencies like the NLRB to fill in interstitial gaps in their statutory scheme, receive the deference that should be accorded to agency action, and continue to apply their statutes to facts that the framers of these laws could not have imagined when enacted decades earlier.[27]

---

[21] *See infra* notes 341–347 and accompanying text (discussing the development of the NLRB's authority).

[22] *See West Virginia v. EPA*, 142 S. Ct. at 2609 (providing for judicial deference only when Congress clearly authorizes the action); Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–44 (1984) (requiring judicial deference when an agency's action is "based on a permissible construction of the statute").

[23] *See infra* notes 28–51 and accompanying text.

[24] *See infra* notes 52–77 and accompanying text.

[25] *See infra* notes 78–203 and accompanying text.

[26] *See infra* notes 206–289 and accompanying text.

[27] *See infra* notes 290–384 and accompanying text.

I. A NATIONAL LABOR POLICY: THE NATIONAL LABOR RELATIONS ACT

The NLRA is a bill of rights for American workers.[28] Enacted in 1935, the Act is the product of a half-century of violent labor uprisings,[29] judicial interference with the right to organize,[30] the economic strife of the Great Depression,[31] and New Deal experimentation with building a common law of federal labor relations through administrative adjudication.[32] To eliminate obstructions to the free flow of commerce caused by labor unrest, the Act states that the policy of the United States is to:

> [E]ncourage[e] the practice and procedure of collective bargaining . . . by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.[33]

The Act takes a three-pronged approach to effectuating this policy. Section 7 guarantees workers "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" and "the right to re-

---

[28] *See* HARRY A. MILLIS & EMILY CLARK BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY 30 (1950) ("The National Labor Relations Act of 1935, the Wagner Act, brought to fruition in a brief, carefully drawn statute a revolutionary national labor policy—that workers were to be protected in the right to organize and bargain collectively through freely chosen representatives.").

[29] *See, e.g.*, JEREMY BRECHER, STRIKE! 174–80 (50th anniversary ed. 2020) (describing the National Textile Strike in 1934); JAMES GREEN, THE DEVIL IS HERE IN THESE HILLS 265–85 (2015) (describing the Battle of Blair Mountain in 1921); DRAY, *supra* note 8, at 107–18 (describing the Great Strike in 1877), 140–45 (describing the Haymarket Riot in 1886), 339–44 (describing the Ludlow Massacre in 1914); MILLIS & BROWN, *supra* note 28, at 7 (describing the impact of labor uprisings following the Civil War).

[30] *See infra* notes 361–364 and accompanying text (describing the limited role of the courts relevant to NLRB decisions); MILLIS & BROWN, *supra* note 28, at 7–19 (describing "the use of courts in labor disputes"); *see also* Robert H. Bremner, *The Background of the Norris-La Guardia Act*, 9 HISTORIAN 171, 175 (1947) (analyzing the Norris-La Guardia Act that "prescribes the conditions upon which federal courts may issue injunctions in cases involving or growing out of labor disputes"). *See generally* FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION (1930) (examining the role of courts and labor injunctions).

[31] In 1934, the year before the NLRA's enactment, the United States experienced 1,856 strikes sidelining 1,466,695 workers. FLORENCE PETERSON, BUREAU OF LAB. STATS., DEP'T OF LAB., BULL. NO. 651, STRIKES IN THE UNITED STATES 1880–1936, at 21 (1938), https://fraser.stlouisfed.org/files/docs/publications/bls/bls_0651_1938.pdf [https://perma.cc/8LX3-WD3D]. In 1935, the year of the NLRA's passage, there were 2,014 strikes involving 1,117,213 workers. *Id.*

[32] *See infra* notes 319–327 and accompanying text (examining the National Labor Board and the Old NLRB).

[33] 29 U.S.C. § 151.

frain from any or all of such activities."[34] This right to self-organization and collective bargaining is the foundation of the Act and lies at the heart of its provisions and protections. Section 8 targets employer and union unfair labor practices that Congress believed to threaten industrial peace and interstate commerce.[35] It prohibits interference with employees' Section 7 rights, discrimination against employees because of their union activity, and refusals to bargain in good faith.[36] Section 9 provides for self-determination elections for employees to decide whether to select union representation.[37] It also stipulates that labor organizations designated or selected by a majority of employees in an appropriate bargaining unit are the "exclusive [bargaining] representatives of all the employees in [the] unit."[38]

Congress phrased Section 7 and its implementing provisions generally.[39] This was intentional. The drafters of the original 1935 Wagner Act deliberately "broadened the NLRB's administrative discretion 'by employing general enabling language' especially in regard to the finding of unfair labor practices, to the determination of the appropriate unit for collective bargaining, and to the board's power to provide remedies."[40] They did so to "'permit [the Board] to prevent activities for which . . . experience provided no precedent.'"[41] A blanket prohibition on interference with workers' core Section 7 rights was especially necessary, according to a 1935 Senate committee report, because "employers will doubtless find methods of interference, etc., which are not specifically recited in the other unfair practices, but are just as effective in impeding self-organization and collective bargaining."[42]

The Act establishes the NLRB as a quasi-judicial body to enforce the promises of Sections 7, 8, and 9.[43] The President appoints the Board's five members, who are then confirmed by the Senate, to serve five-year staggered

---

[34] *Id.* § 157.

[35] *See id.* § 158 (describing what is considered unfair labor practices by both employers and labor organizations).

[36] *Id.*

[37] *Id.* § 159(a).

[38] *Id.*

[39] *See id.* § 157 (granting rights to employees).

[40] 1 JAMES A. GROSS, THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD 133 (1974) (quoting IRVING BERNSTEIN, THE NEW DEAL COLLECTIVE BARGAINING POLICY 88 (1950)).

[41] *Id.* (quoting BERNSTEIN, *supra* note 40, at 94).

[42] STAFF OF S. COMM. ON EDUC. AND LAB., 74TH CONG., COMPARISON OF S. 2926 (73D CONG.) AND S. 1958 (74TH CONG.) 26–27 (Comm. Print 1935), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1935, at 1352 (1949).

[43] 29 U.S.C. § 153; *see* NLRB v. Aakash, Inc., 58 F.4th 1099, 1104 (9th Cir. 2023) ("Congress explicitly granted all judicial or quasi-judicial functions to the Board . . . ."); *accord* Humphrey's Ex'r v. United States, 295 U.S. 602, 628–29 (1935).

terms.[44] To protect their independence as adjudicators and policy makers, the Act insulates Board members from termination except "for neglect of duty or malfeasance in office, but for no other cause."[45] To translate the Act's general language into a body of workable law, the Act vests the Board with adjudicative authority to create binding precedent in the course of resolving representation[46] and unfair labor practice disputes.[47] Through case adjudication, the Board has exercised its broad discretion to define the substance and contours of the Act based on the statutory policy set forth in Sections 1 and 7.[48] The Board also has power to promulgate substantive rules.[49] After issuing only a single substantive rule in its first seventy-five years,[50] since 2012 the Board has utilized its rulemaking authority more regularly, although adjudication remains the Board's preferred means for policy making.[51]

---

[44] 29 U.S.C. § 153(a); *see* Joan Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935–2000*, 61 OHIO ST. L.J. 1361, 1363 (2000) (describing the history of the NLRB).

[45] 29 U.S.C. § 153(a). Section 3(d) of the Act creates a General Counsel of the Board, also appointed by the President and confirmed by the Senate, who possesses final authority to investigate unfair labor practices, issue complaints, and prosecute unfair labor practices before the Board. *Id.* § 153(d); *see* NLRB v. United Food & Com. Workers Union, Loc. 23, AFL-CIO, 484 U.S. 112, 124 (1987) (noting the distinction between the General Counsel and the NLRB); *Aakash, Inc.*, 58 F.4th at 1104–05 (determining that the NLRA permits for-cause removal of Board members but not the General Counsel); Exela Enter. Sols., Inc. v. NLRB, 32 F.4th 436, 443–44 (5th Cir. 2022) (determining that the General Counsel has prosecutorial functions while Board members have adjudicatory functions).

[46] 29 U.S.C. § 159. The Act directs the Board to determine whether "a question of representation affecting commerce" exists meriting an election under Section 9(a), whether the bargaining unit sought is "appropriate" under Section 9(b), and whether conduct before and during an election interferes with employee choice. *Id.*

[47] *Id.* § 160(a). Section 10(a) of the Act empowers the Board "to prevent any person from engaging in any unfair labor practice . . . affecting commerce." *Id.* After the General Counsel investigates and issues a complaint alleging that an employer or union has committed an unfair labor practice, an administrative law judge conducts a hearing and issues a recommended decision and order. *Id.* § 160(c). On exceptions from the judge, the Board makes findings of fact and, if it determines that the respondent has violated the Act as alleged, the Act directs the Board to "issue . . . an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies" of the Act. *Id.*

[48] *Id.* §§ 151, 157 (describing the importance of collective bargaining and other employee rights).

[49] *Id.* § 156; Am. Hosp. Ass'n v. NLRB, 499 U.S. 606, 609–10 (1991).

[50] *Am. Hosp. Ass'n*, 499 U.S. at 608 ("For the first time since the National Labor Relations Board . . . was established in 1935, the Board has promulgated a substantive rule defining the employee units appropriate for collective bargaining in a particular line of commerce."); Collective- Bargaining Units in the Health Care Industry, 54 Fed. Reg. 16336 (Apr. 21, 1989) (to be codified at 29 C.F.R. pt. 103).

[51] *See* Standard for Determining Joint Employer Status, 88 Fed. Reg. 73946 (Oct. 27, 2023) (to be codified at 29 C.F.R. pt. 103); Representation Case Procedures, 88 Fed. Reg. 58075 (Aug. 25, 2023) (to be codified at 29 C.F.R. pt. 102); Representation—Case Procedures: Election Bars; Proof of Majority Support in Construction-Industry Collective-Bargaining Relationships, 85 Fed. Reg. 18366 (Apr. 1, 2020) (to be codified at 29 C.F.R. pt. 103); Joint Employer Status Under the National Labor

II. DEFERENCE TO AGENCY DECISION MAKING UNDER *CHEVRON*

Deference to administrative agencies accommodates the delicate balance of power that occurs between the Legislative Branch and the Executive Branch when Congress establishes an administrative program to effectuate legislative action. Because Congress could not envision and legislate for every possible permutation that a statutory scheme could encounter, it delegates legislative power to the Executive Branch.[52] In doing so, Congress directs the Executive to implement unforeseen nuances of its legislative programs.

In 1984's *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, the Court instructed lower courts to defer to an agency's reasonable construction of an ambiguous statute, even though courts regularly interpret ambiguous statutory language.[53] *Chevron* limited judicial review because an agency's interpretation of ambiguous language in a congressional statute is a *legislative* act implicating policy choice, not a *judicial* act implicating the construction of language and law.[54] *Chevron* explains that "[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation."[55] *Chevron* reflects mid-twentieth century judicial conservatism, in which the Court defers to political actors and political winds—notwithstanding its own views on a law's purpose—and directs the federal judiciary to do the same.[56] "Our Constitution vests such [policy making] responsibilities in the political branches."[57]

Over time, *Chevron*'s simple direction to the lower courts has evolved into a well-known two-step framework for analyzing when deference to agency action is appropriate. *Chevron* step one directs courts to employ traditional rules of construction to determine whether a statute's meaning is unambiguous

---

Relations Act, 85 Fed. Reg. 11184 (Feb. 26, 2020) (to be codified at 29 C.F.R. pt. 103); Representation-Case Procedures, 84 Fed. Reg. 69524 (Dec. 18, 2019) (to be codified at 29 C.F.R. pt. 102); Representation—Case Procedures, 79 Fed. Reg. 74308 (Dec. 15, 2014) (to be codified at 29 C.F.R. pts. 101–03); Notification of Employee Rights Under the National Labor Relations Act, 76 Fed. Reg. 54006 (Aug. 30, 2011) (to be codified at 29 C.F.R. pt. 104).

[52] *See* Gundy v. United States, 139 S. Ct. 2116, 2123 (2019) ("Congress may 'obtain[ ] the assistance of its coordinate Branches'—and in particular, may confer substantial discretion on executive agencies to implement and enforce the laws." (alteration in original) (quoting Mistretta v. United States, 488 U.S. 361, 372 (1989))).

[53] 467 U.S. 837, 842–43 (1984).

[54] *See id.* at 843 ("The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974))).

[55] *Id.* at 843–44.

[56] *See id.* at 866 (explaining that "[t]he responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones").

[57] *Id.* (quoting TVA v. Hill, 437 U.S. 153, 195 (1978)).

(a *judicial* role).[58] If the statutory meaning is ambiguous, however, *Chevron* step two instructs courts to decide only whether the agency has filled in the statutory gaps in a permissible or reasonable manner (a *policy* role).[59] And, depending on who you ask, those two steps may be preceded by a step zero that asks whether *Chevron* even applies in the first place.[60]

The courts have regularly applied *Chevron* in NLRB cases to defer to the NLRB's policy choices. Beginning shortly after the decision itself, the Court invoked *Chevron* as a yardstick to evaluate deference to the Board,[61] and the courts of appeals have followed its lead.[62] The courts often cite *Chevron* alongside pre-*Chevron* NLRB case law requiring deference to the Board under its unique statutory scheme.[63]

---

[58] *Id.* at 842–43; *see* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 986 (2005); *see, e.g.*, STI Pharma, LLC v. Azar, 613 F. Supp. 3d 152, 164 (D.D.C. 2020) (stressing judicial primacy in observing that, "[i]f those tools yield a single correct interpretation of the statute, that ends the matter").

[59] *Brand X*, 545 U.S. at 986; *Chevron*, 467 U.S. at 843.

[60] *See* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 191 (2006) (defining step zero as "the initial inquiry into whether the *Chevron* framework applies at all"); Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 836 (2001) (explaining that step zero is an "inquiry that must be made in deciding whether courts should turn to the *Chevron* framework at all"); *see also* Ali v. Barr, 951 F.3d 275, 279 (5th Cir. 2020) ("Administrative-law wonks call that a '*Chevron* Step Zero' decision.").

[61] *See* Epic Sys. Corp. v. Lewis, 584 U.S. 497, 520–21 (2018) (holding that no deference applied in the case under *Chevron*); NLRB v. Ky. River Cmty. Care, Inc., 532 U.S. 706, 713 (2001) (holding that "[t]wo aspects of the Board's interpretation are reasonable, and hence controlling on this Court"); Holly Farms Corp. v. NLRB, 517 U.S. 392, 399 (1996) (stating that, when a statute is ambiguous, the Court "must respect the judgment of the agency empowered to apply the law"); NLRB v. Town & Country Elec., Inc., 516 U.S. 85, 89–90 (1995) (stating that "the Board often possesses a degree of legal leeway when it interprets its governing statute, particularly where Congress likely intended an understanding of labor relations to guide the Act's application"); ABF Freight Sys., Inc. v. NLRB, 510 U.S. 317, 324 (1994) ("When Congress expressly delegates to an administrative agency the authority to make specific policy determinations, courts must give the agency's decision controlling weight . . . ."); Lechmere, Inc. v. NLRB, 502 U.S. 527, 536 (1992) ("[T]he NLRB is entitled to judicial deference when it interprets an ambiguous provision of the statute that it administers."); Am. Hosp. Ass'n v. NLRB, 499 U.S. 606, 614 (1991) (finding no ambiguity in the case but stating that "if we could find any ambiguity . . . we would still defer to the Board's reasonable interpretation of the statutory text"); Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council, 485 U.S. 568, 574 (1988) (stating that Board interpretations are "normally . . . entitled to deference unless that construction were clearly contrary to the intent of Congress"); NLRB v. United Food & Com. Workers Union, Loc. 23, AFL-CIO, 484 U.S. 112, 123 (1987) (stating that, under *Chevron*, the Court has "traditionally accorded the Board deference with regard to its interpretation of the NLRA").

[62] *See* Nicholas M. Ohanesian, *Administrative Deference and the National Labor Relations Board: Survey and Analysis*, 56 CREIGHTON L. REV. 43, 55–61 & nn.102–32 (2022) (indexing 180 NLRB cases between 1985 and 2021 in which the courts of appeals applied *Chevron*).

[63] William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1108 (2008).

Chevron matters. The empirical evidence demonstrates that the NLRB wins more cases under *Chevron* than other generally applicable standards of review. According to some scholars, courts of appeals applied *Chevron* in 87.5% of the thirty-two NLRB cases they studied over an eleven-year period from 2003 to 2013.[64] During that time, the Board won in 82.1% of those cases, a higher win percentage than the overall agency average of 78.1%.[65] A more recent study focusing specifically on the NLRB and judicial deference analyzed hundreds of NLRB cases in the federal courts from 1985 through 2021 and found similar win-loss rates when courts applied *Chevron*.[66] It determined that the Board prevailed in 73.9% of cases in which the courts applied *Chevron*;[67] 25% of cases where the courts applied *Skidmore v. Swift & Co.*,[68] which grants an agency only so much deference as its reasoning has the "power to persuade";[69] and 45% of cases in which the court simply reviewed for "reasoned decisionmaking" under the Administrative Procedure Act[70] without a related *Chevron* analysis.[71]

In that way, *Chevron* provides a buffer zone for the Board's policy decisions when the Board fills gaps in its organic statute.[72] Judges affirm agency interpretations contrary to the judges' political leanings.[73] They are forced to do so because *Chevron* directs them to leave agency action alone so long as it

---

[64] Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 21–22, 25–26, 54 tbl.3 (2017).

[65] *Id.* 54–55, 54 tbl.3. In another article, Professors Barnett and Walker described the NLRB as one "of the big winners among the agencies." Kent Barnett & Christopher J. Walker, Chevron *Step Two's Domain*, 93 NOTRE DAME L. REV. 1441, 1459 (2018).

[66] *See* Ohanesian, *supra* note 62, at 55–61 (analyzing wins and losses under *Chevron*).

[67] *Id.* (calculating that the Board won 133 and lost 47 *Chevron* cases).

[68] *Id.* at 61–62 (calculating that the Board won 1 and lost 3 *Skidmore*-only cases).

[69] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) ("The weight of such a[n agency's] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors that give it power to persuade, if lacking power to control.").

[70] Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 42 (1983) (holding that the agency acted in an arbitrary and capricious manner under the Administrative Procedure Act when its "explanation for rescission of the passive restraint requirement [was] *not* sufficient to enable us to conclude that the rescission was the product of reasoned decisionmaking").

[71] Ohanesian, *supra* note 62, at 63–66 (calculating that the Board won 16 and lost 28 cases that courts reviewed for reasoned decisionmaking without a related *Chevron* analysis).

[72] *See* Eskridge & Baer, *supra* note 63, at 1107 ("To carry out the congressional *purpose*, the agency needs discretionary breathing room, and so courts should not second-guess their decisions unless inconsistent in some important way with the statute as Congress devised and wrote it.").

[73] *See* Kent Barnett, Christina L. Boyd & Christopher J. Walker, *Administrative Law's Political Dynamics*, 71 VAND. L. REV. 1463, 1468 (2018) ("*Chevron* deference significantly curbs (but does not fully constrain) judicial discretion. For instance, the most liberal panels agree with conservative agency statutory interpretations only 18% of the time when they do not use *Chevron* deference but 51% when they do. Similarly, the most conservative panels agree with liberal agency interpretations only 18% of the time without *Chevron* deference but 66% with it.").

is reasonable.[74] This buffer allows agencies to act quickly when implementing new policies, relieved from some of the burden of having to predict exactly how courts will construe the statute. It frees agencies from being bound by contrary circuit court interpretations not commanded by a statute's unambiguous meaning.[75] Finally, it allows for bold policy making, pushing regulatory activity to the edges of the "Overton window"[76] so long as the statutory construction falls within a wide range of reasonableness.[77]

III. The Major Questions Doctrine

In 2022, in *West Virginia v. EPA*, the Court pulled away from *Chevron* and made explicit a doctrine that had been implicit through a half-dozen cases over the prior twenty years.[78] The major questions doctrine directs courts to first analyze agency action to determine whether the agency purports to regulate a matter of economic or political significance.[79] If so, the agency must then demonstrate "clear congressional authorization" for its action.[80] Section A of this Part traces the development of the major questions doctrine.[81] Section B of this Part surveys how litigants before the Board have asserted the major questions doctrine, mimicking the Court's ill-defined analyses.[82]

A. From Brown & Williamson *to* West Virginia*, the Major Questions Doctrine Gets Buff*

Chevron has evolved from a conservative doctrine to a conservative target, with deference to agency action coming under fire. From the early days of

[74] *See id.*

[75] *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005) ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.").

[76] *See* Derek Robertson, *How an Obscure Conservative Theory Became the Trump Era's Go-To Nerd Phrase*, POLITICO MAG. (Feb. 25, 2018), https://www.politico.com/magazine/story/2018/02/25/overton-window-explained-definition-meaning-217010/ [https://perma.cc/S78X-SKJZ] (defining the "Overton window" as "the range of ideas outside which lie political exile or pariahdom" and explaining that moving it to the left or the right brings formerly unacceptable ideas into the mainstream).

[77] *See, e.g.*, Rust v. Sullivan, 500 U.S. 173, 184–87 (1991) (holding that, under *Chevron*, the Secretary of Health and Human Services permissibly construed a prohibition on spending federal funds on abortion services to permit a "gag rule" prohibiting doctors from even discussing abortion as a medical option).

[78] *See generally* West Virginia v. EPA, 142 S. Ct. 2587 (2022) (analyzing the case presented under the major questions doctrine).

[79] *Id.* at 2607–09.

[80] *Id.*

[81] *See infra* notes 83–178 and accompanying text.

[82] *See infra* notes 179–203 and accompanying text.

the *Chevron* doctrine, commentators have criticized the decision as usurping the judicial role.[83] Justices Thomas and Gorsuch have asserted that *Chevron* deference constitutes an abandonment of the judiciary's duty under the separation of powers to provide a check on the Executive Branch's administration of the laws.[84] The Court has barely cited *Chevron* in the last decade.[85] And, indeed, the Court heard challenges to *Chevron* in the Fall 2023 term, in which the regulated parties contended that the Court should narrow *Chevron* to circumstances where a statute is considered ambiguous or overrule it altogether as inconsistently applied and intrusive on the judicial role.[86]

The major questions doctrine is consistent with this anti-*Chevron* trend. It eliminates the *Chevron* buffer and places additional interpretive burdens on agencies employing older laws to attack significant new problems. Like a game of statutory whack-a-mole, as statutes age the problems they were enacted to address evolve.[87] Even though unforeseen by the drafters of the original legislation, these new challenges nevertheless implicate the agency's mission

---

[83] *See* Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era,* 3 YALE J. ON REGUL. 283, 283 (1986) ("Affording deference to an agency's legal analysis, however, seems facially contrary to the fundamental principle, incorporated in Chief Justice John Marshall's broad dictum in *Marbury v. Madison*, that '[i]t is emphatically the duty of the judicial department to say what the law is.'" (alteration in original) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803))); *see also* Ilan Wurman, *The Specification Power,* 168 U. PA. L. REV. 689, 699 (2020) (discussing Justice Scalia's conflicting views on *Chevron* deference and his "not[ing] the apparent inconsistency between deference to agency legal interpretations and the requirements of Article III").

[84] *See* Buffington v. McDonough, 143 S. Ct. 14, 22 (2022) (mem.) (Gorsuch, J., dissenting from denial of certiorari) ("We should acknowledge forthrightly that *Chevron* did not undo, and could not have undone, the judicial duty to provide an independent judgment of the law's meaning in the cases that come before the Nation's courts."); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149–58 (10th Cir. 2016) (Gorsuch, J., concurring) (describing Justice Thomas's critiques of *Chevron*); Jonathan R. Siegel, *The Constitutional Case for* Chevron *Deference*, 71 VAND. L. REV. 937, 947, 950 (2018) (citing Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 112–33 (2015) (Thomas, J., concurring in the judgment)).

[85] *See* Erica N. White, *Overcoming the Major Questions Doctrine with Federal Public Health Authorities*, 18 HARV. L. & POL'Y REV. (forthcoming 2024) (manuscript at 8) (stating that the Court has not cited *Chevron* since 2016), https://ssrn.com/abstract=4410940 [https://perma.cc/34CH-WVRF].

[86] *See* Relentless, Inc. v. Dep't of Com., 144 S. Ct. 325, 325 (2023) (mem.) (granting petition for certiorari in part from 62 F.4th 621 (1st Cir. 2023)); Loper Bright Enters. v. Raimondo, 143 S. Ct. 2429, 2429 (mem.) (granting petition for certiorari in part from 45 F.4th 359 (D.C. Cir. 2022)); Petition for Writ of Certiorari at 20–30, Relentless, Inc. v. Dep't of Com., No. 22-1219 (U.S. June 14, 2023); Petition for Writ of Certiorari, Loper Bright Enters. v. Raimondo at 28–33, No. 22-451 (U.S. Nov. 10, 2022).

[87] *See* Daniel T. Deacon, *Justice Scalia on Updating Old Statutes (with Particular Attention to the Communications Act)*, 16 COLO. TECH. L.J. 103, 105 (2017) ("Statutes are written for a specific time. Congress may be (and often is) unaware of potential changes that may disrupt the regulatory landscape."); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1480 (1987) ("As society changes, adapts to the statute, and generates new variations of the problem which gave rise to the statute, the unanticipated gaps and ambiguities proliferate."). *See generally* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982) (examining the issue of "statutorification" and evaluating responses).

and the broad policy goals set in the original underlying legislation.[88] Over time, however, the "fit" of the original statutory design may no longer adequately address new variations of old problems. Congressional disfunction places institutional pressures on agencies to find a good fit to resolve pressing policy challenges within the original rubric of their organic law.[89] After all, agencies have a *duty* under their authorizing statutes to try to address them, especially if the underlying statute could reasonably be read to permit the proposed solution. As scholars have observed, "[w]hen agencies charged with a regulatory mission fail to address new policy problems that arguably fall within their core domain, society might be deprived of important gains—public health, safety, environmental benefits, consumer protection, and market efficiencies—which may be hard to recapture later."[90]

Targeting the regulatory power of agencies administering mature statutes is a feature, not a bug, of the major questions doctrine. Almost uniformly, the Court's major questions doctrine cases address issues of fit between aging laws and contemporary problems. The Court has employed the major questions doctrine to impede agencies from exercising "never previously claimed,"[91] "newfound,"[92] "unprecedented,"[93] and "unheralded"[94] power to address emergent economically or politically significant problems under extant grants of statutory authority.[95] For older statutes with broad empowering language, finding "clear congressional authorization" is, by design, a high bar, as several Justices have candidly acknowledged.[96]

---

[88] *Cf.* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 239–40 (1959) ("[In the context of federal preemption] these problems came to us as ordinary questions of statutory construction. But they involved a more complicated and perceptive process than is conveyed by the delusive phrase, 'ascertaining the intent of the legislature.' Many of these problems probably could not have been, at [sic] all events were not, foreseen by the Congress. Others were only dimly perceived and their precise scope only vaguely defined. This Court was called upon to apply a new and complicated legislative scheme, the aims and social policy of which were drawn with broad strokes while the details had to be filled in . . . .").

[89] Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 5 (2014).

[90] *Id.* at 4–5.

[91] Biden v. Nebraska, 143 S. Ct. 2355, 2372 (2023).

[92] West Virginia v. EPA, 142 S. Ct. 2587, 2610 (2022).

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

[94] Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014).

[95] *See* Jodi L. Short & Jed H. Shugerman, *Major Questions About Presidentialism: Untangling the "Chain of Dependence" Across Administrative Law*, 65 B.C. L. REV. 511, 515 (2024) (arguing that the Court applies the major questions doctrine to limit the authority of agencies it deems "unruly and unaccountable").

[96] *See West Virginia v. EPA*, 142 S. Ct. at 2623 (Gorsuch, J., concurring) (observing that "courts may examine the age and focus of the statute the agency invokes in relation to the problem the agency seeks to address" because "it is unlikely that Congress will make an '[e]xtraordinary gran[t] of regulatory authority' through 'vague language' in 'a long-extant statute'" (alterations in original) (quoting

From 2000 through 2022, the Court decided six major questions cases concerning agency regulatory action in highly charged subject areas. The first three sprinkled breadcrumbs, in which the Court rejected the agency's interpretation of its enabling statute while noting the political context to bolster the court's statutory reading.[97] In the next three cases, context takes charge, with the political and economic implications determinative of the level of deference.[98] Over the course of these cases, the Court shifted the major questions doctrine from a "weak" version to a "strong" version.[99]

These two tranches reflect major questions doctrines with two different functions, as scholars have noted.[100] In the breadcrumb cases, the major questions doctrine serves as one of many tools of statutory interpretation that the

Util. Air Regul. Grp., 573 U.S. at 324)); Transcript of Oral Argument at 54, *Biden v. Nebraska*, 143 S. Ct. 2355 (2023) (No. 22-506) (Justice Kavanaugh: "So then that leaves us with a situation that I think we've seen before, an old statute with a general language, Congress specifically considering the present issue repeatedly but not, as you acknowledge, passing legislation that would authorize the specific act—and then, in the wake of Congress not authorizing the action, the executive, nonetheless, doing a massive new program. And that seems problematic under—going back to the *Benzene* case, the *Brown & Williamson*, *UARG* [(*Utility Air Regulatory Group*)].").

[97] *See Util. Air Regul. Grp.*, 573 U.S. at 321 (holding that the EPA's rule was invalid); Gonzales v. Oregon, 546 U.S. 243, 267–68 (2006) (holding that the Attorney General's Interpretive Rule was invalid because it involved "broad and unusual authority"); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 155 (2000) (holding that the FDA did not have the authority to regulate tobacco). There are two previous cases that trade on major-questions-like interpretive tools. These proto-breadcrumb cases cite the unlikelihood of the agency's claimed breadth of regulatory authority as part of a traditional statutory analysis. *See* MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 231 (1994) ("It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to 'modify' rate-filing requirements."); Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 645 (1980) ("In the absence of a clear mandate in the Act, it is unreasonable to assume that Congress intended to give the Secretary the unprecedented power over American industry that would result from the Government's view of §§ 3(8) and 6(b)(5), coupled with OSHA's cancer policy.").

[98] *See* Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., OSHA (*NFIB*), 142 S. Ct. 661, 665 (2022) (describing the Secretary's vaccination rule as a "significant encroachment into the lives—and health—of a vast number of employees"); *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489 (describing the eviction moratorium at issue as economically and politically significant due to the reach of the regulation); King v. Burwell, 576 U.S. 473, 485 (2015) (determining that the Patient Protection and Affordable Care Act was economically and politically significant because the reform "involve[es] billions of dollars in spending each year and affect[s] the price of health insurance for millions of people").

[99] *See* Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475, 479–80 (2021) (coining the "weak" and "strong" versions of the doctrine).

[100] *See* Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1020–36 (2023) (comparing and evaluating the emergence of the "new major questions doctrine"); Thomas O. McGarity, *The Major Questions Wrecking Ball*, 41 VA. ENV'T L.J. 1, 6–8, 10–16, 24–33 (2023) (describing the "*Chevron* workaround," "bulwark," and "wrecking ball" versions of the doctrine); Sunstein, *supra* note 99, at 479–80 (comparing the weak and strong forms of the doctrine).

Court employs to apply the traditional *Chevron* doctrine.[101] In 2006, in *Gonzales v. Oregon*, the Court cited the illogical breadth of the Attorney General's claimed statutory authority under the Controlled Substances Act (CSA) to determine that Congress did not delegate him authority in the CSA to regulate pharmaceuticals necessary for physician-assisted suicide in the first place—*Chevron* step zero.[102] In 2000, in *FDA v. Brown & Williamson Tobacco Corp.*, the Court used the existence of an extensive statutory scheme regulating the tobacco industry outside of the Food, Drug, and Cosmetic Act to determine that Congress spoke directly to the question—*Chevron* step one.[103] And in 2014, in *Utility Air Regulatory Group v. EPA*, the Court relied on the dramatic expansion of regulatory coverage to exponentially more entities than Congress intended, such as "large office and residential buildings, hotels, large retail establishments, and similar facilities," to find the EPA's interpretation impermissible— *Chevron* step two.[104]

Prior to *West Virginia*, the only NLRB case in which a court applied the major questions doctrine was a "breadcrumb" case: 2012's *Chamber of Commerce of the United States v. NLRB*.[105] There, the U.S. District Court for the District of South Carolina found that, under *Chevron* step one, the Board's 2010 final rule requiring private sector employers and unions to post a notice of employee rights exceeded the Board's statutory authority.[106] Like other breadcrumb cases, *Chamber of Commerce* employs the major questions doctrine as an exclamation point for emphasis at the end of a traditional *Chevron* analysis.

---

[101] *See* Deacon & Litman*, supra* note 100, at 1020–23 (examining how the major question doctrine "modifies the normal *Chevron* framework"); Sunstein, *supra* note 99, at 480–82 (describing the "*Chevron* carve-out theory of the major questions doctrine").

[102] 546 U.S. at 267 (approaching the question as a *Chevron* step zero issue and observing that "[t]he idea that Congress gave the Attorney General such broad and unusual authority through an implicit delegation in the CSA's registration provision is not sustainable").

[103] 529 U.S. 120, 159 (2000) (asserting that the Court's "inquiry into whether Congress has directly spoken to the precise question at issue"—the *Chevron* step one question—"is shaped, at least in some measure, by the nature of the question presented").

[104] 573 U.S. 302, 310, 315 (2014) (asking whether "the agency has acted reasonably and thus has 'stayed within the bounds of its statutory authority'" (quoting Arlington v. FCC, 569 U.S. 290, 297 (2013))); *id.* at 324 (finding the EPA's interpretation unreasonable under *Chevron* step two "because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization").

[105] *See* Chamber of Com. of U.S. v. NLRB, 856 F. Supp. 2d 778, 796 (D.S.C. 2012) (applying the major questions doctrine after finding that "the NLRA is completely silent as to the notice-posting requirement"), *aff'd*, 721 F.3d 152 (4th Cir. 2013); *see also* West Virginia v. EPA, 142 S. Ct. 2587, 2609 (requiring Congress to clearly authorize agency action).

[106] *Chamber of Com. of U.S.*, 856 F. Supp. 2d at 796 (holding, in light of the fact that "Congress has required notice posting in at least nine other federal labor statutes" but not in the NLRA, that whether the NLRA permits a notice posting requirement "is clearly a major question, not an interstitial matter" under *Chevron* step one).

With the strong version of the doctrine, however, context is destiny. *Chevron* disappears, and the major questions doctrine takes its place as the predicate analysis for agency action, positing an *inversion* of *Chevron* that demands a *higher* quantum of proof as to statutory authority because of the magnitude of the problem the agency is attempting to address. In 2015, in *King v. Burwell*, the Court abandoned *Chevron* for de novo review once it identified the existence of a major question.[107] The Court continued its march in 2021, in *Alabama Ass'n of Realtors v. Department of Health and Human Services*, which didn't mention *Chevron* at all.[108] Rather, it set forth the principle that an agency may not rely on a reasonable interpretation of an ambiguous statute to regulate a major question because Congress will "speak clearly when authorizing an agency to exercise powers of 'vast "economic and political significance."'"[109]

Four months later, the Court abandoned both *Chevron* and traditional statutory construction, instead imposing a clear authorization rule requiring additional clarity for agency regulation when major questions are involved. The Court, in 2022, in *National Federation of Independent Business v. Department of Labor, Occupational Safety and Health Administration* (*NFIB*)[110] considered the Biden Administration's emergency Occupational Safety and Health Administration (OSHA) standard requiring large employers to ensure employees were either vaccinated against COVID-19 or wore masks and tested weekly.[111] OSHA issued this rule under its authority to promulgate emergency temporary safety standards.[112] The Court began: "Administrative agencies are creatures of statute," and "accordingly possess only the authority that Congress has provided."[113] But, instead of pivoting to the statutory text with a *Chevron* analysis or even de novo statutory construction, the Court examined the scope of the regulatory action, focusing on the breadth of the impact of its mandate that required some eighty-four million workers to vaccinate or test.[114] Because of the vast scope of the regulatory action, the Court moved the ball for statutory authorization further

[107] 576 U.S. 473, 485 (2015) (holding that, "in extraordinary cases . . . there may be reason to hesitate before concluding that Congress has intended such an implicit delegation" and in those cases, *Chevron* is inapplicable (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000))). In these instances, "[i]t is instead [the Court's] task to determine the correct reading" of the law. *Id.* at 486.

[108] *See generally* 141 S. Ct. 2485 (2021) (per curiam) (making no mention of *Chevron*).

[109] *Id.* at 2489 (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324).

[110] *See generally* Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., OSHA (*NFIB*), 142 S. Ct. 661 (2022).

[111] *Id.* at 663–64.

[112] *Id.* (quoting 29 U.S.C. § 655(c)(1)).

[113] *Id.* at 665.

[114] *See id.* (opining that the regulation is "a significant encroachment into the lives—and health—of a vast number of employees").

down the field, requiring "Congress to speak clearly" or otherwise "plainly authorize[]" the regulatory action to survive judicial review.[115] Construing the Occupational Safety and Health (OSH) Act to apply primarily to hazards endemic to the workplace, and not hazards incidental to the workplace,[116] the Court discerned no clear congressional authorization for the Secretary's action.[117] As in prior "major questions" cases, the Court relied on the fact that OSHA had not previously adopted similar health regulations as a "'telling indication' that the mandate extends beyond the agency's legitimate reach."[118]

NFIB signaled trouble for administrative agencies in at least two ways. First, it turned *Chevron* on its head. Under *Chevron*, courts are directed to read ambiguous statutory language as an implied grant of legislative authority to agencies to promulgate rules that represent reasonable constructions of their empowering statutes.[119] But under the clear authorization rule that took shape in *NFIB*—and would later come to full fruition in *West Virginia*—context comes before text; if the regulation has political or economic breadth, then ambiguity in the statutory text negates legislative delegation.[120] The second major problem is the Court's focus on prior administrative inaction. By inferring congressional intent from an agency's previous silence, the Court is anti-textualist and minimizes the importance of traditional tools of statutory construction, such as textual analysis, structure and purpose, and legislative history.[121] In doing so, it impedes an agency's ability to confront emergent matters

[115] *Id.* (quoting Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) (per curiam)).

[116] *Id.* ("Although COVID-19 is a risk that occurs in many workplaces, it is not an *occupational* hazard in most.").

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

[118] *Id.* at 666 (quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 505 (2010)). Justice Gorsuch's concurrence names the doctrine and places it in a constitutional framework. *Id.* at 667 (Gorsuch, J., concurring) ("We sometimes call this the major questions doctrine."). He compared the major questions doctrine to the non-delegation doctrine, which restricts Congress's ability to delegate legislative power to the Executive Branch absent intelligible principles for the Executive to exercise that authority. *Id.* at 668–69 (citing Gundy v. United States, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting)). Both, according to Justice Gorsuch, ensure that legislative power remains with elected representatives, rather than administrative agencies—which Justice Gorsuch believes are unaccountable to the public. *Id.* at 669.

[119] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

[120] *See* West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022) ("[I]n certain extraordinary cases . . . . [t]he agency . . . must point to 'clear congressional authorization' for the power it claims" (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014))); *NFIB*, 142 S. Ct. at 665 (determining that the OSHA regulation lacked "clear congressional authorization").

[121] *See* Brianne J. Gorod, Brian R. Frazelle & J. Alex Rowell, *Major Questions Doctrine: An Extraordinary Doctrine for "Extraordinary" Cases*, 58 WAKE FOREST L. REV. 599, 628–38 (2023) (explaining the anti-textualist aspects of the major questions doctrine); *see also* Biden v. Nebraska, 143

that may fall within its mandate and within ambiguous statutory language, but that Congress may not have—or could not have—specifically contemplated at the time of the law's enactment. Given congressional gridlock, the major questions doctrine leaves the federal government frequently unable to address imminent dangers that require swift action.

In *West Virginia*, the Court formally acknowledged the previously unnamed major questions doctrine, elevating policy over text and aggrandizing the judicial role.[122] The Clean Air Act of 1990 instructs the EPA to adopt "the best system of emission reduction" determined to be "adequately demonstrated" to limit air pollution by new secondary sources, such as power plants.[123] Once the EPA regulates new sources, the Clean Air Act requires the EPA also to regulate existing sources unless they are already covered by other provisions of the Clean Air Act.[124] Pursuant to this authority—and the Court's prior decisions holding that greenhouse gases were pollutants under the Clean Air Act[125]—in 2015, the EPA required existing power plants to shift to cleaner processes for generating energy.[126] Power plants could do this by producing less dirty energy overall, shifting some production to clean energy processes like wind or solar energy generation, or by purchasing emission allowances as part of a cap-and-trade program.[127] No existing power plant would be able to meet the EPA's reduction goals without implementing one of the three options,[128] and the plan was projected to reduce coal-generated electricity from 38% of the nation's energy consumption to 27% by 2030.[129]

The Court held that the EPA had regulated a major question without clear congressional authorization and vacated the rule.[130] It conceded that, in its major questions cases, the "regulatory assertions had a colorable textual basis," suggesting that such a basis would have been sufficient under *Chevron* to sustain the EPA's action.[131] According to the Court, however, Congress does not

S. Ct. 2355, 2385 (2023) (Kagan, J., dissenting) (complaining that the Court used to "hew to a statute's text" to prevent Justices' policy views from seeping into decisions but now "reads statutes unnaturally, seeking to cabin their evident scope").

[122] *See* 142 S. Ct. at 2610 ("Under our precedents, this is a major questions case.").

[123] *Id.* at 2601 (citing 42 U.S.C. § 7411(a)(1)).

[124] *Id.* (citing 42 U.S.C. § 7411(d)(1)).

[125] *See* Am. Elec. Power Co., Inc. v. Connecticut, 564 U.S. 410, 416 (2011) (noting the Court's previous determination that greenhouse gases are air pollutants); Massachusetts v. EPA, 549 U.S. 497, 528 (2007) (stating that "[w]e have little trouble concluding" that the Clean Air Act "authorizes EPA to regulate greenhouse gas emissions").

[126] *West Virginia v. EPA*, 142 S. Ct. at 2601–02.

[127] *Id.* at 2603.

[128] *Id.* at 2602.

[129] *Id.* at 2604.

[130] *Id.* at 2610, 2616.

[131] *Id.* at 2609.

use oblique language to vest agencies with "[e]xtraordinary grants of regulatory authority" or "empower an agency to make a 'radical or fundamental change' to a statutory scheme."[132] The Court wrote:

> [I]n 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. . . . To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to "clear congressional authorization" for the power it claims.[133]

The Court then easily concluded that, "[u]nder our precedents, this is a major questions case."[134]

In *West Virginia*, the Court made no real effort to define an "extraordinary case," which would help lower courts or federal agencies identify major questions in future cases.[135] So, let's mine the decision for clues. First, the subject matter, or context, of the regulation matters only where "the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority."[136] Second, the EPA discovered significant "unheralded," not previously exercised power in an ancillary provision of a long-extant statute.[137] Third, in the Court's opinion, that newfound authority changed the nature of the statutory scheme from one focused on making extant technology cleaner to one focused on reducing the use of coal overall in the national economy.[138] Fourth, Congress had declined to enact a similar program itself, suggesting that the EPA made an end-run around legislative action concerning an issue of "earnest and profound debate."[139] In summary: Economic breadth, regulatory novelty, transformative impact, and political inaction are touchstones of *West Virginia*'s application of the doctrine.

Because the EPA's Clean Power Plan addressed a major question, the Court was then obligated to analyze whether the Clean Air Act provided clear

---

[132] *Id.* (quoting MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 229 (1994)).

[133] *Id.* (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

[134] *Id.* at 2610.

[135] *See id.* at 2608 (noting that some cases may be extraordinary but failing to set clear contours for application of the major question doctrine).

[136] *Id.* (amendment in original) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000)).

[137] *Id.* at 2610 (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324).

[138] *Id.* at 2610, 2611–13.

[139] *Id.* at 2614 (quoting Gonzales v. Oregon, 546 U.S. 243, 267 (2006)).

congressional authorization.[140] The Clean Air Act's language granting the EPA authority to require the "best system of emission reduction . . . adequately demonstrated" was, according to the Court, merely an "empty vessel," a "vague statutory grant . . . not close to the sort of clear authorization required by [the Court's] precedents."[141] One could contend, of course, that Congress granted the EPA an empty vessel, fully cognizant that the EPA would fill it.[142] Dismissing the Government's remaining structural and contextual arguments, the Court concluded that the EPA was not "acting pursuant to a clear delegation" from Congress.[143]

In a concurrence joined only by Justice Alito, Justice Gorsuch deemed the major questions doctrine a substantive constitutional canon.[144] His concurrence posited the doctrine as a safeguard against encroachment on the Constitution's Vesting Clause, which grants all legislative power to the Congress.[145] So characterized as a guarantor of the separation of powers, he placed the doctrine alongside other clear statement rules designed to protect constitutional values.[146] He then attempted to supply some "guidance about when an agency action involves a major question for which clear congressional authority is required."[147] This included political significance, such as contemporaneous debates in federal and state legislatures or congressional consideration and rejection of similar legislation; economic significance, such as if the regulation affects "a significant portion of the American economy,"[148] transforms an industry, or requires "billions of dollars in spending";[149] or intrusion on areas traditionally reserved to state law.[150] Turning to what constitutes a clear statement,

---

[140] *Id.*

[141] *Id.* at 2601, 2614.

[142] Justice Kagan made this point, albeit belatedly, in *Biden v. Nebraska*:

> Here is a fact of the matter: Congress delegates to agencies often and broadly. And it usually does so for sound reasons. Because agencies have expertise Congress lacks. Because times and circumstances change, and agencies are better able to keep up and respond. Because Congress knows that if it had to do everything, many desirable and even necessary things wouldn't get done. In wielding the major-questions sword, last Term [in *West Virginia*] and this one, this Court overrules those legislative judgments.

143 S. Ct. 2355, 2397 (2023) (Kagan, J., dissenting).

[143] *West Virginia v. EPA*, 142 S. Ct. at 2616.

[144] *See id.* at 2616–26 (Gorsuch J., concurring) (noting that the major question doctrine "operates to protect foundational constitutional guarantees").

[145] *Id.* at 2616–20.

[146] *Id.* at 2619 ("Much as constitutional rules about retroactive legislation and sovereign immunity have their corollary clear-statement rules, Article I's Vesting Clause has its own: the major questions doctrine.").

[147] *Id.* at 2620.

[148] *Id.* at 2621 (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

[149] *Id.* (quoting King v. Burwell, 576 U.S. 473, 485 (2015)).

[150] *Id.* at 2620–21.

Justice Gorsuch continued his mission to provide some direction to lower courts. He directed them to eschew oblique, general, or subtle language; to examine the age and focus of the statute, as "an agency's attempt to deploy an old statute focused on one problem to solve a new and different problem may also be a warning sign";[151] to examine previous agency interpretations of the statutory language, as a claim of "previously 'unheralded power' . . . generally warrants 'a measure of skepticism'";[152] and to police mismatches between the challenged action and the agency's mission and expertise.[153]

In *West Virginia,* the Court defined the "particular and recurring problem" that the major questions doctrine is attempting to solve as "agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted."[154] But the major questions doctrine is a solution in search of a problem. Determining the scope of regulatory authority Congress reasonably understood to have granted is the bread and butter of *Chevron*, steps zero, one, *and* two, as Justice Kagan pointed out in her dissent.[155] The Court failed to explain why the traditional approach, via *Chevron* or even de novo review, would be insufficient to protect the "separation of powers principles and . . . practical understanding of legislative intent" that supposedly undergird the major questions doctrine.[156] The major questions doctrine's heightened standard of proof (clear statement rule or otherwise) seems intended only to make regulating more difficult for agencies struggling with issues of fit between modern problems and older statutory schemes—despite agencies' ability to address them with more facility and expertise.[157]

Biden v. Nebraska, the Court's latest major questions decision, proves this point.[158] There, the Court conceded that interpretation of statutory text alone would be sufficient to justify its holding.[159] It nevertheless applied the major questions doctrine as a separate, but independent, ground for analysis.[160] *Nebraska* concerned the Biden Administration's attempt to waive $430 billion of student loan debt to alleviate borrowers' pandemic-related economic dis-

---

[151] *Id.* at 2623.

[152] *Id.* (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324).

[153] *Id.* at 2622–23.

[154] *Id.* at 2609.

[155] *See id.* at 2634 (Kagan, J., dissenting) ("[I]n the relevant cases, the Court has done statutory construction of a familiar sort.").

[156] *Id.* at 2609 (majority opinion).

[157] *See supra* notes 87–96 and accompanying text (discussing the complexities of adapting old statutes to modern issues).

[158] *See generally* Biden v. Nebraska, 143 S. Ct. 2355 (2023) (applying the major questions doctrine to federal student debt relief programs).

[159] *See id.* at 2375 n.9 ("[S]tatutory text alone precludes the Secretary's program.").

[160] *See id.* ("Today's opinion simply reflects this Court's familiar practice of providing multiple grounds to support its conclusions.").

tress.[161] The Administration relied on a post 9/11 law, the HEROES Act, that grants the Secretary of Education power to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs . . . as the Secretary deems necessary in connection with a war or other military operation or national emergency."[162] Several states alleged that the Secretary's debt forgiveness exceeded his authority.[163]

The Court tackled this allegation in two sections. The first could have appeared in any opinion of the last fifty years as it was a straightforward analysis of the statutory text.[164] The Court read "modify" more narrowly than the Secretary proposed.[165] The Court then contrasted prior HEROES Act modifications that were modest and mostly procedural with this one, which "created a novel and fundamentally different loan forgiveness program."[166] As to the power to waive provisions of the law, the Court again zeroed in on prior waivers that only jettisoned small requirements.[167] Debt forgiveness, on the other hand, created an entirely new program, according to the Court.[168] Rejecting several other remaining arguments, the Court summed up: "However broad the meaning of 'waive or modify,' that language cannot authorize the kind of exhaustive rewriting of the statute that has taken place here."[169]

The second, seemingly superfluous, section was all major questions doctrine—an accepted part of the Court's repertoire after *West Virginia*.[170] The Court succinctly summarized *West Virginia*'s test: "Given 'the "history and the breadth of the authority that [the agency] ha[d] asserted," and the "economic and political significance" of that assertion,' we found that there was '"reason to hesitate before concluding that Congress" meant to confer such authority.'"[171] It then applied these four factors—history, breadth, economic significance, and political significance—and checked off each as present:

1.) the debt forgiveness program interprets the HEROES Act more broadly than previously applied (history);[172]

---

[161] *Id.* at 2365.

[162] *Id.* at 2363 (quoting 20 U.S.C. § 1098bb(a)(1)).

[163] *Id.* at 2362 ("Six States sued, arguing that the HEROES Act does not authorize the loan cancellation plan.").

[164] *See id.* at 2368–71 (analyzing the text of the HEROES Act).

[165] *Id.* at 2369–70 (citing MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 228, 231 (1994)).

[166] *Id.* at 2369.

[167] *See id.* at 2370 (noting that "the Secretary's invocation of the waiver power here does not remotely resemble how it has been used on prior occasions").

[168] *Id.*

[169] *Id.* at 2371.

[170] *See id.* at 2372–75 (analyzing the debt relief plan under the major questions doctrine).

[171] *Id.* at 2372 (quoting West Virginia v. EPA, 142 S. Ct. 2587, 2608 (2022)).

[172] *Id.*

2.) under the proposed interpretation, "the Secretary would enjoy virtually unlimited power to rewrite" the law (breadth);[173]
3.) the cost of the program approaches "one-third of the Government's $1.7 trillion in annual discretionary spending" (economic significance);[174] and
4.) Congress had previously shown extensive attention to the subject (political significance), as had the public (political significance).[175]

Because the debt cancellation program implicated a major question "that Congress would likely have intended for itself," proof of clear congressional authorization of the Administration's regulatory authority was required.[176] "And as we have already shown, the HEROES Act provides no authorization for the Secretary's plan even when examined using the ordinary tools of statutory interpretation—let alone 'clear congressional authorization' for such a program."[177]

The Court conceded that "statutory text alone preclude[d] the Secretary's program."[178] So, the question going forward is how the Court will utilize the major questions doctrine when "statutory text alone" does not support the anti-regulatory outcome. That has traditionally been the province of *Chevron*'s demand that courts defer to agency policy judgments effectuating ambiguous statutory text. But now, instead of demurring from policy, the major questions doctrine focuses judicial attention primarily and forthrightly on the rule's underlying subject and whether, in the Court's opinion, it's a big deal. If it is, ambiguity precludes agency action. This analysis transfers primary responsibility for assigning value to policy from Executive Branch agencies to courts. *West Virginia* and *Nebraska* move judicial review 180 degrees away from *Chevron* and thrust the courts into the political mix, despite the Court's stated desire to confine political decisions to the Legislative Branch.

B. The Major Questions Doctrine's Flirtations with the NLRB So Far

The door is now open to the *West Virginia* "strong" version of the major questions doctrine. As one would expect, parties before the NLRB have embraced the Court's invitation to argue that the doctrine deprives the Board of power over a wide variety of subjects. An examination of their arguments

---

[173] *Id.* at 2373.
[174] *Id.*
[175] *Id.* at 2374.
[176] *Id.* at 2375 (quoting *West Virginia v. EPA*, 142 S. Ct. at 2613).
[177] *Id.*
[178] *Id.* at 2375 n.9 ("Today's opinion simply reflects this Court's familiar practice of providing multiple grounds to support its conclusions.").

demonstrates how easy it is to make a colorable major questions doctrine argument under the Court's recent precedents.

For example, in 2022, the Board proposed rulemaking over the standard used to determine joint employer status under the Act, an exercise in which the Board has engaged for decades. Recent administrations, however, have vacillated over the nature of control necessary for a user entity to be considered a joint employer with its supplier.[179] On the heels of the Court's *West Virginia* decision, numerous parties contended that the major questions doctrine precluded the Board's rulemaking due to the proposed rule's purported significant economic impact. The parties' assertions read like the Court's opinions: the proposed rule would affect "a wide swath of businesses across innumerable industries,"[180] "have a sweeping impact on almost all businesses,"[181] or impose increased "compliance costs on a vast majority of franchisors."[182] Other parties

[179] *See* Standard for Determining Joint-Employer Status, 87 Fed. Reg. 54641, 54642–43 (Sept. 7, 2022) (to be codified at 29 C.F.R. pt. 103) (citing cases); *see also* Boire v. Greyhound Corp., 376 U.S. 473, 481 (1964) (discussing joint employer status under the Act).

[180] Chamber of Com. of the U.S., Comment Letter on Proposed Rule on the Standard for Determining Joint-Employer Status Under the National Labor Relations Act (Dec. 8, 2022), at 27, REGULATIONS.GOV, https://www.regulations.gov/comment/NLRB-2022-0001-11425 [https://perma.cc/6XQ2-ZKTM] (claiming that the proposal implicates a "matter of vast economic and political significance" because it "would potentially impose joint-employer status on a wide swath of businesses across innumerable industries").

[181] Coal. for a Democratic Workplace, Comment Response to the National Labor Relations Board's Notice of Proposed Rulemaking on Standard for Determining Joint-Employer Status (Dec. 7, 2022), at 7, REGULATIONS.GOV, https://www.regulations.gov/comment/NLRB-2022-0001-11456 [https://perma.cc/Z9QR-R22B] (arguing that "[t]he expanded standard, which could establish NLRA joint employer status based on *any evidence of any type of control*, would have a sweeping impact on almost all businesses, creating vast economic impact and significance").

[182] Int'l Franchise Ass'n, Comment Letter on Proposed Standard for Determining Joint-Employer Status (Dec. 7, 2022), at 27, REGULATIONS.GOV, https://www.regulations.gov/comment/NLRB-2022-0001-11257 [https://perma.cc/2QRZ-4PPY] (attempting to quantify the rule's economic impact, offering that, "[i]n 2013, gross franchisee sales were in excess of $2 trillion" and, given the potential for increased "compliance costs on a vast majority of franchisors . . . [w]hether such employers should be subject to the NLRA's requirements—for the first time since the NLRA's enactment in 1935—is a major question" (internal quotations omitted)); *see also* Indep. Bakers Ass'n, Comment Letter on the Standard for Determining Joint-Employer Status (Dec. 7, 2022), at 2, REGULATIONS.GOV, https://www.regulations.gov/comment/NLRB-2022-0001-11602 [https://perma.cc/EP2J-CTS2] (arguing that the proposed rule "radically expand[ed] the Board's joint employer standard beyond the common law boundaries which Congress intended to limit the Board's authority"); Council on Lab. L. Equal., Comment Letter on Behalf of The Council on Labor Law Equality to the National Labor Relations Board's Proposed Rulemaking, "Standard for Determining Joint Employer Status" (Dec. 7, 2022), at 36, REGULATIONS.GOV, https://www.regulations.gov/comment/NLRB-2022-0001-11208 [https://perma.cc/RM47-D6MD] (arguing that the proposed rule was a "wholesale expansion of the Board's jurisdiction and regulatory power"); Retail Indus. Leaders Ass'n, Comment Letter on Standard for Determining Joint-Employer Status (Dec. 6, 2022), at 6, REGULATIONS.GOV, https://www.regulations.gov/comment/NLRB-2022-0001-9576 [https://perma.cc/WB7Z-F6F8] (noting the economic and political significance of the proposed rule).

in adjudication before or with the Board have alleged similar economic significance without elaboration.[183]

The Board's jurisdictional discretion was cited as grounds for finding economic and political significance in a case asking whether the definition of "employee" under Section 2(3) of the Act includes student-athletes.[184] There, the University of Southern California claimed that the athletes' potential inclusion would be a "momentous expansion in the scope of the Act" that requires "a clear statement of Congressional approval through an amendment of the Act" under the major questions doctrine.[185] One commentor in the joint employer rulemaking asserted that a change in Board precedent to potentially reach more joint employers creates a major question.[186] In another case, a party pointed only to a change in Board precedent to justify invoking the major questions doctrine.[187]

Parties before the Board have cited political indicia to claim major question status for their cases, too. Parties have claimed that Congress's failure to enact legislation means the Board is now powerless to reconsider doctrines addressing

[183] *See* Reply Brief of Petitioner at 6 n.2, Hosp. Menonita de Guayama, Inc. v. NLRB, Nos. 22-1163, 22-1180 (D.C. Cir. Mar. 31, 2023) ("The Board's argument that a 'dramatic' increase and continued expansion in mergers and acquisitions justify imposing a successor bar 'in light of economic developments' . . . arguably implicates the Major Questions Doctrine as it purports to affect policy impacting the national economy."); Statement of Position in Response to the Remand of the District of Columbia Circuit at 28–29 & n.41, Browning-Ferris Indus. of Cal., Inc., Nos. 32-CA-160759, 32-RC-109684 (N.L.R.B. Feb. 6, 2023) ("[C]onsistent with the Supreme Court's admonitions in *West Virginia* . . . regarding the major questions doctrine, the economic and political significance of the Act's secondary boycott doctrine compels the Board to hesitate before concluding that Congress meant to confer the authority for it to act where Congress itself has not done so." (internal quotations omitted)); Opposition to Motion for Summary Judgment at 25–26 & n.3, Arrmaz Prods., Inc., AFL-CIO, CLC, No. 12-CA-294086 (N.L.R.B. Aug. 26, 2022) ("The notion that the Board would jettison more than fifty years of Board and court precedent and 'create' the most economically draconian remedy in its ninety year history in such a manner is utterly untenable. . . . [I]t unquestionably creates the analog of a 'major question' . . . .").

[184] 29 U.S.C. § 152(3); *see* JENNIFER ABRUZZO, OFF. OF THE GEN. COUNS., NLRB, MEMO GC 21-08, STATUTORY RIGHTS OF PLAYERS AT ACADEMIC INSTITUTIONS (STUDENT-ATHLETES) UNDER THE NATIONAL LABOR RELATIONS ACT 1 (2021), https://apps.nlrb.gov/link/document.aspx/09031d458356ec26 [https://perma.cc/PT9U-Z3VM] (arguing that "certain Players at Academic Institutions are employees under the Act").

[185] Answer to Complaint at 12 ¶ 10, Univ. of S. Cal., No. 31-CA 290326 (N.L.R.B. June 1, 2023).

[186] *See* Int'l Franchise Ass'n, *supra* note 182, at 24, 29 (contending that "the Board had never before sought to regulate as joint employers entities who possessed only reserved, indirect, and unexercised control" of a supplier's employees and, therefore, the subject is a major question because it is an "unprecedented expansion of the Board's authority despite the franchise business model's prominent place in the American economy the last sixty years").

[187] *See* Cemex Constr. Materials Pac., LLC, 372 N.L.R.B. No. 157, 2023 WL 7648946, at *2–3 (Nov. 13, 2023) ("The Respondent suggests that the Board's overruling of longstanding precedent triggers a major-questions analysis.").

the same subjects.[188] They have argued that recalibrating the definition of joint employer to hew more closely to the common law is outside of the Board's expertise, akin to the IRS regulating health care or the CDC imposing an eviction moratorium.[189] In the Atlanta Apple case, Apple asserted that the Board cannot reevaluate whether captive audience meetings run afoul of the Act because doing so would constitute a significant change in longstanding Board policy, justifying skepticism of the Board's authority.[190] In the Amazon case, Amazon argued that, under the major questions doctrine, the First and Fifth Amendments precluded the Board from finding the CEO's CNBC statements and the company's prohibition on off-duty employees engaging in protected activity on employer property during non-work time unlawful.[191] And others have just thrown the major questions doctrine out there because, why not?[192]

---

[188] *See* Retail Indus. Leaders Ass'n, *supra* note 182, at 6 (opining that the inclusion of joint employer language in the Protecting the Right to Organize Act "confirm[s] that [Congress] intends to be the decision maker on this [sic] issues"); Motion to Dismiss at 13, Apple Inc., No. 10-CA-295915 (N.L.R.B. May 2, 2023) (contending that the General Counsel's proposal to ban captive audience meetings conflicts with "attempts by Congress to amend the provision of the Act . . . (along with attempts by various state legislatures to ban such meetings)" which "demonstrates precisely the type of major policy decision to be left to Congress"); Opposition to Motion for Summary Judgment at 25–26, 25 n.3, Arrmaz Prods., Inc., *supra* note 183 (positing the existence of a major question because "the General Counsel's proposal for 'comparator' contract approach [for remediating certain refusals to bargain] bears a striking resemblance to interest arbitration" that was included in the failed Employee Free Choice Act).

[189] *See* Chamber of Com. of the U.S., *supra* note 180, at 28 ("[T]he proposed rule would fundamentally revise the NLRA by expanding the Board's authority beyond the common law and in a manner that is contrary to established agency practice. It is not plausible that Congress gave the Board the authority to adopt on its own such a regulatory scheme."); Statement of Position on Remand in Response to the Remand of the District of Columbia Circuit, *supra* note 183, at 29 n.41 ("As the test of joint employment must comport with the judicially-developed common law of agency, Congress did not confer plenary authority to the Board to delineate the boundaries of such a definition.").

[190] Motion to Dismiss, *supra* note 188, at 12–13 ("The General Counsel's pronouncement therefore directly conflicts with over 70 years of precedent, an express admission by the NLRB in *Babcock* that Section 8(c) requires captive audience meetings . . . .").

[191] *The NLRB's Union Assault on Amazon*, *supra* note 18 (describing the complaint against Amazon brought by NLRB and Amazon's answer).

[192] *See* Cross-Exceptions and Brief in Support of Cross-Exceptions at 3 ¶ 4, Laborers' Int'l Union of N. Am., Loc. 872, No. 28-CB-267014 (N.L.R.B. May 19, 2023) ("The ALJ failed to apply the 'major questions doctrine' and find that asserted rule advanced by the Region is barred by that doctrine. Labor relations is undeniably a major question."). These are only the cases we know about. According to a FOIA production as of June 6, 2023, parties have raised the major questions doctrine or cited to *West Virginia* in at least ten other cases, but those records are not publicly available as of this writing. *See* Apple, Inc., No. 16-CA-314927 (N.L.R.B. Mar. 27, 2023); Concord Coop., Inc., No. 07-CA-312917 (N.L.R.B. Feb. 24, 2023); Apple, Inc., No. 18-CA-311790 (N.L.R.B. Feb. 8, 2023); Apple, Inc., No. 09-CA-309104 (N.L.R.B. Dec. 16, 2022); Apple, Inc., No. 14-CA-307194 (N.L.R.B. Nov. 16, 2022); Apple, Inc., No. 14-CA-304665 (N.L.R.B. Oct. 5, 2022); All. of Motion Picture & Television Producers, No. 31-CA-299755 (N.L.R.B. July 18, 2022); Basin Elec. Power Coop., No. 27-CA-299483 (N.L.R.B. July 15, 2022); Nestle Purina Petcare, 14-CA-298322 (N.L.R.B. June 27, 2022); Activision Publ'g, Inc., No. 18-CA-296972 (N.L.R.B. June 3, 2022).

These arguments are listed not to suggest they're right or wrong under *West Virginia*. Rather, they're noted because, two years ago, each one would have been considered run-of-the-mill for the NLRB. But now, once parties assert an outsized economic impact, cite the fact that the issue has drawn congressional attention or been the subject of failed legislation, or accuse the Board of changing longstanding precedent, they have made a prime facie case of a major question. The Board and lower courts must take that argument seriously without much guidance on how to rebut *West Virginia*'s powerful new anti-regulatory presumption.[193] From a pragmatic standpoint, the Court's squishy definition of a major question will hobble the Board and its sister agencies in litigating costs alone.[194]

If a court demands clear congressional authorization from the Act's general grant of authority in Section 7 based on a prima facie showing of a major question, the Court's 2018 decision in *Epic Systems Corp. v. Lewis*, although not a major questions case, foreshadows a crabbed reading of the Board's broadly worded statute.[195] *Epic Systems* asked whether the Board reasonably interpreted the NLRA to prevent employers from requiring employees to surrender their Section 7 right to collectively arbitrate employment disputes.[196] Because the Federal Arbitration Act (FAA) requires enforcement of arbitral agreements, the question before the Court was whether there was "a clearly expressed congressional intention" that the NLRA should displace the FAA—a standard strikingly similar to the "clear congressional authorization" articulat-

---

[193] The Board has rejected two attempts to apply the major questions doctrine, finding it inapposite where the Board is acting within a regulatory sphere traditionally reserved to its discretion. *See* Cemex Constr. Materials Pac., LLC, 372 N.L.R.B. No. 157, 2023 WL 7648946, at *2–3 (Nov. 13, 2023) (declining to apply the major questions doctrine simply because the Board overruled longstanding precedent, holding that "both the text of the Act and the Supreme Court's long history of recognizing the Board's administrative discretion to set policy in this area clearly establish that this is not one of the 'extraordinary cases [in which] both separation of powers principles and a practical understanding of legislative intent' should make a court 'reluctant to read into ambiguous statutory text the delegation claimed to be lurking there'" (quoting West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022))); Standard for Determining Joint Employer Status, 88 Fed. Reg. 73946, 73975 (Oct. 27, 2023) (to be codified at 29 C.F.R. pt. 103) ("Based on the Board's long history of analyzing joint-employment relationships and regulating entities it finds to be joint employers, we find that the major-questions doctrine does not foreclose our decision to put forward a new interpretation of the definition of 'employer' in Section 2(2) of the Act.").

[194] Even Justice Kavanaugh candidly admitted when he was a judge on the U.S. Court of Appeals for the D.C. Circuit that "determining whether a rule constitutes a major rule sometimes has a bit of a 'know it when you see it' quality." U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 423 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

[195] *See generally* 584 U.S. 497 (2018) (considering the scope of the NLRA and the authority of the Federal Arbitration Act).

[196] *See id.* at 502 (noting that the NLRA "secures to employees rights to organize unions and bargain collectively, but it says nothing about how judges and arbitrators must try legal disputes").

ed in *West Virginia*.[197] The Court found no such clarity in the general provisions of Section 7, quipping that, "[i]t's more than a little doubtful that Congress would have tucked into the mousehole of Section 7's catchall term an elephant that tramples the work done" by the FAA and related statutes.[198] Although *Epic Systems* involved a conflict between the NLRA and another statute (which the Board typically loses), one could easily imagine the Court approaching a major questions case with the same skepticism.[199]

The one court to apply the major questions doctrine in an NLRB case wielded it like a sword. In 2023, in *Tesla, Inc. v. NLRB*, the U.S. Court of Appeals for the Fifth Circuit sua sponte invoked the major questions doctrine to strike down a Board rule regulating uniform policies.[200] Its major questions analysis was superfluous—the court conceded that a traditional discussion of caselaw and a balancing of management and employee rights were dispositive rationales.[201] But, in dicta, and showing the ease with which hostile courts can flail with the doctrine's sharp edges, the court offered, "though we base our ruling primarily on the lack of balance shown by the NLRB's new rule . . . we also *note* that the Board has exceeded its statutory authority in crafting the rule."[202] Relying only on the broad application of the rule (without analysis of economic or political significance), the court, citing *West Virginia*, held that "Congress likely would not have intended to permit" the Board to make "a major decision [regarding uniform policies in workplaces] without clearer statutory indication."[203] It is unusual for a court to find that an agency has exceeded statutory authority in a "note," but the major questions doctrine allows for this kind of subjective and breezy holding.

---

[197] *Id.* at 510 (quoting Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 533 (1995)); *see West Virginia v. EPA*, 142 S. Ct. at 2609 ("The agency . . . must point to 'clear congressional authorization' for the power it claims." (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014))).

[198] *Epic Sys. Corp.*, 584 U.S. at 515–16.

[199] *See, e.g.*, Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 147 (2002) (considering immigration law); NLRB v. Bildisco & Bildisco, 465 U.S. 513, 532–33 (1984) (considering the bankruptcy code); S. S.S. Co. v. NLRB, 316 U.S. 31, 46–47 (1942) (considering maritime law).

[200] *See* Tesla, Inc. v. NLRB, 86 F.4th 640, 651 & n.19 (5th Cir. 2023) ("Congress likely would not have intended to permit such a major decision without clearer statutory indication." (citing *West Virginia v. EPA*, 142 S. Ct. at 2611–14)).

[201] *See id.* at 651 (noting that the ruling was based "primarily on the lack of balance shown by the NLRB's new rule").

[202] *Id.* (emphasis added).

[203] *Id.* at 651 & n.19.

IV. THE MAJOR QUESTIONS DOCTRINE THREATENS THE ADMINISTRATION OF THE NLRA AND U.S. LABOR POLICY

Statutes generally do not expire, but the major questions doctrine posits that they become stale. Congress charged the NLRB with enforcing collective rights by translating general statutory language into a common law of federal labor relations.[204] The Act and its policy making machinery remain good law. It has been amended numerous times between 1935 and 1974 and never repealed.[205] In recent decades, the modern workplace has brought to the Board issues that Senators Wagner and Taft, the fathers of the current NLRA, could never have imagined. They could plainly envision, however, that employment practices and workplace norms would continue to frustrate worker expectations in an economy driven by profit maximization at the expense of worker dignity, no matter the source. The Act, however, provides workers a mechanism to resolve these gripes short of work stoppages and industrial strife, and nothing limits the Board's power to disputes that could have arisen in 1935, a principle the Court has recognized.[206]

Through *Chevron* deference and its predecessors, the Board has enjoyed a presumption of good faith and expertise in interpreting the Act's general provisions to defuse novel threats to workplace harmony that could interfere with interstate commerce if left unabated.[207] But the Board's continued ability to interpret the Act's general provisions and address significant questions of collective action in the modern workplace may now turn on whether a court will construe the underlying policy question as major. As explained below, each factor upon which the Court has relied—economic significance, transformative breadth, political significance, and ahistorical assertions of regulatory authority—has the potential to undermine the Board's ability to carry out its robust mission. Section A of this Part analyzes the Court's consideration of the economic significance and transformative breadth factors.[208] Section B of this Part examines the political significance factor.[209] Section C of this Part considers historical and new assertions of Board power.[210]

[204] *See generally* 29 U.S.C. §§ 151–169 (granting the NLRB authority through the NLRA).

[205] *See generally id.* (detailing the grant of authority to the NLRB).

[206] *See* NLRB v. J. Weingarten, Inc., 420 U.S. 251, 266 (1975) ("The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board."); *accord* Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983).

[207] *See, e.g.*, Holly Farms Corp. v. NLRB, 517 U.S. 392, 398–99 (1996) (stating that, when a statute is ambiguous, the Court "must respect the judgment of the agency empowered to apply the law").

[208] *See infra* notes 211–227 and accompanying text.

[209] *See infra* notes 228–281 and accompanying text.

[210] *See infra* notes 282–289 and accompanying text.

A. Economic Significance and Transformative Breadth

Mathematical budgetary calculations are ill-fitting to judicial competence, so the Court has not quantified what constitutes "vast 'economic . . . significance'" in its major questions doctrine.[211] Its analyses are all tell and no show. But we know the Court has looked to the number of people or entities the regulation affects as a proxy for economic significance.[212] *That* could be a problem for the NLRB. The Board has broad jurisdiction over almost all private-sector employers and labor organizations in the United States, and a skeptical court could view this breadth as probative in the major questions determination.[213] In the Wagner Act and as reenacted in 1947's Taft-Hartley Act, Congress charged the Board with preserving industrial peace by preventing all "unfair labor practice[s] . . . affecting commerce."[214] Commerce, as defined in the Act and confirmed by the Court, runs "the fullest *jurisdictional* breadth constitutionally permissible under the Commerce Clause."[215] As the Court observed in 1939, "[t]he power of Congress to regulate interstate commerce [as vested with the Board] is plenary and extends to all such commerce be it great or small."[216] The Board recently estimated that one of its rules would apply to approximate-

[211] *See* Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) (quoting Util. Air Regul. Grp. v. EPA 573 U.S. 302, 324 (2015)) (failing to define the parameters of economic significance); *Util. Air Regul. Grp.*, 573 U.S. at 324 (same); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000) (same).

[212] *See* Biden v. Nebraska, 143 S. Ct. 2355, 2373 (2023) (affecting "practically every student borrower"); Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., OSHA (*NFIB*), 142 S. Ct. 661, 665 (2022) ("The Secretary has ordered 84 million Americans to either obtain a COVID–19 vaccine or undergo weekly medical testing at their own expense. . . . [This] is instead a significant encroachment into the lives—and health—of a vast number of employees."); *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489 ("At least 80% of the country, including between 6 and 17 million tenants at risk of eviction, falls within the moratorium."); King v. Burwell, 576 U.S. 473, 485 (2015) ("The tax credits are among the Act's key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people.").

[213] *See* 29 U.S.C. § 152(2) (defining "employer" as "any person acting as an agent of an employer, directly or indirectly," excluding only the federal and state governments and employers already "subject to the Railway Labor Act"); *id.* § 152(5) (defining "labor organization" as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work").

[214] *Id.* § 160(a).

[215] NLRB v. Reliance Fuel Oil Corp., 371 U.S. 224, 226 (1963) (emphasis added); *see also* NLRB v. Fainblatt, 306 U.S. 601, 607 (1939) ("The Act on its face thus evidences the intention of Congress to exercise whatever power is constitutionally given to it to regulate commerce by the adoption of measures for the prevention or control of certain specified acts—unfair labor practices—which provoke or tend to provoke strikes or labor disturbances affecting interstate commerce."); NLRB, FIRST ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 11 (1936) ("It is thus insured that the Board's authority is coextensive with Federal power under the Constitution.").

[216] *Fainblatt*, 306 U.S. at 606.

ly "6,140,612 business firms with employees."[217] In other words, the Board regulates almost all private businesses in the United States that employ workers,[218] including the non-unionized workplaces that now dominate the U.S. employment landscape.[219]

The Board's broad jurisdictional reach is also *discretionary*.[220] Congress "left it to the Board to ascertain whether proscribed practices would in particular situations adversely affect commerce when judged by the full reach of the constitutional power of Congress."[221] It enjoys both statutory and regulatory discretion to extend its reach to industries as it wishes. It has done so throughout its history, bringing under the Act's umbrella for-profit hospitals,[222] professional baseball,[223] higher education,[224] symphony orchestras,[225] and commercial enti-

---

[217] Standard for Determining Joint Employer Status, 88 Fed. Reg. 73946, 74013–14 (Oct. 27, 2023) (to be codified at 29 C.F.R. pt. 103).

[218] The NLRA does exempt certain categories of employees from the Act's definition of "employee," such as employees working in agriculture, as domestic laborers, or as supervisors. 29 U.S.C. § 152(3).

[219] Union density in the private sector has declined significantly since the height of the Wagner and Taft-Hartley Acts' regime in the 1950s—indeed, private sector density is lower now than it was when Congress enacted the Wagner Act in 1935. *See* LAWRENCE MISHEL, LYNN RHINEHART & LANE WINDHAM, ECON. POL'Y INST., EXPLAINING THE EROSION OF PRIVATE-SECTOR UNIONS 8–9 (2020), https://www.epi.org/unequalpower/publications/private-sector-unions-corporate-legal-erosion/ [https://perma.cc/MK9E-JQPU] (analyzing "U.S. private-sector union membership rate[s]").

[220] *See* 29 U.S.C. § 164(c)(1) ("The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to [the Administrative Procedure Act] decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction . . . ."); Off. Emps. Int'l Union, Loc. No. 11, AFL-CIO, v. NLRB, 353 U.S. 313, 318–19 (1957) (noting that the Board may decline to review a complaint); NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 684 (1951) (same).

[221] Polish Nat'l All. of U.S. v. NLRB, 322 U.S. 643, 648 (1944).

[222] *See* Butte Med. Props., 168 N.L.R.B. 266, 268 (1967) (finding that "the operations of proprietary hospitals affect commerce within the meaning of the Act" and are "within the Board's statutory jurisdiction").

[223] *See* Am. League of Pro. Baseball Clubs, 180 N.L.R.B. 190, 192 (1969) ("We can find, neither in the statute nor in its legislative history, any expression of a Congressional intent that disputes between employers and employees in this industry should be removed from the scheme of the National Labor Relations Act.").

[224] *See* 29 C.F.R. § 103.1 (2024) (asserting jurisdiction over "any private nonprofit college or university which has a gross annual revenue . . . of not less than $1 million"); Colleges and Universities, 35 Fed. Reg. 18370, 18370–71 (Dec. 3, 1970) (to be codified at 29 C.F.R. pt. 103) (asserting the Board's authority over certain forms of higher education).

[225] *See* 29 C.F.R. § 103.2 (2024) (asserting jurisdiction over "any symphony orchestra which has a gross annual revenue . . . of not less than $1 million"); Jurisdictional Standards Applicable to Symphony Orchestras, 38 Fed. Reg. 6176, 6176–77 (Mar. 7, 1973) (to be codified at 29 C.F.R. pt. 103) (asserting the Board's authority over symphony orchestras).

ties operated by federally recognized Indian tribes.[226] In this way, the Board has transformed labor relations for entire classes of employers and their employees.

If we take seriously the Court's skepticism about regulatory action that affects or transforms significant numbers of people, businesses, or other entities, every Board action could potentially be a matter of vast economic significance, even though most of its precedential decisions and rules have low direct economic costs.[227] The major questions doctrine perversely manipulates Congress's broad grant of jurisdiction to the Board to *constrict* the Board's authority to fix the problems Congress charged it with solving.

B. Political Significance

The Court will also find that a regulation involves a major question when it involves a topic of "political significance."[228] Political significance is an easily manipulated factor to deny an agency the power to regulate a subject reasonably construed to be within its statutory grant of authority.[229] As scholars have suggested, political significance is inherently subjective.[230] What one person may find politically significant could be very different than what another person might find politically significant—and the Court's cases have provided little objective guidance to help bridge the gap.[231] Lower courts—not to mention legislators, regulators, or practitioners—have not applied this factor with

---

[226] *See In re* San Manuel Indian Bingo & Casino, 341 N.L.R.B. 1055, 1058–63 (2004) (concluding that the Board had jurisdiction based on the statutory language and congressional intent), *enforced*, 475 F.3d 1306 (D.C. Cir. 2007).

[227] *See* Purple Commc'ns, Inc., 361 N.L.R.B. 1050, 1057–58 (2014) ("Employee email use will rarely interfere with others' use of the email system or add significant incremental usage costs, particularly in light of the enormous increases in transmission speed and server capacity."); *id.* at 1056 ("Not coincidentally, the increased use of email has been paralleled by dramatic increases in transmission speed and server capacity, along with similarly dramatic decreases in email's costs."); *see also* Joint Employer Status Under the National Labor Relations Act, 85 Fed. Reg. 11184, 11234 (Feb. 26, 2020) (to be codified at 29 C.F.R. pt. 103) (finding that the direct cost of compliance with the 2020 Joint Employer rule was an estimated $144.69 to small employers and $97.08 to unions "in order to review and understand the rule"); Notification of Employee Rights Under the National Labor Relations Act, 76 Fed. Reg. 54,006, 54043 (Aug. 30, 2011) (to be codified at 29 C.F.R. pt. 104) (finding the first year cost to small entities to review the Board's notice posting rule and post the required notice to be $64.40).

[228] West Virginia v. EPA, 142 S. Ct. 2587, 2613 (2022); Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., OSHA (*NFIB*), 142 S. Ct. 661, 665 (2022); Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021); Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000).

[229] *See* Deacon & Litman, *supra* note 100, at 1051–69 (arguing that the political significance requirement "allows ideological opponents . . . to . . . unmake portions of a statute" and therefore "undermines one of the doctrine's foremost justifications").

[230] *See id.* at 1055 (describing the Court's recent cases as employing "overtly values-based criteria" in deciding that a regulation was politically significant).

[231] *See id.*

much predictability, either.[232] In a time of political polarization and legislative deadlock, the Court's opinions have granted legislators two powerful tools to influence (or, if one is being cynical, manipulate) the major questions determination: legislation and oversight.

1. Legislation

Congress's deliberation over, but failure to enact, legislation on the regulated subject is a sign of political significance under the major questions doctrine.[233] In the Court's assessment, the fact that Congress devotes resources such as floor time, committee hearings, and staff attention about a subject (such as climate, student loans, or pandemic mitigation) compels the inference that Congress wants to reserve that topic for itself.[234] Or, at the very least, it suggests that the agency is doing something untoward by addressing threats under the purview of a broad authorizing statute before Congress could muster the will to do so.

The major questions doctrine creates a counterintuitive form of preemption, where Congress can deprive an agency of its power to reasonably interpret its underlying statute not by *enacting* a law, but by *failing* to enact one.[235]

---

[232] *See* McGarity, *supra* note 100, at 39–43 (discussing divergent district court decisions on whether the CDC's mask requirement for public transport raises a major question); White, *supra* note 85, manuscript at 22–26 (collecting lower court major question cases); *see also* Natasha Brunstein, *Major Questions in Lower Courts,* 75 ADMIN. L. REV. 661, 663 (2023) ("There is no one major questions doctrine in the lower courts. Judges have taken vastly different approaches to defining and applying the doctrine both within and across circuits. These differences illustrate that many judges may view the doctrine as a little more than a grab bag of factors, which they seem to be choosing from at their discretion.").

[233] *See West Virginia v. EPA*, 142 S. Ct. at 2614 (citing to the fact that Congress "consistently rejected proposals to amend the Clean Air Act to create" a program similar to that which the EPA promulgated via regulation); *NFIB*, 142 S. Ct. at 666 (relying in part on the Senate passage of a resolution of disapproval under the Congressional Review Act of OSHA's emergency standard mandating COVID-19 vaccinations for large employers); *cf. Ala. Ass'n of Realtors*, 141 S. Ct. at 2487–90 (finding probative that Congress twice enacted temporary eviction moratoria before the CDC issued one through regulatory action under its administrative authority to contain disease).

[234] *See* Biden v. Nebraska, 143 S. Ct. 2355, 2373 (2023) (noting that "Congress is not unaware of the challenges facing student borrowers" and pointing out that legislators introduced eighty bills regarding debt forgiveness in the 116th Congress); *West Virginia v. EPA*, 142 S. Ct. at 2609 ("We presume that 'Congress intends to make major policy decisions itself, not leave those decisions to agencies.'" (quoting U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 419 (D.C. Cir. 2017) (mem.) (Kavanaugh, J., dissenting from denial of rehearing en banc))).

[235] *See West Virginia v. EPA*, 142 S. Ct. at 2641 (Kagan, J., dissenting) (chastising the majority for relying on the fact that Congress had previously rejected similar cap-and-trade proposals because, "[a]s we have explained time and again, failed legislation 'offers a particularly dangerous basis on which to rest an interpretation of an existing law a different and earlier Congress' adopted" (quoting Bostock v. Clayton County, 140 S. Ct. 1731, 1747 (2020))); United States v. Estate of Romani, 523 U.S. 517, 535 (1998) (Scalia, J., concurring in part and concurring in the judgment) ("Congress cannot

When legislators and the NLRB simultaneously identify difficult issues and take action to try to remedy them, courts should view it as a collaborative belt-and-suspenders approach, not as congressional preemption.[236] Legislators and the Board both have roles in improving the administration of the Act. Senators and Representatives do so as part of their continuing duty to evaluate whether the statutory language continues to meet legislative goals; the Board does so because, as the Court has recognized, "[t]he responsibility to adapt the Act to [the] changing patterns of industrial life is entrusted" to it.[237]

Over the Board's almost ninety-year history, the Board and Congress have frequently played ping-pong with issues of joint concern, raising the unintended possibility that legislative attention inadvertently has now deprived the Board of regulatory authority. Some notable examples include:

- The 1977 Labor Reform Act—which passed the House but failed to overcome a filibuster in the Senate—would have legislatively reversed the Board's 1970 decision in *Ex-Cell-O Corp.*[238] by directing the Board to assess make-whole relief when an employer refused to bargain after a union's certification.[239] In 2021, the General Counsel proposed to the Board that it revisit *Ex-Cello* through adjudication.[240]

---

express its will by a *failure* to legislate" and "[t]he act of refusing to enact a law (if that can be called an act) has utterly no legal effect, and thus has utterly no place in a serious discussion of the law.").

[236] *See* Fred B. Jacob, *The Major Questions Doctrine and Legislative Experimentation*, NOTICE & COMMENT, YALE J. ON REGUL. (Mar. 3, 2023), https://www.yalejreg.com/nc/the-major-questions-doctrine-and-legislative-experimentation-by-fred-b-jacob/ [https://perma.cc/ML4Y-98JP] ("Under the Court's new major questions doctrine, legislative attention that generates political controversy could convert a previously promulgated agency regulation from a general gap-filler to a major question. [Because] significant congressional attention to the codification of an existing regulation suggests a shortcoming in current statutory language . . . .").

[237] NLRB v. J. Weingarten, Inc., 420 U.S. 251, 266 (1975); *accord* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005) (holding that courts should defer to agency interpretations, even where such interpretations diverge from prior policies); Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 863–64 (1984) ("An initial agency interpretation is not instantly carved in stone. On the contrary, the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis."); Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983) (holding that agencies "must be given ample latitude to 'adapt their rules and policies to the demands of changing circumstances'" (quoting *In re* Permian Basin Area Rate Cases, 390 U.S. 747, 784 (1968))).

[238] 185 N.L.R.B. 107, 108–10 (1970) (determining that "current remedies of the Board designed to cure violations of Section 8(a)(5) are inadequate"), *mot. for summary reversal granted*, 449 F.2d 1046 (D.C. Cir. 1971).

[239] Labor Reform Act, H.R. 8410, 95th Cong. § 8 (1977); *see also* H.R. REP. NO. 95-637, at 7–8 (1977) (providing for compensation of employees "in refusal to bargain cases").

[240] *See* ArrMaz Prods., Inc., 372 N.L.R.B. No. 12, 2022 WL 17820769, at *2, *3 n.2 (Dec. 6, 2022) ("[T]he General Counsel requests that we adopt a compensatory remedy requiring the Respondent to make its employees whole for the lost opportunity to bargain at the time and in the manner contemplated by the Act.").

- The 1977 Labor Reform Act also would have required the Board to expedite representation elections—ensuring that elections were held within fifteen days of the filing of a petition supported by a majority of the bargaining unit and forty-five days in other cases.[241] In 2014, the Board amended its representation rules to eliminate delays and reduce the number of days between petition and election, ensuring that "representation cases should be resolved quickly and fairly."[242] The GOP-controlled Congress then passed a resolution of disapproval under the Congressional Review Act (CRA) in 2015 that President Obama vetoed.[243] After this Congressional action, in 2019, the Trump Board repealed the 2014 rule via rulemaking.[244] In August 2023, the Board revisited and repealed the 2019 rulemaking and returned to the 2014 rule.[245]
- The Board's 1971 decision in *Linden Lumber Division, Summer & Co.* held that employers may insist on an NLRB-conducted election, even when presented with conclusive evidence that a majority of employees signed cards authorizing union representation.[246] The Employee Free Choice Act, which also passed the House but never received a Senate vote due to a likely filibuster, would have implicitly overruled *Linden Lumber* by directing the Board to certify unions based solely on a card majority.[247] In 2022, the General Counsel proposed overruling *Linden Lumber* based on her analysis that it encouraged the commission of unfair labor practices and left employees without an adequate remedy for the

[241] H.R. 8410; *see also* H.R. REP. NO. 95-637, at 5 (providing a standard for expedited elections).

[242] Representation—Case Procedures, 79 Fed. Reg. 74308, 74308 (Dec. 15, 2014) (to be codified at 29 C.F.R. pts. 101–03) (eliminating procedural delays to elections so that matters of representation may be resolved speedily).

[243] *See* S.J. Res. 8, 114th Cong. (2015) (disapproving "the rule submitted by the National Labor Relations Board relating to representation case procedures").

[244] *See generally* Representation—Case Procedures, 84 Fed. Reg. 69524 (Dec. 18, 2019) (to be codified at 29 C.F.R. pt. 102) (repealing the majority of the 2014 amendments).

[245] Representation Case Procedures, 88 Fed. Reg. 58075, 58075–76 (Aug. 25, 2023) (to be codified at 29 C.F.R. pt. 102).

[246] Linden Lumber Div., Summer & Co., 190 N.L.R.B. 718, 720–21 (1971), *enforcement denied*, 487 F.2d 1099 (D.C. Cir. 1973), *rev'd*, 419 U.S. 301 (1974).

[247] *See* Employee Free Choice Act of 2007, H.R. 800, 110th Cong. § 2 (2007) (stating that "the Board shall not direct an election but shall certify the individual or labor organization as the representative" when there is a card majority).

tainted elections that resulted.[248] The Board's August 2023 decision in *Cemex Construction Materials Pacific, LLC*, agreed.[249]

For another example, let's drill down on captive audience meetings, like the one that allegedly occurred at the Atlanta Apple Store.[250] Captive audience meetings are meetings in which employers require employees, on pain of termination, to attend anti-union meetings on work time during organizing campaigns.[251] Shortly after Congress passed the Taft-Hartley Act in 1947, the Board, in 1948, decided *Babcock & Wilcox Co.*,[252] permitting employers to hold captive audience meetings, notwithstanding employees' right to refrain from engaging in union activity under the Act.[253] In recent years, industrial experience and empirical research have suggested that the mandatory nature of these meetings makes them more of a threat than speech.[254] Based on this lived experience, NLRB policymakers and legislators considered whether the tools at their disposal could address this problem.[255] In 2011, Board Member Craig Becker challenged the underpinnings of *Babcock & Wilcox* in a dissent, relying

[248] *See* Brief in Support of the General Counsel's Exceptions to the Administrative Law Judge's Decision, Cemex Constr. Materials Pac., LLC, Nos. 28-CA-230115, 28-CA-235666, 31-CA-237882, 31-CA-237894, 31-CA-238094, 31-CA-238239, 31-CA-238240, 28-CA-249413, 28-RC-232059, at 36–45 (N.L.R.B. Apr. 11, 2022) (writing in support for the Board to overturn *Linden Lumber*).

[249] *See* Cemex Constr. Materials Pac., LLC, 372 N.L.R.B. No. 130, 2023 WL 5506930, at *24–38 (Aug. 25) ("We find merit in the General Counsel's argument on exception that the Board should overrule *Linden Lumber*"), *mot. for reconsideration denied,* 372 N.L.R.B. No. 157, 2023 WL 7648946 (Nov. 13, 2023).

[250] *See supra* note 5 and accompanying text (describing Apple's conduct of allegedly forcing employees to attend captive audience meetings).

[251] *See* Jessica Harris, Editorial, *Captive Audience Meetings: A Backgrounder*, ON LAB. (Apr. 2, 2014), https://onlabor.org/captive-audience-meetings-a-backgrounder/ [https://perma.cc/FGB7-Q5JY] (describing captive audience meetings and their legal context).

[252] 77 N.L.R.B. 577, 578 (1948) (holding that it was not a violation for the employer to "compel[] its employees during working hours to attend and listen" to certain speeches).

[253] 29 U.S.C. § 157.

[254] *See* Charles J. Morris, *Freeing the Captives: How Captive-Audience Meetings Under the NLRB Can Be Controlled*, 69 ADMIN. L. REV. 869, 869 (2017) (describing "*captive-audience meetings*, which, according to an influential management consulting group that boasts of being 'the preeminent firm in countering union organizing campaigns,' is '*management's most important weapon'* in a union-election campaign"); Harris, *supra* note 251 (providing a background on captive audience meetings and their effects); KATE BRONFENBRENNER, ECON. POL'Y INST., BRIEFING PAPER NO. 235, NO HOLDS BARRED: THE INTENSIFICATION OF EMPLOYER OPPOSITION TO ORGANIZING 9–26 (2009), https://www.epi.org/publication/bp235/ [https://perma.cc/VYE5-X9P7] (analyzing tactics by employers and their effect on representative elections).

[255] *See* NLRB v. Seven-Up Bottling Co. of Mia., Inc., 344 U.S. 344, 349 (1953) ("'Cumulative experience' begets understanding and insight by which judgments . . . are validated or qualified or invalidated. The constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process.").

on more fulsome analyses of Section 8(c) and its legislative history.[256] Around that time, House and Senate members included captive audience meetings bans as part of a large labor law reform package, the Protecting the Right to Organize (PRO) Act—taking a legislative, rather than regulatory, route to address the problem.[257] The PRO Act was introduced in 2019 and received hearings in the House and Senate.[258] It passed the House in 2020 and 2021 but failed to emerge from committee in the Senate both times.[259] Then, in 2022, building on Member Becker's dissent, NLRB General Counsel Jennifer Abruzzo issued a memorandum concluding that *Babcock & Wilcox* was wrongly decided and announced her intention to allege that captive audience meetings interfered with free elections and employees' Section 7 rights.[260] Cases asking the Board to reverse *Babcock & Wilcox* are currently pending.[261]

Under the major questions doctrine, the House's earnest, but failed, attempt to address the problem of captive audience meetings—in between initiatives at the NLRB to reconsider its historical precedent—could force a court to

[256] *See* 2 Sisters Food Grp., Inc., 357 N.L.R.B. 1816, 1824–28 (2011) (Member Becker, dissenting in part) (contending that *Babcock & Wilcox* was wrongly decided); *see also* Roger C. Hartley, *Freedom Not to Listen: A Constitutional Analysis of Compulsory Indoctrination Through Workplace Captive Audience Meetings,* 31 BERKELEY J. EMP. & LAB. L. 65, 109 (2010) ("This Article has demonstrated that neither the text nor the legislative history of section 8(c) provides clear and unambiguous evidence that Congress intended to require reversal of *Clark Brothers* when it enacted 8(c).").

[257] *See* Protecting the Right to Organize Act of 2021, H.R. 842, 117th Cong. § 104(3) (2021) (proposing to add a proviso to Section 8(c) reading, "*Provided*, That it shall be an unfair labor practice under subsection (a)(1) for any employer to require or coerce an employee to attend or participate in such employer's campaign activities unrelated to the employee's job duties . . . ."); Protecting the Right to Organize Act of 2019, H.R. 2474, 116th Cong. § 2(c)(3) (2019) (same).

[258] *See* H.R. 2474 (introducing the PRO Act in the House); 166 CONG. REC. S963 (daily ed. Feb. 10, 2020) (referring H.R. 2474 to the Senate).

[259] *See* 167 CONG. REC. H1125, H1177 (daily ed. Mar. 9, 2021) (passing in the House of Representatives); 166 CONG. REC. H927 (daily ed. Feb. 6, 2020) (same). At the same time, several states got into the business of regulating captive audience speeches in the workplace, explicitly defining employer discussions of unionizations—pro or con—as political and prohibited. *See* Rebecca Rainey, *U.S. Chamber Sues Over Connecticut 'Captive Audience' Meeting Law*, BLOOMBERG L. (Nov. 1, 2022), https://news.bloomberglaw.com/daily-labor-report/us-chamber-sues-over-connecticut-captive-audience-meeting-law [https://perma.cc/2FFC-PMAB] (describing a Connecticut law prohibiting "firing or disciplining workers who refuse to attend" captive audience meetings). *See generally* Paul M. Secunda, *Toward the Viability of State-Based Legislation to Address Workplace Captive Audience Meetings in the United States,* 29 COMP. LAB. L. & POL'Y J. 209 (2008) (analyzing the treatment of captive audience meetings under state law).

[260] JENNIFER A. ABRUZZO, OFF. OF THE GEN. COUNS., NLRB, MEMO GC 22-04, THE RIGHT TO REFRAIN FROM CAPTIVE AUDIENCE AND OTHER MANDATORY MEETINGS 3 (2022), https://apps.nlrb.gov/link/document.aspx/09031d458372316b [https://perma.cc/G3VR-8LCW].

[261] *See* Brief in Support of General Counsel's Exceptions to the Administrative Law Judge's Decision, *supra* note 248, at 45–66 (arguing that "*Babcock*'s holding is based on a fundamental misunderstanding of Section 8(c)"); *see also* General Counsel's Exceptions to the Administrative Law Judge's Decision and Argument in Support of Exceptions, Starbucks Corp., No. 18-CA-293653, at 17–37 (N.L.R.B. Apr. 14, 2023) (same).

infer that Congress has now reserved that "major question" for itself. Scholars have suggested that the doctrine's proponents conceive of it as an action-forcing event;[262] that placing significant limits on agency authority will ultimately force Congress to "step up" and legislate, breaking through the political disfunction that has marked the last quarter-century of American politics.[263] An aggressive major questions doctrine, however, will actually *discourage* legislating.[264] Legislating is hard, and legislators know that most bills are unlikely to become law, especially in this era of legislative gridlock. If the mere introduction of legislation on captive audience meetings will stymie the Board's regulatory authority, the safest route is "for legislators to refrain from introducing bills to improve agency functions or clarify ambiguous laws."[265] Additionally, the very point of the Court's major questions line of cases is to discourage the Board from wading into an area in which Congress has shown interest. The major questions doctrine thus sets up a game of chicken, in which the Legislative and Executive Branches both hold back for fear that either's action will doom efforts to resolve emergent problems.

The logical implication of this focus on political significance is that the Board should *ignore* major problems that reasonably fall under the NLRA's purview if Congress has previously shown an interest but was unable to marshal a legislative response. The Board's absence will leave parties without legal solutions, heightening the possibility that they instead resort to work stoppages or other forms of industrial conflict to resolve their disputes. This is exactly the kind of interference with interstate commerce that Congress enacted the Wagner and Taft-Hartley Acts to prevent.

This makes little sense. Would the Congress that passed the Wagner Act really prefer the agency it created to prevent labor conflict do *nothing* to address captive audience speeches if the Board determined that they were more threat than speech?[266] Or would it have preferred *some* action to address the

---

[262] *See* Daniel E. Walters & Elliott Ash, *If We Build It, Will They Legislate? Empirically Testing the Potential of the Nondelegation Doctrine to Curb Congressional "Abdication,"* 108 CORNELL L. REV. 401, 410 (2023) (noting an argument that doctrines such as the nondelegation doctrine provide incentive for congressional action).

[263] *Id.* ("The implicit theory purportedly justifying this return to the nondelegation doctrine and related doctrines like the major questions doctrine appears to be that if the courts build real limits on Congress's ability to delegate policymaking discretion to agencies, Congress will step up and legislate—call it the 'Field of Dreams Theory.'").

[264] *See* Jacob, *supra* note 236 (arguing that "fear of unintentionally creating a major question that precludes administrative initiatives will stymie congressional action").

[265] *Id.*

[266] This kind of determination is soundly in the Board's wheelhouse. *See* NLRB v. Gissel Packing Co., 395 U.S. 575, 620 (1969) ("[A] reviewing court must recognize the Board's competence in the first instance to judge the impact of utterances made in the context of the employer-employee relationship . . . ."(citation omitted)); *id.* at 617 (agreeing with the Board that its balancing of management

problem the underlying legislation was broadly intended to fix? We should be more attuned to the desire of the Congress that *enacted* the law than subsequent Congresses that could not muster the will to amend or repeal it.[267] This is especially true given that all three branches have the power to police administrative overreach. The President exercises centralized oversight over Executive Branch rulemaking through the appointments process and the Office of Information and Regulatory Affairs (OIRA).[268] Congress has enacted a streamlined mechanism for checking agency action under the CRA that allows the House and Senate to review all major regulations and disapprove them if an agency oversteps its interpretive authority.[269] And *Chevron* allows the Judicial Branch to check agency action, ensuring that they only promulgate regulations based on reasonable interpretations of their enabling statutes' ambiguous provisions.[270] Because one judge's view of ambiguous and reasonable may be different than another's, *Chevron* builds in the pragmatic reality that conservative judges with an anti-regulatory bent will be able to put their mark on judicial review.[271] Together, these mechanisms make it unlikely that an agency could go rogue by extending regulatory power beyond legal or political justification.

2. Congressional Oversight

Gonzales v. Oregon's observation that the major questions doctrine applies to "subject[s] of . . . 'earnest and profound debate' across the country" suggests that congressional oversight could trigger the doctrine's applica-

---

and labor rights "must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear"). In *Biden v. Nebraska*, the Court agreed that matters within an agency's wheelhouse are less likely to implicate the concerns of the major questions doctrine. *See* 143 S. Ct. 2355, 2374 (2023) (stating that student debt relief is "in the 'wheelhouse' of the House and Senate Committees on Appropriations"); *id.* at 2398 (Kagan, J., dissenting) ("Student loans are in the Secretary's wheelhouse.").

[267] *See* West Virginia v. EPA, 142 S. Ct. 2587, 2641 (2022) (Kagan, J., dissenting) (opining that "it is [the enacting] Congress's choice which counts, not any later one's").

[268] *See* 5 U.S.C. § 804(2) (requiring the Office of Information and Regulatory Affairs (OIRA) to make a major rule determination under the Congressional Review Act (CRA)); Exec. Order No. 12866, 58 Fed. Reg. 51735 (Oct. 4, 1993).

[269] *See* McGarity, *supra* note 100, at 19–22 (criticizing the major questions doctrine fiction as inconsistent with the CRA, in which Congress set forth a process for it to register disagreement with major rules); Chad Squitieri, *Who Determines Majorness?*, 44 HARV. J. L. & PUB. POL'Y 463, 491–95 (2021) (same).

[270] *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–44 (1984) (providing for judicial deference to agencies when their action is "based on a permissible construction of the statute").

[271] *See* Barnett et al., *supra* note 74, at 1468 (concluding, based on a study of *Chevron* in the courts of appeals, that, "conservative panels are more likely to agree with conservative agency interpretations and less likely to agree with liberal interpretations; vice versa for liberal panels").

tion.[272] Political actors—including legislators, lobbyists, think tanks, and political action groups—can stage politics, generate controversy, and gin up an issue concurrently with regulatory action. As many have posited, crocodile tears over proposed regulatory action may generate sufficient political controversy to create a major question when a broad statutory authorization previously would have sufficed to permit the agency action.[273] The rule then issues in a cloud of politics that may not have existed prior to the regulatory initiative, tarring it with the "politically significant" label. This manufactured outrage allows a minority to deprive the agency of reasonable executive authority that *Chevron* would have permitted.

The NLRB is no stranger to the kind of political attention that could attract major questions doctrine arguments. Board policy making, and the actions of its individual members and General Counsel, have routinely been subject to congressional oversight and interest from political actors. During the Obama Administration, the GOP-controlled House Committee on Education and the Workforce conducted oversight over a host of Board actions. This included *Specialty Healthcare* (the standard for determining an appropriate bargaining unit), *Browning Ferris Industries* (joint employer status), and the Board's 2014 effort to revamp its representation rules to speed up elections.[274] When the House flipped under the Trump Administration, Congressional oversight of the Board's rulemaking activity and policy agenda was equally active.[275] State ac-

[272] 546 U.S. 243, 267–68 (2006) (quoting Washington v. Glucksberg, 521 U.S. 702, 735 (1997)); *see* Biden v. Nebraska, 143 S. Ct. 2355, 2373–74 (2023) (citing a newspaper article for the premise that "[s]tudent loan cancellation 'raises questions that are personal and emotionally charged, hitting fundamental issues about the structure of the economy'" (quoting Jeff Stein, *Biden Student Loan Debt Plan Fuels Broader Debate Over Forgiving Borrowers*, WASH. POST (Aug. 31, 2022), https://www.washingtonpost.com/us-policy/2022/08/31/student-debt-biden-forgiveness/ [https://perma.cc/8UZN-UXKE])).

[273] *See* Deacon & Litman, *supra* note 100, at 1058 ("Triggering the major questions doctrine with some reference to the political controversy surrounding a policy allows political opponents of that policy . . . to amend an Act of Congress by essentially 'repealing a portion' of an agency's authority." (quoting Clinton v. City of New York, 524 U.S. 417, 438 (1998))); McGarity, *supra* note 100, at 19–22 (noting an objection to the major questions doctrine based on the "impenetrable vagueness of 'majorness'"); Natasha Brunstein & Richard L. Revesz, *Mangling the Major Questions Doctrine*, 74 ADMIN. L. REV. 317, 354–55 (2022) ("[O]pponents of an agency's regulatory power could well fund an opposition campaign that would . . . result in the loss of an agency's authority to regulate.").

[274] *See generally, e.g.*, *Hearing on Worker-Management Relations: Examining the Need to Modernize Federal Labor Law: Hearing Before the Subcomm. on Health, Emp., Lab., and Pensions of the H. Comm. on Educ. and the Workforce*, 115th Cong. (2018); *Restoring Balance and Fairness to the National Labor Relations Act: Hearing Before the Subcomm. on Health, Emp., Lab., and Pensions of the H. Comm. on Educ. and the Workforce*, 115th Cong. (2017); *Expanding Joint Employer Status: What Does it Mean for Workers and Job Creators?: Hearing Before the Subcomm. on Health, Emp., Lab., and Pensions of the H. Comm. on Educ. and the Workforce*, 113th Cong. (2014).

[275] *See generally, e.g.*, *National Labor Relations Board Budget Request for FY 2021: Hearing Before the H. Appropriations Subcomm. on Dept's of Lab., Health and Hum. Servs., Educ., and Related*

tors have shown interest in the Board's actions, too, teeing up individual prosecution decisions for major question treatment.[276] Indeed, the Court's *West Virginia v. EPA* decision itself was an excuse for House Republicans to conduct oversight of the NLRB and seven other agencies.[277]

The abstract and manipulable nature of the "earnest and profound debate" inquiry makes it easy for a court to construe any political attention as necessitating a major question finding. The Court is quite familiar with political conflict surrounding NLRB action. Since 2010, it has decided a trilogy of cases involving the Senate's refusal to confirm the NLRB's presidential nominees and resulting efforts to keep the agency running in the absence of confirmed policymakers.[278] The Court has also recently held that labor speech—at least in the public sector—is inherently political and, therefore, the First Amendment

---

Agencies of the H. Appropriations Comm., 116th Cong. (2020); H. COMM. ON EDUC. AND LAB., 116TH CONG., CORRUPTION, CONFLICTS, AND CRISIS: NLRB ASSAULT ON WORKERS' RIGHTS UNDER THE TRUMP ADMINISTRATION (2020), https://democrats-edworkforce.house.gov/download/corruption-conflicts-and-crisis-the-nlrbs-assault-on-workers-rights-under-the-trump-administration [https://perma.cc/6YLN-QFN8]; Press Release, Educ. and the Workforce Comm. Democrats, Chairman Scott Subpoenas NLRB Chairman for Documents Regarding Potential Conflicts of Interest (Sept. 15, 2020), https://democrats-edworkforce.house.gov/media/press-releases/chairman-scott-subpoenas-nlrb-chairman-for-documents-regarding-potential-conflicts-of-interest [https://perma.cc/UA2K-NAQD].

[276] In 2011, the Democratic General Counsel of the NLRB issued a complaint against Boeing for discriminatorily relocating a manufacturing line from Washington State to South Carolina. The complaint provoked outrage from South Carolina politicians. Wendy Kaufman, *Labor Agency Challenges Boeing Factory Location*, NPR (June 14, 2011), https://www.npr.org/2011/06/14/137141619/labor-agency-challenges-boeing-factory-location [https://perma.cc/HA5X-5W4F]. The GOP-controlled House Committee on Oversight and Government Reform hauled the General Counsel to a field hearing in South Carolina via subpoena to challenge his decision, placing him on the hotseat so then-Governor Nikki Haley and then-Representative Tim Scott could excoriate him for attempting to harm South Carolina workers. Bo Petersen, *Solomon: 'Boeing Retaliated,'* POST & COURIER, (Charleston, S.C.), (June 17, 2011), https://www.postandcourier.com/business/solomon-boeing-retaliated/article_a9a01a6d-995b-5874-a7d1-517237350919.html [https://perma.cc/Q4BM-T8S7].

[277] *See* West Virginia v. EPA ,142 S. Ct. 2587, 2616 (2022) (holding that the EPA exceeded its regulatory authority); Letter from Virginia Foxx, Ranking Member, H. Comm. on Educ. & Lab., and Rick W. Allen, Ranking Member, Subcomm. on Health, Emp., Lab. & Pensions of the H. Comm. on Educ. & Lab., to Lauren McFerran, Chairman, NLRB (Sept. 22, 2022), https://republicans-edlabor.house.gov/UploadedFiles/09.30.22_-_Letter_to_McFerrin_RE_WV_vs_EPA.pdf [https://perma.cc/LCW9-DMHJ] ("[W]e are concerned the NLRB may attempt to skirt the legislative process altogether by enacting its provisions through rulemaking."); Educ. & the Workforce Comm. Democrats, Press Release, Foxx Denounces the Biden Administration's Executive Overreach (Sept. 30, 2022), https://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=408638 [https://perma.cc/8G7M-4G5W] (providing links to letters about *West Virginia v. EPA* to eight federal agencies).

[278] *See generally* NLRB v. SW Gen., Inc., 580 U.S. 288 (2017) (considering whether the Acting General Counsel's appointment was valid while his nomination was pending under the Federal Vacancies Reform Act); NLRB v. Noel Canning, 573 U.S. 513 (2014) (considering whether the President's recess appointments of three Board Members comported with the Appointments Clause); New Process Steel, L.P. v. NLRB, 560 U.S. 674 (2010) (considering whether the Board could operate with only two members under Section 4 of the Act). For a discussion of the politicization of NLRB appointments, see Flynn, *supra* note 44, at 1363.

prohibits states from entering into contracts requiring represented public employees to remit fair share fees to public sector unions.[279] In all, the Court has ruled against the Board, or labor unions, in nearly every case to reach it since 1996, demonstrating the conservative majority's devaluing of labor interests: both governmental and institutional.[280] For judges seemingly predisposed to anti-labor and anti-regulatory outcomes, it may be difficult to resist the temptation to construe frequent congressional oversight over NLRB policymaking as political significance under the major questions doctrine.[281]

C. History: Novel Agency Interpretations and Improper Motives

The Court has repeatedly acknowledged that agencies may adjust their regulatory schemes in the face of evolving circumstances.[282] It has also held that the Board must protect labor peace by applying the Act's general provi-

---

[279] Janus v. AFSCME, 585 U.S. 878, 892–93 (2018); *cf.* Commc'ns Workers of Am. v. Beck, 487 U.S. 735, 762–63 (1988) (holding that, to avoid potential constitutional issues, the NLRA should be interpreted to allow union-represented employees subject to agency fee requirements to withhold any portion of dues intended for political use).

[280] *See generally, e.g.*, Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021); Epic Sys. Corp. v. Lewis, 584 U.S. 497 (2018); *Janus*, 138 S. Ct. 2448; *SW Gen.*, 580 U.S. 288; Harris v. Quinn, 573 U.S. 616 (2014); *Noel Canning*, 573 U.S. 513; Knox v. Serv. Emps. Int'l Union, Loc. 1000, 567 U.S. 298 (2012); *New Process Steel*, 560 U.S. 674; Chamber of Com. of U.S. v. Brown, 554 U.S. 60 (2008); Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002); BE&K Constr. Co. v. NLRB, 534 U.S. 1074 (2002); NLRB v. Ky. River Cmty. Care, 532 U.S. 706 (2001); *cf.* Glacier Nw., Inc. v. Int'l Bhd. of Teamsters, Loc. Union No. 174, 143 S. Ct. 1404 (2023) (permitting state court litigation against labor union for property damage incidental to a strike despite the union's preemption argument, but in concert with the Board's position seeking remand). *But see* Ohio Adjutant Gen.'s Dep't v. FLRA, 143 S. Ct. 1193, 1196 (2023) (finding that Federal Labor Relations Authority has jurisdiction over "rare bird" hybrid federal-state National Guard technicians (quoting Babcock v. Kijakazi, 142 S. Ct. 641, 644 (2022))).

[281] To point out one example of a Justice unable to hide his antilabor priors, Justice Kennedy expressed his view of public sector unions in the *Janus* argument, sarcastically asking counsel for the state whether the unions would "be a partner with you in advocating for a greater size workforce, against privatization, against merit promotion, against—for teacher tenure, for higher wages, for massive government, for increasing bonded indebtedness, for increasing taxes?" Transcript of Oral Argument, Janus v. AFSCME, 585 U.S. 878, at 47 (Feb. 26, 2018), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-1466_bocf.pdf [https://perma.cc/CST7-93CL].

[282] In *Brown & Williamson*, for example, in the context of holding that the FDA did not have authority to regulate tobacco under the Food, Drug, and Cosmetic Act, the Court acknowledged:

> [A]n agency's initial interpretation of a statute that it is charged with administering is not "carved in stone." As we recognized in *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Automobile Ins. Co.,* 463 U.S. 29 (1983), agencies "must be given ample latitude to 'adapt their rules and policies to the demands of changing circumstances.'"

529 U.S. 120, 156–57 (2000) (first quoting Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 863 (1984); and then quoting *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 42) (internal citations omitted).

sions to new industrial landscapes, even if that requires changing prior positions or regulating in novel areas.[283] Board members, therefore, often signal their openness to reconsidering precedent.[284] And, at the beginning of each new term, the General Counsel prepares a list of precedents identified for reexamination if an appropriate charge is filed.[285] Most of the areas of regulatory and congressional interest discussed in the prior section—captive audience speeches, make-whole relief following certification challenges, representation case processing speed, recognition procedures—have appeared on these lists. For the Board to address concerns with extant law, it would necessarily depart from prior precedent and exercise regulatory authority that it had previously rejected or never considered.

In almost every major questions case, the Court has pointed to the agency's shift away from its historical statutory interpretation as a smoking gun.[286]

[283] *See* NLRB v. J. Weingarten, Inc., 420 U.S. 251, 266 (1975) ("The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board.").

[284] *See* Aspirus Keweenaw, 370 N.L.R.B. No. 45, 2020 WL 6594972, at *13 (Nov. 9, 2020) (Member McFerran, concurring) (arguing that the Board should reconsider precedent on mail balloting and absentee voting); Centerpoint Energy Houston Elec., LLC, 368 N.L.R.B. No. 109, 2019 WL 5711972, at *1 n.4 (Oct. 31, 2019) ("In denying review, Chairman Ring and Member Kaplan apply extant Board law concerning 'plant clericals.' They note, however, that Board law in that area is inconsistent and that they would reconsider the 'plant clericals' analysis, and its value in determining whether bargaining units are appropriate, in a future case.").

[285] *See* JENNIFER ABRUZZO, OFF. OF THE GEN. COUNS., NLRB, MEMO GC 21-04, MANDATORY SUBMISSIONS TO ADVICE 2–8 (2021), https://www.nlrb.gov/guidance/memos-research/general-counsel-memos [https://perma.cc/8MLY-VTAL] (listing General Counsel Abruzzo's enforcement priorities, including eleven different doctrinal areas in which the prior Republican Board had overruled precedent); PETER B. ROBB, OFF. OF THE GEN. COUNSEL, NLRB, MEMO GC 18-02, MANDATORY SUBMISSIONS TO ADVICE 1–4 (2017), https://www.nlrb.gov/guidance/memos-research/general-counsel-memos [https://perma.cc/A7GL-CYZ5] (listing General Counsel Robb's priorities, including "cases over the last eight years that overruled precedent and involved one or more dissents"); RICHARD F. GRIFFIN, JR., OFF. OF THE GEN. COUNS., NLRB, MEMO GC 14-01, MANDATORY SUBMISSIONS TO ADVICE 1–4 (2014) (listing General Counsel Griffin's priorities), https://www.nlrb.gov/guidance/memos-research/general-counsel-memos [https://perma.cc/7BEN-SEY9]; RONALD MEISBURG, OFF. OF THE GEN. COUNS., NLRB, MEMO GC 07-11, MANDATORY SUBMISSIONS TO ADVICE 2–4 (2007), https://www.nlrb.gov/guidance/memos-research/general-counsel-memos [https://perma.cc/4Z4F-P4JX] (listing General Counsel Meisburg's priorities).

[286] *See* Biden v. Nebraska*,* 143 S. Ct. 2355, 2372 (2023) (finding the major questions doctrine applicable because the Secretary had "never previously claimed powers of this magnitude," but instead past actions "have been extremely modest and narrow in scope"); West Virginia v. EPA, 142 S. Ct. 2587, 2612 (2022) ("This view of EPA's authority was not only unprecedented; it also effected a 'fundamental revision of the statute, changing it from [one sort of] scheme of . . . regulation' into an entirely different kind." (quoting MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 231 (1994))); Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., OSHA (*NFIB*), 142 S. Ct. 661, 666 (2022) ("It is telling that OSHA, in its half century of existence, has never before adopted a broad public health regulation of this kind . . . ."); Ala. Ass'n of Realtors v. Dep't of Health & 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."); Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014) ("When

Under the major questions doctrine, the Court criticizes agencies when they change prior positions to assert "unheralded" or "newfound" regulatory authority to address emergent situations, like evictions that spread disease and low vaccination rates during a national pandemic.[287] The change in position ostensibly proves that the agency is not engaging in a good-faith interpretation of a broadly worded, older statute to effectuate needed public policy. Rather, it suggests that the agency is making an end run to implement a policy choice that Congress could not assemble the votes to enact. The exercise of previously unexplored regulatory power embedded in a law's general provisions triggers skepticism.

The irony is that, to place the rhetorical onus of improper action on the *agency* for stretching its regulatory authority too far (rather than on the Court for ignoring its own teachings on regulatory flexibility), the Court has appropriated themes familiar from NLRA law. The Board infers unlawful motives when employers shift justifications for taking employment actions.[288] This is just like how the major questions doctrine implies agencies possess untoward motives when they rethink extant regulatory authority. For those familiar with anti-discrimination law, the major questions doctrine's shifting justifications analysis triggers synaptic connections that the true "motive is one that the [agency] desires to conceal."[289] For jurisprudence based in suspicion that agencies are circumventing congressional prerogatives when they innovate,

---

an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy . . . we typically greet its announcement with a measure of skepticism.") (internal quotations omitted); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 146 (2000) (finding it unlikely that Congress authorized FDA regulation of tobacco, given that "[t]he FDA's disavowal of jurisdiction was consistent with the position that it had taken since the agency's inception").

[287] *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489 (criticizing eviction moratoriums as a product of unprecedented power); *NFIB*, 142 S. Ct. at 666 ("It is telling that OSHA, in its half century of existence, has never before adopted a broad public health regulation of this kind . . . .").

[288] *See* Sound One Corp., 317 N.L.R.B. 854, 858 (1995) ("The Board has long expressed the view that 'when an employer vacillates in offering a rational and consistent account of its actions, an inference may be drawn that the real reason for its conduct is not among those asserted.'" (citing Aluminum Tech. Extrusions, 274 N.L.R.B. 1414, 1418 (1985))); *accord* Black Ent. Television, Inc., 324 N.L.R.B. 1161, 1161 (1997). The courts of appeals apply this principle as well. *See* NLRB v. Nevis Indus., Inc., 647 F.2d 905, 910 (9th Cir. 1981) ("Where the employer's asserted justification is shifting and unreliable, its case is weakened . . . ."); NLRB v. Superior Sales, Inc., 366 F.2d 229, 235 (8th Cir. 1966) (explaining that a shift in employer position weakens the employer's case); NLRB v. Georgia Rug Mill, 308 F.2d 89, 91 (5th Cir. 1962) (same). The same principles apply under Title VII when determining if an employer has taken action against an employee on the basis of the employee's race, sex, or religion. *See* Twiggs v. Selig, 679 F.3d 990, 994 (8th Cir. 2012) (recognizing a concern where there is a "substantial change in an employer's legitimate, nondiscriminatory reason for firing an employee"); EEOC v. Ethan Allen, Inc., 44 F.3d 116, 120 (2d Cir. 1994) (noting the shift in company position).

[289] Shattuck Denn Min. Corp. v. NLRB, 362 F.2d 466, 470 (9th Cir. 1966).

this subconscious implication allows the major questions doctrine to land blows without explicitly revealing its anti-regulatory bias.

V. Suggestions for Avoiding the Major Questions Trap

There is plenty of valid criticism of the major questions doctrine to go around;[290] this Article, however, assumes it's here to stay.[291] As such, the work going forward must focus on minimizing harm to labor rights, environmental safety, public health, education equity, and other important missions of administrative agencies. On that front, some proposals to keep the major questions doctrine modest, for the administrative state generally and the Board specifically, follow. Section A of this Part offers suggestions for cabining the doctrine to extraordinary cases, as the Court's opinions ostensibly intend to do.[292] Section B of this Part proposes that the major question doctrine may not be applicable to the Board at all.[293]

A. Ensuring That Major Questions Are Rare

The Court claims that the major questions doctrine is an *exception* to the general rule of deferential *Chevron* judicial review that applies only to "extraordinary" cases.[294] But the Court's cases have made major questions arguments to the Board and its sister agencies quite ordinary.[295] It is critical to erect guardrails to implement the major questions doctrine in a narrow manner that allows the Board, and other agencies implementing older statutes, to continue to fulfill their statutory mandates. If we are to take the Court at its word that the doctrine is a *limited* exception from the general rules of agency review, the

---

[290] Criticisms of the major questions doctrine come in numerous flavors, and the scholar Beau J. Baumann has compiled them in a very helpful reading list. *See* Beau J. Baumann, *Volume IV of the Major Questions Doctrine Reading List*, NOTICE & COMMENT, YALE J. ON REGUL. (Aug. 14, 2023), https://www.yalejreg.com/nc/volume-iv-of-the-major-questions-doctrine-reading-list-by-beau-j-baumann/ [https://perma.cc/R2DY-3L4Y].

[291] *Biden v. Nebraska* makes it clear that the doctrine is not going anywhere. *See* 143 S. Ct. 2355, 2374 (2023) (casting aside the dissent's "attempt to relitigate *West Virginia*").

[292] *See infra* notes 294–314 and accompanying text.

[293] *See infra* notes 315–384 and accompanying text.

[294] West Virginia v. EPA, 142 S. Ct. 2587, 2600–09 (2022) (offering that the major questions doctrine only applies to "certain extraordinary cases" and that "[i]n the ordinary case, that context has no great effect on the appropriate analysis"); *accord* King v. Burwell, 576 U.S. 473, 485 (2015); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000). *Black's Law Dictionary* defines extraordinary as "[b]eyond what is usual, customary, regular, or common," using "extraordinary measures" as an example. *Extraordinary*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[295] *See supra* notes 179–192 and accompanying text (analyzing the application of the major questions doctrine to NLRB decisions); White, *supra* note 85, manuscript at 22–27 (collecting dozens of lower court cases where parties have challenged agency action under the major questions doctrine).

Court must refine its current approach[296] into a standard that lower courts can use to identify truly exceptional cases and to resist the temptation to apply overbroadly.[297] The exception should not swallow the rule.

First, agencies can try to avoid a major question determination themselves. One scholar prudently suggests that agencies should attempt to break their rules into smaller regulatory chunks to avoid economic and political significance.[298] He further recommends that agencies should restrain themselves from making broad public pronouncements on the breadth and reach of their regulatory actions,[299] such as those the Court relied upon in *Biden v. Nebraska* and *West Virginia v. EPA* as admissions against interest.[300]

Agencies should also carefully conduct required economic analyses under the CRA to avoid an unintentional admission that a rule is major for major questions doctrine purposes. The CRA is a mine trap for unsuspecting agencies, as it sets forth Congress's definition of "major rule."[301] Some have suggested that the CRA "major rule" determination is an effective proxy for "major question": an argument that has considerable surface appeal given the CRA's congressional imprimatur and the similar nomenclature.[302] The major rule de-

[296] *See* McGarity, *supra* note 100, at 19–22 (critiquing the Court's "vagueness" on what constitutes majorness); Natasha Brunstein & Donald L.R. Goodson, *Unheralded and Transformative: The Test for Major Questions After* West Virginia, 47 WM. & MARY ENV'T L. & POL'Y REV. 47, 70–71 (2022) (noting "the lack of a coherent framework for the major questions doctrine leading up to *West Virginia*" that "does not make for an administrable doctrine for lower courts and litigants"); *see also* Jacob, *supra* note 230 ("Deciding what is a major question, at this point, is a bit more art than science.").

[297] *See* Gorod et al., *supra* note 121, at 627–28 (noting concerns with the breadth and unwieldiness of the major questions doctrine). *But see* Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777, 779–80 (2017) (contending that lower courts should not determine whether an issue is a major question because "a question should not qualify as 'major' unless and until the Court has granted certiorari to resolve it").

[298] McGarity, *supra* note 100, at 56–57.

[299] *Id.* at 57.

[300] *See* Biden v. Nebraska, 143 S. Ct. 2355, 2364 (2023) (citing to a *Washington Post* article published two weeks before the pandemic-related debt forgiveness was enacted, in which the President opined that "the pandemic is over"); West Virginia v. EPA, 142 S. Ct. 2587, 2612 (2022) ("In the words of the then-EPA Administrator, the rule was 'not about pollution control' so much as it was 'an investment opportunity' for States . . . ."); *id.* at 2622 (Gorsuch, J., concurring) (citing to a White House fact sheet acknowledging that the Clean Power Plan would cause an "aggressive transformation" of the electricity sector).

[301] *See generally* 5 U.S.C. §§ 801–808. Under the CRA, a major rule is one that OIRA determines has "an annual effect on the economy of $100,000,000 or more," "a major increase in costs or prices," or "significant adverse effects on competition, employment, investment, productivity, innovation" or foreign competition. *Id.* § 804(2). In turn, OIRA demands that agencies conduct an economic analysis as a prerequisite for its major rule determination. RUSSELL T. VOUGHT, OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB MEMO M-19-4, GUIDANCE ON COMPLIANCE WITH THE CONGRESSIONAL REVIEW ACT 3–7 (2019), https://www.whitehouse.gov/wp-content/uploads/2019/04/M-19-14.pdf [https://perma.cc/TZ69-G8P4].

[302] *See* Health Freedom Def. Fund, Inc. v. Biden, 599 F. Supp. 3d 1144, 1165 (M.D. Fla. 2022) (relying on the fact that the CDC's public transportation mask mandate was "a 'major rule' under the

termination for CRA purposes, however, is relatively low stakes, resolving only the number of legislative days required to delay a rule's effective date pending congressional review.[303] But it is highly meaningful for major questions doctrine purposes. Consequently, where agencies may have been lax in conceding major rule status for a CRA analysis, they should tighten up their approach to avoid confusion. Alternatively (or additionally), agencies should explicitly state in their regulatory preamble that the major *rule* determination for CRA purposes is not a concession of a major *question* determination. Agencies should undertake similar caution when conducting reviews under the Regulatory Flexibility Act[304] and Executive Order 12866, *Regulatory Planning and Review*,[305] both of which also require the agency to analyze the costs, scope, and liabilities of proposed regulations.[306]

Agencies should further consider utilizing the standing Executive Branch legislative coordination program with Congress to discourage the introduction of legislative proposals that duplicate regulatory initiatives.[307] This coordination could prevent well-meaning legislators who want to improve agency functioning and programmatic efficiency from introducing long-shot legislation that inadvertently undermines agency authority to regulate the same subject area. Agency congressional affairs shops should also work closely with legislators to provide them with information about their regulatory initiatives and statutory justifications. This would help friendly legislators build a congressional record that supports the agency's regulatory authority and avoid comments that undermine it, with an eye towards major questions litigation.[308]

Congressional Review Act, and an 'economically significant regulatory action'" under Executive Order 12866 in finding that the mandate involved a major question), *vacated as moot sub nom.* Health Freedom Def. Fund v. President of United States, 71 F.4th 888 (11th Cir. 2023); Louis J. Capozzi III, *The Past and Future of the Major Questions Doctrine*, 84 OHIO ST. L.J. 191, 229–30 (2023) (contending that courts should review an agency's own economic modeling for the CRA's major rule determination in evaluating whether a rule implicates a major question).

[303] *See* 5 U.S.C. § 801 (setting out the standards of when a rule will take effect).

[304] *See generally id.* §§ 601–612. The Regulatory Flexibility Act requires agencies to examine its rules to determine whether they have a "significant economic impact on a substantial number of small entities," to develop an initial analysis detailing the rule's potential effect on small businesses for public input in a notice of proposed rulemaking, and then to respond with an analysis in the final rule. *Id.* §§ 602–604.

[305] Regulatory Planning and Review, 58 Fed. Reg. 51735, 51735–44 (Oct. 4, 1993).

[306] *See* West Virginia v. EPA, 142 S. Ct. 2587, 2622 (2022) (Gorsuch, J., concurring) (relying on the EPA's Regulatory Impact Analysis that stated that the Clean Power Plan would cause "dozens of power plants to close and eliminate thousands of jobs").

[307] *See generally* OFF. OF MGMT. AND BUDGET, EXEC. OFF. OF THE PRESIDENT, LEGIS. COORDINATION AND CLEARANCE, OMB CIRCULAR NO. A-19 (1979), https://www.whitehouse.gov/wp-content/uploads/2017/11/Circular-019.pdf [https://perma.cc/4R5D-RFCQ].

[308] *See* Biden v. Nebraska, 143 S. Ct. 2355, 2374 (2023) (quoting then-Speaker Pelosi, approximately one year before the Secretary granted loan forgiveness, asserting that the President did not have the authority to do so).

Second, although this Article and others have examined each indicator of major questions status individually, the Court's decisions invariably recognize that the regulations under review implicate all the indicia simultaneously. The major questions determination is a *conjunctive* test. Under *West Virginia,* and as confirmed in *Nebraska*, this is a four-part test, which asks whether the rule involves "highly consequential" power (for example, power of economic and political significance) that Congress would not be "reasonably . . . understood to have granted" in a general statement of agency authority (for example, "unheralded and transformative" power).[309] For a lower court to evaluate properly whether a subject implicates a major question, it must therefore ask whether the rule (1) exercises unheralded powers broader than the agency had historically exercised; (2) transforms the regulated industry with its breadth; (3) carries economic significance; *and* (4) generates political significance.[310] Conjunctive review is essential to help lower courts resist the temptation to apply the doctrine in more than just the most "breathtaking" of cases.[311]

Third, for at least the "strong" version of the major questions doctrine, the Court's focus on history, breadth, economic significance, and political controversy shows that major questions must be major *in light of society as a whole*, not just major through the lens of the individual statute. That is, a subject may be "major" for a particular law, but it may not be major—in terms of nationwide political, societal, or economic impact—for the major questions doctrine. The CDC's eviction moratorium, OSHA's vaccination mandate, and the EPA's Clean Power Plan cap-and-trade greenhouse gas rule—all of which triggered the new "strong" version of the major questions doctrine—emerged from a pandemic that captured the nation's attention and threatened the planet.[312] On the other hand, the Board's standard for determining joint-employer status is extremely important to entities subject to the Act and political actors interested in the Board, but it would be a stretch to say that it has captivated the nation's attention. As a rough measure of this contrast, a search in Westlaw's "News"

---

[309] *Id.* at 2372; *West Virginia v. EPA*, 142 S. Ct. at 2609; Gorod et al., *supra* note 121, at 617–18.

[310] *See West Virginia v. EPA*, 142 S. Ct. at 2608–10 (noting each of these factors).

[311] Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021). For discussions of how courts should apply the conjunctive tests, see Gorod et al., *supra* note 121, at 617, 619–21; Brunstein & Goodson, *supra* note 296, at 74–82; see also Todd Phillips & Beau J. Baumann, *The Major Questions Doctrine's Domain*, 89 BROOK. L. REV. (forthcoming 2024) (manuscript at 18, 21), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4504304 [https://perma.cc/M2DW-95MS] (proposing a streamlined version of the test, focusing on whether the rule at issue is (1) major and (2) exceptional, addressing economic and political significance under prong one and history and transformation under prong two).

[312] *West Virginia v. EPA*, 142 S. Ct. at 2602–06 (describing the history of the Clean Power Plan); Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., OSHA (*NFIB*), 142 S. Ct. 661, 662 (2022) (describing the vaccination requirement as a response to the COVID-19 pandemic); *Ala. Ass'n of Realtors*, 141 S. Ct. at 2486–87 (describing the eviction moratoriums as a response to the COVID-19 pandemic).

database for relevant stories on the eviction moratorium rule, the vaccination mandate rule, and the Clean Power Plan following their promulgation to June 2023 produced 4,064, 3,863, and 8,501 hits respectively.[313] The Board's joint employer standard merited only 335 stories.[314] Even though it may have wide breadth, agency action that interests only the regulated community is perfectly routine—it is *not* a major question by definition. In that case, the courts should apply the traditional *Chevron* analysis, which still gives courts leeway to say that the agency has unreasonably interpreted an ambiguous statute.

B. Congress Created the Board to Address Major Questions of Labor Policy

The major questions doctrine is a method of determining congressional intent.[315] Since *West Virginia*, the Board has heard from numerous parties that the major questions doctrine precludes all sorts of adjudicative and regulatory actions.[316] The "unique place in American history and society" and "unique political history" that the Court identified as held by tobacco industry in *FDA v. Brown & Williamson Tobacco Corp.*, could also be said about unions in this

[313] A search in Westlaw's "News" database for newspaper stories for "eviction" and "moratorium" and "CDC" or "center for disease control," beginning on March 1, 2020 (approximately the first day of the pandemic) through June 21, 2023 produced 4,064 articles. A similar search during the same time period for "vaccin!" and "mandat!" and "OSHA" or "Occupational Safety and Health Administration" produced 3,863 hits. A search for "clean power plan" or "cap and trade" and "epa" or "environmental protection agency" between the Clean Power Plan's (CPP) 2014 introduction and June 22, 2023 produced 8,501 hits.

[314] A search in Westlaw's "News" database for newspaper stories from the year the Board revised its joint employer standard, January 1, 2015, through June 21, 2023, for the terms "joint employer" and "nlrb" or "national labor relations" and "browning" (as in, *Browning-Ferris*) or "rule" produced only 335 hits.

[315] *See West Virginia v. EPA*, 142 S. Ct. at 2609 ("And yet, in each case, given the various circumstances, 'common sense as to the manner in which Congress [would have been] likely to delegate' such power to the agency at issue . . . made it very unlikely that Congress had actually done so." (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000))) (internal citations omitted); *id.* ("Thus, 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. . . . To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to 'clear congressional authorization' for the power it claims." (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014))); *see also Biden v. Nebraska*, 143 S. Ct. at 2376 (Barrett, J., concurring) (explaining that "the major questions doctrine is a tool for discerning—not departing from—the text's most natural interpretation"). Justice Gorsuch's concurrence suggesting that the doctrine is a constitutional canon only garnered a single additional vote. *West Virginia v. EPA*, 142 S. Ct. at 2619 (Gorsuch, J., concurring).

[316] *See supra* notes 179–192 (discussing the impact of *West Virginia* on Board action).

country.[317] This led Congress to create "a distinct regulatory scheme" for resolving labor disputes before they interfere with commerce. [318] Given this, as set forth below, one potential path forward for the Board is to examine whether the major questions doctrine should apply to it at all.

First, the Act's "distinct regulatory scheme" authorizes the Board to exercise broad adjudicative precedential authority. Congress modeled the Board on the National Labor Board (NLB) and the Old NLRB,[319] which exercised significant authority to interpret the broadly empowering but general language of Section 7(a) of the New-Deal-era National Industrial Recovery Act.[320] The experience of the NLB and Old NLRB taught that obstructions to interstate commerce from labor strife could come in all forms and for a multiplicity of reasons. The NLB[321] and the Old NLRB[322] resolved what were indubitably

---

[317] 529 U.S. at 159–60 (relying on Congress's establishment of a specific scheme to regulate tobacco in concluding that the FDA did not possess the authority over tobacco as a "drug" under its general statutory remit).

[318] *Id.*

[319] *See* Gross, *supra* note 40, at 15–148 (explaining the history of the NLRB). Under the National Industrial Recovery Act, the Roosevelt administration had experimented with two executive branch agencies, the National Labor Board (NLB) and the "Old" NLRB. *Id.* The two agencies were charged with interpreting Section 7(a) of the NIRA, which granted workers the right to organize, and with resolving labor disputes. Along the way, they began to develop "the beginnings of a common law of industrial relations," according to Labor Secretary Frances Perkins. *Hearings Before the S. Comm. on Educ. and Lab. on S. 2926*, 73d Cong. 19 (1935) (statement of the Hon. Frances Perkins, Sec'y of Lab.), *reprinted in* 1 NLRB, *supra* note 42, at 49 (1949).

[320] National Industrial Recovery Act, Pub. L. No. 73-67, § 7(a), 48 Stat. 195, 198–99 (1933) (guaranteeing that "employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection").

[321] The NLB established the principle of majority rule and exclusive representation. Denver Tramway Corp., 1 N.L.B. 64, 64–65 (1934). It worked out rudimentary elements of employment discrimination law, such as motive and pretext, in the course of adjusting disputes over discharges. Gen. Cigar Co., 1 N.L.B. 71, 71 (1934). It set forth principles for determining when company unions coerced employee rights. Nat'l Lock Co., 1 N.L.B. 15, 19 (1934) ("The employer has no right to initiate a plan of organization, or to participate in any way, in the absence of any request from the employees, in their designation of representatives and their self-organization."). It recognized strikers' right to immediate reinstatement when protesting violations of statutory rights. Joseph F. Corcoran Shoe Co., 1 N.L.B. 78, 80 (1934). It forged new ground on bargaining obligations and the duty to bargain in good faith. Hall Baking Co., 1 N.L.B. 83, 83 (1934) ("The objective sought by the law is the making of collective agreements."); S. Dresner & Son, 1 N.L.B. 26, 26–27 (1934) ("Peaceful relations between management and labor can only result from a display of mutual trust and confidence. Agreement is possible wherever the will to agree is present."); E. Air Transp., Inc., 1 N.L.B. 28, 28 (1933) (requiring the employer to confer with the employees' bargaining representative before jettisoning employees' seniority ratings after a purchase because the employer "should have made an earnest effort to arrive at a mutual agreement").

[322] Within six months of its creation, acting as a judicial body interpreting the broad language of Section 7(a), the Old NLRB had "yielded a unique body of authority on peacetime regulation of labor relations." Note, *The Decisions of the National Labor Relations Board*, 48 HARV. L. REV. 630, 630,

major questions. The Wagner Act—which was drafted in large part by members and staff of the NLB and Old NLRB[323]—imported the machinery and substantive law of these agencies into the NLRA.[324] The drafters copied Section 7(a) "verbatim" into the Act, repeating its language in Section 7 and in Section 8(a)(1)'s prohibition on interference with employee rights.[325] In this way, the Wagner Act was "designed . . . to make the precedents of the NLB and the [Old] NLRB available" to the new Board to continue their work developing a common law of labor relations.[326] As Justice Frankfurter observed, "if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it."[327] The Wagner Act brought the whole garden.

Congress wanted the Board to do big things. The Act gives the Board jurisdiction coextensive with the Commerce Clause itself.[328] Its text uses plain and unrestricted language to empower the Board in its mission.[329] And, as the Court recognized early on, Congress "left to the Board the work of applying

653 (1935). Based on the text of Section 7(a), precedent from the NLB, and the underlying policy of the NIRA and New Deal, the Old NLRB propounded holdings on discrimination, employer domination of company unions, the closed shop, and appropriate bargaining units. *See generally id.* (reviewing decisions of the Old NLRB). Most importantly, the Old NLRB held that the right to collectively bargain in Section 7(a) would be meaningless if an employer was not required to bargain with a majority-selected union representative to reach a single agreement on terms and conditions of employment that applied to the entire bargaining unit, rather than negotiate multiple agreements with majority and minority unions. Houde Eng'g Co., 1 N.L.R.B. (Old) 35, 38–40 (1934).

[323] GROSS, *supra* note 40, at 132.

[324] *Id.* at 133.

[325] STAFF OF S. COMM. ON EDUC. AND LABOR, 74TH CONG., COMPARISON OF S. 2926 (73D CONGRESS) AND S. 1958 (74TH CONGRESS) 25-26 (Comm. Print 1935) ("This section . . . is nothing more than a verbatim recital of the various rights granted employees under section 7(a)."), *reprinted in* 1 NLRB, *supra* note 42, 1935, at 1350, 1351–52 (1949).

[326] GROSS, *supra* note 40, at 133 (quoting IRVING BERNSTEIN, THE NEW DEAL COLLECTIVE BARGAINING POLICY 94 (1950)); *see id.* at 67, 132–37 (explaining the development of the Act).

[327] Hall v. Hall, 594 U.S. 59, 73 (2018) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947)).

[328] NLRB v. Reliance Fuel Oil Corp., 371 U.S. 224, 226 (1963); *see also supra* notes 213–219 and accompanying text (describing the breadth of the Board's authority).

[329] For example, Congress frequently used the word "any" in the Act to define the unbounded nature of the Board's authority. *See, e.g.*, 29 U.S.C. § 160(a) (directing the Board "to prevent *any* person from engaging in any unfair labor practice . . . affecting commerce"); *id.* § 152(2) (defining employer to include "*any* person acting as an agent of an employer, directly or indirectly"); *id.* § 152(3) (stating that "the term 'employee' shall include *any* employee, and shall not be limited to the employees of a particular employer"); *id.* § 164(c)(1) (allowing the Board to decline jurisdiction "over any labor dispute involving *any* class or category of employers"). "Any" denotes a legislative instruction to implement the aims of the law broadly, with no basis for limitation. *See* Babb v. Wilkie, 140 S. Ct. 1168, 1173 n.2 (2020) ("We have repeatedly explained that 'the word 'any' has an expansive meaning.' (quoting Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 219 (2008))); *Ali*, 552 U.S. at 219 (holding that use of "the expansive word 'any' and the absence of restrictive language [leaves] 'no basis in the text for limiting'" the statutory language (quoting United States v. Gonzales, 520 U.S. 1, 5 (1997))).

the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms."[330] Throughout the Board's history, it has applied the broad language of the Act to address significant developments in workplace practices and culture that threatened industrial peace. It has done so even when it might be viewed as transforming accepted business practices and expectations of particular industries or corporate America generally.

In the 1930s, the Board's exercise of jurisdiction changed the constitutional landscape and the definition of interstate commerce.[331] By 1941, it altered the dynamic for employer property rights, holding that employees enjoyed the right to engage in union organizing on employer property during their non-working hours, displacing state and common property law.[332] In the 1950s and 1960s, the Board required employers to bargain over the subcontracting of unit work and prohibited them from partially closing facilities for anti-union reasons—two findings that altered the employer's traditional entrepreneurial discretion over its enterprise.[333]

Years later, when threats to American manufacturing from Japan dominated the economic and political landscape, the Board interpreted the Act to prevent employers from adopting Japanese-style cooperative models of labor management, sparking attempts to legislatively overrule its decision and a presidential veto.[334] In 1995, the NLRB successfully prosecuted injunction proceedings accusing the owners of Major League Baseball of failing to bar-

---

[330] Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798 (1945); *accord* Beth Israel Hosp. v. NLRB, 437 U.S. 483, 500–01 (1978) (recognizing that, "if [the Board] is to accomplish the task which Congress set for it, [the Board] necessarily must have authority to formulate rules to fill the interstices of the broad statutory provisions"); *see also supra* notes 40–42 and accompanying text (discussing the Wagner Act's legislative history); James A. Gross, *Conflicting Statutory Purposes: Another Look at Fifty Years of NLRB Law Making*, 39 INDUS. & LAB. RELS. REV. 7, 8 (1985) ("The NLRB, in applying the Act, must give specific meaning to the general designs of the statute, interpret where neither statutory language nor congressional intent is clear, and even fill in gaps in the legislation—gaps ranging from small intervals to large expanses."); Clyde W. Summers, *Politics, Policy Making, and the NLRB*, 6 SYRACUSE L. REV. 93, 95 (1954) ("The Board, in exercising its function of interpreting and elaborating the skeletal words of the statute, is compelled to mould and develop a body of law.").

[331] *See* NLRB v. Jones & Laughlin Steel Corp. 301 U.S. 1, 32 (1937) (considering the "constitutional boundary" of affecting commerce).

[332] *Republic Aviation Corp.*, 324 U.S. at 805.

[333] Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 267 (1965); Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 208 (1964). *See generally* JAMES A. GROSS, BROKEN PROMISE: THE SUBVERSION OF U.S. LABOR RELATIONS POLICY, 1947–1994, at 172–74, 225–27 (1995) (analyzing the *Fibreboard* decision).

[334] *See generally* Electromation, Inc., 309 N.L.R.B. 990 (1992) (legislating on Employee Involvement programs), *enforced*, 35 F.3d 1148 (7th Cir. 1994); Teamwork for Employees and Managers Act of 1995, H.R. 743, 104th Cong. (1995); Rafael Gely, *Whose Team Are You On? My Team or My TEAM?: The NLRA's Section 8(a)(2) and the TEAM Act*, 49 RUTGERS L. REV. 323 (1997) (considering cooperative efforts programs in the workplace).

gain in good faith with the players, ending a costly players' strike that cancelled most of the 1994 baseball season.[335] In the twenty-first century, the Board has attempted to ensure that the policy of Section 1 and the protections of Section 7 remain available to most American workers. These efforts have continued with the new challenges the new century has brought: such as social media,[336] email in union organizing,[337] employment arbitration agreements,[338] and the prevalence of contingent work arrangements.[339] In the Court's words, the Board is effectuating its "responsibility to adapt the Act to changing patterns of industrial life" by addressing significant issues of the modern workplace that threaten the Act's core guarantees.[340]

Even as Congress substantively amended the NLRA in 1947, 1959, 1970, and 1974, it held fast to the original statutory machinery.[341] Indeed, subsequent amendments expanded the Board's jurisdiction. In 1947, Congress enacted the Taft-Hartley Act, which added a host of unfair labor practices to the Act for the Board to interpret and implement.[342] It also restructured the Board to emphasize its judicial role by expanding the Board's membership, allowing it to act in panels of three members like appellate courts, and establishing an independ-

[335] Silverman v. Major League Baseball Player Rels. Comm., Inc., 880 F. Supp. 246, 253 (S.D.N.Y.), *aff'd*, 67 F.3d 1054 (2d Cir. 1995).

[336] *See* Three D, LLC, 361 N.L.R.B. 308, 308–09 (2014) (finding that Facebook communications between employees complaining about employer tax withholding error "constituted 'concerted activities' . . . 'for the purpose of . . . mutual aid or protection'"); Hisps. United of Buffalo, Inc., 359 N.L.R.B. 368, 368 (2012) (finding employees unlawfully discharged for their Facebook responses to coworkers' criticisms of their job performance).

[337] *See* Purple Commc'ns, Inc., 361 N.L.R.B. 1050, 1057, 1057 n.32 (2014) (determining that email is effective for "quickly sharing information and views [and] *increases* its importance to employee communication"), *overruled by* Caesar's Ent., 368 N.L.R.B. No. 143, 2019 WL 6896714 (2019).

[338] *See* Epic Sys. Corp., v. Lewis, 138 S. Ct. 1612, 1626–27 (2018) (rejecting the Board's holding that Section 7 precludes employers from requiring employees to sign arbitration agreements surrendering their rights to collective arbitral processes).

[339] *See* Miller & Anderson, Inc., 364 N.L.R.B. 428, 440–41 (2016) ("Employer consent is not necessary for units that combine jointly employed and solely employed employees of a single user employer."); Browning-Ferris Indus. of Cal., Inc., 362 N.L.R.B. 1599, 1609 (2015) ("The procurement of employees through staffing and subcontracting arrangements, or contingent employment, has increased steadily since [1984]," which "is reason enough to revisit the Board's current joint-employer standard."), *aff'd in part, rev'd in part,* 911 F.3d 1195 (D.C. Cir. 2018), *on remand to* 369 N.L.R.B. No. 139 (2020), 2020 WL 4366383, *enforcement denied*, 45 F.4th 38 (D.C. Cir. 2022).

[340] NLRB v. J. Weingarten, Inc., 420 U.S. 251, 266–67 (1975); *see, e.g.*, J&R Flooring, Inc., 356 N.L.R.B. 11, 12–15 (2010) (requiring email dissemination of notice postings in addition to postings on bulletin boards in light of evolving use of electronic communication systems).

[341] *See* National Labor Relations Act, Amendments, Pub. L. No. 93-360, §§ (a)–(e), 88 Stat. 395 (1974) (amending Board jurisdiction); Postal Reorganization Act, Pub. L. No. 91-375, §§ 1201–1209, 84 Stat. 719 (1970) (same); Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (1959) (amending Board authority); Labor Management Relations Act, Pub. L. No. 80–101, 61 Stat. 136 (1947) (same).

[342] Labor Management Relations Act, Pub. L. No. 80-101, 61 Stat. 136 (1947).

ent General Counsel responsible for prosecuting unfair labor practices.[343] Congress also downplayed the economic implications of Board decisions by prohibiting the NLRB from employing economists.[344] In 1959, the Landrum Griffin Act vested the Board with additional unfair labor practices to interpret and adjudicate and gave the Board more discretion to hone its jurisdictional reach.[345] And then, in 1970 and 1974, Congress expanded the Board's jurisdiction to the U.S. Postal Service and non-profit hospitals, respectively.[346] Congress saw the Board's work applying the Act's general provisions to the myriad of questions that the public brings to its attention and gave the Board further power that it has not taken back. In this way, the "failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress."[347]

Next, most Board decisions do not involve statutory interpretation and therefore do not implicate the major questions doctrine, even if highly controversial.[348] Congress knew, from prior experience, that labor disputes can erupt quickly. An expert agency with a national presence was necessary to resolve disputes that turned on foundational issues, like the obligation to recognize a bargaining representative or the duty to bargain in good faith, before they hurt the economic ecosystem. When the Board applies extant law to high-profile actors, it may result in a make-whole order with monetary relief, generate political controversy, and trigger legislative oversight. But it is ultimately about

---

[343] *Id.*; *see* FRED A. HARTLEY, JR., OUR NEW NATIONAL LABOR POLICY 139 (1948) (emphasizing, in an analysis of Taft-Hartley by one of its authors, that the law "radically altered" the Board into "a semijudicial body charged with the responsibility of administering, enforcing, and interpreting" the amended Act).

[344] 29 U.S.C. § 154(a) ("Nothing in this subchapter shall be construed to authorize the Board to appoint individuals . . . for economic analysis.").

[345] Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (1959).

[346] *See* National Labor Relations Act, Amendments, Pub. L. No. 93-360, §§ (a)–(e), 88 Stat. 395 (1974); Postal Reorganization Act, Pub. L. No. 91-375, §§ 1201–1209, 84 Stat. 719 (1970).

[347] NLRB v. Bell Aerospace Co. Div. of Textron, 416 U.S. 267, 274–75 (1974). To the extent that the major questions doctrine works as an adjunct of the non-delegation doctrine, as Justice Gorsuch has asserted in *West Virginia v. EPA*, the courts have consistently rejected non-delegation challenges to the NLRA under the intelligible principle test. 142 S. Ct. 2587, 2619–20 (2022); *see* Brown v. Roofers & Waterproofers Union, Loc. No. 40, 86 F. Supp. 50, 55 (N.D. Cal. 1949) (turning away nondelegation challenge to the Board's authority under Section 10(k) to resolve jurisdictional dispute as bounded by the requirement that disputes interfere with interstate commerce); Pittsburgh Plate Glass Co. v. NLRB, 313 U.S. 146, 165 (1941) (rejecting a nondelegation challenge to the Board's authority to determine an "appropriate" unit under Section 9 of the Act).

[348] *See* Amy Semet, *An Empirical Examination of Agency Statutory Interpretation*, 103 MINN. L. REV. 2255, 2282 (2019) (noting that "the Board engages in some measure of statutory interpretation in less than 2% of all cases during the indicated time frame; in most instances, it simply applies existing caselaw").

the resolution of a single labor dispute, not statutory interpretation.[349] As "significant" as these cases may be, they typically involve the application of extant law to facts.[350] *West Virginia*'s peeve about agencies claiming unheralded and transformative authority over a matter of economic and political significance is typically not at play (even if the respondent cries "major questions!" in its pleading).

Third, because the Board's work is primarily *reactive*, not *proactive*, there is less potential for the kind of mischief that the major questions doctrine is designed to curtail. The Board is an independent adjudicative agency isolated from executive control under the Court's 1935 decision, *Humphrey's Executor v. United States.*[351] "Such a body cannot in any proper sense be characterized as an arm or an eye of the executive."[352] The structure of the Act requires private parties to file petitions to initiate the Board's police powers.[353] The Board cannot seek out contemporary issues to decide, and it does not have an equivalent of an Equal Employment Opportunity Commission (EEOC) Commissioner's charge.[354] Accordingly, although the Board and General Counsel can ask the public to bring cases to the agency that would move the law in a particular direction, the Court's concern with agencies *initiating* a regulatory agenda to

---

[349] *See, e.g.*, Tesla, Inc., 370 N.L.R.B. No. 101, 2021 WL 1171743, at *1 (Mar. 25, 2021) (finding that an employer violated Section 8 by coercively interrogating employees and "maintaining a media-contact provision in its Confidentiality Agreement"), *enforced,* 63 F.4th 981 (5th Cir.), *vacated and reh'g granted*, 73 F.4th 960 (5th Cir. 2023) (mem.); McDonald's USA, LLC, 368 N.L.R.B. No. 134, 2019 WL 6838007 (Dec. 12, 2019) (considering allegations regarding interrogation, threatening, and wrongfully discharging employees), *pet. for review denied sub nom.* Fast Food Workers Comm. v. NLRB, 31 F.4th 807 (D.C. Cir. 2022); Steven Greenhouse, *Labor Board Drops Case Against Boeing After Union Reaches Accord*, N.Y. TIMES (Dec. 9, 2011), https://www.nytimes.com/2011/12/10/business/labor-board-drops-case-against-boeing.html [https://perma.cc/4JTJ-L7PZ] (considering Boeing to be a "politically charged case").

[350] *See generally, e.g.*, *Tesla, Inc.*, 370 N.L.R.B. No. 101 (lacking an analysis of statutory interpretation); *McDonald's USA, LLC*, 368 N.L.R.B. No. 134 (same).

[351] *See* 295 U.S. 602, 628–29 (1935) (holding that Congress may create multi-member adjudicative bodies with members protected from dismissal by the President); *see also* Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2199 (2020) ("*Humphrey's Executor* permitted Congress to give for-cause removal protections to a multimember body of experts, balanced along partisan lines, that performed legislative and judicial functions and was said not to exercise any executive power.").

[352] Humphrey's Ex'r v. United States, 295 U.S. 602, 628 (1935).

[353] NLRB v. Ind. & Mich. Elec. Co., 318 U.S. 9, 17–18 (1943); *see also* Plumbers, Steamfitters, Refrigeration, Petroleum Fitters & Apprentices of Loc. 298, A.F.L. v. County of Door, 359 U.S. 354, 358 (1959) (noting that "Board regulations allow such a charge to be filed by 'any person'"); Loc. Union No. 25 of the Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. N.Y., New Haven & Hartford R.R. Co., 350 U.S. 155, 160–61 (1956) (same). The same goes for the Board's election processes, which may only be triggered by the filing of an appropriate petition. 29 U.S.C. § 159.

[354] *See* 42 U.S.C. § 2000e-5(b) (providing that a charge may be filed "by a member of the Commission" alleging unlawful employment practices under Title VII).

promulgate rules that Congress could not enact is less apposite to the Board.[355] Even the Board's rulemaking—however controversial it may be[356]— tends to focus on rules that will guide and aid its adjudicative responsibilities.[357] The Board, with the sole exception of its failed notice posting rule, does not issue proscriptive regulations that mandate action (like an eviction moratorium, vaccination mandate, or a cap-and-trade program).[358]

Of course, the Board makes a common law of labor relations through its adjudications. Congress established a primarily adjudicative agency to develop the law on a case-by-case basis with the speed and dexterity necessary to address unanticipated conflicts, which would be difficult through the painstaking quasi-legislative rulemaking process. One benefit of making policy through adjudication is that the speed of precedential decision making allows the Board to pivot quickly in response to changing political norms if an appropriate case is pending.[359] For example, in the last three months of 2017, the newly installed Trump NLRB reversed five significant Obama-era precedents in a whirlwind of activity reflecting the changed political environment.[360] This

---

[355] *See* West Virginia v. EPA, 142 S. Ct. 2587, 2622 (2022) (Gorsuch, J., concurring) (commenting that legislative inaction "has frustrated the Executive Branch and led it to attempt its own regulatory solution").

[356] *See* Jeffrey M. Hirsch, *NLRB Elections: Ambush or Anticlimax?*, 64 EMORY L.J. 1647, 1650 (2015) (discussing employers' claims that the Board 2014 rules allow "ambush elections" that "will infringe employers' free speech interests and employees' right to make an informed choice about unionization").

[357] Its most recent high-profile rulemakings are good examples: representation case procedures rules that govern the processes for conducting elections. Representation Case Procedures, 88 Fed. Reg. 58075 (Aug. 25, 2023) (to be codified at 29 C.F.R. pt. 102); Representation—Case Procedures: Election Bars; Proof of Majority Support in Construction-Industry Collective-Bargaining Relationships, 85 Fed. Reg. 18366 (Apr. 1, 2020) (to be codified at 29 C.F.R. pt. 103); Representation—Case Procedures, 84 Fed. Reg. 69524 (Dec. 18, 2019) (to be codified at 29 C.F.R. pt. 102); and its joint employer rules that lay down legal principles to allow adjudicators to evaluate employer status in unfair labor practice and representation proceedings. Standard for Determining Joint Employer Status, 88 Fed. Reg. 73946 (Oct. 27, 2023) (to be codified at 29 C.F.R. pt.103); Joint Employer Status Under the National Labor Relations Act, 85 Fed. Reg. 11184 (Feb. 26, 2020) (to be codified at 29 C.F.R. pt. 103).

[358] *See* Notification of Employee Rights Under the National Labor Relations Act, 76 Fed. Reg. 54006 (Aug. 30, 2011) (to be codified at 29 C.F.R. pt. 104); *see also supra* note 106 and accompanying text (discussing the district court's opinion vacating the rule).

[359] *See* Anne Marie Lofaso, *The Persistence of Union Repression in an Era of Recognition*, 62 ME. L. REV. 199, 228–29 (2010) (describing the Board's response to policy making by adjudication); Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163, 163–64 (1985) (considering policy oscillation in reversing Board decisions).

[360] *See* Raytheon Network Centric Sys., 365 N.L.R.B. No. 161, 2017 WL 6507215, at *1 (Dec. 15, 2017) (overruling E.I. du Pont de Nemours, 364 N.L.R.B. 1648 (2016)); PCC Structurals, Inc., 365 N.L.R.B. No. 160, 2017 WL 6507219, at *1 (Dec. 15, 2017) (overruling Specialty Healthcare & Rehab. Ctr. of Mobile, 357 N.L.R.B. 934 (2011)), *overruled by* Am. Steel Constr., Inc., 372 N.L.R.B. No. 23, 2022 WL 17974956 (Dec. 14, 2022); Hy-Brand Indus. Contractors, Ltd., 365 N.L.R.B. No. 156, 2017 WL 6403496, at *2 (Dec. 14, 2017) (overruling Browning-Ferris Indus. of Cal., Inc., 362

prompt political accountability from Board Members appointed by the President and confirmed by the Senate should give the courts pause before applying the major questions doctrine instead of deferring to the elected branches.

Finally, as confirmed through decades of judicial review, the Act itself requires deference to the Board's policy making, and the major questions doctrine should not undermine that precedent. Congress only gave the courts of appeals constrained authority "to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board."[361] This does not vest the courts with general plenary authority over the Board.[362] Rather, as the Court has held since Eisenhower was President, the judicial role under the Act is "limited"[363] and "narrow."[364]

The tradition of judicial deference to Board policy making recognizes Congress's acute awareness of the courts' pervasive hostility to labor from the post-industrial era through 1928's Norris-LaGuardia Act, which was recent history when Congress passed the NLRA in 1935. To avoid judicial intrusion on labor policy, Congress deliberately broke away from the judicial model that predated the Wagner Act, vesting an administrative agency, not the courts, with primary responsibility for developing a common labor law.[365] Supporters of

---

N.L.R.B. 1599 (2015)), *vacated on other grounds*, 366 N.L.R.B. No. 26, 2018 WL 1082557 (Feb. 26), *reconsideration denied*, 366 N.L.R.B. No. 93, 2018 WL 2761557 (June 6, 2018); The Boeing Co., 365 N.L.R.B. No. 154, 2017 WL 6403495, at *2 (Dec. 14, 2017) (overruling in part Martin Luther Mem'l Home, Inc., 343 N.L.R.B. 646 (2004)); UPMC, 365 N.L.R.B. No. 153, 2017 WL 6350171, at *1 (Dec. 11, 2017) (overruling U.S. Postal Serv., 364 N.L.R.B. No. 116, 2016 WL 4548860 (2016)).

[361] 29 U.S.C. § 160(e)–(f). The Act further instructs that "[t]he findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." *Id.* § 160(e).

[362] *See* Garner v. Teamsters, Chauffeurs & Helpers Loc. Union No. 776 (A.F.L.), 346 U.S. 485, 490–91 (1953) (conceding that Congress "confide[d] primary interpretation and application of [the NLRA] to a specific and specially constituted tribunal" and "prohibit[ed] federal courts from intervening in such cases, except by way of review or on application of the federal Board"). This is in contrast to provisions of the U.S. Code providing the district courts with plenary jurisdiction under the Administrative Procedure Act, 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."), or over federal questions. 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

[363] NLRB v. Truck Drivers Loc. Union No 449, 353 U.S. 87, 96 n.28 (1957) (quoting Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 188 (1941)).

[364] Beth Israel Hosp. v. NLRB, 437 U.S. 483, 501 (1978).

[365] *See* Semet, *supra* note 348, at 2275–76 ("Judicial decisions weakening union power had caused many to be fearful of using courts as a vehicle to combat labor abuses, so Congress created an administrative agency to handle disputes as an alternative to courts." (citing Michael J. Hayes, *After 'Hiding the Ball' Is Over: How the NLRB Must Change Its Approach to Decision-Making*, 33 RUTGERS L.J. 523, 554 (2002) ("[I]n passing the [NLRA], Congress continued the process of diminishing the role of courts in the labor area by creating an *alternative* to the courts . . . ."))); Ralph K. Winters, Jr., *Judicial Review of Agency Decisions: The Labor Board and the Court*, 1968 SUP. CT. REV. 53, 59

organized labor profoundly distrusted the courts to fairly implement any statute protecting worker rights, given their then-recent experiences with federal and state courts exploiting injunctive power to quash concerted activity under antitrust and conspiracy laws.[366] Senator Wagner opted instead to give power to an expert agency,[367] based on the models of the NLB and the Old NLRB, that successfully performed similar tasks under the National Industrial Recovery Act before the Court declared it unconstitutional.[368] As the Court explained almost forty years after the Act's passage:

> [W]hen it set down a federal labor policy Congress . . . . sought . . . to restructure fundamentally the processes for effectuating that policy, deliberately placing the responsibility for applying and developing this comprehensive legal system in the hands of an expert administrative body rather than the federalized judicial system.[369]

In this light, the Court has conceded that, "courts are not primary tribunals to adjudicate such issues."[370] Nothing since the Wagner Act's enactment has displaced that jurisdictional decision.

Deference to the Board recognizes its expertise. The NLRB's empiric process—consisting of expert Board Members, a dedicated staff with institutional wisdom in understanding and resolving labor disputes, and input from the public and regulated entities through administrative hearings and due pro-

---

n.5 ("The creation of the Board, therefore, may fairly be viewed as the result of congressional dissatisfaction with judicial lawmaking in the area of labor law.").

[366] *See supra* note 30 and accompanying text (describing "judicial interference with the right to organize").

[367] Nicholas M. Ohanesian, *Errors and Omissions: Applying Lessons from History to Decide the Future of Administrative Deference with Respect to the National Labor Relations Board*, 37 NOTRE DAME J.L. ETHICS & PUB. POL'Y ONLINE SUPP. 540, 554 (2023), https://jleppdotorg.files.wordpress.com/2023/05/ohanesian.final_-1.pdf [https://perma.cc/RL6G-ZZKB] (collecting the Act's legislative history).

[368] *See supra* notes 319–327 and accompanying text (examining the history of the NLB and Old NLRB).

[369] Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Emps. of Am. v. Lockridge, 403 U.S. 274, 288 (1971).

[370] San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959); *see also* Sears, Roebuck & Co. v. San Diego Cnty. Dist. Council of Carpenters, 436 U.S. 180, 191 (1978) ("The interest in uniform development of the new national labor policy required that matters which fell squarely within the regulatory jurisdiction of the federal Board be evaluated in the first instance by that agency."); Garner v. Teamsters, Chauffeurs & Helpers Loc. Union No. 776 (A.F.L.), 346 U.S. 485, 490 (1953) ("Congress . . . considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies."); Amalgamated Util. Workers v. Consol. Edison Co. of N.Y., 309 U.S. 261, 264 (1940) ("By the express terms of the Act, the Board was made the exclusive agency for [determining unfair labor practices].").

cess—produces results in interpreting the Act's policies, prescriptions, and prohibitions superior to what a generalist judge could provide.[371] The Court has therefore directed lower courts to defer to the Board's "special expertise;"[372] its "special competence in dealing with labor problems;"[373] its "special function of applying the general provisions of the Act to the complexities of industrial life;"[374] and Congress's commitment to the Board of the "difficult and delicate responsibility" of "striking that balance [between competing labor and management interests] to effectuate national labor policy."[375] Due to this expertise, "[w]here Congress has in the statute given the Board a question to answer, the courts will give respect to that answer."[376]

Even though the courts frequently use the familiar *Chevron* two-step framework in Board cases, and the Board benefits, deference to NLRB policy making is baked into the Act and survives *West Virginia*'s modification of *Chevron*.[377] The judiciary's deference to the Board's development of law and policy began well before *Chevron*.[378] As the Court summarized thirty-plus

[371] *See* Republic Aviation Corp. v. NLRB, 324 U.S. 793, 800 (1945) ("One of the purposes which lead to the creation of such boards is to have decisions based upon evidential facts under the particular statute made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration."); Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941) ("Congress met these difficulties by leaving the adaptation of means to end to the [Board's] empiric process of administration."); *see also* Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2102–03 (1990) (concluding that agencies "are far better situated than courts to soften statutory rigidities or to adapt their terms to unanticipated conditions" due to their "fact-finding capacities, electoral accountability, and continuing attention to changed circumstances").

[372] Ford Motor Co. v. NLRB, 441 U.S. 488, 495 (1979); Loc. Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of N. Am., AFL-CIO v. Jewel Tea Co., 381 U.S. 676, 685–86 (1965).

[373] Am. Ship Bldg. Co. v. NLRB, 380 U.S. 300, 316 (1965); *accord* Pattern Makers' League of N. Am., AFL-CIO v. NLRB, 473 U.S. 95, 100 (1985).

[374] NLRB v. Erie Resistor Corp., 373 U.S. 221, 236 (1963).

[375] NLRB v. Truck Drivers Loc. Union No. 449, 353 U.S. 87, 96 (1957); *see also* First Nat. Maint. Corp. v. NLRB, 452 U.S. 666, 689 (1981) (Brennan, J., dissenting) (encouraging deference to the Board's "exercise of its congressionally delegated authority and accumulated expertise").

[376] NLRB v. Ins. Agents' Int'l Union, AFL-CIO, 361 U.S. 477, 499 (1960).

[377] *See supra* notes 64–71 and accompanying text (collecting cases applying *Chevron* in NLRB cases and the Board's win-rate under *Chevron*).

[378] *See* Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941) ("Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy."); *accord* NLRB v. Enter. Ass'n of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Mach. & Gen. Pipefitters of N.Y. & Vicinity, Loc. Union No. 638, 429 U.S. 507, 528 (1977) ("The Board's reading and application of the statute involved in this case, however, are long established, have remained undisturbed by Congress, and fall well within that category of situations in which the courts should defer to the agency's understanding of the statute which it administers."); NLRB v. Gissel Packing Co., 395 U.S. 575, 613 n.32 (1969) ("In fashioning its remedies under the broad provisions of § 10(c) of the Act (29 U.S.C. 160(c)), the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts."); Am. Ship Bldg. Co. v. NLRB, 380 U.S. 300, 316

years of precedent in 1978's *Beth Israel Hospital v. NLRB*, "[t]he rule which the Board adopts is judicially reviewable for consistency with the Act, and for rationality, but if it satisfies those criteria, the Board's application of the rule, if supported by substantial evidence on the record as a whole, must be enforced."[379] Standalone *Beth Israel* NLRB-deference remains an independent and vibrant basis for granting deference to the Board.[380] Indeed, even after *Chevron,* the Court[381] and the courts of appeals[382] have been more likely to apply NLRB-specific deference than *Chevron* itself. In this way, "the NLRB is a unique agency."[383] This deference has become, over time, part of the accepted statutory interpretation of the NLRA, relied on by the Board to permit nimble policy making in adjudication and by parties for predictability in evaluating the prospects of judicial review. Stare decisis, of course, is at its apex when

(1965) ("There is of course no question that the Board is entitled to the greatest deference in recognition of its special competence in dealing with labor problems.").

[379] 437 U.S. 483, 501 (1978).

[380] *See* Eskridge & Baer, *supra* note 63, at 1107 (concluding, based on an analysis of post-*Chevron* Supreme Court cases, that "[g]iven the similarities between the deference tests found in *Beth Israel*-type cases and the *Chevron* test itself, one would have expected *Beth Israel* deference to have died in *Chevron*'s wake," but "this has not been the case"); Juan Caballero, Note, *Administering the Spectrum of Deference in the Administrative Age*, 10 N.Y.U. J.L. & LIBERTY 810, 830–31 (2016) ("While this may lead one to conclude that *Beth Israel* constitutes a proto-*Chevron* which would likely be consumed in the conflagration of *Chevron,* it continues to be cited as a distinct deference precedent by courts in NLRB cases.").

[381] *See, e.g.*, Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 142–43 (2002) (noting the Board's generally broad jurisdiction under the NLRA); Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 364 (1998) ("Courts must defer to the requirements imposed by the Board if they are 'rational and consistent with the Act' . . . and if the Board's 'explication is not inadequate, irrational or arbitrary' . . . ." (first quoting Fall River Dyeing & Fishing Corp. v. NLRB, 482 U.S. 27, 42 (1987); and then quoting NLRB v. Erie Resistor Corp., 373 U.S. 221, 236 (1963))); Auciello Iron Works, Inc. v. NLRB, 517 U.S. 781, 787 (1996) ("The Board's judgment in the matter is entitled to prevail."); NLRB v. Health Care & Ret. Corp. of Am., 511 U.S. 571, 576 (1994) (noting that the Board's decision will have deference if it is "rational and consistent with the Act"); Litton Fin. Printing Div. v. NLRB, 501 U.S. 190, 200 (1991) (holding that the Board's decision "is both rational and consistent with the Act"); NLRB v. Curtin Matheson Sci., Inc., 494 U.S. 775, 786 (1990) (noting that "[t]his Court has accorded Board rules considerable deference"); Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 42 (1987) ("The Board, of course, is given considerable authority to interpret the provisions of the NLRA."); NLRB v. Fin. Inst. Emps. of Am., Loc. 1182, 475 U.S. 192, 202 (1986); NLRB v. Action Auto., Inc., 469 U.S. 490, 494 (1985) (recognizing that the Board has broad jurisdiction to interpret the NLRA); Pattern Makers' League of N. Am. v. NLRB, 473 U.S. 95, 100 (1985) (noting that the Board "is accorded substantial deference"); NLRB v. Int'l Longshoremen's Ass'n, AFL-CIO, 473 U.S. 61, 78 (1985) ("We . . . are mindful of the rule that the Board's construction of the Act is due our deference.").

[382] Amy Semet, *Statutory Interpretation and* Chevron *Deference in the Appellate Courts: An Empirical Analysis*, 12 UC IRVINE L. REV. 621, 653 (2022) (explaining that, in the author's review of over 2,500 courts of appeals decisions involving the NLRB, "[o]f all the statutory interpretation cases, courts expressly cited and applied *Chevron* only about one-quarter of the time").

[383] *Id.* at 675.

interpreting statutes like the NLRA given that Congress may legislatively overrule any interpretation it disagrees with—which, here, it has not.[384]

CONCLUSION

The Board's work is not done. The number of strikes in 2022 increased by fifty-two percent, and the number of employees involved in those strikes grew from 140,000 to 224,000.[385] In June 2023, Starbucks Workers United shut down twenty-one stores and impeded staffing at over one hundred more, striking over the company's alleged refusal to bargain over the removal of messages celebrating LGTBQIA+ Pride month from its stores.[386] One month later, the Screen Actors Guild and the Writers Guild went on strike simultaneously for the first time since 1960 in demand for more streaming and digital distribution residuals. These months-long strikes imperiled the downstream jobs of tens of thousands of entertainment industry workers, before ultimately winning wage increases, streaming bonuses, and protections against artificial intelligence abuses.[387] In September, the United Auto Workers struck Ford, General Motors, and Stellantis simultaneously for three months after contract talks fell apart, ultimately winning significant gains for its members at all three compa-

[384] *See* Kimble v. Marvel Ent., LLC, 576 U.S. 446, 456 (2015) (holding that "we apply statutory *stare decisis* even when a decision has announced a judicially created doctrine designed to implement a federal statute") (internal quotations omitted); Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 274 (2014) ("The principle of *stare decisis* has special force in respect to statutory interpretation because Congress remains free to alter what we have done." (cleaned up) (quoting John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 139 (2008))).

[385] JOHNNIE KALLAS, KATHRYN RITCHIE & ELI FRIEDMAN, WORKER INST. AT CORNELL, LABOR ACTION TRACKER: ANNUAL REPORT 2022, at 3, 5 (2023), https://www.ilr.cornell.edu/sites/default/files-d8/2023-02/ILR%20Labor%20Action%20Tracker%202022%20Final%201-20-23%20Rev.pdf [https://perma.cc/6WZL-FKCM].

[386] Dee-Ann Durban, *Starbucks Union Says Pride Weekend Strikes Closed 21 US Stores*, AP NEWS (June 26, 2023), https://apnews.com/article/starbucks-strike-pride-456cd0e40bba4004ff70c777ac67446b [https://perma.cc/4WMQ-Z8ZS].

[387] *See* Gili Malinsky, *Hollywood's Actors Are Back to Work—Here's What They Actually Got in SAG-AFTRA's New Contract*, CNBC (Nov. 17, 2023), https://www.cnbc.com/2023/11/17/sag-aftras-new-deal-whats-in-it-and-what-experts-say.html [https://perma.cc/R8RP-EQHQ] (describing the terms of the deal to end the Screen Actors Guild and Writers Guild strikes); Wendy Lee & Meg James, *WGA and the Studios Reach Tentative Deal to End Writers' Strike*, L.A. TIMES, https://www.latimes.com/entertainment-arts/business/story/2023-09-24/writers-strike-over-wga-studios-reach-deal-actors [https://perma.cc/C5LZ-MHY7] (Sept. 24, 2023) (same); Alissa Wilkinson, *Hollywood's Historic Double Strike, Explained*, VOX, https://www.vox.com/culture/2023/7/13/23793828/sag-aftra-strike-wga-hollywood [https://perma.cc/45BS-FJN9] (July 13, 2023) (noting that the strike "has lasted 146 days" at the time the article was written); Stacy Perman & Anousha Sakoui, *Hollywood Studios Could Face Two Strikes for the First Time in 63 Years. How Did We Get Here?*, L.A. TIMES (July 10, 2023), https://www.latimes.com/entertainment-arts/business/story/2023-07-10/la-et-ct-sag-aftra-strike-analysis [https://perma.cc/K4AR-LRYZ] (describing the SAG strike in 1960).

nies.[388] Due to these work stoppages, the number of strikes in 2023 increased over 2022 by 9%, and the number of employees involved increased by 141%.[389] Over 2022 and 2023, strikes cost the nation 29,322,110 employee workdays, a significant loss of production to an economy many believe to have been teetering on the verge of recession.[390]

At the same time, seventy-one percent of Americans approve of labor unions, the highest recorded support since 1965.[391] President Biden "intend[s] to be the most pro-union President leading the most pro-union administration in American history."[392] The Great Resignation created post-pandemic labor shortages despite record-low unemployment and placed bargaining power in workers' hands for the first time in recent memory.[393] Unions gained 200,000 members in 2022, with the biggest increases among workers of color.[394] It is no accident that employees are emboldened, and corporations are fighting back.

This scenario would be familiar to Senator Wagner—labor and business at locked horns, with their battles spilling over into the public's lap. And though the statute that bears his name is now almost a century old, and the problems may take different form, the machinery he created still stands to bring the parties back to labor peace. A proper limitation of the major questions doctrine to truly exceptional cases, and that recognizes Senator Wagner's inspiration and vision, will allow the Board to continue doing its job.

---

[388] *See* Chris Isidore, *UAW Members at Ford and Stellantis Approve Contract*, CNN, https://www.cnn.com/2023/11/18/business/ford-uaw-ratifies-contract/index.html [https://perma.cc/96EY-WFWC] (Nov. 18, 2023) (describing terms of the deals); Camila Domonoske, *The UAW Won Big in the Auto Strike—But What Does It Mean for the Rest of Us?*, NPR (Nov. 12, 2023), https://www.npr.org/2023/11/12/1211602392/uaw-auto-strike-deals-ratified-big-three-shawn-fain [https://perma.cc/YB52-Y59C] (describing the terms and effects of the deals).

[389] KATHRYN RITCHIE, JOHNNIE KALLAS & DEEPA KYLASAM IYER, WORKER INST. AT CORNELL, LABOR ACTION TRACKER: ANNUAL REPORT 2023, at 3 (2024), https://www.ilr.cornell.edu/sites/default/files-d8/2024-02/Labor-Action-Tracker-2023-Annual-Report.pdf [https://perma.cc/GWR4-KH36].

[390] *See id.* (noting 24,874,522 strike days in 2023); KALLAS ET AL., *supra* note 385, at 3 (noting 4,447,588 strike days in 2022).

[391] Justin McCarthy, *U.S. Approval of Labor Unions at Highest Point Since 1965*, GALLUP (Aug. 30, 2022), https://news.gallup.com/poll/398303/approval-labor-unions-highest-point-1965.aspx [https://perma.cc/XH3U-BH8U].

[392] President Joseph Biden, Remarks by President Biden in Honor of Labor Unions (Sept. 8, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/08/remarks-by-president-biden-in-honor-of-labor-unions/ [https://perma.cc/RCM5-UQHL].

[393] Stephanie Ferguson, *Understanding America's Labor Shortage*, CHAMBER OF COM. OF U.S. (Feb. 13, 2024), https://www.uschamber.com/workforce/understanding-americas-labor-shortage [https://perma.cc/9NVG-SUG4].

[394] Heidi Shierholz, Margaret Poydock & Celine McNicholas, *Unionization Increased by 200,000 in 2022*, ECON. POL'Y INST. (Jan. 19, 2023), https://www.epi.org/publication/unionization-2022 [https://perma.cc/23S7-3LKC].