

MAJOR QUESTIONS REQUIRE MAJOR COORDINATION: ENHANCING REGULATORY COORDINATION TO COMBAT NONDELEGATION AND ANTI-DEFERENCE JUDICIAL SCRUTINY

Abstract: While Congress’s ability to legislate in a timely and effective fashion has declined substantially over recent decades, the complexity of issues demanding serious attention from the United States legal system has risen, leading to a situation where problems outpace solutions. Administrative agencies have regularly stepped in to address novel and highly technical crises. Agencies utilize longstanding statutory delegations of authority that are sufficiently general in their terms to enable them to handle problems that did not exist when a statute was originally drafted. Lately, an emphatic de-regulatory nondelegation movement has developed in the courts with conservative judges seeking to narrow delegations of authority, especially in areas of progressive administrative action. When a cited delegation of authority to regulate is countermanded by the courts, it effectively remands the matter to Congress, where it will meet bipartisan gridlock. Prominent among the nondelegation rationales for blocking agency action is the “major questions” doctrine, coupled with a growing criticism of *Chevron* deference. Serious societal problems like climate change require responsive administrative actions, providing increased opportunity for use of the major questions doctrine to block their implementation. Recent decisions in the U.S. Circuit Courts of Appeals provide a solution to this regulation constricting dilemma: the case for courts to extend deference to agency interpretations of regulatory authority is substantially strengthened where agencies have engaged in a process of coordination among those with relevant expertise and overlapping statutory authority on the subject matter at issue. This Note argues that to solve the nondelegation tensions and effectively address pressing crises like climate change, judicial review of agency actions under nondelegation and deference doctrines should always incorporate a thoughtful analysis of an agency’s coordination policies and practices.

INTRODUCTION

Widespread crises like climate change and COVID-19 continue to pervade our globalizing world.¹ Yet efforts to counter these crises have largely

¹ See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2022: IMPACTS, ADAPTATION, AND VULNERABILITY 1, 33 (Hans-O. Pörtner et al. eds., 2022), https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_SummaryForPolicymakers.pdf [<https://perma.cc/LSD8-4HHM>] (stating that we “will miss a brief and rapidly closing window” to counteract the effects of climate change if we wait any longer to act); WHO Coronavirus (COVID-19) Dashboard,

stalled due to the financial and political divisions that accompany them.² Most of these efforts have proceeded through the U.S. administrative state—the apparatus of federal agencies nested under the executive branch tasked with administering laws.³ But U.S. courts have been increasingly skeptical of agency attempts to solve certain “major questions,” reasoning that Congress must explicitly authorize agencies to regulate these areas.⁴ Recent efforts by the Environmental Protection Agency (EPA) to combat climate change and the Occupational Health & Safety Administration (OSHA) to address the COVID-19 pandemic became the latest victims of this trend, with the U.S. Supreme Court holding that various regulations extended beyond the agencies’ authority due to their “vast economic and political significance.”⁵

In addition to the ongoing global pandemic, climate change remains an existential threat to our world, and yet climate action in Congress has been

WORLD HEALTH ORG., <https://covid19.who.int/> [<https://perma.cc/GCL8-L6XJ>] (recording over 6.8 million global deaths due to COVID-19).

² See Coral Davenport & Lisa Friedman, ‘Build Back Better’ Hit a Wall, but Climate Action Could Move Forward, N.Y. TIMES (Jan. 20, 2022), <https://www.nytimes.com/2022/01/20/climate/build-back-better-climate-change.html> [<https://perma.cc/53T3-E99J>] (writing that some Republicans oppose acting on climate change because it is viewed as part of the “far-left agenda”); Mark Muro & John C. Austin, *The Vaccine Divide Will Drive Even Worse Economic Divides*, BROOKINGS INST. (Sept. 13, 2021), <https://www.brookings.edu/blog/the-avenue/2021/09/13/the-vaccine-divide-will-drive-even-worse-economic-divides/> [<https://perma.cc/5WKK-LBQE>] (observing that Americans are politically divided over getting the COVID-19 vaccine and vaccination rates are crucial for “economic recovery and growth”); *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (rejecting one of the Environmental Protection Agency’s (EPA) interpretations of the Clean Air Act (CAA) because of the effects that it would have on a large part of the economy); DANIEL A. FARBER & CINNAMON P. CARLARNE, *CLIMATE CHANGE LAW* 60 (1st ed. 2018) (noting that the U.S. Senate expressed opposition to the Kyoto Protocol—a global effort to combat climate change through an emissions market—because it would impair the U.S. economy and put it at a disadvantage to other countries).

³ See *Congress and Climate Change*, CTR. FOR CLIMATE & ENERGY SOLS., <https://www.c2es.org/content/congress-and-climate-change/> [<https://perma.cc/V667-F36G>] (stating that federal climate action has largely proceeded under the EPA’s administration of the 1970 CAA). See generally *Biden v. Missouri*, 142 S. Ct. 647 (2022) (upholding the Department of Health and Human Services’ rule requiring employees of covered facilities to be vaccinated against COVID-19 to maintain eligibility for Medicare and Medicaid).

⁴ See *Indus. Union Dep’t, AFL-CIO v. Am. Petrol. Inst. (Benzene Case)*, 448 U.S. 607, 685–86 (1980) (Rehnquist, J., concurring in judgment) (opining that major national policy decisions must be addressed by Congress and the President through the legislative process, rather than Congress delegating those decisions to the Executive Branch); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) (observing that the regulation of tobacco was “a decision of such economic and political significance” that Congress could not have intended to delegate it to the Food and Drug Administration (FDA)); *King v. Burwell*, 576 U.S. 473, 486 (2015) (holding that an Internal Revenue Service (IRS) rule carried extraordinary economic and political consequences).

⁵ See *West Virginia v. EPA*, 142 S. Ct. 2587, 2610–16 (2022) (labeling the EPA’s plan to regulate powerplants as a “major question” and requiring “clear congressional authorization” to implement it (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324)); *Nat’l Fed’n Indep. Bus. v. Dep’t of Labor*, 142 S. Ct. 661, 663 (2022) (staying the Occupational Safety and Health Administration’s (OSHA) COVID-19 vaccine mandate). The vaccine mandate required that covered workers receive the coronavirus vaccine, except for workers who obtain a weekly medical test and wear a mask daily. *Id.* at 662.

desultory and virtually non-existent.⁶ The situation is so drastic that citizens have sued the U.S. government over climate inaction, arguing that such passivity violates their constitutional and fundamental rights.⁷ Congressional productivity in general remains at an all-time low, continuing a trend of steady and persistent decline over the past couple of decades.⁸ Whether as a result of po-

⁶ See Remarks on Efforts to Combat the Climate Crisis in Somerset, Massachusetts, 2022 DAILY COMP. PRES. DOC. 1 (July 20, 2022) (calling climate change an “emergency” and stating that Congress has failed to address it); INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2021: THE PHYSICAL SCIENCE BASIS 1, 4 (Valérie Masson-Delmotte et al. eds., 2021), https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_SPM_final.pdf [<https://perma.cc/CB8W-6GQH>] (finding that “it is unequivocal” that humans have warmed the Earth’s land, air, and sea, and limiting human-induced warming to a specific level is necessary to prevent irreversible damage to our climate systems). The Intergovernmental Panel on Climate Change (IPCC) was created by the United Nations Environment Programme and the World Meteorological Organization and is made up of 195 member countries. See *About the IPCC*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, <https://www.ipcc.ch/about/preparingreports> [<https://perma.cc/BAW3-X4G4>]. The IPCC issues objective reports and assessments with thousands of contributors that are drafted and reviewed to provide objectivity and transparency. *Id.*; see also *Juliana v. United States*, 947 F.3d 1159, 1175 (9th Cir. 2020) (observing that through congressional inaction, Congress has “abdicated their responsibility to remediate the [effects of climate change]”); *Congress Climate History*, CTR. FOR CLIMATE & ENERGY SOLS., <https://www.c2es.org/content/congress-climate-history/> [<https://perma.cc/YQN3-257J>] (observing that climate change has been debated in Congress for more than thirty years and listing significant attempts at legislation to address the issue); *Congress and Climate Change*, *supra* note 3 (noting that Congress has not seriously debated a comprehensive market-based approach to climate change since cap-and-trade legislation failed in 2009). The 2009 Waxman-Markey bill, which would have established a national emissions trading system, passed the House but stalled in the Senate, dying a year later when Republicans took back control of the House. See FARBER & CARLARNE, *supra* note 2, at 151 (describing federal climate regulation efforts).

⁷ See Mina Juhn, Note, *Taking a Stand: Climate Change Litigants and the Viability of Constitutional Claims*, 89 FORDHAM L. REV. 2731, 2750–51 (2021) (describing various cases challenging government inaction on climate change); *Juliana*, 947 F.3d at 1164 (observing that continuing political climate inaction “may hasten an environmental apocalypse”).

⁸ See Drew DeSilver, *Congress Is Off to a Slow Start in 2021, Much as It Has Been in Previous Years*, PEW RSCH. CTR. (Aug. 13, 2021), <https://www.pewresearch.org/fact-tank/2021/08/13/congress-is-off-to-a-slow-start-in-2021-much-as-it-has-been-in-previous-years/> [<https://perma.cc/YHJ2-77V6>] (stating that the 117th Congress had enacted the “fourth fewest laws . . . in the first eight months of its two-year term” of any Congress since 1987); Neal Rothschild, *Productivity in Congress Tanked in 2020*, AXIOS (Dec. 13, 2020), <https://www.axios.com/2020/12/14/congress-legislation-covid-19-2020> [<https://perma.cc/W3FA-RP2Q>] (observing that since the 1970s, the 116th U.S. Congress has been the least productive); Rey Mashayekhi, *The Current Congress Has Been the Least Productive in Decades, a Warning Sign for Biden if the Senate Stays Red*, FORTUNE (Dec. 10, 2020), <https://fortune.com/2020/12/10/biden-divided-congress-senate-georgia-runoff-mcconnell-gop-republican-majority/> [<https://perma.cc/VYV2-7MPM>] (noting that President Trump signed only 194 bills into law as of December 4, 2020). Similar articles have been written about previous Congresses over the past decade, reflecting the consistent decrease in productivity. See Drew DeSilver, *Congress Still on Track to Be Among Least Productive in Recent History*, PEW RSCH. CTR. (Sept. 23, 2014), <https://www.pewresearch.org/fact-tank/2014/09/23/congress-still-on-track-to-be-among-least-productive-in-recent-history/> [<https://perma.cc/2PE2-TMUB>] (providing a chart and commentary showing a persistent decline in substantive laws enacted by Congress from the 104th through the 113th U.S. Congresses); Chris Cillizza, *The Least Productive Congress Ever*, WASH. POST (July 17, 2013), <https://www.washingtonpost.com/news/the-fix/wp/2013/07/17/the-least-productive-congress-ever/> [<https://perma.cc/2SLU-4MLV>] (stating

larization, heightened partisanship, identity politics, or something else entirely, many believe that Congress has become unable to properly legislate.⁹ President Biden has made climate a cornerstone of his political platform and, following lengthy delays in Congress, enacted a bipartisan infrastructure bill in November 2021 and the Inflation Reduction Act (IRA) in August 2022.¹⁰ Alt-

that the 112th Congress passed the fewest bills since statistics began being reported in 1947); *Statistics and Historical Comparison*, GOVTRACK, <https://www.govtrack.us/congress/bills/statistics> [<https://perma.cc/Q2LK-YL6B>] (showing historical data from the 93d U.S. Congress through the 117th U.S. Congress and the percentage of enacted laws remaining below 4% ever since the 109th Congress). But see *Vital Statistics on Congress*, BROOKINGS INST. (Nov. 21, 2022), <https://www.brookings.edu/multi-chapter-report/vital-statistics-on-congress/> [<https://perma.cc/U9TK-CB6P>] (observing that although fewer laws are enacted, the length of individual bills tends to grow); Cillizza, *supra* (noting that looking only at bills passed is overly simplistic because certain bills matter more than others).

⁹ See Lee Hamilton, *How Congress Has Changed*, IND. UNIV. CTR. ON REPRESENTATIVE GOV'T (Apr. 22, 2020), <https://corg.iu.edu/programs/hamilton-views/comments-on-congress/How%20Congress%20Has%20Changed.html> [<https://perma.cc/NCF8-SYWL>] (stating that both voters and members of Congress view issues increasingly through a partisan lens, and split control of Congress has become more frequent); Josh Huder, *Our Very Unproductive Congress*, GOV'T AFFAIRS INST. GEORGETOWN UNIV., <https://gai.georgetown.edu/our-very-unproductive-congress/> [<https://perma.cc/KKW8-WTYP>] (noting that polarization has a greater effect when the chambers of Congress are split); German Lopez, *The Battle Over Identity Politics, Explained*, VOX, <https://www.vox.com/identities/2016/12/2/13718770/identity-politics> [<https://perma.cc/NT4L-VBKG>] (Aug. 17, 2017) (commenting that identity politics have been utilized by both conservative and liberal politicians); see also Ezra Klein, *Congressional Dysfunction*, VOX, <https://www.vox.com/2015/1/2/18089154/congressional-dysfunction> [<https://perma.cc/9F9H-FT6S>] (May 15, 2015) (noting that since 2010, congressional productivity has deteriorated and Congress's approval ratings have been declining below 10%); *Congress and the Public*, GALLUP, <https://news.gallup.com/poll/1600/congress-public.aspx> [<https://perma.cc/TV29-4Q4W>] (providing data that shows a persistent decline in congressional job approval, trust, and confidence). But see Cynthia R. Farina, *Congressional Polarization: Terminal Constitutional Dysfunction?*, 115 COLUM. L. REV. 1689, 1693 (2015) (suggesting that even though Congress has not been very successful in performing its constitutional role, historical evidence cannot account for the overly negative congressional polarization rhetoric).

¹⁰ See Ella Nilsen, *Biden's "All of Government" Plan for Climate, Explained*, VOX, <https://www.vox.com/22242572/biden-climate-change-plan-explained> [<https://perma.cc/GQ5X-VXCU>] (Jan. 27, 2021) (explaining Biden's goals of addressing climate change, including rejoining the Paris Agreement and hiring government employees with backgrounds in climate change); *The Biden Plan for a Clean Energy Revolution and Environmental Justice*, DEMOCRATIC NAT'L COMM., <https://joebiden.com/climate-plan/> [<https://perma.cc/U55X-DXQS>] (describing Biden's plans to tackle climate change and combat environmental injustice); see also Jacob Pramuk, *Biden Signs \$1 Trillion Bipartisan Infrastructure Bill into Law, Unlocking Funds for Transportation, Broadband, Utilities*, CNBC, <https://www.cnbc.com/2021/11/15/biden-signing-1-trillion-bipartisan-infrastructure-bill-into-law.html> [<https://perma.cc/C8JB-K5FW>] (Nov. 15, 2021) (noting that the bill was enacted after "years of failed attempts" in Washington); *Inflation Reduction Act Guidebook*, WHITE HOUSE, <https://www.whitehouse.gov/cleanenergy/inflation-reduction-act-guidebook/> [<https://perma.cc/F2PA-ZVQ2>] (describing the Inflation Reduction Act (IRA) as the "most significant action Congress has taken on clean energy and climate change"). The \$1 trillion infrastructure bill includes \$60 billion to be spent on modernizing the power grid, \$7.5 billion to build electric vehicle charging stations, and \$50 billion for relief from natural disasters caused by climate change. See *Delivering Results from President Biden's Bipartisan Infrastructure Law*, WHITE HOUSE, <https://www.whitehouse.gov/bipartisan-infrastructure-law/> [<https://perma.cc/C2XK-ARXC>] (detailing the provisions within the infrastructure bill). The bill's original form would have made it the most significant effort ever to address climate change, but the version

though the IRA is the most comprehensive congressional act ever to target climate change, it was barely enacted into law due to the unanimous opposition of Republican lawmakers—hardly a bipartisan effort.¹¹

Until this recent legislation, efforts to combat climate change proceeded almost entirely under the 1970 Clean Air Act (CAA), a statute initially created to address public health and welfare from air emissions of hazardous air pollutants, rather than climate change.¹² Like other enabling legislation, the CAA gives the EPA the authority to set and enforce limits on certain air pollutants.¹³ In 2009, the EPA released an endangerment finding that global warming emissions posed a danger to public health, thus allowing regulation under the CAA.¹⁴

In the absence of specific legislative attention and delegated authority, executive branch agencies have filled the void in addressing climate change and

that passed was stripped-down and left out critical climate provisions, such as the Clean Electricity Program. See Jeff Brady, *Congress Is Debating Its Biggest Climate Change Bill Ever. Here's What's at Stake*, NPR (Sept. 15, 2021), <https://www.npr.org/2021/09/15/1036954961/congress-is-debating-its-biggest-climate-change-bill-ever-heres-whats-at-stake> [<https://perma.cc/WSV5-YRK7>] (detailing the congressional debates around Biden's initial \$3.5 trillion budget package and the massive reductions in greenhouse gas emissions that it would achieve); Coral Davenport, *Key to Biden's Climate Agenda Likely to Be Cut Because of Manchin Opposition*, N.Y. TIMES, <https://www.nytimes.com/2021/10/15/climate/biden-clean-energy-manchin.html> [<https://perma.cc/47BF-VDSZ>] (Nov. 3, 2021) (noting that the “muscle” of Biden's climate agenda was the \$150 billion Clean Electricity Program).

¹¹ See Zoya Teirstein, *House Passes the Inflation Reduction Act, the 'Most Significant' Climate Bill in US History*, GRIST (Aug. 12, 2022), <https://grist.org/politics/house-passes-the-inflation-reduction-act-the-most-significant-climate-bill-in-us-history/> [<https://perma.cc/GE77-WGXF>] (noting that every House Republican voted against the bill); see also *FACT SHEET: The Inflation Reduction Act Supports Workers and Families*, WHITE HOUSE (Aug. 19, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/19/fact-sheet-the-inflation-reduction-act-supports-workers-and-families/> [<https://perma.cc/9FPY-88ZR>] (describing key climate provisions of the IRA); Melissa Barbanell, *A Brief Summary of the Climate and Energy Provisions of the Inflation Reduction Act of 2022*, WORLD RES. INST. (Oct. 28, 2022), <https://www.wri.org/update/brief-summary-climate-and-energy-provisions-inflation-reduction-act-2022> [<https://perma.cc/M8GU-73FY>] (modeling the U.S. greenhouse gas emissions under the IRA).

¹² See *Congress and Climate Change*, *supra* note 3 (noting that Congress has done little on federal climate action and most efforts have emanated through the EPA's administration of the CAA); *Summary of the Clean Air Act*, EPA, <https://www.epa.gov/laws-regulations/summary-clean-air-act> [<https://perma.cc/E3PX-BKGD>] (providing an overview of the 1970 CAA); 42 U.S.C. § 7401 (1970) (listing the provisions of the CAA).

¹³ See *Regulatory and Guidance Information by Topic: Air*, EPA, <https://www.epa.gov/regulatory-information-topic/regulatory-and-guidance-information-topic-air> [<https://perma.cc/T3YP-YFGA>] (describing some of the authority given to the EPA under the CAA); see also *What Does the FDA Do*, HG.ORG LEGAL RES., <https://www.hg.org/legal-articles/what-does-the-fda-do-35057> [<https://perma.cc/H5TC-3CXQ>] (noting that the 1938 Food, Drug and Cosmetic Act, among other sources of law, granted regulatory authority to the FDA).

¹⁴ See 42 U.S.C. § 7521(a) (requiring the Administrator of the EPA to prescribe standards for emissions of air pollutants that are determined to “endanger public health or welfare”); see also *The Clean Air Act*, UNION OF CONCERNED SCIENTISTS, <https://www.ucsusa.org/resources/clean-air-act> [<https://perma.cc/QA5E-AUEH>] (Feb. 1, 2012) (noting that since the 2009 endangerment finding, the EPA must take steps to reduce global warming emissions pursuant to the CAA).

other areas of pressing need.¹⁵ On average over the past decade, agencies issued twenty-eight rules and regulations for every one law enacted by Congress.¹⁶ These agencies often work together to craft rules, utilizing and relying on each other's relevant expertise.¹⁷

Occasionally referred to as the “regulatory state” or “deep state,” there has been growing opposition in recent years to the notion of an unelected bureaucracy creating myriad laws.¹⁸ Environmental law, however, would scarcely

¹⁵ See *Reg Stats*, GEORGE WASH. UNIV. REG. STUD. CTR., <https://regulatorystudies.columbia.gwu.edu/reg-stats> [<https://perma.cc/WF2F-S6V2>] (showing an overall increasing trend of economically significant final rules published by presidential year). The Obama Administration set the record for economically significant agency action, and the Trump Administration followed as a close second. See *id.* (providing supporting data). A recent example of agency rulemaking on climate change issues is the ongoing effort by the U.S. Securities and Exchange Commission (SEC) to amend its disclosure rules to require reporting of certain climate-related information, including greenhouse gas emissions, from publicly traded companies. See *Enhancement and Standardization of Climate-Related Disclosures for Investors*, 87 Fed. Reg. 21334 (proposed Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249) (describing the proposed rulemaking); Press Release, U.S. Sec. & Exch. Comm'n, SEC Extends Comment Period for Proposed Rules on Climate-Related Disclosures, Reopens Comment Periods for Proposed Rules Regarding Private Fund Advisors and Regulation ATS (May 9, 2022), <https://www.sec.gov/news/press-release/2022-82> [<https://perma.cc/B2AZ-JJV9>] (extending the public comment period for the proposed rule); Jim Tyson, *SEC Aims to Set Climate Risk, Cybersecurity Rules Before May*, UTILITY DIVE (Jan. 19, 2023), <https://www.utilitydive.com/news/sec-aims-set-climate-risk-cybersecurity-rules-before-may-ESG-buybacks-SPACs/640640/> [<https://perma.cc/YA4W-PJ8D>] (stating that the SEC's climate disclosure rule is expected to be finalized in May 2023).

¹⁶ See Clyde Wayne Crews Jr., *The 2021 “Unconstitutionality Index”: 19 Federal Rules and Regulations for Every Law Congress Passes*, FORBES (Feb. 2, 2021), <https://www.forbes.com/sites/waynecrews/2021/02/02/the-2021-unconstitutionality-index-19-federal-rules-and-regulations-for-every-law-congress-passes/> [<https://perma.cc/RM2Y-ZS6H>] (providing data from Forbes's “Unconstitutionality Index” that tracks agency rulemakings).

¹⁷ See *Managing for Results: Using GPRA to Help Congressional Decisionmaking and Strengthen Oversight: Hearing Before the H. Subcomm. on Rules and Org. of the H. Comm. on Rules*, 106th Cong. 19 (2000) (statement of David M. Walker, Comptroller Gen. of the U.S.) (noting that “concerted and coordinated efforts” of agencies are necessary to bring about the goals of the federal government); Kimberly H. Anker, Note, *Best Frenemies: Evaluating the Dual Jurisdiction of the Federal Antitrust Agencies*, 63 B.C. L. REV. 255, 255, 271 (2022) (observing that the Department of Justice and the Federal Trade Commission have coordinated extensively via interagency processes to avoid conflicts in areas where they share jurisdiction); Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1155–69 (2012) (discussing interagency collaboration through memorandums of understanding (MOUs) and joint rulemakings). Freeman and Rossi state that agencies often enter into MOUs with each other to promote information exchange, coordination of reviews in areas where authority overlaps, and even to agree on substantive policy decisions. Freeman & Rossi, *supra*, at 1161. These MOUs are voluntary agreements that are unenforceable and unreviewable by courts, and although Congress can explicitly require them, agencies often enter into them of their own fruition. *Id.*

¹⁸ See John Pearson, *Tyranny of the Administrative State?—Another View*, PA TIMES (Sept. 12, 2017), <https://patimes.org/tyranny-administrative-state-view/> [<https://perma.cc/U2AS-2E6L>] (commenting on the views of professors and journalists that the administrative state is unconstitutional); PHILIP HAMBURGER, *THE ADMINISTRATIVE THREAT* 1 (2017) (noting that term “deep state” was coined due to the impingement administrative agencies create with our elected government).

exist without the regulatory oversight and rulemaking of federal agencies.¹⁹ Indeed, without the EPA's exercise of authority under the CAA, there would be almost no regulations targeting climate change.²⁰

Tallying the rules and regulations created by the entire administrative agency system produces a dizzying sum, but these actions are often reviewed, revised, and rescinded as a result of the normal rulemaking process.²¹ Historically, federal courts examined agency actions under a pair of deferential frameworks—*State Farm* and *Chevron*—but increasingly have done so in recent years under the so-called “major questions” doctrine.²² Invoking the major

¹⁹ See Jonathan Cannon, *Environmental Law Futures*, ENV'T L. INST. (Mar. 15, 2019), <https://www.eli.org/vibrant-environment-blog/environmental-law-futures> [<https://perma.cc/HX9V-58UH>] (stating that environmental law is a branch of administrative law); David S. Tatel, *The Administrative Process and the Rule of Environmental Law*, 34 HARV. ENV'T L. REV. 1, 1 (2010) (noting that the “technical expertise” employed by the EPA and other federal agencies is well beyond the ability of Congress); Kathryn E. Kovacs, *Climate Change Is the Most Important Issue in Administrative Law*, YALE J. ON REG. (June 19, 2010), <https://www.yalejreg.com/nc/climate-change-is-the-most-important-issue-in-administrative-law-by-kathryn-e-kovacs/> [<https://perma.cc/WY5F-6NTA>] (acknowledging that Supreme Court opinions regarding climate change “appear in most administrative law casebooks”).

²⁰ See generally *Massachusetts v. EPA*, 549 U.S. 497 (2007) (finding that the CAA authorizes the EPA to regulate greenhouse gas emissions from new motor vehicles in the event that it forms a “judgment” that such emissions contribute to climate change). See also Kovacs, *supra* note 19 (arguing that “climate change is the most important question in administrative law”).

²¹ See Crews, *supra* note 16 (observing that the Obama Administration crafted a 95,894-page Federal Register in 2016, consisting of 3,853 rules and regulations, while the Trump Administration's 2020 Federal Register consisted of 86,356 pages and 3,353 rules). Ironically, many of the rules under the Trump Administration were “deregulatory” in nature. See *id.* (noting that the Trump White House labeled hundreds of rules as “deregulatory”); see also *Challenging Regulatory Actions*, JUSTIA, <https://www.justia.com/administrative-law/challenging-regulatory-actions/> [<https://perma.cc/XGG4-67S7>] (May 2022) (laying out the procedures that agencies must follow when creating new rules and when rules are challenged). Importantly, and unlike the congressional lawmaking process, informal agency rulemaking involves accepting public comments on proposed rules, with the Administrative Procedures Act (APA) requiring agencies to respond to all comments to a reasonable extent. *Id.* Formal rulemaking further requires a public hearing, thus giving the public a voice in either process. *Id.*

²² See *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (describing the “arbitrary and capricious” standard of review under the APA); *Chevron USA, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (creating an analysis for judicial review of agency actions); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–61 (2000) (refraining from granting *Chevron* deference and creating the U.S. Supreme Court precedent for the major questions doctrine); Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986) (“A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, *major questions*, while leaving interstitial matters to answer themselves in the course of the statute's daily administration.” (emphasis added) (first citing *Montana v. Clark*, 749 F.2d 740, 746 (D.C. Cir. 1985); then citing *Mayburg v. Sec'y of Health & Hum. Servs.*, 740 F.2d 100, 106 (1st Cir. 1984); then citing *Constance v. Sec'y of Health & Hum. Servs.*, 672 F.2d 990, 995–96 (1st Cir. 1982); and then citing *Int'l Bhd. of Teamsters v. Daniel*, 439 U.S. 551, 566 n.20 (1979))); see also *King v. Burwell*, 576 U.S. 473, 484–85 (2015) (invoking the major questions doctrine and declining to apply the *Chevron* analysis).

questions doctrine is often a death knell for agency actions.²³ This trend of disabling agencies from regulating important issues is likely to continue and agencies should take heed of this when undertaking future rulemaking efforts, as any regulation with far-reaching effects may face similar scrutiny.²⁴

This Note argues that the judiciary's current nondelegation and anti-deference push is a misguided effort to restrict the ability of federal agencies to properly regulate in their areas of expertise.²⁵ This Note concludes that courts should include coordination efforts between agencies possessing relevant expertise and statutory authority as a formal procedural component within their judicial review analysis and give enhanced deference where such an articulated process has taken place.²⁶

Part I of this Note describes the roots of congressional delegation of power to federal agencies, the federal rulemaking process, benefits of interagency collaboration and examples thereof, and the origins of various judicial standards of review for agency actions.²⁷ Part II evaluates the importance of federal agencies in the U.S. legal system, the evolving trend of judicial review toward restricting agency action, and whether the recent jurisprudence of the U.S. Courts of Appeals for the D.C. and Fifth Circuits provides an avenue for combatting these judicial constraints on administrative authority.²⁸ Part III concludes that deference to federal agencies is critical in addressing complex issues and examines the role that interagency coordination can play in plausible major questions challenges to the Securities and Exchange Commission's new climate-related risk disclosure rule.²⁹ Part III culminates by arguing that courts should include interagency coordination as a formal analytical element when reviewing agency actions.³⁰

²³ See *supra* note 5 and accompanying text (noting recent cases where agency actions have failed to survive the major questions doctrine).

²⁴ See Jonathan H. Adler, *Why the Supreme Court's Decision in NFIB v. OSHA May Be Even Worse News for Climate Regulation Than You Thought*, VOLOKH CONSPIRACY (Jan. 24, 2022), <https://reason.com/volokh/2022/01/24/why-the-supreme-courts-decision-in-nfib-v-osha-may-be-even-worse-news-for-climate-regulation-than-you-thought/> [<https://perma.cc/X788-QYMG>] (predicting with accuracy that the Supreme Court, through the reasoning of the *National Federation of Independent Business v. Occupational Safety & Health Administration* vaccine mandate case, would conclude that the EPA lacks authority to effectuate changes in the energy grid through its existing authority to control emissions from power plants); *Major Decision for Major Questions: Supreme Court Reins in Federal Regulatory Authority*, DECHERT LLP (July 20, 2022), <https://www.dechert.com/knowledge/onpoint/2022/7/west-virginia-v-epa.html> [<https://perma.cc/7CTQ-QSHA>] (discussing further areas of regulation where a major questions doctrine challenge could be brought).

²⁵ See *infra* notes 147–251 and accompanying text.

²⁶ See *infra* notes 231–251 and accompanying text.

²⁷ See *infra* notes 31–146 and accompanying text.

²⁸ See *infra* notes 147–218 and accompanying text.

²⁹ See *infra* notes 223–246 and accompanying text.

³⁰ See *infra* notes 247–251 and accompanying text.

I. DEEP STATE OF THE UNION

Federal agency rulemaking involves a process whereby Congress grants specific authority to the agency to implement statutory programs.³¹ The implications of this congressional delegation of power are striking because, when an agency creates rules pursuant to delegated legislative authority, it assumes the function of Congress in making law.³²

Agency action includes, but is not limited to, reviewing petitions for rulemakings, proposing and finalizing rules and regulations, and conducting enforcement actions.³³ Although all these forms of agency action are subject to some form of review, final agency rulemakings tend to draw the most vehement debates.³⁴

Section A of this Part discusses the history of Congress's ability to delegate its powers.³⁵ Section B of this Part provides an overview of the federal rulemaking process.³⁶ Section C of this Part describes how final rulemakings are subject to various standards of judicial review.³⁷ Section D of this Part examines agency coordination and provides longstanding examples of such cooperative efforts.³⁸

³¹ See generally MAEVE CAREY, CONG. RSCH. SERV., IF10003, AN OVERVIEW OF FEDERAL REGULATIONS AND THE RULEMAKING PROCESS (2021) (describing the federal rulemaking process).

³² See *Nat'l Latino Media Coal. v. FCC*, 816 F.2d 785, 788 (D.C. Cir. 1987) (stating that “the agency stands in the place of Congress”). “A valid legislative rule is binding upon all persons, and on the courts, to the same extent as a congressional statute.” *Id.*

³³ See generally OFF. FED. REG., A GUIDE TO THE RULEMAKING PROCESS (2011), https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf [<https://perma.cc/YBR5-2324>] (describing the rulemaking process from issuance of a Notice of Proposed Rulemaking (NPRM) to implementation of a final rule); *Agency Enforcement Actions*, JUSTIA, <https://www.justia.com/administrative-law/enforcement-actions/> [<https://perma.cc/2Q9R-NETP>] (May 2022) (noting that federal agencies can be authorized to bring formal legal enforcement actions when rules, regulations, or statutes are violated); 5 U.S.C. § 553(e) (“Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.”). Through this section of the APA, individuals may request that an agency take action on a particular issue. See generally MAEVE CAREY, CONG. RSCH. SERV., R46190, PETITIONS FOR RULEMAKING: AN OVERVIEW (2020) (describing the APA petition mechanism under 5 U.S.C. § 553(e)).

³⁴ See OFF. FED. REG., *supra* note 33 (noting that Notices of Proposed Rulemakings are subject to comments from the public); CAREY, *supra* note 33, at 8 (stating that an agency's denial of a petition may also be subject to judicial review); *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (reasoning that an agency's enforcement action can be subject to review as to whether it “exceeded” their statutory authority). Compare Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1525 (2015) (arguing that rulemaking delegation erodes the U.S. institution of government because “shadow administrators”—lawmakers outside of Congress in federal agencies—threaten the independence of both Congress and the Executive), with Tatel, *supra* note 19, at 1 (expressing that, in the context of rulemaking, the “technical expertise” of federal agencies is far greater than that of Congress). This Note will primarily focus on final rulemakings. See *infra* notes 59–66 and accompanying text (describing the federal rulemaking process).

³⁵ See *infra* notes 39–58 and accompanying text.

³⁶ See *infra* notes 59–66 and accompanying text.

³⁷ See *infra* notes 67–126 and accompanying text.

³⁸ See *infra* notes 127–146 and accompanying text.

A. Congressional Power and the Nondelegation Doctrine

In 1825, in *Wayman v. Southard*, Chief Justice Marshall recognized that Congress may delegate powers granted to it in the Constitution as long as they are not “strictly and exclusively legislative.”³⁹ Then, more than one hundred years later, the Supreme Court created the so-called nondelegation doctrine, prohibiting Congress from delegating power to other governmental branches unless there is some “intelligible principle” to which the delegatee must conform.⁴⁰ Soon after, the Court employed the nondelegation doctrine to strike down two prominent New Deal laws.⁴¹

Eventually, the pendulum swung back after the Court revised the “intelligible principle” test because of a pragmatic concern that Congress would be unable to legislate properly in such a rapidly evolving and technically intricate society without the power to delegate authority to agencies “under broad general directives.”⁴² The Court has also noted that finding a “constitutional compulsion” for Congress to ascribe minute details in every law would reduce the effectiveness and flexibility of both the legislative and administrative processes.⁴³

The nondelegation doctrine has its roots in the broad theme of separation of powers found in the U.S. Constitution.⁴⁴ Although the Constitution does not explicitly authorize Congress to delegate its powers, it does grant broad au-

³⁹ 23 U.S. (10 Wheat.) 1, 42–43 (1825).

⁴⁰ See *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406, 409 (1928) (holding that Congress may delegate authority to the President of the United States and other executive branch officers within “defined limits”).

⁴¹ See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935) (invalidating the delegation of legislative power to the President to establish codes of fair competition under the National Industrial Recovery Act); *Pan. Refin. Co. v. Ryan*, 293 U.S. 388, 430 (1935) (holding that the delegation of power to the President to restrict interstate transportation of petroleum via rules and regulations went beyond the limits of constitutional authority of delegation).

⁴² See *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (describing our society as “increasingly complex” and “replete with ever changing and more technical problems” (quoting *Opp Cotton Mills, Inc. v. Adm’r, Wage & Hour Div. of Dep’t of Labor*, 312 U.S. 126, 145 (1941))).

⁴³ See *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 398 (1940) (explaining why Congress’s delegation of power is valid).

⁴⁴ See U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress . . .”); *id.* art. II, § 2, cl. 2 (authorizing the appointment of “Officers” to positions “which shall be established by Law”); *id.* art. I, § 8, cl. 18 (empowering Congress to “make all Laws which shall be necessary and proper for carrying into Execution” both Congress’s specifically enumerated powers and “all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof”); *Separation of Powers: Delegation of Legislative Power*, NAT’L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/research/about-state-legislatures/delegation-of-legislative-power.aspx> [<https://perma.cc/88DM-DE47>] (Nov. 16, 2022) (stating that constitutional separation-of-powers provisions provide that the legislature enacts laws, which are administered by the executive, and interpreted by the judiciary); see also *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (noting the implications of the separation of powers canons on statutory delegations to federal agencies).

thority to create federal agencies and offices.⁴⁵ The Supreme Court, however, in 1996, in *Loving v. United States*, expounded that the nondelegation doctrine was not informed solely by the arrogation and impairment analyses of the Constitution's separation-of-powers doctrine, which necessitates that the performance of constitutional duties of one governmental branch cannot be impaired by another, and that a branch cannot arrogate power to itself.⁴⁶ Rather, the Court has also found delegations of power to administrative agencies to be improper on other constitutional grounds like the Due Process Clause of the Fifth Amendment.⁴⁷

In 1976, in *Hampton v. Wong*, then-Justice Rehnquist observed that the Supreme Court had been disinclined to expand the narrow nondelegation doctrine holdings of its New Deal era.⁴⁸ Not long after, however, Justice Rehnquist appeared to invoke the doctrine in two cases involving OSHA.⁴⁹

Then, in 2019, in *Gundy v. United States*, the Court returned to the nondelegation doctrine, with a visible split emerging among the modern Roberts Court on the doctrine's jurisprudence.⁵⁰ Justice Kagan's plurality opinion concluded that the delegation of power to the U.S. Attorney General through a provision of the Sex Offender Registration and Notification Act passed consti-

⁴⁵ See *Buckley v. Valeo*, 424 U.S. 1, 138–39 (1976) (per curiam) (finding that Congress may create “offices” and provide methods of appointment to those “offices” under the Necessary and Proper Clause); 1 ANNALS OF CONG. 383 (1789) (observing that the Constitution contemplated the creation of “departments of an executive nature” to “aid” the President in the execution of the law).

⁴⁶ See 517 U.S. 748, 758 (1996) (observing that although the foundation of the nondelegation doctrine is that Congress cannot convey its lawmaking function to another branch or entity, it does not mean that “only Congress can make a rule of prospective force”). The Court further explained that “[t]o burden Congress with all federal rulemaking would divert that branch from more pressing issues, and defeat the Framers’ design of a workable National Government.” *Id.*

⁴⁷ See U.S. CONST. amend. V (stating the constitutional due process requirements); *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) (observing that a statute’s delegation of power may be in violation of due process when it unconstitutionally interferes with “personal liberty and private property”); *Yakus v. United States*, 321 U.S. 414, 419, 447 (1944) (finding that the legislative delegation of power to the Office of Price Administration under the Emergency Price Control Act did not violate the requirements of due process).

⁴⁸ See 426 U.S. 88 (1976) (Rehnquist, J., dissenting) (stating that the Court has not sought to expand the narrow holdings of *Shechter Poultry* and *Panama Refining* throughout the forty years following those decisions); *supra* note 41 and accompanying text (discussing the New Deal era cases).

⁴⁹ See *Indus. Union Dep’t, AFL-CIO v. Am. Petrol. Inst. (Benzene Case)*, 448 U.S. 607, 672 (1980) (Rehnquist, J., concurring in judgment) (expressing the opinion that Congress “improperly delegated” power to the Secretary of Labor to regulate benzene); *Am. Textile Mfg. Inst. v. Donovan*, 452 U.S. 490, 543 (1981) (Rehnquist, J., dissenting) (believing that Congress unconstitutionally delegated authority to make “hard policy choices” to the executive branch regarding the regulation of cotton dust (quoting *Benzene Case*, 448 U.S. at 671)).

⁵⁰ See 139 S. Ct. 2116, 2131 (2019) (showing a split between the Kagan plurality and Gorsuch dissent on the nondelegation doctrine). Justice Alito concurred with the plurality, agreeing on the case law concerning the nondelegation doctrine, but noting his willingness to support reconsideration of the “intelligible principle” test once a majority of the court wished to rethink the doctrine. *Id.* at 2130–31 (Alito, J., concurring in judgment).

tutional concerns without trouble.⁵¹ A dissent authored by Justice Gorsuch, and joined by Chief Justice Roberts and Justice Thomas, however, opposed that view, finding the delegation unconstitutional and calling for an end to the “intelligible principle” test.⁵²

In addition to the Supreme Court’s ability to overturn congressional delegations of power, Congress itself has the power to review the authority it provides to administrative agencies, predominately through the Congressional Review Act (CRA).⁵³ Before an agency’s final rule can take effect, the agency must submit it to Congress and the Government Accountability Office.⁵⁴ Once received, Congress can submit and take action on a joint resolution of disapproval within a specific amount of time, thereby overturning the rule.⁵⁵ The joint resolution is sent to the President for signature or veto, but Congress retains the power to override a Presidential veto.⁵⁶ Importantly, if Congress or the President prevents the rule from going into effect, the agency is prohibited from making a rule in the future that is “substantially” similar unless specifically authorized by Congress.⁵⁷ The CRA is thus a powerful tool for undoing newly issued rules, particularly once a new party gains control of the White House.⁵⁸

⁵¹ See *id.* at 2121 (plurality opinion) (holding that the delegation “easily passes constitutional muster”).

⁵² See *id.* at 2143 (Gorsuch, J., dissenting) (finding that the statute provided “unfettered discretion” in violation of the Constitution).

⁵³ See 5 U.S.C. § 801 (providing the procedure for congressional review of agency rulemakings); DeSilver, *supra* note 8 (writing that, “[i]n 2017 . . . 14 of 46 laws passed by the new GOP-controlled Congress and signed by President Donald Trump overturned rules issued in the waning days of the Obama administration” through use of the Congressional Review Act (CRA)); CONG. RSCH. SERV., R43992, THE CONGRESSIONAL REVIEW ACT (CRA): FREQUENTLY ASKED QUESTIONS 1 (2021) (“The CRA was enacted in 1996 as part of the Small Business Regulatory Enforcement Fairness Act.”); see also TODD GARVEY & DANIEL J. SHEFFNER, CONG. RSCH. SERV., R45442, CONGRESS’S AUTHORITY TO INFLUENCE AND CONTROL EXECUTIVE BRANCH AGENCIES (2021) (discussing further congressional oversight tools).

⁵⁴ See 5 U.S.C. § 801(a)(1)(A) (providing the procedure for submitting a rule to Congress under the CRA).

⁵⁵ See *id.* §§ 801–802 (describing the congressional disapproval procedure).

⁵⁶ *Id.*

⁵⁷ See *id.* § 801(b) (describing how the CRA operates to prevent agencies from issuing similar rules once they are overturned).

⁵⁸ See DeSilver, *supra* note 8 (discussing the importance of the CRA after a presidential election). Former President Trump, for example, attempted to use the CRA to overturn many environmental rules and laws during his years in office. See Juliet Eilperin & Darla Cameron, *How Trump Is Rolling Back Obama’s Legacy*, WASH. POST, <https://www.washingtonpost.com/graphics/politics/trump-rolling-back-obama-rules/> [<https://perma.cc/M589-FHF9>] (Jan. 20, 2018) (providing a graph depicting key policy areas targeted by President Trump under the CRA); Jenna Johnson, Juliet Eilperin & Ed O’Keefe, *Trump Is Finding It Easier to Tear Down Old Policies Than to Build His Own*, WASH. POST (June 4, 2017), https://www.washingtonpost.com/politics/trump-is-finding-it-easier-to-tear-down-old-policies-than-to-build-his-own/2017/06/04/3d0bcd2b-47c5-11e7-a196-a1bb629f64cb_story.html [<https://perma.cc/G4M7-XVT5>] (observing that President Trump and the 115th Congress revoked numerous EPA policies aimed at reducing pollution and confronting climate change that were instituted during the Obama era). But see *Congressional Review Act: Overview and Tracking*, NAT’L CONF.

B. How It's Made: Federal Rules and Regulations

Federal agencies retain significant power once Congress delegates the authority to craft and enforce rules that carry the force of law.⁵⁹ An agency, however, may not exceed its statutory authority or the Constitution when taking such actions.⁶⁰ Congress has enacted procedural statutes, such as the Administrative Procedure Act (APA), to control the agency rulemaking process.⁶¹ Agencies must follow the procedures prescribed within the APA when creating, amending, or repealing a rule.⁶²

The rulemaking process begins with an agency publishing a Notice of Proposed Rulemaking (NPRM) in the Federal Register.⁶³ Following the NPRM, “interested persons”—including other federal agencies—are given an opportunity to publicly comment on the proposed rule, a period typically of at least thirty days.⁶⁴ Agencies must then review and respond to “significant” public comments.⁶⁵ After conclusion of the public comment process, the agency pub-

OF STATE LEGISLATURES, <https://www.ncsl.org/ncsl-in-dc/publications-and-resources/congressional-review-act-overview-and-tracking.aspx> [https://perma.cc/52HP-S5L8] (Feb. 20, 2023) (noting that the CRA has successfully overturned only 17 out of over 125 rules that were challenged by more than 200 joint resolutions of disapproval since its enactment). The 107th Congress used the CRA to overturn one rule, and the 115th Congress overturned sixteen. *Id.*

⁵⁹ See CAREY, *supra* note 31 (explaining the importance of federal rulemaking authority); Nat'l Latino Media Coal. v. FCC, 816 F.2d 785, 788 (D.C. Cir. 1987) (observing that, once delegated power, the agency fills the role of Congress and adopts binding legislative rules).

⁶⁰ See OFF. FED. REG., *supra* note 33 (explaining the boundaries on agency action).

⁶¹ See 5 U.S.C. §§ 500–559 (prescribing fair administrative procedure and describing the default practice that all agencies must follow when promulgating rules).

⁶² See CAREY, *supra* note 31 (explaining the importance of the APA).

⁶³ See 5 U.S.C. § 553(b) (describing the process for agency rulemaking). The NPRM must include the “time, place, and nature of the rule making proceedings,” a “reference to the legal authority under which the rule is proposed,” and “either the terms or substance of the proposed rule or a description of the subjects and issues involved.” *Id.*

⁶⁴ *Id.* § 553(c).

⁶⁵ See CAREY, *supra* note 31 (describing to which comments an agency is required to respond); see also *Agency Rulemaking*, JUSTIA, <https://www.justia.com/administrative-law/rulemaking-writing-agency-regulations/> [https://perma.cc/JR7G-RGD5] (May 2022) (noting that an agency may modify rules based on public input or rewrite the rule entirely and publish it for public comment once again). Comments are “significant” if they are not speculative, are grounded in a basis of facts or policy, and cast doubt on the reasonableness of an agency’s adopted position on the matter. See *Home Box Off., Inc. v. FCC*, 567 F.2d 9, 35 & n.58 (D.C. Cir. 1977) (noting that significant comments are placed within the framework of the “arbitrary and capricious” standard of review). Congress intended the comment and response period to be a democratic check on agency power and a means of better informing agency reasoning. See Donald J. Kochan, *The Commenting Power: Agency Accountability Through Public Participation*, 70 OKLA. L. REV. 601, 601–02, 612 (2018) (describing the critical role that public comments play in the accountability of administrative agencies). The SEC’s proposed climate disclosure rule has received nearly 15,000 public comments since it was released in March 2022. See Mark Segal, *SEC Chair Gensler Says Commission Considering Adjustments to Climate Disclosure Rules*, ESG TODAY (Feb. 13, 2023), <https://www.esgtoday.com/sec-chair-gensler-says-commission-considering-adjustments-to-climate-disclosure-rules/> [https://perma.cc/RH9L-2488] (describing the magnitude of public input provided to the SEC). Formal rulemakings—those required by

lishes the final rule with a “concise general statement” of the rule’s “basis and purpose” within the Federal Register.⁶⁶

C. Assessing Agency Actions: Time for a Judicial Review

Agencies administer the authority delegated to them by promulgating rules that bind the public, taking enforcement actions for violations of statutes and regulations, granting licenses, and providing guidance on specific regulatory policies.⁶⁷ The U.S. Constitution vests the judicial power in the Supreme Court and grants Congress the power to establish inferior courts, which has been used to create federal courts that can hear both criminal and civil cases.⁶⁸ Through this constitutional power and the APA, federal courts have the authority to review agency actions and delegations of power.⁶⁹ Subsection 1 of this Section details the APA’s role in governing judicial review of agency actions.⁷⁰ Subsection 2 describes the “arbitrary and capricious” standard of review.⁷¹ Subsection 3 looks at various judicial deference doctrines with a key focus on *Chevron* deference.⁷² Subsection 4 outlines the development of the major questions doctrine and its evolving usage of as a form of judicial review.⁷³

statute to be made on the record—must be made after an opportunity for a public hearing. *See* 5 U.S.C. §§ 553, 556, 557 (providing the procedure for formal rulemakings).

⁶⁶ *See* 5 U.S.C. § 553(c) (describing the process for publication of final rules). Subject to a few exceptions, the rule must be published for at least thirty days in the Federal Register before going into effect. *See* CAREY, *supra* note 31 (explaining when a final rule can go into effect).

⁶⁷ *See* 5 U.S.C. § 553 (describing the process for agency rulemaking); *id.* § 558 (imposing specific requirements on agencies when reviewing applications for a license); 42 U.S.C. § 301 (authorizing the Social Security Administration to pay benefits to certain disabled individuals); *Pierce v. Sec. & Exch. Comm’n*, 786 F.3d 1027, 1031 (D.C. Cir 2015) (denying an individual’s petition for review of enforcement actions brought by the SEC); Press Release, U.S. Sec. & Exch. Comm’n, SEC Division of Examinations Announces 2021 Examination Priorities (Mar. 3, 2021), <https://www.sec.gov/news/press-release/2021-39> [<https://perma.cc/3M9E-KEQX>] (declaring an enhanced focus on climate-related risks).

⁶⁸ *See* U.S. CONST. art. III, § 1 (describing the power vested in, and limits of, the judiciary); U.S. CONST. art. I, § 8, cl. 9 (authorizing Congress to create “Tribunals inferior to the supreme Court”); *see also* Judiciary Act of 1789, ch. 20, 1 Stat. 73, 73 (establishing the federal judiciary); 28 U.S.C. § 41 (establishing federal circuit and district courts); *id.* § 1331 (empowering district courts with “original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States”).

⁶⁹ *See* JARED P. COLE, CONG. RSCH. SERV., R44699, AN INTRODUCTION TO JUDICIAL REVIEW OF FEDERAL AGENCY ACTION 6–8 (2016) (describing the constitutional, prudential, and jurisdictional considerations required for an agency action to be reviewable); DANIEL J. SHEFFNER, CONG. RSCH. SERV., LSB10536, JUDICIAL REVIEW OF ACTIONS LEGALLY COMMITTED TO AN AGENCY’S DISCRETION (2020) (expanding on the judicial review authority granted by the APA); *see also infra* notes 74–85 (explaining the authority and procedure for judicial review of agency actions).

⁷⁰ *See infra* notes 74–85 and accompanying text.

⁷¹ *See infra* notes 86–92 and accompanying text.

⁷² *See infra* notes 93–111 and accompanying text.

⁷³ *See infra* notes 112–126 and accompanying text.

1. The Purpose of Procedure

The APA is the most extensive authorization of judicial review of federal agency action and provides a process by which aggrieved parties can challenge those actions in court.⁷⁴ When acting, agencies must comply with substantive legal requirements, including an agency's "organic," or authorizing, statute.⁷⁵ Federal agencies are also subject to numerous procedural requirements under the APA, and courts can review compliance with these requirements.⁷⁶

On the other side, there are limits on judicial review of administrative actions.⁷⁷ An individual, business, or other organization seeking review under APA must have suffered a legal wrong or be adversely affected by an agency action.⁷⁸ Judicial review of agency action under the APA is authorized only if a separate statute authorizes review of the action, or if no other adequate remedy in a court exists and the agency action is "final."⁷⁹ Those seeking a court's review of an agency's action must also generally conform to constitutional standing requirements.⁸⁰

Additionally, to hear a case, courts must have subject matter jurisdiction over the claim.⁸¹ According to the Supreme Court, the APA by itself does not

⁷⁴ 5 U.S.C. § 611(a)(1) (stating that parties adversely affected by agency actions can seek judicial review). See generally Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207, 1208 (2015) (explaining how the APA has been afforded "quasi-constitutional status").

⁷⁵ See *Drake v. FAA*, 291 F.3d 59, 62 (D.C. Cir. 2002) (expounding the scope of judicial review permitted by the agency's "organic statute"); ALFRED C. AMAN, JR. & WILLIAM PENNIMAN, *SKILLS & VALUES: ADMINISTRATIVE LAW* 2 (2012) (observing that judicial review procedures can differ between agencies and statutes).

⁷⁶ See 5 U.S.C. § 706(2) (describing the scope of judicial review of agencies); see also *supra* notes 59–66 and accompanying text (describing some procedural requirements of the federal rulemaking process).

⁷⁷ See *COLE*, *supra* note 69, at 6 (noting that limits on judicial review of agency action involve constitutional, prudential, and statutory factors).

⁷⁸ See 5 U.S.C. § 702 (describing a person's right of review).

⁷⁹ See *id.* § 704 (describing a statutory limit on judicial review of administrative action). Judicial review is also unavailable if another statute precludes judicial review of the action, or the action is "committed to agency discretion by law." See *id.* § 701 (explaining when judicial review can be applied).

⁸⁰ See Aaron Gott & Luis Blaquez, *What Are The Standing Requirements for an Administrative Procedure Act Claim?*, BONA LAW PC, <https://www.bonalaw.com/insights/legal-resources/what-are-the-standing-requirements-for-an-administrative-procedure-act-claim> [<https://perma.cc/2H64-MWAC>] (observing that those seeking judicial review of an agency's action must meet Article III and prudential zone-of-interests standing); *Monsanto Co. v. Geerston Seed Farms*, 561 U.S. 139, 149 (2010) (acknowledging that an injury must be "concrete, particularized, and actual or imminent . . . fairly traceable to the challenged action, and . . . redressable by a favorable ruling" to meet the standing requirement under Article III of the U.S. Constitution (citing *Horne v. Flores*, 557 U.S. 433, 445 (2009))).

⁸¹ See U.S. CONST. art. III, § 2 (requiring a federal court to have subject matter jurisdiction to hear a claim); *Subject Matter Jurisdiction*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/subject_matter_jurisdiction [<https://perma.cc/A73D-NXWY>] (June 2017) (defining subject matter jurisdiction as the power a court possesses to hear a certain type of claim).

provide such jurisdiction.⁸² Some statutes establish subject matter jurisdiction over agencies in specific courts, such as the exclusive jurisdiction to review certain rules and regulations of the EPA given to the U.S. Court of Appeals for the D.C. Circuit.⁸³ Title 28 of the U.S. Code § 1331 also grants federal courts subject matter jurisdiction over “nonstatutory” and constitutional claims, and claims arising under the APA.⁸⁴

Finally, as for the remedy, courts reviewing actions of administrative agencies are authorized by the APA to either compel agency action or hold actions unlawful.⁸⁵

2. Like a Good Neighbor: *State Farm*’s “Arbitrary and Capricious” Test

When a court reviews an agency action under the APA, it must apply a specific standard of review, the most frequent of which is the “arbitrary and capricious” standard, under which a court can hold an action to be unlawful.⁸⁶ Courts predominantly employ this catchall standard when examining an agency’s factual findings during informal rulemakings and discretionary decisions.⁸⁷ In 1983, the Supreme Court, in *Motor Vehicle Manufacturers Ass’n of the United States v. State Farm Mutual Automobile Insurance Co.*, elaborated on

⁸² See *Califano v. Sanders*, 430 U.S. 99, 107 (1977) (concluding that an “implied grant of subject matter jurisdiction” is not provided by the APA for federal judicial review of agency action).

⁸³ See 42 U.S.C. § 4915(a) (authorizing exclusive jurisdiction in the D.C. Circuit for review of certain rules and regulation promulgated by the Federal Aviation Administration and the EPA); Eric M. Fraser, David K. Kessler, Matthew J.B. Lawrence & Stephen A. Calhoun, *The Jurisdiction of the D.C. Circuit*, 23 CORNELL J.L. & PUB. POL’Y 131, 132 (2013) (describing the D.C. Circuit as “unique” among its circuit peers because of its higher administrative law caseload).

⁸⁴ See 28 U.S.C. § 1331 (granting “original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States”); *Trudeau v. Fed. Trade Comm’n*, 456 F.3d 178, 185 (D.C. Cir. 2006) (holding that “[s]ection 1331 is an appropriate source of jurisdiction for” APA, non-statutory, and constitutional claims).

⁸⁵ See 5 U.S.C. § 706(2) (describing the scope of judicial review of agency action and further elaborating that courts must review the agency’s administration record and take “due account . . . of the rule of prejudicial error”); see also *id.* § 551(13) (defining “agency action” as “the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act”).

⁸⁶ See JONATHAN M. GAFFNEY, CONG. RSCH. SERV., LSB10558, JUDICIAL REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT (APA) 2 (2020) (explaining that a standard of review is the lens by which a court analyzes an agency’s action); 5 U.S.C. § 706(2)(A) (describing an instance where agency actions can be held unlawful); see also *Arbitrary*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining arbitrary as something “determined without consideration of or regard for facts, circumstances, fixed rules, or procedures”); *Capricious*, *id.* (defining capricious as “characterized by or guided by unpredictable or impulsive behavior”).

⁸⁷ See *Ass’n of Data Processing Serv. Orgs. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 745 F.2d 677, 684 (D.C. Cir. 1984) (observing that section 706(2) of the APA is a catchall provision for all administrative misconduct left unaddressed by the more specific paragraphs of the APA, such as informal rulemakings); *Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2569 (2019) (reviewing the Secretary of Commerce’s exercise of discretion under the “arbitrary and capricious” standard).

the narrow scope of the “arbitrary and capricious” standard.⁸⁸ When reviewing an agency’s decision under this standard, the *State Farm* analysis directs courts to focus on whether pertinent data was examined, a reasonable explanation articulated, and a “rational connection” linking the underlying facts to the action taken existed.⁸⁹

The *State Farm* Court posited that an agency decision is arbitrary and capricious if it (1) relied on factors unintended by Congress; (2) was unsupported by evidence; (3) did not consider an important aspect of the issue; and (4) was “so implausible” that a differing perspective or an agency’s inherent expertise could not account for it.⁹⁰ But although a court may set aside agency actions that fail to meet these criteria, it may not hold a decision unlawful simply because it disagrees with the agency’s reasoning.⁹¹ At its core, the arbitrary and capricious standard necessitates only that an agency show that it engaged in reasoned decision-making by providing an elucidating and adequate explanation for its decision.⁹²

3. Digging Holes or Filling Them In? Deference to Agency Interpretations

The executive branch often asks federal agencies to apply a statute’s general policies to complex and novel situations that Congress could not have imagined when drafting the enabling legislation.⁹³ This means that federal agencies must fill in the gaps that Congress did not specifically address.⁹⁴ Constant-

⁸⁸ See 463 U.S. 29, 43 (1983) (describing the components of the arbitrary and capricious analysis).

⁸⁹ *Id.*

⁹⁰ See *id.* (further developing the arbitrary and capricious analysis).

⁹¹ See *id.* (noting that a court cannot “substitute its judgment for that of the agency”).

⁹² See *id.* at 52 (setting aside the agency’s decision to rescind the passive restraint requirement because the explanation given was not the product of reasoned decision-making).

⁹³ See *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (finding that to properly address issues in our rapidly evolving society, Congress must be able to provide broad delegations of power to agencies).

⁹⁴ See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 518–19 (opining that administrative flexibility is crucial and agencies must be able to “change the law” when “new information or even new social attitudes” necessitate it); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 398 (1940) (describing policy reasons against forcing Congress to ascribe minute details in every law); *AMAN & PENNIMAN*, *supra* note 75, at 2 (explaining that agencies are expected to apply a statute’s general policies in myriad situations that legislators are unable to properly account for or distinguish); *Tatel*, *supra* note 19, at 1 (noting that the “technical expertise” employed by the EPA and other federal agencies is well beyond the ability of Congress); CHARLES F. PHILLIPS, JR., *THE REGULATION OF PUBLIC UTILITIES: THEORY AND PRACTICE* 140–41 (2d ed. 1988) (discussing, in the context of authority delegated to public utility commissions, the inherent difficulties that arise when the legislative branch tries to stipulate rules applicable to every conceivable scenario); ROBERT N. CORLEY, ROBERT L. BLACK & O. LEE REED, *THE LEGAL ENVIRONMENT OF BUSINESS* 152–53 (5th ed. 1981) (describing additional reasons why the expertise of agencies is preferred over that of Congress in crafting regulations).

ly evolving industries and issues require flexibility in standards that Congress cannot adequately include in a statute.⁹⁵

In addition to judicial review under the “arbitrary and capricious standard,” the APA permits courts to “set aside agency action” that is “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right” or otherwise “not in accordance with law.”⁹⁶ Although courts generally decide questions of law de novo—that is, without deference to a lower court or agency decision—Supreme Court jurisprudence has explicitly directed courts to defer to agency interpretations of ambiguous statutes and regulations.⁹⁷

A critical addition to judicial deference toward agency action originated in the Supreme Court’s seminal 1984 decision in *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*⁹⁸ *Chevron* deference involves a two-step process, beginning with the court assessing whether Congress explicitly addressed the issue in dispute based on the statute’s text, legislative history, and policy.⁹⁹ If the answer to this first step is “Yes,” the court must enforce Congress’s unambiguous intent.¹⁰⁰ Conversely, if the court finds the statute ambiguous, *Chevron*’s second step requires deference to an agency’s reasonable interpretation of the statute—regardless of whether the court would have reached a separate conclusion—as long as the agency reasonably interpreted the statute.¹⁰¹

Underlying *Chevron*’s heightened deference is the policy rationale that Congress has delegated to agencies the power to “elucidate” certain statutory

⁹⁵ See AMAN & PENNIMAN, *supra* note 75, at 2–4 (observing how agencies must adapt standards to meet novel circumstances, even under a statute’s clear policy objective).

⁹⁶ See 5 U.S.C. § 706(2)(A), (C) (describing situations whereby actions can be held unlawful).

⁹⁷ See *City of St. Louis v. Dep’t of Transp.*, 936 F.2d 1528, 1533 (8th Cir. 1991) (finding that although questions of law are usually reviewed de novo, the Supreme Court has consistently held that agencies can decide questions of law as long as their interpretation of the statute is reasonable); *Chevron USA, Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 866 (1984) (allowing deference to the reasonable interpretation of a statute the agency administers); *Auer v. Robbins*, 519 U.S. 452, 462–63 (1997) (allowing deference to an agency’s reasonable interpretation of its own regulations); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (allowing deference to an agency’s informal interpretation of a statute, which has the “power to persuade” a reviewing court).

⁹⁸ See 467 U.S. at 866 (determining that the EPA’s definition of “source” was a permissible construction of the statute in question); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 188 n.1 (2006) (discussing the influence of *Chevron* and noting that courts cited the decision 7,233 times between 1984 and 2005).

⁹⁹ *Chevron*, 467 U.S. at 842, 859–60, 862, 864–65 (explaining step one of the *Chevron* analysis and reviewing the statutory language, legislative history, and policy of the CAA).

¹⁰⁰ *Id.* at 842–43 (elaborating on step one of the *Chevron* analysis).

¹⁰¹ *Id.* at 843–44 (describing step two of a court’s review under *Chevron*); *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982–83 (2005) (“Only a judicial precedent holding that the statute unambiguously forecloses the agency’s interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.”). This second step overlaps in large part with *State Farm*’s “arbitrary and capricious” standard of review. See *Arent v. Shalala*, 70 F.3d 610, 616 & n.6 (D.C. Cir. 1995) (holding that the overlap between the standards of review exists because whether an agency action is “manifestly contrary to the statute” is an important consideration under both *State Farm* and *Chevron* (quoting *Chevron*, 467 U.S. at 844)).

provisions because agencies possess relevant expertise with respect to administration of the law.¹⁰² Even before *Chevron*, courts were compelled to defer to agency interpretations of statutes that are “reasonably susceptible” of multiple interpretations, especially when legislation deals with difficult technical problems necessitating special expertise and acumen.¹⁰³ This is because agencies’ interpretations are not simply the opinions of individuals, but rather the opinions of collective entities best suited to deal with the problems Congress designed a statute to address.¹⁰⁴

But since *Chevron*, the Supreme Court has often held that it will not grant deference, and will instead dictate its own constructions of statutory meaning if it thinks that standard norms of statutory construction would result in a contradictory answer.¹⁰⁵ For example, in 2001, in *United States v. Mead Corp.*, the Court observed that *Chevron* deference will be greatest where Congress has expressed an intent to delegate broad authority to the agency to carry out an enabling legislation’s goals or when strong evidence suggests an implicit congressional delegation.¹⁰⁶

Although *Chevron* remains the most commonly employed analysis, other Supreme Court cases have given courts the ability to provide agency decision-making with further deference.¹⁰⁷ In 1944, in *Skidmore v. Swift & Co.*, the

¹⁰² *Chevron*, 467 U.S. at 843–44, 865 (expounding policy reasons for judicial deference to agency interpretations); see also Tatel, *supra* note 19, at 4 (explaining that the EPA, rather than Congress, possesses the necessary data and expertise to properly implement the CAA).

¹⁰³ See ATT’Y GEN.’S COMM. ON ADMIN. PROC., FINAL REPORT ON ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE, S. DOC. NO. 8, at 90–91 (1st Sess. 1941) (noting that a court need not always exercise independent judicial judgment on questions of law); see also *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944) (holding that courts can give deference to agencies because their policies are based on technical experience and expertise); *Chevron*, 467 U.S. at 844–45 (noting the historical application of the deference principle to agency interpretation).

¹⁰⁴ See ATT’Y GEN.’S COMM. ON ADMIN. PROC., FINAL REPORT ON ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE, S. DOC. NO. 8, at 90–91 (discussing the reasoning for statutory interpretation deference).

¹⁰⁵ See *Immigr. & Naturalization Serv. v. Cardoza Fonseca*, 480 U.S. 421, 449–50 (1987) (utilizing the “plain meaning” theory of statutory construction to find congressional intent in the Refugee Act of 1980). The plain meaning theory provides that when a statute or regulation clearly shows the legal meaning of a term, judges will apply that interpretation and disregard an expert agency’s differing opinion. See *Hercules, Inc. v. EPA*, 938 F.2d 276, 284 (D.C. Cir. 1991) (concluding that the plain meaning of the statute at issue precludes the EPA’s interpretation).

¹⁰⁶ See *United States v. Mead Corp.*, 533 U.S. 218, 236–37 (2001) (discussing the amount of deference administrative agencies should receive under judicial standards of review).

¹⁰⁷ See Sunstein, *supra* note 98, at 188 n.1 (describing *Chevron*’s usage and influence); see also *Skidmore*, 323 U.S. at 140 (stating that an agency’s informal interpretation of a statute carrying “the power to persuade” a reviewing court can be given deference). An agency’s interpretation of its own regulations has been given deference unless such an interpretation is “plainly erroneous.” See *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (describing the standard for *Auer* deference (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989))). *Auer* deference operates almost identically to *Chevron* deference: if the agency’s interpretation of its own regulation—rather than an enabling statute—is reasonable, that construction is entitled to substantial deference. See *Decker v. Nw.*

Court held that courts may afford judicial deference depending on the diligence of an agency's consideration, the rationality of its analysis, and its "consistency with earlier and later pronouncements."¹⁰⁸ Under *Skidmore*, when an agency interprets a comprehensive regulatory scheme with special expertise, courts should provide some deference or reverence to the agency's interpretation.¹⁰⁹ An agency's interpretation is not strictly binding, but may persuade courts if found to be a well-reasoned judgment.¹¹⁰ Similarly, in 1991, in *Pauley v. BethEnergy Mines, Inc.*, the Court provided that, where a statute creates a complicated and technical regulatory plan, courts should defer to the expertise of agencies when making policy judgments thereunder.¹¹¹

4. An Elephant in a Mousehole: The Major Questions Doctrine

In very rare cases, courts may refrain from deferring to an agency's action based on the idea that the regulatory issue was so important that Congress could not have implicitly delegated such power to the agency.¹¹² In 2001, in *Whitman v. American Trucking Ass'ns*, Justice Scalia noted for the Supreme Court that Congress does not generally change the essential details of a regulatory plan in ambiguous or supplementary provisions—in other words, Congress does not "hide elephants in mouseholes."¹¹³ Justice Scalia's metaphor is based on the seminal decision in the 2000 case, *FDA v. Brown & Williamson Tobacco Corp.*, where the Court held that the FDA's asserted authority to regulate the entire tobacco industry could not have been a delegation of power con-

Env't Def. Ctr., 568 U.S. 597, 617 (2013) (Scalia, J., concurring in part and dissenting in part) (describing the relationship between *Auer* and *Chevron* deference); *Martin v. Occupational Safety & Health Rev. Comm'n*, 499 U.S. 144, 150–51 (1991) (presuming that the authority of an agency to interpret its own regulations is part of the lawmaking powers that have been delegated to that agency).

¹⁰⁸ See *Skidmore*, 323 U.S. at 140 (providing guidance for courts to review when making a deferential judgment).

¹⁰⁹ See *Mead Corp.*, 533 U.S. at 235 (stating when *Skidmore* deference applies); *Skidmore*, 323 U.S. at 139 (noting that judges are unlikely to have the "specialized experience and . . . information" than Administrators do); Transcript of Oral Argument at 28–29, *Am. Hosp. Ass'n v. Becerra*, 142 S. Ct. 1896 (2022) (No. 20-1114) ("*Skidmore* says . . . when [agencies] get to something . . . they know more about, we ought to pay attention to them.>").

¹¹⁰ *Skidmore*, 323 U.S. at 140.

¹¹¹ See 501 U.S. 680, 697 (1991) (elaborating on the *Chevron* doctrine and describing scenarios where courts should afford agencies further deference).

¹¹² See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) (noting that courts should hesitate before deferring to an agency's broad assertion of authority).

¹¹³ 531 U.S. 457, 468 (2001) (first citing *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994); and then citing *Brown & Williamson Tobacco Corp.*, 529 U.S. at 159–60). *Whitman* concerned the delegation of legislative power to the Administrator of the EPA under the CAA and whether the EPA's interpretation of a provision in the statute was permissible. *Id.* at 462. The Court concluded that the delegation of legislation power to the EPA was not unconstitutional, but that the EPA's interpretation of the relevant CAA provision was impermissible. *Id.* at 486.

templated by Congress.¹¹⁴ The ruling in *Brown & Williamson* birthed what has colloquially been known as the “major questions” doctrine, which allows judicial scrutiny of agency decisions that are more economically and politically consequential.¹¹⁵

The major questions doctrine implicitly implicates *Chevron* deference because of the emphasis it places on congressional intent.¹¹⁶ Courts most often employ the doctrine in parallel with *Chevron* “step zero”: the point at which courts decide whether to utilize the *Chevron* framework at all.¹¹⁷ For example, in 2015, in *King v. Burwell*, the Court reaffirmed *Chevron*’s holding that an ambiguous statute constitutes an implicit congressional delegation of authority to the agency to fill the statutory gaps.¹¹⁸ The Court, however, observed that the Internal Revenue Service’s (IRS) determination about whether certain tax credits were allowed under the Affordable Care Act (ACA) constituted a major question that was paramount to the overall statutory plan.¹¹⁹ Thus, the Court provided no *Chevron* deference to the IRS’s interpretation and held that if Congress had intended to broadly delegate so much power, it would have ex-

¹¹⁴ See 529 U.S. at 160 (observing that Congress could not have granted the FDA such authority “in so cryptic a fashion” (citing *MCI Telecomms. Corp.*, 512 U.S. at 231)); *MCI Telecomms. Corp.*, 512 U.S. at 231 (finding it “highly unlikely” that the determination of how the entire telecommunications industry would be regulated would be left to agency discretion by Congress); see also *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 239 (2009) (Stevens, J., dissenting) (calling on the “elephant in a mousehole” doctrine to argue that a provision’s silence should not be treated as an implicit source of authority when it could fundamentally change the way an agency approaches regulation); *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261, 303–04 (2009) (Ginsburg, J., dissenting) (employing the “elephant in a mousehole” doctrine to argue that Congress could not have intended to upend an entire pollution-control scheme through silence in an ancillary permitting provision).

¹¹⁵ See *Brown & Williamson Tobacco Corp.*, 529 U.S. at 160 (expressing confidence that Congress could not have delegated the significant decision to regulate the tobacco industry to the FDA); Breyer, *supra* note 22, at 370 (providing the underlying reasoning for the major questions doctrine long before it became part of the Supreme Court’s jurisprudence).

¹¹⁶ See *Chevron USA, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (stating that if Congress has spoken directly to the question at issue, the court “must give effect” to that “unambiguously expressed intent of Congress”); *Brown & Williamson Tobacco Corp.*, 529 U.S. at 132, 160 (endorsing the notion that *Chevron* relies on implied congressional intent and finding that Congress could not have intended to delegate to the FDA such expansive authority).

¹¹⁷ See Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 836 (2001) (describing the judicial inquiry into whether a court should turn to *Chevron* at all as “step zero”); Sunstein, *supra* note 98, at 191 (defining the threshold inquiry into whether the *Chevron* framework applies to an agency’s interpretation of a statute as “step zero”); *Barnhart v. Walton*, 535 U.S. 212, 221 (2002) (finding *Chevron* to be the appropriate standard of review because of the “interstitial nature of the legal question”); see also Breyer, *supra* note 22, at 370 (providing that Congress is more likely to have answered “major issues” and left “interstitial” legal questions to the administrative agencies).

¹¹⁸ 576 U.S. 473, 484–85 (2015).

¹¹⁹ See *id.* at 486–87 (describing the issue as one of “deep ‘economic and political significance’” (quoting *Brown & Williamson Tobacco Corp.*, 529 U.S. at 160)). Specifically, the IRS ruled that the Affordable Care Act (ACA) “allows tax credits for insurance purchased on any Exchange created under the Act.” *Id.* at 496–98.

plicitly done so.¹²⁰ The Court then analyzed the statute independently of the IRS's interpretation and upheld the tax credit system.¹²¹

In 2019, in a denial of certiorari in the case *Paul v. United States*, Justice Kavanaugh wrote a statement where he opined that the Supreme Court had not adopted a nondelegation analysis for major questions, but rather only had applied the doctrine using statutory interpretation principles.¹²² The doctrine provides that, for an agency to claim regulatory authority over an economically and politically significant major policy question, Congress must:

- (i) expressly and specifically decide the major policy question itself and delegate to the agency the authority to regulate and enforce; or (ii) expressly and specifically delegate to the agency the authority both to decide the major policy question and to regulate and enforce.¹²³

The major questions doctrine then appeared in the 2022 COVID-19 vaccine mandate case, *National Federation of Independent Business v. Department of Labor*, where the Supreme Court noted that OSHA's lack of history in regulating the public health gave further weight to the holding that the mandate went beyond the agency's authority.¹²⁴ Moreover, the Court most recently invoked the doctrine in 2022, in *West Virginia v. EPA*.¹²⁵ In *West Virginia v. EPA*, the Court cited the doctrine to strike down the Clean Power Plan (CPP), an EPA rule, based on (1) the extensive political and economic consequences; (2) the EPA's lack of traditional expertise in the field of energy system regulation;

¹²⁰ *Id.* at 486–87. The Court moreover reasoned that *Chevron* deference was inappropriate here given that the IRS had no relevant expertise in crafting health insurance policies. *Id.*

¹²¹ *See id.* at 496–98 (holding that the applicable statutory section, in the context of the entire statute, could be read consistently with Congress's plan for the ACA).

¹²² *See* 140 S. Ct. 342, 342 (mem.) (2019) (Kavanaugh, J., respecting the denial of certiorari) (discussing the major questions doctrine). Justice Kavanaugh's statement built upon the opinions of then-Justice Rehnquist and Justice Gorsuch regarding the major questions doctrine. *Id.*; *see also* *Indus. Union Dep't, AFL-CIO v. Am. Petrol. Inst. (Benzene Case)*, 448 U.S. 607, 685–86 (1980) (Rehnquist, J., concurring in judgment) (opining that Congress and the President must address major national policy decisions through the legislative process, rather than by Congress delegating those decisions to the Executive Branch); *Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting) (arguing that the nondelegation doctrine's "intelligible principle" test was unconstitutional).

¹²³ *Paul*, 140 S. Ct. at 342.

¹²⁴ *See* 142 S. Ct. 661, 665–67 (2022) (staying OSHA's COVID-19 vaccine mandate for certain classes of employees because it extended beyond the agency's reach and was a decision of "vast economic and political significance" to which Congress must have clearly spoken (quoting *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam))); *supra* note 5 and accompanying text (discussing the Supreme Court's reliance on the major question doctrine to stay the OSHA vaccine mandate).

¹²⁵ *See generally* 142 S. Ct. 2587 (2022).

and (3) the absence of explicit congressional authorization to regulate in this way.¹²⁶

D. Agency Coordination: A Not So New Tool

Agency coordination is crucial to the administrative state's effectiveness and often takes place during the federal rulemaking process.¹²⁷ Coordination through interagency consulting helps alleviate regulatory dysfunction by improving decision-making through differing perspectives and expertise, promoting constructive monitoring between agencies, and decreasing opportunities for agency capture.¹²⁸

A statutory example of interagency coordination is found in section 7 of the Endangered Species Act (ESA), which specifically requires interagency cooperation and consultation to ensure that agency actions do not harm, destroy, or modify the habitats of species that are endangered, threatened, or deemed to be critical.¹²⁹ Similarly, the National Environmental Policy Act re-

¹²⁶ See *id.* at 2612–14 (explaining why the EPA had exceeded its statutory authority under the major questions doctrine). The Court noted that the EPA had discovered this “transformative . . . authority” through the “vague language of an ‘ancillary provision’ of the [Clean Air] Act” *Id.* at 2610 (first quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)); and then quoting *Whitman v. Am Trucking Ass’n*, 531 U.S. 457, 468 (2001)).

¹²⁷ See *supra* note 17 and accompanying text (describing the ubiquitous nature of interagency coordination throughout the federal government); see also *supra* notes 59–66 and accompanying text (describing the federal rulemaking process and when agencies coordinate between one another).

¹²⁸ See *Adoption of Recommendations*, 77 Fed. Reg. 47800, 47810 (Aug. 10, 2012) (describing the benefits of agency coordination and providing recommendations); Anker, *supra* note 17 (describing coordination efforts between the Department of Justice and the Federal Trade Commission); see also *Agency Capture*, OXFORD REFERENCE, <https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095355737> [<https://perma.cc/2RTJ-VYDH>] (defining agency capture as a process by which those entities an agency is designed to regulate “capture” the regulatory process and use it to their advantage). Coordination also allows agencies to develop a single integrated record instead of using a sequential decision-making process, thereby improving the expertise and reasoning on which actions are based. See *Freeman & Rossi*, *supra* note 17, at 1183 (describing a benefit of agency collaboration); see also *Sec. & Exch. Comm’n v. Chenery Corp.*, 318 U.S. 80, 87 (1943) (“The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.”).

¹²⁹ See 16 U.S.C. § 1536 (requiring interagency cooperation with all federal departments and agencies); ZYGMUNT PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 437 (5th ed. 2016) (observing that the Department of the Interior has resolved hundreds of potential conflicts with endangered species through formal or informal interagency “consultation” processes under ESA section 7). The Endangered Species Act (ESA) amendments promulgated in 1979 went even further to promote agency coordination, creating a so-called “God Squad” composed of the Secretaries of Agriculture, Army, and Interior, the Chairman of the Council of Economic Advisors, the Administrators of the EPA and National Oceanic and Atmospheric Administration, and a representative from the affected state. See Benjamin Rubin, *Calling on the “God Squad,”* NOSSAMAN LLP (Apr. 23, 2014), <https://www.endangeredspecieslawandpolicy.com/calling-on-the-god-squad> [<https://perma.cc/QW6R-W2VB>] (describing the function and composition of the “God Squad”). The ESA authorizes this powerful group to exempt an agency action from section 7(a)(2)’s requirements. See *id.* (discussing the authority of the “God Squad”); 16 U.S.C. § 1536(h) (creating the “God Squad”

quires a federal agency making a decision to consult with other agencies with jurisdiction over, or special expertise concerning, the environmental issue involved.¹³⁰ Agency coordination is also present on Wall Street, as the Dodd-Frank Wall Street Reform and Consumer Protection Act created the Financial Stability Oversight Council (FSOC) to facilitate coordination and information sharing between member agencies on policymaking, rulemaking, reporting, and enforcement actions.¹³¹

Interagency coordination outside of statutory prescriptions is also prevalent.¹³² One of the most important joint rulemakings involved the collaboration of the EPA and the National Highway Traffic Safety Administration to promulgate the first ever greenhouse gas emissions standards for automobiles in 2009.¹³³ The extensive coordination between the two agencies involved sharing resources and expertise, which helped settle significant legal questions.¹³⁴ Although joint rulemaking efforts are powerful in aiding coordination between agencies with closely related regulatory missions, they are still relatively rare.¹³⁵

committee). The amendment creating the “God Squad” stipulated the snail darter’s existence—the fish at the center of the Supreme Court case *Tennessee Valley Authority v. Hill*—as the issue to be resolved at the committee’s first meeting. See PLATER ET AL., *supra*, at 437–39 (discussing Congress’s response to the decision in the snail darter case); 437 U.S. 153, 193 (1978) (determining that the operation of the Tellico Dam directly conflicts with Congress’s explicit provisions in section 7 of the ESA).

¹³⁰ See 42 U.S.C. § 4332 (requiring cooperation between federal agencies on environmental impacts of agency actions).

¹³¹ See *About FSOC*, U.S. DEP’T OF THE TREASURY, <https://home.treasury.gov/policy-issues/financial-markets-financial-institutions-and-fiscal-service/fsoc/about-fsoc> [<https://perma.cc/EGG2-LCS3>] (explaining what the Financial Stability Oversight Council (FSOC) is and how it operates). The FSOC consists of ten voting members—composed of the heads of nine different agencies and one independent member—and five nonvoting members. *Id.* President Biden’s Executive Order on Climate-Related Financial Risk requires coordination between the FSOC member agencies to assess and share information related to climate-related financial risk data. Exec. Order No. 14,030, 86 Fed. Reg. 27967 (May 25, 2021).

¹³² See *supra* note 17 and accompanying text (discussing the commonly utilized methods of inter-agency coordination outside of congressional requirements).

¹³³ See Freeman & Rossi, *supra* note 17, at 1169 (touting the achievement as a “significant feat of regulatory harmonization”).

¹³⁴ See *id.* at 1170–73 (observing the benefits of the joint rulemaking); PATRICK GILBRIDE ET AL., U.S. ENV’T PROT. AGENCY, REPORT NO. 21-E-0125, CONCERNS ABOUT THE PROCESS USED FOR THE SAFE VEHICLES RULE DEMONSTRATE THE NEED FOR A POLICY ON EPA’S ROLE IN JOINT RULEMAKINGS (2021) (describing the coordination processes and statutory authority to promulgate the joint rulemaking).

¹³⁵ See Freeman & Rossi, *supra* note 17, at 1167 (noting that joint rulemakings promote uniformity but only 3.9% of the annual sum of rules made in 2010 were joint rules); see also Dean Scott, *Carbon Capture Roadmap Suggests Competing Agencies a Key Hurdle*, BLOOMBERG L. (Feb. 17, 2022), <https://news.bloomberglaw.com/daily-tax-report/carbon-capture-roadmap-suggests-competing-agencies-a-key-hurdle> [<https://perma.cc/YHR2-FEQS>] (stating that the Biden Administration’s goals of using carbon capture and storage for combatting climate change may be held up by the multitude of federal statutes and federal agencies that could claim authority).

The courts have often addressed the role of interagency coordination.¹³⁶ For example, in 2007, in *Massachusetts v. EPA*, the Supreme Court held that the EPA's reliance on *FDA v. Brown & Williamson Tobacco Corp.* was misplaced.¹³⁷ The Court observed that it could easily harmonize the efforts of Congress to increase collaboration and research between agencies with the EPA's longstanding mandate to regulate various pollutants that could harm the public.¹³⁸ The Court moreover noted that such cooperative regulatory efforts complement the EPA's mandate.¹³⁹

In three separate cases decided by the U.S. Courts of Appeals, judicial review of agency action involved an examination into whether coordination took place between agencies with relevant expertise on the subject matter at issue.¹⁴⁰ In 2015, in *Delaware Department of Natural Resources and Environmental Control v. EPA*, the U.S. Court of Appeals for the D.C. Circuit held that an EPA final rule affecting the use of certain types of power generators was arbitrary and capricious.¹⁴¹ The court invalidated the rule in part because the EPA did not obtain input from or consult with the Federal Energy Regulatory Commission (FERC) or its electric reliability organization, the North American Electric Reliability Corporation—two expert agencies on electricity grids—during the rulemaking process.¹⁴²

¹³⁶ See *Massachusetts v. EPA*, 549 U.S. 497, 530 (2007) (discussing the EPA's coordination with other agencies); *Am. Lung Ass'n v. EPA*, 985 F.3d 914, 966–68 (D.C. Cir. 2021) (holding that the EPA did not act arbitrarily and capriciously when creating the Clean Power Plan (CPP) rule, in part because it properly coordinated with the Department of Energy (DOE) and the Federal Energy Regulatory Commission (FERC), two agencies with relevant expertise and authority to regulate energy markets), *rev'd on other grounds sub nom.* *West Virginia v. EPA*, 142 S. Ct. 2587 (2022); *Huawei Techs. USA, Inc. v. FCC*, 2 F.4th 421, 427 (5th Cir. 2021) (holding that the FCC was able to make a rule based primarily on national security concerns because it coordinated with agencies with relevant expertise and authority to regulate national security).

¹³⁷ See *Massachusetts v. EPA*, 549 U.S. at 530 (rejecting the EPA's invitation to apply the major questions doctrine); see also *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) (creating the major questions doctrine).

¹³⁸ *Massachusetts v. EPA*, 549 U.S. at 530.

¹³⁹ See *id.* (describing the benefits of agency coordination in understanding climate change).

¹⁴⁰ See *Del. Dep't of Nat. Res. & Env't Control v. EPA*, 785 F.3d 1, 18 (D.C. Cir. 2015) (reviewing an EPA rule and placing emphasis on the fact that EPA did not consult with FERC or the North American Electric Reliability Corporation in crafting it); *Am. Lung Ass'n*, 985 F.3d at 966–69 (looking to the coordination between EPA, FERC, and the DOE when assessing whether the major questions doctrine was implicated); *Huawei Techs. USA*, 2 F.4th at 443 (finding that the FCC exercised its limited national security authority while deferring to other agencies with greater expertise in the matter); see also *supra* notes 86–126 (describing the various standards of judicial review).

¹⁴¹ See 785 F.3d at 4–5 (reviewing the rule under the arbitrary and capricious standard). The rule would have exempted backup generators from emissions controls under certain circumstances, which the EPA justified as supporting electrical system reliability. See *id.* at 6–7 (discussing the purpose and history of the rule).

¹⁴² See *id.* at 18 (encouraging the EPA to solicit input and involve FERC in its rulemaking process on remand). The FERC regulates interstate transmission of electricity, monitors and investigates energy markets, and oversees environmental matters related to natural gas and other matters. See *What*

The D.C. Circuit applied similar logic in 2021, in *American Lung Ass'n v. EPA*, when determining whether the EPA could repeal former President Obama's CPP and replace it with the Affordable Clean Energy Rule (ACE Rule).¹⁴³ There, the court rejected the plaintiff-states' challenge under the major questions doctrine, reasoning that the plaintiffs overlooked the fact that the EPA developed the CPP in a coordinated effort with the FERC and Department of Energy (DOE)—two agencies with relevant expertise in electricity generation, transmission, and reliability.¹⁴⁴

Finally, in 2021, in *Huawei Technologies USA, Inc. v. FCC*, the Fifth Circuit assessed claims that the FCC went beyond its statutory authority in creating the "USF Rule," a rule meant to protect U.S. communication networks from national security threats.¹⁴⁵ The court held that the rule was entitled to *Chevron* deference because the FCC participated in interagency coordination and collaborated with agencies with expertise in national security decisions when crafting the rule.¹⁴⁶

II. OVERCOMING HURDLES TO EFFECTIVE RULEMAKING: NONDELEGATION AND ANTI-DEFERENCE

Federal courts have become increasingly hostile toward providing deference to federal agencies, leading to a possible reshaping of crucial deference

FERC Does, FED. ENERGY REGUL. COMM'N, <https://www.ferc.gov/about/what-ferc/what-ferc-does> [<https://perma.cc/9AHP-9PGV>] (Aug. 16, 2022) (describing FERC's authority). The EPA regulates industries and matters through enabling legislation in order to "protect human health and the environment." See *Our Mission and What We Do*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/about-epa/our-mission-and-what-we-do> [<https://perma.cc/WT4G-6XXL>] (June 13, 2022) (explaining the function of the EPA). The Supreme Court has concluded that the EPA has express statutory authority under the CAA to regulate greenhouse gas emissions. See *Massachusetts v. EPA*, 549 U.S. at 528–33 (confirming that greenhouse gases constitute "air pollutants" under the CAA, thus permitting the EPA to regulate them once an endangerment finding is made); *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011) (ruling that fossil fuel-based power plants produce significant greenhouse gas pollution, thereby subjecting them to regulation under the CAA). The Court in *American Electric Power Co. v. Connecticut* also observed that the EPA's expertise made it "best suited to serve as primary regulator of greenhouse gas emissions." 564 U.S. at 428.

¹⁴³ See generally 985 F.3d at 930 (reviewing challenges to the Trump EPA's 2019 ACE Rule as a means of regulating greenhouse gas emissions from power plants).

¹⁴⁴ See *id.* at 966–69 (finding that FERC and DOE were crucially important in crafting the CPP when determining that the major questions doctrine was not implicated); Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64661, 64671 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60) (noting "extensive consultation with key agencies responsible for [electric system] reliability"). The DOE has authority to address "energy, environmental and nuclear challenges" throughout the United States. See *Mission*, DEP'T OF ENERGY, <https://www.energy.gov/mission> [<https://perma.cc/6NM5-57TM>] (describing the role of the DOE).

¹⁴⁵ See 2 F.4th 421, 427 (5th Cir. 2021) (holding that the USF Rule was not arbitrary and capricious and was entitled to *Chevron* deference).

¹⁴⁶ See *id.* at 443 (reasoning that the FCC was exercising its limited national security authority while deferring to other agencies with more expertise in the matter).

doctrines and an expansion of judicial power.¹⁴⁷ This trend, coupled with the reemergence of the major questions doctrine, has severely hampered the administrative state's lawmaking power.¹⁴⁸ These reductions in agency authority could stall critical regulatory measures needed to quickly and efficiently adapt to complex issues, such as climate change.¹⁴⁹ Although state and local efforts to combat climate change have made great strides, recent Intergovernmental Panel on Climate Change (IPCC) reports state that dramatic mitigation and adaptation efforts are needed, requiring immediate lawmaking at the federal level.¹⁵⁰

¹⁴⁷ See *Paul v. United States*, 140 S. Ct. 342 (mem.) (2019) (Kavanaugh, J., respecting the denial of certiorari) (observing that the deference and nondelegation opinions of Justice Rehnquist and Justice Gorsuch “may warrant further consideration in future cases”); *Michigan v. EPA*, 576 U.S. 743, 761–62 (2015) (Thomas, J., concurring) (arguing that *Chevron* deference subverts the power of the judiciary to exercise its independent judgment in interpreting federal statutes). Justice Gorsuch, while serving on the Tenth Circuit, authored a concurrence to one of his own majority opinions, arguing that *Chevron* deference permits agencies to “swallow huge amounts of core judicial and legislative power” and that the time has come to face the “elephant in the room”—an ode to the “elephant in the mousehole” doctrine. See *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (opining that *Chevron* does not fit within the Constitution’s design); see also *supra* notes 112–126 (discussing major questions and the “elephant in the mousehole” doctrine).

¹⁴⁸ See *Nat’l Fed’n of Independ. Bus. v. Dep’t of Labor*, 142 S. Ct. 661 (2022) (invoking the major questions doctrine to stay OSHA’s COVID-19 vaccine mandate); *Gundy v. United States*, 139 S. Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting) (arguing that the major questions doctrine prevents Congress from divesting its legislative power to an executive agency, thereby preserving its constitutional role); *King v. Burwell*, 576 U.S. 473, 486 (2015) (utilizing the major questions doctrine to hold an IRS interpretation of the ACA to be too expansive); see also James Goodwin, *Will Confirming Judge Barrett Be the Death of Chevron Deference?*, UNION OF CONCERNED SCIENTISTS: THE EQUATION (Oct. 15, 2020), <https://blog.ucsusa.org/guest-commentary/will-confirming-judge-barrett-be-the-death-of-chevron-deference/> [<https://perma.cc/XAY5-MTN5>] (noting that decreasing deference to federal agencies would contribute to “kneecapping” our regulatory system and thwart science-based expert policymaking).

¹⁴⁹ See *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 328–29 (2014) (finding EPA’s rule regulating greenhouse gas emissions to be an impermissible interpretation of the CAA under *Chevron*); *Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451, 453–54 (D.C. Cir. 2017) (holding that the EPA exceeded its authority in crafting a rule that would regulate hydrofluorocarbons, a substance that contributes to climate change). Supreme Court Justice Kavanaugh wrote the majority opinion in *Mexichem Fluor, Inc. v. EPA* while on the D.C. Circuit, wherein he stated, “Congress’s failure to enact general climate change legislation . . . does not license an agency to take matters into its own hands, even to solve a pressing policy issue such as climate change.” *Id.* at 460. *But see* *Bostock v. Clayton County*, 140 S. Ct. 1731, 1753 (2020) (disregarding the “elephant in a mousehole” doctrine because the statute at issue “virtually guaranteed that unexpected applications would emerge over time”); Scalia, *supra* note 94, at 518–19 (opining that administrative flexibility is crucial and agencies must be able to “change the law” when “new information or even new social attitudes” necessitate it). Scholars have argued that the current anti-deference and nondelegation trend of the Supreme Court will pose additional hurdles to climate change regulations. See *supra* note 24 and accompanying text (observing that the Supreme Court has already applied its newfound nondelegation reasoning to climate change and will likely continue to use that reasoning when hearing future cases in a variety of other subject areas).

¹⁵⁰ See Sue Reid & Jennifer K. Rushlow, *Behind the Curtain: Insiders’ View of Developing and Enforcing State Climate Change Laws*, 50 ENV’T L. REP. 10466, 10468, 10479 (2020) (praising the efforts of California and Massachusetts in combatting climate change through their respective Global Warming Solutions Acts); INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *supra* note 1 (discussing the most recent IPCC report and the “brief and rapidly closing window” to counteract the

Section A of this Part discusses the importance of administrative agencies and how their composition is key to proper lawmaking.¹⁵¹ Section B analyzes recent nondelegation and deference jurisprudence and its resulting effects.¹⁵² Section C explores whether agency coordination can be used to overcome nondelegation and deference challenges.¹⁵³

A. *Who's the Expert Here? Federal Agencies*

Federal agencies are often called “expert agencies” because their composition includes professionals—such as scientists, engineers, and economists—who specialize in the fields within which each agency operates.¹⁵⁴ Historically, the Supreme Court has cautioned against second-guessing the judgment of agencies due to their policy expertise far outweighing that of judges.¹⁵⁵ The

effects of climate change if we wait any longer to act). Past IPCC reports have expressly stated that climate-related risks of all types will increase with global warming of 1.5 degrees Celsius and further with 2 degrees Celsius. *See generally* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, GLOBAL WARMING OF 1.5 °C (Valérie Masson-Delmotte et al. eds., 2018), <https://www.ipcc.ch/sr15/> [<https://perma.cc/FBG7-FVQM>] (urging that enhanced national action is crucial in mitigating and adapting to the threats of global warming).

¹⁵¹ *See infra* notes 154–167 and accompanying text.

¹⁵² *See infra* notes 168–199 and accompanying text.

¹⁵³ *See infra* notes 200–218 and accompanying text.

¹⁵⁴ *See* AMAN & PENNIMAN, *supra* note 75, at 3 (noting that most of the expertise agencies possess is found within its professional staff); Rebecca Hersher, *Why Having Diverse Government Scientists Is Key to Dealing with Climate Change*, NPR (Apr. 30, 2021), <https://www.npr.org/2021/04/30/981331348/biden-administration-seeks-to-build-trust-and-diversity-among-federal-scientists> [<https://perma.cc/W59Z-PHMA>] (noting that agencies like the EPA, NASA, and Department of Agriculture employ scientists, mathematicians, engineers, and economists to provide the technical expertise for policies and regulations); Taryn MacKinney, *Federal Agencies Have Lost Hundreds of Scientists Since 2017. What Comes Next?*, UNION OF CONCERNED SCIENTISTS: THE EQUATION (Jan. 30, 2021), <https://blog.ucsusa.org/taryn-mackinney/federal-agencies-have-lost-hundreds-of-scientists-since-2017-what-comes-next/> [<https://perma.cc/344G-HPRC>] (noting that under President Trump, the EPA and the Fish and Wildlife Service lost hundreds of scientists); *see also* FARBER & CARLARNE, *supra* note 2, at 26 (noting that in *American Electric Power Co. v. Connecticut*, the decision that the EPA’s regulatory authority “displaced” the federal common law of nuisance resulted in the EPA becoming the “primary forum for climate policy”).

¹⁵⁵ *See* *Chevron USA, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984) (stating that “the responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones”); *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 195 (1978) (“Our Constitution vests such responsibilities in the political branches.”); *see also* *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001) (explaining that *Skidmore* instructs courts to give further deference to expert agencies when interpreting a “highly detailed” regulatory scheme); FARBER & CARLARNE, *supra* note 2, at 22 (observing that agencies have far more experience than any judge in applying statutes in highly technical areas); AMAN & PENNIMAN, *supra* note 75, at 3 (stating that the deep subject matter expertise of federal agencies is crucial to administering Congress’s policy intent).

Court has afforded this deference in large part because Congress lacks the technical ability to consider every implication of a statute.¹⁵⁶

Public opinion tends to be skeptical toward the power of an unelected bureaucracy to create rules and regulations.¹⁵⁷ In 2019, in *Gundy v. United States*, Justice Gorsuch authored a dissent that argued that accountability would suffer if Congress could delegate its legislative power to the executive branch.¹⁵⁸ Earlier Supreme Court opinions have held the opposite, however, stating that unlike the unelected Supreme Court Justices and other federal judges that compose our judiciary, administrative agencies are held accountable to an elected president.¹⁵⁹

Moreover, the procedural requirements that agencies must undertake to reach a final rulemaking encourages accountability.¹⁶⁰ The public comment and response period is significant, as it addresses the concerns of stakeholders—including citizens, nonprofits, and corporations—in a process far simpler

¹⁵⁶ See *supra* notes 93–95 (discussing the role of federal agencies in providing technical expertise to situations that legislators could not properly consider); *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007) (“While the Congresses that drafted § 202(a)(1) might not have appreciated the possibility that burning fossil fuels could lead to global warming, they did understand that without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete.”).

¹⁵⁷ See Hamburger, *supra* note 18, at 3 (arguing that administrative agencies evade governance and circumvent constitutional processes); Glenn Harlan Reynolds, *Unelected Bureaucrats Are Running Our Lives*, USA TODAY, <https://www.usatoday.com/story/opinion/2017/06/12/unelected-bureaucrats-running-our-lives-glenn-reynolds-column/102750080/> [<https://perma.cc/AY7B-TW79>] (June 12, 2017) (stating that the administrative state is a power grab of the “knowledge elite”); Brittany Hunter, *How Did Unelected Bureaucrats Hijack the Role of Legislators?*, PAC. LEGAL FOUND. (Feb. 2, 2021), <https://pacificlegal.org/unelected-bureaucrats-hijack-the-role-of-legislators/> [<https://perma.cc/S327-ELXK>] (putting forth the idea that federal agencies make up a “shadow government of unelected officials”).

¹⁵⁸ *Gundy v. United States*, 139 S. Ct. 2116, 2134–35 (2019) (Gorsuch, J., dissenting) (arguing that when an agency addresses a social problem, Congress could either take credit for a welcomed resolution or place blame on the agency for a decision that produces unintended consequences). Justice Gorsuch continues that, in turn, the executive branch might blame Congress for those same missteps. *Id.*

¹⁵⁹ See *Chevron*, 467 U.S. at 865–66 (stating that the political branches of the Government—including Executive Branch agencies—are held accountable by the public, whereas federal judges are not); Ian Millhiser, *9 High-Stakes Issues the Supreme Court Will Take Up This Term*, VOX (Sept. 28, 2021), <https://www.vox.com/22675986/supreme-court-term-roe-wade-gun-rights-anti-discrimination-laws-october-2021> [<https://perma.cc/7QYE-EAAT>] (observing that federal judges “lack the democratic legitimacy that comes from an electoral mandate”); FARBER & CARLARNE, *supra* note 2, at 22 (noting that it is federal agencies, rather than the courts, that Congress has given “primary responsibility” to carry out the law). Moreover, the Court’s own language in *Chevron* addresses the accountability concerns head-on:

Judges are not experts in the field, and are not part of either political branch of the Government While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

467 U.S. at 865–66.

¹⁶⁰ See *supra* notes 59–66 and accompanying text (describing the federal rulemaking process).

and more inclusive than legislative lobbying.¹⁶¹ Likewise, these rulemaking procedures often involve multiple agencies, each providing their own expertise to create a more rigorous and thorough record.¹⁶² Final rules are also subject to the Congressional Review Act, providing yet another avenue of political accountability.¹⁶³

A further important component of administrative agencies lies in their structure: although commissioners and agency heads are often politically appointed, they rely on the expertise of their career staff when making decisions.¹⁶⁴ Even though staff members can work on certain policies of politically appointed agency heads, their relatively fixed nature under statutory mandates means that they are less apt to be influenced by shifts in political power, allowing for stable policymaking and job retention.¹⁶⁵ Additionally, federal employ-

¹⁶¹ See *supra* note 65 and accompanying text (noting that the comment and response period is a democratic check on agency actions and promotes agency accountability); see also *How States Define Lobbying and Lobbyist*, NAT'L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/research/ethics/50-state-chart-lobby-definitions.aspx> [<https://perma.cc/UC3N-FF2N>] (Sept. 3, 2021) (defining lobbying as "an attempt to influence government action through either written or oral communication"); Aaron Stein, *How to Influence Congress*, BORGEN PROJECT (Mar. 24, 2018), <https://borgenproject.org/how-to-influence-congress/> [<https://perma.cc/9BZJ-JKFP>] (reporting that it is corporations, institutions, and organizations that do most of the legislative lobbying); see also *How Public Comment Works*, PUB. COMMENT PROJECT, <https://publiccommentproject.org/how-it-works> [<https://perma.cc/9RNC-2USW>] (observing that a variety of entities and persons are able to write a public comment on an agency rulemaking); OFF. FED. REG., *supra* note 33, at 1, 6 (explaining that public comments may result in an agency terminating, changing, or proceeding with a rulemaking).

¹⁶² See *supra* note 128 and accompanying text (describing the benefits of agency coordination in improving the administrative record).

¹⁶³ See *supra* notes 53–58 and accompanying text (describing how the Congressional Review Act (CRA) functions to overturn final rules).

¹⁶⁴ See AMAN & PENNIMAN, *supra* note 75, at 3 (explaining how the composition of administrative agencies lends itself to their functions). These staff members are further divided into more specialized offices and areas where they perform data and policy analysis, provide guidance, and advise agency heads in specific industries, technologies, and techniques. See *id.* (describing the bureaucratic makeup of federal agencies). These professionals are called "career staff" because they remain within agencies regardless of changing presidential administrations and congressional chamber politics. See Kristen Holmes, 'An Attempt to Sabotage': Trump's Potential Purge of Career Employees Casts Pall Across Federal Government, CNN, <https://www.cnn.com/2020/12/03/politics/trump-potential-purge-job-protections-career-government-employees/index.html> [<https://perma.cc/CN8A-SKPP>] (Dec. 3, 2020) (explaining that federal agency employees typically remain in their roles during presidential transitions); see also *Government Employee Retention in Public Sector*, RETENSA, <https://retensa.com/clients/clients-by-industry/retain-government-employees/> [<https://perma.cc/NZW8-LSNA>] (reporting that job stability has allowed government employment to maintain one of the statistically lowest turnover rates compared with most other industries).

¹⁶⁵ See AMAN & PENNIMAN, *supra* note 75, at 3–4 (noting that the head of an agency will often set priorities and that policies can be formally changed through orders or gradually changed through years of persuasion); Alex Zhao & Daniel Lippman, *Biden Races to Hire Senior Staff at Drained Agencies*, POLITICO (Aug. 10, 2021), <https://www.politico.com/interactives/2021/biden-staffing-hiring-trump-turnover/> [<https://perma.cc/4PT3-9S4E>] (noting that the Senior Executive Service (SES) is mostly composed of employees hired under previous presidents); *supra* note 164 and accompanying text (discussing job retention and stability in administrative agencies). The SES is a core group of

ees are subject to the Hatch Act, the purpose of which is to prevent partisan influence or coercion of federal employees.¹⁶⁶ These accountability and bipartisan structures thus lend further credence to the crucial function that expert agencies serve in administering various laws.¹⁶⁷

B. Deference and Delegation: The Past, Present, and Future

Nondelegation and deference doctrines are intrinsically intertwined, and both areas of the law have been subject to the ebb and flow of judicial jurisprudence.¹⁶⁸ Recently, courts have incorporated both doctrines when assessing challenges to agency action, as plaintiffs seek to take advantage of a judiciary that is inherently skeptical of the administrative state.¹⁶⁹ Subsection 1 of this Section describes the treatment of *Chevron* deference by current and recent Supreme Court Justices.¹⁷⁰ Subsection 2 describes the development of the major questions doctrine and examines scenarios where it could have been, and often was, applied.¹⁷¹

1. The Supreme Court's Evolving Treatment of *Chevron* Deference

Overall, *Chevron* deference has allowed a significant increase in judicial discretion to agency policymaking through statutory interpretation.¹⁷² Defer-

federal employees intended to “solve interagency problems and gain expertise beyond any single organization.” Zhao & Lippman, *supra*.

¹⁶⁶ See U.S. OFF. OF SPECIAL COUNS., A GUIDE TO THE HATCH ACT FOR FEDERAL EMPLOYEES 2 (2014), <https://osc.gov/Documents/Outreach%20and%20Training/Handouts/A%20Guide%20to%20the%20Hatch%20Act%20for%20Federal%20Employees.pdf> [<https://perma.cc/49WM-H3PA>] (providing an overview of the Hatch Act).

¹⁶⁷ See *supra* notes 164–167 (describing the composition and function of federal agencies).

¹⁶⁸ See *supra* notes 116–121 and accompanying text (describing how *Chevron* is implicated in the major questions analysis); *supra* notes 39–52 (discussing the pendulum swing of judicial jurisprudence regarding agency power).

¹⁶⁹ See *supra* notes 147–149 and accompanying text (discussing recent cases that involve both deference and nondelegation challenges and the varying doctrinal opinions of Supreme Court Justices).

¹⁷⁰ See *infra* notes 172–179 and accompanying text.

¹⁷¹ See *infra* notes 180–199 and accompanying text.

¹⁷² See Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts: The Codebook Appendix*, 116 MICH. L. REV. ONLINE 1, 1 (2017), https://repository.law.umich.edu/mlr_online/vol116/iss1/1/ [<https://perma.cc/F37Z-QFED>] (determining that throughout 1,558 agency interpretations reviewed by circuit courts between 2003 and 2013, the *Chevron* analysis was utilized 77% of the time and agency interpretations were upheld 71% of the time); Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1, 31 (1998) (finding that courts reaching the second step of *Chevron* deference in 1995 and 1996 “upheld the agency view in 89% of the applications”); Sunstein, *supra* note 98, at 188 n.1 (describing the profound impact *Chevron* has had on judicial review of agency interpretations of law). But see *Alaska Dep’t of Env’t Conservation v. EPA*, 540 U.S. 461, 487–88 (2004) (observing that interpretations in agency manuals, guidance, and the like do not warrant *Chevron* deference, but nevertheless warrant respect).

ence to agency interpretations of the law, however, has been met with fervent criticism in the judiciary—including by current members of the Supreme Court.¹⁷³ While presiding on the Supreme Court, Justice Antonin Scalia defended *Chevron* in a law review article and described the doctrine as a means of capitalizing on the comparative institutional advantage agencies hold over courts in policymaking when no specific action is required by the text of a statute.¹⁷⁴ Justice Scalia later became more critical of *Chevron* deference, taking a heavier textualist approach to the doctrine's first step.¹⁷⁵ Similarly, while sitting on the U.S. Court of Appeals for the D.C. Circuit, then-Judge Brett Kavanaugh frequently chose not to defer to agency interpretations of the law.¹⁷⁶ Justice Gorsuch has likewise been outspoken about *Chevron* deference, opining while on the Tenth Circuit that *Chevron* has allowed the executive branch to usurp a great deal of judicial and legislative authority in a manner counter to the Constitution's original design.¹⁷⁷ Finally, Justice Thomas has criticized

¹⁷³ See *Michigan v. EPA*, 576 U.S. 743 (2015) (Thomas, J., concurring) (opining that *Chevron* deference is unconstitutional); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (sharply criticizing *Chevron* deference as a “judge-made doctrine for the abdication of the judicial duty”); Millhisser, *supra* note 159 (stating that the Supreme Court’s conservative Justices are “increasingly hostile” to *Chevron* deference); Goodwin, *supra* note 148 (observing that some groups have made overturning *Chevron* deference a priority in order to bring about the demise of the administrative state). The author also notes that overturning *Chevron* would result in hindering “our system of regulatory safeguards.” *Id.*; see also Evan Bernick, *Judge Amy Coney Barrett on Statutory Interpretation: Textualism, Precedent, Judicial Restraint, and the Future of Chevron*, YALE J. ON REG. (July 3, 2018), <https://www.yalejreg.com/nc/judge-amy-coney-barrett-on-statutory-interpretation-textualism-precedent-judicial-restraint-and-the-future-of-chevron-by-evan-bernick/> [<https://perma.cc/37CU-4EVD>] (noting that *Chevron*’s “future is uncertain”).

¹⁷⁴ See Scalia, *supra* note 94, at 518–19 (stating that broad delegations by Congress demand that “‘new’ or ‘changing’ agency interpretations” not be found suspect, and the ability of *Chevron* to accept changes in an agencies’ interpretation is “one of the strongest indications that the *Chevron* approach is correct”).

¹⁷⁵ See *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 321 (2014) (stating that reasonable statutory interpretations require conformity with the specific context where the language appears and the broader context of the statutory scheme, and deference will not be given to an agency interpretation that is inconsistent with this framework).

¹⁷⁶ See *Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451, 460 (D.C. Cir. 2017) (holding that congressional inaction on climate change legislation does not permit the EPA to regulate such matters); *Am. Petrol. Inst. v. EPA*, 862 F.3d 50, 75 (D.C. Cir. 2017) (per curiam) (finding that deference should not be given to the EPA’s decision to regulate materials transferred to a third-party through a procedure requiring shipment to a permitted facility or verified recycler).

¹⁷⁷ *Gutierrez-Brizuela*, 834 F.3d at 1149 (Gorsuch, J., concurring); see also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”). Justice Gorsuch recently stated that *Chevron* cases “tend to arise in circumstances just like this, where the government’s seeking deference for a rule that advantages it” Transcript of Oral Argument at 73, *Am. Hosp. Ass’n v. Becerra*, 142 S. Ct. 1896 (2022) (No. 20-1114). Interestingly, Justice Gorsuch’s mother, Anne McGill Burford, was the first female administrator of the EPA and led the agency when it wrote the rule at the heart of the original *Chevron* case. See *Chronology of EPA Administrators*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/history/chronology-epa-administrators> [<https://perma.cc/K89U-DLDN>] (Apr. 26, 2022) (recording that Anne M. Gorsuch [Burford] was the administrator for the EPA from May 20, 1981 to March 9, 1983); Matt

deference to agency interpretations as an affront to the separation of powers, stating that *Chevron* precludes courts from exercising their independent judgment, and forces judges to abandon their interpretation of an ambiguous statute in favor of an agency's interpretation.¹⁷⁸ Despite the debates encircling *Chevron* deference, the doctrine has been utilized consistently when reviewing agency action, often with outcomes that have helped safeguard the environment.¹⁷⁹

2. When Does a Question Become “Major”?

Major questions jurisprudence has similarly swung back and forth over the years but is now expanding rapidly.¹⁸⁰ This trend has emerged in parallel to the increasing pervasiveness of complex societal issues.¹⁸¹

In 2007, in *Massachusetts v. EPA*, the Supreme Court rejected claims that the EPA's refusal to determine whether greenhouse gases cause or contribute to climate change implicated the major questions doctrine.¹⁸² Instead, the Court

Ford, *The Supreme Court Is Poised to Sabotage the Administrative State*, NEW REPUBLIC: THE SOAP-BOX (Nov. 30, 2021), <https://newrepublic.com/article/164558/supreme-court-chevron-deference-gorsuch> [<https://perma.cc/4GXE-ZMM4>] (observing that Anne Gorsuch was the Administrator of the EPA when the rule at issue in *Chevron* was written).

¹⁷⁸ See *Michigan v. EPA*, 576 U.S. 743, 761–62 (2015) (Thomas, J., concurring) (arguing that *Chevron* places the final interpretative authority to “say what the law is” in the Executive branch, rather than the courts (quoting *Marbury*, 5 U.S. (1 Cranch) at 177)). In the November 2021 oral arguments for *American Hospital Ass'n v. Becerra*, Justice Thomas questioned whether *Chevron* should be overruled by the Supreme Court. See Transcript of Oral Argument at 73, *Am. Hosp. Ass'n*, 142 S. Ct. 1896 (No. 20-1114) (“[A]re you arguing that we should overrule *Chevron* to get to the statutory approach that you’re taking?”).

¹⁷⁹ See *Massachusetts v. EPA*, 549 U.S. 497, 527–30 (2007) (applying *Chevron* step one and finding the CAA unambiguous, thus rejecting the agency's contradictory interpretation of the statute). In his dissent in *Massachusetts v. EPA* Justice Scalia contended that the EPA's exclusion of greenhouse gases was entitled to deference under *Chevron*. *Id.* at 552–53 (Scalia, J., dissenting). The Court also held that the EPA's refusal to determine whether greenhouse gases cause or contribute to climate change was arbitrary and capricious. See *id.* at 534 (majority opinion) (holding that the EPA did not offer a reasonable explanation for its decision); see also *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 703–04 (1995) (deferring via *Chevron* to the Secretary of the Interior's interpretation of the ESA's “take” provision as reasonable due to the degree of regulatory expertise necessary for enforcement and the wide latitude provided by the ESA to enforce the statute). But see *Michigan v. EPA*, 576 U.S. at 760 (concluding that the EPA's regulation of power plants should not be accorded *Chevron* deference because it unreasonably interpreted cost to be irrelevant under the CAA).

¹⁸⁰ See *supra* notes 112–126 and accompanying text (discussing the evolution of the major questions doctrine).

¹⁸¹ See *supra* note 2 and accompanying text (observing the massive scale of parties effected by the COVID-19 pandemic and climate change).

¹⁸² See 549 U.S. at 529–30 (holding that the EPA's reliance on *FDA v. Brown & Williamson Tobacco Corp.* was misplaced). The EPA attempted to invoke certain actions and deliberations of Congress as a command to stop the agency from treating greenhouse gases as air pollutants and regulating their emissions. *Id.* at 529. The Court found no congressional action in support of these claims. *Id.* at 529–30.

held that curtailing emissions of substances destroying the global climate was reasonable and that the statute was unambiguous, thus stopping the *Chevron* analysis at step one.¹⁸³

In 2014, however, in *Utility Air Regulatory Group v. EPA* (*UARG*), Justice Scalia, utilizing the *Chevron* framework, deferred to some of the EPA's interpretations of the CAA, but rejected one as unreasonable because it would expand the EPA's regulatory authority to regulate the national economy in such a drastic manner without the clear authorization of Congress.¹⁸⁴ This departs from Justice Scalia's earlier opinion in the 2001 case, *Whitman v. American Trucking Ass'n*s, where he stated that the Supreme Court has never required a statute to explicitly decide when a regulation has gone too far, even in large regulatory schemes with broad economic effects.¹⁸⁵ Instead, the Court in *Whitman* observed that it is the administrative agencies who hold the discretion to make such determinations.¹⁸⁶ Following the *UARG* decision, in 2015, in *King v. Burwell*, the Court used the major questions doctrine to hold that the IRS's interpretation of the ACA was impermissible, even though it still upheld the underlying tax credit system.¹⁸⁷

Major questions jurisprudence then swung back in 2019, in *Gundy v. United States*, where the plurality opinion found no constitutional concerns with the delegation of power.¹⁸⁸ Justice Gorsuch dissented in the case, believing that the major questions doctrine should apply.¹⁸⁹ Just one year later, in 2020, in *Bostock v. Clayton County*, Justice Gorsuch rejected the application of the major questions doctrine, finding that Congress's drafting decisions in Title VII of the Civil Rights Act demonstrated that the statute could apply to previ-

¹⁸³ See *id.* at 531 (finding no compelling reason to read ambiguity into the statute).

¹⁸⁴ 573 U.S. 302, 323–24, 332–33 (2014). Specifically, the Court held that EPA's requirement of "best available control technology" for "anyway" sources was a permissible interpretation of the law, whereas its decision to require greenhouse gas emissions under "Prevention of Significant Deterioration" and Title V permitting for stationary sources overstepped its statutory authority under the CAA. *Id.* at 332–33.

¹⁸⁵ See 531 U.S. 457, 475 (2001) (observing that a statute "need not provide a determinate criterion"). Justice Scalia stated that the Court had "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law." See *id.* at 474–75 (quoting *Mistretta v. United States*, 488 U.S. 361, 416 (1989)) (noting that the Court had "found an 'intelligible principle' in various statutes authorizing regulation in the 'public interest'").

¹⁸⁶ *Id.* at 473–76. The Court concluded that the EPA did not violate the nondelegation doctrine. *Id.* at 472. Justice Scalia had previously observed that "a certain degree of discretion, and thus of lawmaking, inheres in most executive or judicial action . . ." *Mistretta*, 488 U.S. at 417 (Scalia, J., dissenting) (emphasis omitted).

¹⁸⁷ See *supra* notes 118–121 (describing the *King v. Burwell* case).

¹⁸⁸ See *supra* notes 50–52 (explaining the *Gundy* case and the plurality opinion).

¹⁸⁹ See *Gundy v. United States*, 139 S. Ct. 2116, 2131, 2141–42 (2019) (Gorsuch, J., dissenting) (arguing that the statutory delegation was in violation of the Constitution).

ously-uncontemplated situations.¹⁹⁰ In *Bostock*, while noting that Title VII's effects have created far-reaching and unexpected consequences, the Court held that the imposition of a law prohibiting the firing of an individual for merely being gay or transgender was a necessary consequence of Title VII's broad statutory language.¹⁹¹

The Court has also invoked the major questions doctrine to invalidate rules in *National Federation of Independent Business v. Department of Labor*, a 2022 decision staying a COVID-19 vaccine mandate, and in *Alabama Ass'n of Realtors v. Department of Health & Human Services*, a 2021 case involving the Center for Disease Control's nationwide eviction moratorium.¹⁹²

The Court most recently employed the doctrine in 2022, in *West Virginia v. EPA*, to strike down the EPA's CPP rule.¹⁹³ The Court held that the effect of the CPP on determining the future amounts of coal-based generation in the energy system was a major question that Congress could not have delegated to

¹⁹⁰ 140 S. Ct. 1731, 1753 (2020) (stating that the Act “virtually guaranteed that unexpected applications would emerge over time” and employers cannot shield themselves with the “elephant in a mousehole” doctrine). In *Bostock*, an employer argued that prohibiting employers from firing someone for being homosexual or transgender would extend past Title VII into other state and federal laws, and that construing the statute in this way would prove unsustainable and violate employers’ religious convictions. *Id.*

¹⁹¹ See *id.* at 1754 (concluding that employers must comply with Title VII’s requirements).

¹⁹² See 142 S. Ct. 661 (2022) (staying OSHA’s vaccine mandate based on the application of the major questions doctrine); *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2490 (2021) (vacating the stay on the Centers for Disease Control and Prevention’s (CDC) eviction moratorium because Congress did not specifically authorize it). The Court reviewed the CDC’s eviction moratorium under the major questions doctrine, finding that the CDC exceeded its statutory authority in areas of “economic and political significance.” See *Ala. Ass’n of Realtors*, 141 S. Ct. at 2489 (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)). Both the vaccine mandate and eviction moratorium rulings were made on the “shadow docket,” referring to decisions made without oral argument and outside of the Court’s regular docket. See *What Is the Shadow Docket and Why Is It Important?*, DWORKEN & BERNSTEIN, <https://dworkenlaw.com/what-is-the-shadow-docket-and-why-is-it-important/> [<https://perma.cc/GTZ2-6YJL>] (describing the shadow docket); William Baude, *Foreword: The Supreme Court’s Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 1 (2015) (defining the shadow docket as “a range of orders and summary decisions that defy [the Supreme Court’s] normal procedural regularity”). Justice Gorsuch stated in his *National Federation of Independent Business* concurrence that the Supreme Court “established at least one firm rule” on the shadow docket in *Alabama Ass’n of Realtors* regarding the major questions doctrine. *Nat’l Fed’n of Independ. Bus.*, 142 S. Ct. at 667 (2022) (Gorsuch, J., concurring).

¹⁹³ See 142 S. Ct. 2587, 2616 (2022) (reversing the judgment of the D.C. Circuit). In *West Virginia v. EPA*, the primary issue was whether Congress granted the EPA the authority to implement the generation-shifting framework devised in the CPP. *Id.* at 2615–16. Generation shifting refers to the transfer of electricity production from sources with higher greenhouse gas emissions, such as coal plants, toward lower emitting producers, such as natural gas or renewable energy sources. See *id.* at 2603 (describing the generation shifting approach employed in Building Blocks 2 & 3 of the CPP). To achieve such a shift in generation, plant operators could reduce the electricity production output of the plant, build or invest in a lower emitting facility, and buy emissions credits under a cap-and-trade program. *Id.*

the EPA.¹⁹⁴ The Court moreover exacerbated a thorny doctrinal mess by refusing to reference the *Chevron* or *State Farm* doctrines.¹⁹⁵ The Court likewise did not explain why these statutory interpretation principles were inapplicable in the case, yet nonetheless proceeded to conduct a statutory interpretation analysis based solely on the major question doctrine.¹⁹⁶

After reviewing these back-and-forth decisions, an issue arises in the fact that courts inconsistently invoke and apply the major questions doctrine.¹⁹⁷ This doctrinal uncertainty is worth noting, as any important regulation in our globalized world is likely to have far-reaching and economically pervasive effects, both domestically and abroad.¹⁹⁸ The Seventh Circuit observed as much in *Zero Zone, Inc. v. U.S. Department of Energy*, writing that the DOE has determined that national energy conservation causes global effects, and such far-reaching effects are an “appropriate consideration” when making national policy decisions.¹⁹⁹

C. Agency Coordination: Are the Circuits on to Something?

In 2021, in *Huawei Technologies USA, Inc. v. FCC*, the Fifth Circuit addressed arguments that the FCC exceeded the bounds of its statutory authority

¹⁹⁴ See *id.* at 2610, 2612–13 (noting that it is more likely that Congress would have retained the authority to make such a decision). The Court held that the EPA would need to identify a “clear congressional authorization” to implement framework described in the CPP. *Id.* at 2609 (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324).

¹⁹⁵ See generally *id.* at 2610–16 (applying the major questions doctrine without referencing any deference doctrines).

¹⁹⁶ See *id.* at 2614–16 (interpreting sections of the CAA by looking at the text, legislative history, and intent of the statute). This method of examining a statute is identical to what *Chevron* calls for in step one of its application. See *supra* note 99 and accompanying text (guiding a court to review the statutory language, legislative history, and policy of a statute).

¹⁹⁷ See *supra* notes 180–199 and accompanying text (discussing the various issues that did and did not implicate major questions). There are many other cases in which major questions challenges could easily have been invoked based on the vast economic and political significance of the issues therein. See *Babbitt v. Sweet Home Cmty. for a Great Or.*, 515 U.S. 687, 708 (1995) (finding the Secretary of the Interior’s regulation defining the term “harm” within the meaning of the ESA was reasonable). That regulation would have far-reaching effects on what would constitute a “take” under Section 9 of the ESA. See *id.* at 714 (Scalia, J., dissenting) (arguing that upholding the regulation as a permissible exercise of agency authority would impose “unfairness to the point of financial ruin—not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoological use”). The Supreme Court has similarly found that the Clean Water Act can, in effect, be used to regulate groundwater discharges through applicable permits, despite arguments by dissenting Justices and the EPA itself that such permitting is beyond their statutory authority. See *County of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1473–92 (2020) (discussing the various interpretations of the Clean Water Act in addressing groundwater discharges).

¹⁹⁸ See *supra* notes 3–5 and accompanying text (discussing agency regulations with far reaching effects); *infra* notes 238–246 and accompanying text (observing that the Securities and Exchange Commission’s recent climate disclosure regulations are already garnering major questions challenges).

¹⁹⁹ 832 F.3d 654, 679 (7th Cir. 2016).

in promulgating the Universal Service Fund rule (USF Rule).²⁰⁰ That rule prohibited entities using government subsidies under the USF to purchase telecommunications equipment from companies that posed security risks to communications networks.²⁰¹ Huawei—a Chinese company designated as a security risk—challenged the rule on multiple grounds, one of which argued that the FCC lacked authority to make broad, independent decisions on matters of national security.²⁰² The court responded that, although the FCC has limited national security expertise, the agency participated in interagency working groups and was informed by additional agencies with expertise in national security while crafting the rulemaking.²⁰³ As such, the court held that the FCC may consider the judgments of other federal agencies who have national security expertise, while also applying its own judgments within its statutorily prescribed area of expertise.²⁰⁴ In sum, the court concluded that the FCC did not lack statutory authority to promulgate the rule and deferred to the agency’s reasonable interpretations of applicable statutes under *Chevron*.²⁰⁵

²⁰⁰ See 2 F.4th 421, 427 (5th Cir. 2021) (holding that the FCC did not act arbitrarily and capriciously under *State Farm* and granting the agency deference under *Chevron*).

²⁰¹ See *id.* (providing a brief overview of the rule that Huawei was challenging).

²⁰² See *id.* at 443–46 (describing Huawei’s quasi-major questions challenges to the USF Rule). Huawei argued that Congress could not have meant to give the FCC such “significant” authority to make national security decisions based on “general terms like ‘quality services.’” *Id.* at 443.

²⁰³ See *id.* at 443 (finding that the FCC is exercising its limited national security authority while deferring to other agencies with more expertise in the matter); *Id.* at 430 n.12 (finding that the Public Safety and Homeland Security Bureau is “the FCC’s primary expert on public safety and homeland security matters” (quoting *Public Safety and Homeland Security*, FED. COMM’NS COMM’N, <https://www.fcc.gov/public-safety-and-homeland-security> [<https://perma.cc/W25U-C83U>]); see also *In re Protecting Against Nat’l Sec. Threats to the Commc’ns Supply Chain Through FCC Programs Huawei Designation ZTE Designation*, 34 FCC Rcd. 11423, 11438–39 (Nov. 26, 2019) (stating that national security risk determinations will be made and “harmonize[d]” with other executive agencies).

²⁰⁴ See *Huawei Techs. USA*, 2 F.4th at 444 n.53 (finding that the rule does not permit the agency to make an “entirely ‘independent judgment about national security and foreign affairs’”); *In re Protecting Against Nat’l Sec. Threats to the Commc’ns Supply Chain*, 34 FCC Rcd. at 11427–28 (describing the efforts in this regard of the Federal Acquisition Security Council, whose members include the Department of Defense and Department of Homeland Security, among others); see also Freeman & Rossi, *supra* note 17, at 1163 (noting, as an example of interagency coordination, that the Department of Defense and Department of Homeland Security signed a Memorandum of Understanding in 2010 whereby they agreed to collaborate on cybersecurity). Additionally, when assessing whether the rule was arbitrary and capricious, the court noted that the FCC discussed and rejected challenges from Huawei on the rulemaking record, which argued that the agency lacked authority and expertise to make judgments on matters of national security. See *Huawei Techs. USA*, 2 F.4th at 452 (noting that the FCC properly addressed all relevant and significant comments). The court observed that the FCC did not respond to Huawei’s challenge that it violated the Appointments Clause of the U.S. Constitution by delegating authority to designate companies to the Public Safety and Homeland Security Bureau. *Id.* The court, however, found this to be unpersuasive because the challenge was buried in other arguments and was not stated clearly. *Id.*

²⁰⁵ See *Huawei Techs. USA*, 2 F.4th at 447 (holding that the FCC’s interpretation of the “quality services” statutory provision was reasonable). The court also held that the agency did not act arbitrarily or capriciously in adopting the rule. *Id.* at 427.

Similarly, in 2021, in *American Lung Ass'n v. EPA*, the D.C. Circuit reviewed challenges to the EPA's 2019 ACE Rule as a means of regulating greenhouse gas emissions from power plants.²⁰⁶ The court held that the EPA acted unlawfully in adopting the ACE Rule and repealing the prior administration's CPP because it misinterpreted the CAA and produced a rule that was arbitrary and capricious.²⁰⁷ The court utilized the *State Farm* standard of review, but did not cite *Chevron*, even though the court's analysis involved similar deferential questions about statutory ambiguity.²⁰⁸

The states challenging the rule repeatedly attempted to invoke the major questions doctrine and argued that the EPA had no authority or expertise on the issue of electricity generation and was seeking to regulate a broad swath of the American economy.²⁰⁹ President Trump's EPA itself argued that allowing generation shifting to be a "best system of emission reduction" would give the EPA authority to almost wholly restructure any industry's practices.²¹⁰ But the court gave little weight to these challenges and looked to interagency coordination to reject them outright, reasoning that opponents overlooked the fact that the EPA developed the CPP in a coordinated effort with the FERC and the DOE, two agencies with relevant expertise in electricity generation, transmission, and reliability.²¹¹ By garnering the input and assistance of these expert

²⁰⁶ See 985 F.3d 914, 930 (D.C. Cir. 2021) (describing the purpose of the ACE Rule and the issue in the case), *rev'd on other grounds sub nom.* *West Virginia v. EPA*, 142 S. Ct. 2587 (2022).

²⁰⁷ See *id.* at 930–31 (vacating the ACE Rule and remanding to the EPA).

²⁰⁸ See *id.* at 980 (stating that "we need not decide whether *Chevron* supplies the appropriate framework for reconciling conflicting statutory provisions"); see also *id.* at 987 (reviewing the EPA's interpretation and finding that its view gives effect to the statute's gap-filling function).

²⁰⁹ See *id.* at 958–61 (noting the argument of intervenors and the EPA itself that the CPP would have massive and pervasive effects on regulated parties, every electricity customer, and the economy as a whole); *Intervene*, CORNELL L. SCH. LEGAL INFO. INST. (June 2020), <https://www.law.cornell.edu/wex/intervene> [<https://perma.cc/WTN4-EXU2>] (defining an "intervenor" as a third party who was not named as an original party but enters into an existing case due to some personal stake in its resolution); see also *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) ("When 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." (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000))).

²¹⁰ See *Am. Lung Ass'n*, 985 F.3d at 966 (quoting the EPA's last-ditch effort to apply the major questions doctrine to the CPP's best-system determination). The court responded that even the most basic regulation of power plants would increase the cost of business of certain plants with accompanying generation-shifting effects. See *id.* at 966 (stating that this "is how pollution regulation in the electricity sector has always worked"); see also Brief of Amici Curiae of Grid Experts Benjamin F. Hobbs, Brendan Kirby, Kenneth J. Lutz & James D. McCalley in Support of Respondents at 13–15, *Am. Lung Ass'n*, 985 F.3d 914 (No. 19-1140) (observing that any air pollution control measure—including the CAA's highly-regarded Acid Rain Program—results in generation-shifting).

²¹¹ See *Am. Lung Ass'n*, 985 F.3d at 966–69 (stating that FERC and DOE were crucially important in crafting the CPP, when determining that the major questions doctrine was not implicated); Carbon Pollution Emissions Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64661, 64671 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60) (noting "extensive consultation with key agencies responsible for [electric system] reliability").

agencies regarding the realities of electricity systems, the decision-making of the previous administration's EPA in enacting the CPP easily survived the arbitrary and capricious standard of review and major questions concerns.²¹² On the other hand, the court held that the Trump administration EPA's decision-making was arbitrary and capricious and based on an erroneous interpretation of the CAA.²¹³

The Supreme Court ultimately reversed the D.C. Circuit's judgment in *West Virginia v. EPA*, but the Court never addressed the D.C. Circuit's reasoning on agency coordination efforts, as it simply applied the major questions doctrine to strike down the CPP.²¹⁴ The Court did state that the generation-shifting method utilized in the CPP was outside the EPA's traditional expertise, but throughout the entire case—including the concurrence and dissent—there was no mention of the DOE or the FERC, nor the energy expertise they provided to the EPA.²¹⁵

Although these lower court cases did not turn solely on interagency coordination, their reasoning provides an important procedural tool to an agency's arsenal when courts scrutinize agency action.²¹⁶ When reviewing an agency action, courts give favorable weight to the interagency coordination efforts

²¹² See *Am. Lung Ass'n*, 985 F.3d at 967 (noting that the “wooden refusal to factor in . . . such on-point considerations” of other expert agencies would result in an agency action being found arbitrary and capricious). The D.C. Circuit applied similar reasoning in *Delaware Department of Natural Resources & Environmental Control v. EPA*. See 785 F.3d 1, 14, 18 (D.C. Cir. 2015) (striking down the rule at issue in part due to the failure of the EPA to consult other agencies with grid reliability expertise).

²¹³ See *Am. Lung Ass'n*, 985 F.3d at 954–55 (vacating the ACE rule).

²¹⁴ See *West Virginia v. EPA*, 142 S. Ct. 2587, 2616 (2022) (holding that the EPA acted outside the scope of authority provided to it by the CAA in its determination that generation shifting was a “best system of emission reduction”). The Supreme Court made the ruling based solely on the major questions doctrine, whereas the lower court's decision was on the arbitrary and capricious standard of review and other statutory interpretation principles. *Id.*; see *Am. Lung Ass'n*, 985 F.3d at 954–55 (employing the *State Farm* doctrine and a textual analysis of the statute).

²¹⁵ See *West Virginia v. EPA*, 142 S. Ct. at 2612 (finding electricity and energy system regulation to be outside the normal expertise of the EPA). The Court did explicitly state that one “would not expect the Department of Homeland Security to make trade or foreign policy even though doing so could decrease illegal immigration,” but the Department of Homeland Security's national security expertise was instrumental to the FCC in creating the USF Rule, which did in fact result in massive effects on trade and foreign policy. *Id.* at 2613; see *Huawei Techs. USA, Inc. v. FCC*, 2 F.4th 421, 427 (5th Cir. 2021) (noting the importance of consultation between the FCC and agencies with more expressly defined national security expertise in creating a rule with large-scale effects); *supra* notes 200–205 and accompanying text (describing the *Huawei* case). See generally JILL GALLAGHER, CONG. RSCH. SERV., R47012, U.S. RESTRICTIONS ON HUAWEI TECHNOLOGIES: NATIONAL SECURITY, FOREIGN POLICY, AND ECONOMIC INTERESTS (2022) (describing the far-reaching economic, trade, and foreign policy impacts of recent restrictions on Huawei).

²¹⁶ See *supra* notes 200–213 and accompanying text (promoting the importance of consultation between expert agencies when hearing delegation and deference challenges but deciding the cases on other grounds).

found within the rulemaking record.²¹⁷ In unity is strength, and just as a bundle of sticks is harder to break than a single stick, the coordinated efforts of agencies in the rulemaking process may prove more resilient to attack.²¹⁸

III. ANSWERING MAJOR QUESTIONS

The major questions doctrine has evolved considerably over recent decades to become a powerful tool for judges to employ when reviewing significant agency regulations.²¹⁹ This has been coupled with an ongoing criticism of *Chevron* deference, to the point where the Supreme Court has refrained from even citing the doctrine when conducting statutory interpretation analyses.²²⁰

Section A of this Part highlights the glaring consequences of the Supreme Court's growing nondelegation and anti-deference jurisprudence and responds by emphasizing the importance of federal agency coordination as a means of overcoming it.²²¹ Section B outlines a recent SEC rulemaking apt for a major questions challenge and proposes coordination practices to assist the agency in surviving judicial review.²²²

A. The Best Defense Is a Coordinated Offense

The Supreme Court has made clear through principles set forth in recent cases that when an agency administers a statute in a manner that carries vast economic and political significance, the action will be hard-pressed to pass judicial scrutiny.²²³ The utilization of these normative statutory interpretation

²¹⁷ See *supra* notes 141–142, 200–213 and accompanying text (describing cases that turn in part on interagency coordination); see also *Sec. & Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 87 (1943) (“The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.”).

²¹⁸ See AESOP, THE BUNDLE OF STICKS, LIBRARY OF CONG., <https://read.gov/aesop/040.html> [<https://perma.cc/68NM-FEHU>] (providing a tale of sons learning the power of strength in numbers); see also *In re Mitigation of Orbital Debris in the New Space Age*, 35 FCC Rcd. 4156, 4165–67, 4166 n.66 (2020) (noting the importance of interagency coordination in the regulation and mitigation of orbital debris, an area where the FCC has limited statutory authority).

²¹⁹ See *supra* notes 112–126, 180–196 and accompanying text (outlining the development of the major questions doctrine).

²²⁰ See *supra* notes 172–179 and accompanying text (noting the attitudes of current Supreme Court Justices toward *Chevron*); see also *supra* notes 193–196 and accompanying text (explaining how the Supreme Court undertook a statutory interpretation analysis under the major questions doctrine without referencing either *State Farm* or *Chevron*); *West Virginia v. EPA*, 142 S. Ct. 2587, 2610–16 (2022) (utilizing the major questions doctrine without reference to any judicial deference doctrines).

²²¹ See *infra* notes 223–237 and accompanying text.

²²² See *infra* notes 238–251 and accompanying text.

²²³ See *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (creating a canon where an agency's interpretation of a long-existing statute will be disfavored if it asserts regulatory authority not previously used and the action carries large economic and political consequences); *King v. Burwell*, 576 U.S. 473, 484–85 (2015) (expounding a principle that, when an agency answers a question of vast

principles complements the Court's antipathy toward administrative agencies.²²⁴ The unelected Court, in wishing to prevent agencies from stepping beyond their prescribed authority, is instead seizing the power to make important policy decisions for themselves.²²⁵ The realities of climate change and other modern problems are irreconcilable with the Court's major questions jurisprudence, as the economic and political significance of preventing climate action is far more devastating than the recent attempts to regulate it.²²⁶

economic and political significance in the administration of a statute—one central to that statutory scheme—courts may ignore the agency's interpretation in its entirety if the agency is believed to be lacking expertise in the matter).

²²⁴ See Lisa Heinzerling, *The Supreme Court's Clean-Power Power Grab*, 28 GEO. ENV'T L. REV. 425, 427–28 (2016) [hereinafter Heinzerling, *Power Grab*] (observing that the Supreme Court is reducing the power of the administrative state based on “power canons” that “have no credible link to an assessment of likely congressional behavior or desires” (citing Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 1937 (2017) [hereinafter Heinzerling, *Power Canons*])).

²²⁵ See *id.* at 428 (noting that these power canons are normative, not descriptive, and are dangerous from a democratic perspective). Heinzerling continues that these new principles of statutory interpretation “disrupt the rule-of-law values of predictability and objectivity, threaten democratic values, and draw on no widely shared public values.” See *id.* (stating that these canons are a judicial “power grab” (citing Heinzerling, *Power Canons*, *supra* note 224, at 1937)). The major questions doctrine—as it is applied during *Chevron* “step zero”—circumvents *Chevron*'s legal statutory interpretation analysis in favor of a broader policy determination based on the financial and political consequences of agency action. See *supra* note 117 and accompanying text (describing *Chevron* “step zero” and how it operates); *supra* note 223 and accompanying text (describing how courts can ignore an agency's interpretation in its entirety). The real legal analysis is delegation-based, but even that examination looks to whether—in the court's *opinion*—Congress could have meant to delegate the authority to the agency. See *supra* note 123 and accompanying text (observing instances where the Supreme Court believes Congress can properly delegate power to agencies). If Congress truly opposes a final rulemaking, it can utilize the Congressional Review Act (CRA) to overturn the rule and prevent future rulemakings that are “substantially the same” unless explicitly authorized. See *supra* notes 53–58, 163 (describing the CRA and its recent uptick in usage). Given this substantial power of Congress, it is even more misguided for the Supreme Court to wield the seemingly limitless power of the major questions doctrine. *Id.* Members of Congress most recently passed a CRA resolution of disapproval targeting an Environmental, Social, and Governance (ESG) rule created by the Department of Labor. See Andrew Solender & Hans Nichols, *GOP Pits Endangered Democrats Against Biden*, AXIOS (Mar. 1, 2023), <https://www.axios.com/2023/03/02/esg-senate-democrats-tester-manchin> [<https://perma.cc/2R5F-JVMB>] (explaining that the ESG rule allows retirement investment plan managers to implement ESG factors when investing in retirement funds). Although President Biden has since vetoed the resolution, its true purpose was to be used as ammunition when the ESG rule is challenged in the courts. *Id.*; see Mariana Alfaro, *Biden Issues First Veto, Rejecting Republican-Led Bill on Labor Rule*, WASH. POST, <https://www.washingtonpost.com/politics/2023/03/20/biden-veto-investment-rule-republicans/> [<https://perma.cc/9SRP-NP8Z>] (Mar. 20, 2023) (noting that President Biden vetoed the CRA resolution).

²²⁶ See *Displaced on the Frontlines of the Climate Emergency*, UNHCR: THE UN REFUGEE AGENCY, <https://storymaps.arcgis.com/stories/065d18218b654c798ae9f360a626d903> [<https://perma.cc/3GLV-7ASA>] (providing data showing that climate change has displaced an average of 21.5 million people per year over the past decade, far greater than the number displaced through conflict or violence). A recent report by Deloitte found that rapid decarbonization could lead to the U.S. economy gaining \$3 trillion over the next fifty years, whereas inaction on climate change could cost the U.S. economy \$14.5 trillion over the same period. See Press Release, Deloitte, *Deloitte Report: Inaction on Climate Change Could Cost the US Economy \$14.5 Trillion by 2070* (Jan. 25, 2022), <https://www2.deloitte.com/us/en/pages/about-deloitte/articles/press-releases/deloitte-report-inaction-on-climate->

Moreover, the Court has issued some of its major questions decisions through the “shadow docket,” making it even more difficult to counter its agenda.²²⁷ It is a near certainty that the major questions doctrine, along with the anti-deference momentum of the current Supreme Court, will continue to thwart critical agency actions.²²⁸

Unfortunately, Congress has shown that it is either unwilling or incapable of speaking to important issues and lacks the impetus to directly authorize agencies to do so through additional enabling legislation.²²⁹ Even if Congress does act, it is an inevitable facet of lawmaking that even the most comprehensive and detail-oriented legislations will not account for the manifold practicalities that will arise in their administration.²³⁰

As a result, it falls upon agencies to thread these rapidly changing times and regulate efficiently and effectively within the judiciary’s new bounds.²³¹

change-could-cost-the-us-economy-trillions-by-2070.html [https://perma.cc/CN7E-T3J4] (describing the economic effects of transitioning to a low-emissions economy).

²²⁷ See *supra* note 192 and accompanying text (discussing the shadow docket).

²²⁸ See *West Virginia v. EPA*, 142 S. Ct. 2587, 2616 (2022) (invoking the major questions doctrine to hold that the EPA exceeded its authority in promulgating the CPP); *supra* note 24 and accompanying text (discussing other areas where the Court’s recent nondelegation and anti-deference analyses have been, and could be, used); *infra* notes 238–246 and accompanying text (describing how the SEC’s climate disclosure regulations are sure to face a major questions challenge once finalized). The Supreme Court most recently invoked the major questions doctrine when hearing oral arguments in a case about the Biden administration’s student debt relief plan. See Adam Liptak, *Supreme Court Appears Skeptical of Biden’s Student Loan Forgiveness Plan*, N.Y. TIMES (Feb. 28, 2023), <https://www.nytimes.com/2023/02/28/us/politics/student-loan-supreme-court-biden.html> [https://perma.cc/MJ52-K6AJ] (suggesting the plan was undertaken without clear congressional authorization). Student debt has increased more than two-fold over the past couple decades, with borrowers now owing the U.S. government over 1.6 trillion dollars. See *Is Rising Student Debt Harming the U.S. Economy?*, COUNCIL ON FOREIGN RELS., <https://www.cfr.org/backgrounder/us-student-loan-debt-trends-economic-impact> [https://perma.cc/A2GZ-KU4M] (Oct. 20, 2022) (examining the student debt crisis and avenues for relief). Supporters of student debt relief programs argue that they could help the U.S. economy and improve the standard of living for a large portion of Americans. *Id.*

²²⁹ See *supra* notes 2, 6–11 and accompanying text (detailing the trend of congressional action and heightening polarization); see also Kimberly Strawbridge Robinson & Courtney Rozen, *Supreme Court Vaccine Decision Signals Trouble for Climate Rule*, BLOOMBERG L. (Jan. 14, 2022) <https://news.bloomberglaw.com/us-law-week/supreme-court-vaccine-decision-signals-trouble-for-climate-rule> [https://perma.cc/28EZ-XKCV] (observing that conservative Justices are clinging to the judge-made major questions doctrine that “undercut[s]” federal agencies and “hamstring[s]” their ability to regulate, while Congress remains unwilling to address important issues due to bipartisan divides).

²³⁰ See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 32–33 (2012) (noting that “general terms . . . are adopted to cover a multitude of situations that cannot practicably be spelled out in detail or even foreseen”); Goodwin, *supra* note 148 (noting that it is an inescapable trait of lawmaking that gaps and ambiguities will present themselves in the implementation and enforcement of laws); *supra* notes 93–95 and accompanying text (adding that Congress cannot ascribe every minute detail that may arise in the administration of a law).

²³¹ See AMAN & PENNIMAN, *supra* note 75, at 2–3 (stating that evolving industries require evolving standards, which are incapable of being catalogued when a statute was written, despite an expressly prescribed policy objective); Goodwin, *supra* note 148 (observing that administration of regulatory statutes necessitates the use of new and changing science and technology).

To take up this task, agencies should look to the important procedural component that buttressed the recent decisions of the Fifth and D.C. Circuits in cases reviewing agencies' statutory authority.²³²

In each respective decision, the court held that the agency's action did not exceed its mandated powers, in part because the agency was informed by and deferred to the judgments of agencies with relevant expertise and statutory authority on the subject matter underpinning the rulemakings.²³³ As a result, neither court found the rulemakings to be arbitrary and capricious under the *State Farm* analysis, nor hindered by the *Chevron* doctrine.²³⁴ Both regulations overcame similarly phrased major questions challenges at the circuit court level, and the courts provided a procedural device—coordination with other expert agencies during the rulemaking process—to combat this impractical doctrine.²³⁵

Additionally, the Supreme Court's holding in *West Virginia v. EPA* that electricity system generation and reliability was outside the EPA's traditional expertise blatantly ignores the agency's long history of regulations that directly impact those matters.²³⁶ Just as the Fifth Circuit observed that the FCC had

²³² See *supra* notes 202–205, 209–212 and accompanying text (noting that consultation between agencies during the rulemaking process was crucial in overcoming nondelegation and deference challenges); *Am. Lung Ass'n v. EPA*, 985 F.3d 914, 966–69 (D.C. Cir. 2021) (describing the importance of the FERC and the DOE in crafting the CPP), *rev'd on other grounds sub nom. West Virginia v. EPA*, 142 S. Ct. 2587 (2022); *Huawei Techs. USA, Inc. v. FCC*, 2 F.4th 421, 443 (5th Cir. 2021) (noting the FCC's deference to agencies with more national security expertise).

²³³ See *supra* notes 202–205, 209–212 and accompanying text (describing how coordination between agencies with relevant expertise in national security and electricity system reliability supported the rulings that each agency did not exceed its statutory authority); see also FARBER & CARLARNE, *supra* note 2, at 25 (stating that electric power generation is the “second largest source of greenhouse gas emissions in the United States”).

²³⁴ See *Am. Lung Ass'n*, 985 F.3d at 967 (utilizing the *State Farm* doctrine); *Huawei Techs. USA*, 2 F.4th at 427, 447 (utilizing the *State Farm* & *Chevron* doctrines); *supra* notes 200–205 and accompanying text (describing how the USF rule survived the arbitrary and capricious test and observing that the FCC's interpretation of the applicable statute was given deference under *Chevron*); *supra* notes 206–212 and accompanying text (observing that the CPP overcame the arbitrary and capricious standard of review). Although the D.C. Circuit did not decide the case on the grounds of *Chevron*, it did use a similar statutory interpretation analysis to find the interpretations of the Obama administration's EPA permissible. See *supra* note 208 and accompanying text (noting that the court found the interpretations to fulfill their gap-filling function); see also *supra* notes 86–111 and accompanying text (describing the relevant judicial deference standards of review).

²³⁵ See *supra* notes 202–205, 209–212 and accompanying text (examining how the rulemakings in each case were able to overcome major questions challenges); *supra* notes 112–126, 180–199 and accompanying text (describing the major questions doctrine). But see *supra* notes 214–215 and accompanying text (observing that the Supreme Court struck down the rule at issue in the *American Lung Ass'n v. EPA* case under the major questions doctrine but did not give any thought to the inter-agency coordination processes on the underlying rulemaking record).

²³⁶ Compare 142 S. Ct. at 2612 (finding electricity and energy system regulation to be outside the normal expertise of the EPA), with *supra* note 210 (noting how all pollution control regulations on power plants impact the energy system), and KENNETH W. CLARKSON & ROGER LEROY MILLER, INDUSTRIAL ORGANIZATION: THEORY, EVIDENCE, AND PUBLIC POLICY 457 tbl.20-2 (1981) (showing

exercised the same limited national security authority as it had for decades while providing deference to other agencies' judgments, so too was the EPA exercising its limited authority in the field of electricity generation while deferring to the expert judgments of the DOE and the FERC.²³⁷

B. Climate in the Crosshairs

Current and future rulemakings, such as the Securities and Exchange Commission's (SEC) soon-to-be-finalized climate-related risk disclosure regulations, should take heed of these major questions challenges and the importance of concerted rulemaking efforts.²³⁸ Major questions doctrine challenges have already arrived at the SEC's door, and litigation can be expected once the rule becomes final.²³⁹ The SEC has historically regulated environ-

the sixteen federal agencies—including the EPA—that have jurisdiction over certain energy functions).

²³⁷ See *supra* notes 202–204 and accompanying text (describing the FCC's limited national security authority and the deference to agencies with more explicit expertise in that area); *supra* note 210 and accompanying text (describing how EPA regulations often indirectly regulate the energy system); *supra* note 211 and accompanying text (describing the substantial coordination between the EPA and other agencies with electric system expertise); *supra* note 212 and accompanying text (noting the emphasis placed on agency coordination by the D.C. Circuit in cases where EPA regulations concern electricity system reliability). By solely targeting the EPA's expertise, the Supreme Court discredits the interagency efforts of the FERC and the DOE, along with all the public commenters who provided their reasoned input. *Supra* notes 214–215 and accompanying text (noting that the extensive consultation between the EPA, DOE, and FERC was never mentioned in the Supreme Court's opinion despite being talked about at length by the lower court).

²³⁸ See The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334 (proposed Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249) (proposing amendments under the Securities Act of 1933 and Securities Exchange Act of 1934 that would require public companies to disclose climate-related information that may have a material effect on their business or financial statements in registration statements and annual reports, including greenhouse gas emissions metrics); Tyson, *supra* note 15 (noting that the rule should be finalized in May 2023); see also *supra* notes 202–205, 209–212 and accompanying text (describing how consultation between agencies during the rulemaking process can be crucial in overcoming nondelegation and deference challenges). The major questions doctrine might also be invoked against regulators seeking to make rules about cryptocurrencies and antitrust. See *Major Decision for Major Questions: Supreme Court Reins in Federal Regulatory Authority*, *supra* note 24 (discussing other regulations that could warrant a major questions doctrine challenge).

²³⁹ See Soc. for Corp. Governance, Comment Letter on Proposed Rule for the Enhancement and Standardization of Climate-Related Disclosures for Investors (June 17, 2022), <https://www.sec.gov/comments/s7-10-22/s71022-20132044-302525.pdf> [<https://perma.cc/EB8C-Y7SD>] (asserting a major questions challenge against the rule due to its “great economic and political importance”); see also Mark Segal, *Republicans Launch Group to ‘Combat Threat’ of ESG, ‘Rein in’ SEC*, ESG TODAY (Feb. 6, 2023), <https://www.esgtoday.com/republicans-launch-group-to-combat-threat-of-esg-rein-in-sec/> [<https://perma.cc/Q3GX-955K>] (noting that Republican lawmakers are seizing the opportunity to apply the Supreme Court's *West Virginia v. EPA* decision to the SEC's climate disclosure rules); Taryn Zucker, Lauren Lee & Evelyn Kim, *Supreme Court's West Virginia v. EPA Decision Casts a Shadow Over SEC's Proposed Climate-Related Disclosure Rule*, FRESHFIELDS (July 19, 2022), <https://blog.freshfields.us/post/102ht6r/supreme-courts-west-virginia-v-epa-decision-casts-a-shadow->

mental disclosures—such as compliance with environmental laws—but has refrained from treading very far into the realm of climate change disclosures, issuing only guidance and interpretative statements on existing rules up to the present.²⁴⁰ The political and economic effects of climate-related disclosures are enormous, as the financial markets will increasingly incorporate risks associated with climate change into credit ratings, loans, investment trends, and more.²⁴¹ In line with these effects, SEC Commissioner Peirce invoked the key language of the major questions doctrine in a lengthy dissent to the proposed rule, stating that the SEC lacked sufficiently clear authorization from Congress

over-secs-proposed [<https://perma.cc/GB4V-7ZYV>] (describing the applicability of the major questions doctrine to the SEC's proposed rule).

²⁴⁰ See Commission Guidance Regarding Disclosure Related to Climate Change, Release Nos. 33-9106, 34-61469, FR-82 (Feb. 8, 2010), <https://www.sec.gov/rules/interp/2010/33-9106.pdf> [<https://perma.cc/KR2D-3HPV>] (describing the statutory authority for environmental disclosures, the long history of regulations thereunder, and how climate related-risks relate to those regulations). The SEC has the authority to require companies to disclose material risk-related information under Regulation S-K of the Securities Act and Exchange Act. See Elsa Allman & Joonsung (Francis) Won, *Can ESG Disclosure Improve Investment Efficiency?*, WORLD BANK BLOGS (Sept. 20, 2021), <https://blogs.worldbank.org/allaboutfinance/can-esg-disclosure-improve-investment-efficiency> [<https://perma.cc/U662-AVAG>] (describing the SEC's authority to regulate disclosures).

²⁴¹ The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. at 21430–31 (observing that company valuations may rise or fall depending on these disclosures and that companies may change their behavior through market incentives to reevaluate certain assets and geographic-driven risks); Ricardo Martinez, Corey Goldblum, Michael Monaco & Damian Hales, *Embedding Climate Risk into Banks' Credit Risk Management*, DELOITTE (Dec. 10, 2021), <https://www2.deloitte.com/us/en/insights/industry/financial-services/climate-change-credit-risk-management.html> [<https://perma.cc/P7H2-GPM2>] (discussing how financial instruments will need to integrate climate-related risks into activities like credit risk management, through ESG metrics and other climate-related financial disclosures); Virginia Milstead & Sophie M. Mancall-Bitel, *Climate-Related Securities Suits May Increase with New SEC Standards*, REUTERS, <https://www.reuters.com/legal/legalindustry/climate-related-securities-suits-may-increase-with-new-sec-standards-2022-01-31/> [<https://perma.cc/64A3-MNMZ>] (Jan. 31, 2022) (noting that possible consequences of climate disclosures include increased demand for goods and services that produce fewer emissions, decreased demand for those that do not, and reputational risks for companies that do not adapt); Heather Clancy, *How ESG Scores Can Affect the Cost of Credit*, GREENBIZ (Feb. 18, 2021), <https://www.greenbiz.com/article/how-esg-scores-can-affect-cost-credit> [<https://perma.cc/EJY3-TY8J>] (observing that a recently created financial arrangement, called a “sustainability-linked loan” provides better interest rates on business loans to firms with strong ESG measures); Press Release, Commodity Futures Trading Comm'n, CFTC's Climate-Related Market Risk Subcommittee Releases Report (Sept. 9, 2020), <https://www.cftc.gov/PressRoom/PressReleases/8234-20> [<https://perma.cc/4A7Y-UQ7N>] (stating that “[c]limate change poses a major risk to the stability of the U.S. financial system and to its ability to sustain the American economy”); U.S. Small Bus. Admin., Off. of Advocacy, Comment Letter on Proposed Rule for the Enhancement and Standardization of Climate-Related Disclosures for Investors (June 17, 2022), <https://www.sec.gov/comments/s7-10-22/s71022-20131758-302192.pdf> [<https://perma.cc/8MDF-5ZBD>] (levying concerns over “the widespread economic impacts of the [regulations] on both public and privately owned small businesses”); see also Mark Segal, *BlackRock to Continue Asking for Climate Targets and Disclosure Despite Anti-ESG Pushback*, ESG TODAY (Dec. 20, 2022), <https://www.esgtoday.com/blackrock-to-continue-asking-for-climate-targets-and-disclosure-despite-anti-esg-pushback/> [<https://perma.cc/LE4W-SQ9L>] (discussing the profound politicization surrounding climate-related risk disclosures).

to make a decision with such substantial political and economic effects.²⁴² Aggrieved plaintiffs will surely bring this argument before the courts once the rule is finalized, and the SEC should coordinate extensively with other agencies with relevant expertise in this area to overcome it.²⁴³

For example, the SEC could work closely with the EPA on which greenhouse gas emissions should be disclosed and how their statutory authorities differ on the matter, thereby alleviating concerns that the rules would, in effect, regulate emissions as the market incentivizes companies to reduce them.²⁴⁴ Coordination with the FSOC and the collection of agencies therein would likewise provide a detailed rulemaking record of the larger financial market effects.²⁴⁵ If all the consequences are found manageable and the SEC relies on the judgments of these other agencies, it would be irreconcilable for a court of nine or fewer non-experts to overrule the expertise of so many highly technical agencies under the major questions doctrine, or any other deference or delegation analyses.²⁴⁶

²⁴² See Hester M. Peirce, Comm'r, U.S. Sec. & Exch. Comm'n, *We Are Not the Securities and Environment Commission—At Least Not Yet* (Mar. 21, 2022), <https://www.sec.gov/news/statement/peirce-climate-disclosure-20220321> [<https://perma.cc/F69C-D5LX>] (arguing that the SEC lacks the clear authority to issue these regulations by directly referencing the Supreme Court's major questions jurisprudence and power canons); see also *supra* notes 223–225 and accompanying text (describing the Supreme Court's major questions jurisprudence and power canons).

²⁴³ See *supra* note 239 and accompanying text (describing the major questions challenges brought against the rule during the public comment period); see also *supra* note 223 and accompanying text (providing that courts will be skeptical of agency actions when they carry large economic and political consequences). But see *supra* note 128 and accompanying text (observing that administrative actions must be judged on their underlying record and that agency coordination can help develop a single, more thorough record); *supra* notes 154–156 and accompanying text (describing the importance of deferring to agencies with highly technical expertise).

²⁴⁴ See *supra* note 142 and accompanying text (describing the EPA's express authority to regulate greenhouse gas emissions); Env't Prot. Agency, *Comment Letter on Proposed Climate Risk Disclosure Rule for the Enhancement and Standardization of Climate-Related Disclosures for Investors* (June 18, 2022), <https://www.sec.gov/comments/s7-10-22/s71022-20132508-302990.pdf> [<https://perma.cc/Q4H6-YBRC>] (explaining the distinct statutory authorities for the EPA and the SEC in regulating greenhouse gas emissions disclosures, and the differences between climate disclosures that each agency tracks); see also *supra* note 241 (describing the market effects created by emissions disclosures). Exxon Mobil, a public company that will be subject to this rulemaking, has called on the SEC and EPA to coordinate with one another "to ensure a consistent standard applies [to all companies]". Exxon Mobil Corp., *Comment Letter on Proposed Rule for the Enhancement and Standardization of Climate-Related Disclosures for Investors* (June 17, 2022), <https://www.sec.gov/comments/s7-10-22/s71022-20132323-302882.pdf> [<https://perma.cc/42S3-WN87>].

²⁴⁵ See *supra* note 131 and accompanying text (describing the FSOC and its purpose); FIN. STABILITY OVERSIGHT COUNCIL, *REPORT ON CLIMATE-RELATED FINANCIAL RISK* 1, 10 (2021), <https://home.treasury.gov/system/files/261/FSOC-Climate-Report.pdf> [<https://perma.cc/Z9DJ-CTPF>] (describing how climate-related risks pose threats at every level of the financial system).

²⁴⁶ See *supra* notes 86–126 and accompanying text (describing the various judicial standards employed when reviewing agency actions and factors determining when deference should be given); *supra* notes 93–95 and accompanying text (noting further policy reasons for delegating power to agencies and deferring to their judgments); *supra* note 159 and accompanying text (stating that judges

In sum, the current major questions analysis is too narrow, as all modern regulations have significant and pervasive effects.²⁴⁷ Society cannot sit idly by and wait for bipartisan gridlock to subside.²⁴⁸ If recent history has shown anything, it is that polarization is only getting worse.²⁴⁹ Administrative agencies are composed in a way that makes them ideally situated to address these cross-sectoral issues—courts just need to let them try.²⁵⁰ To do so, courts must allow

are not experts and should leave policy choices to the political branches of the government). Such interagency coordination could help prove that the exercise of regulatory power was not “manifestly contrary” to or without authorization from any enabling legislation and that the agency acted reasonably in creating the rule under that authority. *See* *Arent v. Shalala*, 70 F.3d 610, 616 n.6 (D.C. Cir. 1995) (holding that the overlap between the standards of review exist because whether an agency action is “manifestly contrary to the statute” is an important consideration under both *State Farm* and *Chevron* (quoting *Chevron USA, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984))); *supra* notes 116–117 (describing the overlap between the major questions doctrine and the *Chevron* doctrine); *Chevron*, 467 U.S. at 843–44 (noting that an agency’s action must be *reasonable* for deference to be given); *Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983) (stating that the *State Farm* doctrine necessitates only that an agency show that it engaged in *reasoned* decision-making by providing an elucidating and adequate explanation for its decision). Whether an action is unreasonable or contrary to a statute requires looking at the rulemaking record and at whether the agency has the necessary expertise to implement the statute. *See supra* notes 120–126 and accompanying text (observing that the expertise of the agency creating the rule is a significant factor in determining whether an agency has exceeded its authority under the major questions doctrine); *Sec. & Exch. Comm’n v. Chenery Corp.*, 318 U.S. 80, 87 (1943) (“The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.”).

²⁴⁷ *See supra* note 199 and accompanying text (observing the global effects of national energy conservation); *supra* note 210 and accompanying text (noting the effects of the CPP’s generation shifting provisions); *supra* note 202 and accompanying text (noting the concerns over the USF Rule’s influence on national security decisions); *supra* note 241 and accompanying text (describing the potential consequences of a climate disclosure rule).

²⁴⁸ *See supra* notes 2, 6–11 and accompanying text (detailing the trend of congressional action and heightening polarization); *see also supra* note 150 (observing the immediate efforts necessary to combat climate change). President Biden’s Build Back Better bill has a goal of transforming the United States energy system, with climate measures totaling “\$555 billion over 10 years . . .” *See* German Lopez, *A Climate Opportunity*, N.Y. TIMES, <https://www.nytimes.com/2022/02/06/briefing/biden-democrats-climate-bill.html> [<https://perma.cc/39BT-4GVZ>] (Feb. 7, 2022) (noting that the budget dedicated to climate is more than six times larger than the next biggest federal investment in climate, back in 2009). Unfortunately, Republicans have shown little to no urgency in acting on climate change. *See* Davenport & Friedman, *supra* note 2 (writing that some Republicans oppose acting on climate change because it is viewed as part of the “far-left agenda”); Teirstein, *supra* note 11 (noting that all Republicans in the House of Representatives opposed the Inflation Reduction Act).

²⁴⁹ *See supra* notes 2, 6–11, 216 and accompanying text (describing the continually rising polarization in our legislature and society); Alayna Treene, *The Biden Agenda Is Meeting a Dead End*, AXIOS (Jan. 11, 2022), <https://www.axios.com/biden-agenda-dead-end-763109db-1210-4a2e-9d22-caec5a63aa62.html> [<https://perma.cc/N53B-BNPG>] (noting that Democratic lawmakers are pessimistic about passing any laws the party supports); *see also* FARBER & CARLARNE, *supra* note 2, at 26 (observing noteworthy efforts to pass federal climate legislation by the Obama administration, just to have them fail once political party control shifted).

²⁵⁰ *See supra* notes 164–167 and accompanying text (providing an overview of federal agency staffing and observing agency resistance to political shifts in power); Segal, *supra* note 65 (observing that the SEC has already made changes to the proposed climate disclosure rule based on the input of

agencies to coordinate with one another in areas where separately they may lack explicitly granted authority and distinct expertise, and must give deference to these processes as long as they are reflected in the rulemaking record.²⁵¹

CONCLUSION

The major questions doctrine is a misguided approach to keeping administrative agencies in check, and applying it results in a stagnation of federal policymaking on important issues that require significant attention. The Supreme Court has utilized the doctrine in conjunction with an anti-*Chevron* push to halt regulatory rules that do not fit its political skew—in effect creating policy choices of its own. This coupling of anti-administrative state trends in the judiciary will result in its own “vast economic and political” consequences, as the country will be unable to adapt to novel problems while waiting for Congress to speak clearly to every miniscule detail. If agencies augment their rulemaking procedures through deliberate and detailed coordination with other agencies, they may be able to overcome the Supreme Court’s attitudes toward science-driven and expertise-based solutions. Although such actions are not uncommon and often the norm, agencies should elaborate on these structures and emphasize their importance when subjected to judicial review. If one agency’s interpretation of its statutory authority is found suspect, perhaps the concerted efforts of others with related expertise and relevant authority will provide an amalgamation of authority, and a rulemaking record, strong enough to withstand delegation and deference concerns. Global issues demand immediate attention. The country cannot cover behind an imaginary elephant in the face of future-shaping questions. Agencies must be allowed to act.

BENJAMIN C. SKILLIN

almost 15,000 comments from the general public); *see also* Dallas Burtraw, Art Fraas & Nathan Richardson, *Greenhouse Gas Regulation Under the Clean Air Act: A Guide for Economists*, 5 REV. ENV'T ECON. & POL'Y 293, 304 (2011) (noting back in 2011 that an agency regulatory approach could have achieved steep emissions reductions—around 10%—a degree congruent to that which would have resulted from the failed Waxman-Markey bill).

²⁵¹ *See supra* notes 200–215 and accompanying text (discussing the EPA’s utilization of the energy expertise of the DOE and FERC in crafting the CPP, and the FCC’s incorporation of the national security expertise of relevant federal agencies in crafting the USF Rule); *supra* note 128 and accompanying text (describing the advantages of interagency coordination and the requirement that agency action be reviewed based on the underlying rulemaking record).