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The Major Questions Doctrine: Judicial Power and the Prevalence of Policy Drift in the United States

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Abstract: A major challenge of governance in the United States is policy drift, the phenomenon wherein a policy's outcomes are transformed due to a failure to update its rules or structures to meet changing circumstances. Policy drift has been prevalent in recent decades due to declining legislative productivity, a veto-riddled legislative process, and the rapid pace of technological and environmental change. We argue that the emergence of the "major questions doctrine" in Supreme Court jurisprudence is likely to exacerbate the problem of policy drift. This new doctrine enables courts to declare administrative actions as invalid if they are "novel" or of "economic or political significance" and lack "clear congressional authorization." This doctrine, which departs from past standards that were more deferential to agencies, exacerbates the likelihood of policy drift by limiting the capacity of agencies to actively adapt policy implementation to changing circumstances. By rendering agency action suspect on the basis of novelty or significance, the doctrine limits action in precisely those policy domains most in need of adaptation. We show the relationship between the doctrine and policy drift through case studies of three policy domains (air pollution, student loan debt, and workplace vaccine mandates). We then examine how the doctrine has already begun to spread through lower courts, where its impact is likely to be felt most strongly. Finally, we discuss the normative and theoretical implications of our analysis, noting how the doctrine further concentrates power in the judiciary and undermines democratic accountability and transparency in the policy process.

Keywords: Supreme Court; major questions doctrine; policy drift; policy adaptation; public policy

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1 Introduction

Over the last three years (2022–24), the Roberts Court has transformed administrative law and the relationship between federal courts and agencies. In the highly-anticipated case *Loper Bright Enterprises v. Raimondo* (2024), the Supreme Court ended a 40-year precedent known as "*Chevron* deference" that had instructed federal courts to defer to administrative agencies when statutes were ambiguous and agency interpretations were reasonable (*Chevron v. NRDC* 1984). Two years prior, the Court articulated an alternative legal standard for administrative law cases called the "major questions doctrine" (MQD), which directs federal courts to restrict "novel" or "major" agency actions when there is no explicit congressional authorization for them. In this article, we argue that the shift from *Chevron* to the MQD will exacerbate policy drift, the phenomenon wherein a policy's outcomes are transformed due to a failure to adapt to changing circumstances. The MQD heightens the possibility of drift in precisely those policy domains most in need of adaptation, and undermines democratic accountability and transparency by shifting power from administrative agencies to the judiciary.

The MQD emerged in a series of Supreme Court cases decided in 2022 and 2023. The doctrine, which continues to evolve, has been articulated by Chief Justice Roberts as the expectation that Congress will "speak clearly if it wishes to assign to an agency decisions of vast economic and political significance" (*West Virginia v. EPA* 2022, 11). Simply put, the more consequential the agency action, the more likely courts would require a clear congressional authorization of that action to survive judicial scrutiny. The MQD has its roots in jurisprudence and legal scholarship since the 1980s, but the 2022–23 cases marked the emergence of a distinctively articulated and applied doctrine. This doctrine marked a clear departure from the more permissive approach of *Chevron* deference, even before the Court formally overturned *Chevron*. While *Chevron* deference empowered federal agencies to act in the face of statutory ambiguity, the MQD does the opposite: it precludes meaningful administrative action unless the congressional directive is explicit.

Legal scholars have rightly noted the importance of the MQD, and have offered penetrating analyses of the doctrine's jurisprudential roots (Brunstein and Revesz 2022; Coenen and Davis 2017; Larsen 2024; Sohoni 2022), the merits of its legal foundation (Levin 2024; Sohoni 2022), its potentially transformative impact on both domestic and foreign policy (Daval, Bendicksen, and Kesselheim 2023; Meyer and Sitaraman 2023; Steele 2024; Spitler 2023), and its implications for democracy (Deacon and Litman 2023; Freeman and Stephenson 2023; Levin 2024). This scholarship has shed light on the doctrine's origins, development, and novelty and its consequences for jurisprudence and the policymaking process. In this article, we offer further

insight into how the emergence and application of the MQD affects patterns of *policy development*. Drawing on political science theories of institutional change, we argue that the MQD increases the likelihood of *policy drift*. Policy drift, as explained in detail below, refers to "the transformation of a policy's outcomes due to the failure to update its rules or structures to reflect changing circumstances" (Galvin and Hacker 2020, 216).

Our contributions are threefold. First, we apply the concept of "policy drift" to analyze and interpret the MQD's effects on policy development. As political scientists have shown, the problem of policy drift has become more prevalent as congressional gridlock and other factors limit the legislative maintenance of federal public policies (see, e.g. Mettler 2016), often leaving subnational governments, administrative agencies, and lower courts to address changing circumstances and alleviate policy drift (see, e.g. Barnes 2008; Galvin and Hacker 2020). We argue that the MQD limits administrative agencies' ability to adapt in the face of drift. Importantly, the MQD threatens to curtail agency action precisely in policy domains most susceptible to drift, since the changing circumstances that induce drift are also likely to be "economically or politically significant."[1] Second, we discuss the MQD's influence in lower federal courts to show how the development of a new doctrine holds the potential to reshape policy outcomes not just through Supreme Court decisions, but also the broader federal judiciary. By creating a new "doctrine," the Court goes beyond curtailing administrative authority in specific cases and generates new expectations with consequences for litigants and lower courts (Larsen 2024).[2] Third, we add to mounting concerns about the normative implications of the MQD for democracy. We argue that the MQD shifts authority from administrative agencies (who are subject to executive branch control and public input) towards the judiciary (which is more insulated from electoral politics and public scrutiny), thereby undermining democratic accountability and transparency in the policymaking process.

The article proceeds as follows. We begin with a summary of the development of the major questions doctrine. We then explain the concept of policy drift and discuss

1 This argument builds on legal scholars' critiques that the MQD makes it harder for administrative agencies to deal with emergent problems. Our use of the concept of policy drift contributes to our understanding of this problem in two ways. First, it goes beyond an analysis of court-agency relations and invites a broader analysis of inter-branch dynamics in the policy development process, by allowing us to draw in the existing scholarship on the role of the branches in the problem of policy drift. Second, it helps us see that the problems posed by the MQD for policy development are connected to a broader phenomenon (i.e., the increasing prevalence of policy drift in recent decades) which has numerous sources.

2 As Maltzman, Spriggs, and Wahlbeck note, "The legal rules articulated in court opinions … give the Court its most powerful legal weapon" (2000, 5).

how it characterizes a major problem of governance in the contemporary United States. Next, to illustrate how the MQD facilitates policy drift, we turn to case studies of the three policy domains affected by the Court's use of the MQD during 2022–23: the application of the Clean Air Act to air pollution regulation, the application of the HEROES Act to student loan debt relief, and the application of the Occupational Health and Safety Act to workplace pandemic control. In each case, we examine the statute's history, changing circumstances that induce policy drift, attempts by administrative agencies to adapt accordingly, and the effects of the Supreme Court's application of the MQD in forestalling adaptation and enabling drift. We then discuss how the MQD will have important implications for policymaking in lower courts. Finally, we close with a discussion of the normative and theoretical implications of our analysis.

2 The Emergence of the Major Questions Doctrine

Contestation over the nature and extent of administrative authority has been persistent in U.S. politics, especially since the significant expansion of the administrative state during the New Deal (see, e.g. Grisinger 2012). In the judicial realm, debates over administrative authority have played out in cases of both constitutional and statutory interpretation. Opponents of a robust administrative state were able to forestall its emergence by winning pivotal legal disputes during the early New Deal. Notably, the Supreme Court overturned provisions of the National Industry Recovery Act as unconstitutional delegations of legislative power in two 1935 cases (*Panama Refining Co v. Ryan* and *Schechter Poultry Corp v. U.S.*), briefly establishing the nondelegation doctrine as a serious constraint on administrative power. Starting in the late 1930s, however, the Court gradually became more accepting of administrative authority and ultimately affirmed the constitutionality of the administrative state (e.g. *National Broadcasting Co v. U.S.* 1943; *Whitman v. American Trucking* 2001).

While the Court has largely accepted the constitutionality of the administrative state, opponents of federal regulation have challenged administrative authority on statutory interpretation grounds. In these disputes, courts are tasked with discerning whether relevant statutes authorize federal agencies to take a particular action. For instance, does the Clean Water Act authorize the Environmental Protection Agency to regulate isolated wetlands (*SWANCC v. Army Corps of Engineers* 2001)? Does the National Labor Relations Act authorize the National Labor Relations Board to block enforcement of mandatory arbitration clauses in employment contracts (*Epic Systems v. Lewis* 2018)? Since 1984, such questions were largely decided under a legal test set out in the Supreme Court's ruling in *Chevron v. NRDC*. In *Chevron*, the Court

scrutinized the discretion afforded the Environmental Protection Agency (EPA) in defining a "stationary source" under the Clean Air Act. To uphold EPA discretion in this case, the Court formulated a general doctrine under which courts should evaluate the behavior under administrative agencies. This doctrine, known as "*Chevron* deference," became a core component of judicial oversight and authority over administrative agency action (Wiseman and Wright 2022).

Under *Chevron* deference, courts were instructed to uphold a federal agency's interpretation of a statute if: (1) the statute did not directly speak to the issue, i.e. the statutory language is ambiguous; and (2) the agency's interpretation is "reasonable". *Chevron* deference empowered agencies to promulgate rules and regulations by protecting their authority to act in the face of ambiguous language. This protection was especially significant given the ambiguity of the many major federal statutes, which are often written with vague language to help ensure their enactment (Lovell 2003). Although the Supreme Court itself applied *Chevron* deference inconsistently (Eskridge and Baer 2008), the doctrine consistently shaped lower court decision-making in ways that bolstered administrative agencies' authority (Barnett and Walker 2017; Barnett, Boyd, and Walker 2018).

While *Chevron* deference's short-term effect was to benefit the goals of the Reagan administration, conservative elites grew increasingly skeptical of it. Partisan dispositions on specific uses of administrative authority remain conditioned by the policy domain and control of the executive branch, but since the 2010s, conservatives have generally found *Chevron* deference to be too permissive of regulatory authority and incompatible with their legal and policy commitments (Elinson and Gould 2022; Merrill 2022). As this skepticism grew, conservative jurists became more willing to challenge *Chevron* (Eskridge and Baer 2008), leading to its gradual decline in Supreme Court jurisprudence and the emergence of alternative approaches to administrative law such as the MQD. In 2024, the Supreme Court's ruling in *Loper Bright v. Raimondo* finally overturned the initial 1984 ruling and ended *Chevron* deference.

Meanwhile, ideas and considerations that would inform the MQD were bubbling in Supreme Court jurisprudence. Legal scholars have traced the doctrine's jurisprudential roots to earlier decisions and legal scholarship prior to its first formal use in 2022. The influence of Justice Breyer's scholarship is often noted as informing the development of major questions considerations (e.g. Coenen and Davis 2017; Larsen 2024). Breyer, then an administrative law scholar, wrote in a 1986 law review article that jurists may consider "whether the legal question is an important one" when reviewing agency actions and that "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" (Breyer 1986, 370).

By the 2000s, the Supreme Court began considering the significance of agency action when evaluating claims over agency discretion. In *FDA v. Brown & Williamson Tobacco* (2000), the Court concluded that "[i]t is highly unlikely that Congress would leave the determination" of an important question such as regulation or prohibition of tobacco products "to the FDA's discretion in so cryptic a fashion." This principle – that Congress would not hide such substantial authority in "cryptic" language – is often called the "elephant in the mousehole" rule. More recently, in *Utility Air Regulatory Group v. EPA* (2014), the Court said they "expect Congress to speak clearly if it wishes to assign to agency decisions of 'vast economic and political significance'." In *King v. Burwell* (2015), a dispute over whether the IRS could offer tax credits in a federal health insurance exchange under the Affordable Care Act, the Court mused that "[w]hether those credits are available on Federal Exchanges is thus a question of deep 'economic and political significance' that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly." The Court reasoned that given the importance of this question to the statute writ large, Congress would not have delegated such discretion to the IRS without an explicit statutory authorization.

Legal analysts have since marked *King* (2015) as fashioning a "major questions exemption" to *Chevron* in which the Court would not presume that delegations of authority enabling agencies to act on "major" questions would be found in "cryptic" statutory language (Coenen and Davis 2017; Monast 2016, 787–88).[3] Subsequent events evinced a growing interest in formalizing considerations of "major"-ness as an interpretive canon, including programs hosted by the Federalist Society and Justice Kavanaugh's defense of such a doctrine during his confirmation hearing (Larsen 2024, 5–7). In several cases before federal courts, the Trump administration also made bold claims under the label of a major questions doctrine that went much further than the Court's rulings in *King* and prior cases (Brunstein and Revesz 2022). Despite the newfound salience of major questions considerations, the phrase "major questions doctrine" was used just once by a federal judge before 2017 and appeared only five times in all federal court decisions before 2020 (Larsen 2024, 4).

The Supreme Court's 2021 and 2022 terms marked the emergence of a "new" major questions doctrine, articulated and applied in three cases: *West Virginia v. EPA* (2022), *NFIB v. DOL/OSHA* (2022), and *Biden v. Nebraska* (2023).[4] The new doctrine

3 Some analysts trace the origins of the doctrine to earlier cases including *MCI Communications v. American Telephone* (1994), *Brown v. Williamson Tobacco* (2000), *Whitman v. American Trucking* (2001), and *United Air Regulatory Group v. EPA* (2014) (see, e.g., Bowers 2022; Brunstein and Revesz 2022; Larsen 2024). We focus on *King* (2015) as a key origin point due to its clear articulation of principles found in the "new" major questions doctrine that emerged in 2022–23.

4 Similar principles were used in a *per curiam* opinion in *Alabama Association of Realtors vs. HHS* (2021).

directs courts to evaluate agency actions in two steps (Bowers 2022). First, courts must determine whether an agency action is of "major" national significance. In determining "major"-ness, courts may look to several factors including novelty and "economic and political significance." The Supreme Court has looked for evidence of economic significance in estimates of costs and industries affected by the action and evidence of political significance in the level of contestation surrounding the action (Deacon and Litman 2023). The Court's guidelines on how to determine "major"-ness remain unclear and incomplete, thereby leaving judges with substantial discretion.[5] Second, if courts find that an action is of major significance, they must then ask if "clear congressional authorization" to regulate in that manner exists. The Supreme Court's recent rulings have pointed to the novelty of agency actions, vague statutory language, and failed legislative attempts to grant new authority as evidence of a lack of clear congressional authorization. Administrative actions that are considered "major" but have not been specifically and explicitly authorized by Congress fail scrutiny under the major questions doctrine.

On the surface, the new MQD might be seen as merely continuing the Court's prior analysis in cases over administrative discretion and authority. However, the doctrine as articulated in the 2022–23 cases departs from previous cases in key ways. First, whereas past cases had considered "major"-ness as one of many factors when applying *Chevron* deference, the new MQD works outside the *Chevron* framework entirely, enabling courts to strike down agency action without considering whether it constitutes a reasonable interpretation of broad or ambiguous statutory language (Coenen and Davis 2017; Deacon and Litman 2023; Levin 2024; Sohoni 2022).[6] Second, even when the Court considered majorness without applying *Chevron* deference in

5 As the Congressional Research Service's report on the MQD noted, there is a "lack of clear guidance from the Court on what can be considered a 'major' question" (Bowers 2022). The majority opinions in the Court's MQD cases use a variety of measures to determine economic and/or political significance without laying out guidelines for how future courts should make such determinations. Even when Justices Kavanaugh and Gorsuch have attempted to lay out criteria for major-ness in dissenting or concurring opinions, they have provided non-exhaustive and vague lists of considerations (Sohoni 2022, 287–89).

6 For example, in *FDA v. Brown and Williamson* (2000) and *Whitman v. American Trucking* (2001), the Court considered the significance of the policy question in determining step one of *Chevron* (i.e., whether Congress had directly spoken on the issue). In conjunction with other factors, the Court considered the "elephant in a mousehole" principle to conclude that Congress had already spoken on relevant questions. In *Utility Air Regulatory Group v. EPA* (2014), the Court considered "majorness" under step two of Chevron (i.e., whether the agency interpretation was reasonable). After finding in its step-one analysis that Congress did not clearly speak on whether stationary sources of greenhouse gas emissions would need to comply with certain permitting requirements, the Court nevertheless found that the EPA rule in question was "unreasonable" because of its tremendous economic consequences (Coenen and Davis 2017).

King v. Burwell (2015), it used major questions considerations as a tool of statutory interpretation, as part of its justification for dismissing agency views in discerning the precise meaning of the statute, rather than sidestepping statutory meaning altogether (Deacon and Litman 2023, 3). In short, the MQD articulated in the 2022–23 cases is a distinct, standalone doctrine that enables the Court to "require explicit and specific congressional authorization for certain agency policies. Even broadly worded, otherwise unambiguous statutes do not appear good enough when it comes to policies the Court deems 'major'" (Deacon and Litman 2023, 2; see also Sohoni 2022). Now that the Supreme Court has "place[d] a tombstone on *Chevron* that no one can miss" (Justice Gorsuch, concurring, in *Loper Bright Enterprises v. Raimondo* 2024), the MQD is positioned to play a significant role in how federal courts approach disputes over administrative authority.

We argue that the application of the MQD in the Court's recent rulings have profound implications for policy development in the United States. We expect that the MQD will exacerbate the already-prominent phenomenon of policy drift, making it far more difficult for public policy to address rapidly changing socio-economic conditions.

3 The Problem and Prevalence of Policy Drift in the United States

Policy drift, a concept popularized by the political scientist Hacker (2004), refers to the phenomenon in which public policy remains formally unchanged but produces new outcomes as it interacts with changing external circumstances (see also Mahoney and Thelen 2009, 17). A simple example of policy drift is the minimum wage: absent a formal revision of the policy, the value of the minimum wage depreciates over time due to inflation. This depreciation undermines the goals of the original policy, since it no longer enables the same standard of living or provides workers with the same bargaining power.

Political scientists have used the concept of policy drift to describe significant transformations that occurred in various policy domains without formal policy change. One of Hacker's (2004) original examples was the development of health insurance policy. He notes that by the 1970s, 80 % of Americans were covered by private insurance plans (whose provision was subsidized by the government) that pooled risk while many others were covered by Medicare and Medicaid. During the 1980s–90s, however, a number of changes including rising healthcare costs and new forms of insurance led to a massive contraction in coverage and benefits under private programs. Although there had not been formal policy change, the impact of

the policy was fundamentally different as a result of changing conditions in the external environment. Other studies of policy drift have examined how failures to update labor law in the face of changes in the labor market and employer strategies have sharply limited protections for unionization (Galvin 2019; Snead 2023), how growth in the size of the workforce without commensurate increases in enforcement capacity has undermined worker protections in the Fair Labor Standards Act (Galvin 2016), how changes in the form of government-subsidized private retirement savings plans have undermined the extent of retirement security that these plans provide (Hacker 2005), how changing market dynamics enabled the ballooning of Medicare Advantage enrollments not anticipated in the program's original design (Kelly 2016), and how rapid increases in property values enabled municipal governments in California to use tax increment financing districts initially designed for blighted-area redevelopment as ersatz general funds (Marantz 2018).

Policy drift has become a prevalent phenomenon in U.S. politics for three reasons. First, the decline in legislative productivity means that Congress updates statutes less often. Partisan polarization and divided government in Congress have made it more difficult for coalitions to pass new policies that tackle important problems or amend existing statutes to make them better suited to address changing circumstances (see, e.g. Lee 2015, 2016; Warburton 2024). Indeed, many major federal policies, such as the National Labor Relations Act or the Higher Education Act, have not been updated by Congress in the 21st century (Mettler 2016). In this respect, contemporary Congresses stand in stark contrast to those of the mid-20th century: dominant coalitions in the 1930s–60s enacted and updated New Deal and Great Society programs, divided government in the 1970s oversaw the enactment of major statutes such as the Clean Air and Water Acts and the Occupational Health and Safety Act, and statutes such as the Voting Rights Act and environmental protection laws were consistently amended and reauthorized during the 1970s–1990s. Recent stagnation in Congress' legislative productivity, however, has placed many of these statutes on the path of policy drift.

Second, and relatedly, the numerous veto points in the U.S. policy process make legislative updating of policies difficult. Veto points refer to the stages in the policymaking process where a distinct actor can block the adoption of new policies. The separation of powers in the federal legislative process means that three sets of separately-elected actors (the president, the House, and the Senate) can each block action. Features of congressional design, such as the committee system, increase the number of actors in each chamber who can slow down the process as well. The now-ubiquitous use of filibuster threats has increased the threshold at which legislative action can proceed in the Senate (Koger 2010; Wawro and Schickler 2006). For actors seeking policy change, these veto points make it difficult "to mobilize the resources and assemble a coalition" needed to amend or replace legislation (Mahoney and

Thelen 2009, 19; see also Krehbiel 1998). These veto points can stymie actors who seek to repeal existing policies, but they also facilitate policy drift by preventing legislative action to adapt existing policies to changing circumstances.

Third, the dynamism of contemporary society regularly raises new challenges for all governments. Rapid technological and environmental change has transformed the structure of markets and labor arrangements in industries ranging from telecommunications to transportation. The effects of climate change and the COVID-19 pandemic, for example, have introduced massive disruptions in public health and the global economy. Challenges of this scope and magnitude often warrant coordinated and sustained government intervention into complex and fast-changing problems. The Supreme Court recognized this condition as necessitating nimble administrative authority in a 1989 case, writing that "in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives" (*Mistretta v. United States*).

This article builds on prior scholarship's identification of the factors that facilitate policy drift. Early analyses focused on legislative (in)action as the key determinant of policy drift. More recently, scholars have become increasingly attuned to the role of other political institutions in facilitating or alleviating policy drift, including courts, subnational governments, and administrative agencies (Barnes 2008; Galvin and Hacker 2020; Hackett 2023; Snead 2023). Most pertinently for our analysis, Snead (2023) shows how the Supreme Court can facilitate policy drift by foreclosing policy adaptation in venues outside Congress, such as subnational governments or administrative agencies. We build on this work and show how the design and application of judicial doctrines can play a key role in facilitating drift across policy areas.

Specifically, we argue that the emergence of the MQD will further exacerbate the prevalence of policy drift in the United States. The MQD increases the difficulty of pursuing administrative agency action as an antidote to policy drift. Importantly, the MQD is likely to enable Court intervention *specifically* in statutes undergoing drift. As our case studies will show, the very presence of significantly changing circumstances can be used to classify an agency action responding to those circumstances as "major" under the doctrine.

With the legislative process in a state of gridlock and agency discretion constrained, federal policymaking authority will continue to flow through the judiciary and the Supreme Court in particular. Scholars have already documented how congressional overrides of Supreme Court cases have trickled to a halt in the 21st century (Hasen 2019). This decline not only illustrates how the Court has gained power at the expense of Congress, but also has implications for the relationship between the judicial branch and administrative state. In a context of congressional

paralysis, there is minimal recourse for administrative agencies when the Supreme Court nullifies their promulgated rules and regulations. In contrast to past eras when Congress would respond to Court decisions by explicitly granting federal agencies with authority or discretion (Eskridge 1991), it is unlikely that coalitions can corral the requisite supermajority to overrule Court determinations regarding administrative authority and "major questions."

We note that the MQD is not the *only* way that the Court can induce policy drift. Indeed, the history of the Supreme Court is replete with examples of the Justices restricting agency efforts to adapt to changing circumstances. For example, studies by Snead (2023, 2024) have shown how the Court has used statutory interpretation to narrow the application of the Voting Rights Act and the National Labor Relations Act, preventing administrative agencies and other actors from pursuing policy adaptation in the domains of voting rights and labor law. In a road not taken, some jurists have periodically and unsuccessfully attempted to articulate a strong version of a "nondelegation doctrine" that would curtail administrative authority across policy domains under the reasoning that it constitutes unconstitutional delegation of legislative powers (Kelley 2016; Seidenfeld and Rossi 2000; Tortorice 2019).

The major questions doctrine represents a new general principle that can exacerbate policy drift across the whole scope of the administrative state. It organizes the Court's efforts to limit administrative authority, invites litigation to that end, and signals to lower courts that they should be skeptical of agencies' attempts at adaptation to changing circumstances.

In the next section, we turn to three case studies of policy domains where the MQD was recently applied by the Supreme Court. In each case study, we show how the changing circumstances induced policy drift, how agency action attempted to stem this drift by updating policies, and how the Court's application of the MQD facilitates further drift.

4 Case Study 1: The Clean Air Act and Greenhouse Gas Emissions

4.1 Clean Air Act: Policy History and Changing Circumstances

The Clean Air Act as we know it today was enacted in 1970, with unanimous support in the Senate and only one "nay" vote in the House.[7] The Act created a complex

7 The Clean Air Act was initially enacted in 1963, but the 1970 amendments enacted much of the statute's significant provisions.

regulatory scheme that requires federal and state governments to reduce the emission of air pollutants through active regulation. The cornerstones of the Act's regulatory scheme are the National Ambient Air Quality Standards (NAAQS) set by the EPA and the State Implementation Plans (SIPs) through which state governments enforce those standards.[8] The Act was amended by bipartisan majorities in 1977 and 1990 to include provisions designed to prevent the significant deterioration of air quality in areas meeting NAAQS, expand the use of the "best available control technology" standard to address new sources of pollution, and curb the prevalence of acid rain and urban air pollution (Waxman 1991).

In some ways, the Clean Air Act has been remarkably successful: the levels of certain pollutants such as carbon monoxide emissions and lead in gasoline have declined dramatically (Aldy et al. 2022; Sansevero 1996). The Act has avoided legislative repeal or retrenchment, and public opinion polls suggest strong support for environmental protection even at the cost of economic growth (Saad 2019).

Despite its reduction of some pollutants, the changing circumstances of air pollution have presented new challenges to the Act's efficacy in meeting its broader goals. Global climate change, driven by the emission of carbon dioxide and other greenhouse gases, has emerged as the greatest and most urgent environmental threat facing the planet. As shown in Figure 1, global carbon emissions have been rapidly accelerating since the mid-20th century. The widespread consequences of these

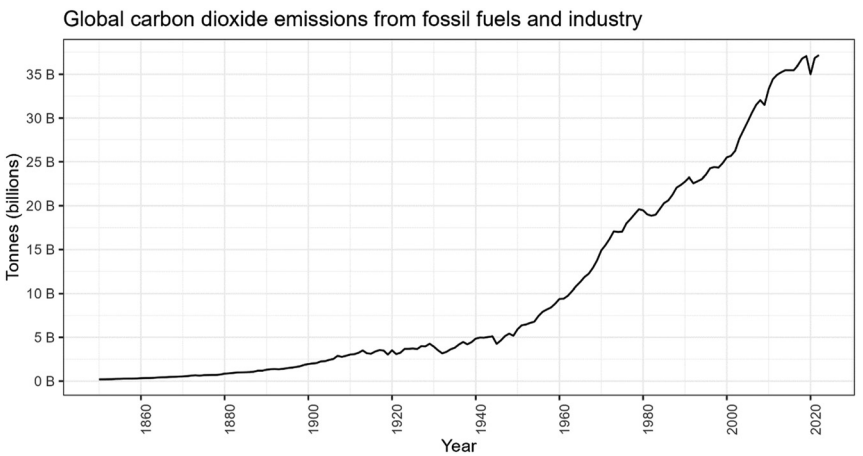

Figure 1: Global carbon emissions. Source: Ritchie, Roser, and Rosado (2020).

8 The EPA reviews state plans and is authorized to issue a federal implementation plan if state plans are non-compliant.

emissions pose urgent challenges to governments around the world. In the United States, despite repeated efforts by environmentalists and allied legislators, Congress has been slow to respond with new legislation on the issue. Scientific research positing a link between human behavior and global climate change first received attention in the early 20th century (Applegate 2013), but comprehensive regulatory action was not seriously considered until the late 1980s. A 1988 NASA report linked CO_2 levels to deleterious environmental change and President George H.W. Bush initially showed enthusiasm for the U.S. to be a global leader in addressing CO_2 emissions before adopting a more *laissez-faire* approach. During debate over the 1990 Clean Air Act Amendments, environmentalists advocated for Congress to include provisions explicitly allowing EPA regulation of greenhouse gas emissions from motor vehicles, which at the time accounted for one-third of the greenhouse gas emissions in the atmosphere.[9] This proposal ultimately failed following opposition from the auto industry and the Bush administration.[10] In the 1990s, sustained opposition from industry groups and most Republicans precluded domestic reforms on climate change, leading President Clinton to pursue international action instead (Turner and Isenberg 2018). As the political parties continued to polarize on environmental issues in the 2000s, even market-friendly cap-and-trade bills failed to gain much traction (Karol 2019).

As the climate crisis worsened, legislative inaction continued to push the Clean Air Act towards a state of policy drift. To combat the growing crisis, environmentalists turned to administrative agencies and federal courts, arguing that the Clean Air Act requires federal regulation of greenhouse gas emissions as a harmful pollutant (see, e.g. amicus brief of climate scientists in *Massachusetts v. EPA* 2007). Out of the available statutory tools, the Clean Air Act was and remains the most well-equipped to address greenhouse gas emissions. The statute was designed to curtail air pollutants, it includes provisions for regulators to revise air quality standards, and its basic regulatory scheme has proven successful in reducing other harmful and toxic emissions. Given the ongoing congressional gridlock, administrative agencies and courts have been left to determine whether and how the Clean Air Act applies to greenhouse gases. Despite affirming the Act's applicability to greenhouse gases in *Massachusetts v. EPA* (2007), the Supreme Court's decision in *West Virginia v. EPA* (2022) used the major questions doctrine to limit the capacity of the EPA to adapt policy implementation to meet changing circumstances.

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9 *Provisions of HR 3030, the Clean Air Act Amendments of 1989, That Fall Within The Jurisdiction of the Committee on Public Works and Transportation*, House Committee on Public Works and Transportation, 101th Cong., 214 (1990).

10 *Clean Air Act Amendments (Part 3)*, House Committee on Energy and Commerce, 101th Cong., 789, 802 (1989); *Clean Air Act Amendments of 1989, Part 4*, Senate Committee on Environment and Public Works, 101th Cong., 531 (1989).

4.2 Clean Air Act: MQD and Policy Drift

As climate change became a more salient issue in U.S. politics, environmentalists pushed for the application of the Clean Air Act to greenhouse gas emissions, arguing that the statute was written to account for evolving understandings of "pollutants" and that lawmakers were thinking of climate change when drafting the bill and its amendments (Kintisch 2011). Opponents of such regulation responded by arguing that Congress regularly debates climate change bills and has yet to explicitly authorize the EPA to address greenhouse gases (see, e.g. Cato Institute brief in *Massachusetts v. EPA*).

The Court first tackled the question of whether the Clean Air Act's regulatory scheme can be applied to greenhouse gas emissions in *Massachusetts v. EPA* (2007), which ruled that greenhouse gases were air pollutants and that states could sue the EPA to regulate them. This decision illustrated the potential of Court decisions to help *alleviate* policy drift (or in other words, facilitate policy adaptation) and was viewed contemporaneously as a transformative victory for the environmental movement (Lazarus 2020). Rather than definitively settle the question, however, the ruling raised additional legal questions as the EPA promulgated new regulations on greenhouse gas emissions. The most ambitious of these regulations was the Clean Power Plan (CPP), announced in 2015 under Section 111 of the Clean Air Act. Under the CPP, states would be assigned emissions-reductions targets with the goal of moving U.S. energy sources from coal-fired plants towards gas-fired, renewable, or possibly even nuclear energy. The plan sought a 32 % reduction in greenhouse gas emissions from power plants from 2005 levels by 2030, and went beyond previous regulations by mandating power plants replace their entire electricity systems rather than merely add some additional technology (e.g. scrubbers) to reduce their hazardous emissions (Davenport 2016; EPA 2015).

Upon announcement of the plan, its opponents – including fossil fuel industry leaders and Republican politicians such as House Energy and Commerce Committee Chair Fred Upton – mobilized across different venues to counteract it. Relying heavily on Republican support, Congress passed a resolution nullifying the CPP that was vetoed by President Obama (Regan 2015). Subsequent congressional attempts to limit EPA authority or reverse the CPP in 2016 also failed.[11] Concurrently, opponents pursued judicial action: a coalition of over 20 states joined with energy companies to challenge the CPP in court, with 34 Senators and 171 members of the House filing an

11 For example, in 2016, the House passed H.R. 4768, "The Separation of Powers Restoration Act", to strengthen judicial authority to review agency decision making. In justifying the need for such legislation, supporters cited instances of environmental "overreach", including the Clean Power Plan. The bill did not receive a vote in the Senate.

amicus brief in support (Tsang 2017). These judicial efforts initially appeared ineffective: then-D.C Circuit Court Judge Brett Kavanaugh wrote an opinion dismissing a petition to stay the enactment of the CPP on procedural grounds (*Murray Energy v. EPA* 2019). Meanwhile, "legal experts from both sides" expected the CPP to stand on the merits as a "novel and even audacious legal interpretation of the 1970 Clean Air Act" (Davenport 2015). Opponents nevertheless appealed to the Supreme Court, arguing that the CPP could cause irreparable harm to utilities and industry, and that the Court should halt its implementation if there was a chance it would be struck on the merits in the future. The Court, in a 5-4 vote, ruled with CPP opponents, staying the implementation of the plan (Biesecker and Hananel 2016).

In 2022, the Court examined the legality of the Clean Power Plan on its merits in the case *West Virginia v. EPA*. The Court concluded that the EPA lacked the authority under the Clean Air Act to enact the regulation. In arriving at this conclusion, the majority opinion explicitly applied the MQD as the basis for its reasoning and offered its most comprehensive articulation of the doctrine to date. The Court found that the plan was clearly an action of major significance as it would require "billions of dollars in compliance costs" and would empower the EPA to "substantially restructure the American energy market." Having found the CPP to be of major economic significance, the Court then examined whether Congress had clearly and explicitly authorized the EPA to promulgate such a plan. It concluded that it is "highly unlikely that Congress would leave to 'agency discretion' the decision of how much coal-based generation there should be over the coming decades" and that the proposed regulation was an attempt to exert "unprecedented power" over industry. The Clean Power Plan therefore ran afoul of MQD considerations: the regulatory action was of major significance but was not specifically and explicitly authorized by Congress. The Court's admission that capping CO_2 emissions might be a sensible solution to the "crisis of the day" alluded to the ruling's significant implications for contemporary environmental challenges.

Beyond blocking the implementation of the CPP in the future, the *West Virginia* decision's use of the MQD also undermines the EPA's authority to address climate change more generally. As environmental law and policy scholar James Monast argued, "The more complex the issue, the more flexibilities federal agencies need. And if the Supreme Court is going to force Congress to make very specific choices about how to address complex, rapidly changing issues, it's going to limit our ability to effectively address those issues" (Castro-Root 2022; see also Monast 2016). The need for administrative flexibility is partly the result of congressional inaction, as a Senate floor speech criticizing the ruling by Jeff Merkley's (D-OR) underscored. Merkley argued that a "functioning" Senate would be able to respond to the ruling but that the "secret, silent filibuster" has blocked its ability to do so.[12]

12 See *Congressional Record,* July 20, 2022.

The above statements illustrate how the MQD facilitates drift in the domain of air pollution policy. After decades of congressional inaction, environmentalists successfully mobilized to lobby the executive branch to pursue regulation of greenhouse gas emissions, drawing on the broad authorization granted to the EPA to address air pollutants. Politicians and subject matter experts alike recognized the necessity of administrative flexibility to address the climate crisis, especially given the difficulty of legislative action in a veto-ridded environment. The Court's ruling in *West Virginia* not only forecloses adoption of the specific regulation in dispute, but it also limits the capacity of future administrations to use the regulatory authority of the EPA in flexible ways to address the problem of greenhouse gas emissions – or other air pollutants that may become prevalent in the future.

The congressional response to *West Virginia* helps illustrate our broader point about the MQD's effects. In 2022, Congress narrowly adopted the Inflation Reduction Act (IRA), which includes a provision allowing the EPA to define several greenhouse gases as pollutants subject to regulation. While this provision bolsters EPA authority to address climate change, important limitations placed on the EPA by the Court remain, in at least two ways. First, the IRA does not give the EPA explicit authority to regulate power plants or to mandate "generation-shifting" regulations (Parenteau 2022). Second, while the IRA updates the Clean Air Act by specifying certain substances as pollutants, the EPA still does not have the authority to adapt to future changing circumstances by recognizing other substances as pollutants. Put differently, the EPA will require further congressional authorization to tackle any unexpected future changes that give rise to new kinds of pollutants. Furthermore, the passage of the IRA itself illustrates the challenges of policy adaptation in the legislative domain. The IRA passed with narrow margins (220-207 in the House and 51-50 in the Senate) and relied on the budget reconciliation process to avoid the Senate's cloture threshold. The budget reconciliation process requires that bills are limited to issues of spending, revenue, and the debt limit, leaving it as an ineffective vehicle to set broad, national regulatory policy. With continued legislative gridlock and the emergence of the MQD, we should expect public policy efforts to combat climate change in the U.S. to remain limited.

5 Case Study 2: The HEROES Act and Student Loan Debt

5.1 HEROES Act: Policy History and Changing Circumstances

The Higher Education Relief Opportunities for Students (HEROES) Act was enacted in 2002 to empower the Department of Education to provide relief from burdens posed

by student loan debt to those suffering from war, disaster, or other emergencies. Introduced against the backdrop of the "War on Terror", the bill quickly passed through Congress with unanimous consent in both chambers. Initially set to expire in September 2003, Congress passed extensions of the law in 2003 and 2005 and made the provisions permanent in 2007. The extensions passed unanimously or near-unanimously in each instance.[13] As amended, the statute allows the Secretary of Education to "waive or modify" federal student loan requirements for three categories of affected individuals: those serving on active duty during a war or military operation or national emergency, those residing in a disaster area connected with a national emergency, or those suffering direct economic hardship as a result of a war or military operation or national emergency (Granovskiy and Hegji 2019). Since 2003, the Secretary of Education has issued waivers and modifications several times to amend loan deferrals, periods of loan forbearance, and the overpayment of grant funds for affected individuals (Office of Legal Counsel 2022).

The nature of threats and emergencies facing the United States have shifted since the 2000s. The HEROES Act was initially passed and reauthorized amid heightened military mobilization during the wars in Afghanistan and Iraq. In the early 2020s, the United States faced a national emergency caused by the global COVID-19 pandemic, which wrought widespread health, social, and economic hardships. Between February 2020 and August 2023, over 1.1 million Americans died from COVID and over 6.2 million were hospitalized (CDC 2020). Economists estimated that the total financial burden of the COVID pandemic at the end of 2023 was $14 trillion (Hlávka and Rose 2023). Public officials recognized the pandemic as a national emergency by early 2020: the federal government declared COVID-19 to be a public health emergency on January 31, 2020, and renewed this declaration several times through February 9, 2023 (HHS ASPR, n.d.).

In relation to the domain of student loans, the health and economic hardships of the pandemic are layered atop a burgeoning debt burden that has grown exponentially since the HEROES Act was initially passed in 2003. Since 2006, the total value of outstanding student loan debt has skyrocketed from roughly $480 billion to over $1.7 trillion (Federal Reserve Board 2024). According to the Survey of Consumer Finances, the mean inflation-adjusted value of student loan debt held by an American family increased from $10,940 in 1989 to $40,550 in 2019 (see Figure 2). During this time, total student loan debt has surpassed the volume of both total credit card and auto loan debt.

As the Department of Education examined the burdens posed by substantial student loan debt and the economic hardships wrought by the pandemic, it turned towards student debt pauses and forgiveness as appropriate polices during both the

13 See legislative histories for P.L. 107–122, P.L. 107–76, P.L. 109–78, and P.L. 110–93.

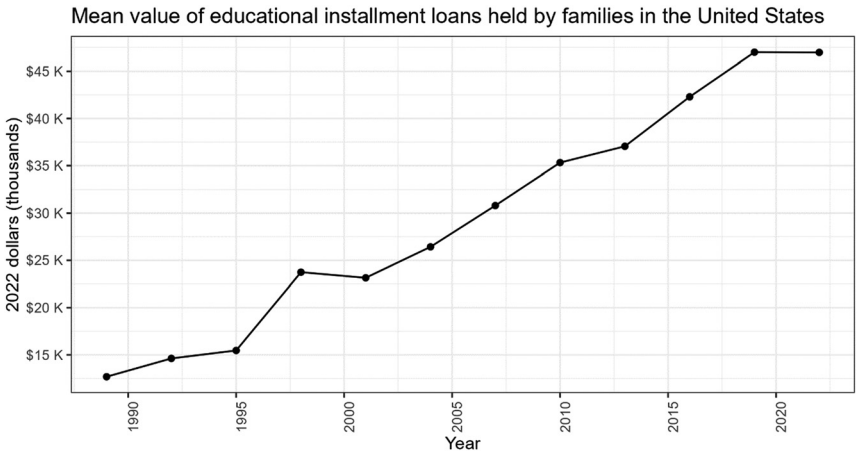

Figure 2: Mean value of education installment loan held by American families, 1989–2019. Source: Survey of Consumer Finances (Federal Reserve Board 2023).

Trump and Biden administrations. In March 2020, Congress enacted a pause on loan repayments and interests until September 30, 2020, as a provision in the CARES Act, an omnibus pandemic relief statute. The Trump administration then used the authority provided by the HEROES Act to extend the pause twice. The Biden administration continued extending the pause several more times through September 2023. In justifying the pause of student loan debt collection, then-Secretary of Education Betsy DeVos said in December 2020, "The coronavirus pandemic has presented challenges for many students and borrowers, and this temporary pause in payments will help those who have been impacted" (Department of Education 2020). In 2022, DeVos' successor in the Biden administration, Miguel Cardona, articulated a similar rationale for the pause: "This additional extension will allow borrowers to gain more financial security as the economy continues to improve and the nation continues to recover from the COVID 19 pandemic" (Department of Education 2022).

With the moratorium on loan repayments set to end, the Department of Education sought other means to alleviate the burden placed upon those holding student debts. To relieve such burdens, the Biden administration announced a new plan in October 2022 to cancel up to $10,000 of debt for most borrowers and $20,000 for Pell Grant recipients, citing its authority under the HEROES Act. Although President Biden's remarks announcing the plan acknowledged the general burden of student loan debt and sustained campaigns for debt relief (Biden 2022), the Department of Education rooted its legal authority for the debt relief plan in the state of emergency brought by the COVID-19 pandemic: the Department's legal counsel stated that the

HEROES Act "grants the Secretary authority that could be used to effectuate a program of targeted loan cancellation directed at addressing the harms of the COVID-19 pandemic" (Brown 2022).

5.2 HEROES Act: MQD and Policy Drift

The Biden administration's debt relief plan was immediately challenged in federal court, with Justice Amy Coney Barrett rejecting two emergency pleas to halt the plan within weeks of its enactment. In December 2022, however, the Court granted cert to two cases challenging the validity of the debt relief program, issuing their decisions in June 2023. In *Biden v. Nebraska* (2023), a 6-3 majority applied the major questions doctrine to rule that the plan was invalid. In assessing the "major"-ness of the plan, the Court noted both its economic significance (it would "release 43 million borrowers from their obligation to pay $430 billion in student loans") and its novelty (the "Secretary has never previously claimed powers of this magnitude under the HEROES Act"). Because the debt forgiveness plan was determined to be of major significance, the Court also examined whether Congress had explicitly authorized such actions under the HEROES Act. Finding no clear authorization, the Court reasoned that it was "'highly unlikely that Congress' authorized such a sweeping loan cancellation program 'through such a subtle device as permission to modify.'"

The Supreme Court's use of the MQD severely undercuts the flexibility of the HEROES Act to address economic hardship resulting from the COVID-19 pandemic or other potential national emergencies, setting the statute along a path of policy drift. The inherent traits of emergencies render the applications of the statute susceptible to skepticism under the MQD. Emergencies are by their nature frequently unexpected, unprecedented, and difficult to anticipate. New emergencies are likely to create the context for novel hardships and consequently novel administrative remedies. Especially as polarization and veto points make quick legislative responses to emergencies from Congress more difficult, the Court's application of the MQD undermines the possibility of applying the HEROES Act during future national emergencies.[14]

14 Consider, for example, the initial pauses on student loan repayments. Early on during the COVID-19 pandemic, Congress was able to overcome veto points and pass the CARES Act with various emergency-related provisions including a student loan pause. Future attempts to pass COVID relief legislation, however, quickly encountered challenges rooted in polarization and veto points, despite the ongoing severity of the pandemic. From late 2020 through 2023, the Trump and Biden administrations relied on the HEROES Act to extend the pause, which certainly marked an economically significant and novel use of the statute's regulatory authority. The MQD, as applied in *Biden v.*

In addition to limiting applications of the HEROES Act that adapt to changing circumstances, the Supreme Court's ruling further limits the federal government's ability to effectively respond to the underlying student debt crisis. Even as debt burdens have grown exponentially, congressional gridlock has stymied efforts to respond to the crisis: both proponents and opponents of debt relief have failed to advance bills past veto points.[15] The scale of the student debt crisis means that future economic disruptions are likely to generate more hardships for borrowers. As the series of repayment pauses declared during the pandemic showed, the executive branch is left as the institution best situated to adapt available policy tools to address such hardships. The Court's decision in *Biden v. Nebraska*, however, curtails such possible adaption by freezing the HEROES Act in time, allowing only minor modifications to loan payments that reflect the type and scale of the emergencies faced during the early 2000s. Indeed, while the Biden administration has taken subsequent measures to alleviate the debt burden of many borrowers, these efforts have come in piecemeal form via minor tweaks to existing programs (Kanno-Youngs 2024). Although these steps have provided relief for thousands of borrowers, they are of much smaller scale than the broad plan struck down by the Court.

Compared to the case of the Clean Power Plan, the extent to which the Department of Education's debt relief plan represented an adaptation of the HEROES Act's goals may be more contentions. Detractors of the plan argued that it was undertaken not because of the pandemic-related emergency, but rather as a means to satisfy the president's campaign promise for debt relief (see, e.g. brief of Marsha Blackburn and other Senators in *Biden v. Nebraska*). Even if one does not accept the administration's stated rationale for the connection between the plan and the goals of the HEROES Act, however, the Court's ruling has implications for policy drift. As discussed above, the use of the MQD in this case potentially forecloses future applications of the HEROES Act that may be more self-evidently connected to the Act's original goals. For those concerned about the regulatory action's connection to the original statute in this case, the second stage of *Chevron* deference would have offered a sufficient tool for judicial review. The use of the MQD to strike down the plan, as opposed to *Chevron*, has more far-reaching consequences for possible future uses of the HEROES Act or the use of other legislation to respond to the ongoing student debt crisis. Indeed, in 2024, two lower courts cited *Biden v. Nebraska*'s finding that student debt relief was a

Nebraska, could plausibly have been used to block the administrative actions used by the Trump and Biden administrations to pause student loan repayments.

15 For examples of proponents' bills, see 116 H.R. 3887, 116 S. 2235, 115 S. 3320, 115 H.R. 108, 115 S. 1521, 117 H.R. 4797. For an example of an opponent's bill, see 117 S. 4253.

"major question" in their decisions invalidating a different and narrower debt relief plan promulgated under a different statute (the Higher Education Act).[16]

6 Case Study 3: The Occupational Safety and Health Act and Covid-19 Vaccine Mandates

6.1 OSH Act: Policy History and Changing Circumstances

Like the Clean Air Act and the HEROES Act, the Occupational Safety and Health (OSH) Act of 1970 was enacted by large bipartisan majorities. The bill was a response to dangerous working conditions: at the time of the bill's passage, 14,000 workers were dying of traumatic injury each year. Numerous workers suffered drastic, immediate injury and many more saw their health gradually deteriorate as the result of extended time in unsafe conditions (Morris 2015). These conditions had led to significant mobilization among rank-and-file labor union members in the 1960s (Donnelly 1982), sparking the Johnson administration to propose a workplace safety bill in 1967. The OSH Act that eventually passed in 1970 was a compromise between initial labor-supported proposals advanced by liberal Democrats and more limited proposals advanced by the Nixon administration (MacLaury 1981).

The OSH Act imposed a general duty on employers to "provide workplaces that are free of potentially harmful hazards" and authorized the promulgation of both industry-specific and general workplace safety standards. The statute created the Occupational Safety and Health Administration (OSHA) to issue and enforce workplace standards, and authorized it to inspect workplaces without advance notice (Congressional Research Service 2015). The Act also authorizes OSHA to issue "emergency temporary standards" without the public comment and hearings required in the normal rulemaking process, if the agency determines that employees are experiencing or at risk of exposure to grave danger. These standards can last up to six months, after which the agency must pursue permanent standards through the normal rulemaking process (Szymendera 2022).

Since its passage, the Act has produced mixed results (Noble 1986; Rosner and Markowitz 2020). There is evidence that OSHA inspections and citations reduce worker injury rates (Foley et al. 2012; Haviland et al. 2012; Levine, Toffel, and Johnson 2012), but the agency's inspection and rulemaking activity has been inconsistent. After initial robust enforcement during the Carter administration, federal officials have been slow to promulgate workplace safety rules, pro-business majorities in

16 See Memorandum and Order (Document #76, 2024), *State of Alaska v. U.S. Department of Education*, U.S. District Court for the State of Kansas and Memorandum and Order (Document #35, 2024), *State of Missouri v. Biden*, U.S. District Court for the Eastern District of Missouri.

Congress have repealed agency actions, the federal judiciary has stifled robust regulations, and Republican administrations have limited the agency's activity (Morris 2015; Rosner and Markowitz 2020; Witko 2013). Despite these challenges, the agency has periodically promulgated standards on various aspects of workplace health and safety including noise levels, exit routes, hazardous materials, sanitation, first aid, and machinery risks (OSHA, n.d.).

The COVID-19 pandemic introduced various challenges for workplace health and safety, especially after the end of initial stay-at-home orders that had functionally closed workplaces in many industries. By April 2020, elected officials were actively discussing using OSHA's regulatory authority to address the workplace hazards introduced by the pandemic. Senator Elizabeth Warren (D-MA) called on Congress to direct the Occupational Safety and Health Administration to issue a new spate of rules to ensure workplaces were sufficiently protected from viral transmission (Warren 2020), and then-candidate Biden appeared to back similar measures (Biden 2020). During the Trump administration, OSHA issued some voluntary guidelines on social distancing and masking (Swanson and Yaffe-Bellany 2020).

Upon taking office, the Biden administration directed OSHA to take stronger regulatory measures to address viral transmission. In June 2021, the agency issued emergency temporary standards that required health care employers to create COVID-19 plans. In November 2021, the agency issued new emergency temporary standards applying to all large employers that required policies for employees to be vaccinated against COVID-19 or show proof of weekly negative tests for the disease (Szymendera 2022). In response to these rules, Senate Republicans and a few moderate Democrats passed a joint resolution disapproving of the OSHA rules (by a vote of 52-48), but the resolution lay dormant in the House.[17] Opponents of the OSHA measures also advanced challenges through litigation, eventually leading to Supreme Court review of the regulations.

6.2 OSH Act: MQD and Policy Drift

Challenges to OSHA's "test or vaccine" mandate moved quickly through the federal courts. The Fifth Circuit Court of Appeals issued a nationwide stay of the standard in November 2021, but the Sixth Circuit nullified the stay a month later. Shortly thereafter, the Supreme Court accepted emergency applications to rule on the standard and issued a *per curiam* order on January 13, 2022, in *NFIB v. DOL/OSHA*.[18]

17 See actions taken on 117 S.J.R. 29.

18 Concurrently, in *Biden v. Missouri*, the Court upheld a Department of Health and Human Services regulation that imposed a similar vaccine mandate on staff at healthcare facilities receiving Medicare or Medicaid funds, drawing on authority from the 1965 statute that created these two programs.

Although the order did not explicitly mention the term "major questions doctrine," its reasoning followed the contours of the doctrine as it would be articulated in *West Virginia* a few months later. The order begins with an analysis aligning with the first prong of the MQD, emphasizing the economic significance of the agency action ("The mandate … applies to roughly 84 million workers, covering virtually all employers with at least 100 employees") and its novelty ("OSHA has never before imposed such a mandate. Nor has Congress"). The Court then noted the need for "Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance", referencing the second prong of the MQD.

Justice Gorsuch's concurrence, joined by Justices Thomas and Alito, went further by explicitly applying the MQD to the issue at hand. The concurrence stated that "'We expect Congress to speak clearly' if it wishes to assign to an executive agency decisions of 'vast economic and political significance'." It viewed the OSHA rule as a matter of "vast" significance given its scope as the rule would affect 84 million employees. To support the conclusion that Congress had not explicitly delegated such authority to OSHA, Justice Gorsuch noted how several COVID-19 pandemic-related bills had been passed by Congress, none of which included mandates like those promulgated by OSHA.

The Court's application of MQD considerations to OSHA rulemaking further illustrates the potential of the MQD to facilitate policy drift. In this instance, OSHA was enacted in 1970 with a broad purpose to ensure workplace safety. At that time, major threats to American workers included asbestos, traumatic injuries in mines, factories, and construction sites, and musculoskeletal injuries more broadly. By 2020, however, the most urgent workplace hazard in the United States was the viral transmission of COVID-19. In both 2021 and 2022, COVID-19 was the third leading cause of death in the United States behind only heart disease and cancer (Xu et al. 2022). The use of MQD considerations to curtail robust OSHA action not only affected the federal response to the pandemic, but also portends future hurdles for the OSH Act's implementation. As workplace threats gradually shift over time or are subject to exogenous shocks wrought by pandemics or other large-scale emergencies, the application of the MQD is likely to sharply limit OSHA's capacity to pursue its mission of protecting the health and safety of U.S. workers against evolving workplace hazards.

Of course, as noted by the Court in *NFIB v. DOL/OSHA* (2022), Congress could enact new legislation to enhance worker safety. However, given the ongoing polarization and gridlock in Congress along with a nearly two-decade hiatus in transformative regulatory legislation, this seems unlikely. As such, proponents of worker safety have no choice but to turn to alternate venues such as subnational policymaking and administrative action. Indeed, political observers have noted the importance of response to the pandemic as an issue in the 2020 election, indicating

that voters supported President Biden's candidacy, to some extent, as a way to strengthen the federal pandemic response (Miller, Woods, and Kalmbach 2022). By blocking such a response in the domain of workplace health and safety, however, the Court used the MQD to induce policy drift.

7 Effects in Lower Courts

A crucial aspect of Supreme Court authority springs from its position atop the federal judicial hierarchy. This position not only gives the Supreme Court the final word on legal questions, but also allows it to fashion precedent that shapes lower court decisionmaking (see, e.g. Segal, Spaeth, and Benesh 2005; Songer, Segal, and Cameron 1994; Westerland et al. 2010). The rules, frameworks, or doctrines that the Court produces help organize and structure lower court adoption of the Supreme Court's precedents (Larsen 2024, 46–49). The emergence of the MQD may mark an even more significant jurisprudential shift in the lower courts compared to the Supreme Court, as the lower courts had continued to frequently apply *Chevron* deference in the 2010s even as the Supreme Court informally abandoned the principle (Barnett and Walker 2017). Now that the Supreme Court has formally overturned *Chevron* deference, the MQD is poised to fill the vacuum in lower court cases involving disputes over agency actions.

The major questions doctrine will both *empower* and *constrain* lower federal courts. As argued above, a central feature of the MQD is that it *empowers* courts to more stringently review agency actions (especially compared to *Chevron* deference), thereby shifting policymaking authority from the bureaucracy to the judiciary.[19] The embrace of the new MQD may be especially pronounced among the wave of conservative jurists appointed to federal courts during the Trump administration who appear eager to weaken the administrative state (Hollis-Brusky and Parry 2021; Sobkowski 2023). In relation to the Supreme Court, however, lower court judges will be *constrained* in future administrative law cases: precedent may drive judges to apply the MQD even if they would have otherwise preferred deference to agency authority. This constraint will likely remain powerful as long as the Justices that articulated and applied the new MQD retain control of the Supreme Court (Westerland et al. 2010).

To see how the Supreme Court's adoption of a new doctrine reverberates through the lower courts, we can examine references to the MQD in federal court

19 Relatedly, the vague and incomplete criteria for "major"-ness in the Supreme Court's decisions, as noted above, leaves federal judges with a great deal of discretion in when and how to apply the MQD (see, e.g., Sohoni 2022; Sobkowski 2023).

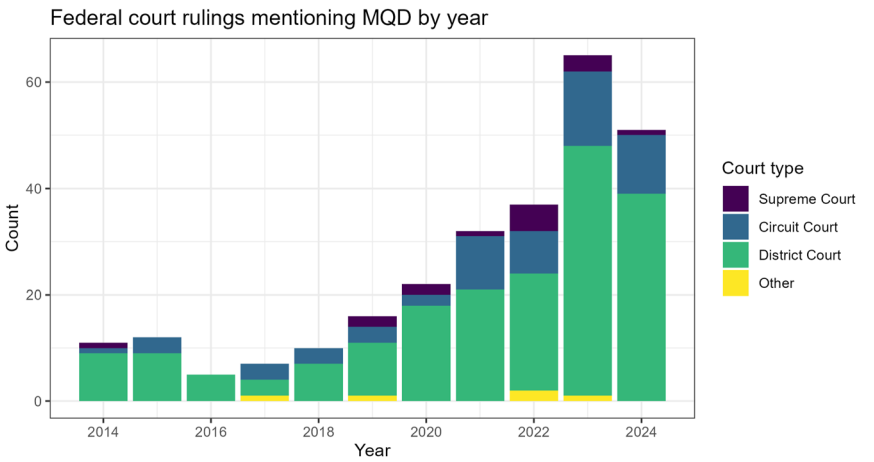

Figure 3: Source: Results from Nexus Uni "Legal" Database for search terms "major questions" and "vast economic and political significance" covering January 1, 2014 to July 31, 2024.

proceedings. Figure 3 shows the number federal court cases in which judges have included the phrases "major questions" or "vast economic and political significance" from January 2014 through July 2024.[20] These terms appeared increasingly often in circuit and district court rulings in the early 2020s.[21] Following the Supreme Court's articulation of a new MQD in 2022, there was a sharp increase in the appearance of these terms in lower court rulings. In just the first seven months of 2024, the MQD has been mentioned in 39 district court cases and 11 circuit court cases, nearly surpassing the 47 and 14 mentions recorded in the full calendar year of 2023. Beyond mentions alone, an analysis by Bloomberg Law found that applications of the MQD in lower court rulings increased in 2022 and 2023. The analysis found that among the Circuit Courts of Appeal, the Fifth Circuit – often noted as the most conservative one – applied the doctrine most often (Webb 2023).

Within these cases, we see federal courts applying the MQD to an array of policy domains. Similar to the Supreme Court's approach to COVID emergencies, the Fifth, Sixth, and Eleventh Circuits all invoked the MQD in their evaluations of the Biden administration's vaccine regulations (Ritter 2023, 22–23). Lower courts applied the MQD in litigation over President Biden's debt relief program before it reached the Supreme Court (Ritter 2023, 27). More recently, the D.C. Circuit Court of Appeals heard

20 These data were collected using the Nexus Uni "Legal" database.

21 Part of the rise in 2021 may reflect a response to the Supreme Court's emergency order in the case *Alabama Association of Realtors v. HHS* (2021), where it deployed some of the ideas that would later be articulated in the 2022–23 cases (Bowers 2022).

a challenge to tailpipe admissions rules promulgated under the Clean Air Act on the grounds that such regulation is a major question and the EPA lacks explicit statutory authority to issue such regulations, clearly reflecting MQD considerations (Zoppo 2023).

Lower court deliberations reveal how the MQD may affect administrative authority in a wide range of policy domains. Several lower court rulings have already applied the MQD in cases concerning regulations on nuclear waste, clean water, minimum wages for federal contractors, and gun control. We briefly summarize a few illustrative cases below:

- In *Texas v. Nuclear Regulatory Commission* (2023), a Fifth Circuit Court of Appeals panel invoked the MQD to rule that the Nuclear Regulatory Commission lacked the authority to license a temporary facility in Andrews County, Texas to house nuclear waste. Writing for the panel, Judge Ho argued that "[d]isposal of nuclear waste is an issue of great 'economic and political significance' … What to do with the nation's ever-growing accumulation of nuclear waste is a major question …"
- In *North Carolina Coastal Fisheries Reform Group v. Capt. Gaston LLC* (2023), a Fourth Circuit Court of Appeals panel invoked the MQD to rule against plaintiffs who had used the citizen suit provisions of the Clean Water Act to argue that commercial shrimp trawlers were illegally disposing "bycatch" – unwanted (often dead) fish – into North Carolina waters. Writing for the panel, Judge Richardson concluded that whether bycatch was a pollutant was a "major question" and that the statute's "expansive, vaguely worded definition" did not provide clear congressional authorization for the regulation of such material.
- In *Texas et al v. Biden* (2023), the U.S. District Court for the Southern District of Texas struck down the Biden administration's executive order issued under the Procurement Act to mandate a $15 minimum wage for federal contractors. In invoking the MQD, the Court referenced estimates of the costs imposed on employers in order to classify the order as one of "vast economic significance."
- In *Chamber of Commerce v. CFPB* (2023), the U.S. District Court for the Eastern District of Texas invoked the MQD to limit the Consumer Financial Protection Bureau's regulation that discriminatory lending constitutes an "unfair act or practice" under the Dodd-Frank Act's provisions against "unfair, deceptive, and abusive acts and practices." The District Court found that the regulation constituted a "question of major economic and political significance" since it would affect the large financial services industry and the relative powers of federal and state governments to regulate discrimination (Better Markets 2023).
- In *Watterson v. ATF* (2023), the U.S. District Court for the Eastern District of Texas granted a preliminary injunction against a Bureau of Alcohol, Tobacco, and Firearms regulation revising the definition of "rifle" used in its enforcement of

the National Firearms Act and the Gun Control Act. The plaintiffs in the case have argued that the regulation was inherently a major question because it relates to "decisions regarding public safety and the right to keep and bear arms" (Ritter 2023, 25).

These cases illustrate how lower courts are applying the MQD, classifying agency actions as "major" and assessing whether clear congressional authorization exists for those regulations. This approach to assessing agency actions is a stark departure from *Chevron* deference. While identifying whether policy drift is occurring in each of these domains would require a fuller analysis, the brief reviews above provide some suggestive evidence that the agency actions struck down in these cases reflected attempts to adapt to changing circumstances. Beyond the outcomes of these specific cases, the growing use of the MQD in the federal judiciary is likely to create additional administrative burdens for agencies (e.g. subjecting agency actions to temporary injunctions and other procedural hurdles), limiting their ability to adapt policies to changing circumstances.[22]

8 Implications

In this article, we have argued that the Court's use of the major questions doctrine will exacerbate the phenomenon of policy drift in the United States. In its cases applying the MQD to curtail administrative action in the domains of environmental protection, student loan debt, and workplace safety, the Court has prevented attempts to adapt public policies to changing circumstances. In addition to the direct effects of the Supreme Court's use of the MQD on policy development, the articulation and codification of the MQD as a doctrine influences lower court proceedings and may produce a "chilling effect" on novel agency action.[23] By applying the concept of policy drift in our analysis of the MQD's effects, we build on legal scholars' insights about the MQD's likely effects on administrative agencies, showing how these effects contribute to a broader phenomenon in U.S. policy development that has numerous sources.

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22 For other examples of how litigation and procedural decisions can create administrative burdens for agency action, see Snead (2024) and Vladeck (2023).

23 We expect this "chilling effect" because agencies must now anticipate MQD challenges when pursuing regulatory action. For example, as EPA Administrator Michael Regan noted in a recent interview, the courts' changing interpretation of the agency's statutory authority means that it has to "measure twice and cut once," slowing down its regulatory efforts and spending more time on litigation (Vietor 2024).

The phenomenon of policy drift poses a problem for governance: although policies remain formally unchanged, the failure to adapt their implementation to changing circumstances means that their goals may be significantly undermined. Importantly, drift is not simply the maintenance of the *status quo*. The interaction of past policy with new circumstances generates different policy outcomes in the present – outcomes that can subvert the policy's original goals and/or pose new harms. For example, even if the Clean Air Act remains unchanged on paper, the emergence of new air pollutants that are not regulated by the EPA would mean that the outcomes of the Clean Air Act have changed. By precluding the statute from adequately addressing air pollution associated with climate change, the Supreme Court *exacerbates* an existing problem. In this way, policy drift poses a direct threat to the attempt to govern a complex and rapidly changing society through the administrative state. By incorporating novelty and economic or political significance as characteristics that render agency actions vulnerable to the MQD, the Court has made the very policy domains subject to the most significant changing circumstances more vulnerable to policy drift.

The MQD further undermines the possibility of effective governance by shifting authority from the executive branch to the courts. On paper, the MQD may be seen as safeguarding *congressional* authority – and indeed the Court claims this is the case.[24] But this claim elides the reality of congressional authority in two ways. First, the Court assumes that Congress can and should speak in clear detail when legislating an agency's mandate without considering that Congress is equally able to speak clearly if it disagrees with an agency's interpretation of that mandate. In this sense, the MQD does not return power to Congress but rather *limits* the power of Congress to develop general standards and delegate specific implementation to more nimble administrative agencies. Second, the Court ignores that a veto-riddled legislative process means that Congress' ability to respond to disputes over interpretations of statutes is, at best, slow-moving. Under such conditions, disputes over administrative authority are essentially resolved either by the executive branch or the courts. In the past, *Chevron* deference set the role of the Court as narrowly determining whether administrative actions were reasonable under the statute in question. The MQD, however, gives the federal judiciary a far bigger role: courts wield wide discretion to determine administrative actions as "major" and thus to sharply limit administrative authority when choosing to do so. This form of judicial power is particularly pernicious because it prevents action from the governing institution (administrative agencies with policy expertise) best suited to adapt policy in the face of changing circumstances.

24 For example, Roberts wrote in the majority opinion in *Biden v. Nebraska* that "this is a case about … the Executive seizing the power of the Legislature."

By shifting power and authority away from administrative agencies and toward the courts, the MQD undermines transparency and democratic accountability in the policy process in at least three ways. First, the process through which executive agencies promulgate rules is more transparent, and invites greater public participation than the legal process. Under the Administrative Procedures Act, agencies must pursue notice-and-comment processes: before promulgating a rule, they must first issue notice of public rulemaking, hear public comments (typically for a period of one to two months), and consider public comments. In contrast, federal court proceedings are more opaque and less accessible: participating in litigation is a costly endeavor, filing amicus briefs requires substantial legal expertise or sufficient resources to retain counsel, and federal judges deliberate in private without any requirement to hear and consider public comment. Although administrative agencies' notice-and-comment process is subject to biases (Libgober and Carpenter 2024; Yackee and Yackee 2006), these procedures still establish *some* avenue for public input and transparency, and similar (if not stronger) objections have been raised about the judicial process (see, e.g. Epstein, Landes, and Posner 2013; Galanter 1974; Rahman and Thelen 2021). We contend, therefore, that administrative agencies are more transparent and allow for greater public input than federal courts.

Second, administrative agencies are more democratically accountable than federal courts. As the majority ruling in *Chevron* noted, "While agencies are not directly accountable to the people, the Chief Executive is [accountable]."[25] The lifetime tenure of Supreme Court Justices, on the other hand, insulates them from electoral pressures and enables the institution's unrepresentativeness to be especially enduring.[26] Imagine a counterfactual world where OSHA's test-or-vaccine rule was enforced. To register displeasure with the regulation, the public could vote against the Democratic ticket in the next presidential election. The agency action could be made a salient part of the campaign, providing voters with a voice in the future of federal regulation. Such a scenario is hardly far-fetched. Conservative politicians have frequently railed against "big government" regulation as part of successful electoral campaigns. There is, however, no similar way for the electorate to reverse the Court's ruling. Simply re-electing a Democratic president would not

25 As the ruling went on to note, policy choices by executive branch agencies may help "resolv[e] 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" (*Chevron v. NRDC* 1984, 865–66).

26 While all three branches of the U.S. federal government have unrepresentative features, lifetime tenure makes it possible for unrepresentativeness on the Court to be especially enduring. Consider the current Court: five of the nine Justices were appointed by Republican presidents who lost the popular vote. The last three Justices appointed (Gorsuch, Kavanaugh, and Barrett) were confirmed by narrow Senate majorities that each represented less than 45 % of the U.S. population (From 2022).

change the limits on administrative authority set by the Court's application of the MQD. Even if voters do not respond directly to agency decisionmaking in electoral politics, changes in executive control are more responsive to public preferences than composition of the federal judiciary – especially the Supreme Court.

Relatedly, the MQD affects democratic accountability by shifting the burden of policy adaptation from agencies to Congress. Indeed, the doctrine's strongest adherents (including its supporters on the Supreme Court) argue that this is one of its key merits, under the rationale that elected lawmakers should address important policy questions rather than unelected bureaucrats. As discussed earlier, however, the threshold for action in Congress is very high. In short, this means that electing sufficient members of Congress to adopt legislation requires *supermajority* electoral support, whereas electing a president requires something closer to *majority* electoral support. This higher threshold for action in the Senate is indeed one of the underlying causes of persistent legislative gridlock. By requiring congressional action to enable policy adaptation, the MQD makes it much harder for the mass public to express displeasure with policy drift.

Third, the MQD enables counter-majoritarian rule by favoring opponents of regulatory action even when they are in coalitions that lose national elections. Rather than mobilize coalitions in Congress or win control of the executive branch in the next presidential elections, opponents of federal regulation need only file MQD lawsuits to subvert agency actions that are novel or that potentially have significant economic or political effects (assuming that the Court is willing to apply the MQD in their case). As Deacon and Litman (2023) have pointed out, the MQD even builds in opposition from losing political coalitions as a measure of majorness, as it "allows courts to point to minority political party opposition and political controversy over an agency's policy" as evidence of political significance (45). Opponents of regulatory action to adapt policies to changing circumstances, then, need not pursue electoral support if they can expect the Court's preferences to be aligned with theirs. Indeed, in the three cases examined here, we observed attempts at policy adaptation by Democrats elected to the executive branch blocked in a manner that aligned with the preferences of the opposing political party.

In sum, we expect that the MQD will exacerbate policy drift by limiting policy adaptation, both through applications of the doctrine by federal courts and by generating new incentives for administrative agencies. By shifting authority from the executive branch to the judiciary, the MQD further limits the federal government's ability to govern effectively in the face of changing circumstances. This shift in authority poses problems for transparency and democratic accountability in the policy process. Given the way that the MQD's vague and expansive definition of "major"-ness, we expect these dynamics to unfold especially in the very areas of great

economic and political significance that tend to experience rapidly changing external circumstances.

Finally, we note one theoretical contribution of our analysis for political science scholarship on the Court's role in policymaking: we draw a link between judicial *doctrine* and patterns of policy development. When analysts of policy development examine the Supreme Court, they are often interested in the outcome of the case (e.g. whether a statute or its interpretation was struck down) rather than the judicial doctrine or philosophy that the Court used to reach that outcome. In individual cases, it may seem to matter little how the Court justifies its ultimate conclusions. There is, however, a long tradition of legal entrepreneurs deploying ideational resources to transform law and politics beyond the individual case at hand. For example, the emergence and proliferation of "originalism" organized conservative legal thought in support of conservative policy goals and unified the GOP coalition (Terbeek 2021) – an effort that has only accelerated given conservative efforts to build new legal institutions such as the Federalist Society (Hollis-Brusky 2015; Teles 2008).

We contend that that the development and application of the major questions doctrine exerts influence on American politics in similar ways. We do not argue that judicial doctrines and philosophies *determine* the outcomes that judges reach, but rather that they generate commitments and incentives which shape overall patterns of policy development. As Wiseman and Wright (2022) argue, previously embedded administrative law doctrines such as *Chevron* deference shaped the policymaking process by establishing judicial control over agencies and by setting the terms of deference to agency action. By creating the MQD, the Court is once again transforming the policymaking process by dramatically narrowing the conditions under which agencies can expect judicial deference.

In other words, it is significant that the Court invalidated agency actions through the *major questions doctrine* (rather than *Chevron*). Judicial doctrines constrain lower court judges, inform how political actors in other institutions pursue policy implementation, and shape debates among policymakers.[27] Organized legal movements recognize the importance of doctrinal development, supplying intellectual capital to realize their preferred shifts (Hollis-Brusky 2015; Terbeek 2021; Larsen 2024, 49). The accumulation of doctrinal precedent may even constrain future Justices (Bailey and Maltzman 2011). Future research could consider the policy development implications of other judicial doctrines and philosophies. For instance, the Court's originalist turn has elevated the importance of interpreting policies with reference to history and tradition, which may facilitate more opportunities for policy

27 On the last point, consider how the Congressional Research Service closely monitors jurisprudential developments and writes reports about the potential impact of new doctrines (including the major questions doctrine), directed at policymakers in Congress.

conversion, the phenomenon wherein policies remain formally unchanged but are "interpreted and enacted" in the service of different "goals, functions, or purposes" (Mahoney and Thelen 2009, 17–18). Changing doctrines may also facilitate policy adaptation: for example, the application of a "rational basis" review to economic legislation (*U.S. v. Carolene Products* 1938) may have incentivized more delegation by Congress and more assertiveness by bureaucrats.

Tracing how judicial doctrine affects policy development also helps reconcile competing approaches to the study of judicial behavior, drawing upon the strengths of both the "attitudinal" and "legal" models (Bailey and Maltzman 2011; Segal and Spaeth 2002). As noted by Lax (2011, 135), doctrinal developments "are not merely compatible with the view of justices as policy seekers, but must be understood in order to properly understand such policy seeking behavior. … we can emphasize policy goals but should not neglect the instruments by which they might be pursued." This insight clearly applies here. From an attitudinal perspective, the Court's recent anti-regulatory decisions can be linked to the policy goals of the Republican party coalition, the conservative legal movement, and the ideological preferences of the Justices themselves. However, *how* the Court arrives at its conclusions has important implications, even if doctrines and philosophies are not the primary determinants of case outcomes. The emergence of MQD portends a distinct legal and policy landscape from forty-year era of *Chevron* deference: one where the judiciary will have much more power to forestall attempts by agencies to adapt in the face of policy drift.

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References

Aldy, Joseph E., Maximilian Auffhammer, Maureen Cropper, Arthur Fraas, and Richard Morgenstern. 2022. "Looking Back at 50 Years of the Clean Air Act." *Journal of Economic Literature* 60 (1): 179–232.

Applegate, Zoe. 2013. "Guy Stewart Callendar: Global Warming Discovery Marked." *BBC News*. https://www.bbc.com/news/uk-england-norfolk-22283372 (accessed April 24, 2013).

Bailey, Michael A., and Forrest Maltzman. 2011. *The Constrained Court: Law, Politics, and the Decisions Justices Make*. Princeton: Princeton University Press.

Barnes, Jeb. 2008. "Courts and the Puzzle of Institutional Stability and Change: Administrative Drift and Judicial Innovation in the Case of Asbestos." *Political Research Quarterly* 61 (4): 636–48.

Barnett, Kent, and Christopher J. Walker. 2017. "Chevron in the Circuit Courts." *Michigan Law Review* 116 (1): 1–73.

Barnett, Kent, Christina L. Boyd, and Christopher J. Walker. 2018. "The Politics of Selecting Chevron Deference." *Journal of Empirical Legal Studies* 15 (3): 597–619.

Better Markets. 2023. "Actions in the Federal Courts – Month in Review Newsletter – September 2023." *Better Markes* (blog). https://bettermarkets.org/newsroom/actions-in-the-federal-courts-month-in-review-newsletter-september-2023/ (accessed September 28, 2023).

Biden, Joseph R. 2020. "My Plan to Safely Reopen America." *New York Times*, April 12, 2020, sec. Opinion. https://www.nytimes.com/2020/04/12/opinion/joe-biden-coronavirus-reopen-america.html.

Biden, Joseph R. 2022. "Remarks by President Biden Announcing Student Loan Debt Relief Plan." *The White House*. https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/08/25/remarks-by-president-biden-announcing-student-loan-debt-relief-plan/ (accessed August 25, 2022).

Biesecker, Michael, and Sam Hananel. 2016. "Supreme Court Puts Obama's Clean Power Plan on Hold." *AP News*. https://apnews.com/united-states-government-98b898c2ea124bf0bc7eb12d1584d12f (accessed February 9, 2016).

Bowers, Kate R. 2022. "The Major Questions Doctrine." In *Focus IF12077. Congressional Research Service*. https://crsreports.congress.gov/product/pdf/IF/IF12077.

Breyer, Stephen. 1986. "Judicial Review of Questions of Law and Policy." *Administrative Law Review* 38 (4): 363–98.

Brown, Lisa. 2022. "Letter to Miguel Cardona." In *The Secretary's Legal Authority for Debt Cancellation*. https://www2.ed.gov/policy/gen/leg/foia/secretarys-legal-authority-for-debt-cancellation.pdf (accessed August 23, 2022).

Brunstein, Natasha, and Richard L. Revesz. 2022. "Mangling the Major Questions Doctrine." *Administrative Law Review* 74: 217–8.

Castro-Root, Gabe. 2022. "What the Supreme Court's Blockbuster Climate Ruling Means for North Carolina." *Charlotte Observer*. https://www.charlotteobserver.com/news/business/article263211488.html (accessed July 10, 2022).

CDC. 2020. *COVID Data Tracker*. Centers for Disease Control and Prevention. https://covid.cdc.gov/covid-data-tracker (accessed March 28, 2020).

Coenen, Michael, and Seth Davis. 2017. "Minor Courts, Major Questions." *Vanderbilt Law Review* 70 (3): 777–844.

Congressional Research Service. 2015. "The OSH Act: A Legal Overview." CRS Report R43768. Congressional Research Service.

Daval, C. Joseph Ross, Liam Bendicksen, and Aaron S. Kesselheim. 2023. "Eroding Judicial Deference to the FDA – Consequences for Public Health." *New England Journal of Medicine* 388 (11): 963–6.

Davenport, Coral. 2015. "Court Gives Obama a Climate Change Win." *New York Times*, June 9, 2015, sec. U.S. https://www.nytimes.com/2015/06/10/us/coal-epa-clean-power-plan.html.

Davenport, Coral. 2016. "Obama Climate Plan, Now in Court, May Hinge on Error in 1990 Law." *New York Times*, September 25, 2016, sec. U.S. https://www.nytimes.com/2016/09/26/us/politics/obama-court-clean-power-plan.html.

Deacon, Daniel, and Leah Litman. 2023. "The New Major Questions Doctrine." *Virginia Law Review* 109 (5): 1009–94.

Department of Education. 2020. "Secretary DeVos Extends Student Loan Forbearance Period through January 31, 2021." In *Response to COVID-19 National Emergency*. U.S. Department of Education. https://content.govdelivery.com/accounts/USED/bulletins/2afbc4b (accessed December 4, 2020).

Department of Education. 2022. *Biden-Harris Administration Extends Student Loan Pause through August 31| U.S. Department of Education*. U.S. Department of Education. https://www.ed.gov/news/press-releases/biden-harris-administration-extends-student-loan-pause-through-august-31 (accessed April 6, 2022).

Department of Health and Human Services, Administration for Strategic Preparedness and Response. n.d. "List of Public Health Emergency Declarations." https://aspr.hhs.gov:443/legal/PHE/Pages/default.aspx (accessed November 23, 2023).

Donnelly, Patrick G. 1982. "The Origins of the Occupational Safety and Health Act of 1970." *Social Problems* 30 (1): 13–25.

Elinson, Gregory A., and Jonathan S. Gould. 2022. "The Politics of Deference." *Vanderbilt Law Review* 75 (2): 475–552.

EPA. 2015. "FACT SHEET: Overview of the Clean Power Plan." Overviews and Factsheets. United States Environmental Protection Agency, August 2015. https://archive.epa.gov/epa/cleanpowerplan/fact-sheet-overview-clean-power-plan.html.

Epstein, Lee, William M. Landes, and Richard A. Posner. 2013. "How Business Fares in the Supreme Court." *Minnesota Law Review* 97 (4): 1431–73.

Eskridge, William N. 1991. "Overriding Supreme Court Statutory Interpretation Decisions." *The Yale Law Journal* 101 (2): 331–455.

Eskridge, William N., and Lauren E. Baer. 2008. "The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan." *The Georgetown Law Journal* 96 (4): 1083–226.

Federal Reserve Board. 2023. "The Fed - Chart: Survey of Consumer Finances, 1989–2022." https://www.federalreserve.gov/econres/scf/dataviz/scf/chart/#series:Education_Installment_Loans;demographic:all;population:1;units:mean (accessed November 2, 2023).

Federal Reserve Board. 2024. "Consumer Credit - G.19." Board of Governors of the Federal Reserve System. https://www.federalreserve.gov/releases/g19/HIST/cc_hist_memo_levels.html (accessed August 7, 2024).

Foley, Michael, Z. Joyce Fan, Eddy Rauser, and Barbara Silverstein. 2012. "The Impact of Regulatory Enforcement and Consultation Visits on Workers' Compensation Claims Incidence Rates and Costs, 1999–2008." *American Journal of Industrial Medicine* 55 (11): 976–90.

Freeman, Jody, and Matthew C. Stephenson. 2023. "The Anti-democratic Major Questions Doctrine." *The Supreme Court Review* 2022 (June): 1–48.

From, Al. 2022. "The Challenge to Democracy – Overcoming the Small State Bias." *Brookings*. https://www.brookings.edu/articles/the-challenge-to-democracy-overcoming-the-small-state-bias/ (accessed July 6, 2022).

Galanter, Marc. 1974. "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change." *Law & Society Review* 9 (1): 95–160.

Galvin, Daniel J. 2016. "Deterring Wage Theft: Alt-Labor, State Politics, and the Policy Determinants of Minimum Wage Compliance." *Perspectives on Politics* 14 (2): 324–50.

Galvin, Daniel J. 2019. "From Labor Law to Employment Law: The Changing Politics of Workers' Rights." *Studies in American Political Development* 33 (1): 1–37.

Galvin, Daniel J., and Jacob S. Hacker. 2020. "The Political Effects of Policy Drift." *Studies in American Political Development* 34: 216–38.

Granovskiy, Boris, and Alexandra Hegji. 2019. "Education-Related Regulatory Flexibilities, Waivers, and Federal Assistance in Response to Disasters and National Emergencies." CRS Report R42881. Congressional Research Service. https://crsreports.congress.gov/product/pdf/R/R42881.

Grisinger, Joanna L. 2012. *The Unwieldy American State: Administrative Politics Since the New Deal*. Cambridge: Cambridge University Press.

Hacker, Jacob S. 2004. "Privatizing Risk without Privatizing the Welfare State: The Hidden Politics of Social Policy Retrenchment in the United States." *American Political Science Review* 98 (2): 243–60.

Hacker, Jacob S. 2005. "Policy Drift: The Hidden Politics of US Welfare State Retrenchment." In *Beyond Continuity: Institutional Change in Advanced Political Economies*, edited by Wolfgang Streeck, and Kathleen Ann Thelen. Oxford University Press. https://books.google.com/books?hl=en&lr=&id=c84SDAAAQBAJ&oi=fnd&pg=PR9&dq=Policy+drift:+The+hidden+politics+of+US+welfare+state+retrenchment&ots=UFIs_oUrZB&sig=WGENgN24tLi5de4mzQnY6q9HQ9A.

Hackett, Ursula. 2023. "Litigating Policy Drift: Frozen Categories and Thresholds in Court." *Perspectives on Politics* 1–12. https://doi.org/10.1017/S153759272300292X.

Hasen, Richard L. 2019. "Polarization and the Judiciary." *Annual Review of Political Science* 22 (1): 261–76.

Haviland, Amelia M., Rachel M. Burns, Wayne B. Gray, Teague Ruder, and John Mendeloff. 2012. "A New Estimate of the Impact of OSHA Inspections on Manufacturing Injury Rates, 1998–2005." *American Journal of Industrial Medicine* 55 (11): 964–75.

Hlávka, Jakub, and Adam Rose. 2023. "COVID-19's Total Cost to the U.S. Economy Will Reach $14 Trillion by End of 2023." *USC Schaeffer* (blog). https://healthpolicy.usc.edu/article/covid-19s-total-cost-to-the-economy-in-us-will-reach-14-trillion-by-end-of-2023-new-research/ (accessed May 16, 2023).

Hollis-Brusky, Amanda. 2015. *Ideas with Consequences: The Federalist Society and the Conservative Counterrevolution*. New York: Oxford University Press.

Hollis-Brusky, Amanda, and Celia Parry. 2021. "'In the Mold of Justice Scalia': The Contours & Consequences of the Trump Judiciary." *The Forum* 19 (1): 117–42.

Kanno-Youngs, Zolan. 2024. "Biden Chips Away at Student Loan Debt, Bit by Bit, amid High Expectations." *The New York Times*, February 21, 2024, sec. U.S. https://www.nytimes.com/2024/02/21/us/politics/biden-student-loan-forgiveness-debt.html.

Karol, David. 2019. *Red, Green, and Blue: The Partisan Divide on Environmental Issues*. Cambridge University Press.

Kelley, William K. 2016. "Justice Scalia, the Nondelegation Doctrine, and Constitutional Argument Federal Courts, Practice & Procedure Symposium: Justice Scalia and the Federal Courts." *The Notre Dame Law Review* 92 (5): 2107–28.

Kelly, Andrew S. 2016. "Boutique to Booming: Medicare Managed Care and the Private Path to Policy Change." *Journal of Health Politics, Policy and Law* 41 (3): 315–54.

Kintisch, Eli. 2011. "Was the Clean Air Act Intended to Cover CO2?" *ScienceInsider*. https://www.science.org/content/article/was-clean-air-act-intended-cover-co2 (accessed February 7, 2011).

Koger, Gregory. 2010. *Filibustering: A Political History of Obstruction in the House and Senate*. Chicago: University of Chicago Press.

Krehbiel, Keith. 1998. *Pivotal Politics: A Theory of U.S. Lawmaking*. Chicago: University of Chicago Press.

Larsen, Alli Orr. 2024. "Becoming a Doctrine." *Florida Law Review* 76 (1). https://doi.org/10.2139/ssrn.4374736.

Lax, Jeffrey R. 2011. "The New Judicial Politics of Legal Doctrine." *Annual Review of Political Science* 14 (1): 131–57.

Lazarus, Richard J. 2020. *The Rule of Five: Making Climate History at the Supreme Court*. Cambridge: Harvard University Press.

Lee, Frances E. 2015. "How Party Polarization Affects Governance." *Annual Review of Political Science* 18 (1): 261–82.

Lee, Frances E. 2016. *Insecure Majorities: Congress and the Perpetual Campaign*. Chicago: University of Chicago Press.

Levin, Ronald M. 2024. "The Major Questions Doctrine: Unfounded, Unbounded, and Confounded." *California Law Review* 112. https://www.californialawreview.org/print/major-questions-critique.

Levine, David I., Michael W. Toffel, and Matthew S. Johnson. 2012. "Randomized Government Safety Inspections Reduce Worker Injuries with No Detectable Job Loss." *Science* 336 (6083): 907–11.

Libgober, Brian, and Daniel Carpenter. 2024. "Lawyers as Lobbyists: Regulatory Advocacy in American Finance." *Perspectives on Politics* 1–20. https://doi.org/10.1017/S1537592723002943.

Lovell, George I. 2003. *Legislative Deferrals: Statutory Ambiguity, Judicial Power, and American Democracy*. New York: Cambridge University Press.

MacLaury, Judson. 1981. "The Job Safety Law of 1970: Its Passage Was Perilous." *Monthly Labor Review* 104: 18.

Mahoney, James, and Kathleen Thelen. 2009. "A Theory of Gradual Institutional Change." In *Explaining Institutional Change: Ambiguity, Agency, and Power*, edited by James Mahoney, and Kathleen Thelen, 1–37. New York: Cambridge University Press.

Maltzman, Forrest, James F. Spriggs, and Paul J. Wahlbeck. 2000. *Crafting Law on the Supreme Court: The Collegial Game*. Cambridge: Cambridge University Press.

Marantz, Nicholas J. 2018. "Drift and Conversion in Metropolitan Governance: The Rise of California's Redevelopment Agencies." *Journal of Urban Affairs* 40 (7): 901–22.

Merrill, Thomas W. 2022. *The Chevron Doctrine: Its Rise and Fall, and the Future of the Administrative State*. Cambridge: Harvard University Press.

Mettler, Suzanne. 2016. "The Policyscape and the Challenges of Contemporary Politics to Policy Maintenance." *Perspectives on Politics* 14 (2): 369–90.

Meyer, Timothy, and Ganesh Sitaraman. 2023. "The National Security Consequences of the Major Questions Doctrine." *Michigan Law Review* 122.1: 55.

Miller, Jon D., Logan T. Woods, and Jason Kalmbach. 2022. "The Impact of the Covid-19 Pandemic in a Polarized Political System: Lessons from the 2020 Election." *Electoral Studies* 80 (December): 102548.

Monast, Jonasj. 2016. "Major Questions about the Major Questions Doctrine." *Administrative Law Review* 68 (3): 445–89.

Morris, Jim. 2015. *After 44 Years, Halting Progress on Workplace Disease*. Center for Public Integrity. http://publicintegrity.org/inequality-poverty-opportunity/workers-rights/worker-health-and-safety/unequal-risk/after-44-years-halting-progress-on-workplace-disease/ (accessed July 6, 2015).

Noble, Charles. 1986. *Liberalism at Work: The Rise and Fall of OSHA*. Philadelphia: Temple University Press.

Office of Legal Counsel. 2022. *Use of the HEROES Act of 2003 to Cancel the Principal Amounts of Student Loans*. Washington, D.C.: Department of Justice. https://www.justice.gov/olc/opinion/use-heroes-act-2003-cancel-principal-amounts-student-loans.

OSHA. n.d. "Regulations (Standards - 29 CFR): Standard Number 1910." Occupational Safety and Health Administration. https://www.osha.gov/laws-regs/regulations/standardnumber/1910 (accessed October 12, 2023).

Parenteau, Patrick. 2022. "The Inflation Reduction Act Doesn't Get Around the Supreme Court's Climate Ruling in West Virginia V. EPA, but it Does Strengthen EPA's Future Abilities." *The Conversation* (blog). http://theconversation.com/the-inflation-reduction-act-doesnt-get-around-the-supreme-courts-climate-ruling-in-west-virginia-v-epa-but-it-does-strengthen-epas-future-abilities-189279 (accessed August 24, 2022).

Rahman, K. Sabeel, and Kathleen Thelen. 2021. "The Role of the Law in the American Political Economy." In *The American Political Economy: Politics, Markets, and Power*, edited by Alexander Hertel- Fernandez, Jacob S. Hacker, Kathleen Thelen, and Paul Pierson, 76–102. Cambridge: Cambridge University Press.

Regan, Michael D. 2015. "Obama Vetoes GOP Attempt to Reverse Power Plant Regulations." *PBS NewsHour*, December 19, 2015, sec. Politics. https://www.pbs.org/newshour/politics/obama-vetoes-gop-bill-seeking-to-stop-clean-power-plan.

Ritchie, Hannah, Max Roser, and Pablo Rosado. 2020. "CO_2 and Greenhouse Gas Emissions." *Our World in Data*, May. https://ourworldindata.org/co2-emissions.

Ritter, Ling. 2023. "Elephants in Mouseholes: The Major Questions Doctrine in the Lower Courts." SSRN Scholarly Paper. Rochester, NY. https://papers.ssrn.com/abstract=4694666.

Rosner, David, and Gerald Markowitz. 2020. "A Short History of Occupational Safety and Health in the United States." *American Journal of Public Health* 110 (5): 622–8.

Saad, Lydia. 2019. "Preference for Environment over Economy Largest Since 2000." Gallup.Com. (April 4, 2019). https://news.gallup.com/poll/248243/preference-environment-economy-largest-2000.aspx.

Sansevero, Christine. 1996. "The Effect of the Clean Air Act on Environmental Quality: Air Quality Trends Overview." *Pace Environmental Law Review* 14 (1): 31–44.

Segal, Jeffrey A., and Harold J. Spaeth. 2002. *The Supreme Court and the Attitudinal Model Revisited*. Cambridge: Cambridge University Press.

Segal, Jeffrey A., Harold J. Spaeth, and Sara C. Benesh. 2005. *The Supreme Court in the American Legal System*. Cambridge: Cambridge University Press.

Seidenfeld, Mark, and Jim Rossi. 2000. "The False Promise of the New Nondelegation Doctrine Essay." *The Notre Dame Law Review* 76 (1): 1–20.

Snead, Warren. 2023. "The Supreme Court as an Agent of Policy Drift: The Case of the NLRA." *American Political Science Review* 117 (2): 661–74.

Snead, Warren. 2024. "The Supreme Court and the Allocation of Burden: Truncating the Voting Rights Act." *Law & Social Inquiry* 49 (4): 1990–2020.

Sobkowski, Patrick J. 2023. "Of Major Questions and Nondelegation." *Notice & Comment, Yale Journal on Regulation* (blog). https://www.yalejreg.com/nc/of-major-questions-and-nondelegation-by-patrick-j-sobkowski/ (accessed July 3, 2023).

Sohoni, Mila. 2022. "The Major Questions Quartet." *Harvard Law Review* 136: 262.

Songer, Donald R., A. Segal Jeffrey, and Charles M. Cameron. 1994. "The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions." *American Journal of Political Science* 38 (3): 673–96.

Spitler, Eric J. 2023. "The Supreme Court's Major Questions Doctrine: Implications for Responding to Financial Crises Articles & Remarks." *North Carolina Banking Institute* 27: 1–62.

Steele, Graham S. 2024. "Major Questions' Quiet Crisis." *George Mason Law Review* 31 (1): 265–339.

Swanson, Ana, and David Yaffe-Bellany. 2020. "Trump Declares Meat Supply 'Critical,' Aiming to Reopen Plants." *The New York Times*. April 28, 2020, sec. Business. https://www.nytimes.com/2020/04/28/business/economy/coronavirus-trump-meat-food-supply.html.

Szymendera, Scott D. 2022. "Occupational Safety and Health Administration (OSHA): COVID-19 Emergency Temporary Standards (ETS) on Health Care Employment and Vaccinations and Testing for Large Employers." Congressional Research Service. CRS Report R46288. Congressional Research Service. https://crsreports.congress.gov/product/pdf/R/R46288.

Teles, Steven M. 2008. *The Rise of the Conservative Legal Movement: The Battle for Control of the Law*. Princeton: Princeton University Press.

Terbeek, Calvin. 2021. "Clocks Must Always Be Turned Back': Brown V. Board of Education and the Racial Origins of Constitutional Originalism." *American Political Science Review* 115 (3): 821–34.

Tortorice, Marla D. 2019. "Nondelegation and the Major Questions Doctrine: Displacing Interpretive Power." *Buffalo Law Review* 67 (4): 1075–132.

Tsang, Linda. 2017. "Clean Power Plan: Legal Background and Pending Litigation in West Virginia v. EPA." CRS Report R44480. Congressional Research Service.

Turner, James Morton, and Andrew C. Isenberg. 2018. *The Republican Reversal: Conservatives and the Environment from Nixon to Trump*. Cambridge: Harvard University Press.

Vietor, Tommy. 2024. “Republicans’ Work till You Die Agenda.” *Pod Save America*. https://crooked.com/podcast/republicans-work-till-you-die-agenda/.

Vladeck, Stephen. 2023. *The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic*. New York: Basic Books.

Warburton, Moira. 2024. “Why Congress Is Becoming Less Productive.” *Reuters*. https://www.reuters.com/graphics/USA-CONGRESS/PRODUCTIVITY/egpbabmkwvq/ (accessed March 12, 2024).

Warren, Elizabeth. 2020. “Congress Needs a Plan to Confront the Coronavirus. I Have One.” *New York Times*. April 8, 2020, sec. Opinion. https://www.nytimes.com/2020/04/08/opinion/coronavirus-congress-warren.html.

Wawro, Gregory John, and Eric Schickler. 2006. *Filibuster: Obstruction and Lawmaking in the U.S. Senate*. Princeton: Princeton University Press.

Waxman, Henry A. 1991. “An Overview of the Clean Air Act Amendments of 1990.” *Environmental Law* 21 (4): 1721–816.

Webb, Erin. 2023. “More Major Questions Doctrine Decisions Are Coming.” *Bloomberg Law*. https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-more-major-questions-doctrine-decisions-are-coming (accessed November 5, 2023).

Westerland, Chad, Jeffrey A. Segal, Lee Epstein, Charles M. Cameron, and Comparato Scott. 2010. “Strategic Defiance and Compliance in the U.S. Courts of Appeals.” *American Journal of Political Science* 54 (4): 891–905.

Wiseman, Alan E., and John R. Wright. 2022. “Chevron, State Farm, and the Impact of Judicial Doctrine on Bureaucratic Policymaking.” *Perspectives on Politics* 20 (3): 901–15.

Witko, Christopher. 2013. “Party Government and Variation in Corporate Influence on Agency Decision Making: OSHA Regulation, 1981–2006.” *Social Science Quarterly* 94 (4): 894–911.

Xu, Jiaquan, Shelly Murphy, Kenneth Kochanek, and Elizabeth Arias. 2022. *Mortality in the United States, 2021*. Hyattsville, MD: National Center for Health Statistics.

Yackee, Jason Webb, and Susan Webb Yackee. 2006. “A Bias towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy.” *The Journal of Politics* 68 (1): 128–39.

Zoppo, Avalon. 2023. “DC Circuit Grapples with ‘Major Questions Doctrine’ in Vehicle Emissions Case.” *National Law Journal, September* 15: 2023. https://www.law.com/nationallawjournal/2023/09/15/dc-circuit-grapples-with-major-questions-doctrine-in-vehicle-emissions-case/.