ARTICLES

Regulatory Antecedents and the Major Questions Doctrine

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ABSTRACT

In recent years, federal courts have increasingly assessed the legality of regulatory action by considering its antecedents, or lack thereof, in prior agency actions. In several Supreme Court decisions—including the Court's recent opinions in which it expressly applied the major questions doctrine—a majority of justices have expressed skepticism of agency authority when "an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy." District and appellate courts have relied on this language to strike down numerous agency actions dating back to 2014, and judicial scrutiny of regulatory antecedents has grown since the Supreme Court formalized the major questions doctrine in West Virginia v. Environmental Protection Agency *in 2022.*

Yet federal agencies have insufficiently adapted to this increased judicial focus on regulatory antecedents. While significant agency rulemakings typically include extensive dockets with many different types of analysis, they have generally provided limited analysis of regulatory antecedents. When agencies do provide relevant analysis, as they have for several recent proposals that have met objections under the major questions doctrine, such analysis often fails to catalog key regulatory antecedents or is insufficiently targeted at legal objections from opponents of the policy. In some actions, the only explicit discussion of the

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Supreme Court's emphasis on agency exercise of "unheralded power" comes from dissenting commissioners on a multi-member agency.

This Article recommends that agencies more extensively catalog regulatory antecedents at all stages of the rulemaking process, from drafting to promulgation. By assessing antecedents in regulatory proposals, agencies can more fully lay the foundation for their authority and facilitate targeted comments that consider whether the antecedents offered by the agency support the proposed action. This will enable an even more complete analysis of regulatory antecedents in the final rulemaking, which will provide government litigators with a roadmap for responding to claims that the agency action lacks precedent and thereby reduce the vulnerability of agency action under the major questions doctrine.

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INTRODUCTION

The major questions doctrine is here to stay.[1] But what makes a "major" question triggering the doctrine? This question has puzzled legal observers,[2] district and appellate judges,[3] and even the Supreme Court justices themselves.[4] Yet at least one common theme emerges from the Court's recent caselaw: to trigger the doctrine, an agency must, at a minimum, exercise its authority in an unprecedented manner.

The Court first clearly articulated its focus on regulatory novelty under the "major questions" umbrella in *Utility Air Regulatory Group v. Environmental Protection Agency* (*UARG*). There, the Court announced that "[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' . . . we typically greet its announcement with a measure of skepticism."[5] Decided in 2014, *UARG* held that the Environmental Protection Agency (EPA) lacked authority to require permitting of stationary sources based solely on their emission of greenhouse gases.[6] While parts of the decision rested on more traditional tools of statutory interpretation,[7] the Court also noted that it was "reluctant to read into ambiguous statutory text" the "unheralded power" that EPA's interpretation effectively asserted over the "construction and modification of tens of thousands, and the operation of millions, of small sources nationwide."[8] According to the Court, the fact that EPA had never previously claimed authority over nearly so many sources offered strong evidence that the Clean Air Act did not delegate that authority.

The Supreme Court has since interpreted *UARG*—and, in particular, its focus on regulatory novelty—as canonical to the major questions doctrine.[9] Since *UARG*, the Court has applied that doctrine four times to hold agency action unlawful.[10] In each decision—all issued since August 2021—the Court emphasized what

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1. The Supreme Court used the label "major questions doctrine" for the first time in a majority opinion in June 2022, in West Virginia v. EPA, 142 S. Ct. 2587 (2022). That case identified several previous Supreme Court decisions as falling within the doctrine. *Id.* at 2608–10.

2. *See* Natasha Brunstein & Donald L. R. Goodson, *Unheralded and Transformative: The Test for Major Questions After West Virginia*, 47 WM. & MARY ENV'T L. & POL'Y REV. 47, 49 n.3 (2022) (citing law-review articles).

3. Natasha Brunstein, *Major Questions in Lower Courts*, 75 ADMIN L. REV. 661. (2024).

4. Cass R. Sunstein, *Two Justifications for the Major Questions Doctrine* (July 7, 2023), https://perma.cc/E6PX-SSVN (describing different formulations of the major questions doctrine between different justices who have been in the majority of recent major-questions cases).

5. Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014) [*UARG*] (quoting Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)).

6. *UARG*, 573 U.S. at 333.

7. *See id.* at 332–33.

8. *Id.* at 324.

9. *See* Brunstein & Goodson, *supra* note 2, at 60.

10. The Supreme Court also applied the major questions doctrine in *King v. Burwell*, 576 U.S. 473 (2015), which upheld the availability of tax credits under the Affordable Care Act in states that had a federal exchange.

it characterized as a lack of regulatory antecedents for the challenged action.[11] That emphasis was most pronounced in *West Virginia v. Environmental Protection Agency*,[12] in which the Court formally announced the "major questions doctrine" and centralized regulatory novelty within the doctrine.[13]

While the contours of the major questions doctrine are still being defined,[14] the concept of regulatory novelty plays an important role in the doctrine under both Supreme Court precedent and lower-court application.[15] If an action represents a marked and substantial departure from anything the agency has done before (i.e., is "unheralded"), then this could favor the application of the major questions doctrine to strike down the challenged action—so long as the doctrine's other prongs are met (including the transformative nature of the challenged action and its economic and political significance[16]). If, however, the agency can point to analogous exercises of authority in the past, such a showing could strongly support the agency's statutory authority for the challenged action.[17]

Given the Court's focus on regulatory antecedents, agencies implementing contentious policies that could be vulnerable under the major questions doctrine have a strong incentive to identify relevant antecedents. Yet for several key recent policy proposals—issued after the Court's focus on regulatory antecedents became clear—agencies have focused limited attention on identifying relevant antecedents and failed to explicitly address objections that the agency is asserting "unheralded power." This omission leaves much of the work of identifying relevant antecedents to public commenters. While supportive commenters sometimes offer helpful regulatory antecedents for the agency to discuss in its final rule, such work should not fall principally on commenters and should instead be conducted by the agency itself. An agency can, of course, defend a policy against

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11. Biden v. Nebraska, 143 S. Ct. 2355, 2373–75 (2023); *West Virginia*, 142 S. Ct. at 2610–12; Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661, 665 (2022); Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021).

12. Of the three Supreme Court decisions between 2021 and 2022 cited in the prior footnote, *West Virginia* was also the only opinion that was not issued per curiam.

13. *E.g. West Virginia*, 142 S. Ct. at 2610 (defining "a major questions case" in part as one in which an agency "'claim[s] to discover in a long-extant statute an unheralded power' representing a 'transformative expansion in [its] regulatory authority'") (quoting *UARG*, 573 U.S. at 324).

14. *E.g.*, Alison Gocke, *Chevron's Next Chapter: A Fig Leaf for the Nondelegation Doctrine*, 55 U.C. DAVIS L. REV. 955, 966–67 (2021) ("Scholars have struggled to discern any coherent principle behind the doctrine. Those who have attempted to define the doctrine have come to different conclusions about what the major questions doctrine is, and even which cases fall within its domain in the first place.").

15. *See infra* Part I.

16. *See West Virginia*, 142 S. Ct. at 2608–10 (highlighting "economic and political significance" of agency action and a "transformative expansion in [the agency's] regulatory authority"). For an extensive analysis of the major questions doctrine, see Brunstein & Goodson, *supra* note 2.

17. *Cf.* Smiley v. Citibank, 517 U.S. 735, 740 (1996) ("[A]gency interpretations that are . . . long standing come . . . with a certain credential of reasonableness, since it is rare that error would long persist."). *See also infra* Part I for cases in which the reviewing court upheld an agency action on the basis that it was not "unheralded."

major questions challenges with antecedents identified only in the final promulgation and not in the proposal, but if the agency identifies relevant antecedents at the proposal stage, then it can consider more targeted rebuttals to the relevance of particular antecedents and better structure its final action and legal justification to limit legal vulnerability.

Agencies can better anticipate and address objections that they are exercising unprecedented power by identifying and documenting relevant regulatory antecedents early and throughout the rulemaking process. Doing so has numerous advantages. By assessing regulatory antecedents before the proposal stage, agencies could weigh the legal vulnerabilities of competing regulatory approaches and perhaps fine-tune their regulatory approach. Detailing those antecedents in the proposed rule would also effectively invite more targeted comments on the relevance of regulatory antecedents that the agency could consider and respond to when finalizing the rule. Furthermore, by responding to relevant objections and further detailing antecedents at the final rulemaking stage, agencies can provide a roadmap for the legal defense of those rules in court. While litigators could hone the agency's argument, agency attorneys involved in the regulatory process will often have more time and subject-matter expertise to identify regulatory antecedents.

This Article proceeds in three parts. Part I traces the increasing emphasis on regulatory novelty in the courts, describing the focus on regulatory novelty in the Supreme Court's "major questions" case law and in lower federal courts that have applied those precedents. Part II looks at how agencies have responded to this judicial focus on regulatory novelty. It provides two case studies of agency actions proposed since the Supreme Court emphasized the significance of regulatory antecedents: the Securities and Exchange Commission's climate-disclosure regulation and the Federal Energy Regulatory Commission's policy statements for natural gas pipelines. In both instances, dissenting commissioners invoked the doctrine. Yet both times, the proposal offered limited regulatory antecedents.[18] Instead, commenters identified key regulatory antecedents for the proposed action—antecedents that, if included in the final agency action, would offer strong support for that action in subsequent legal challenges.

18. Multi-member agencies differ in terms of whether and how commissioners are provided an opportunity to respond to dissenting views. *See* Sharon Jacobs, *Administrative Dissents*, 59 WM. & MARY L. REV. 541, 566–69 (2017). At FERC, the process is particularly informal and commissioners sometimes issue dissenting statements after an order is published. *Id.* at 566–67 & n.112. In these two case studies, therefore, it is not clear that the agency majority had an opportunity to review and respond to dissenting statements. Nonetheless, the fact that dissenting statements relied on the major questions doctrine suggests that such objections were salient in the agency deliberations. Even if the agency could not directly respond to the dissenting statement, it should have more thoroughly assessed regulatory antecedents and established that the policy was not unheralded.

Part III suggests that agencies more consistently and robustly document regulatory antecedents throughout the rulemaking process, including a detailed discussion of relevant antecedents at the proposal stage. This Part identifies numerous advantages to assessing and describing relevant antecedents throughout the rulemaking process and offers recommendations on the types of antecedents for agencies to consider.

I. THE SIGNIFICANCE OF REGULATORY NOVELTY IN JUDICIAL REVIEW

This Part traces the rising importance in recent years of regulatory novelty in judicial review. It begins by discussing six Supreme Court cases in which the Court focused on the novelty of the regulatory action. As these cases demonstrate, the Court considers the unprecedented nature of an agency action to be a core component of the major questions doctrine. The Court particularly emphasized the significance of regulatory novelty over the past two terms in *West Virginia v. Environmental Protection Agency*, *Biden v. Nebraska*, and two per curiam opinions striking down high-profile public-health regulations. This Part then traces the consideration of regulatory novelty and attention to agency exercise of unheralded power in federal appellate and district courts.

All told, this Part demonstrates that courts have become increasingly focused on regulatory novelty over the past decade, with the fate of numerous regulations turning in large part on whether the reviewing court considered those regulations to be unprecedented.[19] Moreover, in light of the Supreme Court's increased attention to the major questions doctrine, that focus on regulatory novelty is likely to continue over the coming years.

A. CONSIDERATION OF REGULATORY NOVELTY IN THE SUPREME COURT

Supreme Court cases under the major questions umbrella make clear that the doctrine turns in large part—though not exclusively[20]—on whether the agency is exercising unheralded power.

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19. Scholars Leah M. Litman and Daniel T. Deacon have also traced the heightened focus on anti-novelty in judicial jurisprudence, tying it to the constitutional anti-novelty principle that Litman has previously identified. *See* Daniel T. Deacon & Leah M. Litman, The New Major Questions Doctrine, 109 Va. L. Rev. 1009, 1070–71 (2023). ("Similar to the origins of the constitutional anti-novelty rhetoric, the regulatory anti-novelty rhetoric began with the passing observation, in *Brown & Williamson*, that the agency had asserted a new and different authority to regulate the tobacco industry. . . . Since Brown & Williamson, the novelty of an agency's regulation has increasingly featured in the Court's major question cases and has also taken on additional significance. It has now hardened into a central principle guiding the application of the doctrine.").

20. *See infra* note 78 and accompanying text (highlighting other required elements to trigger the doctrine).

The Court's focus on regulatory "unheralded power" begins, in a sense, with a case in which it did not deploy the term: *Food & Drug Administration v. Brown & Williamson Tobacco Corporation*.[21] In that 2000 decision, the Court confronted the Food and Drug Administration's (FDA) determination that tobacco products fall under its jurisdiction pursuant to the Food, Drug, and Cosmetic Act (FDCA) and concurrent regulations restricting the sale and distribution of tobacco to minors.[22] The Court ruled against the FDA, concluding "that Congress has clearly precluded the FDA from asserting jurisdiction to regulate tobacco products."[23]

The Court relied on three primary and interrelated rationales for rejecting the FDA's claimed authority to regulate tobacco.[24] First, the Court identified inconsistencies between the FDA's purported authority and the FDCA's text, structure, and purpose,[25] concluding "that were the FDA to regulate cigarettes and smokeless tobacco, the Act would require the agency to ban them."[26] Second, the Court discussed the significance of historical legislation involving tobacco, concluding that Congress "has foreclosed the removal of tobacco products from the market"[27] and instead, through a series of statutes passed since the 1960s, regulated tobacco through more targeted measures.[28] Third, and most relevant here, the Court recognized that this legislation occurred "against the backdrop of the FDA's consistent and repeated statements that it lacked authority under the FDCA to regulate tobacco" in most circumstances.[29] Although the FDA's previous positions were "not determinative" by themselves, the Court found them "relevant to understanding . . . the background against which Congress enacted subsequent tobacco-specific legislation."[30] The inconsistency between the FDA's newfound and prior position—and the fact that Congress had passed numerous statutes related to tobacco against the backdrop of that longstanding prior positions—led the Court to conclude that Congress had not granted the FDA authority

21. 529 U.S. 120, 159 (2000). The Supreme Court quoted from *Brown & Williamson* for its pronouncement in *UARG* that "[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' . . . we typically greet its announcement with a measure of skepticism." *UARG*, 573 U.S. at 324 (quoting *Brown & Williamson,* 529 U.S. at 159).

22. *Brown & Williamson,* 529 U.S. at 126 (citing Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg, 44,396 (Aug. 28, 1996)).

23. *Id.*

24. *See generally* Natasha Brunstein & Richard L. Revesz, *Mangling the Major Questions Doctrine*, 74 ADMIN. L. REV. 217, 226–27 (2022) (outlining three rationales).

25. *Brown & Williamson,* 529 U.S. at 133–37.

26. *Id.* at 137.

27. *Id.*

28. *Id.* at 137–43 (collecting and analyzing numerous statutes evincing "the collective premise . . . that cigarettes and smokeless tobacco will continue to be sold in the United States," such that "[a] ban of tobacco products by the FDA would therefore plainly contradict congressional policy").

29. *Id.* at 144.

30. *Id.* at 147.

to regulate tobacco. The Court's consideration of regulatory precedent in *Brown & Williamson* was contextual rather than categorical, focusing on the agency's novel regulatory approach in conjunction with other legislative action since the FDCA's passage.

Whereas the Court's focus on regulatory novelty in *Brown & Williamson* was nuanced and narrow, the Court expressed a somewhat broader skepticism of novel regulatory approaches fourteen years later in *UARG*. In that case, the Court confronted the legality of EPA regulations that subjected stationary sources to the permitting requirements of specific Clean Air Act provisions based solely on their emission of greenhouse gases.[31] EPA had previously regulated greenhouse gas emissions from motor vehicles and, as EPA interpreted the statute, this automatically subjected stationary sources to Clean Air Act regulation on the basis of their greenhouse gas emissions.[32] Under those stationary-source provisions, however, regulation is triggered for sources emitting or having the potential to emit as few as 100 tons per year[33]—a threshold that, if applied to greenhouse gases, would newly subject to regulation millions of small stationary sources.[34] EPA accordingly issued a regulation known as the "Tailoring Rule" that substantially raised the emission threshold for stationary-source permitting for greenhouse gas emissions, ensuring a manageable number of regulated sources.[35]

In *UARG*, the Supreme Court rejected the Tailoring Rule—and, more broadly, EPA's authority to regulate stationary sources under the relevant provisions based only on their emission of greenhouse gases. To reject the Tailoring Rule, the Court relied on the Clean Air Act's plain language, concluding that the emission thresholds that EPA adopted were incompatible with those provided by statute and amounted to a "rewriting of the statutory" text.[36] For the broader conclusion about EPA's authority, the Court relied on the Clean Air Act's "structure and design," finding "no doubt that the [relevant statutory provisions] are designed to apply to, and cannot rationally be extended beyond, a relative handful of large sources."[37] The Court further noted that "EPA's interpretation is also unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization."[38] Partially quoting from *Brown & Williamson*, the Court announced: "When an agency

31. *UARG*, 573 U.S. at 333.
32. *See id.* at 310.
33. *Id.* at 309–10.
34. *Id.* at 322 (stating that "annual permit applications would jump from about 800 to nearly 82,000" under Prevention of Significant Deterioration program and "from fewer than 15,000 to about 6.1 million" under Title V under strict adherence to statutory emission thresholds) (citing Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,557, 31,562–63 (June 3, 2010) [hereinafter Tailoring Rule]).
35. *Id.* at 312 (citing Tailoring Rule, 75 Fed. Reg. 31,514).
36. *Id.* at 325.
37. *Id.* at 322.
38. *Id.* at 324.

claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' . . . we typically greet its announcement with a measure of skepticism."[39] This characterization broke from *Brown & Williamson*'s more nuanced approach to regulatory novelty and suggested a broader skepticism of regulatory "unheralded power" that would come to form the basis of the major questions doctrine in subsequent decisions.

Those subsequent decisions came in 2021 and 2022, through a series of three opinions striking down environmental and public-health regulations. Two of those decisions were relatively short per curiam opinions issued after expedited briefing. First, in *Alabama Association of Realtors v. Department of Health & Human Services*, the Court blocked the Center for Disease Control and Prevention's ("CDC") nationwide eviction moratorium for tenants in financial need located in counties experiencing high levels of COVID-19 transmission.[40] The CDC had issued the moratorium under a provision of the Public Health Service Act that, as the Court characterized it, "authorizes [CDC] to implement measures like fumigation and pest extermination."[41] Though the Court's analysis was brief, it pointed to the statutory text, the breadth of asserted power, and the unheralded nature of that assertion under the applicable statutory provision.[42] The Court particularly emphasized the latter point, stating that "[s]ince th[e applicable] provision's enactment in 1944, no regulation premised on it has even begun to approach the size or scope of the eviction moratorium."[43] The regulation's unprecedented nature thus served as a key basis for the Court to find it unlawful.

Next, in *National Federation of Independent Business v. Department of Labor*, the Court blocked an Occupational Safety and Health Administration ("OSHA") regulation mandating that large employers require eligible employees to either be vaccinated against COVID-19 or undergo regular testing and masking.[44] The Court's brief analysis begins by addressing the text of the Occupational Safety and Health Act of 1970, stating that the statute addresses "hazards that employees face at work" and therefore does not permit broader regulation of COVID-19 that "is not an *occupational* hazard in most."[45] Highly relevant to the Court's analysis was its finding "that OSHA, in its half century of existence, has never before adopted a broad public health regulation of this kind—addressing a threat that is untethered, in any causal sense, from the workplace."[46] The Court found that this "lack of historical precedent, coupled with the breadth of authority" claimed,

39. *Id*. (quoting *Brown & Williamson,* 529 U.S. at 159).
40. 141 S. Ct. 2485 (2021).
41. *Id*. at 2486.
42. *Id*. at 2488–89.
43. *Id*. at 2489. The Court did not specifically quote *UARG*'s "unheralded power" language.
44. 142 S. Ct. 661 (2022).
45. *Id*. at 665.
46. *Id*. at 666.

served as a "telling indication" that OSHA's regulation exceeded its authority.[47] Notably, on the same day that the Supreme Court issued *National Federation of Independent Business*, it also issued a decision in *Biden v. Missouri* upholding a Department of Health and Human Services regulation requiring facilities receiving Medicare and Medicaid funding to ensure that their staff is vaccinated against COVID-19.[48] While the decision does not invoke the major questions doctrine specifically, it finds that the regulation is consistent with the agency's "longstanding practice" of imposing "conditions that address the safe and effective provision of healthcare," including those "that relate to the qualifications and duties of healthcare workers themselves."[49]

The Court's most detailed analysis of regulatory novelty came in *West Virginia v. Environmental Protection Agency*—the case in which it announced the major questions doctrine by name.[50] In dispute in the case was the Clean Power Plan, a 2015 regulation from the EPA issued under Section 111(d) of the Clean Air Act aimed at reducing greenhouse gas emissions from the power sector.[51] Section 111(d) authorizes EPA to issue "standards of performance" for existing stationary sources for certain types of pollutants.[52] The statute defines a "standard of performance," in relevant part, as "a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction."[53]

In the Clean Power Plan, EPA defined the "best system of emission reduction" for greenhouse gases from the power sector through a combination of three approaches, or "building blocks."[54] The first and least contentious of these building blocks involved certain technological improvements at coal-fired power

47. *Id.* at 666 (cleaned up).

48. 142 S. Ct. 647 (2022).

49. *Id.* at 652–53.

50. 142 S. Ct. 2587 (2022).

51. *Id.* at 2602 (citing Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,510 (Oct. 23, 2015) [hereinafter Clean Power Plan]). The procedural posture of *West Virginia* is far more complicated than the other cases discussed in this Article, for reasons that do not affect its implications for this Article. EPA promulgated the Clean Power Plan in 2015, but the rule was stayed by the Supreme Court and did not take effect. *Id.* at 2604 (citing *West Virginia v. EPA*, 577 U.S. 1126 (2016)). After the Trump administration took office, EPA repealed the Clean Power Plan in 2019, concluding that the Plan was issued "in excess of its statutory authority." *Id.* (quoting Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32,520, 32,523 (July 8, 2019)). The U.S. Court of Appeals for the D.C. Circuit subsequently vacated that repeal, finding that EPA had the authority to issue the Clean Power Plan in the first place. *Id.* at 2605 (citing Am. Lung Ass'n v. Env't Prot. Agency, 985 F.3d 914, 988 (D.C. Cir. 2021)). *West Virginia* was the appeal of that D.C. Circuit decision.

52. 42 U.S.C. § 7411(d).

53. *Id.* § 7411(a)(1). The provision also requires that the system be "adequately demonstrated" and that EPA "tak[e] into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements."

54. *West Virginia*, 142 S. Ct. at 2593 (citing Clean Power Plan, 80 Fed. Reg. at 64,667).

plants.[55] The second and third building blocks relied on an approach called "generation shifting," in which power generation shifts from higher- to lower-emitting power sources.[56] Specifically, the second building block envisioned that generation would incrementally shift from coal-fired power plants to lower-emitting gas-fired power plants; the third building block envisioned that generation would incrementally shift from those fossil-fuel plants to zero-emitting renewable-energy power sources.[57] Having identified these three building blocks as the "best system of emission reduction," EPA then imposed emissions limits for the power sector that could be achieved using these approaches.[58]

In *West Virginia*, the Court held that Section 111(d) does not permit EPA to premise its emissions limits under that provision on generation shifting. Rather than begin with the statutory text as it mostly had in the decisions analyzed above, the Court discussed each of those decisions (and several others[59]) to identify a canon of "extraordinary cases" involving "regulatory assertions [that] had a colorable textual basis" but in which "'common sense as to the manner in which Congress would have been likely to delegate' such power to the agency at issue . . . made it very unlikely that Congress had actually done so."[60] Among other common features of those prior decisions, the Court pointed to the "unprecedented"[61] and "unheralded"[62] nature of the challenged regulations[63] as a reason for "reluctance" to read the claimed authority "into ambiguous statutory text."[64] The Court labeled this "identifiable body of law" as the "major questions doctrine."[65]

Turning to the Clean Power Plan, the Court then explained that "this is a major questions case" in which "EPA claimed to discover in a long-extant statute an unheralded power representing a transformative expansion in its regulatory authority."[66] The Court began by emphasizing the Clean Power Plan's unprecedented nature, claiming that "[p]rior to 2015, EPA had always set emissions limits under Section 111" premised on the emission reductions achievable through

55. *Id*. (citing Clean Power Plan, 80 Fed. Reg. at 64,727).

56. *Id*.

57. *Id*. (citing Clean Power Plan, 80 Fed. Reg. at 64,667, 64,729, 64,748).

58. *Id*. (citing Clean Power Plan, 80 Fed. Reg. at 64,797–811).

59. MCI Telecommunications Corp. v. American Telephone & Telegraph Co., 512 U.S. 218 (1994); Gonzales v. Oregon, 546 U.S. 243 (2006).

60. *West Virginia*, 142 S. Ct. at 2609 (quoting *Brown & Williamson*, 529 U.S. at 133) (cleaned up).

61. *Id*. at 2608 (quoting *Alabama Ass'n of Realtors*, 141 S. Ct. at 2489).

62. *Id*. (quoting *UARG*, 573 U.S. at 324).

63. The Court also quoted its prior recognition in *National Federation of Independent Business* that "'OSHA, in its half century of existence,' had never relied on its authority to regulate occupational hazards to impose such a remarkable measure" as it did in the COVID-19 vaccine-or-test rule. *Id*. at 2608–09 (quoting 142 S. Ct. at 666).

64. *Id*. at 2609.

65. *Id*.

66. *Id*. at 2610 (cleaned up) (quoting *UARG*, 573 U.S. at 324).

at-the-source pollution controls and not on generation shifting.[67] The Court dismissed one counter-example offered by EPA in litigation—a 2005 mercury regulation that set a sector-wide emissions cap rather than mandate controls for individual sources[68]—on the basis that the 2005 rule supposedly "set the cap based on the application of particular controls" that could be installed at individual plants (a characterization the dissent disputed).[69] The Court also pointed to EPA's longstanding preference for a "technology-based approach" since the Clean Air Act's passage.[70]

In June 2023, the Court continued to focus on regulatory novelty in its most recent case under the major questions doctrine: *Biden v. Nebraska*.[71] In *Nebraska*, the Court considered a challenge to the Department of Education's program under the HEROES Act canceling $10,000 to $20,000 in student-loan debt per eligible borrower.[72] Most of the Court's analysis focused on the text of the HEROES Act, concluding that the statute on its face did not permit the debt-forgiveness program.[73] After conducting this more traditional statutory analysis, the Court then turned to the major questions doctrine, which it found presented a separate and independent basis to reject the program.[74] And like in *West Virginia*, the Court's major-questions analysis in *Nebraska* began with a discussion of regulatory novelty. In particular, the Court grounded its analysis on the fact that the Department of Education "never previously claimed powers of this magnitude under the HEROES Act," since "past waivers and modifications issued under the Act have been extremely modest and narrow in scope."[75] Like prior recent cases under the major questions doctrine, the Court placed great emphasis on the novelty of the agency's program.

As *West Virginia* and *Nebraska* make clear, regulatory novelty is now embedded as one of the core aspects of the major questions doctrine. For the doctrine to apply, the Court explained, a regulation must be "unprecedented," "effect[] a

67. *Id.*

68. *Id.* (citing Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units, 70 Fed. Reg. 28,606 (May 18, 2005) [hereinafter Mercury Rule]). The dissent disputed this characterization, explaining that "the approval of cap and trade [in the Mercury Rule] allowed EPA to make the emissions limits more stringent than it otherwise could have, because EPA knew that plants unable to cost-effectively install scrubbers could instead meet the limits through generation shifting." *Id.* at 2639–40 (citing Mercury Rule, 70 Fed. Reg. at 28,619). It also highlighted numerous instances in which EPA had relied on generation shifting under other Clean Air Act provisions. *Id.* at 2640 (Kagan, J., dissenting) (collecting regulations). The majority opinion did not directly respond to the dissent's characterization of the Mercury Rule. In a footnote, it also dismissed the relevance of the other antecedents offered by the dissent, characterizing them as "inapposite" because they "were not Section 111 rules." *Id.* at 2611 n.1 (majority opinion).

69. *Id.* at 2610.

70. *Id.* at 2611.

71. 143 S. Ct. 2355 (2023).

72. *Id.* at 2358.

73. *Id.* at 2368–71.

74. *Id.* at 2372–74.

75. *Id.* at 2372.

fundamental revision of the statute," and concern an issue of "vast economic and political significance."[76] Thus, while regulatory novelty by itself does not trigger the major questions doctrine or invalidate an agency regulation, it is a key factor that courts will consider when assessing the doctrine's application and the regulation's legality.

B. CONSIDERATION OF REGULATORY NOVELTY IN APPELLATE AND DISTRICT COURTS

It is not only the Supreme Court that has focused on regulatory novelty in recent years. Following the Court's lead, federal appellate and district courts have also begun assessing the legality of agency action based in part on the novelty of that action and whether it asserts "unheralded power." As of November 2022, more than two dozen federal appellate and district court decisions have cited *UARG*'s "unheralded power" language.[77] (Although this section does not address appellate and district decisions issued since November 2022, numerous courts have relied on the major questions doctrine to strike down agency actions during that time.[78]) In most of those opinions, the citation was part of a discussion as to whether the agency was exercising unprecedented authority that factored into the court's decision on the legality of the challenged action.

Consideration of the "unheralded" nature of agency action has been used to strike down (either vacate or enjoin) high-profile agency actions under the Obama, Trump, and Biden administrations. These include the Obama administration's fiduciary rule to broaden regulation of investment advice related to pensions and retirement plans[79] and regulations of hydraulic fracturing on federal

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76. *West Virginia*, 142 S. Ct. at 2608, 2612; *Nebraska*, 143 S. Ct. at 2372–73.

77. As of November 2022, a search on WestLaw for cases citing *UARG* and using the phrase "unheralded power" yields twenty-nine results. Of those twenty-nine results, one is a state court opinion, and another is the Supreme Court's decision in *West Virginia*. Of the other twenty-seven results, fifteen are from federal district courts and twelve are from federal appellate courts. One of the appellate court decisions is the D.C. Circuit opinion on the rescission of the Clean Power Plan, which the Supreme Court overturned in *West Virginia*. Am. Lung Ass'n v. Env't Prot. Agency, 985 F.3d 914, 964 (D.C. Cir. 2021). One of the twelve appellate court decisions citing *UARG*'s "unheralded power" language overturns one of the fifteen district court decisions citing this same language. Chamber of Com. of United States of Am. v. United States Dep't of Lab., 885 F.3d 360, 381 (5th Cir. 2018); Chamber of Com. of the United States of Am. v. Hugler, 231 F. Supp. 3d 152, 179 (N.D. Tex. 2017). One of the twelve appellate decisions affirms one of the fifteen district decisions. Merck & Co. v. United States Dep't of Health & Hum. Servs., 962 F.3d 531 (D.C. Cir. 2020); Merck & Co. v. United States Dep't of Health & Hum. Servs., 385 F. Supp. 3d 81, 97 (D.D.C. 2019). The twelve appellate decisions also include two Sixth Circuit dissenting opinions on the legality of the OSHA vaccine-or-test regulation that the Supreme Court resolved in *National Federation of Independent Business*, as well as two Fifth Circuit decisions on the Deferred Action for Parents of Americans and Lawful Permanent Residents program. In re MCP NO. 165, 21 F.4th 357, 397 (6th Cir. 2021) (Larsen, J., dissenting) (OSHA rule); In re MCP No. 165, 20 F.4th 264, 273 (6th Cir. 2021) (Sutton, C.J., dissenting from denial of rehearing en banc) (OSHA rule); Texas v. United States, 787 F.3d 733, 761 n.90 (5th Cir. 2015) (DAPA); Texas v. United States, 809 F.3d 134, 183 n.190 (5th Cir. 2015) (DAPA).

78. *See* Brunstein, *supra* note 2.

79. *E.g.*, Chamber of Com. of United States of Am. v. United States Dep't of Lab., 885 F.3d 360 (5th Cir. 2018).

lands;[80] actions taken under the Trump administration to require drug manufacturers to disclose wholesale acquisition costs in television advertisements,[81] restrict immigration in light of the COVID-19 pandemic,[82] impose COVID-related restrictions on the cruise ship industry,[83] and use military construction funds to construct a border wall;[84] and the Biden administration's travel mask mandate[85] and vaccination requirement for HeadStart employees, volunteers, and contractors.[86] As discussed further below, courts on several occasions have also identified regulatory antecedents to reject claims that the agency was overstepping its statutory authority.[87]

Decisions striking down purportedly unprecedented agency action typically discuss the "unheralded" nature of the asserted authority somewhat briefly and contextualize it among other factors counseling against the lawfulness of the challenged action.[88] This is consistent with the Supreme Court's treatment of regulatory novelty in *Brown & Williamson* and *UARG*.[89] However, in light of the Court's increased focus in recent terms on regulatory novelty under the major questions doctrine,[90] this may be starting to change. In its September 2022 decision permanently enjoining the COVID-19 vaccination for HeadStart personnel, the U.S. District Court for the Western District of Louisiana distinguished 18 regulatory antecedents that the government offered in litigation.[91]

As noted above, a handful of courts have upheld agency action in part because it did not represent an "unheralded power," pointing to regulatory consistency

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80. State of Wyoming v. United States Dep't of the Interior, No. 2:15-CV-041-SWS, 2016 WL 3509415, at *7 (D. Wyo. June 21, 2016), *judgment vacated, appeal dismissed sub nom.* Wyoming v. Zinke, 871 F.3d 1133 (10th Cir. 2017). The Tenth Circuit dismissed the case and vacated the judgment under prudential ripeness due to a change in administration, and did not address the case's merits.

81. Merck & Co. v. U.S. Dep't of Health & Hum. Servs., 962 F.3d 531 (D.C. Cir. 2020) (affirming district court's vacatur).

82. P.J.E.S. by & through Escobar Francisco v. Wolf, 502 F. Supp. 3d 492, 538 (D.D.C. 2020).

83. State v. Becerra, 544 F. Supp. 3d 1241, 1264 (M.D. Fla. 2021).

84. California v. Trump, 407 F. Supp. 3d 869, 895 (N.D. Cal. 2019), *aff'd sub nom.* Sierra Club v. Trump, 977 F.3d 853 (9th Cir. 2020), *judgment vacated sub nom.* Biden v. Sierra Club, 142 S. Ct. 56 (2021). The Supreme Court's one-paragraph judgment was based on changed circumstances and not on the merits.

85. Health Freedom Def. Fund, Inc. v. Biden, No. 8:21-CV-1693-KKM-AEP, 2022 WL 1134138, at *11 (M.D. Fla. Apr. 18, 2022).

86. Louisiana v. Becerra, No. 3:21-CV-04370, 2022 WL 4370448, at *11–12 (W.D. La. Sept. 21, 2022).

87. *See infra* notes 94–97 and accompanying text.

88. A particularly stark example is the Fifth Circuit's decision striking down DAPA, which quotes *UARG*'s discussion of "unheralded power" only in a footnote. *Texas*, 809 F.3d at 183 n.190. In numerous other cases, the court discusses the lack of antecedents in a paragraph or two. *E.g.*, *Chamber of Com.*, 885 F.3d at 380–81; *P.J.E.S.*, 502 F. Supp. 3d at 538.

89. *See supra* notes 14–32 and accompanying text.

90. *See supra* notes 33–46 and accompanying text.

91. 629 F.Supp.3d 477 (W.D. La. 2022).

and relevant antecedents.[92] In several of these cases, however, the issue has been quite clear-cut. For instance, one decision by the U.S. Court of Appeals for the Fifth Circuit highlighted OSHA's "consistent[] . . . interpretation for decades" to issue citations at a multi-employer construction worksite.[93] Another by the U.S. District Court for the District of Columbia upheld a Treasury Department regulation that adopted a "substantially similar" interpretation to one it had adopted for "nearly the entirety of its statutory existence."[94] In two other cases, a federal district and appellate court respectively rejected claims that the agency was exercising "unheralded power" and pointed to relevant antecedents, but was reversed on appeal when the reviewing court concluded that the antecedents identified below were insufficiently targeted (including the D.C. Circuit in the challenge to the repeal of the Clean Power Plan that would become *West Virginia*).[95]

As these examples illustrate, federal appellate and district courts are frequently considering regulatory antecedents to assess whether a challenged agency action constitutes a claim of unprecedented power that exceeds the agency's authority.[96] In light of the Supreme Court's increased focus on regulatory novelty under the major questions doctrine, courts are likely to continuing to assess the novelty of agency action to help determine whether the agency is properly exercising its authority[97]—at least for "extraordinary" regulations concerning "vast economic and political significance" that could plausibly trigger the major questions doctrine.[98]

II. REBUTTING CLAIMS OF NOVELTY IN THE REGULATORY PROCESS: TWO CASE STUDIES

With courts increasingly focused on regulatory novelty, agencies issuing controversial policies that are likely to face legal challenges under the major questions doctrine have a strong incentive to identify regulatory antecedents early in the rulemaking process. Yet agencies have not developed a consistent practice of identifying relevant regulatory antecedents for key regulatory proposals under

92. The Supreme Court has also previously cited consistency with agency practice in upholding a challenged regulation. Biden v. Missouri, 142 S. Ct. 647, 652–53 (2022); *see also supra* note 48.

93. Acosta v. Hensel Phelps Constr. Co., 909 F.3d 723, 735–36 (5th Cir. 2018).

94. Ass'n for Cmty. Affiliated Plans v. United States Dep't of Treasury, 392 F. Supp. 3d 22, 35 (D.D.C. 2019), aff'd sub nom. Ass'n for Cmty. 966 F.3d 782 (D.C. Cir. 2020).

95. Am. Lung Ass'n v. EPA, 985 F.3d 914, 964 (D.C. Cir. 2021), *rev'd and remanded sub nom.* West Virginia v. EPA, 142 S. Ct. 2587 (2022); Chamber of Com. of the United States of Am. v. Hugler, 231 F. Supp. 3d 152, 179 (N.D. Tex. 2017), *rev'd sub nom.* Chamber of Com. of United States of Am. v. United States Dep't of Lab., 885 F.3d 360 (5th Cir. 2018).

96. In another case that cited *UARG*'s "unheralded power" language, the court held that an agency had "express statutory command" and did not delve into regulatory history. Finnbin, LLC v. Consumer Prod. Safety Comm'n, 45 F.4th 127, 134 (D.C. Cir. 2022).

97. *See* Brunstein, *supra* note 3, at 662 (noting that in the approximately 15 months after *West Virginia* was decided, 38 appellate and district court cases cited the case when analyzing an argument under the major questions doctrine).

98. *See West Virginia*, 142 S. Ct. at 2608

such circumstances. In the two case studies below, dissenting commissioners on multi-member agencies argued that the agency was violating the major questions doctrine by exercising unheralded power; yet, in both instances, the agency's proposal included limited analysis of relevant antecedents.[99]

A search of the Federal Register and other administrative decisions and guidance reveals that, as of November 2022, agencies have explicitly discussed "major questions," "unheralded power," and related phrases on just a handful of occasions.[100] Those invocations have typically been in response to comments and not part of an affirmative justification for the agency's authority to take the action being proposed or finalized. In several recent final rules, for instance, agencies have rebutted public comments submitted on the proposed regulation claiming that the regulation represents an exercise of unheralded power and triggers the major questions doctrine.[101] Under the Trump administration, agencies on several occasions invoked the major questions doctrine as a basis for repealing prior agency policies, including the Clean Power Plan[102] and the Department of Housing and Urban Development's regulations requiring grantees to affirmatively further fair housing.[103] Furthermore, as detailed in the two case studies below, sometimes the only explicit discussion of the major questions doctrine comes from dissenting commissioners in a multi-member agency.[104]

This Part explores two case studies that fall into the latter bucket, where agencies have been reluctant to explore regulatory antecedents while dissenting commissioners argued that the agency was exercising unheralded power in violation of the major questions doctrine. We first discuss the treatment of regulatory antecedents in the Securities and Exchange Commission's proposed rule to require publicly traded companies to disclose information about the extent to which climate change is affecting their financial performance and their business is exposed

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99. As noted above, it is unclear whether the agency majority had an opportunity to review and respond to dissenting statements in these two case studies. *See supra* note 18. This fact is not material to our argument, which proposes that agencies catalog relevant antecedents early in the rulemaking process for any significant policy likely to face major questions challenges.

100. Related phrases that we searched for are "major questions doctrine," "major question," "major questions canon," and "vast economic and political significance."

101. *E.g.* Deferred Action for Childhood Arrivals, 87 Fed. Reg. 53,152, 53,186–88 (Aug. 30, 2022); 2022-2023 Station-Specific Hunting and Sport Fishing Regulations, 87 Fed. Reg, 57,108, 57,118–19 (Sept. 16, 2022); Pell Grants for Prison Education Programs; Determining the Amount of Federal Education Assistance Funds Received by Institutions of Higher Education (90/10), 87 Fed. Reg. 65,426, 65,445 (Oct. 28, 2022).

102. Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32,520, 32,529 (July 8, 2019).

103. Preserving Community and Neighborhood Choice, 85 Fed. Reg. 47,899, 47,903–04 (Aug. 7, 2020) (discussing the "major issues doctrine"). Also under the Trump administration, the Department of Education issued a procedural rule mandating that the Department consider the major questions doctrine in future rulemakings and guidance documents. Rulemaking and Guidance Procedures, 85 Fed. Reg. 62,597, 62,601 (Oct. 5, 2020).

104. *See infra* Part II.A–B.

to risk from a shift to a clean-energy economy.[105] We then discuss the Federal Energy Regulatory Commission's treatment of regulatory antecedents in its policy statements for natural gas infrastructure.[106] Though only two examples, these case studies illustrate the treatment of regulatory antecedents more broadly in the regulatory process. Notably, both case studies are from 2022, following two of the recent Supreme Court decisions striking down regulations under the major questions doctrine.[107]

A. SEC'S PROPOSED RULE TO STANDARDIZE AND ENHANCE CLIMATE-RELATED DISCLOSURES

In April 2022, the Securities and Exchange Commission (SEC or the Commission) proposed a regulation to require public companies to provide detailed reporting of climate-related risks.[108] The proposal seeks to standardize and enhance corporate reporting of greenhouse gas emissions, climate-related risk management, exposure to severe weather events and natural hazards, and climate-related goals and governance structures.

The Commission issued this proposal pursuant to its authority under the Securities Act of 1933 and the Securities Exchange Act of 1934.[109] Collectively, these statutes empower the SEC to regulate the securities industry and ensure that investors receive adequate and truthful information about securities offered for public sale. The statutes authorize the Commission to require companies to publicly disclose any information that is "necessary or appropriate in the public interest or for the protection of investors."[110] They define the public interest to include "whether the action will promote efficiency, competition, and capital formation."[111]

In 2010, the Commission issued guidance recognizing that "efforts to reduce greenhouse gas emissions" around the globe broadly affect corporate "performance and operations."[112] In that guidance, the Commission concluded that

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105. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21,334 (Apr. 11, 2022) [hereinafter Proposed SEC Rule].

106. Certification of New Interstate Natural Gas Facilities, 178 FERC ¶ 61,107 (2022) [hereinafter Updated Certificate Policy Statement]; Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews, 178 FERC ¶ 61,108 (2022) [hereinafter GHG Policy Statement]. The Commission issued both of these policy statements in February 2022. In March 2022, it published an order designating the two policy statements as drafts and accepting further comments. Order on Draft Policy Statements, 178 FERC ¶ 61,197 (2022). As of November 2022, the Commission has not finalized either policy statement.

107. *See supra* notes 40-47 and accompanying text.

108. Proposed SEC Rule, *supra* note 105.

109. *Id*. at 21,334.

110. 15 U.S.C. § 77g(a)(1); *accord id*. § 77b(b)(i).

111. *Id*. § 77b(b).

112. Commission Guidance Regarding Disclosure Related to Climate Change at 2, Release No. 82 (Feb. 8, 2010) [Disclosure Guidance]. *See also id*. at 5–6 (explaining that "regulatory, legislative and other developments [related to climate change] could have a significant effect on operating and financial

existing regulations may already sometimes require companies to disclose certain climate-related risks when material, including physical climate-change risks; direct impacts on business from climate-related legislation, regulation, and international agreements; and indirect consequences of those regulations such as increased or decreased demand or competition for particular goods or services.[113] Although the 2010 guidance did not formally mandate any particular climate-related disclosures, the Commission stated that it would monitor compliance with its directives and consider future rulemaking as necessary.[114]

But such a rulemaking did not materialize over the ensuing decade. In the absence of clear requirements, observers and experts found that companies have not consistently disclosed detailed information on the risks that climate change—and efforts to mitigate it across the world—pose on their operations and assets.[115] The widespread observation that "existing disclosures of climate-related risks do not adequately protect investors" ultimately spurred the Commission to propose specific regulations for climate-risk disclosure.[116] In its 2022 proposal, the SEC required public companies to disclose a range of climate-related information, including the actual financial impact the company has faced due to physical or transition risks, the company's greenhouse gas emissions,[117] the impact of climate-related weather events and transition activities on the company's business, the company's climate-related targets or goals (if any), and the company's

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decisions, including those involving capital expenditures to reduce emissions and, for companies subject to 'cap and trade' laws, expenses related to purchasing allowances where reduction targets cannot be met"). For a more extensive discussion of the risks that climate change and efforts to mitigate it present to corporate assets and operations, see Madison Condon et al., *Mandating Disclosure of Climate-Related Financial Risk*, 23 N.Y.U. J. LEGIS. & PUB. POL'Y 745, 749–59 (2022).

113. *See* Disclosure Guidance, *supra* note 112, at 22–27. *See id.* at 12–21 for an overview of existing SEC rules that, according to the guidance, require certain climate-related disclosures.

114. *Id.* at 27-28.

115. *See, e.g.*, GOV'T ACCOUNTABILITY OFF., CLIMATE-RELATED RISKS: SEC HAS TAKEN STEPS TO CLARIFY DISCLOSURE REQUIREMENTS, GAO-18-188 (2018) ("[C]ompanies may report similar climate-related disclosures in different sections of the filings, and climate-related disclosures in some filings contain disclosures using generic language, not tailored to the company, and do not include quantitative metrics"); Condon et al., *supra* note 113, at 775-77 ("[T]he SEC's 2010 Guidance did not result in the disclosure many expected."); Proposed SEC Rule, 87 Fed. Reg. at 21,335 (explaining that "registrants often provide information outside of Commission filings and provide different information, in varying degrees of completeness, and in different documents and formats," thereby "impair[ing] the ability to make investment or voting decisions in line with investors' risk preferences").

116. Proposed SEC Rule, 87 Fed. Reg. at 21,335.

117. The proposal would require companies to disclose their Scope 1 and Scope 2 emissions, along with Scope 3 emissions when material or relevant to the company's emissions target. *Id.* at 21,345. Scope 1 refers to "direct emissions from sources that are owned or controlled" by the company. Scope 2 refers to "indirect emissions from sources that are owned or controlled" by the company, such as emissions from the generation of electricity purchased by the company. Scope 3 refers to "emissions . . . from sources not owned or directly controlled by [the company] but related to [its] activities," such as emissions from employee travel and commuting. *See* Greenhouse Gases at EPA, ENV'T PROT. AGENCY, https://perma.cc/5SBC-UPBK (last updated July 18, 2022).

approach to climate-related risk management and any relevant governance structures.[118]

Not all of the SEC commissioners supported the proposal. Commissioner Hester M. Peirce dissented, arguing that the proposal runs afoul of the major questions doctrine, strays from the purpose of the statutory scheme, and is inconsistent with the agency's traditional approach to disclosure regulation.[119] In Commissioner Peirce's view, the "proposal turns the disclosure regime on its head" because it is not focused on providing investors with "an accurate picture of the company's present and prospective performance" but instead prioritizes "a company's climate reputation."[120] Commissioner Peirce argued that the proposed rule broke from the Commission's historic approach by pursuing broad public-policy goals rather than providing material information that could aid "someone whose interest is in a financial return on an investment."[121]

The proposal, for its part, did catalog some regulatory antecedents for its approach, but that discussion was brief and relatively narrow. In particular, the proposal included a four-paragraph Background section that discussed the Commission's history of requiring disclosures related to environmental risk and liability.[122] That section highlighted two antecedents involving "the disclosure of material environmental issues."[123] First, it pointed to SEC guidance and regulation in the 1970s and 1980s requiring companies to disclose "litigation and other business costs arising out of compliance with federal, state, and local laws that regulate the discharge of materials into the environment or otherwise relate to the

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118. A complete list of the proposed disclosures is provided at Proposed SEC Rule, 87 Fed. Reg. at 21,345. A detailed discussion of each item follows over the rest of the rule's preamble.

119. Hester M. Peirce, Comm'r, Sec. and Exch. Comm'n, We are Not the Securities and Environment Commission – At Least Not Yet (Mar. 21, 2022). Commissioner Peirce did not cite the "major questions doctrine" by name (note that her statement was released before *West Virginia*) but quoted *UARG* for the proposition that when "an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' we typically greet its announcement with a measure of skepticism." *Id.* (quoting *UARG*, 573 U.S. at 324). Commissioner Peirce's dissent cited academic work arguing that mandating climate-related financial disclosure would violate the major questions doctrine. *See, e.g.*, *id.* n.45 (citing Andrew N. Vollmer, MERCATUS CENTER, *Does the SEC Have Legal Authority To Adopt Climate-Change Disclosure Rules?* (2021), https://perma.cc/6SFS-7TCA).

120. PEIRCE, *supra* note 119.

121. *Id.* Despite Commissioner Peirce's argument, the Proposed Rule repeatedly highlights benefits to investors and does not hypothesize about the rule's potential effects on mitigating climate change. *See, e.g.*, Proposed SEC Rule, 87 Fed. Reg. at 21,335 ("We are proposing to require disclosures about climate-related risks and metrics reflecting those risks because this information can have an impact on public companies' financial performance or position and may be material to investors in making investment or voting decisions. For this reason, many investors—including shareholders, investment advisers, and investment management companies—currently seek information about climate-related risks from companies to inform their investment decision-making. Furthermore, many companies have begun to provide some of this information in response to investor demand and recognition of the potential financial effects of climate-related risks on their businesses.").

122. *See* Proposed SEC Rule, 87 Fed. Reg. at 21,337-38.

123. *Id.* at 21,337.

protection of the environment."[124] Second, it recognized the significance of the 2010 guidance document discussed above on corporate climate-risk disclosure, explaining that "proposals set forth in this release would augment and supplement the disclosures already required in SEC filings."[125] Outside the Background section, the Commission briefly identified regulatory antecedents for various provisions of the Proposed Rule in numerous places.[126]

While the Commission's proposal offered a short and limited discussion of regulatory antecedents, supportive commenters offered more extensive and effective arguments that the proposal was consistent with prior Commission regulations. Four comment letters in particular—submitted, respectively, by a group of thirty law professors;[127] the Working Group on Securities Disclosure Authority;[128] Harvard Law School professor John C. Coates;[129] and the Institute for Policy Integrity at New York University School of Law, Environmental Defense Fund, and Boston University School of Law professor Madison Condon[130]—detailed a broad range of SEC antecedent regulations to rebut Commissioner Peirce's claim that the SEC's proposal was unprecedented.

For instance, whereas the Commission concentrated mainly on a handful of prior environmental-focused disclosure requirements, commenters highlighted a broader range of antecedent regulations and noted that the Commission "has repeatedly required disclosure of information that, while not financial on its face, is nevertheless relevant to investors' assessment of a registrant's future financial prospects."[131] These include disclosures related to corporate

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124. *Id*. & *id*. n.29–32 (citing, inter alia, Release No. 33–6383, 47 Fed. Reg. 11,380 (Mar. 3, 1982)).

125. *Id*. at 21,338 (citing Disclosure Guidance, *supra* note 113).

126. *See, e.g*., *id*. at 21,352 (noting that rule's materiality determination "is similar to what is required when preparing the MD&A section in a registration statement or annual report"); *id*. at 21,359 (recognizing that regulatory provisions on corporate governance "are similar to the Commission's existing rules under Regulation S–K that call for disclosure about corporate governance in that they are intended to provide investors with relevant information about a registrant's board, management, and principal committees"); *id*. at 21,366 & n.347 (providing regulatory antecedents for use of a 1% threshold).

127. Jill E. Fisch et al., Comment Letter on Enhancement and Standardization of Climate-Related Disclosures for Investors (June 6, 2022), https://perma.cc/42CG-KUJW.

128. Working Group on Securities Disclosure Authority, Comments on Climate-Related Disclosures for Investors (June 16, 2022), https://perma.cc/3Z9K-9A6L. The Working Group on Securities Disclosure Authority is a bipartisan group that includes "leading academics, former Commission officials, and market participants," including four SEC chairs, five SEC commissioners, and five SEC general counsel. Richard L. Revesz, one of the authors of this Article, was a member of the working group and a signatory of the letter.

129. John C. Coates, Comment Letter on Enhancement and Standardization of Climate-Related Disclosures for Investors (June 2, 2022), https://perma.cc/4W2Q-KZBC.

130. Institute for Policy Integrity et al., Regulatory Precedents for the Proposed Rule (June 17, 2022), https://perma.cc/KD2E-AMAS. The authors of this Article are both on staff at the Institute for Policy Integrity, although neither personally signed this comment letter.

131. *Id*. at 3. *See also id*. at 7 ("[E]xisting disclosure requirements elicit information about non-financial information that can serve as a proxy for financial risk. These disclosures allow investors to draw inferences about future performance from a director or manager's past performance; interpret

governance,[132] corporate performance targets and employee compensation,[133] and the sources and availability of raw materials.[134] Commenters similarly discussed how the Commission has previously required disclosure related to pressing and politically sensitive market developments, such as risks stemming from Y2K, the Eurozone crisis, Brexit, the COVID-19 pandemic, and the war in Ukraine.[135] As the coalition of law professors explained, such examples illustrate that "[t]he Commission is cognizant of the appropriate role of disclosure as a regulatory tool and it is not aiming to address climate change any more than it was trying to solve a geopolitical crisis (Russia's war on Ukraine) or a global health crisis (the Covid-19 pandemic) when it required public companies, for the benefit of investors and markets, to disclose the risks and operational and financial impacts of these critical events."[136]

In addition to identifying these additional regulatory antecedents, commenters also offered more extensive evidence and argument that the antecedents the Commission highlighted (i.e., its environmental disclosure regime dating back to the 1970s) support its authority to mandate climate-risk disclosure. For instance, commenters noted that caselaw supports the SEC's authority to require disclosure of environmental risk.[137] Commenters also highlighted that opponents of prior SEC environmental-disclosure requirements had not challenged the Commission's legal authority to require such disclosures.[138]

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whether compensation performance targets will change internal risk-taking behavior leading to heightened financial risks; estimate a company's viability based on its access to necessary materials; and assess risks associated with regulatory non-compliance. In line with this rich tradition of non-financial disclosures that proxy for risk, the Proposed Rule similarly allows investors to ascertain future transition risk from a company's greenhouse gas emissions.").

132. *Id*. at 5 ("In 1978, when issuing regulations requiring the disclosure of governance information, the SEC further explained that 54% of individual investors found that information on the 'quality of management' was 'extremely useful' in deciding whether to invest. In line with these findings, the SEC began requiring companies to disclose whether directors, officers, or nominated directors, had been involved in certain types of legal proceedings.").

133. *Id*. ("In 2009, the SEC began requiring companies to disclose performance targets and goals tied to employee compensation, if there were a risk that the compensation structure could reasonably have a material adverse effect on the company.").

134. Institute for Policy Integrity et al., *supra* note 130, at 6.

135. Fisch et al., *supra* note 127, at 8; Institute for Policy Integrity et al., *supra* note 131, at 17; *see also* Working Group on Securities Disclosure Authority, *supra* note 129, at 7 ("[T]he SEC has long rejected the view that it cannot require disclosure on politically sensitive subjects.").

136. Fisch et al., *supra* note 127, at 10.

137. Coates, *supra* note 129, at 10 (noting that in NRDC v. SEC, 606 F.2d 1031 (D.C. Cir. 1979), while "the Commission was not required to adopt environmental disclosure obligations beyond what it had already adopted, the Court also concluded that it was authorized to and could do so, if the Commission itself came to an expert judgment that doing so was in service of its statutory missions of protecting investors and promoting the public interest.").

138. Working Group on Securities Disclosure Authority, *supra* note 128, at 4 ("Even opponents of the [2010] guidance agreed that the SEC has authority to mandate environmental-related disclosures—and that such disclosures have long encompassed climate-related matters.").

The Commission finalized a scaled-down version of this rule in March 2024, after substantive work on this Article was complete.[139]

B. FERC'S PROPOSED POLICY STATEMENTS FOR NATURAL GAS INFRASTRUCTURE

In February 2022, the Federal Energy Regulatory Commission (FERC or the Commission) issued two "policy statements" offering guidance on the agency's permitting of interstate natural-gas pipelines under the Natural Gas Act (NGA). The policy statements—which were initially issued to take immediate effect but have since been designated as drafts[140]—emphasize the significance that the Commission will place on environmental impacts in the permitting process. Most notably, as outlined below, the policy statements announce that the Commission will consider greenhouse gas emissions in the permitting process and lay out certain parameters that will guide such consideration.

Passed in 1938, the NGA charges the Commission with regulating the transmission of natural gas in interstate commerce.[141] In particular, Section 7 prohibits the construction or operation of interstate natural-gas infrastructure unless the Commission grants a "certificate of public convenience and necessity" permitting such construction or operation and enabling the operator to exercise eminent domain over all properties necessary to construct the pipeline.[142] The NGA does not define the term "public convenience and necessity" or enumerate factors for the Commission to consider under that standard.[143]

Although FERC assesses applications for a certificate of public convenience and necessity on a case-by-case basis, the Commission has traditionally issued policy statements outlining the types of considerations that will underlie its review. Before 2022, the Commission last issued its Section 7 policy statement in 1999.[144] That 1999 policy statement provides a framework for the Commission to balance a broad range of factors in pipeline certification.[145] But many have criticized the Commission for failing to consistently implement this framework in practice,[146] and instead prioritizing contractual agreements for pipeline capacity (known as precedent agreements) above all other purportedly relevant

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139. The Enhancement and Standardization of Climate-Related Disclosures for Investors, Secs. & Exch. Comm'n, https://www.sec.gov/files/rules/final/2024/33-11275.pdf (Mar. 6, 2024).

140. *See supra* note 106.

141. 15 U.S.C. § 717(b).

142. *Id.* § 717f(c)(1)(A), (h).

143. *See id.*

144. Statement of Policy, Certification of New Interstate Pipeline Facilities, 88 FERC ¶ 61,227 (1999) [hereinafter 1999 Policy Statement].

145. *Id.* at 18 (explaining that the Commission will balance a proposed pipeline's economic effects against "adverse effects the project might have on [1] the existing customers of the pipeline proposing the project, [2] existing pipelines in the market and their captive customers, or [3] landowners and communities affected by the route of the new pipeline.").

146. *See* Updated Certificate Policy Statement, *supra* note 106, at para. 14 (explaining that "stakeholders have raised various concerns with, among other things, the use of eminent domain, the need for new projects, and the environmental impacts of project construction and operation, including impacts on climate change and environmental justice communities").

factors.[147] The Commission's limited consideration of environmental and climate impacts has drawn particular scrutiny.[148] In particular, several recent D.C. Circuit decisions rejected FERC pipeline approvals for inadequately considering the climate impacts of pipeline approvals.[149] Those decisions criticized the Commission for paying inadequate attention to the emissions resulting from the increased natural gas consumption and production that pipeline build-out will cause (known respectively as "downstream" and "upstream" emissions).[150]

In February 2022,[151] the Commission released two new policy statements that sought to "provide a more comprehensive analytical framework . . . on how the Commission will evaluate all factors bearing on the public interest" in Section 7 certification proceedings.[152] The primary policy statement, titled "Certification of New Interstate Natural Gas Facilities," updated the 1999 policy statement by emphasizing the need to look beyond precedent agreements when considering project need[153] and the importance of balancing environmental impacts in the

147. *E.g.* SARAH LADIN & BURCIN UNEL, INST. FOR POL'Y INTEGRITY, REFORMING PIPELINE REVIEW 3 (2022), ("[T]he Commission has in practice given only the barest of consideration to factors beyond precedent agreements—long-term capacity contracts between the pipeline and shippers or end users—in evaluating need and determining whether a project is required by the public convenience and necessity. Instead, the Commission relies heavily, if not exclusively, on evidence provided by private actors that a project is needed—that is the precedent agreements.").

148. While the 1999 Policy Statement calls for the consideration of environmental impacts, it provides that "[t]he balancing of interests and benefits . . . will precede the environmental analysis [and] will largely focus on economic interest." 1999 Policy Statement, *supra* note 143, at 28. However, the Commission also acknowledged in an order clarifying that policy statement that "adverse impacts on . . . the environment" could cause "the balance [to] tip against certification." Order Clarifying Statement of Policy, Certification of New Interstate Natural Gas Pipeline Facilities, 65 Fed. Reg. 7862, 7867 (Feb. 16, 2000) [hereinafter Order Clarifying 1999 Policy Statement]. And as the Commission explained in the Updated Certificate Policy Statement, "in practice," the review of economic and environmental impacts occurs concurrently, such that the "1999 Policy Statement has created some confusion and incorrectly conveyed how the Commission considers environmental impacts." Updated Certificate Policy Statement, *supra* note 106, at 72.

149. Sierra Club v. FERC (*Sabal Trail*), 867 F.3d 1357, 1379 (D.C. Cir. 2017); Food & Water Watch v. FERC, 28 F.4th 277, 292 (D.C. Cir. 2022). In another case, the D.C. Circuit expressed "misgivings" about the Commission's assessment of climate impacts, but found that the issue was not preserved. Birckhead v. FERC, 925 F.3d 510, 520 (D.C. Cir. 2019). In at least one recent case, the D.C. Circuit found that the Commission's review of climate impacts in a Section 7 proceeding was sufficient. Delaware Riverkeeper Network v. FERC, 45 F.4th 104, 109–12 (D.C. Cir. 2022).

150. *Birckhead*, 925 F.3d at 520.

151. The Commission issued notices of inquiry on its Section 7 policy statement in 2018 and 2021, receiving comments from a wide range of stakeholders. Alexandra B. Klass, *Evaluating Project Need for Natural Gas Pipelines in an Age of Climate Change: A Spotlight on FERC and the Courts*, 39 YALE J. ON REGUL. 658, 682–84 (2022).

152. Updated Certificate Policy Statement, *supra* note 106, at para. 51.

153. *E.g. id.* at para. 54 ("Although precedent agreements remain important evidence of need, and we expect that applicants will continue to provide precedent agreements, the existence of precedent agreements may not be sufficient in and of themselves to establish need for the project").

certification decision.[154] The Commission announced that it would "balance . . . all of the benefits of a proposal together with all of the adverse impacts, including the economic and environmental impacts," in deciding whether to certify a proposed pipeline,[155] without "adopt[ing] any bright-line standards for how [it] will carry out this balancing."[156]

In the second policy statement, titled "Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews," the Commission provided further insight into how it would consider climate impacts as part of the public-interest balancing.[157] Most notably, the Commission announced that it would quantify downstream and upstream greenhouse gas emissions and factor them into the public-interest balancing test when those emissions are "reasonably foreseeable,"[158] consistent with D.C. Circuit precedent.[159] The policy statement "encouraged" applicants "to propose mitigation that will minimize climate impacts," and noted that "[t]he Commission will consider any mitigation measures proposed by the project sponsor on a case-by-case basis when balancing the need for a project against its adverse environmental impacts."[160]

Two FERC commissioners issued lengthy dissenting statements. Commissioner Mark C. Christie's dissent centered on the major questions doctrine, arguing that the policy statements "rewrite . . . the Natural Gas Act" and "represent[] a truly radical departure from decades of Commission practice and precedent."[161] In particular, Commissioner Christie stated FERC's claimed authority "to reject a project based solely on [greenhouse gas] emissions is specious and ahistorical."[162] Commissioner Christie targeted the consideration of downstream and upstream emissions, arguing that FERC's consideration of environmental impacts "is limited to the effects stemming from the construction and operation of the proposed facilities" and does not extend to impacts flowing from the natural-gas consumption and production that those facilitates promote[163]—an analysis that is "far

154. *E.g. id.* at para. 62, 72–76 (recognizing that the Commission will consider "environmental interests" and "the interests of landowners and surrounding communities, including environmental justice communities" when "determining whether to issue a certificate of public convenience and necessity").

155. *Id.* at para. 94.

156. *Id.* at para. 99. For a more extensive summary of the Updated Certificate Policy Statement, see Klass, *supra* note 152, at 682–85.

157. GHG Policy Statement, *supra* note 106.

158. *Id.* at para. 31. The Commission also stated that it would "[c]onsider direct emissions of a project"—that is, the emissions released directly from the proposed infrastructure itself. *Id.*

159. *See supra* notes 148 and accompanying text.

160. GHG Policy Statement, *supra* note 106, at para. 98.

161. *Id.* at para. 2 (Christie, dissenting). Commissioner Christie issued the same dissent to both policy statements. For simplicity's sake, we consistently cite his dissent to the GHG Policy Statement.

162. *Id.* at para. 12 (Christie, dissenting).

163. *Id.* at para. 27 (Christie, dissenting).

removed from the Commission's . . . traditional responsibilities."[164] In a separate lengthy dissent, Commissioner James Danly also disputed FERC's authority to factor climate impacts (particularly downstream and upstream impacts) into certificate evaluations, without explicitly invoking the major questions doctrine.[165]

Whereas the dissents focused considerably on the major questions doctrine, the policy statements themselves did not address the doctrine. For instance, the policy statements did not reference the major questions doctrine or caselaw cautioning against the exercise of "unheralded power." And although the policy statements cataloged some relevant regulatory antecedents, that analysis was limited. The greenhouse gas policy statement contained one paragraph discussing how "Commission staff has addressed climate change in some fashion in its NEPA documents for at least a decade."[166] In a sentence, the Commission explained that it has "recognized from its earliest decisions that it may consider the end use of gas as a factor in assessing the public interest and has long considered the impact of natural gas combustion on air pollution," citing four Commission orders from the 1940s through 1960s.[167] In another sentence, the Commission highlighted that a 1961 Supreme Court decision, *Federal Power Commission v. Transcontinental Gas Pipe Line Corp*., recognized that the Commission[168] "had the authority to consider . . . the impact of end-users combusting transported gas on air quality, as part of its public convenience and necessity determination."[169]

Like with the SEC proposal, supportive commenters offered a more extensive analysis of regulatory antecedents to rebut claims from dissenting commissioners that FERC's proposal was unprecedented.[170] For instance, one comment letter

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164. *Id*. at para. 28 (Christie, dissenting).

165. *E.g*. *id*. at para. 26 (Danly, dissenting) ("Congress put its thumb on the scale in favor of gas and charged the Commission with ensuring that there would be adequate infrastructure in place to provide an abundant supply of natural gas available at reasonable prices for all Americans to use. The purpose of the NGA is narrow and clear. And it is a mousehole through which the elephant of addressing the climate change impacts of the entire natural-gas industry cannot pass"). Commissioner Danly issued a separate dissenting opinion for the Updated Certificate Policy Statement, which touched upon a broader range of issues.

166. *Id*. at para. 10 (explaining that the Commission has quantified direct greenhouse gas emissions for "at least a decade" and that "[s]tarting in late 2016," the Commission "began to conservatively estimate indirect downstream greenhouse gas emissions" in its environmental analyses).

167. *Id*. at para. 82.

168. FERC was known as the Federal Power Commission until 1977. *See* Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565 (1977) (codified as 42 U.S.C. § 7172 (a)(1)). For simplicity, this Article uses "Commission" to also refer to the Federal Power Commission.

169. *Id*. at para. 103.

170. *See* Todd Aagaard et al., Comments of Legal Scholars Supporting FERC's Authority to Consider Climate Impacts in Certification Proceedings Under Section 7 of the Natural Gas Act (Apr. 25, 2022) [hereinafter Legal Scholars Comments]; Supplemental Comments of the Institute for Policy Integrity at New York University School of Law 6–12 (Oct. 20, 2022) [hereinafter Policy Integrity Comments]; Comments of the Sabin Center for Climate Change Law 2–3 (Apr. 25, 2022); The Niskanen Center and Affected Landowners' Joint Comments in Response to the Commission's Order on Draft Policy Statements 6–9 (Apr. 25, 2022). Note that the authors of this Article were both signatories to the Legal Scholars Comments. Author Max Sarinsky was also a signatory on the Supplemental

from thirty individuals affiliated with legal academic institutions more extensively detailed how the Commission has long considered the advantages and disadvantages of natural gas relative to the alternative fuel sources that the natural gas could displace, and that this assessment has included effects on air pollution from the consumption of those competing fuels.[171] The comment letter identified numerous additional certificate proceedings in which the Commission considered downstream air pollution impacts and factored them prominently into its public convenience and necessity determination.[172] It noted one docket in which the Commission previously recognized that downstream air pollution was "one of the important factors" that it considered in Section 7 proceedings.[173]

Commenters also highlighted that the Commission's current Section 7 policy statement (from 1999) identifies downstream air pollution as an important effect to consider in certification proceedings—a fact that the new, proposed policy statements (from 2022) themselves failed to note.[174] In particular, the 1999 policy statement explains that the "environmental advantages of gas over other fuels" can be considered among the "public benefits" of a proposed natural-gas project.[175] In a subsequent clarification to the 1999 policy statement issued a few months later, the Commission further explained that "the Commission will continue to take into account as a factor for its consideration the overall benefits to the environment of natural gas consumption" when the "natural gas will displace fuels that are more harmful to the environment."[176] As commenters explained, the Commission's previous consideration of downstream air-pollution emissions resulting from natural-gas pipeline build-out—including under its current policy statement—helps counter the argument from dissenting commissioners that FERC is exercising "unheralded power" by doing so in the new policy statements.[177]

The Commission has not (re-)finalized its proposed policy statements as of February 2024, so it remains to be seen how the Commission will respond to

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Comments of the Institute for Policy Integrity. In addition, numerous industry organizations submitted comments supporting the argument that the draft policy statements violate the major questions doctrine. *See, e.g.*, Comments of Enbridge Gas Pipelines 14–46 (Apr. 25, 2022); Comments of the Interstate Natural Gas Association of America 12–21 (Apr. 25, 2022). All comments on the policy statements are available on FERC's website, by searching through dockets PL18-1-000 and PL-21-3-000 at https://perma.cc/FWB5-4YEW.

171. Legal Scholars Comments, *supra* note 169, at 10–11, 16.

172. *Id.* at 16 n.73.

173. *Id.* at 16 & n.75 (citing Transwestern Pipeline Co., 36 F.P.C. 176, 213 (1966)).

174. *Id.* at 17.

175. 1999 Policy Statement, *supra* note 143, at 16.

176. Order Clarifying Statement of Policy, Certification of New Interstate Pipeline Facilities, 90 FERC ¶ 61,128 at 17 (2000). Commenters also highlighted several instances in recent years in which the Commission had put this guidance into practice and directly factored downstream air-pollution effects into its Section 7 determination. *See* Policy Integrity Comments, *supra* note 169, at 9 n.42 (citing examples).

177. Policy Integrity Comments, *supra* note 169, at 7–10.

dissenting commissioners—and address claims that it is acting in an unprecedented fashion in violation of the major questions doctrine—if and when it finalizes those policy statements.

C. TAKEAWAYS FROM THESE TWO ILLUSTRATIONS

These two illustrations offer several important takeaways for how the major questions doctrine is factoring into agency decision-making more broadly.

First, when an agency engages in a substantial and politically controversial action, chances are high that the action will be challenged under the major questions doctrine. Both of these illustrations relate to environmental and climate policy, but arguments that an agency is acting in an unprecedented fashion in violation of its statutory mandate have arisen from many corners of the administrative state including immigration,[178] public health,[179] and financial regulation.[180] Such challenges appear to have become more frequent since the Supreme Court's decision in *West Virginia*.[181]

Second, if these two illustrations are any indication, agencies in high-profile regulatory proposals are often failing to catalog relevant antecedents that could be useful for assessing whether the program is sufficiently unprecedented to potentially trigger the major questions doctrine. In both illustrations above, the respective agencies offered limited analysis of regulatory antecedents, despite such analysis bolstering the proposals at issue. The failure to catalog regulatory antecedents is particularly noteworthy in these two examples because, in both, dissenting commissioners argued that the agency's action was unprecedented and overstepped its statutory mandate.

Third, supportive commenters have sometimes stepped in to buttress agency proposals by providing useful regulatory antecedents. In both the SEC and FERC dockets above, supportive commenters offered a broader and deeper range of regulatory antecedents than the agencies did in their proposals. Although it is not unusual for supporters to buttress a rulemaking proposal, the distinction in volume and quality between the analysis offered by the agencies versus supportive commenters in these examples seems particularly stark. Given the strength of opposition to these two agency actions under the major questions doctrine, it appears unwise for the issuing agencies not to provide further analysis of regulatory antecedents on their own. That recommendation is the focus of the next Part.

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178. *See supra* notes 82, 84 and accompanying text.

179. *See supra* notes 40–48, 85–86 and accompanying text.

180. *See supra* notes 79 and accompanying text.

181. *Compare* Brunstein, *supra* note 3, at 662 (identifying 38 cases applying the major questions doctrine in the approximately 15 months after *West Virginia* was decided) with *supra* note 77 and accompanying text (identifying 29 cases applying the major questions doctrine between 2014–2022).

III. BEST PRACTICES FOR THE CONSIDERATION OF REGULATORY ANTECEDENTS

In light of recent caselaw, courts are likely to closely scrutinize regulatory antecedents when agency actions are challenged under the major questions doctrine.[182] Yet as the two case studies discussed above illustrate, agencies frequently do not include an extensive discussion of regulatory antecedents when proposing (or, in the FERC example, issuing) contentious regulations and policies.[183] This contrast between judicial doctrine and regulatory practice creates litigation risk for the agency. To better prepare for legal challenges, agencies should more extensively catalog regulatory antecedents early and throughout the rulemaking process.

This Part recommends that agencies provide an extensive analysis of regulatory antecedents at the regulatory proposal stage for significant or controversial actions, much like proposals often include dedicated sections on other legal justifications or supporting analyses. It first recommends best practices for the content of those analyses. In particular, this Part recommends that agencies look extensively for analogous exercises of agency authority, and search for relevant characterizations of agency authority in prior agency statements. Such an analysis would be substantially more extensive, both by depth and breadth, than the analyses that agencies conducted in the two case studies discussed in Part II.

This Part then offers best practices for the timing of these analyses, explaining how analysis of regulatory antecedents at (and even before) the proposal stage will best enable the agency to frame the issues, respond to targeted rebuttals, and ultimately defend against legal challenges. It concludes that detailed analysis of regulatory antecedents at every rulemaking stage—pre-proposal, proposal, and final action—will enable agencies to better respond to major questions arguments and reduce litigation risk.

A. AGENCIES SHOULD IDENTIFY A BROAD AND DEEP RANGE OF REGULATORY ANTECEDENTS

In the two case studies discussed in Part II, the respective agencies identified and briefly discussed some relevant regulatory antecedents.[184] Yet, supportive commenters offered a far more extensive inventory and analysis of antecedents supporting the agency's authority.[185] Those comments offer lessons for how agencies should approach their analysis of regulatory antecedents in future dockets.

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182. *See supra* Part I.

183. *See supra* Part II. Recall that the FERC policy statements were initially issued as final documents, although they were later withdrawn and reclassified as proposals. *See supra* note 93.

184. *See supra* notes 123–27 (SEC proposal), 166–69 (FERC policy statements) and accompanying text.

185. *See supra* notes 128–39 (SEC proposal), 170–77 (FERC policy statements) and accompanying text.

Analysis of regulatory antecedents from supportive commenters in these two case studies was both broader and deeper than the agency's analysis. By *broader*, we mean that supportive commenters identified a more extensive range of relevant regulatory antecedents, including antecedents that may have appeared more attenuated on their face, yet strongly supported the agency's action. And by *deeper*, we mean that supportive commenters expanded upon the regulatory antecedents identified by the agency and emphasized particularly relevant features of quotations within those prior actions. Agencies are likely to benefit from both a broader and deeper presentation of relevant antecedents. In this section, we briefly discuss each in turn.

Broader antecedents. It is not entirely clear what "unheralded" means in the context of the major questions doctrine, or how original or unprecedented an agency action must be to qualify.[186] It is thus hard to predict which antecedents courts will credit in future cases, and the level of judicial scrutiny may vary from one case to another.[187] Even still, both logic and Supreme Court precedent suggest that agencies need not identify identical exercises of regulatory authority to defeat claims that their action is unheralded. For one, regulatory history rarely contains a perfect parallel. Thus, if an identical exercise of authority were required, then the major questions doctrine would apply far beyond the "extraordinary" case.[188] For another, in *Missouri v. Biden*, the Supreme Court upheld a contentious regulation mandating COVID-19 vaccination of certain healthcare employees by relying on analogous but non-identical regulatory antecedents.[189]

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186. The Supreme Court has not precisely defined what it means for an agency action to be "unheralded." But it has indicated that it requires the agency's action to be "unprecedented" and not merely novel or new. *See West Virginia v. EPA*, 142 S. Ct. at 2596. And it has also recognized that analogous exercises of authority can serve as regulatory antecedents that support a rule's legality. *See* Biden v. Missouri, 142 S. Ct. 647, 653 (2022) (citing regulations imposing "conditions of participation that relate to the qualifications and duties of healthcare workers" at facilities that participate in Medicare and Medicaid as a key basis to uphold an agency regulation requiring such participants to ensure their employees are vaccinated against COVID-19).

187. Without further guidance, judges are likely to approach the question from different levels of specificity. Litigation over the repeal of the Clean Power Plan evinces this point. At the D.C. Circuit, the court rejected the assertion that the Clean Power Plan marked an exercise of "unheralded power," noting that power plants "have been subject to regulation under Section [111] for nearly half a century." Am. Lung Ass'n v. EPA, 985 F.3d 914, 964 (D.C. Cir. 2021). But the Supreme Court required greater specificity in EPA's antecedents, finding that the Clean Power Plan was "unheralded" because it marked the first time that EPA issued a regulation under Section 111 that was premised on generation shifting and not restricted to the emission reductions achievable through at-the-source pollution controls. *See West Virginia v. EPA*, 142 S. Ct. at 2596; *see also supra* notes 60–63 and accompanying text.

188. Agency actions would be unnecessary unless they were in some fashion novel (unless the action was merely restoring a prior policy that had since been rescinded). Regulatory novelty alone does not necessarily signal that the action is unheralded or unlawful, as there are many potential reasons that an agency may pursue a new policy. *Cf.* Leah Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407, 1427 (2017) (rejecting the argument "that legislative novelty suggests that previous Congresses assumed similar legislation was unconstitutional.").

189. *Biden v. Missouri*, 142 S. Ct. at 652–53.

Accordingly, antecedents evincing that the agency has exercised analogous authority should suffice to establish that a new claim of authority is not unprecedented.[190]

Analogous exercises of agency authority can take numerous forms, and will often not be limited to the most obvious or direct regulatory analogs. Agencies should consider a broad range of antecedents showing that the agency has previously deployed similar tools or pursued similar ends. In the SEC climate-risk disclosure proposal, for instance, commenters identified numerous antecedents in which the SEC required disclosure of non-financial information,[191] whereas the agency's analysis identified only environmental-related disclosures.[192] Relevant antecedents need not come only from prior rulemakings, but can also come from agency guidance,[193] enforcement actions, adjudications, and certification or permitting proceedings.[194]

When considering relevant antecedents, agencies should take account not only of prior policy choices, but also prior statements concerning the scope of the agency's authority, including in earlier legal memoranda or through the consideration of regulatory alternatives in prior policies. In *Massachusetts v. EPA*, for instance, the Supreme Court highlighted the fact that EPA had "previously affirmed" in a memorandum that it had authority to regulate greenhouse gases under the Clean Air Act[195]—in spite of the fact that EPA had never actually exercised that authority. The Supreme Court highlighted this fact in concluding that EPA had authority to regulate greenhouse gases under the Clean Air Act, distinguishing *Brown & Williamson* on the basis that the defendant agency had invoked this interpretation before.[196]

Agencies should be particularly thoughtful about the timing of antecedents. Although the most direct antecedents will often be recent,[197] courts could be more willing to disregard recent antecedents under the theory that older antecedents that were issued closer in time to the passage of the operative legislation are

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190. Dena Adler & Max Sarinsky, *After* West Virginia*, the Major Questions Doctrine Remains Limited to Extraordinary Cases*, ADMIN. & REG'Y LAW NEWS, Summer 2022 at 5, 7, https://perma.cc/BEU8-9MW3.

191. *See supra* notes 131–37 and accompanying text (discussing SEC-required disclosures related to corporate governance, employee compensation, raw materials, Y2K, the Eurozone crisis, Brexit, the COVID-19 pandemic, and the war in Ukraine).

192. *See supra* notes 122–27 and accompanying text.

193. *See, e.g.*, *supra* notes 112-14 and accompanying text (discussing SEC guidance on disclosure of climate-related risk).

194. *See, e.g.*, *supra* notes 165-66 and accompanying text (discussing FERC's consideration of downstream air pollution in individual certification proceedings).

195. Massachusetts v. EPA, 549 U.S. 497, 531 (2007) (highlighting 1998 agency memorandum in which EPA "affirmed that it *had* [the] authority" to regulate greenhouse gases).

196. *See id.* at 530–31 (distinguishing *Brown & Williamson*).

197. For the SEC's climate-risk disclosure proposal, for instance, the most direct antecedent was the agency's 2010 guidance document on disclosing climate-related risk. *See supra* notes 112-15 and accompanying text. For the FERC policy statements, the most direct antecedents were recent orders where the agency had estimated both direct and indirect greenhouse gas emissions. *See supra* note 150 and accompanying text.

more indicative of statutory purpose and intent.[198] Agencies should thus consider older antecedents even when they are less direct than newer ones.[199] Agencies should fully explain the relevance of less-direct regulatory antecedents, as discussed further below.

When agencies promulgate regulations with numerous provisions that are being challenged as distinct violations of the major questions doctrine, they may wish to separately catalog antecedents for each of those provisions. For instance, the SEC provided some limited analysis of regulatory antecedents for individual provisions of the climate-risk disclosure regulation.[200] Extending this practice could help shield multi-pronged regulations against major questions challenges. Although the SEC proposal highlighted antecedents for certain regulatory provisions, commenters identified how the agency could expand upon that analysis by identifying antecedents for other provisions.[201]

Deeper antecedents. In addition to providing a broad range of relevant antecedents, agencies should also provide a detailed analysis of the antecedents that identify and explain how those antecedents are analogous to the current action. Agencies should describe precedents with particularity. Where the relevance of a less-direct antecedent may not be obvious, agencies should seek to identify features of or quotations from those antecedents evincing the agency recognized then that it possessed authority analogous to the authority it now asserts.

FERC's policy statements illustrate how a deeper analysis of relevant antecedents can help rebut claims that the agency is asserting unheralded authority. In the policy statements, the Commission identified several antecedents but described them briefly and at a high level of generality.[202] Given their limited attention in the policy statements, dissenting commissioners did not even distinguish these antecedents.[203] Supportive commenters provided more detail on the

198. The Supreme Court's formulation of the major questions doctrine focuses on the statute's "long-extant" nature. *West Virginia*, 142 S. Ct. at 2610. In a two-justice concurrence in *West Virginia* offering his theory of the major questions doctrine, Justice Gorsuch argued that courts should "examine the age and focus of the statute the agency invokes in relation to the problem the agency seeks to address" and claimed that "an agency's attempt to deploy an old statute focused on one problem to solve a new and different problem may also be a warning sign that it is acting without clear congressional authority." *Id.* at 2623 (Gorsuch, J., concurring).

199. In the FERC policy statements, for instance, the agency had only recently assessed greenhouse gas emissions, but had considered the downstream impacts of other air pollutants resulting from pipeline build-out dating back decades. *See supra* notes 153–57 and accompanying text.

200. *See supra* note 112 (highlighting SEC's identification of antecedents for materiality, corporate governance, and threshold provisions).

201. *See* Institute for Policy Integrity et al., *supra* note 130, at 10–15 (identifying antecedents for blanket disclosures and bright-line thresholds); *id.* at 15–17 (identifying antecedents for disclosure of uncertain future risks); *id.* at 17–22 (expanding on SEC's analysis of governance-related disclosure requirements).

202. *See supra* notes 150–153 and accompanying text.

203. *See supra* notes 145–149 and accompanying text.

antecedents identified by the Commission, drawing out their relevance and identifying particular quotations in prior proceedings in which FERC recognized an analogous authority.[204] Those comments provide a roadmap for the depth of analysis that agencies themselves should perform, enabling a detailed presentation of relevant antecedents without having to rely on outside stakeholders.

B. AGENCIES SHOULD CONSIDER REGULATORY ANTECEDENTS AT ALL STAGES OF THE REGULATORY PROCESS, INCLUDING THE PROPOSAL

Whereas the prior section provides recommendations on the types of antecedents agencies should analyze, this section discusses when they should analyze them. It recommends that agencies assess regulatory antecedents at all key stages of the regulatory process: formation, proposal, and finalization. The proposal stage is perhaps the most critical because a detailed analysis of regulatory antecedents at the proposal stage enables the agency to frame the issue and allows for more targeted objections that the agency can address at finalization. This section outlines the merits of analyzing regulatory antecedents at each of the three regulatory stages.

Formation. The formation stage is the pre-proposal period where the agency selects its regulatory approach.[205] This is when the agency first decides whether to act and serves as an opportunity for the agency to analyze the strengths and weaknesses of alternative regulatory approaches. Such an assessment includes considering the legal vulnerabilities and litigation risks of regulatory alternatives.

Given the prominence of the major questions doctrine in recent administrative caselaw[206] and court filings,[207] assessing the legal vulnerabilities and litigation risks of regulatory alternatives should include an analysis of the major questions doctrine. This includes (though is not limited to[208]) consideration of regulatory antecedents and whether the contemplated action would be unprecedented in a manner that may trigger the doctrine. Of course, the agency need not choose the least-innovative option, particularly when more innovative alternatives better achieve the agency's policy objections (as they often will). But regulatory novelty

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204. *See supra* notes 169-76 and accompanying text. For instance, supportive commenters noted that in one docket, the Commission recognized that downstream air pollution was "one of the important factors" that it considered in natural-gas pipeline certification proceedings. *See supra* note 172 and accompanying text. Commenters also highlighted relevant quotations in the Commission's 1999 policy statement claiming a similar authority.

205. Agencies sometimes solicit public input before issuing a regulatory proposal through either a request for information or advanced notice of proposed rulemaking. Other times, agencies issue a proposal without having previously solicited public comment. *See A Brief Overview of Rulemaking and Judicial Review*, Congressional Research Service, 2-4 (2017). The recommendations presented herein apply equally to both cases.

206. *See supra* Part I.

207. *See supra* note 84 and accompanying text.

208. *See supra* note 63 and accompanying text (explaining that under *West Virginia*, the major questions doctrine applies if a regulation is both unheralded and effects a fundamental revision of the statute).

can help inform an assessment of litigation risk and serve as an important consideration when the agency selects among alternatives that meet its policy objectives.

The Clean Power Plan offers a useful illustration. In that rule, EPA considered setting the best system of emission reduction based on co-firing and carbon capture and storage (CCS).[209] While EPA found these tools to be both "technically feasible" and "cost effective," it preferred generation shifting as the less-expensive alternative.[210] An important countervailing consideration, however, is that CCS and co-firing are source-based rather than system-based controls, making them more squarely in line with EPA's traditional approach to regulation under Section 111.[211] Although the purpose of this illustration is not to second-guess EPA's approach or suggest that the alternative would have necessarily yielded a different litigation outcome,[212] the illustration serves to highlight the importance of considering regulatory novelty during proposal formation. Moving forward, agencies should analyze regulatory antecedents at the early stages of rulemaking when selecting between regulatory approaches as part of an assessment of legal risk under the major questions doctrine.

Identification of regulatory antecedents during the formation stage also has the benefit of enabling intergovernmental review of those antecedents early in the rulemaking process—which could bolster the consideration of antecedents or affect the regulatory design in light of them. Before an executive agency proposes a "significant regulatory action," it must submit that proposal to the Office of Information and Regulatory Affairs (OIRA) for White House and interagency review.[213] That review process can strengthen the agency's legal justification and ensure that the regulation is consistent with the agency's authority.[214] Providing a discussion of regulatory antecedents in draft proposals submitted to OIRA will thus enable more careful consideration of those antecedents—and, therefore, the rule's susceptibility to the major questions doctrine—early in the rulemaking process.

Even if an agency cannot identify relevant antecedents for a particular regulatory alternative, this does not necessarily mean that the agency should avoid that alternative. After all, the unprecedented nature of agency regulation serves as just one prong under the major questions doctrine; as noted above, for the doctrine to

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209. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662, 64,727 (Oct. 23, 2015) [hereinafter Clean Power Plan]. Recall that EPA instead premised its regulation on generation shifting, which the Supreme Court struck down in *West Virginia*. *See supra* notes 43–63 and accompanying text.

210. Clean Power Plan, 80 Fed. Reg. at 64,727.

211. *See West Virginia*, 142 S. Ct. at 2610 ("Prior to 2015, EPA had always set emissions limits under Section 111 based on the application of measures that would reduce pollution by causing the regulated source to operate more cleanly").

212. EPA promulgated the Clean Power Plan years before the Supreme Court's current focus on the major questions doctrine. *See* Daniel Deacon, *The New Major Questions Doctrine*, Law & Economics Working Papers. 239, 18-21 (2022).

213. Exec. Order No. 12,866, 58 Fed. Reg. § 6(a)(3)(B) (Sept. 30, 1993).

214. *See generally* Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 Harv. L. Rev. 1838, 1854–59 (2013) (describing OIRA and interagency review process).

apply, the action must also cause a "'fundamental revision of the statute" and concern an issue of "vast economic and political significance."[215] Thus, although the lack of relevant antecedents may factor against a regulatory alternative, it is not by itself dispositive. However, it is a key prong of the major questions analysis that agencies are particularly well-suited to analyze.

Regulatory proposal. The regulatory proposal is when the agency issues a notice of proposed rulemaking in the Federal Register that is subject to public comment.[216] The regulatory proposal must include "reference to the legal authority under which the rule is proposed" along with "either the terms or substance of the proposed rule or a description of the subjects and issues involved."[217]

The requirement that agencies reference the legal authority for a proposed regulation[218] serves at least two key purposes. First, it "functions to ensure that the agency considers whether it actually has the authority to make the rule it is proposing."[219] Second, it ensures that interested parties have adequate notice and opportunity to comment on the agency's authority.[220] But this is not a high hurdle. Although an agency must provide some basis of legal authority,[221] its explanation need not include a detailed analysis[222] or anticipate and respond to potential counterarguments.[223]

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215. *See supra* note 76 and accompanying text.

West Virginia, 142 S. Ct. at 2612 (alterations omitted) (quoting MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 231 (1994)). Only when an agency's action is both unheralded and transformative does it trigger the major questions doctrine and thus the need for "clear congressional authorization" for the action. *Id*. at 2614 (quoting *Util. Air Regul. Grp*., 573 U.S. at 324).

216. The Administrative Procedure Act typically requires agencies to engage in notice-and-comment rulemaking, subject to designated exceptions. 5 U.S.C. § 553. Notice-and-comment rulemaking is generally not required when agencies issue "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice," or "when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." *Id*. § 553(b)(A)–(B). Notice-and-comment rulemaking is also not required for "military or foreign affairs function[s]" or for "matter[s] relating to agency management or personnel or to public property, loans, grants, benefits, or contracts." *Id*. § 553(a).

217. *Id*. § 553(b)(2)–(3).

218. *Id*. § 553(b)(2).

219. United States v. Whitlow, 714 F.3d 41, 46 (1st Cir. 2013); *see also* United States Telecomm. Ass'n v. FCC, 825 F.3d 674, 697 (D.C. Cir. 2016) (explaining that a court's role in challenges to legal authority underlying agency rules "is to ensure that an agency has acted 'within the limits of [Congress's] delegation' of authority") (alteration in original) (quoting Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865 (1984)).

220. Whitlow, 714 F.3d at 46.

221. *See, e.g*., Nat'l Tour Brokers Ass'n v. United States, 591 F.2d 896, 900, 903 (D.C. Cir. 1978).

222. *Cf. id*. at 900 (explaining that the agency could have fulfilled the requirement by specifying with particularity the statutory provisions under which the proposed regulation was being issued); Glob. Van. Lines, Inc. v. Interstate Com. Comm'n, 714 F.2d 1290, 1298 (5th Cir. 1983) (finding that agency violated the requirement by omitting reference in its proposal to key statutory provision on which the regulation relied).

223. Koretoff v. Vilsack, 707 F.3d 394, 398 (D.C. Cir. 2013) ("It is certainly true that agencies are required to ensure that they have authority to issue a particular regulation. . . . But as we have repeatedly

Nonetheless, agencies routinely provide more extensive analysis of their legal authority in the regulatory proposal that goes far beyond the Administrative Procedure Act's requirements. That analysis often considers judicial canons of constructions and agency deference. For instance, agencies frequently cite the doctrine of *Chevron* deference in a proposed regulation to justify their legal authority.[224] Agencies have relied on *Chevron* deference in rulemaking relatively consistently over the past several presidential administrations.[225] But the Supreme Court is now relying less on *Chevron* deference[226] (and is now deciding two compansion cases that raise the question of whether to overturn or narrow *Chevron*[227]) and the major questions doctrine has come to play a significant interpretive role in recent years.[228] Therefore, while agencies should continue to consider *Chevron* deference and judicial canons of construction when analyzing their legal authority, they should also give close attention to the major questions doctrine—particularly for significant and controversial rulemakings that are more likely to face a challenge under the doctrine. In particular, as detailed above, agencies should catalog regulatory antecedents that support the claimed legal authority by demonstrating that the agency is not exercising an unheralded power.[229]

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made clear, agencies have no obligation to anticipate every conceivable argument about why they might lack such statutory authority.").

224. We searched for references to "'Chevron' and 'deference'" in rules, proposed rules, and notices published in the Federal Register between January 1, 1985 and July 1, 2022 and available on regulations.gov. Based on these search results, we concluded that agencies and commissions have cited *Chevron* deference to support their authority to promulgate a rule or order at least 266 times since 1985. Of those citations, 61 were in proposed rules, with the vast majority (58) of those citations appearing in the regulatory preamble. Agencies also discussed *Chevron* deference in 165 final rules published in the Federal Register during the same time period. Of those, 78 references appeared in the preamble, 37 references were summarizing public comments, and 82 references appeared in the agency's responses to comments. These numbers may represent an underestimate of the number of times that agencies justified their action by reference to *Chevron* deference because all such discussions may not contain the word "deference" (or even "Chevron").

225. Our search yielded just one instance during the Reagan administration in which an agency discussed *Chevron* deference in a Federal Register rule, proposed rule, or notice; three references during the George H.W. Bush administration, and seventeen references under the Clinton administration. References to *Chevron* deference increased substantially during the George W. Bush administration, with 51 total references at an average of approximately six per year. References to *Chevron* deference increased further during the Obama administration, with 106 search results at an average of approximately 13 per year. That annual average increased even further under the Trump administration, where our search yielded 65 results at an average of approximately 16 per year. Under the first seventeen months of the Biden administration (through July 1, 2022), there were 23 references to *Chevron* deference in Federal Register rules, proposed rules, or notices.

226. *See, e.g.*, Nathan Richardson, *Deference Is Dead* (*Long Live Chevron*), 73 RUTGERS U. L. REV. 441 (2021) (discussing how *Chevron* deference has lost prominence in Supreme Court jurisprudence and come under threat).

227. Loper Bright Enterprises v. Raimondo, 143 S. Ct. 2429 (2023); Relentless, Inc. v. Department of Commerce, 144 S. Ct. 325 (2023).

228. *See supra* Part I for a discussion about the rise of the major questions doctrine (and, in particular, the judicial focus on an agency's claim of "unheralded" authority).

229. *See supra* Part III.A.

Analyzing regulatory precedents in the proposed rule provides several advantages for the agency and the public. From a strategic perspective, opponents of the regulation who plan to challenge the rule on major questions grounds may want to refute the relevance of particular antecedents offered by the agency in their comments. The agency can then refine its presentation of regulatory antecedents in the final regulation when it considers objections raised by commenters, including rebutting counter-arguments raised about the relevance of particular antecedents, adding antecedents identified by supportive commenters or responsive to unanticipated major questions objections in opposing comments,[230] or expanding upon its analysis of particular antecedents in response to targeted objections.[231] Extensively analyzing antecedents in the proposed regulation sets up the agency for an even more refined presentation in the final rule.[232]

Final regulation. The final regulation is when the agency formally promulgates a rule and offers its complete justification for that rule. When issuing a final regulation, agencies must consider and respond to "relevant matter presented" in public comments.[233]

If an agency offers an extensive analysis of regulatory antecedents in its proposal, the final regulation allows the agency to consider public comments submitted, respond to concerns raised about the relevance of particular antecedents, and refine its discussion of antecedents to bolster its legal justification. Agencies should err on the side of overinclusion when it comes to its presentation of regulatory antecedents in the final rule because government attorneys will select which antecedents to feature in future litigation.

A robust analysis of regulatory antecedents in the final regulation will provide a roadmap for government litigators, thereby assisting the government's defense of the regulation and lowering litigation risk. While litigators can continue to refine the agency's presentation of regulatory antecedents, there are at least three additional advantages to the agency engaging in a robust characterization of regulatory antecedents itself (beyond the ability to anticipate and respond to opposing arguments through the notice-and-comment process[234]). First, regulators are subject-matter experts in the agency's authority, whereas litigators are typically from

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230. *See supra* Part III.A for a discussion of the breadth of antecedents that agencies should identify in proposed rules. Of course, agencies cannot anticipate every objection to a regulatory proposal in advance, and the relevance of some antecedents may only come into focus through objections provided during the notice-and-comment process.

231. *See supra* Part III.A for a discussion of the depth of antecedents that agencies should identify in proposed rules.

232. Agencies frequently provide supporting documentation with a proposed regulation such as economic or technical analyses. This practice similarly allows the agency to receive public comment and revise the supporting documentation when finalizing the rule.

233. 5 U.S.C. § 553(c). Courts have interpreted this to mean that an agency "need not address every comment, but it must respond in a reasoned manner to those that raise significant problems." City of Waukesha v. EPA, 320 F.3d 228, 257 (D.C. Cir. 2003).

234. *See supra* notes 215-17 and accompanying text.

the Department of Justice and may lack relevant subject-matter expertise. Agencies have career staff who have long institutional memories and may serve as repositories of agency history. Second, agency regulators may have more time to identify relevant antecedents,[235] particularly when litigation is fast-tracked through a request for preliminary relief.[236]

Third, and finally, courts may look more favorably upon antecedents identified by the agency when issuing the regulation compared to those identified after the fact by litigators.[237] As the Supreme Court explained in *Securities & Exchange Commission v. Chenery Corp.*, a reviewing court "must judge the propriety of [an administrative agency's discretionary] action solely by the grounds invoked by the agency."[238] Although this principle does not prohibit Department of Justice litigators from refining the presentation of the agency's legal arguments, the government's litigation position may be weaker if it relies on regulatory antecedents that the agency itself did not cite.[239]

CONCLUSION

This Article traces the increasing attention on regulatory novelty when courts assess the legality of agency action. This enhanced focus provides a strong incentive for agencies to analyze regulatory antecedents during the rulemaking process, particularly for large and contentious regulations that may face challenges under the major questions doctrine. This Article recommends best practices for both the content and timing of agency consideration of regulatory antecedents in the rulemaking process. It suggests that agencies consider a broad range of relevant antecedents and extensively document how those antecedents are analogous to the current action. The Article also recommends that agencies analyze regulatory antecedents at all stages of rulemaking, with a particular emphasis on the regulatory proposal.

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235. *See* Jacob E. Gersen & Anne Joseph O'Connell, *Deadlines in Administrative Law*, 156 U. PA. L. REV. 923, 945–46 (2008) (finding that the average duration for rulemakings without a statutory deadline is 528 days).

236. Litigation can move particularly rapidly when plaintiffs seek preliminary relief against large and contentious regulations. The COVID-19 vaccination-or-testing standard that the Supreme Court struck down in National Federation of Independent Business v. Department of Labor provides an example. Petitioners moved for a stay in the U.S. Court of Appeals on the same day that the regulation was finalized, and the government's brief was due three days later. *See* Docket, BST Holdings v. OSHA, 17 F.4th 604 (5th Cir. 2021); COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61,402 (Nov. 5, 2021). The regulatory process itself could move quickly for such rules, but likely not as quickly. For instance, the Occupational Safety and Health Administration took approximately two months to promulgate the COVID-19 vaccination-or-testing standard. *See* Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin, 142 S. Ct. 661, 663 (2022). The agency issued that regulation without notice and comment pursuant to the relevant statute. *See id.*

237. *See* Dep't of Homeland Sec. v. Regents of the Univ. of California, 140 S. Ct. 1891, 1909 (2020) (discussing "prohibition on *post hoc* rationalizations" in litigation over agency action).

238. Sec. & Exch. Comm'n v. Chenery Corp., 332 U.S. 194, 196 (1947); *see also* Kevin M. Stack, *The Constitutional Foundations of* Chenery, 116 YALE L.J. 952 (2007).

239. *Cf.* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 50 (1983) ("[C]ourts may not accept appellate counsel's post hoc rationalizations for agency action"); FPC v. Texaco Inc., 417 U.S. 380, 397 (1974) (same).