Agency Enforcement Proceedings and the Major Questions Doctrine

LOUIS J. CAPOZZI III*

TABLE OF CONTENTS

INTRODUCTION

In recent years, the Supreme Court has significantly checked the power of federal administrative agencies to change the law through the issuance of regulations.[1] But

* Solicitor General of Missouri; Lecturer in Law, University of Pennsylvania Carey School of Law; Public Member, Administrative Conference of the United States. For their helpful feedback on article drafts, I am grateful for feedback from my symposium co-panelists: Judge Trevor McFadden, Eric Heigis, and Russ Ryan; thoughtful comments from: Jonathan Adler, Stephanie Barclay, Beau Baumann, Ron Cass, Eli Nachmany, Todd Phillips, Chad Squitieri, Mark Storslee, Ilan Wurman, and David Zaring; and excellent research assistance from Megan Gerges, Liam Kerr, and William McCarter.

1. *See, e.g.*, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024) (repudiating *Chevron* deference).

in 2024, the Supreme Court turned its attention to the substantial power of agencies to enforce laws. In *SEC v. Jarkesy*, the Court held that the Constitution prohibited the Securities and Exchange Commission (SEC) from imposing civil monetary fines for securities fraud in an in-house enforcement proceeding.[2] Especially in light of the Court's expressed concerns about agencies abusing their enforcement powers,[3] the limits on those powers will likely receive renewed attention in the coming years.

This Article considers one important constraint on agency authority: the major questions doctrine. That doctrine ensures that agencies do not exercise major powers without clear congressional authorization.[4] By enforcing that rule, courts ensure that Congress—not agencies—plays the primary role in resolving pressing modern policy questions.[5]

In the past few years, the Supreme Court has frequently applied the major questions doctrine to block agencies from changing the law by issuing regulations. But this raises a question: Does the doctrine apply when agencies attempt to change the law through enforcement proceedings?

The answer is yes. Although one recent article argued that the doctrine should be cabined to rulemaking,[6] the rationales behind the major questions doctrine apply with full force to agency enforcement proceedings—whether through in-house adjudications or enforcement actions in court. Although most cases featuring the major questions doctrine have featured rulemakings, the Supreme Court has also applied the major questions doctrine in the context of agency enforcement proceedings.[7] Whether analyzed using a formalist or functionalist approach to the separation of powers,[8] applying the major questions doctrine to enforcement

---

2. 144 S. Ct. 2117, 2139 (2024).

3. *See id.* (refusing to "concentrate the roles of prosecutor, judge, and jury in the hands of the Executive Branch"); *id.* at 2140–41 (Gorsuch, J., concurring) (expressing skepticism about the fairness of agency adjudicative processes).

4. *See, e.g.*, West Virginia v. EPA, 597 U.S. 697, 723 (2022).

5. *See id.* at 735–42 (Gorsuch, J., concurring); Louis J. Capozzi III, *In Defense of the Major Questions Doctrine*, 100 NOTRE DAME L. REV. 509 (2025).

6. *See* Todd Phillips & Beau J. Baumann, *The Major Questions Doctrine's Domain*, 89 BROOK. L. REV. 747, 755–56 (2024) (arguing that the major questions doctrine should be cabined to rulemaking); *see also* Fred B. Jacob, *The National Labor Relations Act, the Major Questions Doctrine, and Labor Peace in the Modern Workplace*, 65 B.C. L. REV. 1381, 1437 (2024) (suggesting major questions doctrine should usually not apply to NLRB and focusing on its "reactive" regulatory approach in adjudications). Although no other article has focused on whether the major questions doctrine applies to agency enforcement actions, Chris Brummer, Yesha Yadav, and David Zaring recently suggested the doctrine would apply to agency efforts to regulate digital currencies through enforcement proceedings. *See* Chris Brummer et al., *Regulation by Enforcement*, 96 S. CAL. L. REV. 1297, 1328—29 (2024).

7. *See* Kent v. Dulles, 357 U.S. 116, 129–30 (1958) (applying the major questions doctrine to an agency in-house adjudication); ICC v. Cincinnati, New Orleans & Texas Pac. Ry. Co., 167 U.S. 479, 493, 511 (1897) (applying the major questions doctrine to an agency in-court enforcement proceeding); *see also* Gonzales v. Oregon, 546 U.S. 243, 248–49 (2006) (applying the major questions doctrine to an agency's interpretive rule explaining how the agency would enforce statute).

8. *See generally* Thomas A. Koenig & Benjamin R. Pontz, *The Roberts Court's Functionalist Turn in Administrative Law*, 46 HARV. J.L. & PUB. POL'Y 221 (2023) (summarizing the formalist and functionalist approaches to administrative law).

proceedings is necessary to prevent agencies from exercising legislative power and unduly aggrandizing their authority at Congress's expense.

This Article proceeds as follows. Part I briefly surveys the different modes of agency actions, focusing on how agencies change the law through the issuance of regulations, in-house adjudications, and in-court enforcement actions. Part II summarizes the major questions doctrine and its resurgence in recent years. Part III argues that the major questions doctrine should apply to enforcement proceedings. Part IV addresses counterarguments, including those offered in a recent article taking the contrary position.[9]

I. HOW AGENCIES CHANGE THE LAW

Administrative agencies seeking to change the law are "free to select from a menu of policymaking tools."[10] To start, agencies can invoke statutory delegations from Congress and issue regulations that impose binding, prospective obligations on the public.[11] Before issuing regulations, agencies typically must give the public notice of the proposed rule, allow public comment, respond to comments in a statement of basis and purpose, publish the rule in advance of its effective date, and submit to extensive judicial review of the legality and reasonableness of the regulation.[12] Although issuing regulations is not nearly as difficult as complying with Article I's system of bicameralism and presentment (and does not serve as a substitute for the complex of interests and trade-offs necessary for lawmaking),[13] notice-and-comment procedures are "labor-intensive" for agencies.[14] Agencies must carefully consider public comments, analyze the pros and cons of their actions, and submit to searching judicial review.[15]

However, agencies can also change the law in a less direct and transparent manner: enforcement proceedings.[16] As entities within the Executive Branch, agencies are charged with enforcing a wide range of statutes. Agencies frequently change the law by altering their interpretation of those statutes and bringing enforcement actions against regulated entities for actions deemed inconsistent.[17]

---

9. Phillips & Baumann, *supra* note 6, at 755–56.

10. M. Elizabeth Magill, 71 U. CHI. L. REV. 1383, 1383 (2004) (noting that an agency can set policy "by adopting a rule, bringing or deciding a case, or announcing its interpretation of a statute"); *see* Brummer et al., *supra* note 6, at 1303.

11. *See* 5 U.S.C. §§ 551(4)–(5); Brummer et al., *supra* note 6, at 1304 (comparing rulemaking to Congress's act of legislating).

12. *See* 5 U.S.C. § 553; Hickman & Pierce § 5.1; Magill, *supra* note 10, at 1390. The APA also envisions the use of substantially more rigorous formal rulemaking procedures; but as a practical matter, such procedures are rarely used. *See* United States v. Florida East Coast Ry. Co., 410 U.S. 224, 235 (1973).

13. *See* Ronald A. Cass, *Models of Administrative Action*, 72 VA. L. REV. 363, 382–84 (1986).

14. Magill, *supra* note 10, at 1390.

15. *See, e.g.*, Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039 (1997); *see generally* FCC v. Prometheus Radio Project, 592 U.S. 414, 423 (2021).

16. *See, e.g.*, Brummer et al., *supra* note 6, at 1298–1302.

17. *See, e.g.*, NLRB v. Wyman-Gordon Co., 394 U.S. 759, 765–66 (1969) ("Adjudicated cases . . . generally provide a guide to action that the agency may be expected to take in future cases."); SEC

For example, the Federal Communications Commission (FCC) enforces a statutory prohibition on broadcasters permitting "any obscene, indecent, or profane language."[18] The FCC has repeatedly altered its view on what kind of language satisfies that standard and has brought enforcement proceedings to announce its changed views.[19] As another example, the National Labor Relations Board (NLRB) frequently updates its view of what constitutes an "unfair labor practice."[20] In 2024, the NLRB used an enforcement proceeding to expand its view of what constitutes an "unfair labor practice"—overruling its own precedent to reach an employer's decision to install cameras on its property.[21]

Agencies can bring roughly two types of enforcement proceedings—and they can often *choose* which type to bring.[22] First, agencies can bring enforcement actions in federal court. For example, when the Securities and Exchange Commission (SEC) believes someone has committed securities fraud, it can sue the suspect in court and ask the court to adopt its interpretation of the applicable legal requirement.[23]

Alternatively, agencies can oversee internal enforcement proceedings—often called adjudications.[24] Agency adjudication processes vary widely.[25] Sometimes the agency initiates the adjudicatory process, but private parties can also initiate agency adjudications, such as when a landowner asks the EPA to determine whether a piece of land is a "wetland."[26] Procedures in agency adjudications also vary widely. Some are very informal, featuring only notice of adverse actions and a chance to be heard.[27] Other agencies offer full trial-like proceedings—with discovery and a formal hearing presided over by an agency employee called an Administrative Law Judge (ALJ).[28] Agencies have statutory authority to assess crippling civil penalties following their enforcement proceedings.[29] For example,

---

v. Chenery Corp., 332 U.S. 194, 209–10 (1947) (Jackson, J., dissenting) (allowing an agency to take property away by changing its understanding of the law in an enforcement proceeding); De Niz Robles v. Lynch, 803 F.3d 1165, 1170–71 (10th Cir. 2015) (addressing an agency's attempt to impose retroactive liability in an enforcement proceeding).

18. 18 U.S.C. § 1464.

19. *See, e.g.*, FCC v. Fox Television Stations, 556 U.S. 502, 517, 529–30 (2009) (upholding one such change but noting that FCC was wise not to impose fines for conduct committed before enforcement proceeding in which it announced new view).

20. *See* 29 U.S.C. § 158; *see also* Jacob, *supra* note 6, at 1418–19 (explaining how the NRLB could use adjudications to change the law on workplace captive audience meetings).

21. *See* Endurance Envtl. Sols., LLC and Teamsters Local No. 100, 373 NLRB No. 141, 2024 WL 5057785 at *1 (NLRB Dec. 10, 2024).

22. *See, e.g.*, Magill, *supra* note 10, at 1386; Brummer et al., *supra* note 6, at 1305.

23. *See, e.g.*, SEC v. Jarkesy, 144 S. Ct. at 2117, 2125 (2024).

24. *See, e.g.*, Magill, *supra* note 10, at 1386.

25. *See generally* ILAN WURMAN, ADMINISTRATIVE LAW THEORY AND FUNDAMENTALS 259–91 (2024).

26. *See, e.g.*, *Section 404 of the Clean Water Act*, EPA, https://www.epa.gov/cwa-404/what-jurisdictional-delineation-under-cwa-section-404 [https://perma.cc/PNR2-SRCL].

27. WURMAN, *supra* note 25, at 269–81.

28. *Id.*

29. *See, e.g.*, Sackett v. EPA, 598 U.S. 661, 662 (2023) (outlining draconian penalties EPA threatened against family it deemed to be building in wetlands without proper license); Jonathan H. Adler, *Wetlands, Property Rights, and the Due Process Deficit in Environmental Law*, 2012 CATO SUPREME CT. REV. 139, 159 (discussing combination of harsh penalties and lack of due process in EPA enforcement schemes).

in *Jarkesy*, the SEC sought millions of dollars in fines against its target.[30] Although agencies' authority to impose such fines through in-house adjudications stands in considerable doubt following *Jarkesy*, agencies can still impose other serious sanctions like stripping one's ability to practice his profession.[31] And while judicial review of agency adjudications remains available, courts apply a deferential standard of review that makes it very challenging to get an adverse agency action overturned.[32]

Agencies often supplement their enforcement efforts with guidance documents and interpretive rules outlining the agency's policy position on how a statute should be enforced.[33] Indeed, agencies issue "thousands, if not millions," of guidance documents and interpretive rules every year—including many that announce major policy changes.[34] For example, during the Bush Administration, the Attorney General issued an interpretive rule explaining his view that the drugs used for physician-assisted suicide are controlled substances and, consequently, subject to strict federal rules.[35] As a formal matter, these guidance documents are not binding.[36]

However, as a practical matter, guidance documents have "the same . . . effects as [regulations]" because regulated entities know agencies will bring enforcement proceedings if their guidance documents are not obeyed.[37] Therefore, agencies can "bypass the rulemaking process" and often avoid judicial review by choosing to issue guidance documents or interpretive rules. Courts and scholars have recognized that agencies can effectively change the law—without any meaningful procedural checks—through the combination of guidance documents and the threat of enforcement.[38]

---

30. SEC v. Jarkesy, 144 S. Ct. at 2117, 2140 (2024) (Gorsuch, J., concurring).

31. *See, e.g.*, *id.* at 2127 (noting SEC banned Jarkesy "from participating in the securities industry"); David Zaring, *Enforcement Discretion at the SEC*, 94 TEX. L. REV. 1155, 1170, 1219 (2016).

32. *See, e.g.*, *Jarkesy*, 144 S. Ct.at 2126 (noting "deferential" standard of review).

33. *See, e.g.*, Brummer et al, *supra* note 6, at 1305–06.

34. Cary Coglianese, *Illuminating Regulatory Guidance,* 9 MICH. J. ENV. & ADMIN. L. 243, 247–48 (2020); *see* Ronald A. Cass, *Rulemaking Then and Now: From Management to Lawmaking*, 28 GEO. MASON L. REV. 683, 694 (2021); *see, e.g.*, Texas v. United States, 809 F.3d 134, 146–48 (5th Cir. 2015) (discussing Obama Administration's attempt to dramatically overhaul immigration law through guidance document).

35. *See* Gonzales v. Oregon, 546 U.S. 243, 243–54 (2006).

36. *See, e.g.*, Magill, *supra* note 10 at 1386.

37. Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE. L.J. 1311, 1317 (1992); *see* Kisor v. Wilkie, 588 U.S. 558, 607—08 (2019) (Gorsuch, J., concurring in the judgment) (noting practical similarities between guidance documents and regulations); ADMIN CONF. OF THE U.S., RECOMMENDATION 2017—5, AGENCY GUIDANCE THROUGH POLICY STATEMENTS (2017) (noting "members of the public sometimes find they have no practical escape from" compliance with agency guidance documents).

38. *See, e.g.*, Appalachian Power Co. v. EPA, 208 F.3d 1015, 1020 (D.C. Cir. 2000); Anthony, *supra* note 37, at 1312–17.

Notably, both scholars and courts have raised due process concerns about agencies changing the law through enforcement proceedings.[39] Unlike regulations—which, as a formal matter, only change legal obligations *prospectively*—agency adjudications and in-court enforcement actions usually purport to impose liability for what was *already* the law.[40] Consequently, when agencies change the meaning of the law through enforcement actions, they risk imposing retroactive liability on their targets.[41] For instance, in *SEC v. Chenery Corp.*, the Court upheld the SEC's new understanding of the Public Utility Holding Company Act of 1935, which it enforced through an in-house adjudication—an action that had the effect of retroactively stripping regulated entities of their property.[42]

Moreover, with respect to internal agency adjudications, courts, and scholars have questioned the fairness of agency procedures.[43] In some agencies, the same individuals who make the rules being enforced also vote to initiate enforcement proceedings and later decide whether the targeted party is liable. In other words, these agencies lack separation of prosecutorial and adjudicatory functions.[44] Even where that is not a problem, agency adjudicators are often suspected of having pro-agency biases; they are, after all, agency employees and can sometimes even be subject to adverse employment actions if they rule against the agency.[45] Indeed, in *Jarkesy*, Justice Gorsuch noted that the SEC had a *far higher* win rate in internal adjudications than with in-court enforcement proceedings.[46]

Due-process concerns aside, many scholars and courts believe that it is preferable for agencies to change the law through rulemaking procedures instead of enforcement proceedings.[47] The requirement for rulemaking at least ensures fair notice to the public of legal changes, careful deliberation and consideration of a

---

39. *See, e.g.*, Wurman, *supra* note 25, at 253–54; Magill, *supra* note 10, at 1396.

40. *See, e.g.*, De Niz Robles v. Lynch, 803 F.3d 1165, 1172 (10th Cir. 2015); Wurman, *supra* note 25, at 241–42; Brummer et al., *supra* note 6, at 1304–05.

41. *See, e.g.*, Magill, *supra* note 10, at 1396. This reality helps explain why some courts have hesitated to block agencies from announcing legal changes through guidance documents. *See, e.g.*, Pacific Gas & Elec. Co. v. FPC, 506 F.2d 33, 41 (D.C. Cir. 1974) ("In the absence of such a policy statement, the Commission could have proceeded on an ad hoc basis . . . . In following such a course, the only difference from the present situation would be that the Commission would be acting under a secret policy."). At least when agencies issue such documents, the public is given fair notice of what the agency intends to do. *See id.*

42. *See* 332 U.S. 194, 210–11 (1947) (Jackson, J., dissenting).

43. *See, e.g.*, SEC v. Jarkesy, 144 S. Ct. 2117, 2140–42 (Gorsuch, J., concurring).

44. *See, e.g.*, Christopher S. Yoo et al., *Due Process in Antitrust Enforcement: Normative and Comparative Perspectives*, 94 S. CAL. L. REV. 843, 894–95 (2021).

45. *See, e.g.*, Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 584 U.S. 325, 347–48 (2018) (Gorsuch, J., dissenting) (discussing this in context of Patent Trial and Appeal Board); Bernard Segal, *The Administrative Law Judge*, 62 A.B.A. J. 1424, 1426 (1976).

46. *See Jarkesy*, 144 S. Ct. at 2141.

47. *See, e.g.*, Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 690–91 (D.C. Cir. 1973) (highlighting advantages of rulemaking over enforcement proceedings); Richard J. Pierce, Jr., *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300, 308–09 (1988); *see also* Aaron L. Nielson, *In Defense of Formal Rulemaking*, 75 OHIO ST. L.J. 237 (2013) (arguing for use of more demanding formal rulemaking procedures).

broad range of perspectives by agencies, and some opportunity for public participation in lawmaking.[48] By contrast, when agencies change the law through enforcement proceedings, they risk making law based on the idiosyncratic factual circumstances of the case they choose to bring, the public usually does not have a meaningful chance to participate, and agencies only consider the arguments the party before it happens to make.[49] Consequently, "courts consistently recognize the advantages of rulemaking and frequently strive to encourage agencies to make policy primarily through the rulemaking process."[50]

II. THE MAJOR QUESTIONS DOCTRINE

Federal agencies' abilities to change the law are not limitless. The major questions doctrine is one of the most significant restraints on federal agency power.[51] Simply put, it requires an agency claiming the power to resolve a question of "economic and political significance" to point to "clear congressional authorization."[52] As Justice Kavanaugh has explained, the major questions doctrine holds that "[i]n order for an [administrative] agency to exercise regulatory authority over a major policy question of great economic and political importance, Congress must either: (i) expressly and specifically decide the major policy question itself and delegate to the agency the authority to regulate and enforce; or (ii) expressly and specifically delegate to the agency the authority both to decide the major policy question and to regulate and enforce."[53] And as Justice Gorsuch has articulated, the major questions doctrine ensures that agencies do not repurpose vague, old statutory delegations to change the law, and that Congress makes the important policy decisions governing the lives of Americans.[54]

"The major questions doctrine is as old as the administrative state itself."[55] As recounted more fully in my prior articles, the doctrine traces its roots to 18th-century agency law, 18th-century statutory interpretive rules, and Dillon's Rule, under which delegations from state legislatures to municipal governments were narrowly construed.[56] When federal and state courts confronted delegations to

48. Pierce, *supra* note 47.

49. *See, e.g.*, *id.*; Magill, *supra* note 10, at 1396.

50. Pierce, *supra* note 47, at 308-09.

51. *See, e.g.*, Louis J. Capozzi III, *The Past and Future of the Major Questions Doctrine*, 84 OHIO ST. L.J. 191, 194–95 n.17 (2023) (citing a variety of articles recognizing this point).

52. West Virginia v. EPA, 597 U.S. 697, 721–23 (2022).

53. Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., respecting the denial of certiorari).

54. *See West Virginia*, 597 U.S. at 735–42 (Gorsuch, J., concurring); *see also* State v. Su, 121 F.4th 1, 18 (9th Cir. 2024) (Nelson, J., concurring) ("[T]he doctrine keeps Congress in its constitutional lane, preventing it from delegating fundamental policy decisions to the Executive Branch.").

55. All. for Fair Bd. Recruitment v. SEC, 125 F.4th 159, 159, 180 (5th Cir. 2024) (en banc) (citing Capozzi, *supra* note 51, at 196–226); *see West Virginia*, 597 U.S. at 735—42 (Gorsuch, J., concurring); Biden v. Nebraska, 600 U.S. 2355, 2381 n.3 (2023) (Barrett, J., concurring).

56. *See* Capozzi, *supra* note 51, at 197–208; *see also* Ilan Wurman, *Importance and Interpretive Questions*, 110 VA. L. REV. 909 (2024); T.T. Arvind & Christian R. Burset, *"Major Questions" in the Common Law Tradition*, Y. J. REG. NOTICE AND COMMENT (Jul. 7, 2023),

railroad commissions—the first modern administrative agencies—in the mid-to-late 1800s, they applied a presumption against the implied delegations of powers to those agencies.[57]

The Supreme Court applied that presumption in *ICC v. Cincinnati, New Orleans & Texas Pacific Railway Co.* (the "*Queen and Crescent Case*").[58] There, the Interstate Commerce Commission (ICC) claimed the power to set carriage prices for passengers and freight under a statute requiring railroads to charge "reasonable and just" rates.[59] When a railroad refused to comply with a rate the ICC said was the "reasonable and just" rate, the ICC brought an enforcement action and asked a federal court to enforce compliance. The Supreme Court, however, ultimately held that Congress had not given the agency the authority to set railroad carriage rates.[60] And rather than apply routine statutory interpretation to arrive at that result, the Court held that the ICC needed to point to statutory language that was "clear and direct," "open to no misconstruction."[61] After all, the Court explained, "[t]he importance of the question [at stake] cannot be overestimated," because "[b]illions of dollars [were] invested in railroad properties" and "[m]illions of passengers, as well as millions of tons of freight, [were] moved each year by the railroad companies[.]"[62] And the power to set rates was "so vast and comprehensive, so largely affecting the rights of carrier and shipper, as well as indirectly all commercial transactions[.]"[63] Such a "power of supreme delicacy and importance" could only be conferred by Congress through a "definite and exact statement."[64] After surveying analogous state laws that had clearly granted railroad commissions the power to set rates, the Court concluded that the ICC's authority was merely "debatable" and not "expressly given."[65]

A few decades later, the presumption against implied delegations faded as a prominent rule of law.[66] However, even in the decades following the New Deal,

---

https://www.yalejreg.com/nc/major-questions-in-the-common-law-tradition-by-t-t-arvind-christi an-r-burset [https://perma.cc/KR6K-UQZJ]; Steven G. Calabresi & Gary Lawson, *The Depravity of the 1930s and the Modern Administrative State*, 94 NOTRE DAME L. REV. 821, 855 (2018) (summarizing GARY LAWSON & GUY SEIDMAN, A GREAT POWER OF ATTORNEY: UNDERSTANDING THE FIDUCIARY CONSTITUTION (2017)); Ilan Wurman, *The Origins of Substantive Due Process*, 87 U. CHI. L. REV. 815, 826–27 (2020) (discussing Dillon's Rule); Clayton P. Gillette, *In Partial Praise of Dillon's Rule, or, Can Public Choice Theory Justify Local Government Law?*, 67 CHI.-KENT. L. REV. 959 (1991) (discussing Dillon's Rule).

57. *See* Capozzi, *supra* note 51, at 200–06; Bd. of R.R. Comm'rs of Or. v. Or. Ry. & Navigation Co., 19 P. 702, 703 (Or. 1888); ICC v. Cincinnati, New Orleans & Tex. Pac. Ry. Co., 167 U.S. 479, 500–05 (1897)); *see also* J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 499; *id.* § 390 (1891) (stating that "all statutory powers" are "construed strictly"); FRANK J. GOODNOW, THE PRINCIPLES OF ADMINISTRATIVE LAW OF THE UNITED STATES 326–27 (1905).

58. 167 U.S. 479 (1897).

59. *See* Interstate Commerce Act § 1, ch. 104, 24 Stat. 379, 379 (1887).

60. *Queen and Crescent Case*, 167 U.S. at 501 (1897).

61. *Id.* at 505.

62. *Id.* at 494.

63. *Id.* at 494–95.

64. *Id.* at 495, 505.

65. *Id.* at 494, 500.

66. *See* Capozzi, *supra* note 51, at 208–10.

the Supreme Court occasionally interpreted delegations to agencies narrowly.[67] For example, in *Kent v. Dulles*, the State Department denied Kent a passport during an internal agency adjudication and hearing process because he was a suspected Communist.[68] Kent challenged that action in court and the Supreme Court agreed, holding that the State Department lacked the power to deny him a passport.[69] Although the Court acknowledged that "the power of the Secretary of State over the issuance of passports [was] expressed in broad terms," it narrowly interpreted the statute.[70] The Court justified this move by emphasizing the importance of passports to the "liberty" to travel.[71] The Court then held that courts must "construe narrowly all delegated powers that curtail or dilute" things like the liberty to travel.[72]

Although the Supreme Court applied the major questions doctrine infrequently in the following decades, it has seen a marked resurgence in the past few years. In the 2021 and 2022 Terms, the Court applied the doctrine in four high-profile cases.[73] In *West Virginia v. EPA*, for example, the Court held that the major questions doctrine barred the Environmental Protection Agency (EPA) from repurposing a vague, old statute to impose cap-and-trade regulations to combat climate change.[74] In doing so, the Court opted against "routine statutory interpretation," holding that an agency claiming major powers must point to statutory authority that is more than "plausible" or "colorable."[75] According to Chief Justice Roberts's majority opinion, the major questions doctrine is justified by "the separation of powers" and a "practical understanding of legislative intent."[76] Concurring, Justice Gorsuch elaborated on the majority's separation-of-powers justification. He argued that the major questions doctrine enforces the Constitution's requirements for lawmaking, just as American courts had long used other constitutional clear statement rules to implement constitutional requirements.[77]

In its modern form, the major questions doctrine features a two-part test.[78] When reviewing an agency's decision, courts must first ask whether the agency has claimed a major power. If so, courts next consider whether the agency has identified "clear congressional authorization" for its action.[79] As a broad range of scholars have recognized, the major questions doctrine plays a significant role in

67. *See id.* at 210–12.
68. 357 U.S. 116, 117–19 (1958).
69. *Id.* at 128–29.
70. *Id.* at 127–29.
71. *Id.* at 125–27.
72. *Id.* at 129.
73. *See* Alabama. Ass'n of Realtors v. HHS, 141 S. Ct. 2485, 2486 (2021) (per curiam); Nat'l Fed'n of Indep. Bus. v. OSHA, 142 S. Ct. 661, 665 (2022) (per curiam); *West Virginia* v. EPA, 597 U.S. 697, 724 (2022); *Biden v. Nebraska*, 600 U.S. 477, 503–04 (2023).
74. 597 U.S. 697, 732–35.
75. *Id.* at 722–24
76. *Id.* at 723.
77. *Id.* at 736–42 (Gorsuch, J., concurring).
78. *See, e.g.*, *id.* at 767 (Kagan, J., dissenting).
79. *Id.* at 723.

preventing agencies from repurposing vague, old statutory delegations to resolve pressing, modern policy problems without Congress's meaningful involvement.[80]

III. THE MAJOR QUESTIONS DOCTRINE APPLIES TO AGENCY ENFORCEMENT PROCEEDINGS

In a recent article, Todd Phillips and Beau Baumann argued that the major questions doctrine should be cabined to rulemakings and should not apply to agency enforcement proceedings.[81] This Article disagrees with that contention. Considering the doctrine's rationales, the Supreme Court's precedent, and either a formalist or functionalist approach to the separation of powers, the major questions doctrine applies fully to agency enforcement proceedings. Concluding otherwise would only cripple the major questions doctrine and allow the easy circumvention of Article I's lawmaking procedures. It would also further incentivize agencies to change the law through enforcement proceedings instead of rulemakings—and even those comfortable with federal agencies wielding legislative powers should oppose agencies changing the law in a less transparent, fair, and rational manner.

A. The Major Questions Doctrine's Rationales Apply to Enforcement Proceedings

Whether one conceives of the major questions doctrine as implementing Article I's requirements for lawmaking and protecting the separation of powers, or as a textualist tool of interpretation, the major questions doctrine should apply to agency enforcement proceedings.

Start with the former rationale. As the Supreme Court has explained, the major questions doctrine ensures that Congress—and only Congress, along with the President exercising a potential veto—makes the major policy choices governing Americans' lives.[82] The doctrine fulfills that end in two ways. First, it prevents agencies from seizing new powers by "exploit[ing] some gap, ambiguity, or doubtful expression in Congress's statutes to assume responsibilities far beyond [their] initial assignment[s]."[83] Second, it prevents Congress from *intentionally* using vague language to delegate the power to make major policy decisions to others.[84]

---

80. There is also a vigorous ongoing debate on the legitimacy and wisdom of the major questions doctrine. *See, e.g.*, Ronald M. Levin, *The Major Questions Doctrine: Unfounded, Unbounded, and Confounded*, 112 CALIF. L. REV. 899 (2024). This Article does not revisit that debate; those interested in that topic should consider my prior defense of the doctrine. *See* Capozzi, *supra* note 5.

81. *See* Phillips & Baumann, *supra* note 6; Jacob, *supra* note 6.

82. *See West Virginia*, 597 U.S. at 735; *Biden v. Nebraska*, 143 S. Ct. 2355, 2374 (2023); Capozzi, *supra* note 5, at 516–17.

83. *NFIB v. OHSA*, 142 S. Ct. 661, 669 (2022) (Gorsuch J., concurring); *see U.S. Telcom. Ass'n v. FCC*, 855 F.3d 381, 417 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

84. *See* Capozzi, *supra* note 5, at 516–17; Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1495 (2015); Jacob Loshin & Aaron

Just as agencies can use rulemakings to impose major policy choices, they can also do so through enforcement proceedings.[85] As in rulemakings, agency officials interpret the statutes delegating power to them when deciding whether to initiate enforcement proceedings.[86] And in both rulemakings and enforcement proceedings, agencies can stretch the meaning of statutes to impose new policies when making enforcement decisions. Thus, the rationales of the major questions doctrine apply with full force to *both* rulemakings and enforcement proceedings.[87]

Consider, for example, the recent experience of digital currency providers. Since the introduction of Bitcoin in 2008 and the proliferation of other digital currencies, digital currency has become a significant part of the American economy.[88] Indeed, about one-in-five Americans have invested in digital currencies.[89] Valued at around one trillion dollars as of 2022,[90] the question of whether and how to regulate digital currencies seems like a question of "vast economic . . . significance."[91] Those questions are also politically important and contentious; indeed, they received ample attention during the 2024 federal elections.[92]

Those considerations suggest that Congress should decide whether and how to regulate digital currencies.[93] And notably, Congress *has* been actively debating such regulation.[94] Because those debates have not resulted in legislation, the federal government had allowed people to invest in digital-currency ventures over the prior decade.[95] Indeed, in 2021, SEC Chairman Gary Gensler acknowledged that

---

Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19, 63 (2010) (noting Congress has intentionally used vague language).

85. *See* Part I, *supra*.

86. *See, e.g.*, Magill, *supra* note 10, at 1384–88.

87. *See, e.g.*, Brummer et al, *supra* note 6, at 1328–29.

88. *See, e.g.*, Christina Polizu et al., *A Deep Dive Into Crypto Valuation*, S&P GLOBAL (Nov. 10, 2022), https://tinyurl.com.yc6h9k79 [https://perma.cc/M92R-6NZU] ("As of August 2022, the total market capitalization of cryptocurrencies stood at $1.1 trillion . . . or about 2.5% of the U.S. equity market capitalization.").

89. *See, e.g.*, Thomas Franck, *One in five adults has invested in, traded or used cryptocurrency, NBC News poll shows*, CNBC (Mar. 31, 2022), https://www.cnbc.com/2022/03/31/cryptocurrency-news-21percent-of-adults-have-traded-or-used-crypto-nbc-pollshows.html#:~:text=One%20in%20five%20Americans%20has,at%20a%20rate%20of%2050%25 [https://perma.cc/69UW-8WQF].

90. *See, e.g.*, Michelle Neal, *Advances in Digital Currency Experimentation*, FED. RES. BANK N.Y. (Nov. 4, 2022), https://tinyurl.com/d4bfkeb4 [https://perma.cc/8BV9-PDQV].

91. *See* Nebraska, 600 U.S. at 2373 (reaffirming that a regulation with $50 billion in economic impact is a major question).

92. *See, e.g.*, Tonya M. Evans, *Crypto Voters in 2024 And Beyond: Shaping Policy and Political Power*, FORBES (Nov. 7, 2024) ("The 2024 election cycle has brought an unexpected issue to the forefront of U.S. politics: cryptocurrency."), https://www.forbes.com/sites/tonyaevans/2024/11/04/crypto-voters-in-2024-and-beyond-shaping-policy-and-political-power [https://perma.cc/Y8KM-34WN].

93. *See, e.g.*, J.W. Verrett, *Crypto Is 'Major Question' Only Appellate Courts Can Answer*, LAW360 (Mar. 6, 2023), https://www.law360.co.uk/articles/1582430/crypto-is-major-question-only-appellate-courts-can-answer [https://perma.cc/285N-FHKF] ("Whether this revolution in finance succeeds or not, it has surely reached the point where the major questions doctrine applies.").

94. *See, e.g.*, Digital Commodities Consumer Protection Act, S. 4760, 117th Cong. (Aug. 3, 2022); Lummis-Gillibrand Responsible Financial Innovation Act, S. 4356, 117th Cong. (Jun. 7, 2022).

95. *See, e.g.*, SEC v. Ripple Labs, Inc., 682 F.Supp.3d. 308, 316–21 (S.D.N.Y Jul. 13, 2023) (documenting years in which Ripple Labs was allowed to operate before SEC sued it).

"only Congress could really address" the "exchanges trading in crypto assets."[96] But Chairman Gensler subsequently changed his mind. He decided to alter the law to subject digital currency companies to comprehensive securities litigation, threatening to dramatically transform—or even eliminate—a major American industry.[97] He sent letters to various companies, threatening enforcement actions against them.[98] The SEC then brought in-court enforcement proceedings, arguing that Congress had addressed the regulation of digital assets in the 1930s securities laws–even though that had escaped notice for 90 years.[99]

The SEC's actions circumvented Congress's legislative efforts and interrupted an "earnest and profound debate across the country."[100] Article I of the Constitution does not allow the SEC to change the 1930s securities laws to comprehensively regulate an important industry that Congress could not have foreseen. Instead of rushing to conclude that the 1930s Congress delegated such important authority, courts should apply the major questions doctrine and demand "clear congressional authorization" for the agency's actions.[101] Assuming the SEC could not satisfy that demanding standard,[102] the major questions doctrine would thus ensure that the people's *current* elected representatives decide whether and how to regulate this important industry that many voters care about.[103] That is *precisely* what the major questions doctrine is designed to accomplish.[104] It should not matter that the SEC proceeded through enforcement proceedings and the imposition of retroactive liability instead of issuing prospective regulations.

Likewise, those who conceive of the major questions doctrine as merely the correct way to read statutes also have no reason to cabin the doctrine to rulemaking. Justice Barrett has defended the major questions doctrine along these lines, arguing that "a reasonably informed observer" reading a statutory delegation within our "system of separated powers" would "expect Congress to legislate on important subjects" while

---

96. Game Stopped? Who Wins and Loses When Short Sellers, Social Media, and Retail Investors Collide, Part III: Hearing Before the H. Comm. on Fin. Servs., 117th Cong. 12 (2021) (statement of Gary Gensler, SEC Chair).

97. *See, e.g.*, Perianne Boring et al., *The SEC's Approach to Digital Asset Regulation Harms Investors*, BLOOMBERG L. (Mar. 8, 2023), https://news.bloomberglaw.com/us-law-week/the-secs-approach-to-digital-asset-regulation-harms-investors [https://perma.cc/8X3Y-77UT] (noting SEC's "regulation-by-enforcement" campaign "has created arbitrary and destructive results"); The Editorial Board, *The FTX Crypto Fiasco*, WALL STREET J. (Nov.10, 2022), https://www.wsj.com/articles/the-ftx-crypto-fiasco-cryptocurrency-sam-bankman-fried-alameda-coindesk-binance-11668122004 [https://perma.cc/2YNV-VBN7].

98. *See, e.g.*, Alex Wilhelm, *Coinbase stock drops after SEC Wells notice, a possible prelude to 'enforcement action,'* TechCrunch (Mar. 22, 2023), https://techcrunch.com/2023/03/22/coinbase-stock-drops-after-sec-wells-notice-a-possible-prelude-to-enforcement-action [https://perma.cc/Q7GU-U7UY].

99. *See, e.g.*, *Ripple Labs, Inc.*, 682 F.Supp.3d at 320.

100. *West Virginia*, 597 U.S. at 732 (cleaned up).

101. Biden v. Nebraska, 143 S. Ct. at 2375.

102. Fully addressing that question is beyond the scope of this paper, but I am skeptical that the statutory term "investment contract" reaches digital currencies, which one purchases without a contract. *See, e.g.*, Michael J. O'Connor, *Overreaching Its Mandate? Considering the SEC's Authority to Regulate Cryptocurrency Exchanges*, 11 DREXEL L. REV. 539, 582–83 (2019).

103. *See* Evans, *supra* note 92.

104. *See* Capozzi, *supra* note 5, at 537.

delegating away only "the details."[105] Similarly, Ilan Wurman has defended the major questions doctrine as a textualist *interpretive* canon.[106]

The textualist rationale for the major questions doctrine should apply *whenever* Article III courts read statutes delegating powers to agencies. When agencies initiate enforcement proceedings, they are still interpreting and enforcing statutes that delegate authority to them.[107] After all, agencies can only exercise the powers delegated to them in statutes.[108] And in conducting judicial review, courts assessing agency actions must apply all textualist tools—including the major questions doctrine—to decide whether the agency is actually exercising power delegated by Congress.[109] For example, in the digital currency context, textualists should approach the SEC's claim that Congress delegated the power to regulate an industry that would have been innovative and unforeseeable in the 1930s with skepticism—unless the SEC can point to "text directly authorizing the agency action or context demonstrating that the agency's interpretation is convincing."[110]

B. Precedent Supports Applying the Major Questions Doctrine to Agency Enforcement Proceedings

The majority of cases in which courts have applied the major questions doctrine have involved rulemakings and legislative rules purporting to set rules for future conduct. However, the Supreme Court has never suggested that the major questions doctrine applies *only* in the rulemaking context. In fact, the Supreme Court and lower courts have applied the major questions doctrine (or at least a variant) in the context of agency enforcement proceedings.

One such example is *Kent v. Dulles*, which involved an agency adjudication.[111] The case featured a relatively informal adjudication over a passport and hearing by the Department of State.[112] In that adjudicatory process, the State Department interpreted a statutory delegation to give itself the power to deny suspected Communists a passport, and it applied that interpretation to reject Kent's application.[113] In applying the major questions doctrine to hold that the State Department lacked such authority, the Court wielded the doctrine to limit the agency's discretion in enforcing the statute.

As another example of the major questions doctrine being applied to an agency's adjudication process, consider the Fifth Circuit's recent decision in

---

105. Biden v. Nebraska, 143 S. Ct. at 2380 (Barrett, J., concurring) (quoting Wayman v Southard, 23 U.S. (10 Wheat) 1, 20 (1825)).

106. *See* Wurman, *supra* note 56, at 916.

107. *See, e.g.* Magill, *supra* note 10, at 1384–85.

108. *See* La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986).

109. *See, e.g.*, Jonathan H. Adler, *The Delegation Doctrine*, 2024 HARV. J.L. & PUB. POL'Y PER CURIAM, No. 12, at *1–3.

110. Biden v. Nebraska, 143 S. Ct. 600 U.S. 477, 516 (2023) (Barrett, J., concurring).

111. 357 U.S. 116 (1958); *see also* Eli Nachmany, *Bill of Rights Nondelegation*, 49 BYU L. REV. 513, 539 n.29 (2023) (analyzing *Kent*).

112. *Kent*, 357 U.S. at 117.

113. *Id.* at 129–30.

Tesla v. NLRB.[114] After Tesla tried to force its employees to wear uniforms instead of union T-shirts, the union initiated an unfair labor practice proceeding before the NRLB.[115] In the subsequent adjudication, the NRLB ultimately overruled one of its internal precedents and ruled against Tesla.[116] On appeal, the Fifth Circuit reversed. Among other rationales, the Fifth Circuit relied on the major questions doctrine, noting that the agency's interpretation "would make all company uniforms presumptively unlawful" and that "Congress likely would not have intended to permit such a major decision without clearer statutory" authority.[117]

The Supreme Court has also applied a variant of the major questions doctrine in the context of an in-court enforcement proceeding. In the *Queen and Crescent Case*, the ICC believed it had the power to decide what constituted a "reasonable and just" rate railroads could charge customers. It then used that power to announce particular rates for individual railroads.[118] When a railroad refused to abide by a specific rate announced by the ICC, the ICC brought an enforcement action in federal court to compel compliance.[119] The Supreme Court held that Congress had not given the ICC the power to set carriage rates with sufficiently clear statutory language.[120] There, too, the Supreme Court enforced limits on the delegation of major powers even though the agency was purporting to enforce preexisting legal obligations in an enforcement proceeding.

Relatedly, the Supreme Court applied the major questions doctrine to an agency interpretive rule in *Gonzales v. Oregon*.[121] Interpretive rules are more analogous to enforcement proceedings than regulations because they explain how an agency intends to enforce preexisting obligations in statutes.[122] For example, in *Gonzales*, the Attorney General purported to interpret the Controlled Substances Act and declared that the drugs used for physician-assisted suicide were controlled substances within the meaning of the Act.[123] In a case challenging the legality of the interpretive rule, the Supreme Court rejected the Attorney General's interpretation, holding he lacked the power to enforce the Controlled Substances Act against the drugs at issue.[124] As part of that analysis, the Court employed the major questions doctrine, finding that "oblique" language could not give the Attorney General the power to resolve a "subject of earnest and profound debate across the country."[125]

---

114. 86 F.4th 640, 651 (5th Cir. 2023).
115. *Id.* at 643–44.
116. *Id.* at 644–46.
117. *Id.* at 651.
118. 167 U.S. 479 at 500–01 (1897).
119. *Id.*
120. *Id.* at 495–505.
121. 546 U.S. 243 (2006).
122. *See, e.g.*, Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106 (D.C. Cir. 1993) (holding that valid interpretive rules exist when the agency, in the absence of the rule, would already have an "adequate basis to enforce" the statute as stated); Wurman, *supra* note 25, at 211–15.
123. *Gonzales*, 546 U.S. at 253–54.
124. *Id.* at 258–75.
125. *Id.* at 267–68.

In summary, precedent forecloses cabining the major questions doctrine solely to rulemakings. The Court has applied the doctrine to agency enforcement proceedings—both in-house adjudications and in-court actions—and to an interpretive rule that would have been the basis of enforcement proceedings.

C. Under Either A Formalist or Functionalist Conception of the Separation of Powers, the Major Questions Doctrine Applies to Agency Enforcement Proceedings

Finally, applying the major questions doctrine to agency adjudications and enforcement proceedings is appropriate under both a formalist and a functionalist approach to the separation of powers. In brief (and at the risk of oversimplification), formalists focus on strictly following the rules laid out in the Constitution, while functionalists tend to focus on achieving a healthy balance of power within the federal government.[126]

I have previously explained why both formalists and functionalists should support the major questions doctrine *as a general matter*,[127] and the same is true with respect to enforcement proceedings. Start with a formalist approach. Article I of the Constitution "vested" "*all* legislative Powers herein granted" in "a Congress of the United States."[128] The use of the word "all"—absent in the Constitution's other two vesting clauses—was intentional, making clear that *only* Congress possesses the "legislative Powers" granted by Article I.[129] And Article I lays out exhaustive and specific procedures by which Congress must make law—a drafting choice that makes little sense if Congress can effectively circumvent those procedures through expansive delegations.[130] Moreover, the President is not given the power to make law but merely to "execute[]" it.[131] Instead, the President is given the power to "*recommend* to [Congress's] Consideration such Measures as he shall judge necessary and expedient[.]"[132] Indeed, "[t]he power to recommend legislation, granted to the President, serves only to emphasize that it is his function to recommend and that it is the function of the Congress to legislate."[133]

Formalists should agree that Congress can delegate certain discretionary decisions about enforcement to the Executive Branch, including the power to "fill up the details"

---

126. *See* Koenig & Pontz, *supra* note 8; Chad Squitieri, *Administrative Virtues*, 76 ADMIN. L. REV. 599, 645–53 (2024).

127. *See* Capozzi, *supra* note 5, at 514.

128. U.S. Const. art. I, § 1 (emphasis added).

129. *See* MICHAEL MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION 113 (2020) (agreeing); Nachmany, *supra* note 112, at 521–522.

130. *See, e.g.*, Ronald A. Cass, *Fixing Deference: Delegation, Discretion, and Deference Under Separated Powers*, 17 NYU J. L. & LIBERTY 1, 13–17, 21–23 (2024).

131. U.S. Const. art. II, § 3; *see* MCCONNELL, supra note 129, at 30, 113.

132. *Id.* (emphasis added). Chad Squitieri offers a helpful history of the Recommendation Clause. *"Recommend . . . Measures": A Textualist Reformulation of the Major Questions Doctrine*, 75 BAYLOR L. REV. 706, 749–758 (2023).

133. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 632 (1952) (Douglas, J., concurring); *see* MCCONNELL, supra note 129 (agreeing); Squitieri, *supra* note 126, at 5.

of statutory schemes.[134] But when the Executive Branch fulfills those responsibilities, it is—in formalist terms—exercising *executive* power, not *legislative* power.[135] From a formalist perspective, agencies cannot exercise legislative power.[136] Doctrines like the non-delegation doctrine and major questions doctrine are thus appropriately applied in any context where an agency moves beyond the role of merely enforcing statutes and attempts to make major policy decisions.[137] Formalists need not be blind to reality—they can recognize that agencies often go beyond mere enforcement and attempt to create major new rules through enforcement proceedings.[138] As a result, according to formalist principles, it makes sense to apply the major questions doctrine when agencies act in this way.[139]

The same conclusion should follow under a functionalist approach to the major questions doctrine. As Elizabeth Magill has explained, under functionalism, there is "consensus about the objective of the system of separation of powers:" "prevent[ing] a single governmental institution from possessing and exercising too much power."[140] The Executive Branch poses a threat to that goal because it has acquired an alarming amount of power over business and the everyday lives of Americans.[141] Aside from enforcing laws, the Executive Branch also *makes* the vast majority of new federal legal rules.[142] Quantity aside, the laws enacted by the Executive Branch "touch[] on almost every aspect of daily life,"[143] including the environment, energy, financial markets, working conditions, agricultural rules, the use of property, education, transportation, and even the type of household appliances that can be used.[144] As a result, Americans could easily "be excused for thinking that it is really [federal] agenc[ies] doing the legislating" in this Nation.[145]

The consequence is that the Executive Branch is by far the most powerful branch of government—playing the dominant role in making and enforcing laws.[146] Congress, by contrast, is at risk of losing its primacy over lawmaking.[147]

---

134. Wayman v. Southard, 23 U.S. (10 Wheat) 1, 20 (1825).

135. *See, e.g.*, J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

136. *See, e.g.*, Gundy v. United States, 588 U.S. 128, 152–159 (2019) (Gorsuch, J., dissenting).

137. *See, e.g.*, Capozzi, *supra* note 5, at 565.

138. *See, e.g.*, Brummer et al., *supra* note 6, at 1298–99; Magill, *supra* note 10, at 1384–85.

139. *See, e.g.*, Brummer et al., *supra* note 6, at 1328–29.

140. Magill, *supra* note 16, at 1147–49.

141. *See* Capozzi, *supra* note 5, at 553–54.

142. *See, e.g.*, Justin Walker, *The Kavanaugh Court and the* Schechter-*to*-Chevron *Spectrum: How the New Supreme Court Will Make the Administrative State More Democratically Accountable*, 95 IND. L. J. 923, 923 (2020) ("Rather than elected representatives, unelected bureaucrats increasingly make the vast majority of the nation's laws . . ."); Jonathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 IOWA L. REV. 1931, 1941–44 (2020).

143. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 499 (2010).

144. *See, e.g.*, Kelsey Tamborrino, *House passes bill to block federal gas stove ban*, POLITICO (June 13, 2023), https://www.politico.com/news/2023/06/13/house-passes-bill-block-gas-stove-ban-00100492 [https://perma.cc/6TEB-4RA6].

145. City of Arlington v. FCC, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting).

146. *See, e.g.*, Capozzi, *supra* note 5, at 553.

147. *See id.*

For all those committed to a republican form of government in which elected representatives debate and deliberate over significant policy issues, this development should be alarming.[148] Moreover, the dynamic in which agencies can unilaterally establish new laws weakens federalism by allowing agencies to speedily preempt diverse state approaches to particular problems.[149] It also erodes the rule of law by virtually ensuring that policies swing back and forth with each new administration—as with net neutrality.[150] For these reasons, I have argued that functionalists should support a resurgent major questions doctrine.[151]

Once again, there is no good reason for functionalists to confine the major questions doctrine to rulemaking.[152] To repeat, as a practical matter, agencies can—and do—change the law through enforcement proceedings.[153] When agencies do that, they circumvent and sideline Congress, leaving Congress with few realistic ways to reclaim its legislative powers absent the Executive Branch's cooperation. For example, if the President is satisfied with the SEC's regulation of digital currencies, he would likely be inclined to veto any legislative compromise on the subject, and it is highly unlikely Congress could override such a veto.[154] Furthermore, changing the law through enforcement proceedings presents similar threats to federalism (by preempting state laws) and the rule of law (by enabling shifting enforcement policies with each new administration).[155]

Even aside from general concerns about circumventing the legislative process, functionalists should be *especially* concerned when agencies try to change the law through enforcement proceedings. To start, such procedures often impose retroactive liability on those targeted by the agency,[156] just as the SEC has done with digital currency providers.[157] A broad range of jurists have recognized the injustice of such retroactive liability.[158] And enforcement proceedings allow agencies to change the law while circumventing the requirements and advantages of rulemaking, including fair notice, public comment, and a thorough explanation

148. *See id.* at 556.

149. *See id.* at 560.

150. *See* Capozzi, *supra* note 5, at 555; Adler & Walker, *supra* note 142, at 1941–44.

151. *See* Capozzi, *supra* note 5, at 515.

152. *See, e.g.*, Brummer et al., *supra* note 6, at 1328–29.

153. *See, e.g.*, Magill, *supra* note 10, at 1384–85.

154. *See* Capozzi, *supra* note 5, at 512.

155. *See, e.g.*, Jacob, *supra* note 6, at 1438–39 (acknowledging a "whirlwind of activity" in which NLRB overruled prior precedents after President Trump was first elected).

156. *See* Part I, *supra*.

157. *See* Brummer et al., *supra* note 6, at 1335.

158. *See, e.g.*, Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994) (Stevens, J.) ("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly."); General Motors Corp. v. Romein, 503 U.S. 181, 191 (1992) (Scalia, J.) ("Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions."); *Chenery*, 332 U.S. at 216–17 (Jackson, J., dissenting) (denouncing retroactive liability in adjudications as "administrative authoritarianism" and a "power to decide without law").

of policies that address public concerns.[159] Consequently, "[f]avoring *ex post* adversarial litigation over *ex ante* rulemaking creates the possibility of . . . much lower-quality, lesser-informed policy" decisions by agencies.[160] Thus, even those who support robust agency power should oppose this manner of lawmaking.[161]

That point leads to an additional reason that functionalists should oppose cabining the major questions doctrine to rulemaking. If agencies can avoid the application of the major questions doctrine by changing the law through enforcement proceedings, agencies will be further incentivized to change the law through enforcement proceedings instead of rulemakings. Indeed, Phillips and Baumann, who advocate for cabining the major questions doctrine to rulemaking, *admit* this is an implication of their argument.[162] Even without that incentive, some agencies—like the NLRB and Federal Trade Commission—already avoid rulemakings and typically change the law through enforcement proceedings.[163] Those who defend rulemaking because it provides for fair notice, public participation, and reasoned decision-making should thus oppose confining the major questions doctrine to rulemaking. Doing so would only further "push[] agencies toward alternatives to legislative rules" like enforcement proceedings, thus aggrandizing an inferior method of agency lawmaking.[164]

IV. COUNTERARGUMENTS

Several Contrary Arguments Merit Consideration, but They are Ultimately Unpersuasive

First, some have suggested that the major questions doctrine should not apply to agency enforcement actions because they are not exercises of legislative power. As Phillips and Baumann articulate the point, the major questions doctrine's "purpose is to guard against executive aggrandizement through dubious assertions of regulatory authority."[165] And legislative rules issued through rulemaking procedures create a unique risk of "executive unilateralism" because such rules "bind[] the public with the force of laws."[166] By contrast, in agency enforcement actions, "agencies proceed case-by-case with the active supervision of the federal judiciary" and "are not asserting legislative rules to which courts are bound."[167] In their view, "agencies are not engaging

159. *See, e.g.*, Brummer et al., *supra* note 6, at 1318 ("[A]gencies could pursue adjudications, or at minimum find adjudication attractive, insofar as it enables rulemaking in ways that avoid the kind of public scrutiny and involvement entailed in administrative procedure."); James D. Cox, *Headwinds Confronting the SEC*, 18 N.C. BANKING INST. 105, 107 (2013) ("[W]hen the SEC brings enforcement actions, it does not have to do cost-benefit analysis.").

160. *See, e.g.*, Brummer et al., *supra* note 6, at 1331.

161. *See, e.g.*, Pierce, *supra* note 47, at 308–09.

162. Phillips & Baumann, *supra* note 6, at 801–02.

163. *See* Magill, *supra* note 10, at 1385.

164. Phillips & Baumann, *supra* note 6, at 801–02.

165. Phillips & Baumann, *supra* note 6, at 755.

166. *Id.* at 756.

167. *Id.*

in lawmaking" in enforcement proceedings, meaning the major questions doctrine is inapplicable.[168]

However, that proposed distinction between rulemaking and agency enforcement proceedings does not work. There is "active supervision of the federal judiciary" to check an agency's interpretation of Congress's statutory delegations following *both* rulemakings and enforcement proceedings; in both cases, courts are tasked with ensuring that the agency is complying with the statute at issue.[169] And while courts frequently say that regulations bear the "force of law," they only have legal effect if they represent permissible interpretations of the statute at issue—just as a court will only uphold an agency enforcement action if it is based on permissible reading of the statute at issue. In both cases, "an agency literally has no power to act . . . unless and until Congress confers power upon it."[170] And with *both* rulemakings and enforcement proceedings, there is a risk of "executive unilateralism" whereby agencies change the law without meaningful Congressional involvement. Thus, Phillips and Baumann's proposed distinction between rulemaking and enforcement actions is not meaningful in ways that matter.

Second, Phillips and Baumann argue that applying the major questions doctrine to enforcement actions is inconsistent with a formalist approach to the separation of powers because it would "imperil Article II power" and "compress the Article III power to 'say what the law is.'"[171] But that does not seem right. Start with Article II power. Their idea seems to be that agencies are not, in a formal sense, making law when they bring enforcement actions—they are merely enforcing it. But as a formalist matter, agencies are *always* enforcing the law—not making it—even when they issue regulations. Even if the principle is only honored in the breach, the Supreme Court has consistently reaffirmed that Congress cannot delegate legislative powers and that, by providing an "intelligible principle," Congress is the one making the law and agencies are merely executing it—regardless of whether they proceed through regulation or an enforcement action.[172] Thus, application of the major questions doctrine to limit an agency's discretion to change the law in the guise of enforcement no more offends Article II when applied to enforcement proceedings than to rulemakings.

Nor does applying the major questions doctrine to agency enforcement proceedings usurp judicial power. Although in-court enforcement proceedings can be an attempt by "agencies to shift responsibility for rulemaking to the courts, a shirking

168. *Id.* at 793.

169. Admittedly, there is *earlier* federal judicial supervision when an agency brings an in-court enforcement proceeding as compared to an in-house adjudication, and there are good reasons to think the former proceedings will be fairer than the latter. *See, e.g.*, *Jarkesy*, 144 S. Ct. at 2141 (Gorsuch, J., concurring). Although due process concerns may be somewhat lessened with in-court enforcement proceedings, agencies can still use those proceedings to change the law, thus activating the concerns behind the major questions doctrine.

170. La. Pub. Serv. Comm'n v. FEC, 476 U.S. 355, 374 (1986); *see also* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 876–77 (2001).

171. Phillips & Baumann, *supra* note 6, at 757.

172. *See, e.g.*, *J.W. Hampton*, 276 U.S. at 409.

strategy,"[173] courts ultimately play the same role when presiding over agency enforcement proceedings or reviewing rules. In both contexts, judges interpret statutes and apply the Constitution. Just as the Supreme Court rejected "routine" statutory interpretation in *West Virginia*,[174] it can do the same when reviewing agency enforcement proceedings. For example, when considering enforcement actions against digital currency providers, there is no reason that courts cannot apply the major questions doctrine alongside the judicially-created *Howey* test,[175] which courts use to interpret the relevant statutory term—"investment contract."[176] In such situations, courts would simply demand especially strong showings from the SEC under the *Howey* test. This approach is consistent with what the Supreme Court has done when interpreting statutes in cases involving regulations.[177]

Third, Phillips and Baumann argue that enforcement proceedings cannot satisfy the first prong of the major questions doctrine because "enforcement actions are necessarily less major" due to the agency "proceeding case-by-case under existing precedent."[178] But the Supreme Court has already made clear that it considers the full scope of the power *claimed* by the agency—not just the scope of the action immediately under review.[179] In *West Virginia v. EPA*, for example, the Court noted that the EPA's argument implied that it could shut down all coal- and natural-gas-powered plants, even though the agency was not doing so in the instant case.[180] As another example, when the Interstate Commerce Commission brought an enforcement action against particular railroads, the Supreme Court considered whether the agency had the *general* power to set railroad carriage rates; it did not just focus on the power to set rates for the railroads that were parties in the case.[181] Similarly, when an agency brings an enforcement action against an individual digital currency provider and presents a theory that would subject the entire industry to pervasive securities regulations, courts must consider whether the agency has that *broad* power.

Fourth, Phillips and Baumann observe that some statutes allowing agencies to bring enforcement proceedings also permit *private* parties to bring enforcement actions.[182] For example, private parties can bring suits attempting to subject businesses to securities regulation.[183] Consequently, they suggest that it would be

---

173. Brummer et al., *supra* note 6, at 1320.
174. *West Virginia*, 597 U.S. at 722–44.
175. *See* SEC v. W.J. Howey Co., 328 U.S. 293, 297–98 (1946).
176. *See, e.g.*, Brief in Support of Motion to Dismiss, SEC v. Wahi, No. 2:22-cv-01009, 2023 WL 3666774 (W.D. Wash. Feb. 6, 2023) (showing how *Howey* can be applied alongside major questions doctrine).
177. *See, e.g.*, *West Virginia*, 597 U.S. at 720–735.
178. Phillips & Baumann, *supra* note 6, at 795.
179. *See, e.g.*, *Gonzales*, 546 U.S. at 267–68.
180. *See, e.g.*, *West Virginia*, 597 U.S. at 728–29.
181. *See Queen and Crescent Case*, 167 U.S. at 494–95.
182. Phillips & Baumann, *supra* note 6, at 756.
183. *See, e.g.*, 15 U.S.C. § 77(b).

"awkward" to apply the major questions doctrine in a case brought by a private party.[184] They also suggest such cases involve no "claim of unheralded regulatory power" since "the SEC is not a party" in such cases.[185]

But it is hard to see why that would be so. The major questions doctrine recognizes that *Congress*—not others—must make major policy decisions.[186] When agencies attempt to make major policy decisions by changing the law, the major questions doctrine operates as a barrier.[187] If Congress outsourced the power to change the law to a different entity—like private parties—there is no reason the same constitutional protections should not apply.[188] And if private entities argue that an agency does have a major power, courts can and should still ask if Congress clearly delegated that major power to the agency.

Consider the example of digital currencies again. If a private party brought an action arguing that a digital currency was a security subject to securities laws, the question should remain whether Congress clearly delegated to the SEC the authority to regulate digital currencies as securities subject to comprehensive regulation. Just because Congress delegated to private parties the power to ask a court to subject Entity A to agency regulation does not mean the question of whether Congress actually subjected Entity A to the agency's authority has disappeared.

Finally, Phillips and Baumann argue that precedent supports—or at least does not foreclose—cabining the major questions doctrine to rulemaking.[189] Although they acknowledge that the Supreme Court applied the major questions doctrine in *Gonzales*,[190] a case not featuring rulemaking, they neglect the *Queen and Crescent Case* and *Kent*.[191] As for cases affirmatively supporting their position, Phillips and Baumann cite only one district court case. That case asserted *ipse dixit* in a couple of sentences that the major questions doctrine did not apply in an FTC enforcement action because the agency was "not flexing its regulatory muscles" but "merely asking a court to interpret and apply a statute enacted by Congress."[192] However, at the risk of obnoxious repetition, agencies do flex their "regulatory muscles" and make policy through enforcement actions.[193] And, to

184. Phillips & Baumann, *supra* note 6, at 756.

185. *Id.* at 754.

186. *See, e.g.*, Capozzi, *supra* note 5, at 527–32.

187. *See id.*

188. *Cf.* Consumers Rsch. v. FCC, 109 F.4th 743, 774–76 (5th Cir. 2024) (en banc) (outlining private non-delegation doctrine).

189. Phillips & Baumann, *supra* note 6, at 755 ("[T]he Supreme Court has so far only applied the MQD to 'legislative' agency actions carrying the force of law.").

190. *Id.* at 768 (acknowledging *Gonzales* is a "difficult case" for their argument).

191. Mr. Baumann does not believe the *Queen and Crescent Case* is part of the major questions doctrine corpus; I have previously addressed his arguments on that point. *See* Capozzi, *supra* note 51, at 204 n.92; *see also* Jack M. Beermann, *The Anti-Innovation Supreme Court: Major Questions, Delegation, Chevron, and More*, 65 W. & M. L. REV. 1265, 1292 n.119 (2024) (writing in opposition to major questions doctrine but concurring with my interpretation of the *Queen and Crescent Case*).

192. FTC v. Kochava, Inc., 671 F. Supp.3d 1161, 1180 (D. Idaho 2023).

193. *See* Part I, *supra*.

repeat, the fact that a court checks the agency's assertion of authority and interprets the statute at issue cannot be enough to remove a case from the major questions doctrine's domain because the court does the same thing even in cases featuring rulemaking.

CONCLUSION

The major questions doctrine is a fundamental restraint on the power of administrative agencies to change the law and a central protection for the legislative process. Agencies cannot circumvent that essential protection by changing the law through enforcement proceedings and hiding behind the fiction that they are merely "enforcing" the law. The separation of powers surely cannot be so easily manipulated.[194]

194. *See, e.g.*, INS v. Chadha, 462 U.S. 919, 958 (1983) ("To preserve . . . checks, and maintain the separation of powers, the carefully defined limits on the power of each Branch must not be eroded.").