Take the Politics Out of Political Significance: The Case for Using Objective Metrics in Major Questions Analysis

*David T.S. Jonas**

Abstract. Under the major questions doctrine, the Supreme Court looks to the "economic and political significance" of an agency's rule to help determine whether Congress intended to delegate the authority to issue that rule. While the Court has largely settled on a "billions of dollars" threshold for finding economic significance, the test for political significance remains unclear. Indeed, the Supreme Court has indicated that the major questions doctrine should be guided by judicial common sense rather than a searching evidentiary inquiry.

The growing role of the major questions doctrine in American jurisprudence, however, requires courts to forewarn legislators and legal actors as to what is "major" and what is merely "interstitial." To achieve that, this Comment will argue that courts should readily accept objective evidence of political significance. Specifically, courts should welcome surveys of congressional and state legislative activity, the number of public comments a proposed rule receives, estimates of the number of people directly affected by a rule, search engine trends data, and the results of public opinion surveys as evidence of political significance. Metrics like these provide a more reliable foundation for major questions analysis and enhance the major questions doctrine's goals of congressional and presidential accountability.

* J.D. Candidate, Antonin Scalia Law School, George Mason University, 2024. This Comment won the Antonin G. Scalia Writing Award for 2022-23. The author would like to thank Professors Jennifer L. Mascott, Jeremy A. Rabkin, J.W. Verret, and Todd J. Zywicki, as well as editors Jamieson Knopf and Seth Lucas for their guidance and assistance in writing this Comment.

Introduction

If the last fifteen years of scholarship on the major questions doctrine are any indication, the idea that courts should use objective metrics to determine whether an agency rule concerns an issue of "economic and political significance" represents a minority viewpoint.[1] "[T]here is no principled difference between a major question and a minor one," declares Professor Abigail Moncrieff.[2] The idea of economic and political significance "has never been justified by any coherent rationale," states one unsigned note in the *Harvard Law Review*.[3] "It is hard to imagine that the courts could develop judicially manageable standards" on an issue's public salience, according to Natasha Brunstein and Professor Richard Revesz.[4] "[T]here is no reliable metric for identifying a constitutionally excessive delegation," writes Professor John Manning.[5]

But recent developments—such as the Supreme Court's decision in *Biden v. Nebraska*[6]—strongly suggest that a more objective, metrics-based approach to the major questions doctrine is not merely possible, but is being implemented at this very moment.[7] Here, just as in the fields of antitrust, trademark, and torts, statistical analysis of public perception could be the next key tool courts use to help manage this still-emerging

---

[1] *See, e.g.*, Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 1986 (2017) (analyzing the "objectivity" of economic and political significance and ultimately finding: "This is not an objective test of statutory meaning. The very identification of issues as economically and politically significant in the relevant way involves subjective judgments.").

[2] *See* Abigail R. Moncrieff, *Reincarnating the "Major Questions" Exception to* Chevron *Deference as a Doctrine of Noninterference* (*or Why* Massachusetts v. EPA *Got It Wrong*), 60 ADMIN. L. REV. 593, 612 (2008).

[3] *See* Note, *Major Question Objections*, 129 HARV. L. REV. 2191, 2196–97 (2016).

[4] *See* Natasha Brunstein & Richard L. Revesz, *Mangling the Major Questions Doctrine*, 74 ADMIN. L. REV. 217, 253 (2022).

[5] *See* John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 258; *see also* Lisa Schultz Bressman, *The Jurisprudence of "Degree and Difference": Justice Breyer and Judicial Deference*, 132 YALE L.J.F. 729, 754 (2022) ("Although the Court has said the doctrine applies only in 'extraordinary' cases, it has offered no metric for assessing a question's significance beyond general, easily satisfied criteria.").

[6] 143 S. Ct. 2355 (2023).

[7] *See, e.g.*, *id.* at 2373, Brown v. U.S. Dep't of Educ., 640 F. Supp. 3d 644, 665 (N.D. Tex. 2022) (conducting a survey of legislation introduced in recent Congresses that attempted to forgive large, blanket amounts of student debt, noting each bill had failed), *vacated and remanded*, 600 U.S. 551 (2023); *see also* Avalon Zoppo, *After Supreme Court's EPA Ruling, Texas Turns to 'Major Questions' Doctrine In DACA Challenge*, NAT'L L.J. (July 6, 2022), https://perma.cc/L337-KKMM (noting that states like Texas are amending complaints' arguments to incorporate *West Virginia v. EPA* and ask courts to throw out agency rules over the "vast economic and political importance" factor using the number of beneficiaries as a metric).

and consequential doctrine.[8] Indeed, the major questions doctrine is such a powerful form of judicial review, a more objective approach is likely a prerequisite to the doctrine's survival in the long term.[9]

When reviewing an agency rule under the major questions doctrine, the Supreme Court looks to the rule's "economic and political significance" to weigh whether Congress intended to delegate authority to the agency to issue that rule.[10] Indeed, no single phrase sums up the arc of the major questions doctrine better than economic and political significance.[11] Since the Supreme Court first used the phrase in 2000, the Court has broadened and narrowed "significance" numerous times to shift the line between what constitutes a major question and what is merely an "interstitial" question.[12] In doing so, the Court grappled with a difficult question that many scholars and jurists have attempted to answer: what precisely makes an issue significant?[13]

"Economic significance" and "political significance" are imprecise terms, but economic significance can be boiled down to the dollar amount of the expected economic impact of an agency action.[14] Political significance, however, has eluded easy definition. As then-Judge Brett Kavanaugh hinted in one prominent dissent, political significance has a "know it when you see it quality."[15] Even so, the Court has shown every intention of keeping political significance as at least one factor in

---

[8] *See* Susan J. Becker, *Public Opinion Polls and Surveys as Evidence: Suggestions for Resolving Confusing and Conflicting Standards Governing Weight and Admissibility*, 70 OR. L. REV. 463, 467–68 (1991).

[9] *See* Riley T. Svikhart, *"Major Questions" as Major Opportunities*, 92 NOTRE DAME L. REV. 1873, 1901–02 (2017) (arguing that the costs of judges possibly using major questions review in bad faith do not outweigh the benefits of maintaining the separation of powers: "[T]he ends of working to preserve the separation of powers justify the means of furnishing judges with the kind of discretion that may enable occasional arbitrariness and capriciousness."). Such analysis suggests that if the "costs" of employing the major questions doctrine come to outweigh the benefits in protecting the separation of powers, courts may eventually drop the doctrine.

[10] *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 147, 160 (2000) (using the phrase "economic and political significance" for the first time in the context of the major questions doctrine); *see also* West Virginia v. EPA, 142 S. Ct. 2587, 2608–10 (2022) (using the phrase "economic and political significance" for the first time in a case designated as a "major questions case"); *Nebraska*, 143 S. Ct. at 2373 (showing the Supreme Court's most recent use of the phrase in a majority decision).

[11] *See infra* Part I.

[12] *See, e.g.*, Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324, 342 (2014) (adding "vast" before "economic and political significance" as an attempt to narrow the term's application).

[13] *See infra* Part II.

[14] *See* King v. Burwell, 576 U.S. 473, 485–86 (2015) (noting that "billions of dollars in spending" by private parties on health insurance constitutes "economic and political significance").

[15] U.S. Telecom Ass'n v. FCC (USTA), 855 F.3d 381, 423 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) (discussing major questions in denial of rehearing en banc).

determining whether a case is subject to major questions review. In fact, Justice Neil Gorsuch has suggested that political significance *alone* could invoke major questions review.[16]

Whichever approach the Court ends up pursuing, legal actors must work to create rules to inform everyone from members of Congress to agencies to litigants as to what constitutes political significance. In the words of Professor Cass Sunstein, such a powerful form of judicial review "should be crisp and easy to apply."[17] That judicial imperative makes it vital that litigants and courts work together to develop a crisp and easy to apply political significance factor.[18] To do that, courts should look to objective metrics surrounding a rule's development and promulgation. Such an approach holds the most promise for achieving greater clarity under major questions review.

Part I traces the history of "political significance" from its birth in a journal article by then-Judge Stephen Breyer to its latest use by the Supreme Court in 2023. Part II details efforts by lower court judges and litigants to use objective metrics to guide major questions analysis. Part III argues that courts should rely on evidence—such as congressional and state legislative activity surveys, the number of public comments a proposed rule receives, estimates of the number of people directly affected by a rule, search engine trends data, and public opinion surveys—for showing political significance. Part III further explains that, even if imperfect, these data points ensure rigor within the doctrine and give litigants forewarning about which questions are likely "interstitial" rather than "major."[19] Part IV addresses likely counterarguments by using a hypothetical test case concerning firearm regulation to show how courts might incorporate such data into their analyses to improve upon raw judicial intuition.[20] Part IV further argues that a clearer political significance threshold not only increases judicial clarity but also enhances accountability in Congress and the President.

16 *See* West Virginia v. EPA, 142 S. Ct. 2587, 2620–21 (2022) (Gorsuch, J., concurring).

17 Cass R. Sunstein, *There are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475, 488 (2021).

18 *See id.*

19 One often sees the phrases "minor," "ordinary," or "interstitial," used to describe a non-major question. This Comment generally uses the term that the case or source being discussed uses for simplicity and ease of reading. That said, this Comment recommends using "interstitial," as it mirrors most closely the language used by then-Judge Stephen Breyer when he coined the phrase "major questions." *See infra* Part I.

20 *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) ("[W]e must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.").

I. The Roots of Political Significance: The Battle of "And" Versus "Or"

Dozens of law review articles have traced the development of the major questions doctrine, but no article has specifically detailed the history of the political significance factor within major questions review.[21] Indeed, while this background will likely be familiar to observers of administrative law, the history of "political significance" outlined here should reflect a novel tracing of the development of an under-inspected factor in major questions review. This history helps explain why the use of objective metrics does not stray from (and indeed enhances) the underpinnings of the major questions doctrine.

A. *Judge Breyer Coins "Major Questions" with Political Significance at the Forefront*

In 1986, few observers would have guessed that an article authored by then-Judge Stephen Breyer would spawn one of the most consequential doctrines on delegation and the exercise of legislative power in the modern administrative state.[22] In his article *Judicial Review of Questions of Law and Policy*, Judge Breyer opined on the proper role courts should play when reviewing agency rules.[23] Judge Breyer was concerned with a paradox: the relevant caselaw required courts to defer to agencies on a range of interpretative matters, but courts are simultaneously asked to provide a check on administrative power.[24] In listing off some of the factors a judge might consider when deciding how much deference to give an agency, Judge Breyer wrote, "Congress is more likely to have focused upon, and answered, *major questions*, while leaving interstitial matters to answer themselves in the course of the statute's daily administration."[25] Within the context of the article itself, the coinage of "major questions" is but one small assertion thrown in among dozens about how courts should

[21] See Adam R. F. Gustafson, *The Major Questions Doctrine Outside Chevron's Domain*, Ctr. for the Study of the Admin. State, Working Paper No. 19-07, 2019, for a thorough history of the major questions cases.

[22] *See* Bressman, *supra* note 5, at 730.

[23] *See* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370–71 (1986).

[24] *Id.* at 363–64.

[25] *Id.* at 370 (emphasis added).

approach questions of deference and delegation.[26] But this line, above every other, has since taken on a life of its own.[27]

And yet, for all the attention the "major questions" sentence would see in the coming years, few have fully analyzed the example Judge Breyer presents a paragraph later to illustrate what makes an issue major.[28] Judge Breyer contrasts major questions with "interstitial matters" by using two seemingly similar cases concerning agency rules issued by the National Labor Relations Board ("NLRB").[29] For an example of a minor interstitial rule, Judge Breyer points to *NLRB v. Hearst Publications*.[30] In *Hearst*, the Court reversed the lower court's decision rejecting the NLRB's findings that "newsboys" who distributed newspapers in the Los Angeles metropolitan area qualified as employees for the purposes of organizing a union.[31] For Judge Breyer, *Hearst* "presented a minor, interstitial question of law, which was intimately bound up with the statute's daily administration."[32] He added that such a question of whether newsboys counted as employees "was likely to be better understood by a technically expert agency than by a legally expert court."[33]

On the other hand, *Packard Motor Car v. NLRB*,[34] decided just three years after *Hearst*, addressed what Judge Breyer saw as "a legal question of great importance in the field of labor relations."[35] In *Packard*, the question

[26] *See id.* at 372–83, 389–90. Judge Breyer makes normative and positive assertions on judicial review of agency rules and regulations ranging from thoughts on *Chevron* deference, to "hard look" doctrines, to how courts should handle review of the record when lacking technical expertise. *Id.*

[27] A LexisNexis search of the full and exact sentence Judge Breyer uses to coin "major questions" yields eleven federal cases and sixty-nine law review articles. The phrase most recently appeared in Justice Amy Coney Barrett's concurrence in *Biden v. Nebraska*. 143 S. Ct. 2355, 2380 (2023) (Barrett J., concurring).

[28] For example, a LexisNexis search of the pincite for Judge Breyer's example of a major case versus an "interstitial matter" on p. 371 yields no federal cases and only nine law review articles, most of which do not discuss the example Judge Breyer presents. For an example of a law review article that discusses Judge Breyer's "major" and "interstitial" framework, see Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 10 (1990) ("The *Hearst* case itself illustrates a distinction between major and minor issues.").

[29] *See* Breyer, *supra* note 23, at 371. The Merriam-Webster dictionary defines "interstitial" as "occurring in or being an interval or intervening space or segment." *Interstitial*, MERRIAM-WEBSTER.COM, https://perma.cc/C6UN-N8AD. Judge Breyer's use of the word seems to suggest that "interstitial matters" are those that are commonplace and fill in the gaps of policy through rulemaking. *See* Breyer, *supra* note 23, at 371.

[30] Breyer, *supra* note 23, at 371.

[31] NLRB v. Hearst Publ'ns, 322 U.S. 111, 133–35 (1944).

[32] *See* Breyer, *supra* note 23, at 371.

[33] *Id.*

[34] 330 U.S. 485 (1947).

[35] *See* Breyer, *supra* note 23, at 371.

presented was whether shop foremen across all industries were covered by the National Labor Relations Act ("NLRA").[36] For Judge Breyer, *Packard*'s nationwide shop foremen question warranted greater scrutiny than the question of Los Angeles' newsboys, as "[the] [foremen] question raised *political*, as well as policy, concerns."[37] In Judge Breyer's eyes, "it seem[ed] unlikely that Congress wished to leave so important and delicate a legal question to the Board to decide."[38]

This is a highly instructive set of examples that often gets overlooked by observers trying to find the line between major and minor.[39] For Judge Breyer, the question of whether newsboys in one geographic area are employees under the NLRA is a "minor, interstitial question."[40] Yet, whether shop foremen across the nation are employees under the NLRA is "a legal question of great importance."[41] What accounts for the difference?

First, Judge Breyer credits the difference between the two cases to political concerns.[42] Judge Breyer thought that the leap from newsboys in Los Angeles to all shop foremen across the nation represented a canyon-jump in the *political* nature of the question the Court was asked to rule on.[43] Essentially, Judge Breyer believed that Congress would want to have its say on the shop foremen question, while Congress would likely find the newsboys question to be the kind of matter left to agency discretion.[44] Digging below the surface on the foremen question, Judge Breyer appears to include the greater number of individuals affected, the wider geographic area being regulated, and the increased likelihood that Congress did not intend for the agency to decide the matter as important factors in what makes an agency rule major.[45]

Second, Judge Breyer takes no notice of the difference in the economic nature of the two rulings.[46] Instead, Judge Breyer posits that the two cases differ greatly in terms of political and policy concerns.[47] At a

---

36 *Packard*, 330 U.S. at 486.

37 *See* Breyer, *supra* note 23, at 371 (emphasis added).

38 *Id. See also* Am. Ship Bldg. Co. v. NLRB, 380 U.S. 300, 318 (1965) ("The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.").

39 *See* LexisNexis Search, *supra* note 28.

40 *See* Breyer, *supra* note 23, at 371.

41 *Id.*

42 *See id.*

43 *See id.*

44 *See id.*

45 *See id.*

46 *See* Breyer, *supra* note 23, at 371.

47 *See id.*

minimum, such an absence of an economic rationale suggests that Judge Breyer's analysis does not necessarily hinge on the economic costs of an agency rule for determining whether a rule is major.[48]

Finally, Judge Breyer finds "great importance" *relative* to the issue of labor relations itself, not in comparison to other issues.[49] For Judge Breyer, the question is not whether "labor relations" itself is a "question of great importance," but whether the issue presented to the court must be weighed in relation to the issue as a whole.[50] For Judge Breyer, the importance of the sub-issue at play (i.e., shop foremen nationwide versus newsboys in Los Angeles) dictates the level of importance.[51] In other words, when defining the scope or breadth of an issue, the crucial factor is its impact in relation to the larger policy field that the agency seeks to regulate.[52]

Federal court decisions that cite Judge Breyer's piece have filtered out much of the context Judge Breyer places in his short discussion of major questions.[53] The comparison between *Packard* and *Hearst* does not appear in any of the fourteen Supreme Court opinions that employ the term "economic and political significance."[54] And yet, for any legal observer seeking the substantial base of major questions as intended by its creator, political questions of "great importance" form much of the basis of it.[55] If nothing else, the very genesis of "major questions" takes into account the political importance of an issue in deciding whether an issue is major.[56] Thus, the roots of the major questions doctrine are firmly grounded in the political significance of an issue.

---

48 *See id.*

49 *See id.*

50 *Id.*

51 *See id.*

52 *See* Breyer, *supra* note 23, at 371. For example, we may concede that a regulation that severely restricts a wide range of common firearms would be "major" in relation to the issue of guns and gun violence in America. However, an agency rule banning a fairly uncommon accessory might be considered "interstitial" because it falls closer into the "gap-filling" and "minor" class due to its small impact on firearm policy overall. *See infra* Part IV.

53 A LexisNexis search yields no federal case citing p. 371 of Judge Breyer's article, where these two cases are compared. Such a search only yields an advisory case in the Rhode Island Supreme Court, and it does not mention *Packard* or *Hearst*.

54 A LexisNexis search for Supreme Court opinions containing the phrase "economic and political significance" yields only one case that cites *Packard* or *Hearst*, and that case only cites *Hearst* for a discussion on "non-deferential judicial determination of questions of law." *See* Buffington v. McDonough, 143 S. Ct. 14, 16 (2022) (Gorsuch, J., dissenting).

55 *See* Breyer, *supra* note 23, at 371.

56 *See id.*

B. *"Economic and Political Significance" Makes Its Debut in the Courts*

Over the next fourteen years, Judge Breyer's article bubbled up on rare occasions.[57] But Judge Breyer's article was cited most for another passage concerning *Chevron* deference, not for its "major questions" concept.[58] In 2000, however, "major questions" made its Supreme Court debut in *FDA v. Brown & Williamson Tobacco Corp.*[59] *Brown & Williamson* constitutes the first citation directly to Judge Breyer's seemingly off-hand observations on major questions.[60] Curiously enough, now-Justice Breyer dissented in this case, essentially disagreeing with the Court's first real application of the concept he nominally created.[61]

In *Brown & Williamson*, the Food and Drug Administration ("FDA") argued it had the authority to issue a rule banning youth-targeted advertising by the tobacco industry because the Food, Drug, and Cosmetic Act of 1938 gave the FDA authority to regulate nicotine and, therefore, tobacco.[62] The Court disagreed, however, and expressed doubt that Congress was "likely to delegate a policy decision of such economic and political *magnitude* to an administrative agency."[63] Later in the opinion, the Court employed similar language to describe the weightiness of the power the FDA claimed, stating that "Congress could not have intended to delegate a decision of such economic and political *significance* to an agency in so cryptic a fashion."[64] The word "significance" won over "magnitude" in later cases.[65] Given tobacco's large economic and political footprint in the United States, *Brown & Williamson* is often read to require the "extraordinary case" of both economic *and* political significance to invoke major questions review.[66]

---

[57] A LexisNexis search yields six federal cases that cite Judge Breyer's article before the Supreme Court first cited the article for its major questions framework in *Brown & Williamson* in 2000.

[58] *See, e.g.*, Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Or., 515 U.S. 687, 703–04 (1995); Bus. Roundtable v. SEC, 905 F.2d 406, 417 (D.C. Cir. 1990); Chi. Mercantile Exch. v. SEC, 883 F.2d 537, 548 n.4 (2nd Cir. 1989).

[59] 529 U.S. 120, 159 (2000).

[60] *See id.*

[61] *See id.* at 192 (Breyer, J., dissenting).

[62] *See id.* at 146–47 (majority opinion).

[63] *Id.* at 138 (emphasis added).

[64] *Id.* at 160 (emphasis added).

[65] *See, e.g.*, West Virginia v. EPA, 142 S. Ct. 2587, 2605 (2022); Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014).

[66] *See* Nathan Richardson, *Keeping Big Cases from Making Bad Law: The Resurgent "Major Questions" Doctrine*, 49 CONN. L. REV. 355, 366 (2016).

Crucially, the Court rejected the FDA's claim that the Court was required to apply *Chevron* deference.[67] The majority replied that questions of implicit deference require courts to determine whether "Congress has directly spoken to the precise question at issue is shaped, at least in some measure, by the nature of the question presented."[68] For the *Brown & Williamson* Court, the nature of the question mattered because "[i]n extraordinary cases . . . there may be reason to hesitate before concluding that Congress has intended such an implicit delegation."[69] As the Court saw it, the question of FDA regulation of tobacco was "hardly an ordinary case."[70] Tobacco, the Court said, had "its own unique political history."[71] In other words, when a case presents an "extraordinary case" on an issue of economic and political significance, courts may bypass *Chevron* deference and find the agency acted outside the scope of its delegated powers.[72]

The *Brown & Williamson* Court established another key marker on the question of economic and political significance. According to the Court, economic and political significance rests on judicial common sense.[73] Recall the *Brown & Williamson* Court's use of "economic and political magnitude." The Court said it "must be guided to a degree by *common sense* as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency."[74] Indeed, one key feature of nearly all major questions cases is that the Supreme Court does not expend much effort in deciding levels of significance or magnitude.[75] The Supreme Court tends to appeal to an innate sense of significance rather than list off objective metrics that show an issue has significance.[76] Any person advocating for more direction from a court as to what constitutes "significance" must contend with the

67 *See Brown & Williamson*, 529 U.S. at 159.

68 *Id.*

69 *Id.*

70 *Id.*

71 *Id.*

72 *See* Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 193, 241 (2006).

73 *Brown & Williamson*, 529 U.S. at 133.

74 *Id.* (emphasis added).

75 *See, e.g.*, Gonzales v. Oregon, 546 U.S. 243, 267–68 (2006) (holding that the "importance of the issue of physician-assisted suicide, which has been the subject of an earnest and profound debate across the country" was enough by itself to invoke major questions review (internal quotation marks omitted)).

76 *See, e.g.*, *Brown & Williamson*, 529 U.S. at 160 (holding that tobacco's "unique political history" and its footprint occupying a "significant portion of the American economy" were enough to show significance).

Court's stated rationale that judicial intuition is a permissible tool for measuring significance.[77]

Indeed, future litigants would use *Brown & Williamson*'s political history approach in attempting to argue for the overall significance of an issue.[78] In *Massachusetts v. EPA*,[79] the Environmental Protection Agency ("EPA") relied on *Brown & Williamson*'s use of "tobacco['s] unique political history" to invalidate the FDA's "reliance on its general authority to regulate drugs as a basis for asserting jurisdiction over an 'industry constituting a significant portion of the American economy.'"[80] The EPA picked up on this "unique political history" argument to argue that climate change had its own unique political history, one that had "even greater economic and political repercussions than regulating tobacco."[81] The EPA then used this background to reason that it did not have the authority to regulate greenhouse gases, or at least that the EPA should be given *Chevron* deference as to its decision.[82] While the Court ultimately ruled against the EPA on its claim that it lacked the power to regulate greenhouse gases, the Court did so on grounds other than the EPA's political history argument.[83]

Note, however, the assertion that the issue of greenhouse gas emissions was *more* significant than tobacco regulation in the eyes of the EPA.[84] This suggests some capacity for litigants to rank and make arguments about whether an issue has more or less significance than other issues.[85] Again, this suggests that, over time, issues themselves can serve as data points or benchmarks for cases to be ranked, so that a line can be drawn between major and interstitial questions.[86]

---

77 *See* Brunstein & Revesz, *supra* note 4, at 238–42 (describing the Trump administration's tactics for playing up political significance in cases seeking to undo Obama-era agency rules); *see also* Biden v. Nebraska, 143 S. Ct. 2355, 2384 (2023) (Barrett, J., concurring) ("[T]he [major questions] doctrine is not an on-off switch that flips when a critical mass of factors is present—again, it simply reflects common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude." (internal quotation marks omitted)).

78 *See, e.g.*, Massachusetts v. EPA, 549 U.S. 497, 512 (2007).

79 549 U.S. 497 (2007).

80 *Id.* at 512 (quoting *Brown & Williamson*, 529 U.S. at 159).

81 *Id.*

82 *See id.*

83 *See id.* at 531. Instead, the Court said that *Brown & Williamson* was (1) about banning tobacco, and this was about regulation, and (2) the FDA had said for decades it did not have the authority to regulate tobacco. *Id.*

84 *See id*.

85 *See Massachusetts*, 549 U.S. at 512.

86 *See* West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022) ("Scholars and jurists have recognized the common threads between those [major questions doctrine] decisions.").

Massachusetts produced one final takeaway in terms of "significance": the Agency's contention that "political repercussions" help define whether an issue has political significance.[87] It suggests that the ramifications or effects of a rule in the real world remain an important factor in major questions analysis.[88] If so, litigants should be able to present objective evidence of a rule's actual or projected real-world impact to persuade a court to invoke major questions review.[89]

C. *The Curious Case of* Gonzales v. Oregon

No case has been more instrumental in the development of political significance in the major questions doctrine than *Gonzales v. Oregon*.[90] Based on *Brown & Williamson*, it appeared that the Supreme Court had settled on its formula for deciding whether a case posed a major question.[91] One central factor to the *Brown & Williamson* framework was "economic *and* political significance," meaning that a party would need to show both forms of significance to invoke major questions review.[92] *Gonzales* changed that by expanding the types of cases potentially subject to major questions review.[93]

In *Gonzales*, the Court employed "significance" to cast doubt on the claim by the Department of Justice ("DOJ") that it had the power to deregister doctors who prescribe assisted-suicide medicines.[94] The *Gonzales* Court held that the nation was engaged in an "earnest and profound debate" surrounding physician-assisted suicide.[95] It then equated this "debate" principle with political significance, saying that the DOJ's claim of agency power "makes the oblique form of the claimed delegation all the more suspect."[96] The analysis for significance ended

87 *See Massachusetts*, 549 U.S. at 512.

88 *See id.*

89 *See id.*

90 546 U.S. 243 (2006). As seen in every other major questions case the Supreme Court has heard, there has been a plausible economic significance argument. As discussed in this section, however, there is almost certainly no economic significance present in *Gonzales*. *See infra* Table 1.

91 *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000).

92 *See id.* (emphasis added).

93 *See, e.g.*, West Virginia v. EPA, 142 S. Ct. 2587, 2620–21 (2022) (Gorsuch, J., concurring). Note that Justice Neil Gorsuch's reading of the major questions caselaw to support the "or" reading of significance would stand on very shaky ground without *Gonzales*.

94 Gonzales v. Oregon, 546 U.S. 243, 267 (2006) (citing *Brown & Williamson*, 529 U.S. at 160).

95 *Id.* (quoting Washington v. Glucksberg, 521 U.S. 702, 735 (1997)). Note that in *Washington v. Glucksberg*, the full phrase is "an earnest and profound debate about the morality, legality and practicality of physician-assisted suicide." 521 U.S. 702, 735 (2006).

96 *Gonzales*, 546 U.S. at 267–68.

there, but the case provides a valuable data point: merely generating an "earnest and profound debate" may make an issue politically significant.[97]

But there was no mention of economic significance in *Gonzales*. In fact, *Gonzales* would have likely failed any economic significance test, as physician-assisted suicide is extremely rare, and its economic impact is miniscule in comparison to the overall healthcare sector.[98] Indeed, the economic impact of physician-assisted suicide does not even reach the "billions of dollars" threshold later embraced by the Court.[99] This presents courts with a curious dilemma: should they follow the spirit of the standard emerging from *Gonzales*, which appears to consider *either* economic *or* political significance?[100] Or, should they stick to the definition of economic *and* political significance that requires both factors to be present to invoke major questions review?[101] Or is economic and political significance a term of art, closer to a sliding scale between the two factors to show overall significance?[102] This is one of the most vexing conundrums in major questions review. Either *Gonzales* was decided incorrectly insofar as significance is concerned, or one must read "economic and political significance" to mean something other than its plain text suggests.[103]

Gonzales also posits an interesting question: what precisely does "political" mean? For the majority, physician-assisted suicide is not just significant because of the national "debate."[104] As the Court's full quote from *Washington v. Glucksberg*[105] makes clear, it's significant also because of the "morality" and "practicality" of physician-assisted suicide.[106] For the *Gonzales* court, it's not simply the volume, the salience, or the overall heat

97 *See id.* (quoting *Glucksberg*, 521 U.S. at 735).

98 *See* OR. HEALTH AUTH. PUB. HEALTH DIV., OREGON DEATH WITH DIGNITY ACT: 2020 DATA SUMMARY 4 (2021), https://perma.cc/CTV3-3ZLL. For example, in 2005, the year *Gonzales* was decided, thirty-eight Oregonians died through voluntary self-administration of doctor-prescribed lethal medications. *Id.* at 14.

99 *See* King v. Burwell, 576 U.S. 473, 485–86 (2015). Even if we placed a value of $10 million on the lives of each Oregonian who elected to participate in physician-assisted suicide in 2005 (and their family's costs), it would only amount to $380 million. Indeed, one could argue that physician-assisted suicide provides a net economic benefit, as it tends to be used by families looking to end the suffering of loved ones and may save in terms of the cost of unwanted medical care.

100 *See Gonzales*, 546 U.S. at 267.

101 *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000).

102 *See* Andrew Michaels, *OSHA Case Shows Fluidity of Major Questions Doctrine*, LAW360 (Jan. 26, 2022), https://perma.cc/KM59-LMJL.

103 Indeed, the majority in *West Virginia* appeared to sidestep *Gonzales* in terms of analyzing the underlying agency rule's level of significance. *See infra* Section I.E.

104 *See Gonzales*, 546 U.S. at 249, 267–68, 298–99.

105 521 U.S. 702 (1997).

106 *Id.* at 735.

that a policy issue generates, but whether it touches on a deep moral issue that Congress itself needs to decide (or refrain from deciding).[107]

As seen in later major questions cases, the Court has not steadfastly embraced the "or" reading of significance. Beyond the contours of the term itself, the leap from *Brown & Williamson* to *Gonzales* to later cases represents the indeterminate nature of "significance."[108] As many observers have noted, tracing the major questions cases requires acknowledging that the Court has zigzagged on some of the principles undergirding the doctrine.[109]

D. *Vast, Deep, and Nothing at All: The Supreme Court Zigs and Zags on Significance*

Since *Gonzales*, a majority of the Supreme Court has returned to "economic and political significance" seven times.[110] Over those cases, with economic and political significance established as one of the key elements in deciding whether to invoke major questions review, the Supreme Court grappled with the scope of the phrase, expanding and narrowing it on several occasions.[111]

For example, eight years after *Gonzales*, the Court returned to "economic and political significance" by adding the word "vast" ahead of the phrase.[112] In *Utility Air Regulatory Group v. EPA*,[113] the Court faced the question of whether the EPA had the "power to require permits for the construction and modification of tens of thousands, and the operation of millions, of small sources nationwide."[114] In attempting to glean whether Congress intended to extend EPA authority under the Clean Air Act into a new area of greenhouse gas regulation, the *Utility Air* Court said it expects "Congress to speak clearly if it wishes to assign to an agency decisions of *vast* economic and political significance."[115]

---

107 *See Gonzales*, 546 U.S. at 249, 267–68, 298–99.

108 *See* Gustafson, *supra* note 21, at 17 ("The Supreme Court has used superficially similar statements of the major questions doctrine to achieve diametrically opposed outcomes.").

109 *See id.*

110 A LexisNexis search of Supreme Court cases that contain the exact phrase "economic and political significance" yields nine cases where the majority used the phrase, and fourteen cases when dissents and concurrences are included. *See infra* Table 1.

111 The introduction of "vast" can be seen as an attempt to narrow the scope of major questions review. Justice Gorsuch's and then-Judge Kavanaugh's later reliance on an "or" reading can be seen as broadening the scope of major questions review. *See infra* Section I.E.

112 *See* Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014).

113 573 U.S. 302 (2014).

114 *Id.* at 324.

115 *Id.* (emphasis added) (internal quotation marks omitted).

Again, the Court did not define the term further, but the addition of "vast" appears to narrow what qualifies as a major question.[116] If we view *Gonzales* as embracing an "or" reading of the economic and political significance, then *Utility Air* represents an "and" reading of the phrase, but with the additional requirement that the underlying consequences of an issue be "vast."[117] Indeed, one can imagine many significant economic and political issues that may not rise to the level of "vast."[118]

"Vastness" itself further supports *Brown & Williamson*'s notion that the major questions doctrine may only be applied in "extraordinary cases."[119] In other words, the major questions doctrine is a tool to be used in exceptional circumstances.[120] It is a kind of "break glass in case of emergency" form of throwing out agency rules based on ambiguous or "newly discovered" agency powers.[121] In that vein, "vast" could also be a message to lower courts not to invoke major questions doctrine lightly.[122]

One year later, the Court in *King v. Burwell*[123] substituted the word "deep" for "vast" when modifying the concept of economic and political significance.[124] In *King*, the Court answered the question of whether subsidies for purchasing health insurance on exchanges set up by the federal government under the Affordable Care Act could extend to states that had not set up their own exchanges.[125] In deciding how much deference to afford to the interpretation of the Affordable Care Act by the Internal Revenue Service ("IRS"), the Court sidestepped *Chevron* deference

116 At this point, given *Gonzales*, the "or" reading is plausible, but the addition of "vast" under a plain text reading would presumably lead to fewer agency rules falling under major questions review.

117 *Utility Air*, 573 U.S. at 324.

118 For example, consider a hypothetical rule issued by the FDA based on ambiguous statutory language banning the sale of energy drinks. Such a rule would involve "billions of dollars" and may likely draw strong political reactions. However, would such a rule involve "vast" economic and political significance?

119 *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000).

120 *See id.*

121 *See, e.g.*, West Virginia v. EPA, 142 S. Ct. 2587, 2612 (2022) ("Under its newly discovered authority, however, EPA can demand much greater reductions in emissions based on a very different kind of policy judgment . . . ." (internal quotation marks and citations omitted)).

122 *See* Int'l Refugee Assistance Project v. Trump, 883 F.3d 233, 291 (4th Cir. 2018) (Gregory, C.J., concurring) ("The clear-statement rule [under the major questions doctrine] guards against unnecessary erosion of separation of powers and political accountability by insisting that the legislature directly confront the benefits and implications of these decisions."), *vacated*, 138 S. Ct. 2710 (2018).

123 576 U.S. 473 (2015).

124 *See id.* at 485–86.

125 *Id.* at 483–84.

by invoking the "extraordinary case" concept found in *Brown & Williamson*.[126]

The *King* Court found the question of federal subsidies for purchasing health insurance on exchanges to be precisely "one of those [extraordinary] cases."[127] The Court explained:

> The tax credits are among the Act's key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people. Whether those credits are available on Federal Exchanges is thus a question of *deep* "economic and political significance" that is central to this statutory scheme . . . .[128]

"Deep" in this context can be read in two ways. First, it could be read as simply pointing out that this issue more than meets the standard of significance required under major questions doctrine.[129] It is not establishing "deepness" as a requirement, but rather explaining that this is not a close call in terms of where the line is.[130] Second, "deep" could be read as reinforcing the vastness idea in *Utility Air*.[131] Had the Court not seen the issue of health exchange subsidies as having "deep economic and political significance," then presumably it would have invoked *Chevron* and applied that doctrine instead.[132]

The data points the *King* Court embraced for finding a "deep economic and political significance" are noteworthy. If an agency action involves "billions of dollars" and affects the price of an important product for "millions of people," then we have a question of "deep economic and political significance."[133] This represents the first time the Supreme Court attempted to attach numbers to what truly defines significance.[134] It suggests that litigants asking a court to invoke major questions review would be wise to present evidence showing a very large financial impact of the rule and one that affects as many people as possible.[135]

As illustrated in Table 1 below, the Court returned to "vast" to modify "economic and political significance" for the next three major questions

126 *Id.* at 485–86.

127 *Id.*

128 *Id.* (emphasis added) (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

129 *See King*, 576 U.S. at 485–86.

130 *See id.*

131 *See Utility Air*, 573 U.S. at 324.

132 *See King*, 576 U.S. at 485–86.

133 *Id.* (internal quotation marks omitted).

134 *See id.* A LexisNexis search of Supreme Court cases that contain the exact phrase "economic and political significance" yields fourteen cases—three of which the Supreme Court decided before *King*, and none of which attach numbers to the phrase.

135 Indeed, later litigants would stress the economic cost to private actors and the number of beneficiaries and people affected. *See infra* Part II.

cases.[136] However, in 2022, the Supreme Court finally uttered the phrase "major questions doctrine" in a majority opinion to describe its review of questions of economic and political significance.[137] Crucially, in doing so, it left out "vast" or "deep" when addressing the heart of its conception of the major questions doctrine, once again expanding the breadth of the issues it can cover.[138]

Table 1. Supreme Court Cases Where the Majority Invokes Major Questions Review using "Economic and Political Significance" as a Factor[139]

Case Name	Year Decided	Economic Significance?[140]	Political Significance?[141]	Vast or Deep Significance?
FDA v. Brown & Williamson Tobacco	2000	Yes	Yes	Neither Stated
Gonzales v. Oregon	2006	No	Yes	Neither Stated
Utility Air Regulatory Group v. EPA	2014	Yes	Yes	Vast
King v. Burwell	2015	Yes	Yes	Deep

136 Further note that even Justice Gorsuch used "deep" in his dissent in *Gundy v. United States*, 139 S. Ct. 2116, 2141 (2019).

137 *See* West Virginia v. EPA, 142 S. Ct. 2587, 2608–10 (2022).

138 *See id.*; *see also infra* Section I.E.

139 FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 147, 160–61 (2000); Gonzales v. Oregon, 546 U.S. 243, 267 (2006); Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014); *King*, 576 U.S. at 485–86; Ala. Ass'n of Realtors v. Dep't of Health and Hum. Servs., 141 S. Ct. 2485, 2489 (2021) (per curiam); Biden v. Missouri, 142 S. Ct. 647, 658 (2022) (per curiam); Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety and Health Admin., 142 S. Ct. 661, 665 (2022) (per curiam); *West Virginia*, 142 S. Ct. at 2605, 2608, 2613 (using "vast" when describing the EPA's argument in *Utility Air*, but omitting "vast" and "deep" when performing its own major questions analysis); Biden v. Nebraska, 143 S. Ct. 2355, 2372–75, 2380 (2023) (omitting the terms "vast" and "deep" when performing the major questions analysis; however, Justice Barrett's concurrence in *Nebraska* uses "vast," but that was not a majority decision).

140 This column uses the question of whether economic significance was at least plausible in each particular case. In some instances, whether economic significance exists is arguable.

141 This column uses the question of whether political significance was at least plausible in each particular case. In some instances, whether political significance exists is arguable.

Table 1. Supreme Court Cases Where the Majority Invokes Major Questions Review using "Economic and Political Significance" as a Factor[139]				
Case Name	**Year Decided**	**Economic Significance?**	**Political Significance?**	**Vast or Deep Significance?**
Alabama Association of Realtors v. HHS	2021	Yes	Yes	Vast
Biden v. Missouri	2022	Yes	Yes	Vast
NFIB v. DOL, OSHA	2022	Yes	Yes	Vast
West Virginia v. EPA	2022	Yes	Yes	Neither
Biden v. Nebraska	2023	Yes	Yes	Neither

E. Wild West Virginia: Significance Takes Its Place in Footholds of History

The most authoritative statement on economic and political significance—and the major questions doctrine in general—came recently in the Supreme Court's decision in *West Virginia v. EPA*.[142] In deciding whether the EPA had the authority to issue the Clean Power Plan under a plausible but scanty reading of the Clean Air Act, the Court held that in an "ordinary case," the "nature of the question" posed to the Court matters little; it's simply a question of statutory construction.[143] The Court held, however,

> our precedent teaches that there are "extraordinary cases" that call for a different approach—cases in which the "history and the breadth of the authority that [the agency] has asserted," and the "economic and political significance" of that assertion, provide a "reason to hesitate before concluding that Congress" meant to confer such authority.[144]

[142] 142 S. Ct. 2587 (2022).

[143] *Id.* at 2607–08.

[144] *Id.* at 2608 (quoting *Brown & Williamson*, 529 U.S. at 159–60). Again, note the lack of "vast" or "deep" to modify "economic and political significance."

Of course, in one sense, this was a straightforward case in terms of economic and political significance, as *Utility Air* established that the regulation of greenhouse gases is both economically and politically significant.[145] Likewise, *West Virginia* covered similar ground in terms of agency discretion and the "ancillary" nature of the Clean Air Act nominally authorizing the EPA's rule.[146] However, *West Virginia* relays several important guidance points on "significance."

First, *West Virginia* provides the first real acknowledgment of the major questions doctrine as a recognized concept and not simply one consigned to law review articles and textbooks.[147] Indeed, the *West Virginia* Court, for the first time, plainly states that "[u]nder our precedents, this is a major questions case."[148]

Second, *West Virginia* provided crucial context to the "significance" cases discussed thus far. Chief Justice John Roberts detailed the path the major questions cases have taken and put this into context for how the court will weigh significance.[149] For example, the *West Virginia* Court embraced the "extraordinary case" qualifier presented in *Brown & Williamson*.[150] Without an extraordinary case where the "history and the breadth of the authority" asserted has "economic and political significance," the major questions doctrine is not invoked.[151] Likewise, according to the *West Virginia* Court, *Utility Air* triggered major questions review owing to the "unheralded regulatory power over a significant portion of the American economy."[152]

But most crucially, the Court's handling of *Gonzales* tells us that the decision is something of an outlier when it comes to economic and political significance. The *West Virginia* Court called the Attorney General's asserted power to deregister doctors over assisted suicide drugs

145 *See* Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 307, 324 (2014).

146 *See West Virginia*, 142 S. Ct. at 2602, 2609–10.

147 *See id.* at 2609 ("Scholars and jurists have recognized the common threads between [major questions doctrine] decisions.").

148 *Id.* at 2610. Further note that the Court says major questions doctrine "took hold because it refers to an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting *highly consequential power* beyond what Congress could reasonably be understood to have granted." *Id.* at 2609 (emphasis added). Again, this speaks to the requirement that political significance be understood in terms of its ramifications on social life.

149 *See id.* at 2607–09.

150 *See id.* at 2607–08.

151 *See id.* (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000)).

152 *See West Virginia*, 142 S. Ct. at 2608 (internal quotation marks omitted) (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

"such [a] broad and unusual authority" that it was "not sustainable."[153] The Court thus shied away from significance as a factor in its analysis of *Gonzales*.[154] In fact, the lesson from *West Virginia* appears to be that *Gonzales* does *not* stand for the proposition that political significance alone could invoke major questions review.[155] Instead, *Gonzales* seems to now stand for the idea that if the connection between a statute and an agency rule is too attenuated, then the rule should be struck down.[156] In that sense, *Gonzales* is not a "significance" case at all, but rather a "clear congressional statement" case.[157]

Third, Justice Gorsuch's concurrence in *West Virginia* presents the counterargument that the caselaw is more comfortably rooted in the expansive "or" reading of significance.[158] While the majority's decision does not embrace the nondelegation doctrine framework the concurrence pushes, Justice Gorsuch points to cases like *Gonzales* to suggest that only political significance may be necessary to invoke the major questions doctrine.[159] On the economic side of the equation, Justice Gorsuch cites *MCI Telecommunications Corp. v. AT&T Co.*[160]—where billions of dollars were at stake on the issue of tariff-filing requirements—to likewise suggest that economic significance alone may suffice to invoke major questions review.[161] Crucially, *MCI* likely lacked the elements to constitute political significance, as tariff-filing requirements lack a high level of public salience and a profound national debate.[162] Again, such analysis comes from a concurrence by a lone Justice, but it suggests litigants would be foolish not to make political significance claims, even if other factors

153 *See id.* (quoting Gonzales v. Oregon, 546 U.S. 250, 267 (2006)).

154 *See id.*; Gonzales v. Oregon, 546 U.S. 250, 267–68 (2006). Indeed, a future Court that seeks to impose the "and" reading of significance would be wise to note the Court's embrace of other cases for significance, but its hesitance on *Gonzales*.

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

156 *See id.* at 2608–10.

157 *See* Int'l Refugee Assistance Project v. Trump, 883 F.3d 233, 291 (4th Cir. 2018) (Gregory, C.J., concurring) (noting that lower courts typically "require a clear statement of congressional intent before finding that Congress has ceded decisions of great economic and political significance"), *vacated*, 138 S. Ct. 2710 (2018). *Gonzales* could thus be seen as representing the "clear statement" requirement rather than as a model for significance analysis.

158 *See West Virginia*, 142 S. Ct. at 2620–22 (Gorsuch, J., concurring.).

159 *Id.* at 2620.

160 512 U.S. 218 (1994).

161 *See West Virginia*, 142 S. Ct. at 2621 (Gorsuch, J., concurring).

162 *See id.* at 2621.

are lacking.[163] Indeed, lower courts have already cited to Justice Gorsuch's concurrence when trying to analyze the political side of significance.[164]

Whatever an observer makes of Justice Gorsuch's analysis, one thing is clear from *West Virginia*: the Court has given little indication that it wants to discard political significance as a factor in major questions review. The majority does not explicitly embrace Justice Gorsuch's expansive view of "significance," but it clearly sees "significance" as being flexible enough to run through issues as diverse as tobacco, assisted suicide, greenhouse gas regulation, and health insurance subsidies.[165] Even if one does not buy that political significance *alone* could invoke the major questions doctrine, *West Virginia* appears to (arguably) set up political significance on something of sliding scale, where if an issue has less economic significance, political significance can make up the gap, and vice-versa.[166] *Gonzales* may have not received a full embrace, but it likely survives as a kind of non-economic backstop for any litigant pursuing major questions review going forward.[167]

The implications from *West Virginia* are clear. If a plaintiff can prevail on getting an agency rule thrown out under the political significance factor alone or on a sliding scale, then there are possibly hundreds of agency rules that could be susceptible to such a challenge.[168] Indeed, if one

163 *See id.* at 2620-22. Again, Justice Gorsuch's best argument for the "or" reading of significance is that the major questions doctrine would face a sizable loophole where agencies could get around major questions review by simply targeting "political" issues with minimal economic impact.

164 *See* Brown v. U.S. Dep't of Educ., 640 F. Supp. 3d 644, 664 (N.D. Tex. 2022) (citing Justice Gorsuch's concurrence in *West Virginia* to conduct its own "significance" analysis), *vacated and remanded*, 600 U.S. 551 (2023).

165 *See West Virginia*, 142 S. Ct. at 2608–09.

166 *See* Michaels, *supra* note 102.

167 *See* Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1051 (2023) ("Both the Supreme Court and the lower courts' recent application of the major questions doctrine suggest that a policy can be major, and accordingly require explicit congressional authorization, when the policy is politically significant or controversial."). Indeed, the very thrust of "significance" points to the idea that if major questions doctrine is about congressional intent, political significance should be enough. After all, without it, major questions would have a massive hole in it. For example, could an agency promulgate rules with ambiguous congressional direction on an issue like human cloning simply because it lacks a significant economic impact? The general thrust of major questions—that Congress is expected to speak loudly and clearly before agencies take on big subjects—seems to suggest that if Congress would think an underlying issue is a "big deal" even without a major economic impact, then so too should courts.

168 *See id.* at 1056 ("The Court's attention to whether an agency rule is politically controversial allows ideological opponents of particular policies to, whether deliberately or not, effectively unmake portions of a statute delegating authority to an agency. This feature undermines one of the doctrine's foremost justifications—namely, that the doctrine ensures issues are resolved in the legislative process, rather than outside of it— and it is in tension with other aspects of the Court's separation of powers jurisprudence.").

listens closely, one can hear the sound of a dozen state Attorneys' General Offices looking over their current dockets and thinking, "wait, should we make a major questions claim here?"[169] Likewise, lower courts will surely begin (if they have not already) hearing major questions claims on political significance grounds, and at this point, with sparse guidance from the Supreme Court.[170] Indeed, it only took one year from *West Virginia* for the Supreme Court to revisit political significance—and it did little to give pause to litigators hungry to bring major questions claims.

F. *A Textbook Case of Significance:* Biden v. Nebraska *and the Battle Between the Objective and Subjective Approaches to the Major Questions Doctrine*

Just one term removed from *West Virginia*, the Supreme Court took a step closer to the more objective approach to major questions analysis and one step further away from the "commonsense" subjective approach.[171] In *Biden v. Nebraska*, six states sought a preliminary injunction blocking the Secretary of Education from cancelling over $430 billion in federal student loan debt.[172] The Biden administration argued that the Secretary of Education had the power to forgive wide swaths of federal student debt under the HEROES Act of 2003, which gives the Secretary the power to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs . . . in connection with a war or other military operation or national emergency."[173] Given the nationwide emergency caused by the COVID-19 pandemic, the Department of Education's Office of General Counsel stated that the HEROES Act "could be used to effectuate a program of targeted loan cancellation directed at addressing the financial harms" of forty-three million affected borrowers.[174] The Supreme Court disagreed, responding bluntly to the Biden administration's assertion that the HEROES Act grants this claimed power that "[i]t does not."[175]

169 *See* Zoppo, *supra* note 7.

170 Jonas J. Monast, *Major Questions About the Major Questions Doctrine*, 68 ADMIN. L. REV. 445, 448–49 (2016) ("More is unclear than clear about the bounds of the major questions doctrine at this stage. The doctrine is defined in the most general of terms, providing little guidance to courts or to federal agencies evaluating their statutory mandates.").

171 *Compare* Biden v. Nebraska, 143 S. Ct. 2355, 2373–74 (2023) (using a more objective approach when conducting a major questions analysis), *with id.* at 2378 (Barrett, J., concurring) (using a commonsense approach to conduct a major questions analysis).

172 *See id.* at 2364–65.

173 *See id.* at 2363–65.

174 *See id.* at 2364–65.

175 *See id.* at 2368.

Writing for the majority, Chief Justice Roberts grounded his analysis in his interpretation of the phrase "waive or modify" to cast doubt on the Biden administration's assertion that Congress had delegated the Department of Education the power to so broadly cancel federal student loan debt.[176] In this sense, *Nebraska* represents a "clear congressional statement" case more than it does a major questions case. However, near the end of the majority opinion, Chief Justice Roberts invoked *West Virginia* to set up his own major questions analysis of student debt cancellation.[177] After likening the powers asserted by the Department of Education here in *Nebraska* to the EPA's claimed authority in *West Virginia*, the Chief Justice analyzed the significance of student debt cancellation by stating "[t]he 'economic and political significance' of the Secretary's action is staggering by any measure."[178]

On the economic side of significance, the Chief Justice cited a Wharton School study that estimated that "the program will cost taxpayers 'between $469 billion and $519 billion,'" easily fulfilling the economic part of the equation.[179] Without explicitly saying so, the Chief Justice then turned to the political significance of student debt cancellation, noting that,

> Congress is not unaware of the challenges facing student borrowers. "More than 80 student loan forgiveness bills and other student loan legislation" were considered by Congress during its 116th session alone. And the discussion is not confined to the halls of Congress. Student loan cancellation "raises questions that are personal and emotionally charged, hitting fundamental issues about the structure of the economy." The sharp debates generated by the Secretary's extraordinary program stand in stark contrast to the unanimity with which Congress passed the HEROES Act.[180]

This is a stunning example of the Court performing a (albeit brief) political significance analysis. For Chief Justice Roberts, the number of bills introduced in Congress related to student loans provides evidence of how aware legislators are about "the challenges facing student borrower lenders."[181] Likewise, the "sharp debates generated" by President Joseph

176 *See id.* at 2368–70.

177 *See Nebraska*, 143 S. Ct. at 2372 ("Given the history and the breadth of the authority that the agency had asserted, and the economic and political significance of that assertion, we found that there was reason to hesitate before concluding that Congress meant to confer such authority." (internal quotation marks and citations omitted) (cleaned up)).

178 *See id.* at 2373 (quoting West Virginia v. EPA, 142 S. Ct. 2587, 2608 (2022)).

179 *Id.*

180 *Id.* at 2273–74 (citations omitted).

181 *Id.*

Biden's student loan debt forgiveness plan provided evidence that the Secretary of Education overstepped his delegated authority.[182]

At the end of the day, the sheer economic size, outsized attention in Congress, and the intensity of public debate make student loan forgiveness a textbook example of economic and political significance.[183] Absent a shift away from *West Virginia*, this was an easy case in terms of "significance."[184] What is new, however, is the Court seeking to tie the political side of significance to more tangible evidence such as the number of bills introduced in Congress and the vote total in 2003 for passage of the HEROES Act. The Court did rely on some "common sense" evidence such as a quotation from the *Washington Post* to support its analysis, but in contrast to observers who suggested there could never be an objective approach to the major questions doctrine, we see hints that the Court is already stepping in that direction.[185]

And much like *West Virginia*, the meatier analysis of the major questions doctrine comes in the form of a concurrence, this time by Justice Amy Coney Barrett.[186] The stated purpose of her concurrence is to defend the majority from charges—most notably those in the dissent from Justice Elena Kagan—that the major questions doctrine "is inconsistent with textualism."[187] To do that, Justice Barrett used the example of a babysitter who stretches her instructions from her employer parents to justify taking the kids on an expensive trip to an amusement park to demonstrate "literalism" in action and as a contrast to textualism.[188]

In providing this example, Justice Barrett embraces the "commonsense" subjective approach to the major questions doctrine. As Justice Barrett further explained,

> In my view, the major questions doctrine grows out of these same commonsense principles of communication. Just as we would expect a parent to give more than a general instruction if she intended to authorize a babysitter-led getaway, we also "expect Congress to speak

182 *See id.* (summing up the controversy generated by student debt cancellation by writing "[a] decision of such magnitude and consequence on *a matter of earnest and profound debate* across the country must rest with Congress itself, or an agency acting pursuant to a clear delegation from that representative body" (internal quotation marks and citations omitted) (emphasis added)).

183 *See infra* Table 2.

184 *See Nebraska*, 143 S. Ct. at 2372.

185 *See id.* at 2373–74 (citing Jeff Stein, *Biden Student Debt Plan Fuels Broader Debate over Forgiving Borrowers*, WASH. POST (Aug. 31, 2022), https://perma.cc/S9X7-R6CG, to support the presence of political significance).

186 *See id.* at 2376 (Barrett, J., concurring).

187 *See id.*

188 *See id.* at 2379–80.

> clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"[189]

In Justice Barrett's view, "vast economic and political significance" is not so much a mandatory trigger for major questions analysis, but instead part of a sliding scale whose presence means it is "less likely . . . Congress would have delegated the power to the agency without saying so more clearly."[190] Indeed, Justice Barrett counsels us that the major questions doctrine "is not an on-off switch that flips when a critical mass of factors is present."[191] Justice Barrett's analysis of "significance" amounts to a blunt rebuttal to any advocate of a more objective form of major questions analysis.

Thus, Chief Justice Robert's majority opinion in *Nebraska* and Justice Barrett's concurrence replicate the brewing battle between the more objective and more subjective applications of the major questions doctrine. In the Chief Justice's opinion, we see a Justice trying to articulate why student loan cancellation is significant by pointing to the hundreds of billions of dollars in costs to taxpayers and the dozens of bills introduced in Congress on the subject.[192] By contrast, Justice Barrett's concurrence seeks to downplay and even flip the script on "significance" by arguing that it is merely a contextual hint that an agency has misinterpreted its instructions from Congress—not a mechanism to flip the "on-off switch" of major questions review.[193]

If this dynamic between the majority and a lone concurrence seems familiar, it is because it also occurred in *West Virginia*. If Justice Gorsuch's *West Virginia* concurrence can be viewed as trying to shift the majority to the view that the major questions doctrine can be activated under political significance alone, Justice Barrett's *Nebraska* concurrence can be viewed as attempting to prevent the majority from shifting to a more objective form of major questions review.

Whether Justices Gorsuch and Barrett will be successful is a question for future terms of the Court. What is certain, however, is that the Court remains in the early stages of molding the contours of major questions review.[194] As a result, "significance" as an analytical factor is open to refinement, definition, and being made "crisp[er]" to inform legal actors and legislators about the bounds of delegating congressional power to an

189 *See id.* at 2380 (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

190 *See Nebraska*, 143 S. Ct. at 2384 (Barrett, J., concurring) ("Common sense tells us that as more indicators from our previous major questions cases are present, the less likely it is that Congress would have delegated the power to the agency without saying so more clearly.").

191 *See id.*

192 *See id.* at 2373–74 (majority opinion).

193 *See id.* at 2384 (Barrett, J., concurring).

194 *See* Monast, *supra* note 170, at 448–49.

agency.[195] In other words, with political significance firmly entrenched as a crucial if not dispositive favor in major questions analyses, courts must work to clarify and define the term. But how specifically can litigants demonstrate political significance to a court?

II. In Search of Metrics: Lower Courts and Litigants Attempt to Make "Significance" Work

As the twenty-three year history of "significance" at the Supreme Court suggests, lower courts have often had little to work with in terms of a working definition of significance.[196] Such a gap has not gone unnoticed, particularly among lower court judges, litigants, and academics.[197] A survey of the decisions, briefs, and law review articles on "significance" suggests a hunger for more guidance and more rules to constrain or direct the doctrine, but also reveals mixed opinions on the viability of objective metrics to help draw the line between "major" and "interstitial."[198]

A. *Then-Judge Kavanaugh's "Significance" Factors*

One of the most prominent attempts to fashion metrics for significance came in a 2017 case concerning net neutrality rules.[199] In *United States Telecom Association v. FCC* ("*USTA*"),[200] the Court of Appeals for the D.C. Circuit denied a motion to rehear a case en banc concerning the net neutrality rules promulgated by the Federal Communications Commission ("FCC") in 2015.[201] What followed was a lively discussion on what constitutes a major question, or as then-Judge Kavanaugh referred to it, "a major rule."[202]

In his dissent from the denial of a rehearing, Judge Kavanaugh began by embracing the "or" reading of economic and political significance.[203] He wrote that agencies need clear authorization when attempting to regulate

195 *See* Sunstein, *supra* note 17, at 488.

196 *See* Monast, *supra* note 170, at 448.

197 *See* Sunstein, *supra* note 17, at 487.

198 *See* Richardson, *supra* note 66, at 406–09, 423–24; *see also* Sunstein, *supra* note 72, at 243 (noting the "difference between interstitial and major questions is extremely difficult to administer").

199 U.S. Telecom Ass'n v. FCC (*USTA*), 855 F.3d 381, 422–24 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

200 855 F.3d 381 (D.C. Cir. 2017).

201 *Id.* at 382.

202 *Id.* at 383.

203 *Id.* at 421 (Kavanaugh, J., dissenting from denial of rehearing en banc).

"some major social *or* economic activity."[204] Sensing the disconnect between this phrase and "vast economic and political significance" of *Utility Air* from 2014, he then listed four factors that help define whether something has "major" social or economic significance: (1) "the amount of money involved for regulated and affected parties," (2) "the overall impact on the economy," (3) "the number of people affected," and (4) "the degree of congressional and public attention to the issue."[205] Judge Kavanaugh then admitted that such factors have a "know it when you see it" flavor to them, but that whatever the finer elements of the test may be, net neutrality rules clearly qualify as a major rule.[206]

The factors listed by Judge Kavanaugh paint a realist calculus for determining what counts as a major question, one that looks to how Congress functions in the real world.[207] In his dissent, Judge Kavanaugh described one empirical study on Congress's statutory drafting practices which established that "major rules doctrine reflects congressional intent and accords with the in-the-arena reality of how legislators and congressional staff approach the legislative function."[208] Indeed, Judge Kavanaugh's two social factors—the number of people affected and the degree of congressional and public attention to an issue—are particularly grounded in how legislators and their staff decide if an issue is a big deal in the first place.[209]

If we assume that "social" is a stand-in for "political," then political significance under Judge Kavanaugh's metrics appears to root the question of significance around the salience of a legal question. Indeed, as Brunstein and Revesz note of Judge Kavanaugh's approach, "[t]hough the Court has never held that public salience is a necessary factor in the major questions inquiry, lower court judges have advanced this argument."[210] Courts tend to not have experience measuring the level of an issue's salience, but Judge Kavanaugh's factors indicate that some judges may be

---

204 *Id.* (emphasis added). Note the use of "social" rather than "political" activity, which further suggests the factor's non-economic impact on people's lives beyond just political implications.

205 *USTA*, 855 F.3d at 422–23 (Kavanaugh, J., dissenting from denial of rehearing en banc).

206 *Id.* at 423. Do note one concern: it is not readily apparent that *Gonzales* fits into this calculus. Physician-assisted suicide affects very few families every year and has a minimal economic impact, leaving "congressional and public attention" as the sole enumerated factor that would have fit into this analysis. *See supra* Section I.C.

207 *USTA*, 855 F.3d at 422–23 (Kavanaugh, J., dissenting from denial of rehearing en banc).

208 *Id.* at 422.

209 *See* Aaron L. Nielson, *The Minor Questions Doctrine*, 169 U. PA. L. REV. 1181, 1183–84 (2021) (defining "minor" questions as "relatively uncontroversial, often bipartisan policies that help the public but that are not especially salient").

210 *See* Brunstein & Revesz, *supra* note 4, at 252.

persuadable if presented with convincing evidence on the question.[211] Now that Judge Kavanaugh is Justice Kavanaugh, we may see more attempts—both by Justices and by litigants—to use objective factors related to salience in analyses over whether to invoke major questions review.

B. The Trump Administration Sees Opportunity (and Critics See Mischief) in "Significance" Metrics

One of the most compelling arguments for the broader legal community to accept objective metrics for showing "significance" is that—to some degree—it is already happening.[212] Presenting data points for showing significance is not some untested strategy, but a growing reality forced by the necessity of litigants making their cases on the Supreme Court's own stated criteria for major questions review.[213]

One demonstration of this trend comes in the form of the Trump administration's use of metrics in major questions litigation in lower courts, documented in detail by Brunstein and Revesz.[214] These two authors argue that litigants are already plying lower courts with objective evidence to try and use the "political significance" factor to trigger major questions review.[215] For example, in the lead-up litigation to *West Virginia*, Judge Justin Walker of the Court of Appeals for the D.C. Circuit pointed out (from one of the Trump administration's briefs) that the EPA received 4.3 million public comments when it solicited comments for the 2015 Clean Power Plan during its notice-and-comment period.[216] To put this number into context, Judge Walker recalled that the plan under *Massachusetts v. EPA* from 2007 received roughly 50,000 public comments.[217]

Brunstein and Revesz further note that "the Trump Administration also invoked the major questions doctrine by using the metric of the number of beneficiaries" such as in litigation dealing with the Department of Homeland Security's Deferred Action for Childhood Arrivals ("DACA")

211 *See USTA*, 855 F.3d at 422–23 (Kavanaugh, J., dissenting from denial of rehearing en banc).

212 *See* Biden v. Nebraska, 143 S. Ct. 2355, 2373 (2023) (counting more than eighty pieces of student loan legislation introduced in the 116th Congress); *see also, e.g.*, Brunstein & Revesz, *supra* note 4, at 236–42.

213 *See* Brunstein & Revesz, *supra* note 4, at 236–42.

214 *See id.*

215 *See id.*

216 Am. Lung Ass'n v. EPA, 985 F.3d 914, 998 (2021) (Walker, J., dissenting).

217 *Id.*

program.[218] Indeed, agencies often by law (such as responding to public comments), executive order, or by political necessity (responding to inquiries from Congress) need to outline how many people a potential rule or program may affect.[219] Litigants can easily drop such an estimate (such as the 1.7 million individuals being eligible for DACA in that litigation) into a brief to give a court a rough approximation of the "breadth" of an agency rule.[220]

But use of such metrics has not come without dissent, both from judges and academics. As one judge on the Court of Appeals for the Fifth Circuit put it when confronted with an estimate of 4.3 million potential beneficiaries from Deferred Action for Parents of Americans ("DAPA") as proof of political significance, "[t]he question of whether an agency has violated its governing statute does not change if its actions affect one person or '4.3 million' persons."[221] Brunstein and Revesz are likewise quick to note their displeasure with the Trump administration's strategy, particularly when the administration was on the receiving end of a major questions claim.[222] When the Trump administration was defending its own agency rules, "the Trump Administration took a far narrower and more conventional approach when its own regulations were attacked on major questions grounds."[223]

Tactics aside, Brunstein and Revesz point to a more fundamental flaw in the Trump administration's approach, namely the dynamic nature of political significance.[224] They note the example of Congress passing an at-the-time uncontroversial law, but by the time the agency issues a final rule, the salience of an issue has risen considerably.[225] Indeed, this is not some hypothetical scenario. As seen in *Alabama Association of Realtors v.*

218 *See, e.g.*, Brunstein & Revesz, *supra* note 4, at 247. ("In its litigation over the legality of the DACA program, for example, the Trump Administration argued that DACA violated the major questions doctrine because of the large number of DACA beneficiaries: 1.7 million individuals were eligible for DACA, and nearly 700,000 individuals had already been granted DACA.").

219 *See, e.g.*, Bump-Stock-Type Devices, 83 Fed. Reg. 66514, 66537–38 (Dec. 16, 2018) (to be codified at 27 C.F.R. pts. 447, 478, 479) (noting that while the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") did not estimate the number of owners of bump-stock-type devices, they did estimate that roughly 280,000 to 520,000 such devices were currently in circulation, which the ATF used to help respond to public comments asserting how many individuals would be affected by the rule).

220 *See* Brunstein & Revesz, *supra* note 4, at 247.

221 *See* Texas v. United States, 809 F.3d 134, 216 n.58 (5th Cir. 2015) (King, J., dissenting).

222 *See* Brunstein & Revesz, *supra* note 4, at 237–38.

223 *Id.* at 236 n.146.

224 *See id.* at 253.

225 *See id.*

United States Department of Health and Human Services[226] at the trial stage, the court used the fact that forty-three states and the District of Columbia had adopted their own eviction moratoriums as evidence *supporting* the economic and political significance of a nationwide moratorium.[227] That same evidence, however, could just as easily support the opposite conclusion: that a nationwide moratorium was politically uncontroversial *at the time the rule was issued*.

According to Brunstein and Revesz, the time dynamic for political significance shows that it is "hard to imagine that the courts could develop judicially manageable standards" when salience itself is affected by the legislative and rulemaking processes.[228] Indeed, Brunstein and Revesz note that "adopting the Administration's standard [of using objective metrics] would mean that opponents of regulatory authority could simply fund public campaigns to show opposition to impact the outcome of a case" after issuing the rule.[229] It seems backwards in some regard to think that the public's reaction to an agency rule could somehow play a factor in overruling a nominal delegation of authority passed by Congress in the first place.[230]

Brunstein and Revesz's greater point is one replete in the literature: judges will never willingly give up a convenient judicial tool for nullifying an agency rule that they themselves find politically controversial, and thus, objective metrics are simply theater or will be used in bad faith.[231] For these critics, the major questions doctrine is fundamentally about judicial legislating, and even in a case where judges try to approach the doctrine honestly, individual biases ultimately determine what is politically significant and what is not.[232] For example, Professors Leah Litman and Daniel Deacon argue that political significance is more akin to political *controversy*, and that this empowers judges to seek out "majorness" by way of things they personally find controversial.[233] Under this view, courts will never willingly construct a crisper political significance factor beyond raw judicial feelings because it undermines the purpose of political significance as a judicial tool to veto agency rules based on personal preference.[234]

226 No. 20-cv-3377, 2021 U.S. Dist. LEXIS 85568 (D.D.C. May 5, 2021).

227 *See* Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs., No. 20-cv-3377, 2021 U.S. Dist. LEXIS 85568, at *20–21 (D.D.C. May 5, 2021).

228 Brunstein & Revesz, *supra* note 4, at 253.

229 *Id.* at 255.

230 *See id.*

231 *See* Deacon & Litman, *supra* note 167, at 33.

232 *See id.*

233 *See id.*

234 *See id.*

Indeed, the real mountain an objective metrics approach must climb is that—whether one believes that judges will approach major questions review in good faith or in masked self-interest—the Court's precedent laid out in *Brown & Williamson* roots the major questions doctrine in judicial "common sense."[235] Whatever its flaws, any supporter or critic of the doctrine can simply say the doctrine itself is not meant to be a searching evidentiary inquiry, as evidenced by Justice Barrett's "not an on-off switch" line from her *Nebraska* concurrence.[236] Judicial common sense may be superior in this sense, not only because it is efficient and easy to apply, but because the separation of powers requires the judiciary to draw whatever lines necessary to (hopefully) protect individual liberty.[237]

In other words, not only must an objective metrics approach help legal actors better evaluate significance, but it also must convince judges that the added cost, complexity, and possible downsides promote (or properly constrain) the doctrine better than common sense would.[238] This is essentially the bar any objective test for political significance must clear: can a framework of objective evidence showing whether a legal question has political significance improve upon common sense and address the added concerns of legal actors using the doctrine in bad faith?

III. The Salience of Soybeans, Suicide, and Student Loans: Evaluating Possible Metrics for Determining Political Significance

What kinds of data points would help more objectively determine whether an issue is politically significant? And when assembled into a cohesive package, would such an objective approach improve upon judicial common sense enough to be worth the added costs?

235 *See* FDA v. Brown & Williamson Tobacco, 529 U.S. 120, 133 (2000).

236 *See* Biden v. Nebraska, 143 S. Ct. 2355, 2384 (2023) (Barrett, J., concurring).

237 *See* Michael Sebring, *The Major Rules Doctrine: How Justice Brett Kavanaugh's Novel Doctrine Can Bridge the Gap Between the* Chevron *and Nondelegation Doctrines*, 12 NYU J.L. & LIBERTY 189, 224–25 (2018) (advocating for defining major questions factors with more specificity by asking: "[H]ow do you know an impermissible delegation of legislative authority when you see it? By its own telling, the Court has had a hard time devising a satisfying answer. *But the difficulty of the inquiry doesn't mean it isn't worth the effort*. After all, at stake here isn't just the balance of power between the political branches who might be assumed capable of fighting it out among themselves. At stake is the principle that the scope of individual liberty may be reduced only according to the deliberately difficult processes prescribed by the Constitution, a principle that may not be fully vindicated without the intervention of the courts." (citing United States v. Nichols, 784 F.3d 666, 671 (2015) (Gorsuch, J., dissenting))).

238 *See id.* at 225 ("[T]o a growing number of justices on the Court, defining the edges of this major rules doctrine is a judicial imperative under the existing strictures of the Constitution.").

In answering such questions, litigants and judges should look for occasions throughout the legislative and rulemaking processes where the importance of an issue springs forward, not unlike the way prices in a market indicate the utility of a good, or the way in which a number of votes for a candidate in an election can reveal political preferences.[239] Five metrics have been proposed or used by litigants and judges within major questions review (and in other areas of the law) for evaluating the level of political significance an issue may have: (1) the number of bills filed at the congressional and state levels, (2) the number of public comments a proposed rule receives, (3) estimates of the number of people directly affected by a rule, (4) search engine trends, and (5) public opinion survey results.

A. *Legislation Filed at the Congressional and State Levels*

As seen in the majority's analysis in *Nebraska*, perhaps the best metric for an issue's preeminence in the national debate comes from surveying the introduction of legislation at the state and congressional levels.[240] This metric hints at then-Judge Kavanaugh's realist take on how political significance works. If courts require clear congressional authorization to ensure voters are heard on politically significant issues, then legislation *itself* represents the intended outcome of voters being heard.[241] In other words, under the logic of the major questions doctrine, legislation is precisely how legislatures respond to sufficient public pressure and debate.[242] Political significance matters because it reflects whether voters have authorized Congress to delegate power to agencies.[243]

For example, in the student loan cancellation precursor case of *Brown v. U.S. Department of Education*,[244] the District Court for the Northern District of Texas found that the Department's program to forgive up to $20,000 of federal student loans for qualifying borrowers fell under major

239 This concept is often referred to as the difference between "stated preferences" and "revealed preferences." In the context of administrative law, one tends to see this concept most often employed when agencies conduct cost-benefit analyses to attempt to "price" public benefits and related costs. *See* John Bronsteen, Christopher Buccafusco & Jonathan S. Masur, *Well-Being Analysis vs. Cost-Benefit Analysis*, 62 DUKE L.J. 1603, 1613–14 (2013) ("When they are available, revealed preferences are typically preferred to stated preferences, although this is not an absolute: a high-quality stated-preference study may be chosen over a lower-quality revealed preference study.").

240 *See Nebraska*, 143 S. Ct. at 2373–74.

241 *See* U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 422–23 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

242 *See* West Virginia v. EPA, 142 S. Ct. 2587, 2617 (2022) (Gorsuch, J., concurring).

243 *See id.*

244 No. 22-cv-0908, 2022 U.S. Dist. LEXIS 205875 (N.D. Tex. Nov. 10, 2022).

questions review.[245] For Judge Mark Pittman, the economic significance of the program was easy to prove, with the program estimated to cost $400 billion over its life, which was "20 times more than the amount in *Alabama Association of Realtors*."[246]

To show political significance, the district court turned to Justice Gorsuch's concurrence in *West Virginia* to frame its analysis of whether the Department of Education's program qualified for major questions review.[247] The Court noted that "if Congress 'considered and rejected' such bills [on the subject of the underlying rule], 'that too may be a sign that an agency is attempting to work around the legislative process to resolve for itself a question of great political significance.'"[248] The district court then detailed three pieces of legislation introduced in recent Congresses that attempted to forgive large amounts of student debt, noting that each bill had failed.[249] The district court concluded that "given Congress's extensive consideration of various bills attempting to forgive student loans and failure to pass such bills, the Program is of vast political significance."[250]

The district court in *Brown* listed only three student-lending reform bills that were introduced and never passed during the 116th and 117th Congresses, but it could have listed even more.[251] A total of thirty-six bills and resolutions introduced in the 117th Congress contained the phrase "student loan forgiveness," and permutations such as "student loan cancellation" and "student loan relief" would add dozens more, as seen in the *Nebraska* majority opinion.[252] Indeed, several bills were introduced to explicitly prevent the Department of Education from canceling debt.[253] On the other hand, many of these student loan relief bills dealt with issues

245 *Id.* at *29–30.

246 *See id.* at *28–29.

247 *See id.* at *29.

248 *See id.* (quoting West Virginia v. EPA, 142 S. Ct. 2587, 2617 (2022) (Gorsuch, J., concurring)).

249 *See id.* at *29–30.

250 *See* Brown v. U.S. Dep't of Educ., No. 22-cv-0908, 2022 U.S. Dist. LEXIS 205875, at *30–31 (N.D. Tex. Nov. 10, 2022). Notably, the plaintiffs in *Brown* attempted to show political significance by pointing to a Court of Appeals for the Fifth Circuit case that called student loan reform "one of today's most hotly debated issues" and by citing a *New York Times* article discussing opposition by congressional Republicans to the proposed plan. Plaintiffs' Brief in Support of Motion for a Preliminary Injunction at 18, Brown v. U.S. Dep't of Educ., No. 22-cv-908 (N.D. Tex. Nov. 10, 2022) (citing BST Holdings, LLC v. OSHA, 17 F.4th 604, 614 (5th Cir. 2021); Michael D. Shear, Jim Tankersley & Zolan Kanno-Youngs, *Biden Gave In to Pressure on Student Debt Relief After Months of Doubt*, N.Y. TIMES (Aug. 26, 2022), https://perma.cc/K6NU-EWV4).

251 *See id.* at *29–30.

252 Search query for "student loan forgiveness" for the 117th Congress, CONGRESS.GOV (Dec. 27, 2022); *see also* Biden v. Nebraska, 143 S. Ct. 2355, 2373 (2023) (counting more than eighty pieces of student loan legislation introduced in the 116th Congress).

253 *See, e.g.*, the Student Loan Accountability Act, S. 4253, 117th Cong. (2022).

not at the heart of *Brown*, such as student debt forgiveness for frontline healthcare workers and public service employees.[254]

A debate can be had on precisely how many bills would serve to make the underlying policy question major, but the pieces of legislation surrounding blanket student loan reform serve as a strong example of this metric's potential. Indeed, the plaintiffs in *Brown* did not even raise congressional legislation as evidence of political significance.[255] Yet, Judge Pittman sought out on his own accord some objective measure to find political significance.[256] And while the district court did not explicitly consider it, the dueling nature of bills introduced (bills to explicitly direct the Department of Education to forgive student debt versus bills to explicitly forbid the Department from implementing the program) would be strong objective evidence of political significance if one considers opposition and controversy to be valid underpinnings of political significance, as the majority in *Nebraska* apparently did.[257]

A particularly thorough litigant or judge could likewise survey state legislation to get an understanding of whether a national "debate" is taking place on an issue.[258] For example, imagine a court tasked with deciding whether a Commodity Futures Trading Commission ("CFTC") regulation on soybean futures has political significance.[259] What would a survey of state legislation reveal about the subject? In Virginia, for example, no state representative has introduced legislation on soybeans since 2012 except commending and memorial resolutions.[260] Interestingly, before 2012, there was a flurry of activity on soybeans as states like Virginia considered whether to use soybeans for biofuels.[261] By contrast, the 2022

254 *See, e.g.*, the Student Loan Forgiveness for Frontline Health Workers Act, S. 3828, 117th Cong. (2022); the Strengthening Loan Forgiveness for Public Servants Act, S. 2478, 117th Cong. (2022).

255 *See* Plaintiffs' Brief in Support of Motion for Preliminary Injunction at 17–20, Brown v. U.S. Dep't. of Educ., No. 22-cv-0908, 2022 U.S. Dist. LEXIS 205875 (N.D. Tex. Nov. 10, 2022).

256 *See* Brown v. U.S. Dep't of Educ., No. 22-cv-0908, 2022 U.S. Dist. LEXIS 205875, at *28–30 (N.D. Tex. Nov. 10, 2022).

257 *See* Deacon & Litman, *supra* note 167, at 33; *see also* Biden v. Nebraska, 143 S. Ct. 2355, 2373–74 (2023) ("Student loan cancellation raises questions that are personal and emotionally charged, hitting fundamental issues about the structure of the economy. The sharp debates generated by the Secretary's extraordinary program stand in stark contrast to the unanimity with which Congress passed the HEROES Act." (citations omitted)).

258 *See* Gonzales v. Oregon, 546 U.S. 243, 267–68 (2006).

259 For the sake of this hypothetical, we presume that the regulation has little to no economic significance, such as the CFTC seeking to rename soybeans or designating the soybean as the official national legume.

260 Survey conducted by searching for "soybeans" in Virginia's Legislative Information System dating back to the 1994 legislative session, VIRGINIA'S LEGISLATIVE INFORMATION SYSTEM, https://perma.cc/59N8-KH43 (search keyword box for "soybeans").

261 *Id.*

Virginia legislative session alone saw roughly fifty bills concerning the regulation of carbon dioxide.[262] If a litigant conducted a survey of all fifty states, she could likely construct a rich analysis showing which pockets of the country have "debated" (and to what level) this issue thoroughly in state legislatures. Indeed, these data points suggest that litigants can use legislative surveys to show whether a "debate" is ongoing, whether a debate has largely been "resolved," or if the debate is dormant enough to avoid constituting a major question.

B. *The Number of People Affected*

Then-Judge Kavanagh's first "social activity" metric listed in his dissent in *USTA* is a straightforward one—the number of people that are affected by an issue or regulation.[263] This metric is intuitive but tough to apply in practice: how directly "affected" must a person be to count? For example, only a few hundred individuals and their families go through the process of physician-assisted suicide in any given year.[264] And yet, end of life care affects tens of millions of individuals and those with infirm family members.[265] A CFTC regulation on soybean futures directly affects commodity traders, but do soybean farmers count as being affected? What about food processors, or even consumers of soybeans? The EPA's proposed generation-shifting rules in *West Virginia* only directly affected a narrow band of power plant operators, but indirectly, those rules would have impacted every ratepayer (and airbreather) in the country.[266] This metric requires some amount of intuition on where to draw the line, but as seen in the assisted suicide example, understanding that very few families deal with assisted suicide in any given year would at least initially point against political significance.

In practice, thankfully, agencies often produce estimates of who is affected by a rule and often to what degree in terms of costs during the rulemaking process.[267] Especially when conducting their own cost-benefit

---

262 Survey conducted by searching for "carbon dioxide" in Virginia's Legislative Information System dating back to the 1994 legislative session, VIRGINIA'S LEGISLATIVE INFORMATION SYSTEM, https://perma.cc/H8YX-GMJC (search keyword box for "carbon dioxide").

263 *See* U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 423 (D.C. Cir. 2017).

264 *See* OR. HEALTH AUTH. PUB. HEALTH DIV., *supra* note 98.

265 Renee Stepler, *5 Facts about Family Caregivers*, PEW RSCH. CTR. (Nov. 18, 2015), https://perma.cc/3UN2-M7J2.

266 *See* West Virginia v. EPA, 142 S. Ct. 2587, 2603 (2022).

267 *See, e.g.*, Brunstein & Revesz, *supra* note 4, at 247. ("In its litigation over the legality of the DACA program, for example, the Trump Administration argued that DACA violated the major questions doctrine because of the large number of DACA beneficiaries: 1.7 million individuals were eligible for DACA, and nearly 700,000 individuals had already been granted DACA.").

analyses, agencies must often decide who has "standing" and who to include as a beneficiary for calculating social costs.[268] In the immediate term, we would expect judges to use agency-generated figures to guide their notions of political significance.[269] Over time, however, litigants could develop their own estimates and use previous cases—such as the 1.3 million beneficiaries in the DACA cases—as benchmarks for establishing significance. Indeed, in the soybeans example, one could imagine a court scoffing at the idea that nearly every American would be "affected" by the rule given that ubiquitous nature of soybeans in our nation's food system, while accepting that the 115,153 Americans employed in soybean farming would qualify as those affected by the rule.[270]

C. *Search Engine and "Trends" Data*

The uneasiness on which *Gonzales* stands helps make the case for metrics tied to measuring whether something has been the subject of an "earnest and profound debate."[271] In one example of such a metric's use, Judge Richard Posner in *United States v. Costello*[272] compared the number of Google search results for the phrases like "harboring fugitives" and "harboring victims" to show that the word "harboring" comported more closely to the plaintiff's reading of the relevant statute.[273] Litigants in major questions cases could use similar search and "trends" data to establish political significance.

For example, a Google Trends analysis from 2004 to 2022 comparing the search terms "abortion" and "soybeans" shows that not once in eighteen years has the term "soybeans" even approached a tenth of the search interest as "abortion."[274] By comparison, "assisted suicide" routinely beat out "soybeans" as a search term until 2017, but "soybeans" has been

268 *See* William N. Trumbull, *Who Has Standing in Cost-Benefit Analysis?*, 9 J. POL'Y ANALYSIS & MGMT. 201, 203–04 (1990).

269 *See* Brunstein & Revesz, *supra* note 4, at 247–49.

270 *See Soybean Farming in the US – Employment Statistics 2005-2028*, IBISWORLD (May 31, 2022), https://perma.cc/36H2-SYQE.

271 *See* Gonzales v. Oregon, 546 U.S. 243, 267 (2006).

272 666 F.3d 1040 (7th Cir. 2012).

273 *Id.* at 1044.

274 Search engine query comparison between "soybeans" and "abortion" from 2004 to 2022, GOOGLE TRENDS, https://trends.google.com/trends/explore?date=all&geo=US&q=Soybeans,abortion. This search was done on September 1, 2023.

searched more often since 2017.[275] If nothing else, such comparisons can help show whether an issue is rising or falling in terms of political salience.

D. *Polling Data*

Perhaps most intuitively, litigants could present data from public opinion polls.[276] The veracity of polling data, as well as the ability to manipulate results using leading questions or by weighting responses in an unrepresentative fashion, are serious concerns, but courts have used comparable data in cases covering everything from trademark litigation to consumer protection to defamation.[277] Just as important, there are few more efficient ways of measuring whether an issue is subject to an "earnest and profound debate across the country" than the aggregation of individual self-reporting.[278]

Trouble comes, however, in two forms. First, how do we define the scope of the debate? For example, was the Clean Power Plan addressed in *West Virginia* about utility regulation or climate change? The breadth one uses to describe an issue—and the level of detail about which one asks respondents—affects how people respond.[279] Second, pollsters can only poll so many issues at once. How can we expect them to credibly rank the importance of student loans or soybeans when hundreds of issues are potentially significant?

But polling comes with one very distinct upside. It mirrors the process by which we expect Congress to decide the most significant political questions.[280] When an issue like gun violence polls at the highest levels of salience in public surveys, we likewise presume a higher level of congressional attention on the issue.[281] In turn, we expect legislators will speak out on the issue or pursue legislation to address the public's

---

275 Search engine query comparison between "soybeans" and "assisted suicide" from 2004 to 2022, GOOGLE TRENDS, https://trends.google.com/trends/explore?date=all&geo=US&q=Soybeans,assisted%20suicide. This search was done on September 1, 2023.

276 *See* 2 GILSON ON TRADEMARKS § 8.03(3)(d) (2022) (discussing the general admissibility of survey data at trial).

277 *See* Becker, *supra* note 8, at 467–68.

278 *See id.* at 466.

279 *See id.* at 478–80.

280 *See* West Virginia v. EPA, 142 S. Ct. 2587, 2617 (2022) (Gorsuch, J., concurring) ("Today, some might describe the Constitution as having designed the federal lawmaking process to capture the wisdom of the masses.").

281 For up-to-date polling on U.S. opinion on political issues, see *Most Important Problem*, GALLUP, https://news.gallup.com/poll/1675/most-important-problem.aspx.

concerns. Thus, polling data can give courts a rough sense of how much "close attention" is brought to bear on Congress and the President to act.[282]

For example, in *National Federation of Independent Business v. Department of Labor, Occupational Safety and Health Administration*,[283] the Court rejected the Department of Labor's attempt to require large swaths of the private workforce to impose vaccine requirements related to the COVID-19 pandemic.[284] Polling by Gallup on the issue showed a small majority (58%) approved of President Biden's approach embodied in that rule, while 42% opposed the plan.[285] Other polls found similar margins of support and opposition.[286] While those margins may seem large in other contexts, such as election results, these levels of opposition and support suggest a relatively lively debate.[287]

Ideally, litigants would supplement issue-specific polling with polling data that showed the overall salience of an issue as well. As mentioned, pollsters often ask voters to rank their concerns or top issues.[288] Litigants could conduct polls asking respondents to rank the underlying subject of a rule against a host of others. Obviously, one cannot expect a respondent to rank the hundreds of possible issues that Congress contends with during any given session, but using past cases of "significance," litigants could design polls that rank issues in a way that would be helpful to courts given the benchmarks created by past cases.[289]

E. *Number of Public Comments*

As Judge Walker noted in his dissent in the appeal leading up to *West Virginia*, one key objective measure of the political significance of a rule is the number of public comments received during the notice-and-comment period.[290] Indeed, Judge Walker's comparison of the 4.3 million public comments the Clean Power Plan received in 2015 to the 50,000 comments

---

[282] *See* U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 423 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) (noting that Congress and the public have paid "close attention" to the development and promulgation of the FCC's net neutrality rules).

[283] 142 S. Ct. 661 (2022).

[284] *See id.* at 665–66.

[285] *See* Jeffrey M. Jones, *Majority in U.S. Supports Biden COVID-19 Vaccine Mandates*, GALLUP (Sept. 24, 2021), https://perma.cc/C846-H2X6.

[286] *See* Roy Maurer, *Number of Workers Under Vaccine Orders Levels Off*, SHRM (Jan. 12, 2022), https://perma.cc/Q5A4-4SLS.

[287] *See infra* Table 3.

[288] *Most Important Problem*, *supra* note 281. .

[289] For an example of a real-time issue ranking system design, see Mike Rothschild, *Political Issues That Matter Most Right Now*, RANKER (July 28, 2022), https://perma.cc/2P4R-NZD8.

[290] *See* Am. Lung Ass'n v. EPA, 985 F.3d 914, 998 (2021) (Walker, J., dissenting).

from the EPA rulemaking at the heart of *Massachusetts v. EPA* is precisely the kind of "Aha!" moment that objective data can produce.[291]

The most obvious criticism of such a statistic is the ease at which comments can be generated.[292] Automated processes can be used to submit an oversized number of comments to give the appearance of grassroots support for a position, a term sometimes referred to as "astroturfing."[293] Indeed, the net neutrality rules received 24 million comments, but "nearly eight million comments came from email addresses associated with fakemailgenerator.com and more than 500,000 came from Russian email addresses."[294] If, over time, parties become incentivized to try and pump up comment numbers, it will likely make cross-temporal comparisons more difficult.

Indeed, once a court formally says the number of comments received will help determine the kind of judicial review the underlying rule will receive, it seems inevitable that interested parties would attempt to pump up that statistic.[295] Just as congressional staffers often attempt to have statements and documents entered into the record to create a paper trail of "intent" for courts to work off of, so too could organizers seek to submit a greater number of comments on the off chance that it will encourage a court to invoke major questions review.[296]

While this is a valid concern, it is not obvious that such gamesmanship robs this metric of its value for measuring political significance. Indeed, many interest groups and citizens have long viewed the comment process for major rulemaking as a chance to inflate numbers to try and sway agency rule-writers, especially in an age of "e-rulemaking."[297] In other words, comment inflation itself is an indicator of

---

291 *See id.*

292 *See* James V. Grimaldi & Paul Overberg, *Millions of People Post Comments on Federal Regulations. Many are Fake*, WALL ST. J. (Dec. 17, 2017), https://perma.cc/7ALG-59GY.

293 *See id.*

294 *See* STAFF OF PERMANENT S. COMM. ON INVESTIGATIONS, 116TH CONG., REP. ON ABUSES OF THE FEDERAL NOTICE-AND-COMMENT RULEMAKING PROCESS, at 19 (Comm. Print 2019).

295 *See* Brunstein & Revesz, *supra* note 4, at 254 ("[O]pponents of an agency's regulatory power could well fund an opposition campaign that would, under the Trump Administration's approach, result in the loss of an agency's authority to regulate.").

296 *See* Blanchard v. Bergeron, 489 U.S. 87, 98–99 (1989) (Scalia, J., concurring) ("As anyone familiar with modern-day drafting of congressional committee reports is well aware, the references to the cases were inserted, at best by a committee staff member on his or her own initiative, and at worst by a committee staff member at the suggestion of a lawyer-lobbyist; and the purpose of those references was not primarily to inform the Members of Congress what the bill meant . . . but rather to influence judicial construction.").

297 *See* Beth Simone Noveck, *The Electronic Revolution in Rulemaking*, 53 EMORY L.J. 433, 441–43 (2004) ("Automating the comment process might make it easier for interest groups to participate by using bots—small software 'robots'—to generate instantly thousands of responses from stored

the public salience of a proposed agency rule.[298] Even in a world where political actors know the number of comments can help invoke major questions review, the additional number of comments induced will likely be marginal given that comment inflation is already a reality.[299]

Indeed, criticisms of the "number of comments" metric seem better directed at the notice-and-comment process itself. If the comment system seems rigged or misleading, Congress should reform the process to cut down on "bots" and other "fake" comments.[300] If anything, using the number of comments as a metric for major questions review creates helpful incentives for both Congress and courts. Not only does it incentivize them to scrutinize comments and the process by which comments are gathered more closely, but a rule receiving millions of comments—even if flawed—will still send a strong message to the agency to make sure it has clear congressional direction before pursuing its rules any further.[301]

In short, if one buys the argument that the major questions doctrine enhances accountability by forcing Congress to write clearer, more updated laws, then a flurry of comments is a helpful indicator to legislators to consider additional legislation on the rule being proposed.[302] If at some point nearly every proposed rule receives millions of comments, then perhaps this metric would lose its value. But for now, even with "bots" and "fake" commenters, proposed agency rules with sizable political impacts tend to elicit an outsized number of comments.[303]

membership lists. Moving from longstanding agency traditions to a rationalized online system levels the playing field and lowers the bar to engagement. Suddenly, anyone (or anything) can participate from anywhere.").

298 *See id.*

299 For example, when the Clean Power Plan received 4.3 million comments without much indication that major questions review was a possibility, it seems like that number might have very well been in the same ballpark even if organizers knew it could be used for major questions review. When the Supreme Court only invokes that form of review every few years, it may not prove a reliable method for interest groups and organizers to pursue.

300 *See* REP. ON ABUSES OF THE FEDERAL NOTICE-AND-COMMENT RULEMAKING PROCESS, *supra* note 294, at 3–4 (making seven recommendations for reforming the comment process to prevent fake comments).

301 *See* Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 YALE L.J. 1748, 1812–13 (2021) (arguing that major questions cases are those where "political accountability is a meaningful possibility"). Again, if political accountability is one of the chief rationales for major questions review, then using objective criteria such as the number of comments likely enhances accountability in situations where public attention to the issue is very high.

302 *See id.*

303 *See, e.g.*, U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 423 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) (noting that Congress and the public have paid "close attention" to the development and promulgation of the FCC's net neutrality rules, which ended up receiving over 24 million comments).

IV. How an Objective Metrics Analysis Might Play Out: The Political Significance of Bump Stocks under Major Questions Review

On March 28, 2018, the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") under President Donald Trump published a notice of proposed rulemaking concerning "bump-stock-type devices."[304] According to the DOJ, which houses the ATF, the rule was meant to "clarify that bump-stock-type devices are 'machineguns' . . . because such devices allow a shooter of a semiautomatic firearm to initiate a continuous firing cycle with a single pull of the trigger."[305] In its final form, the rule would also "inform[] current possessors of bump-stock-type devices of the proper methods of disposal, including destruction by the owner or abandonment to ATF."[306]

In two lawsuits that followed, opponents of the rule sought preliminary injunctions to block the rule alleging violations of the Administrative Procedure Act ("APA").[307] District courts in Utah and Western Michigan denied the motions.[308] The Court of Appeals for the Sixth Circuit affirmed its lower court's decision, while the Court of Appeals for the Tenth Circuit initially vacated but then later denied the plaintiffs' motion for an injunction as well.[309] On October 3, 2022, the Supreme Court denied cert for both of these appeals.[310]

In 2023, however, two circuits struck down the ATF's bump stock rule in a pair of separate decisions.[311] On January 6, 2023, the Court of Appeals for the Fifth Circuit struck down the rule on a "plain reading of statutory language" and, alternatively, as a violation of the rule of lenity.[312] On April

304 *See* Bump-Stock-Type Devices, 83 Fed. Reg. 66514, 66515 (Dec. 16, 2018).

305 *Id.*

306 *Id.*

307 *See* Aposhian v. Barr, No. 19-cv-37, 2019 U.S. Dist. LEXIS 229054, at *1–2 (D. Utah Mar. 20, 2019), *vacated*, 973 F.3d 1151 (10th Cir. 2020); Gun Owners of Am. v. Barr, 363 F. Supp. 3d 823, 825–26 (W.D. Mich. 2019), *vacated sub nom.* Gun Owners of Am., Inc., v. Garland, 2 F.4th 576 (6th Cir. 2021). A third lawsuit decided by the DC Court of Appeals in 2022 likewise held bump stocks could be classified as machine guns. *See* Guedes v. BATFE, 45 F.4th 306, 310 (D.C. Cir. 2022), *petition for cert. filed*, No. 22-1222 (U.S. July 14, 2023).

308 *See Aposhian*, 2019 U.S. Dist. LEXIS 229054, at *5; *Barr*, 363 F. Supp. 3d at 826.

309 *See* Gun Owners of Am., Inc. v. Garland, 19 F.4th 890, 896 (6th Cir. 2021); Aposhian v. Wilkinson, 989 F.3d 890, 891 (10th Cir. 2021).

310 *See* Gun Owners of Am., Inc. v. Garland, 143 S. Ct. 83 (2022); Aposhian v. Garland, 143 S. Ct. 84 (2022).

311 *See* Cargill v. Garland, 57 F.4th 447, 451 (5th Cir. 2023); Hardin v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 65 F.4th 895, 897 (6th Cir. 2023).

312 *See Cargill*, 57 F.4th at 451.

23, 2023, the Court of Appeals for the Sixth Circuit invoked the rule of lenity alone to strike down the ATF's bump stock rule.[313]

Neither the district courts nor the majorities in these appeals court decisions mention the major questions doctrine in their opinions. However, Judge Eric Murphy of the Court of Appeals for the Sixth Circuit, in his dissent in *Gun Owners*, did invoke the "extraordinary cases" language of *Brown & Williamson*.[314] For Judge Murphy, the ATF's bump stock rule fell under *Gonzales*, leading him to doubt that Congress had "impliedly delegate[ed] to the Attorney General the 'extraordinary authority' to invent new gun crimes."[315]

Although the district courts and the courts of appeals majorities in these cases ultimately did not invoke the major questions doctrine, the question of whether a bump stock ban is politically significant represents an excellent test case for an objective metrics analysis. Likewise, it represents an opportunity to compare an objective metrics analysis with a baseline of judicial common sense, as outlined in *Brown & Williamson*.[316]

Here, judicial common sense would likely tell us that firearm regulation is one of the most contentious issues in American politics.[317] Even relatively minor changes in gun laws can garner massive protest unseen in the vast majority of other political issues.[318] And as Judge Murphy noted in *Gun Owners*, hundreds of thousands of individuals would effectively have to dispose of their previously legal property under a bump stock ban, potentially making them felons if they do not comply.[319] Thus, at first glance, the bump stock rule appears to have a relatively high level of political significance. But as shown below, an analysis using the metrics discussed in Part III paints a different picture of the political significance of a rule banning bump stocks.

A. *Legislation Concerning Bump Stocks Filed at the Congressional Level*

Over the 115th, 116th, and 117th Congresses, only nine bills were introduced on the topic of bump stocks, and all of them purported to outlaw bump stocks, more closely regulate bump stocks, or increase

313 *See Hardin*, 65 F.4th at 897.

314 *See Gun Owners*, 19 F.4th at 920 (Murphy, J., dissenting).

315 *See id.* at 921.

316 *See* FDA v. Brown & Williamson, 529 U.S. 120, 133 (2000).

317 *See* Cody J. Jacobs, *Guns in the Private Square*, 2020 U. ILL. L. REV. 1097, 1097 (2020).

318 *See, e.g.*, Brad Brooks, *Thousands of Armed U.S. Gun Rights Activists Join Peaceful Virginia Rally*, REUTERS (Jan. 20, 2020), https://perma.cc/RU26-T5U8.

319 *See Gun Owners*, 19 F.4th at 918, 921 (Murphy, J., dissenting).

reporting on bump stock ownership and sales.[320] Unlike the issue of student loan reform, where several bills were introduced in the 117th Congress to explicitly forbid the Department of Education from cancelling large swaths of student debt, the last three Congresses have only seen bills from both major parties that reflect a desire to more closely regulate bump stocks.[321] Although these bills vary in the precise amount and kind of regulation, such a survey indicates that (relative to the issue of gun regulation) bump stocks likely represent a "minor" political question that is "relatively uncontroversial" and "bipartisan."[322]

B. *Number of People Affected by the Bump Stock Rule*

In its rulemaking, the ATF estimated there were between 280,000 to 520,000 bump-stock-type devices in circulation in the United States.[323] The ATF did not estimate how many owners that amounted to, although some commenters "stated this rule will affect between 200,000 and 500,000 owners."[324] The ATF further estimated that "1 manufacturer, 2,281 retailers, an uncertain number of individuals who have purchased bump-stock-type devices or would have purchased them in the future, [and] an estimated 22 employees" would likewise be directly impacted by the rule.[325]

Again, then-Judge Breyer's "relativity" framework is instructive here. With some estimates pegging the number of guns in America at nearly 423 million, bump stock devices would only constitute about one-tenth of one percent of that amount (if included as machine guns).[326] By all accounts, bump stocks are niche devices very much to the periphery of overall gun ownership.[327] Compared to our baseline of judicial common sense, the

320 Search query for "bump stock" for the 115th, 116th, and the 117th Congresses, CONGRESS.GOV (Dec. 27, 2022).

321 *See id.*; search query for "student loan forgiveness" for the 117th Congress, CONGRESS.GOV (Dec. 27, 2022).

322 *See* Nielson, *supra* note 209, at 1183–84 (defining "minor" questions as "relatively uncontroversial, often bipartisan policies that help the public but that are not especially salient").

323 *See* Bump-Stock-Type Devices, 83 Fed. Reg. 66514, 66538 (Dec. 16, 2018).

324 *Id.* at 66537.

325 *Id.* at 66545.

326 *See* Dru Stevenson & Jenna R. Shorter, *Revisiting Gun Control and Tort Liability*, 54 IND. L. REV. 365, 383–84 (2021).

327 As one gun store owner put it in reference to bump stocks and the ATF's final rule: "We never have carried them or stocked them . . . I don't think it's really going to have an effect on anything." Nicole Cobler, *Bump Stock Ban Met with Shrugs*, AUSTIN AMERICAN-STATESMAN (Mar. 26, 2019), https://perma.cc/U6T4-E929.

number of people affected appears to show a smaller amount of political significance than one might expect.

C. *Number of Comments Received During the Bump Stock Rule Comment Period*

The ATF's proposed bump stock rule received around 186,000 comments during its initial notice period, with roughly two-thirds of those comments in support of the rule.[328] In comparison, the EPA's Clean Power Plan at the heart of *West Virginia* received 4.3 million comments, and the FCC's Net Neutrality rule in *USTA* received over 24 million comments (with the caveat that millions of those comments appear to have been fake).[329] The IRS's rule establishing exchanges and qualified health plans at the heart of *King v. Burwell* received 24,781 public comments.[330] Here, the number of comments received for the bump stock rule would likely point to only modest political significance. Crossing over 100,000 comments is notable among agency rules, but it does not approach the millions of comments some of the biggest "major questions" cases have received.[331]

D. *Public Polling Data on Bump Stocks*

A poll conducted by National Public Radio and Ipsos in 2017 in the wake of the Las Vegas mass shooting found that 83% of respondents either strongly favored or somewhat favored banning firearm attachments such as bump stocks "that allow rifles to rapidly fire similar to an automatic

328 *See* Bump-Stock-Type Devices Rule, 83 Fed. Reg. at 66519.

329 *See* Am. Lung Ass'n v. EPA, 985 F.3d 914, 998 (D.C. Cir. 2021) (Walker, J., dissenting); REP. ON ABUSES OF THE FEDERAL NOTICE-AND-COMMENT RULEMAKING PROCESS, *supra* note 294, at 5.

330 *See* Establishment of Exchanges and Qualified Health Plans Rule, 77 Fed. Reg. 18310, 18312 (Mar. 27, 2012) (codified at 45 C.F.R. pts. 155, 156, 157).

331 By comparison, the U.S. Department of Health and Human Services' ("HHS"") 2020 rule under the Trump administration rolling back aspects of President Barack Obama's HHS rule on nondiscrimination in health programs that receive federal funding received roughly 198,845 comments. *See* Nondiscrimination in Health and Health Education Programs or Activities Rule, 85 Fed. Reg. 37160, 37164 (June 19, 2020) (codified at 42 C.F.R. pts. 438, 440, 460).

weapon."[332] Other polling on the issue tends to produce similar results.[333] At first glance, such a broad majority of support for a bump stock ban would point away from political significance. That said, polling on gun safety proposals tends to misrepresent the actual legislative process, where such firearm regulations often have a difficult time making it through Congress.[334] Ideally, parties would conduct or have access to polling data that compares the salience of—for instance—banning bump stocks to banning assault rifles or raising the age limit for possessing firearms. In short, publicly available polling data initially points to a lack of political significance for the bump stock rule, but in real-life, one would expect opponents of the rule to present polling data that frames the issue in other ways that may produce different results.

E. *Search Engine "Trends" Data on Bump Stocks*

Comparing "bump stocks" to several other search terms involved in the other major question cases reveals a relatively low salience for the issue.[335] For example, outside of the time periods surrounding the Las Vegas mass shooting and the Trump administration's announcement of the bump stock rule, terms like "assisted suicide" from *Gonzales* and "greenhouse gas emissions" in *Utility Air* saw much greater search activity on Google.[336] Interestingly, the term "eviction moratorium," as seen in *Alabama Realtors*, saw higher spikes during the height of that issue than bump stocks at the height of its searches.[337] This metric is in need of greater refinement, but in the case of bump stocks, the search engine data suggests brief moments of intense spotlight, but the issue otherwise is not a lasting part of the national debate.

---

[332] Danielle Kurtzleben, *Poll: Majorities Of Both Parties Favor Increased Gun Restrictions*, NAT'L PUB. RADIO (Oct. 13, 2017, 5:00 AM), https://perma.cc/3CVQ-WWHV. Further note that this poll found that most respondents (53%) agreed that the benefits of gun ownership outweighed the risks (38% disagreeing), suggesting this particular sample of respondents was not necessarily biased against gun ownership. *Id.*

[333] *See, e.g.*, Steven Shepard, *Gun Control Support Surges in Polls*, POLITICO (Feb. 2, 2018, 5:46 AM), https://perma.cc/CHU9-8CJ4.

[334] *See* Harry L. Wilson, *If Polls Say People Want Gun Control, Why Doesn't Congress Just Pass It?*, THE CONVERSATION (Mar. 7, 2018, 5:43 AM), https://perma.cc/74TP-BZ49.

[335] Search engine query comparison between "bump stocks," "assisted suicide," and "greenhouse gas emissions" from 2004 to 2022, GOOGLE TRENDS, https://trends.google.com/trends/explore?date=all&geo=US&q=bump%20stocks,assisted%20suicide,greenhouse%20gas%20emissions. This search was done on September 1, 2023.

[336] *See id.*

[337] Search engine query comparison between "bump stocks" and "eviction moratorium" from 2004 to 2022, GOOGLE TRENDS, https://trends.google.com/trends/explore?date=all&geo=US&q=bump%20stocks,eviction%20moratorium. This search was done on September 17, 2023.

F. *Conclusions Drawn from an Objective Analysis of Bump Stocks*

In general, the objective approach presents a different picture for the level of political significance the issue of bump stocks carries with it.[338] In examining the results, we discover that the issue of bump stocks falls short in several related subfactors for political significance, such as breadth and accountability to voters, when compared to previous major questions cases.[339]

Table 2. Comparison of Levels of Political Significance for ATF's Bump Stock Rule

Metric	Corresponding Political Significance Subfactor	Level of Significance Using Objective Approach	Expected Level of Significance for Subfactor Using Common Sense Approach (No Metrics)
Introduced Legislation	Accountability	Low	Medium
Number of Comments	Salience	Medium	Medium to High
Polling Data	Controversy	Low	Medium to High
Search Engine Data	Salience	Low	Medium to High
Number of People Affected	Breadth and Impact	Low	Medium
Overall	**Total Political Significance**	**Low**	**Medium to High**

While these subfactors and underpinnings of political significance remain speculative, one can quickly see how objective metrics can be used to assemble a series of "data points" of past cases to develop benchmarks for what is major and what is merely interstitial.[340]

338 *See infra* Table 2.

339 *See id.*

340 *See infra* Table 3.

Table 3. Benchmark Rules and Cases for Comparing Levels of Political Significance			
Metric	**Low**	**Medium**	**High**
Introduced Legislation[341]	Bump Stock Rule (*Gun Owners*)	National Eviction Moratorium (*Alabama Realtors*)	Student Loan Forgiveness (*Nebraska*)
Number of Comments[342]	Health Exchanges Rule (*King*)	Bump Stock Rule (*Gun Owners*)	Net Neutrality (*USTA*)
Polling Data[343]	Bump Stock Rule (*Gun Owners*)	National Eviction Moratorium (*Alabama Realtors*)	Private Sector Vaccine Mandate (*OSHA*)
Search Engine Trends Data[344]	Bump Stock Rule (*Gun Owners*)	National Eviction Moratorium (*Alabama Realtors*)	Physician Assisted Suicide (*Gonzales*)
Number of People Affected[345]	Physician Assisted Suicide (*Gonzales*)	National Eviction Moratorium (*Alabama Realtors*)	Private Sector Vaccine Mandate (*OSHA*)

341 *See supra* Section IV.A. As noted, only nine bills were introduced on bump stocks over the 115th, 116th, and 117th congresses, a total of thirty-four bills and resolutions were introduced in the 117th Congress that contained the phrase "student loan forgiveness" (although many fewer concerned blanket student loan forgiveness), and twenty-three bills and resolutions concerning the national eviction moratorium were introduced in the 116th and 117th Congresses.

342 *See supra* Section IV.C. As noted, the rule at the heart of *King v. Burwell* received 24,781 public comments, the ATF's proposed bump stock rule received around 186,000 comments during its initial notice period, and the Federal Communication Commission's net neutrality rules ended up receiving over 24 million comments.

343 *See supra* Section IV.D and note 285. Individual polls have shown a net support rating of +65% for the bump stock rule, a +31% rating for extending the national eviction moratorium, and a +16% rating for President Biden's private sector vaccine mandate. *See* Kathy Frankovic, *Americans Approve of Extending the Eviction Moratorium Through July*, YOUGOV AM. (July 6, 2021, 10:00 AM), https://perma.cc/JYV2-VFUT.

344 *See supra* Section IV.E and notes 335–337. As noted, outside of the time periods surrounding the Las Vegas mass shooting and the Trump administration's announcement of the bump stock rule, terms like "assisted suicide" from *Gonzales* and "greenhouse gas emissions" in *Utility Air* saw greater search interest than bump stocks.

345 *See supra* Section IV.B and note 98. In general, we can estimate that physician assisted suicide directly impacts hundreds to thousands of families in a given year, that the national eviction moratorium affected millions of families (one estimate put the number of prevented evictions after 11 months of the moratorium at 1.55 million), and the number of workers affected by the private sector vaccine mandate in the tens of millions (84 million workers were covered by the initial rule according

These benchmarks represent a path forward for the Court, one that allows objective metrics to supplement the existing major questions caselaw. Over time, courts will decide more and more cases under major questions review, and, like data points charted on a graph, we can construct a body of benchmarks to guide legal actors.

Indeed, we can see that the objective approach—outside of adhering to the imperative of doctrinal crispness—has three other key benefits related to properly aligning incentives between courts, voters, Congress, and agencies. First, being more precise about where we draw the line between major and interstitial questions incentivizes Congress to pass clearer, more updated legislation.[346] Second, it helps orient judges and gives legal actors a vocabulary for their "common sense" intuitions by introducing outside points of reference.[347] Third, metrics more firmly root the major questions doctrine in its realist goal of political accountability—that voters benefit from major questions being major and interstitial questions remaining interstitial.[348]

After all, if bump stocks represent a major question, then an agency that issues a rule on bump stocks without clear, explicit, and recent direction from Congress has acted before Congress has properly internalized the voters' say on the issue.[349] Under a realist framework, Congress does not pass clear, explicit legislation on the most significant issues in American life without equally clear, explicit instruction from voters.[350] With issues as major as climate change, we expect that message will be conveyed by voters and received by legislators—in campaigns, through constituent letters and calls, and by lobbying from stakeholder groups.[351] But for bump stocks, that message may never come, at least not

to OSHA). *See* Erik Gartland, *Families With Children at Increased Risk of Eviction, With Renters of Color Facing Greatest Hardship*, CTR. ON BUDGET & POL'Y PRIORITIES (Nov. 2, 2021, 5:00 AM), https://perma.cc/Y4XC-PHLZ; *see also* Jennifer Liu, *The Latest Federal Vaccine Mandate Covers 84 Million Workers—Here's What to Know*, CNBC (Nov. 4, 2021, 12:53 AM), https://perma.cc/M5MA-8NDL.

346 *See* Eidelson, *supra* note 301, at 1812, 1820.

347 *See id.*

348 *See* Nielson, *supra* note 209, at 1204 (asserting that when courts treat "minor questions" as major, they increase the "risk of policy stagnation").

349 *See* West Virginia v. EPA, 142 S. Ct. 2587, 2617 (2022) (Gorsuch, J., concurring) ("Today, some might describe the Constitution as having designed the federal lawmaking process to capture the wisdom of the masses.").

350 *See id.*

351 *See* U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 422–23 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

to the degree necessary for the "extraordinary case" at the heart of the major questions doctrine.[352]

In other words, under the logic of the major questions doctrine, courts should impose the highest levels of accountability upon Congress and the President when power is nominally delegated to agencies to promulgate rules implicating the issues that voters care about most.[353] That way, Congress and the President must tackle these major issues with an equally high level of deference to the public.[354] At the nadir of congressional accountability, however, are the issues that are entirely uncontroversial, overwhelmingly bipartisan, or barely recognized by voters in the first place.[355] Just as homeowners expect plumbers to fix the plumbing in their homes absent highly particularized instructions, so too do voters expect Congress and agencies to routinely fix anything broken and ensure the administrative system functions optimally.[356] Thus, when courts more readily defer to agencies on interstitial issues, lawmakers can actually fulfill the near endless list of "minor" demands voters make upon the federal government—a process courts are ill-equipped to referee.[357]

In this vein, applying the major questions doctrine to regulations addressing climate change likely enhances political accountability by making sure Congress and the President hear from voters.[358] But applying major questions review to things like bump stocks could mean reducing political accountability, because Congress and the President lack the feedback mechanism to constructively implement the public's views on the tens of thousands of interstitial "plumbing" issues the federal government faces on a daily basis.[359] If so, elevating too many interstitial questions into major ones may make Congress and the President *less* accountable to the voting public and *more* beholden to potential litigants, as the greater public's unstated interest in functional government is

352 *See* Eidelson, *supra* note 301, at 1811–12.

353 *See* Breyer, *supra* note 23, at 370–71.

354 *See id.*

355 *See* Nielson, *supra* note 209, at 1204.

356 *See id.*

357 *See* Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 46 (1825) ("The difference between the departments undoubtedly is that the legislature makes, the executive executes, and the judiciary construes the law; but the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a court will not enter unnecessarily.").

358 *See* Int'l Refugee Assistance Project v. Trump, 883 F.3d 233, 291 (4th Cir. 2018) (Gregory, C.J., concurring) ("The clear-statement rule [under major questions doctrine] guards against unnecessary erosion of . . . political accountability by insisting that the legislature directly confront the benefits and implications of these decisions").

359 *See id.*

overridden by a smaller minority's vocal interest in invoking a stricter form of judicial review.[360] It is this principle—that courts must ensure that "the federal lawmaking process [captures] the wisdom of the masses"—that lies at the heart of the major questions doctrine.[361]

Conclusion

Given the past twenty-three years of major questions cases, observers should fully expect the scope of "economic and political significance" to narrow and expand as the Supreme Court develops its caselaw. One of the few near-certainties is that political significance will remain a crucial part of major questions analysis. This makes sense. Without a specific factor related to the non-economic ways in which Congress, the President, and agencies can affect people's lives, courts would create a sizable gap in the larger doctrine. However, such a factor deserves greater crispness. Objective evidence of political significance provides worthwhile benefits over judicial common sense in pursuit of this crispness.

If the major questions doctrine does indeed represent an enhancement of political accountability, then calibrating "political significance" will be one of the Court's most important goals in developing the overall doctrine. That line is elusive, constantly shifting, and open to broad interpretation. But the introduction of objective evidence will aid the Court in its pursuit of this crucial inflection point.

360 *See* Deacon & Litman, *supra* note 167, at 6.

361 West Virginia v. EPA, 142 S. Ct. 2587, 2617 (2022) (Gorsuch, J., concurring) ("Today, some might describe the Constitution as having designed the federal lawmaking process to capture the wisdom of the masses.").