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Becoming a Doctrine

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BECOMING A DOCTRINE

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Abstract

On the last day of the 2021–22 Term, the Supreme Court handed down a decision on "the major questions *doctrine*" and granted certiorari to hear a case presenting "the independent state legislature *doctrine*"—neither of which had been called "doctrines" there before. This raises a fundamental and underexplored question: how does a doctrine become a doctrine? Law students know the difference between doctrinal classes and seminars, but how does an idea bantered about in a seminar (say, about agencies deciding major questions) become a "doctrine" complete with judicial tests, steps, and exceptions? Taking an analogy to medicine, when does a series of symptoms become a "disease?" And, importantly, what consequences flow from attaching the label?

This Article tackles those important questions. It explores the significant consequences that come with the label "doctrine"—consequences for litigants, lower courts, and even theories of legal change. Becoming a doctrine is more than just semantics; it is a baptism that matters. And, significantly, it is a job not solely within the province of courts. This Article traces the fingerprints of outsiders on the journey from legal idea to doctrine. Comparing the process to doctrine evolution of the past, I argue that modern communication tools—new search methods, social media, and amicus briefing—give political agents the chance to "doctrinize" an idea quickly and to generate legal change through courts. In short, "becoming a doctrine" is now a campaign—and one that deserves our attention.

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INTRODUCTION

On the last day of the 2021–22 Term, the Supreme Court handed down a decision on "the major questions doctrine" and granted certiorari to hear a case presenting "the independent state legislature doctrine"—neither of which had been called "doctrines" by the Court before.[1] On the former, Justice Elena Kagan in dissent protested that the majority had "announce[d] the arrival" of something new that "magically appear[ed]."[2] On the latter, scholars are currently bickering over whether to actually call the concept a doctrine, causing journalists to throw up their hands and write "independent state legislature theory *or* doctrine."[3]

This all raises a fundamental and underexplored question: how does a doctrine become a doctrine?[4] Law students know the difference between doctrinal classes and seminars, but how does an idea bantered about in a seminar (say, about agencies deciding major questions) become a "doctrine" complete with

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1. West Virginia v. EPA, 142 S. Ct. 2587, 2594 (2022); Moore v. Harper, 142 S. Ct. 2901 (2022) (mem.). As described below, the phrase "major questions doctrine," or as it is sometimes called "major rules doctrine," is largely attributed to then-Judge Brett Kavanaugh and traced to his dissent in the 2017 D.C. Circuit case about net neutrality. U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 402 (2017) (Kavanaugh, J., dissenting). The concept is at least twenty years old, but the phrase was not used by the Supreme Court until *West Virginia v. EPA* in 2022. At the time of this writing, the only court to have ever used the phrase "independent state legislature doctrine" did so in a footnote to describe the then-upcoming *Moore* case at the Supreme Court. *See* Eggers v. Evnen, 48 F.4th 561 n.1 (8th Cir. 2022).

2. 142 S. Ct. at 2633, 2641 (Kagan, J., dissenting); *see also* Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1012 (2023) (analyzing "significant recent developments in the major questions doctrine").

3. *See, e.g.*, *What is the Independent State Legislature?*, NAT'L CONST. CTR., at 03:55 (Mar. 17, 2022), https://constitutioncenter.org/interactive-constitution/podcast/what-is-the-independent-state-legislature-doctrine [https://perma.cc/VU7S-8RRP]. For debates on the phrase, see Jason Marisam, *The Dangerous Independent State Legislature Theory*, 2022 MICH. ST. L. REV. 571, 573–75; Carolyn Shapiro, *The Independent State Legislature Claim, Textualism, and State Law*, 90 U. CHI. L. REV. 137, 142–44 (2023).

4. For discussion of this question, see Edward Rubin & Malcom Feeley, *Creating Legal Doctrine*, 69 S. CAL. L. REV. 1989, 1990–92 (1996); Samuel L. Bray, *On Doctrines that do Many Things*, 18 GREEN BAG 2D 141, 148–50; Tonja Jacobi & Emerson H. Tiller, *Legal Doctrine and Political Control*, 23 J.L. ECON. & ORG. 326, 326–27 (2007); Catharine Pierce Wells, *Langdell and the Invention of Legal Doctrine*, 58 BUFF. L. REV. 551, 553–54 (2010); *see also* Aaron-Andrew P. Bruhl, *Communicating the Canons: How Lower Courts React When the Supreme Court Changes the Rules of Statutory Interpretation*, 100 MINN. L. REV. 481, 542–46 (2015) (discussing how canons crystalize—"the mechanism by which an interpretive notion or practice with many possible names comes to be called one particular thing").

judicial tests, steps, and exceptions? Taking an analogy to medicine, when does a series of symptoms become a "disease?"[5] And, importantly, what consequences flow from attaching the label?

This Article tackles those questions using the major questions doctrine as an initial lens. It explores the consequences that come with the label "doctrine"—consequences for litigants, lower courts, and even theories of legal change and popular constitutionalism. Although I ask the deep question "what is doctrine anyway?" the point of this Article is not to quibble on the boundaries of that word's definition. Rather, the take-home point here is that language and labels are powerful, particularly in an age of clever framing and crowdsourcing legal arguments through blogs, podcasts, and Twitter.[6]

Most lawyers assume that "doctrine" is court-generated: a test used to resolve legal disputes that is judge-made, judge-tweaked, and judge-inherited. That is part of the story, but not the whole story. As this Article shows, the journey from legal idea to legal doctrine is marked by outside influence, and a particular type of outside influence today.

Take the major questions doctrine for example (or as some people call it the "major rules doctrine" or the "MQD"). The idea is straightforward: Congress does not generally delegate high-stakes questions to administrative agencies without being explicit about it.[7] Beginning in the year 2000, there are a handful of Supreme Court cases that employ this concept.[8] Until 2022, however, it had not earned "doctrine" status in the Supreme Court, and rarely was it referred to in any lower court

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5. Thanks to Katherine Mims Crocker for this thoughtful and creative analogy.

6. For my prior take on that phenomenon, see Jeffrey L. Fisher & Allison Orr Larsen, *Virtual Briefing at the Supreme Court*, 105 CORNELL L. REV. 85, 95 (2019).

7. For important literature on the origin and evolution of the major questions doctrine, see Cass R. Sunstein, *There Are Two "Major Question" Doctrines*, 73 ADMIN. L. REV. 475, 481 (2021); Kevin O. Leske, Essay, *Major Questions about the "Major Questions" Doctrine*, 5 MICH. J. ENV'T. & ADMIN. L. 479, 484–89 (2016); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2121 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)); Jonas J. Monast, *Major Questions About the Major Questions Doctrine*, 68 ADMIN. L. REV. 445, 453–62 (2015); Cass R. Sunstein, *Two Justifications for the Major Questions Doctrine*, 76 FLA. L. REV. 251 (2024).

8. For a helpful and recent origin story of the major questions doctrine, see Deacon & Litman, *supra* note 2, at 1012.

as a "doctrine;" instead, it was called a canon or interpretative tool, or an exception to *Chevron* deference.[9]

As it turns out, the road for how the MQD became the MQD largely lies outside the courthouse altogether. The phrase was used just once by any federal judge before 2017[10] and in only five federal decisions—at any level of court—before 2020.[11] One might assume that doctrine comes from clever lawyers trying to win their cases. But in the cases cited by the Supreme Court as authority for the major questions doctrine, not only is the word "doctrine" missing from the Court's description of the idea (until 2022), but it is also missing from the briefings and oral arguments.[12]

Instead, the word "doctrine" to describe the major questions concept was first used by law professors and then bandied about on blogs, quickly picked up by advocacy groups on Twitter and used as a rallying cry in opinion pieces and programming by those seeking to challenge the administrative state.[13] In 2016—long before it was anointed a "doctrine" by the Supreme Court—the "major questions doctrine" was featured by name in the annual Federalist Society conference.[14] And the following year the American Constitution Society used the MQD label to warn about a new "strategy" in the conservative agenda to

9. As explained below, until very recently there are not many cases that use the phrase "major questions doctrine" or "major rules doctrine"—only five before 2020 and only twenty-four before 2022. *See infra* note 38.

10. Coal. for Responsible Regul., Inc. v. EPA, No. 09–1322, 2012 WL 6621785, at *12 (D.C. Cir. Dec. 20, 2012) (Brown, J., dissenting from the denial of reh'g en banc).

11. *See id.*; U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 383 (D.C. Cir. 2017); Int'l Refugee Assistance v. Trump, 883 F.3d 233, 291 (4th Cir. 2018) (Gregory, C.J., concurring); Gundy v. United States, 139 S. Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting); Conservation L. Found., Inc. v. Longwood Venues & Destinations, Inc., 422 F. Supp. 3d 435, 455 n.13 (D. Mass. 2019), *vacated*, No. 20-1024, 2020 WL 6111192 (1st Cir. Oct. 14, 2020).

12. For details, see *infra* note 38.

13. The MQD went from a mere 28 mentions on Twitter in 2020 and 113 mentions in 2021 to a whopping 484 mentions in 2022 (showing the influence no doubt of the 2022 *West Virginia v. EPA* case at the Court). For further detail, see *infra* Part I & Section IV.B.

14. The Federalist Society, *Resolved: The FCC Does Not Have The Legal Authority to Implement Net Neutrality*, YOUTUBE at 28:00 (Jan. 15, 2016) https://www.youtube.com/watch?v=Dc1AM1XhOt8&t=1702s [https://perma.cc/EFU2-2ZV8] (debating FCC net neutrality and the "major questions doctrine").

"intensif[y] the war on regulation."[15] In short, "becoming a doctrine" is now a campaign.

I argue here that "doctrinizing"—by which I mean using the word "doctrine" to elevate the prominence of a legal concept—is a process that has always happened but has changed over time. Specifically, this Article compares the process of "becoming a doctrine" in the digital age to the journey for other doctrines hatched in earlier time periods—including the political question doctrine, *Chevron* doctrine, and standing doctrine.[16]

Not all of these doctrinal origin stories are the same. And many of them involve some form of outside influence. Certainly outsiders (meaning those who are not judges or even the advocates appearing before judges) have always played a role in generating the label "doctrine" and affixing it to a new legal idea. Indeed, law professors are key players here, and this dynamic may be an inevitable byproduct of the twentieth-century case law method of teaching that encourages strategic framing by professors to spot patterns and to aid student understanding.[17]

But modern times bring modern dynamics. The evolution from idea to doctrine is affected by the search tools we use (tools that go beyond judicial decisions and no longer rely on just analogical reasoning), the arrival of "virtual briefing"[18] (blogs, podcasts, and tweets produced by interested nonparties and intended to reach the Justices' ears), and generally the lightning fast way we communicate—and frame—legal ideas these days. Today, earning the label "doctrine" for a legal idea is a quest open to all and promising big results quickly.

Calling a legal idea a "doctrine" is more than semantics; it is a *baptism* that matters for several important reasons.[19] First

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15. Rena Steinzor, *The Major Rules Doctrine—A "Judge-Empowering Proposition,"* AM. CONST. SOC'Y (Oct. 4, 2018), https://www.acslaw.org/expertforum/the-major-rules-doctrine-a-judge-empowering-proposition/ [https://perma.cc/PM4U-PYJW].

16. For a comprehensive take on the origin of the political question doctrine, see generally Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908 (2015). For *Chevron*, see generally Gary Lawson & Stephen Kam, *Making Law Out of Nothing at All: The Origins of the* Chevron *Doctrine*, 65 ADMIN. L. REV. 1 (2013). For standing, see generally Louis L. Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255 (1961); Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961).

17. Wells, *supra* note 4, at 594–95.

18. Fisher & Larsen, *supra* note 6, at 93.

19. The word "doctrine" actually has religious origins, as I discuss below in Section II.A.

and perhaps most obviously, there is a litigation bump that follows becoming a doctrine.[20] Much like labeling an ailment a disease can increase the number of patients, so, too, does the label "doctrine" change how frequently the idea surfaces in litigation.

Returning to the MQD to illustrate: once outsiders had coined that phrase and only after then-Judge Kavanaugh referred to the concept by name in 2017, there was a significant and quantifiable litigation shift.[21] Court filings asserting this claim (under many different descriptive phrases, not just MQD) almost tripled in the time since the doctrine label was used by then-Judge Kavanaugh—jumping from 198 such filings in 2016 to 450 filings in 2022.[22] Now that the Supreme Court has signed on to the phrase, one can only imagine the consequences for litigation strategies. Any lawyer worth their salt will think of the MQD quickly as a way to challenge actions of an administrative agency.[23]

Second, reaching doctrine status also changes the content of the law itself. Much like when we compress information to transfer it (such as converting raw audio into a MP3 file), using a doctrinal label is at bottom a shorthand—and that means you lose a lot of data and texture in the transmission.[24] Again, the MQD example is instructive. Before 2022, lawyers would make the same argument by analogy to older cases (indeed, one lower court judge called it a "wild card" argument).[25] After 2022, the MQD became a thing unto itself, requiring tests, steps, and exceptions, as befitting doctrine status. The similarities and differences to the cases that came before lose significance because they are not included with the transfer. Nuance is lost when doctrine is generated.

Finally, perhaps the ultimate significance of the word "doctrine" is that it is a way to usher in change by connecting

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20. *See infra* Section IV.A.

21. *See infra* Section IV.A, chart 1.

22. *See id.*

23. A search in Thomson Reuters Westlaw Precision's "Table of Contents" field in its Briefs Databases revealed 149 results in which the major questions doctrine was mentioned in the heading of a brief filed in the various U.S. Courts of Appeals. All of these filings occurred in the past three years. The query used was TC (("major questions" "major rules") /3 doctrine) and DA (aft 1999).

24. Hat-tip to Professor Tejas Narechania for this thoughtful insight and analogy.

25. Conservation L. Found., Inc. v. Longwood Venues & Destinations, Inc., 422 F. Supp. 3d 435, 455 n.13 (D. Mass. 2019), *vacated*, No. 20-1024, 2020 WL 6111192 (1st Cir. Oct. 14, 2020).

popular political movements to the language of judicial decision-making. Today's newest doctrines (the major questions doctrine and the independent state legislature doctrine) closely align with current political movements, such as the deconstruction of the administrative state (MQD) and claims of election fraud (ISLD).

By looking at *who* is championing these new doctrines, what we witness is a fast connection between popular politics and legal change through courts. Importantly, the word "doctrine" is the key to operationalizing that change. That word has a very particular meaning for those who went to law school. "Doctrine" connotes seriousness and authority: *this is law*. Particularly as federal courts are staffed with judges who cringe at the idea of "judicial activism"—the improper use of courts to promote policy change—having a "doctrine" that effectively brings that change through the guise of formalism can be very powerful.

That alignment with political movements may not be entirely new, but the tools available to usher in that change *are* new . . . and fast. Becoming a doctrine is necessarily organic and messy; it is perhaps impossible—and maybe silly—to seek a unified process. That is not my goal in this Article. At bottom, my objective is to bring to light another development that comes with legal practice in a digital age. Generating doctrine status today follows quickly from the sophisticated framing of legal arguments, the wide open field of influential voices, and the reduced friction between political and legal actors.[26]

There may be no systematic way for a legal system to govern how an idea becomes a doctrine, but it is at least a journey that should not be taken without thought.

To begin, Part I of this Article outlines the origin of the major questions doctrine as an illustration of becoming a doctrine. Part II asks the foundational question "what is doctrine anyway?" It explores possible definitions and offers a few examples of "almost doctrines" and "has-been doctrines." Part III takes a closer look at the role of outsiders in using the label "doctrine" and compares that process today to the same journey for various doctrines in earlier generations. Part IV builds the case for why becoming a doctrine matters. In doing so, it explores the implications of earning the label for litigation

26. For other examples of this dynamic in my work, see generally Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757 (2014) [hereinafter Larsen, *The Trouble with Amicus Facts*]; Fisher & Larsen, *supra* note 6.

strategy, lower courts, and the capacity of judicial review to usher in political change.

I. BECOMING THE MAJOR QUESTIONS DOCTRINE

In January 2022 when the Supreme Court heard oral arguments in *West Virginia v. EPA*,[27] a case challenging the EPA's authority to pass the Clean Power Plan, a law professor wrote a provocative question on Twitter: "okay i graduated law school in 2000 and i think i did pretty well and i swear to god i never heard of the 'major questions' doctrine until this week. like, umm, where is this from?"[28]

She asks a good question. Until the Court's decision in the *West Virginia* case, one could be forgiven for being unfamiliar with the major questions doctrine or even just the idea (forget the label) that Congress does not generally delegate "highly consequential power" to an agency without being explicit about it.[29] What the majority now calls "doctrine" Justice Kagan (in her dissent) described as something less than that—just the "ordinary method" of "normal statutory interpretation" done "without multiple steps, triggers, or special presumptions."[30] Despite these protests, it seems like the major questions doctrine has officially arrived. So how did we get here?[31]

The concept is usually traced back to the 2000 *Brown & Williamson*[32] Supreme Court case in which the FDA asserted jurisdiction over tobacco and Justice Sandra Day O'Connor wrote that major "economic and political significance" such that it was unrealistic to assume Congress delegated it to an agency *sub silentio*.[33] Justice O'Connor, in turn, gave credit for the idea to a 1986 law review article written by then-Judge Stephen

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27. 142 S. Ct. 2587 (2022).

28. Ann M. Lipton (@AnnMLipton), TWITTER (Jan. 8, 2022, 1:13 PM), https://www.twitter.com/AnnMLipton/status/1479879008087121920 [https://perma.cc/2W96-S9YU].

29. 142 S. Ct. at 2633–34 (Kagan, J., dissenting).

30. *Id.*

31. I am certainly not the first to tell this story, although I believe I am the first to focus on the power of the word "doctrine" within the narrative. For other accounts of the MQD origin story, see Leske, *supra* note 7, at 484–88; Kent Barnett & Christopher J. Walker, *Short-Circuiting the New Major Questions Doctrine*, 70 VAND. L. REV. EN BANC 147, 149–52 (2017).

32. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000), *superseded in part by statute*, Pub. L. No. 111-31, § 907(d)(3)(A)–(B), 123 Stat. 1776 (codified as 21 U.S.C. § 387(g)).

33. *Id.* at 147.

Breyer.[34] "Congress," then-Judge Breyer wrote, "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."[35] In 2001, Justice Antonin Scalia, in typical fashion, linked the idea to a memorable analogy: Congress "does not, one might say, hide elephants in mouseholes."[36]

Subsequent opinions—both from the Supreme Court and the lower courts—then used this analogy or canon of interpretation or limitation on deference to agencies, citing to *Brown & Williamson* and to the elephants language with increasing regularity but still at a modest pace.[37] Searching all federal decisions dating back from 2000 that cite *Brown & Williamson* and use the words doctrine /5 major (or alternatively canon /5 major to be more inclusive) I uncovered a grand total of just twenty-four cases—only seven cases before 2020 and just one case before 2017.[38] That does not seem like much of a doctrine yet.

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34. *Id.* at 159.

35. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986).

36. Whitman v. Am. Trucking, 531 U.S. 457, 468 (2001).

37. *See, e.g.*, Coal. for Responsible Regul., Inc. v. EPA., No. 09-1322, 2012 WL 6621785, at *18 (D.C. Cir. Dec. 20, 2012) (Sentelle, C.J., Rogers, J., & Tatel, J., concurring in the denials of reh'g en banc) (citing the elephants in mouseholes analogy); Gundy v. United States, 139 S. Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting) ("Although it is nominally a canon of statutory construction . . . .").

38. Wall v. CDC & Prevention, No. 21-cv-975, 2022 WL 1619516, at *3 (M.D. Fla. Apr. 29, 2022); Health Freedom Def. Fund, Inc. v. Biden, 599 F. Supp. 3d 1144, 1164 (M.D. Fla. 2022), *vacated as moot*, 71 F.4th 888 (11th Cir. 2023); Louisiana v. Biden, 585 F. Supp. 3d 840, 863 (W.D. La. 2022), *vacated*, 64 F.4th 674 (5th Cir. 2023); Bradford v. U.S. Dep't of Lab., 582 F. Supp. 3d 819, 839 (D. Colo. 2022); Kentucky v. Biden, 23 F.4th 585, 607 (6th Cir. 2022); *In re* MCP No. 165, 21 F.4th 357, 372–74 (6th Cir. 2021), *application granted*, 595 U.S. 109 (2022); Louisiana v. Becerra, 20 F.4th 260, 262–63 (5th Cir. 2021); Texas v. Becerra, 575 F. Supp. 3d 701, 714 (N.D. Tx. 2021); Florida v. Dep't of Health & Hum. Serv., 19 F.4th 1271, 1303 (11th Cir. 2021); BST Holdings, LLC v. OSHA, 17 F.4th 604, 617 (5th Cir. 2021); Sanofi-Aventis U.S., LLC v. U.S. Dep't of Health & Hum. Serv., 570 F. Supp. 3d 129, 200 (D.N.J. 2021), *aff'd in part*, *rev'd in part*, 58 F.4th 696 (3d Cir. 2023); Tiger Lily, LLC v. U.S. Dep't of Hous. & Urb. Dev., 5 F.4th 666, 671 (6th Cir. 2021); Brown v. Sec'y, U.S. Dep't of Health & Hum. Serv., 4 F.4th 1220, 1252 (11th Cir. 2021), *vacated*, 20 F.4th 1385 (11th Cir. 2021); Ohio v. Yellen, 547 F. Supp. 3d 713, 738 (S.D. Oh. 2021), *rev'd in part, vacated in part*, 53 F.4th 983 (6th Cir. 2022); State v. Becerra, 544 F. Supp. 3d 1241, 1264, 1267 (M.D. Fla. 2021); Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Serv., 539 F. Supp. 3d 29, 40 (D.D.C. 2021); Am. Lung Ass'n v. EPA, 985 F.3d 914, 959 (D.C. Cir. 2021), *rev'd and remanded*, 142 S. Ct. 2587

In 2014 and 2015, we then get two cases from the Supreme Court that use the MQD idea as part of the *Chevron* analysis—on the question whether to defer to agency legal interpretations. First, in *Utility Air Regulatory Corp. v. EPA*,[39] the Court found that the relevant provision of the Clean Air Act was ambiguous and then—on *Chevron* step two—held it was unreasonable for the agency to conclude that greenhouse gases were air pollutants for the program at hand because such a ruling would bring a "transformative expansion in EPA's regulatory authority."[40]

Similarly, in 2015 the Court decided *King v. Burwell*,[41] the poster child case for the MQD—meaning the one most used as the exemplar of the concept in administrative law courses. In *King v. Burwell*, Chief Justice John Roberts wrote for the majority that it was unlikely Congress, in the Affordable Care Act, delegated to the IRS the decision whether tax exemptions under the new law went to those who used both state and federally created healthcare exchanges.[42] This prompted another round of scholarship, much of which credited Chief Justice Roberts for the birth of the MQD.[43]

But in none of these cases—not the FDA case, the elephants in mouseholes case, or the *Chevron* cases—was the phrase "doctrine" used to describe the concept that Congress does not

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(2022); *In re* Gateway Radiology Consultants, P.A., 983 F.3d 1239, 1255, 1257 (11th Cir. 2020); Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1923, 1925 (2020); Conservation L. Found., Inc. v. Longwood Venues & Destinations, Inc., 422 F. Supp. 3d 435, 455 (D. Mass. 2019), *vacated and remanded*, No. 20-1024, 2020 WL 6111192 (1st Cir. Oct. 14, 2020); Gundy v. United States, 139 S. Ct. 2116, 2142 (2019); Int'l Refugee Assistance Project v. Trump, 883 F.3d 233, 290–91 (4th Cir. 2018), *vacated*, 138 S. Ct. 2710 (2018); U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 385 (D.C. Cir. 2017); Coal. for Responsible Regul., Inc. v. EPA, No. 09–1322, 2012 WL 6621785, at *9 (D.C. Cir. Dec. 20, 2012) (Brown, J., dissenting from the denial of reh'g en banc).

39. 573 U.S. 302 (2014).

40. *Id.* at 324.

41. 576 U.S. 473 (2015).

42. *Id.* at 486.

43. Barnett & Walker, *supra* note 31, at 148; *see also* Adam White, *Symposium: Defining Deference Down*, SCOTUSBLOG (June 25, 2015, 11:27 PM), https://www.scotusblog.com/2015/06/symposium-defining-deference-down/ [https://perma.cc/5NMH-DMXZ] ("Quite frankly, those moments left me optimistic that both the Chief Justice and Justice Kennedy were seriously considering siding with the challengers—that they would invoke *Brown & Williamson*'s 'major questions' doctrine to refuse to give *Chevron* deference to the IRS, and in turn that they would interpret the statute according to its plain meaning and rule against the administration.").

delegate major questions to agencies.[44] In fact, although *King v. Burwell* in particular prompted much academic commentary on the subject and commentators outside the courts started throwing the MQD phrase around liberally,[45] it is important to note that the phrase was not actually mentioned once in the opinion or even in the oral argument—by either side.[46]

The omission is telling, and without the jump-start from the word "doctrine," the MQD continued slumbering along in the lower courts. In the just twenty-four federal cases citing *Brown & Williamson* and mentioning the concept (even if not by name) from 2000–2022, the lower courts—following the Supreme Court's lead—were typically calling the idea a "statutory interpretation canon" or an application of "*Chevron* 'step zero'" (an instance when *Chevron* does not apply).[47] Only one federal

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44. The MQD played a part in the CDC eviction moratorium cases and vaccine mandate cases also decided in in the 2021–22 term, but the phrase was not uttered in either per curiam opinion. *See* Deacon & Litman, *supra* note 2, at 1024–25 (finding that the Court in *Alabama Ass'n of Realtors* engaged in statutory interpretation consistent with other major questions cases without specifically invoking the major questions doctrine). *See generally* Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485 (2021) (holding that for a federally imposed moratorium to continue, Congress must specifically authorize it).

45. *See, e.g.*, Christopher J. Walker, *What* King v. Burwell *Means for Administrative Law*, YALE J. ON REG.: NOTICE & COMMENT BLOG (June 25, 2015), https://www.yalejreg.com/nc/what-king-v-burwell-means-for-administrative-law-by-chris-walker/ [https://perma.cc/7WHE-MGXY] ("It will also be interesting to see how this amplified major questions doctrine affects other judicial challenges to executive action."); Leske, *supra* note 7, at 479 ("After over a decade of hibernation, the United States Supreme Court has awoken the 'major questions' doctrine, which has re-emerged in an expanded form."); Erin Morrow Hawley, *Symposium: Administrative Law Lessons from* King v. Burwell, SCOTUSBLOG (Dec. 15, 2015, 3:52 PM), https://www.scotusblog.com/2015/12/symposium-administrative-law-lessons-from-king-v-burwell/ [https://perma.cc/D593-8YEB]. For a helpful discussion about how interpretive canons—including this one—"crystallize," see Bruhl, *supra* note 4, at 542–46.

46. Indeed, the phrase "major questions" or "major rules" was never uttered in the *King* oral argument, nor cited in the majority opinion, nor even addressed in the dissent. To confirm this fact, I searched not only for the phrase "major questions doctrine" but also for its sometimes synonym "major rules doctrine." The word "major" only comes up four times in the opinions (not at all in argument) and in none of those instances is it used to describe the concept in question. This observation is widely overlooked by legal scholars, but not completely. *See* Jonas J. Monast, *supra* note 7, at 451 ("The characterization of the issue as a major question was a cornerstone for the Court's reasoning, but the doctrine itself received scant attention in the majority opinion.").

47. *See, e.g.*, ClearCorrect Operating, LLC v. Int'l Trade Comm'n, 810 F.3d 1283, 1303 n.1 (Fed. Cir. 2015) (O'Malley, J., concurring). As mentioned above, the

judge (in dissent) called the major questions doctrine a doctrine before 2017.[48]

And the concept—whatever you call it—did not come up very often at all from 2000–2017. One district court explained, "the 'major questions' canon is not a strong, predictable doctrine but a sort of wild card that the Court occasionally pulls from its back pocket, invariably in cases of great 'political' significance."[49] And, as then-Judge Kavanaugh argued in dissent on the DC Circuit, the idea has a "know it when you see it" quality.[50]

Instead, as explained more thoroughly below, the story of the MQD's rise to doctrine status really exists outside the courthouse altogether. Professor Abigail Moncrieff was the first to refer to the major questions concept as a "doctrine" in a 2008 law review article, which was cited once in a dissent by a D.C. Circuit judge in 2012.[51] By 2013, the phrase "major questions doctrine" had been worked into the mainstream scholarly lexicon, appearing in several prominent law reviews, and by 2015–16 it was being bantered about casually on Twitter, blogs, and podcasts.[52]

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way I searched was conservative—I looked for all cases citing *Brown & Williamson* and using the word major /5 doctrine or major /5 canon (thus capturing both the "major questions doctrine" or the "major rules doctrine" or the "major rules canon" as it is sometimes called).

48. *See* Coal. for Responsible Regul., Inc. v. EPA, No. 09–1322, 2012 WL 6621785, at *12 (D.C. Cir. Dec. 20, 2012) (Brown, J., dissenting from the denial of reh'g en banc).

49. Conservation Law Found. v. Longwood Venues & Destinations, 422 F. Supp. 3d 435, 455 n. 13 (D. Mass 2019) (citing ADRIAN VERMEULE, LAW'S ABNEGATION: FROM LAW'S EMPIRE TO THE ADMINISTRATIVE STATE 30 (1st ed. 2016)).

50. *See* U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 423 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) ("[D]etermining whether a rule constitutes a major rule sometimes has a bit of a 'know it when you see it' quality.").

51. 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, 597 (2008); *Coal. for Responsible Regul., Inc.*, No. 09–1322, 2012 WL 6621785, at *6.

52. For examples of early scholarly use of the phrase "major questions doctrine," see Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 990 n.322 (2013) (using the phrase and crediting Cass Sunstein with it in his *Chevron* Step Zero paper in 2000); Walker, *supra* note 45 ("It will also be interesting to see how this amplified major questions doctrine affects other judicial challenges to executive action."); Nathan Richardson, *Keeping Bad Cases from Making Bad Law: The Resurgent "Major Questions" Doctrine*, 49 CONN. L. REV. 355, 355 (2016); Leske, *supra* note 7, at 479 (2016) ("[A]fter over a decade of

The phrase "major questions doctrine" really rose to prominence in 2017 after its appearance in a then-Judge Kavanaugh dissent on the D.C. Circuit,[53] and subsequently in a feisty exchange with Senator Amy Klobuchar in Kavanaugh's 2018 confirmation hearing in which the Senator called it "something else that you came up with."[54]

The journey to doctrine for the MQD ended, of course, in 2022 when the Supreme Court decided *West Virginia v. EPA* and invalidated the Clean Power Plan.[55] Despite Justice Kagan's protests in dissent, the Court for the first time used the phrase "major questions doctrine" to describe the legal idea launched in *Brown & Williamson* and used in a pattern of "extraordinary cases" since then.[56]

Responding to the dissent's accusation that he was being innovative, Chief Justice Roberts said,

> [A]s for the major questions doctrine "label," . . . it 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 . . . . Scholars and jurists have recognized the common threads between those decisions. So do we.[57]

In other words, there is nothing new to see here—just traditional judicial doctrine formation. Cases create patterns, and patterns eventually generate labels, and none of this is worth getting worked up about.

So…is he right?

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hibernation, the United States Supreme Court has awoken the 'major questions' doctrine, which has re-emerged in an expanded form."). More recently, scholars have noticed a change in the major questions doctrine. *See* Sunstein, *supra* note 7, at 483; Deacon & Litman, *supra* note 2, at 1035–36.

53. *See U.S. Telecom Ass'n*, 855 F.3d at 419.

54. *Supreme Court Nominee Brett Kavanaugh Confirmation Hearing, Day 2, Part 3*, C-SPAN, at 17:02–17:08 (Sept. 5, 2018), https://www.c-span.org/video/?449705-11/supreme-court-nominee-brett-kavanaugh-confirmation-hearing-day-2-part-3 [https://perma.cc/365B-CTF9].

55. West Virginia v. EPA, 142 S. Ct. 2587, 2615–16 (2022).

56. *Id.* at 2595 ("Precedent teaches that there are 'extraordinary 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 . . . . Under this body of law, known as the major questions doctrine . . . the agency must point to 'clear congressional authorization' for the authority it claims.").

57. *Id.* at 2609.

II. WHAT IS DOCTRINE ANYWAY?

The first task in evaluating the MQD's journey or the process of becoming a doctrine generally is to ask the thorny and deep question behind all of this: what is doctrine anyway?[58] It is the sort of question we all think we know the answer to, but when push comes to shove it is hard to articulate a satisfactory answer. Examples of doctrinal tools are ample and probably on the tip of your tongue: the *Erie* doctrine, the political question doctrine, standing doctrine, the doctrine of unconstitutional conditions, and Equal Protection doctrine, to name but a few. What makes these doctrines *doctrines*?

A. *Doctrines as Judicial Tools?*

Traditionally, the answer tracks Chief Justice Roberts's intuition in the *West Virginia* case quoted above: doctrine is judge-made law that identifies "common threads" arising in recurring problems and crystalizes those patterns in tests to apply to future controversies.[59] In the words of Professors Tonja Jacobi and Emerson Tiller, "At the most general level, [doctrines] act as decision-making principles that stipulate, with varying degrees of specificity, outcomes that should follow from underlying fact patterns."[60] In other words, "Legal doctrine is the currency of the law . . . [It] *is* the law, at least as it comes from courts."[61]

One common way to conceptualize doctrines is to think of them as judicial tools. Professor Samuel Bray does just that using a helpful analogy to kitchen tools—tools that are meant to do one thing well (such as a garlic press) and others that do

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58. Most scholars who ask this question address important debates outside the scope of this Article, such as whether doctrine matters to the resolution of cases at all, or whether the Supreme Court truly controls the formation of it. *See generally* Emerson H. Tiller & Frank B. Cross, *What is Legal Doctrine?*, 100 NW. U. L. REV. 517 (2006) (exploring how higher courts may use legal doctrine to influence lower court decisions); Jacobi & Tiller, *supra* note 4 (analyzing situations where doctrine may determine the outcome of cases); Toby J. Heytens, *Doctrine Formulation and Distrust*, 83 NOTRE DAME L. REV. 2045 (2008) (analyzing how higher courts craft rules that can and will be applied by lower courts); Rubin & Feeley, *supra* note 4 (developing theories of how doctrine is created). I acknowledge these important debates but need not enter them.

59. *See West Virginia*, 142 S. Ct. at 2609. For similar definitions, see Rubin & Feeley, *supra* note 4, at 1990 ("All legal doctrines must have a beginning, and many can be directly traced to rather particular groups of judicial decisions."); Bruhl, *supra* note 4, at 542–46 (discussing how canons crystalize in courts).

60. Jacobi & Tiller, *supra* note 4, at 326.

61. Tiller & Cross, *supra* note 58, at 517.

multiple things (such as a chef's knife).[62] Professor Bray points out it is no coincidence that critics of multifunction doctrines tend to be scholars (who do not actually have to use the tool in the kitchen) and defenders tend to be judges (who do).[63]

If kitchen tools are not your thing, another option is to conceptualize doctrines as the "building blocks" of the law. As Professor Joseph Blocher and Luke Morgan explain, doctrine exists for judges to get a handle on a larger legal phenomenon—a way to break down complicated ideas of the law into "smaller constituent parts."[64]

And perhaps the most intuitive definition of "doctrine" for lawyers is that it is the "black letter law," otherwise known as what you would study for the bar exam. As Professor Catharine Wells puts it, "We think of doctrine as a form of legal analysis whose use is so well understood that there is no need for methodological analysis. Our views about it are casual and unreflective."[65]

Implicit (or sometimes explicit) in all these definitions of doctrine, however, is the notion that doctrine is born out of judicial necessity—a way to get the business of courts done.[66] Just like one needs a chef's knife to make dinner, a judge needs doctrine to guide discretion and actually resolve cases—the cases on today's docket and the cases on tomorrow's.[67]

This is true when actually using the kitchen tool or when writing a recipe for others (such as lower court judges) to use later. Thus, as Blocher and Morgan explore, sometimes doctrine is "announced by the Supreme Court more or less out of the blue" (such as the Free Exercise rule in *Employment Division v. Smith*),[68] and sometimes it is developed through "gradual adoption" in the lower courts (such as the intermediate scrutiny used by lower courts in Second Amendment cases until 2022).[69] Indeed, *Chevron* doctrine is perhaps the best example of a

62. Bray, *supra* note 4, at 141.

63. *See id.* at 148–49.

64. *See* Joseph Blocher & Luke Morgan, *Doctrinal Dynamism, Borrowing, and the Relationship Between Rules and Rights*, 28 WM. & MARY BILL RTS. J. 319, 321 (2019).

65. Wells, *supra* note 4, at 554.

66. *See* Tiller & Cross, *supra* note 58, at 530–31.

67. *See* Blocher & Morgan, *supra* note 64, at 321.

68. 494 U.S. 872 (1990).

69. *Id.* at 324–25.

doctrine grown primarily in the lower courts—and specifically the D.C. Circuit—before gaining prominence nationally.[70]

Another aspect of the definition of doctrine which is particularly important for present purposes is the moment when those doctrines—or kitchen tools—get a name. Is a garlic press as popular a kitchen tool if it is just known as that squeezy thing around the kitchen that works to make pesto?

Professor Aaron Bruhl has helpfully discussed this labeling power in a similar context—for canons of statutory interpretation. Using the elephants in mouseholes analogy as an example, Professor Bruhl explains that one aspect of "crystalizing" a canon is in the way the concept is phrased: "That capacity to communicate, to stick in the mind and rise quickly to the lips in the future."[71] Labels matter. The framing of a doctrine makes a difference in terms of prominence. To prove the point, as Professor Bruhl documents, the "no elephants in mouseholes" canon has been cited "more than twice as often as the non-metaphorical language."[72]

To be sure, the naming of doctrines is not neat and tidy. Some doctrines—or what we think of as doctrinal anyway—are actually called "rules." Take, for example, the "rule of lenity" or the "rule against perpetuities." Sometimes we hear would-be doctrines called canons (such as the "canon of constitutional avoidance") or principles (such as the "Purcell principle"[73]). And sometimes there are important legal concepts that bind courts that do not have a label at all (we do not really call *Miranda* a doctrine, and yet it certainly binds legal actors and has for some time).

Perhaps these legal ideas exist on a spectrum, or perhaps they reflect accidents of history. Perhaps the word "doctrine" is more important to formalists, and the word "right" is more

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70. For the origin story of how the *Chevron* doctrine became the *Chevron* doctrine, see Gary Lawson & Stephen Kam, *Making Law out of Nothing at All: The Origins of* Chevron *Doctrine*, 65 ADMIN. L. REV. 1, 33–38 (2013); Thomas W. Merrill, *The Story of* Chevron USA Inc. v. Natural Resources Defense Council, Inc.*: Sometimes Great Cases Are Made Not Born*, *in* STATUTORY INTERPRETATION STORIES 164, 185–86 (William N. Eskridge et al. eds., 2011).

71. Bruhl, *supra* note 4, at 543–44.

72. *Id.* at 545.

73. The Purcell principle is an election law concept—with recent heightened relevance—that courts should not change election rules close to an election. It gets its name from *Purcell v. Gonzalez*, 549 U.S. 1 (2006). *See* Josh Gerstein, *The Murky Legal Concept That Could Swing the Election*, POLITICO (Oct. 5, 2020, 7:58 PM), https://www.politico.com/news/2020/10/05/murky-legal-concept-could-swing-the-election-426604 [https://perma.cc/3XCM-YYG4].

important to progressives? In any event, it is not my project to rank doctrines, rules, and principles (and indeed I am not even sure how one would do that).

But it is also hard to deny that the word "doctrine" connotes that the rule, idea, or concept in question should be taken very seriously. Indeed, the word "doctrine" actually has religious origins.[74] A religious "doctrine" is "the written body of teachings of a religious group that are generally accepted by that group."[75] Britannica instructs that in the context of religion "[d]octrines seek to provide religion with intellectual systems for guidance in the processes of instruction, discipline, propaganda, and controversy."[76]

The religious overtone of the word "doctrine" is no coincidence when imported to law. There is something very momentous, in other words, when the word "doctrine" is attached to a legal idea. It connotes acceptance and a particularly significant type of authority. Citing doctrine to a court is more than citing a clever idea or even a line of precedent. Doctrine must be dealt with. Doctrine is law.

Legal education plays an important role in this. The word "doctrine" means something very specific in law school. In law school we separate "doctrinal classes" from "non-doctrinal" ones. And with that "doctrine" label comes significant change. A doctrine—as opposed to just a legal argument—must be reckoned with by the decisionmaker. A doctrine—as opposed to a series of on point cases—has tests, steps, and exceptions.[77] The anointment of the label "doctrine" is an announcement of legal change and perhaps political triumph. So, the origin story for becoming a doctrine really matters.

Interestingly, most traditional accounts of "where doctrines come from" place special influence on the role of attorneys and

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74. *See* Albert Cook Outler, *Doctrine and Dogma*, BRITANNICA, https://www.britannica.com/topic/doctrine [https://perma.cc/5AUB-L7PL].

75. *Religious Doctrine*, VOCABULARY.COM, https://www.vocabulary.com/dictionary/religious%20doctrine [https://perma.cc/XF9N-ZQUD].

76. Outler, *supra* note 74.

77. *See, e.g.*, Joseph P. Bauer, *The* Erie *Doctrine Revisited: How a Conflicts Perspective Can Aid the Analysis*, 74 NOTRE DAME L. REV. 1235, 1244, 1248 (1999) (describing the steps of the *Erie* doctrine); McKart v. United States, 395 U.S. 185, 193 (1969) ("[L]ike most judicial doctrines, [the doctrine is] subject to numerous exceptions."); Herrera v. Wyoming, 139 S. Ct. 1686, 1697–98 (2019) (applying an exception to the "doctrine of issue preclusion").

the creative rhetoric they use in court to win cases.[78] This makes sense. The daily diet of a judge includes briefs written by advocates and packed with narratives that try to persuade. Bray explains that attorneys are taught to "throw into a brief every argument they can think of," which means more doctrines for judges to evaluate.[79] Attorney behavior can also build doctrinal prominence. Bruhl has documented that the "rhetorical choices of attorneys"—measured by what they highlight in their brief headings—fuel the ascent of certain canons of interpretation over others.[80]

Moreover, there has always been a role for those outside the courtroom to participate in doctrinal development as well. Legal scholars in particular have been vital in spotting patterns in cases, naming those patterns, and bestowing the word "doctrine" upon them.[81] For example, as Professor Tara Grove persuasively documents (and as described more fully below), the political question doctrine got its name—and much of its content—not from the Supreme Court or even lower courts but from law school scholars in the early 1930s and subsequent editions of federal courts casebooks.[82]

The history of the political question doctrine is an important illustration of the influence of modern legal education. Naming doctrines is a natural consequence of the switch of emphasis from abstract concepts to cases,[83] as Professor C.C. Langdell, the Dean of Harvard Law School from 1870–1895, famously pioneered.[84] Langdell believed in "an unfiltered exposure of law students to original source materials, which he defined as appellate judicial opinions."[85] This was a "revolutionary

78. Bray, *supra* note 4, at 148; Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2154 (2015); *see also* Bruhl, *supra* note 4, at 545 (noting that "the [elephant] canon's ascent has arguably been fueled more by attorneys than by the Supreme Court").

79. Bray, *supra* note 4, at 148.

80. Bruhl, *supra* note 4, at 545.

81. Although, it is hard to deny, as Samuel Bray observes, that the scholarly view of doctrine is different from the actors who are using the doctrine to actually solve problems. *See* Bray, *supra* note 4, at 149.

82. Grove, *supra* note 16, at 1948–49, 1953–54. Grove argues that the modern political question doctrine differed significantly from the tests used in the earlier years, and that the test used today was not created until the mid-twentieth century. *Id.* at 1911.

83. Thomas Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 13 (1983).

84. *Id.* at 1.

85. G. Edward White, *The Impact of Legal Science on Tort Law*, *1880-1910*, 78 COLUM. L. REV. 213, 220 (1978) [hereinafter White, *The Impact of Legal Science on Tort Law*].

change" in legal education.[86] Once professors started spotting patterns and pulling common threads among cases, "doctrines" became just a useful way to name them. For this reason, some scholars have called Langdell the "inventor" of modern legal doctrine.[87]

Nonetheless, all accounts of "what is doctrine"—including those that emphasize the shift in legal education—focus on courts. Doctrine can come either from on high at the Supreme Court or grow more in a grassroots gradual way from the lower courts. Doctrine might be influenced by the lawyers who press issues and the scholars who spot patterns and name them, but at the end of the day—just like Chief Justice Roberts explains in *West Virginia v. EPA*—doctrine is a tool to craft judge-made law consistently, a way to treat like cases alike over time.

B. *"Almost Doctrines"*

Nothing about any of the above insists that doctrines live forever or are anything like a closed set. Consider two legal ideas that have sometimes been referred to as doctrines in modern times: the anti-novelty doctrine (the idea that we should be skeptical of Congressional innovations) and the political process doctrine (the prohibition on subjecting legislation benefiting racial minorities to a more burdensome political process than that imposed on other legislation). The former is on the rise, while the latter is on the descent. But both journeys are influenced by the presence or absence of the "doctrine" label.

First, consider the argument on the rise—the anti-novelty doctrine. As Professors Thomas Schmidt, Neal Katyal, and Leah Litman have each explored, there is a new move in recent Supreme Court cases to treat a statute's novelty as a reason to

86. *Id.*

87. Wells, *supra* note 4, at 551, 553 (2010) ("Thus, the modern notion of legal doctrine was at the center of Langdell's contribution to American law. It was doctrine that Langdell sought to teach by the case method; doctrine that formed the substance of his contract theory; and doctrine that he believed should be consulted in the decision of cases."); *see also* White, *The Impact of Legal Science on Tort Law*, *supra* note 85, at 221 ("What students and scholars of law needed to do, under Langdell's educational system, was 'to select, classify, and arrange all the cases which had contributed in any important degree to the growth, development, or establishment of . . . essential doctrines.'").

be constitutionally suspicious.[88] Professors Katyal and Schmidt refer to this as "the anti-novelty doctrine."[89]

According to Litman, the "anti-novelty doctrine" began as passing rhetoric in the 1992 decision of *New York v. United States*[90] (the federalism case about whether Congress could require state legislatures to regulate low level radioactive waste) where the statute's novelty was mentioned briefly in the Court's closing paragraphs.[91] Mentioned a few times subsequently (including in the 2012 challenge to the Affordable Care Act),[92] the Court picked up the concept again and stepped on the gas when considering the constitutionality of the Public Company Accounting Oversight Board (PCAOB) in *Free Enterprise Fund v. Public Co. Accounting Oversight Board.*[93] There the Court said, "[T]he most telling indication of the severe constitutional problem with the PCAOB is the lack of historical precedent" for it.[94]

By 2020, anti-novelty was a headliner argument. In the *Seila Law LLC v. Consumer Financial Protection Bureau*[95] decision, the majority cited *Free Enterprise Fund* as authority for the claim that a statute's newness is good reason to be suspect.[96] In fact, this caused Justice Kagan to dissent in memorable language on the anti-novelty point saying, "Congress regulates in that sphere under the Necessary and Proper Clause, not (as the majority seems to think) a Rinse and Repeat Clause."[97]

I count this doctrine as an "almost doctrine" because no court has yet bestowed the "doctrine" label on the concept. But it is not a risky prediction that the baptism is on the way. As Litman points out in her article *Debunking Antinovelty*, "Every Justice on the Supreme Court [as of 2017] has joined an opinion promoting the idea that legislative novelty is evidence of constitutional defect."[98] The concept also appears fairly

88. Katyal & Schmidt, *supra* note 78, at 2113; Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407, 1410–11 (2017).

89. Katyal & Schmidt, *supra* note 78, at 2113.

90. 505 U.S. 144 (1992).

91. New York v. United States, 505 U.S. 144, 177 (1992); Litman, *supra* note 88, at 1410–11.

92. Litman, *supra* note 88, at 1410–11.

93. 561 U.S. 477 (2010).

94. *Id.* at 505.

95. 140 S. Ct. 2183 (2020).

96. *Id.* at 2201.

97. *Id.* at 2241 (Kagan, J., concurring in the judgment and dissenting in part).

98. Litman, *supra* note 88, at 1411–12.

regularly in the lower courts, Litman observes.[99] And two such court of appeals decisions have used anti-novelty to invalidate a federal statute.[100]

There are a couple of interesting observations to make about the almost doctrine of anti-novelty. First, note that Litman never calls the judicial innovation she describes a "doctrine" in her article or anywhere else.[101] Similarly, on the podcast she co-hosts, *Strict Scrutiny*, she refuses to call the independent state legislature doctrine a doctrine.[102] This seems to be a purposeful move. The omission of the word "doctrine"—even in description of the concept—recognizes the power of the word.

Further, Tom Schmidt and Neal Kaytal bring some insight as to the possibility of *accidental* doctrine creation in the anti-novelty context.[103] They observe that "sophisticated litigants have been using the anti-novelty concept as an atmospheric to their constitutional challenges."[104] This, they say, has "leak[ed]" into the Court's doctrine.[105] Blaming a newly expanded canon of constitutional avoidance, they say framing "constitutional-ish points, coupled with the avoidance doctrine, has given us a dangerous cocktail . . . an opening for new doctrines."[106] The connection between sophisticated framing of arguments and the creation of new doctrines seems intuitive. Although the doctrinal baptism by a court has not yet occurred for the anti-novelty concept, it is a safe bet that it is coming soon.

If the "anti-novelty doctrine" is an almost doctrine on the rise, now consider a "has-been doctrine" that is in decline. Modern readers will most likely associate the "political process doctrine" with the Supreme Court's 2014 decision in *Schuette v. Coalition to Defend Affirmative Action*.[107] The idea is that

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99. *Id.*

100. *Id.* at 1412 (first citing United States v. Kebodeaux, 687 F.3d 232, 237–38 (5th Cir. 2012), and then Thomas More L. Ctr. v. Obama, 651 F.3d 529, 556, 559 (6th Cir. 2011) (Sutton, J., concurring)).

101. *See, e.g.*, Litman, *supra* note 88.

102. Strict Scrutiny, *Debunking the Independent State Legislature Fantasy*, CROOKED (Sept. 5, 2022), https://crooked.com/podcast/debunking-the-independent-state-legislature-fantasy/ [https://perma.cc/JMJ2-MGXD].

103. Katyal & Schmidt, *supra* note 78, at 2153–55.

104. *Id.* at 2114.

105. *Id.*

106. *Id.*

107. 572 U.S. 291 (2014). For useful background on the doctrine and the case, see generally Christopher E. D'Alessio, Note, *A Bridge Too Far: The Limits of the*

courts will be very skeptical of a "political structure that . . . place[s] special burdens on the ability of minority groups to achieve beneficial legislation."[108] It arose in *Schuette* after Michigan voters, by popular referendum, effectively ended affirmative action in their state.[109]

The Sixth Circuit in the case below applied the political process doctrine, which has its theoretical roots in Professor John Hart Ely's process theory and its precedential roots in three cases from the 1960s and early 1980s (sometimes called the "*Hunter* trilogy").[110] The challengers argued—and the Sixth Circuit agreed—that ending affirmative action by referendum improperly eliminated legislative wins by racial minority groups and that this violated the "political-process doctrine."[111]

When the case reached the Supreme Court, however, Justice Scalia called it the "so-called political process doctrine."[112] Never a good sign. And the Court (in an opinion by Justice Anthony Kennedy) went on to reject the challenge.[113] Importantly, the Court in *Schuette* did not overrule any of the prior "political-process doctrine" cases; it just backed away from the label and distanced itself from the idea that the cases collectively created a doctrine.[114]

This decision to withhold the "doctrine" label is intriguing. Although scholars debate whether the political process doctrine died in the *Schuette* decision or was just gutted / misapplied, it is particularly interesting that no prior case was overruled in order to retreat from doctrine status—nor was the case litigated

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Political Process Doctrine in Schuette v. Coalition to Defend Affirmative Action, 9 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 103 (2013).

108. Coal. to Def. Affirmative Action v. Regents of the Univ. of Mich., 701 F.3d 466, 474 (6th Cir. 2012), *rev'd sub nom*. Schuette v. Coal. to Def. Affirmative Action, 572 U.S. 291 (2014).

109. *Id.* at 471.

110. *Coal. to Def. Affirmative Action*, 701 F.3d at 480-89 (this was the decision under review in the case that ultimately became *Schuette* at the Supreme Court); L. Darnell Weeden, *Affirmative Action California Style—Proposition 209: The Right Message While Avoiding a Fatal Constitutional Attraction Because of Race and Sex*, 21 SEATTLE U. L. REV. 281, 291 (1997). The "*Hunter* trilogy" consists of *Hunter v. Erickson*, 393 U.S. 385 (1969), *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982), and *Crawford v. Bd. of Educ. of L.A.*, 458 U.S. 527 (1982). For more information about John Hart Ely's process theory, see Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 747, 773 (1991).

111. *Regents of the Univ. of Mich.*, 701 F.3d at 489.

112. *Schuette*, 572 U.S. at 318 (Scalia, J., concurring).

113. *Id.* at 314 (plurality opinion).

114. *Id.* at 318 (Scalia, J., concurring) (disagreeing with the plurality's refusal to repudiate "political-process doctrine").

as presenting a stare decisis issue.[115] Indeed, the phrase "so-called political process doctrine" did not appear in any of the briefs or oral argument until it popped up in Justice Scalia's opinion.[116]

But the consequences of losing the "doctrine" label have been dramatic. Since 2013, not a single plaintiff nationwide has successfully brought a "political process doctrine" challenge, and very few have tried.[117] This could be a sign that the doctrine was never very sturdy to begin with, but it could also be an indication that doctrine status is not permanent even if the underlying cases are never overruled.

One cannot help but be reminded of the current status of the *Chevron* doctrine (the origin of which is discussed below): can a doctrine cease to become a doctrine just because it is no longer called a doctrine or is not cited by the Supreme Court?[118] Or does the end of a doctrine require some sort of affirmative judicial act—five votes at the highest Court?[119]

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115. For scholarly debate on what *Schuette* means for the doctrine, see Margaux Poueymirou, Note, Schuette v. Coalition to Defend Affirmative Action *& the Death of the Political Process Doctrine*, 7 UC IRVINE L. REV. 167, 176 (2017) ("Deriving a framework from *Hunter* and *Seattle* . . . Judge Henderson pushed what he identified as a 'principle' closer toward the status of a legal doctrine."); *see also* Steve Sanders, *Race, Restructurings, and Equal Protection Doctrine Through the Lens of* Schuette v. BAMN, 81 BROOK. L. REV. 1393, 1438 (2016) (discussing whether the "*Hunter*/*Seattle* doctrine" really existed and concluding it was "conjecture" rather than a "true doctrine").

116. From what I can tell, the only person to use the phrase "so-called 'political process doctrine'" before Justice Scalia did was Professor Brian Souceck in an article previewing the 2013 Term. *See* Brian Souceck, *Does Michigan's Constitutional Prohibition of Affirmative Action in Public University Admissions Violate the Equal Protection Clause?*, 41 PREVIEW U.S. SUP. CT. CASES 9, 9 (2013).

117. Indeed, the phrase appears in only four decisions after *Schuette* was decided; the plaintiff was not successful in any of the four. *See* Lewis v. Bentley, No. 2:16-CV-690, 2017 WL 432464, at *13 (N.D. Ala. Jan. 31, 2017); Howe v. Haslam, No. M2013–01790–COA–R3–CV, 2014 WL 5698877, at *23, *26 (Tenn. Ct. App. Nov. 4, 2014) (McBrayer, J., concurring in part); Lewis v. Governor of Ala., 896 F.3d 1282, 1297–98 (11th Cir. 2018); Lewis v. Governor of Ala., 944 F.3d 1287, 1322, 1324 (11th Cir. 2019) (Jordan, J., dissenting), *aff'd*, 816 Fed. App'x. 422 (11th Cir. 2020).

118. *See* J. Michael Showalter & Samuel A. Rasche, *Gorsuch Says "*Chevron *Doctrine" is Dead Even Though the US Supreme Court Refuses to Say So*, NAT'L L. REV. (Nov. 11, 2022), https://www.natlawreview.com/article/gorsuch-says-chevron-doctrine-dead-even-though-us-supreme-court-refuses-to-say-so [https://perma.cc/4NWT-KSLL]; *cf.* Michael Herz, Chevron *is Dead; Long Live* Chevron, 115 COLUM. L. REV. 1867, 1879 (2015) (discussing a viable *Chevron* consistent with separation of powers principles and a form of judicial self-regulation).

119. It is worth noting that, as of this writing, that fifth vote has been explicitly

At least several prominent lawyers of the Supreme Court bar think we need an affirmative move from the highest Court in the land to end the *Chevron* doctrine: "If *Chevron* is at least partially interred at the Supreme Court, it is surely out of its grave and roaming like a zombie at the circuit courts," said the Cato Institute and Manhattan Institute in a recent article.[120] The implication is that doctrines (or at least *that* doctrine) live on in the lower courts even when neglected by the Justices.[121] Doctrines, in other words, do not die through neglect.

For now, the point is just to consider the capacity of doctrine to generate and whither through clever arguments and framing. And, most importantly, whatever doctrine is (and perhaps the concept defies any easy definition), there is a significant amount of power wrapped up in the label.

III. THE ROLE OF OUTSIDERS IN BECOMING A DOCTRINE

The word "doctrine" seems to matter a great deal in legal circles. But despite the historical emphasis on cases and courts, at least for the major questions doctrine, the journey from legal idea to doctrine is a journey that looks to be fueled by nonjudicial actors: scholars, lawyers outside the case, and organizations that advocate for particular legal viewpoints. Is that dynamic new or worrisome?

To form a basis for comparison, this Part collects the origin stories of other doctrines formed in earlier times and then compares those stories to the two new ones highlighted above: the major questions doctrine and the independent state legislature doctrine. In doing so, it focuses on the role of outsiders in all of those journeys.

A. *A Look Back: Becoming a Doctrine in the Past*

1. The Political Question Doctrine

As federal courts students know all too well, the political question doctrine is a judicially crafted limitation on judicial review that forbids courts from deciding so-called "political questions," or questions where discretion is wholly committed

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requested in *Loper Bright Enterprises* v. *Raimondo,* a case seeking to overturn *Chevron* and currently pending at the Supreme Court. Reply Brief for Petitioners at 9, Loper Bright Enters. v. Raimondo, No. 22-451 (Mar. 8, 2023).

120. Jess Krochtengel, *Amici See NJ Fishing Case as Vehicle to End* Chevron, LAW360 (Dec. 19, 2022, 7:08 PM), https://www.law360.com/articles/1558896/amici-see-nj-fishing-case-as-vehicle-to-end-chevron [https://perma.cc/588Y-KVR2].

121. Bruhl, *supra* note 4, at 519.

to another branch of government by the Constitution.[122] The limitation is said to derive from Article III and is most commonly traced back to *Marbury v. Madison*[123] in which Chief Justice John Marshall declares that "certain questions are wholly outside the purview of the courts—'questions, in their nature political.'"[124]

Several years ago, Professor Tara Grove did a deep dive into the origin of the political question doctrine and made some very interesting discoveries.[125] First, she persuasively documents that the political question doctrine we know today looks a lot different from the political question doctrine used by state and federal courts in the early nineteenth century.[126] What we know now to be the political question doctrine was originally, it turns out, a doctrine of deference to political actors on factual questions and had nothing to do with Article III.[127]

More relevant to this Article, however, Professor Grove also details the development of the doctrine among scholars and, interestingly, in consecutive editions of federal courts casebooks.[128] From the early nineteenth through the mid-twentieth century, the Supreme Court and lower courts applied the old version of the political question doctrine (what Grove calls the traditional version).[129] But, by the mid-twentieth century, there was a shift in thinking which she says "can be traced to significant changes in the academic discourse about the doctrine."[130]

From 1927 through around 1960, legal scholars started to call the "political question doctrine" by that name and trace it to Article III.[131] And—interestingly—the shift, Grove says, was

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122. Grove, *supra* note 16, at 1909; Baker v. Carr, 369 U.S. 186, 210 (1962).

123. 5 U.S. (1 Cranch) 137 (1803).

124. Grove, *supra* note 16, at 1938 (citing *Marbury*, 5 U.S. (1 Cranch) at 170); *see also* Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 239 (2002) ("*Marbury* itself contains the seeds for the view that the authority to answer some constitutional questions rests entirely with the political branches."). For a contradicting view on the *Marbury v. Madison* origin story to the political question doctrine, see Grove, *supra* note 16, at 1938.

125. Grove, *supra* note 16, at 1911.

126. *Id.* at 1915.

127. *Id.* at 1935; *see also id.* at 1914 (arguing that the Supreme Court changed the political question doctrine in Baker v. Carr, 369 U.S. 186 (1962)).

128. *Id.* at 1950.

129. *Id.* at 1951–53.

130. *Id.* at 1947.

131. *Id.* at 1949.

fueled not by courts, but by federal courts casebooks.[132] She says, "these casebook selections not only reflected but also likely contributed to a change in the understanding of the political question doctrine."[133]

Felix Frankfurter is a key player here.[134] Before he was a Supreme Court Justice, he was a well-known professor at Harvard Law school.[135] In the first edition of his very popular casebook on federal jurisdiction—originally published in 1931—then-Professor Frankfurter chose to spend very little time on the cases exploring the traditional political question doctrine (the factual deference idea), and instead discussed only a single case about the Guarantee Clause, *Pacific States Telephone & Telegraph Co. v. Oregon*,[136] which contemporary commentators called an outlier and "a departure from the traditional political question doctrine."[137] Interestingly, in his casebook Frankfurter listed this case and discussion around it under the heading "Constitutional Limits of the Judicial Power—Case or Controversy."[138]

Grove thinks this was a deliberate move on Frankfurter's part.[139] Felix Frankfurter ran with a crowd of legal scholars known for something called legal process theory (alongside famous legal thinkers Professors Henry Hart and Herbert Wechsler).[140] Legal process scholars acknowledge that judging carries a healthy dose of discretion, but they also insist that this discretion can be "properly confined through procedure."[141] This thinking all tracks with a healthy dose of skepticism about the Court from progressives in the wake of the *Lochner* era.[142] For thinkers like this, a doctrine—such as the political question doctrine—that limits the kinds of controversies courts could hear must have been very tempting to highlight.[143]

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132. *Id.* at 1954.

133. *Id.* at 1953.

134. *See id.* at 1953–54 ("Professors Hart and Wechsler dedicated the first edition of their casebook to Frankfurter," whom they acknowledged "opened [their] minds to these problems.").

135. BRAD SNYDER, DEMOCRATIC JUSTICE: FELIX FRANKFURTER, THE SUPREME COURT, AND THE MAKING OF THE LIBERAL ESTABLISHMENT 184, 188 (2022) (ebook).

136. 223 U.S. 118 (1912).

137. *See, e.g.*, Grove, *supra* note 16, at 1942.

138. *See id.* at 1950–51.

139. *Id.* at 1951 n.221.

140. *Id.* at 1913.

141. *Id.* at 1955–56.

142. *Id.* at 1913.

143. *Id.* at 1956.

Over time, as Professor Grove documents, this legal process school version of the political question doctrine was repeated time and time again, so much so that it eventually eclipsed the traditional version of the political question doctrine.[144] Indeed, the legal process-backed version became incorporated into theories of judicial review by no less legal thinkers than Learned Hand and Alexander Bickel.[145] According to Grove, what we now know as the political question doctrine "was overlooked (or mischaracterized) by casebook after casebook and article after article."[146] These scholars and commentators did more than critique, explore, or analyze patterns in cases; rather, they had a hand in *creating* the political question doctrine.

By 1962, when the Supreme Court cemented—and Grove says changed—the political question doctrine in *Baker v. Carr*,[147] the "doctrine" was already well established in the legal academy.[148] This makes sense. Lawyers—future litigators and future judges—are heavily influenced by the law as they learn it in law school. Just as administrative law students in 2024 will learn the major questions doctrine, so did federal courts students in 1932 learn the political question doctrine—inspired out of patterns of cases in courts, but named and shaped by outsiders.

2. *Chevron* Doctrine

A different sort of origin story exists for the *Chevron* doctrine. *Chevron* of course is (for now) the leading doctrine on how to divide authority between agencies and courts in determining statutory meaning.[149] It was decided in 1984.[150] Under the now famous two-step *Chevron* doctrine, courts ask, first, whether Congress has answered the question at hand (using traditional tools of statutory interpretation) and, second,

144. *Id.* at 1957.

145. *Id.*

146. *Id.* at 1958.

147. 396 U.S. 186 (1962).

148. Grove, *supra* note 16, at 1961–64, 1970 (arguing that the Supreme Court in *Baker* took the legal process version of the political question doctrine and changed it to assert a more robust form of judicial power).

149. *See generally* Chevron v. Nat. Res. Def. Council, 467 U.S. 837 (1984) (holding that when statutes are ambiguous, courts should defer to reasonable agency interpretations).

150. *Id.*

if not, whether the agency nonetheless provides a reasonable answer.[151]

The leading narrator of *Chevron*'s origin story is Professor Tom Merrill.[152] As Professor Merrill explains, *Chevron* the case did not become *Chevron* the doctrine right away.[153] The two-step framework was a "significant departure from prior law" and "broke new ground," but it was "little noticed when it was decided."[154]

Justice John Paul Stevens in fact—the author of the *Chevron* opinion—for years insisted that *Chevron* was a nothingburger of a case.[155] This sentiment is reflected in Justice Harry Blackmun's conference notes, which Professor Merrill helpfully translates.[156] Interestingly, the two-step framework of the *Chevron* doctrine was entirely missing from the briefs—"Stevens apparently came up with these innovations on his own."[157] And "there is nothing in the conference notes to suggest that the [J]ustices regarded *Chevron* as a watershed case."[158] The opinion was unanimous, and perhaps the most telling remark from the Justices' internal correspondence was the word "Whew!" written on the top of the draft by Justice Blackmun, apparently indicating "a sense of relief" that Justice Stevens had resolved a complicated, technical—but not a game-changing—sort of question.[159]

The *Chevron* doctrine only became the *Chevron* doctrine years later and after two important developments.[160] The first change is a "reverse migration" story about the D.C. Circuit told by Professor Gary Lawson.[161] The D.C. Circuit is the most important court in administrative law. Justice Scalia (who taught administrative law and then sat on the D.C. Circuit

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151. *Id.* at 842–43.

152. *See generally* Thomas W. Merrill, *The Story of* Chevron*: The Making of an Accidental Landmark*, 66 ADMIN. L. REV. 253 (2014) (exploring how *Chevron* became a landmark case).

153. *Id.* at 275–77.

154. *Id.* at 255–57.

155. *Id.* at 275 ("There is no evidence that Justice Stevens understood his handiwork in *Chevron* as announcing fundamental changes in the law of judicial review.").

156. *Id.* at 270.

157. *Id.* at 269–70.

158. *Id.* at 272.

159. *Id.* at 274.

160. *Id.* at 257, 277.

161. *See id.* at 275 n.80, 277 (explaining how *Chevron* became a leading case initially on the D.C. Circuit).

before he was a Justice) once called the D.C. Circuit the "resident manager" of administrative law as opposed to the Supreme Court, which is just the "absentee landlord."[162] According to Lawson and Merrill, *Chevron* "was embraced with particular fervor" on the D.C. Circuit particularly by the newly-appointed Reagan judges (although, as Merrill points out, Democrat-appointed judges consistently reached for *Chevron* as well).[163] On this theory, *Chevron* was first embraced as doctrine not by the Supreme Court, but by the D.C. Circuit and then, over time, by the other lower courts—perhaps because it is a useful tool for reaching consensus and clearing difficult cases off of a docket.

The second important stop on *Chevron*'s journey to doctrine status came from within the Department of Justice (DOJ).[164] According to Professor Merrill, "*Chevron* was regarded as a godsend by Executive Branch lawyers charged with writing briefs defending agency interpretations of law."[165] These lawyers thus began to cite the two-step doctrine—as doctrine—in every brief.[166] As Merrill explains, *Chevron* "may have taken time for courts other than the D.C. Circuit to accept it as orthodoxy. But it was quickly seized on as a kind of mantra by lawyers in the Justice Department who pushed relentlessly to capitalize on the perceived advantages the decision presented."[167]

The *Chevron* doctrine—a revolutionary doctrine in administrative law—thus did not start out with a noted baptism in the Supreme Court as doctrine in 1984. It has more of a grassroots origin story—embraced by lower courts over time and pushed by government attorneys as "orthodoxy" until it came to be so.

3. Standing Doctrine

A more complicated origin story exists for standing doctrine, the rules that limit *who* can bring suit as part of a "case or

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162. *See* Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and The Supreme Court*, 1978 SUP. CT. REV. 345, 371 (1978) ("As a practical matter, the D.C. Circuit is something of a resident manager, and the Supreme Court an absentee landlord.").

163. Merrill, *supra* note 152, at 278–79.

164. *Id.* at 281.

165. *Id.*

166. *Id.*

167. *Id.*

controversy" under Article III of the Constitution.[168] There are some twists and turns in the history of standing doctrine, and not everyone agrees on the path. The most commonly accepted story is that standing doctrine was an invention of liberal Justices to insulate New Deal legislation from the *Lochner* Court.[169] Professors Richard Pierce and Cass Sunstein tell this tale, and point to Justices Louis D. Brandeis and Felix Frankfurter as the inventors of standing doctrine in the 1920s and 30s.[170]

On this account, standing doctrine was a "'calculated effort' by liberals to 'assure that the state and federal governments would be free to experiment with progressive legislation.'"[171] Although the word "standing" was not used in these *Lochner*-era cases, "[t]he development of what we know now as standing in the early part of the twentieth century was indeed a novelty."[172]

Other scholars, most notably Professors Caleb Nelson and Ann Woolhandler, have challenged this traditional narrative.[173] They say that there was an "active law of standing in the eighteenth and nineteenth centuries," even if it was not called standing doctrine and was instead implicit in the distinction between public and private rights.[174] And empiricists

168. In the interest of time, I am only able to give the highlights of this history, but for a more comprehensive tale (involving at least five time periods) see Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, pt. 1 (1992) (explaining the history of standing) [hereinafter Sunstein, *What's Standing After* Lujan*?*].

169. *See* Maxwell L. Stearns, *Standing at the Crossroads: The Roberts Court in Historical Perspective*, 83 NOTRE DAME L. REV. 875, 882 (2008) ("The New Deal Court developed standing as a means of insulating progressive regulatory reform from attack in a conservative lower federal judiciary that it feared was committed to obstructing progressivism based upon a recently discredited set of constitutional barriers"); Sunstein, *What's Standing After* Lujan*?*, *supra* note 168, at 179–81.

170. Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1767 (1999); Sunstein, *What's Standing After* Lujan*?*, *supra* note 168, at 179.

171. Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921-2006*, 62 STAN. L. REV. 591, 597 (2010) (quoting Steven Winter, *The Meaning of Under Color of Law Metaphor of Standing and the Problem of Self-Governance*, 91 MICH. L. REV. at 1371, 1455–56 (1988)).

172. Sunstein, *What's Standing After* Lujan?, *supra* note 168, at 180; *see also* Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1434 (1988) [hereinafter Sunstein, *Public Law*] ("For most of the nation's history, there was no distinctive body of standing doctrine.").

173. Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 691 (2004).

174. *Id.*

complicate the origin story even further—noting that the cases provide strong support for the claim that liberal justices created standing doctrine but that the seeds for such doctrine existed before that time.[175]

In any event, the standing doctrine plot thickened over time. Used most famously by left-leaning Justices to insulate liberal legislation after World War II, standing doctrine then evolved under the Burger Court to be used by conservative Justices to insulate state laws from what they saw as activist federal judges.[176] This "countermovement," as Sunstein calls it, was in many ways fueled by "separation of power norms."[177]

Professor Sunstein's underlying concern with this new generation of standing cases penned by conservative jurists (*Allen v. Wright*[178]; *Lujan v. Defenders of Wildlife*[179]) is that they overlook "[t]he distinctive judicial role [which] is the protection of traditional or individual rights against governmental overreaching."[180] Professor Sunstein says this doctrine is "ahistorical" and "a form of *Lochner*-style substantive due process" that smuggles in specific normative commitments about democracy.[181]

Wherever you land on the history, becoming standing doctrine is a Supreme Court story. The doctrine was championed by various Justices at various times to advance various normative commitments. Whether it was to protect progressive legislation or prevent government overreach, standing doctrine is a Supreme Court-crafted and Supreme Court-modified tool.

B. *The Role of Outsiders in Becoming a Doctrine Today*

Two new doctrinal origin stories are examined below: the independent state legislature doctrine and a review of the major questions doctrine. There are both similarities and differences in becoming a doctrine today and becoming a doctrine yesterday. The most striking difference, however, is that doctrinal development in these modern examples is led by

175. Ho & Ross, *supra* note 171, at 595, 648.

176. Sunstein, *What's Standing After* Lujan?, *supra* note 168, at 179.

177. Sunstein, *Public Law*, *supra* note 172, at 1432, 1459.

178. 468 U.S. 737 (1984), *abrogated by* Lexmark Intern., Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014).

179. 504 U.S. 555 (1992).

180. Sunstein, *Public Law*, *supra* note 172, at 1460.

181. Sunstein, *What's Standing After* Lujan?, *supra* note 168, at 217, 236.

a new type of outsider with powerful delivery tools.[182] Today, doctrinizing is no longer confined to law professors writing annual legal federal courts treatises or DOJ lawyers defending federal statutes for the government. Instead, the main players in these new doctrinal origin stories are activist groups—some outside the mainstream—who can now communicate their arguments to courts directly and quickly.

1. The Independent State Legislature Doctrine

A prominent current example of a modern doctrinal origin story is the so-called "independent state legislature doctrine," (ISLD) concerning which branch of state government controls federal election rules.[183] The stakes of this claim are hard to overstate: if vindicated in its strongest form, it would eliminate state constitutional protections of voting rights, at least when federal elections are concerned.[184]

This example stands out as particularly insightful on the power of the word "doctrine." There is actually a current dispute about whether the independent state legislature doctrine should be called a doctrine at all.[185] Some scholars purposely call it a theory—avoiding the word doctrine deliberately[186]—and others even call it a fantasy.[187] As Professor Jason Marisam explains: "the word choice—doctrine vs. theory—matters [because] [t]he word 'doctrine' suggests the view is embedded in established precedent," which he rejects.[188]

In any event, the independent state legislature doctrine/theory/myth was on the Supreme Court's docket for last year's Term and has recently (although only very recently) attracted a lot of attention.[189] Although its origins can be traced

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182. *See, e.g.*, Marisam, *supra* note 3, at 572 (explaining that powerful "[c]onservative scholars, justices, and the Trump [organization]" have championed the independent state legislature doctrine).

183. *Id.*

184. *Id.* at 573.

185. *Id.* at 574.

186. *Id.* at 574–75; Shapiro, *supra* note 3, at 140 n.14.

187. *See* Strict Scrutiny, *supra* note 102 ("I don't even want to call it a theory. Frankly, I don't think it deserves that.").

188. Marisam, *supra* note 3, at 574–75.

189. *See, e.g.*, *'Independent State Legislature Theory'*, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/issues/defend-our-elections/independent-state-legislature-theory [https://perma.cc/J679-D3BE] ("The Brennan Center . . . mobilized to secure a Supreme Court ruling rejecting this fringe theory in the case *Moore v. Harper*."); *see also* J. Michael Luttig, *The Court is Likely to Reject the Independent*

to *Bush v. Gore*[190] in 2000, very few people outside of election law circles had heard of this argument until it was used by President Donald J. Trump in efforts to overturn the 2020 election.[191]

Professor Carolyn Shapiro tells the origin story in a recent law review article.[192] The idea stems from two parts of the Constitution: (1) the "Electors Clause" in Article II which assigns to state legislatures the job of "directing the manner" in which presidential electors are appointed and (2) the "Elections Clause" in Article I which similarly authorizes state legislatures to determine the "Times, Places and Manner of holding elections for Senators and Representatives."[193] The idea, in a nutshell, is that this language is a limited delegation of federal power to state legislatures but not to state courts or any other state actor.

Scholars have debated the history of these Clauses over the years, but "the Supreme Court has never held that when a state legislature regulates federal elections, it is free of such substantive state constitutional constraints."[194] Indeed, as Professor Shapiro explains, before 2000, the Court had never really talked about that possibility.[195] And, as others have said,

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State Legislature Theory, ATLANTIC (Apr. 13, 2023), https://www.theatlantic.com/ideas/archive/2023/04/independent-state-legislature-theory-moore-harper/673690/ [https://perma.cc/3K8R-Z4EM] (showing that the independent state legislature theory attracted national attention).

190. 531 U.S. 98 (2000).

191. For a brief history of the origins of the independent state legislature theory, see Ethan Herenstein & Thomas Wolf, *The Independent State Legislature Theory Explained*, BRENNAN CTR. FOR JUST. (June 27, 2023), https://www.brennancenter.org/our-work/research-reports/independent-state-legislature-theory-explained [https://perma.cc/ZPW8-NTAS].

192. Shapiro, *supra* note 3, at 145–75.

193. *Id.* at 145.

194. *Id.* at 152.

195. *Id.* at 155. As Shapiro explains, there is confusing dicta in *McPherson v. Blacker*, 146 U.S. 1 (1892). The dicta is contradictory and ends with

> "[w]hat is forbidden or required to be done by a State [in the Article II context] is forbidden or required of the legislative power under the state constitutions as they exist[,]" and that "[t]he [state's] legislative power is the supreme authority except as limited by the constitution of the State."

Shapiro, *supra* note 3, at 152–53 (quoting *McPherson*, 146 U.S. at 25).

before 2020, the ISLD was banished to the land of "fringe theories."[196]

The seeds for the idea were sown in the litigation we now just call *Bush v. Gore*. The Supreme Court decided a couple of cases around the presidential election between George W. Bush and Al Gore in 2000. First, in Palm Beach County, Florida, Gore requested a manual recount, and the Florida Supreme Court decided that its state had to accept the results of the recount—even if turned in late—because of the Florida Constitution's express provision guaranteeing the right to vote.[197] George Bush appealed that decision to the U.S. Supreme Court and argued that the Florida Supreme Court had improperly intruded on the authority that the federal Constitution gave to the Florida legislature.[198] The U.S. Supreme Court did not decide this issue—it remanded back to the state court for clarification[199]—but the seed had been sown.

Then, in the more famous Florida recount litigation to reach the Supreme Court, in which the Court shut down the recount in the 2000 election, Chief Justice William Rehnquist wrote a concurring opinion giving the argument about the independent state legislature some airtime.[200] He said, "the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance."[201] In the words of Shapiro, this was "literally unprecedented. Chief Justice Rehnquist cited no authority for it, and none appears to have existed at the time."[202]

Furthermore, as Shapiro explains, Chief Justice Rehnquist did not suggest that the state court could not restrict the state legislature—the question instead was whether they had construed their delegated authority properly.[203] And in any event, as Shapiro points out, only three Justices joined this concurrence (Justices Rehnquist, Scalia, and Thomas)—there

196. *See, e.g.*, Michael Sozan, *Supreme Court May Adopt Extreme MAGA Election Theory That Threatens Democracy*, CTR. FOR AM. PROGRESS (Sept. 26, 2022), https://www.americanprogress.org/article/supreme-court-may-adopt-extreme-maga-election-theory-that-threatens-democracy/ [https://perma.cc/M6VX-5WQP] ("This theory has long been considered to be on the fringes of conservative legal arguments and discredited by the Supreme Court for more than a century.").

197. Bush v. Palm Beach Cnty. Canvassing Bd., 531 U.S. 70, 73, 75–76 (2000).

198. *Id.* at 73.

199. *Id.* at 78.

200. Bush v. Gore, 531 U.S. 98, 112–13 (2000) (Rehnquist, C.J., concurring).

201. *Id.* at 113.

202. Shapiro, *supra* note 3, at 160.

203. *Id.*

was "nothing close to a majority" opinion endorsing the theory.[204]

After the dust settled on *Bush v. Gore*, the independent state legislature idea hibernated for about twenty years. Except for one failed effort in an Arizona independent redistricting case,[205] the independent state legislature theory/doctrine only reared its head again right after the 2020 election between Joe Biden and Donald Trump.[206] Because the 2020 election took place in the middle of a pandemic, several unprecedented issues were presented to states such as Wisconsin, Pennsylvania, and North Carolina involving the deadlines for receipt of absentee ballots (which of course were returned in record numbers because of COVID-19).[207]

Emergency applications were filed to the U.S. Supreme Court in the fall of 2020.[208] Although none were successful, several conservative Justices expressed an interest in the so-called ISLD.[209] Justices Thomas, Samuel Alito, and Neil Gorsuch relied on the Palm Beach County decision and Chief Justice Rehnquist's concurrence in *Bush v. Gore* to accuse state supreme courts of "rewriting state law" and stealing authority properly delegated to state legislatures alone.[210] And, in the Wisconsin litigation, Justice Kavanaugh wrote separately that "[t]he text of Article II means that 'the clearly expressed intent of the legislature must prevail' and that a state court may not depart from the state election code enacted by the legislature."[211]

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204. *Id.* at 162.

205. In 2015, a voter initiative in Arizona had transferred redistricting authority from the state legislatures and given it to an independent commission. Marisam, *supra* note 3, at 580–81 (discussing *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 813 (2015)). The Arizona legislature argued that this violated the word "legislature" in the U.S. Constitution's Elections Clause. *Id.* at 581. That argument was rejected by the U.S. Supreme Court, but four Justices dissented arguing that the word "legislature" in the Elections Clause referred to an institution and not a law-making process, generally. *Id.*

206. *See* Shapiro, *supra* note 3, at 162–63.

207. *Id.*

208. *Id.* at 144.

209. *Id.* at 175.

210. *See* Shapiro, *supra* note 3, at 142. Shapiro additionally claims that these Justices went beyond the theory endorsed by Chief Justice Rehnquist in 2000. *Id.* at 164–66.

211. Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 34 n.1 (2020) (Kavanaugh, J., concurring).

In June 2022, the U.S. Supreme Court granted cert in *Moore v. Harper*,[212] a case from North Carolina squarely presenting the independent state legislature theory / doctrine.[213] Since that time, scholars have taken up the call to unpack the history and logic of this claim.[214] All of that is critical reading. I ask a separate question: How did this idea germinate? Outside of election law circles most people had never heard of the independent state legislature theory until the cert grant in *Moore*.[215] How did this fringe theory become mainstream?

There are a couple of influential dynamics at work here. First, unlike the doctrines of the past discussed above, this would-be doctrine has been the subject of a concerted amicus campaign.[216] Amicus curiae briefs (Latin for "friend of the court") are briefs filed by outsiders to litigation to assist the judges or Justices deciding the case with questions the parties either do not or cannot discuss.[217]

A look at the amicus activity on the independent state legislature idea reveals how new this is. Using the search query *independent /3 legislature /3 (theory OR doctrine) and DA(aft 1999)* in Westlaw's briefs database (both state and federal), I found one brief from 2003, one brief from 2020, and thirty-two briefs filed in 2022.[218] Certainly, much of the surge in amicus activity must be reflective of attention to the issue caused by the *Moore* case. But that is not the entire story.

Many of those amicus briefs—filed in the Wisconsin, Pennsylvania, and North Carolina cases—are all filed by the

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212. 142 S. Ct. 2901 (2022) (mem.).

213. *Id.*

214. *See, e.g.*, Shapiro, *supra* note 3, 145–75; Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 ST. MARY'S L.J. 445, 503–32 (2022).

215. *See* Hansi Lo Wang, *This Conservative Group Helped Push a Disputed Election Theory*, NPR (Aug. 12, 2022, 5:01 AM), https://www.npr.org/2022/08/12/1111606448/supreme-court-independent-state-legislature-theory-honest-elections-project [https://perma.cc/GYQ8-V6AC] ("Over the past two years, what many in the legal world considered a fringe theory has become an increasingly hot topic.").

216. *See* Thomas Wolf & Gabriella Sanchez, *Friends of the Court Weigh in on the Independent State Legislature Theory*, BRENNAN CTR. FOR JUST. (Dec. 1, 2022), https://www.brennancenter.org/our-work/analysis-opinion/friends-court-weigh-independent-state-legislature-theory [https://perma.cc/FC3N-5JQ7] (surveying and reporting on the nearly seventy amicus briefs filed on the independent state legislature theory in *Moore v. Harper*).

217. Larsen, *The Trouble with Amicus Facts*, *supra* note 26, at 1761.

218. The thirty-four briefs are on file with the author.

same entity: the Honest Elections Project.[219] According to corporate records, and as reported by NPR, in 2020, the Honest Elections Project became a registered business alias for The 85 Fund, which itself is a tax-exempt group with ties to Leonard Leo—the Federalist Society's co-chairman.[220]

This group has been busy since 2020.[221] Part of its mission is to elevate the independent state legislature idea from theory to doctrine.[222] In the words of its executive director Jason Snead, "This is a priority for us…. While the Court briefly revisited the independent state legislature doctrine last Term, it has yet to 'make it clear' that the doctrine is our law." [223]

There is nothing, of course, particularly nefarious or illegal about political groups using the amicus tool to advance an agenda in the courts. It has happened for a long time and has grown in prevalence in recent years.[224] But it is certainly not the old-school way that a doctrine became a doctrine. This isn't Frankfurter publishing annual federal courts treatises and tweaking the narrative (as in the political question doctrine), or DOJ lawyers repeating a label as a government litigation strategy (as in *Chevron* doctrine).[225] Rather, these are motivated advocacy groups quickly seizing on a political moment and capturing that momentum to turn to the courts for legal change.

And it happened very quickly. Consider the speed at which these modern doctrines became doctrines: five years for the

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219. *See, e.g.*, Brief of Amicus Curiae for Honest Elections Project in Support of Petitioners at 1, Moore v. Harper, 142 S. Ct. 2901 (2022) (mem.) (No. 21-1271) [hereinafter Honest Elections Project Amicus Brief]; *see also* Wang, *supra* note 215 ("The Honest Elections Project's court filings . . . have . . . urg[ed] the justices to weigh in on [the independent state legislature theory].").

220. Wang, *supra* note 215.

221. *See id.* (explaining that the group has been filing several briefs and advocating on behalf of the theory since 2020).

222. *See* Honest Elections Project Amicus Brief, *supra* note 219, at 1 (referring specifically to theory as the "'independent state legislature' doctrine," and stating they are "devoted" to "fair, reasonable measures that [independent] legislatures put in place").

223. *See* Hansi Lo Wang, *This Conservative Group Helped Push a Disputed Election Theory*, NPR (Aug. 12, 2022, 5:01 AM), https://www.npr.org/2022/08/12/1111606448/supreme-court-independent-state-legislature-theory-honest-elections-project [https://perma.cc/GYQ8-V6AC] (quoting Jason Snead).

224. I have written quite a bit of this in the past. *See* Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 VA. L. REV. 1901, 1911 (2016); Larsen, *The Trouble with Amicus Facts*, *supra* note 26, at 1765–68.

225. *See* discussion *supra* Section III.A.

MQD and two years for the ISLD.[226] It is not hard to identify reasons for the speed. We have communicated legal ideas in a radically new way since the dawn of the Internet age.

First, the digital age has altered the way we conduct legal research. We no longer search by case analogy (think Shepardizing and headnotes); we now use word search boxes (think Googling) instead.[227] This change is subtle but powerful. Full text searching brings a new emphasis on quotes over holdings and "words over concepts."[228] Gone are the days of hunting for principles of law in a digest or Shepardizing a case for ones with similar facts.[229] The new digital mode of legal research leads directly to language in a decided case perfect for an argument in a new one. As Professor Fred Schauer puts it, "[I]t is not what the Supreme Court held that matters, but what it said."[230] This of course means searching for catchy doctrinal labels, citing doctrinal labels, and quickly cementing doctrinal labels.

Moreover, briefing at the Supreme Court has changed significantly as well. As I have documented in the past, there has been a tremendous amicus growth spurt and a new orchestrated change to how amici seek to influence the Court.[231] The way we conduct legal dialogue has changed even the need to brief the Court at all. There is now a cottage industry of virtual briefing (through podcasts, blogs, and Twitter) as a way to reach the Justices directly and outside the adversarial process.[232]

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226. For the MQD I am counting from the 2017 mention of the phrase by then-Judge Kavanaugh in *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 419 (2017) (Kavanaugh, J., dissenting), to the 2022 Supreme Court decision, *West Virginia v. EPA*, 142 S. Ct. 2587 (2022). For the ISLD I am counting from the 2020 election litigation to the 2022 certiorari grant in *Moore v. Harper*, 142 S. Ct. 2901 (2022) (mem.).

227. I made this same observation in Allison Orr Larsen, *Factual Precedents*, 162 U. PA. L. REV. 59, 74 (2013) [hereinafter Larsen, *Factual Precedents*].

228. Judith M. Stinson, *Why Dicta Becomes Holding and Why it Matters*, 76 BROOK. L. REV. 219, 253 (2010).

229. Larsen, *Factual Precedents*, *supra* note 227, at 228.

230. Frederick Schauer, *Opinions as Rules*, 53 U. CHI. L. REV. 682, 683 (1986) (reviewing BERNARD SCHWARTZ, THE UNPUBLISHED OPINIONS OF THE WARREN COURT (1985)).

231. *See generally* Larsen, *The Trouble with Amicus Facts*, *supra* note 26 (discussing and critiquing the increased use of amicus briefs); Larsen & Devins, *supra* note 224 (describing the history of and modern practice for producing amicus briefs).

232. *See* Fisher & Larsen, *supra* note 6, at 85, 87, 98, 99.

The net result is that the digital age has super-charged the development of legal arguments and clever legal labels—making the evolution of those ideas very fast and very open to all-comers. It reflects a crowdsourcing dynamic to judicial decision-making.

Indeed, judging by the increased rate of amicus filings on the independent state legislature doctrine recently (only 1 filed pre 2020 and 33 filed since then), the speed at which this doctrine has become front and center is rather remarkable.[233] Interestingly—and importantly—until very recently the ISLD was not mainstream even in conservative legal circles. The Cato Institute, for example, which is a right-leaning think tank co-founded by the Koch brothers, concluded that the independent state legislature theory would disrupt "settled law" and embraces a "long rejected" Constitutional interpretation.[234] And the list of amici refuting the doctrine at the Supreme Court in the *Moore v. Harper* case contains many familiar conservative names: former Fourth Circuit Judge Mike Luttig, Federalist Society Founder Steve Calabresi, and Republican Strategist Ben Ginsberg, to name a few.[235]

Instead, what appears to be a vocal few have seized an opportunity to push a wild-card theory into mainstream doctrine, all in the span of two short years. The chief proponents of the theory in the lower courts are Stephen Miller and John Eastman, a lawyer who advised President Trump in his attempt to retain power after the 2020 election.[236]

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233. *See* text accompanying notes 222–33 (discussing the number of amicus briefs filed on the topic and noting search terms used in the search).

234. Sozan, *supra* note 196 ("[T]he theory has long been considered to be on the fringes of conservative legal arguments."). *See, e.g.*, Andy Craig, *The Limits of Independent State Legislature Theory*, CATO INSTITUTE (July 6, 2022, 3:29 PM), https://www.cato.org/blog/limits-independent-state-legislature-theory [https://perma.cc/MSW2-R5WJ]; Andy Craig, *Ron Johnson's Unconstitutional Elections Scheme*, CATO INST. (Nov. 23, 2021, 11:21 AM), https://www.cato.org/blog/ron-johnsons-unconstitutional-elections-scheme [https://perma.cc/TC9Q-CAVK].

235. For a list of the amici in *Moore v. Harper*, see Wolf & Sanchez, *supra* note 216.

236. *See, e.g.*, Kyle Cheney, *Fighting Jan. 6 Committee, John Eastman Details How He Came Into Trump's Post-Election Fold*, POLITICO (Feb. 22, 2022, 8:49 PM), https://www.politico.com/news/2022/02/22/john-eastman-donald-trump-00010876 [https://perma.cc/ZC2K-AQ8U]; Andrew Chung & Lawrence Hurley, *Analysis: Republicans Ask U.S. Supreme Court to Curb State Courts' Election Oversight Role*, REUTERS (Mar. 2, 2022, 5:31 PM), https://www.reuters.com/world/us/republicans-ask-us-supreme-court-curb-state-courts-election-oversight-role-2022-03-02/ [https://perma.cc/ZS6K-C4GW]; *The Radical Legal Theory Threatening Fair Election*

These lawyers have recently brought litigation in states that have liberalized their election laws, and they rely on the ISLD to do so.[237] Using the name "America First Legal," the independent state legislature theory/doctrine has been part of a concerted partisan political strategy.[238] In the words of the Brennan Center, "Long relegated to the fringe of election law, the [ISLD] will soon be front and center."[239]

2. The Major Questions Doctrine (again)

Now consider the second newly anointed doctrine. While we have already traveled the road to the major questions doctrine through judicial decisions, now let us focus on the role of outsiders in generating the doctrine label. Remember that the phrase did not get judicial attention until used by then-Judge Kavanaugh in dissent on the D.C. Circuit in 2017.[240] Indeed, in the important Supreme Court precursors to the doctrine's 2022 anointment—*FDA v. Brown & Williamson*, *King v. Burwell*, and *Whitman v. American Trucking*—the phrase "major questions doctrine" or "major rules doctrine" was never used at all—either by the Justices or by advocates at oral argument.[241]

The phrase "major questions doctrine" was first used in a law review article in 2008, which was cited once in a dissent by a D.C. Circuit judge in 2012.[242] In 2013, the phrase appeared in several prominent law reviews, but it was still largely absent from the federal dockets.[243]

Administration, AM. OVERSIGHT (June 30, 2023), https://www.americanoversight.org/investigation/the-radical-legal-theory-threatening-fair-election-administration [https://perma.cc/2UDN-RM8R].

237. *See* Nick Corasaniti & Alexandra Berzon, *Lawyers Who Advanced Trump's Election Challenges Return for Midterms*, N.Y. TIMES (Nov. 2, 2022), https://www.nytimes.com/2022/11/02/us/politics/election-lawyers-trump-midterms.html [https://perma.cc/5B2S-9EUQ].

238. *See The Radical Legal Theory Threatening Fair Election Administration*, *supra* note 236.

239. Herenstein & Wolf, *supra* note 191.

240. U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 417–18 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

241. For elaboration, see *supra* Part I.

242. Coal. for Responsible Regul., Inc. v. EPA, No. 09–1322, 2012 WL 6621785, at *6 (D.C. Cir. Dec. 20, 2012) (Brown, J., dissenting from the denial of reh'g en banc).

243. For examples of early scholarly use of the phrase "major questions doctrine," see generally Gluck & Bressman, *supra* note 52; Leske, *supra* note 7; Richardson, *supra* note 52; Walker, *supra* note 45. More recently scholars have noticed a change in the major questions doctrine. *See* Sunstein, *supra* note 7, at 477–78, 480; Deacon & Litman, *supra* note 2, at 1023–49.

In 2015–16, the word "doctrine" to describe major questions quickly found its way to the blogs (including SCOTUSblog) and Twitter, being used particularly by conservative scholars such as Professors Erin Hawley, Josh Blackman, and Ilya Shapiro, and conservative entities such as the CATO institute.[244] Perhaps not coincidentally, this timing coincided with the election of President Trump, the rise to prominence of Steve Bannon, and their endorsement of the "deconstruction of the administrative state."[245]

Although Chief Justice Roberts did not use the phrase "major questions doctrine" in his 2015 *King v. Burwell* decision about the tax exemptions in the Affordable Care Act, outsiders were quick to attach the label shortly after the decision came down.[246] In the words of Professor Kevin Leske in 2015, "After over a decade of hibernation, the United States Supreme Court has awoken the 'major questions' doctrine, which has re-emerged in an expanded form."[247]

Conservative organizations quickly began adopting the doctrine label and disseminating it widely. The phrase MQD was used in the annual Federalist Society conference in 2016 and, before that, by a fellow for the conservative-leaning AEI in

244. *See* Hawley, *supra* note 45 ("Further, while the King Court seemed to breathe new life into the major questions doctrine, the idea that courts should interpret statutes to require specific delegations for significant questions is nothing new."); Josh Blackman (@JoshMBlackman), TWITTER (Nov. 22, 2016, 6:07 PM), https://twitter.com/JoshMBlackman/status/801200407200546817 [https://perma.cc/F3YF-P5FJ]; Josh Blackman (@JoshMBlackman), TWITTER (Nov. 8, 2019, 3:21 PM), https://twitter.com/JoshMBlackman/status/1192899946208464898 [https://perma.cc/3UNL-H7JE] ("At long last, DOJ identifies the 'constitutional defects' in DACA. The answer sounds in the nondelegation and major questions doctrine. @ishapiro and I discussed these themes in our @Cato amicus brief: https://reason.com/2019/09/11/daca-major-questions-gundy-and-the-non-delegation-doctrine/."); Josh Blackman (@JoshMBlackman), TWITTER (Dec. 15, 2017, 6:18 PM), https://twitter.com/JoshMBlackman/status/941809751222116352 [https://perma.cc/Y56X-3LWG] ("Eventually, I will have to dust off brief [sic] I wrote in Zubik v. Burwell. https://scribd.com/document/295269074/Zubik-v-Burwell-Amicus-Brief-Cato-Institute. Under the major questions doctrine, the agencies lacked the authority to pick and choose which religious groups could get exemptions.") [hereinafter Blackman, Tweet Three].

245. *See* Phillip Rucker & Robert Costa, *Bannon Vows a Daily Fight for Deconstruction of the Administrative State*, WASH. POST (Feb. 23, 2017, 9:28 PM), https://www.washingtonpost.com/politics/top-wh-strategist-vows-a-daily-fight-for-deconstruction-of-the-administrative-state/2017/02/23/03f6b8da-f9ea-11e6-bf01-d47f8cf9b643_story.html [https://perma.cc/DH2J-DR52].

246. Leske, *supra* note 7, at 480.

247. *Id.*

2015.[248] The Cato Institute—having once referred to the same argument as a canon of statutory interpretation—started routinely deploying the phrase "major questions doctrine" in its amicus briefs by 2018.[249] And other conservative groups—the Pacific Research Institute and the Heritage Foundation, for example—adopted the same strategy, using "major questions doctrine" in amicus briefs where they once had applied the same argument as a canon of interpretation or limitation to *Chevron*.[250]

Even critics started to use the MQD phrase at this point. In 2017, the American Constitution Society used the MQD label to warn about a "new approach" in the conservative agenda to "intensify[] [the] war on regulation."[251] And Professor Christopher Walker—Chair of the American Bar Association's Section of Administrative Law and Regulatory Practice and Member of the Administrative Conference of the United States—used the "major-questions doctrine" phrase when

248. The Federalist Society, *supra* note 14, at 28:24 (debating about FCC net neutrality and the "major questions doctrine"). In 2015, following the decision in *King v. Burwell*, Adam White (Senior Fellow at AEI, a group aligned with conservatism) wrote an article for SCOTUSblog discussing the ways in which the opinion may have reinvigorated the major questions doctrine and positing that "[the Court's] promotion of the major questions doctrine, as a matter of administrative law, may prove to be of a great benefit in other cases." White, *supra* note 43.

249. Blackman, Tweet Three, *supra* note 244 ("Eventually, I will have to dust off brief [sic] I wrote in Zubik v. Burwell. https://scribd.com/document/295269074/Zubik-v-Burwell-Amicus-Brief-Cato-Institute Under the major questions doctrine, the agencies lacked the authority to pick and choose which religious groups could get exemptions. The IFR comes close to complying with that doctrine."); *see, e.g.*, Brief for the CATO Inst. as Amicus Curiae Supporting the Markle Interests Petition for Certiorari at 9, Weyerhaeuser Co. v. U.S. Fish & Wildlife Service, 139 S. Ct. 361 (2018) (No. 17-71) ("Several of this Court's precedents have confirmed this 'major questions' doctrine over the past 25 years.") [hereinafter *Weyerhaeuser* Amicus Brief].

250. *Compare* Brief of Pac. Rsch. Inst. & CATO Inst., et al. as Amici Curiae in Support of Petitioners at 12–13, King v. Burwell, 576 U.S. 473 (2015) (No. 14-114) ("There is no reason to believe Congress gave the IRS the power to grant federal tax credits to those purchasing health coverage through federal Exchanges. . . . [T]he issue's political sensitivity cuts against presuming a delegation here—not in favor of it."), *with Weyerhaeuser* Amicus Brief, *supra* note 249, at 9 ("Several of this Court's precedents have confirmed this 'major questions' doctrine over the past 25 years[.]"), *and* Brief of the CATO Inst. & Mountain States Legal Found. as Amici Curiae in Support of Petitioner at 2, West Virginia v. EPA, 142 S. Ct. 2587 (2022) (Nos. 20-1530, 20-1531, 20-1778, 20-1780) ("This interpretive principle is known as the major questions doctrine.").

251. Steinzor, *supra* note 15.

opining that *King v. Burwell* "seems like a judicial power grab over the Executive in the modern administrative state."[252]

Things really got interesting when the MQD was elevated in prominence by then-Judge Kavanaugh who used the phrase in his 2017 dissent on the D.C. Circuit in a net neutrality case.[253] That moment seems to have changed the game.

Following 2017, there was a boon of scholars, bloggers, journalists, and Twitter users freely calling the MQD a doctrine.[254] And, the phrase even made it into Justice Kavanaugh's Supreme Court confirmation hearing in 2018.[255] At that hearing, Senator Klobuchar asked Kavanaugh whether the "major questions doctrine" was "something else that you came up with."[256]

By December 2021–January 2022, the genie was out of the bottle. After the Supreme Court decisions (coming from the shadow docket) in the OSHA vaccine mandate cases, and once cert had been granted in *West Virginia v. EPA*, virtually

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252. Christopher J. Walker, *Courts Regulating the Regulators*, REGUL. REV. (Apr. 25, 2016), https://www.theregreview.org/2016/04/25/walker-courts-regulating-the-regulators/ [https://perma.cc/UD58-ANMY].

253. *See* U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 417 (D.C. Cir. 2017) (Kavanaugh, J., dissenting); *see also* Kavanaugh, *supra* note 7, at 2152 (explaining the basis for then-Judge Kavanaugh's rationale behind the MQD).

254. *See, e.g.*, Daniel Lyons (@ProfDanielLyons) TWITTER (Nov. 3, 2017, 12:23 PM), https://www.twitter.com/ProfDanielLyons/status/926485015269126149 [https://perma.cc/7KXY-QK6J] ("1 difference is that major questions doctrine wasn't a thing when Brand X was decided. DC cir bound, but SCOTUS thinking re Chev may shift."); Josh Chafetz (@joshchafetz) TWITTER (June 21, 2018, 1:22 PM), https://twitter.com/joshchafetz/status/1009849087276003328?s=20 [https://perma.cc/FW65-6UPT] ("That was a theme of this very brief piece I wrote a couple of years ago on the so-called 'major questions doctrine.' I think it has only accelerated since then. https://t.co/myhx1NT0Zw"); Cheryl Bolen, *Kavanaugh, Wary of* Chevron *Rule, Could Flip Administrative Law*, BLOOMBERG L. (July 9, 2018, 9:11 PM), https://news.bloomberglaw.com/us-law-week/kavanaugh-wary-of-chevron-rule-could-flip-administrative-law [https://perma.cc/72NJ-82LX]. For use of the phrases in case law around this time period, see *supra* note 38.

255. *Supreme Court Nominee Brett Kavanaugh Confirmation Hearing, Day 2, Part 3*, *supra* note 54, at 17:35. *See* Ellen M. Gilmer, *Kavanaugh Tackles Doctrine That Loomed Over Climate Plan*, ENERGYWIRE (Sept. 6, 2018, 7:23 AM), https://www.eenews.net/articles/kavanaugh-tackles-doctrine-that-loomed-over-climate-plan/ [https://perma.cc/FA9K-4F3G]; *see also* Chris Tavenor, *Let's Talk About the Most Important Line From Kavanaugh's Confirmation Hearing*, OHIO ENV'T COUNS.: BLOG (Sept. 10, 2018), https://theoec.org/lets-talk-about-the-most-important-line-from-kavanaughs-confirmation-hearing/ [https://perma.cc/K4FD-RJG8] (declaring Kavanaugh's statements regarding the MQD as the most important during his confirmation hearings).

256. *Supreme Court Nominee Brett Kavanaugh Confirmation Hearing, Day 2, Part 3*, *supra* note 54, at 17:08.

everyone in all forms of modern legal analysis—podcasts, Twitter, blogs, and traditional news outlets—used the "major questions doctrine" label.[257] Whether the purpose was to criticize or applaud it, the MQD had taken over and was treated as if it had always been a thing.

IV. WHY DOES IT MATTER? THE POWER OF THE LABEL "DOCTRINE"

Is all this just semantics? If a legal case will come out the same way, who cares whether the rationale is justified as a doctrine or not? What power comes from that word "doctrine"?

In short, a lot. As psychologists and linguistic scholars have known for years, "[g]iving something a name makes it real."[258] Even Aristotle "recognized that giving names to previously nameless things is our best means of 'getting hold of something fresh.'"[259] And Chief Justice Roberts once quipped in an oral argument (when talking about something called the "*Blackledge–Menna* doctrine"), "[I]t's, you know, it's obvious the key word is doctrine. It suggests to me that there's more covered by that than just *Blackledge* and *Menna*."[260]

Naming a concept has power, even if the idea itself has been around for a while. Indeed for this reason the medical community wrings its hands over naming a disease—particularly a mental illness—because of the effect that the naming act has on the number of people who feel symptoms or the significance given to those symptoms by the medical

257. *See, e.g.*, Frank Garrison & Paige Gilliard, *The Supreme Court Should Rebuke the EPA's Unconstitutional Lawmaking*, THE HILL (Feb. 21, 2022, 7:00 AM), https://thehill.com/opinion/judiciary/594996-the-supreme-court-should-rebuke-the-epas-unconstitutional-lawmaking/ [https://perma.cc/K25T-V3ML]; The Ezra Klein Show, *Transcript: Ezra Klein Interviews Jamal Greene*, N.Y. TIMES (Feb. 4, 2022), https://www.nytimes.com/2022/02/04/podcasts/transcript-ezra-klein-interviews-jamal-greene.html [https://perma.cc/6GNX-B3DW]; Linda Greenhouse, *What the Supreme Court's Vaccine Case Was Really About*, N.Y. TIMES (Jan. 17, 2022), https://www.nytimes.com/2022/01/17/opinion/supreme-court-vaccine-osha.html [https://perma.cc/L6F8-XCDY].

258. Susan Rako, *The Power of Naming*, PSYCH. TODAY (Feb. 13, 2018), https://www.psychologytoday.com/us/blog/more-light/201802/the-power-naming [https://perma.cc/EG6L-HAYB]; *see also* Bryan Garner, *The Power of Naming*, 101 A.B.A. J. 24, 24 (2015) ("In some primitive cultures, names are thought to possess magical powers.").

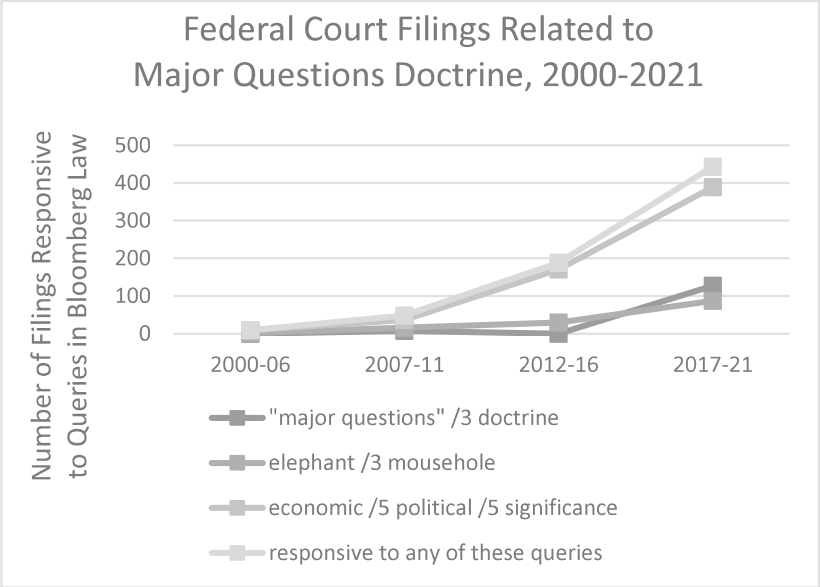
259. David E. Leary, *Naming and Knowing: Giving Forms to Things Unknown*, 62 SOC. RSCH. 267, 268 (1995).

260. Transcript of Oral Argument at 41, Class v. United States, 137 S. Ct. 798 (2018) (No. 16-424).

profession.[261] Similarly, "becoming a doctrine" in law matters—it matters to litigation strategies, to the development of law in the lower courts, and to the debate over the legitimacy of judicial review generally.

A. *Litigation Strategy*

The most quantifiable effect of the doctrine label can be seen in litigation filings. Return to the MQD as an example. As one might expect, the phrase "major questions doctrine" in briefs has spiked dramatically in the last five years as the phrase itself has caught on in legal circles.[262] Indeed, as depicted in the below chart of briefs filed in federal cases, the phrase was barely used before 2017 but has been used in briefs 130 times in the past five years after then-Judge Kavanaugh articulated the phrase in his 2017 D.C. Circuit dissent.[263]



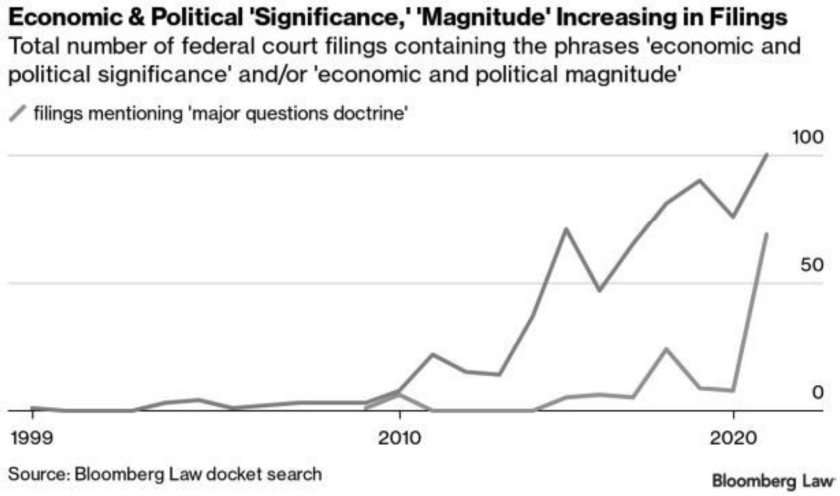
261. *See, e.g.*, Daniel Barron, *Should Mental Disorders Have Names?*, SCI. AM. (Feb. 19, 2019), https://blogs.scientificamerican.com/observations/should-mental-disorders-have-names/ [https://perma.cc/JY3U-MTVY] ("The DSM lacks 'validity,' they say. A diagnosis based on a combination of symptoms is, they might argue, like a constellation of stars—sure, you could reliably identify the Big Dipper, but no one would argue that the Big Dipper is a valid interstellar system. It's just a name."); Katrina Karkazis & Ellen Feder, *Naming the Problem: Disorder and their Meanings*, 372 LANCET 2016, 2016 (2008) (arguing that the name of an illness "can convey subtle and not so subtle ideas about normal and abnormal, good and bad").

262. *See supra* Part I.

263. *See* U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 419–21 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

Interestingly, also depicted in the above chart, it is not just the actual phrase "major questions doctrine" that is now all the rage in court briefs. Following the 2017 mention by then-Judge Kavanaugh, filings mentioning related phrases from earlier cases saw a dramatic spike as well (more than double).

Similarly in a 2022 study of federal docket filings, Bloomberg Law searched for the phrases "economic and political significance" or "economic and political magnitude"—language that comes straight from the *Brown & Williamson* tobacco decision in 2000 (the case that sowed the seeds of the MQD but was written before the word "doctrine" was attached to the concept).[264] Theoretically, this language could have been used in briefs all along for the past twenty-five years. But instead, as the Bloomberg chart reflects (reproduced below), the use of these pre-MQD phrases in docket filings has "drastically increased in recent years."[265]



Putting these two charts together, this means not only has the "major questions doctrine" been employed by lawyers with dramatically increased frequency over the past five years, but something else is also happening. It is not just language that is changing. Once the word "doctrine" was deployed from the bench in 2017 to describe the concept that Congress does not lightly delegate major questions to administrative agencies,

264. Erin Webb, *The Significance Behind the Major Questions Quandary*, BLOOMBERG L. (Feb. 28, 2022), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-the-significance-behind-the-major-questions-quandary [https://perma.cc/B28H-GZBJ].

265. *Id.* The chart reproduced also comes from the Bloomberg article in note 264.

lawyers are quick to see examples of the phenomenon everywhere—citing cases they could have cited all along, but which are now more salient and quickly come to mind.

A similar effect occurs in psychiatry. Mental illnesses and disorders are listed and defined in the "Diagnostic and Statistical Manual of Mental Disorders (DSM), which has been deemed the 'bible' of mental health."[266] The DSM is updated periodically, and every new version lists disorders that were not labeled disorders previously and periodically removes disorders as well.[267]

Although the naming of mental health illnesses carries great advantages in disseminating best practice for medical treatments, it also carries significant risks—specifically the spawning of false positives. The concern is that once a set of symptoms is labeled a "disease" or a "disorder," the naming act itself will generate more patients with those symptoms.[268] Indeed, this concern is born out in the data. As each edition of the DSM adds new disorders, the rate of Americans diagnosed with mental illness has steadily ticked upward—a pattern that many see as more than coincidental.[269] In the words of one doctor who steered the DSM-IV task force: "Psychiatry should

266. Cynthia M.A. Geppert, *Is the DSM the Bible of Psychiatry?*, PSYCHIATRIC TIMES (Dec. 1, 2006), https://www.psychiatrictimes.com/view/dsm-bible-psychiatry [https://perma.cc/MGC5-EJF6].

267. The definition section in the DSM disclaims being able to define a mental disorder with precision, but nonetheless states that "each of the mental disorders is conceptualized as a clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is associated with present distress." *See* D. J. Stein et al., *What is a Mental/Psychiatric Disorder? From DSM-IV to DSM-V*, 40 PSYCH. MED. 1759, 1759–60 (2010); *see also Diagnostic and Statistical Manual of Mental Disorders*, AM. PSYCHIATRIC ASS'N, https://www.psychiatry.org/psychiatrists/practice/dsm [https://perma.cc/R3J5-5HB5] (explaining how the DSM is updated).

268. *See* Robin S. Rosenberg, *Abnormal is the New Normal: Why Will Half of the U.S. Population have a Diagnosable Mental Disorder?*, SLATE (Apr. 12, 2013, 8:00 AM), https://slate.com/technology/2013/04/diagnostic-and-statistical-manual-fifth-edition-why-will-half-the-u-s-population-have-a-mental-illness.html [https://perma.cc/2T3V-EF53].

269. *Id.* ("The increasing prevalence is in part because each edition of the DSM has increased the overall number of disorders. The DSM-I, from 1952, listed 106; the DSM-III, from 1980, listed 265, and the . . . DSM-IV has 297."); *see also* Lorna Wing, *Reflections on Opening Pandora's Box*, 35 J. AUTISM & DEVELOPMENTAL DISORDERS 197, 199 (2005) https://doi.org/10.1007/s10803-004-1998-2 [https://perma.cc/WRE7-WC3B] (discussing the increase in autism diagnoses following the inclusion of Asperger's syndrome in the DSM-IV).

not be in the business of inadvertently manufacturing mental disorders."[270]

When applied to the law, this logic has at least equivalent power. The strategic use of labels and narratives is not lost on the astute attorney.[271] Lawyers are incentivized and trained to issue spot and to look for winning arguments. Give them a new tool to win for their client—say, the MQD—and they will start to see it as relevant everywhere.[272]

Add to that incentive the fact that lawyers are trained in law school to equate "doctrinal" with a hard and fast rule, or as it is known "black letter law."[273] One memorizes doctrines for the bar exam; one plays with ideas and arguments in a seminar. Therefore, a good lawyer is more likely to make an argument under a "doctrine" as opposed to some other canon of construction or the like because of an assumption that courts generally will take it more seriously and lend it greater consideration.

The psychiatry analogy is once again useful: the diagnosing physician will look to make a DSM label fit a particular patient to satisfy an insurance company's requirements—the label has power and real practical consequences.[274] The same is true in the law. The label doctrine connotes certain directions to courts—and litigants know this. So good lawyers will use the word repeatedly and on purpose.

Thus, the rewards and power of "becoming a doctrine" are known to everyone—incentivizing those with an agenda to deploy the word strategically. This explains the litigation spike

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270. Allen Frances, *A Warning Sign on the Road to DSM-V: Beware of Its Unintended Consequences*, 26 PSYCHIATRIC TIMES 3, 8 (2009), https://www.psychiatrictimes.com/view/warning-sign-road-dsm-v-beware-its-unintended-consequences [https://perma.cc/8PLT-8YSG].

271. Garner, *supra* note 258, at 25 ("For the practicing lawyer, this is a powerful lesson. If you represent American Airlines, do you refer to your client in a brief as 'AA,' 'the Company' or 'American'? American, if you're astute.").

272. There is a name for this phenomenon generally: "frequency illusion" is a cognitive bias that occurs when "a concept or thing you just found out about suddenly seems to crop up everywhere." *There's a Name for That: The Baader-Meinhof Phenomenon*, PAC. STANDARD (June 14, 2017), https://psmag.com/social-justice/theres-a-name-for-that-the-baader-meinhof-phenomenon-59670 [https://perma.cc/57KW-749Y].

273. *See* Wells, *supra* note 4, at 554, 618.

274. HERB KUTCHINS & STUART A. KIRK, MAKING US CRAZY: DSM: THE PSYCHIATRIC BIBLE AND THE CREATION OF MENTAL DISORDERS, 12 (1997) (making this argument in the psychiatry context).

reflected in the charts above.[275] The increase is not just because the MQD makes major questions more visible, it is because the formation of the doctrine as a tool becomes quite attractive for the savvy lawyer trying to win.

We also see the flip side of this dynamic in litigation strategy. In the *West Virginia v. EPA* oral argument, only one side persistently used the word "doctrine" when referring to the major questions argument—the side seeking to have the concept invoked.[276] The lawyers defending the EPA, by contrast, avoided the word carefully—instead referring to the concept as "a canon," "interpretative principle," or "interpretative exercise," even when responding to conservative Justices' explicitly using the word "doctrine" to frame their questions.[277]

Litigation strategists are savvy—they know the power of the word "doctrine" and they will use it (or not use it) accordingly.

B. *Law Development in Lower Courts*

Not only does the word "doctrine" affect the number of claims filed to courts (the front end), but it also influences how courts must deal with those claims (the back end).

A well-entrenched "opinion-writing norm[]," as Sam Bray helpfully describes, is that "a judge will discuss, and dispose of, each argument the parties advance."[278] But not all arguments are treated the same way, and the word "doctrine" when attached to an argument affects the hierarchy. Put simply, a legal argument detached from the word doctrine (call it a canon, or just an idea) can be—and is often—dismissed with the back of the judicial hand, maybe even relegated to the footnotes. Rejecting a doctrine, however, is a different mental exercise: it requires tests, steps, and elaboration—more than just a footnote.[279] Elevating a concept to a doctrine, therefore, changes

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275. *See supra* Section IV.A, chart 1 (illustrating the increased usage of the major questions doctrine in filings after Justice Kavanaugh's usage of the doctrine).

276. *See, e.g.*, Transcript of Oral Argument at 40, West Virginia. v. EPA, 142 S. Ct. 2587 (2022) (No. 20-1530) (Mr. Roth: "That immense authority cannot be reconciled with the statutory text and structure, let alone with the major questions doctrine.").

277. *See, e.g.*, *id.* at 34 (responding to Justice Amy Coney Barrett asking about a "doctrine" using the word "canon"); *id.* at 81–82 (downplaying the weight of MQD as a "doctrine," instead referring to it as an "interpretive principle" or an "interpretive exercise").

278. Bray, *supra* note 4, at 148.

279. *Id.*

the way that concept is treated in the courts and developed over time.

Before 2022, for example, the use of the major questions idea/canon/*Chevron* exception was amorphous and spotty. Recall the words of the D.C. Circuit in 2017 "determining whether a rule constitutes a major rule sometimes has a bit of a 'know it when you see it' quality."[280] Or, in the words of a district court judge writing around the same time, the MQD was a bit of a "wild card."[281]

Now things are different. After the Supreme Court's use of the word "doctrine" to anoint the MQD in 2022, courts will have to confront the argument in a new way. Ideas can be bandied about haphazardly, but doctrines require tests.[282] This new reality was anticipated in Justice Kagan's dissent in *West Virginia*: "Apparently, there is now a two-step inquiry."[283] She explained that in the old days—before the MQD was the MQD and when it was just an argument of statutory interpretation—the Court "ha[d] done statutory construction of a familiar sort . . . without multiple steps, triggers or special presumptions . . . ."[284]

Justice Kagan is on to something here. Regardless of one's position on the merits of the MQD, what she is talking about are the effects of labeling it so—what happens when a legal idea crosses from a law school seminar to a doctrinal class.[285] Now no longer a wild card or a one-off argument that courts can either deal with or not as they see fit, lower courts after 2022 are going to have to decide "how major is major" or whether a case presented is "extraordinary" and how "clear" is the "clear" Congressional authorization.[286]

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280. U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 423 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

281. Conservation L. Found., Inc. v. Longwood Venues & Destinations, Inc., 422 F. Supp. 3d 435, 455 n.13 (D. Mass. 2019), *vacated*, No. 20-1024, 2020 WL 6111192 (1st Cir. Oct. 14, 2020).

282. Bray, *supra* note 4, at 148.

283. West Virginia v. EPA, 142 S. Ct. 2587, 2634 (2022) (Kagan, J., dissenting).

284. *Id.*

285. *Id.* at 2633–34.

286. The implications of these doctrinal questions going forward have not been lost on scholars. *See* Deacon & Litman, *supra* note 2, at 1036; Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2023 (2021). And one can imagine the same challenge facing lower courts should the Supreme Court announce the arrival of the "independent state legislature doctrine" in the future. What tests will

The journey to doctrine, therefore, brings significant change to the work of the lower federal courts. Not only is the quantity of the MQD arguments pressed to them changing, but the nature of those arguments—and the required response—has also changed.[287] Like a baton being passed from one court to another, to be effective, a doctrine cannot be a "wild card" or a "know it when you see it" concept.[288] A doctrine needs to be able to be replicated and taught and subject to principled application. Doctrinizing a concept, in other words, will change it, compress it, and simplify it.

An analogy to information theory is helpful here.[289] In information theory, data compression is the process of encoding information using fewer bits than the original representation.[290] The reason for doing so (as anyone who has downloaded music to a phone can tell you) is for ease of transfer.[291] But with this transfer comes a loss of data, almost inevitably.[292] Most forms of transmission create loss—for example, not all audio frequencies transfer when compressing raw audio to an MP3 file.[293] It is an inevitable byproduct that comes with compression.[294]

The same is true when a legal idea earns "doctrine status" and is henceforth discussed by shorthand. The compression, if you will, loses context and texture. When a court or an advocate reasons by analogy to precedents—such as to *Brown & Williamson* or *King v. Burwell*—it requires an understanding of context and an evaluation of similarities and differences between the cases.[295] Using the shorthand instead—the "major questions doctrine applies here"—necessarily misses that context and texture. The MQD is a thing in and of itself now; the similarities and differences to the cases that came before

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need to be formed to determine when a state court or state Constitution has truly vested power away from its legislature to determine federal elections?

287. Deacon & Litman, *supra* note 2, at 1036.

288. *Id.*

289. No doubt what follows is a vast oversimplification. For more on information theory (but also a lot of math), see generally C. E. Shannon, *A Mathematical Theory of Communication*, 27 BELL SYS. TECH. J. 379 (1948).

290. Omar Adil Mahdi et al., *Implementing a Novel Approach an Convert Audio Compression to Text Coding via Hybrid Technique*, 9 INT'L J. OF COMPUT. SCI. ISSUES 53, 53 (2012).

291. *Id.*

292. *See* Shannon, *supra* note 289, at 379.

293. Mahdi et al., *supra* note 290, at 54.

294. *Id.*

295. Walker, *supra* note 45, at 2.

lose significance because they are not included with the transfer. This is all a consequence that comes from compressing an idea into a label—nuance is lost and the law itself changes.

And that consequence isn't new. Remember the political question doctrine origin story? Part of the history Tara Grove unearthed was that in labeling and documenting the political question doctrine, Frankfurter and company changed it.[296] Or recall that *Chevron* was not always *Chevron* (indeed the author of the decision did not think he was articulating anything new); the two-step doctrine that every administrative law student learns became bread and butter of lower court decision-making but only after it earned doctrine status years later.[297]

To be sure, there is value in "doctrinizing"—just like there is value in naming a disease or compressing data. My point is not to denigrate the importance of becoming a doctrine but to call attention to its practical consequences. Because of the nature of judicial decision-making, calling an idea a doctrine changes the way that argument will be evaluated. The "steps, triggers or special presumptions" Justice Kagan complained about in her *West Virginia v. EPA* dissent come with doctrine territory.[298] Thus, doctrinizing a concept will not only elevate its prominence; it will alter it.

C. *Doctrinizing as a Connection to Political Movements*

Finally, there is another significant consequence of becoming a doctrine that is harder to articulate but ironically perhaps the most intuitive. Calling a concept a "doctrine" is a way to usher in legal change pushed by politics. Or another way to think about it, when fueled by outsiders and political actors, "doctrinizing" operationalizes what is commonly called popular constitutionalism.[299]

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296. Grove, *supra* note 16, at 1912 ("Somewhat remarkably, however, and despite the lack of change in the case law, much of the legal community gradually came to see the 'political question doctrine' as a device that would prohibit federal courts from ruling on certain constitutional issues. Although there may be multiple explanations for this shift, I suggest that one important influence was the academic discourse about the doctrine.").

297. Merrill, *supra* note 152, at 275 ("There is no evidence that Justice Stevens understood his handiwork in *Chevron* as announcing [a] fundamental change[].").

298. West Virginia v. EPA, 142 S. Ct. 2587, 2634 (Kagan, J., dissenting).

299. It is not my project to wade into the debate over the definition of "popular constitutionalism," as there are already many voices doing so. *See, e.g.*, Mark Tushnet, *Popular Constitutionalism as Political Law*, 81 CHI.-KENT L. REV. 991, 999–1001 (2006) ("[P]opular constitutionalism does not offer crisp analytic categories.");

Professors Mark Rosen and Christopher Schmidt wrote about the connection between legal rhetoric and political change when they addressed the "broccoli argument" and how it almost dismantled the Affordable Care Act (ACA) in 2012.[300] The broccoli argument was a version of a slippery slope claim pressed by lawyers challenging the individual mandate of the ACA: if Congress can do this, then Congress can make you eat broccoli.[301] As is well known now, answering the broccoli argument became mission critical for the Court: "Five justices cited the government's inability to provide a satisfying answer to the broccoli hypothetical as a justification for creating a novel limitation on Congress's Commerce Clause powers," and the dissent even acknowledged the argument's force by dubbing it "the broccoli horrible."[302]

Rosen and Schmidt say that the reason this argument got so much play inside the Court had everything to do with conversations happening outside the Court: "By the time the case reached the Supreme Court, a robust public engagement with the constitutional issues had already developed. This engagement was the product of the Tea Party movement, which was committed to a belief that the ACA violated core constitutional principles."[303] Interestingly, they say, the story of the broccoli hypothetical has everything to do with "popular constitutionalism" and an "extrajudicial constitutional moment."[304] There was, in their words, a "constitutional battle taking place outside the courts . . . ."[305] The broccoli argument "encapsulated popular anxieties about the liberty costs of the ACA . . . ."[306]

Erwin Chemerinsky, *In Defense of Judicial Review: The Perils of Popular Constitutionalism*, 2004 U. ILL. L. REV. 673, 675–76 (2004) (criticizing the lack of "precise definition of the concept" of popular constitutionalism). For my purposes I will use Professor Larry Kramer's original definition: "[A] system [in which the people assume] active and ongoing control over the interpretation and enforcement of constitutional law." Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CALIF. L. REV. 959, 959 (2004).

300. Mark D. Rosen & Christopher W. Schmidt, *Why Broccoli? Limiting Principles and Popular Constitutionalism in the Health Care Case*, 61 UCLA L. REV. 66, 100 (2013).

301. *Id.* at 69.

302. *Id.* at 70.

303. *Id.* at 71.

304. *Id.*

305. *Id.* at 119.

306. *Id.*

What the broccoli argument accomplished was to connect this robust public discourse to "the language of court-made doctrine."[307] Because "[c]onstitutional doctrine can be technical and abstruse," there is often a disconnect between a political movement seeking change in the popular discourse and the way lawyers and judges can operationalize that change into law.[308]

Creation of doctrine bridges that gap. And the modern examples discussed above fit this pattern precisely. Conservatives say that the MQD is a response to an administrative state that has grown beyond constitutionally permissible bounds, and the ISLD is a reaction to state supreme courts who are inappropriately (and unconstitutionally) messing with elections.[309] These are arguments actively bubbling up through popular discourse in conservative circles. The "deconstruction of the administrative state" became a rallying cry connected with Steve Bannon, advisor to former President Trump in and around 2016.[310] And the "stolen election" claims about the 2020 election—what motivated the renewed interest in the ISLD—of course, were started by President Trump and at one point, were believed by about sixty percent of Republicans.[311]

Regardless of one's evaluation of the claims behind the new doctrines, my point is that the political movement cannot get to legal change by courts without the word doctrine. And there is a facet of this dynamic that is unique to conservatives. Deeply baked in the conservative legal movement is an avulsion to "judicial activism," loosely defined as using courts to advance policy preferences. If you want change from courts without being called an activist, you need doctrine—something external

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307. *Id.* at 113.

308. *Id.*

309. *See, e.g.*, Peter Wallison, *Supreme Court's Embrace of 'Major Questions' Could Rein In Administrative State*, WASH. EXAM'R (Sept. 19, 2022 12:16 AM), https://www.washingtonexaminer.com/restoring-america/equality-not-elitism/supreme-courts-embrace-of-major-questions-could-rein-in-administrative-state [https://perma.cc/M547-YC4D] ("The underlying policy of the major questions doctrine is as clear as the Constitution itself: Under the Constitution's separation of powers, Congress must make the laws, not an administrative agency."). *See generally* Michael T. Morley, *The Independent State Legislature Doctrine*, 90 FORDHAM L. REV. 501 (2021) (explaining the justifications for the ISLD).

310. Rucker & Costa, *supra* note 245.

311. *See* Mark Murray, *Poll: 61% of Republicans Still Believe Biden Didn't Win Fair and Square in 2020*, NBC NEWS (Sept. 27, 2022, 12:21 PM), https://www.nbcnews.com/meet-the-press/meetthepressblog/poll-61-republicans-still-believe-biden-didnt-win-fair-square-2020-rcna49630 [https://perma.cc/8W7R-YHVG].

to the judge's own preference and something with independent force.

Seen this way, doctrine generation is a way to empower formalists. There is a purported objectivity that comes with becoming a doctrine—a way that enables a judge to say, "Don't blame me, I was just applying doctrine."

And perhaps that explains why liberal legal thinkers react so fiercely to it.[312] Recall how there is a current debate about what to call the "independent state legislature" claim currently pending at the Supreme Court. Proponents of the theory (the political right) use the word doctrine; opponents of the theory (the political left) consciously decline to do so. This fight over semantics demonstrates the power of the word and the origin of the campaign. What is happening is a political fight but dressed up in legal clothes.

Indeed, perhaps it indicates that the divide that once existed (or was thought to exist) between political thinkers and legal thinkers has become smaller or contains less friction. This closer connection could be a consequence of technological changes in the way we communicate legal ideas and crowdsource judicial decisions (through Twitter, blogs, and podcasts), the ease of legal research these days, or a reflection of the growth of the conservative legal movement spearheaded by the Federalist Society.[313] I think the answer is all of the above. Put together, these dynamics vividly depict perhaps the most powerful use of the word "doctrine"—to introduce and cement change.

This also brings to the forefront the significance of the role of outsiders in becoming a doctrine today. The origin stories for the MQD and the ISLD involve active campaigns by interested political actors.[314] There is something different between that and government lawyers pushing *Chevron* strategically or even a professor writing an annual treatise and framing the political question doctrine in a tactical way.

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312. *See* Strict Scrutiny, *supra* note 102 (calling the ISLD a fantasy).

313. I have discussed all these ideas in prior work. For thoughts on the way we crowdsource judicial decisions, see Fisher & Larsen, *supra* note 6, at 95. For the influence of research tools on the way we frame legal arguments, see Larsen, *Factual Precedents*, *supra* note 227, at 74. For the rise of the conservative legal movement and its consequences for constitutional law, see generally Allison Orr Larsen, *Constitutional Law in an Age of Alternative Facts*, 93 N.Y.U. L. REV. 175 (2018).

314. See *supra* sources accompanying note 7 (providing important literature on the origin and evolution of the MQD). S*ee generally* Herenstein & Wolf, *supra* note 191 (noting stories of the origin of the ILSP); Shapiro, *supra* note 3 (telling the origin story of the ISLP).

It is not that the old way was pure and the new way is opportunistic. Framing legal arguments in smart ways is not new. But using the word "doctrine" carries with it a power to promote legal transformation that is self-conscious, purposeful, and powerful. Once an argument crosses over from seminar to doctrinal class (like the major questions doctrine), or once the broccoli hypothetical goes from Tea Party rallying cries to the courtroom, an important leap has been made. It is a far cry from thinking of doctrine as a judicial tool to solve repeat puzzles; it is doctrine as power to make political change, pure and simple.

CONCLUSION

In the law, words are power. And a very powerful word in legal circles is the word "doctrine." That word connotes something to a legal audience: "take this seriously," "study this for the bar," and "this deserves more than just a footnote in response."

Law students in 2024 will learn the major questions doctrine as a doctrine. Law students even ten years ago did not. This makes a difference in terms of litigation strategy, opinion drafting, and even the way to operationalize a legal change. Given the power of the word "doctrine," it is imperative to trace and critically think about who is using the word and for what purposes. As the way we communicate legal arguments changes and the pace of legal dialogue quickens, the doors are open to all-comers to use the word "doctrine" as a campaign. There are lessons here for everyone: scholars, advocates, bloggers, and judges. Becoming a doctrine matters and should not be taken lightly.