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Major questions are those with vast political and economic significance, but what is economically significant, setting aside politics? This article presents economic facts observed from cases that have applied the major questions doctrine to federal agency rules. We also review the thresholds considered by the executive branch for "economically significant" regulations that require cost benefit analysis with thresholds enacted by Congress. Putting aside politics, we look at how the courts, Congress, and executive branch have assessed the economic impacts of federal rules. Given the contextual nature of economic facts in each case, separation of powers considerations will guide how the major questions doctrine is implemented by courts, and how Congress and the executive branch regulate going forward after *Loper Bright*.

JEL: L4, K2, L1
Keywords: major questions doctrine, economic significance, economic regulation

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I. Introduction

What is economic, as distinguished from political, significance in the major questions doctrine? In this article, we look at how courts size up the economic significance of federal rules for purposes of determining whether to apply the major questions doctrine. But are political and economic factors linked? Does a regulation with significant economic impact always have political importance as well? Should these two features be independently significant or are they jointly significant?[1] Would a regulation of economic significance but slight political impact—or vice versa—be considered "major" enough to apply the doctrine? It may have more economic, than political, significance. Contrarily, agency rules may have more political than economic significance if they focus on specific interest groups or political constituencies rather than economic considerations.

We make an effort to better understand the contours of "vast political and economic significance" in order to answer these questions by taking a closer look at the economic facts of major questions cases.[2] In *FDA v. Brown & Williamson Tobacco Corp*.,[3] a precursor case to *West Virginia v. EPA*, the Supreme Court applied the major questions doctrine to "extraordinary circumstances" of "vast 'economic and political significance.'"[4] Other scholars may focus on politics, while we choose to understand better the economic features of the doctrine.

Economic significance of a rule is in large part defined by the costs and benefits of the rule. Two factors comprise the costs. The first is compliance for companies and citizens, which typically involve legal and administrative efforts. The second are fines and fees after agency

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[1] *U.S. Telecom Ass'n v. FCC,* 855 F.3d 381 (D.C. Cir. 2017) (J. Kavanaugh, dissenting), at 12, https://media.cadc.uscourts.gov/opinions/docs/2017/05/15-1063-1673357.pdf [hereinafter *USTA v. FCC*], citing 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, 1003 (2013) ("Major policy questions, major economic questions, major political questions, preemption questions are all the same.").

[2] "Under that doctrine, EPA explained, courts 'expect Congress to speak clearly if it wishes to assign to an agency decisions of vast "economic and political significance."' *West Virginia v. EPA,* 597 U.S. 697 (2022), https://www.supremecourt.gov/opinions/21pdf/20-1530_n758.pdf [hereinafter *West Virginia v. EPA*], at 11*, quoting Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014) https://supreme.justia.com/cases/federal/us/573/12-1146/case.pdf [hereinafter *Utility Air v. EPA*].

[3] *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120 (2000), https://supreme.justia.com/cases/federal/us/529/120/case.pdf [hereinafter *FDA v. Brown & Williamson*].

[4] "As in *MCI*, we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *FDA v. Brown & Williamson* at 160, citing *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218 (1994), https://supreme.justia.com/cases/federal/us/512/218/case.pdf [hereinafter *MCI v. AT&T*].

enforcement. Benefits of a rule are the social welfare gained by the rule. Social welfare lost is a cost, and pecuniary fines and fees are transfers, aside from opportunity costs.

An assessment of economic significance in the major questions doctrine is distinguishable from cost-benefit analysis conducted by the executive branch for regulatory review. However, as we discuss in this paper, the inputs for determining the economic significance of a rule are based on economic facts that are considered by judges and federal officials alike. In the second part of this article, we review the executive branch's treatment of economic significance as reference even though it is not dispositive for analysis by Article III courts.

A. Economic Significance in Major Questions Cases

Table 1 shows the economic facts that have come before the Supreme Court in major questions cases and cases relevant to the doctrine. Major questions doctrine cases include *FDA v. Brown & Williamson Tobacco (2000), Gonzales v. Oregon (2006), Utility Air v. EPA (2014), Alabama Assn. of Realtors v. HHS (2021), West Virginia v. EPA (2022), NFIB v. OSHA (2022), Biden v. Missouri (2022), Becerra v. Louisiana (2022),* and *Biden v. Nebraska (2023).*

Cases relevant to the major questions doctrine but do not rely on the doctrine or that predate it, are, *FDA v. Brown & Williamson Tobacco* (2000) include *The Queen and Crescent Case (1897), Skidmore v. Swift (1944), Chevron v. NRDC (1984), MCI v. AT&T (1994), Whitman v. Am. Trucking (2001), NCTA v. BrandX (2005), King v. Burwell (2015), USTA v. FCC (CADC) (2017), Gundy v. U.S. (2019), Ohio v. EPA (2024),* and *Loper Bright v. Raimondo (2024).* We include these cases in this paper to provide context on the economic facts involved in cases that are related to the major questions doctrine.

The table shows the year of the decision, the name of the federal agency with the rulemaking in question, the federal rule at issue, the years that have elapsed since Congress passed the statute, and the federal statute and year originally enacted. In many cases, federal agencies create rules many years after the authorizing statute. For broad delegations of authority, a general authorizing statute can grant authority dozens of years later, and in other cases, court challenges arise soon after enactment.

It is still to be determined how courts will apply the major questions doctrine[5] after the Supreme Court decision in *Loper Bright Enterprises v. Raimondo* (2024).[6] The *Skidmore* case in 1944 and the Administrative Procedure Act in 1946 were starting points for review of agency actions which preceded *Chevron* in 1984.[7] After the *Loper Bright* decision in summer 2024, *Chevron* no longer applies. *Skidmore* deference[8] or "*Loper Bright* deference"[9] will be used as lower courts apply the new precedent.[10]

The Supreme Court's decision in *Loper Bright* to overturn *Chevron* deference has significant implications for the major questions doctrine. By removing the requirement for courts to defer to agency interpretations of ambiguous statutes, *Loper Bright* empowers judges to exercise their own independent judgment. Once again This shift is likely to strengthen the major questions doctrine, as courts scrutinize agency actions. Agencies will need to demonstrate clear congressional authorization for their actions.

Loper Bright leads to increased judicial scrutiny of authorizing statutes and agency rulemaking. Agencies might find it more challenging to justify expansive interpretations of their statutory authority, particularly in controversial policy areas. The need to provide clear textual support for their actions may lead to more precisely worded statutes from Congress, potentially limiting agency discretion. Ultimately, *Loper Bright* signals a potential shift in the balance of power between the branches of government, with the judiciary playing a more assertive role in shaping the regulatory landscape.

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[5] On the major questions doctrine, *see generally* Caroline Cecot, *The Meaning of "Silence,"* 31 GEO. MASON L. REV. 515 (2024), https://lawreview.gmu.edu/wp-content/uploads/2024/03/Cecot-31-Geo.-Mason-L.-Rev.-515-2024-1.pdf.

[6] *Loper Bright Enterprises v. Raimondo*, 603 U.S. ___ (2024), https://www.supremecourt.gov/opinions/23pdf/22-451_7m58.pdf [hereinafter *Loper Bright v. Raimondo*].

[7] *ICC v. Cincinnati, New Orleans & Tex. Pac. Ry. Co.,* 167 U.S. 479 (1897) https://supreme.justia.com/cases/federal/us/167/479/ [hereinafter *The Queen and Crescent Case*], predates *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), https://supreme.justia.com/cases/federal/us/323/134/ [hereinafter *Skidmore v. Swift*] and is discussed in detail in Louis J. Capozzi, *The Past and Future of the Major Questions Doctrine*, 84 OHIO STATE L.J. 191, 228, https://moritzlaw.osu.edu/sites/default/files/2023-06/09.Capozzi_v84-2_191-242%202023-06-02%2018_51_09.pdf.

[8] Christopher J. Walker, "What *Loper Bright Enterprises v. Raimondo* Means for the Future of Chevron Deference," YALE J. ON REG. NOTICE & COMMENT BLOG, June 28, 2024, https://www.yalejreg.com/nc/what-loper-bright-enterprises-v-raimondo-means-for-the-future-of-chevron-deference/.

[9] Adrian Vermeule, "*Chevron* by Any Other Name," THE NEW DIGEST SUBSTACK, June 28, 2024, https://thenewdigest.substack.com/p/chevron-by-any-other-name.

[10] Adam White, "*Loper Bright* and the End of Administrative Exceptionalism," THE DISPATCH, July 10, 2024, https://thedispatch.com/article/loper-bright-and-the-end-of-administrative-exceptionalism/.

Table 1. Cases Relevant to the Major Questions Doctrine

Case	Year	Agency	Issue	Years After Statute	Statute and Year Enacted
The Queen and Crescent Case	1897	ICC	Rate regulation of Southern railway freight	10	Interstate Commerce Act (1887)
Skidmore v. Swift & Co.	1944	DOL	Definition of "work" for overtime compensation	6	Fair Labor Standards Act (1938) (wage and hour rules)
Chevron v. NRDC	1984	EPA	Definition of "stationary source"	14	Clean Air Act (1970) (1981 rules on "bubble")
MCI v. AT&T	1994	FCC	Definition of "modify any requirement"	60	Communications Act (1934) (long-distance carrier tariffs)
FDA v. Brown & Williamson Tobacco	2000	FDA	Definition of "drug" and "major rules" doctrine	62	Food, Drug, and Cosmetic Act (1938) (1996 tobacco ads)
Whitman v. Am. Trucking	2001	EPA	Definition of "adequate" and "requisite;" no "elephants in mouseholes"	31	Clear Air Act (1970) (1997 new ozone NAAQS)
NCTA v. Brand X	2005	FCC	Definition of "offer" of "telecom service" or "information service"	9	Telecommunications Act (1996) (2002 ruling)
Gonzales v. Oregon	2006	DOJ	State laws on assisted suicide	36	Controlled Substances Act (1970) (2001 interpretive rule)
Utility Air v. EPA	2014	EPA	Definition of "air pollutant"	44	Clean Air Act (1970) (2009, 2011-2013 regulations)
King v. Burwell	2015	IRS	IRS tax credits	5	Patient Protection and Affordable Care Act (2010)
USTA v. FCC (CADC)	2017	FCC	Definition of "telecom service" or "information service"	31	Telecommunications Act (1996) (2010, 2015 OIO Rule)
Gundy v. US	2019	DOJ	Pre-Act offender rules	13	Sex Offender Reg. Not. Act (2006) (2007, 2010 rules)
Alabama Assn. of Realtors v. HHS	2021	HHS	COVID-19 CDC eviction moratorium	77	Public Health Service Act (1944) (2020 moratorium)
West Virginia v. EPA	2022	EPA	Emissions and "major question doctrine"	52	Clean Air Act (1970) (2015 Clean Power Plan, ACE Rule)
NFIB v. OSHA	2022	DOL	COVID-19 vaccine and testing requirements	52	Occupational Safety and Health Act (1970) (2021 rule)
Biden v. Missouri Becerra v. Louisiana	2022	HHS	COVID-19 vaccine requirements	87	Social Security Act of 1935 (2021 CMS rule)
Biden v. Nebraska	2023	DOE	Student loan forgiveness	20	HEROES Act (2003) (2020 EO to forgive student loans)
Ohio v. EPA	2024	EPA	Definition of "tailor"	54	Clean Air Act (1970) (Good Neighbor Plan)
Loper Bright v. Raimondo	2024	DOC	Fishery observer program for domestic vessels	48	Magnuson-Stevens Act (1976) (2020 NFMS final rule)

In order to understand how courts decide economic significance in the context of the major questions doctrine, it is important to analyze the "major" or "extraordinary" threshold.[11]

In *West Virginia v. EPA*, Justice Gorsuch described the scope and size of economic facts in major questions cases. He suggests that the criteria include whether the regulation sought to impact a "significant portion of the American economy" or required massive spending by regulated parties.[12] Any agency rule can significantly limit economic freedom of the industry it singles out, but some regulations can be more impactful than others.

In his dissenting opinion in *USTR v. FCC,* Justice Kavanaugh listed economic factors that would cause a case to rise to a major question, acknowledging that no bright-line test currently exists.[13] The list included, "the amount of money involved for regulated and affected parties, the overall impact on the economy, the number of people affected, and the degree of congressional and public attention to the issue."[14] Of these factors – the amount of money involved, overall impact on the economy, the number of people and degree of attention – the degree of congressional and public attention goes towards political factors more than economic, in our view.

In addition to looking at economic factors, we ask how methods, calculations, and definitions are implemented by agencies. Definitions can alter the scope of a rule or merely make improvements on the margin. Calculations or methodology changes can also have significant effects on the outcome of the analysis. In fact, rulemaking is a process of making tradeoffs between interested parties – a method or calculation cuts the pie between parties and industry and government.[15]

The calculations that have significant impacts, may rise to the level of a major calculation, or a major question ("vast" and "extraordinary"). Deciding a "major matter of policy" incorporates these methods or calculations. The majority opinion in *USTA v. FCC*

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[11] Capozzi, *supra* note 7, at 228 ("the Court has looked at two primary factors: a major shift in regulatory control in an important industry and the costs of the policy on the regulated," noting *West Virginia v. EPA* at 2608).
[12] *West Virginia v. EPA,* at 18, citing *Utility Air v. EPA*, at 324. Justice Kagan characterizes Justice Gorsuch's description of "massive" effects in her dissent: "The majority thus pivots to the massive consequences generation shifting could produce—but that claim fares just as poorly," *id*. at 24 (Kagan, J., dissenting).
[13] *USTA v. FCC,* at 12.
[14] *Id.*
[15] *See generally* JAMES M. BUCHANAN AND GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (University of Michigan Press, 1960).

describes the concept: "The major rules doctrine is said to promote separation-of-powers principles by assuring that Congress has delegated authority to an Executive agency to decide a major matter of policy."[16] If Congress did not spell out the calculation and left wide discretion to the agency that the outcomes would be unpredictable or beyond a range of expected outcomes, then perhaps the statute was ambiguous or silent to begin with.

In overturning *Chevron*, the Supreme Court expects lower courts to exercise statutory interpretation subject to *Skidmore* deference and clear statement and other nondelegation canons. After *Loper Bright*, the larger question remains about how specific Congress should be to delegate authority in increasingly technical regulations.

B. Is There a Major Methods or Major Calculations Doctrine?

What degree of specificity can we expect Congress to define methods or calculations in federal statutes? Does Congress give agencies the delegated authority to make rules with a wide range of outcomes or does Congress have in mind a range of desired outcomes available to the agency and, if so, how narrow is that range? Are tradeoffs made by Congress or are they made by unelected agency officials?

This leads us to ask whether there is a "major methods" doctrine or a "major calculations" doctrine. A "major methods" or "major calculations" doctrine would incorporate the discretion for an agency to change the methods, inputs, and outcomes of a policy. As opposed to a "major rule" the terminology of methods or calculations adds more specificity to the extent of latitude given to an agency to make determinations that sometimes involve mathematical analysis and technical considerations. A "rule" would encompass methods and calculations but it could also not involve such calculations either.

Methods and calculations involve the definition of inputs and scope of a policy. Indeed, at some point, policymaking can rise to the level of legislation. Where is that line between rulemaking and legislating? Methods, calculations, and definitions have ranges of possible values and meanings that are commonly understood. The Supreme Court has said that we don't hide "elephants in mouse holes" to mean that disproportionate outcomes are not routine. If a rule

[16] *See generally*, *USTA v. FCC*, at 10, citing Kavanaugh, J., dissenting, https://media.cadc.uscourts.gov/opinions/docs/2017/05/15-1063-1673357.pdf; *see also* Congressional Research Service, "The Major Questions Doctrine," Nov. 2, 2022, https://crsreports.congress.gov/product/pdf/IF/IF12077.

has extraordinary or vast significance, it will not be hidden in a small footnote. In that sense, outcomes beyond a predictable scope or iterative "interstitial" matters may rise to legislation, rather than rulemaking.[17]

Regulations involve tradeoffs of costs, resources, and ultimately, freedom, between private firms and government.[18] Article III courts, however, are not tasked with making those tradeoffs, rather they are expected to parse whether Congress has granted authority to the agencies to regulate. The Court has said, "It is not our role to weigh such tradeoffs."[19]

To make regulatory tradeoffs, agencies do their work with methods and calculations. We can think of a federal agency as an entity that takes inputs and produces outputs. The agency makes rules based on a blueprint that Congress directs, taking into account the inputs, weights, assumptions, predictions, data, and reliance interests that are deliberated in the legislative process. When an agency applies methods to implement a rule, it may not necessarily implicate the major questions doctrine. But, if a change in method drastically changes the output, a "major calculation" may be at hand as opposed to "interstitial matters."[20] In *MCI v. AT&T*, for example, the FCC's rule was described as to "effec[t] a 'fundamental revision of the statute, changing it from [one sort of] scheme of . . . regulation' into an entirely different kind."[21]

In telecommunications law, definitional questions have been raised around whether the FCC has authority to reclassify a broadband internet access service (BIAS) as a Title I or Title II

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[17] *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457 (2001), https://supreme.justia.com/cases/federal/us/531/457/case.pdf [hereinafter *Whitman v. Am. Trucking*]. *See also* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986) ("A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration.").

[18] The field of public choice economics looks at policymaking and political inputs through the analogy of calculus. Rather than a direct efficiency analysis or equilibrium analysis, policymaking includes a political component of balancing, weights, and non-market considerations such as the public interest, distributional equity, and fairness. That there are non-market inputs does not eliminate the usefulness of a calculus framework which says that inputs lead to outputs. Government regulation intervenes in a market equilibrium to add non-market considerations to the scales.

[19] *Nat'l Fed. of Ind. Business v. OSHA*, 595 U.S. 109 (2022), https://www.supremecourt.gov/opinions/21pdf/21a244_hgci.pdf [hereinafter *NFIB v. OSHA*], at 8.

[20] Breyer, *supra* note 59.

[21] *MCI Telecomms. Corp. v. AT&T,* 512 U.S. 218, 231 (1994), https://supreme.justia.com/cases/federal/us/512/218/case.pdf, cited in *West Virginia v. Envtl. Prot. Agency*, 597 U.S. 697 (2022), https://www.supremecourt.gov/opinions/21pdf/20-1530_n758.pdf [hereinafter *West Virginia v. EPA*] and *Biden v. Missouri and Becerra v. Louisiana*, 142 S. Ct. 647 (2022), https://www.supremecourt.gov/opinions/21pdf/21a240_d18e.pdf [hereinafter *Biden v. Missouri and Becerra v. Louisiana*].

service in the Communications Act of 1996. Because the Title I and Title II regimes have far different rules, the method used to define the service has broad implications. The Supreme Court in *NCTA v. Brand X*,[22] the D.C. Circuit in *USTA v. FCC*, and more recently the Sixth Circuit[23] have looked at whether the FCC's governing statute gives authority or not to change whether a service falls into one category or another.

In the appeal of the FCC's 2024 order classifying broadband access as a Title II service, the U.S. Court of Appeals for the Sixth Circuit ruled that a definition change implicated the major questions doctrine.[24] In a *per curiam* opinion, the court states, "Net neutrality is likely a major question requiring clear congressional authorization."[25] They write that after *Loper Bright*, ancillary authority to fill gaps does not suffice to show clearly delegated authority to define whether broadband is a telecommunications service or information service.[26]

In environmental law, methods have been an issue in cases such as *Ohio v. EPA*, where the EPA altered an emissions equation that changed the outcome of the policy to include a far larger number of states than expected.[27] While not a major questions doctrine case, in *Ohio v. EPA*,[28] EPA recalculated its determination without a new round of public comments. The change

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[22] *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005), https://www.law.cornell.edu/supct/pdf/04-277P.ZO [hereinafter *NCTA v. Brand X*] ("The issue before the Commission was whether cable companies providing cable modem service are providing a "telecommunications service" in addition to an "information service.").

[23] *See* Matt Daneman and Howard Buskirk, "FCC's Pending Net Neutrality Order Is Seen Facing Similar Legal Fight as 2015's," COMMUNICATIONS DAILY, Apr. 15, 2024, https://communicationsdaily.com/article/2024/04/15/fccs-pending-net-neutrality-order-is-seen-facing-similar-legal-fight-as-2015s-2404120054; Brian Rankin, "'Net Neutrality' Faces a Stiff Judicial Test," WALL ST. J., Apr. 25, 2024, https://www.wsj.com/articles/net-neutrality-faces-a-stiff-judicial-test-major-questions-doctrine-5a195768; Eric Fruits and Ben Sperry, "Will the Courts Allow the FCC to Execute One More Title II Flip Flop?" TRUTH ON THE MARKET BLOG, June 10, 2024, https://truthonthemarket.com/2024/07/10/will-the-courts-allow-the-fcc-to-execute-one-more-title-ii-flip-flop/; Donald Verrilli and Ian Gershengorn, "Net Neutrality Rules Face 'Major Questions' Buzzsaw at High Court," BLOOMBERG LAW, Sept. 20, 2023, https://news.bloomberglaw.com/us-law-week/net-neutrality-rules-face-major-questions-buzzsaw-at-high-court.

[24] *In re: MCP No. 185; Federal Communications Commission, In the Matter of Safeguarding and Securing the Open Internet, Declaratory Ruling, Order, Report and Order, and Order on Reconsideration, FCC 24-52, 89 Fed. Reg. 45404, published May 22, 2024*, U.S. Court of Appeals for the Sixth Circuit, Order No. 24-7000, Case No. 24-3449, filed Aug. 1, 2024, at 6, https://www.bloomberglaw.com/public/desktop/document/InreMCPNo185OpenInternetRuleFCC2452DocketNo24070006thCirJun122024?doc_id=X6PGS452E1J9E7PI6N1MNHL0KM5 ("The petitioners are likely to succeed on the merits because the final rule implicates a major question, and the Commission has failed to satisfy the high bar for imposing such regulations.").

[25] *Id*. at 6.

[26] *Id*. at 8.

[27] *Ohio v. Envtl. Prot. Agency*, 144 S. Ct. 691 (2024), https://www.supremecourt.gov/opinions/23pdf/23a349_0813.pdf [hereinafter *Ohio v. EPA*].

[28] *Id.* at 9 ("EPA focused on what it called the "'knee in the curve,'" or the point at which more expenditures in the upwind States were likely to produce "very little" in the way of "additional emissions reductions and air quality

in modeling was large enough that "the agency would need 'to conduct a new assessment and modeling of contribution and subject those findings to public comment.'"[29] The court describes how a calculation change by the EPA would subject an entirely different group of recipients of the regulation, "…a different set of States might mean that the [methods] would shift… each State differs in its mix of industries, in its preexisting emissions-control measures, and in the impact those measures may have on emissions and downwind air quality."[30]

In technical areas such as telecommunications and environmental standards, the definitions and methods used by a federal agency can drastically change the recipients and effects of a regulation. A review of major questions cases can help shed light on how federal courts have interpreted statutes and considered economic facts to determine major questions and major rules.

The next section reviews facts in the case law where courts have found agency rulemakings to be economically significant. After agencies applied their methods and calculations to the facts at hand, they may have exceeded the statutory authority granted to them by Congress. That is where the major questions doctrine may come into play when a federal rule is challenged in federal court and the effects of the rule have vast economic and political significance.

II. How Do Courts Define Economically Significant?

The major questions doctrine as interpreted by the judicial branch is based on findings of fact and matters of law related to the number on people, companies, industry, and the economy at large. We first look at cases where a "significant portion" of the economy is reached by federal regulation, and then we look at cases that reach specific numbers of people, affect large dollar amounts of economic activity, or impose hefty compliance costs on parties involved. Then we look at impacts of agency actions on business structure and the national economy.

Table 2 summarizes economic facts in cases relevant to major questions cases according to the number of people, number of firms, cost to the national economy, costs to industry operations, and compliance costs.

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improvement" downwind... EPA used this point to select a "uniform level" of cost, and so a uniform package of emissions reduction tools, for upwind States to adopt.").

[29] *Id*. at 10.

[30] *Id*.

Table 2. Economic Facts in Cases Relevant to the Major Questions Doctrine

Case	Year	# People	# Firms	Cost to Industry	Impact on Economy
The Queen and Crescent Case	1897	"millions of passengers"	Rate regulation of 24 Southern Railway companies	"billions of dollars are invested in railway properties"	"millions of tons of freight"
Skidmore v. Swift	1944	All workers who spend time waiting as working time	All firms	$77,000 overtime wages, damages, fees for 7 workers	Labor market effects
Chevron v. NRDC	1984	50 states	Major and minor sources of emissions	"construction, modification" of sources, plant additions and "attainment of standards by a fixed date"	"allow reasonable economic growth to continue"
MCI v. AT&T	1994	40% of consumers in long-distance sector	482 long-distance carriers under the "permissive detariffing" policy	Price rate schedules posted publicly created regulatory burdens on new entrants	"unnecessary and counterproductive" for consumer protection and competition
FDA v. Brown & Williamson Tobacco	2000	400,000 deaths per year and all young people in America	Tobacco industry	Restrictions on advertising, sale, and distribution of tobacco products	"an industry constituting a significant portion of the American economy"
Whitman v. Am. Trucking	2001	50 states	Major and minor sources of emissions in NAAQS	"lengthy and expensive" task to develop implementation plans	Potential to impact the entire national economy
NCTA v. Brand X	2005	Consumers of high-speed internet access	Cable modem internet service providers	Discourage or chill investment and development of new and innovative services	Stifle innovation and consumer choice
Gonzales v. Oregon	2006	50 states, physician licensing boards	All physicians	Use of controlled substances in physician-assisted suicide	Physician-assisted suicide
Utility Air v. EPA	2014	Decade-long delays in issuing permits	Millions of emissions sources: retail stores, offices, apartments, schools, churches	PSD: 800 to 82,000 permits, Title V: 6.1 million permits, PSD: $1.5 billion, Title V: $21 billion; Permitting: $147 billion, $37,500 per day of violation	Delayed construction projects
King v. Burwell	2015	50 states, price for millions of people	Health insurance issuers	Creation of an "exchange" in each State	Billions of dollars of healthcare tax credits
USTA v. FCC (CADC)	2016, 2017	"all users of public IP addresses"	Broadband internet access providers	"Staggering" impact on investment and operations	50 billion interconnected devices
Gundy v. US	2019	500,000 sex offenders	Sex offender registration by law enforcement	Enforcement uncertainty	Protection of citizens, burdens on sex offenders

Alabama Assn. of Realtors v. HHS	2021	Between "6 and 17 million tenants at risk of eviction"	Landlords with tenants who had not paid rent	$46.5 billion in emergency rental assistance	Any tenant in a county with high levels of COVID-19
West Virginia v. EPA	2022	Increased consumer electricity costs by over $200 billion, thousands of job losses	Closure of dozens of coal plants	Transformation of the electricity sector	"reduce[d] GDP by at least a trillion 2009 dollars by 2040," but also possible economic benefits
NFIB v. OSHA	2022	84.2 million workers, "saving 6,500 lives and prevent hundreds of thousands of hospitalizations"	All firms with at least 100 employees	$13,653 standard violation, up to $136,532 willful violation, "billions of dollars of unrecoverable compliance costs"	Mandates for COVID-19 vaccines and testing
Biden v. Missouri, Becerra v. Louisiana	2022	10 million healthcare workers	Healthcare providers and employees	Termination of provider agreements and pecuniary fines for violations	Termination of healthcare jobs
Biden v. Nebraska	2023	43 million borrowers total, 20 million might be eligible	$1.6 trillion in student loan debt held by lenders	$10,000 per borrower, between $469 billion and $519 billion	Erase debt for 20 million and reduce debt for remaining 23 million borrowers
Ohio v. EPA	2024	All 23 downwind states and 3 more, submit new SIPs to EPA (12 of which had 70% of emissions)	2015 EPA revised its air-quality standards for ozone from 75 to 70 parts per billion	Costs to reduce a ton of nitrous-oxide emissions "hundreds of millions[,] if not billions of dollars." Costs which are "nonrecoverable"[31]	Regulation of ozone pollution at large
Loper Bright v. Raimondo	2024	Domestic vessels and vessels in federal waters	Domestic fisheries	20% of revenues, $710 per day for fisheries	Costs to domestic fisheries

In the next sections, we discuss in detail the facts that indicated economic significance to the reviewing courts. Economic significance was found when federal rules affected a significant portion of the American economy, involved significant regulatory actions, large numbers of American workers, students, tenants, employers, state governments, and consumers, small but concentrated groups of merchants such as fisheries, large industries such as broadband providers, and rules that involve billions of dollars of impact and compensatory or pecuniary damages. Compliance costs and secondary effects of federal regulations are also considered by the federal courts in these cases.

[31] *Ohio v. EPA*, at 14.

1. "Significant Portion of the American Economy"

In *FDA v. Brown & Williamson Tobacco Corp*., the Supreme Court noted that the Food and Drug Administration (FDA) asserted jurisdiction to regulate "an industry constituting a significant portion of the American economy."[32] The Supreme Court also noted that FDA's inference of jurisdiction without explicit authority was not the norm, "we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[33]

In *Alabama Assn. of Realtors v. HHS*, the Supreme Court reviewed a Centers for Disease Control (CDC) rule that reached 80% of the country, "including between 6 and 17 million tenants at risk of eviction" under the moratorium.[34] In that case, it was clear that "[w]e expect Congress to speak clearly when authorizing an agency to exercise powers of "vast 'economic and political significance.'"[35] "That is exactly the kind of power that the CDC claims here."[36] The 80% of the population was considered an "unprecedented" "claim of expansive authority…"[37] The Court wrote, "Since that provision's enactment in 1944, no regulation premised on it has even begun to approach the size or scope of the eviction moratorium."[38]

2. "Significant Regulatory Action"

The major questions doctrine does not rely on a determination of "significant regulatory action" but the concept does help provide context to what may be considered "economic significant" rules. The Congressional Review Act defines "significant regulatory action" under Section 3(f)(1) of Executive Order 12866 and amended by Executive Order 14094.[39]

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[32] *FDA v. Brown & Williamson,* at 158. The decision in *Brown* was later abrogated by Congressional statute. The "significant portion" of the economy sets one outer boundary that if such a large proportion of the economy is affected by a regulation, that Congress would need to speak.
[33] *Id*. at 160.
[34] *Alabama Assn. of Realtors v. Dept. of Health & Human Serv.*, 594 U.S. 758 (2021), https://www.supremecourt.gov/opinions/20pdf/594us2r68_b97d.pdf [hereinafter *Alabama Assn. of Realtors v. HHS*].
[35] *Id*. citing *Utility Air v. EPA*, at 324 (quoting *FDA v. Brown & Williamson Tobacco,* at 160).
[36] *Id*.
[37] *Id*.
[38] *Id.*
[39] Executive Order 14094 of April 6, 2023, Modernizing Regulatory Review, https://www.govinfo.gov/content/pkg/FR-2023-04-11/pdf/2023-07760.pdf, amending Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf, and Executive Order 13563 of January 18, 2011, Improving Regulation and Regulatory Review.

Rules that have an annual effect of $200 million or more in a material way are "significant" and a rule likely to have "annual effect on the economy of $100 million or more" is a "major rule."[40] A "major rule" would have this threshold dollar amount but also could cause "a major increase in costs or prices for consumers, individual industries," or "significant adverse effects on competition, employment, investment, productivity, or innovation."[41] This definition directs the Office of Information and Regulatory Affairs (OIRA) to conduct an assessment of benefits and costs anticipated from the regulatory action.[42]

3. Number of People Affected

The number of people affected by a particular federal rule has been an economic fact of interest to the courts. The number of people can be described as economy-wide or issue-specific depending on the regulation.

Several cases have involved economy-wide measures. These cases involved regulations that could possibly touch all Americans, such as landlords and tenants, employers and workers, and citizens who live in downwind states. A broad swath of Americans are also included in more specific groups such as workers who work overtime, rail passengers, telecommunications consumers, and student loan borrowers.

In *Alabama Assn. of Realtors v. HHS*, the federal rule reached "80% of the country"[43] or nearly 240 million people that could be affected by the COVID-19 eviction moratorium, "including between 6 and 17 million tenants at risk of eviction."[44]

In *Skidmore v. Swift*, the federal rule on overtime wages would have affected American employees across industries and positions who worked overtime, not just the firefighters in the case.[45] The Supreme Court opinion does not cite figures for how many employees worked overtime but spoke generally about the economy-wide rule. This early case is not a major questions doctrine case, as it precedes much of the development of administrative law, but has implications for the reach of federal rules. *Skidmore* deference is a foundational case in the line of cases leading up to the major questions doctrine cases.

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[40] *Id. See also* Capozzi, *supra* note 7.
[41] *Id*.
[42] EO 12866, at Section 6.
[43] *Alabama Assn. of Realtors v. HHS,* at 764.
[44] *Id*.
[45] *Skidmore v. Swift*, at 139.

In *NFIB. v. OSHA*, the COVID-19 vaccine mandate reached nearly 84.2 million workers in firms that have at least 100 employees.[46] "Hundreds of thousands of employees" could possibly leave their jobs under the mandate.[47] The reach of the mandate would extend to workers with "everyday risk" beyond those just in "crowded or cramped environments."[48] The federal government claims the mandate would "save over 6,500 lives and prevent hundreds of thousands of hospitalizations."[49]

In *Biden v. Missouri* and *Becerra v. Louisiana*, the number of people that would be affected by the regulation was at least 10 million healthcare workers.[50] These healthcare workers and providers could face pecuniary fines for providers and termination of jobs for workers.

In *Biden v. Nebraska*, 20 million student loan borrowers with $430 billion in outstanding debt would be affected by the student loan forgiveness order.[51] The Secretary of Education's plan would forgive loans for those 20 million people while another 23 million people would have a reduction in the median amount of debt held from $29,400 to $13,600.[52] All taxable Americans presumably are affected since the source of the loan forgiveness would be taxpayers.

In *USTA v. FCC*, the federal rule reaches across the Internet and would affect "all users of public IP addresses, or everything that connects to the Internet," as possibly under the authority of the FCC to regulate.[53] The reach of the rule focuses on parts of the network but also the "portion of the economy affected:" which could include "every Internet service provider, every Internet content provider, and every Internet consumer."[54] Aside from the number of people, the financial impact, which is included in the section below, is "staggering."[55] While the opinion does not depend on the major questions doctrine, it is discussed in the dissent.

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[46] *NFIB v. OSHA*, at 4.
[47] *Id*. at 8.
[48] *Id*. at 7.
[49] *Id*. at 8.
[50] *Biden v. Missouri*, at 1.
[51] *Biden v. Nebraska*, 600 U.S. 477 (2023), https://www.supremecourt.gov/opinions/22pdf/22-506_nmip.pdf; *id*. at 22 ("But imagine instead asking the enacting Congress a more pertinent question: 'Can the Secretary use his powers to abolish $430 billion in student loans, completely canceling loan balances for 20 million borrowers, as a pandemic winds down to its end?' We can't believe the answer would be yes.").
[52] *Id.*
[53] *USTA v. FCC*, at 40 (page 15).
[54] *Id*. at 85 (J. Kavanaugh, dissenting at 13).
[55] *Id.*

In other cases, issue-specific or industry-specific groups would be affected by a federal rule. This includes subgroups such as tobacco smokers, sex offenders, healthcare workers, employees in downwind states, or domestic vessel operators.

In *FDA v. Brown & Williamson*, 400,000 deaths per year could be impacted by a ban on smoking advertisements promulgated by the FDA.[56] The restrictions on advertising, sale, and distribution of tobacco was also meant to deter all American young people from tobacco use.

In *Gundy v. U.S.*, there were 500,000 sex offenders who would be classified under the new criminal enforcement regime.[57] The rule would protect victims and potential victims across the country, but the economic significance of the rule is otherwise not discussed in the case. This case does not depend on the major questions doctrine, but Justice Gorsuch in dissent discusses the relationship between the major questions doctrine and the nondelegation doctrine.[58] It is worth noting the reach and scope of the federal rule by the number of people involved in the regulation.

In *West Virginia v. EPA*, tens of thousands of jobs would potentially be affected in the Environmental Protection Agency (EPA)'s Clean Power Plan's generation-shifting scheme.[59] When power plants are closed, job losses would result. American consumers of electricity, which would reach the entire population of households, across the country could be affected through higher electricity prices.[60]

In *MCI v. AT&T*, the Federal Communication Commission's (FCC) rule would reach 40% of consumers using service from companies in the long-distance telecommunications sector.[61] The court does not discuss the number of people who subscribe to long-distance service but focuses on the nature of the tariff rules on prices and competition in the sector.

In *The Queen and Crescent Case*, "millions of passengers" were affected by the Interstate Commerce Commission's (ICC)'s rule.[62] At the time of the case in 1897, millions of passengers was a large proportion of the American population.

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[56] *FDA v. Brown & Williamson*, at 120.
[57] *Gundy v. United States*, 588 U.S. 128 (2019), https://www.supremecourt.gov/opinions/18pdf/17-6086_2b8e.pdf.
[58] *Id*. at 20.
[59] *West Virginia v. EPA*, at 10.
[60] *Id.* at 12.
[61] *MCI v. AT&T*, at 232 ("It is hard to imagine that a condition shared by 40% of all long-distance customers, and by all long-distance carriers except one, qualifies as 'special' within the intent of this limitation.").
[62] *The Queen and Crescent Case*, at 494.

In *King v. Burwell*, the price of health insurance impacted "millions of people" and billions of dollars in healthcare tax credits.[63] The people who enrolled in an insurance plan through a Federal Exchange were authorized to get tax credits,[64] but the regulation would also affect all Americans indirectly through the tax system.

The number of people affected by a federal rule may be more relevant to the political significance of a federal rule since the effects of a rule would impact individuals directly rather than corporations or industries which would then pass on effects to individuals. Yet the number of people affected by a federal rule that touches their livelihood, housing, finances, and prices goes into the analysis of economic significance in major questions cases.

4. Number of Companies Affected

Aside from the number of people affected, the number of companies impacted by a federal rule is also relevant for determining economic significance.

In *Alabama Assn. of Realtors v. HHS*, the number of companies affected by the CDC rule was noted as "millions of landlords across the country" that would be affected by the eviction moratorium.[65] In this case, residential property owners would be subject to the "risk of irreparable harm by depriving them of rent payments with no guarantee of eventual recovery."[66]

In *Utility Air v. EPA*, the number of companies affected by the EPA rule is in the "millions of small sources."[67] These rules reach millions of sources of emitters, including small businesses and community anchor institutions and non-profit organizations. "In the Tailoring Rule, EPA asserts newfound authority to regulate millions of small sources—including retail stores, offices, apartment buildings, shopping centers, schools, and churches…"[68] In this case, the agency's enforcement activity would not be static but would be changing over time. The EPA sought: "…to decide, on an ongoing basis and without regard for the thresholds prescribed by Congress, how many of those sources to regulate."[69]

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[63] *King v. Burwell*, 576 U.S. 473 (2015), https://supreme.justia.com/cases/federal/us/576/14-114/case.pdf, at 8.
[64] Id. at 7.
[65] *Alabama Assn. of Realtors v. HHS*, at 765.
[66] *Id*.
[67] *Utility Air v. EPA,* at 23.
[68] *Id*.
[69] *Id*.

In *The Queen and Crescent Case*, at least two dozen Southern Railway companies were under rate regulation by the ICC.[70] These companies covered a large portion of the United States and railway traffic at the time.

In *FDA v. Brown & Williamson Tobacco*, the tobacco industry had so much "economic significance"[71] that it was unlikely that Congress would have included tobacco in the statute without specifically enumerating it, especially when Congress enacted three tobacco-specific statutes that stood alone.[72] As a major question, whether or not the FDA should have power to regulate advertising and distribution of tobacco to young people impacted all tobacco industry participants at the time.

In *MCI v. AT&T*, the FCC lifted tariff schedule filing requirements for new entrants and the rule was applied to all nondominant long-distance carriers.[73] The "permissive detariffing" policy impacted 12 long-distance carriers in 1982 which grew to 482 long-distance carriers a decade later.[74] The tariff filing requirements were purportedly to "prevent price discrimination and unfair practices" but with more competition, the tariff rules could increase "filing costs [that] raise artificial barriers to entry" while the "publication of rates facilitates parallel pricing and stifles prices competition," according to the petitioners.[75]

In *Gonzalez v. Oregon*, a federal rule would preempt state regulation of physician licensing in 30 states for the use of controlled substances in physician-assisted suicide.[76] The rule would impact the providers who conduct physician-assisted suicide, but also the industry and licensing boards in the states.

In *Ohio v. EPA*, all 23 downwind states would need to submit a new State Implementation Plan (SIP) to the EPA for lowering emissions which would affect businesses in those states.[77] The businesses in those states would be directly affected by the rule but businesses and emitters across the country are on notice for possible changes in rules by the EPA.

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[70] *The Queen and Crescent Case*, at 478-81.
[71] *FDA v. Brown & Williamson Tobacco*, at 147 ("Given the economic and political significance of the tobacco industry at the time, it is extremely unlikely that Congress could have intended to place tobacco within the ambit of the FDCA absent any discussion of the matter.").
[72] *Id*. at 153.
[73] *MCI v. AT&T*, at 220.
[74] *Id*. at 239.
[75] *Id*. at 233.
[76] *Gonzalez v. Oregon*, 546 U.S. 243 (2006), https://tile.loc.gov/storage-services/service/ll/usrep/usrep546/usrep546243/usrep546243.pdf.
[77] *Ohio v. EPA*, at 4.

In *Loper Bright v. Raimondo*, all domestic vessel operators were affected by the federal regulation.[78] The court did not list the number of fisheries in its analysis, but the entire sector is covered by the rule. This case does not rely on the major questions doctrine, but the economic facts are worth noting in light of the discussion of delegated authority and the overruling of *Chevron* deference in the case. *Chevron* itself was not a major questions doctrine case.

5. Dollar Amount of Economic Activity in the Economy

A dollar amount threshold does not define a "major question."[79] The dollar amount of the economic activity is, however, a factor in determining economic significance of a particular rule. Courts have noted facts around both absolute and relative dollar amounts.

In *Biden v. Nebraska*, the dollar amount of economic activity is cited as a cost to taxpayers of "'between $469 billion and $519 billion,' depending on the total number of borrowers ultimately covered."[80] This number was described as "ten times the 'economic impact' … found significant"[81] in the eviction moratorium case in *Alabama Assn. of Realtors v. HHS* which triggered the major questions doctrine.[82] The abolishment of $430 billion in student loans would be a portion of the $1.6 trillion in debt held by 43 million people.[83] The amount of student loan forgiveness of $10,000 per borrower[84] was meant to be "directed at addressing the financial harms of the COVID-19 pandemic."[85]

In *Alabama Assn. of Realtors v. HHS*, "Congress has provided nearly $50 billion in emergency rental assistance—a reasonable proxy of the moratorium's economic impact."[86] Like with student loan forgiveness, the amount of rental assistance through a moratorium of $50 billion as a policy matter is economically significant to have a stimulative or meaningful effect to "alleviate burdens caused by the burgeoning COVID-19 pandemic."[87]

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[78] *Loper Bright v. Raimondo*, at 3-4.
[79] *USTA v. FCC*, at 12 ("The Court has not articulated a bright-line test that distinguishes major rules from ordinary rules.").
[80] *Biden v. Nebraska*, at 21.
[81] *Id*.
[82] *Id.*
[83] *Id*. at 22.
[84] *Id*. at 6.
[85] *Id.*
[86] *Alabama Assn. of Realtors v. HHS*, at 764.
[87] *Id*. at 760.

In *King v. Burwell*, billions of dollars of spending in healthcare tax credits and healthcare prices for millions of people were affected by the creation of a Federal Exchange under the Affordable Care Act.[88] This dollar amount encompasses the healthcare system broadly under federal exchanges and price effects.

In West Virginia v. EPA, a startling amount of economic activity would possibly affected by the rule of "reduce[d] GDP by at least a trillion 2009 dollars by 2040."[89] In terms of costs, "'billions of dollars in spending' by private persons or entities" should require "clear congressional authorization," according to the court.[90] In the facts of the case, EPA's modeling suggested that the Clean Power Plan implementation would entail "billions of dollars in compliance costs (to be paid in the form of higher energy prices)…"[91] Justice Kagan, however, raises a counterpoint that the costs are not as large as they seem and compliance costs are "vastly outweighed by the Plan's projected benefits."[92]

In *Utility Air v. EPA*, the economy as a whole could suffer when "decade-long delays in issuing permits would become common, causing construction projects to grind to a halt nationwide;"[93] this delay in buildout would cause a decline in economic activity at large. The government would also spend more time to administer the EPA rule, taking away resources for other matters. State government officials would spend more time administering the rules as well: "The permitting authority (the State, usually) also bears its share of the burden: It must grant or deny a permit within a year, during which time it must hold a public hearing on the application."[94] The court found that the degree of burden was "significant," particularly the procedural impediments placed on the permitting authority.[95]

6. Dollar Amount of Economic Activity in the Regulated Industry

The dollar amount of economy activity can be significant for a particular industry, even if it is not significant to the economy as a whole. In fact, regulations placed on a particular industry could be considered significant even if the impact is small across the economy. In several major

[88] *King v. Burwell*, at 8.
[89] *West Virginia v. EPA* at 10.
[90] *Id.*, citing *King v. Burwell*, 576 U.S. 473, 485 (2015).
[91] *Id*.
[92] *Id*. at 23 n.6 (Kagan, J., dissenting).
[93] *Utility Air v. EPA*, at 17.
[94] *Id*. at 18.
[95] *Id*. at 19.

questions cases, the impact on specific industries is significant when focused on that industry and not the national economy.

In *Alabama Assn. of Realtors v. HHS*, the "financial burden on landlords" was a consideration when calculating the economic impacts of a COVID-19 eviction moratorium and the emergency rental assistance provided by Congress in the amount of $50 billion.[96] Landlords in particular were the focus of the rule, including all landlords across the 50 states.

In other cases that are not major questions doctrine cases but relevant to the analysis, we see that the dollar amount of activity in the regulated industry can be significant to that sector.

In *The Queen and Crescent Case*, the court looked at the effects of the ICC rule on the railway industry, noting "billions of dollars are invested in railway properties" and "millions of tons of freight" were transported by the Southern Railway companies.[97] Rate regulation on those railway carriers would impact their investments and unit economics. This case predates the major questions doctrine, but is cited by Justice Gorsuch in *West Virginia v. EPA* as an example of the historical cases and underpinnings of the doctrine.[98]

In *USTA v. FCC*, the effects of the FCC's rule would impact "investment in infrastructure, content, and business" of broadband providers in particular, at a "staggering" level.[99] The dollar amount of the size of impact on investment is not explicitly stated. In a related case, *NCTA v. Brand X*, the federal rulemaking is discussed in light of the economic effects on consumers of high-speed internet access across the country.[100] The dollar amount is not cited specifically but the court discusses that FCC's view on the "minimal regulatory environment that promotes investment and innovation in a competitive market."[101]

In *Loper Bright v. Raimondo*, the cost of salaries of the federal observers was taken directly from revenues from the fisheries.[102] Fisheries were specifically impacted and the focus of the regulation. The court did not discuss economic impacts outside of the fisheries industry, but focused on the balance of power between courts and agencies and for administrative law more broadly.

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[96] *Alabama Assn. of Realtors v. HHS*, at 764.
[97] *The Queen and Crescent Case*, at 494.
[98] *West Virginia v. EPA*, at 6 (Gorsuch, J., concurring), citing *ICC* v. *Cincinnati, N. O. & T. P. R. Co.*, 167 U. S. 479, 499 (1897) [*The Queen and Crescent Case*].
[99] *USTA v. FCC,* at 85 (J. Kavanaugh, dissenting, at 13).
[100] *NCTA v. Brand X*, at 2.
[101] *Id*. at 30.
[102] *Loper Bright v. Raimondo*, at 3.

7. Compliance Costs for the Regulated Industry

The costs of compliance of a federal rule are a central part of analysis of the economic significance of a rule. When Congress regulates interstate commerce, there are compliance and legal costs for industries to understand and follow the rules. These costs can involve structural changes and capital costs in order to fit new regulations. In some cases, these costs could grow be exorbitantly costly.

In *Utility Air v. EPA*, the dollar amount from projected administrative costs was "$12 million to over $1.5 billion" per year, and the dollar amount for permitting costs of "$147 billion."[103] In addition, the $37,500 per day fine for violations would accrue to non-compliant firms. Increased paperwork costs are not trivial either, including "detailed reports, detailed scientific analysis of the source's potential pollution-related impacts," [104] that show that emissions sources do not contribute to the violation of applicable pollution standards with use of the "best available control technology" for each regulated pollutant it emits.[105]

In *Ohio v. EPA*, compliance costs include equipment upgrades to adhere to new emission standards. EPA's repeal of power plan would impose costs on emitters to replace equipment to meet emissions standards.[106] *Ohio v. EPA* is not a major questions doctrine case, but shows the impact of EPA's decisions to change the methods and implementation of a federal rule based on its understanding of Congressional authority granted to the agency. Compliance costs are imposed through emissions standards that were developed outside of the legislative process but at the agency.

In *Chevron v. NRDC*, compliance costs involve the construction and modification of sources. New plant additions were considered in the court's analysis.[107] The firms' ability to meet the rules is cost to industry. The firms would need to spend to reach the "attainment of

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[103] *Utility Air v. EPA*, at 17.
[104] *Id.*
[105] *Id.*
[106] *Ohio v. EPA*, at 7 n.4 ("Comments of Lower Colorado River Authority 21 (June 21, 2022) (power plants that 'have already invested' in one emissions-control tool 'have already undertaken significant costs to achieve [nitrous oxide] reductions and have less to gain from additional control installation.'").
[107] *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984), https://tile.loc.gov/storage-services/service/ll/usrep/usrep467/usrep467837/usrep467837.pdf [hereinafter *Chevron v. NRDC*].

standards by a fixed date."[108] *Chevron v. NRDC* is not a major questions doctrine case, but the economic facts and scope provide context for how judges interpret authorizing statutes.

In *NFIB v. OSHA*, employers would incur "billions of dollars in unrecoverable compliance costs"[109] in order to adhere to the COVID-19 vaccination mandate. The costs include verification of vaccination status of each employee with records of proof.[110] As an exception for unvaccinated workers, employers were mandated to "undergo [weekly] COVID-19 testing and wear a face covering at work in lieu of vaccination."[111]

In *Whitman v. American Trucking*, the "lengthy and expensive" task of developing state implementation plans (SIP) is a compliance cost on firms and states.[112] Even though the EPA is not permitted to consider the cost of implementing the air quality standard in setting the initial standard, that does not affect whether the regulation itself imposes costs on the regulated industry.[113] This case also is not a major questions doctrine case, but rather a nondelegation case. However, the reach and extent of the economic effects of the regulation on the regulated industry are worth noting.

8. Substantial Change to the National Economy

Some federal rules that make structural changes to specific markets or industries, could cause substantial changes to the national economy at large. In some cases, "extravagant statutory power over the national economy" could extend beyond Congress's statutory intent.[114] In several cases, particularly those involving emergency COVID-19 rules, raised questions about the effect of rules on the national economy.

In *NFIB v. OSHA*, the COVID-19 vaccination mandate would lead to "hundreds of thousands of employees to leave their jobs."[115] which affects the healthcare sector and employees, but also the economy at large.[116] The government argued that the mandate would "save over 6,500 lives and prevent hundreds of thousands of hospitalizations" which would have

[108] *Id.*
[109] *NFIB v. OSHA*, at 8.
[110] *Id.*
[111] *Id*. (cite omitted)
[112] *Whitman v. Am. Trucking*, at 479.
[113] *Id*. at 463.
[114] *Utility Air v. EPA*, at 20.
[115] *NFIB v. OSHA*, at 8.
[116] *Id*.

a public safety impact,[117] but it would also have implications on the healthcare sector at large. If employees have to leave their jobs for refusal to accept vaccinations, that would have economic implications for labor markets in the future as well. The workplace safety standards that govern employers encroached on public health measures, according to the court.[118]

In *Alabama Assn. of Realtors v. HHS*, the landlord-tenant relationship itself would be changed through the COVID-19 rent moratorium through giving "CDC a breathtaking amount of authority. It is hard to see what measures this interpretation would place outside the CDC's reach."[119] The extent of the authority that would be given over other areas aside from health and safety was extensive. The court asked if the CDC, under their claim of emergency authority, have the power to "mandate free grocery delivery to the homes of the sick or vulnerable? Require manufacturers to provide free computers to enable people to work from home? Order telecommunications companies to provide free high-speed Internet service to facilitate remote work?"[120]

In *Biden v. Nebraska*, the effects of a student loan forgiveness across the economy would go beyond just the education sector, but "a significant portion of the American economy."[121] A moral hazard problem could arise from the loan forgiveness of such broad extent. The court was concerned that the Secretary of Education was claiming authority of "entirely different kind" than in the Education Act.[122] The way the Department interpreted the statute was a "fundamental revision of the statute" which was saying "the Secretary may unilaterally define every aspect of federal student financial aid, provided he determines that recipients have "suffered direct economic hardship as a direct result of a . . . national emergency."[123]

In *Utility Air v. EPA*, the court discussed the effects of the EPA rule on the "national economy."[124] The court writes, "…we confront a singular situation: an agency laying claim to extravagant statutory power over the national economy while at the same time strenuously asserting that the authority claimed would render the statute 'unrecognizable to the Congress that

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[117] *Id*. at 8.
[118] *Id*. at 6.
[119] *Alabama Assn. of Realtors v. HHS*, at 764-65.
[120] *Id*.
[121] *Biden v. Nebraska*, at 21, quoting *Utility Air v. EPA*, 573 U.S. at 324, quoting *FDA v. Brown & Williamson*, 529 U.S. at 159.
[122] *Biden v. Nebraska*, at 21.
[123] *Id*.
[124] *Utility Air v. EPA*, at 20.

designed.'"[125] The EPA rule reached the national economy by regulating millions of small sources of emissions and requiring "construction and modification of tens of thousands" nationwide.[126] The rulemaking would also impose command-and-control regulation of "everything from 'efficient light bulbs' to 'basic industrial processes.'"[127]

In *West Virginia v. EPA*, the effects of the EPA's rule would result in "higher energy prices… and eliminate tens of thousands of jobs across various sectors" which would affect consumers and the national economy, outside of the energy sector.[128] By interpreting its authority to regulate the energy market in this rulemaking, the EPA could even force coal plants to shut down entirely.[129] The extent of overreach possible in this case was described as an "unprecedented power of American industry."[130]

9. Substantial Change to the Regulated Industry

In other cases, agencies have sought to make substantial changes to the market structure or legal environment for a specific regulated industry. The court has found economic significance of rules placed on specific industries even if the rulemakings focused on those industries in particular.

In *West Virginia v. EPA*, the effects of the new rule affects not only the national economy but would "substantially restructure the American energy market."[131] In particular, "The issue here is whether restructuring the Nation's overall mix of electricity generation, to transition from 38% coal to 27% coal by 2030, can be the 'best system of emission reduction…'"[132] The rule would "require the retirement of dozens of coal plants" which would change the energy sector.[133]

In *Utility Air v. EPA*, the EPA's rule as applied "would overthrow—the Act's structure and design… EPA described the calamitous consequences of interpreting the Act in that way."[134] As a result, "decade-long delays in issuing permits would become common, causing construction

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[125] *Id.*
[126] *Id*. at 19-20.
[127] *Id*. at 26.
[128] *West Virginia v. EPA*, at 10.
[129] *Id*. at 24.
[130] *Id*., citing *Industrial Union Dept.*, *AFL–CIO* v. *American Petroleum Institute*, 448 U. S. 607, 645 (1980) (plurality opinion).
[131] *Id.* at 20.
[132] *Id*. at 16.
[133] *Id*. at 10.
[134] *Utility Air v. EPA*, at 17.

projects to grind to a halt nationwide."[135] The energy sector would have to undergo substantial changes.

In *USTA v. FCC*, the FCC's classification of broadband internet providers would greatly impact "investment in infrastructure, content, and business" that would be a major question that Congress would need to address specifically in updated legislation, rather than interpretation by the agency, according to Justice Kavanaugh's dissenting opinion.[136] As discussed in *NCTA v. Brand X*, the FCC's rules would change the regulatory treatment of cable modem service that would change the economics of the industry.[137]

As discussed earlier, the question of whether the FCC has authority to reclassify broadband internet access service (BIAS) as a Title I or Title II service under the Telecommunications Act of 1996 has come before the federal courts yet again. In an appeal of an order promulgated by the FCC in 2024, the Sixth Circuit applies the major questions doctrine.[138] After *Loper Bright*, clearly delegated authority is needed to define whether broadband is a telecommunications service or information service.[139]

The ongoing "net neutrality" cases or otherwise known as the Title I or Title II broadband classification litigation, may be one of the more salient applications of the new administrative law landscape post-*Loper Bright* and post-*West Virginia v. EPA*. Given the political ping-pong of classification of broadband service that has occurred over the last twenty years at the FCC, the Supreme Court may find that it is time to send the definition of broadband back to Congress. Economic considerations as well as political would support more certainty on the inputs of this line of rulemakings.

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[135] *Id*.
[136] *USTA v. FCC,* at 85 (J. Kavanaugh, dissenting, at 13).
[137] *NCTA v. Brand X*, at 2.
[138] *In re: MCP No. 185; Federal Communications Commission, In the Matter of Safeguarding and Securing the Open Internet, Declaratory Ruling, Order, Report and Order, and Order on Reconsideration, FCC 24-52, 89 Fed. Reg. 45404, published May 22, 2024*, U.S. Court of Appeals for the Sixth Circuit, Order No. 24-7000, Case No. 24-3449, filed Aug. 1, 2024, at 6, https://www.bloomberglaw.com/public/desktop/document/InreMCPNo185OpenInternetRuleFCC2452DocketNo24070006thCirJun122024?doc_id=X6PGS452E1J9E7PI6N1MNHL0KM5 ("The petitioners are likely to succeed on the merits because the final rule implicates a major question, and the Commission has failed to satisfy the high bar for imposing such regulations.").
[139] *Id*. at 8.

III. Economic Significance in Executive Branch Regulatory Review

Regulatory review in the executive branch provides additional context. While executive branch definitions of "economically significant" rules provide helpful context, they do not bind federal courts in their major questions doctrine analysis, even when codified by Congress. But it's important to understand the development of the definition of major rules at the Office of Management and Budget (OMB) and Office of Regulatory Affairs (OIRA) as agencies of the executive branch under Article II of the constitution. The executive branch's determination of scope and size of the threshold for major rules can inform Congress and the judiciary when writing and interpreting statutes that delegate authority to the federal agencies.

Table 3 shows a timeline of "major rules" and "economically significant" rules as later codified by Congress in the context of regulatory review.[140] In this table, the President's executive orders from the 1970s onward are listed with the year, presidential administration, and a description of the executive order. The table shows executive orders starting with President Nixon, the "major rule" phrase by President Reagan in 1981 and $100 million threshold (which has since been increased to $200 million but also subject to adjustment over time), and the "economically significant" phrase by President Clinton in 1993.

Table 3. Economic Significance in Executive Branch Review

Item	Year	President	Description
OMB Papers: QLR #1	1971	Nixon	"Quality of life review" (QLR) required agencies to submit to OMB for regulatory review
EO 11821	1974	Ford	"Inflation impact statements" established
EO 11949	1977	Ford	"Economic impact statements" established
EO 12044	1978	Carter	"Evaluate the direct and indirect effects of alternatives" required agencies to present alternative regulations
Regulatory Flexibility Act and Paperwork Reduction Act	1980	Carter	Creates OIRA to report on regulations that are "likely to have significant economic impact" on small entities
EO 12291	1981	Reagan	"Major rule" and "significant" effects and $100 million annual cost threshold, and Director of OMB, subject to direction of Task Force, makes the "major" determination. Unified Regulatory Agenda reports have to classify regulations in

[140] Susan E. Dudley, *Regulatory Oversight and Benefit-Cost Analysis: A Historical Perspective*, J. BENEFIT COST ANAL. 2020; 11(1):62–70, doi:10.1017/bca.2019.34; Susan E. Dudley, *OIRA Past and Future*, Working Paper 19-17, April 2023, https://administrativestate.gmu.edu/wp-content/uploads/2023/04/19-17_Dudley.pdf, and Clyde Wayne Crews, Jr., *What's the Difference Between "Major," "Significant," and All Those Other Federal Rule Categories? A Case for Streamlining Regulatory Impact Classification*, Competitive Enterprise Institute Issue Analysis 2017 No. 8, September 2017, https://cei.org/wp-content/uploads/2017/09/Wayne-Crews-What-is-the-Difference-Between-Major-and-Significant-Rules-1.pdf.

			priority and significance. Regulatory Impact Analysis (RIA) to include benefits, costs, potential net benefits, alternatives.
EO 12866	1993	Clinton	"Economically significant" concept is later cited as originating in 3(f)(1) but not directly stated as such, still uses "significant regulatory action" where OIRA Administrator can define "significant" and waive review too
Unfunded Mandates Reform Act (UMRA)	1995	Clinton	$100 million threshold for significant regulations
Congressional Review Act	1996	Clinton	Codifies the "major rule" definition and $100 million threshold, citing back to EO 12291. Directs GAO to report to Congress by type and priority of significance
Regulatory Right-to-Know Act	2000	Clinton	"Major rule" report in the Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act, and "non-major" rules are all other rules
OMB Circular A-4	2003	Bush	Guidance from OMB to federal agencies on regulatory analysis and accounting statements
EO 13422	2007	Bush	"Specific market failure" and "significant guidance documents" which are defined with the $100 million threshold
EO 13563	2011	Obama	Reaffirmed EO 12866
EO 13579	2011	Obama	Encouraged agencies to conduct retrospective review
Regulatory Accountability Act (introduced, no vote)	2017	Obama	"Major guidance" and "major rule" with $100 million to be "adjusted once every 5 years to reflect increases in the Consumer Price Index"
EO 13771	2017	Trump	Remove 2 regulations for every 1 new one issued
EO 13777	2017	Trump	Established Regulatory Reform Officers and Regulatory Reform Task Forces within agencies
EO 14094	2023	Biden	$200 million threshold for "significant regulatory action," adjustable every 3 years by the OIRA Administrator

Executive Order 11949 (1977) (President Ford)[141] directed agencies to prepare "economic impact statements" which were meant to build on Executive Order 11821[142] which directed agencies to prepare "inflation impact statements" to measure the impact of rulemaking, ratemaking, licensing, and price controls on inflation.[143] These 2 Ford EO's followed the Nixon OMB's Quality of Life Review[144] which started the practice of asking federal agencies to review the impact of their regulations.[145]

[141] Executive Order 11949—Economic Impact Statements, December 31, 1976, https://archives.federalregister.gov/issue_slice/1977/1/5/1017-1028.pdf.
[142] Executive Order 11821—Inflation Impact Statements, November 29, 1974, https://archives.federalregister.gov/issue_slice/1974/11/29/41497-41502.pdf.
[143] Susan E. Dudley, *Regulatory Oversight and Benefit-Cost Analysis: A Historical Perspective*, J. BENEFIT COST ANAL. 2020; 11(1):62–70, doi:10.1017/bca.2019.34, at 63.
[144] Office of Mgmt. & Budget, *OMB Papers: Quality of Life Review #1, Agency Regulations, Standards, and Guidelines Pertaining to Environmental Quality, Consumer Protection, and Occupational and Public Health and Safety* 2 (1971).
[145] Jonathan B. Wiener and Daniel L. Ribeiro, *Environmental Regulation Going Retro: Learning Foresight from Hindsight,* 32 J. OF LAND USE & ENV. LAW 1 (2016), https://law.fsu.edu/sites/g/files/upcbnu1581/files/JLUEL/jluel-v32n1.pdf at 16 n.93.

Executive Order 12044 (1978) (President Carter)[146] continued the effort and "required agency heads to determine the need for a regulation, evaluate the direct and indirect effects of alternatives, and choose the least burdensome approach"[147]

The Regulatory Flexibility Act of 1980[148] and Paperwork Reduction Act of 1980[149] established the Office of Regulatory Affairs (OIRA) to measure impacts of regulations on small entities and to determine "significant economic impact" ("likely to have a significant economic impact on a substantial number of small entities") and required April and October reports on the Regulatory Agenda.[150]

Executive Order 12291 (1981) (President Reagan)[151] established the term "major rule" and "significant" effects,[152] directing OIRA to make the determination of "major" rules. The Reagan order is said to be the "origin of the $100 million annual cost threshold for major rule classification, defined like this in E.O. 12291."[153] The OMB Director in particular can define "major" on behalf of the President. The order states, "To the extent permitted by law, the Director shall have authority, subject to the direction of the Task Force, to (1) Designate any proposed or existing rule as a major rule in accordance with Section 1(b) of this Order…"[154]

Executive Order 12866 (1993) (President Clinton)[155] was probably the first to actually define economic significance. Section 3(f)(1) defines a "significant regulatory action" as having a $100 million or more impact or "adversely affect in a material way the economy, a sector of

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[146] Executive Order 12044—Federal Regulation, March 24, 1978, https://www.govinfo.gov/content/pkg/FR-1978-03-24/pdf/FR-1978-03-24.pdf.
[147] Dudley, *supra* note 20 at 63.
[148] *See generally* Congressional Research Service, *The Regulatory Flexibility Act: An Overview*, August 16, 2021, https://crsreports.congress.gov/product/pdf/IF/IF11900.
[149] P.L. 96-511, Paperwork Reduction Act of 1980, https://www.congress.gov/bill/96th-congress/house-bill/6410; *see generally* U.S. Department of Justice, *Memorandum Opinion for the Counsel to the Vice President and for the Counsel to the Director*, Office of Management and Budget, June 22, 1982, https://www.justice.gov/file/149961/dl?inline=.
[150] *Id.*
[151] Executive Order 12291—Federal Regulation, February 17, 1981, https://www.archives.gov/federal-register/codification/executive-order/12291.html; *see also* https://www.govinfo.gov/content/pkg/FR-1981-02-19/pdf/FR-1981-02-19.pdf.
[152] Clyde Wayne Crews, Jr., *What's the Difference Between "Major," "Significant," and All Those Other Federal Rule Categories? A Case for Streamlining Regulatory Impact Classification*, Competitive Enterprise Institute Issue Analysis 2017 No. 8, September 2017, https://cei.org/wp-content/uploads/2017/09/Wayne-Crews-What-is-the-Difference-Between-Major-and-Significant-Rules-1.pdf at 11.
[153] *Id.*
[154] EO 12291, Section 6(a), https://www.archives.gov/federal-register/codification/executive-order/12291.html.
[155] Executive Order 12866—Regulatory Planning and Review, September 30, 1993, https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf.

the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities."[156] The OIRA Administrator can define "significant" and may waive review of significant regulatory actions, too. "Significant" rules are a larger set of rules than "major" rules, where 200 of approximately 3,000 new federal rules have been deemed significant since the EO 12866.[157] The EO also directs agencies to submit a report called the Unified Regulatory Agenda with a Regulatory Plan that categories rules by priority and significance with categories that include: "other significant, substantive, nonsignificant, routine and frequent, and informational/administrative/other."[158] The Regulatory Plan and the Unified Agenda of Federal Regulatory and Deregulatory Actions define "economically significant" but refers back to EO 12866.

Congress codified the $100 million analysis threshold for regulatory review by the Executive Branch in the Unfunded Mandates Reform Act (UMRA) of 1995.[159]

The Congressional Review Act of 1996[160] also codified the "major rule" definition and $100 million threshold with a definition the same as EO 12291 (1981) (President Reagan).[161] The GAO submits reports to Congress on "major" rules and over $100 million in estimated annual costs. GAO categories rules by type and priority with a schema that does not exactly track with the Unified Regulatory Agenda categories, but for rule type: "major/non-major" and for priority type: "significant/substantive" vs. "routine/info/other."[162]

The Regulatory Right-to-Know Act of 2000[163] includes analysis of costs and benefits in the "major rule" report in the Report to Congress on the Benefits and Costs of Federal

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[156] *Id.; see* Crews at 14.
[157] *Id.*
[158] Crews at 19-20.
[159] P.L. 104-4, Mar. 22, 1995, https://www.govinfo.gov/content/pkg/PLAW-104publ4/pdf/PLAW-104publ4.pdf; *see generally* Congressional Research Service, The Unfunded Mandates Reform Act: A Primer, June 16, 2023, https://crsreports.congress.gov/product/pdf/IF/IF12431/2.
[160] *See generally* Congressional Research Service, *The Congressional Review Act (CRA): A Brief Overview*, August 29, 2024, https://crsreports.congress.gov/product/pdf/IF/IF10023; Congressional Research Service, The Congressional Review Act (CRA): Frequently Asked Questions, Nov. 12, 2021, https://crsreports.congress.gov/product/pdf/R/R43992.
[161] Crews at 12.
[162] *Id*. at 20.
[163] P.L. 106-554, https://www.govinfo.gov/content/pkg/PLAW-106publ554/pdf/PLAW-106publ554.pdf.

Regulations[164] and Agency Compliance with the Unfunded Mandates Reform Act. In this report, "non-major" rules are defined as all other rules that are not "major."[165]

OMB Circular A-4 (2003) (President Bush 43) [166] also refers back to EO 12866, yet "economically significant" is not used verbatim in the Clinton order.[167]

Executive Order 13422 (2007) (President Bush)[168] requires identifying "specific market failure" and "significant guidance documents" for federal regulations that have economic impact of $100 million or more. Closer scrutiny of a rule is applied if it is found to "create a serious inconsistency … materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights or obligations of recipients thereof; or raise novel legal or policy issues…"[169] which matches language in EO 12866.

Executive Order 13563 (2011) (President Obama)[170] reaffirmed the Clinton EO 12866, and President Obama also issued Executive Order 13579[171] which encouraged agencies to conduct retrospective review.

Executive Order 13771 (2017) (President Trump)[172] directed agencies to remove two regulations for every one newly issued rule. Executive Order 13777[173] established Regulatory Reform Officers and Regulatory Reform Task Forces within agencies.

The Regulatory Accountability Act of 2017[174] did not receive a vote in Congress but would have introduced the term "major guidance" and "major rule" with $100 million to be

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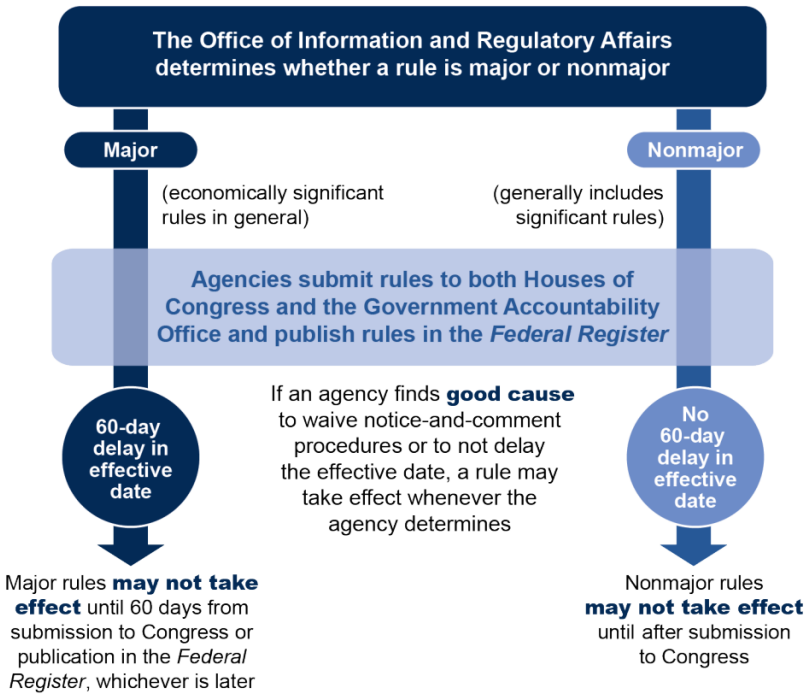
[164] *See generally* "Report to Congress on the Costs and Benefits of Federal Regulation," September 30, 1997, https://obamawhitehouse.archives.gov/omb/inforeg_rcongress.
[165] *Id.*
[166] OMB Circular No. A-4, Sept. 17, 2003, https://obamawhitehouse.archives.gov/omb/circulars_a004_a-4/; Circular No. A-4, Nov. 9, 2023, To the Heads of Executive Agencies and Establishments, Subject: Regulatory Analysis, https://www.whitehouse.gov/wp-content/uploads/2023/11/CircularA-4.pdf (last accessed Sept. 9, 2024).
[167] Crews at 16. "If a rule is economically significant, it is also significant and major. This does not necessarily hold in reverse. Major and significant rules may or may not be economically significant." *Id*.
[168] Executive Order 13422—Further Amendment to Executive Order 12866 on Regulatory Planning and Review, January 18, 2007, https://www.govinfo.gov/content/pkg/WCPD-2007-01-22/pdf/WCPD-2007-01-22-Pg48.pdf.
[169] *Id.*
[170] Executive Order 13563—Improving Regulation and Regulatory Review, January 18, 2011, https://obamawhitehouse.archives.gov/the-press-office/2011/01/18/executive-order-13563-improving-regulation-and-regulatory-review.
[171] Executive Order 13579—Regulation and Independent Regulatory Agencies, July 11, 2011, https://obamawhitehouse.archives.gov/the-press-office/2011/07/11/executive-order-13579-regulation-and-independent-regulatory-agencies.
[172] Executive Order 13771—Reducing Regulation and Controlling Regulatory Costs, January 30, 2017, https://www.govinfo.gov/content/pkg/DCPD-201700084/pdf/DCPD-201700084.pdf.
[173] Executive Order 13777—Enforcing the Regulatory Reform Agenda, February 24, 2017, https://www.govinfo.gov/content/pkg/FR-2017-03-01/pdf/2017-04107.pdf.
[174] H.R. 50—Regulatory Accountability Act of 2017, https://www.congress.gov/bill/115th-congress/house-bill/5.

"adjusted once every 5 years to reflect increases in the Consumer Price Index for All Urban Consumers, as published by the Bureau of Labor Statistics of the Department of Labor."[175]

Executive Order 14094 (2023) (President Biden)[176] modernized regulatory review and reaffirmed EO 12866 (1993) (President Clinton) and EO 13563 (2011) (President Obama). It increased the threshold to $200 million for "significant regulatory action," a threshold that can be adjusted every 3 years by the OIRA Administrator based on changes in gross domestic product.[177]

Figure 1 provides a schematic of the Executive Branch's treatment of "significant" regulations, a figure from a GAO report shows the different definitions between major "economically significant" rules and nonmajor rules (which may be significant nonetheless in the OMB schema).[178]



[175] *Id.*
[176] Executive Order 14094—Modernizing Regulatory Review, April 6, 2023, https://www.govinfo.gov/content/pkg/FR-2023-04-11/pdf/2023-07760.pdf, amending Executive Order 12866—Regulatory Planning and Review, September 30, 1993, https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf, and Executive Order 13563—Improving Regulation and Regulatory Review, January 18, 2011, https://obamawhitehouse.archives.gov/the-press-office/2011/01/18/executive-order-13563-improving-regulation-and-regulatory-review.
[177] *Id.*
[178] GAO, Trends at the End of Presidents' Terms Remained Generally Consistent across Administrations, Jan. 2023, GAO-23-105510, https://www.gao.gov/assets/820/817228.pdf.

Figure 1. Major and Nonmajor Rules[179]

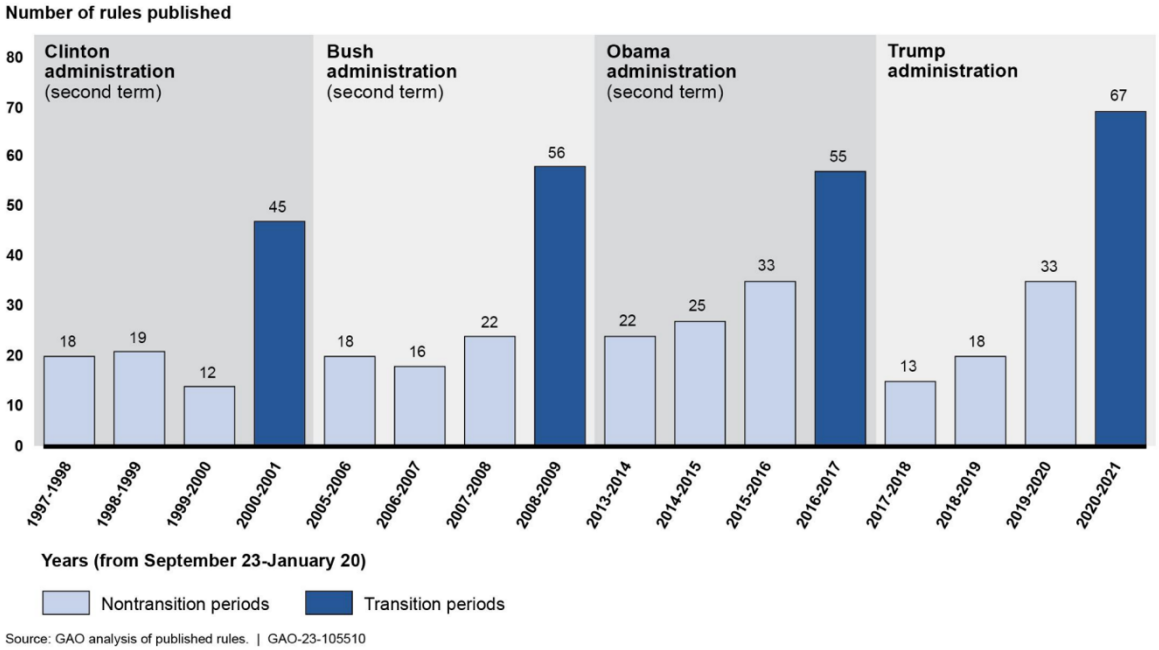


Figure 2. Number of Major Rules Published Across Administrations[180]

Figure 2 shows the number of economically significant rules as defined by the executive branch for purposes of regulatory review from 1997 to 2021 in the Clinton, Bush, Obama, and Trump administrations.[181] The number of major rules hovers below 20 in each year-long period but increases to over 50 in transition periods.

While the Executive Branch's determinations do not affect the judicial branch's analysis of economic significance in major questions cases, it does show when the OMB and OIRA Administrator find it important to apply benefit-cost analysis to federal rulemakings.

IV. Conclusion

The facts presented in major questions cases show that vast economic significance can arise when a federal rule affects large numbers of people, imposes large compliance costs, and has substantial effects on the economy at large or the industry in particular.

[179] *Id*. at 14, fig. 1.
[180] *Id*. at 19, fig. 3.
[181] *Id*.

Courts should not adopt bright line economic thresholds, such as compliance costs or industry impact exceeding predefined monetary benchmarks (e.g., $200 million, as referenced in executive branch review), to guide the determination of "vast economic significance." But instead, they should assess the specific economic context, including the scale of affected industries, the number of impacted individuals, and the broader economic consequences of regulatory actions.

Executive branch regulatory review of "economically significant" rules offer valuable reference points for the major questions doctrine. Retrospective reviews by the executive branch of existing regulations could ensure that economic thresholds and agency interpretations align with current realities and statutory intent. Federal courts should independently evaluate economic facts to maintain judicial impartiality and uphold separation-of-powers principles.

Congress should articulate explicit thresholds and regulatory boundaries within statutes, ensuring clarity about the extent of delegation to federal agencies. Given the role of methods and calculations in defining economic outcomes, Congress should evaluate whether significant methodological changes within agencies necessitate new statutory clarity.

Separation of powers considerations will be the basis for how the major questions doctrine is implemented and interpreted by courts, Congress, and the executive branch going forward. Economic facts will shape how each case is independently decided at common law but can offer important context for Congress and the courts as it applies the doctrine to different rules and contexts.

The judiciary has the task to determine whether Congress delegated authority with enough specificity to permit the federal actions at issue. The Congress needs to be clear in its statutory language and scope of delegation, while still allowing for the necessary flexibility in implementation. These cases show the extent that regulatory activity can exceed delegated authority, and in several cases, with extraordinary and vast effects on Americans and the American economy.

After *Loper Bright* and amidst the evolving landscape of administrative law, it becomes increasingly important for federal agencies, industry, and the executive branch to understand Congress’s intent, oftentimes many years after the authorizing statutes. Ultimately, the separation of powers in our constitutional system will continue to create tension along with the time elapsed between prior policymakers and current officials.