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Too Big to Fix

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ABSTRACT

As a country we are facing urgent and "big" challenges. These include increasing threats related to climate change, global pandemics and strife, and technological advancements, as well as ongoing systemic barriers to equity and economic progress. Big problems often require big, large-scale solutions. Through the lens of labor and employment law, this Article claims that courts now consider some problems "too big to fix." This Article illustrates the judiciary's hostility toward, and rejection of, big solutions from the private sector, the executive branch, and even Congress.

Focusing on courts' rejection of private challenges to pervasive discrimination, the first Part of this Article illustrates judicial reservations about addressing problems that affect many workers and are therefore considered "too big." Courts have also rejected executive branch efforts to use novel tools and regulation in responding to urgent issues affecting many people, including the COVID-19 pandemic and economic inequality. In Part II, the Article argues that "too big to fix" is aptly demonstrated by the "anti-administrative" movement, which gained momentum and reached new heights in the administrative law decisions the Supreme Court issued in 2022, most notably its announcement of the major questions doctrine.

In Part III, the Article discusses additional restraints on congressional efforts at big fixes and suggests a bias against allowing Congress to provide agencies with flexibility to apply their statutes to evolving markets and problems. Finally, in Part IV, the Article assesses potential smaller responses to the too big to fix problem by the private bar, agencies, and Congress, ultimately arguing that too much is lost by accepting incremental approaches. The Article concludes that the courts have raised the stakes; with historical channels for change unavailable or not working, substantial Congressional and court reforms are necessary.

While others have commented on the Court's use of procedural tools to bar access to substantive rights, as well as the Court's antinovelty and anti-administrative predilections, this Article offers an interrelated—but new and broader—framework, identifying a rejection of big solutions beyond just the administrative state. Rather, this Article argues that the Court is closing off all avenues for relief, foreclosing private parties and the government from responding to large-scale systemic problems and injustice, at a moment when such solutions are more important than ever.

INTRODUCTION

For over a decade, private litigants and administrative agencies have been facing an increasingly conservative and skeptical judiciary and an increasingly polarized Congress. At the same time, as a nation we are confronting pervasive and polarizing challenges that cut across substantive issue areas, such as the environment, housing, student debt, immigration, voting rights, gun safety, and labor rights, to name a few. As a result, in a time of large-scale societal problems, courts are hostile to "big" solutions; that is, actions that affect a lot of working people. Impact is relative, but based on the cases discussed within, "big" actions affect at least one million workers and sometimes substantially more.

Part I of this Article lays out the "too big to fix" problem and its implications, illustrating how the judicial branch is hamstringing private litigants. Using the lens of labor and employment law, this Part illustrates the Court's restraints on private litigants by discussing its arbitration decisions and its holding in *Wal-Mart Stores, Inc. v. Dukes*,[1] the largest private discrimination class action certification ever attempted. Drawing on my experience prosecuting discrimination cases at the U.S. Equal Employment Opportunity Commission, this Part reveals the paradox of bad faith actors discriminating so broadly that they can use procedural strategies and judicial skepticism about the scope of the problem to escape judgment.

In its last few Terms, the Supreme Court has also executed a long-term agenda to strip executive branch agencies of their power.[2] Part II provides a broader analysis of the Supreme Court's recent administrative law doctrine and argues that its development too is an example of too big to fix. Building on the work of other academics, including what Professor Metzger has referred to as "contemporary anti-administrativism,"[3] and Professor Litman's "antinovelty" presumption,[4] this Part focuses on how the major questions doctrine

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1 564 U.S. 338 (2011).

2 *See, e.g.*, Charlie Savage, *Legal Conservatives' Long Game: Amp Up Presidential Power but Kneecap Federal Agencies*, N.Y. TIMES (Jul. 4, 2024), https://www.nytimes.com/2024/07/04/us/politics/conservative-legal-movement-supreme-court.html [https://perma.cc/6HZE-LL89].

3 Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 4 (2017) (describing it as an academic, political, and judicial reaction to the Obama administration's frustration with inaction by Congress and active use of administrative agencies to carry out its policy agenda).

4 *The Presumption Against Novelty in the Roberts Court's Separation-of-Powers Case Law*, 137 HARV. L. REV. 2034, 2035 (2024) ("These cases suggest that the current Court

illustrates the too big to fix problem. Using a labor and employment lens, this Part uses examples to illustrate past and potential future implications of the too big to fix problem on worker mobility, economic security, and safety and health, including the executive branch's ability to address global pandemics, extreme heat in the workplace, noncompetitive workplace restraints, and access to overtime pay. Not only does the hostility to big fixes prevent urgently needed remedies, but it also perpetuates the growth of problems by incentivizing delay and an antiregulatory approach. In other words, the longer problems go unaddressed, the harder they are to resolve, because they become too big to fix.

Part III notes that while the Supreme Court is calling for a greater role for the legislative branch, it is also foreshadowing increased restraints on Congress in the form of a reinvigorated nondelegation doctrine, potentially foreclosing yet another avenue for relief.

Finally, in Part IV, the Article assesses potential responses to the too big to fix problem by the private bar, agencies, and Congress. In doing so, it offers a critique of the incrementalism demanded by the Court's too big to fix mentality, and it argues that the Court's preferred smaller solutions are insufficient to address many of today's major problems. The Article concludes that because the Court has raised the stakes by foreclosing historical channels for change, substantial reforms are needed inside and outside government, particularly by and within Congress and for the judiciary, if we are to effectively confront "big" societal challenges affecting millions of workers.

I
JUDICIAL REJECTION OF TOO BIG TO FIX PROBLEMS IN THE PRIVATE SECTOR

For some time, the Supreme Court has chipped away at private access to the courts to seek large-scale remedies, including narrowing the scope of class action litigation and allowing forced arbitration with class action waivers.[5] Perversely, these court decisions can incentivize

views antinovelty as more than mere rhetoric. Instead, the Court wields it as a presumption dictating that novel statutes and regulations be treated with heightened judicial scrutiny.") [hereinafter *The Presumption Against Novelty*]; Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407, 1415 (2017); *see also* Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2113 (2015); Neal K. Katyal, *Rethinking Legal Conservatism*, 36 HARV. J.L. & PUB. POL'Y 949, 951 (2013).

[5] *See, e.g.*, Epic Sys. Corp. v. Lewis, 584 U.S. 497 (2018).

bad faith actors to violate the law as an effective cost of doing business. This precedent also emboldens bad actors to discriminate so extensively that they become beyond the reach of large-scale redress. The below examples illustrate how an increasingly conservative judiciary has been foreclosing avenues to relief through the private bar by marking the problems as too big to fix.

Since the 1990s, the judiciary has increasingly restricted litigants' access to the courts, including making it harder for plaintiffs to pursue class actions.[6] A clear example is the Supreme Court's cases on forced arbitration. In *Epic Systems Corp. v. Lewis*,[7] for example, the Supreme Court held that the Federal Arbitration Act requires courts to enforce arbitration provisions in employment contracts and that such provisions do not violate the National Labor Relations Act, even when the arbitration terms prohibit the pursuit of class or collective action. Because class actions and class settlements allow problems to be addressed on a larger scale, and in some cases allow bundling of claims that would otherwise go unaddressed for practical reasons,[8] such procedural restrictions can undermine enforcement of workplace policies that are dependent on private and collective enforcement actions.[9] As Justice Kagan noted in *American Express Co. v. Italian*

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6 Melissa Hart, *Will Employment Discrimination Class Actions Survive?*, 37 AKRON L. REV. 813, 835 (2004) ("[M]any commentators have observed 'a significant and increasing hostility to the class action mechanism' as 'a broad trend in American courts today.'") (citations omitted); *see also* Tanya Goldman & David Weil, *Who's Responsible Here? Establishing Legal Responsibility in the Fissured Workplace*, 42 BERKELEY J. EMP. & LAB. L. 55, 64 (2021) ("Access to individual and collective rights have also been eroded through recent court decisions."); Suzette M. Malveaux, *Is It Time for A New Civil Rights Act? Pursuing Procedural Justice in the Federal Civil Court System*, 63 B.C. L. REV. 2403, 2405 (2022) ("The Court has systemically eroded Americans' capacity to protect and enforce their substantive rights.").

7 *E.g.*, 584 U.S. 497, 525 (2018).

8 *See, e.g.*, Michael Selmi & Sylvia Tsakos, *Employment Discrimination Class Actions After* Wal-Mart v. Dukes, 48 AKRON L. REV. 803, 806 (2015); Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 157 (1982) ("[R]acial discrimination is by definition class discrimination.").

9 *E.g.*, Goldman & Weil, *supra* note 6, at 64; Samuel R. Bagenstos, *Consent, Coercion, and Employment Law*, 55 HARV. C.R.-C.L. L. REV. 409, 413 (2020) ("*Epic Systems* made it harder to enforce the Fair Labor Standards Act (FLSA), the federal minimum wage law."). There is also a large amount of literature about the neo-Lochernism of the Court's arbitration cases and its presumption that employees have bargaining power and workers have freedom to contract with their employers. *E.g.*, *id.* at 415−16; Charlotte Garden, Epic Systems v. Lewis*: The Return of Freedom of Contract in Work Law?*, 2 AM. CONST. SOC'Y SUP. CT. REV. 137, 159 (2018).

Colors Restaurant, federal arbitration clauses with class action waivers can "prevent[] the effective vindication of federal statutory rights."[10]

In the employment context, cost is also a factor that prevents workers and plaintiffs' attorneys from bringing claims without a class or similar mechanism, as Justice Kagan discussed in *Italian Colors*.[11] Additionally, a class can strengthen the evidence of discrimination, making workers more likely to succeed in putting forward proof of their claim. For example, a plaintiff bringing a sex or race discrimination claim may be more likely to be believed if there are other workers who also testify to experiencing discrimination. In fact, empirical research and analysis has shown that mandatory employment arbitration created what Professor Estlund coined a "black hole" of missing employment arbitration claims. That is, many workers subject to mandatory arbitration agreements never bring claims to assert violations, with significant consequences for the enforcement and vindication of employees' rights.[12]

In her dissent in *Epic Systems*, Justice Ginsburg reinforced that the implications of the Court's decision would include "underenforcement of federal and state statutes designed to advance the well-being of vulnerable workers."[13] Using the example of wage theft, which costs workers, particularly low-wage workers, billions of dollars each year (and three times more than the amounts lost to other forms of theft),[14] Justice Ginsburg elucidated how the Court's decision would aggravate this problem.[15] By allowing employers to require arbitration provisions which prohibit collective action, the Court removes the private bar's

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10 570 U.S. 228, 241 (2013) (Kagan, J., dissenting).

11 *Id.* at 245–46 (noting that "the expense involved in proving the claim in arbitration is ten times what Italian Colors could hope to gain, even in a best-case scenario," and that the arbitration provisions further prevented any cost sharing or shifting). When I worked at the U.S. Department of Labor, I also spoke with plaintiffs' attorneys who were concerned that industry-wide violations were going unaddressed because it was too expensive to bring individual claims in arbitration challenging the misclassification of employees as independent contractors.

12 Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 682 (2018) ("Mandatory arbitration is less of an 'alternative dispute resolution' mechanism than it is a magician's disappearing trick or a mirage. Metaphors beckon, but I have opted for that of the black hole into which matter collapses and no light escapes.").

13 Epic Sys. Corp. v. Lewis, 584 U.S. 497, 550 (2018) (Ginsburg, J., dissenting).

14 Brady Meixell & Ross Eisenbrey, *An Epidemic of Wage Theft Is Costing Workers Hundreds of Millions of Dollars a Year*, ECON. POL'Y INST. (Sept. 11, 2014), https://www.epi.org/publication/epidemic-wage-theft-costing-workers-hundreds/ [https://perma.cc/49D9-Q42M] ("[W]age theft is costing workers more than $50 billion a year.").

15 *Epic Sys.*, 584 U.S. at 550−51 (2018) (Ginsburg, J., dissenting).

incentive to pursue such cases; the individual recoveries are insufficient to justify the outlay of resources as compared with a class action.[16]

Following the Court's *Epic Systems* decision, one study found that district courts citing *Epic Systems* were sending sixty-seven percent of their workplace claims to mandatory arbitration.[17] The Court's decision does not just risk underenforcement but actually incentivizes wage theft by scofflaw employers. Where the risk of enforcement is limited, wage theft can be rationalized as part of the cost of doing business; the employer will save more than it risks paying in remedies and fines.[18]

The Supreme Court's hostility to both class actions and addressing large problems affecting many people was further illustrated with the *Wal-Mart v. Dukes* case. In 2024, women still earned an average of eighty-five percent of men's earnings[19] and held less than a third of C-Suite positions.[20] Yet past efforts to use large-scale class action to address discrimination in pay and promotions have failed, and the Court has practically foreclosed such possibilities.

In *Wal-Mart Stores, Inc. v. Dukes*,[21] a 5–4 decision, the Supreme Court rejected class certification for a proposed class of 1.5 million female employees alleging sex discrimination in violation of Title VII of the Civil Rights Act. It was the largest class action employment lawsuit ever filed.[22] Relying on statistical and expert testimony as well

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16 *Id.* Justice Ginsburg goes a step further, noting that where there is an enforcement barrier, employers are incentivized to commit wage theft: "Employers, aware that employees will be disinclined to pursue small-value claims when confined to proceeding one-by-one, will no doubt perceive that the cost-benefit balance of underpaying workers tips heavily in favor of skirting legal obligations." *Id.* at 551.

17 Sanford Heisler Sharp McKnight, LLP, *'Epic' Impact: How a Major SCOTUS Decision in Favor of Arbitration Is Shaping the Landscape for Workplace Lawsuits*, WORKING FOR JUST. BLOG (Feb. 28, 2019), https://www.sanfordheisler.com/blog/2019/02/epic-impact-how-a-major-scotus-decision-in-favo/ [https://perma.cc/BGQ3-FAGL].

18 *Epic Sys.*, 584 U.S. at 551 (Ginsburg, J., dissenting).

19 Richard Fry & Carolina Aragao, *Gender Pay Gap in U.S. Has Narrowed Slightly Over 2 Decades*, PEW RSCH CTR. (Mar. 4, 2025), https://www.pewresearch.org/short-reads/2025/03/04/gender-pay-gap-in-us-has-narrowed-slightly-over-2-decades/ [https://perma.cc/PJ5D-WWK2].

20 Alexis Krivkovich, Emily Field, Lareina Yee & Megan McConnell, with Hannah Smith, *Women in the Workplace 2024: The 10th-Anniversary Report*, MCKINSEY & CO. (Sept. 17, 2024), https://www.mckinsey.com/featured-insights/diversity-and-inclusion/women-in-the-workplace [https://perma.cc/AFF8-5PEJ] (noting also that women of color make up seven percent of C-Suite positions).

21 564 U.S. 338, 367 (2011).

22 Stephanie Bornstein & Joseph M. Sellers, *The Legacy of* Wal-Mart v. Dukes *and the Administrative Response*, 37 ABA J. LAB. & EMP. L. 289, 289 (2023); Selmi & Tsakos, *supra* note 8, at 814.

as the testimony of over 100 female current and former employees, plaintiffs contended that supervisors were exercising discretion over pay and promotion decisions in a manner that disparately affected women, and that Walmart's failure to rectify this discrimination and its "corporate culture" of bias resulted in disparate treatment.[23] Promotion procedures at issue in the disparate impact claim included failures to announce positions, tap on the shoulder procedures, policies requiring the ability to relocate,[24] and other subjective processes which are largely understood to allow subjective bias to infect employment decision-making.[25]

The Court was clearly cognizant of the scope of the case. In the first sentence of the opinion, Justice Scalia noted, "We are presented with one of the most expansive class actions ever,"[26] and not long after, he reiterated that the case confronted "the Nation's largest private employer."[27] Headlines following the decision questioned whether Walmart was "Too Big to Sue."[28]

Drawing attention to the vast size of the proposed class, the Court did not consider there to be common questions of law or fact, a prerequisite to class certification.[29]

> Here respondents wish to sue about literally millions of employment decisions at once. Without some glue holding the alleged reasons for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question why was I disfavored.[30]

Specifically, the Court concluded that plaintiffs lacked "'[s]ignificant proof' that Wal-Mart 'operated under a general policy of discrimination.'"[31]

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23 564 U.S. at 342, 345−46.

24 *Id.* at 370−71.

25 *See* Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 741, 744−45 (2005).

26 564 U.S. at 342.

27 *Id.*

28 Lila Shapiro, *Walmart: Too Big to Sue*, HUFFINGTON POST (Aug. 20, 2011), http://www.huffingtonpost.com/2011/06/20/walmart-too-big-to-sue_n_880930.html (on file with the Oregon Law Review).

29 564 U.S. at 359−60.

30 *Id.* at 352.

31 *Id.* at 355 ("To the contrary, left to their own devices most managers in any corporation—and surely most managers in a corporation that forbids sex discrimination—would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all.").

The court rejected the plaintiffs' proffer of evidence showing statistically significant disparities that could result only from sex discrimination. The Court reasoned that these disparities did not prove a pattern or practice of discrimination "in *all* of Wal-Mart's 3,400 stores,"[32] but also that delegated discretion alone did not demonstrate a "specific employment practice" connecting all "1.5 million claims together."[33] The plaintiffs' anecdotal evidence was rejected for not sufficiently representing a large enough proportion of class members, stores, and states at issue in the lawsuit.[34]

The point here is not to relitigate the *Wal-Mart* decision; there were challenges with the novel approach and even some progressive commentators have endorsed the Court's decision.[35] Rather, this example illustrates how the sheer scope of the alleged claims, rather than drawing attention to the need for a remedy, instead created additional hurdles toward bringing a unique and innovative legal challenge. In other words, if the court requires such uniformity across the class to prove commonality, plaintiffs will never be able to prove common problems central to proving discrimination as the class grows larger and affects more workers. Walmart itself argued in the district court that "the size alone of this case makes it impossible for class certification," an argument that other defendants have also asserted in employment litigation.[36] This was a complaint the EEOC also received in its investigations and litigation, including, for example, in its litigation against Bass Pro stores for race discrimination.[37]

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[32] *Id.* at 357.

[33] *Id.*

[34] *Id.* at 358.

[35] Deborah M. Weiss, *A Grudging Defense of* Wal-Mart v. Dukes, 24 YALE J.L. & FEMINISM 119, 173–74 (2012).

[36] Wal-Mart v. Dukes*: Is 1.6 Million Women 0.6 Million Too Many?*, 2 AM. U. LAB. & EMP. L.F. 151, 156–57 (2011) (citing Principle Brief for the Petitioner, 222 F.R.D. 137 (N.D. Ca. 2004) (arguing that the size of the class exceeds the population of at least twelve of the fifty states)).

[37] *E.g.*, Appellee's Response to the Petition for Rehearing En Banc, EEOC v. Bass Pro Outdoor World, LLC, No. 15-20078 (5th Cir. Nov. 29, 2016) ("In other words, Bass Pro would have this Court hold that damages and jury trials are categorically unavailable in a case where discrimination is particularly widespread and systemic, that is, a pattern or practice case."). In a tied vote, the Fifth Circuit ultimately denied rehearing en banc, with two dissenting opinions. The first dissent noted in its first sentence, and numerous times throughout, that the EEOC was "asserting the violation of the rights of 50,000 applicants," suggesting the sheer scope of the alleged discrimination implicated its "manageability concerns" and the Seventh Amendment. EEOC v. Bass Pro Outdoor World, L.L.C., 865 F.3d 216, 217 (5th Cir. 2017) (Jolly, J., dissenting).

The point of class actions, of course, is not necessarily to make it easier to prove discrimination. They provide economies of scale and important social impacts.[38] There are many critiques of class actions, including everything from the possibility they might force defendants to settle unmeritorious claims to their potential unconstitutionality.[39] There is no numeric cap on class actions, however, which is why the Court's implication that the sheer size of the class stood as a barrier to pursuing and vindicating the discrimination claims is problematic. Here, the shadow of the large number of affected workers appears to have informed the analysis of whether the claims were, in fact, alike.

At the end of the day, the facts remained. Female employees accounted for seventy percent of the hourly employees at Walmart, but thirty-three percent of its managers.[40] Pay disparities existed in all the store's regions.[41] And a big, sweeping approach to remedying these disparities was off the table. Following the decision, there was an immediate decline in class action filings and class action settlements.[42] The immediate drop in filings did bounce back over time, but with attorneys pursuing more modest, targeted class claims.[43]

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38 *See* Nicholas Almendares, *The Undemocratic Class Action*, 100 WASH. U. L. REV. 611, 613 n. 2 (2023) (noting "*Brown v. Board of Education*, 347 U.S. 483 (1954), was a class action."); Arthur R. Miller, *The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative*, 64 EMORY L.J. 293, 312 (2014) ("[R]estricting class actions and other forms of group litigation inevitably leads to the under-enforcement of important public policies.").

39 *See, e.g.*, Alexandra D. Lahav, *Are Class Actions Unconstitutional?*, 109 MICH. L. REV. 993 (2011).

40 Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 369–70 (2011) (Ginsburg, J., concurring in part) (citing district court decision, 222 F.R.D. 137, 145, 146, 155 (N.D. Cal. 2004)).

41 *Id.*

42 Bornstein & Sellers, *supra* note 22, at 302 ("Unsurprisingly, in the first few years after *Dukes*, there was a shock to the system, and the number of Title VII class action claims filed dropped precipitously. In 2013, two years after decision, investigative journalist outlet Pro Publica reported (relying on data from Seyfarth Shaw and the Impact Fund) that the combined top ten settlement amounts from employment class actions dropped by over eighty-five percent, from $345 million in 2010 to $45 million in 2012, and that the annual number of new employment discrimination class actions filed dropped by about half, from twenty-five or thirty before *Dukes* to ten or twelve several years after.") (internal citations omitted). *But see* Selmi & Tsakos, *supra* note 8, at 822 ("Contrary to rumblings throughout the legal community that *Wal-Mart* portended the destruction of employment class actions, the decision has not manifested as a death knell for class certification.").

43 Alix Valenti, *Class Actions Ten Years After* Wal-Mart Stores, Inc. v. Dukes*: Difficult but Not Impossible*, 24 ATL. L.J. 2, 43 (2022) ("Classes with the most likelihood of certification are smaller (less than 1,000), representing employees of a single employer or within one region."); Malveaux, *supra* note 6, at 2421 ("The net result, however, has been a higher bar for collective action.").

The combined effect of *Epic Systems* and *Wal-Mart v. Dukes* has been significant on the number and nature of class actions brought on behalf of workers, impeding their ability to seek large scale relief and lowering resolution amounts.

Additional evidence of the Court's assault on "big" fixes is its foreclosure of the use of nationwide, or universal, injunctions. In a case concerning President Trump's Executive Order on birthright citizenship, the court held that federal courts lack the authority to issue "universal injunctions,"[44] removing another potential avenue for large-scale remedies. Rather, injunctions must be tailored and limited to providing complete relief to the parties.[45] While members of the Court noted that litigants can still seek large scale relief through a class action, it is a tool that has been so weakened by the Court itself, it is unlikely to prove a sufficient backstop. Justice Alito wrote separately to admonish courts to closely adhere to Rule 23's class certification requirements,[46] noting that there would be "discrete scenarios" warranting nationwide classes, "[b]ut district courts should not view today's decision as an invitation to certify nationwide classes without scrupulous adherence to the rigors of Rule 23."[47] The practical import is that when there is a presumptively facially unconstitutional Executive Order, as in the *Trump v. CASA* case limiting birthright citizenship,[48] most parties will likely have to bring class actions and successfully certify and litigate them to achieve nationwide relief.[49] This will inevitably further limit the scope of relief available.

Finally, looming on the horizon is a potential constitutional challenge to the disparate impact theory of liability, a critical tool particularly for employment plaintiffs. The Trump Administration has issued an Executive Order calling disparate impact liability unconstitutional.[50] At least one current Justice on the Court may be

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44 Trump v. Casa, Inc., 145 S. Ct. 2540, 2547–48 (2025).

45 *Id.* at 2557.

46 *Id.* at 2566 (Alito, J., concurring) ("[T]oday's decision will have very little value if district courts award relief to broadly defined classes without following 'Rule 23's procedural protections' for class certification.").

47 *Id.* (Alito, J., concurring).

48 *See, e.g.*, *id.* at 2589 (Sotomayor, J., dissenting) (referring to the Citizenship Order as "patently unlawful").

49 *See id.* at 2556 (referring to universal injunctions as "a class-action workaround"). Parties, such as States, may also be able to assert third-party standing claims.

50 Exec. Order No. 14281, 90 Fed. Reg. 17537 (2025), https://www.whitehouse.gov/presidential-actions/2025/04/restoring-equality-of-opportunity-and-meritocracy/ [https://perma.cc/49NX-J886].

open to such a challenge. Justice Thomas has said that "[u]nder any fair reading of the text, there can be no doubt that the Title VII enacted by Congress did not permit disparate-impact claims" and that the Court's precedent to the contrary is wrong.[51] An attack on disparate impact liability would be yet another blow to big fixes.

This Part has used examples from labor and employment law to demonstrate that a hostile judiciary has severely restrained the private bar's pursuit of class action litigation and universal relief that remedies alleged labor and employment violations affecting large numbers of workers, thus incentivizing underenforcement and further violations. According to the Court, these approaches were too big, too novel, or too major, and therefore too big to fix.

II
ANTI-ADMINISTRATIVE LAW REINFORCES TOO BIG TO FIX

This Part discusses administrative law doctrine more broadly, including recent Supreme Court decisions that are emblematic of and will reinforce the difficulty of addressing societal dilemmas that are, according to the Court, too big to fix through the executive branch.[52] First, this Part addresses the major questions doctrine, which is almost explicitly an example of the Court's posture of "too big to fix."[53] As

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51 Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 550 (2015) (Thomas, J., dissenting and discussing why Griggs v. Duke Power Co., 401 U.S. 424 (1971) was wrong when it was decided).

52 Numerous academics have addressed the important role of the administrative state in addressing societal dilemmas and the implications of attacks on the administrative state and agency regulatory power. *See, e.g.*, K. Sabeel Rahman, *Reconstructing the Administrative State in an Era of Economic and Democratic Crisis*, 131 HARV. L. REV. 1671, 1675 (2018) (reviewing JON D. MICHAELS, CONSTITUTIONAL COUP: PRIVATIZATION'S THREAT TO THE AMERICAN REPUBLIC (2017)) ("Despite its neutral trappings in legal doctrine and thought, the administrative state is not ultimately a neutral institutional structure. Its origins are rooted in the attempt to grapple with the upheavals and inequalities of the industrializing economy. Similarly, its dismantling reflects not just legalistic and political critique, but also a systematic effort to shift the balance of social, political, and economic power."); Thomas O. McGarity, *The Major Questions Wrecking Ball*, 41 VA. ENV'T. L.J. 1, 23 (2023) ("[M]any statutes . . . empower agencies to protect the public health, safety, and welfare.").

53 The Court's new jurisprudence on the administrative state is not limited to its announcement of the major questions doctrine in *West Virginia v. EPA*, 597 U.S 697 (2022). In a trio of cases from its 2024 Term, the Court also destabilized agency action. *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 412 (2024) (overturning the *Chevron* doctrine, which accorded deference to agency interpretations of ambiguous statutory language); Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys., 603 U.S. 799, 804 (2024) (holding that a claim does not accrue for purposes of the Administrative Procedure Act until the plaintiff is injured by the final agency action); SEC v. Jarkesy, 603 U.S. 109, 120 (2024) (holding that plaintiff was entitled to a jury trial in SEC action for civil penalties for

exemplified by the Court's decision in *National Federation of Independent Business v. Department of Labor* (*NFIB v. OSHA*),[54] the major questions doctrine explicitly heightens the scrutiny on actions that are "major," including many regulatory actions aimed at addressing big challenges, thus serving as a deregulatory tool.

Second, this Part illustrates past and potential future implications of the too big to fix problem on worker mobility, economic security, and safety and health. This Part includes examples of how the major questions doctrine is limiting the executive branch's ability to address risks to workers, including from pandemics, extreme heat, and noncompete clauses. The Part also notes restraints on regulatory actions that affect millions of workers and how this has hampered agency efforts to improve overtime pay.

A. The Major Questions Doctrine as a Deregulatory Tool

The Supreme Court has ruled that so-called major questions are beyond the reach of the administrative state, even where there is seemingly expansive statutory authority to address them. Indeed, in a series of recent cases, the Supreme Court has clarified the scope of the major questions doctrine and the breadth of issues which might be considered "major." The common theme in these cases is the Court's limitation on big fixes. The major questions doctrine is an almost explicit rejection of administrative actions offering any sort of novel big fix.

The Court announced its "new" major questions doctrine in *West Virginia v. EPA*.[55] As elucidated by the Court, the doctrine consists of

securities fraud); *see also* Richard J. Pierce, Jr., *The Supreme Court's Opinion in* SEC v. Jarkesy *Has the Potential to Be Extremely Destructive*, 109 MINN. L. REV. HEADNOTES 21, 21 (2024) (noting that the Court's decision in *Jarkesy* "may have catastrophic effects on hundreds of regulatory regimes administered by dozens of agencies.").

54 595 U.S. 109, 120–21 (2022).

55 597 U.S. 697, 732 (2022). Relatively early in the Court's recent "major questions" jurisprudence, the Court implicitly relied on the doctrine in a trio of cases challenging regulations to address COVID-19. *See* Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs., 594 U.S. 758, 764–65 (2021) (per curiam) (the Court invalidated a COVID-19 eviction moratorium by the Centers for Disease Control (CDC) because the government had rested its authority to wield such "sweeping power" on a "wafer-thin reed" of a statutory provision); NFIB v. OSHA, 595 U.S. 109, 119 (2022) (the Court stayed the Occupational Safety and Health Administration (OSHA) vaccine mandate as "beyond the agency's legitimate reach"); Biden v. Missouri, 595 U.S. 87, 94 (2022) (the Court clarified the extent of the emerging major questions doctrine by upholding a Center for Medicaid & Medicare Services (CMS) vaccine mandate as consistent with the agency's "longstanding practice . . . in implementing the relevant statutory authorities . . . .").

a two-part analysis. A court first determines whether an exercise of regulatory power constitutes a "major question." Factors the Court has articulated as relevant in determining whether an issue is "major" include its current political and economic significance,[56] whether it is an "unheralded" and "transformative" exercise of novel authority,[57] such as expanding the scope of the agency's regulatory authority,[58] and whether it is an issue typically within the province of the states.[59]

If a court concludes that an agency action constitutes a "major question," the agency must then demonstrate "clear congressional authorization" for its interpretation that goes beyond "a merely plausible textual basis"—hence, many scholars have identified the major questions doctrine as a clear statement rule.[60] That is, the major

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56 597 U.S. at 721 ("[O]ur precedent teaches that there are 'extraordinary cases' that call for a different approach—cases in which the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority.") (internal citation omitted); *see also* Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1014 (2023); Biden v. Nebraska, 600 U.S. 477, 504 (2023) (describing the impact of the Secretary of Education's program to forgive $430 billion in student loans as "sweeping," "unprecedented," and beyond its purview, and noting as relevant to its political significance the eighty student loan bills introduced in the 116th session of Congress).

57 597 U.S. at 721−22, 724.

58 In *Utility Air Regulatory Group v. EPA*, for example, the Supreme Court nixed an Environmental Protection Agency (EPA) rule that would have expanded the agency's regulatory authority over tens of thousands, and in some cases millions, of never before regulated small- and medium-sized sources of greenhouse gas emissions. 573 U.S. 302, 321–22 (2014); *see also NFIB*, 595 U.S. at 117 ("Permitting OSHA to regulate the hazards of daily life . . . would significantly expand OSHA's regulatory authority."). In the Court's view, allowing such a rule would have radically altered the Department's authority, allowing it to control a substantively new category of risk beyond the boundaries of the workplace.

59 In *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 594 U.S. at 764, for example, the Court also noted that the moratorium upset the traditional assumption that landlord-tenant relations fell under the purview of state, rather than federal law.

60 *See, e.g.*, Deacon & Litman, *supra* note 56, at 1012; Jonathan H. Adler, *The Delegation Doctrine*, 12 HARV. J.L. & PUB. POL'Y PER CURIAM 1, 2 (2024) ("Thus, in the major questions doctrine cases—both those in the latest quartet and those before—the Court has insisted upon clear evidence, if not an actual clear statement, that Congress delegated broad regulatory authority concerning matters of great economic or political significance."); 597 U.S. at 736–43 (2022) (Gorsuch, J., concurring) (describing doctrine as a clear statement rule); *id.* at 723 ("Extraordinary grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or 'subtle device[s].' Nor does Congress typically use oblique or elliptical language to empower an agency to make a 'radical or fundamental change' to a statutory scheme.") (internal citations omitted).

questions doctrine generally stands for the proposition that Congress does not delegate extraordinary powers without speaking clearly.[61]

This requirement for "statutory clarity" authorizing agency action reveals the Court's deregulatory preference and is yet another impediment to novel statutory interpretation and creative approaches for addressing big problems.[62] As Professors Deacon and Litman note in their distillation of the "new" major questions doctrine, the Chief Justice himself has noted at oral argument that "the breadth of some of those [statutory] provisions would by their terms literally cover the authority that the agency exercised," but "given the nature of the authority and its consequences," that statutory authority "was not clear enough."[63] Professor McGarity notes that the major questions doctrine thus "amount[s] to a presumption against agency attempts to find in aging statutes powers that they have not previously exercised and a judicially imposed limitation on Congress's power to address dynamic situations by employing broad statutory language to allow agencies to adapt to changing circumstances."[64]

It is hard to overstate the significance of this in terms of the clarity of congressional authorization required for what the Court will determine to be "major" issues, restricting Congress and trumping the typical statutory interpretation the court and agencies would conduct.

Both components of the required analysis—whether the issue is "major" in the eyes of the court, and whether Congress has clearly authorized the action—will function to frustrate administrative and legislative efforts, including allowing issues to be politized and made

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61 Deacon & Litman, *supra* note 56, at 1036 ("Congress must clearly and explicitly authorize the particular agency action at issue.").

62 *Id.* at 1011 ("[T]he major questions doctrine has emerged as a powerful weapon wielded against the administrative state"); *The Presumption Against Novelty*, *supra* note 4, at 2051 ("The Court's application of the doctrine thus operates as a statute-narrowing device, 'severely restricting agencies from adopting regulations pursuant to generally worded congressional statutes,' which in turn discourages regulation and facilitates deregulation."); McGarity, *supra* note 52, at 19 ("The doctrine is not neutral in that it favors deregulation over regulation."); *id.* at 22−23 ("While the doctrine's bias against new federal regulation may be highly desirable to judges who harbor a deep distrust of the administrative state, it runs counter to many statutes that empower agencies to protect the public health, safety, and welfare.").

63 Deacon & Litman, *supra* note 56, at 1037 (quoting Transcript of Oral Argument at 107−08, Biden v. Nebraska, 600 U.S. 477 (2023) (No. 22-506)).

64 McGarity, *supra* note 52, at 2.

"major,"[65] or neglected for so long that their impact becomes expansive and/or costly, and thus, major.

Not only is the major questions doctrine an example of the too big to fix challenge, but it also suggests a similarly narrow avenue for success as exists for the private bar. That is, it effectively prevents big fixes and limits interventions to incrementalism at best.[66] "Put more succinctly, one might say based on Chief Justice Roberts's opinion that the major questions doctrine applies to curtail administrative discretion when an agency stretches the boundaries of statutory interpretation to claim new authority to address big problems that, previously, were not obviously within the agency's purview."[67]

B. Implications of the Major Questions Doctrine for Workers' Health, Safety, and Economic Security

To further elucidate the practical implications of these administrative constraints for contemporary crises workers are facing, the following examples address the Department of Labor's efforts to protect workers from the harms of COVID-19, the Federal Trade Commission's (FTC's) rulemaking to increase worker mobility and competition, and the Department of Labor's ongoing efforts to protect workers from the effects of extreme heat. They illustrate how the major questions doctrine is already serving as a deregulatory tool and impeding big solutions, and how it will likely thwart future solutions with significant impacts.

1. COVID-19 Emergency Temporary Standard

The Department of Labor's efforts to protect 84 million workers from COVID-19 resulted in one of the Court's "new" major questions

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65 Deacon & Litman, *supra* note 56, at 1057 ("By making the courts' interpretation depend in part on the present-day significance of the rule, the major questions doctrine allows political activity outside of formal lawmaking channels to affect the outcome of cases. Especially if the major questions doctrine results in a court deviating from the best or even the otherwise unambiguous meaning of the statute in question, this allows entities to functionally amend statutes through political opposition rather than by doing what would otherwise be required: passing legislation.").

66 *See, e.g.*, *The Presumption Against Novelty*, *supra* note 4, at 2048 (describing how the Court's *West Virginia* decision contemplates "gradual legal development") ("[T]he presumption against novelty operated within the framework of past precedent to constrain EPA to develop policy incrementally.").

67 Kristin E. Hickman, *The Roberts Court's Structural Incrementalism*, 136 HARV. L. REV. 75, 86 (2022).

doctrine decisions.[68] The Court's reaction to OSHA's rulemaking illustrates both the too big to fix problem and the challenge for addressing urgent and novel issues, such as a global pandemic. In *NFIB v. OSHA*,[69] the Court addressed a Department of Labor emergency temporary standard requiring all employers with 100 employees or more to implement a vaccination or test-and-mask policy to limit the spread of COVID-19 in the workplace.[70] OSHA estimated the rule would affect approximately 84 million workers, "save over 6,500 lives and prevent hundreds of thousands of hospitalizations."[71] The Court reinstated a stay after finding petitioners were likely to succeed in their argument that the Department had exceeded its authority in issuing the emergency temporary standard.

In its decision, the Court barely grappled with the statutory text, focusing instead on the size and novelty of OSHA's proposed approach. The Occupational Safety and Health Act (OSH Act) empowers OSHA to issue "emergency temporary standards," forgoing the typical notice and comment process of rulemaking, when it finds "that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards," and that the "emergency standard is necessary to protect employees from such danger."[72] In other words, the statute Congress enacted specifically contemplates times when OSHA may need to respond to "new hazards" that pose a grave danger to employees.[73]

Rather than grapple with the statute itself,[74] the Court seemingly imported a new requirement into the OSH Act that OSHA can regulate hazards workers only experience in the workplace. The Court could not separate the risks of COVID in the workplace from those outside the workplace (even though OSHA regulates many risks, such as fire, heights, and chemicals that exist within and outside the workplace). It concluded that the OSH Act "empowers the Secretary [of Labor] to set workplace safety standards, not broad public health measures."[75]

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68 *See* Deacon & Litman, *supra* note 56.

69 595 U.S. 109, 112 (2022).

70 *Id.* at 112−13, 120.

71 *Id.* at 120.

72 29 U.S.C. § 655(c)(1).

73 *Id.*

74 *See, e.g.*, Eric Berger, *Constitutional Conceits in Statutory Interpretation*, 75 ADMIN. L. REV. 479, 492 (2023).

75 *NFIB*, 595 U.S. at 117.

Further, "[p]ermitting OSHA to regulate the hazards of daily life . . . would significantly expand OSHA's regulatory authority."[76] In particular, it would expand OSHA's regulatory authority beyond the workplace because "[a] vaccin[e], after all, 'cannot be undone at the end of the workday.'"[77] In the Court's view, allowing such a rule would have radically altered the Department of Labor's authority, allowing it to control a substantively new category of risk beyond the boundaries of the workplace.[78] Similar to its too big to fix reaction to the private litigation in *Wal-Mart*, here, in the administrative context, the Court was struck by the scope of regulation and authority OSHA had asserted without historical practice. It noted instead that narrower, "targeted regulations are plainly permissible,"[79] such as "regulat[ing] researchers who work with the COVID-19 virus," or focusing on "risks associated with working in particularly crowded or cramped environments."[80]

The Court was also concerned with the "lack of historical precedent."[81] The Court found it "telling that OSHA, in its half century of existence, has never before adopted a broad public health regulation of this kind" as evidence that the emergency temporary standard was "beyond the agency's legitimate reach,"[82] though it did not find relevant that the nation had also never faced a pandemic of the size, scope, and consequence as the COVID-19 pandemic. Instead, that

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76 *Id.* at 118.

77 *Id.*

78 *Id.* at 117–19.

79 *Id.* at 119.

80 *Id.*

81 *Id.*

82 *Id.* As further evidence that smaller-scale, more targeted regulations might be permissible responses, while large-scale approaches would be too expansive and unprecedented, the Court issued two other relevant COVID-19 decisions. In *Biden v. Missouri*, 595 U.S. 87, 89 (2022), the Court held that an interim final rule imposing a COVID-19 vaccination mandate in healthcare facilities participating in Medicare and Medicaid was within Health and Human Services' (HHS) statutory authority. The *Biden* Court reasoned, in part, that HHS had long imposed conditions of participation on such healthcare facilities, including conditions related to the prevention and control of infectious diseases and the qualifications of healthcare personnel. *Id.* at 90–91. On the other hand, the Court struck down an eviction moratorium. Echoing language in *NFIB*, in *Alabama Ass'n of Realtors*, 594 U.S. 758, 765 (2021) (per curiam), the Supreme Court invalidated a COVID-19 eviction moratorium by the Centers for Disease Control (CDC) because the government had rested its authority to wield such "sweeping power" on a "wafer-thin reed" of a statutory provision. Explaining that "[s]ince that provision's enactment in 1944, no regulation premised on it has even begun to approach the size or scope of the eviction moratorium," the Court characterized the government's articulation of its longstanding statutory authority as "expansive" and "unprecedented." *Id.* at 765.

OSHA had never acted in this way was evidence that it lacked the authority, illustrating another obstacle for the executive branch to address new and emerging threats, other than in "targeted" ways. In other words, as one law professor has described the major questions doctrine, "the Court took [a] broad statutory delegation and rewrote it into a narrow one."[83]

The Court determined the matter was too big—too major—to be regulated without explicit congressional authorization.[84] Specifically, the Court stated, "We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance."[85] As further cases arose in the lower courts, this too big to fix theme would continue. Scale and novelty would continue to impede the government's efforts to address emerging and growing threats.

2. Federal Trade Commission Noncompete Rule as a Major Question

In 2024, the FTC conducted rulemaking to ban noncompetes, taking on a problem affecting a vast number of workers in every sector of the economy. One in five American workers are subject to a noncompete—a contract term that prevents them from working for a competitor or from starting a competing business.[86] These contracts limit labor mobility, depressing wages and working conditions. They also limit competition. In a novel use of its statutory authority, the FTC found that noncompete agreements violated the agency's prohibition against unfair methods of competition and issued a rule banning all workplace noncompete agreements, with very limited exception.[87]

The rule was immediately challenged in multiple venues, with plaintiffs contending that it exceeded the scope of the FTC's statutory rulemaking authority and violated the major questions and nondelegation doctrines, among other alleged deficiencies. One court held in favor of the FTC and two held for the challengers.[88] A federal

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83 Berger, *supra* note 74, at 498 (discussing West Virginia v. EPA, 597 U.S. 697 (2022)).

84 *Id.* at 490–91.

85 595 U.S. at 117 (quoting Alabama Ass'n. of Realtors v. Dep't of Health & Hum. Servs., 594 U.S. 758, 764 (2021)).

86 *FTC Announces Rule Banning Noncompetes*, FTC (Apr. 23, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes [https://perma.cc/5UVU-57GG].

87 Noncompete Clause Rule, 89 Fed. Reg. 38342 (May 7, 2024) (to be codified at 16 C.F.R. pts. 910, 912).

88 *E.g.*, ATS Tree Servs., LLC v. FTC, No. CV 24-1743, 2024 WL 3511630, at *1 (E.D. Pa. July 23, 2024) (denying challenge to rule); Ryan, LLC v. FTC, No. 3:24-CV-00986-E,

district judge in Florida granted the plaintiffs' injunction, holding that the plaintiffs were likely to succeed in arguing that the rule violated the major questions doctrine.[89] As of October 2025, rule was enjoined nationwide.[90]

In determining that the FTC's noncompete ban implicated the major questions doctrine, the Florida district judge echoed Justice Roberts's language that even where the statutory text could support the agency's asserted authority, where the action was "major," more was required.[91] The district judge stated that "[t]he doctrine assumes, as is true here, that the FTC's reading of its authority under Section 6(g) is plausible, but requires more, given the significant consequences of the rule."[92]

The court noted that the rule would have significant economic implications, including affecting over 30 million employees and over 400 billion dollars in wage transfers over ten years; that it was politically significant, including being the subject of state and federal legislative efforts; and that it transformed the agency's rulemaking authority.[93] Once deciding that "on balance," the rule likely presented a major question, the court determined that Congress had not clearly authorized it.[94] The district judge echoed the Supreme Court's antinovelty approach, noting the "lack of historical precedent," for the FTC's action.[95] Both injunctions are currently on appeal, but the Trump administration has asked the circuit courts to stay those appeals while they reconsider whether to defend the rule.[96]

The Florida district judge was explicit that the Court's recent major questions doctrine jurisprudence tipped the scales in this case:

> If I were to stop at this point, I would conclude that the plaintiff, though making a plausible case, has not shown a substantial likelihood of success on the merits. But recent jurisprudence from the

2024 WL 3879954, at *1, *8 (N.D. Tex. Aug. 20, 2024) (holding FTC lacked substantive rulemaking authority and that the rule was arbitrary and capricious); Props. of the Villages, Inc. v. FTC, No. 5:24-CV-316-TJC-PRL, 2024 WL 3870380, at *6 (M.D. Fla. Aug. 15, 2024) (holding that plaintiffs were likely to succeed on the merits of their claim that the rule violated the major questions doctrine and granting them a preliminary injunction).

89 Props. of the Villages, Inc., 2024 WL 3870380, at *8.

90 PRAC. L. LAB. & EMP., THOMSON REUTERS, FTC NONCOMPETE CLAUSE RULEMAKING TRACKER, Westlaw, W-044-0137.

91 Props. of the Villages, Inc., 2024 WL 3870380, at *8.

92 *Id.* at *6.

93 *Id.* at *7–8.

94 *Id.* at *8.

95 *Id.* (quoting NFIB v. OSHA, 595 U.S. 109, 119–20 (2022)).

96 PRAC. L. LAB. & EMP., THOMSON REUTERS, FTC NONCOMPETE CLAUSE RULEMAKING TRACKER, Westlaw, W-044-0137.

> Supreme Court, in combination with the *breadth and the scope* of the FTC's final rule, requires me to consider the FTC's authority to issue the final rule in the context of the major questions doctrine.[97]

Thus, the major questions doctrine jurisprudence invites courts to investigate whether an administrative action is big, and in the case of the FTC's rule, the fact that it affected thirty million workers and billions of dollars in wages solidified the judge's ruling that the problem was too big to fix.

3. Extreme Heat in the Workplace

Another big problem that the federal government has attempted to address is extreme heat in the workplace. The growing threat of climate change poses risks in multiple areas of law, including environmental, property, and labor and employment law, to name a few. The issue of extreme heat in the workplace helps illustrate how the Court's anti-administrative decisions might constrain big solutions going forward. The issue of federal regulation of extreme heat in the workplace is not yet ripe for litigation because the Department of Labor has not yet finalized its proposed rule. Nevertheless, it is discussed here to show how the mere existence and threat of the major questions doctrine might impede prioritizing and successfully implementing a federal fix to the problem of extreme heat.

Heat is a well-recognized occupational hazard. At the federal level, OSHA has recognized and been working to address the risks of extreme heat in the workplace for several decades, across administrations.[98] The National Institute for Occupational Safety and Health (NIOSH) first recommended an OSHA heat standard in 1972.[99] In the meantime, OSHA has issued guidance, launched a Heat Illness Prevention Campaign, launched a Heat Topics webpage on workplace heat with resources and guidance, and produced, in conjunction with NIOSH, a heat app.[100] Heat is also recognized as an occupational hazard in existing OSHA rules, including OSHA's recordkeeping regulations,

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97 Props. of the Villages, Inc., 2024 WL 3870380, at *6 (emphasis added).

98 *See, e.g.*, Reed Shaw, *OSHA's Authority to Regulate Workplace Heat*, 38 ABA J. LAB. & EMP. L. 51, 52−53 (2024).

99 Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings, 89 Fed. Reg. 70698 (proposed Aug. 30, 2024) (to be codified at 29 C.F.R. pts. 1910, 1915, 1917, 1918, 1926, and 1928).

100 *See, e.g.*, Shaw, *supra* note 98, at 53, 57−58.

which require employers to record and report heat-related workplace illnesses that require medical treatment.[101]

Notwithstanding these subregulatory tools, increasing temperatures mean that thousands of workers are still getting sick and dying from heat-related causes each year.[102] OSHA has a statutory mandate to ensure safe and healthful employment by identifying when a significant risk of material harm exists in the workplace and to issue safety or health standards that substantially reduce or eliminate that workplace risk.[103] Congress's broad delegation of authority in the Occupational Safety and Health Act of 1970[104] authorizes "the Secretary of Labor to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce"[105] and provides the procedures for such promulgation.[106] Congress did not specify the topics of such standards, nor likely would it have predicted in 1970 all the potential occupational hazards that might affect safe and healthful working conditions. Based on its expertise and this statutory mandate, OSHA has issued a notice of proposed rulemaking—a step in the process toward regulating heat through a workplace safety standard.

The proposed OSHA heat standard at its most basic includes commonsense requirements, including an employee plan, and the provision of water, shade, and rest when certain triggers are met. Despite being common sense, the solutions are also costly and implicate political controversy related to climate change.[107] While several states have enacted their own standards, in Texas and Florida, the Governors have taken action to preempt local ordinances that would

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101 *See, e.g.*, 29 C.F.R. 1904.7.

102 Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings, 89 Fed. Reg. 70698 (proposed Aug. 30, 2024) (to be codified at 29 C.F.R. pts. 1910, 1915, 1917, 1918, 1926, and 1928) (citing BLS data).

103 Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 (OSH Act).

104 *Id.*; *see also* Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 611 (1980) ("The Act delegates broad authority to the Secretary to promulgate different kinds of standards.").

105 OSH Act § 651; 448 U.S. at 611.

106 29 U.S.C. § 655(b).

107 *See, e.g.*, Michael Sainato, *Big Business Lobbies Against Heat Protections for Workers as US Boils*, THE GUARDIAN (July 31, 2023, at 07:00 ET), https://www.theguardian.com/environment/2023/jul/31/heat-protections-workers-big-business-lobbies [https://perma.cc/XM42-U64X] (noting that the American Farm Bureau Federation, which "has a long history of denying science around the climate crisis" opposes the proposal); Emma Dumain, *Republicans Scoff at 'Idiotic' Biden Heat Plan for Workers*, E&E NEWS BY POLITICO (July 23, 2024, at 06:32 ET), https://www.eenews.net/articles/republicans-scoff-at-idiotic-biden-heat-plan-for-workers-ee/ [https://perma.cc/QW8V-F4Z9].

protect workers from the hazards of extreme heat.[108] Efforts in Congress to introduce bills to force OSHA to act and to protect workers could also serve as evidence that this is a political issue. Together, these all but ensure that if OSHA were to ever finalize the standard, it undoubtedly will face a major questions challenge at the very least based on the standard's political and economic significance.[109] Heat is another issue that affects millions of workers, with sometimes fatal implications. Despite OSHA's broad statutory delegation and historical efforts to regulate heat for several decades, the growth and scale of the problem may perversely make it become too big to fix.

C. Restraining "Too Big" Regulations: Overtime

In addition to the restraints imposed by the major questions doctrine, the Court has also been restraining administrative action affecting broad swaths of workers. This mirrors the skepticism private litigants face. Previously, where the private plaintiffs' bar was unable to address systemic issues, the government could step in, in the form of enforcement actions or regulatory changes. In terms of enforcement, the government is not subject to forced arbitration provisions and can seek remedies that serve the public interest and address systemic issues.[110]

The executive has, however, also faced challenges in defending administrative action that would affect millions of workers in the

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[108] Sainato, *supra* note 107; Dumain, *supra* note 107; Alejandra Borunda, *Florida Blocks Heat Protections for Workers Right Before Summer*, NPR (Apr. 12, 2024, at 14:07 ET), https://www.npr.org/2024/04/12/1244316874/florida-blocks-heat-protections-for-workers-right-before-summer [https://perma.cc/W6ET-7PDP].

[109] OSHA has estimated in its proposed rule that the costs for the regulated community could be almost $8 billion. Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings, 89 Fed. Reg. at 70824.

[110] *See, e.g.*, EEOC v. Waffle House, Inc., 534 U.S. 279 (2002); US DEP'T OF LAB., SOLICITOR OF LABOR ENFORCEMENT REPORT FISCAL YEAR 2023 4 (2023), https://www.dol.gov/sites/dolgov/files/SOL/reports/SOL2023-Enforcement-Report.pdf [https://perma.cc/A42F-5N7Z] ("The Department of Labor is not bound by employer arbitration agreements. Because mandatory arbitration and class action waivers are on the rise, there are more workplaces where the Department's Office of the Solicitor provides the only viable avenue for meaningful legal recourse—particularly where state and local laws are weak."); *see also* Bornstein & Sellers, *supra* note 22, at 289 ("Because *Dukes* and *Epic Systems* pose steep, and expensive, hurdles to private class-action litigation by employees, federal agencies play an increasingly crucial role in both *ex post* enforcement and *ex ante* regulation to encourage legal compliance by employers.").

courts.[111] This Part uses the Department of Labor's overtime rulemaking as an example of the Court finding too big regulatory action problematic, even separate and apart from the major questions doctrine.

The Department of Labor has been unsuccessful in updating the salary below which workers are automatically eligible for overtime pay. Regulatory updates sometimes do not happen for decades, which means that once they do finally happen, millions of workers can be affected by the changes, resulting in additional scrutiny. That is, any update to overtime regulations is necessarily a big change. There has been a historical decline in the salary threshold that determines whether workers are entitled to or are exempt from overtime pay when they work more than forty hours in a workweek. The Fair Labor Standards Act (FLSA), the national law governing workers' wages and hours, requires that most employees be paid the minimum wage and overtime when they work over forty hours in a week. The FLSA exempts "bona fide" executive, administrative, and professional (EAP) employees from its overtime requirements and delegates responsibility for defining those terms to the Department of Labor.[112]

Since 1938, the Department has updated the regulations defining "bona fide" EAP employees exempt from the minimum wage and overtime provisions of the Fair Labor Standards Act.[113] The Department updated these regulations in 1940, refining the duties tests and requiring generally that EAP employees be paid on a salary basis, meet a minimum salary level, and perform the duties of an EAP. In 1940, the Department set the salary level to at least $200 per month.[114] After issuing several updates through 1975, the Department did not update the levels again until 2004. In those ensuing decades, the number of workers eligible for overtime pay dropped precipitously

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111 Not all administrative action is equal. The Trump Administration's second term will test whether the courts are amenable to *deregulatory* actions by the executive branch, even when they have big impacts.

112 *See* 29 U.S.C. § 213(a)(1).

113 3 Fed. Reg. 2518 (Oct. 20, 1938) (codified at 29 C.F.R. pt. 541), https://archives.federalregister.gov/issue_slice/1938/10/20/2517-2519.pdf#page=2 (on file with the Oregon Law Review) ("Regulations Defining and Delimiting the Terms 'any Employee Employed in a Bona Fide Executive, Administrative, Professional, or Local Retailing Capacity, or in the Capacity of Outside Salesman' Pursuant to Section 13(A)(1) of the Fair Labor Standards Act").

114 5 Fed. Reg. 4077 (Oct. 15, 1940) (codified at 29 C.F.R. pt. 541), https://archives.federalregister.gov/issue_slice/1940/10/15/4075-4078.pdf#page=3 [https://perma.cc/93MB-WR9P] ("Defining and Delimiting the Terms 'Any Employee Employed in a Bona Fide Executive, Administrative, Professional, or Local Retailing Capacity, or in the Capacity of Outside Salesman'").

from 12.6 million to 1.1 million workers nationwide.[115] That is, overtime pay was not reaching those it was meant to help because salary thresholds became out of date.

In 2016, 2019, and again in 2024, the Department sought to raise the minimum salary level at which employees must be paid to be exempt from overtime,[116] thus increasing the number of workers eligible for overtime pay.[117] In 2016 and again in 2024, the regulations were rebuffed because of the number of people they affected. That is, they were considered too big.

A Texas federal district court judge stayed the 2016 rule and ultimately granted summary judgment, invalidating a rule which the department estimated would have affected a little over four million workers.[118] In 2019, under the first Trump Administration, the Department successfully issued a nominal increase to the salary threshold, using the same methodology the Department had previously used.

In 2024, another Texas federal district court judge once again held that the department had exceeded its statutory authority in issuing a rule which over two stages of increases would have affected approximately four million workers.[119] In both cases where the courts prevented the salary threshold increase from going into place, the district court judges were concerned that the department was using the salary test as a screening function, instead of the duties test, with their analysis strongly focused on the roughly four million workers who would no

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115 Ross Eisenbrey, *The Number of Salaried Workers Guaranteed Overtime Pay Has Plummeted Since 1979*, ECON. POL'Y INST. (June 11, 2015), https://www.epi.org/publication/the-number-of-salaried-workers-guaranteed-overtime-pay-has-plummeted-since-1979/ (on file with the Oregon Law Review).

116 29 C.F.R. pt. 541 (2024) (2024 Rule); 29 C.F.R. pt. 541 (2016) (2016 Rule); 29 C.F.R. pt. 541 (2019).

117 These regulations did not address the duties tests, which set out guidelines for the responsibilities—or duties—EAP employees must do in their workplace, in addition to receiving a minimum salary level and being paid on a salary basis, to be exempt from receiving overtime pay. *Fact Sheet #17A: Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees Under the Fair Labor Standards Act (FLSA)*, WAGE & HOUR DIV. U.S. DEP'T LAB. (2019), https://www.dol.gov/agencies/whd/fact-sheets/17a-overtime [https://perma.cc/4RE4-HGZ3].

118 Nevada v. U.S. Dep't of Lab., 218 F. Supp. 3d 520, 526–33 (E.D. Tex. 2016) (*Nevada I*); Nevada v. U.S. Dep't of Lab., 275 F. Supp. 3d 795, 805–08 (E.D. Tex. 2017) (*Nevada II*).

119 Texas v. U.S. Dep't of Lab., No. 4:24-CV-468-SDJ, 2024 WL 4806268, at *16 (E.D. Tex. Nov. 15, 2024); *see also* Texas v. U.S. Dep't of Lab., 738 F. Supp. 3d 807, 812 (E.D. Tex. 2024) (granting Texas a preliminary injunction).

longer be exempt but become eligible for overtime, even though these numbers fell within historical norms.[120]

In granting summary judgment invalidating the 2016 rule, the Judge held that "[b]ecause the Final Rule would exclude so many employees who perform exempt duties, the Department fails to carry out Congress's unambiguous intent."[121] This language was echoed in the 2024 decision: "According to the Department, in the first year that the 2024 Rule is effective, more than four million employees all over the country will lose their exempt [from overtime] status. In succeeding years, millions more employees will lose their exempt status."[122] The decision included over ten references to the "millions" of employees who would be affected by the rule.[123] The 2024 decision also suggested the change was too soon after the Trump administration's 2019 rulemaking and cited this as a discrepancy given the long gaps between previous rulemakings.[124]

The legal issues surrounding the overtime salary threshold are complex. What is clear, however, is that both judges were troubled by the number of workers affected by the rule. In other words, historical delays in regular regulatory updates had rendered the problem too big to fix—at least with the Department's proposed approach.[125] Lags in rulemaking can be the consequence of many factors unrelated to the need for rulemaking, including political context, changing agency priorities in different administrations, lack of funding and capacity, or other intervening events that dictate priorities (including new legislation, leadership, or external factors, such as a pandemic).

These lags can result in a situation where many workers are no longer receiving the protections that Congress intended.[126] In this

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120 *See, e.g.*, *Nevada I*, 218 F. Supp. 3d at 5331 ("For instance, the Department estimates 4.2 million workers currently ineligible for overtime, and who fall below the minimum salary level, will automatically become eligible under the Final Rule without a change to their duties."); *see also Nevada II*, 275 F. Supp. 3d at 805 ("With this said, the Department does not have the authority to use a salary-level test that will effectively eliminate the duties test as prescribed by Section 213(a)(1).").

121 *Nevada II*, 275 F. Supp. 3d at 807.

122 Texas v. U.S. Dep't of Lab., 2024 WL 4806268, at *17 (internal citations omitted).

123 *Id.*

124 *Id.*

125 A more incremental approach by the first Trump administration, however, went into effect, even though it affected approximately one million workers, inviting the question whether one million is not as big as over four million, or if the administration proposing the rule was more relevant in the eyes of the judiciary.

126 2024 Rule, *supra* note 116 ("As the Department observed in these rulemakings, even a well-calibrated salary level that is not kept up to date becomes obsolete as wages for

instance, workers earning as little as $35,568 are exempt from earning overtime when they work over forty hours in a week. In 2025, this is essentially equivalent to earning the minimum wage in the fifty-three jurisdictions that will reach or exceed a $17.00 per hour minimum wage, exacerbating economic precarity that two administrations have been unable to address through big fixes.[127] These rulemakings were struck down not under the major questions doctrine, but, as in *Wal-Mart*, seemingly influenced by a significant skepticism of the scope of affected workers, illustrating the variety of tools employed by the courts to halt big solutions.

In sum, Part II illustrates judicial restraints on big administrative fixes. In a radical departure from precedent, the major questions doctrine prevents actions that are major, novel, politically or economically significant, or transformative, without explicit congressional authorization. The Part illustrates how the doctrine has been, or might be applied to, many urgent societal dilemmas, including global pandemics, rising temperatures, and economic precarity. It also creates a "use it or lose it"[128] element to statutes, preventing Congress from providing broad delegations of authority that might address situations that were unforeseeable at the time the legislation was drafted.

Finally, this Part concludes by noting that just as with private litigants, the courts are also skeptical of solutions affecting too many workers, making it difficult to remedy historical delays resulting in an erosion of workers' rights. Collectively, these examples illustrate that size, novelty, and delay can all be factors in making an emerging or growing problem too big for the government to fix.[129]

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nonexempt workers increase over time. Long intervals between rulemakings have resulted in eroded earnings thresholds based on outdated earnings data that were ill-equipped to help identify bona fide EAP employees.") (citing previous rulemakings).

127 Yannet Lathrop, *Raises from Coast to Coast in 2025*, NAT'L EMP. L. PROJECT 1, 1 (2024), https://www.nelp.org/insights-research/raises-from-coast-to-coast-in-2025/ [https://perma.cc/S9B9-2QNV].

128 Deacon & Litman, *supra* note 56.

129 It would be remiss to not also acknowledge the second Trump Administration's efforts to deconstruct and vastly diminish the administrative state, which will have long-term implications on agencies' abilities to issue regulations and take action to address structural disparities and social welfare. *See, e.g.*, Rahman, *supra* note 52, at 1688 ("But in a reality where background economic, social, and historical conditions already encode structural disparities of wealth, opportunity, power, and influence, eliminating regulatory agencies and tools that are potentially capable of addressing these disparities (even if they are not always deployed in these ways) precludes much of equality- or inclusion-promoting public policy from getting off the ground in the first place.").

III
RESTRAINTS ON CONGRESSIONAL ACTION, INCLUDING NONDELEGATION DOCTRINE

This Part notes that, while on the one hand the Court is suggesting Congress play a larger and more explicit role, on the other hand it is suggesting increased scrutiny of congressional delegations of authority to administrative agencies. In addition to the restraints on Congress imposed by the major questions doctrine, the Court has hinted at its inclination to hold Congress accountable through a revival of the nondelegation doctrine, which prevents Congress from delegating its legislative power to another government branch.[130]

The Court has not used the nondelegation doctrine since 1935, but at least six Justices have hinted at an interest in reviving the doctrine.[131] Many have observed, for example, Chief Justice Roberts's nod to the nondelegation doctrine in the conclusion of *Loper Bright*: "And when a particular statute delegates authority to an agency *consistent with constitutional limits*, courts must respect the delegation, while ensuring that the agency acts within it."[132] In other words, the Court is suggesting a greater scrutiny of congressional action; thus even where Congress provides explicit delegations, the Court will query whether Congress's delegation fell within its constitutional authority.

In *FCC v. Consumers' Research*,[133] the Court declined the opportunity to reinvigorate the doctrine, continuing the Court's broader trend in closely examining agency action, but not going so far as to further limit it at this time. It held that Congress's delegation of authority to the FCC was sufficiently guided and constrained, and that the FCC likewise had not impermissibly delegated its authority to a private nonprofit corporation, therefore neither had it violated the so-called private nondelegation doctrine.[134] The Court confirmed that in nondelegation challenges it will continue to evaluate "whether Congress has set out an 'intelligible principle' to guide what it has

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130 *See* Gundy v. United States, 588 U.S. 128, 132 (2019) (discussing nondelegation doctrine). The Court declined, however, in its most recent Term to use the doctrine to further limit agency authority, at least as it pertains to the Federal Communications Commission (FCC).

131 Christopher J. Walker, *Congress and the Shifting Sands in Administrative Law*, 34 WIDENER COMMONWEALTH L. REV. 187, 201 (2025); *see also Gundy*, 588 U.S. at 179 (2019) (Gorsuch, J., dissenting); Berger, *supra* note 74, at 511.

132 Loper Bright Enters. v. Raimondo, 603 U.S. 369, 413 (2024) (emphasis added).

133 *See generally* No. 24-354, slip op. (U.S. June 27, 2025).

134 *Id.* at 34.

given the agency to do."[135] In the *Consumers' Research* case, the Court found that Congress had "imposed ascertainable and meaningful guideposts for the FCC to follow when carrying out its delegated function of collecting and spending contributions from carriers."[136] The Court also vacated and remanded to the Fifth Circuit two private nondelegation challenges related to horseracing regulations to be reconsidered in light of its decision in *Consumers' Research*.[137]

Justice Gorsuch dissented from the decision in *Consumers' Research* and was joined by Justices Thomas and Alito in stating that the Court should continue to revisit the nondelegation doctrine.[138] So while the decision ultimately did not remove any authority from Congress or the agency, it suggests continued scrutiny of Congressional delegations and administrative policymaking, with implications for addressing big problems and improving social welfare.[139]

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135 *Id.* at 11.

136 *Id.* at 19.

137 *See generally* FTC v. Nat'l Horsemen's Benevolent & Protective Ass'n, No. 24-429 (June 30, 2025), https://www.supremecourt.gov/docket/docketfiles/html/public/24-429.html [https://perma.cc/QH2F-F9VG]; Horseracing Integrity & Safety Authority, Inc. v. Nat'l Horsemen's Benevolent & Protective Ass'n, No. 24-433 (June 30, 2025), https://www.supremecourt.gov/docket/docketfiles/html/public/24-433.html [https://perma.cc/6CJB-VEAT].

138 Justice Kavanaugh concurred in the judgment, writing separately to suggest that the outcome could be different for independent agencies, consistent with his longstanding concern with independent agencies engaging in policy and enforcement without democratic accountability. *See, e.g.*, *In re* Aiken Cnty., 645 F.3d 428, 442 (D.C. Cir. 2011) (Kavanaugh, J., concurring). Of note, Justice Kavanaugh did not consider the FCC to be independent, because the President can remove its commissioners at will. Consumers' Research, slip op. at 11–12 (Kavanaugh, J., concurring). He suggested that in the event such a delegation arose, a more "stringent" test than the intelligible principle one would need to be applied, or the Court should "overrule (or significantly narrow) *Humphrey's Executor v. United States*," ensuring there are no independent agencies, a position the Court has strongly hinted it will consider next term. *Id.* at 12–13. *See generally* Trump v. Wilcox, 605 U.S. 1 (2025) (holding that President was likely to succeed on the merits of the claim that he has the authority to terminate without cause Members of the National Labor Relations Board and Merit Systems Protection Board, notwithstanding their statutory protections and Supreme Court precedent to the contrary).

139 *See, e.g.,* Daniel E. Walters & Elliott Ash, *If We Build It, Will They Legislate? Empirically Testing the Potential of the Nondelegation Doctrine to Curb Congressional "Abdication,"* 108 CORNELL L. REV. 401, 413–14 (2023) ("The nondelegation doctrine and the major questions doctrine have the potential to be unsettling, and many believe that they would ultimately lead to confusion and disruption, if not also an actual diminution in accountability, responsiveness, and social welfare.") (internal citations omitted); *see also* Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 687–88 (1980) (Rehnquist, J., concurring) (stating that a section of the OSH Act related to OSHA's authority to issue health standards was an unconstitutional delegation by Congress).

And so, the Court's too big to fix approach closes off nearly all opportunities to address big problems. As Part I detailed, restrictions on private suits have meant that the private sector is unable to pursue big fixes, pushing work on big problems to the administrative branch. At the same time, the Court's administrative law decisions limit what administrative agencies can do about big problems, further pushing that work to Congress. And now, the Court has signaled an increased gatekeeping role for the legislative branch as well. It limits what Congress can do about big problems, not just in the major questions doctrine and requirements for clear legislative intent, but also in a potential future revival of the nondelegation doctrine, which may further constrain congressional action. Together the major questions doctrine and nondelegation doctrine limit Congress from using broad language to delegate authority to agencies to adapt to present and new conditions.[140]

IV
EVALUATING EXISTING MECHANISMS FOR EFFECTIVE RESPONSES

This final Part looks to the private sector, administrative state, and Congress for possible responses to the too big to fix problem. It first acknowledges the possibility of incremental responses: smaller litigation, smaller regulation, and politically feasible congressional fixes that adhere to the judiciary's skepticism of "big" fixes. Ultimately it rejects these as insufficient to address large-scale problems like climate change, inequality, and global pandemics. Next, it concludes that congressional and court reform will be needed and must continue to be explored to address the too big to fix problem, while acknowledging such reforms would require significant shifts in political momentum and makeup.

A. Problems of Thinking Smaller

One lesson from the Court's too big to fix outlook is to simply think smaller. The Court has encouraged private litigants to bring smaller litigation, administrative agencies to make smaller interventions, and Congress to engage in narrower, clearer delegations. Section A explores how private actors, administrative agencies, and Congress have responded with smaller strategies and efforts to comply with the judiciary's too big to fix posture. It further details what is lost from this

140 McGarity, *supra* note 52, at 4.

approach, and in doing so it articulates this Article's core critique of the Court's too big to fix jurisprudence.

1. Small(er) Strategies for the Private Bar

For private plaintiffs, the lessons learned from the *Wal-Mart* decision were to proceed with smaller, more targeted class actions, with fewer potential participants and more narrowing strategies.[141] This outcome, combined with the growth of arbitration provisions with class action waivers in response to *Epic Systems*, means that many claims will simply never be brought.[142] The private bar has primarily looked to Congress to support fixes and enable more action on their part, with limited success.

The Court's landmark decision in *Bostock v. Clayton County, Georgia* holding that employees cannot be discriminated against because of their sexual orientation or gender identity suggests a potential remaining avenue for using individual claims to seek bigger outcomes.[143] The Court's decision illustrates the great pains the Court took to minimize the real-world implications of its decision and ground it in legal analysis and not affected parties. In other words, there may be a narrow path for bringing individual cases to the courts focused on a statutory analysis, even where the interpretation is novel and the implications are big.

In *Bostock*, the Court confirmed, for the first time, significant protections for employees who might experience discrimination in the workplace based on their sexual orientation and gender identity. The case consolidated the claims of three employees who alleged their employers fired them because they were gay or transgender.[144] The Court held that the language "because of . . . sex" in Title VII prohibits discrimination based on an employee's sexual orientation or gender identity.[145]

Unlike in *Wal-Mart v. Dukes*, the Court shied away from any discussion of the significant nationwide implications of its decision,

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141 *See, e.g.*, Valenti, *supra* note 43, at 43; Malveaux, *supra* note 6, at 2421 ("The net result, however, has been a higher bar for collective action.").

142 *See, e.g.*, Estlund, *supra* note 12. Additionally, challenges to disparate impact liability could bring additional barriers for the private bar and the government in seeking large-scale remedies.

143 590 U.S. 644, 662 (2020) ("For an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex.").

144 *Id.* at 653.

145 *Id.* at 657.

taking pains to ground the case in a straightforward statutory analysis. The Court did not even name that its decision would potentially affect millions of workers. Rather, the Court noted that "[f]ew facts are needed to appreciate the legal question we face."[146] And there were, in fact, very few plaintiffs and defendants before the Court—three consolidated cases involving three employees (two who had since passed away) and three small businesses. Rather than considering the broad scope of the issue, Justice Gorsuch reiterated the individual nature of the question before the Court, which informed his analysis; "the statute focuses on discrimination against individuals, not groups."[147] The Court rejected the employers' policy appeals, noting that such broader policy implications were "questions for future cases, not these."[148]

There are tensions, however, between the Court's analysis in *Bostock* and its major questions decisions, even understanding that one addresses private rights and the other agency action. Unlike the Court's major questions doctrine, which Justice Kagan has called one of the Court's "get-out-of-text-free cards,"[149] in *Bostock* the Court grappled directly with the statutory text. In doing so, the Court rejected an antinovelty presumption. Rather, Justice Gorsuch noted that the text necessitated the outcome, regardless of what the drafters might have anticipated at the time, echoing language from Justice Scalia in the seminal *Oncale v. Sundowner Offshore Services, Inc.* case, a precursor to the *Bostock* decision.[150]

> Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. . . . But the limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a statute give us one answer and

146 *Id.* at 653.

147 *Id.* at 667.

148 *Id.* at 681.

149 West Virginia v. EPA, 597 U.S. 697, 779 (Kagan, J., dissenting) ("The current Court is textualist only when being so suits it. When that method would frustrate broader goals, special canons like the "major questions doctrine" magically appear as get-out-of-text-free cards.").

150 Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 79 (1998) ("As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.").

> extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit.[151]

Additionally, unlike the Court's consideration of after-the-fact legislative bills and political debates in assessing whether an issue is "major" for purposes of the major questions doctrine, in *Bostock*, the Court considered this to be a "particularly dangerous" basis for interpreting a law.[152] These discrepancies further highlight the significant transformation the major questions doctrine imports into judicial review of "big" fixes.

One takeaway might be that bringing smaller, individual, nonclass claims grounded in statutory language is still a feasible approach for actions that might be novel and affect millions of workers. This approach is still limited—it would require unique circumstances like the facts in *Bostock*; the ability to set new, nationwide precedent; and it would provide only individualized remedies.

2. Small(er) Strategies by Agencies

The administrative state is a key partner in enacting Congress's intent. It brings its technical expertise, regulatory capacity, and sometimes more nimble capabilities to carry out legislation. It allows Congress to delegate authority to agencies to more flexibly respond to current problems.[153] Yet it is currently at a critical crossroads.

Not allowing administrative agencies to take big actions has costs. It allows factors including delay, neglect, and intervening events that may be unrelated to the policy need or design to influence its viability. As illustrated by the overtime context, for example, a presumption against big actions allowed delayed action to impede future action. Neglecting the problem allows it to become too big to rectify.

Some delay might be intentional to discourage such policies and be brought about by changes in administrations and political priorities. Delay can also be the unintentional result of competing priorities and limited resources, such as when vast labor rulemaking resources were redirected to responding to the COVID-19 pandemic. In either case, it can have the same effect of allowing the problem to swell to proportions requiring fixes that courts might presume to be too big.

Administrative agencies are still grappling with the changing judicial landscape—both in terms of a more conservative judiciary and

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151 Bostock v. Clayton Cnty., 590 U.S. 644, 653 (2020).

152 *Id.* at 670.

153 For a fuller discussion of this, see McGarity, *supra* note 52, at 36.

new anti-administrative precedents and doctrines, and more recent cuts decimating whole programs and staffs.[154] During the Biden administration, there was an effort, like that under President Obama, to use agencies to further an ambitious policy agenda, but with mixed success once those actions were challenged in court.

Where agencies took steps to achieve incremental wins that might benefit fewer workers but be safer from legal challenge, those sometimes were still enjoined. In the case of the Department of Labor's latest overtime rulemaking, for example, the Department decided to increase the salary threshold but also, as a backstop should a court strike it down, take a much more incremental approach of updating for inflation the methodology used by the Bush and first Trump administrations to increase the salary threshold. This provision was still struck down. The district judge again focused on the size of the impact, even though those in the administration viewed this as an incremental step. The district judge noted that "'approximately 1 million employees' became nonexempt—i.e., eligible for overtime pay—as a result of this change. The Department implemented this salary-level increase even though its last salary-level increase, which took effect in January 2020, rendered about 1.2 million workers nonexempt who had previously met the . . . [e]xemption."[155]

Ultimately the court concluded that even this change affected too many employees, illustrating that the new salary threshold, as updated for inflation, was doing too much of the work in determining overtime eligibility, rather than the duties test.[156] But the court also found persuasive that the Department's action came only five years after the last update, rather than 15–30 years, like the previous 2004 and 2019

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154 *See, e.g.*, Exec. Order No. 14210, 90 Fed. Reg. 9669 (2025); Trump v. AFGE, No. 24A1174, slip op. (U.S. July 8, 2025) (holding that the Trump Administration was likely to prevail in its argument that the President's Executive Order and corresponding memoranda calling for large-scale reductions in the federal workforce were lawful); Sean Michael Newhouse, *At Least 148,000 Federal Employees Have Left Government Under Trump, Good Government Group Reports*, THE GUARDIAN (Aug. 1, 2025), https://www.govexec.com/workforce/2025/08/least-148000-federal-employees-have-left-government-under-trump-good-government-group-reports/407171/ [perma.cc/585M-JKRP].

155 Texas v. U.S. Dep't of Lab., No. 4:24-CV-468-SDJ, 2024 WL 4806268, at *17 (E.D. Tex. Nov. 15, 2024).

156 *Id.* at *19. Interestingly, this part of the rulemaking affected over one million workers, roughly the same number of workers as were affected by the Trump administration's rulemaking, raising additional questions about why this rulemaking was too big.

updates had, and noted that the minimum wage had not increased in the interim.[157]

These unusual considerations, not tethered in any way to the statute's text, like the court's major questions doctrine, import into a statutory analysis postenactment political strife and inertia. In other words, previous failed efforts to raise the minimum wage and increase the salary threshold became relevant to the legal analysis of the Secretary's authority to "define[] and delimit[]" the overtime exemption for executive, administrative, and professional employees.[158] This case illustrates that while there may be some benefits from a narrower, more incremental approach, these will not always be successful in the courts, even if not touching on the major questions doctrine.

Sometimes, even an incremental approach that could be successful will be insufficient. If we return to the example of extreme heat, incrementalism has been the approach that OSHA has pursued for decades, using subregulatory and other tools, including guidance, outreach and awareness, and enforcement to protect workers. But the rapid rise of extreme heat and its resultant impacts on workers persuaded OSHA that a bigger step was needed to keep workers safe.

The executive branch could still stay the course, advancing ambitious executive action that can make a difference for communities, including underserved communities. Even with significant losses in the Court, the Biden administration, perhaps unsurprisingly, still prevailed in more than half of the cases before the Supreme Court in which it participated. But these successes were not in the "big" cases. The only COVID vaccine mandate the Court upheld, for example, was for CMS, finding that requiring vaccination of Medicare and Medicaid providers' staff members was consistent with CMS's existing protocols. The agency had long imposed conditions of participation on healthcare facilities, including conditions related to the prevention and control of infectious diseases and the qualifications of healthcare personnel.

Future administrations, particularly Democratic ones likely to receive a chillier reception in the currently conservative courts and facing an increasingly demoralized and deconstructed civil service, will have to evaluate the resource and litigation costs and risks for proceeding. This is particularly true considering the decimation of career expertise and staff in these agencies, and in some cases the

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157 *Id.* at *18.

158 29 U.S.C. § 213(a)(1).

closure of entire agencies. At the same time, agencies will have to evaluate any broader-scale benefits of action, even if ultimately unsuccessful in court. This might include potential market effects, incentivizing state actions, and establishing certain messaging or mobilizing citizens and advocates around a political agenda.[159] Administrations will also have to look to Congress for administrative law reform and support in regaining some of their authority to act, something the current Congress seems unlikely to enact, both because a Republican-controlled Congress is likely to be more antiregulatory and given Congress's current acquiescence to extreme cuts to the budget and authority of the administrative agencies.[160]

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[159] Since the FTC published its rule banning noncompete agreements, for example, Minnesota has banned noncompete agreements; the New York and Rhode Island legislatures passed bans that were then vetoed by their governors; and several other reforms have been introduced. *See, e.g.*, Minn. Stat. § 181.988 (2024); Maysoon Khan, *New York Governor Vetoes Bill That Would Ban Noncompete Agreements*, AP NEWS (Dec. 23, 2023, at 13:58 PT), https://apnews.com/article/noncompete-agreement-bill-veto-new-york-61e53ad13f41f1da574740438ee34e63 (on file with the Oregon Law Review); Alexander Castro, *Gov. McKee Vetoes Bills on Kratom, Nursing Homes and Noncompete Clauses*, RHODE ISLAND CURRENT (June. 27, 2024, at 17:16 PT), https://rhodeislandcurrent.com/2024/06/27/gov-mckee-vetoes-bills-on-kratom-nursing-homes-and-non-compete-clauses/ (on file with the Oregon Law Review). Management firm client alerts have cautioned that noncompete agreements are under assault and some have advised that clients review and drop any noncompete agreements they deem unnecessary. *See, e.g.*, Scott R. McLaughlin et al., *FTC's Ban on Noncompete Agreements: Definitions, Prohibitions, Requirements, and Employer Considerations*, OGLETREE DEAKINS (May 24, 2024), https://ogletree.com/insights-resources/blog-posts/ftcs-ban-on-non-compete-agreements-definitions-prohibitions-requirements-and-employer-considerations/ [https://perma.cc/76QP-TQ6Y] ("[E]mployers should narrowly tailor non-competes, nonsolicits, and/or nondisclosure covenants. If the FTC / federal efforts fail, many states are still heading in the direction of limiting the use of restrictive covenants."). In other words, there are some state and market implications from the rulemaking, even if it ultimately remains enjoined or withdrawn.

[160] *See, e.g.*, West Virginia v. EPA, 597 U.S. 697, 779–80 (2022) (Kagan, J., dissenting) (noting that the Court is marking its "anti-administrative-state stance" with the "goals," including to "[p]revent agencies from doing important work, even though that is what Congress directed."); Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 346 (2019) ("With increasing urgency over the past two decades, congressional Republicans have advanced proposals to discipline a regulatory state that, in their view, does too much and with too little care."); Gregory A. Elinson & Jonathan S. Gould, *The Politics of Deference*, 75 VAND. L. REV. 475, 476 (2022); *Directing the Repeal of Unlawful Regulations*, THE WHITE HOUSE (Apr. 9, 2025), https://www.whitehouse.gov/presidential-actions/2025/04/directing-the-repeal-of-unlawful-regulations/ [https://perma.cc/GS8W-YJD7] (calling for repealing rules without notice and comment, one example of President Trump's deregulatory agenda).

B. Strategies for Congress

It is increasingly clear from the Court's recent cases that when the situation demands action it is Congress who must act, not administrative agencies.[161] In *Corner Post*, for example, Justice Barrett concludes her decision with, "But we do agree with the dissent on one point: '[T]he ball is in Congress' court.'"[162] Justice Roberts concludes *West Virginia* with, "A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body."[163] Justice Gorsuch in his concurrence in *NFIB* states, "There are some 'important subjects, which must be entirely regulated by the legislature itself. . . .'"[164]

Academics have similarly concluded that the Court's anti-administrative cases signal that "the Court is calling on Congress (and courts) to play a more active role."[165] In some cases, this has prompted academics to call for new legislation, such as a new civil rights act.[166] While acknowledging that the Court's recent administrative law decisions will "shift power to federal courts" and "result in a deregulatory turn toward a much more limited federal government," Professor Walker proposes ways for Congress to "reassert itself in federal governance."[167]

This Section first describes three problems with the Court's turn to Congress, including inevitable congressional inaction or incremental response, judicial restraints on congressional action, and a lack of evidence suggesting Congress will respond to Court decisions preserving the status quo. Nevertheless, this Section concludes with needs for congressional action and reform.

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161 Some judges and commentators have also critiqued the Court for itself stepping into the role of the legislative branch and engaging in policymaking. *See West Virginia*, 597 U.S. at 783 ("[T]he Court substitutes its own ideas about delegations for Congress's. And that means the Court substitutes its own ideas about policymaking for Congress's.").

162 Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys., 603 U.S. 799, 825 (2024).

163 *West Virginia*, 597 U.S. at 735; *see also* Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs., 594 U.S. 758, 766 (2021) ("If a federally imposed eviction moratorium is to continue, Congress must specifically authorize it.").

164 NFIB v. OSHA, 595 U.S. 109, 126 (2022) (Gorsuch, J., concurring).

165 *See, e.g.*, Walker, *supra* note 131, at 199 (in reference to the overruling of the *Chevron* doctrine specifically, but also stated throughout the essay as a broader response to the Court's decisions); Walters & Ash, *supra* note 139, at 456 ("For decades, theorists have offered variations on this most basic idea that enforcing the nondelegation doctrine will positively change the way that Congress works and improve the functioning of our democracy.").

166 Malveaux, *supra* note 6, at 2405.

167 Walker, *supra* note 131, at 202.

1. Challenges to Congressional Action

There are three noteworthy problems with the Court's suggested turn to Congress. First, Congress has not always proved willing and able to respond promptly and timely to current issues and controversies, as exemplified by its failure to pass a timely budget each year to fund the government.[168] Some academics have argued that "Congress has grown incapable of responding to the most politically salient issues of our time in the form of legislation."[169] Professor McGarity goes further, stating that "[i]t is beyond naïve" to believe that striking down novel interpretations will result in congressional action "to address newly emerging problems."[170]

Additionally, political makeup and stalemates are likely to result in incremental rather than big solutions. Incrementalism will offer some additional protections and benefits to some workers.[171] In response to *Epic Systems*, for example, Congress passed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021.[172] The bill ensures that those bringing claims involving sexual assault or sexual harassment are not bound by arbitration agreements but can pursue their claims in court. This was a narrow solution to a big problem of forced arbitration and class action waivers preventing individuals from vindicating their rights, including from other forms of unlawful harassment and discrimination.

In the labor and employment space, Congress has enacted bipartisan protections for pregnant workers[173] and shown the ability to enact sectoral protections even where it has failed to advance broader legislation.[174]

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168 Drew DeSilver, *Congress Has Long Struggled to Pass Spending Bills on Time*, PEW RSCH. CTR. (Sept. 13, 2023), https://www.pewresearch.org/short-reads/2023/09/13/congress-has-long-struggled-to-pass-spending-bills-on-time/ [https://perma.cc/A5QJ-EDUY].

169 *Reform Congress, Not the Court*, 137 HARV. L. REV. 1653, 1654 (2024).

170 McGarity, *supra* note 52, at 37.

171 *See, e.g.*, Saul Levmore, *Interest Groups and the Problem with Incrementalism*, 158 U. PA. L. REV. 815, 827 (2010) (critiquing incrementalism as allowing a divide and conquer strategy for interest groups but offering the example of successful incremental expansions of smoking bans).

172 *See* Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90, 136 Stat. 26 (codified as amended in scattered sections of 9 U.S.C.).

173 Pregnant Workers Fairness Act, Pub. L. No. 117-328, 136 Stat. 102 (codified at 42 U.S.C. § 2000gg).

174 For example, in the sports arena, Congress has enacted equal pay provisions, protections from abuse and retaliation, and improved representation, all for athletes, by amending the U.S. Olympic Charter. The Ted Stevens Olympic and Amateur Sports Act, 36

Yet incrementalism can both fail to resolve the problem and impede further momentum.[175] The Family and Medical Leave Act (FMLA) of 1993 is an example.[176] First introduced in 1985, the bill was twice vetoed by President George Bush[177] before President Clinton signed it into law. Lawmakers secured its passage by accepting compromises, including carve-outs and making the leave unpaid. While at the time advocates hoped it would be a first step, thirty years later, advocates have been unable to pass paid leave at the federal level, despite its popularity across political affiliation and growing state momentum.[178]

Despite these significant headwinds, Congress could take on a more active role with sufficient political pressure and will. During the COVID-19 pandemic, when the nation was facing big challenges, Congress passed an unprecedented amount of legislation.[179] This included emergency funding to state and local governments; the nation's first, yet temporary, federal paid leave laws; protections for unemployment insurance; and more, demonstrating the branch's ability to respond with big temporary solutions to urgent crises.[180] This action was reminiscent of the Troubled Asset Relief Program (TARP) Congress enacted in reaction to the 2008 financial crisis. There are

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U.S.C. § 2205, governs the federal charter of the U.S. Olympic and Paralympic Committee. In the past few years Congress has amended it several times to enact additional protections for athletes. *See id.* (establishing an Athletes' Advisory Council for amateur athletes); Equal Pay for Team USA Act of 2022, Pub. L. No. 117-340, 136 Stat. 6175; Empowering Olympic, Paralympic, and Amateur Athletes Act of 2020, Pub. L. No. 116-189, 134 Stat. 943.

175 Professor Saul Levmore sees a theoretically opposite problem with incrementalism, including the potential for overregulation past the socially optimum level as the incremental path allows advocates to divide and conquer special interest opposition. Levmore, *supra* note 171, at 827.

176 29 U.S.C. § 2611.

177 G. John Tysse & Kimberly L. Japinga, *The Federal Family and Medical Leave Act: Easily Conceived, Difficult Birth, Enigmatic Child*, 27 CREIGHTON L. REV. 361, 361 (1994).

178 Mel Leonor Barclay & Grace Panetta, *A 1993 Family and Medical Leave Law Was Supposed to Be Just the Start. Thirty Years Later, Not Much Has Changed.*, THE 19TH (Feb. 6, 2023, at 03:00 PT), https://19thnews.org/2023/02/family-medical-leave-law-30/#:~:text=Lawmakers%20reached%20a%20compromise%2C%20Sholar,a%20book%20on%20FMLA's%20history [https://perma.cc/5UC6-4HVJ] (quoting former Rep. Byrne, "We all understood that this was incremental progress. We understood that it needed to be longer, and that it needed to be paid.").

179 *Statistics and Historical Comparison*, GOVTRACK, https://www.govtrack.us/congress/bills/statistics [https://perma.cc/R93T-W893] (last visited July 27, 2025).

180 *See, e.g.*, Families First Coronavirus Response Act, Pub. L. No. 116-127, 134. Stat. 178 (2020); Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, 134 Stat. 281 (2020); Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, 138 Stat. 4459 (2022); American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4 (2021).

many factors that might have infused these reactions to big, urgent crises, including opportunities for bipartisan support, and implications for business stakeholders and "the economy" in an election year. While they suggest some capacity to respond to urgent crises affecting certain sectors, they do not necessarily signal the ability to address long term and increasingly urgent crises, such as climate change. In other words, perhaps Congress can respond to a house on fire, but not a slow burn.

The second challenge with the Court's turn to Congress is that the Court's recent decisions may further impair Congress's ability to act, particularly with respect to new and big problems.[181] "In recent years, the Court has treated 'legislative novelty [as] a mark against a law's constitutionality,'"[182] "curbing Congress's ability to address 'the ever-increasing and evolving problems faced by our society.'"[183] That, coupled with the potential revival of the nondelegation doctrine, continued use of the major questions doctrine, and demise of *Chevron* deference to agencies, will likely expose even new laws to continued challenge in implementation. Even where Congress wants to act in response to Court cases, the process of predicting what requires express delegation and how much must be included in legislation is complex. In fact, Daniel Walters and Elliott Ash found after surveying nondelegation doctrines at the state level that there were minimal, if any, effects on state legislative activity.[184] In other words, courts' increased use of the nondelegation doctrine at the state level did not result in increased legislative activity in response, which might have been expected if the courts are telling the legislature they have delegated too much authority in their existing statutes.[185]

Finally, the third problem is that the Court's presumption that Congress will respond to its decisions restraining administrative action with a more robust legislative role might be a fallacy. It is possible that Congress might be more motivated to act in response to big administrative agency action and large private lawsuits than to Supreme Court decisions preserving the status quo. Congress has

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181 *See, e.g.*, Loper Bright Enters. v. Raimondo, 603 U.S. 369, 413 (2024) ("And when a particular statute delegates authority to an agency *consistent with constitutional limits*, courts must respect the delegation, while ensuring that the agency acts within it.") (emphasis added); *see also* Walters & Ash, *supra* note 139, at 471 ("[I]t is clear that Congress's capacity to support the task of legislating is in a long-term secular decline.").

182 *Administrative Law—Separation of Powers—Public Rights Doctrine*—SEC v. Jarkesy, 138 HARV. L. REV. 405, 411 (2024).

183 *Id.* at 414.

184 Walters & Ash, *supra* note 139, at 415.

185 *Id.*

robustly employed its Congressional Review Act authority, for example, when it disagrees with administrative action.[186] In a survey of over 100 congressional drafters, Professors Bressman and Gluck noted that "respondents also painted a picture of legislative staffers in a primary interpretive conversation with agencies, not with courts."[187] There is no guarantee, therefore, that the Supreme Court's major questions doctrine, or other anti-administrative holdings, are more likely to force congressional response.

2. Needs for Congressional Action and Reform

Keeping these challenges in mind, it seems inevitable that Congress must play a significant role in responding to current societal dilemmas and balancing the three branches of government. For Congress to do so, there need to be both procedural and substantive changes. Several scholars have noted that if the Constitution demands Congress play a greater role and delegate less, greater resources need to also be invested in Congress to do its job, including restoring resources that were cut starting in the 1990s.[188]

More substantively, congressional intervention demands significant work be put into building power and political will to advance policy goals in Congress and to ensure that policies resonate with peoples' lived experiences. America's workers need to feel that they inform legislative policy, and that the policy in turn empowers them, for them to maintain faith in government institutions.[189]

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[186] Professor McGarity has argued that the major questions doctrine is in fact inconsistent with the Congressional Review Act, noting that "[i]t is more than a little incongruous for a court to declare that it is up to Congress to decide a major question presented by a major rule when Congress has already evaluated that rule under the Congressional Review Act and decided to allow it to go into effect." McGarity, *supra* note 52, at 23.

[187] Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 725 (2014).

[188] Rahman, *supra* note 52, at 1708 ("Crucially, achieving a better division of labor between legislature and administration requires more than exhortations to Congress; it also requires a very real restoration of investment in Congress's core competencies and capacities, from policy analysis to legislative staff to oversight hearings."); Walters & Ash, *supra* note 139, at 471 (citing CONGRESS OVERWHELMED: THE DECLINE IN CONGRESSIONAL CAPACITY AND PROSPECTS FOR REFORM 31 (Timothy M. LaPira, Lee Drutman & Kevin R. Kosar eds., 2020)).

[189] *See, e.g.*, Alexander Hertel-Fernandez, *Beyond Deliverism*, DEMOCRACY J. (2025), https://democracyjournal.org/magazine/76/beyond-deliverism/ [https://perma.cc/ZE58-JPGG]; Deepak Bhargava, *Advice for 'Speak Truth to Power' Activists: Build Power of Your Own*, CHRON. PHILANTHROPY (Aug. 14, 2024), https://www.philanthropy.com

Without congressional intervention, the Court will also likely continue to issue decisions that reinforce an anti-administrative, deregulatory, antinovelty agenda, which may further support increased politicization and minority rule, thus making future action even more unlikely to succeed.[190] Legislative reforms along these lines, including for court reform and administrative law reform (such as a "fast-track legislative procedure for the major questions doctrine modeled on the Congressional Review Act" which would provide Congress a tool to respond more nimbly to a major questions decision by the Court)[191] will require significant political will and a different makeup of Congress.

Finally, aside from the need for congressional reform, calls for court reform have been growing.[192] Even President Biden, a former Chairperson of the Senate Judiciary Committee and institutionalist, called for court reform toward the end of his administration, including term limits for Supreme Court justices and ethics rules.[193]

Court packing is a huge political lift and lessons we can draw from history on how this would proceed are complex. There are echoes today of President Roosevelt's court packing plan as he grew increasingly frustrated by the Supreme Court striking down big, powerful New Deal

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/commons/advice-for-speak-truth-to-power-activists-build-power-of-your-own [https://perma.cc/N2HC-N4V7]; K. Sabeel Rahman, *Democracy Reform Symposium*, 109 CALIF. L. REV. 979, 982 (2021) ("[T]he fight for democracy isn't just in the courts, and it's not even just in the legislatures, it's this interplay between grassroots organizing, movement building, protest in the streets, and policy change.").

190 *See, e.g.*, *The Presumption Against Novelty*, *supra* note 4, at 2034 ("Since then, however, and especially since Litman first explored the trend in 2017, the Court has deployed antinovelty language with increasing frequency in cases touching all three branches of the federal government."); Deacon & Litman, *supra* note 56, at 1060 ("The new major questions doctrine's reliance on political controversy also exacerbates our constitutional system's skew toward minority rule.").

191 Walker, *supra* note 130, at 206.

192 *See* Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2240 n.1 (2019) (reviewing RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT (2018)) ("[I]t is striking how many commentators—including prominent constitutional scholars, a former Attorney General, and current members of Congress—have recently questioned the legitimacy of the United States Supreme Court.").

193 *See, e.g.*, Jeff Mason & Andrea Shalal, *Biden Proposes Term Limits, Code of Conduct to Rein in 'Extreme' Supreme Court*, REUTERS (July 29, 2024, at 10:51 PM PT), https://www.reuters.com/world/us/biden-propose-supreme-court-term-limits-binding-code-conduct-2024-07-29/ [https://perma.cc/K7PR-GNRN]; *FACT SHEET: President Biden Announces Bold Plan to Reform the Supreme Court and Ensure No President Is Above the Law*, WHITE HOUSE (July 29, 2024), https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2024/07/29/fact-sheet-president-biden-announces-bold-plan-to-reform-the-supreme-court-and-ensure-no-president-is-above-the-law/ [https://perma.cc/8HQ2-GMVK].

legislation.[194] Roosevelt noted in one of his fireside chats that "[t]he Courts, however, have cast doubts on the ability of the elected Congress to protect us against catastrophe by meeting squarely our modern social and economic conditions. . . ."[195] In a 1937 labor and employment case challenging the constitutionality of Washington State's minimum wage law,[196] some have surmised that Justice Owen Roberts switched his vote in that case in response to political pressure. Whether "the switch in time that saved nine" happened or not,[197] the Court started to accept social welfare policies they had previously considered too big—including upholding the constitutionality of the Wagner Act, thus protecting workers' rights to organize and collectively bargain.[198] Nevertheless, other historical evidence points to President Roosevelt's court packing and reorganization plans as the beginning of the erosion of his political power and New Deal push.

Court reform proposals are neither novel nor unprecedented.[199] Because we are in a different political moment and makeup than almost a century ago, however, political organizing and pressure in demanding such reforms will be needed to produce changes.

At a time when big fixes are difficult for the private bar and the administrative branch, what are the options for paths forward? Incrementalism is a flawed option: faced with the magnitude of societal dilemmas and, a likely hostile judiciary, even incremental solutions

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194 Stephan O. Kline, *Revisiting FDR's Court Packing Plan: Are the Current Attacks on Judicial Independence So Bad?*, 30 MCGEORGE L. REV. 863, 908 (1999) (discussing President Roosevelt's Recommendation to Reorganize the Judicial Branch of the Federal Government, also known as "Court Packing Plan").

195 *Id.* at 924.

196 W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

197 *Compare* Kline, *supra* note 194, at 937 ("Hughes knew that FDR was preparing some attack on the Court and delayed issuing the opinion for strategic purposes, to undermine whatever action FDR might take."), *with id.* at 954 n. 421 (citing Felix Frankfurter, *Mr. Justice Roberts*, 104 U. PA. L. REV. 311, 313 (1955)) (quoting from Justice Roberts memorandum explaining the change in the outcome in *Parrish* from precedent and concluding, "These facts make it evident that no action taken by the President in the interim had any causal relation to my action in the *Parrish* case."). *See also* Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201, 227 (1994) ("Though Hughes was largely unsuccessful in his attempt to avoid imparting the sense that *West Coast Hotel* was an act of judicial obeisance to an aggressive executive, it is now amply clear that the Constitutional Revolution was actually initiated more than six weeks before the Court-packing plan, a very closely guarded secret, became public knowledge.").

198 NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937).

199 Kline, *supra* note 194, at 901 ("During the 1936 session of Congress, more than 100 separate proposals were introduced to alter the balance of power between the Court and the political branches."); *see also* Judicial Modernization and Transparency Act, S. 5229, 118th Cong. (2024).

may not lead to forward progress. Looking to the other branches of government, it seems clear that Congress must take up the mantle in a much more ambitious way, including exploring options for court reform. Yet this is a tall order in the current political climate, requiring both the political will and action of Congress to reassert its role as a coequal branch of government.

CONCLUSION

This Article has observed that a conservative judiciary has effectively foreclosed different institutions and the public and private sector from solving big problems by foreclosing all pathways to progress on urgent and big societal dilemmas. Whether creating enormous transaction costs for the private sector or announcing new doctrines to restrain the administrative state, the Court has found different ways to shut them down. To some extent, that is part of the conservative theory of democracy and execution of a long-term conservative agenda—to require that big solutions come from Congress. Congress too, however, has had its authority weakened and altered by the courts. While the paths may be doctrinally different, whether the theory is explicitly too big, or anti-class action, anti-administrative, antinovelty, the major questions doctrine, or nondelegation, in the end the result is the same: it is too big to fix.

Looking to each of these institutions for opportunities, this Article has rejected incremental responses as sufficient and suggested that all paths ultimately lead to Congress for any hope of a fix. It acknowledges the need for reforms to and from Congress but is not so naïve as to suggest there is currently sufficient political will and makeup of Congress to promote such reforms.

What is clear is that the Supreme Court has raised the stakes. The previous channels to action are not available or working, requiring some big changes to respond to the most urgent problems of our time.