Regulation in Real Time: Why Agency Enforcement Should Remain Untouched by the Major Questions Doctrine

by Aidan Woutas[*]

Federal agencies do much of their important regulatory work not through the rules they publish, but through the cases they bring—cases that, unlike rules, are subject to scrutiny before an Article III court. As the major questions doctrine's reach has expanded in the rulemaking context, litigants have increasingly urged courts to extend it to enforcement as well, so that an agency cannot build a regulatory regime through case-by-case litigation that it could not adopt by rule. This Contribution disagrees with that extension and argues that the major questions doctrine should not reach enforcement actions. Courts should hesitate to treat effective, adaptive regulation as inherently suspect, particularly when they do so on the assumption that a paralyzed Congress can reliably fill the void in a fast-moving regulatory landscape. Enforcement lacks the unreviewed, universally binding force that makes rulemaking substantial enough to warrant elevated scrutiny, and extending the doctrine into this realm would override the settled principle, dating to NLRB v. Bell Aerospace*, that agencies may develop policy case-by-case.*

There are two primary ways federal agencies fulfill their mandate: notice-and-comment rulemaking, which produces broad and prospective administrative regulations applicable to entire industries, types of institutions, or the public at large; and enforcement actions, which are undertaken on a case-by-case basis and apply existing legal requirements to particular parties in response to alleged violations.[1] When reviewing agency actions in recent decades, the Supreme Court has been reluctant to

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[1] *See* 5 U.S.C. §§ 551(4)–(7), (10), 553–554.

validate actions seeking to resolve questions of "vast economic and political significance" without clear authorization from Congress to do so.[2] This clear statement rule reflects a skepticism of agency efforts to discover "unheralded power" in "long-extant statute[s]" through expansive readings of general or ambiguous language.[3] This stance has come to be known as the "major questions doctrine" ("MQD"). Whether the doctrine should extend beyond rulemaking, however, remains contested. Missouri Solicitor General Louis J. Capozzi, for instance, has argued that MQD's separation-of-powers rationale applies equally to agency enforcement proceedings because agencies may use adjudication to establish consequential regulatory policies without clear congressional authorization, thereby circumventing the limits the doctrine imposes on unilateral agency action.[4] This Contribution argues that the major questions doctrine should remain confined to rulemaking because enforcement actions, unlike sweeping agency rules, are subject to judicial review and case-by-case adjudication, which constrain agencies' ability to impose novel regulatory policies unilaterally.

In each of the cases in which this Court has invoked the doctrine, an agency unilaterally announced a policy of nationwide effect before any court reviewed it, for example, regulations seeking to restructure the nation's electricity generation (Environmental Protection Agency),[5] canceling nearly half a trillion dollars in federal student debt (Department of Education),[6] or asserting a previously disclaimed power to regulate tobacco products as customarily marketed (Food and Drug Administration).[7] Proponents of an extension contend that the formal distinction between rules and enforcement actions can obscure their practical equivalence, as an agency may use repeated lawsuits to establish a regulatory standard across an industry without ever

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[2] West Virginia v. EPA, 597 U.S. 697, 716 (2022) (quoting Utility Air Regulatory Group v. EPA, 573 U.S. 302, 324 (2014)).
[3] *West Virginia*, 597 U.S. at 724.
[4] Louis J. Capozzi III, *Agency Enforcement Proceedings and the Major Questions Doctrine*, 23 GEO. J.L. & PUB. POL'Y 339, 340 (2025).
[5] *West Virginia*, 597 U.S. at 713–14 (describing the Clean Power Plan's restructuring of electricity generation).
[6] Biden v. Nebraska, 600 U.S. 477, 483 (2023).
[7] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 126–27 (2000).

promulgating a generally applicable rule.[8] In the cryptocurrency context, for instance, Eric Wessan and Phil Pillari argue that the Securities and Exchange Commission's ("SEC") enforcement campaign raises a major question because the agency is asserting authority over a trillion-dollar industry it had not previously regulated, using litigation to establish new legal standards without the procedural safeguards of notice-and-comment rulemaking.[9] Yet the Supreme Court's MQD cases have involved unilateral agency pronouncements that sought to bind an entire regulated population before judicial review, rather than case-by-case enforcement actions subject to adversarial testing.[10] The major questions doctrine, in other words, has so far applied where an agency's own unilateral action, rather than a deliberative multi-branch process, was the mechanism by which a sweeping new policy took effect.

Enforcement actions share none of those features and fundamentally differ from rulemaking in the ways that matter most to the MQD's stated rationale. Rather than announcing a nationwide policy on its own authority, an agency initiating an enforcement action asks a court to apply a statute against a single party, who may contest that interpretation with the full benefit of the adversarial process. As one court explained in declining to extend the doctrine to an enforcement action, an agency is "not flexing its regulatory muscles—it is merely asking a court to interpret and apply a statute enacted by Congress."[11] Unlike rulemaking, enforcement actions carry their own built-in check—review before an Article III court—before they bind anyone at all.

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[8] *See* Capozzi, *supra* note 4; Chris Brummer, Yesha Yadav & David Zaring, *Regulation by Enforcement*, 96 S. CAL. L. REV. 1297, 1328–29 (2024).

[9] Eric Wessan & Phil Pillari, *Problems with Rulemaking by District Court Enforcement Action: the SEC's Improper Cryptocurrency Regulation*, HARV. J.L. & PUB. POL'Y PER CURIAM, Summer 2024, at 4 https://journals.law.harvard.edu/jlpp/problems-with-rulemaking-by-district-court-enforcement-action-the-secs-improper-cryptocurrency-regulation-eric-wessan-phil-pillari/. At the time of writing the above article, Eric Wessan was the Solicitor General of Iowa, and Phil Pillari was a J.D. Candidate at Northwestern Pritzker School of Law.

[10] *See, e.g.*, *West Virginia,* 597 U.S. at 713–14; *Biden*, 600 U.S at 483.; *Brown & Williamson*, 529 U.S. at 126–27.

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

This distinction is not merely theoretical. Every court that has encountered a major questions challenge to an agency enforcement action has rejected it, reasoning that the doctrine targets unilateral policymaking rather than the adjudication of existing law.[12] In the cases in which the Supreme Court has applied the doctrine to agency action, a recurring factual pattern emerges: an agency asserts a novel power that it had not previously exercised, claiming an extraordinary breadth of authority over conduct or an industry it had not historically regulated.[13] Ordinary enforcement, litigated one case at a time against individual parties, bears little resemblance to that posture.

This approach comports with the long-settled principle in administrative law, originating in *NLRB v. Bell Aerospace Co.*, that agencies retain broad discretion to develop policy on a case-by-case basis if they so choose and are not required to use formal rulemaking simply because it alters a prior interpretation.[14] Extending the major questions doctrine to enforcement would functionally override that discretion, treating an agency's routine choice of procedural vehicle as itself suspect—an outcome nothing in the doctrine's own rationale requires. Ultimately, adjudications are a critical part of agencies' enumerated powers, and they meaningfully differ from the exercises of "agency self-aggrandizement" that courts applying the doctrine have warned against.[15]

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[12] *See, e.g.,* SEC v. Payward, Inc., 763 F. Supp. 3d 901, 909–10 (N.D. Cal. 2025); SEC v. Coinbase, Inc., 726 F. Supp. 3d 260, 282–84 (S.D.N.Y. 2024); SEC v. Terraform Labs Pte. Ltd., 684 F. Supp. 3d 170, 188–90 (S.D.N.Y. 2023); *Kochava*, 671 F. Supp. 3d at 1180.

[13] *See* N.C. Coastal Fisheries Reform Grp. v. Capt. Gaston LLC, 76 F.4th 291, 299–301 (4th Cir. 2023) (identifying the novelty and breadth of asserted agency authority among the indicators relevant to the major questions doctrine analysis).

[14] NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974); *see also* SEC v. Chenery Corp., 332 U.S. 194, 202–03 (1947).

[15] City of Arlington v. FCC, 569 U.S. 290, 293 (2013) (describing concerns about "agency self-aggrandizement").

It is true, however, that most enforcement actions resolve by settlement or consent decree rather than litigated judgment.[16] After all, settlements, unlike verdicts, are never independently tested by an Article III court. That practice has drawn criticism, including from within the agencies that rely on it, as a form of "regulation by enforcement."[17] The concern is that an agency can establish a *de facto* legal standard simply by settling enough cases on a consistent theory, since other regulated parties, unwilling to bear the cost and risk of contesting the theory themselves, decide to just comply with it going forward.[18] As an example of the lighter scrutiny settlements typically receive, the Second Circuit reversed Judge Rakoff's refusal to approve one such settlement absent any judicial finding of fact, holding that courts owe an agency's proposed settlement substantial deference and need not independently adjudicate its merits before approving it.[19]

This prevalence of settlements, however, does not eliminate the fundamental distinction between agency enforcement and agency policymaking, and two considerations reinforce that distinction. First, enforcement actions that proceed to final judgment do indeed create precedent, and a court's interpretation of the governing statute binds future cases in that jurisdiction under ordinary principles of *stare decisis*. This interpretation is entitled to the same "enhanced force" any statutory precedent commands.[20] If an enforcement action is litigated before a neutral court, the resulting precedential effect is entirely fair—and undeserving of MQD scrutiny—because it was earned through full adversarial testing against a defendant equipped to contest it. Second, if an enforcement action is in fact resolved by settlement, as often happens, only the settling party is bound. No

[16] *See* Press Release, U.S. Sec. & Exch. Comm'n, SEC Announces Enforcement Results for Fiscal Year 2023 (Nov. 14, 2023), https://www.sec.gov/newsroom/press-releases/2023-234 (stating that "the majority of the Commission's enforcement actions are filed as settled matters");
[17] *See, e.g.*, Elad L. Roisman, Comm'r, SEC, Remarks at SEC Speaks (Oct. 8, 2020) (noting that the SEC has both a regulatory and enforcement role).
[18] *Id.*
[19] SEC v. Citigroup Global Mkts., 752 F.3d 285 (2d Cir. 2014).
[20] Kimble v. Marvel Entertainment, LLC, 576 U.S. 446, 455–56 (2015).

precedent is created by a consent decree.[21] Although repeated settlements may create practical pressure to conform to the agency's interpretation, they do not establish binding legal rules. Every other regulated party remains free to go to trial and litigate the same statutory question on its own merits. Either way, the agency does not get to write the rule that follows from its own enforcement action. That is the role of a court, based on existing statutes, and only if the opposing party chooses to test the agency's theory, and the agency prevails. The accountability which the major questions doctrine seeks to guarantee remains, supplied by the judicial branch rather than notice-and-comment procedures.

Moreover, any potential benefits gained by extending the doctrine would be outweighed by real losses to flexibility and a disruption of the separation of powers. Congress often legislates in broad terms because it cannot anticipate every circumstance in which regulation may become necessary. These broad delegations of authority allow agencies to apply statutory requirements to unforeseen circumstances and fill regulatory gaps without requiring Congress to amend the statute each time new conditions arise.[22] The securities and cryptocurrency context is again illustrative. In defining "investment contract" under the Securities Act, the Supreme Court has explained that the concept "embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits."[23] That flexibility was central to the statute's design and reflected an understanding, carried forward from decades of state securities regulation, that any fixed or narrow definition would inevitably be outpaced by new schemes Congress could not have anticipated.[24] When it established the SEC,

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[21] *See* Langton v. Hogan, 71 F.3d 930, 935 (1st Cir. 1995) (explaining that a consent judgment does not establish precedent under stare decisis or bind nonparties through issue or claim preclusion).

[22] *See* Jeffrey E. Shuren, *The Modern Regulatory Administrative State: A Response to Changing Circumstances*, 38 HARV. J. ON LEGIS. 291, 325 (2001).

[23] SEC v. W. J. Howey Co., 328 U.S. 293, 299 (1946).

[24] *See Id.* at 298 (noting that "investment contract" had been "broadly construed by state courts so as to afford the investing public a full measure of protection," with "[f]orm . . . disregarded for substance"); *see also id*. at 298 n.4

Congress carried that same philosophy forward, adopting broad terms under the "expectation[]" the SEC would regulate "virtually any instrument that might be sold as an investment . . . in whatever form they are made and by whatever name they are called."[25] Thus, enforcement allows the SEC to apply Congress's deliberately flexible statutory framework to novel cryptocurrency schemes through established legal principles, without requiring new rulemaking for each innovation.

This dynamic is not unique to any one regulatory field. Any agency tasked with policing adaptive, if not deliberately evasive conduct must be able to apply statutory requirements to reach schemes that Congress could not have contemplated when it enacted the statute. Enforcement, precisely because it proceeds case-by-case rather than through a single generally applicable rule, allows agencies to remain nimble in a complex and dynamic world—adapting their application of settled statutory standards to conduct Congress could not have anticipated without needing to restart the rulemaking process each time. Extending the MQD to enforcement would jeopardize that flexibility. Agencies must be able to apply settled statutory language to new facts with confidence. If the MQD is extended to adjudication, each new application would risk being recharacterized after the fact as the unauthorized construction of a regulatory regime simply because it is responsive to a newfound issue. That would strip the executive branch of the flexibility Congress built into open-ended delegations in exchange for a line that is difficult to administer. Courts have already recognized what is lost when an agency's oversight is curtailed in this manner: to limit an agency's authority to apply its governing statute to new circumstances is to "hamstring" it in a way Congress never intended.[26]

Even granting that the cumulative effect of repeated enforcement could function like a regulatory regime, the proposed fix does not work in practice. The question remains of when enforcement "adds up" to enough to invoke the MQD. Ten actions in a

(collecting state cases, including Klatt v. Guaranteed Bond Co., 213 Wis. 12, 250 N.W. 825 (1933)).

[25] SEC v. Terraform Labs Pte. Ltd., 684 F. Supp. 3d 170, 190 (S.D.N.Y. 2023) (quoting SEC v. Edwards, 540 U.S. 389, 393 (2004)).

[26] *Terraform*, 684 F. Supp. 3d at 190.

particular regulatory realm? Fifty? Against how many parties, and over what span of time, can an agency act before its application of a governing statute is retroactively recast as the unauthorized construction of a new regime? Any line a court might draw would be unavoidably arbitrary. Courts have recognized the attractiveness of precisely this defense, explaining that the major questions doctrine "is not a talisman to be invoked by concerned litigants whenever they are beholden to new administrative requirements."[27]

Nor does the size or scope of the regulated industry on its own supply the missing line. As the First Circuit explained, the relevant inquiry is not simply "the size of the *industry* being regulated," but the economic significance of the *agency's* particular assertion of regulatory authority.[28] Yet litigants have tried to use that framing when pursuing MQD arguments, including those challenging SEC cryptocurrency enforcement actions. Jacobi and Monast document repeated instances of defendants in SEC cryptocurrency enforcement actions invoking the MQD and emphasizing the industry's trillion-dollar market valuation and substantial daily trading volume.[29] An agency that continues to apply a familiar statutory standard to new facts—however large the affected market becomes—is doing something meaningfully different from an agency that announces a new regulatory program by rule. Extending the doctrine to enforcement on the basis of aggregate dollar amounts or the number of people or parties affected would arbitrarily conflate these two inquiries.

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[27] Airlines for Am. v. DOT, 127 F.4th 563, 578 (5th Cir. 2025), *vacated, reh'g en banc granted*, 154 F.4th 323 (5th Cir. 2025) (quoted for its characterization of the major questions doctrine rather than its substantive holding).

[28] United States v. Freeman, 147 F.4th 1, 29 (1st Cir. 2025) (emphasis added).

[29] Patrick Jacobi & Jonas Monast, *Major Floodgates: The Indeterminate Major Questions Doctrine Inundates Lower Courts*, 62 HARV. J. ON LEGIS. 43, 53–54 (2024) (discussing the economic-significance arguments raised in SEC v. Green United, No. 2:23-cv-00159-BSJ (D. Utah Mar. 20, 2024), and in SEC v. Binance Holdings Ltd., 738 F. Supp. 3d 20 (D.D.C. 2023)). At the time of writing the above article, Patrick Jacobi was a Senior Attorney at the Center for Environmental Law and Policy, and Jonas Monast was an Associate Professor at the University of North Carolina School of Law.

The MQD often relies on a significant assumption that when an agency's authority proves inadequate to address a new problem, Congress can easily step in to supply clear authorization.[30] That assumption has unfortunately grown considerably less reliable. Consider artificial intelligence, which, despite seemingly universal agreement about the need for regulation, has yet to be met with a coherent regulatory regime established by Congress (as of the publication of this Contribution). Asked recently whether Congress might pass meaningful artificial intelligence legislation, one senator responded: "[W]e can't pass a budget, you think we're going to have some great bill on AI?"[31] The case for applying the MQD is stronger when agencies adopt sweeping rules through notice-and-comment rulemaking, whereas enforcement allows agencies to address emerging problems under existing statutory authority without waiting for a gridlocked Congress to act. The doctrine depends on Congress's ability to act as a live, available check and step in when necessary to pave the way for agency action, but in the coming years it is likely that agencies will need to fill gaps themselves. Courts certainly shouldn't excuse agencies from statutory limits, but courts should hesitate before imposing new ones on them. Extending the major questions doctrine to enforcement, on the assumption that Congress remains a reliable and responsive backstop, asks courts to act on a premise that does not reflect the last several decades of legislative practice.

The MQD helps to keep major shifts in regulatory power answerable to Congress rather than to agencies acting unilaterally. That rationale should not extend to enforcement. An agency bringing an enforcement action claims no new authority of its own; it merely asks a neutral court to test its reading of a statute Congress already enacted, against a party equipped to contest that reading through the ordinary tools of adversarial process—no matter whether it culminates in a settlement or a trial. This built-in check is precisely what the MQD's rulemaking cases have lacked, and what makes extending the doctrine to

[30] *See* West Virginia v. EPA, 597 U.S. 697, 723 (2022) (grounding the doctrine in "a practical understanding of legislative intent").

[31] Miranda Nazzaro, "*Lawmakers scramble to catch up on AI*," THE HILL (last visited Nov. 2, 2026), https://thehill.com/policy/technology/6091629-senate-scrambles-over-ai-safety/.

enforcement unnecessary. Meanwhile, the costs of extending the doctrine are real: agencies would lose the interpretive flexibility Congress deliberately built into open-ended statutes in exchange for a threshold no court has shown itself able to administer, at a moment when Congress itself is least equipped to supply the correction the MQD assumes is available. Courts should decline the invitation to extend the major questions doctrine into this territory. Enforcement is not rulemaking by another name, and it should not be treated as though it were.