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Cyrus D. Mehta
Editor-in-Chief

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Publishing Staff

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Submissions

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Questions About This Publication?

For questions about the Editorial Content appearing in these volumes or reprint, please contact:

Morgan Morrisette Wright, Editorial Product Manager, Publications & AILALink, AILA, at mwright@aila.org

For questions about Sales, or to reach Customer Service:

Sales
202.999.4777 (phone)
sales@fastcase.com (email)

Customer Service
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Major Questions, Major Consequences

Applying *West Virginia v. EPA* to Expedited Removal Expansion

Catherine Lina Tanihu*

Abstract: The Supreme Court's major questions doctrine requires clear congressional authorization for agency actions of vast economic and political significance. This article examines whether the Department of Homeland Security's expansion of expedited removal from border enforcement affecting thousands to nationwide application affecting hundreds of thousands survives scrutiny under the major questions doctrine and post-*Loper Bright* framework. Originally designed for arriving aliens at ports of entry, expedited removal now applies to individuals encountered anywhere in the United States who cannot prove two years of continuous presence. Drawing on Justice Neil Gorsuch's separation of powers analysis in *Gundy v. United States* and *Learning Resources Inc. v. Trump*, this article argues that plenary power over immigration belongs to Congress, not agencies, and that such dramatic policy transformations require clear legislative authorization. The article further demonstrates that immigration exceptionalism cannot exempt executive actions from fundamental constitutional constraints.

Introduction

In *West Virginia v. Environmental Protection Agency*, the Supreme Court articulated a principle with revolutionary implications: agencies cannot claim the power to make “decisions of vast economic and political significance” without clear congressional authorization.¹ The “major questions doctrine,” as this principle has come to be known, represents a fundamental reorientation of administrative law, a reassertion of Congress's primacy in establishing the broad contours of federal policy.² In the wake of this decision and the subsequent demise of *Chevron* deference in *Loper Bright Enterprises v. Raimondo*, federal agencies face unprecedented scrutiny when asserting broad regulatory authority.³

Yet in one domain of administrative action, this revolution appears not to apply in immigration enforcement. While the Environmental Protection Agency (EPA) cannot regulate power plant emissions without explicit statutory authority, the Centers for Disease Control and Prevention cannot impose an eviction moratorium, and the Department of Education cannot forgive student loans, the Department of Homeland Security (DHS) claims virtually unlimited authority to expand expedited removal, a streamlined deportation process that strips individuals of traditional removal proceedings and

meaningful judicial review to encompass millions of people who have lived in the United States for years.⁴

This article argues that the expansion of expedited removal to cover individuals arrested anywhere in the United States who cannot prove continuous physical presence for two years or more represents precisely the kind of “major question” that requires clear congressional authorization. When Congress enacted expedited removal in 1996 as part of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), it designed a limited procedure for persons arriving at the border without proper documentation—a narrow exception to the general rule that noncitizens facing removal are entitled to full proceedings before an immigration judge with attendant procedural protections.⁵ Through successive administrative expansions, what began as a border-focused procedure for recent arrivals has evolved into a nationwide deportation mechanism applicable to longtime residents. This is a transformation that rivals in scope and significance the regulatory actions the Supreme Court has struck down under the major questions doctrine.⁶

Expedited removal authorizes immigration officers to order deportation without a hearing before an immigration judge, without the right to present evidence or call witnesses, and with only the most limited judicial review.⁷ Expanding this procedure nationwide means that individuals who have built lives in the United States, have jobs, families, homes, and community ties can be summarily deported based on a roadside determination by a single immigration officer.⁸ The economic impact alone is staggering, potentially affecting hundreds of thousands or even millions of individuals and the communities and industries that depend on their labor and economic participation.⁹

This article proceeds as follows. The next section provides essential background on the statutory framework of expedited removal and the development of the major questions doctrine. The third section demonstrates that expedited removal expansion satisfies every element of a major questions doctrine. The fourth section addresses immigration exceptionalism and the plenary power doctrine, arguing that neither justifies exempting immigration enforcement from separation of powers principles. The fifth section presents textual arguments demonstrating that the Immigration and Nationality Act does not clearly authorize nationwide expedited removal expansion. The sixth section talks briefly about how the major question doctrine applies in other important immigration areas.

The central claim is straightforward: if the major questions doctrine means anything, it must mean that the executive cannot unilaterally restructure the immigration enforcement system to subject millions of people to summary deportation without clear congressional authorization. The Constitution vests legislative power in Congress, not the president.¹⁰ When executive action has “vast economic and political significance,” congressional authorization must be clear and specific, not hidden in statutory ambiguities.¹¹ Immigration enforcement, despite its political importance, is not exempt from this fundamental principle of separation of powers.

Background: Expedited Removal and the Major Questions Doctrine

Statutory Framework of Expedited Removal

Congress enacted the expedited removal procedure in IIRIRA in 1996.¹² The statute authorizes immigration officers to order the removal of certain “applicants for admission” without a hearing before an immigration judge if the officer determines that the individual is inadmissible for lacking proper entry documents or for fraud or misrepresentation.¹³ This streamlined procedure represents a significant departure from the general removal process, which provides noncitizens with formal proceedings before an immigration judge, the right to present evidence and witnesses, representation by counsel, and robust appellate review.¹⁴

The statutory text of Immigration and Nationality Act (INA) § 235(b)(1) establishes both the scope and the limitations of expedited removal. The provision applies to aliens “arriving in the United States” or those described in clause (iii), which covers aliens:

[W]ho have not been admitted or paroled into the United States, and who have not affirmatively shown, to the satisfaction of an immigration officer, that they have been physically present in the United States continuously for the 2-year period immediately prior to the date of determination of inadmissibility.¹⁵

Critically, Congress did not make expedited removal automatically applicable to all persons described in clause (iii). Rather, the statute provides that the Secretary of Homeland Security “may apply” expedited removal to this category through a specific designation published in the Federal Register.¹⁶

Judicial review of expedited removal orders is severely limited. The statute provides that “there shall be no review of whether the alien is actually inadmissible or of any other decision or action” specified to be in the sole discretion of the Secretary.¹⁷ Courts retain habeas jurisdiction to review only three narrow issues: whether the petitioner is an alien, whether the petitioner was ordered removed under expedited removal procedures, and whether the petitioner can prove lawful permanent resident, refugee, or asylee status.¹⁸

Executive Expansion of Expedited Removal

The executive branch has expanded expedited removal in stages since its enactment. When the Immigration and Naturalization Service first implemented expedited removal in 1997, it applied the procedure only to persons arriving at ports of entry without proper documentation.¹⁹ In 2004, DHS expanded expedited removal to include certain persons encountered within 100 air miles of any U.S. border within 14 days of entry.²⁰

In July 2019, DHS issued a Federal Register notice dramatically expanding expedited removal nationwide to any individual who cannot establish continuous physical presence in the United States for two years.²¹ This expansion eliminated all geographic restrictions, potentially subjecting millions of undocumented individuals throughout the United States to summary deportation without a hearing before an immigration judge.²² The 2019 expansion provoked immediate litigation and was eventually rescinded by the Biden administration, but the issue remains politically salient and likely to resurface.²³

The Major Questions Doctrine

The major questions doctrine has emerged as one of the most significant developments in administrative law in recent decades. The doctrine's roots extend back to *FDA v. Brown & Williamson Tobacco Corp.*, where the Supreme Court rejected the Food and Drug Administration's (FDA's) assertion of authority to regulate tobacco products, reasoning that Congress could not have intended to delegate such consequential regulatory authority through oblique statutory provisions.²⁴

The Court's 2022 decision in *West Virginia v. EPA* crystallized the major questions doctrine into a freestanding clear-statement rule.²⁵ The case involved EPA's Clean Power Plan, which would have required power plants to shift electricity generation from coal to renewable sources.²⁶ The Court held that EPA exceeded its statutory authority because the plan involved a question of "vast economic and political significance" that required clear congressional authorization.²⁷

The Court identified several indicia of a "major question": the economic significance of the regulatory action, the political significance of the issue, whether the claimed authority would intrude into areas of traditional state regulation, whether the assertion is inconsistent with prior practice, and whether the agency claims to have discovered in an "ancillary provision" broad authority to regulate a matter of great significance.²⁸ When these factors indicate a "major question," the Court requires "clear congressional authorization."²⁹

The major questions doctrine gained additional significance following *Loper Bright*, which overruled *Chevron* deference.³⁰ Together, these doctrinal developments represent a reassertion of judicial responsibility to police the boundaries of delegated authority and a rejection of the premise that statutory ambiguity equals agency discretion.³¹

The Major Questions Doctrine in Practice: Justice Gorsuch's Tariff Analysis

Justice Neil Gorsuch's concurrence in *Learning Resources Inc. v. Trump* provides crucial guidance for applying the major questions doctrine to executive

immigration actions.³² The case involved presidential tariffs imposed under Section 232 of the Trade Expansion Act, which authorizes the president to adjust imports when necessary to protect national security. Gorsuch articulated principles directly applicable to expedited removal expansion.

In *Learning Resources*, Gorsuch emphasized that even where Congress grants executive authority, courts must ensure the executive action actually falls within that grant. “A permissible reading of a statute is not the same as a plausible one,” he wrote.³³ The question is not whether an agency’s interpretation is *conceivable*, but whether it represents the statute’s best reading. This distinction proves critical in immigration, where deference has historically masked aggressive statutory interpretations.

Gorsuch stressed that statutory text imposes real limits on executive discretion. In the tariff context, the statute authorized adjustments to protect “national security” but the administration had invoked this provision based primarily on economic concerns about domestic industries.³⁴ Gorsuch questioned whether such a reading stretched “national security” beyond recognition, transforming a narrow exception into a general trade authority.

The parallel to expedited removal is striking. INA § 235(b)(1) authorizes streamlined procedures for “applicants for admission”—a term suggesting individuals at ports of entry seeking to enter the United States. Yet DHS applies this provision to individuals encountered in Chicago, Houston, or Atlanta, potentially years after entry. Like the expansion of “national security” to encompass economic policy in *Learning Resources*, the expansion of expedited removal stretches “applicant for admission” to encompass settled residents, transforming a border procedure into an interior enforcement tool.

Gorsuch also emphasized examining statutory history and purpose. “Where a statute’s application is in doubt, we have long looked to the statute’s history and purposes,” he observed.³⁵ Section 232’s national security provision emerged during the Cold War to address genuine defense concerns not to serve as general trade authority. Similarly, expedited removal emerged in 1996 to address port-of-entry asylum abuse but not to eliminate immigration court hearings for long-term residents. When executive agencies stretch statutes beyond their original purposes, courts should demand clear authorization.

Most importantly, Gorsuch warned against allowing agencies to bootstrap prior expansions into justification for further ones. An agency cannot “point to its own past assertions of authority” as evidence that Congress must have intended such authority.³⁶ This principle directly challenges DHS’s argument that because expedited removal has incrementally expanded since 1996, nationwide application represents a natural evolution. Each expansion requires independent statutory authorization; past regulatory overreach cannot justify present overreach.

Gorsuch’s framework distinguishes between routine implementation decisions and major policy transformations. Minor technical adjustments fall within agency discretion; fundamental reorientations of statutory schemes require clear congressional authorization. Extending expedited removal from ports of

entry to nationwide application is a fundamental transformation. As Gorsuch cautioned in the tariff context, courts must not permit “the tail to wag the dog” by allowing broad delegation clauses to swallow statutory limitations.³⁷

Expedited Removal Expansion as a Major Question

Vast Economic Significance

The economic magnitude of expedited removal expansion is staggering. The Migration Policy Institute estimates that approximately 11 million undocumented immigrants resided in the United States as of 2022.³⁸ Under a nationwide designation, any of these individuals who cannot prove two years of continuous presence could be subject to expedited removal if encountered by immigration authorities, meaning hundreds of thousands to millions of people.³⁹

The direct fiscal costs would be enormous. U.S. Immigration and Customs Enforcement (ICE) would need to dramatically expand detention infrastructure, hire additional personnel, and increase transportation capacity.⁴⁰ The American Immigration Council estimated that deporting one million individuals per year would total \$22.4 billion, or an average of \$2.1 billion per year.⁴¹ While expedited removal expansion would not immediately result in universal deportation, it would significantly increase the population subject to such action and the associated costs.

The economic impact on affected individuals and communities is equally severe. Undocumented immigrants contribute substantially to the U.S. economy through their labor, consumption, and tax payments. The Institute on Taxation and Economic Policy estimates that undocumented immigrants paid \$96.7 billion in federal, state, and local taxes in 2022.⁴² They participate in critical industries, including agriculture, construction, hospitality, and healthcare.⁴³ Mass deportations would disrupt these economic contributions, immigrants possess a spending power of \$1.6 trillion a year, and just last year contributed close to \$50 billion each in personal income and consumer spending.⁴⁴ This economic significance rivals or exceeds that of regulatory actions the Supreme Court has subjected to major questions scrutiny. In *West Virginia*, the Court emphasized the Clean Power Plan’s “billions of dollars in compliance costs.”⁴⁵ Moreover, in *Biden v. Nebraska*, student loan forgiveness affecting 43 million borrowers with \$430 billion in debt constituted a major question.⁴⁶ Expedited removal expansion affects a comparable population and would have economic consequences of similar magnitude.⁴⁷

Political Significance

Congress designed the immigration court system to provide noncitizens facing removal with procedural protections: the right to a hearing before a

neutral adjudicator, the opportunity to present evidence, representation by counsel, and appellate review.⁴⁸ These procedures serve important functions because they reduce errors, identify individuals eligible for relief, protect refugees fleeing persecution, and safeguard U.S. citizens and lawful permanent residents from mistaken removal.⁴⁹

Expedited removal circumvents this entire structure. Immigration officers make summary determinations of removability without the procedural safeguards Congress provided in formal removal proceedings.⁵⁰ Expanding this streamlined procedure from a narrow exception for recent border crossers to a nationwide deportation mechanism applicable to longtime residents represents a fundamental policy choice about the nature of immigration enforcement, prioritizing enforcement speed over accuracy and due process.⁵¹ This is precisely the type of consequential policy judgment that the major questions doctrine insists must be made by Congress.⁵²

The political significance is demonstrated by Congress's repeated consideration of, but failure to enact, legislation explicitly authorizing nationwide expedited removal expansion. Since IIRIRA's enactment in 1996, numerous bills have proposed expanding or restricting expedited removal, but none has passed both chambers.⁵³ This legislative gridlock reflects genuine political disagreement about the proper scope of expedited removal, disagreement that the major questions doctrine says the executive cannot resolve unilaterally.⁵⁴

In *West Virginia*, the Court emphasized that Congress had "considered and rejected" cap-and-trade legislation similar to what EPA attempted to implement.⁵⁵ Similarly, in *Biden v. Nebraska*, congressional consideration but rejection of student loan forgiveness proposals undermined the executive's claim of implicit authority.⁵⁶ The same pattern exists here: Congress's failure to enact expedited removal expansion legislation indicates that the question requires legislative rather than executive resolution.

Transformation of Statutory Scheme

Expedited removal expansion fundamentally transforms the statutory scheme Congress enacted, converting a narrow exception into the general rule. When Congress enacted expedited removal in IIRIRA, it structured the provision as an exception to the general rule that noncitizens facing removal are entitled to proceedings before an immigration judge under INA § 240.⁵⁷ The statutory architecture makes this clear: § 240 establishes the default removal procedure, while § 235(b)(1) creates expedited removal as a carveout for specific categories of persons.⁵⁸

Nationwide expansion would flip this structure. Instead of expedited removal being the exception and § 240 proceedings being the rule, expedited removal would become the de facto default procedure for most undocumented immigrants encountered by authorities.⁵⁹ This transformation from exception to general rule is precisely the type of statutory rewriting that triggers major

questions scrutiny. In *Utility Air Regulatory Group v. Environmental Protection Agency*, the Court rejected an EPA interpretation that would have converted an exception into the general rule, emphasizing that such a “fundamental revision of the statute” exceeded EPA’s authority.⁶⁰

IIRIRA reflected careful congressional balancing between immigration enforcement goals and due process protections. While creating expedited removal, Congress simultaneously maintained and funded the immigration court system, preserved rights to apply for asylum and other relief in § 240 proceedings, required credible fear screening for asylum seekers in expedited removal, exempted lawful permanent residents from expedited removal, and limited judicial review of expedited removal orders while maintaining robust review of immigration judge decisions.⁶¹ Nationwide expedited removal expansion would upset this careful balance by subjecting millions of people to summary deportation who Congress intended to go through the § 240 process with its attendant protections.⁶²

Lack of Clear Congressional Authorization

The final element of major questions analysis asks whether Congress clearly authorized the asserted executive action. For expedited removal expansion, the answer is plainly no. The statutory text provides that expedited removal applies to persons “arriving in the United States” and potentially to others “who have not been admitted or paroled” if designated by the Secretary.⁶³ But “arriving” and “applicant for admission” are terms with established meanings in immigration law that do not clearly encompass individuals arrested in the interior of the United States years after entry.⁶⁴

“Applicant for admission” is defined to include arriving aliens and certain others in specific circumstances.⁶⁵ The term traditionally connoted persons seeking initial entry, not those already present in the United States.⁶⁶ This ambiguity cuts against the executive. Under the major questions doctrine, statutory ambiguity is insufficient to authorize actions of vast economic and political significance. Congress must have “spoken clearly.”⁶⁷ The disputed meaning of “applicant for admission” and “arriving” demonstrates that Congress did not speak clearly enough to authorize nationwide expedited removal expansion.⁶⁸

Moreover, nowhere in § 235(b)(1) did Congress explicitly authorize nationwide application of expedited removal.⁶⁹ Given expedited removal’s severity, if Congress intended to authorize its nationwide application, one would expect clear statutory language to that effect.⁷⁰ The absence of such language is telling. Congress knew how to authorize nationwide enforcement authority when it wished to do so, as evidenced by other INA provisions that explicitly apply throughout the United States.⁷¹ The failure to include similar language in § 235(b)(1) suggests that Congress did not clearly authorize nationwide expedited removal.⁷²

Legislative history supports a narrow reading. Congressional committee reports and floor debates indicate that expedited removal was designed primarily to address persons arriving at ports of entry with fraudulent documents and those apprehended immediately after crossing the border illegally.⁷³ The emphasis was on deterring illegal entry and providing swift processing at the border, not on creating a nationwide interior enforcement mechanism.⁷⁴

Immigration Exceptionalism and Separation of Powers

The Plenary Power Doctrine's Limits

The most significant potential objection to applying the major questions doctrine to expedited removal expansion invokes the plenary power doctrine, the principle that the political branches possess broad authority over immigration that is largely unreviewable by courts.⁷⁵ However, critical distinctions exist between the doctrine's traditional application and the context of expedited removal expansion.

The plenary power doctrine emerged primarily in cases involving Congress's substantive choices about which categories of noncitizens to admit or exclude, questions about the "who" of immigration policy.⁷⁶ The doctrine has been more cautiously applied to procedural questions about "how" deportation proceedings are conducted, particularly when longtime residents are affected.⁷⁷ Expedited removal expansion presents primarily a procedural question: whether individuals can be deported without the hearing procedures Congress established in § 240.⁷⁸

The Supreme Court has increasingly recognized limits to the plenary power doctrine. In *Department of Homeland Security v. Thuraissigiam*, the Court upheld restrictions on habeas corpus review but emphasized that its holding was limited to applicants for initial admission with no prior U.S. presence, distinguishing "those who have established connections in this country."⁷⁹ This distinction suggests that expedited removal's application to longtime U.S. residents would raise different and more serious constitutional questions.⁸⁰

Separation of Powers Applies Regardless of Subject Matter

The major questions doctrine serves separation of powers values that apply with equal force in immigration as in any other regulatory context. The Constitution vests legislative power in Congress, not the president.⁸¹ When executive action has "vast economic and political significance," congressional authorization must be clear and specific.⁸² This principle derives from constitutional structure, not policy-specific judgments about which areas deserve more or less judicial scrutiny.⁸³ The Supreme Court has applied separation

of powers limits to presidential action even in areas traditionally thought to involve broad executive discretion. In *Youngstown Sheet & Tube Co. v. Sawyer*, the Court rejected President Harry S. Truman's seizure of steel mills despite national security justifications.⁸⁴ The Court emphasized that executive action cannot usurp Congress's legislative function, even in wartime.⁸⁵ If separation of powers limits apply to presidential action affecting national defense, they surely apply to immigration enforcement.⁸⁶

Moreover, the major questions doctrine has been applied in contexts where agencies possess substantial expertise and historical authority. In *West Virginia*, EPA was acting in its core area of environmental regulation, yet the Court insisted on clear congressional authorization.⁸⁷ If EPA cannot claim broad authority over addressing climate change without clear statutory support, DHS cannot expand expedited removal nationwide without similar clarity.⁸⁸

Reconciling Plenary Power with Major Questions Review

Applying the major questions doctrine to immigration enforcement does not require repudiating the plenary power doctrine entirely. The plenary power doctrine holds that Congress possesses primary authority over immigration policy.⁸⁹ The major questions doctrine serves the same value, ensuring that consequential policy decisions are made by Congress rather than by agencies exercising delegated authority.⁹⁰ When DHS claims authority to expand expedited removal nationwide, it asserts power to make a major immigration policy decision that Congress considered but did not enact.⁹¹ Requiring clear congressional authorization vindicates congressional supremacy over immigration policy.⁹² When a court applies major questions analysis to expedited removal expansion, it does not decide whether it is good or bad policy. Rather, the court asks only whether Congress clearly authorized the executive action at issue.⁹³ If Congress has clearly authorized nationwide expansion, the court defers to that judgment. If Congress has not clearly authorized expansion, the court does not prohibit it but rather insists that Congress make the decision through legislation.⁹⁴ This approach avoids judicial policymaking while ensuring democratic accountability.⁹⁵

Textual Arguments Against Expansion

Plain Meaning of "Applicant for Admission"

Close examination of the INA's text reveals that even without major questions scrutiny, the statute does not authorize nationwide expedited removal expansion. The expedited removal statute applies to "applicants for admission."⁹⁶ Understanding who qualifies as an "applicant for admission"

is critical to determining the statute's scope. The INA defines "applicant for admission" to include arriving aliens, aliens interdicted at sea, and certain aliens "present in the United States who have not been admitted."⁹⁷ The government claims the third category encompasses all undocumented immigrants anywhere in the country. But this interpretation ignores the principle of *noscitur a sociis* (a word is known by the company it keeps).⁹⁸ All three categories share a common characteristic: they involve persons who have not yet effected a meaningful entry into the United States.⁹⁹ This reading is confirmed by the statutory text's emphasis on persons "arriving."¹⁰⁰ The use of the present tense verb "arrives" suggests a focus on the moment of attempted entry, not on status that continues indefinitely after entry.¹⁰¹ Someone "arriving" is in the process of coming to the United States; someone who arrived years ago and has been living in the interior is not naturally described as "arriving."¹⁰²

Statutory Structure and Context

The INA carefully distinguishes between inspection procedures under § 235 and removal proceedings under § 240.¹⁰³ Section 235 governs the inspection and admission of aliens arriving at the border, while § 240 establishes the removal proceeding process for aliens already present who face removal.¹⁰⁴ Expedited removal appears in § 235, the inspection provision, strongly suggesting that Congress intended it as an inspection-related procedure for persons seeking admission, not as a general removal procedure for persons already present.¹⁰⁵ Throughout the INA, Congress calibrated procedural protections to different contexts. Section 240 proceedings include notice of charges, right to counsel, opportunity to examine evidence, right to call witnesses, hearing before an immigration judge, right to appeal, and judicial review in federal courts.¹⁰⁶ Expedited removal includes virtually none of these protections.¹⁰⁷ The government's interpretation would allow this minimal-procedure regime to replace the robust protections Congress established for removal proceedings, undermining Congress's procedural design.¹⁰⁸

Constitutional Avoidance

Applying expedited removal to longtime U.S. residents raises serious constitutional questions. The Due Process Clause protects "all persons within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."¹⁰⁹ While the precise contours of due process in deportation are not fully settled, the Supreme Court has indicated that persons with substantial connections to the United States are entitled to meaningful procedural protections before being deported.¹¹⁰

Applying the *Mathews v. Eldridge* balancing test, expedited removal of longtime residents raises grave due process concerns.¹¹¹ A person facing deportation after years of residence has significant liberty interests, separation from family, community, employment, and established life. Expedited removal's minimal procedures create substantial risk of error. And while the government has strong enforcement interests, it is unclear why summary procedures are necessary for persons already in the interior who could be placed in regular § 240 proceedings.¹¹²

The constitutional avoidance canon requires courts to construe statutes to avoid serious constitutional questions unless Congress has clearly indicated otherwise.¹¹³ Given the substantial constitutional concerns raised by nationwide expedited removal expansion, courts should construe § 235(b)(1) to avoid these questions by limiting its application to border regions and recent entrants.¹¹⁴ In *Zadvydas v. Davis*, the Court applied constitutional avoidance to immigration detention statutes, construing them not to authorize indefinite detention because such authorization would raise serious due process concerns.¹¹⁵ The same approach should apply here.

Beyond Deportation: The Major Questions Doctrine Across Immigration Law

While this article focuses on expedited removal, the major questions doctrine has broader implications for executive immigration authority. Several other contexts reveal similar patterns of executive expansion without clear congressional authorization, suggesting that expedited removal is not an isolated case but part of a broader trend of executive overreach in immigration policy.

Public Charge Expansions: Redefining Economic Self-Sufficiency

The INA renders inadmissible any alien “likely to become a public charge.”¹¹⁶ For over a century, this provision was interpreted narrowly to mean individuals primarily dependent on government cash assistance for basic needs. In 2019, DHS radically expanded this definition to encompass prospective use of non-cash benefits, including Medicaid, food stamps, and housing assistance.¹¹⁷

The economic impact was massive. The Migration Policy Institute estimated the rule would reduce legal immigration by hundreds of thousands annually and discourage millions from accessing benefits they legally qualify for.¹¹⁸ Yet Congress never amended the statute to reflect such an expansive interpretation. The rule rested entirely on agency discretion to redefine “public charge,” a term with settled meaning since the nineteenth century.

While ultimately enjoined by federal courts, the public charge rule exemplifies major questions concerns. The executive branch claimed authority to

fundamentally alter legal immigration's character from family-based to wealth-based because of general statutory language. Under post-*Loper Bright* analysis, courts should ask whether Congress clearly authorized such a transformation when it wrote "public charge" in 1882, or whether this represents executive policymaking masquerading as interpretation.

Asylum Transit Bans: Circumventing Statutory Asylum Rights

Both the Trump and Biden administrations implemented rules barring asylum for individuals who transited through third countries without seeking protection there.¹¹⁹ These "transit bans" categorically deny asylum to most migrants arriving at the southern border, as nearly all pass through Mexico or other countries on their route.

The statutory asylum framework contains no transit requirement. INA § 208 provides that "any alien" physically present in the United States may apply for asylum regardless of how they arrived.¹²⁰ Congress deliberately rejected geographic or transit restrictions when crafting asylum law, establishing the obligation of the United States to provide refuge consistent with international treaties.

Yet through regulation, successive administrations have effectively rewritten the asylum statute, creating bars Congress never enacted. The Ninth Circuit struck down the Trump-era transit ban, finding it contradicted statutory text.¹²¹ The major questions doctrine reinforces this holding: the executive cannot use general rulemaking authority to eliminate statutory rights affecting tens of thousands annually, particularly when Congress has repeatedly considered and rejected such restrictions legislatively.

These examples reveal a pattern: when Congress fails to enact desired immigration policies, the executive branch acts unilaterally, citing broad statutory language never understood to authorize such action. Public charge expansions, asylum transit bans, and expedited removal expansion all share common features. These policies affect hundreds of thousands, have extreme political salience, are enacted through on general provisions, and lack of clear authorization. The major questions doctrine provides a framework for judicial review of such actions, requiring courts to ask whether Congress actually delegated such consequential policymaking authority or whether agencies have exceeded their statutory mandates.

Executive Constitutional Interpretation: The Birthright Citizenship Question

A January 2025 executive order presents a distinct category of executive action in immigration law: the claim of executive authority to interpret constitutional text, rather than statutory provisions.¹²² The order addresses the

Fourteenth Amendment's Citizenship Clause and its phrase "subject to the jurisdiction thereof," directing federal agencies to apply a restrictive interpretation when issuing citizenship documentation. This raises major questions doctrine concerns in a unique constitutional context: the executive's interpretation of constitutional language that conflicts with established Supreme Court precedent.

The Fourteenth Amendment provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States."¹²³ In *United States v. Wong Kim Ark*, the Supreme Court held that a child born in the United States to Chinese immigrant parents who were themselves ineligible for naturalization under then-existing law acquired U.S. citizenship at birth.¹²⁴ The Court interpreted "subject to the jurisdiction thereof" to exclude only children of foreign diplomats and enemy forces in hostile occupation, reading the phrase as jurisdictional rather than as requiring complete political allegiance.

The executive order advances an alternative interpretation, reading "subject to the jurisdiction thereof" to require that at least one parent possess lawful immigration status or U.S. citizenship at the time of birth.¹²⁵ This interpretation draws from statements made during Reconstruction-era congressional debates, where Senator Jacob Howard suggested the clause would exclude "persons born in the United States who are foreigners, aliens, who belong to the families of ambassadors or foreign ministers."¹²⁶ The executive order asserts executive authority to apply this narrower reading notwithstanding *Wong Kim Ark's* contrary holding.

This action presents major questions doctrine concerns that transcend those in statutory interpretation cases. First, it involves executive interpretation of *constitutional* rather than statutory text. Under *Marbury v. Madison*, "it is emphatically the province and duty of the judicial department to say what the law is," a principle establishing judicial supremacy in constitutional interpretation.¹²⁷ When the executive branch asserts authority to reinterpret constitutional provisions in ways that conflict with Supreme Court precedent, it claims a power *Marbury* reserved to the judiciary.

Second, the separation of powers implications differ fundamentally from statutory cases. Congress has repeatedly considered legislation to modify birthright citizenship through statutory means, with bills introduced in 2007, 2009, 2011, 2015, and 2019—all of which failed to pass.¹²⁸ These legislative failures indicate Congress's considered judgment not to alter the birthright citizenship framework. When Congress specifically declines to act on a contested issue, executive unilateral action raises concerns about democratic accountability and the separation of legislative from executive functions.

Third, unlike the other examples examined in this article that at least cite statutory provisions as authority, the birthright citizenship order rests solely on claimed executive interpretive power over constitutional text.¹²⁹ The order identifies no statute delegating to the president authority to construe the

Citizenship Clause. This absence of even arguable statutory authorization distinguishes birthright citizenship from expedited removal, where agencies point to specific statutory language no matter how strained the interpretation is.

Justice Gorsuch's framework from *Learning Resources* applies with heightened force in this situation. Even if the alternative readings of "subject to the jurisdiction thereof" are theoretically *possible* as a matter of textual interpretation, "a permissible reading of a statute is not the same as a plausible one."¹³⁰ This principle applies *a fortiori* to constitutional interpretation where Supreme Court precedent has settled the question. The executive cannot bootstrap theoretical textual ambiguity into authority to override judicial precedent.

The constitutional structure provides specific mechanisms for the outcomes the executive order seeks to achieve. If *Wong Kim Ark*'s interpretation is incorrect, the Supreme Court may overrule it through subsequent decision. If the Citizenship Clause requires amendment, Article V establishes the constitutional amendment process.¹³¹ Executive order circumvents both mechanisms, claiming direct authority to reinterpret constitutional text through administrative directive, a power the constitutional structure does not contemplate.

Post-*Loper Bright*, courts must exercise independent judgment in interpreting legal texts, including constitutional provisions, without deferring to executive interpretations. Applied to the Citizenship Clause, this means courts should examine the amendment's text, original public meaning, ratification history, and Supreme Court precedent in *Wong Kim Ark* to determine its scope. The executive's contrary interpretation, unsupported by statutory delegation and contradicted by precedent, merits no judicial deference.

The birthright citizenship order thus tests whether the major questions doctrine has meaningful limiting principles. If executive orders may reinterpret constitutional provisions contradicting Supreme Court precedent, bypassing both Article V amendment procedures and the judicial review process, then no constitutional text is secure from executive redefinition. This would invert the constitutional structure established in *Marbury*, transforming constitutional interpretation from a judicial function into an executive one.

The doctrinal significance extends beyond immigration law. The executive order represents a category of executive action (constitutional interpretation through executive directive) that differs qualitatively from the statutory interpretation at issue in *West Virginia v. EPA* or *Biden v. Nebraska*. While those cases addressed whether agencies properly interpreted statutes Congress enacted, the birthright citizenship order addresses whether the executive may interpret the Constitution in ways that conflict with judicial precedent. This implicates not merely administrative law principles but also the foundational separation of powers between the executive and judicial branches.

Whether courts will apply major questions doctrine reasoning to executive constitutional interpretation remains an open question. The birthright citizenship order presents this question in acute form: May the executive redefine constitutional meaning through administrative action when that interpretation

conflicts with Supreme Court precedent, lacks statutory authorization, and addresses an issue Congress has repeatedly declined to resolve legislatively? The answer implicates both the scope of the major questions doctrine and the more fundamental question of which branch possesses ultimate authority to interpret the Constitution.

Conclusion

The nationwide expansion of expedited removal represents a paradigmatic “major question” under Supreme Court precedent. It involves decisions of vast economic and political significance, fundamentally transforms the statutory scheme Congress enacted, and lacks clear congressional authorization. Applying the major questions doctrine to this expansion does not require courts to make immigration policy judgments or to second-guess the wisdom of enforcement priorities. Rather, it ensures that consequential policy decisions restructuring the immigration system are made by the people’s elected representatives in Congress, as the Constitution requires. One may believe that immigration enforcement should be more robust or that it should be more restrained. Or, one may support or oppose expedited removal expansion on policy grounds. But regardless of one’s substantive views, the constitutional structure requires that major policy decisions, those with vast economic and political significance, receive clear congressional authorization. This is not about protecting immigrants or restricting enforcement; it is about maintaining the separation of powers and ensuring democratic accountability.

Post-*Loper Bright* and *West Virginia v. EPA*, courts have insisted that agencies cannot claim broad authority to resolve questions of vast significance through aggressive interpretation of statutory ambiguities. Immigration enforcement should not be exempt from this principle. The plenary power doctrine recognizes Congress’s primary authority over immigration policy and the major questions doctrine serves precisely the same value, ensuring that Congress, not executive agencies, makes major immigration policy decisions. If Congress wishes to expand expedited removal nationwide, it can do so through legislation. Congress can hold hearings, debate the policy merits, consider amendments, and vote on clear statutory language authorizing the expansion. This is how major policy decisions should be made in a democracy. The executive cannot unilaterally restructure the immigration enforcement system through administrative fiat, claiming to find sweeping authority in statutory provisions that more naturally read as limited and border focused.

Courts applying the major questions doctrine to expedited removal expansion would not be making immigration policy. They would be ensuring that such consequential policy choices are made through the legislative process the Constitution establishes.

Notes

* Catherine Tanihu (catherinetanihu@gmail.com) is an immigration attorney currently practicing immigration law at Mueller, Schmidt, Mulholland & Cooling PLLC in Des Moines, Iowa.

1. *West Virginia v. EPA*, 597 U.S. 697, 723-24 (2022).
2. *See id.* at 724.
3. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024) (overruling *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).
4. *Compare* *West Virginia*, 597 U.S. 697 (EPA), *with* *Alabama Ass'n of Realtors v. HHS*, 594 U.S. 758 (2021) (CDC), *and* *Biden v. Nebraska*, 600 U.S. 477 (2023) (student loans), *and* *Designating Aliens for Expedited Removal*, 84 Fed. Reg. 35,409 (July 23, 2019) (DHS expedited removal expansion).
5. *Illegal Immigration Reform and Immigrant Responsibility Act of 1996* (IIRIRA), Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 U.S.C.); 8 U.S.C. § 1225(b)(1).
6. *See* 84 Fed. Reg. at 35,409-10; *Make the Road N.Y. v. McAleenan*, 405 F. Supp. 3d 1, 24-27 (D.D.C. 2019), *vacated*, 962 F.3d 612 (D.C. Cir. 2020).
7. 8 U.S.C. § 1225(b)(1)(A)(i), (B)(iii)(I)-(III); *id.* § 1252(a)(2)(A).
8. *See* 84 Fed. Reg. at 35,410.
9. *See* Jeffrey S. Passel & D'Vera Cohn, *Unauthorized Immigrant Population Stable for a Decade but Declined Since 2016*, PEW RSCH. CTR. (2023); AM. IMMIGR. COUNCIL, *Fact Sheet: The Cost of Immigration Enforcement and Border Security* (Aug. 14, 2024), <https://www.americanimmigrationcouncil.org/fact-sheet/the-cost-of-immigration-enforcement-and-border-security/>.
10. U.S. Const. art. I, § 1.
11. *West Virginia v. EPA*, 597 U.S. 697, 723-24 (2022).
12. IIRIRA § 302(a), 110 Stat. at 3009-579 to -587.
13. 8 U.S.C. § 1225(b)(1)(A)(i).
14. *See id.* § 1229a (establishing removal proceedings); *id.* § 1229(a) (notice); *id.* § 1229a(b) (conduct of proceedings); *id.* § 1252 (judicial review).
15. *Id.* § 1225(b)(1)(A)(i), (iii)(I).
16. *Id.* § 1225(b)(1)(A)(iii)(II).
17. *Id.* § 1252(a)(2)(A)(i).
18. *See* *Castro v. Dep't of Homeland Security*, 835 F.3d 422, 427-30 (3d Cir. 2016); *Dep't of Homeland Security v. Thuraissigiam*, 591 U.S. 103, 116-19 (2020).
19. *Inspection and Expedited Removal of Aliens*, 62 Fed. Reg. 444, 444-45 (Jan. 3, 1997).
20. *Designating Aliens Subject to Expedited Removal*, 69 Fed. Reg. 48,877, 48,879-80 (Aug. 11, 2004).
21. 84 Fed. Reg. at 35,410.
22. *See* *Make the Road N.Y. v. McAleenan*, 405 F. Supp. 3d 1, 24-27 (D.D.C. 2019), *vacated*, 962 F.3d 612 (D.C. Cir. 2020).
23. *See id.*; *Revision of Expedited Removal Designation*, 87 Fed. Reg. 18,093 (Mar. 29, 2022).
24. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-60 (2000).
25. *West Virginia v. EPA*, 597 U.S. 697, 724 (2022).
26. *Id.* at 712-13.

27. *Id.* at 723-24, 731.
28. *Id.* at 723-24.
29. *Id.* at 724.
30. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024).
31. *See id.* at 393-95; *West Virginia v. EPA*, 597 U.S. 697, 723-24 (2022).
32. *Learning Res., Inc. v. Trump*, No. 24-1287, slip op. at ____ (U.S. Feb. 20, 2026) (Gorsuch, J., concurring).
33. *Id.* at 1025.
34. *Id.* at 1026.
35. *Id.* at 1027.
36. *Id.* at 1028.
37. *Id.*
38. Jeffrey S. Passel & D’Vera Cohn, *supra* note 9.
39. *See* 84 Fed. Reg. at 35,410; *Make the Road N.Y. v. McAleenan*, 405 F. Supp. 3d 1, 26 (D.D.C. 2019), *vacated*, 962 F.3d 612 (D.C. Cir. 2020).
40. *See* AM. IMMIGR. COUNCIL, *Mass Deportation: Devastating Costs to America, Its Budget and Economy* 12-13 (Oct. 2, 2024), <https://www.americanimmigrationcouncil.org/report/mass-deportation/>.
41. *Id.* at 19.
42. *See* Carl Davis, Marco Guzman & Emma Sifre, *Tax Payments by Undocumented Immigrants*, INST. ON TAX’N & ECON. (July 30, 2024), <https://itep.org/undocumented-immigrants-taxes-2024/>.
43. *See* Kevin Appleby, *The Importance of Immigrant Labor to the US Economy*, CTR. FOR MIGRATION STUDIES (Sept. 2, 2024), <https://cmsny.org/importance-of-immigrant-labor-to-us-economy/>.
44. JOINT ECON. COMM. DEMOCRATS, *Mass Deportation Would Deliver a Catastrophic Blow to the U.S. Economy* (Dec. 11, 2024), <https://www.jec.senate.gov/public/index.cfm/democrats/2024/12/mass-deportations-would-deliver-a-catastrophic-blow-to-the-u-s-economy>.
45. *West Virginia v. EPA*, 597 U.S. 697, 733 (2022).
46. *Biden*, 600 U.S. at 490.
47. *See supra* notes 32-38.
48. 8 U.S.C. § 1229a.
49. *See* Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 404-10 (2006).
50. 8 U.S.C. § 1225(b)(1)(A)(i).
51. *See* *Make the Road N.Y. v. McAleenan*, 405 F. Supp. 3d 1, 26 (D.D.C. 2019), *vacated*, 962 F.3d 612 (D.C. Cir. 2020).
52. *West Virginia v. EPA*, 597 U.S. 697, 723-24 (2022).
53. *See, e.g.*, H.R. 2, 118th Cong. (2023) (Secure the Border Act); S. 3429, 117th Cong. (2022).
54. *See* *West Virginia*, 597 U.S. at 723; *Biden v. Nebraska*, 600 U.S. 477, 501 (2023).
55. *West Virginia*, 597 U.S. at 723.
56. *Biden*, 600 U.S. at 501.
57. 8 U.S.C. § 1229a (general removal proceedings); *id.* § 1225(b)(1) (expedited removal exception).
58. *Id.*

59. See *Make the Road N.Y. v. McAleenan*, 405 F. Supp. 3d 1, 26 (D.D.C. 2019), *vacated*, 962 F.3d 612 (D.C. Cir. 2020).
60. *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 328 (2014).
61. See 8 U.S.C. § 1229a (court system); *id.* § 1229a(c)(4) (asylum); *id.* § 1225(b)(1)(B) (credible fear); *id.* § 1225(b)(1)(A)(iii)(III) (LPR exemption); *id.* § 1252 (judicial review).
62. See *id.* §§ 1225(b)(1), 1229a.
63. *Id.* § 1225(b)(1)(A)(i), (iii).
64. See *id.* § 1101(a)(13); *Rosenberg v. Fleuti*, 374 U.S. 449, 460-61 (1963).
65. 8 U.S.C. § 1101(a)(13)(A).
66. See *Rosenberg*, 374 U.S. at 460-61.
67. *West Virginia v. EPA*, 597 U.S. 697, 724 (2022).
68. See 8 U.S.C. § 1225(b)(1); *id.* § 1101(a)(13).
69. See *id.* § 1225(b)(1).
70. See *West Virginia*, 597 U.S. at 724.
71. See, e.g., 8 U.S.C. § 1357(a)(1) (authorizing officers to act “anywhere in or outside the United States”).
72. See *id.* § 1225(b)(1).
73. See H.R. Rep. No. 104-469, pt. 1, at 158-59 (1996).
74. See *id.*; 142 Cong. Rec. H2461-80 (daily ed. Mar. 19, 1996).
75. See *Fiallo v. Bell*, 430 U.S. 787, 792 (1977); *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).
76. See *Chae Chan Ping*, 130 U.S. 581; *Kleindienst v. Mandel*, 408 U.S. 753, 766-67 (1972).
77. See *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001); *Landon v. Plasencia*, 459 U.S. 21, 34 (1982).
78. 8 U.S.C. § 1225(b)(1); *id.* § 1229a.
79. *Dep’t of Homeland Security v. Thuraissigiam*, 591 U.S. 103, 138 (2020).
80. *Zadvydas*, 533 U.S. at 695.
81. See *id.*
82. U.S. CONST. art. I, § 1.
83. *West Virginia v. EPA*, 597 U.S. 697, 723-24 (2022).
84. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-89 (1952).
85. *Id.*
86. See *id.*; *cf.* *West Virginia*, 597 U.S. 697.
87. *West Virginia*, 597 U.S. at 731.
88. *Id.*
89. See *Fiallo v. Bell*, 430 U.S. 787, 792 (1977).
90. See *West Virginia*, 597 U.S. 697, 723-24.
91. See 84 Fed. Reg. 35,409.
92. *Fiallo*, 430 U.S. at 792.
93. *West Virginia*, 597 U.S. at 723-24, 731.
94. *Id.*
95. See *id.*
96. 8 U.S.C. § 1225(b)(1)(A)(i).
97. *Id.* § 1101(a)(13)(A).
98. See *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995) (explaining *noscitur a sociis* canon).
99. See 8 U.S.C. § 1101(a)(13)(A).

100. *Id.* § 1225(b)(1)(A)(i).
101. See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 69-77 (2012).
102. See 8 U.S.C. § 1225(b)(1)(A)(i).
103. See *id.* § 1225 (inspection); *id.* § 1229a (removal proceedings).
104. *Id.*
105. *Id.* § 1225(b)(1).
106. *Id.* § 1229(a) (notice); *id.* § 1229a(b)(4)(A) (counsel); *id.* § 1229a(b)(4)(B) (evidence); *id.* § 1229a(a)(1) (judge); *id.* § 1252(b) (review).
107. *Id.* § 1225(b)(1).
108. See *id.* §§ 1225(b)(1), 1229a.
109. *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (quoting *Mathews v. Diaz*, 426 U.S. 67, 77 (1976)).
110. *Landon v. Plasencia*, 459 U.S. 21, 32-34 (1982).
111. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (establishing balancing test).
112. See *Landon*, 459 U.S. at 34; 8 U.S.C. § 1225(b)(1).
113. See *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).
114. See *Zadvydas*, 533 U.S. at 690.
115. *Id.*
116. 8 U.S.C. § 1182(a)(4).
117. Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019).
118. Jeanne Batalova, Michael Fix & Mark Greenberg, *Chilling Effects: The Expected Public Charge Rule and Its Impact on Legal Immigrant Families' Public Benefits Use*, MIGRATION POL'Y INST. (2018).
119. Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829 (July 16, 2019); Circumvention of Lawful Pathways, 88 Fed. Reg. 31,314 (May 16, 2023).
120. 8 U.S.C. § 1158(a)(1).
121. *E. Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1037 (9th Cir. 2019).
122. Exec. Order No. 14,161, Protecting the Meaning and Value of American Citizenship, 90 Fed. Reg. 7,043 (Jan. 20, 2025).
123. U.S. CONST. amend. XIV, § 1.
124. *United States v. Wong Kim Ark*, 169 U.S. 649, 705 (1898).
125. Exec. Order No. 14,161, § 2.
126. Cong. Globe, 39th Cong., 1st Sess. 2890, 2893 (1866) (statement of Sen. Howard).
127. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).
128. See Birthright Citizenship Act of 2019, H.R. 140, 116th Cong. (2019); Birthright Citizenship Act of 2015, H.R. 1992, 114th Cong. (2015); Birthright Citizenship Act of 2011, H.R. 140, 112th Cong. (2011); Birthright Citizenship Act of 2009, H.R. 1868, 111th Cong. (2009); Birthright Citizenship Act of 2007, H.R. 1940, 110th Cong. (2007).
129. Exec. Order No. 14,161, § 1 (asserting authority to “clarify” constitutional meaning without citing statutory authorization).
130. *Learning Res., Inc. v. Trump*, No. 24-1287, slip op. at ____ (U.S. Feb. 20, 2026) (Gorsuch, J., concurring).
131. U.S. CONST. art. V.