ADMINISTRATIVE LAW — SEPARATION OF POWERS — NEW YORK COURT OF APPEALS AFFIRMS INVALIDATION OF SODA-PORTION CAP. — *New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Department of Health and Mental Hygiene*, 16 N.E.3d 538 (N.Y. 2014).

Over the last decade, New York City has pioneered a number of efforts to combat rising obesity rates, including banning trans fats and requiring restaurants to post calorie counts. Perhaps none of these efforts has generated as much controversy, however, as the 2012 passage of a regulation limiting portions of certain sugary drinks to no more than sixteen ounces. Last summer, in *New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Department of Health and Mental Hygiene*,[1] the New York Court of Appeals affirmed lower courts' invalidation of that rule. In finding that the city's Board of Health (the "Board") had usurped legislative authority, the court invoked New York's seminal separation of powers precedent, *Boreali v. Axelrod*,[2] which held that a health agency had impermissibly exercised legislative power in part because it had conducted a cost-benefit analysis — and thus weighed considerations unrelated to its mandate of protecting public health — without legislative guidance or authorization.[3] The *Coalition* court clarified that agencies may consider factors outside their immediate area of expertise; such considerations become problematic, however, when they involve particularly significant value judgments.[4] The *Coalition* court's approach thus resembles the federal "major questions" doctrine, under which courts require a clear statement from the legislature to bring issues of great "economic and political significance"[5] within an agency's realm. If significance is to be dispositive in New York's separation of powers framework, adopting an approach that explicitly focuses on it would simplify the doctrine and reflect the inevitability of cost-benefit analysis in the modern regulatory state.

In May 2012, New York City's then-mayor, Michael Bloomberg, announced a proposed regulation that would bar food service establishments from selling certain sugary drinks in containers larger than sixteen ounces (the "Rule").[6] The Rule was designed to reduce the city's

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[1] 16 N.E.3d 538 (N.Y. 2014).

[2] 517 N.E.2d 1350 (N.Y. 1987).

[3] *Id.* at 1355–57.

[4] *See Coalition*, 16 N.E.3d at 546–47.

[5] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000).

[6] N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, 970 N.Y.S.2d 200, 204 (App. Div. 2013); *see also* N.Y.C. HEALTH CODE § 81.53 (2013). The Board limited the Rule's application in three ways: First, the Rule did not apply to alcoholic or milk-based beverages or to drinks sweetened with calorie-free sweeteners. *See Coalition*, 970

obesity rate.[7] In September 2012, after receiving more than 38,000 public comments on the subject,[8] the Board voted to adopt the Rule.[9]

Six not-for-profit and labor organizations challenged the validity of the Rule.[10] Justice Tingling of the Supreme Court (a state trial court) invalidated it,[11] concluding that the Board had "trespassed on legislative jurisdiction."[12] He found that the Board had violated the separation of powers doctrine laid out in *Boreali*,[13] which had looked to four "coalescing circumstances" to find that New York's Public Health Council had overstepped its authority in regulating smoking.[14] Those four circumstances, deemed "factors" in subsequent cases,[15] were that the agency: (1) based its decision partly on economic and social concerns — areas outside its realm of expertise — without legislative instruction regarding whether or how to weigh such factors;[16] (2) regulated "on a clean slate" instead of merely filling in the details of legislation; (3) acted in an area in which the legislature had tried and failed to agree; and (4) reached a decision for which the agency's specific expertise was not needed.[17] Finding that the first three factors weighed against the Board,[18] Justice Tingling invalidated the Rule.[19]

N.Y.S.2d at 205. Second, the Rule applied only to establishments regulated by the city's Department of Health and Mental Hygiene, and not to establishments regulated by the state's Agriculture Department, such as supermarkets and convenience stores. *See id.* at 204–05. Finally, the Rule permitted refills. N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, No. 653584/12, 2013 WL 1343607, at *8 (N.Y. Sup. Ct. Mar. 11, 2013).

[7] *See* Michael M. Grynbaum, *New York Plans to Ban Sale of Big Sizes of Sugary Drinks*, N.Y. TIMES, May 30, 2012, http://www.nytimes.com/2012/05/31/nyregion/bloomberg-plans-a-ban-on-large-sugared-drinks.html [http://perma.cc/H8JL-RDVC].

[8] Roughly 84% supported the proposal and 16% opposed it. *Coalition*, 970 N.Y.S.2d at 205.

[9] *Id.* The Board of Health is the policymaking arm of the city's Department of Health and Mental Hygiene, which is a "creature of both state law and the city charter." Paul A. Diller, *Local Health Agencies, the Bloomberg Soda Rule, and the Ghost of Woodrow Wilson*, 40 FORDHAM URB. L.J. 1859, 1880 (2013). The Board is "empowered to add to, amend, or repeal the city's health code" to secure "life and health in the city." *Id.* (quoting N.Y. CITY CHARTER § 558(b) (2004)) (internal quotation mark omitted).

[10] *Coalition*, 16 N.E.3d at 542.

[11] *Coalition*, 2013 WL 1343607, at *20.

[12] *Id.* at *6. Justice Tingling found that the Board has no legislative power. *Id.* at *16.

[13] *Id.* at *8–18.

[14] Boreali v. Axelrod, 517 N.E.2d 1350, 1355 (N.Y. 1987).

[15] *See, e.g.*, *Coalition*, 16 N.E.3d at 546. These four circumstances or factors must be "viewed in combination"; none "standing alone" indicates agency overreach. *Boreali*, 517 N.E.2d at 1355.

[16] Justice Tingling phrased this first factor as "whether the challenged regulation is based upon concerns not related to the stated purpose of the regulation." *Coalition*, 2013 WL 1343607, at *8.

[17] *Id.*; *see also Boreali*, 517 N.E.2d at 1355–56.

[18] *Coalition*, 2013 WL 1343607, at *9, *16, *18. Regarding the fourth factor, Justice Tingling rejected the challengers' argument that, because the Rule was written by the Mayor's office and enacted by the Board without substantive changes, the Board had exercised no special expertise in promulgating the Rule. *Id.* at *18.

[19] *Id.* at *20. Justice Tingling also found that the Rule's exceptions rendered it arbitrary and capricious. *Id.*; *see also supra* note 6 (describing the Rule's exceptions).

The Appellate Division unanimously affirmed.[20] Considering the first *Boreali* factor, Justice Renwick, writing for the court, found that the Board had weighed concerns beyond its field of expertise, including behavioral economics concepts.[21] Turning to the second factor, the court determined that although the City Charter granted the Board authority over "all matters affecting health in the city,"[22] the Board could engage only in "interstitial rule making designed to protect the public from inherently harmful and inimical matters" — a category that did not apply to soda consumption.[23] The court also found that the third and fourth *Boreali* factors weighed against the Board.[24]

The Court of Appeals affirmed.[25] After determining that the Board lacked independent legislative authority,[26] Judge Pigott, writing for the majority,[27] turned to the *Boreali* analysis. Regarding the first factor — whether the agency considered concerns unrelated to public health — the court clarified that "*Boreali* should not be interpreted to prohibit an agency from attempting to balance costs and benefits."[28] Instead, the Court of Appeals emphasized that it was the politically and socially significant nature of the cost-benefit analysis that rendered the Rule legislative, explaining: "To apply the distinction between policy-making and rule-making, a court is . . . required to differentiate between levels of difficulty and complexity in the agency's task of weighing competing values."[29]

The court then offered guidance on what kinds of agency decisions cross the line into policymaking. A regulation amounts to mere rulemaking when "the connection of the regulation with the preservation of health and safety is very direct, there is minimal interference with

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[20] N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, 970 N.Y.S.2d 200, 204 (App. Div. 2013).

[21] *See id.* at 209. The Rule's exceptions provided further support for the court's conclusion that "the health of the residents of New York City was not [the Board's] sole concern"; if it were, the Rule "would apply to all public and private enterprises" in the city. *Id.* at 210. As a threshold matter, the Appellate Division, like the trial court, found that the Board lacked inherent legislative power. *Id.* at 206.

[22] N.Y. CITY CHARTER § 556 (2004).

[23] *Coalition*, 970 N.Y.S.2d at 211.

[24] *Id.* at 211–13. According to the Appellate Division, the City Council had rejected various measures targeting sugary drinks. *Id.* The court disagreed with the trial court on the applicability of the fourth factor, pointing out that the Rule "was drafted, written and proposed by the Office of the Mayor" and enacted "without substantive changes," and thus the Board's technical expertise was not needed. *Id.* at 213. Notably, the Appellate Division declined to consider whether the Rule was arbitrary and capricious. *Id.*

[25] *Coalition*, 16 N.E.3d at 543.

[26] *See id.* at 543–45.

[27] Judge Pigott was joined by Judges Graffeo, Smith, and Abdus-Salaam. Judge Rivera took no part in the decision.

[28] *Coalition*, 16 N.E.3d at 546–47.

[29] *Id.* at 547.

the personal autonomy of those whose health is being protected, and value judgments concerning the underlying ends are widely shared."[30] Thus, when an agency bans toxins or requires warnings to be posted, "no policy-making in the *Boreali* sense is involved."[31] By contrast, "[a]n agency that adopts a regulation, such as the [Rule] or an outright prohibition of sugary beverages, that interferes with commonplace daily activities preferred by large numbers of people must necessarily wrestle with complex value judgments concerning personal autonomy and economics"[32] — value judgments that belong with the legislature.

Turning to the second *Boreali* factor, the Court of Appeals determined that the Board had written on a clean slate.[33] The court again emphasized the broad impact of the agency's decision: "Devising an entirely new rule that significantly changes the manner in which sugary beverages are provided to customers at eating establishments is not an auxiliary selection of means to an end; it reflects a new policy choice."[34] The court briefly addressed the third factor, concluding that inaction on the part of the state and city legislatures further suggested that the Rule made new policy.[35] Finally, the court declined to address the fourth *Boreali* factor; the Rule was invalid regardless.[36]

Judge Read dissented.[37] After arguing that the Board has state-granted authority independent of the City Council,[38] she asserted that the Board's broad mandate to protect health under the City Charter permitted it to issue the Rule.[39] Turning to the majority's *Boreali* analysis,[40] Judge Read challenged the majority's conclusion that the Board's cost-benefit analysis was problematic, maintaining that agencies are "*supposed* to take into account . . . any deleterious side-effects of their rules on affected entities."[41] She also questioned the notion that regulating indirectly, by influencing consumer choices, amounted

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[30] *Id.* at 548.

[31] *Id.* at 547.

[32] *Id.* at 548.

[33] *See id.*

[34] *Id.*

[35] *Id.* at 548–49.

[36] *Id.* at 549. The court warned that this factor may sometimes carry weight. *See id.* Judge Abdus-Salaam wrote a brief concurrence to "emphasize the carefully circumscribed nature of the Court's decision." *Id.* (Abdus-Salaam, J., concurring).

[37] Judge Read was joined by Chief Judge Lippman.

[38] *Coalition*, 16 N.E.3d at 556 (Read, J., dissenting) (tracing the Board's history to conclude that its authority "is delegated by the New York State Legislature, and its regulations have the force and effect of state law").

[39] *See id.* at 558.

[40] As an initial matter, Judge Read maintained that *Boreali* did not apply: it set forth a *state* separation of powers doctrine that does not apply to *local* governments. *Id.*

[41] *Id.* at 559.

to forbidden policymaking.[42] Accordingly, she would have found the Rule a valid exercise of the Board's authority.[43]

Boreali's separation of powers doctrine has generated controversy since its inception, in part because its first factor called into question agencies' ability to consider factors outside their immediate area of expertise, such as the cost of a regulation.[44] *Coalition*, however, clarified that the first *Boreali* factor requires legislative authorization only for agency cost-benefit analyses that require especially significant value judgments — ones that implicate the everyday activities of a wide segment of the population and impinge on individual autonomy in a particularly controversial way. In demanding clear legislative guidance for significant rulemakings, the *Coalition* court's reasoning resembles that of federal major questions cases. If a regulation's significance is to be the decisive factor in New York's separation of powers analysis, the Court of Appeals should embrace a framework explicitly centered on this factor and abandon *Boreali*'s four-part approach.

In *Boreali*, the court attempted to draw a "difficult-to-define line between administrative rule-making and legislative policy-making" by looking, in part, to the agency's balancing of economic and social concerns unrelated to its statutory mandate of safeguarding health.[45] Such cost-benefit analysis was "a uniquely legislative function" that required legislative authorization or guidance.[46] Critics of *Boreali* have since voiced concern that this first *Boreali* factor could stymie agency efforts to weigh the costs of a proposed regulation.[47] Apparently responding to such concerns, the *Coalition* court clarified that agencies must be permitted to weigh considerations outside their field of expertise; "cost-benefit analysis is the essence of reasonable regulation," and "*Boreali* should not be interpreted to prohibit" it.[48]

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[42] *See id.* at 560 ("[T]he Board chose this means over other possible approaches as a way to tailor its regulations so as to impose the least burden on society . . . .").

[43] According to Judge Read, because the Board had the authority to issue the Rule, the proper standard of review was whether the regulation was arbitrary and capricious; she found it was not. *See id.* at 560–61.

[44] *See* Boreali v. Axelrod, 517 N.E.2d 1350, 1359–60 (N.Y. 1987) (Bellacosa, J., dissenting) (warning of "[t]he cloud deposited by the instant case on modern administrative and regulatory law," *id.* at 1360). More recently, some critics have argued that *Boreali* should be abandoned entirely, while others have contended merely that lower courts have occasionally applied *Boreali*'s four "coalescing circumstances" too rigidly. *Compare, e.g.*, Brief of Amici Curiae Paul A. Diller et al. in Support of Respondents-Appellants at 7–8, *Coalition*, 16 N.E.3d 538 (No. 2013-00291) [hereinafter Diller Brief], *with* Brief of Amici Curiae Professors of Administrative Law and State and Local Government Law at 19, *Coalition*, 16 N.E.3d 538 (No. 2013-00291). Scholars have criticized the first *Boreali* factor, in particular, as "mandat[ing] agency tunnel vision." *See* Diller Brief, *supra*, at 13.

[45] *Boreali*, 517 N.E.2d at 1355.

[46] *Id.*

[47] *See* Diller, *supra* note 9, at 1899 (calling the Appellate Division's application of the first *Boreali* factor in *Coalition* "simply unworkable").

[48] *Coalition*, 16 N.E.3d at 546–47.

Instead, the *Coalition* court's reasoning suggested that an agency's consideration of factors outside its area of expertise, while generally permissible, amounts to illicit policymaking when it implicates particularly significant value judgments. Such judgments include those that interfere with the common activities of much of the population and implicate personal autonomy.[49] To illustrate its point, the court provided examples of health regulations that do not amount to policymaking: banning toxins, requiring restaurants to post nutrition information, regulating water purity, and requiring guards to be placed in high-rise windows.[50] In each of these cases, an agency engages in cost-benefit analysis — weighing, for example, public safety benefits against costs to industry — but the benefits clearly outweigh the costs, so the choice is straightforward.[51] In determining that the Rule required a comparatively "difficult and complex" cost-benefit analysis,[52] the court repeatedly emphasized personal autonomy: not only did the Rule restrict commercial liberty, but it also limited individual decisionmaking in a way that routine health regulations do not.

While the *Coalition* court did not expressly articulate *when* an agency action raises such autonomy concerns, it appeared to focus on two types of regulations: those that subtly or indirectly manipulate individual choice, and those that do not reflect broad social consensus. The court suggested that the government's use of an "*indirect method* — making it inconvenient, but not impossible, to purchase more than 16 fluid ounces of a sugary beverage"[53] — posed a greater risk to individual autonomy than regulations that ban toxins or simply provide additional information, such as calorie content.[54] Echoing schol-

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[49] *Id.* at 547.

[50] *Id.* at 547–48.

[51] *Id.* at 548.

[52] *Id.* at 547.

[53] *Id.* (emphasis added).

[54] *Id.* Indeed, rather than limiting autonomy, labeling requirements and other information-forcing regulations can be seen as *increasing* autonomy "[b]y pointing out the consequences of one's behavior without actually restricting that behavior." Thaddeus Mason Pope, *Balancing Public Health Against Individual Liberty: The Ethics of Smoking Regulations*, 61 U. PITT. L. REV. 419, 461–62 (2000). Even regulations that directly restrict a person's range of opportunity — such as bans on lead paint — might be considered autonomy-promoting if the behavior being limited was not substantially voluntary in the first place. We might assume, for example, that few people freely and knowingly choose to use lead paint. Banning lead paint might thus be justified as an example of "soft paternalism": the notion that it may be "proper to interfere with an individual's liberty for that individual's own good only if — indeed, precisely because — her contrary choice was not, or may not have been, substantially autonomous." *Id.* at 456. Soft paternalism justifies many public health regulations. *See* United States v. Dotterweich, 320 U.S. 277, 280 (1943) (noting the FDA's mission to protect the "health of people which . . . [is] largely beyond self-protection").

While a regulation capping sugary-drink portions differs from a lead-paint ban in several ways, *see* David Adam Friedman, *Public Health Regulation and the Limits of Paternalism*, 46 CONN. L. REV. 1687, 1708–09 (2014) (comparing the two policies and noting that removing lead

arly and popular skepticism of the use of behavioral economics in policymaking,[55] the court suggested that only democratically accountable legislators should be permitted to "modify [individual] behavior indirectly."[56] Yet a more overt approach, such as an "outright prohibition of sugary beverages," would also impermissibly limit liberty, according to the court.[57] This suspicion of a ban on soda, but not of similar bans on, say, lead paint, suggests that autonomy concerns loom larger when the judgments underlying a prohibition are not widely shared — in other words, when the ban is particularly controversial.[58] Thus, while it is unclear after *Coalition* exactly which agency actions are significant enough to mandate legislative input, regulations that limit autonomy by indirectly manipulating behavior or by issuing especially controversial bans appear to qualify.

Notably, the perceived significance of the Rule determined the outcome of the entire *Boreali* analysis, not merely that of the first factor. In its brief discussion of the second *Boreali* factor, the court found the Rule's broad impact dispositive, noting that "the policy choices made here were far from 'subsidiary'"; rather, the Rule involved "*significantly* chang[ing] the manner in which sugary beverages are provided to customers."[59] Because the third and fourth factors barely influenced the case's outcome, the four-part *Boreali* test collapsed into just one inquiry in *Coalition*: the regulation's significance.[60]

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from paint "had little impact or visibility to the consumer"), a portion-cap rule could, at least arguably, also be seen as an example of soft paternalism. Evidence suggests that people consume more calories *without realizing it* when offered larger portions, *see* Hery (Michelle) Min, Note, *Large-Sized Soda Ban as an Alternative to Soda Tax*, 23 CORNELL J.L. & PUB. POL'Y 187, 227 (2013), and as the city argued, limiting portion sizes might require people "to make conscious decisions" to consume more, N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, 970 N.Y.S.2d 200, 205 (App. Div. 2013). Under this view, a portion-cap rule might *promote* autonomous decisionmaking.

55 *See* Pelle Guldborg Hansen & Andreas Maaløe Jespersen, *Nudge and the Manipulation of Choice*, 2013 EUR. J. RISK REG. 3, 5 (describing critics' views that "state manipulation with the choices of citizens appears to be at odds with the democratic ideals of free exercise of choice, deliberation, and public dialogue").

56 *Coalition*, 16 N.E.3d at 547.

57 *Id.* at 548.

58 *See id.* (explaining that an agency that limits or bans substances "preferred by large numbers of people must necessarily wrestle with complex value judgments concerning personal autonomy"). The view that regulations limit individual autonomy more when they diverge from shared value judgments might be based on a fear of administrative capture or tyranny: where regulations do not reflect broad consensus, unelected regulators might have veered from their legislative mandate.

59 *Id.* (emphasis added).

60 The court appeared to view the third and fourth factors as largely superfluous. *See id.* at 548–49 (declining to analyze the fourth factor and noting, in discussing the third factor, that "inaction on the part of the State Legislature and City Council . . . simply constitutes additional evidence" that the Board overstepped). Depending on how the *Boreali* analysis evolves in future cases, the third and fourth factors could theoretically maintain independent force and could justify invalidating even an insignificant agency action. After *Coalition*, however, it is difficult to imagine a regulation that could

Agency decisions with major economic, social, or political consequences have also attracted the attention of the U.S. Supreme Court in the major questions cases. In those cases, the Court required a clear legislative statement to authorize especially significant agency decisions. For example, in *FDA v. Brown & Williamson Tobacco Corp.*,[61] the Court refused to defer to the FDA's determination that it had jurisdiction to regulate tobacco products in the absence of a clear congressional statement granting that authority.[62] According to the Court, "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[63] Similarly, in *Gonzales v. Oregon*,[64] the Court rejected the argument that Congress had implicitly granted the Attorney General the authority to regulate physician-assisted suicide under the Controlled Substances Act.[65] In part because of the "importance of the issue of physician-assisted suicide, which has been the subject of an 'earnest and profound debate' across the country,"[66] the Court found the "oblique form" of the asserted legislative authorization particularly "suspect."[67] Although the *Coalition* court clothed its decision in the trappings of the *Boreali* factors and did not explicitly approach the case as one of statutory interpretation, its mission mirrored the Court's in *Brown & Williamson* and *Gonzales*: to require clear legislative guidance for controversial agency choices with major political consequences, even when the agency's statutory mandate may appear to permit such choices.[68]

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violate the third or fourth *Boreali* factors without qualifying as significant: the third factor aims at policies that attract legislative debate, which are by nature likely to be politically significant; and courts are unlikely to consider the fourth factor, which asks whether an agency's expertise was needed in a rulemaking, without some other evidence of agency overreach, *see* Consol. Edison Co. of N.Y. v. Dep't of Envtl. Conservation, 519 N.E.2d 320, 322 (N.Y. 1988) (suggesting that the fourth factor moves in tandem with the first; under *Boreali*, an agency "usurp[s] the role of the Legislature when, rather than employing its public health expertise in making technical determinations so as to implement legislative policies, [it] engage[s] in a balancing of political, social and economic factors").

[61] 529 U.S. 120 (2000).

[62] *Id.* at 159–60.

[63] *Id.* at 160. This was true even though some have suggested that the text of the Food, Drug, and Cosmetic Act, which permits the FDA to regulate "drugs" and "devices," could reasonably be read to encompass tobacco. *See id.* at 161–62 (Breyer, J., dissenting); John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 233 ("Given the breadth of the FDCA's text, one might have thought that the FDA's decision to regulate tobacco would be a serious candidate for *Chevron* deference.").

[64] 546 U.S. 243 (2006).

[65] *Id.* at 267.

[66] *Id.* (quoting Washington v. Glucksberg, 521 U.S. 702, 735 (1997)).

[67] *Id.* at 267–68.

[68] One could, of course, question whether the Rule was sufficiently significant to warrant the application of a major questions–like approach. A "significant" or "major" question could be, at minimum, one with enormous social and economic consequences, *see Brown & Williamson*, 529 U.S. 120, one that generates heated public debate, *see Gonzales*, 546 U.S. 243, or one whose resolution could substantially change the regulatory status quo for an industry, *see* MCI Telecomms.

While the major questions doctrine has been criticized,[69] it arguably reflects real legislative and popular anxieties. Some empirical evidence suggests that legislatures may not intend agencies to answer politically and economically significant questions.[70] Moreover, regardless of legislative intent, courts may fear that agencies tackling high-profile, politically charged decisions without legislative guidance act undemocratically by circumventing political processes and popular debate. Under this view, judicial intervention is needed "to ensure accountability, or at least the promise of representative and responsive government for which accountability stands."[71] Further, the more an agency action appears to limit personal autonomy, the more courts may perceive a need for structural protections against regulatory overreach.[72] Thus, while Judge Read criticized the *Coalition* majority for striking down "an *unpopular* regulation, not an illegal one,"[73] the majority's

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Corp. v. AT&T Co., 512 U.S. 218 (1994) (finding it "highly unlikely that Congress would leave the determination of whether an industry will be . . . rate-regulated to agency discretion," *id.* at 231). Arguably, the Rule could be seen as "significant" in any of these ways. Because the *Coalition* court focused more on the Rule's controversial nature and political significance than on its effects on industry or the economy at large, however, the case may resemble *Gonzales* more than *Brown & Williamson* or *MCI*.

[69] *See, e.g.*, Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 231–47 (2006); David Baake, *Obituary:* Chevron*'s "Major Questions Exception,"* HARV. ENVTL. L. REV. BLOG (Aug. 27, 2013, 5:43 PM), https://journals.law.harvard.edu/elr/2013/08/27/obituary-chevrons-major-questions-exception [http://perma.cc/63K7-FZM6] (arguing that the doctrine limits agencies' ability to "tackl[e] major threats to human health and welfare"). Some commentators have suggested that the major questions doctrine met its demise in *Massachusetts v. EPA*, 549 U.S. 497 (2007), and *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013). *See* Abigail R. Moncrieff, *Reincarnating the "Major Questions" Exception to* Chevron *Deference as a Doctrine of Noninterference (or Why* Massachusetts v. EPA *Got It Wrong)*, 60 ADMIN. L. REV. 593, 594–95 (2008); Baake, *supra*. However, others maintain that it was invoked anew in *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014). *See* Abbe R. Gluck, *What the EPA Case *Really* Has to Say About the ACA Subsidies Cases*, BILL OF HEALTH (June 26, 2014), http://blogs.law.harvard.edu/billofhealth/2014/06/26/what-the-epa-case-really-has-to-say-about-the-aca-subsidies-cases [http://perma.cc/R74E-LYDA] (noting court filings that so argue). This comment assumes no stance toward the doctrine's desirability or continued validity.

[70] *See* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside — An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 1002–03 (2013) ("Our findings offer some confirmation for the major questions doctrine — the idea that drafters intend for Congress, not agencies, to resolve these types of questions. More than 60% of [congressional counsels surveyed] corroborated this assumption." *Id.* at 1003.). By contrast, some scholars suggest that legislators occasionally "punt" difficult questions to agencies. *See, e.g.*, DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY 10 (1993).

[71] Lisa Schultz Bressman, *Deference and Democracy*, 75 GEO. WASH. L. REV. 761, 764 (2007).

[72] *Cf.* Clinton v. City of New York, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) (discussing the role of separation of powers in protecting individual liberty). Some have argued that the agency action in *Gonzales* implicated liberty concerns. *See* Jaime Staples King & Benjamin W. Moulton, *Rethinking Informed Consent: The Case for Shared Medical Decision-Making*, 32 AM. J.L. & MED. 429, 468 (2006) (describing *Gonzales* as "clearly establish[ing] the primacy in the law of an individual's autonomy over her health").

[73] *Coalition*, 16 N.E.3d at 561 (Read, J., dissenting).

unease with allowing agencies to impose autonomy-limiting policies without legislative guidance in fact taps into longstanding, if contestable, concerns about the proper scope of regulatory power.

If the *Coalition* court sought to require clear legislative authorization for politically significant value judgments, it might have been better served to abandon the *Boreali* framework and adopt an approach that explicitly focuses on the significance of the agency's decision. First, such an approach would clearly lay out the court's enterprise instead of cloaking its major object in a multifactor analysis. Second, eliminating the *Boreali* framework would squelch any lingering doubts about the role of cost-benefit balancing in agency decisionmaking. Although scholars and judges — including the *Coalition* majority and dissent — have emphasized the centrality of cost-benefit analysis,[74] lower courts may interpret *Coalition*'s continued reference to the first *Boreali* factor to restrict agencies' use of such analysis.[75]

Finally, and perhaps ironically, abandoning the four *Boreali* factors might better vindicate the aims of *Boreali* itself. As a guidepost for its separation of powers analysis, the *Boreali* court cited a federal opinion known as the *Benzene* case;[76] there, the U.S. Supreme Court refused to allow an agency to claim sweeping regulatory authority without clear legislative authorization.[77] The theme of *Benzene* thus echoes that of the major questions cases: some decisions are too critical to leave to agencies, at least absent clear legislative intent to delegate.[78] In referencing *Benzene*, the *Boreali* court may have signaled that its primary goal was not to establish a four-factor framework, but rather to emphasize legislative primacy in "resolv[ing] difficult social problems."[79] The *Coalition* court recognized the importance of this central theme.[80] But in refusing to abandon the four *Boreali* factors, it missed a crucial opportunity to elucidate it.

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[74] *See* Richard B. Stewart, Essay, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 444 (2003) (noting the "widely accepted" role of cost-benefit analysis in regulation).

[75] *See* Diller Brief, *supra* note 44, at 14–16. Indeed, even Judge Read apparently did not see the majority opinion as cabined to especially significant value judgments; rather, she expressed concern that the majority had found something "inherently wrong" with cost-benefit analysis per se. *Coalition*, 16 N.E.3d at 559 (Read, J., dissenting).

[76] *See* Boreali v. Axelrod, 517 N.E.2d 1350, 1354 (N.Y. 1987) (citing Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst. (*Benzene*), 448 U.S. 607, 645–46 (1980)).

[77] *Benzene*, 448 U.S. at 645.

[78] *See* Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 457 (2008) (comparing *Benzene* to major questions cases such as *Brown & Williamson*).

[79] *Boreali*, 517 N.E.2d at 1356.

[80] *See Coalition*, 16 N.E.3d at 546 ("Any *Boreali* analysis should center on the theme that 'it is the province of the people's elected representatives, rather than appointed administrators, to resolve difficult social problems by making choices among competing ends . . . .'" (quoting *Boreali*, 517 N.E.2d at 1356)).