DOES THE MAJOR QUESTIONS DOCTRINE APPLY TO THE FEDERAL COURTS?

Michael Coenen & Seth Davis***

The new "major questions doctrine" (MQD) requires courts to apply a "distinct" approach to statutory interpretation when reviewing challenges to an agency action of "vast economic and political significance." Under that approach, courts must assume that such an action exceeds the scope of that agency's statutory authority unless there exists "clear congressional authorization" for it. In this Article, we examine whether this new rule for administrative agencies (or what we call the "agency MQD") implies the existence of a similarly strong constraint on the federal courts' power to interpret and apply statutes for themselves (or what we call the "judicial MQD"). That is, we ask whether a principled commitment to the agency MQD requires a further commitment to the idea that courts also cannot implement unclear federal statutes in "major"-seeming ways.

To answer that question, we tease out several potential justifications for the agency MQD and ask, with respect to each justification, whether there exists a coherent basis for distinguishing courts' rendering of "major" statutory decisions from agencies' formulation of "major" statutory policies. We begin with a pair of justifications that are "Congress-protecting" in their orientation: first, a "semantic" justification that sees the agency MQD as a means of accurately interpreting Congress's actual statutory commands, and second, an "anti-aggrandizement" justification that sees the agency MQD as a prophylactic safeguard against agency efforts to "exploit" statutory powers that Congress "inadvertently" conferred. Both of these justifications, we argue, fully extend to statutes that are implemented by the federal courts and thus would seem to require adoption of an equally strong judicial MQD. We then consider an additional set of justifications that are "Congress-constraining" in their orientation: first, a "clarity-mandating" justification that sees the agency MQD as a requirement that seeks to ensure meaningful congressional accountability for any major actions taken on

* Marino, Tortorella and Boyle Professor of Law, Seton Hall Law. Email: michael.coenen@shu.edu.

** Professor of Law, University of California, Berkeley School of Law. Email: sethdavis@berkeley.edu. For helpful conversations and feedback, we would like to thank Anya Bernstein, Dan Coenen, Daniel Deacon, and Leah Litman. Thanks also to Sean Phillips and his colleagues at the *Fordham Law Review* for their valuable editorial assistance.

Congress's behalf, and second, a "nondelegation-avoiding" justification that sees the agency MQD as a means of avoiding potential violations of the Article I nondelegation doctrine. For these justifications, our conclusions are more qualified: we think the clarity-mandating justification implies a similarly strong judicial MQD, but we acknowledge that the nondelegation-avoiding justification creates some—though not total—room for treating "major" judicial applications of statutes as comparatively less threatening to constitutional nondelegation norms (and thus less vulnerable to attack under a nondelegation-based version of the MQD). With all that on the table, we conclude our analysis by discussing ways in which courts might respond to the court-constraining implications of the agency MQD. While we identify a few potential ways of sidestepping or instead giving effect to the idea that the agency MQD implies a similarly strong judicial MQD, we conclude that the most promising path forward is to recast the agency MQD as a soft and context-sensitive interpretive canon along the lines of the "elephants-in-mouseholes" canon that already prevails within the judicial domain.

INTRODUCTION

The U.S. Supreme Court has made major changes to the law of statutory interpretation in cases concerning the powers of administrative agencies. In *Loper Bright Enterprises v. Raimondo*,[1] the Court repudiated the doctrine of *Chevron* deference[2] and replaced it with a requirement that reviewing courts exercise "independent judgment on questions of law."[3] But in a separate line of cases—commonly grouped under the heading of the "major questions doctrine" (MQD)[4]—the Court has gone even further than call for a restoration of "normal statutory interpretation" in agency-related cases.[5] In particular, the Court has held, when an agency claims the statutory authority to do something "major," courts must employ a "distinct" interpretive approach,[6] one that flips on its head the posture of *Chevron* deference and presumes an absence of authority to act in the absence of "*clear*

1. 144 S. Ct. 2244 (2024), *overruling* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

2. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984), *overruled by Loper Bright*, 144 S. Ct. 2244 (2024).

3. *Loper Bright*, 144 S. Ct. at 2262.

4. *See generally* Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009 (2023).

5. West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022) (contrasting the Court's MQD cases with cases involving "normal statutory interpretation").

6. *Id.* at 2609 ("[T]he approach under the major questions doctrine is distinct.").

congressional authorization."[7] This, we think, is a big deal.[8] In particular, by adopting this new version of the MQD, the Court has likely narrowed the reach of a wide range of different congressional statutes, rendering numerous existing agency actions (and countless future agency actions) vulnerable to invalidation on the ground that the applicable statutory language qualifies as too much of a "wafer-thin reed,"[9] "empty vessel,"[10] or "vague term[]"[11] to support agency action of "vast economic and political significance."[12]

When it comes to statutory interpretation outside the administrative domain, meanwhile, things remain pretty much business as usual. When deciding statutory cases not involving agency power, that is, the Court has continued to prescribe highly consequential outcomes without invoking the "clear congressional authorization" requirement—or even considering whether such a requirement ought similarly to apply. To take a few examples, the Court has recently held that affirmative action in higher education admissions violates the antidiscrimination provisions of Title VI of the Civil Rights Act[13] ("Title VI"), that the National Collegiate Athletic Association's (NCAA) regulation of student athletes is subject to the requirements of federal antitrust law,[14] and that employment discrimination on the basis of sexual orientation and gender identity falls within the scope of the ban on sex discrimination in Title VII of the Civil Rights Act.[15] Indeed, *Loper Bright* itself, which defended its jettisoning of the nearly forty-year-old *Chevron* framework by reference to § 706 of the

7. *Id.* (emphasis added) (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

8. For others offering a similar assessment of the doctrine's majorness, see, e.g., Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 263 (2022) (emphasizing that the MQD has "altered the doctrine of judicial review of agency action in its method and content, in ways that will have momentous consequences"); Ronald M. Levin, *The Major Questions Doctrine: Unfounded, Unbounded, and Confounded*, 112 CALIF. L. REV. 899, 901 (2024) (characterizing the MQD as an "enormously prominent phenomenon for the administrative law practitioner").

9. Ala. Ass'n of Realtors v. Dep't of Health & Human Servs., 141 S. Ct. 2485, 2489 (2021).

10. *West Virginia*, 142 S. Ct. at 2614.

11. *Id.* at 2609.

12. *Id.* at 2605 (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324); *see id.* at 2609 ("Extraordinary grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or 'subtle devices.'" (internal alterations omitted) (quoting Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 468 (2001))); *id.* at 2616 (Gorsuch, J., concurring) ("Under [the MQD's] terms, administrative agencies must be able to point to 'clear congressional authorization' when they claim the power to make decisions of 'vast economic and political significance.'").

13. 42 U.S.C. §§ 2000d to 2000d-7; Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2156 n.2 (2023); *see also id.* at 2221 (Gorsuch, J., concurring) ("Title VI bears independent force beyond the Equal Protection Clause. Nothing in it grants special deference to university administrators. Nothing in it endorses racial discrimination in any degree or for any purpose. Title VI is more consequential than that.").

14. Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021).

15. *See* 42 U.S.C. §§ 2000e to 2000e-17; Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020).

Administrative Procedure Act[16] (APA), could similarly be characterized as a statutory decision of "vast economic and political significance."[17] And yet, in deciding these cases, the Court did not bother to ask whether the result itself qualified as "major" and, if so, whether its reading of the statute satisfied the exceedingly high demands of the "clear congressional authorization" requirement.[18] The Court, as best as we can tell, understands the MQD to operate exclusively within the confines of federal administrative law, leaving the federal judiciary free to render its own "major" statutory decisions by way of the standard operating procedure of "normal statutory interpretation."[19]

The question we ask in this Article is whether, in so doing, the present-day Court is problematically trying to have its cake and eat it too. In a nutshell, the problem is this: the MQD for federal agencies (or what we will call the "agency MQD") derives from the basic idea that Congress either does not or should not rely on persons outside the legislative branch to do "major" things on Congress's behalf. But if that is true, it would seem to follow that there ought to exist a parallel "judicial MQD" that similarly prevents the federal courts from implementing unclear statutes in analogously "major" ways. Put differently, although the agency MQD currently purports to limit only the scope of federal *executive* power, it trades on a set of concepts, assumptions, and arguments that, if taken seriously, would require an analogous limitation on the scope of federal *judicial* power as well.[20] Call this idea the "equal

16. 5 U.S.C. §§ 551–559, 701–706; *see* 5 U.S.C. § 706 ("To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."); Loper Bright Enters v. Raimondo, 144 S. Ct. 2244, 2263–67 (2024) (defending the conclusion that "[t]he deference that *Chevron* requires of courts reviewing agency action cannot be squared with the APA").

17. *See Loper Bright*, 144 S. Ct. at 2311 (Kagan, J., dissenting) (emphasizing that the decision carries the significant consequence of "put[ting] courts at the apex of the administrative process as to every conceivable subject" and giving courts a "commanding role" in "every sphere of current or future federal regulation").

18. As we note further below, the Court in *Bostock* did at least apply the "elephants-in-mouseholes" canon, which can be thought of as a precursor to the modern-day MQD. *See Bostock*, 140 S. Ct. at 1753; *see infra* Part IV.C (discussing this aspect of the *Bostock* decision). But as we also note, the elephants-in-mouseholes canon appears to subject reviewing courts to a weaker set of constraints than does the "clear congressional authorization" requirement of the MQD itself. *See infra* Part I.B.

19. *West Virginia*, 142 S. Ct. at 2609 (characterizing the "approach" required by the MQD as "distinct" from the "ordinary method" of "normal statutory interpretation").

20. A few scholars have already begun to consider this possibility. *See, e.g.*, Fred B. Jacob, *The Black Hole of Administrative Law: The Threat of an Ever-Expanding Major Questions Doctrine to the Judiciary*, 98 ST. JOHN'S L. REV. 567 (2024) (warning that the new MQD forms the basis for judicial reconsideration of numerous prior statutory decisions not directly involving the scope of agency power); Alisa B. Klein, *Major Questions Doctrine Jujitsu: Using the Doctrine to Rein in District Court Judges*, 76 ADMIN. L. REV. 327, 335 (2024) (contending that "the principles that underlie the major questions doctrine apply with equal force when interpreting the authority that the APA vests in district court judges," particularly with respect to those judges' power to issue "universal" or "nationwide" injunctions); THOMAS W. MERRILL, HOOVER INST., THE MAJOR QUESTIONS DOCTRINE: RIGHT DIAGNOSIS, WRONG REMEDY 28 (2023), https://www.hoover.org/research/major-questions-doctrine-right-diagnosis-wrong-remedy [https://perma.cc/UN56-CSYF] (highlighting the potential application of the

application thesis": in simple terms, it posits that a principled commitment to the agency MQD must carry with it a similarly strong commitment to the judicial MQD. And that, in turn, would mean that courts cannot simultaneously insist on "clear congressional authorization" for "major" agency actions while subjecting their own major decisions to a looser and more lenient standard of statutory support.

This Article presents and evaluates the equal application thesis. It concludes that the equal application thesis is generally correct but that the extent of its correctness depends on the operative justifications for the agency MQD. Unfortunately, the Court has provided strikingly little clarity about what those justifications are, and we must therefore consider several possibilities. In particular, drawing on various strands of the Court's recent opinions, along with a few more extensive discussions of the doctrine offered by some of its individual justices, we identify *four* potential bases for subjecting "major" agency-based exercises of statutory authority to a "clear congressional authorization" requirement. We then argue that three of these four justifications would compel recognition of an equally strong judicial MQD, and we further conclude that the remaining justification requires adherence to the judicial MQD in some but not all categories of "major" statutory cases.

We begin in Part I by describing the basic rule of the modern-day agency MQD and the general absence of an equally strong judicial MQD.[21] This background sets the stage for one of this Article's analytical contributions, which is a top-level distinction between two different categories of justifications for the agency MQD that the justices have gestured toward.[22] Much of the critical commentary on the agency MQD has argued that it represents an encroachment on Congress's legislative powers.[23] That may well be true, but any argument to that effect has to grapple with the Court's occasional suggestions that the agency MQD in fact serves to bolster rather than undermine Congress's legislative authority. In other words, both

MQD to the federal courts). Indeed, it is one that we ourselves gestured toward in an earlier article about a prior iteration of the agency MQD. Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777, 807 (2017) (raising the question of whether the MQD should apply to federal courts based on the nondelegation justification). What we offer here is intended to complement those accounts by carefully and systematically analyzing the question of whether the judicial MQD follows from the agency MQD's potential underlying justifications.

21. *See infra* Part I.

22. In particular, this typology differs from the suggestion that the two basic justifications for the MQD are grounded, respectively, in considerations of semantic usage and considerations related to the constitutional separation of powers. *See, e.g.*, Cass R. Sunstein, *Two Justifications for the Major Questions Doctrine*, 76 FLA. L. REV. 251 (2024). In our view, the better way of conceptualizing the justifications is to distinguish between those that seek to vindicate the interests of Congress and those that seek to constrain the powers of Congress.

23. *See, e.g.*, Deacon & Litman, *supra* note 4, at 1079, 1082 (criticizing the MQD on the ground that, among other things, it "hobbles delegations in circumstances in which Congress is most likely to have wanted an agency to be able to adopt new solutions to novel problems" and emphasizing that the MQD "makes it difficult [for Congress] to realize the full benefits of delegation").

Congress-protecting and *Congress-constraining* justifications for the agency MQD are floating around in the Court's current case law.[24]

In Part II, we home in on the *Congress-protecting* justifications to which the Court has alluded, highlighting two different types of suggestions that the agency MQD helps to safeguard Congress's own expectations and prerogatives. Both of these Congress-protecting justifications start from the empirical premise that Congress generally does not want agencies to take major actions on its behalf, but each responds to that premise in a somewhat different way. The *semantic* justification posits that the agency MQD is justified simply because it ensures that courts accurately interpret statutes to do what Congress would in fact want those statutes to do.[25] By contrast, the "*anti-aggrandizement*" justification sees the agency MQD as a prophylactic means of making it exceedingly difficult—even at the expense of occasionally construing statutes inaccurately—for agencies to "exploit" or "aggrandize" their statutory powers at Congress's expense.[26] We further explain in Part II why we believe that both of these Congress-protecting rationales require a commitment to an equally strong judicial MQD. In particular, we contend that a key premise underlying both the semantic and anti-aggrandizement arguments—namely, the premise that Congress is zealously protective of its own authority to make major policies for itself—applies with full force to the question of whether courts should apply unclear statutory provisions in major-seeming ways. Thus, we conclude in Part II that the equal application thesis is indeed correct insofar as the agency MQD operates as a Congress-protecting device.

Part III then considers a contrasting set of *Congress-constraining* justifications, which see the agency MQD as a means of ensuring that

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24. There are undoubtedly other potential justifications for the MQD that we do not deeply engage with in this Article. Of particular note, Professor Gary Lawson has recently suggested that the doctrine might be defensible as a sort of "civil rule of lenity" that works to protect "subjects of legislative power" from governmental action that threatens their negative rights. *See* Gary Lawson, *"The Game" (or How I Learned to Stop Worrying and Love the Major Questions Doctrine)*, 14 HARV. J.L. & PUB. POL'Y PER CURIAM 1, 5–6 (2024) (further suggesting that the agency MQD "implements what Professor Randy Barnett has called a 'Presumption of Liberty'" (citing RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 5 (2004))). Although we think that this account of the doctrine is consistent with the agency MQD's on-the-ground effects (and that the doctrine's tendency to yield libertarian results is a significant reason why the Court's conservative justices have been so quick to embrace it), we do not here include it within our analysis for the simple reason that none of the justices have thus far attempted to justify the doctrine as a means of promoting libertarianism. Put differently, we are in this Article taking the Court at its word that the agency MQD exists for the purpose of vindicating a particular institutional vision of the Congress-agency relationship, and we are solely focused on what that institutional vision implies regarding the appropriate relationship between Congress and the courts. We realize that our approach may strike some readers as naïve, and we acknowledge that the justices' public defenses of the doctrine may fail to capture the actual reasons why they privately favor it. But we emphasize that our goal here is not to offer a descriptively accurate account of the actual reasons why the Court's majority favors the agency MQD; rather, it is simply to outline what a fully coherent approach to the major questions doctrine would require courts to do.

25. *See infra* Part II.A.

26. *See infra* Part II.B.

Congress does not run afoul of constitutional constraints on its own legislative authority. Here, too, we further subdivide the relevant arguments into two basic types. The first is a *clarity-mandating* justification, which treats the agency MQD as helping to ensure that Congress cannot escape accountability for major policy decisions by subtly or indirectly authorizing nonlegislative actors to make those decisions on its behalf.[27] And the second is a *nondelegation-avoiding* justification, which treats the agency MQD as a means of effectuating the Article I–based nondelegation doctrine.[28] We then argue that the clarity-mandating justification fully supports the equal application thesis, as there is no good reason to think that the sort of constitutional "accountability-forcing" requirement envisioned by this justification would apply with any less force to congressional efforts to smuggle major policies into ambiguous statutes that courts, rather than agencies, are tasked with enforcing. With respect to the nondelegation-avoiding justification, by contrast, we acknowledge a basis for differentiating between courts' and agencies' work with unclear statutory commands. Among other things, we acknowledge that, if one accepts the (contestable) idea that courts decide some major cases by merely "discovering" or "discerning" the right answer (without exercising anything akin to policymaking discretion), then a proponent of the (nondelegation-based) agency MQD would sometimes have grounds for *not* applying a similarly strong version of the judicial MQD.

We conclude the Article by considering practical implications of our analysis and the means by which the Court might respond to it. Part IV considers three possibilities. First, the Court could (partially) sidestep the implications of the equal application thesis by treating the nondelegation-avoiding justification as the exclusive basis for the agency MQD.[29] Second, the Court could seek to satisfy the demands of the equal application thesis by adopting a judicial MQD that is at least as strong as the agency MQD.[30] Third, the Court could satisfy the demands of the equal-application thesis by weakening the agency MQD, leveling it down into line with the "elephants-in-mouseholes" canon that the Court sometimes applies when evaluating the correctness of a major statutory position.[31] We argue against the first two of these options on the ground that they pose significant, if not wholly intractable, problems of workability. And we argue in favor of the third, "leveling-down"-based option, concluding that it offers the most conceptually defensible, doctrinally grounded, and practically workable means of grappling with the "major-ness" of both agency-based and court-based statutory actions. At the same time, however, we acknowledge that the "leveling-down" approach is reconcilable with only one of the particular justifications we have flagged—i.e., the semantic

27. *See infra* Part III.A.
28. *See infra* Part III.B.
29. *See infra* Part IV.A.
30. *See infra* Part IV.B.
31. *See infra* Part IV.C.

justification—and we thus acknowledge that proponents of the anti-aggrandizement, clarity-mandating, and nondelegation-avoiding rationales might have reasons to reject it. But if they do, then proponents of those rationales should respond to the implications of the equal application thesis in some other way. And the practical difficulties of doing just that may provide a reason for rejecting those rationales altogether.

I. MAJOR QUESTIONS FOR AGENCIES AND COURTS

We begin with definitions of the "agency MQD" and "judicial MQD." As will become apparent, the former concept is easier to describe than the latter, as the "agency MQD" refers to a now well-established rule of judicial doctrine that courts apply as a matter of course. As for the "judicial MQD," there is no single rule or body of doctrine that the Court currently describes as such. At the same time, however, some normative canons of statutory interpretation might collectively be viewed as collectively laying the foundation for such a rule—a foundation that, if the equal application thesis proves to be correct—the Court could choose to build upon in formalizing a fully-fledged judicial MQD.

A. The Agency MQD

The agency MQD is a rule of administrative law concerning the judicial interpretation of statutes that delineate agencies' regulatory powers. In its current form, the rule provides that courts should not treat such statutes as authorizing agency actions of "vast economic and political significance" unless there exists "clear congressional authorization" for doing so.[32] Much about the doctrine's scope and substance remains unclear: the Court has provided little guidance as to both what constitutes a "major" agency action *and* what constitutes "clear congressional authorization."[33] And much about the agency MQD's justifications remains unclear as well: we do not yet know to what extent the Court thinks of the MQD as a semantic canon, a

32. West Virginia v. EPA, 142 S. Ct. 2587, 2605, 2609 (2022); *see also id.* at 2616 (Gorsuch, J., concurring) (stating that under the major questions doctrine "agencies must be able to point to 'clear congressional authorization' when they claim the power to make decisions of vast 'economic and political significance'"). Numerous commentators have tracked the long and circuitous journey of the MQD from its origins as a within-*Chevron* guide to determining whether a statute spoke to the "precise question at issue" to its present-day status as a basis for *presuming* an absence of agency authority to act in the absence of "clear congressional authorization." *See, e.g.*, Deacon & Litman, *supra* note 4, at 1021–23; Matthew Stephenson & Jody Freeman, *The Anti-Democratic Major Questions Doctrine*, 2022 SUP. CT. REV. 1, 6–20 (emphasizing "how much the MQD, which at least arguably began as a tame and conventional form of statutory interpretation informed by structural inferences, has metastasized into the tool by which the Court seems poised to upend nearly forty years of administrative law").

33. *See, e.g.*, N.C. Coastal Fisheries Reform Grp. v. Capt. Gaston LLC, 76 F.4th 291, 296 (4th Cir. 2023) (noting that "[t]he doctrine's boundaries remain hazy").

constitutionally-grounded rule, or a common-law rule grounded in policy considerations.[34]

These uncertainties aside, however, the basic gist of the rule is easy to describe. The Court has left little doubt that "major" agency actions implicate a fundamentally different sort of statutory analysis than do their nonmajor counterparts. Of particular importance, in *West Virginia v. EPA*[35]—the first non-shadow-docket opinion concerning the new MQD—the Court described the doctrine as a "requirement" that courts depart from the "ordinary method" of "routine statutory interpretation" whenever the applicable agency action counts as "major."[36] That is, when agencies take actions that implicate the MQD, courts must apply a "distinct" interpretive approach, according to which "regulatory assertions" with even "textual plausibility" or a "colorable textual basis" must be rejected unless the "congressional authorization" is "clear."[37]

The potency of this rule was on display in *West Virginia* itself.[38] The case concerned § 111 of the Clean Air Act,[39] which empowers the Environmental Protection Agency (EPA) to regulate the emission of certain types of air pollutants from certain types of stationary sources. Without delving too deeply into the statutory scheme, we can simply note that, when exercising

34. *See* West Virginia v. EPA, 142 S. Ct. at 2609 (referring to "both separation of powers principles and a practical understanding of legislative intent"); *id.* at 2620 (Gorsuch, J., concurring) (describing agency MQD as a separation of powers clear statement rule); Biden v. Nebraska, 143 S. Ct. 2355, 2378 (2023) (Barrett, J., concurring) (describing agency MQD "as an interpretive tool"); Levin, *supra* note 8, at 943, 956, 960 (considering whether agency MQD is a common-law rule based on policy).

35. 142 S. Ct. 2587 (2022).

36. *Id.* at 2609–10 ("The dissent attempts to fit the analysis in [past major questions cases] within routine statutory interpretation, but the bottom line—a requirement of 'clear congressional authorization'—confirms that the approach under the major questions doctrine is distinct.").

37. *Id.* at 2608–09. For a notable effort to suggest that the major questions doctrine applies more narrowly than has often been supposed, see Natasha Brunstein & Donald L.R. Goodson, *Unheralded and Transformative: The Test for Major Questions After* West Virginia, 47 WM. & MARY ENV'T L. & POL'Y REV. 47 (2022). Although we agree that it is possible to read *West Virginia* narrowly, we proceed here on the assumption—shared by many courts and commentators—that the majority intended to set forth a broader and more rigorous rule. *See, e.g.*, Daniel E. Walters, *The Major Questions Doctrine at the Boundaries of Interpretive Law*, 109 IOWA L. REV. 465, 471–72 (2024); Deacon & Litman, *supra* note 4, at 1012; *see also* Louisiana v. Biden, 55 F.4th 1017, 1031 (5th Cir. 2022) (pointing to the lack of a "clear statement" from Congress as a reason to conclude that the demands of the MQD were not met); Heating, Air Conditioning & Refrigeration Distribs. Int'l v. EPA, 71 F.4th 59, 67 (D.C. Cir. 2023) (quoting West Virginia v. EPA, 142 S. Ct. at 2605) (describing *West Virginia* as holding that "courts expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance"). To be sure, we do later discuss the possibility, raised most notably by Justice Barrett, that the agency MQD is best understood as a context-dependent semantic canon. *See* Biden v. Nebraska, 143 S. Ct. at 2378 (Barrett, J., concurring). And we later advocate for explicitly relying on the semantic rationale as a means of limiting the strength and scope of the doctrine itself. In that sense, the analysis of Natasha Brunstein and Don Goodson may prove especially important in highlighting features of the existing doctrine that would help to facilitate such a transition.

38. 142 S. Ct. 2587 (2022).

39. 42 U.S.C. §§ 7401–7671q.

its authority under § 111, the EPA must prescribe a "degree of emission limitation" that is "achievable" by way of the "best system of emission reduction . . . [that] has been adequately demonstrated."[40] *West Virginia* raised the question whether the EPA had exceeded its statutory mandate in 2015 when, through a program called the Clean Power Plan (CPP), it had established limits for carbon dioxide emissions from electrical power plants.[41] As required by § 111, the agency had formulated these limits by identifying a "best system of emission reduction" (BSER).[42] And for the CPP, the BSER involved "generation shifting"—the use of rules and market structures to incentivize a shift of production away from high-carbon sources (such as coal) and toward lower-carbon alternatives (such as natural gas, wind, and solar-powered facilities).[43] The challengers in *West Virginia* sought a judicial declaration that this regulatory approach was unlawful. In particular, they contended that the EPA had exceeded the scope of § 111 by treating generation shifting as a BSER.[44]

Viewed through the lens of "routine statutory interpretation,"[45] the case seemed like an easy one. After all, as Justice Kagan pointed out in dissent, § 111 appeared to give "broad authority to [the] EPA," particularly with respect to the determination of which "system of emission reduction" qualified as "best."[46] What is more, a generation-shifting strategy seemed to "fit[] comfortably within the conventional meaning of a 'system of emission reduction,'" particularly given that "one of the most common mechanisms of generation shifting" (i.e., cap and trade) had been previously described as a "system" by none other than the Supreme Court itself.[47] All of which is simply to say that, to the extent that *West Virginia* posed the statutory question of whether "generation shifting" qualified as a "system of emission reduction" within the meaning of § 111, the question on its face answered itself.[48] Congress had used "expansive language" to define the agency authority in question, and the sort of agency authority being evaluated could be easily and intuitively characterized as encompassed by the terms of that expansive statutory grant.[49]

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40. *See id.* § 7411(a), (d).
41. West Virginia v. EPA, 142 S. Ct. at 2602–03.
42. *Id.* at 2602.
43. *Id.*
44. *See id.* at 2607 ("The issue here is whether restructuring the Nation's overall mix of electricity generation, to transition from 38% coal to 27% coal by 2030, can be the 'best system of emission reduction' within the meaning of Section 111.").
45. *Id.* at 2609.
46. *Id.* at 2629 (Kagan, J., dissenting).
47. *Id.* at 2630–31 (quoting EPA v. EME Homer City Generation, L.P., 572 U.S. 489, 503 n.10 (2014)).
48. *Cf.* Deacon & Litman, *supra* note 4, at 1038 (noting that "the Court even acknowledged that the EPA's generation shifting requirements 'can be described as a "system,"' which is what the statute authorized the agency to establish" (quoting West Virginia v. EPA, 142 S. Ct. at 2614 (majority opinion))).
49. West Virginia v. EPA, 142 S. Ct. at 2632 (Kagan, J., dissenting).

To the majority, however, the case did not call for "routine statutory interpretation" at all.[50] And that was so because in promulgating the CPP the EPA had "'claimed to discover in a long-extant statute an unheralded power' representing a 'transformative expansion in its regulatory authority,'"[51] thus exercising an "unprecedented power over American industry."[52] This feature of the EPA's rule, the Court held, sufficed to render the agency's action "major" and thus obligated the EPA to demonstrate not merely that the program comported with the statutory language of § 111(d), but that the relevant indicia of congressional authorization were "clear."[53] And that, the Court held, was too much weight for the "previously little-used backwater of Section 111(d)" to bear.[54] Of particular note, even though generation shifting could, as a "matter of definitional possibilities," qualify as a "system" of emissions reduction, the Court instead viewed the word "system" as an "empty vessel"—far too "vague" of a "statutory grant" to constitute "the sort of clear authorization required by our precedents."[55]

Other cases pre- and post-*West Virginia* have further elaborated on the scope of this new rule.[56] For example, in *Alabama Ass'n of Realtors v. Department of Health & Human Services*,[57] the Court refused to vacate a lower court stay of a COVID-19–era "eviction moratorium" adopted by the Centers for Disease Control and Prevention (CDC), concluding (a) that the text of the CDC's enabling statute likely prohibited the action in question and (b) that "[e]ven if the text [of the enabling statute] were ambiguous," the agency would almost certainly still lose because "[w]e expect Congress to speak clearly when authorizing an agency to exercise powers of 'vast "economic and political significance."'"[58] Similarly, in *National Federation of Independent Business v. Occupational Safety & Health Administration*,[59] the Court stayed enforcement of the Occupational Safety & Health Administration's (OSHA) COVID-19 vaccine-or-test rule, reasoning that, because the underlying action involved "no 'everyday exercise of federal power,'" the relevant question was whether the agency's enabling statute "plainly authorize[d]" the rule (which, the Court continued, it did not).[60] And finally, in the post-*West Virginia* decision of *Biden v. Nebraska*,[61] the Court held that the secretary of education had exceeded his authority under the

50. *Id.* at 2609.

51. *Id.* at 2610 (alteration in original) (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

52. *Id.* at 2612 (quoting Indus. Union Dep., AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 645 (1980)).

53. *Id.* at 2614.

54. *Id.* at 2613.

55. *Id.* (citation omitted).

56. For an overview of these cases and their connection to *West Virginia*, see generally Sohoni, *supra* note 8, at 262.

57. 141 S. Ct. 2485 (2021) (per curiam).

58. *Id.* at 2489 (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

59. 142 S. Ct. 661 (2022).

60. *Id.* at 665 (quoting *In re* MCP No. 165, 20 F.4th 264, 272 (6th Cir. 2021) (mem.) (Sutton, C.J., dissenting)).

61. 143 S. Ct. 2355 (2023).

federal Higher Education Relief Opportunities for Students Act of 2003[62] ("HEROES Act") by canceling some $430 billion in student debt, with Chief Justice Roberts emphasizing for the majority that the "'economic and political significance' of the Secretary's action is staggering" and that the program could therefore pass muster only if supported by "clear congressional authorization" (which again, the Court held, did not exist).[63]

As noted above, this collection of cases, along with the growing body of lower court decisions picking up on its cues,[64] leaves much unresolved. Of particular importance, there is considerable debate about which factors are relevant to determining whether (and how) an agency action qualifies as significant enough to trigger the MQD's application.[65] In applying the MQD, for instance, the Court has occasionally adverted to the fact that Congress tried and failed to enact a measure similar to the agency action under review, just as it has sometimes drawn attention to an alleged lack of agency expertise concerning the content or form of the regulation at issue.[66] Some justices have suggested that other factors, like federalism impacts,

62. 20 U.S.C. §§ 1098aa–1098ee.

63. Biden v. Nebraska, 143 S. Ct. at 2373, 2375 (quoting West Virginia v. EPA, 142 S. Ct. at 2608–09). Some aspects of *Biden v. Nebraska* could be read as diluting the agency MQD; in particular, and in contrast to *West Virginia*, the Court began its analysis by explaining why the secretary's reading of the HEROES Act was incorrect as a textualist matter before only then invoking the MQD to reaffirm its earlier conclusion. *See id.* at 2375; *see also* Levin, *supra* note 8, at 927 (noting that the opinion is "opaque as to the degree of force that the Court would have been willing to accord to the doctrine under other circumstances"). Nevertheless, we view the decision as largely consistent with *West Virginia* insofar as it continues to suggest that "clear congressional authorization" is necessary to sustain purportedly "major" administrative action against statutory attack. The only relevant difference between *West Virginia* and *Biden v. Nebraska* is that the Court in the latter case felt confident enough about its statutory holding that it was willing to state the conclusion as a matter of "routine statutory interpretation" before proceeding to note that the challenged action was *especially* deficient in light of its major character. *See* Walters, *supra* note 37, at 487 (noting the possibility that *Biden v. Nebraska* might be read to suggest that "the Court prefers to invoke the major questions doctrine only *after* conducting a traditional textualist analysis" but ultimately concluding that "it is far more likely that the Court still construes the major questions doctrine as a clear statement rule and simply moved it after its de novo statutory interpretation for political purposes").

64. *See, e.g.*, Sohoni, *supra* note 8, at 262. For a more recent overview, see Ling Ritter, *Elephants in Mouseholes: The Major Questions Doctrine in the Lower Courts*, 76 STAN. L. REV. 1381, 1387 (2024) (cataloguing ways in which "the major questions doctrine has featured in lower court challenges across a vast expanse of policy areas, including but not limited to: environmental regulation, public health, education, immigration, data privacy, labor and employment, election law, public safety, and national security, economic affairs, and anti-discrimination law," while further noting that, although "[l]ower courts and litigants appear to diverge on the subject of how to assess whether a given action qualifies as 'major,'" it is "evident that the 'clear congressional authorization' bar has teeth").

65. *See, e.g.*, Brunstein & Goodson, *supra* note 37, at 80 (emphasizing that the "unheralded" nature of challenged agency action functions as a key triggering factor for the MQD).

66. *See* West Virginia v. EPA, 142 S. Ct. at 2614 ("[W]e cannot ignore that the regulatory writ EPA newly uncovered conveniently enabled it to enact a program that . . . Congress considered and rejected multiple times."); Brunstein & Goodson, *supra* note 37, at 80 (emphasizing that the "unheralded" nature of challenged agency action functions as a key triggering factor for the MQD).

might also trigger the MQD.[67] Other questions and apparent inconsistencies remain as well.[68] But in spite of all this, we think the core of the rule is now well established: *if* agency action qualifies as "major" (whatever that might mean), then it is *presumptively* unauthorized. And only a showing of "clear congressional authorization" can suffice to overcome the presumption of statutory invalidity.[69]

B. The Judicial MQD

Not all statutory cases involve questions about agency power. Many such cases instead involve what we might call "standalone" statutes that impose substantive rules on private and public actors without directly empowering administrative agencies to implement those rules through regulatory action.[70] Other statutes (most notably federal criminal statutes) do rely on agency enforcement in a technical sense (e.g., criminal prosecutions are brought by the U.S. Department of Justice) but are generally not viewed as being subject to regulatory implementation by the agency itself.[71] And still other statutes rely on something of a mix between agency enforcement and enforcement via privately initiated civil litigation.[72] All of which is to say that courts routinely decide questions of statutory law that do not implicate the scope of a regulatory agency's congressionally delegated powers.

Where this is the case, then, it is *courts* rather than agencies that take on implementation-related responsibilities.[73] For example, a large part of what

67. West Virginia v. EPA, 142 S. Ct. at 2621 (Gorsuch, J., concurring).

68. *See, e.g.*, Todd Phillips & Beau Baumann, *The Major Questions Doctrine's Domain*, 89 BROOK. L. REV. 747, 754–55 (2024) (highlighting unresolved questions concerning, among other things, "whether the MQD applies to regulatory schemes requiring agencies to proceed case-by-case in enforcement proceedings" and how or whether "the MQD interacts with preexisting legal standards that purport to offer binding interpretations of statutory text").

69. *Accord* Levin, *supra* note 8, at 929 (noting that notwithstanding ongoing uncertainties about the scope and operation of the MQD, "the most recent opinions have articulated a clear statement approach forcefully enough to invite the conclusion that the Court will probably continue to adhere to it").

70. *Cf.* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2266 (2024) ("Courts, after all, routinely confront statutory ambiguities in cases . . . that do not involve agency interpretations or delegations of authority.").

71. *Cf.* Dan M. Kahan, *Is* Chevron *Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 470 (1996) (arguing that "federal criminal law, as a whole, is best conceptualized as a regime of delegated common law-making"). *But cf.* Daniel Richman, *Defining Crime, Delegating Authority—How Different Are Administrative Crimes?*, 39 YALE L.J. ON REGUL. 304, 312–13 (2022) (highlighting ways in which administrative agencies are involved in the implementation of federal criminal law). To be sure, some statutes confer special regulatory powers on the U.S. Department of Justice in addition to defining the prohibitions that its prosecutors enforce by way of criminal prosecutions. *See, e.g.*, Gundy v. United States, 139 S. Ct. 2116 (2019) (rejecting a nondelegation challenge to a provision of the federal Sex Offender Registration and Notification Act (SORNA) delegating to the attorney general the authority to "specify the applicability" of the statute's registration requirements to persons convicted of a sex-offense prior to SORNA's enactment).

72. *See generally* Michael Coenen, *Spillover Across Remedies*, 98 MINN. L. REV. 1211, 1233–35 (2014) (highlighting examples of such "hybrid statutes").

73. *See generally* Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035,

gives force to the antidiscrimination prohibitions of Title VII is the reality that an employer who violates its terms can be sued and, if the suit is successful, be forced to pay damages by a court that hears the case.[74] A large part of what gives force to the prohibitions of federal antitrust law is the reality that courts can impose civil liability, criminal penalties, and injunctive remedies on defendants found to violate its terms.[75] And a large part of what gives force to the host of prohibitions codified within the federal criminal law is the reality that criminal prosecutions can and will result in convictions and sentences imposed by the relevant courts. For laws of this sort, then, questions of statutory meaning cannot be disaggregated from questions about judicial power: the greater the scope of a statute's prohibitions, the greater the scope of a court's authority to enforce it. Thus, if and when courts (and especially *federal courts*) render decisions about what a statute provides, they are also rendering decisions about how much power Congress has, through that statute, given to them.[76]

Some judicial decisions might in this sense be viewed as involving "major" assertions of power by the courts. In other words, there are decisions that broaden the scope of a statute's judicially enforceable prohibitions in a manner that is likely to have major economic, political, and social consequences for the country as a whole. In recent years, for example, the Court has held that affirmative action in higher education admissions violates the antidiscrimination provisions of Title VI,[77] that discrimination on the

1040 (2006) (noting, with respect to standalone statutes, that "Congress expresses an implicit preference for judicial [over agency] interpretation by declining to entrust enforcement authority to any particular agency or, perhaps, by assigning responsibility to several agencies").

74. 42 U.S.C. § 2000e-5(f)(3) (providing federal district courts with jurisdiction over civil actions to enforce Title VII).

75. *See, e.g.*, Christine P. Bartholomew, *The Dark Side of Antitrust Statements of Interest*, 49 IOWA J. CORP. L. 233, 234–36 (2024) (describing current state of play in antitrust enforcement).

76. Most federal statutes allow for the exercise of concurrent jurisdiction by federal and state courts, meaning that state courts also play a role in implementing their terms. *See generally* Testa v. Katt, 330 U.S. 386 (1947) (generally recognizing the "power and duty" of state courts to "enforce federal laws"). This is a point we want to acknowledge at the outset of this Article, because it suggests that if there is (or should be) such a thing as the judicial MQD, such a rule would need to apply with as much force to state courts as it does to federal courts. That is, if the equal application thesis is correct, then state courts faced with unresolved questions of federal statutory law would also need to steer clear of any "major" decisions lacking in "clear congressional authorization." Indeed, it may be that some of the MQD's justifications apply with *special* force to state courts. To take one example, to the extent the agency MQD is motivated by constitutional nondelegation concerns, state courts would seem to be an especially problematic repository of delegated congressional authority, even relative to their federal judicial counterparts. *See infra* Part III.B. But unless otherwise noted, we will generally speak about the judicial MQD as a limit on federal judicial authority, understanding that an equally strong (if not stronger) limit on state judicial authority would likely flow from its commands.

77. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2175–76 (2023) (holding that Harvard University's affirmative action admissions policy violated the Equal Protection Clause of the Fourteenth Amendment); *id.* at 2156 n.2 ("[D]iscrimination that violates the Equal Protection Clause of the Fourteenth Amendment

basis of sexual orientation and gender identity are encompassed within Title VII's prohibition on sex discrimination,[78] and that the NCAA's regulation of student athletes is subject to the requirements of federal antitrust law,[79] just to name a few examples. And in none of these cases did the Court pause to consider whether it should apply a strong, majorness-based presumption against reaching those results. There are, moreover, statutory interpretation questions on the horizon that could yield similarly major rulings, including, perhaps notably, a ruling that the 1873 Comstock Act[80] prohibits the mailing and receipt of abortion medication.[81]

As the foregoing discussion suggests, there is no officially recognized judicial MQD. But it would be too much to suggest that courts approach statutory questions without any concern for the potential majorness of their rulings. In particular, there does exist a canon of statutory construction that one could plausibly characterize as a weak-form judicial MQD: the so-called "elephants-in-mouseholes" canon. This canon's premise is that "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."[82] And although the canon itself speaks of majorness in relation to "regulatory scheme[s]," courts have sometimes invoked it in cases not involving agency power: specifically, courts have sometimes understood the canon to counsel against constructions of seemingly "minor" statutory provisions to yield major-seeming judicial results.

There are, however, important differences between the elephants-in-mouseholes canon and the agency MQD as articulated in *West Virginia*. Of particular importance, whereas the latter seems to assume the form of a rigidified and rule-like requirement, the elephants-in-mouseholes canon merely purports to operate as one (of many) tools to guide the exercise of "routine statutory interpretation," and it does not direct a court to reject what it regards as the best interpretation of an ambiguous provision simply because the relevant statutory language is insufficiently "clear."[83]

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committed by an institution that accepts federal funds also constitutes a violation of Title VI.").

78. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020) ("An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex.").

79. Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2160 (2021) (holding that the Sherman Act's rule of reason applies to the NCAA "in its usual form").

80. 18 U.S.C. §§ 1461–1465.

81. *See generally* Application of the Comstock Act to the Mailing of Prescription Drugs That Can Be Used for Abortions, 46 Op. O.L.C. 1 (slip op.) (Dec. 23, 2023) (concluding that 18 U.S.C. § 1461 does not prohibit the mailing of abortion medications "where the sender lacks the intent that the recipient of the drugs will use them unlawfully").

82. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001).

83. *See infra* Part IV.C. Another relevant difference is that the elephants-in-mouseholes canon appears to conceive of "majorness" as relative to the nature of the statutory text being considered; that is, the canon seeks to avoid a "mismatch" between: (i) the framing, placement, and context of a statutory provision; and (ii) the consequences of a particular reading of that provision. *West Virginia*'s formulation of the agency MQD, by contrast, instructs courts to evaluate majorness in the abstract; that is, the question whether agency

The distinction becomes apparent when one compares the Court's holding in *West Virginia*—which, recall, refused to treat generation shifting as a "system of emissions reduction"—with its earlier holding in *Bostock v. Clayton County*,[84] in which Justice Gorsuch's majority opinion concluded that the elephants-in-mouseholes canon *did not* preclude the Court from construing Title VII's prohibition on "discrimination because of sex" as encompassing (and thus empowering courts to adjudicate) claims of discrimination involving sexual orientation and gender identity.[85] Candidly recognizing the "elephant"-like nature of its bottom-line holding, the Court in *Bostock* nonetheless regarded that holding as fully consistent with what it saw as a much-bigger-than-mouse-sized statutory text.[86] Central to the Court's argument was the suggestion that the relevant statutory language—which made it unlawful for an employer to "discriminate against any individual . . . because of such individual's . . . sex"—was "written in starkly broad terms" that it "virtually guaranteed that unexpected applications would emerge over time."[87] That is, even though Congress had not specifically identified sexual orientation and gender identity as protected classifications within the text of Title VII, its reliance on a "general statutory rule" was enough to justify the Court's own elephant-like application of the statute.[88] Thus, and in stark contrast to *West Virginia*—where the "vague," "oblique," and "elliptical" nature of § 111(d)'s "system of emissions reduction" language counted as a reason *against* upholding a "major" agency action[89]—the "broad language" of Title VII counted as a reason in favor of recognizing a congressional willingness to permit "unexpected applications" of that language "over time."[90] Statutory capaciousness, rather than statutory clarity, ultimately sufficed to justify the Court's assertion that "[t]his elephant . . . has been standing before us all along."[91]

To be sure, that is just one application of the canon, and its terms are certainly flexible and open-ended enough to accommodate more or less rigorous applications in future cases. But that fact only underscores the distinction we are trying to draw: the elephants-in-mouseholes canon does not purport to impose a mandatory rule on courts, much less displace "normal statutory interpretation" with a different methodological approach. It may,

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action counts as "major" is treated as antecedent to and thus logically independent of the question of whether there exists "clear congressional authorization" for it.

84. 140 S. Ct. 1731 (2020).

85. *Id.* at 1747, 1753.

86. *Id.*

87. *Id.* at 1750, 1753.

88. *Id.* at 1747.

89. West Virginia v. EPA, 142 S. Ct. at 2609, 2611; *see also id.* at 2622–23, 2624 (Gorsuch, J., concurring) (quoting Spector v. Norwegian Cruise Line, Ltd., 545 U.S. 119, 139 (2005)) (explaining the proposition that "broad or general language" does not generally suffice to authorize major agency actions, while also faulting the agency for "cit[ing] no specific statutory authority allowing it to transform the nation's power supply").

90. *Bostock*, 140 S. Ct. at 1753.

91. *See* Jacob, *supra* note 20, at 575 (emphasizing that Justice Gorsuch's majority opinion in *Bostock* "essentially concedes that Title VII fails to provide 'clear congressional authorization' for the interpretation" the Court endorsed).

at the margins, operate to discourage courts from applying some types of statutory provisions in major-seeming ways. But it does so in a manner that affords the courts more flexibility and wiggle room than agencies receive under the more rigid and rule-like constraints of the agency MQD.[92]

C. The Effect of Loper Bright

Having introduced the agency and judicial MQDs, we pause here to highlight one important question concerning the scope of their respective domains. The agency MQD, recall, applies to statutory provisions that define the scope of agencies' regulatory powers, whereas the judicial MQD (to the extent it exists at all) applies to "standalone" statutes that enshrine rules for courts to enforce on their own. Prior to the Court's decision in *Loper Bright*, one could understand this distinction to track, at least generally, the distinction between statutory provisions that appear within agencies' enabling statutes and those that appear within non-agency-related statutes. Post–*Loper Bright*, however, we think that distinction is overdrawn and that there now exists a meaningful category of statutory provisions that, though embedded within the statutes that agencies administer, are better regarded as implicating the *judicial* rather than agency MQD.

Some provisions of enabling statutes explicitly confer discretionary powers on agencies. Provisions like these continue to implicate the agency MQD and, not surprisingly, have been the focus of the Court's most recent decisions applying the doctrine.[93] But other provisions within enabling statutes do not confer discretionary powers in their own right; rather, they

92. One also finds cases in which the Court has construed non-agency-related statutes with an eye toward avoiding outcomes that might sometimes turn out to qualify as "major" in a more particularized sense. These include cases applying subject-specific canons, such as the rule of lenity, the presumption against preemption, the clear statement rules governing abrogation of sovereign immunity, the "Indian canons of construction," and the *Charming Betsy* canon, all of which might sometimes direct courts away from major-seeming statutory holdings. Canons of this sort might similarly be grouped under the heading of a judicial MQD. *See generally* Ilan Wurman, *Importance and Interpretive Questions*, 110 VA. L. REV. 909, 981 (2024) (suggesting, albeit tentatively, that "a quasi-linguistic canon for resolving ambiguities may justify other substantive canons that are otherwise hard to justify on textualist grounds"). But this collection of decisions—which at best can be seen as giving rise to a hodgepodge of different "importance canons"—still does not include anything akin to the clear statement rule of the agency MQD. More importantly, the applicability of such canons turns on triggering criteria that may or may not be indicative of majorness in a given statutory case.

93. *See, e.g.*, West Virginia v. EPA, 142 S. Ct. at 2599 (applying the agency MQD to a statutory provision that empowered the EPA to prescribe a "best system of emission reduction"); Ala. Ass'n of Realtors v. Dep't of Health & Human Servs., 141 S. Ct. 2485, 2487 (2021) (applying the agency MQD to a statutory provision that empowered the surgeon general (and by extension the CDC) to "make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission or spread of communicable diseases"); Nat'l Fed'n of Indep. Bus. v. Occupational Safety & Health Admin., 142 S. Ct. 661, 663 (2022) (applying the agency MQD to a statutory provision that empowered OSHA to prescribe "occupational safety and health standards"); Biden v. Nebraska, 143 S. Ct. 2355, 2368 (2023) (applying the MQD to a statutory provision authorizing the secretary of education to "waive or modify" rules concerning financial assistance programs established by the Higher Education Act of 1965).

simply define the substantive rules that agencies are tasked with enforcing. Before *Loper Bright*, courts generally treated ambiguous language within such provisions as conveying an implicit delegation of authority to the agency to adopt whatever "permissible" construction of the ambiguity the agency thought best.[94] That being so, it would also have made sense to apply the agency MQD to cases in which agencies construed such ambiguities in a major-seeming manner. After all, given *Chevron*, the agency was still making a seemingly discretionary decision to elevate the major-seeming construction over other "permissible" alternatives. But with *Loper Bright* now on the books, it no longer makes sense to speak of such provisions in this way; rather, such provisions simply have a single, "true" meaning that the courts (and courts alone) are tasked with identifying. That is, with *Chevron* deference now a thing of the past, the agency MQD no longer seems apt for judicial proclamations about the scope of ambiguous rules that agencies must enforce. Such rules, after all, no longer in any real sense create zones of discretion within which agencies choose to operate; rather, they simply carry a hidden meaning that courts have the power to discern.

To take one example, consider *National Cable & Telecommunications Ass'n v. Brand X*.[95] There, the Court held that the Federal Communications Commission (FCC) had permissibly construed a reference in the Communications Act of 1934[96] to "telecommunications service[s]" as excluding the selling of broadband internet service by cable companies.[97] Viewed through the lens of the *Chevron* framework, this conclusion carried important implications regarding the FCC's power to make a potentially important decision about the on-the-ground operation of the Communications Act; in particular, by concluding that the FCC was entitled to *Chevron* deference on the issue, the Court effectively signed off on a discretionary agency authority to exempt (and, perhaps in the future, to unexempt) broadband internet service providers from the statute's common-carrier requirements. A post-*Chevron* Court, by contrast, would have approached the issue in a fundamentally different way: it would have asked whether the statute did or did not dictate the result the FCC had arrived at, and its conclusion would therefore have reflected an exercise of *judicial authority* shaping the substantive scope of the statute itself.

For that reason, we believe that statutory questions of this sort—though once belonging to the domain of the agency MQD—are probably better viewed today as altogether outside its scope. Indeed, such questions are, if anything, probably better regarded as falling within the domain of the judicial

94. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 843 (1984) (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974)) ("The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill *any gap left*, implicitly or explicitly, by Congress." (quoting Morton v. Ruiz, 415 U.S. 199 (1974))), *overruled by* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

95. 545 U.S. 967 (2005).

96. 47 U.S.C. §§ 151–646.

97. *Brand X*, 545 U.S. at 974.

MQD instead. If so, then an interesting and perhaps underappreciated implication of *Loper Bright* would be to diminish the scope of the agency MQD while correspondingly augmenting the scope of the judicial MQD.

Let us now turn to the question of whether courts can coherently choose to apply a robust agency MQD while either failing to apply or merely applying a diluted version of the judicial MQD. In other words, we want to ask whether the agency MQD necessitates the adoption of an equally strong judicial MQD that limits the courts' power to take major statutory actions of their own. Although a few scholars have begun to consider that question,[98] our hope here is to offer a thorough testing of the thesis by reference to a wide range of different potential justifications that might turn out to underlie the agency MQD itself.[99] To that end, the ensuing analysis will describe what we take to be the most plausible justifications for the agency MQD and to consider what each justification implies for the judicial MQD. We begin in Part II with two potential justifications that are "Congress-protecting" in character, and we continue in Part III with two additional justifications that are "Congress-constraining" in character.

II. THE MAJOR QUESTIONS DOCTRINE AS A CONGRESS-PROTECTING DEVICE

An initial set of rationales for the agency MQD might proceed from the premise that the doctrine seeks to protect Congress as the principal lawmaker in the constitutional system.[100] As we see it, there are two variations on the theme, the first of which we call the *semantic justification* and the second of which we call *anti-aggrandizement justification*. Both of these justifications start from the key (though highly contestable) premise that Congress is hesitant to authorize administrative agencies to take major actions on its behalf. But the justifications respond to that premise in different ways. In particular, the semantic justification views the agency MQD as a tool that helps to reveal the "true" meaning of Congress's statutory commands. The anti-aggrandizement justification, by contrast, sees the doctrine as a prophylactic means of preventing agencies from "arrogating"[101] powers to themselves at Congress's expense—one that sometimes goes so far as to require courts to embrace facially implausible constructions of statutory terms for purposes of studiously avoiding the unwanted specter of an agency "exploit[ing]"[102] the scope of its statutory authority.

98. *See* Jacob, *supra* note 20, at 569 ("[A]n aggressive major questions doctrine could extend its reach to judicial interpretation . . . ."); Merrill, *supra* note 20.

99. *See infra* Parts II–III.

100. *See, e.g.*, Ala. Ass'n of Realtors v. Dep't of Health & Human Servs., 141 S. Ct. 2485, 2490 (2021) (defending reliance on the MQD in a case involving a COVID-19–related rent moratorium by emphasizing that "[i]t is up to Congress, not the CDC, to decide whether the public interest merits further action here").

101. Biden v. Nebraska, 143 S. Ct. 2355, 2373 (2023).

102. Nat'l Fed'n of Indep. Bus. v. Occupational Safety & Health Admin., 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring).

In this part, we argue that each of these two Congress-protecting justifications for the agency MQD apply with equal force to judicial efforts to interpret and apply Congress's statutes in major-seeming ways. Thus, to the extent one views the agency MQD exclusively as a Congress-protecting device, one should accept the equal application thesis and adopt an equally stringent version of the judicial MQD.

A. The Semantic Justification

1. The Semantic Justification for the Agency MQD

The semantic justification for the MQD is that it protects Congress by effectuating the best interpretation of a statute's meaning based on a presumption about how Congress uses language. The agency MQD on this view reflects a "practical understanding of legislative intent" based on a "commonsense" intuition about the "manner in which Congress [is] likely to delegate."[103] According to the semantic justification, courts should generally not understand Congress's "open-ended" instructions as encompassing major policy actions, even when those instructions would "literally" seem to include them.[104] This intuition supports the idea that the MQD helps courts identify the "best interpretation of the text."[105] Thus, the semantic justification sees no inconsistency between the core tenets of textualism and the commands of the MQD itself.

The Court itself has offered little further elaboration on the semantic justification, but Justice Barrett recently elaborated on it in her concurring opinion in *Biden v. Nebraska*. According to Justice Barrett, the semantic case for the MQD follows from the premise that speakers generally apply an "expectation of clarity" when asking whether a principal has authorized an agent to undertake "major" actions on the principal's behalf: that is, as a matter of "context," we do not generally understand one person's "open-ended" instructions to another as encompassing certain "major" actions that the instructions in isolation would "literally" seem to include.[106] Justice Barrett develops the idea by way of an example involving a babysitter who, upon being given the parents' credit card and being instructed to "[m]ake sure the kids have fun," proceeds to "take[] the kids on a road trip to an amusement park, where they spend two days on rollercoasters and one night in a hotel."[107] Even if, Justice Barrett argues, the babysitter's actions were authorized by the parents' instructions "in a literal sense," most of us would still regard the babysitters actions as not "consistent with a reasonable understanding of" what the parents authorized the babysitter to do.[108] And

103. West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000)).
104. Biden v. Nebraska, 143 S. Ct. at 2378–79 (Barrett, J., concurring).
105. *Id.* at 2378.
106. *Id.* at 2378–79, 2380.
107. *Id.* at 2379.
108. *Id.* at 2379–80.

that is so, she continues, because "[i]f a parent were willing to greenlight a trip that big, we would expect much more clarity than a general instruction to 'make sure the kids have fun.'"[109]

In Justice Barrett's view, the babysitter example helps to explain why, within the world of administrative law, background context similarly supports the expectation that Congress will "speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"[110] From Congress's perspective, she reasons, such an assignment of a "major" decision-making authority to an agency would seem to be a big deal—especially if we presume, as the Court has put it elsewhere, that Congress "normally 'intends to make major policy decisions itself.'"[111] And if we generally expect principals to speak clearly when intending to communicate "big-deal" instructions to their agents, we should more specifically expect Congress (as the principal with respect to the laws it enacts) to speak clearly when authorizing executive-branch officials (as its agents) to implement its laws in major-seeming ways. Hence, when an agency claims the statutory authority to do something "major," courts should greet the claim with "skepticism,"[112] presuming that the absence of *explicit* statutory authorization signifies a congressional unwillingness to let the agency do that major thing.[113]

The semantic justification for the MQD is not uncontroversial. Critics have contended, for instance, that the argument's heavy emphasis on "context" undermines its pretensions to being textualist in orientation.[114] Others have questioned the empirical premises of the argument.[115] And there

109. *Id.* at 2380.

110. *Id.* (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

111. *Id.*; *see also* West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022) ("We presume that 'Congress intends to make major policy decisions itself, not leave those decisions to agencies.'" (quoting U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc))).

112. Biden v. Nebraska, 143 S. Ct. at 2381 (Barrett, J., concurring); West Virginia v. EPA, 142 S. Ct. at 2609 ("[W]e 'typically greet' assertions of 'extravagant statutory power over the national economy' with 'skepticism.'" (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324)).

113. Justice Barrett's semantic account of the MQD dovetails with the thesis of a recent article by Professor Ilan Wurman. *See* Wurman, *supra* note 92. There, Professor Wurman similarly suggests that the MQD makes sense as a "kind of linguistic canon," premised on the idea that "ordinarily, lawmakers and private parties tend to speak clearly, and interpreters tend to expect clarity, when those lawmakers or parties authorize others to make important decisions on their behalf." *Id.* at 916.

114. *See* Adrian Vermeule, *Text and "Context"*, YALE J. ON REGUL.: NOTICE & COMMENT BLOG (July 13, 2023), https://www.yalejreg.com/nc/text-and-context-by-adrian-vermeule/ [https://perma.cc/7SPU-5YUB] ("The very maxims that Justice Barrett wants to describe as common-sensical 'historical and governmental context' or 'background legal conventions' are indistinguishable from the ones she wants to describe as problematic substantive 'values external to the statute.'"); Jed Shugerman, Biden v. Nebraska*: The New State Standing and the (Old) Purposive Major Questions Doctrine*, CATO SUP. CT. REV., 2022–2023, at 209, 235 (emphasizing Justice Barrett's "conflation of the normative and descriptive," particularly with respect to her reliance on constitutional nondelegation principles).

115. *See generally* Kevin Tobia, Daniel E. Walters & Brian Slocum, *Major Questions, Common Sense?*, 97 S. CAL. L. REV. 1153, 1197–1204 (2024) (finding, based on a survey of laypersons, that respondents generally deemed the babysitter's actions to be authorized by the

is the further difficulty that, even if the justification's premises all turn out to be correct, the MQD's triggering criteria are not specific enough to ensure predictable and value-neutral application by the courts.[116] For our purposes, however, these criticisms can be put to one side. We will assume for now that the agency MQD is justified by the premise that Congress, as a principal, does not intend to offhandedly, casually, or otherwise implicitly authorize its agents within the executive branch to do "major" things on its behalf. The question we want to answer is whether that same point would apply to laws directed towards Congress's "agents" within the federal judiciary.

2. The Semantic Justification and the Equal Application Thesis

In our view, the semantic justification implies an equally strong limit on courts' powers to render statutory decisions of "vast economic and political significance" when interpreting Congress's statutes. That justification, recall, stems from a broadly applicable premise about how principals use language when addressing their agents, and its application therefore ought not to depend on the nature of the particular "agent" that is acting on Congress's behalf. Whether we are dealing with parents and babysitters, employers and employees, Congress and and administrative agencies, or Congress and the courts, the premise points to the same conclusion: principals typically reserve major decisions for themselves and are clear when they intend to take the unusual step of authorizing their agents to take major actions.[117] Therefore, if the premise supports an agency MQD, it ought to similarly support the judicial MQD as well.

To put the point another way, the semantic justification insists that open-ended statutory text does not authorize major exercises of statutory authority because Congress would only choose to permit such exercises through the use of explicit and specific instructions. If that is correct, then the semantic justification applies to courts too. There are differences between courts and agencies. But both share the important trait of not being

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parent's instructions, contrary to the predictions of Justice Barrett); *see also* Shugerman, *supra* note 114, at 236–37 (collecting sources for the claim that "[l]egislatures often deliberately speak unclearly, sometimes out of necessity to delegate power to address unclear future problems like emergencies (more below), and sometimes out of political reality, sometimes out of the reality of limited time and limited consensus"). A related argument faults the semantic rationale for its failure to grapple with the Congressional Review Act, 5 U.S.C. §§ 801–808, (CRA) a law that on its face seems to presuppose the possibility that agencies will exercise vaguely defined powers in major-seeming ways. *See* Chad Squitieri, *Who Determines Majorness?*, 44 HARV. J.L. & PUB. POL'Y 463, 466 (2022) (emphasizing that the CRA "presumes that federal agencies will answer major questions through major rules, and that those rules are to be given legal effect unless Congress expressly says otherwise").

116. *See, e.g.*, Levin, *supra* note 8, at 966 ("Th[e] lack of articulated boundaries [concerning the scope of the MQD] fortifies the criticism that the major questions doctrine is in tension with rule-of-law values.").

117. *See* Biden v. Nebraska, 143 S. Ct. at 2380 (Barrett, J., concurring) (contending that the MQD "grows out of these same commonsense principles of communication" as those illustrated by various hypotheticals involving principals and agents).

Congress.[118] If Congress in fact does not want to have executive-branch actors make major decisions in its stead, it should feel no better about the prospect of judicial-branch actors doing the same.[119] Thus, we should expect that a Congress that typically reserves major decisions for itself would be reluctant to confer on courts the authority to make major statutory decisions in its stead.

We can imagine two potential rejoinders to this argument, neither of which is ultimately persuasive. The first rejoinder goes like this: the semantic justification for the agency MQD has no implications for judicial implementation of legislative commands because Congress and the courts do not occupy a principal-agent relationship. The semantic justification, recall, is premised on a "commonsense" intuition about the communicative norms that people apply when authorizing others to act on their behalf. That intuition, the argument would continue, translates naturally to the context of administrative law, where administrative agencies operate (as their name suggests) as "agents" of the legislature and where statutes purport to authorize, instruct, or otherwise empower those "agents" to do specific things. But the justification translates less easily to standalone statutory cases, in which courts are being asked by one party to determine whether another party (who may or may not be an agency actor) has complied with statutory law. Thus, the argument goes, even if we assume that Congress does not lightly authorize *its own agents* to do major things, that assumption does not carry over into circumstances in which "non-agent" courts proceed to render decisions about what Congress has authorized, prohibited, or required, among other things, by way of substantive statutory commands.

The problem with this argument, we think, is that its underlying premise is wrong. Although courts may not qualify as "agents" of Congress for any and all purposes, we think it makes perfect sense to characterize them as agents of Congress for purposes of interpreting and applying the laws that Congress has written. Indeed, in her previous life as an academic, Justice Barrett endorsed just this idea, defending core tenets of textualism by making clear that "federal courts function as the faithful agents of Congress" when interpreting federal statutes.[120] This view of the courts, she explained, is

118. *See* Coenen & Davis, *supra* note 20, at 807 (noting that "the Court is just as much 'not Congress' as an agency").

119. *Cf.* Beau J. Baumann, *Let's Talk About That Barrett Concurrence (on the "Contextual Major Questions Doctrine")*, YALE J. ON REGUL.: NOTICE & COMMENT BLOG (June 30, 2023), https://www.yalejreg.com/nc/lets-talk-about-that-barrett-concurrence-on-the-contextual-major-questions-doctrine-by-beau-j-baumann/ [https://perma.cc/Q32L-5P4N] (emphasizing that the "linguistic insight" underlying the semantic justification "cut[s] against both of Congress's agents, both courts and agencies" and that if indeed "agencies should pause before doing something major," then "the same goes for courts").

120. Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 112 (2010). In advancing this claim, then-Professor Barrett relied heavily on the work of Professor John Manning, who has defended the idea that federal courts should understand themselves as agents of Congress. *See* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 9 (2001) (tracing the Court's own endorsement of the "faithful agent theory" back to the Marshall Court and contending that the theory "ultimately withstood the test of time"). The contrary view, defended by Professor William Eskridge, is that courts

"animated by a strong commitment to legislative supremacy," according to which the job of a court is to "implement congressional commands" as Congress itself has articulated them.[121] Viewed from that vantage point, a court deciding statutory cases is acting in no less an agency-like capacity than is an agency exercising policymaking discretion; the job of both institutions is to "implement" the statute by reference to "the best understanding of Congress's instructions."[122] And thus, any imputed hesitations Congress might feel about authorizing agents in the executive branch to act majorly are hesitations that such a Congress would naturally seem to feel about authorizing agents in the judicial branch to do the same.[123]

The second potential rejoinder to our argument is a variation on the first. Perhaps the semantic justification for the agency MQD does not carry over to the judicial MQD because administrators and judges—though both agents of Congress—are involved in fundamentally different types of tasks. Agencies, the argument goes, are in the business of *formulating policy*, whereas courts are in the business of *interpreting law*. That being so, one can argue that a Congress wishing to "make policy decisions itself" would not be bothered by major actions that reflect mere interpretive judgment rather than active exercises of policymaking.

One could respond to this point by contesting its underlying premise: in particular, one might insist that statutory interpretation does indeed require the exercise of policy discretion, particularly when the relevant congressional instructions are unclear.[124] But we think the "interpretation-is-different-from-policymaking" argument suffers from a more basic flaw.[125] Even if we agree that courts "merely" interpret the law

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are "cooperative partners" of Congress, acting as "both agents carrying out directives laid out by the legislature and partners in the enterprise of law elaboration." William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 992 (2001). It is not clear that the two views—agency on the one hand, partnership on the other—are that far apart: after all, partnership relationships are fiduciary relationships, as are principal-agent relationships. *See* Seth Davis, *The False Promise of Fiduciary Government*, 89 NOTRE DAME L. REV. 1145, 1146 (2014) ("[F]iduciary law encompasses . . . the traditional doctrinal categories—trust, agency, partnership, corporations, and so on . . . ."). We therefore think that the "cooperative partnership" model, like the "faithful agent" model, is consistent with the equal application thesis.

121. Barrett, *supra* note 120, at 110, 125.

122. *Id.* at 112, 123.

123. *See* Jacob, *supra* note 20, at 573 ("As a doctrine designed to divine legislative intent from statutory context, [the MQD] would seem universally applicable to all statutory interpretation."); *cf.* Klein, *supra* note 20, at 340 (suggesting that Justice Barrett's reasoning about semantic meaning "transfers readily to the APA's judicial review provisions" and thus ought to militate against a construction that would vest "district court judges with unusual forms of authority").

124. Indeed, Justice Barrett herself has suggested that "[s]tatutory ambiguity is essentially a delegation of policymaking authority" that permits judges to "rely[] on extra-statutory policies" for purposes of resolving the ambiguity at hand. Barrett, *supra* note 120, at 123.

125. To be clear, the distinction between interpretation and policymaking might well matter when it comes to other potential justifications for the agency MQD; indeed, as we suggest in Part III, we think the distinction offers some support to the suggestion that an agency MQD justified by the nondelegation doctrine does not necessarily imply a similarly strong MQD for

(and thus do not "make" policy in a traditional sense), it by no means follows that their law-interpreting acts lack significance from a policy perspective. To determine whether a congressional enactment means one thing or another is, in many instances, to determine how multibillion dollar industries must operate,[126] whether politically salient state-level (or executive-branch) policy initiatives will go forward or grind to a halt,[127] whether high-profile culture war disputes should be resolved in favor of one set of adversaries or another,[128] or whether any number of other high-stakes sorts of cases should be resolved in one way or another.[129] Decisions of this sort—even when articulated as decisions about the "meaning" of the law—are capable of yielding outcomes of "vast economic and political significance." And we think it is implausible that the sort of Congress envisioned by the agency MQD's semantic justification would cease to care about such outcomes simply because they were reached by way of "interpretive" rather than discretionary choices.

Indeed, when viewed in this light, the judicial MQD may in fact follow a fortiori from the (semantically justified) agency MQD. The agency MQD, after all, already purports to act as a limit on courts' interpretive authority: that rule is premised on the idea that Congress would not want courts to interpret unclear enabling statutes in such a way as to yield the "major" outcome of permitting some agency to take an act of vast economic and political significance. We think it would be odd for a Congress that views things in this way to simultaneously harbor no qualms about judicial interpretations that have "vast economic and political significance" in their own right. Put differently, if we think Congress disapproves of judicial decisions that have the effect of empowering executive-branch intermediaries to act in a manner that yields major consequences, we should think that Congress would even more strongly disapprove of judicial decisions that directly dictate those major consequences on their own.

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the courts. *See infra* Part III.B.2.b.i. Our point here is simply that we do not see why the distinction ought to matter when it comes to the semantic justification for the agency MQD.

126. *See, e.g.*, Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2167 (2021) (treating the NCAA's compensation restrictions for student athletes as subject to the requirements of federal antitrust law).

127. *See, e.g.*, Arizona v. United States, 567 U.S. 387, 416 (2012) (deeming a series of controversial and high-profile Arizona laws concerning noncitizens to be preempted by federal immigration law); *see also* Burwell v. Hobby Lobby Stores, 573 U.S. 682, 738 (2014) (concluding that the U.S. Department of Health & Human Services' contraception mandate was inconsistent with the federal Religious Freedom Restoration Act insofar as it applied to closely-held for-profit corporations whose owners claimed an abridgement of their sincerely-held religious beliefs).

128. *See, e.g.*, Moyle v. United States, 144 S. Ct. 2015, 2016 (2024) (per curiam) (dismissing as improvidently granted earlier writs of certiorari concerning the question of whether the federal Emergency Medical Treatment and Labor Act preempts an Idaho law prohibiting the performance of abortions unless necessary to prevent the patient's death).

129. *See supra* notes 13–15 and accompanying text (highlighting recent examples of arguably major statutory decisions).

B. The Anti-Aggrandizement Justification

The anti-aggrandizement justification posits that the judiciary's task is to protect Congress's turf against the ongoing threat of agency-based encroachment. Like the semantic justification, it shares the premise that Congress does not typically intend to authorize agencies to take major actions on its behalf. But the anti-aggrandizement justification differs from the semantic justification in its implications for what a court must do when it concludes that the more plausible reading of a statute is that it permits rather than forbids the agency to act in a major way. Adopting the less plausible interpretation, even if it turns out to run counter to congressional intent, remains justified as a response to the risk of an even greater constitutional harm—namely, that of allowing an agency to aggrandize its power at the expense of Congress.

The anti-aggrandizement justification for the agency MQD implies an equally rigorous judicial MQD. The reason why, again, is straightforward: a judicial decision may aggrandize power and encroach upon Congress's turf just as much as an agency decision. A Congress that "intends to make major policy decisions itself"[130] is a Congress that would be no more pleased about usurpation of that authority effectuated by a court instead of an agency. And to the extent that the MQD directs a court to adopt the less plausible of two plausible interpretations of an ambiguous statute in order to avoid the risk of aggrandizement, it should apply not only when courts are reviewing an agency's major action, but also when they are deciding whether to take a major action themselves.

1. The Anti-Aggrandizement Justification for the Agency MQD

The Court has described the principle that one branch may not aggrandize its power at another's expense as central to its separation of powers jurisprudence. The core idea behind the anti-aggrandizement principle is that the system of separated powers is especially threatened when one branch seeks to exercise powers within the province of another branch. There is, the Court has presumed, a "hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power."[131] For this reason, the "concern of encroachment and aggrandizement . . . has animated [the Court's] separation of powers jurisprudence and aroused [its] vigilance."[132]

130. West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022) (quoting U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc)).

131. Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919, 951 (1983).

132. Mistretta v. United States, 488 U.S. 361, 382 (1989); *see* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 57–58 (1982) (stating that the framers "designed" the federal courts "to stand independent of the Executive and the Legislature" in order to combat "the encroachment or aggrandizement of one branch at the expense of the other" (quoting Buckley v. Valeo, 424 U.S. 1, 122 (1976) (per curiam) (describing the separation of powers

In *West Virginia*, the Court at one point characterized the agency MQD as a solution to the "particular and recurring problem" of agencies that aim to aggrandize their powers at the expense of Congress.[133] According to the Court, the anti-aggrandizement concern is a "common thread[]" tracing throughout the major questions decisions, including decisions that predate the doctrine in its modern form.[134] The cases include *Utility Air Regulatory Group v. EPA*,[135] in which the Court reasoned that "it would be patently unreasonable—not to say outrageous—for EPA to insist on seizing expansive power that it admits the statute is not designed to grant."[136] In addition to *Utility Air*, the Court in *West Virginia* cited *King v. Burwell*,[137] in which the Court concluded that it was "especially unlikely that Congress would have delegated" a health insurance policy decision to the "IRS, which has no expertise in crafting health insurance policy."[138] Those cases, in turn, cited *FDA v. Brown & Williamson Tobacco Corp.*[139] and *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*,[140] foundational major questions decisions that themselves invoked anti-aggrandizement concerns,[141] and *Gonzales v. Oregon*,[142] which, although not a major questions decision, hinted at worries that the agency was attempting to arrogate power to itself.[143]

Scholars have also suggested that the major questions cases might be seen as a response to the threat of agency aggrandizement. Before *Chevron*'s

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as a set of "self-executing safeguard[s] against the encroachment or aggrandizement of one branch at the expense of the other"))).

133. West Virginia v. EPA, 142 S. Ct. at 2609 (reasoning that the MQD "address[es] a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted").

134. *Id.* ("Scholars and jurists have recognized the common threads between those decisions. So have we.").

135. 573 U.S. 302 (2014).

136. *Id.* at 324 ("[W]e confront a singular situation: an agency laying claim to extravagant statutory power over the national economy while at the same time strenuously asserting that the authority claimed would render the statute 'unrecognizable to the Congress that designed' it.").

137. 576 U.S. 473 (2015).

138. *Id.* at 485–86; *see also* West Virginia v. EPA, 142 S. Ct. at 2609 (first citing *Util. Air*, 573 U.S. at 324; and then citing *King*, 576 U.S. at 486).

139. 529 U.S. 120 (2000).

140. 512 U.S. 218 (1994).

141. *Brown & Williamson*, 529 U.S. at 159–60 ("Congress, for better or for worse, has created a distinct regulatory scheme for tobacco products, squarely rejected proposals to give the FDA jurisdiction over tobacco, and repeatedly acted to preclude any agency from exercising significant policymaking authority in the area."); *MCI Telecomms. Corp.*, 512 U.S. at 231 ("What we have here, in reality, is a fundamental revision of the statute . . . ."); *see Util. Air*, 573 U.S. at 324 (citing both cases).

142. 546 U.S. 243, 266–67 (2006) ("The structure of the [Controlled Substances Act] . . . conveys unwillingness to cede medical judgments to an executive official who lacks medical expertise."); *see King*, 576 U.S. at 486 (citing *Gonzales*).

143. The Court doubled down on the anti-aggrandizement rationale in *Biden v. Nebraska*. 143 S. Ct. 2355, 2373–74 (2023). The secretary's loan forgiveness program, the Court argued, presented "a case [of] one branch of government arrogating to itself power belonging to another," and involved the unwanted specter of "the Executive seizing the power of the Legislature." *Id.* at 2373.

demise, for instance, the MQD was sometimes characterized as an aggrandizement-focused exception to the general rule of judicial deference to agency interpretations of enabling statutes.[144] Much like a jurisdiction-based exception to *Chevron*, the MQD, thus understood, ensured an independent check on the agency's "primary mandate or subject matter."[145] Of course, with *Loper Bright* now on the books, the MQD's clear statement rule no longer functions as an exception to *Chevron* deference.[146] But even in its new form, the rule can still be seen as serving an anti-aggrandizement function insofar as it denies an administrative agency the authority to take a major action when Congress has not clearly granted that authority.[147]

According to the Court, this is not an idle possibility. Both Chief Justice Roberts's majority opinion in *West Virginia* and Justice Gorsuch's separate opinions about the MQD have implied that the risk of agency aggrandizement is significant and ever present, with agencies hoping to expand their power and tending to do so unless another institution stops them.[148] That is, we take it, the implication of Chief Justice Roberts's suggestion that there is a "recurring problem" of "agencies asserting highly consequential power,"[149] as well as Justice Gorsuch's insistence that agencies are prone to "*exploit*"

144. *See* Nathan Richardson, *Keeping Big Cases from Making Bad Law: The Resurgent Major Questions Doctrine*, 49 CONN. L. REV. 355, 398 (2016) (noting that "the major questions doctrine prevents (or at least attempts to prevent) agency aggrandizement so serious that it outweighs *Chevron*'s general benefits"); Timothy K. Armstrong, Chevron *Deference and Agency Self-Interest*, 13 CORNELL J.L. & PUB. POL'Y 203, 261 (2004) (arguing that the Court in *Brown & Williamson* "rejected the agency's assertion of jurisdiction precisely because it represented an exercise in self-aggrandizement far beyond the scope of authority Congress likely intended to delegate to the agency").

145. Ernest Gellhorn & Paul Verkuil, *Controlling* Chevron*-Based Delegations*, 20 CARDOZO L. REV. 989, 992–93 (1999) (arguing that there should be "independent judicial determination of jurisdictional issues outside the agency's primary mandate or subject matter"); *see* Armstrong, *supra* note 144, at 209, 251, 261 (describing the MQD in similar terms).

146. *See generally* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2263 (2024) (holding that "the deference that *Chevron* requires of courts reviewing agency action cannot be squared with the APA").

147. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022) (citing "separation of powers principles" as a basis for the requirement of "clear congressional authorization" for agency authority to take a major action (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014))); *id.* (labeling aggrandizement "a particular and recurring problem"); *id.* at 2620 (Gorsuch, J., concurring) (same). This anti-aggrandizement rationale is distinct from a rationale grounded in the nondelegation doctrine, about which we will have more to say in Part III. The nondelegation doctrine prohibits Congress from delegating its legislative powers away. *See* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928). The anti-aggrandizement rationale is centered on the concern that agencies might attempt to exercise major power under circumstances in which Congress itself would not want the agency to do so.

148. To be clear, we are not ourselves endorsing this account of agency motivations, which strikes us as an oversimplification of the reality on the ground. For an empirically grounded and more salutary picture of how agencies operate, see generally Anya Bernstein & Cristina Rodríguez, *The Accountable Bureaucrat*, 132 YALE L.J. 1600 (2023).

149. West Virginia v. EPA, 142 S. Ct. at 2609.

ambiguities in pursuit of "expansive and aggressive assertions of executive authority."[150]

Like the semantic justification, the anti-aggrandizement justification assumes that Congress is hesitant to authorize agencies to take major actions. But it adds the premise that Congress may, and indeed often does, inadvertently enact statutory text that could plausibly be interpreted to authorize major agency action. Congress, that is, "passes broadly worded statutes seeking to resolve important policy questions in a field while leaving an agency to work out the details of implementation," but the agency goes beyond those details by "assum[ing] responsibilities far beyond its initial assignment."[151] The MQD's role is to protect Congress's legislative power against inadvertently authorized agency action, and it does so "by guarding against unintentional, oblique, or otherwise unlikely delegations."[152]

Thus, although it shares the underlying premises of the semantic justification, the anti-aggrandizement justification ultimately sees the agency MQD not so much as a means of ensuring accuracy in statutory interpretation as much as it is a means of minimizing the risk of encroachments on congressional power. A thought experiment helps to illustrate the distinction: suppose that a judge believes, after reviewing all the available statutory materials, that there is a 75 percent chance that Congress intended to delegate major authority to an agency and a 25 percent chance that it did not intend to do so. Presented with that information, a judge who accepts the semantic rationale for the agency MQD would have to conclude that the agency action is authorized, because, all things considered, the agency's underlying interpretation of the statute reflects the "best" reading of the statute that Congress enacted, notwithstanding the majorness of the authority being granted. But a judge committed to the anti-aggrandizement rationale would still have reason to hold the agency action unlawful. In particular, the judge could conclude that the constitutional harms that would result from unauthorized agency aggrandizement are so much greater than the constitutional harms that would result from an artificially narrow reading of the statute as to justify erring on the side of caution and adopting the (narrower) reading that is only 25 percent likely to be correct. On the anti-aggrandizement view, that is, courts should favor even semantically implausible readings of statutory text to the extent that doing so helps to mitigate the risk of letting an agency claim more power than Congress intended to give it.

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150. Nat'l Fed'n of Indep. Bus. v. Occupational Safety & Health Admin., 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring) (quoting U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 417 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc)); *see also* West Virginia v. EPA, 142 S. Ct. at 2620 (Gorsuch, J., concurring) ("As the Court aptly summarizes it today, the doctrine addresses 'a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted.'").

151. *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 669 (Gorsuch, J., concurring).

152. *Id.*

As with the semantic justification, the anti-aggrandizement justification strikes us as contestable on its own terms. Among other things (like the semantic justification), it proceeds from the questionable premise that Congress disfavors rather than welcomes "major" applications of its broadly worded statutory commands.[153] The justification also reflects an especially cynical perspective on the aims and motivations of agency officials, whom it casts as avaricious power maximizers seeking to "exploit" statutory ambiguities.[154] And it further reflects a contestable *normative* judgment regarding the relative severity of different types of constitutional harms: for the anti-aggrandizement argument to work, recall, one must maintain that it is qualitatively worse from a separation of powers perspective for agencies to over rather than underenforce the statutes they are tasked with administering. That point, too, strikes us as debatable, especially given the heightened risk of *judicial* aggrandizement that this prioritization of constitutional values would seem to invite. But we will again put those issues to one side and, for now, treat the anti-aggrandizement justification as the operative rationale for the agency MQD. With that assumption in place, let us consider its implications for the judicial MQD.

2. The Anti-Aggrandizement Justification and the Equal Application Thesis

In our view, the anti-aggrandizement justification for the agency MQD straightforwardly implies a similarly strong major questions doctrine for the federal courts. Simply put, if "major" implementations of statutes by executive-branch actors are seen as posing an especially grave risk to the separation of powers, then major implementations of statutes by judicial-branch actors should be seen in the same way. There is no obvious reason why the former would pose any less harm than the latter to Congress's interests and prerogatives and, thus, by extension, the system of separated powers writ large. If, as the Court has elsewhere put it, there exists a "hydraulic pressure inherent *within each of the separate Branches* to exceed the outer limits of its power,"[155] and if those outer limits are indeed exceeded by the undertaking of "major" acts that Congress's statutes do not clearly authorize, then a court that embraces the agency MQD for this reason should similarly embrace the judicial MQD. Or, to put the point one other way, if statutory interpretation aims to prevent "government by bureaucracy [from]

153. *See supra* note 92.

154. *See, e.g.*, Anya Bernstein, *Judicial Accountability*, 113 GEO. L.J. (forthcoming 2025) (manuscript at 4, 57) (noting critically the manner in which the "rhetoric" of the Roberts Court "impugns agencies for being fundamentally unaccountable," while failing to highlight the "numerous constraints agencies work under").

155. Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919, 951 (1983).

supplanting government by the people,"[156] then it ought similarly aim to prevent "government by judiciary" from doing the same.[157]

These observations should at least be enough to establish the prima facie case for treating the judicial MQD as an entailment of the (anti-aggrandizement) agency MQD. To rebut this case, the Court would need a theory to distinguish the risk of judicial aggrandizement from the risk of agency aggrandizement. More to the point, it would need a convincing reason to think that the risk of agency aggrandizement is so much greater than the risk of judicial aggrandizement that a strong-form MQD is warranted for agencies but not for courts. As best as we can tell, the Court has not offered any such theory. Nor do we think that a convincing distinction is in the offing. We can only guess at what the *West Virginia* Court's majority might argue, but we can imagine two possibilities.

The first objection might be that judicial interpretation of ambiguous statutes simply does not pose a risk of judicial aggrandizement because interpretation is not policymaking. Rather, it involves the exercise of "judgment," not "discretion."[158] We further address this distinction between interpretation and policymaking below,[159] but for now, we want to suggest that the argument does not work even if one accepts the premise that when a court exercises its legal judgment, it is not exercising policymaking discretion. In particular, the need for an anti-aggrandizement judicial MQD would seem to exist so as long as one merely accepts that: (a) major statutory decisions not consistent with the statutory text constitute a form of judicial aggrandizement, and (b) the question of whether a major decision is or is not consistent with the statutory text is not always one that yields a self-evident answer (as is, almost by definition, always going to be the case when the statutory language is not "clear").[160] Under these circumstances, we think

156. *See Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 669 (Gorsuch, J., concurring) (stating that MQD "serve[s] to prevent 'government by bureaucracy supplanting government by the people'" (quoting Antonin Scalia, *A Note on the Benzene Case*, AM. ENTER. INST. J. ON GOV'T. & SOC., July-Aug. 1980, at 27)).

157. *See* Jacob, *supra* note 20, at 573–74 (emphasizing that "the judiciary bears the same responsibility as the executive to avoid encroachment on the legislative power in statutory interpretation" and that the MQD "would therefore preclude *courts*, as a matter of constitutional comity, from adopting expansive statutory constructions involving major questions without clear congressional authorization"); *cf.* Klein, *supra* note 20, at 339 ("The Supreme Court should be especially reluctant to interpret a statute to transfer quasi-legislative power from Congress to district court judges, which is a form of judicial self-aggrandizement.").

158. Tellabs, Inc. v. Makor Issues & Rts. Ltd., 551 U.S. 308, 332 (2007) (Scalia, J., concurring in the judgment).

159. *See infra* Part III.B.2.

160. We set to the side the additional complication that the line between a clear statute and an ambiguous one is itself not clear, other than to note that this issue arose in the debate between the majority and the dissenting justices in *Bostock*. *Compare* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020) (concluding that Title VII was "clear" that "[a]n employer who fires an individual for being homosexual or transgender" has violated the statute), *with id.* at 1754 (Alito, J., dissenting) ("There is only one word for what the Court has done today: legislation. The document that the Court releases is in the form of a judicial opinion interpreting a statute, but that is deceptive.").

that even those who insist that judicial interpretation does not involve discretionary choices should remain fully concerned about the risk that judges might err in the interpretive task and cross the line into encroaching on Congress's lawmaking power by rendering a "major" decision that the statute does not in fact authorize. And if that is right, then a judge determined to mitigate the risk of agency aggrandizement by way of the agency MQD should be just as determined to exercise *self*-constraint when it comes to the possibility of construing a federal statute to achieve a major result.

We can also imagine a second, incentives-based argument against the anti-aggrandizement justification for a judicial MQD. That argument would go like this: one might say that federal judges, unlike federal agency officials, have few or no incentives to "exploit"[161] statutory ambiguity to make major decisions. Federal judges, the argument might run, are not answerable to elected politicians with ideological agendas or desires for reelection. Nor are they driven to maximize their budgets or subject to capture or mission creep. For one or more of these reasons, the same risk of judicial aggrandizement is less acute than the risk of agency aggrandizement in major questions cases. And, therefore, there is no need for a judicial MQD.

Count us among the skeptics of the argument that courts and agencies differ in kind when it comes to the risk of aggrandizement and encroachment. At most, the difference between courts and agencies is one of degree. The empirical evidence suggests that judges have multiple motivations, including ideology, desires for professional recognition as well as leisure, and concerns about public welfare.[162] At the Supreme Court level, there is especially strong evidence that ideology matters for the justices in controversial cases—the sorts of cases that one might say have vast economic, political, and social significance.[163] And in such cases, the justices seem to recognize the risk of judicial aggrandizement, at least when they are dissenting.

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161. *See* Nat'l Fed'n of Indep. Bus. v. Occupational Safety & Health Admin., 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring).

162. *See* Frank B. Cross, *What Do Judges Want?*, 87 TEX. L. REV. 183, 186–93 (2008) (discussing empirical evidence concerning multiple judicial motivations); Joseph A. Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN. L. REV. 627, 645–47 (2002) (contrasting the "attitudinal model" and "legal model" of judicial motivation).

163. *See, e.g.*, Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31, 48–49 (2005) ("It is no longer open to debate that ideology . . . plays a significant role in the decisions even of lower court judges when the law is uncertain and emotions aroused. It must play an even larger role in the Supreme Court, where the issues are more uncertain and more emotional and the judging less constrained."); *cf.* Brian Leiter, *Constitutional Law, Moral Judgment, and the Supreme Court as Super-Legislature*, 66 HASTINGS L.J. 1601, 1601 (2015) (noting, with respect to constitutional law—but in terms that would largely apply to many statutory cases as well—that traditionally legal constraints "*underdetermine* the Court's decisions" in many cases, meaning that "the Court essentially makes its final choice among the legally viable options based on the moral and political values of the Justices"). A related driver of Supreme Court decision-making may be a desire to generate outcomes that accord with the personal and ideological preferences of other elites. *See* Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515, 1517 (2010) (suggesting that although the Justices sometimes "deviate from their preferred legal policies" due to "strategic considerations," it is "more often the case that

Indeed, a comparative institutional analysis of courts and agencies may in fact lead to the conclusion that the need to cabin acts of judicial aggrandizement is *more compelling* than the need to cabin analogous acts of agency aggrandizement. The relevant institutional differences between courts and administrative agencies are twofold. First, judicial actors are more politically insulated than are agency actors.[164] Empirical studies have, to be sure, found that federal judges have been "more attentive to public opinion" than one might expect from the countermajoritarian story often told about them.[165] But, as compared to agency officials, federal judges are more insulated from the day-to-day forces of electoral politics,[166] and thus less constrained in their efforts to do "major" things in a manner that contravenes popular will.[167]

Second, because of stare decisis,[168] major judicial decisions are comparatively more entrenched than major agency decisions, especially

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Justices are influenced by the views of other elites who are important to them for personal rather than strategic reasons").

164. *Compare* U.S. CONST. art. III, § 1 (providing that federal judges "shall hold their Offices during good Behaviour"), *with* Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2192 (2020) (holding that, subject to "only two exceptions," the president's ability to remove agency officials from office is "unrestricted").

165. Amanda Frost & Stefanie A. Lindquist, *Countering the Majoritarian Difficulty*, 96 VA. L. REV. 719, 732 (2010) ("[P]olitical scientists have persuasively demonstrated that appointed federal judges are more attentive to public opinion than their insulated positions would seem to warrant."); *see also* Bertrall L. Ross II, *Reconsidering Statutory Interpretive Divergence Between Elected and Appointed Judges*, 80 U. CHI. L. REV. DIALOGUE 53, 77 (2013) ("[E]mpirical social science has consistently shown that there is a statistically significant correlation between federal Supreme Court decisions and public opinion . . . .").

166. *See, e.g.*, Amanda Frost, *Defending the Majoritarian Court*, 2010 MICH. ST. L. REV. 757, 759, 765 (explaining that though federal judges are "attentive to mainstream public opinion," they "nonetheless have greater leeway to flout majority preferences than those subject to periodic elections").

167. Relatedly, Professor Anya Bernstein has recently advocated for a "thicker" understanding of accountability, which promotes democratic self-governance by, among other things, "push[ing] government actors to articulate reasons for their positions," "allow[ing] interested publics to test the quality of government decisions and to influence them over time," and "help[ing] make public institutions sites for the contestations, negotiations, and provisional outcomes that keep a pluralistic polity going." Bernstein, *supra* note 154, at 20. And when courts and agencies are compared by reference to these criteria, the comparative institutional advantages of agencies over courts become even more apparent. For example, agencies have "ongoing, long-term responsibility for effectuating and maintaining" their respective enabling statutes, whereas courts' encounters with the various statutes they interpret are far more "stochastic and staccato." *Id.* at 34–35. In addition, whereas agencies are obligated to consider wide-ranging public input about proposed regulatory initiatives, judges need only "take input from no one beside the litigants before them, and maybe a couple of clerks and colleagues." *Id.* at 41. And, relatedly, while agencies must—often at multiple steps of a rulemaking process—offer comprehensive accounting of the reasons for their regulatory decisions, courts are not bound by any "statute or doctrine laying out just what an opinion must include or what it must respond to" and are similarly under no obligation to share and receive public input on draft opinions or preliminary versions of their statutory decisions. *Id.* at 43. For these and other reasons, one might well reach the conclusion that agencies' major decisions are far more likely to reflect reasoned and deliberative engagement with public views on the underlying issue than are the major decisions of Article III judges.

168. *See generally* Glen Staszewski, *Precedent and Disagreement*, 116 MICH. L. REV. 1019, 1019 (2018) ("[Supreme Court] justices have consistently embraced the principle of

when the decisions are made by the Supreme Court.[169] Administrative law affords agency officials more discretion to reverse course and rescind policies adopted by their predecessors.[170] Thus, all else being equal, a power-aggrandizing judicial decision, which is typically uncorrectable except by subsequent legislative action, is likely to leave a more lasting mark than a power-aggrandizing agency decision that is not binding on future presidential administrations.

For these reasons, we think that concerns about congressional aggrandizement apply with at least as much force to courts as to agencies. That being so, to the extent the agency MQD is justified as an anti-aggrandizement device, there ought to exist a judicial MQD that is just as, if not more, stringent in its demands.

III. THE MAJOR QUESTIONS DOCTRINE AS A CONGRESS-CONSTRAINING DEVICE

Another category of justifications for the MQD starts from the premise that the separation of powers imposes limits on Congress's power to authorize agencies to take major actions. In contrast to the Congress-protecting rationales, these "Congress-constraining" rationales do not require us to assume that Congress typically wants to make major decisions for itself. That is, rather than purporting to *protect* a Congress that is hostile to the idea of major agency authority, these rationales instead purport to *constrain* a Congress that is interested in sharing major decision-making authority with the executive branch.

In this part, we distinguish between two Congress-constraining rationales for the MQD: the first rationale—which we call the *clarity-mandating justification*—sees the MQD as a direct constitutional prohibition on the making of "major" policy pursuant to unclear, subtle, or indirect legislative language. The second rationale, which we call the *nondelegation-avoiding justification*, sees the MQD as a prophylactic safeguard against delegations of regulatory authority that (whether clearly expressed or not) call for the improper exercise of "legislative" power by a nonlegislative actor. We think both rationales support a strong case for the judicial MQD, though as we will

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stare decisis, and the presumption that courts will follow applicable precedent is one of the defining features of the American legal system."). *But cf.* Michael Gentithes, Janus-*Faced Judging: How the Supreme Court Is Radically Weakening Stare Decisis*, 62 WM. & MARY L. REV. 83, 86 (2020) ("Though . . . forecasts are speculative, there is evidence that a weaker version of stare decisis—the presumption that the Supreme Court generally should not overrule its prior decisions—is in vogue on the Court.").

169. On administrative entrenchment and the durability (or lack thereof) of agency policies, see generally Randy J. Kozel & Jeffrey A. Pojanowski, *Administrative Change*, 59 UCLA L. REV. 112 (2011); Elizabeth Magill, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859 (2009); Jonathan Masur, *Judicial Deference and the Credibility of Agency Commitments*, 60 VAND. L. REV. 1021 (2007); Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557 (2003).

170. *See* Ronald M. Levin, *Hard Look Review, Policy Change, and* Fox Television, 65 U. MIA. L. REV. 555, 569–70 (2011) (explaining that judicial stare decisis is "a strong norm," whereas the "constraining force of administrative stare decisis" is weaker).

see, the nondelegation-avoiding rationale raises certain complications that the clarity-mandating rationale does not.

A. The Clarity-Mandating Justification

1. The Clarity-Mandating Justification for the Agency MQD

Stated simply, the clarity-mandating justification for the MQD understands operative "separation of powers principles" to require that Congress *explicitly* authorize any major applications of the statutes it enacts.[171] Congress can satisfy this requirement either by clearly prescribing the major application itself or by clearly authorizing an agency to make the decision whether the statute should be applied in the purportedly major way.[172] Clear congressional authorization is thus both necessary and sufficient to render a delegation of major decision-making authority consistent with the clarity-mandating rule. By forcing Congress to be clear when it intends to authorize a major outcome, this version of the MQD would seek to improve the thoroughness and transparency of congressional deliberations and thus to ensure political accountability for constitutionally-sensitive, though not constitutionally-prohibited, delegations of regulatory authority.

The clarity-mandating justification is consistent with the Court's observation in *West Virginia* that "[a] decision of [major] magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body."[173] Or, as Justice Kavanaugh has put it, Congress has two options: either, Congress may "expressly and specifically decide the major policy question itself and delegate to the agency the authority to regulate and enforce,"[174] or Congress may instead "expressly and specifically delegate to the agency the authority both to decide the major policy question and to regulate and enforce."[175] These two options are different, but, for our purposes, they share the key feature of requiring congressional clarity about its desire to have a major policy question be decided in some particular way. And thus, either option would avoid the constitutionally prohibited outcome of a major policy decision that is untraceable to a clear congressional directive.

Here is another way to see the point. According to the clarity-mandating rationale, constitutional separation of powers principles do not preclude Congress from making a major decision on its own or even from delegating to an agency the power to make that decision on Congress's behalf. Rather, those principles merely mandate precisely what the MQD itself requires—

171. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022).
172. *Id.* at 2616 (identifying these two options for Congress).
173. *Id.*
174. Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., statement respecting the denial of certiorari).
175. *Id.*

namely, that Congress state with clarity its intention to authorize a major application of the statute it enacts—again, either by dictating that application itself or by clearly giving to an agency the discretionary power to do so.[176] The relevant constitutional harm to be guarded against is a sort of congressional hiding of the ball, and the MQD mitigates that harm by forcing Congress to own up to—and thus be accountable for—its desire to produce (or at least permit agencies to produce) statutory applications of "vast economic and political significance."

The source of this clarity mandate is not clear from the Court's jurisprudence. It might be the nondelegation doctrine. But majorness is not relevant to the test for unconstitutional delegations under the intelligible principle test of current doctrine.[177] Moreover, a delegation-derived account of the clarity mandate is inconsistent with the fact that the MQD openly *does not prohibit* Congress from delegating major decision-making authority to agencies; it only prevents Congress from doing so pursuant to unclear or open-ended statutory terms.[178] The *West Virginia* Court's general reference to "separation of powers principles" thus suggests another rationale not based on the nondelegation doctrine,[179] one that, as Justice Barrett elsewhere described it, might flow from the idea "that it is so important for Congress to exercise '[a]ll legislative Powers,' . . . that it should be *forced to think twice* before delegating substantive discretion to agencies—even if the delegation is well within Congress's power to make."[180] Thus understood, the clarity-mandating justification does not require one to assume that some delegations of major authority are unconstitutional *because of* their majorness. Rather, one can accept the current nondelegation doctrine, which applies an intelligible principle test rather than a majorness test, and still argue that Congress should be forced to deliberate and be clear when it is assigning major decision-making authority to an agency. The argument is that the assignment of major decisions to another institutional actor is so constitutionally sensitive (even though it is not constitutionally prohibited by Article I's Vesting Clause) as to justify a rule that will force Congress to grapple with (and be clear about its answer to) the question of whether it really wants to delegate that power away.

176. *Cf.* Benjamin Eidelson & Matthew C. Stephenson, *The Incompatibility of Substantive Canons and Textualism*, 137 HARV. L. REV. 515, 561 (2023) (suggesting that the MQD could be justified as among those legal norms that, though "described as substantive canons of *statutory* interpretation are in fact *constitutional* rules that tie the extent of Congress's power to the clarity with which that power is exercised").

177. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474–75 (2001); J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 401–05 (1928). For more on this point, see *infra* notes 192–95 and accompanying text.

178. *Paul*, 140 S. Ct. at 342 (Kavanaugh, J., statement respecting the denial of certiorari) (distinguishing the MQD from a doctrine that would prohibit "congressional delegations to agencies of authority to decide major policy questions—even if Congress expressly and specifically delegates that authority").

179. West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022).

180. Biden v. Nebraska, 143 S. Ct. 2355, 2378 (2023) (Barrett, J., concurring) (emphasis added). Barrett herself, to be clear, does not endorse this view; as already noted, she instead embraces the semantic justification for the agency MQD.

As with other potential justifications for the agency MQD, this one too is not fully airtight. Deliberation and political accountability seem to be the animating normative commitments,[181] but the textual, historical, and precedential underpinnings of the rule are shaky, and they certainly have not yet been spelled out by the Court in any detail.[182] Even so, let us take the clarity-mandating justification for granted and proceed to consider its implications for the judicial MQD.

2. The Clarity-Mandating Justification and the Equal Application Thesis

We think that the MQD's clarity-mandating justification applies with equal force to major statutory decisions rendered by the courts. The clarity-mandating justification, after all, focuses upon *Congress's* obligation to be clear when it authorizes major outcomes, presenting it with two options: either (a) make the decision itself or (b) clearly authorize another institution to make the decision on Congress's behalf. Nothing in the logic of this justification suggests that its force would depend on the nature of the institution receiving the statutory grant of authority—that is, there is no reason why someone who worries about the prospect of Congress smuggling a major policy decision into an unclear statutory provision should feel any better about that outcome when the body that ultimately announces that decision is a court rather than an agency.

Indeed, we think that the equal application thesis is reflected in Justice Kavanaugh's own description of the clarity-mandating justification. As he put the point, Congress's first option is to "expressly and specifically decide the major policy question itself."[183] It follows that when a court is confronted with a statutory case posing a major question, it must start by asking whether

181. For example, by requiring Congress to enact clear statutory text when it intends to delegate major decision-making authority, the MQD forces legislators to recognize and deliberate about the costs and benefits of the major delegation. Greater deliberation in turn may improve the quality of Congress's decisions; for example, deliberation by legislators may surface statutory provisions that special interests have spirited into bills, thus checking their influence and promoting decision-making based upon the public interest. *See* Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1583 (2001) (arguing that various constitutional doctrines are "rights-driven rules of deliberation and dialogue" that direct courts to defer to political decisions that "bear the earmarks of deliberation and care"); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 45 (1985) (sketching a conception of constitutional structure under which "the representative must deliberate rather than respond mechanically to constituent pressures; but if deliberation produces a conclusion in favor of redistribution or different preferences, so be it"). Transparent statements in statutes, moreover, may facilitate political accountability by making it more apparent to voters where the responsibility for a particular decision ultimately lies. William N. Eskridge Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules As Constitutional Lawmaking*, 45 VAND. L. REV. 593, 630–31 (1992).

182. *See* Eidelson & Stephenson, *supra* note 176, at 562 ("[W]hile some have sought to defend a robust nondelegation doctrine in originalist terms, we know of no originalist argument that Article I's Vesting Clause permits major delegations if, but only if, the statutes that make these delegations also make especially clear that they are doing so.").

183. *Paul*, 140 S. Ct. at 342 (Kavanaugh, J., statement respecting the denial of certiorari).

Congress has "expressly and specifically decid[ed]" that question.[184] Put differently, when Congress intends to make a major decision itself, it must be clear. And if Congress has not made the major decision itself, then the second of Justice Kavanaugh's two options becomes relevant, meaning that a court must then ask whether Congress decided to delegate the major question to the reviewing court to decide in the first instance.

Understood as a clarity mandate, the MQD thus naturally extends to courts. This justification, we think, is comparable to those substantive canons of statutory construction that Professor Ilan Wurman has lumped under the heading of "importance canons."[185] For example, in discussing the rule of lenity as one such "importance canon," Professor Wurman highlights Chief Justice John Marshall's suggestion in *Cohens v. Virginia*[186] that because preempting "the penal laws of a State . . . is a very serious measure," a court should expect that Congress would deliberate before doing so and express its "intention . . . clearly and unequivocally."[187] A clear statement rule against preemption might similarly be justified based on the constitutional value of federalism, just as the MQD as a clarity mandate might be justified based on the constitutional separation of powers. Such clear statement rules constrain Congress by directing courts to reject an interpretation of ambiguous statutory text or broad statutory text that would result in the disfavored outcome. This may be what Justice Kavanaugh has in mind for the MQD, which would disfavor major decisions by requiring Congress either to "expressly and specifically" make them itself or "expressly and specifically" delegate major decision-making authority.[188]

B. The Nondelegation-Avoiding Justification

Unlike the clarity-mandating justification, the nondelegation-avoiding justification for the MQD holds that clear congressional authorization is necessary, *but not sufficient*, to make a major delegation constitutional. According to this justification, at least some delegations of major authority are indeed unconstitutional, even where clearly conferred on the recipient institution. And, the argument continues, the MQD helps to enforce this prohibition on major delegations by helping to prevent Congress from pursuing delegations that might (or might not) run afoul of the rule. We argue that this "nondelegation-avoiding" justification for the agency MQD also supports a judicial MQD, although the scope of such a rule would likely be more limited than that of its agency-based counterpart.

184. *Id.*
185. Wurman, *supra* note 92, at 982.
186. 19 U.S. (6 Wheat.) 264 (1821).
187. *Id.* at 443; *see* Wurman, *supra* note 92, at 982 (quoting *Cohens*, 19 U.S. (6 Wheat.) at 443).
188. *Paul*, 140 S. Ct. at 342 (Kavanaugh, J., statement respecting the denial of certiorari).

1. The Nondelegation-Avoiding Justification for the Agency MQD

a. The Nondelegation Doctrine and Calls for Its Reform

The nondelegation doctrine prohibits Congress from delegating its legislative powers to nonlegislative actors. That rule has traditionally been grounded in Article I's Vesting Clause, which provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States."[189] This text, to be sure, does not explicitly purport to prohibit delegations of "legislative" authority, and there is some historical reason to think that its drafters and ratifiers never understood it to do so.[190] Even so, operative constitutional doctrine has long treated Congress's "legislative powers" as exclusive, meaning that no other branch of the federal government can exercise such powers on Congress's behalf.

Current constitutional doctrine implements this rule through what is known as the "intelligible principle" test.[191] That requirement holds that, so long as Congress supplies meaningful guidance concerning the agency's exercise of an authority granted to it by statute, the authority itself qualifies as merely "executive" in nature and thus involves no impermissible delegation of "legislative" power to a nonlegislative entity.[192] What is more, the Court has traditionally shown great deference to Congress in applying this rule, emphasizing that even relatively open-ended guidance from Congress can suffice to constitute an "intelligible principle" and thus defeat the suggestion that Congress has delegated its legislative power away.[193] Indeed, since 1935, the Court has never held that Congress failed to provide an intelligible principle when authorizing agency action.[194]

In its current, conventional form, the nondelegation doctrine does not jibe with the MQD. The reason why is straightforward: the "majorness" of delegated authority is irrelevant to the intelligibility of Congress's statutory guidance, just as the intelligibility of Congress's statutory guidance is irrelevant to the majorness of a delegated authority. Put differently, if the hallmark of unconstitutionally delegated power is the lack of an intelligible

189. U.S. CONST. art. I, § 1.

190. *See generally* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021) (criticizing the nondelegation doctrine as inconsistent with Founding-era understandings). For a contrary position, see generally Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490 (2021) (defending the nondelegation doctrine on textualist and originalist grounds).

191. *See* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

192. *Id.* at 408–09.

193. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474–75 (2001) ("[W]e have 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'" (quoting Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting))).

194. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 535–48 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388, 430 (1935).

principle to guide the exercise of agency discretion, then the sorts of statutory constructions that the MQD disfavors are no more (or less) likely to violate the nondelegation doctrine than are the sorts of constructions that the MQD permits.[195] The alleged constitutional evil being targeted by this version of the nondelegation doctrine (an agency with completely unbounded discretion to make a major or minor decision) is thus unrelated to the alleged constitutional evil being targeted by the MQD (an agency with even limited discretion to make a "major" decision). That being so, we think it is difficult to understand the MQD as an extension of the existing constitutional nondelegation rule.

But that is not the end of the story. Justice Gorsuch in particular has pushed to revitalize the nondelegation doctrine by jettisoning the intelligible principle requirement, and his efforts appear to have the support of at least four of his fellow conservative appointees.[196] In a recent dissenting opinion

195. As we have elsewhere put the point, the majorness criterion "goes to the *significance of the consequences* that follow from a given policy determination" whereas the intelligibility criterion "goes to the *breadth of discretion* that goes into the making of that determination." Coenen & Davis, *supra* note 20, at 806–07. Individual justices have sometimes suggested that the nondelegation doctrine—even as implemented by way of the intelligible principle requirement—serves the "abstract[]" goal of "ensur[ing] to the extent consistent with orderly governmental administration that *important* choices of social policy are made by Congress." Indus. Union Dep't. v. Am. Petroleum Inst., 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring in the judgment). And dicta from at least one majority opinion might be read as indicating that majorness might sometimes operate as a potential factor of relevance to the intelligible principle test. *See Whitman*, 531 U.S. at 475 (noting that "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred" and that "[w]hile Congress need not provide any direction to the EPA regarding the manner in which it is to define 'county elevators,' which are to be exempt from new-stationary-source regulations governing grain elevators . . . it must provide substantial guidance on setting air standards that affect the entire national economy"); *see also* Louis J. Capozzi III, *In Defense of the Major Questions Doctrine*, 100 NOTRE DAME L. REV 509, 543–44 (2025) (drawing on the dicta from *Whitman* and from some pre-1937 case law to contest the proposition that "the Supreme Court's modern non-delegation doctrine cases don't seem to differentiate between major and nonmajor cases" (citing Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 360–61 (2002)). But in our view, the thrust of the Court's post-1937 case law makes clear that the *majorness* of a delegated power does not in itself render that power "legislative" rather than "executive" in nature, at least for purposes of the nondelegation doctrine in its current form. *Cf.* Gundy v. United States, 139 S. Ct. 2116, 2130–31 (2019) (Alito, J., concurring in the judgment) (noting that "since 1935, the Court has uniformly rejected nondelegation arguments and has upheld provisions that authorized agencies to adopt *important* rules pursuant to extraordinarily capacious standards" (emphasis added)). Perhaps the closest modern authority is the plurality opinion in the *Benzene Case*, which suggested that an "unprecedented" interpretation of the Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (codified as amended in scattered sections and titles of the U.S. Code), which gave OSHA "power to impose enormous costs" on industries, "would make such a 'sweeping delegation of legislative power' that it might be unconstitutional.'" *Am. Petroleum*, 448 U.S. at 645 (plurality opinion). But, for reasons that Professor Ronald Levin has developed in greater detail, that too strikes us as a rather tenuous basis for treating the agency MQD as an entailment of the modern-day nondelegation doctrine. *See* Levin, *supra* note 8, at 948.

196. For a general description of the current state of affairs, see Michael Coenen, *The Shaky Structural Foundations of the New Nondelegation Doctrine*, 27 U. PA. J. CONST. L. (forthcoming 2025) (manuscript at 10–15) (suggesting, among other things, that the MQD itself may reflect a rearguard effort to upend traditional nondelegation principles).

joined by Chief Justice Roberts and Justice Thomas, he explicitly called for replacing the intelligible principle test with a new nondelegation doctrine reoriented around the requirement that Congress must "make[] the policy decisions when regulating private conduct."[197] Under the "Gorsuch test,"[198] the Court would permit Congress to delegate only for purposes of (a) "authoriz[ing] another branch to 'fill up the details'" of a regulatory scheme, (b) "mak[ing] the application of [a statutory] rule depend on executive fact-finding," or (c) "assign[ing] the executive and judicial branches certain non-legislative responsibilities" that overlap with those branches' inherent constitutional powers.[199] The test would thus generally prohibit Congress from delegating powers related to "important subjects," which would instead have to be "*entirely* regulated by the legislature itself."[200]

If reformulated along these lines, the nondelegation doctrine would come into closer alignment with the agency MQD. In particular, its apparent prohibition on delegation with respect to "important subjects" would resonate with the MQD's application to policies of "vast economic and political significance." And it should therefore come as no surprise that Justice Gorsuch has repeatedly described the MQD as operating "in service of the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency."[201]

As others have noted, Justice Gorsuch has not offered a clear explanation of how the MQD enforces nondelegation values.[202] And he has occasionally offered a somewhat more modest description of the MQD's nondelegation bona fides, suggesting that it merely "serves a similar function" to the nondelegation doctrine.[203] Nuances aside, however, the basic idea appears to be this: as Justice Gorsuch and at least some of the Court's other conservative justices now appear to see things, the intelligible principle test should indeed be jettisoned, a delegated power's majorness should be

197. *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting).

198. Johnathan Hall, *The Gorsuch Test:* Gundy v. United States*, Limiting the Administrative State, and the Future of Nondelegation*, 70 DUKE L.J. 175, 177 (2020).

199. *Gundy*, 139 S. Ct. at 2136–37 (Gorsuch, J., dissenting). Justice Alito did not join that opinion in *Gundy* but did separately express "support" for a future effort to "reconsider the approach we have taken for the past 84 years." *See id.* at 2130–31 (Alito, J., concurring in the judgment). Justice Kavanaugh, who did not participate in *Gundy*, has also expressed interest in a future revival of the nondelegation doctrine. *See* Paul v. United States, 140 S. Ct. 342 (2019) (Kavanaugh, J., statement concerning denial of certiorari) ("Justice Gorsuch's scholarly analysis of the Constitution's nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases.").

200. *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting) (emphasis added) (quoting Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42–43 (1825)). For an example of scholarly criticism of Justice Gorsuch's reliance on *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825), for this proposition, see Levin, *supra* note 8, at 948–50.

201. *Gundy*, 139 S. Ct. at 2142.

202. *See, e.g.*, Levin, *supra* note 8, at 945–46 (explaining that Justice Gorsuch's "discussion says nothing at all about why there should be a special standard of review for major questions as opposed to non-major questions").

203. Nat'l Fed'n of Indep. Bus. v. Occupational Safety & Health Admin., 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring).

indicative of its "legislative" character, and the MQD should therefore be seen as a nondelegation-related constraint on Congress's power to authorize agencies to do major things.

b. The Agency MQD and a Reimagined Nondelegation Doctrine

Against that backdrop, the agency MQD becomes plausibly defensible as a clear statement rule that helps to prevent Congress from enacting delegations that would be unconstitutional on account of their majorness. This is true in the most straightforward sense that the MQD "overprotects" nondelegation values by pushing courts to avoid even those statutory constructions that *might* result in improper delegations of legislative power to a nonlegislative entity.[204] But it also could be true in other ways as well. For example, the MQD's clear congressional authorization requirement could promote nondelegation values by forcing legislative actors to confront and deliberate over the question of whether they really want to give a major power to an agency—a question that those same actors could more easily elide if permitted to accomplish major results by way of oblique or unclear statutory language.[205] And the clear congressional authorization requirement might similarly operate to increase the "enactment costs" that Congress must incur as a precondition to delegating major power,[206] thus imposing a sort of "clarity tax" that would deter Congress from pushing the boundaries that the nondelegation doctrine purports to set.[207] In these and other ways, the MQD

204. *See, e.g.*, Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1963 (1997) (emphasizing that modern-day constitutional avoidance canons help to "overprotect[] constitutional values through statutory interpretation" by "enabl[ing] courts to construe statutes not to encroach on constitutional norms even if that encroachment would be upheld in a constitutional adjudication on the merits").

205. *See* Coenen, *supra* note 181, at 1610 (noting of clear statement rules more generally that "by demanding specificity, the Court forces Congress, if it is in fact inclined to override the statutory ruling the Court has embraced, to proceed in a cautious and deliberative mode").

206. *See* Matthew Stephenson, *The Price of Public Action*, 118 YALE L.J. 2, 41–42 (2008). As Professor Matthew Stephenson suggests, clear statement rules can increase the costs for legislators, their staff, and the coalitions favoring enactment in several ways. Being clear—crafting statutory text with the precision and transparency necessary to satisfy a clear statement rule—"takes work," and the time spent on it might be devoted to other tasks. *Id.* at 41. And clear statement requirements may also exact costs as a bill winds its way through the legislative process as well, especially if clear text prompts more controversy and more demands from legislators whose votes are needed to secure the bill's enactment into law. *Id.* at 42 (discussing the potential increase in the "price of . . . support," additional "opportunit[ies] for opponents to obstruct or delay passage," and the possibility that "the clarity of the statement itself raises the profile, and hence the political salience, of the constitutionally problematic provisions").

207. *See, e.g.*, Biden v. Nebraska, 143 S. Ct. 2355, 2377–78 (2023) (Barrett, J., concurring) (describing but not endorsing the idea that the MQD might be justified on the theory that it "overprotects the nondelegation principle by increasing the cost of delegating authority to agencies" and that the doctrine thus works as a "clarity tax" that "might prevent Congress from getting too close to the nondelegation line"); *see also* John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 403 (2010) ("[C]lear statement rules do impose something of a clarity tax upon legislative proceedings in particular areas.").

could end up promoting nondelegation values by making it less likely that Congress will end up enacting statutes that test such values in the first place.

We think this view of the MQD is subject to several caveats. First, as already noted, the nondelegation-avoiding account of the MQD makes sense only insofar as the nondelegation doctrine itself is concerned with majorness, and the Court has not yet explicitly held that it is. Second, to the extent the nondelegation doctrine does indeed turn on majorness, it must further be the case that the category of "important" delegations that the nondelegation doctrine actually prohibits is narrower than the category of "major" delegations that would trigger application of the MQD; otherwise, the agency MQD would become entirely superfluous, amounting to a pointless, if not actively misleading, instruction that Congress speak clearly when conferring powers on agencies that Congress has no authority to confer in the first place.[208] Finally, as with the anti-aggrandizement justification discussed in Part II.B,[209] the nondelegation-avoiding justification for the MQD is not one that bona fide textualists could support, as it unmistakably treats the rule as a "substantive" canon that permits courts to departs from the "best" reading of a statute even when not constitutionally compelled to do so.[210]

2. The Nondelegation-Avoiding Justification and the Equal Application Thesis

With these caveats acknowledged, we now have an account of the nondelegation doctrine that plausibly connects it to the MQD's "clear congressional authorization" requirement. It remains to be seen whether and to what extent a nondelegation-avoiding MQD for agencies implies an analogous nondelegation-avoiding MQD for the courts.

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208. It is possible, we concede, to read some of Justice Gorsuch's statements in this way. But if Justice Gorsuch regards the MQD as operating "in service of" the nondelegation doctrine (rather than a superfluous restatement of that doctrine), then he would have to concede that at least *some* major exercises of agency authority can both: (a) implicate the MQD and (b) be permissibly delegated to that agency by Congress, even under the terms of Gorsuch's more robust nondelegation rule. *See* Gundy v. United States, 139 S. Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting).

209. *See supra* Part II.B.

210. *See, e.g.*, Eidelson & Stephenson, *supra* note 176, at 521 (contending that, despite some notable efforts by others to suggest otherwise, "substantive canons are generally just as inconsistent with textualists' jurisprudential commitments as they first appear"). Importantly, for reasons already noted, the clarity-mandating justification for MQD is not necessarily susceptible to this qualification, because the clarity-mandating justification can be understood as a direct constitutional prohibition on unclear statutes with major applications rather than a substantive canon that operates on behalf of another constitutional rule. *See supra* Part III.A. That said, a textualist might still maintain that the clarity mandate requires courts to invalidate statutes that, though best read to authorize major action, nonetheless do so by way of insufficiently clear language. In other words, whereas nontextualists could plausibly conclude that major action is unauthorized by the statute because the clarity mandate requires a narrow reading of the statute itself, textualists might instead need to conclude that the major action is unauthorized because the statute purporting to authorize it is constitutionally defective.

a. The Prima Facie Case

The prima facie case for applying the nondelegation-avoiding justification to the courts begins with the principle that Congress can no more delegate its legislative power to courts than it can delegate it to agencies. This principle was explicit in the Court's discussion of delegations to the federal courts in *Wayman v. Southard*,[211] which involved rulemaking by the federal judiciary, and they were an implicit component of the Court's analysis in *Standard Oil Co. v. United States*,[212] which rejected a nondelegation challenge to the Sherman Act.[213] A few scholars have questioned this premise.[214] But that position is belied by the Supreme Court's discussions of the nondelegation doctrine (including Justice Gorsuch's own discussion of the doctrine in his dissent in *United States v. Gundy*[215]), and it is in any event inconsistent with the notion that Article I vests its "legislative Powers" exclusively in Congress. Without rehearsing the debate, we take it as given that there is no "federal courts exception" to the nondelegation doctrine.

With that premise in place, the prima facie case for the judicial MQD on nondelegation grounds comes into focus. We have sketched its outline in prior work. Federal courts are "just as much 'not Congress'" as federal agencies are.[216] They can no more exercise exclusively legislative powers than federal agencies can. And if, as the nondelegation-avoiding justification assumes, some exercises of major decision-making authority involve exclusively legislative powers, then there is always a risk that a transfer of that authority to the federal courts violates the nondelegation doctrine. It would therefore follow that if the agency MQD reflects a desirable means of preventing constitutionally suspect delegations of major authority to executive-branch agencies, then the judicial MQD should reflect a similarly desirable means of preventing similarly suspect delegations of major authority to the federal courts.

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211. 23 U.S. (10 Wheat.) 1, 42–43 (1825).

212. 221 U.S. 1 (1911).

213. 15 U.S.C. §§ 1–2; *Standard Oil Co.*, 221 U.S. at 69–70. For further discussion, see Alexander Volokh, *Judicial Non-delegation, the Inherent-Powers Corollary, and Federal Common Law*, 66 EMORY L.J. 1391, 1410–14 (2017); Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 438 (2008).

214. *See* Harold J. Krent, *Delegation and Its Discontents*, 94 COLUM. L. REV. 710, 739–41, 741 nn.131–32 (1994) ("[T]here is no historical support for applying the nondelegation test to delegation to courts.").

215. 139 S. Ct. 2116 (2019); *see id.* at 2135–37 (Gorsuch, J., dissenting) (emphasizing that the nondelegation doctrine prohibits Congress from "divest[ing] itself of its legislative responsibilities" and describing the proposed test for unlawful delegations by reference to delegations to both the executive and judicial branch).

216. Coenen & Davis, *supra* note 20, at 807.

b. Objections

i. The Just-Interpretation Objection

One potential objection to the equal application thesis, which we call the "just-interpretation" objection, would focus on what courts do when they implement statutes. The just-interpretation objection posits that judicial interpretation does not involve the exercise of any legislative power. Judicial interpretation is just interpretation. It involves "judgment[,] . . . not discretion."[217] In this way, judicial interpretation differs from what agencies do when they interpret statutes while implementing them. Agencies exercise discretion, which is a potential indicator of "legislative"-type decision-making, whereas courts use judgment, which is not.[218] And because judicial interpretation, unlike agency interpretation, never involves the exercise of legislative power, judicial interpretation never triggers a nondelegation concern, not even in major cases. If that is true, then there could be no nondelegation justification for a judicial MQD.

This objection gains further traction when one considers the Court's recent decision in *Loper Bright*.[219] There, in the course of defending the Court's decision to jettison *Chevron* deference, Chief Justice Roberts insisted that the ambiguous statutes, "no matter how impenetrable, do—in fact, must—have a single, best meaning" and that courts must therefore "use every tool at their disposal to determine the best reading of the statute and resolve the ambiguity."[220] *Loper Bright* thus makes clear that today's Supreme Court does not regard the mere existence of statutory ambiguity as "a delegation" of policymaking authority "to anybody."[221] Rather, as the Court now sees it, statutory ambiguities merely pose a "legal" question to be resolved by application of the "traditional tools of statutory construction."[222] If that is true, then one cannot necessarily assume a court's interpretation of an ambiguous statute to accomplish a major result would reflect an unconstitutional exercise of legislative authority by a nonlegislative actor, even if the same would be true of an agency's exercise of statutorily delegated policymaking authority.

These assertions take us into deep jurisprudential waters, implicating longstanding debates between formalists and realists about the nature of legal

217. Tellabs, Inc. v. Makor Issues & Rts Ltd., 551 U.S. 308, 332 (2007) (Scalia, J., concurring in the judgment).

218. *See id.* (contrasting judicial interpretation with the "discretion conferred upon administrative agencies, which need not adopt what courts would consider the interpretation most faithful to the text of the statute, but may choose some other interpretation").

219. 144 S. Ct. 2244 (2024).

220. *Id.* at 2266.

221. *Id.*

222. *Id.*("The Framers . . . anticipated that courts would often confront statutory ambiguities and expected that courts would resolve them by exercising independent legal judgment.").

indeterminacy.[223] We ourselves are skeptical of the formalist position, at least insofar as it suggests that judges can set aside their policy preferences when choosing between competing constructions of an unclear statute in a major case that has social, economic, or political salience. That is, although we do not assume that policy preferences simply dictate a court's resolution of a major questions case, we do think that judges predisposed to favor one outcome over another as a policy matter will tend—even if subconsciously—to be drawn to the non–policy-based arguments in its favor.[224] All of which is just simply to say that we view the task of "discovering" a statute's true meaning as involving, at least to some extent, the task of determining which application of the statute makes the most sense as a policy matter. And that latter sort of task that would support the application of a nondelegation-avoiding MQD.[225]

We acknowledge that not everyone sees things in that way. But even if we concede *Loper Bright*'s premise that the resolution of statutory ambiguities is a policy-neutral enterprise, there remain complications for the proponent of the just-interpretation objection to confront. Of particular importance, the objection fails to acknowledge the existence of "common-law" statutes that the Court itself has long described as delegating policymaking authority to the judiciary. There is no other sensible way, for instance, to understand the Court's approach to the antitrust laws in cases such as *Continental T.V., Inc., v. GTE Sylvania Inc.*,[226] which relied upon

223. *See* Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852, 903 (2020) (contrasting the "formalist approach to interpretation," which "presumes a sharper line between law and policy than much administrative law and scholarship," against a realist approach, which insists that "canons of interpretation are indeterminate; appeals to purpose require a value-laden choice regarding the level of generality; and choosing an interpretation based on whatever purpose you select requires expertise that judges lack").

224. We think this is probably what happened in *Bostock*, where textualists disagreed with one another about the proper result. *Compare* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020) ("The answer [under Title VII] is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex."), *with id.* at 1754 (Alito, J., dissenting) ("There is only one word for what the Court has done today: legislation. The document that the Court releases is in the form of a judicial opinion interpreting a statute, but that is deceptive."). It is possible that the source of their disagreement had to do with deeper disagreements about the nature of textualism. *Compare* Mitchell N. Berman & Guha Krishnamurthi, Bostock *Was Bogus: Textualism, Pluralism, and Title VII*, 97 NOTRE DAME L. REV. 67, 76–79 (2021) (considering the debate between Justices Gorsuch and Alito about the proper textualist reading of Title VII and concluding that Justice Gorsuch's textualism was "tortured" even though it reached the right outcome), *with* Andrew Koppelman, Bostock *and Textualism: A Response to Berman and Krishnamurthi*, 98 NOTRE DAME L. REV. REFLECTION 89, 93 (2023) ("[G]iven the Court's commitment to textualism, *Bostock* is correctly reasoned."). But it is also quite possible that much if not all of the disagreement boiled down to policy-based differences regarding the case's bottom-line outcome.

225. Specifically, the idea here would be that the nondelegation-avoiding MQD eliminates potential violations of the nondelegation doctrine by *automatically precluding* courts from applying unclear statutes in major ways and thus, instead, requiring them to "choose" between a narrower range of interpretations, none of which would yield outcomes of vast economic and political significance.

226. 433 U.S. 36 (1977).

economic analysis and rejected traditional common law doctrine by reasoning that "the state of the common law 400 or even 100 years ago is irrelevant to the issue before us: the effect of the antitrust laws upon vertical distributional restraints in the American economy today."[227] This opinion was the "root" of the contemporary understanding of the antitrust laws as common law statutes, as Professor Sanjukta Paul has explained.[228] There are other examples, including the Labor Management Relations Act[229] (LMRA), which the Court has interpreted to delegate lawmaking power to it;[230] the Copyright Act,[231] which includes provisions that courts implement by making new common law;[232] and 42 U.S.C. § 1983, enforcement of which the Court has limited by making common law rules like qualified immunity that it has justified by reference to "policy."[233] There are some statutory cases—and, more to the point, some major statutory cases—where the Court by its own account is not doing "just interpretation" but instead making new law.[234]

Thus, even accepting that some judicial applications of unclear statutes are the product of "interpretive" rather than policy-making judgments, the nondelegation-avoiding judicial MQD should still continue to apply when

227. *Id.* at 53 n.21 (quoting United States v. Arnold, Schwinn & Co., 388 U.S. 365, 392 (1967) (Stewart, J., dissenting)). Further bolstering this point, particularly in the antitrust context, is *Standard Oil Co. v. United States*, 221 U.S. 1 (1911), in which the Court rejected a nondelegation challenge to the Sherman Act not by reference to the idea that courts merely "interpret" the law but instead by reference to the idea that the Sherman Act was specific enough to pass constitutional muster. *Standard Oil Co.*, 221 U.S. at 69–70 (holding that the Sherman Act "certainly generically enumerates the character of acts which it prohibits and the wrong which it was intended to prevent" and did not delegate legislative power to the courts); *see* Volokh, *supra* note 213, at 1410–12 (explaining how the constitutional challenge to the Sherman Act was in substance a nondelegation challenge and that the Court's resolution was consistent with the intelligible principle test).

228. Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L.J. 175, 234–35 (2021). Even Justice Gorsuch has apparently recognized that judicial application of the antitrust laws involves policymaking. *See* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2147 (2021) ("In the Sherman Act, Congress tasked courts with *enforcing a policy* of competition on the belief that market forces 'yield the best allocation' of the Nation's resources." (emphasis added)).

229. Pub. L. No. 104-320, 61 Stat. 136 (1947) (codified as amended in scattered sections of 29 U.S.C.).

230. Textile Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448, 451 (1957) (concluding that LMRA "authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements").

231. Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified as amended in scattered sections of 17 U.S.C.).

232. Shyamkrishna Balganesh, *Debunking Blackstonian Copyright*, 118 YALE L.J. 1126, 1167–68 (2009).

233. In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), which did not involve a § 1983 action, the Court justified qualified immunity as good policy. *Harlow*, 457 U.S. at 813 (holding that "public policy at least mandates an application of the qualified immunity standard that would permit the defeat of insubstantial claims without resort to trial"). Subsequent decisions applied the *Harlow* approach to § 1983 suits. *See, e.g.*, Pearson v. Callahan, 555 U.S. 223, 243 (2009) (considering various policy concerns in crafting the methodology for deciding qualified immunity defenses, including in § 1983 suits).

234. We address the related objection that the Court never makes law but instead finds it. *See infra* notes 271–73 and accompanying text.

courts work with statutes that even formalists would characterize as delegating policymaking authority to the judicial branch. And the hard question (for the formalist) then becomes how, precisely, to distinguish between "merely" ambiguous statutory provisions that do not delegate such authority and those other statutory provisions that involve a bona fide conferral of policymaking discretion. Much of the workaday statutory decisions by federal courts, to be sure, may fall within the first category: ambiguous provisions that do not trigger any nondelegation concern and therefore do not call for the application of a nondelegation-avoiding MQD. But prototypical common law statutes like the Sherman Act or the LMRA would indeed fall within the second category and, to the extent such statutes might give rise to "major"-seeming judicial outcomes, would seem to mandate application of a nondelegation-avoiding MQD.

There are, however, many statutes that occupy a middle-ground between these two extremes. For example, does Title VII involve a delegation of policymaking authority to the courts insofar as it calls upon them to apply its exemptions for "bona fide occupational qualification[s] reasonably necessary to the normal operation of that particular business or enterprise," or does the application of that rule merely involve interpretive judgments about what constitutes a "bona fide occupational qualification," what counts as "reasonably necessary," and so forth.[235] Does the Religious Freedom Restoration Act[236] (RFRA) involve a delegation of policymaking authority to the courts insofar as it requires them to determine whether an infringement on a sincerely held religious belief "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest," or does the application of these rules simply involve interpretive judgments about what these provisions mean?[237] Does § 706(2)(A) of the APA,[238] which empowers courts to strike down agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," raise merely interpretive issues, or

235. *See* 42 U.S.C. § 2000e-2(e)(1) (bona fide occupational qualification exemption). The Court has described this provision as "narrow," a construction it justified based upon the statute's text, legislative history, and deference to the consistent policy of the U.S. Equal Employment Opportunity Commission. Dothard v. Rawlinson, 433 U.S. 321, 334 (1977). For a related observation concerning administrative adjudication, see Daniel T. Deacon, Chenery II *Revisited*, 92 GEO. WASH. L. REV. 1050, 1066 (2024) (emphasizing that "policymaking" is a "natural byproduct of administrative adjudication" in part because when agencies adjudicate they work to "flesh out [legislative] standards by providing reasons for their determinations, reasons that will often cut somewhat more broadly than the case at hand" (citing Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 641 (1995))). It is not difficult to see how, at least with respect to some statutes, the federal courts' work can be viewed in a similar way.

236. 42 U.S.C. §§ 2000bb-1 to 2000bb-4.

237. *See* 42 U.S.C. § 2000bb-1(b) (RFRA's rule limiting when government may substantially burden the exercise of religion); Volokh, *supra* note 213, at 1443 (labeling RFRA one of several "statutes where an elaborate common-law-style edifice has been constructed on the barest of text").

238. 5 U.S.C. §§ 1001–1011.

does it too confer a form of policymaking authority on the courts?[239] We are not sure what the answers to these questions should be, but they are questions that must be asked if one is to insist that the mere "interpretation" of federal statutes is not subject to the nondelegation-avoiding judicial MQD.

A further complication for the "just-interpretation" objection stems from *Loper Bright* itself. Because *Loper Bright* insists that ambiguity alone does not effectuate a delegation of agency authority,[240] the Court can no longer plausibly contend that an ambiguous provision in an enabling statute poses potential nondelegation problems insofar as it might (or might not) be read to authorize an agency to do major things. Put differently, pre–*Loper Bright*, one could insist on a narrow reading of statutory ambiguities on the theory that such a reading was necessary to deny to an agency the *discretionary authority* to do a major thing. But if ambiguities are always resolvable by way of the "interpretive" discovery of a statute's actual semantic import, then one no longer has any *nondelegation-based* reason to worry about an agency's conclusion that an ambiguous statute authorizes it to do a major thing. That is, if the ambiguous provision in question in fact has only one "true" meaning to be discovered by way of interpretive judgment, then the agency *has no discretion* to determine whether the statute permits it to do a major thing. And if that's true, then the nondelegation doctrine cannot furnish a *substantive* reason for favoring the major-act-authorizing interpretation of the statute over the major-act-prohibiting interpretation of the statute. One need not, that is, artificially narrow the scope of the enabling statute for the sake of limiting agency discretion because, *Loper Bright* tells us, the agency in fact has no discretion to choose between the two readings in the first place.[241]

That is not to say, of course, that *Loper Bright* leaves no room at all for a nondelegation-avoiding agency MQD—as with courts, the rule would still have bite as applied to statutory provisions that explicitly delegate open-ended policy discretion to agencies but then go on to define the scope of that discretion in open-ended or unclear terms. But, post–*Loper Bright*, the agency MQD can no longer be said to avoid potential nondelegation problems simply because it pushes courts to adopt artificially narrow readings of enabling statutes' ambiguous terms.

ii. The Inherent Authority Objection

All well and good, we can imagine a critic of the judicial MQD saying, "but there is another, more fundamental objection to the equal application thesis that builds upon the 'just-interpretation' objection." This objection starts with Article III's "judicial Power" to decide "Cases" or

239. *See* 5 U.S.C. § 706(2)(A) (APA's judicial review provision). For an argument that much of modern administrative law, including the arbitrary and capricious standard of review, is federal common law, see Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1298–301 (2012).

240. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2266 (2024).

241. *Id.*

"Controversies."[242] This inherent authority, the objection goes, is the constitutional distinction between courts and agencies that matters for nondelegation purposes.

The inherent authority objection to the equal application thesis is that federal courts, unlike federal agencies, have inherent authority to interpret and even make law in the course of deciding cases and controversies. There is no nondelegation problem when a federal court exercises this inherent authority, which is necessary for fulfilling the judicial duty to decide the matter before it. And there is arguably no nondelegation problem even when Congress has transferred authority to a federal court, so long as the congressionally delegated authority has a reasonable nexus with inherent judicial authority.[243] There being no nondelegation problem, there is no nondelegation-based justification for the judicial MQD.

It is blackletter law, of course, that administrative agencies are creatures of statute that do not have inherent authority.[244] The Supreme Court, by contrast, is a creature of the Constitution.[245] The status of the lower federal courts is more complicated but not the same as the status of administrative agencies. The Constitution contemplated that Congress might create lower federal courts, but, at least according to the consensus view, did not require Congress to do so.[246] One might argue that the lower federal courts are therefore creatures of statute in a very real and constitutionally significant sense,[247] one that is relevant to the nondelegation doctrine's applicability. Indeed, insofar as Congress controls the jurisdiction of the Supreme Court, and may deny it jurisdiction, the Court too depends upon congressional

242. U.S. CONST. art. III, § 2.

243. *Cf.* Volokh, *supra* note 213, at 1404 ("[T]he Inherent-Powers Corollary (and Interlinking Extension) applies only when the delegation is in (or near) areas where the delegate already has a preexisting power . . . .").

244. Nat'l Fed'n of Indep. Bus. v. Occupational Safety & Health Admin., 142 S. Ct. 661, 664–65 (2022) ("Administrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided.").

245. *See* U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court . . . .").

246. Article III, § 1 provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." *Id.* This text reflected the terms of the Madisonian Compromise, which left the creation of the lower federal courts to Congress. *See, e.g.*, ERWIN CHEMERINSKY, SETH DAVIS, FRED O. SMITH & NORMAN W. SPAULDING, FEDERAL COURTS IN CONTEXT 47–48 (2023). For an argument that the Constitution does not leave the creation of lower federal courts to Congress's discretion, see Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741 (1984). *See also* Akhil Reed Amar, *A Neo-federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985) (arguing that Constitution does not mandate the creation of lower federal courts but it does require that a federal court (either the Supreme Court or a lower federal court) be available for federal question, admiralty, and public ambassador cases).

247. *See, e.g.*, Del Valle v. Sec'y of State, 16 F.4th 832, 837 (11th Cir. 2021) ("The lower federal courts are creatures of statute, and hence '[t]heir powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction.'" (quoting *Ex parte* Robinson, 86 U.S. 505, 511 (1873)).

authorization for whatever decision-making authority it has.[248] But the basic point of the inherent authority objection is that all federal courts wield inherent authority under Article III. Major judicial decisions are made by institutions that do not depend entirely on Congress for their existence and authority but who are rather constitutional entities vested with the "judicial Power of the United States." Perhaps for that reason, major judicial decisions should give us less pause than major agency decisions.

There is a small and incisive literature on whether the inherent authority of federal courts to resolve cases and controversies obviates any nondelegation concerns that might arise from comparing them to agencies. Professor Martin Redish has argued that it does,[249] whereas Professor Margaret Lemos has argued that nondelegation concerns apply equally to courts and agencies.[250] Moreover, Professor Aaron Nielsen has explained the doctrine of *Erie Railroad Co. v. Tompkins*[251] in nondelegation terms,[252] and Professor Sasha Volokh has parsed the nondelegation doctrine and the inherent authority exception to conclude that nondelegation concerns apply at least sometimes to courts as they do to agencies.[253] Building on this debate, we would stress three points and conclude that the inherent authority objection does not rule out the judicial MQD but might limit its scope.

First, the inherent authority objection piggybacks on the just-interpretation objection to argue that a court that merely interprets a statute is not exercising any congressionally delegated authority. Rather, the court is exercising the judicial power, with the judge (or judges) "us[ing] his [or their] own judgment as to which method to use" and then applying that method to the statute before the court.[254] Thus understood, there is no nondelegation problem with the choice and application of an interpretive methodology that includes the MQD.

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248. Article III, § 2 provides that "the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress may have directed." U.S. CONST. art. III, § 2. A perennial question in federal courts law is whether Article III's reference to "exceptions" and "regulations" affords Congress plenary authority over Supreme Court jurisdiction. *See, e.g.*, CHEMERINSKY ET AL., *supra* note 246, at 423–24 (summarizing history of congressional control of Supreme Court jurisdiction).

249. *See* MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 140–41 (1995) (arguing that courts may make law pursuant to a delegation of authority so long as they are doing so in order to decide a justiciable case or controversy).

250. Lemos, *supra* note 213, at 442–43 ("[T]here is no persuasive basis on which to exempt delegations to courts from the constitutional restrictions that apply to delegations to agencies.").

251. 304 U.S. 64 (1938).

252. Aaron Nielson, Erie *as Nondelegation*, 72 OHIO STATE L.J. 239, 242 (2011) ("*Erie* is constitutionally correct for the simple reason that pursuant to the nondelegation doctrine, Congress cannot hand off power to create law governing broad swaths of the national economy with no intelligible principle to guide that law's creation—no matter which branch is Congress's delegate."). *See generally* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) ("There is no federal general common law.").

253. *See* Volokh, *supra* note 213, at 1394 (arguing that the "the Inherent-Powers Corollary can justify a large number of delegations to the judiciary" but not all such delegations).

254. *Id.* at 1441.

Second, the inherent authority objection does not, however, eliminate the judicial MQD for statutes that delegate authority to courts. In our view, these include the common law statutes that the Court has understood to effectuate delegations of authority as well as statutes that are so broadly worded or unclear as to assign the decision to the courts. Reasonable minds will differ about where to draw the line, but we think that there are indeed statutes that delegate authority to the judiciary—or at least do so in a manner that implicates the limits of the nondelegation doctrine itself.

Even for these statutes, however, a skeptic of the equal application thesis might argue that the inherent authority exception to the nondelegation doctrine does indeed rule out the judicial MQD. The Court has held that Congress may grant authority within fields where the recipient of the congressional grant has its own inherent authority.[255] This inherent authority exception holds that Congress has greater leeway to delegate authority that overlaps or has a nexus with the inherent authority of another institution. The Court has applied this exception when employing the intelligible principle test for nondelegation. For example, Congress may grant authority to the president in the field of foreign affairs without supplying the same sort of intelligible principle that would be required for a delegation to an agency tasked with regulating some everyday aspect of domestic affairs.[256] By application of the same principle, Congress may grant authority to a Native nation to regulate in an area where federal authority and inherent tribal sovereignty are shared.[257] Similarly, the skeptic would argue, there is no nondelegation problem when Congress either expressly or impliedly delegates lawmaking authority to a court, even if that authority involves a major question.

We think the skeptic's argument has two problems. The first is that the inherent authority exception is an exception to the intelligible principle requirement.[258] It is by no means clear how a reimagined nondelegation doctrine that makes majorness constitutionally significant would interact with the inherent authority exception. If the underlying idea is that there are some "major" decisions that Congress absolutely has to make itself because they are inherently legislative, then we do not think that the inherent authority exception necessarily would save an otherwise unconstitutional delegation of major decision-making authority to federal courts.

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255. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319–22 (1936). For discussion of the inherent authority exception to the nondelegation doctrine, see Seth Davis, *Nondelegation and Native Nations*, 56 CONN. L. REV. 1069 (2024); Volokh, *supra* note 213, at 1394.

256. *See Curtiss-Wright*, 299 U.S. at 319–22 (applying the inherent authority exception to hold that a delegation to the president was constitutional in a case decided just one year after the Court struck down two provisions of New Deal legislation on nondelegation grounds).

257. *See* United States v. Mazurie, 419 U.S. 544, 556–57 (1975) (holding that Congress could, notwithstanding the nondelegation doctrine, delegate authority based on a Native nation's "independent authority over the subject matter").

258. *See Curtiss-Wright*, 299 U.S. at 319–22 (applying inherent authority exception to the intelligible principle requirement); *Mazurie*, 419 U.S. at 556–57.

Justice Gorsuch's *Gundy* dissent, again, is instructive on what the reimagined nondelegation doctrine might mean for a judicial MQD.[259] His three-part test starts from the premise that there are inherently and exclusively legislative decisions that Congress must make. To illustrate this foundational principle, he cites *Wayman*'s distinction between "important subjects" that Congress must itself regulate and matters of "detail[]" that Congress may delegate to courts.[260] If that principle is satisfied, then Justice Gorsuch would allow Congress to "assign the executive and judicial branches certain *non-legislative* responsibilities" in light of the inherent authority doctrine.[261] Returning to *Wayman*, and re-reading it as an inherent authority case, Justice Gorsuch concludes that the statute was constitutional because courts already had inherent authority over their rules of procedure.[262] As best as we can tell, that leaves no room for an inherent authority exception to a nondelegation prohibition on Congress transferring exclusively legislative decisions about "important subjects" to courts.

The second problem for the skeptic of the judicial MQD is that current doctrine recognizes only a limited inherent authority of the federal courts to make federal common law. Thus, not every congressional delegation of lawmaking authority to courts is likely to overlap with an inherent common lawmaking power that the courts already enjoy. The Court stated over forty years ago and has consistently restated since then that the "instances" of legitimate federal common law are "few and restricted."[263] Federal judges may make rules of decision only when it is "necessary to protect uniquely federal interests" and when "Congress has given the courts the power to develop substantive law."[264] The latter category involves delegated authority and thus raises the potential nondelegation problem. The former category is "narrow" and limited to cases where "our federal system does not permit the controversy to be resolved under state law."[265]

Notably, in *Texas Industries, Inc. v. Radcliffe Materials, Inc.*,[266] the Court rejected a federal common law of decision for antitrust cases based upon "far-reaching" policy implications.[267] The justices unanimously concluded that the federal courts could not create a right to contribution when applying the remedial provisions of the antitrust laws even though there was a "federal

259. Gundy v. United States, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., joined by Roberts, C.J., & Thomas, J., dissenting).

260. *Id.* at 2135–36 (discussing Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 10 (1825)).

261. *Id.* at 2137.

262. *Id.* ("*Wayman* itself might be explained by the same principle as applied to the judiciary: Even in the absence of any statute, courts have the power under Article III 'to regulate their practice.'").

263. Texas Indus., Inc. v. Radcliffe Materials, Inc., 451 U.S. 630, 640 (1981) (quoting Wheeldin v. Wheeler, 373 U.S. 647, 651 (1963)).

264. *Id.* (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426 (1964)).

265. *Id.* at 641 (giving three examples of legitimate federal common law: (i) cases involving "the rights and obligations of the United States," (ii) "interstate and international disputes," and (iii) admiralty).

266. 451 U.S. 630 (1981).

267. *Id.* at 646.

interest" and Congress had authorized the federal courts to make common law under "the first two sections of the Sherman Act."[268] The Court construed the statute not to "confer[] on federal courts the broad power to formulate the right to contribution" sought in that case.[269] In so holding, the Court stressed that the "policy questions" involved are "far-reaching" and therefore a "matter for Congress."[270] It would be too much to say that this reasoning reflected a bona fide application of the judicial MQD, but it is consistent with the idea that a federal court should be wary of reading a statute to authorize a major outcome because some major decisions are for Congress and only Congress to make.

The determined skeptic might argue that the Supreme Court has misunderstood federal common law. Properly understood, federal common law is *not* the product of law*making*. Rather, federal common law is out there to be found and thus is the product of law*finding*.[271] The federal courts are never making law, not even under common law statutes that the Court has described as delegating lawmaking authority. Or, at least, federal courts *should* not be making law, and if that is what they understand federal common law to be in a post-*Erie* world, then what is needed is a rethinking of *Erie*'s conception of federal common law.[272] There are hints of this view of the common law in Justice Gorsuch's concurring opinion in *Loper Bright*,[273] and we cannot rule out the possibility that the agency MQD defenders are confident (too confident, in our view) that the MQD has no implications for judges because all that judges do is "just interpretation" or "finding the common law." But to the extent that it is so, we think such defenders need to develop and defend the idea in considerably greater detail than they have thus far done.

Third, and finally, we stress that the inherent authority objection applies to only the nondelegation argument for the MQD. The other justifications do not depend on the nondelegation doctrine and therefore are not susceptible to the objection that the inherent authority of federal courts distinguishes them from federal agencies for nondelegation purposes. At most, then, the inherent authority objection might limit the scope of the judicial MQD if we understand the MQD to be nothing other than a prophylactic rule that aims

268. *Id.* at 642–45.

269. *Id.* at 646.

270. *Id.* at 646–47.

271. For example, Professor Charles Tyler has described the Court's LMRA jurisprudence as a series of cases that found, rather than made, law by looking to the consensus view of contract doctrine. Charles W. Tyler, *Common Law Statutes*, 99 NOTRE DAME L. REV. 669, 681 (2023) ("[T]he Court has tended to derive rules of decision from 'ordinary principles of contract law.'"). For a wide-ranging defense of the idea of finding law, see generally Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527 (2019).

272. Sachs, *supra* note 271, at 530 ("A system of positive law, with fallible people as judges, can still expect those judges to find unwritten law and not to make it.").

273. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2444, 2276 (2024) (Gorsuch, J., concurring) ("At common law . . . the judge's task was to examine [the] pre-existing legal traditions and apply in the disputes that came to him those legal rules that were 'common to the whole land and to all Englishmen.'").

to deter constitutionally suspect delegations of major decision-making authority. Indeed, to the extent one views the nondelegation rationale as one among several justifications for the agency MQD, our analysis would suggest that the other, accompanying justifications would continue to require full adherence to the judicial MQD as well.

IV. POTENTIAL PATHS FORWARD

We have argued that three of the agency MQD's four potential justifications—both of the Congress-protecting rationales (i.e., the semantic justification and the anti-aggrandizement justification) and one of the Congress-constraining rationales (i.e., the clarity-mandating justification)—imply the existence of an equally strong judicial MQD. And we have further concluded that the nondelegation rationale permits recognition of the agency MQD without recognition of a similarly strong and expansive judicial MQD. It thus follows that the only coherent means of embracing the agency MQD without (fully) embracing the judicial MQD is to explicitly recast the latter as a nondelegation-avoiding device—something that the Court has not yet done.

This suggests three possible paths forward for a Court seeking to apply the major questions doctrine in a principled and coherent manner. First, the Court could embrace the nondelegation-avoiding justification as the one and only justification for the agency MQD's existence and thus obviate the need (albeit only to an extent) to bring the agency MQD into alignment with the judicial MQD. Second, the Court could concede that the equal application thesis is correct and thus proceed to strengthen the judicial MQD to bring it into alignment with the existing, strong-form agency MQD (thus satisfying the demands of the equal application thesis by "leveling up"). And finally, the Court could similarly concede that the equal application thesis is correct and thus proceed to weaken the agency MQD to bring into alignment with the existing, weak-form judicial MQD (thus satisfying the demands of the equal application thesis by "leveling down").

For reasons we develop below, we believe the first two of these three options pose significant and potentially intractable problems, enough to raise real doubts about whether they are worth pursuing at all. By contrast, we regard the third, "leveling-down"-based approach as a conceptually defensible, doctrinally grounded, and practically workable path forward.

A. Embracing the Nondelegation-Avoidance Rationale

As we have shown, not every possible justification for the agency MQD requires the Court to embrace an equally strong version of the judicial MQD. In particular, the status-quo asymmetry between the Court's extreme statutory skepticism toward major assertions of agency power and only moderate statutory skepticism toward major assertions of judicial power

might be partly defensible on nondelegation grounds.[274] That might be so because one accepts the formalist premise that the judicial application of unclear statutory language does not involve the sort of policymaking discretion associated with a bona fide exercise of "legislative" power or because one insists that courts have inherent Article III powers to make "major" discretionary decisions in connection with certain types of statutory cases. Thus, embracing the nondelegation-avoiding justification would be consistent with a judicial MQD that is weaker than the agency MQD.

In our view, however, there are two significant problems with this approach. The first has to do with the initial step of recasting the agency MQD as nondelegation-avoiding device. Putting to one side the question of whether such an effort could garner the support of a majority of the Court,[275] one problem is that the nondelegation doctrine does not treat the "majorness" of a delegated power as relevant to its "legislative" or non-"legislative" character. In our view, then, the Court cannot coherently embrace the nondelegation-avoiding justification for the agency MQD unless and until it overrules its prior nondelegation decisions and articulates a new *version* of the doctrine. That is certainly something the Court could try to do; indeed, it is certainly something that some of its members would like to do.[276] But we do not think revamping the nondelegation doctrine along these lines is a good idea—in part because it involves discarding decades worth of prior precedent, in part because the underlying justifications for a revamped, majorness-dependent nondelegation doctrine are not particularly persuasive,[277] and in part because we are doubtful that such a doctrine, even

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274. *See supra* Part III.B.2.

275. There may not be five votes on the current Court for the nondelegation justification. In *West Virginia*, Chief Justice Roberts's opinion for the Court pointed to the semantic justification and "separation of powers principles." 142 S. Ct. 2587, 2609 (2022). As to the latter, Chief Justice Roberts appeared to rely on the anti-aggrandizement justification, not the nondelegation-avoiding justification, as capturing the relevant set of separation of powers–based concerns. *See id.* ("As for the major questions doctrine 'label[],' it took hold because it refers to an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted."). That being said, Chief Justice Roberts joined Justice Gorsuch's *Gundy* dissent, which embraced the nondelegation-avoidance justification. *See* Gundy v. United States, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting). Justice Thomas also joined that dissent, suggesting that at least three justices may accept that justification. *See id.* Justice Barrett has rejected the nondelegation justification. *See* Biden v. Nebraska, 143 S. Ct. 2355, 2378 (2023) (Barrett, J., concurring). It is unclear where Justice Kavanaugh would stand if pressed, as he has labeled the agency MQD as "closely related" to the nondelegation doctrine but recognized that there is a mismatch between the MQD and Justice Gorsuch's reimagined nondelegation framework. *See* Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., statement respecting the denial of certiorari) ("The opinion[] of . . . Justice Gorsuch would not allow . . . congressional delegations to agencies of authority to decide major policy questions—even if Congress expressly and specifically delegates that authority."). It is also unclear whether Justice Alito would embrace the nondelegation-avoidance justification for the agency MQD, although he has written that he is open to reconsidering the nondelegation doctrine more generally. *Gundy*, 139 S. Ct. at 2130–31 (Alito, J., concurring in the judgment).

276. *See supra* note 275.

277. *See* Coenen, *supra* note 181.

if adequately justified, could be operationalized in a workable and sensible manner.[278]

The second problem has to do with the difficulty of navigating the implications of a nondelegation-avoiding agency MQD. As we have already emphasized, an agency MQD justified on nondelegation-avoiding grounds still requires partial adherence to a similarly robust judicial MQD. But delineating the boundaries of that latter doctrine is no easy task. To dictate when and whether a nondelegation-avoiding *judicial* MQD operates to limit courts' own statutory work, the justices would likely need to develop a much more detailed account of the difference between "common-law" statutes that do indeed "delegate" implementation-based responsibilities to the federal courts and a much thicker account of courts' inherent Article III-based authorities to (sometimes?) play a "major" role in carrying out Congress's statutory commands. Embracing the nondelegation-avoidance justification thus manages to sidestep the demands of the equal application thesis, but only at the considerable expense of making relevant a host of knotty questions about the scope of the judicial MQD's applicability.[279]

B. Strengthening the Judicial MQD

The second potential response to the equal application thesis would be for the Court to maintain that agency MQD in its robust, present-day form while formally enshrining a more rigorous and "rulified" version of the judicial MQD. In other words, the Court could accept the equal application thesis as correct and seek to satisfy the demands of that thesis by "leveling up" the judicial MQD to make it at least as rigorous as the agency MQD. This approach might well carry surface-level appeal—particularly to a Court that embraces the agency MQD and would not wish for the equal application thesis to undermine its efficacy. But it too brings with it some serious problems.

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278. One could of course argue that no change to the nondelegation doctrine is necessary because the agency MQD has itself already effectuated the needed change. That is, one might argue that the Court has indeed embraced a new understanding of the nondelegation doctrine by simultaneously (a) adopting the agency MQD and (b) suggesting, as Justice Gorsuch has done, that the agency MQD operates "in service of" the nondelegation doctrine. We think it is possible, as a descriptive matter, that the Court might be *trying* to do just that. *See* Sohoni, *supra* note 8, at 267. But we think that is inappropriate as a normative matter for the Court to pursue such a transformative change in such an opaque and unreasoned manner. *See id.* at 314–15 ("The Court should have stayed its hand before applying, and indeed it had no business creating, a new clear statement rule with such grave consequences for two coequal branches of government (and for society as a whole) that is so opaque in both its application and its justification.").

279. There is another point too. It is possible that some (or all) of the MQD's proponents regard the doctrine as simultaneously justified by *both* the nondelegation-avoidance rationale and another one (or more) of the other rationales we have outlined in our analysis. But if that is the Court's view, then embracing the nondelegation-avoiding rationale does not in fact allow the Court to even partially ignore the demands of the equal application thesis because the thesis would continue to apply with full force in connection with the other operative rationales.

First, strengthening the judicial MQD is likely to exacerbate the significant workability issues that already beset the strong-form agency MQD. Figuring out what qualifies as "major" as opposed to nonmajor action will be no easier when judges apply the MQD to themselves, and the same will likely be true when it comes to the task of figuring out what specifically is entailed by the "distinct" methodological approach envisioned by the "clear congressional authorization" requirement.[280]

In fact, these challenges will likely be *more* difficult to navigate as applied to the judicial MQD, where features unique to the courts' work introduce further complications into the mix. Consider, for instance, the tricky relationship between a strengthened judicial MQD and the demands of statutory stare decisis: If, for example, one regards the "qualified immunity" rule as a major application of 42 U.S.C. § 1983, should it matter for judicial MQD purposes that the rule has been repeatedly reaffirmed over the course of several decades?[281] Or should the absence of "clear" congressional authorization still suffice to demonstrate the rule's bottom-line invalidity? Another tricky set of questions concerns the baseline against which "majorness" of a judicial decision gets discerned: How, in particular, does the strong-form judicial MQD apply in connection with genuinely "high-stakes" cases in which the underlying statutory questions cannot but be resolved in a major-seeming way? One might say, for instance, that *Bostock* posed a question whose answer was bound to be "major" no matter which way the case came out—either Title VII *did* prohibit sexual orientation and gender identity discrimination (thus imposing a major new legal requirement on employers around the country), or Title VII did not prohibit such forms of discrimination (thus denying to employees around the country a major source of antidiscrimination protection).[282] How would the MQD operate in such a case? Does it fall to both sides to demonstrate "clear congressional authorization" for their respective positions? And what happens if neither side manages to carry that burden?

A second problem with the "leveling up" strategy is no less daunting than the first. The issue is this: a strong-form judicial MQD and a strong-form agency MQD may conflict with *one another*. Of particular concern is the question of how to reconcile the demands of both rules when deciding statutory cases about the scope of agency power. To invalidate "major" agency action, after all, is to itself do something major, and one thus might argue that the judicial MQD permits judicial invalidation of major agency action only where the agency's enabling statute clearly authorizes the reviewing court to do so. But that is precisely the opposite of what the agency MQD would require; according to the agency MQD, agencies cannot take major actions unless those actions are supported by clear congressional

280. *See* West Virginia v. EPA, 142 S. Ct. at 2609 ("The agency . . . must point to 'clear congressional authorization' for the power it claims.").

281. *See, e.g.*, Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853, 1857 (2018) (defending qualified immunity on the ground that "much of [the doctrine] falls squarely within statutory stare decisis").

282. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1753 (2020).

authorization, meaning that courts must invalidate the "major" action unless the enabling statute clearly *prohibits* the court from doing so. To put the point more generally, and as Professor Fred Jacob has recently suggested, there is a sense in which the strong-form agency MQD violates the strong-form judicial MQD: The agency MQD itself reflects a major exercise of the federal judicial power that lacks clear congressional (or for that matter constitutional) authorization.[283] And if a strong judicial MQD is simultaneously in effect, it is not clear how or why the agency MQD could continue to exist alongside it.[284]

Finally, even to the extent that that the strong-form agency MQD can peacefully coexist alongside a similarly strong-form judicial MQD, there remains the further problem that strengthening the judicial MQD threatens to further ossify the landscape of substantive federal law. Particularly when Congress confronts obstacles to major but much-needed legislative change,[285] precluding *both* agencies and courts from applying existing statutory law to achieve major-but-not-clearly-authorized results threatens to render all three branches of the federal government simultaneously incapable of confronting significant real-world problems that require a significant governmental response. This is, to be clear, already a criticism that some have leveled against the agency MQD standing alone: where the legislative branch lacks the institutional capacity to adopt "major" (but much needed) new laws, then one should be extremely nervous about imposing new constraints on the executive branch's ability to implement existing laws in new and major ways.[286] But the problem would grow worse where there exists yet a third constraint that precludes the judicial branch from doing the same thing.

C. Weakening the Agency MQD

For these reasons, we think the project of strengthening the judicial MQD to align with the strong-form agency MQD is fraught with risk. By contrast, diluting the agency MQD to make it operate more like the judicial MQD (in its existing and comparatively weaker form) poses comparatively fewer

283. Jacob, *supra* note 20, at 569 (arguing that "*West Virginia*'s creation of the doctrine itself" "would have flunked" the MQD test).

284. To be clear, we offer these observations only tentatively; perhaps there exists some means of reconciling the application of both rules in agency-power cases. And there may also be room to argue that if the agency MQD derives from *constitutional* principles, the rule itself poses no problem in relation to the judicial MQD's requirement that *statutory* judicial decisions be supported by clear congressional authorization. (Put differently, if a court claims the constitutional authority to set aside major agency action not clearly authorized by Congress, then it is not necessarily violating a parallel injunction against rendering major-seeming *statutory* decisions not supported by a clear statutory text.) But there may also be room to argue that it ought to follow a fortiori from the judicial MQD that the court should decline to adopt "major" new rules of constitutional law that the Constitution itself fails to *clearly* support. And if that were the case, then the tension between the two rules cannot be so easily waved away.

285. Levin, *supra* note 8, at 955–61.

286. *Id.* at 961–63.

problems. First, in terms of workability, reconfiguring the agency MQD to operate more like a soft "rule of thumb" would obviate the need to devise a workable definition of "majorness" and a workable version of the "clear congressional authorization" requirement; rather, restoring the agency MQD back to its original "elephants-in-mouseholes"-like roots would likely allow courts to draw guidance from its animating insights without elevating it to the status of a reified bright-line rule.[287] Second, internal tensions between the two rules would likely ease as well. The looser the constraints of the agency MQD, the less frequently it will compel courts to invalidate major agency initiatives in a manner that would run afoul of the (also relatively loose) constraints of the judicial MQD. And finally, leveling down the agency MQD would diminish the risk of ossification and obsolescence by enabling courts and agencies to apply existing statutes in a manner that is meaningfully responsive to changed circumstances.

Appealing as this solution might be as a practical matter, however, there remains a significant impediment to its realization: simply put, weakening the agency MQD may not be fully consistent with three of the four potential justifications we have identified in this Article. As we see it, the anti-aggrandizement justification, the clarity-mandating justification, and the nondelegation-avoidance justification all stand in some tension with the idea that the agency MQD should operate as a soft thumb on the interpretive scale rather than a strong-form clear statement requirement. If, for instance, one views the agency MQD as a necessary prophylactic rule to prevent agency aggrandizements of power,[288] then the requisite theory of prophylaxis would seem to call for something along the lines of a bright-line rule. Similarly, if one believes that the Constitution *requires* Congress to speak clearly before authorizing agencies to implement major policies,[289] then one would probably have to reject a diluted agency MQD on the ground that such a doctrine would sometimes (if not often) let Congress get away with doing something that it is not in fact constitutionally permitted to do. And finally, if one believes that some delegations of major policymaking authority unconstitutionally vest the "legislative" power in nonlegislative actors,[290] one might similarly insist that "leveling down" the agency MQD would reflect an abdication of the federal courts' constitutional responsibilities.[291]

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287. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

288. *See supra* Part II.B.

289. *See supra* Part III.A.

290. *See supra* Part III.B.

291. To be sure, a proponent of the anti-aggrandizement, clarity-mandating, and/or nondelegation-avoiding justification could coherently treat a weak-form agency MQD as a means of underenforcing whatever constitutional norms are said to underlie it. *See* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978) (exploring institutional reasons that explain why the Supreme Court may adopt doctrines underenforcing constitutional norms); *see also* Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1324 (2006). But such a proponent would have to then frankly acknowledge that the doctrine

By contrast, recasting the agency MQD as an interpretive canon would fit comfortably with the semantic justification. The semantic justification, as we have suggested, does not necessarily demand a strong clear statement rule. Indeed, we think the justification makes the most sense precisely when invoked in defense of an agency MQD that operates as one among other context-sensitive tools of statutory interpretation. This point, it seems to us, becomes especially clear when one scrutinizes the arguments of Justice Barrett, the semantic justification's most outspoken judicial proponent. It is true, Justice Barrett notes, that "many [Supreme Court] cases express an expectation of 'clear congressional authorization' to support sweeping agency action."[292] But the agency MQD, properly understood, need not be treated as a strong-form clear statement rule,[293] at least insofar as the sort of "clear congressional authorization" required by the rule need not be found in the "specific words in the statute."[294] Context, no less than plain text, may satisfy the agency MQD's requirement: "Surrounding circumstances, whether contained within the statutory scheme or external to it, can narrow or broaden the scope of a delegation to an agency."[295] Because the semantic justification treats the agency MQD as a contextual tool for "giv[ing] Congress's words their best reading,"[296] its logic is consistent with—and even demands—rejecting the agency MQD as a strong clear statement rule requiring specific and unequivocal statutory authorization for any and all agency actions that the reviewing court characterizes as "major."

If the agency MQD is to be a rule of thumb, the question is how strong or weak that rule will be. For Justice Barrett, the semantic justification seems to point toward a strong rule of thumb that, when placed on the scales, requires an agency to come up with compelling textual or contextual evidence to support its reading of its enabling statute. That, we take it, is the lesson of Justice Barrett's votes in *West Virginia* as well as *Biden v. Nebraska*.[297] But at times, her account suggests that the agency MQD might operate as a weaker presumption against major agency action: a "measure of skepticism" along the lines some of the Court's representative elephants-in-mouseholes decisions.[298] And it is precisely this weakened version of the agency MQD—a version that we think flows logically from the semantic justification—that would bring it into alignment with the

itself is incapable of protecting or constraining Congress as much or as often as the Constitution itself would seem to demand.

292. Biden v. Nebraska, 143 S. Ct. 2355, 2378 (2023) (Barrett, J. concurring).

293. *Id.* ("[N]one requires 'an "unequivocal declaration"' from Congress authorizing the *precise* agency action under review, as our clear statement cases do in their respective domains.").

294. *Id.* at 2380.

295. *Id.*

296. *Id.* at 2384.

297. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2596–99 (2022) (Justice Barrett joined in Chief Justice Roberts's opinion for the Court); Biden v. Nebraska, 143 S. Ct. at 2384 (stressing that agency MQD "has an important role to play").

298. Biden v. Nebraska, 143 S. Ct. at 2381 (quoting Util. Air. Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

Court's current prevailing approach to thinking about majorness when interpreting statutes outside the administrative-law domain.

The closest thing we have to a judicial MQD, recall, is the "elephants-in-mouseholes" canon, which is said to capture the idea that "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions."[299] This "elephants-in-mouseholes" metaphor currently leads a strange dual existence: on the one hand, it is sometimes invoked as a *justification* for the agency MQD itself; in other words, courts advert to the elephants-in-mouseholes idea as a reason why the strong-form agency MQD is necessary.[300] But as we earlier noted, the idea is sometimes invoked directly in standalone statutory cases for purposes of defending particular statutory constructions that the Court has arrived at by way of "normal statutory interpretation."[301] In other words, as of now, the Court sees the elephants-in-mouseholes idea as justifying both the strong-form rule of the agency MQD and a weak-form canon to assist courts in resolving nonagency-related statutory cases. As we see it, then, an easy "leveling down"-based solution would be for courts to simply replace the strong-form agency MQD with the more contextual sort of statutory analysis that the elephants-in-mouseholes idea already supports in cases where agencies are not involved.

Recall in this respect our earlier discussion of *Bostock*. There, Justice Gorsuch treated the "broad language" of Title VII's antidiscrimination prohibition as evidence that an "elephant . . . has been standing before us all along."[302] If that approach to broad statutory text had been applied in *West Virginia*, the EPA's position should have been upheld. After all, treating generation shifting as a "system of emission reduction" under the Clean Air Act might have yielded major consequences,[303] but that statutory language was also "written in starkly broad terms" that "virtually guaranteed that unexpected applications would emerge over time."[304] Put differently, the Court could have—and indeed, we think, should have—recognized in *West Virginia* that, even though the agency's action carried an elephant-like magnitude, the broad and capacious language of § 111(d)—especially when understood in light of the Clean Air Act's broader goals—was sufficiently

299. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001).

300. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Occupational Safety & Health Admin., 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring) (holding that the agency MQD "guards against th[e] possibility" of agency aggrandizement "by recognizing that Congress does not usually 'hide elephants in mouseholes'").

301. *See, e.g.*, Banks v. Booth, 3 F.4th 445, 449 (D.C. Cir. 2021) (applying the elephants-in-mouseholes canon to reject a proposed construction of the Prison Litigation Reform Act).

302. *See* Jacob, *supra* note 20, at 575 (emphasizing that Justice Gorsuch's majority opinion in *Bostock* "essentially concedes that Title VII fails to provide 'clear congressional authorization' for the interpretation" the Court endorsed).

303. West Virginia v. EPA, 142 S. Ct. 2587, 2610 (2022) (describing the case as a major questions case because the EPA had argued "that Section 111(d) empowers it to substantially restructure the American energy market").

304. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1753 (2020).

open-ended (i.e., non-"mousehole"-like) to make room for it. And we think that example underscores the more general point that, by recognizing that "vague" language sometimes (though not necessarily always) signals an affirmative congressional desire for "unexpected applications" of that language "over time," the Court would, in our view, render the agency MQD a much more effective tool for doing what it at least has said it wants the doctrine to do: namely, to ensure that statutory text is read "in context" and "with a view to [its] place in the overall statutory scheme."[305]

We think, then, that the Court's invocation of the elephants-in-mouseholes canon provides doctrinal grounding for a conceptually sound and practically workable way of taking majorness into account for both agency action and judicial action. Leveling down by applying the Court's use of the elephants-in-mouseholes canon in *Bostock* to agency cases simultaneously avoids the difficulties associated with attempting to implement a strong-form judicial MQD and helps to recast the agency MQD in a form that aligns well with Justice Barrett's own semantic-based justification for it. Again, we acknowledge that the maneuver becomes available only if one is willing to discard the other three potential justifications for the agency MQD—the anti-aggrandizement, clarity-mandating, and nondelegation-avoiding justifications seem to us to make demands of the reviewing court that the soft-form elephants-in-mouseholes canon will not do enough to address. But we also think that, once the equal application thesis comes into view, the full doctrinal implications of hewing to a strong-form agency MQD should themselves prompt reconsideration of any justification that would lead the Court to such a rule.[306] By embracing the semantic justification, that is, the MQD's proponents are best situated to craft a legal regime in which the agency MQD *and* the judicial MQD can sensibly and workably coexist.

CONCLUSION

To answer the question with which this Article began, we believe that the major questions doctrine likely does apply—at least in part—to the federal courts. Only the nondelegation-avoiding rationale is consistent with an approach to majorness in the context of court-enforced statutes that differ from the approach to majorness that the agency MQD now prescribes for agency-enforced statutes. The other rationales apply equally to federal courts and federal agencies.

This in turn means that the court has not yet offered a principled justification for the new status quo in statutory interpretation, which has shifted major decision-making authority from federal agencies to federal courts. On the one hand, the agency MQD's strong clear statement rule curtails the power of federal agencies to implement their enabling statutes

305. West Virginia v. EPA, 142 S. Ct. at 2607–08.

306. *Cf.* Klein, *supra* note 20, at 372–73 (highlighting a range of difficult (if not intractable) questions concerning the agency MQD's implications for statutes that confer authorities on the federal courts and suggesting that "[p]erhaps asking such questions will persuade the Court to rein in the major questions doctrine itself").

while increasing the power of federal courts to determine regulatory policy. On the other hand, the federal courts continue to make major decisions when implementing federal statutes through traditional statutory interpretation that includes a comparatively weak elephants-in-mousehole canon. None of the justifications for the agency MQD—not even the nondelegation-avoiding justification—fully supports this bifurcated system of statutory interpretation.

Ours, however, is a time in which the justices seem supremely confident in their own competence to make major decisions of great economic, political, and social significance. Judicial hubris is nothing new in American history. But perhaps it is time for a different way of thinking about courts, one that does not so much contrast courts *against* agencies, but rather treats courts—at least when deciding statutory cases—*as* agencies unto themselves.