

# The New Nondelegation

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*The “major questions” doctrine has sparked extensive criticism from across the political and ideological spectrum. Some denounce it as naked purposivism; others as a baseless blow against the regulatory state. This Essay casts new light on the debate. We argue that the major questions doctrine enforces otherwise underenforced constitutional norms without the disruption that comes with a reinvigorated nondelegation doctrine. If the line between “major” and “nonmajor” questions is drawn in a principled manner (which it can be), the doctrine serves as an important and sensible way for federal courts to check agencies asserting unprecedented and immense authority under broadly worded statutory language. The major questions doctrine thus steers courts away from a robust nondelegation doctrine, while preserving the primacy of Congress as the Nation’s policymaker-in-chief.*

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## Introduction

The “major questions” doctrine has become a fixture of federal administrative law. It lays down the principle that an agency action of vast “economic and political significance” must be grounded in “clear congressional authorization.”<sup>1</sup> The Supreme Court has lately invoked this doctrine to invalidate sweeping regulatory initiatives, such as the EPA’s Clean Power Plan,<sup>2</sup> OSHA’s COVID–19 vaccine mandate,<sup>3</sup> and the CDC’s eviction moratorium.<sup>4</sup> The Court’s growing reliance on this doctrine belies the original presumption that it would apply only in “extraordinary cases.”<sup>5</sup> But we live in extraordinary times. Congressional gridlock and national emergencies have prompted presidents of both parties to pursue unprecedented change through agency regulation. Though critics may object to the major questions doctrine either as a normative matter or to its application in specific cases, all must admit that it is here to stay.

Stephen Breyer coined the term “major questions” in an article from 1986, observing that “Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute’s daily administration.”<sup>6</sup> That uncontroversial premise has blossomed into an immensely controversial legal doctrine. Even now, its metes and bounds remain undetermined. What distinguishes major and nonmajor questions? How clear does the congressional authorization have to be? Additionally, the Supreme Court has yet to fully clarify the doctrine’s basis, beyond some cursory reference to “separation of powers principles and a practical understanding of legislative intent.”<sup>7</sup>

This Essay advances five principal points. First, putting aside debates over its application in particular cases, the major questions doctrine is an important, legitimate tool to curb excessively broad delegations to

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1. *West Virginia v. EPA*, 142 S. Ct. 2587, 2595 (2022) (citations and internal quotation marks omitted).

2. *Id.*

3. *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab.*, 142 S. Ct. 661, 665 (2022) (per curiam).

4. *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489–90 (2021) (per curiam).

5. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

6. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986).

7. *See West Virginia v. EPA*, 142 S. Ct. 2587, 2595 (2022) (justifying the doctrine on those bases).

administrative agencies.<sup>8</sup> Second, the doctrine operates as a canon of constitutional *avoidance* and *enforcement*. The former averts statutory readings that raise serious constitutional doubt, while the latter enforces otherwise underenforced nondelegation principles in cases where constitutional doubt falls short of constitutional violation. Third, the major questions doctrine cabins *Chevron*<sup>9</sup> deference and reasserts the judiciary's primacy on questions of statutory interpretation. Fourth, a majority of Justices on the present Supreme Court likely seek to reinvigorate—or perhaps replace—the existing nondelegation framework to further restrain broad legislative delegations. Lastly, the major questions doctrine forestalls dramatic departures in the Court's nondelegation jurisprudence, thereby helping to preserve the core of the modern regulatory state. At the same time, the doctrine reinforces Congress's role as our Nation's policymaker-in-chief.

Academic comparisons of the nondelegation doctrine and the major question doctrine are plentiful. Some have discussed the nondelegation doctrine's influence on how the Court conceptualizes the major questions doctrine,<sup>10</sup> though not the inverse. Those who have acknowledged this linkage have not defended it as a normative matter.<sup>11</sup> Some have explored what this linkage reveals about the nature of *Chevron* deference,<sup>12</sup> but not about what *Chevron* doctrine reveals about the nature of Congress's Article I power. Furthermore, those who defend the major questions doctrine on nondelegation grounds seldom make appeals to those who regard the administrative state as a positive good.<sup>13</sup> We seek to fill these gaps.

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8. The Supreme Court seems to have applied an analogous clear statement rule as early as the nineteenth century. See *ICC v. Cincinnati, New Orleans & Tex. Pac. Ry. Co.*, 167 U.S. 479, 494–95 (1897) (restricting the Interstate Commerce Commission's authority to set railroad rates on grounds that “no just rule of construction would tolerate a grant of such power by mere implication”).

9. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984).

10. See, e.g., John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 223 (arguing that the nondelegation doctrine “operates exclusively” through the “interpretive canon” of constitutional avoidance); Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 266 (2022) (“The most important work that the nondelegation doctrine would perform can be accomplished on an ad hoc, agency-by-agency, rule-by-rule basis . . .”).

11. See, e.g., Alison Gocke, *Chevron's Next Chapter: A Fig Leaf for the Nondelegation Doctrine*, 55 U.C. DAVIS L. REV. 955, 994 (2021) (depicting the major questions doctrine as “reallocating the balance of power between courts and agencies” and “disconnected from any real exploration of Congress's actual intent”).

12. See Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1020–21 (2023) (arguing that the major questions doctrine “expressly modifies the normal *Chevron* framework”).

13. See Louis J. Capozzi III, *The Past and Future of the Major Questions Doctrine*, OHIO ST. L.J. 191, 242 (2023) (arguing that the doctrine will help “ensur[e] that the people's elected representatives make the laws that govern all of us” once courts lay down “specific doctrinal markers”).

This Essay proceeds in four parts. Part I introduces the nondelegation doctrine's sliding scale framework. Part II frames the major questions doctrine as a canon of constitutional avoidance *and* enforcement. In doing so, we distinguish between two "buckets" of cases. Bucket One cases deal with the scope of an agency's regulatory authority under broadly worded standards of action, like "reasonably necessary or appropriate to provide safe or healthful employment"<sup>14</sup> or "inconsistent with the public interest."<sup>15</sup> Bucket Two cases deal with the scope of an agency's interpretive authority over a statute's operative text, like "modify"<sup>16</sup> or "drug."<sup>17</sup> Parts III and IV discuss the nondelegation principles at stake in these cases. Part IV further explores the ostensible conflict between the major questions doctrine, *Chevron* deference, and textualism. Part V considers how the major questions doctrine serves nondelegation principles without the disruption that comes with a robust constitutional doctrine. This Essay enters the lively debate over the major questions doctrine and defends its general role in our administrative law.<sup>18</sup>

## I. The Nondelegation Doctrine

### A. *Sliding Scale Framework*

The nondelegation doctrine comes from Article I's Vesting Clause.<sup>19</sup> *J.W. Hampton*<sup>20</sup> states the governing test for whether Congress has unconstitutionally delegated "legislative power" to the executive branch: Can the court discern an "intelligible principle" by which Congress has restrained the agency's policymaking discretion?<sup>21</sup> That cases repeatedly cite this

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14. *Indus. Union Dep't, AFL-CIO v. Am. Petrol. Inst. (The Benzene Case)*, 448 U.S. 607, 612, 644 (1980) (limiting OSHA's authority under 29 U.S.C. § 652(b)(8) to regulate workplace benzene exposure).

15. *Gonzales v. Oregon*, 546 U.S. 243, 251, 261, 274–75 (2006) (internal quotations omitted) (limiting the Attorney General's authority under 21 U.S.C. § 824(a)(4) to revoke physician license registrations).

16. *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 220, 232 (1994) (limiting the FCC's authority under 47 U.S.C. § 203(b)(2) to eliminate rate-filing requirements for non-dominant carriers).

17. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 126, 161 (2000) (limiting the FDA's authority under 21 U.S.C. § 393(b) to regulate tobacco products).

18. Our arguments here are informed by the Court's nondelegation and *Chevron* jurisprudence, as well as our predictions for where these areas will go. We do not necessarily agree with each instance of its application of the major questions doctrine.

19. "All legislative Powers herein granted shall be vested in a Congress . . ." U.S. CONST. art. I § 1 (emphasis added).

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

21. *Id.* at 409.

intelligible principle formulation<sup>22</sup> may lead one to conclude that the entire constitutional inquiry begins and ends here. But “the degree of agency discretion that is acceptable varies according to the *scope of the power* congressionally conferred.”<sup>23</sup> Therefore, before we ask whether the statutory standard is sufficiently “intelligible,” we must answer an antecedent question: How much authority can that standard accommodate?

Under the nondelegation doctrine’s sliding-scale framework, the breadth of authority that Congress may delegate depends on the extent to which Congress has constrained the agency’s policymaking discretion. Chief Justice John Marshall observed that Congress must “entirely regulate[]” “important subjects,” but may authorize another “to fill up the details” of matters “of less interest.”<sup>24</sup> Agencies that take up important subjects encroach upon Congress’s turf without the constitutional safeguards embedded in the ordinary legislative process. Courts must therefore police the boundaries between legislative and executive power so that “[i]t is the hard choices, and not the filling in of the blanks, which must be made by the elected representatives of the people.”<sup>25</sup>

Of course, the breadth of agency authority is not determinative.<sup>26</sup> Congress entrusts agencies to regulate vast parts of the Nation’s economic and political life. But in doing so, Congress must adequately constrain the policymaking discretion that attends agencies’ power to implement legislation.<sup>27</sup> Indeed, the Supreme Court “has deemed it constitutionally *sufficient* if Congress clearly delineates the general policy, the public agency

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22. See, e.g., *Gundy v. United States*, 139 S. Ct. 2116, 2129 (2019) (internal citations omitted) (“[T]his Court has held that a delegation is constitutional so long as Congress has set out an ‘intelligible principle’ to guide the delegatee’s exercise of authority.”).

23. *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 475 (2001) (emphasis added). See also *Loving v. United States*, 517 U.S. 748, 777 (1996) (Scalia, J., concurring) (“At some point the responsibilities assigned can become so extensive and so unconstrained that Congress has in effect delegated its legislative power . . .”); Cary Coglianese, *Dimensions of Delegation*, 167 U. PA. L. REV. 1849, 1851 (2019) (“[T]he nondelegation doctrine, properly understood, concerns both the degree of *discretion* afforded to the holder of lawmaking power and the extent of the underlying *power* itself.”).

24. *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825). See also *Yakus v. United States*, 321 U.S. 414, 424 (1944) (“The essentials of the legislative function are the determination of the legislative policy . . .”); *Gundy*, 139 S. Ct. at 2130 (rejecting nondelegation challenge to § 20913(d) of the Sex Offender Registration and Notification Act (SORNA) on grounds that the Attorney General’s “statutory authority, as compared to the delegations we have upheld in the past, is distinctly small-bore”).

25. *Indus. Union Dep’t, AFL–CIO v. Am. Petrol. Inst. (The Benzene Case)*, 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring).

26. *But see Whitman*, 531 U.S. at 487 (Thomas, J., concurring) (“[T]here are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than ‘legislative.’”).

27. See *id.* at 474–76 (majority opinion) (rejecting nondelegation challenge on grounds that “[t]he scope of discretion § 109(b)(1) allows is in fact well within the outer limits of [the Court’s] nondelegation precedents”).

which is to apply it, and the boundaries of this delegated authority.”<sup>28</sup> Statutory standards also permit courts to ascertain whether the agency has transgressed the bounds of its delegated authority.<sup>29</sup> Therefore, intelligible standards constrain agency discretion on two fronts: Congress must define the scope of the agency’s authority; courts must determine whether agency actions adhere to the terms of that delegation.

### B. *Nondelegation as Separation of Powers*

The nondelegation doctrine presumes that all legislative power is vested *solely* in Congress.<sup>30</sup> That the legislative power is expressly vested in Congress (and no other branch) implies that the power may not be delegated. After all, “[t]he Constitution does not vest the Federal Government with an undifferentiated ‘governmental power.’”<sup>31</sup> Nor does it set forth mere default rules that Congress may waive by ordinary legislation.<sup>32</sup> The Framers feared that power would accumulate in one branch—irrespective of whether that power was surreptitiously seized or consciously delegated.<sup>33</sup>

Law is legitimate only if the lawmaking body acts with the consent of the people. In democracies, that consent flows from free and fair elections.

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28. *Mistretta v. United States*, 488 U.S. 361, 372–73 (1989) (emphasis added) (citations and internal quotation marks omitted).

29. See *The Benzene Case*, 448 U.S. at 685–86 (Rehnquist, J., concurring) (arguing that the nondelegation doctrine ensures that reviewing courts can test agencies’ exercise of delegated discretion against statutory standards); *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1945) (“Private rights are protected by access to the courts to test the application of the policy in the light of these legislative declarations.”).

30. The nondelegation doctrine’s originalist pedigree is hotly contested in academic circles. Compare Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 311–12, 366–67 (2021) (arguing that the Constitution, as understood at the Founding, tolerated delegations of legislative power so long as Congress does not “alienat[e]” it), and Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 245 (2006) (“As a matter of text and history, the [nondelegation] doctrine does not have a clear constitutional pedigree . . .”), and Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1722 (2002) (arguing that the doctrine “lacks any foundation in constitutional text and structure, in standard originalist sources, or in sound economic and political theory”), and SAMUEL ESTREICHER & DAVID L. NOLL, *LEGISLATION AND THE REGULATORY STATE* 273–74 (3d ed. 2022) (arguing that the doctrine remains difficult to reconcile with history), with Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L. J. 1490, 1494 (2021) (arguing that “the Founding generation adhered to a nondelegation doctrine”).

31. *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 575 U.S. 43, 67 (2015) (Thomas, J., concurring) (“These grants [of legislative power] are exclusive.”).

32. See *Mistretta*, 488 U.S. at 426 (Scalia, J., dissenting) (“The Constitution . . . as its name suggests, . . . is a prescribed structure, a framework, for the conduct of government. In designing that structure, the Framers *themselves* considered how much commingling was, in the generality of things, acceptable, and set forth their conclusions in the document.”).

33. See THE FEDERALIST No. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961) (“The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”).

Congress speaks for the people. And the people speak through Congress. Some legitimacy deficit is thus inherent in administrative lawmaking. The nondelegation doctrine is singularly concerned with the decisionmaker, separate and apart from the merits of the decision itself.<sup>34</sup>

Additionally, capacious delegations circumvent the legislative process. Agencies may not legislate through the back door what Congress has failed to accomplish from the front.<sup>35</sup> While organic statutes are procedurally unproblematic, agency actions that enforce them do not satisfy the strictures of bicameralism and presentment. These “accountability checkpoints”<sup>36</sup> “represent[] the Framers’ decision that the legislative power . . . be exercised in accord with a single, finely wrought and exhaustively considered, procedure.”<sup>37</sup> The Founding-era principle that “legislation should not be enacted unless it has been carefully and fully considered by the Nation’s elected officials”<sup>38</sup> demands that legislation originate from the floor of Congress, not the offices of administrative agencies.

Even so, the Supreme Court has repeatedly assured us that the nondelegation doctrine is not so rigid as to require Congress to speak directly on every conceivable topic of regulation.<sup>39</sup> The Court has long recognized that “a hermetic sealing-off of the three branches”<sup>40</sup> would effectively “stop the wheels of government.”<sup>41</sup> Cases often arise when courts are called upon to strike the appropriate balance between separation-of-powers formalism and effective governmental administration. In theory, some delegations may

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34. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 131 (1980) (“The point is not that such ‘faceless bureaucrats’ necessarily do a bad job as our effective legislators. It is rather that they are neither elected nor reelected, and are controlled only spasmodically by officials who are.”); David J. Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 241 (arguing that the nondelegation doctrine “responds to concerns about the accountability and discipline of administrative action by focusing on the identity of the decision maker”).

35. See *Gundy v. United States*, 139 S. Ct. 2116, 2144 (2019) (Gorsuch, J., dissenting) (“Because Congress could not achieve the consensus necessary to resolve the hard problems associated with SORNA’s application to pre-Act offenders, it passed the potato to the Attorney General.”).

36. *Ass’n of Am. R.R.s.*, 575 U.S. at 61 (Alito, J., concurring).

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

38. *Id.* at 948–49.

39. See, e.g., *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529–30 (1935) (“We have repeatedly recognized the necessity of adapting legislation to complex conditions involving a host of details with which the national legislature cannot deal directly.”).

40. *Indus. Union Dep’t, AFL–CIO v. Am. Petrol. Inst. (The Benzene Case)*, 448 U.S. 607, 673–74 (1980) (Rehnquist, J., concurring).

41. *Union Bridge Co. v. United States*, 204 U.S. 364, 383, 387 (1907). See also *Loving v. United States*, 517 U.S. 748, 758 (1996) (“To burden Congress with all federal rulemaking would divert that branch from more pressing issues, and defeat the Framers’ design of a workable National Government.”); *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (“[T]he separation-of-powers principle, and the nondelegation doctrine in particular, do not prevent Congress from obtaining the assistance of its coordinate Branches.”).

go too far and corrode “the principle of separation of powers that underlies our tripartite system of Government.”<sup>42</sup> But in practice, the Court has struggled to formulate a workable constitutional doctrine to distinguish between legislative and executive power.

## II. Constitutional Avoidance and Enforcement

Lawrence Sager has observed in the Equal Protection context that federal courts are often reluctant to enforce constitutional norms to their “full conceptual boundaries” due to perceived institutional competence concerns.<sup>43</sup> Like equality, nondelegation has been largely neglected by the Supreme Court’s constitutional doctrine.<sup>44</sup> Equality principles eventually found a home in collateral areas of law.<sup>45</sup> Nondelegation principles have too. We contend that the major questions doctrine plays a proper and important role in “shap[ing] elusive constitutional norms at their margins.”<sup>46</sup> The doctrine thus merits “the full status of positive law which we generally accord to the norms of our Constitution.”<sup>47</sup>

### A. *Nondelegation in Dormancy*

Back in 2000, it was quipped that the nondelegation doctrine had “had one good year [in 1935], and 211 bad ones (and counting).”<sup>48</sup> In its deference to Congress, the Supreme Court has “almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to” agencies.<sup>49</sup> This deference has even extended to statutes

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42. *Mistretta*, 488 U.S. at 371.

43. Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213 (1978).

44. See Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1508 (2015) (“[Application of the ‘intelligible principle’ test] is a classic case in which a gap exists between constitutional meaning and the judicial standards for enforcement.”).

45. See Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 748 (2011) (arguing that the Supreme Court has recognized “liberty” claims under the Due Process Clause to advance “equality” concerns inadequately protected by its Equal Protection jurisprudence).

46. Sager, *supra* note 43, at 1264.

47. *Id.* at 1221.

48. Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000). The Court similarly observed in *Whitman v. Am. Trucking Ass’ns.*, 531 U.S. 457, 474 (2001), that:

In the history of the Court we have found the requisite “intelligible principle” lacking in only two statutes, one [in *Pan. Refining v. Ryan*, 293 U.S. 388, 430 (1935)] of which provided literally no guidance for the exercise of discretion, and the other [in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935)] of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring “fair competition.”

49. *Whitman*, 531 U.S. at 474–75 (citations and internal quotation marks omitted).



authorizing agencies to act in the “public interest.”<sup>50</sup> While the nondelegation doctrine purports to have “outer limits,” it is hard to conceive that any statute would fail to “fit[] comfortably within the scope of discretion permitted by [the Supreme Court’s] precedent.”<sup>51</sup>

The nondelegation doctrine is not merely unenforced but appears presently unenforceable. First, the distinction between legislative and executive power is difficult to draw: The “debate [is] not over a point of principle but over a question of degree.”<sup>52</sup> The task of balancing an agency’s policymaking discretion against the scope of its authority requires courts to weigh one indefinite variable against another—a method of reasoning that often outstrips judicial competence. Additionally, “the necessities of modern legislation dealing with complex economic and social problems”<sup>53</sup> are such that “Congress simply cannot do its job absent an ability to delegate power under broad general directives.”<sup>54</sup> A reinvigorated doctrine would thus require Congress to speak with a level of precision and foresight that it generally cannot muster.

Though the nondelegation doctrine is not (at this time) “readily enforceable by the courts,”<sup>55</sup> it operates *sub silentio* as a canon of statutory interpretation.<sup>56</sup> The major questions doctrine serves a dual function: constitutional *avoidance* and constitutional *enforcement*. The Supreme Court has invoked the doctrine to strike down agency actions whose statutory

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50. See *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 223–24 (1943) (upholding the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*, as constitutional).

51. *Whitman*, 531 U.S. at 474, 476; accord *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting) (“What legislated standard, one must wonder, can possibly be too vague to survive judicial scrutiny, when we have repeatedly upheld in various contexts, a ‘public interest’ standard?”). See also *Loving v. United States*, 517 U.S. 748, 771 (1996) (noting that since 1935, the Court has upheld “without exception, delegations under standards phrased in sweeping terms”); *Gundy v. United States*, 139 S. Ct. 2116, 2129 (2019) (“[Nondelegation] standards . . . are not demanding.”).

52. *Mistretta*, 488 U.S. at 415 (Scalia, J., dissenting); see Antonin Scalia, *A Note on the Benzene Case*, *REGULATION*, July/Aug. 1980, at 27 (describing “the difficulty of enunciating how much delegation is too much”).

53. *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946). See also ELY, *supra* note 34, at 132 (“[T]he nondelegation doctrine became identified with others that were used in the early thirties to invalidate reform legislation, such as substantive due process and a restrictive interpretation of the commerce power . . . and when those doctrines died the nondelegation doctrine died with them.”).

54. *Mistretta*, 488 U.S. at 372.

55. *Id.* at 415 (Scalia, J., dissenting).

56. See *id.* at 373 n.7 (majority opinion) (“[O]ur application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional.”); *Gundy*, 139 S. Ct. at 2142 (Gorsuch, J., dissenting) (“Although it is nominally a canon of statutory construction, we apply the major questions doctrine in service of the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency.”).

authority comes close to violating the nondelegation doctrine.<sup>57</sup> The presupposition that Congress does not intend to delegate authority over issues of “economic and political significance” through “cryptic” language rests upon the precept that agencies cannot exercise immense authority without sufficient constraints on their discretion.<sup>58</sup> The major questions doctrine provides safe haven for these underenforced constitutional principles.<sup>59</sup> It does not avoid the nondelegation doctrine so much as it enforces it.

### B. Two “Buckets” of Major Questions Cases

The Supreme Court’s major questions doctrine decisions fall into one of two buckets. The first deals with statutes that confer broad agency discretion through non-specific standards such as “reasonably necessary or appropriate to provide safe or healthful employment,”<sup>60</sup> “inconsistent with the public interest,”<sup>61</sup> or “necessary to prevent the introduction, transmission, or spread of communicable diseases.”<sup>62</sup> In these cases, the Court has invoked the major questions doctrine to invalidate agency actions that plausibly fit within the statute’s unrestrictive standard of action.<sup>63</sup> The second bucket deals with operative text that is susceptible to either broad or narrow definitions.<sup>64</sup> The dispute is over the meaning of words like “modify,”<sup>65</sup> “drug,”<sup>66</sup> “air pollutant,”<sup>67</sup> “[e]xchange,”<sup>68</sup> and “system.”<sup>69</sup>

Cases in the second bucket raise thorny questions about the scope of *Chevron* deference. Agencies’ asserted discretion to interpret operative

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57. See, e.g., *Indus. Union Dep’t, AFL–CIO v. Am. Petrol. Inst. (The Benzene Case)*, 448 U.S. 607, 645–46 (1980) (interpreting statute narrowly because it would be “unreasonable to assume that Congress intended to give the Secretary . . . unprecedented power over American industry” and indicating that a broader construction would violate the nondelegation doctrine).

58. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000).

59. See *Gundy*, 139 S. Ct. at 2141 (Gorsuch, J., dissenting) (“When one legal doctrine becomes unavailable to do its intended work, the hydraulic pressures of our constitutional system sometimes shift the responsibility to different doctrines.”).

60. *The Benzene Case*, 448 U.S. at 612 (quoting 29 U.S.C. § 652(8)); *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab.*, 142 S. Ct. 661, 663 (2022) (same).

61. *Gonzales v. Oregon*, 546 U.S. 243, 254 (2006) (quoting 21 U.S.C. § 824(a)(4)).

62. *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2487 (2021) (per curiam) (quoting 42 U.S.C. § 264(a)).

63. See *infra* Part III and accompanying text.

64. Of course, the two buckets are closely related. After all, “the question a court faces when confronted with an agency’s interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority.*” *City of Arlington v. FCC*, 569 U.S. 290, 297 (2013). But the distinction between the two buckets is analytically valuable because the nondelegation problems are apparent in the former but more subtle in the latter.

65. *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 225 (1994).

66. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 131 (2000).

67. *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 320 (2014).

68. *King v. Burwell*, 576 U.S. 473, 497–98 (2015).

69. *West Virginia v. EPA*, 142 S. Ct. 2587, 2615 (2022).

text—the sort which *Chevron* contemplates<sup>70</sup>—constitutes a form of policymaking discretion that may flout nondelegation principles unless cabined. Under current doctrine, when Congress delegates authority for an agency to enforce a statute, courts presume that Congress also delegated authority for that agency to “elucidate a specific provision of the statute by regulation.”<sup>71</sup> So delegation of *enforcement* authority generally implies delegation of *interpretive* authority.<sup>72</sup> And wherever there is delegation, the nondelegation doctrine has something to say. All statutory texts are susceptible to either broad or narrow readings. Broader ones would expand the agency’s delegated authority to regulate some subject matter, so courts must presume that Congress intended to delegate as much authority as that broader interpretation allows. Serious nondelegation problems arise when extensive regulatory authority is not delimited by meaningful constraints on agency discretion.<sup>73</sup> In these cases, binding deference to an agency’s interpretation based on the statute’s purported “ambiguity” would operate to rubber-stamp the agency’s exercise of its constitutionally problematic discretion.<sup>74</sup>

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70. See *Smiley v. Citibank (S.D.)*, N. A., 517 U.S. 735, 740–41 (1996) (explaining that *Chevron* deference presumes “that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows”).

71. *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001) (quoting *Chevron, U.S.A., Inc. v. Nat’l Res. Def. Council*, 467 U.S. 837, 843–44 (1984)). *Chevron* currently affords relatively wide berth for the agency to resolve statutory ambiguities. The approach prior to *Chevron* mandates judicial deference only if Congress has clearly delegated to the agency interpretive discretion over particular statutory provisions, with courts actively policing the permissible range of that discretion. See Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 6 (1983) (“[T]o the extent that the court interprets the statute to direct it to supply meaning, it interprets the statute to exclude delegated administrative law-making power.”). A reasonable agency interpretation would be binding only if it falls within that limited range. See *id.* (“The court’s interpretational task is . . . to determine the boundaries of delegated authority.”). The Court will consider these varying approaches in *Loper Bright Enterps. v. Raimondo*, 143 S. Ct. 2429 (No. 22–451) (cert. granted May 1, 2023). See *Petition for Writ of Certiorari, Loper Bright Enterps.*, 143 S. Ct. 2429, i–ii (No. 22–451) (asking the Court to “overrule *Chevron* or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency”).

72. An agency’s authority to enforce a statute is distinct from its authority under *Chevron* to interpret what that statute means. See Barron & Kagan, *supra* note 34, at 218 (“The power to make binding substantive law, after all, involves much more than the power to make controlling interpretations of ambiguous statutory terms; to deny the agency the latter is in no way to make meaningless the grant of the former.”). But to enlarge the latter necessarily enlarges the former.

73. See *Michigan v. EPA*, 576 U.S. 743, 762 (2015) (Thomas, J., concurring) (“Statutory ambiguity thus becomes an implicit delegation of rulemaking authority.”).

74. See Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2150 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014)) (“*Chevron* encourages the Executive Branch (whichever party controls it) to be extremely aggressive in seeking to squeeze its policy goals into ill-fitting statutory authorizations and restraints.”).

### III. Bucket One Cases

#### A. The Benzene Case

The plurality opinion in *The Benzene Case*<sup>75</sup> invoked an early iteration of the major questions doctrine to circumscribe OSHA's authority to regulate occupational benzene exposure under the Occupational Safety and Health Act.<sup>76</sup> Section 6(b)(5) of that Act directs the Secretary of Labor to set occupational safety and health standards "which most adequately assures . . . that no employee will suffer material impairment of health or functional capacity."<sup>77</sup> Section 3(8), in turn, defines "occupational safety and health standard" as that which is "reasonably necessary or appropriate to provide safe or healthful employment."<sup>78</sup> The central issue in the case was whether OSHA exceeded its statutory authority by setting workplace exposure standards to one part benzene per million parts of air (1 ppm).<sup>79</sup>

Benzene is ubiquitous. Ambient air contains benzene quantities between a few parts per billion and 0.5 ppm.<sup>80</sup> Employees in certain workplaces, such as gas stations, petroleum refineries, and chemical processing plants, face greater exposure.<sup>81</sup> High levels of benzene exposure—as low as 10 ppm—can cause leukemia.<sup>82</sup> But there was scant evidence (at the time) that 1 ppm exposure posed any serious medical risk.<sup>83</sup> While OSHA's 1 ppm standard would reduce benzene exposure for 35,000 employees,<sup>84</sup> the tradeoff was significant: Firms would shoulder enormous compliance costs and consumers would adjust to negative downstream effects.<sup>85</sup> In short, "the benzene standard is an expensive way of providing some additional protection for a relatively small number of employees."<sup>86</sup>

The plurality required OSHA to make a threshold finding that 1 ppm exposure renders a workplace "unsafe" under Sections 3(8) and 6(b)(5), such

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75. *Indus. Union Dep't, AFL-CIO v. Am. Petrol. Inst. (The Benzene Case)*, 448 U.S. 607 (1980).

76. *Id.* at 611.

77. 29 U.S.C. § 655(b)(5).

78. *Id.* § 652(8).

79. *The Benzene Case*, 448 U.S. at 613.

80. *Id.* at 615.

81. *Id.* at 615–16.

82. *Id.* at 696 (J. Marshall, dissenting).

83. *See id.* at 614 (noting that the record lacked "substantial evidence" that a 1 ppm ceiling would produce "any discernable benefits" for employees). But for carcinogens like benzene, "OSHA will presume that no safe level of exposure exists in the absence of clear proof establishing such a level and will accordingly set the exposure limit at the lowest level feasible." *Id.* at 624.

84. *Id.* at 629.

85. *See id.* (discussing compliance costs across regulated industries).

86. *Id.* at 628. The petrochemical industry, for instance, would incur \$21.9 million dollars (equal to \$81 million in 2023) in compliance costs for the benefit of 552 employees. *Id.* at 629.

that a “significant risk of harm” exists.<sup>87</sup> But Section 3(8) did not define “safe or healthful employment” in terms of “significant” or “insignificant” risks.<sup>88</sup> Under OSHA’s interpretation, its regulatory authority reaches insignificant risks, even when compliance costs are greatly disproportionate to discernible health benefits.<sup>89</sup> But such an interpretation would raise serious nondelegation concerns: The statute would “make such a ‘sweeping delegation of legislative power’ that it might be unconstitutional.”<sup>90</sup> A narrower interpretation, though arguably one that “does not reflect its most natural reading under established rules of construction,”<sup>91</sup> saves the statute from constitutional invalidation. The plurality’s insistence on some finding of “significant risks” constrained OSHA’s authority and discretion in ways that Congress neglected to do.

In his concurrence, Justice Rehnquist made explicit what the plurality merely implied: Congress unconstitutionally delegated a quintessential legislative choice over how to “balanc[e] statistical lives and industrial resources.”<sup>92</sup> Absent some statutory mandate to weigh benefits against costs, OSHA could exercise unbridled policymaking discretion over the hazards to be regulated and the attendant compliance costs to be imposed. Through the lens of the nondelegation doctrine’s sliding scale framework, Section 3(8)’s “reasonably necessary and appropriate” standard did not suffice given the expansive authority that OSHA had asserted.<sup>93</sup> But instead of striking down Section 6(b)(5) on constitutional grounds, the plurality took a more measured approach, remanding the case back to OSHA to evaluate whether 1 ppm exposure constitutes a “significant risk.”<sup>94</sup> The statute raised serious constitutional doubts; the plurality’s narrow interpretation quelled them.

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87. *Id.* at 642.

88. 29 U.S.C. § 652(8).

89. *See* Indus. Union Dep’t, AFL–CIO v. Am. Petrol. Inst. (*The Benzene Case*), 448 U.S. at 645 (“[OSHA’s] conclusion would in turn justify pervasive regulation limited only by the constraint of feasibility.”).

90. *Id.* at 646 (“A construction of the statute that avoids this kind of open-ended grant should certainly be favored.”).

91. Manning, *supra* note 10, at 245.

92. *The Benzene Case*, 448 U.S. at 685 (Rehnquist, J., concurring).

93. *Id.* at 662 (plurality).

94. *Id.* OSHA responded in the affirmative, and the Court did not second guess. *See* 50 Fed. Reg. 50512 (Dec. 10, 1985) (codified at 29 C.F.R. § 1910.1028(d)(1)) (proposing a reduction in permissible benzene exposure to 1 ppm); Lisa Heinzerling, *Regulatory Costs of Mythic Proportions*, 107 YALE L.J. 1981, 2037 (1998) (explaining OSHA’s estimation that a 1 ppm ceiling would save 822 lives over a fifty-year period).

### B. Alabama Association of Realtors

The next two cases relate to President Biden’s regulatory response to the COVID–19 pandemic. In *Alabama Association of Realtors*,<sup>95</sup> the Court held that the CDC lacked authority under the Public Health Service Act<sup>96</sup> to impose a nationwide eviction moratorium in high-transmission areas.<sup>97</sup> Section 361(a) of that Act authorizes the Surgeon General “to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases.”<sup>98</sup> Whether this provision raised serious nondelegation problems turned on two questions. First, to what extent does the word “necessary” limit the scope of the CDC’s policymaking discretion? Second, how much authority is the CDC asserting in this case?

On the first question, the Court answered that measures are “necessary” only if they “directly relate to preventing the interstate spread of disease.”<sup>99</sup> Under Section 361(a), “the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, . . . and other measures, as in his judgment may be necessary.”<sup>100</sup> The Court reasoned, per *ejusdem generis*, that Congress authorized only a limited and specific set of regulatory interventions—those that “identify[], isolate[e], and destroy[] the disease itself.”<sup>101</sup> The statute could not be read to support the attenuated linkage between the eviction moratorium and public health.<sup>102</sup> But as the dissent noted, Section 361(a) is not nearly as unambiguous as the Court claimed.<sup>103</sup> The provision that “the Surgeon General *may* provide” for certain interventions is permissive and follows an unqualified authorization for him to “make and enforce such regulations as *in his judgment* are necessary” to contain the disease.<sup>104</sup>

Dueling views of Section 361(a)’s textual meaning raised the second question, which the Court answered with help from the major questions

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95. *Ala. Ass’n of Realtors v. Dep’t of Health and Hum. Servs.*, 141 S. Ct. 2485 (2021) (per curiam).

96. 42 U.S.C. § 264(a).

97. *Ala. Ass’n of Realtors*, 141 S. Ct. at 2488.

98. 42 U.S.C. § 264(a).

99. *Ala. Ass’n of Realtors*, 141 S. Ct. at 2488.

100. 42 U.S.C. § 264(a).

101. *See Ala. Ass’n of Realtors*, 141 S. Ct. at 2488 (explaining that this enumeration “informs the grant of authority by illustrating the kinds of measures that could be necessary . . .”).

102. *Id.* (“This downstream connection between eviction and the interstate spread of disease is markedly different from the direct targeting of disease that characterizes the measures identified in the statute.”).

103. *See id.* at 2490 (Breyer, J., dissenting) (“[I]t is far from ‘demonstrably’ clear that the CDC lacks the power to issue its modified moratorium order.” (citations omitted)).

104. 42 U.S.C. § 264(a) (emphasis added); *see Ala. Ass’n of Realtors*, 141 S. Ct. at 2491 (Breyer, J., dissenting) (“Section 361(a)’s second sentence is naturally read to expand the agency’s powers by providing congressional authorization to act on personal property when necessary.”).

doctrine: “Even if the text were ambiguous, the sheer scope of the CDC’s claimed authority under Section 361(a) would counsel against the Government’s interpretation,”<sup>105</sup> either on its own terms or under *Chevron*. The CDC had to concede the “vast economic and political significance” of its eviction moratorium.<sup>106</sup> At least eighty percent of the country, including up to seventeen million tenants, fell under the moratorium’s scope.<sup>107</sup> The moratorium also intruded on a “particular domain of state law: the landlord-tenant relationship.”<sup>108</sup> The Court could not discern any bounds on the CDC’s authority under its proposal: “It is hard to see what measures this interpretation would place outside the CDC’s reach, and the Government has identified no limit in Section 361(a) beyond the requirement that the CDC deem a measure ‘necessary.’”<sup>109</sup> As the Court intimated, the CDC’s interpretation of Section 361(a) would raise serious doubt as to whether its asserted authority fell within the domain of executive power.<sup>110</sup>

One would be correct to point out the Court’s slippery-slope logic. Whether the CDC could “mandate free grocery delivery to the homes of the sick or vulnerable,” “[r]equire manufacturers to provide free computers to enable people to work from home,” or “[o]rder telecommunications companies to provide free high-speed Internet service to facilitate remote work” are unusual hypotheticals that do not directly implicate the case at hand.<sup>111</sup> But these are the right questions to ask in a nondelegation inquiry. What matters is what powers Congress delegated, not what powers the agency later asserts.<sup>112</sup> The Court’s narrower reading of “necessary” mitigated the statutory vagueness that would otherwise generate serious constitutional doubt.

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105. *Ala. Ass’n of Realtors*, 141 S. Ct. at 2489 (majority opinion). The Court underscored that Congress previously enacted a 120-day eviction moratorium in March 2020. *Id.* at 2486. Congress’s failure to extend this moratorium suggests that it has already settled this major question, and “the CDC took matters into its own hands.” *Id.* at 2486–87.

106. *Id.* at 2489 (cleaned up and citations omitted).

107. *Id.* The possibility of criminal sanctions for violating the moratorium—“up to a \$250,000 fine and one year in jail”—reinforced the breadth of the CDC’s asserted authority. *Id.*

108. *Id.* (“[P]reventing [landlords] from evicting tenants who breach their leases intrudes on one of the most fundamental elements of property ownership—the right to exclude.”); see also *U.S. Forest Serv. v. Cowpasture River Pres. Ass’n*, 140 S. Ct. 1837, 1849–50 (2020) (“Our precedents require Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property.”).

109. *Ala. Ass’n of Realtors*, 141 S. Ct. at 2489 (quoting 42 U.S.C. § 264(a)).

110. See *id.* at 2490 (“It is up to Congress, not the CDC, to decide whether the public interest merits further action here.”).

111. *Id.* at 2489.

112. Cf. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472–73 (2001) (rejecting the notion that “an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute,” and explaining that “[w]hether the statute delegates legislative power is a question for the courts, and an agency’s voluntary self-denial has no bearing upon the answer”).

### C. National Federation of Independent Business

*NFIB v. Department of Labor*<sup>113</sup> dealt with OSHA’s COVID–19 vaccine mandate. The mandate covered roughly 84 million workers: requiring all to either get vaccinated or test each week and mask up at work (at their personal time and expense).<sup>114</sup> Sections 655 and 652(8) of the Occupational Safety and Health Act authorize OSHA to enact occupational safety standards “reasonably necessary or appropriate to provide safe or healthful employment.”<sup>115</sup> The Court held that OSHA’s vaccine mandate was not an “occupational safety or health” measure.<sup>116</sup> COVID–19 exposure did not pose a distinct “occupational safety or health threat”<sup>117</sup> but rather a “day-to-day danger[] that all face,” akin to crime and air pollution.<sup>118</sup> But as the joint dissent pointed out, the distinction between “workplace safety standards” and “broad public health measures” is not obvious from the statutory text.<sup>119</sup> The major questions doctrine, however, challenged the agency’s novel reading of its mandate: “Permitting OSHA to regulate the hazards of daily life . . . would significantly expand OSHA’s regulatory authority without clear congressional authorization.”<sup>120</sup>

In his concurrence, Justice Gorsuch delved into the “firm rule” of the major questions doctrine.<sup>121</sup> By “ensur[ing] that the national government’s power to make the laws that govern us remains where Article I of the Constitution says it belongs—with the people’s elected representatives,” the nondelegation doctrine and major questions doctrine both serve to “protect the separation of powers and ensure that any new laws governing the lives of Americans are subject to the robust democratic processes the Constitution demands.”<sup>122</sup> OSHA’s interpretation constrained neither its authority nor discretion, such that the statute would “likely constitute an unconstitutional delegation of legislative authority.”<sup>123</sup> The major questions doctrine sets a

113. *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab.*, 142 S. Ct. 661 (2022) (per curiam).

114. *Id.* at 662. While occupational standards ordinarily undergo rigorous notice and comment procedures, 29 U.S.C. § 655(c)(1) provides that certain “emergency temporary standard[s]” (like the vaccine mandate) may “take immediate effect upon publication in the Federal Register.”

115. 29 U.S.C. § 652(8); 29 U.S.C. § 655(d) (authorizing OSHA to promulgate occupational health and safety standards).

116. *Nat’l Fed’n of Indep. Bus.*, 142 S. Ct. at 666 (quoting 29 U.S.C. § 655(b)).

117. 29 U.S.C. § 655(b).

118. *Nat’l Fed’n of Indep. Bus.*, 142 S. Ct. at 665.

119. *Id.*; *see id.* at 673 (Breyer, Sotomayor & Kagan, JJ., dissenting) (“The statute does not require that employees are exposed to those dangers only while on the workplace clock. And that should settle the matter.”).

120. *Id.* at 665 (majority opinion).

121. *See id.* at 667 (Gorsuch, J., concurring).

122. *Id.* at 668–69.

123. *Id.* at 669 (“Under OSHA’s reading, the law would afford it almost unlimited discretion—and certainly impose no ‘specific restrictions’ that ‘meaningfully constrain’ the agency.” (quoting *Touby v. United States*, 500 U.S. 160, 166–67 (1991))).



ceiling on these two variables, thereby curing the statute's constitutional defects.

Bucket One cases present courts with a choice: Defer to the agency's interpretation and confront serious nondelegation questions, or sidestep those questions by adopting a narrower interpretation. Time and again, the Supreme Court has opted for the latter. While statutory standards like "reasonably necessary or appropriate"<sup>124</sup> somewhat limit the agency's policymaking discretion, they do not cure nondelegation problems where the breadth of the agency's asserted authority puts pressure on the constraining force of those limits. So those statutory standards must be more specific. Some plausibly intelligible principle will not suffice; "clear congressional authorization" is required.<sup>125</sup> The major questions doctrine thus mirrors the nondelegation doctrine's sliding scale framework: "When much is sought from a statute, much must be shown."<sup>126</sup> So the more economically and politically significant the agency action is, the clearer the congressional authorization must be.

#### IV. Bucket Two Cases

Bucket Two cases involve disputes over the meaning of words and whether the challenged agency action falls within that meaning. Plain text arguably favors the agency's interpretation, but the major questions doctrine—and the nondelegation principles underlying it—demands a narrower reading. Bizarre situations arise when self-avowed textualists seem to partake in purposivism, while their (ordinarily less rigidly textualist) colleagues scold them for not being textualist enough. Part IV thus discusses the major questions doctrine's apparent conflict with textualism.

##### A. *Chevron's Narrow Domain*

The major questions doctrine delineates a category of "extraordinary cases" where "the history and the breadth of the authority that the agency has asserted, and the economic and political significance of that assertion" caution against a broad view of *Chevron* deference.<sup>127</sup> Though the *Chevron* opinion was vague on this issue, the Court's subsequent opinion in *Mead*<sup>128</sup> made clear that "*Chevron* was simply a case recognizing that even without express authority to fill a specific statutory gap, circumstances pointing to

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124. 29 U.S.C. § 652(8).

125. *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 665.

126. See *In re MCP No. 165*, 20 F.4th 264, 267 (6th Cir. 2021) (Sutton, C.J., dissenting from denial of initial hearing en banc).

127. *West Virginia v. EPA*, 142 S. Ct. 2587, 2595 (2022) (cleaned up and internal quotation marks and citations omitted).

128. *United States v. Mead Corp.*, 533 U.S. 218 (2001).

implicit congressional delegation present a particularly insistent call for [agency] deference.”<sup>129</sup> *Chevron* and *Mead* thus mandate judicial deference to reasonable agency interpretations “on matters *intentionally* left by Congress to be worked out at the agency level.”<sup>130</sup> No more, no less.

The major questions doctrine accords with *Chevron* insofar as judges already assume that Congress intends to delegate to agencies binding interpretative authority over some statutory questions but not others. *Chevron* does not cast doubt on the traditional premise that courts must decide (as a plenary matter) the statutory parameters over which the agency’s interpretive authority extends.<sup>131</sup> The notion that statutory ambiguity alone requires courts to accord binding agency deference does not comport with established principles of administrative law nor the Court’s jurisprudence in this area.<sup>132</sup> The major questions doctrine dispels the notion that agencies (rather than courts) are ambiguity resolvers. *Chevron*—properly understood—lays down the uncontroversial principle that the agency has power to resolve statutory ambiguities if and only if Congress has clearly delegated such power. Even then, the agency’s interpretation must be “reasonable,”<sup>133</sup> such that it falls within an acceptable range of meanings that the statute leaves open for the agency to decide.<sup>134</sup> But courts must first decide whether Congress may be presumed to have delegated any interpretative authority and, second, the goalposts within which the agency’s interpretation must fall.<sup>135</sup> Therefore, *Chevron*’s domain does not stretch far. If correctly understood and faithfully

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129. *Id.* at 237.

130. *Id.* at 236 (emphasis added).

131. *See Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) (stressing that the agency’s interpretation must fall “within the limits of that delegation” provided by Congress).

132. *See id.* at 843–44 (explaining when “Congress has *explicitly* left a gap for the agency to fill, there is an *express* delegation of authority to the agency to elucidate a specific provision of the statute by regulation.” (emphasis added)); 5 U.S.C. § 706 (providing that “[t]o 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”).

133. *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 321 (2014).

134. *See* Peter L. Strauss, “*Deference*” *Is Too Confusing—Let’s Call Them “Chevron Space” and “Skidmore Weight,”* 112 COLUM. L. REV. 1143, 1145 (2012) (arguing that *Chevron* deference governs “the area within which an administrative agency has been statutorily empowered to act”); Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 872 (2001) (“[I]f *Chevron* rests on a presumption about congressional intent, then *Chevron* should apply only where Congress would want *Chevron* to apply.”); ESTREICHER & NOLL, *supra* note 30, at 668–69 (arguing that *Chevron* deference applies only when the agency acts “within the permissible range of discretion” set by statute).

135. *See Monaghan, supra* note 71, at 27 (“The court’s task is to fix the boundaries of delegated authority, . . . [but] responsibility for meaning is shared between court and agency; the judicial role is to specify what the statute cannot mean, and some of what it must mean, but not all that it does mean.”).

applied, it remains consonant with the principle that it is “the province and duty of the judicial department to say what the law is.”<sup>136</sup>

Consistent with this jurisprudence, the major questions doctrine instructs courts to eschew agency deference where there is “reason to hesitate before concluding that Congress has intended . . . an implicit delegation” to fill statutory gaps.<sup>137</sup> Whether Congress intends to delegate decisions of vast “economic and political significance” through “cryptic” statutory language presents a legal question within courts’ institutional competence.<sup>138</sup> As in all other areas of statutory interpretation, legislative intent (objectified via text or otherwise) is the analytical lodestar.

### B. Brown & Williamson

The central question in *FDA v. Brown & Williamson*<sup>139</sup> was whether the FDA had authority under the Food, Drug, and Cosmetics Act<sup>140</sup> (FDCA) to combat youth nicotine addiction by regulating the sale, distribution, and marketing of tobacco products.<sup>141</sup> Section 321(g)(1) defines “drug” as, *inter alia*, “articles (other than food) intended to affect the structure or any function of the body of man or other animals.”<sup>142</sup> Nicotine appears to fall within this definition, given its “psychoactive, or mood-altering, effects on the brain.”<sup>143</sup> Nevertheless, the Court elided this straightforward textualist conclusion and rejected the FDA’s interpretation on seemingly purposivist grounds.<sup>144</sup> The Court’s reading of Section 321(g)(1) limited the FDA’s regulatory authority to articles that “are unsafe for obtaining any therapeutic benefit,” even though such qualifications were nowhere in the text itself.<sup>145</sup>

Textualists ordinarily do not regard legislative history as a legitimate tool of statutory interpretation.<sup>146</sup> But the Court’s reasoning carved out a

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136. *City of Arlington v. FCC*, 569 U.S. 290, 316–17 (2013) (Roberts, C.J., dissenting) (internal quotation marks omitted) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

137. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

138. *West Virginia v. EPA*, 142 S. Ct. 2587, 2613 (2022) (internal quotation marks and citations omitted).

139. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

140. 21 U.S.C. § 301 *et seq.*

141. *Brown & Williamson*, 529 U.S. at 125–26.

142. 21 U.S.C. § 321(g)(1).

143. *Brown & Williamson*, 529 U.S. at 127 (quoting *Nicotine in Cigarettes and Smokeless Tobacco Is a Drug Under the Federal Food, Drug, and Cosmetic Act*, 61 Fed. Reg. 44619, 44631 (Aug. 28, 1996)).

144. *See id.* at 131–32 (“We need not resolve this [textual] question, however, because . . . the FDA’s claim to jurisdiction contravenes the clear intent of Congress.”).

145. *Id.* at 122.

146. *See, e.g., W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98–99 (1991) (“Where [statutory text] contains a phrase that is unambiguous . . . we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process.”).

category of “extraordinary cases” where the statute’s most congenial textual interpretation is not dispositive.<sup>147</sup> It noted that “we must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.”<sup>148</sup> The major questions doctrine thus does not bar Congress from delegating such authority; it simply provides that Congress may not do so in “so cryptic a fashion.”<sup>149</sup>

Implicit in the Court’s reasoning is the view that the FDCA ought not be read to delegate immense regulatory authority when the statute lacks meaningful constraints on the FDA’s discretion to say what items may (or shall not) be regulated as “drugs.” That the agency, for decades, denied that nicotine was a “drug” under Section 361(g)(1), but then reversed course to say the opposite is emblematic of its vast (and thus problematic) discretion.<sup>150</sup> Interpretive discretion is a form of policymaking discretion that implicates the separation-of-powers concerns underlying the nondelegation doctrine. Where the asserted agency authority is immense, as here, the statutory text cannot be susceptible to a multitude of plausible interpretations for the agency to pick and choose. The unqualified statutory definition of “drug” as any article “intended to affect the structure or any function” of the human body delimits neither authority nor discretion. *Chevron* deference to the agency’s literalist interpretation would run afoul of core nondelegation principles.

### C. West Virginia v. EPA

*West Virginia v. EPA*<sup>151</sup> remains one of the Supreme Court’s most controversial applications of the major questions doctrine. The case dealt with the scope of the EPA’s authority to regulate greenhouse gas emissions from coal- and gas-fired power plants.<sup>152</sup> The Clean Air Act (CAA) empowers the EPA to establish “standards of performance” that reflect the “best system of emission reduction” (BSER).<sup>153</sup> Under Section 111, the EPA may establish emissions limits for any existing stationary source that, “in [the Administrator’s] judgment . . . causes, or contributes significantly to, air

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147. See *Brown & Williamson*, 529 U.S. at 159 (“[O]ur inquiry . . . is shaped, at least in some measure, by the nature of the question presented. . . . In extraordinary cases . . . there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.”).

148. *Id.* at 133.

149. *Id.* at 160.

150. See *id.* at 146 (“The FDA’s disavowal of jurisdiction [over tobacco] was consistent with the position that it had taken since the agency’s inception. As the FDA concedes, it never asserted authority to regulate tobacco products as customarily marketed until it promulgated the regulations at issue here.”).

151. 142 S. Ct. 2587 (2022).

152. *Id.* at 2599–60, 2602–03 (2022).

153. 42 U.S.C. § 7411(a)(1).

pollution which may reasonably be anticipated to endanger public health or welfare.”<sup>154</sup>

In 2015, the EPA promulgated the Clean Power Plan to regulate carbon dioxide emissions from existing power plants.<sup>155</sup> The Plan rested on three “building blocks.”<sup>156</sup> The first was relatively uncontroversial: Coal plants must burn coal more efficiently.<sup>157</sup> But improvements of individual sources were inadequate to meet the environmental crisis at hand.<sup>158</sup> Therefore, “[m]ost of the CO<sub>2</sub> controls” would derive from “generation shifting from higher-emitting to lower-emitting” sources.<sup>159</sup> This approach would “forc[e] a shift throughout the power grid from one type of energy source to another.”<sup>160</sup> The second block required coal-fired plants to switch to cleaner gas-fired plants; the third required both coal and natural gas plants to transition toward wind and solar production.<sup>161</sup>

Regulated firms could implement the Plan in three ways: (1) reduce energy production, (2) build cleaner facilities or subsidize those of another firm, or (3) purchase and sell emission allowances under a de facto cap-and-trade regime.<sup>162</sup> But emissions abatements would not come cheap. Regulated firms would likely shoulder billions of dollars in compliance costs (with negative downstream effects via higher energy prices), retire dozens of coal-fired plants, and eliminate tens of thousands of jobs.<sup>163</sup>

The central issue was whether the EPA overstepped its authority to promulgate “standards of performance for existing sources” by enacting regulations intended to effect “a shift in the energy generation mix at the grid level” beyond individual source improvements.<sup>164</sup> Section 111’s plain text

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154. *Id.* §§ 7411(b)(1)(A), (d)(1).

155. *See* Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64662, 64728 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60) (explaining measurements used in the plan and their rationale).

156. *West Virginia v. EPA*, 142 S. Ct. 2587, 2593 (2022) (internal quotation marks omitted) (quoting Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Generating Utility Units, 80 Fed. Reg. at 64667).

157. *Id.*

158. *Id.* at 2603.

159. *Id.* (internal quotation marks omitted) (quoting Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Generating Utility Units, 80 Fed. Reg. at 64728).

160. *Id.* at 2611–12.

161. *Id.* at 2603. The EPA estimated that the Plan would reduce the country’s coal-based electricity generation from 38% in 2014 to 27% in 2030. *Id.* at 2604.

162. *Id.* at 2603.

163. *Id.* at 2604. The Energy Information Administration, a unit of the Department of Energy, estimated that retail energy prices would increase by 10% in many states and reduce United States GDP by “at least a trillion 2009 dollars by 2040.” *Id.*

164. *Id.* at 2605, 2612 & n.3 (cleaned up) (quoting 42 U.S.C. § 7411(d) and Repeal of the Clean Power Plan, 84 Fed. Reg. 32520, 32523 (to be codified at 40 C.F.R. pt. 60)). To hold that the Clean Power Plan fell outside § 7411(d) resolved the case but did not answer whether other non-individualized emissions limits would also be beyond the scope. *See id.* at 2615–16 (“We have no

arguably cuts in the EPA's favor: Generation shifting falls within the literal meaning of "system."<sup>165</sup> But where the asserted regulatory authority is expansive, the major questions doctrine acts as a strong substantive canon. Indeed, the Court surveyed a slew of Bucket One and Two cases, acknowledging that "all of these regulatory assertions had a colorable textual basis."<sup>166</sup> But that basis cannot be merely "colorable"; it must be sufficiently "clear" whenever an agency seeks to affect a "radical or fundamental change" to the statutory scheme or assert "extravagant statutory power over the national economy."<sup>167</sup>

The EPA's broad reading of "best system of emission reduction" would balloon the agency's discretion and authority beyond what nondelegation principles could bear. To be sure, some limits can be gleaned. The EPA must "tak[e] into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements,"<sup>168</sup> as well as the "remaining useful lives of the [regulated] sources."<sup>169</sup> But these constraints did not adequately shrink Section 111(d)'s roominess.<sup>170</sup> The EPA reversed its "prior view of Section 111 [that] its role was limited to ensuring the efficient pollution performance of each individual regulated source."<sup>171</sup> The Court explained that the agency may not reinterpret the term "best system" to seize "newly discovered authority" and bring about dramatic shifts in the statutory scheme.<sup>172</sup> The EPA sought to do just that based on "a very different kind of *policy judgment*."<sup>173</sup> Serious nondelegation problems would arise if the EPA had unlimited discretion to pick between two

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occasion to decide whether the statutory phrase 'system of emission reduction' refers *exclusively* to measures that improve the pollution performance of individual sources, such that all other actions are ineligible to qualify as the BSER.").

165. Opponents of the Plan could plausibly counter that the phrase "standards of performance for existing sources" implies: (1) The EPA must allow regulated sources to continue "performance," so it cannot force any of them into retirement; and (2) Section 111(d) authorizes the EPA to regulate only "existing sources," thus cannot compel the creation of new ones. 42 U.S.C. § 7411(d)(1). But the Court did not delve into these textualist arguments.

166. *West Virginia v. EPA*, 142 S. Ct. at 2608–09 (discussing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), *Ala. Ass'n. of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485 (2021) (per curiam), *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302 (2014), *Gonzales v. Oregon*, 546 U.S. 243 (2006), and *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab.*, 142 S. Ct. 661 (2022) (per curiam)).

167. *Id.* at 2609 (internal quotation marks and citations omitted).

168. *Id.* at 2601 (quoting 42 U.S.C. § 7411(a)(1)).

169. 42 U.S.C. § 7411(d)(2)(B).

170. *See West Virginia v. EPA*, 142 S. Ct. at 2614 ("But of course almost anything could constitute such a 'system'; shorn of all context, the word is an empty vessel.").

171. *Id.* at 2612.

172. *Id.* (cleaned up) (quoting *Util. Air*, 573 U.S. at 324).

173. *Id.* (emphasis added); *see also id.* (rejecting the notion that "Congress implicitly tasked [the EPA], and it alone, with balancing the many vital considerations of national policy implicated in deciding how Americans will get their energy").

incompatible interpretations of the word “system”—one that relegated Section 111(d) to a “little-used backwater”<sup>174</sup> and another that transformed it into an “[e]xtraordinary grant[]”<sup>175</sup> of power. “[T]o downplay the magnitude” of its asserted discretion and authority, the agency argued that it may not impose costs that would be “exorbitant[]” or “threaten the reliability of the grid.”<sup>176</sup> But the purported discretion to determine what costs are sufficiently “exorbitant” or “threatening” was itself an assertion of tremendous power.<sup>177</sup>

Properly applied, the major questions doctrine helps preserve stability in the regulatory landscape. Presidents come and go, but agencies are creatures of Congress. Agencies are duty bound to enforce statutes, even if the sitting President would prefer otherwise. While presidential leadership generally promotes democratic accountability,<sup>178</sup> the rule of law presupposes some stability across time. Elections do not (by themselves) breathe new meaning into old statutes. Unamended provisions may not be refashioned every four or eight years. But stability need not imply rigidity. The major questions doctrine does not necessarily preclude “‘radical or fundamental change’ to a statutory scheme.”<sup>179</sup> It merely dictates that those changes come from Congress through the deliberative and democratic process laid out in the Constitution.

#### D. *Biden v. Nebraska*

*Biden v. Nebraska*<sup>180</sup> directly impacted the pocketbooks of tens of millions of student loan borrowers. The Court was tasked with deciding whether the Higher Education Relief Opportunities for Students (HEROES) Act<sup>181</sup> authorizes the Secretary of Education to dispense relief to individuals affected by the COVID–19 pandemic by forgiving \$430 billion of federal student loan debt.<sup>182</sup> Under that statute, the Secretary may “waive or modify any statutory or regulatory provision applicable to the student financial assistance programs” under Title IV of the Higher Education Act<sup>183</sup> as he

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174. *Id.* at 2613.

175. *Id.* at 2609.

176. *Id.* at 2612 (internal quotation marks omitted) (quoting Brief for the Federal Respondents at 42, *West Virginia v. EPA*, 142 S. Ct. 2587 (2022) (No. 20–1530)).

177. *See id.* (“[The EPA’s] argument does not so much *limit* the breadth of the Government’s claimed authority as *reveal* it.”).

178. *See Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) (“While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices . . .”).

179. *West Virginia v. EPA*, 142 S. Ct. at 2609 (quoting *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994)).

180. 143 S. Ct. 2355 (2023).

181. 20 U.S.C. § 1098bb.

182. *Biden v. Nebraska*, 143 S. Ct. at 2362, 2364–65.

183. 20 U.S.C. § 1070(b).

“deems necessary in connection with a war or other military operation or national emergency.”<sup>184</sup> Using both “ordinary tools of statutory interpretation” and the major questions doctrine, the Court narrowly construed “waive or modify” to hold that the HEROES Act does not authorize “mass debt cancellation.”<sup>185</sup>

On the merits, the Court started with the statutory text. In its view, the word “modify” is “ordinarily used” to authorize “modest adjustments and additions to existing provisions, not transform them.”<sup>186</sup> The Department’s reliance on the HEROES Act prior to the COVID–19 pandemic—limited only to “minor changes” and nondescript “procedural” provisions—bolstered this narrower reading of “modify.”<sup>187</sup>

While the word “waive” appears to delegate broader authority than “modify,” the Court concluded that “waive” could not rescue the Loan Forgiveness Plan either.<sup>188</sup> Notably, past agency practice sheds light on the scope of its waiver power: Each time, “the Secretary identified a particular legal requirement and waived it, making compliance no longer necessary.”<sup>189</sup> Yet the Government did not point to a specific provision from Title IV of the Higher Education Act that the Secretary had waived.<sup>190</sup> The Secretary may not take the “circuitous approach” of “waiv[ing]” student borrowers’ repayment obligations generally, detached from any specific statutory provision.<sup>191</sup> The Court also dismissed the Secretary’s argument that “the power to ‘waive or modify’ is greater than the sum of its parts,” reiterating (without much elaboration) that he “has not truly waived or modified” any specific provision.<sup>192</sup> So debt cancellation en masse did not fall between the textual goalposts.

The Court next turned to the major questions doctrine as another ground to invalidate the Loan Forgiveness Plan.<sup>193</sup> The reasoning on this score sheds greater light on what triggers the doctrine’s application. First and foremost is the agency’s past practice: “The Secretary has never previously claimed

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184. 20 U.S.C. § 1098bb(a)(1). He must do so such that they “are not placed in a worse position financially in relation to that financial assistance because of their status as affected individuals.” *Id.* § 1098bb(a)(2).

185. *Biden*, 143 S. Ct. at 2375.

186. *Id.* at 2368–69.

187. *Id.* at 2369.

188. *Id.* at 2370.

189. *Id.* at 2370.

190. *Id.* at 2370 & n.4. No provision in Title IV of the Higher Education Act obliges student loan borrowers to repay. Borrowers’ obligation to repay and the Department’s obligation to recoup come from other statutes. *See, e.g.*, 31 U.S.C. § 3711(a)(1) (providing that “[t]he head of an executive, judicial, or legislative agency shall try to collect” all debts owed to the Federal Government).

191. *Biden*, 143 S. Ct. at 2370.

192. *Id.* at 2370–71.

193. *Id.* at 2372–75.



powers of this magnitude under the HEROES Act.”<sup>194</sup> As in other major questions cases that “involved similar concerns over the exercise of administrative power,” the Secretary cannot point to any prior HEROES Act regulation that comes close to mass debt cancellation.<sup>195</sup> The existence of regulatory antecedents predominates whether the agency’s assertion of power is “unheralded” and thus warrants skepticism.<sup>196</sup> Next, the Court looked to the “economic and political significance” of the agency action.<sup>197</sup> The Plan’s \$430 billion price tag and the long record of failed legislative proposals were hard to ignore.<sup>198</sup> The unanimous consensus that marked Congress’s passage of the HEROES Act stands in sharp contrast to the “earnest and profound debate across the country” on student loan forgiveness that exists today.<sup>199</sup> Initial bipartisanship thus cut against the agency’s challenged action.

“[Q]uestions that are personal and emotionally charged, hitting fundamental issues about the structure of the economy” tend to constitute “major” questions, which the agency may not answer absent “clear congressional authorization.”<sup>200</sup> While the Court did not spell out how clear that delegation must be, the threshold seems insurmountable in nearly all cases. The Court stepped in the shoes of the enacting Congress and asked: “Can the Secretary use his powers to abolish \$430 billion in student loans, completely canceling loan balances for 20 million borrowers, as a pandemic winds down to its end?”<sup>201</sup> If some members of Congress would disapprove of the agency’s particular policy (as will invariably be the case) and the statute was passed by overwhelming consensus, then clear congressional authorization does not exist and thus the major questions doctrine is fatal.

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194. *Id.* at 2372.

195. *Id.* (citing *West Virginia v. EPA*, 142 S. Ct. 2587, 2615–16 (2022)).

196. *West Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022) (internal quotation marks and citations omitted).

197. *Biden*, 143 S. Ct. at 2373 (internal quotation marks and citations omitted).

198. *Id.* 2372–73.

199. *Id.* at 2374 (internal quotation marks and citations omitted).

200. *Id.* at 2373–75 (internal quotation marks omitted) (quoting Jeff Stein, *Biden Student Debt Plan Fuels Broader Debate over Forgiving Borrowers*, WASH. POST (Aug. 31, 2022, 6:00 AM), <https://www.washingtonpost.com/us-policy/2022/08/31/student-debt-biden-forgiveness/> [perma.cc/KGN2-7TCF]). Further judicial guidance on the major questions doctrine’s applicability is warranted. Compliance costs or economic impact ought not be sufficient criterion in some cases. For agencies like OSHA and the EPA, the costs of refitting facilities will invariably be high. The Federal Reserve and IRS likewise generate significant economic effects at every step. In our (tentative) view, so long as regulatory antecedents exist to support the challenged agency action, courts should think twice before applying the major questions doctrine.

201. *Id.* at 2374.

## V. Constitutional Enforcement and Textualism

Writing for herself, Justice Barrett sought to counter the “charge that the doctrine is inconsistent with textualism.”<sup>202</sup> In her view, the doctrine elucidates “the text’s most natural interpretation” by “emphasiz[ing] the importance of *context* when a court interprets a delegation to an administrative agency.”<sup>203</sup> She expressly rejects this Essay’s central thesis that the doctrine serves as a substantive canon that “overprotects” or “overenforce[s] Article I’s nondelegation principle.”<sup>204</sup> To start, we do not believe that her framing is mutually exclusive with ours. Canons of construction may be both semantic and substantive.<sup>205</sup> But if put to the choice, we believe that our framing is more faithful to the logic underlying the Court’s major questions cases. Justice Barrett’s position (which, again, we do not disagree with) seems like a revisionist defense against recent, widespread criticism. This Part explains why the major questions doctrine is best understood as a substantive canon and why that understanding remains consonant with basic tenets of textualism.

### A. *Semantic Device or Substantive Canon?*

First, we lay some groundwork. Semantic canons shed light on the linguistic meaning of statutory text.<sup>206</sup> Textualists do not take issue with judges’ reliance on them. Indeed, the plain meaning of text is often impossible to discern unless one resorts to their aid. On the other hand, substantive canons seek to “advance values external to a statute.”<sup>207</sup> They steer judges toward a reading that might be less than best (at least linguistically), but one that protects some substantive value such as

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202. *Biden*, 143 S. Ct. at 2376 (Barrett, J., concurring). For the counterargument, see, e.g., Deacon & Litman, *supra* note 12, at 1012 (arguing that the major questions doctrine “directs courts not to discern the plain meaning of a statute using the normal tools of statutory interpretation” but to invalidate the agency action in spite of it); *West Virginia v. EPA*, 142 S. Ct. 2587, 2641 (2022) (Kagan, J., dissenting) (criticizing the Court’s use of the doctrine as a “get-out-of-text-free card[]”).

203. *Biden*, 143 S. Ct. at 2376 (Barrett, J., concurring).

204. *Id.* at 2377, 2380.

205. See Ilan Wurman, *Importance and Interpretive Questions*, 110 VA. L. REV. (forthcoming 2024) (manuscript at 8) (noting that “the dividing line between linguistic and substantive canons is often thinner than traditionally believed”).

206. We understand the phrase “semantic canon” to encompass a wide array of statutory construction tools. See Antonin Scalia & Bryan Garner, *A Dozen Canons of Statutory and Constitutional Text Construction*, 99 JUDICATURE, Autumn 2015, at 1, 80 (discussing the ordinary-meaning canon, the fixed-meaning canon, the general-terms canon, and others).

207. *Biden*, 143 S. Ct. at 2376 (Barrett, J., concurring).

federalism,<sup>208</sup> tribal sovereignty,<sup>209</sup> or separation of powers. Textualism leaves plenty room for substantive canons. When the statutory text is ambiguous, extrinsic sources are fair game. Furthermore, “strong-form” substantive canons may render unambiguous text non-dispositive by “counsel[ing] a court to *strain* statutory text to advance a particular value.”<sup>210</sup> This Essay posits that the major questions doctrine serves as a strong-form substantive canon: It places a heavy thumb on the scale in favor of plausible linguistic interpretations that constrain the agency’s discretion and authority.

In Justice Barrett’s view, the major questions doctrine serves a more straightforward function. The “common sense” presumption that Congress does not delegate matters of political and economic significance without express authorization offers important “context” for judges to reach the most natural reading of statutory text.<sup>211</sup> Delegation boils down to fiduciary duty. The agent (in this case, the administrative agency) can make sense of the principal’s instructions (the statute) only if those instructions are read in light of the “*context* in which the principal and agent interact.”<sup>212</sup> Justice Barrett offers an illustration: A grocery clerk instructed to go to the orchard and buy apples does not have the authority to complete the “out-of-the-ordinary” (or major) purchase of 1,000 apples if that quantity is five times greater than the store’s normal inventory (or “past practice”).<sup>213</sup> A manager who wanted 1,000 apples would have said so expressly.<sup>214</sup> The clerk who returns with a truckload of apples partakes in literalism, not textualism.

According to Justice Barrett, “[b]ackground legal conventions” also supply linguistic context.<sup>215</sup> For instance, judges frequently interpret criminal statutes with a presumption of *mens rea*.<sup>216</sup> Background presumptions also apply to legislative delegations. Since our “constitutional structure” serves as important “legal context framing any delegation,” judges who stretch statutory text to their fullest (thus authorizing the agency “to make the big-

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208. See *Sackett v. EPA*, 598 U.S. 651, 679 (2023) (requiring “exceedingly clear language if [Congress] wishes to significantly alter the balance between federal and state power” (internal quotation marks and citations omitted)); *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) (advancing a “plain statement rule” because “States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere”).

209. See *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 790 (2014) (“The baseline position . . . is tribal immunity; and to abrogate such immunity, Congress must unequivocally express that purpose.” (cleaned up and citations omitted)).

210. *Biden*, 143 S. Ct. at 2376 (Barrett, J., concurring).

211. *Id.* at 2379–80.

212. *Id.* at 2379 (quoting RESTATEMENT (THIRD) OF AGENCY § 2.02 cmt. e (AM. L. INST. 2005)).

213. *Id.* at 2379.

214. *Id.*

215. *Id.* at 2378.

216. See *Rehaif v. United States*, 139 S. Ct. 2191, 2197 (2019) (applying the “normal presumption in favor of scienter”).

time policy calls itself”) do not take textualism seriously.<sup>217</sup> On the other hand, judges who are clear-eyed about “the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude” are better equipped to arrive at the statute’s “best” reading.<sup>218</sup>

Justice Barrett’s position falls short for three reasons. First, the Court has never framed the major questions doctrine as a semantic canon. In cases where the text’s most natural reading cuts against the agency, the major questions doctrine was not necessary to the Court’s textual analysis.<sup>219</sup> In *Biden v. Nebraska*, for example, the Court explained that “the statutory text alone precludes the Secretary’s program” and that the doctrine serves as “an additional *sufficient* basis” for its decision.<sup>220</sup> “[N]ormal statutory interpretation”<sup>221</sup> merely passed the baton to the major questions doctrine. But Justice Barrett flipped the Court’s analysis on its head. If the doctrine provided necessary context to support the statute’s most plausible reading, then the doctrine would have been part and parcel of “normal statutory interpretation,” not separate from and subsequent to it. *West Virginia* made this disjunction explicit: “‘In extraordinary cases there may be reason to hesitate’ before accepting a reading of a statute that would, under more ‘ordinary’ circumstances, be upheld.”<sup>222</sup> The Court further noted that “the approach under the major questions doctrine is distinct” from “routine statutory interpretation.”<sup>223</sup> So while Justice Barrett’s framing may be persuasive in theory, it does not reflect how the Court has applied the major questions doctrine in practice.

The notion that context helps judges arrive at the statute’s most plausible reading is uncontroversial. However, the Court in *Biden v. Nebraska* arguably ignored context that favored the agency. It dismissed the dissent’s argument that “the dominant piece of context is that ‘modify’ does not stand alone. It is part of a couplet.”<sup>224</sup> In Justice Kagan’s view, “modify”

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217. *Biden*, 143 S. Ct. at 2380 (Barrett, J., concurring).

218. *Id.* at 2384 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)).

219. See *West Virginia v. EPA*, 142 S. Ct. 2587, 2633 (2022) (Kagan, J., dissenting) (arguing that “the relevant [major questions doctrine] decisions do normal statutory interpretation: In them, the Court simply insisted that the text of a broad delegation, like any other statute, should be read in context, and with a modicum of common sense”).

220. *Biden*, 143 S. Ct. at 2375 n.9 (2023) (majority opinion) (emphasis added and citations omitted).

221. *Id.*

222. *West Virginia v. EPA*, 142 S. Ct. at 2609 (cleaned up) (quoting *Brown & Williamson*, 529 U.S. at 159).

223. *Id.*

224. *Biden*, 143 S. Ct. at 2374 (Kagan, J., dissenting); *id.* at 2370–71 (majority opinion); see also *id.* at 2394–95 (Kagan, J., dissenting) (“Would Congress have given the Secretary power to wholly eliminate a requirement, as well as to relax it just a little bit, but nothing in between? The majority says yes. But the answer is no, because Congress would not have written so insane a law.”)

and “waive” should be read together to afford the Secretary a spectrum of options, from minor revisions (“modify”) to major alterations (“waive”).<sup>225</sup> To interpret each verb in isolation is to read the statute shorn from its semantic context.<sup>226</sup> Thus, a “reasonably informed interpreter”<sup>227</sup> might understand the couplet to confer authority that is greater than the sum of its parts.<sup>228</sup> Judges who invoke context only when it cuts against the agency but not the other way around are not in the business of sound linguistics. “[S]eparation of powers concerns” unequivocally animated the Court’s reasoning.<sup>229</sup> So Justice Barrett’s attempt to elide that conclusion is both incomplete and unnecessary.

Lastly, Justice Barrett’s framing “is rooted in the basic premise that Congress normally ‘intends to make major policy decisions itself, not leave those decisions to agencies.’”<sup>230</sup> Whether the major questions doctrine stems from linguistics depends on whether that premise is descriptively sound. But there is room for doubt. Neomi Rao has argued that “the political realities of delegation in Congress” are such that individual legislators stand to benefit when agencies seize important policy questions.<sup>231</sup> Delegations reduce the transaction and information costs inherent in policymaking.<sup>232</sup> Individual legislators can circumvent the rigmarole of bicameralism and presentment by channeling their preferred policy initiatives through an agency.<sup>233</sup> These incentives are particularly strong when the President belongs to a different political party than that which controls either the House of Representatives or Senate.<sup>234</sup> Furthermore, delegations allow legislators to evade political accountability.<sup>235</sup> Regulated entities (and voters) will not know whether to blame Congress for delegating vast discretion or the agency for exercising it.

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225. *Id.* at 2394–95.

226. *See id.* at 2394 (advocating for application of a “whole-sentence” canon); *cf.* *West Virginia v. EPA*, 142 S. Ct. at 2614 (“[S]horn of all context, the word[s] are an empty vessel.”); *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1825 (2020) (Kavanaugh, J., dissenting) (“[C]ourts must adhere to the ordinary meaning of phrases, not just the meaning of the words in a phrase.”); *Dubin v. United States*, 143 S. Ct. 1557, 1565 (2023) (“[B]ecause [the operative text] draws meaning from its context, we will look not only to the word itself, but also to the statute and the surrounding scheme, to determine the meaning Congress intended.” (citations omitted and cleaned up)).

227. *Biden*, 143 S. Ct. at 2380 (Barrett, J., concurring).

228. *Id.* at 2394–95 (Kagan, J., dissenting).

229. *Id.* at 2375 (majority opinion).

230. *Id.* at 2380 (Barrett, J., concurring) (quoting *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of reh’g en banc)).

231. Rao, *supra* note 44, at 1476–77.

232. *Id.* at 1478.

233. *Id.* at 1477–78.

234. *See id.* at 1477 (“Party polarization also reinforces the dynamic by increasing delegations and by aligning the interests of congressmen to their parties rather than to Congress as an institution.”).

235. *Id.* at 1479 (“[M]embers [of Congress] can take credit for responding, but then shift blame to the agency for imposing regulatory costs.”).

With these myriad incentives in mind, it makes sense that agency authority has ballooned under Congress's watch and the judiciary has exhibited greater "concerns over the exercise of administrative power."<sup>236</sup> So Justice Barrett's argument that our system of separation of powers serves as important linguistic context takes for granted that that system works as the Framers intended. When that system breaks down, courts ought to intervene with the doctrinal tools at their disposal. While constitutional law might work, statutory interpretation works better.

*B. Retreat from Textualism?*

Justice Kagan chides the major questions doctrine as a "get-out-of-text-free card[]." <sup>237</sup> She finds herself in good company with many textualists. Their critique tracks the familiar position that judges may not rely on extrinsic sources to discount the statute's plain textual meaning. Additionally, the major questions doctrine vests judges with considerable discretion to determine whether some policy question is major or nonmajor based on their "common sense" impressions of legislative intent.<sup>238</sup> What questions are sufficiently major to trigger the doctrine? What does "clear congressional authorization" look like? As then-Judge Kavanaugh acknowledged, the doctrine "sometimes has a bit of a 'know it when you see it' quality."<sup>239</sup> Textualists are uncomfortable with this wiggle room.<sup>240</sup> Expansive discretion is dangerous in the hands of agencies; it can be even more dangerous in the hands of judges. Given the nondelegation doctrine's overarching purpose to ensure democratic accountability, judges who invoke the major questions doctrine have much explaining to do.<sup>241</sup>

Textualists further object that the major questions doctrine "risks upsetting the legislative bargains that result in particular words being enacted into law."<sup>242</sup> Judges can do no more than speculate as to the unspoken intentions of those who drafted and then voted on the statute. Under this view, it would be inappropriate for judges to assume that Congress never intends to confer expansive authority via broadly worded language, not because such intentions never exist but because it is impossible and futile for courts to

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236. *Biden v. Nebraska*, 143 S. Ct. 2355, 2372 (2023).

237. *West Virginia v. EPA*, 142 S. Ct. 2587, 2641 (2022) (Kagan, J., dissenting).

238. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

239. *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 423 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of reh'g en banc).

240. See, e.g., Chad Squitieri, *Who Determines Majorness?*, 44 HARV. J.L. & PUB. POL'Y 463, 466 (2021) (criticizing the major questions doctrine as a "judge-made presumption" that is "incompatible" with textualism).

241. See Douglas H. Ginsburg & Steven Menashi, *Our Illiberal Administrative Law*, 10 N.Y.U. J.L. & LIBERTY 475, 502 (2016) ("[M]ajor questions present the strongest case for [*Chevron*] deference, for the courts are politically even less accountable than the agencies.").

242. Squitieri, *supra* note 240, at 505.

discern them.<sup>243</sup> After all, “[t]he best evidence of that purpose is the statutory text adopted by both Houses of Congress and submitted to the President.”<sup>244</sup>

In our view, the purported tensions between the major questions doctrine and textualism are overstated. Textualists generally accept clear statement rules<sup>245</sup> and constitutional avoidance canons<sup>246</sup> as legitimate tools of statutory interpretation when faithfully and cautiously applied. Indeed, many “[t]extualists describe themselves as enthusiasts of canons that reflect constitutionally derived values.”<sup>247</sup> Constitutional avoidance canons afford due respect to Congress.<sup>248</sup> Textualism operates under the firm background norm that Congress generally intends for its statutes to survive constitutional scrutiny. So long as judges can find a “fairly possible” interpretation consistent with the Constitution’s prohibition against the delegation of legislative power, their “plain duty is to adopt that which will save the Act.”<sup>249</sup> The major questions doctrine similarly favors judicial modesty. It averts unnecessary conflict between Congress and courts by steering judges away from statutory readings that raise serious nondelegation concerns. Just as courts refuse to presume that Congress intends for agencies to decide major questions absent “clear congressional authorization,”<sup>250</sup> courts refuse

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243. See Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 124 (2010) (“Textualists cannot justify the application of substantive canons on the ground that they represent what Congress would have wanted, because the foundation of modern textualism is its insistence that congressional intent is unknowable.”).

244. *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98 (1991).

245. See John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 123 (2001) (“Although clear statement rules sometimes require judges to reject the most natural reading of a statute in favor of a plausible but less conventional interpretation, textualists have not hesitated to apply them.”); Barrett, *supra* note 243, at 122–23 & nn. 60, 63–64 (collecting cases on tribal immunity and presumptions against extraterritoriality and retroactivity).

246. *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 358 (1998) (Scalia, J., concurring) (explaining that “[t]he doctrine of constitutional doubt does not require that the problem-avoiding construction be the *preferable* one,” since that “would deprive the doctrine of all function.”).

247. Barrett, *supra* note 243, at 168 (internal quotation marks omitted) (quoting John F. Manning, *Legal Realism and the Canons’ Revival*, 5 GREEN BAG 2d 283, 292 n.42 (2002)).

248. See *INS v. St. Cyr*, 533 U.S. 289, 336 (2001) (Scalia, J., dissenting) (“The doctrine of constitutional doubt . . . conform[s] with Congress’s presumed intent not to enact measures of dubious validity.”); see Barrett, *supra* note 243, at 142–43 (describing constitutional avoidance as “a means of effecting the legislature’s desire that its laws be constitutional”).

249. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 562–63, 588 (2012) (internal quotation marks and citations omitted) (applying the constitutional avoidance canon to sustain the Affordable Care Act’s individual mandate under Congress’s Taxing Power); see *Gomez v. United States*, 490 U.S. 858, 864 (1989) (“It is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question.”).

250. *West Virginia v. EPA*, 142 S. Ct. 2587, 2595 (2022) (citations omitted).

to presume that Congress intends to prod constitutional boundaries through mixed messages.<sup>251</sup>

Textualists may nevertheless object that constitutional avoidance empowers judges to construct a “penumbral Constitution” without clear rules to distinguish between those doubts to avoid and those to confront.<sup>252</sup> That may be true as a general matter, but the major questions doctrine deserves more credit. Indeed, clarity and judicial restraint would fare worse under a robust nondelegation doctrine. The argument that judicial enforcement of some not-so-strict nondelegation doctrine would be less detrimental to governmental administration<sup>253</sup> is difficult to sustain from a prudential perspective. Some societal problems beget greater regulatory flexibility than others. Congress—not courts—is better able to calculate the amount of agency discretion necessary to tackle them.<sup>254</sup> Further, constitutional avoidance canons allow the agency to enact another (albeit less sweeping) regulation under the same statutory provision, whereas constitutional invalidation requires Congress to enact another statute. Bicameralism and presentment often doom prospects of new legislation.<sup>255</sup> Constitutional avoidance thus preserves Congress’s legislative prerogative to decide how much delegation is too much.

Critics may nevertheless find these prudential arguments unpersuasive. But the protection of “underenforced constitutional norms” through “super-

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251. See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 248 (1st ed. 2012) (“In the texts that it enacts, a legislature should not be presumed to be sailing close to the wind, so to speak—entering an area of questionable constitutionality without making that entrance utterly clear.”); *Clark v. Martinez*, 543 U.S. 371, 382 (2005) (“The [constitutional avoidance] canon is thus a means of giving effect to congressional intent, not of subverting it.”). *But see* Kavanaugh, *supra* note 74, at 2146 (“[O]ne initial problem with this doctrine is that Congress may have wanted to legislate right up to the constitutional line but didn’t know where it was and trusted the courts to make sure Congress did not unintentionally cross the line.”).

252. See RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 285 (1985) (decrying the “practical effect” of constitutional avoidance in “enlarge[ing] the already vast reach of constitutional prohibition beyond even the most extravagant modern interpretations of the Constitution,” thus “sharpen[ing] the tensions between the legislative and judicial branches”).

253. See Manning, *supra* note 10, at 257–58 (“[T]he practical concerns that make the Court unwilling to enforce the nondelegation doctrine directly . . . go to the strictness with which the Court enforces the nondelegation doctrine, not to whether it enforces that doctrine through avoidance or judicial review.”).

254. See *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting) (noting that Congress is “better equipped to inform itself of the ‘necessities’ of government” than courts and that “the factors bearing upon those necessities are both multifarious and (in the nonpartisan sense) highly political . . .”).

255. See Barron & Kagan, *supra* note 34, at 247 (“Under the . . . nondelegation doctrine, the consequence of a too-broad delegation is prohibition—or, conversely put, a command that Congress decide the matter, even against all evidence that it can do so.”).



strong clear statement rules” can be a legitimate textualist endeavor.<sup>256</sup> Accordingly, the major questions doctrine operates as a constitutional enforcement canon: It favors the second-best statutory interpretation to effectuate values inadequately protected by existing constitutional doctrine. The major questions doctrine allows judges to *cure* constitutional doubts, rather than to merely *avoid* them. Precedent makes clear that the nondelegation doctrine is not doing much work on its own.<sup>257</sup> As a canon of constitutional enforcement, the major questions doctrine picks up where the nondelegation doctrine has left off, advancing constitutional principles in areas where constitutional doctrine offers Congress a blank check. The interpretation that gives credence to the separation-of-powers principles at stake should prevail over the statute’s best textual reading. The responsibility to police the boundaries between major and nonmajor questions falls within the core of the judicial function.

But there is still room for pause. Critics argue that the major questions doctrine “provide[s] the judiciary with an unenumerated political veto” based on an incoherent distinction between major and nonmajor questions.<sup>258</sup> If that distinction is primarily based on judges’ personal views or “common sense” instincts,<sup>259</sup> then the major questions doctrine is as problematic as critics claim. But this distinction is a legal (not political) one. Major questions arise when agencies interpret vague statutes in a way that raises serious nondelegation doubts. Whether (and how much) doubt gets raised depends on how closely the agency’s asserted authority approximates constitutional understandings of undelegatable legislative power. That clear-cut distinctions between major and nonmajor questions might be elusive is not an inherent defect of the major questions doctrine; it merely reflects the “notoriously squishy” nature of the underlying nondelegation framework.<sup>260</sup>

Even still, a coherent and workable body of law exists within the major questions doctrine if one bothers to look. In *Brown & Williamson*, the Court

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256. William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 631 (1992); see Barrett, *supra* note 243, at 175–76 (“[S]o long as courts honor the plain language of a statute and act only in service of values enshrined in the Constitution, they do not act in direct conflict with the rule of law norm that prohibits departures from text in the service of undifferentiated social values.”).

257. See Aditya Bamzai, Comment, *Delegation and Interpretive Discretion: Gundy, Kisor, and the Formation and Future of Administrative Law*, 133 HARV. L. REV. 164, 174 (2019) (“Construing a statute narrowly because of nondelegation concerns seems unnecessary where the doctrine itself has no bite.”).

258. Squitieri, *supra* note 242, at 503.

259. *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (internal quotation marks and citations omitted).

260. *Barron & Kagan*, *supra* note 34, at 250; see *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928) (requiring legislative delegations to “be fixed according to common sense and the inherent necessities of the government co-ordination.”).

looked to the “history and breadth” of the agency’s authority.<sup>261</sup> The same analysis came through in different language in *West Virginia*: Is agency action “unheralded” in light of the agency’s past practice? And does it represent a “transformative” expansion of its regulatory authority?<sup>262</sup> That these two questions are likely determinative should assuage critics who argue that the doctrine empowers judges to make policy rather than interpret law. As in all other areas of statutory interpretation, judges are tasked with ascertaining the metes and bounds of the statutory scheme. Furthermore, the criteria in *West Virginia* reveal the doctrine’s constitutional underpinnings. It is no coincidence that past practice and regulatory authority mirror the nondelegation doctrine’s sliding-scale framework. The major questions doctrine gives effect to otherwise underenforced (and possibly unenforceable) nondelegation principles.

## VI. The New Nondelegation Doctrine

### A. *Nondelegation with Bite?*

There appears to be significant appetite on the Supreme Court bench to revive the nondelegation doctrine, separate and apart from the substantive canons that serve the same purpose. In *Gundy*, Justice Alito expressed that “[i]f a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, [he] would support that effort.”<sup>263</sup> Justice Gorsuch’s dissent—joined by Chief Justice Roberts and Justice Thomas—went further by proposing an alternative nondelegation framework. He laid out three types of constitutionally permissible delegations based on pre-twentieth century legal practice.<sup>264</sup> These “traditional tests,” he argued, should replace the existing *J.W. Hampton* framework, which rests on a “mutated version of the ‘intelligible principle’ remark” and contradicts the original meaning of the Constitution along with “all prior teachings in this area.”<sup>265</sup>

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261. *FDA v. Brown & Williamson*, 529 U.S. 120, 159–60 (2000). With respect to “history,” see *Gundy v. United States*, 139 S. Ct. 2116, 2129 (2019) (plurality) (rejecting the Petitioner’s broader interpretation because “no Attorney General has used (or, apparently, thought to use) § 20913(d) in any more expansive way.”)

262. 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, 49 (2022) (identifying a “two-prong framework”).

263. *Gundy*, 139 S. Ct. at 2131 (Alito, J., concurring). Justice Kavanaugh also expressed interest on this issue. See *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., respecting the denial of cert.) (“Justice Gorsuch’s thoughtful *Gundy* opinion raised important points that may warrant further consideration in future cases.”).

264. *Gundy*, 139 S. Ct. at 2136–37 (Gorsuch, J., dissenting).

265. *Id.* at 2139 (citations omitted).

First, Congress may delegate authority for the Executive to “fill up the details” of legislation.<sup>266</sup> So “Congress must set forth standards ‘sufficiently definite and precise to enable Congress, the courts, and the public to ascertain’ whether Congress’s guidance has been followed.”<sup>267</sup> How does this differ from the intelligible principle framework? Justice Gorsuch does not clarify.<sup>268</sup> But if he means what he says—that “*only* the people’s elected representatives may adopt new federal laws restricting liberty”<sup>269</sup>—the fill up the details test would hamstring agencies’ ability to make policy with binding force of law. Congress may no longer entrust agencies with “the formulation of subsidiary administrative policy within the prescribed statutory framework.”<sup>270</sup> Under that new regime, courts must perform this policy-ridden function under the guise of statutory interpretation or compel Congress to draft complicated statutes with an eye toward all future contingencies. The proffered fill up the details test would surely prove unworkable.<sup>271</sup>

Second, Justice Gorsuch suggested that Congress may authorize an agency to enforce broad rules governing private conduct if that enforcement “depend[s] on executive fact-finding.”<sup>272</sup> That sort of delegation is already folded into the existing framework as a constraint on the agency’s policymaking discretion. So, this second category does not contribute much. Third, “Congress may assign the executive and judicial branches certain non-legislative responsibilities.”<sup>273</sup> Accordingly, “no separation-of-powers problem may arise if the discretion is to be exercised over matters already within the scope of executive power.”<sup>274</sup> But the proposition that the President may exercise executive power offers nothing new.

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266. *Id.* at 2136 (internal quotation marks omitted) (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825)).

267. *Id.* (quoting *Yakus v. United States*, 321 U.S. 414, 426 (1944)).

268. *See id.* at 2143 (conceding that “what qualifies as a detail can sometimes be difficult to discern”).

269. *Id.* at 2131 (emphasis added).

270. *Yakus*, 321 U.S. at 425.

271. *See* Barron & Kagan, *supra* note 34, at 246 (acknowledging the concern that “a meaningfully enforced nondelegation doctrine would have severe adverse consequences for effective governance”); Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303, 305 (1999) (“[T]he nondelegation doctrine would emerge as a crude and unhelpful response to existing problems in modern regulation, even a form of judicial usurpation.”).

272. *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting); *see* *Field v. Clark*, 143 U.S. 649, 683 (1892) (“Conditional legislation” authorizes executive “[a]ction . . . based upon the occurrence of subsequent events, or the ascertainment by [the President] of certain facts . . .”); *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 575 U.S. 43, 78 (2015) (Thomas, J., concurring) (“[T]he practice of conditional legislation does not seem to call on the President to exercise a core function that demands an exercise of legislative power.”).

273. *Gundy*, 139 S. Ct. at 2137 (Gorsuch, J., dissenting).

274. *Id.* (internal quotation marks and citations omitted).

So, only the fill up the details test somewhat departs from existing law. Whether that test marks a significant departure depends on the line that the Court draws to distinguish mere “details” from core legislative decisions.<sup>275</sup> If that distinction mirrors the difference between major and nonmajor questions, no dramatic shifts will likely occur. But a narrow understanding of “details” would critically truncate agencies’ regulatory function. If Congress may not delegate authority to agencies to make policy, then the buck stops with Congress. We are not sure that it is up for the task. A robust nondelegation doctrine would likely generate a regulatory vacuum to be filled (if at all) by prolix and rigid statutes.

### B. *Constitutional Minimalism*

Lawrence Sager has observed that “it is possible for persons to agree as to the abstract meaning—the concept—of a norm, yet disagree markedly over the conception which ought to be adopted to realize that concept.”<sup>276</sup> Indeed, the “concept” of nondelegation—that legislation must come from the legislature—appears uncontroversial. Most conservatives<sup>277</sup> and liberals<sup>278</sup> would agree that Congress may not “vote all powers to the President and adjourn.”<sup>279</sup> Even if the Framers had worded Article I’s Vesting Clause differently, such that the nondelegation doctrine was not a clear implication from it, the Supreme Court would have had to invent one. “That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.”<sup>280</sup> So there should be no dispute as to the core premise of the major questions doctrine: That agencies may not answer major questions if doing so would flout nondelegation principles. While litigants may contest whether (and how) the major questions doctrine should apply in specific cases, to dispute its legitimacy entirely is to discount bedrock constitutional norms.

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275. See Felix Frankfurter, *Task of Administrative Law*, 75 U. PA. L. REV. 614, 614 (1927) (“[Legislative delegations] are euphemistically called ‘filling in the details’ of a policy set forth in statutes. But the ‘details’ are of the essence; they give meaning and content to vague contours.”).

276. Sager, *supra* note 43, at 1213.

277. See, e.g., Douglas H. Ginsburg & Steven Menashi, *Nondelegation and the Unitary Executive*, 12 U. PA. J. CONST. L. 251, 264 n.72 (2010) (“The nondelegation doctrine is too essential a principle of American constitutionalism to disappear entirely.”).

278. See, e.g., Sunstein, *supra* note 271, at 356 (“In the most extreme cases, open-ended grants of authority should be invalidated.”).

279. Scalia, *supra* note 52, at 28 (“[N]o one has ever thought that the . . . [non]delegation doctrine did not *exist* as a principle of our government.”).

280. *Field v. Clark*, 143 U.S. 649, 692 (1892).

It should be no surprise that progressives object to the major questions doctrine.<sup>281</sup> The Supreme Court has invoked the doctrine to strike down regulations targeting serious problems that Congress did not anticipate during the legislative process, including occupational Benzene exposure, youth nicotine addiction, and the COVID–19 pandemic.<sup>282</sup> Whether due to legislative inertia or public squabble, Congress failed to adequately respond in each instance. Take climate change as an example. In *West Virginia v. EPA*, the Court did not contest the ecological consequences of greenhouse gas emissions. It further granted that “[c]apping carbon dioxide emissions at a level that will force a nationwide transition away from the use of coal to generate electricity may be a sensible solution to the crisis of the day.”<sup>283</sup> Yet it struck down the Clean Power Plan on grounds that sensible but systemwide solutions must come from Congress.<sup>284</sup> That Congress is presently unwilling to act does not give free rein for the EPA to do the same.

The Founding-era notion that “excess of lawmaking” was one of “the diseases to which our governments are most liable”<sup>285</sup> seems confounding nowadays. While excessive lawmaking undoubtedly poses “serious threat[s] to individual liberty,”<sup>286</sup> tyranny also lurks where law does not reach. Over the course of our history, Congress has established administrative agencies with vast authority to protect public health, safety, and welfare. Indeed, “[i]f an American could go back in time, she might be astonished by how much progress has occurred in all those areas.”<sup>287</sup> At first glance, the major questions doctrine appears to reverse these hard-fought gains. But by fending off a reinvigorated nondelegation doctrine, the major questions doctrine operates to preserve much of our administrative state. Those who support its continued existence should instead strive to affect regulatory change through

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281. We reject the suggestion that the major questions doctrine cuts only in an anti-regulatory (or politically conservative) direction. Today’s critics will likely invoke the doctrine when a new administration seeks to alter well-established agency practices. By way of example, the IRS (under the Trump Administration) considered promulgating regulations that would index capital gains basis to inflation, and thus reduce net tax revenue. See Daniel Hemel & David Kamin, *The False Promise of Presidential Indexation*, 36 YALE J. ON REG. 693, 694–95 (2019) (discussing the proposed Treasury Department regulation that would index capital gains for inflation). Critics of that proposal cited the major questions doctrine to challenge the legality of unilateral executive action. See *id.* at 716–20 (arguing that the major questions doctrine “does not bode well” for the presidential indexation proposal).

282. See, e.g., David B. Spence, *Naïve Administrative Law: Complexity, Delegation, and Climate Policy*, 39 YALE J. ON REG. 964, 998 (2022) (arguing that the “insist[ence] that Congress make all consequential policy decisions . . . will handicap the government’s ability to deal with important national problems”).

283. *West Virginia v. EPA*, 142 S. Ct. 2587, 2616 (2022) (internal quotation marks and citations omitted).

284. *Id.*

285. THE FEDERALIST No. 62, at 378 (James Madison) (Clinton Rossiter ed., 1961).

286. *West Virginia v. EPA*, 142 S. Ct. at 2618 (Gorsuch, J., concurring).

287. *Id.* at 2643 (Kagan, J., dissenting).

incremental, nonmajor strides. They should welcome—or at least begrudgingly accept—this relegated posture. The alternative would be far worse.

With respect to its nondelegation jurisprudence, the Supreme Court has reached a fork in the road. One path calls for the Court to rigorously inquire into whether statutes evince an intelligible principle or to replace the existing *J.W. Hampton* framework altogether with one resembling Justice Gorsuch’s fill up the details test. What an “originalist” regulatory state would look like remains a mystery. But one can safely assume that the Federal Register will print with much less ink. Between Justices Gorsuch, Alito, Thomas, Kavanaugh, and Chief Justice Roberts, there are enough votes for the Court to broach—and ultimately decide—the viability of a revived nondelegation doctrine.<sup>288</sup> Alternatively, the Court can stick with the status quo, with judges policing the constitutional borderland between legislative and executive power through the major questions doctrine. Agencies may exercise authority over nonmajor questions, while courts retain the prerogative to intervene in “extraordinary cases” where an agency seeks to unilaterally resolve matters of “vast economic and political significance.”<sup>289</sup>

Whether courts enforce nondelegation principles through constitutional doctrine or canons of statutory interpretation matters a great deal. When a court strikes down some agency action as *ultra vires* under the major questions doctrine, the agency may return to the drawing board and promulgate new rules to achieve its policy. The broad contours of the administrative state thus remain unspoiled. But when a court strikes down some statutory provision as unconstitutional, the agency must look elsewhere for authority.<sup>290</sup> So Congress must draft prolix statutes to give necessary policy elaboration that agencies are better equipped to deliver in light of their experience and expertise. To illustrate the dramatic escalation of this latter approach, take § 655(b) of the Occupational Safety and Health Act—at issue in *The Benzene Case*—as an example. OSHA has enacted over 1,500 regulations<sup>291</sup> pursuant to its authority to “promulgate, modify, or revoke any

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288. The Supreme Court might revisit *J.W. Hampton* despite its application of a robust major questions doctrine. Even then, our thesis that the doctrine at least *forestalls* such an outcome still holds water.

289. *West Virginia v. EPA*, 142 S. Ct. at 2605, 2609 (citations omitted).

290. Courts may go as far as to strike down the entire statute on grounds that the specific unconstitutional provision cannot be severed from the rest. See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 697 (2012) (Scalia, J., dissenting) (arguing that “[i]t would take years, perhaps decades, for [various statutory] provisions to be adjudicated separately” and “[t]he Federal Government, the States, and private parties ought to know at once whether the entire legislation fails”).

291. *Law and Regulations: Standards*, OSHA, <https://www.osha.gov/laws-regs> [<https://perma.cc/6DZL-USUJ>].

occupational safety or health standard[s],”<sup>292</sup> including rules on ladder safety,<sup>293</sup> fire prevention,<sup>294</sup> and noise exposure.<sup>295</sup> Only two entail decisions of vast economic or political significance; the rest are relatively interstitial matters that OSHA can (and should) regulate. But if the Court had invalidated § 655(b) on nondelegation grounds, Congress would have had to enact another statute that would either confer less authority to OSHA or satisfy some vague notion of “intelligibility.” The major questions doctrine thus strikes a stable but unsatisfying balance between two important but sometimes incompatible interests: democratic accountability on one hand and workable governance on the other. Perfect ought not be the enemy of good enough.

To the extent that contemporary political pathologies prevent Congress from mustering consensus to tackle important problems with requisite clarity, the major questions doctrine admittedly constrains agencies’ capacity to fill those gaps. The doctrine nevertheless presents a good bargain. The Supreme Court has effectively closed the door to legislation delegating expansive agency power via “cryptic” statutory language.<sup>296</sup> Whether the Court will continue to enforce these limits through statutory interpretation or constitutional adjudication remains an open and crucial question. The major questions doctrine helps to steer the Court’s nondelegation jurisprudence in a more sensible direction. Courts may police constitutionally suspect agency actions without resorting to an austere nondelegation doctrine. In doing so, the “wheels of government” remain spinning.<sup>297</sup>

### Conclusion

The major questions doctrine has lately aroused condemnation from across the political and ideological spectrum. Several textualists regard the doctrine as a purposivist departure from sound interpretive methodology. Progressives tend to regard the doctrine as an instrument of the Supreme Court’s anti-regulatory, libertarian agenda. This Essay presents an alternative perspective. The major questions doctrine offers something for everyone. Textualism makes room for substantive canons when applied in principled and coherent ways. For conservatives, the doctrine lays out the outer perimeter of the agency’s authority and discretion, thereby defending nondelegation principles. And crucially for progressives, this approach dispenses with the regulation but saves the statute, whereas the nondelegation

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292. 29 U.S.C. § 655(b).

293. 29 C.F.R. § 1910.23 (2022).

294. *Id.* § 1910.39.

295. *Id.* § 1910.95.

296. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000).

297. *Union Bridge Co. v. United States*, 204 U.S. 364, 387 (1907).

doctrine would dispense with both. The major questions doctrine is bitter medicine. It is the price paid for a dynamic and enduring regulatory state. For those who believe that “the administrative delegations Congress has made have helped to build a modern Nation,”<sup>298</sup> their best bet is to make peace with the major questions doctrine.

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298. *West Virginia vs. EPA*, 142 S. Ct. 2587, 2643 (2022) (Kagan, J., dissenting).