

# WHO DETERMINES MAJORNNESS?

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## INTRODUCTION

Do federal courts have the constitutional authority to definitively determine questions of politics? The answer would appear obvious: No. Separation-of-powers principles mandate that the judiciary play no direct role in the political process. Instead, federal courts are limited to faithfully applying the outcome of the political process (*i.e.*, law) to particular sets of facts.<sup>1</sup> Peculiar then is the major questions doctrine, which calls on courts to determine policy questions’ “economic and political significance.”<sup>2</sup>

The major questions doctrine is said to do one thing but in practice does another. What is more, at least two sitting Supreme Court Justices have proposed strengthening the major questions doctrine so that it does something else entirely.<sup>3</sup> Both of those Justices are

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1. See U.S. CONST. art. III, § 2 (describing the “judicial Power” as extending to “Cases” and “Controversies”); ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 115–16 (1962) (“One of the chief faculties of the judiciary, which is lacking in the legislature and which fits the courts for the function of evolving and applying constitutional principles, is that the judgment of courts can come later, after the hopes and prophecies expressed in legislation have been tested in the actual workings of our society; the judgment of courts may be had in concrete cases that exemplify the actual consequences of legislative or executive actions.”); John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 438 (2005) [hereinafter *Textualism and Legislative Intent*] (“Textualists focus on the end product of the legislative process . . . .”); Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271, 276 (2005) (referring to judicial restraint as “reinforc[ing] the basic theory on which our political system is grounded”).

2. *King v. Burwell*, 576 U.S. 473, 486 (2015) (referring to “a question of deep ‘economic and political significance’” (quoting *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014) (*UARG*))); see *UARG*, 573 U.S. at 324 (“We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast ‘economic and political significance.’” (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160)); *Brown & Williamson*, 529 U.S. at 133 (“[W]e 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.”); *MCI Telecomms. Corp. v. Am. Tel. & Telegram Co.*, 512 U.S. 218, 231 (1994) (“It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to ‘modify’ rate-filing requirements.”).

3. See *Gundy v. United States*, 139 S. Ct. 2116, 2131–48 (2019) (Gorsuch, J., dissenting); *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., statement respecting the

committed textualists.<sup>4</sup> The present moment thus calls for a thorough explanation as to why textualists should reject the major questions doctrine—including what the doctrine is said to be, what the doctrine actually does in practice, and what the doctrine might soon become.

The major questions doctrine is *said* to assist courts in identifying whether Congress has delegated authority. As the Supreme Court put it, “We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast ‘economic and political significance.’”<sup>5</sup> Baked into that understanding of the major questions doctrine is an implicit presumption that has gone unexamined in present scholarship—namely, that it is *Congress* who decides what is major. How else could Congress fairly be “expect[ed]” to more clearly delegate major authority than non-major authority if Congress does not itself determine what is major?

If the major questions doctrine truly implies a need for courts to elucidate and respect congressional determinations of majorness, textualists should reject the doctrine. That is because textualists understand the 535-member Congress as having no single conception as to what is politically major. Different legislators (and the President exercising the veto power) have different understandings as to which policy questions are major. Thus, from the textualist’s perspective, tasking courts with elucidating a single majorness determination shared by all of Congress is to task courts with conducting an ordinarily futile task.

Even if elucidating a congressional determination of majorness were in some instances theoretically possible, textualists should be suspect of the current doctrine’s reliance on the judge-made

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denial of certiorari). The proposal to strengthen the major questions doctrine is discussed in Part I.C.

4. See, e.g., Neil M. Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 CASE W. RES. L. REV. 905, 908–09 (2016) (“Respectfully, it seems to me an assiduous focus on text, structure, and history is essential to the proper exercise of the judicial function.”); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2118 (2016) (“If the text is sufficiently clear, the text usually controls”).

5. *UARG*, 573 U.S. at 324 (quoting *Brown & Williamson*, 529 U.S. at 160).

“presumption” that Congress “intends to make major policy decisions itself, not leave those decisions to agencies.”<sup>6</sup> That judge-made presumption is in tension with the enacted text of the Congressional Review Act (CRA).<sup>7</sup> That Act presumes that federal agencies will answer major questions through major rules, and that those rules are to be given legal effect unless Congress expressly says otherwise.<sup>8</sup>

Textualism is also incompatible with what the major questions doctrine does in practice. As an analysis of the relevant major questions doctrine cases will reveal, courts are entirely unconcerned with elucidating congressional determinations of majorness. Courts are instead interested in determining majorness themselves. So although the major questions doctrine is said to speak to *whether Congress has* delegated authority, in practice, the major questions doctrine is invoked to *tell Congress how* it may delegate authority.

The difference between those two perceptions of the current major questions doctrine is subtle because the end result is the same: Congress makes its major delegations explicit. But there is a non-trivial distinction between a judicial attempt to elucidate and respect a congressional determination of majorness (a task textualists should reject as ordinarily futile and statutorily suspect), and a judicial mandate to use particularly clear legislative language when discussing those policy questions that a court declares to be major. The latter amounts to courts improperly inserting themselves into the Article I, Section 7 lawmaking process. Because Article I, Section 7 establishes the exclusive lawmaking procedures within which courts are to play no role, textualists should reject the major questions doctrine for what it allows in practice.<sup>9</sup>

Textualists should also reject what the major questions doctrine might soon become. In its current form, the major questions

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6. U.S. Telecom Ass’n v. FCC, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc) (describing a presumption upon which the major questions doctrine is grounded).

7. See 5 U.S.C §§ 801–808 (2018).

8. See *infra* Part II.B.3.

9. See U.S. CONST. art. I, § 7.

doctrine is already a product of the Supreme Court's historical reluctance to enforce the nondelegation doctrine, which itself prohibits Congress from delegating its legislative powers.<sup>10</sup> But although the current major questions doctrine might be motivated by underenforced nondelegation principles, the current major questions doctrine stops short of prohibiting Congress from delegating any authority. Instead, as long as Congress clearly delegates the authority to decide major questions, the current major questions doctrine is satisfied. In two recent opinions, however, Justice Gorsuch (writing for three)<sup>11</sup> and Justice Kavanaugh (writing alone)<sup>12</sup> have proposed strengthening the major questions doctrine so that it could be used to *prohibit* Congress from delegating major authority. To wit, a strengthened major questions doctrine would prohibit Congress from delegating the "authority to decide major policy questions," while leaving Congress free to delegate "the authority to decide less-major or fill-up-the-details decisions."<sup>13</sup>

For those eager to breathe new life into the nondelegation doctrine, strengthening the major questions doctrine may seem like a step in the right direction. After all, preventing "major" delegations may seem better than not preventing any delegations. On the other side of the same coin, those who fear that a fully reinvigorated

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10. See Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777, 781 & n.9 (2017) ("[T]he M[ajor questions exception] indirectly polices the limits of the nondelegation doctrine."); Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19, 21–22 (2010) ("Taking the elephants-in-mouseholes doctrine seriously as a doctrine, this Article proposes that the decisions are . . . driven . . . by long-standing tenets of administrative law, particularly concerns over excessive delegation to the Executive Branch. We argue, then, that what really lies in the mousehole is neither an elephant nor a mouse—but the ghost of the nondelegation doctrine."); *Thomas v. Reeves*, 961 F.3d 800, 825 (5th Cir. 2020) (Willett, J., concurring in the judgment) (noting that the major questions doctrine was "born of nondelegation concerns").

11. See *Gundy v. United States*, 139 S. Ct. 2116, 2131–48 (2019) (Gorsuch, J., dissenting). Justice Gorsuch was joined in his dissent by Chief Justice Roberts and Justice Thomas. *Id.* at 2131. Justice Alito additionally signaled his willingness to "revisit" the nondelegation doctrine in a different case. *Id.* (Alito, J., concurring in the judgment).

12. See *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., statement respecting the denial of certiorari).

13. *Id.* (interpreting Justice Gorsuch's *Gundy* dissent).

nondelegation doctrine would spell disaster for the modern administrative state may see an extended major questions doctrine as a more palatable half-measure. But despite the doctrine's potential to serve as a *modus vivendi*, textualists should reject a strengthened major questions doctrine. This means that, for textualist jurists interested in reviving the nondelegation doctrine, strengthening the major questions doctrine is the wrong way forward. Failing to acknowledge as much risks tying a revived nondelegation doctrine to a majorness inquiry that, at bottom, asks courts to exercise the same type of political discretion that has doomed the current nondelegation doctrine to decades of underutilization.<sup>14</sup>

After providing a brief overview of the relevant doctrines in Part I, Part II explains why textualists should reject the major questions doctrine—both in its present and strengthened forms. Explaining as much requires answering a threshold question that courts and scholars have yet to address: Who determines majorness? As noted above, there are two possible answers, either Congress or the courts. Neither answer is acceptable from the textualist's perspective.

After explaining why textualists should reject the major questions doctrine, Part III highlights two pre-decisional contexts in which courts may consider policy questions' "importance" in an effort to advance nondelegation principles. First, in considering petitions for writs of certiorari, the Supreme Court may consider whether a case presents an "important" federal question.<sup>15</sup> Second, federal courts of appeals may consider a case's "importance" when considering whether the case warrants en banc review.<sup>16</sup> From the textualist's perspective, these two "importance" inquiries are less objectionable than the major questions doctrine because Congress has granted federal courts the statutory authority to consider "importance" in pre-decisional contexts, but not "majorness" when deciding cases on the merits.<sup>17</sup> Thus, those textualist jurists who wish

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14. See *infra* Part I.A.

15. SUP. CT. R. 10(c).

16. FED. R. APP. P. 35(a)(2).

17. *Infra* Part III.

to limit a revived nondelegation doctrine to major questions may prefer to do so in part by applying the revived doctrine to those cases identified as presenting important nondelegation questions.

## I. DOCTRINAL OVERVIEW

The nondelegation doctrine considers what authority Congress *can* delegate. Currently, the major questions doctrine is said to speak to *whether* Congress has delegated authority—although in practice the doctrine is used to tell Congress *how* it can delegate authority. Part I provides a brief overview of the current state of both the nondelegation and major questions doctrines, as well as the recent proposal to strengthen the latter doctrine into a revived form of the first.

### A. *The Nondelegation Doctrine*

Derived from the Constitution's vesting of "all legislative Powers" in Congress, the nondelegation doctrine prohibits Congress from delegating its legislative powers to other entities, such as administrative agencies.<sup>18</sup> Today the doctrine permits Congress to delegate decision-making discretion to agencies so long as the agency's discretion is cabined by an "intelligible principle" set by Congress.<sup>19</sup> The "intelligible principle" test is not difficult to satisfy, making the modern nondelegation doctrine something of a dead letter. As Professor Cass Sunstein put it, the nondelegation doctrine "has had one good year," and over two hundred "bad ones."<sup>20</sup>

In the good year, 1935, the Supreme Court considered a provision in the National Industrial Recovery Act (NIRA) that purported to prohibit the transportation of oil produced in excess of quotas set

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18. U.S. CONST. art. I, § 1; *see also* BICKEL, *supra* note 1, at 223 ("In the . . . delegation cases . . . the Court finds that the legislature, if it did anything, did too much all at once; and that is deemed too little.").

19. Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 414 (2015) (citing *J.W. Hampton, Jr. & Co. v United States*, 276 U.S. 394, 409 (1928)).

20. Cass Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000).

by “order of the President.”<sup>21</sup> Pursuant to that authority, the President approved a “Code of Fair Competition for the Petroleum Industry.”<sup>22</sup> Oil industry plaintiffs sued to prevent the enforcement of the code, arguing that the Recovery Act constituted “an unconstitutional delegation to the President of legislative power.”<sup>23</sup>

In considering the challenge, the Court observed that Congress had not “establishe[d]” any “criterion to govern the President’s course,” nor had Congress “declare[d]” any “policy as to the transportation of the excess production.”<sup>24</sup> Instead, Congress had provided “the President an unlimited authority to determine the policy” himself, thereby “commit[ting] to the President the functions of a legislature rather than those of an executive or administrative officer.”<sup>25</sup> The NIRA’s purported delegation of authority was therefore unconstitutional.<sup>26</sup>

A few months later the Court considered another NIRA provision, pursuant to which the President had approved a “Live Poultry Code.”<sup>27</sup> The defendants in that case were indicted for reasons relating to a variety of the code’s provisions, including the selling of “an unfit chicken.”<sup>28</sup> In considering whether Congress could delegate the authority to promulgate the code, the Court again “look[ed] to the statute to see” if Congress had “itself established the standards of legal obligation, thus performing its essential legislative function, or, by the failure to enact such standards, has attempted to transfer that function to others.”<sup>29</sup> Because the NIRA offered few guiding principles to limit the President’s discretion, the Court invalidated the code as resulting from an unconstitutional

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21. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 406 (1935) (quoting National Industrial Recovery Act § 9(c), 48 Stat. 195, 200 (1933)).

22. *Id.* at 408–09.

23. *Id.* at 411.

24. *Id.* at 415.

25. *Id.* at 415, 418–19.

26. *See id.* at 433.

27. *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 521, 523 (1935) (citing National Industrial Recovery Act. § 3, 48 Stat. 195, 196–97 (1933)).

28. *Id.* at 528.

29. *Id.* at 530.



“delegation of legislative power.”<sup>30</sup>

The canonical story of the nondelegation is said to end there, after which the Supreme Court is said to have turned its back on the doctrine and paved the way for the rise of the modern administrative state.<sup>31</sup> The Court’s historical reluctance to invoke the nondelegation doctrine is often attributed to the difficulty in developing a judicially manageable standard,<sup>32</sup> something that at least one notable textualist has written about in detail. As Justice Scalia explained, “while the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts.”<sup>33</sup> That conclusion aligned with his earlier writings, where he had noted that, without a “workable test” for courts to apply, the nondelegation doctrine “is no doctrine at all, but merely an invitation to judicial policy making in the guise of constitutional law.”<sup>34</sup> Any effort to “successful[ly] reform . . . the nondelegation doctrine”<sup>35</sup> therefore requires addressing the concern that “the line drawing” required by the nondelegation doctrine “is not a legal analysis at all, but is instead political (because it is discretionary) at its core.”<sup>36</sup>

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30. *Id.* at 537, 551.

31. See Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379, 380–81 & n.6 (2017) (describing the familiar “narrative”).

32. See Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781, 821 n.170 (2009) (“The Article I nondelegation doctrine serves largely as a ‘theoretical’ prohibition because, as many commentators have observed, courts have not found a judicially manageable standard for enforcing it.” (citation omitted)).

33. *Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting); see also Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 354 (2002) (“[Justice Scalia] made clear [in *Mistretta*] that he regards the degree of discretion to be vested in administrators as essentially a political question that cannot (at least in the normal run of cases) be evaluated by courts.”).

34. Antonin Scalia, *A Note on the Benzene Case*, 4 REG. 25, 28 (1980).

35. Adam White, *Nondelegation’s Gerrymander Problem*, YALE J. REG. (Dec. 16, 2019), <https://www.yalejreg.com/nc/nondelegations-gerrymander-problem> [<https://perma.cc/78MH-QLPH>].

36. William K. Kelley, *Justice Scalia, The Nondelegation Doctrine, and Constitutional Argument*, 92 NOTRE DAME L. REV. 2107, 2118 (2017); Lawson, *supra* note 33, at 354.

Despite the nondelegation doctrine's "somewhat moribund"<sup>37</sup> state, at least five sitting Supreme Court Justices have expressed interest in developing a workable doctrine. In *Gundy v. United States*,<sup>38</sup> Justice Gorsuch suggested in a dissenting opinion—joined by Chief Justice Roberts and Justice Thomas—that the "intelligible principle" test was constitutionally suspect.<sup>39</sup> The three Justices expressed a desire to "revisit" how much legislative authority Congress can "hand[] off" to the executive branch.<sup>40</sup> In a brief concurrence, Justice Alito noted that he too would "support th[e] effort" to "reconsider[]" the intelligible principle doctrine in a different case.<sup>41</sup> Several months later, a newly seated Justice Kavanaugh had the opportunity to explain that his colleagues' desire to revisit the nondelegation doctrine "raised important points that may warrant further consideration in future cases."<sup>42</sup> One of those "important points" was the major questions doctrine.<sup>43</sup>

### B. *The Major Questions Doctrine*

The major questions doctrine is said to be a statutory canon assisting courts in determining whether Congress has delegated to agencies the authority to decide major questions.<sup>44</sup> As Part II.C.1 will explain, that understanding of the major questions doctrine does not precisely track how the major questions doctrine works in practice. But for purposes of the brief doctrinal overview offered here, the major questions doctrine is accepted at face value.

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37. Transcript of Oral Argument at 56, *Sebelius v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (No. 13–354), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2013/13-354\\_3ebh.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2013/13-354_3ebh.pdf) [<http://perma.cc/J7XT-J43D>].

38. 139 S. Ct. 2116 (2019).

39. *Id.* at 2139 (Gorsuch, J., dissenting) ("This mutated version of the 'intelligible principle' remark has no basis in the original meaning of the Constitution, in history, or even in the decision from which it was plucked.").

40. *Id.* at 2131.

41. *Id.* (Alito, J., concurring).

42. *Paul v. United States*, 140 S. Ct. 342 (2019) (Kavanaugh, J., concurring in denial of certiorari).

43. *Id.*

44. See Kevin O. Leske, *Major Questions About the "Major Questions" Doctrine*, 5 MICH. J. ENVTL. & ADMIN. L. 479, 480 (2016).

The major questions doctrine defines major questions as those having major “economic and political significance.”<sup>45</sup> The specifics of the major questions doctrine are underdeveloped and frequently evolving. Depending on one’s court, the doctrine has been deployed in at least three stages of analysis, all of which concern *Chevron*<sup>46</sup> deference.<sup>47</sup>

Where *Chevron* applies, a court must not “impose its own construction” of a statute if the “statute is silent or ambiguous with respect to” the legal issue at hand.<sup>48</sup> Instead, the court is limited to determining “whether the agency’s answer is based on a permissible construction of the statute.”<sup>49</sup> The *Chevron* test is often described as having three steps: at Step Zero, courts consider whether *Chevron*’s analysis should apply at all;<sup>50</sup> at Step One, courts consider whether a statute is “ambiguous”; at Step Two, courts consider whether the agency’s interpretation of that ambiguous statute is “reasonable.”<sup>51</sup>

The Supreme Court first invoked the major questions doctrine in *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*<sup>52</sup> At issue in *MCI* was the Communications Act of 1934, which provided the Federal Communications Commission (FCC) with authority to “modify” certain rate-filing requirements.<sup>53</sup> Purporting to

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45. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000); *see also* *King v. Burwell*, 576 U.S. 473, 486 (2015) (referring to “a question of deep ‘economic and political significance’” (quoting *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014) (*UARG*))); *UARG*, 573 U.S. at 324 (referring to “decisions of vast economic and political significance”).

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

47. *See* Kent Barnett & Christopher J. Walker, *Short-Circuiting the New Major Questions Doctrine*, 70 *VAND. L. REV. EN BANC* 147, 149 (2017); Loshin & Nielson, *supra* note 10, at 26.

48. *Chevron*, 467 U.S. at 843.

49. *Id.*

50. *See* Cass R. Sunstein, *Chevron Step Zero*, 92 *VA. L. REV.* 187, 190–91 (2006) [hereinafter *Chevron Step Zero*]; Barnett & Walker, *supra* note 47, at 150.

51. *Chevron Step Zero*, *supra* note 50, at 190 (describing the two-step inquiry as “famously” understood).

52. 512 U.S. 218 (1994).

53. *Id.* at 224 (quoting Communications Act of 1934, 47 U.S.C. § 203(b)(2) (1988 ed. and Supp. IV)).

exercise its power to *modify* those requirements, the FCC had issued a rule *exempting* certain telephone companies from having to comply with the rate-filing requirements.<sup>54</sup> But because the rate-filing requirements were of “enormous importance” to the overall “statutory scheme,”<sup>55</sup> the Court concluded that the FCC had overstepped its congressionally delegated authority.<sup>56</sup> It would have been “highly unlikely,” the Court explained, for “Congress [to] leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion.”<sup>57</sup>

The Court next invoked the major questions doctrine in *FDA v. Brown & Williamson Tobacco Corp.*<sup>58</sup> In *Brown & Williamson*, the Food and Drug Administration (FDA) sought to regulate tobacco under statutory references to “drugs” and “devices.”<sup>59</sup> According to the Court, however, regulating tobacco was a matter of major “economic and political significance.”<sup>60</sup> Thus, “[a]s in *MCI*,” the Court was “confident” that Congress had not “intended to delegate” such a “significan[t]” decision “to an agency in so cryptic a fashion.”<sup>61</sup> This was particularly true in light of several statutes that Congress had enacted after granting the FDA the authority to regulate drugs and devices.<sup>62</sup> Those later-enacted statutes created a complex statutory scheme suggesting that Congress had not intended to grant the FDA the authority to regulate tobacco.<sup>63</sup> If Congress wished to delegate the authority to regulate something as major as tobacco, the then-burgeoning major questions doctrine expected Congress to have made that delegation explicit.

A third example of the major questions doctrine was displayed in

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54. *See id.* at 220–22.

55. *Id.* at 231.

56. *Id.* at 231–32.

57. *Id.* at 231.

58. 529 U.S. 120 (2000).

59. *Id.* at 126 (quoting 21 U.S.C. §§ 321(g)–(h), 393 (1994 ed. and Supp. III)).

60. *Id.* at 160.

61. *Id.*

62. *See id.* at 144.

63. *See id.*

*Utility Air Regulatory Group v. EPA (UARG)*.<sup>64</sup> Unlike both *MCI* and *Brown & Williamson*, where the Court invoked the major questions doctrine at *Chevron* Step One,<sup>65</sup> the *UARG* Court invoked the doctrine at *Chevron* Step Two.<sup>66</sup> After rejecting the Environmental Protection Agency's (EPA's) assertion that the relevant statute was unambiguous,<sup>67</sup> the Court explained that the EPA's proposed interpretation was "unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization."<sup>68</sup> "When an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,'" the Court explained, "we typically greet its announcement with a measure of skepticism."<sup>69</sup> Indeed, the Court "expect[s] Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"<sup>70</sup>

The major questions doctrine has also been invoked at *Chevron* Step Zero. There the major questions doctrine acts as a sort of exception to *Chevron*.<sup>71</sup> In *King v. Burwell*<sup>72</sup> the Court considered whether the Affordable Care Act authorized tax benefits for insurance purchased on federal exchanges.<sup>73</sup> Despite language in the statute suggesting that the tax benefits applied only to insurance purchased on state exchanges, the Internal Revenue Service (IRS) interpreted the statute to apply the tax benefits to insurance purchased on federal exchanges and state exchanges alike.<sup>74</sup> The *King* Court explained that it was tasked with deciding an "'extraordinary case[],'" since "[t]he tax credits are among the [Affordable

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64. 573 U.S. 302 (2014).

65. See Barnett & Walker, *supra* note 47, at 150 n.11.

66. See Coenen & Davis, *supra* note 10, at 790.

67. See *UARG*, 573 U.S. at 312.

68. *Id.* at 324.

69. *Id.* (quoting *Brown & Williamson*, 529 U.S. at 159).

70. *Id.* (quoting *Brown & Williamson*, 529 U.S. at 160).

71. See *Chevron Step Zero*, *supra* note 50, at 189 (referring to *Chevron* as "a kind of counter-*Marbury* for the administrative state").

72. 135 S. Ct. 2480 (2015).

73. See *id.* at 2485.

74. See *id.* at 2487.

Care] Act's key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people."<sup>75</sup> Determining "[w]hether those credits are available on Federal Exchanges" required answering "a question of deep 'economic and political significance.'"<sup>76</sup> "[H]ad Congress wished to assign that question to an agency," the Court explained, Congress "surely would have done so expressly."<sup>77</sup>

Having determined the question to be major, the *King* Court concluded that it could not defer to the IRS's statutory interpretation.<sup>78</sup> Instead, the Court went on to independently "determine the correct reading" of the statutory provision.<sup>79</sup> The correct reading, according to the Court, was that the tax benefits were applicable to state and federal exchanges.<sup>80</sup>

Lower courts have engaged with the major questions doctrine as well.<sup>81</sup> Perhaps most notable is *United States Telecom Ass'n v. FCC*, where then-Judge Kavanaugh dissented from the D.C. Circuit's denial of rehearing en banc.<sup>82</sup> Referring to the "major rule" doctrine, then-Judge Kavanaugh understood the doctrine as requiring courts to look for "clear congressional authorization for an agency's major rule."<sup>83</sup> That requirement was grounded in two presumptions: first,

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75. *Id.* at 2488–89 (quoting *Brown & Williamson*, 529 U.S. at 159).

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

77. *Id.* (citations omitted).

78. *See id.* at 2489.

79. *Id.*

80. *See id.* at 2489, 2496. Justice Scalia dissented on textualist grounds, taking issue with the majority's "absurd" holding "that when the . . . Affordable Care Act says 'Exchange established by the State' it means 'Exchange established by the State or the Federal Government.'" *Id.* at 2496 (Scalia, J., dissenting). To be sure, the majority resisted the argument that its holding was inconsistent with the statutory text. According to the majority, the statute could "fairly be read" to apply to both state and federal exchanges. *Id.* (majority opinion). Justice Scalia, joined by Justices Thomas and Alito, remained unconvinced. *See, e.g., id.* at 2500 (Scalia, J., dissenting) ("This Court 'does not revise legislation . . . just because the text as written creates an apparent anomaly.'" (alteration in original) (quoting *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 794 (2014))).

81. *See, e.g.,* Coenen & Davis, *supra* note 10, at 796–99 (2017) (listing lower court cases).

82. *See U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 417 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc).

83. *Id.* at 435.

“a separation-of-powers-based presumption against the delegation of major lawmaking authority from Congress to the Executive Branch,” and second, “a presumption that Congress intends to make major policy decisions itself, not leave those decisions to agencies.”<sup>84</sup>

Applying the major questions doctrine to the FCC’s net neutrality rule then at issue, then-Judge Kavanaugh outlined two questions: “(1) Is the net neutrality rule a major rule? (2) If so, has Congress clearly authorized the FCC to issue the net neutrality rule?”<sup>85</sup> As to the first question, then-Judge Kavanaugh acknowledged that the Supreme Court had “not articulated a bright-line test that distinguishes major rules from ordinary rules,” but explained that “the Court’s cases indicate that a number of factors are relevant.”<sup>86</sup> Those factors included “the amount of money involved for regulated and affected parties, the overall impact on the economy, the number of people affected, and the degree of congressional and public attention to the issue.”<sup>87</sup> Acknowledging that the majorness inquiry had “a bit of a ‘know it when you see it’ quality,” then-Judge Kavanaugh concluded that the net neutrality rule qualified as major “under any conceivable test.”<sup>88</sup> Because the net neutrality rule was a major rule that “Congress ha[d] not clearly authorized the FCC to issue,” then-Judge Kavanaugh would have held the rule unlawful.<sup>89</sup>

### C. *Strengthening the Major Questions Doctrine*

Although the major questions doctrine may be motivated by a desire to scratch the nondelegation itch, the doctrine does not currently prohibit Congress from delegating major authority so long as Congress does so explicitly. Justices Gorsuch and Kavanaugh, however, seem prepared to take things a step further.

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84. *Id.* at 419.

85. *Id.* at 422.

86. *Id.*

87. *Id.* at 422–23.

88. *Id.* at 423.

89. *Id.* at 418.

Acknowledging in *Gundy v. United States*<sup>90</sup> that the nondelegation doctrine has been underenforced, Justice Gorsuch explained that “[w]hen one legal doctrine becomes unavailable to do its intended work, the hydraulic pressures of our constitutional system sometimes shift the responsibility to different doctrines.”<sup>91</sup> Given that hydraulic pressure, the Court “still regularly rein[s] in Congress’s efforts to delegate legislative power” with the help of alternative tools.<sup>92</sup> One alternative tool is the major questions doctrine, which Justice Gorsuch described as having been deployed “in service of the constitutional rule that Congress *may not* divest itself of its legislative power.”<sup>93</sup>

Justice Gorsuch referred to the major questions doctrine as “nominally” being a statutory canon.<sup>94</sup> This description is perhaps a hint that the current doctrine is better understood as empowering courts to *tell Congress how* it may delegate major authority, rather than a passive statutory canon informing courts as to *whether Congress has* delegated such authority. Regardless of what Justice Gorsuch meant to suggest, his *Gundy* dissent could be read as stopping short of proposing that the major questions doctrine be strengthened to *prohibit* Congress from delegating the authority to decide major questions. Justice Kavanaugh, however, did not read Justice Gorsuch’s dissent as being so limited. He instead read Justice Gorsuch’s conception of the major questions doctrine as “*not allow[ing] . . . congressional delegations to agencies of authority to decide major policy questions . . . even if Congress expressly and specifically delegates that authority.*”<sup>95</sup>

Justice Gorsuch and Justice Kavanaugh’s opinions should not be treated as idiosyncratic statements. Jurists have long alluded to a distinction between “major” and “non-major” questions—even if

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90. 139 S. Ct. 2116 (2019).

91. *Id.* at 2141 (Gorsuch, J., dissenting).

92. *Id.*

93. *Id.* at 2142 (emphasis added).

94. *Id.*

95. *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., statement respecting the denial of certiorari) (emphasis added).



not in those precise terms, and even if the line between those two categories has not been clearly demarcated. Chief Justice Marshall, for example, once distinguished “those *important* subjects, which must be entirely regulated by the legislature itself, from those of *less interest*, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.”<sup>96</sup> For his part, Justice Kavanaugh paid particular attention to the views expressed “by then-Justice Rehnquist some 40 years ago” in the *Benzene* case.<sup>97</sup> In the *Benzene* case, then-Justice Rehnquist understood Congress to have “improperly delegated” to the Secretary of Labor “one of the most difficult issues that could confront a decisionmaker: whether the statistical possibility of future deaths should ever be disregarded in light of the economic costs of preventing those deaths.”<sup>98</sup> Such “important choices of social policy” had to be “made by Congress, the branch of our Government most responsive to the popular will.”<sup>99</sup> It followed, according to then-Justice Rehnquist, that Congress *could not* delegate the authority to decide such major questions.<sup>100</sup> Further historical support comes from Justice Thomas, who expressed his view that “the *significance* of [a] delegated decision” may in some instances be “too great for the decision to be called anything other than ‘legislative.’”<sup>101</sup>

To date, courts have not substantially expanded on these historical references. It therefore remains unclear how an important or significant question is identified, and whether those inquiries call for the same exercise of political considerations necessitated by the

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96. *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42 (1825) (emphasis added).

97. *Paul*, 140 S. Ct. at 342 (Kavanaugh, J., statement respecting the denial of certiorari) (citing *Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 685–686 (1980) (*Benzene*) (Rehnquist, J., concurring in the judgment)). Jacob Loshin and Aaron Nielson similarly traced the major questions doctrine to “an attempt to ‘doctrinalize’ the *Benzene* approach into a workable test.” Loshin & Nielson, *supra* note 10, at 22.

98. *Benzene*, 448 U.S. at 672 (Rehnquist, J., concurring).

99. *Id.* at 685–86.

100. *See id.* at 672.

101. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 487 (2001) (Thomas, J., concurring) (emphasis added).

major questions doctrine. Justice Gorsuch and Justice Kavanaugh's recent efforts to build upon these historical references therefore require serious thought, which this Article will now attempt to provide.

## II. THE TEXTUALIST CRITIQUE

The major questions doctrine is underdeveloped in both scholarship and case law. Indeed, one important threshold question has yet to be answered: Who determines majorness? One answer to this question—the answer implied by current doctrine—is that majorness is determined by Congress. If that answer were correct, a court's task would be to elucidate congressional determinations of majorness. Textualists should reject that task as being ordinarily futile and based on a statutorily suspect presumption.

A second answer to the threshold question is that majorness is determined by the judiciary, and a court's task is to exercise its own political discretion to determine which policy questions are major. A review of the relevant precedent reveals that, as a descriptive matter, this answer best explains how the current major questions doctrine works in practice. This answer also underlies the strengthened form of the major questions doctrine proposed by Justices Gorsuch and Kavanaugh. Under that strengthened form of the doctrine, Congress would not only be prohibited from implicitly delegating authority thought by the courts to be major, but would be entirely prohibited from delegating such authority—even if Congress disagrees as to the court's political determination. Textualists should reject this understanding of the major questions doctrine because it improperly inserts courts into the Article I, Section 7 law-making process.<sup>102</sup>

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102. Theoretically there is a third answer to the threshold question: the executive branch could determine majorness. This Article does not thoroughly examine that possibility because, if majorness were definitively determined by the executive branch, there would be little need for a major questions doctrine to begin with. Consider those situations where the executive branch (through either the Office of Information and Regulatory Affairs, *see infra* Part II.B.3, or the agency issuing the challenged rule)

A. *Textualism Defined*

By “textualist,” this Article refers to those who understand courts to be faithful agents of “the people,” as that term is used in the Constitution.<sup>103</sup> The people can express their will—within constitutional limits—in statutes enacted through the Article I, Section 7 lawmaking process. To interpret the people’s will as expressed in such

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determined a rule to be major, and a litigant brought suit to challenge that majoriness determination. In those situations, courts would either quickly rule in favor of the plaintiff (where the court concludes that Congress did not, or could not, delegate major authority), or quickly rule in favor of the agency (where the court concludes that Congress did, and could, delegate major authority). In those other situations where the executive branch determined the rule to be non-major, courts would simply dismiss the case in the agency’s favor. And to the extent that courts would merely consider the executive branch’s majoriness determination to be persuasive (but not dispositive) evidence, the majoriness inquiry is better understood as calling on courts to determine majoriness for themselves. *See generally infra* Part II.C (examining judicial considerations of majoriness).

103. U.S. CONST. pmb. (“We the people of the United States . . .”). Many textualists refer to themselves as faithful agents of Congress, referencing that legislative body as a shorthand for the people who vested it with authority. *See* Amy C. Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193, 2208–11 (2017) (referring to competing textualist theories of faithful agency). Other textualists, such as Justice Scalia, have more clearly stated that “courts are assuredly not agents of the legislature” but instead “are agents of the people.” ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 138 (2012). Following Justice Scalia’s lead, this Article opts to more clearly refer to textualists as being faithful agents of the people. Although the difference in terminology may be little more than semantic for the purposes of this Article, there are two reasons for more clearly referring to the people. First, the judiciary and the Congress are coequal branches; neither is an agent or principal of the other. Second, referring to Congress alone gives short shrift to the President, whom the people have also empowered to participate in the federal lawmaking process by exercising the veto power, U.S. CONST. art. I, § 7, cl. 2, and by “recommend[ing] to [Congress] . . . such measures as [the President] shall judge necessary and expedient.” U.S. CONST. art. II, § 3. Justice Story understood the latter as enabling the President “to point out the evil, and . . . suggest the remedy.” 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1555, at 413 (1833); *see also* Kathryn Marie Dessayer, Note, *The First Word: The President’s Place in “Legislative History”*, 89 MICH. L. REV. 399, 404–05 (1990) (“James Madison’s notes from the Constitutional Convention reveal that the Framers specifically designed the recommendation clause to place an affirmative obligation on the President. . . . Presidents have faithfully presented messages since President Washington’s first term.”).

statutes, textualists look to the statutes' objectified intent.<sup>104</sup> Objectified intent means the intent that an objective reader would take a text to have at the time the text was enacted.<sup>105</sup> The inquiry is limited to objectified intent because textualists understand the legislative process to be complicated and chock-full of political bargains that cannot (and need not) be fully understood by individual legislators, let alone politically insulated jurists.<sup>106</sup> What matters is that the collective legislature voted for a law with a particular text, and that text had a particular public meaning when it was enacted.

Textualists do not suggest that objectified intent is always

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104. See SCALIA & GARNER, *supra* note 103, at 20 (“[T]he textualist routinely takes purpose into account, but in its concrete manifestations as deduced from close reading of the text.”); see also *Textualism and Legislative Intent*, *supra* note 1, at 430 (Textualists “believe that in our system of government, federal judges have a duty to ascertain and implement as accurately as possible the instructions set down by Congress (within constitutional bounds).”); Cory R. Liu, *Textualism and the Presumption of Reasonable Drafting*, 38 HARV J. L. & PUB. POL’Y 711, 726 (“Textualists therefore refuse to go beyond the legislature’s textually-recorded intent, a concept Justice Scalia has called ‘objectified intent.’”).

105. See Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17 (Amy Gutmann ed., 1997) (“We look for a sort of ‘objectified’ intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*.”); Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL’Y 59, 61 (1988). (“Meaning comes from the ring the words would have had to a skilled user of words at the time, thinking about the same problem”); Barrett, *supra* note 103, at 2201–02 (explaining objectified intent as described by Justice Scalia and Judge Easterbrook).

106. See *Textualism and Legislative Intent*, *supra* note 1, at 430–31 (“[T]extualists . . . think it impossible to tell how the [legislative] body as a whole actually intended (or, more accurately, would have intended) to resolve a policy question not clearly or satisfactorily settled by the text. . . . [L]egislative policies are reduced to law only through a cumbersome and highly intricate lawmaking process.”); Amy C. Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 112 (2010) [hereinafter *Substantive Canons*] (“The defining tenet of textualism is the belief that it is impossible to know whether Congress would have drafted the statute differently if it had anticipated the situation before the court. The legislative process is path-dependent and riddled with compromise.”); Amy C. Barrett, *Countering the Majoritarian Difficulty*, 32 CONST. COMMENT. 61, 71 (2017) (book review) [hereinafter *Countering*] (“Modern textualists in particular have emphasized the ways in which the battle between competing interests shapes legislation.”).

obvious on the face of a law.<sup>107</sup> To the contrary, an objective reader utilizes familiar judicial tools to decipher objectified intent—legal precedent and treatises, for example, can provide the necessary context to understand a law’s meaning.<sup>108</sup> Even after resorting to such tools, textualists can sometimes disagree as to what a statute’s objectified intent holds. Justice Gorsuch and Justice Kavanaugh’s dueling textualist opinions in *Bostock v. Clayton County*<sup>109</sup> provide one notable example. Both Justices offered textualist interpretations of statutory language prohibiting an employer from discriminating “because of . . . sex.”<sup>110</sup> Justice Gorsuch concluded that the statutory language prohibited discrimination based on homosexual or transgender status,<sup>111</sup> while Justice Kavanaugh came to the opposite

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107. See John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 696 (1997) [hereinafter *Textualism as a Nondelegation Doctrine*] (“Not even the most committed textualist would claim that statutory texts are inherently ‘plain on their face,’ or that all interpretation takes place within the four corners of the Statutes at Large.”).

108. See SCALIA & GARNER, *supra* note 103, at 33 (referring to “a reasonable reader, fully competent in the language,” and explaining that “[t]he endeavor requires aptitude in language, sound judgment, the suppression of personal preferences regarding the outcome, and, with older texts, historical linguistic research”); *Textualism as a Nondelegation Doctrine*, *supra* note 107, at 695; Michael Francus, *Digital Realty, Legislative History, and Textualism After Scalia*, 46 PEPP. L. REV. 511, 518–19 (2019) (referring to “today’s textualism, known for its insistence on the primacy of text; use of dictionaries and canons; and rejection of legislative history”); cf. John F. Manning, *Textualism and the Role of The Federalist in Constitutional Adjudication*, 66 GEO. WASH. L. REV. 1337, 1339–42, (1998) [hereinafter *Role of The Federalist*] (arguing that modern textualists should “approach *The Federalist* the same way a reasonable ratifier would have,” by looking to *The Federalist* as persuasive, not authoritative, evidence of the Constitution’s meaning).

109. 140 S. Ct. 1731 (2020).

110. *Id.* at 1738 (quoting 42 U.S.C. § 2000e-2(a)(1) (2018)). In a separate dissent, Justice Alito similarly interpreted the relevant statutory language on textualist grounds. See *id.* at 1755–56, 1766–67 (Alito, J., dissenting); Jonathan Skrmetti, *Symposium: The triumph of textualism: “Only the written word is the law”*, SCOTUSBLOG (June 15, 2020, 9:04 PM), <https://www.scotusblog.com/2020/06/symposium-the-triumph-of-textualism-only-the-written-word-is-the-law/> [<https://perma.cc/ET8S-58T3>] (“In sum, the three *Bostock* opinions are a master class in defining and applying textualism.”).

111. See *Bostock*, 140 S. Ct. at 1753 (referring to “today’s holding” as being “that employers are prohibited from firing employees on the basis of homosexuality or transgender status”).

conclusion.<sup>112</sup>

Despite the potential for disagreement on some issues, textualists generally agree on the proper approach to legal questions. Because textualists understand the legislative process outlined in Article I, Section 7 as the exclusive avenue for the people to express their will through federal legislation, textualists do not look to legislative history to elucidate congressional intent.<sup>113</sup> Nor do textualists rely on views expressed by individual legislators after a law is enacted, such as those views that are sometimes expressed in amicus briefs or newspaper articles.<sup>114</sup>

Textualists reject those types of legislative materials because relying on them would allow individual legislators to delegate legislative authority to themselves by purporting to define a law's meaning outside of the Article I, Section 7 process.<sup>115</sup> Additionally, and more foundationally, such materials provide only a limited and biased view into the intricate and complicated process that turns proposed policies into law. That process, which requires bicameralism and presentment, necessitates collaboration and leads to interrelated political bargains that can result in a final legislative bargain (*i.e.*, law).<sup>116</sup> Different legislators (and the President

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112. See *id.* at 1823 & n.1 (Kavanaugh, J., dissenting) (stating that “[a]s written, Title VII does not prohibit employment discrimination because of sexual orientation” and that “[a]lthough this opinion does not separately analyze discrimination on the basis of gender identity, this opinion’s legal analysis of discrimination on the basis of sexual orientation would apply in much the same way to discrimination on the basis of gender identity”).

113. See Max Alderman & Duncan Pickard, *Justice Scalia’s Heir Apparent?: Judge Gorsuch’s Approach to Textualism and Originalism*, 69 STAN. L. REV. ONLINE 185, 186 (2017); William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1528 (1998); see also *Textualism and Legislative Intent*, *supra* note 1, at 431.

114. Cf. Neal Devins, *Measuring Party Polarization in Congress: Lessons from Congressional Participation as Amicus Curiae*, 65 CASE W. RES. L. REV. 933, 946 (2015) (arguing that increased polarization will affect the nature of congressional amicus filings).

115. See *Textualism as a Nondelegation Doctrine*, *supra* note 107, at 711.

116. Pursuant to Article I, Section 7’s bicameralism requirement, all bills must be approved by both chambers of Congress. See William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L. J. 523, 523 (1992). Pursuant to Article I, Section 7’s presentment requirement, all bills must be presented to the President, who can then veto the bill (sending it back to Congress) or sign the bill into law. See *id.*

exercising the veto power) have different opinions as to whether one policy is more or less significant than another. Such opinions are of no concern to textualists, who limit the relevant inquiry to deciding what an objective reader would take a law's enacted text to mean.

B. *Congressional Determinations of Majoriness*

One way to conceptualize the major questions doctrine is to understand it as tasking courts to determine what Congress perceived (or perceives) to be a major question. This theory could provide a theoretical underpinning of the current major questions doctrine; however, as Part II.C.1 shows, the theory does not track how the major questions doctrine works in practice. But even if this first theory were a good fit for the current major questions doctrine, textualists should reject it as calling for a task that is both ordinarily futile and statutorily suspect. The task is ordinarily futile because a collective Congress typically has no shared understanding as to which policies are more politically significant than others. The task is statutorily suspect because it is based on the presumption that Congress wishes to keep major decisions for itself, despite that presumption being in conflict with the CRA.<sup>117</sup>

1. *Past or Present*

If the major questions doctrine calls on courts to elucidate congressional determinations of majoriness, courts must first determine which Congress matters. There are two options. First, courts could look to the enacting Congress—that is, focus on what Congress would have considered to be major when Congress enacted the relevant text. Second, courts could focus on a later Congress—that is, focus on what Congress would consider to be major at a later date, such as when an agency issues a challenged rule or when a court considers the legality of the challenged rule in a lawsuit.

For most textualists, the second option is quite easily dismissed;

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117. See 5 U.S.C §§ 801–808 (2018).

a law's text has a particular public meaning when it is enacted.<sup>118</sup> The only way Congress can change that meaning is to enact new law through the Article I, Section 7 process. This protects private parties, who are legally bound by the objective meaning of the law when it was enacted, and who have the right to expect Congress to speak through the Article I, Section 7 process when Congress wishes to alter legal rights.<sup>119</sup> The remainder of Part II.B will therefore work

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118. See *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1738 (2020) (“This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment.”); *id.* at 1825 (Kavanaugh, J., dissenting) (“The ordinary meaning that counts is the ordinary public meaning at the time of enactment . . . .”); SCALIA & GARNER, *supra* note 103, at 16 (“In their full context, words mean what they conveyed to reasonable people at the time they were written . . . .”); *Role of The Federalist*, *supra* note 108, at 1339 (“Textualists subscribe to an objective theory of interpretation, pursuant to which interpreters ask what a reasonable lawmaker, familiar with the relevant context, would have believed that he or she was voting for.”); Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 367–68 (2005) (“When interpreting old statutes, moreover, the typical textualist judge seeks to unearth the statutes’ *original* meanings rather than enforcing whatever modern readers might take the statutes’ language to mean.”).

In the sense that textualism requires looking to the original public meaning of a law, textualism is essentially indistinguishable from originalism. See ILAN WURMAN, *A DEBT AGAINST THE LIVING: AN INTRODUCTION TO ORIGINALISM* 131 (2017) (“My general point is that if originalism means looking at the text, the historical background, the historical purposes, the intent of the authors, linguistic conventions, and so on to try to assess what the words of the Constitution (or any legal text) *mean*, and subsequently what legal effect that meaning has, then that seems no different than textualism.”). *But see* J.T. Hutchens, *A New New Textualism: Why Textualists Should Not Be Originalists*, 16 KAN. J.L. & PUB. POL’Y 108, 115 (2006) (proposing “evolutionary textualism” pursuant to which “court[s] should interpret the law through the eyes of the reasonable, present-day (that is, at the time of interpretation) target of the legislation”).

119. See *Bostock*, 140 S. Ct. at 1738 (referring to “the right to continue relying on the original meaning of the law [that the people] have counted on to settle their rights and obligations”); *id.* at 1749 (“The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration.”); *id.* at 1825 (Kavanaugh, J., dissenting) (“Citizens and legislators must be able to ascertain the law by reading the words of the statute. Both the rule of law and democratic accountability badly suffer when a court adopts a hidden or obscure interpretation of the law, and not its ordinary meaning.”); Nelson, *supra* note 118, at 352 (“[E]mphasizing . . . that people should not be held to legal requirements of which they lacked fair notice, textualists suggest that interpretation should focus ‘upon what the text would reasonably be understood to mean, rather than upon what it was intended to mean.’” (quoting Antonin Scalia, *Response*, in *A MATTER OF INTERPRETATION*:



under the assumption that, if textualists are to accept the first theory of the major questions doctrine, the doctrine must at least call on courts to focus their inquiry on the last time Congress spoke to the issue through enacted law.<sup>120</sup> Even limiting the inquiry to the enacting Congress, however, proves to be incompatible with textualism.

## 2. Ordinarily Futile

Today, for a bill to become a law, it must first obtain majority support from a 435-member House of Representatives and a 100-member Senate.<sup>121</sup> After that, the bill must be presented to the President, who may sign the bill into law or veto the bill and return it back to Congress.<sup>122</sup> These bicameralism and presentment requirements are mandated by Article I, Section 7 of the Constitution,<sup>123</sup>

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FEDERAL COURTS AND THE LAW, *supra* note 105, at 129, 144)); Note, *Textualism as Fair Notice*, 123 HARV. L. REV. 542, 557 (2009) (defending textualism as providing fair notice and thereby protecting “the importance of interpreting laws as their subjects would fairly have expected them to apply.”); *Dig. Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 783 (2018) (Thomas, J., concurring) (“[W]e are a government of laws, not of men, and are governed by what Congress enacted rather than by what it intended.”).

120. This does not preclude textualist jurists from performing the “classic judicial task of reconciling many laws enacted over time, and getting them to “make sense” in combination.” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) (quoting *United States v. Fausto*, 484 U.S. 439, 453 (1988)). Where the Article I, Section 7 process results in new objectified intent as exhibited in new law, such law must be faithfully applied by courts. *But see* *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 240 (1995) (describing limits on Congress’s ability to intrude on the judicial power by purporting to reopen final judgments through new statutes).

121. *See* U.S. CONST. art. I, § 7, cl. 2; Reapportionment Act of 1929, ch. 28, § 22, 46 Stat. 21, 26–27 (codified as amended at 2 U.S.C. § 2a (2018)).

122. *See* U.S. CONST. art. I, § 7, cl. 2. The President need not formally issue a veto in order to influence the legislative process, but may instead simply signal an intention to veto a bill should the opportunity present itself. *See* Saikrishna Prakash, *Why the President Must Veto Unconstitutional Bills*, 16 WM. & MARY BILL RTS. J. 81, 88 (2007) (noting that “the President may help shape legislation prior to presentment” by, among other things, “threaten[ing] to veto legislation” on either legal or political grounds).

123. Article I, Section 7 of the Constitution provides:

All bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

and advance the Framers' belief "that legislation should not be enacted unless it has been carefully and fully considered by the Nation's elected officials."<sup>124</sup> As Justice Gorsuch explained it, "Article I's detailed processes for new laws were . . . designed to promote deliberation."<sup>125</sup> Influenced by the writings of Locke and Montesquieu, the Framers created a "Constitution reflect[ing] a political theory that places representative, collective lawmaking power at the foundation of political society."<sup>126</sup>

Given the wide cast of political actors involved in the Article I, Section 7 process, textualists consider it nonsensical to ask whether "Congress" (as a single entity) views a particular policy as being

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Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

124. *INS v. Chadha*, 462 U.S. 919, 949 (1983); see also John F. Manning, *Inside Congress's Mind*, 115 COLUM. L. REV. 1911, 1919 (2015) [hereinafter *Inside Congress's Mind*] ("The numerous veto gates erected by the rules of the two Houses build in a bias against enactment, so each bill has a thousand ways to die.").

125. *Gundy v. United States*, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting).

126. Neomi Rao, *Why Congress Matters: The Collective Congress In The Structural Constitution*, 70 FLA. L. REV. 1, 8–9 (2018) (citing Gordon S. Wood, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 151–52, 162 (1969)).

major.<sup>127</sup> Congress is a “they,” not an “it.”<sup>128</sup> Each legislator might weigh the value of a particular policy differently—indeed, that is often how the collective lawmaking process functions.<sup>129</sup> And because each legislator has his or her own “list[] of desires, priorities, and preferences, it turns out to be difficult, sometimes impossible, to aggregate these lists into a coherent collective choice.”<sup>130</sup>

Even if courts could unearth a shared hierarchy of majorness by unraveling the many political bargains that led to a law’s enacted text, the task becomes more difficult over time. Interpreting the meaning of old texts is already difficult enough; attempting to recreate the political bargains that resulted in such texts is harder yet.<sup>131</sup> This additional, practical concern is of particular note where,

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127. See Loshin & Nielson, *supra* note 10, at 52 (arguing from a textualist perspective that the elephants-in-mouseholes’ “searching for a comprehensive purpose is often a futile exercise”). Such “intent skepticism” is not limited to textualists, but is instead shared by scholars belonging to other schools of thought such as legal realism, modern pragmatism, Dworkinian constructivism, and Legal Process purposivism. See *Inside Congress’s Mind*, *supra* note 124, at 1917–24; Loshin & Nielson, *supra* note 10, at 50 (“One need not be a card-carrying textualist, however, to acknowledge that the legislative process is complicated and that legislation is often the result of many congressional compromises, which are reflected in statutory text.”); John F. Manning, *Without the Pretense of Legislative Intent*, 130 HARV. L. REV. 2397, 2400 (2017) (“In work ranging from legal realism to Legal Process purposivism to the formalist ‘new textualism,’ a long line of Harvard judges and law professors have resisted that intentionalist frame of analysis.”).

128. *But see* Ryan D. Doerfler, *Who Cares How Congress Really Works?*, 66 DUKE L.J. 979, 982, 999–1000 (2017) (referring to, and arguing against, the “common refrain” that Congress is a “they,” not an “it”).

129. See SCALIA & GARNER, *supra* note 103, at 22 (“[I]t is precisely because people differ over what is sensible and what is desirable that we elect those who will write our laws—and expect courts to observe what has been written.”).

130. Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 547 (1983).

131. See *Role of The Federalist*, *supra* note 108, at 1365 (“To the extent that it is possible for twentieth-century judges to make sense of the implications of the text, structure, and history of so old a document, the task, done well, is not a simple one.”). *But see* Neil M. Gorsuch, *Justice Neil Gorsuch: Why Originalism Is the Best Approach to the Constitution*, TIME (Sept. 6, 2019, 8:00 AM), <https://time.com/5670400/justice-neil-gorsuch-why-originalism-is-the-best-approach-to-the-constitution/> [https://perma.cc/GCY9-MU3Y] (“Living constitutionalists often complain we can’t know the original understanding because the document’s too old and cryptic. Hardly. We figure out the original meaning of old and difficult texts all the time. Just ask any English professor who teaches Shakespeare or Beowulf.”).

as is often the case, an agency traces its authority to a decades-old statute.<sup>132</sup> Searching such historical statutes for a shared hierarchy of majorness would require courts to inquire into long-forgotten political controversies, raising the real possibility of anachronistic analyses.<sup>133</sup> Such practical difficulties provide textualists with an additional reason to reject any attempt to engage in the ordinarily futile task of assigning a shared hierarchy of majorness to Congress as a whole.<sup>134</sup>

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132. See Jonathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 IOWA L. REV. 1931, 1941 (2020) (“Agencies using their delegated power are often drawing on statutory authority granted many years (or decades) earlier.”).

133. See Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 680 (2013) (“That is why these arguments are inherently anachronistic. People in the past did not know how the future would turn out; therefore they did not understand themselves or their actions in terms of the narratives we craft today.”).

134. The adjective “ordinarily” is used to acknowledge the theoretical possibility that Congress could provide a codified majorness determination within a statute’s enacted text. For example, Congress could enact a law stating that “Agency A has the authority to regulate technological widgets,” and stating further that “regulating Widget X is a matter of non-major significance.” In that hypothetical, even textualists would admit that Congress’s majorness determination could be readily elucidated since it was enacted into law. Such hypothetical examples are examined in greater detail in Parts II.C.2 and III.C.3, where the examples are used to highlight the consequences of courts having the authority to determine majorness for themselves. But it is worthwhile to here briefly explain why, if the major questions doctrine were to call for congressional determinations of majorness, the theoretical possibility that Congress could enact majorness determinations into law does not save the major questions doctrine from being unacceptable to textualists.

The problem lies in the relative uselessness of Congress offering boilerplate codifications of majorness in an enacted law. If Congress had the foresight to state that “regulating Widget X is a matter of non-major significance,” Congress could have just as easily answered the underlying delegation question more directly by stating that “Agency A is delegated the authority to regulate Widget X.” But of course, the major questions and nondelegation doctrines exist *because* Congress does not always have such foresight. Put differently, to say that a major questions doctrine tasking courts with elucidating congressional determinations of majorness could be acceptable to textualists because Congress could theoretically speak to a policy question’s majorness ignores the reality that the only set of cases in which the major questions doctrine is helpful is the set of cases where Congress did not speak directly to the particular question at hand.

More foundationally, as far as the major questions doctrine is concerned, the legal effect of Congress stating (A) “regulating Widget X is a matter of non-major

### 3. Statutorily Suspect

Not only is assigning a shared hierarchy of majorness to Congress an ordinarily futile task, it is also a task premised on a statutorily suspect presumption. As previously mentioned, the current major questions doctrine is premised on the “presumption that Congress intends to make major policy decisions itself, not leave those decisions to agencies.”<sup>135</sup> But that judicially crafted presumption is in tension with the CRA,<sup>136</sup> within which Congress established a presumption that all “major rules” must be given legal effect unless Congress affirmatively enacts a new law stating that a particular major rule should not be given legal effect. In short, where the major questions doctrine presumes that Congress wishes to answer major questions itself, the CRA exhibits a congressional presumption that agencies will answer major questions through major rules.

Enacted in 1996, the CRA provides that “[b]efore a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress . . . a report containing—(i) a copy of the rule; (ii) a concise general statement relating to the rule, *including whether it is a major rule*; and (iii) the proposed effective date of

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significance,” is the same as the legal effect of Congress stating (B) “Agency A is delegated the authority to regulate Widget X.” In both instances, Agency A has the authority to regulate Widget X. Since the legal effect between those two alternatives is the same, textualist jurists would need to identify some reason, based in the *text* of the Constitution or other relevant law, justifying the requirement that Congress use the judicially-preferred language laid out in alternative (A). As Professor John F. Manning has argued, “clear statement rules . . . impose something of a clarity tax upon legislative proceedings,” and such a tax “demand[s] a justification other than the raw expression of judicial value preferences.” John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 403 (2010). Put differently, textualists do not understand the judicial task as permitting courts to order Congress to use specific language just for kicks. Instead, textualists understand the judicial task as calling only for the interpretation of the words that Congress and the President have themselves settled upon during the Article I, Section 7 lawmaking process—a process affording courts no opportunity to express bare policy preferences.

135. *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc).

136. 5 U.S.C. §§ 801–808 (2018).

the rule.”<sup>137</sup> The CRA’s definition of “major rule” is strikingly similar to the major questions doctrine’s definition of “major questions.”<sup>138</sup> The CRA defines “major rule” as follows:

The term “major rule” means any rule that [the Office of Information and Regulatory Affairs (OIRA)] finds has resulted in or is likely to result in—

(A) an annual effect on the economy of \$100,000,000 or more;

(B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or

(C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

The term does not include any rule promulgated under the Telecommunications Act of 1996 and the amendments made by that Act.<sup>139</sup>

Both the CRA and the major questions doctrine speak to economic significance (subsections (A) and (B) in the CRA provision above) as well as political significance (subsection (C) in the CRA provision above).<sup>140</sup>

In enacting the CRA, Congress tasked OIRA with applying the statutory definition of “major rule” to determine whether any particular rule qualifies as major.<sup>141</sup> Major rules, according to Congress, *must* be given legal effect sixty days after the agency transmits the

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137. *Id.* § 801(a)(1)(A) (emphasis added). For discussions on a perceived impetus for the CRA, see Paul J. Larkin, Jr., *Reawakening the Congressional Review Act*, 41 HARV. J.L. & PUB. POLY. 187, 197 n.21 (2018); Note, *The Mysteries of the Congressional Review Act*, 122 HARV. L. REV. 2162, 2164 (2009).

138. The major questions doctrine defines major questions as those with “economic and political significance.” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000).

139. 5 U.S.C. § 804(2) (2018).

140. *See, e.g., Brown & Williamson*, 529 U.S. at 160 (referring to “economic and political significance”).

141. *See* 5 U.S.C. § 804(2) (2018).

rule to Congress or publishes the rule in the Federal Register; the only exception mentioned in the CRA is if Congress affirmatively enacts a new law disapproving of the major rule.<sup>142</sup> The CRA carefully outlines the procedural steps that Congress may take to disapprove of a major rule.<sup>143</sup> For example, the CRA states that a new law disapproving of a major rule should explicitly state “[t]hat Congress disapproves the rule submitted by the \_\_\_ relating to \_\_\_, and such rule shall have no force or effect.’ (The blank spaces being appropriately filled in).”<sup>144</sup>

The judge-made presumption in the major questions doctrine threatens to turn the CRA’s detailed sixty-day *disapproval* process on its head to instead require Congress to take special steps to *approve* an agency’s major rule. There are legislative proposals before Congress that would achieve a similar result.<sup>145</sup> If Congress were to enact such proposals, courts could more credibly claim that Congress generally intends to retain an exclusive authority to decide major questions. But until such proposals are enacted, courts should not purport to “protect” an allegedly implicit congressional intent to retain the exclusive authority to decide major questions when the CRA explicitly anticipates that agencies will decide major questions through major rules.

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142. *See id.* § 801(a)(3). Rules determined to be non-major are also set to go automatically into effect, although they do so without any added delay. *See id.* § 801(a)(4) (“Except for a major rule, a rule shall take effect as otherwise provided by law after submission to Congress . . .”).

143. *See id.* § 801(a) (referring to a “joint resolution”); *id.* § 801(a)(3)(B) (referring to the presidential veto process); Note, *The Mysteries of the Congressional Review Act*, 122 HARV. L. REV. 2162, 2169 (2009) (referring to “the presentment requirement of the CRA”).

144. 5 U.S.C. § 802(a) (2018) (parenthetical in original).

145. *See, e.g.*, Regulations from the Executive in Need of Scrutiny Act of 2019 H. R. 3972, 116th Cong. (2019) [hereinafter “REINS Act”]. The REINS Act would amend the CRA to require congressional approval for major rules. *See id.* § 801. Non-major rules would still go into effect unless explicitly disapproved by Congress. *See id.* § 803. The REINS Act was first introduced into Congress nearly a decade ago, and has been reintroduced since. *See* Jonathan R. Siegel, *The REINS Act and the Struggle to Control Agency Rulemaking*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 131, 133 (2013); Press Release, Senators Reintroduce REINS Act (Jan. 10, 2019), <https://www.paul.senate.gov/news/senators-reintroduce-reins-act-0> [<https://perma.cc/3P6S-FWVF>].

To be sure, it is theoretically possible for the major questions doctrine to be consistent with the CRA. Although the CRA presupposes agency authority to issue major rules, it could be that Congress only intends to elsewhere grant such major authority. In other words, it could be that the CRA presumes that *some* agencies may issue major rules, so long as Congress has elsewhere given those agencies the explicit statutory authority to do so. But that attempt to harmonize the major questions doctrine with the CRA must take on the heavy burden of overcoming the CRA's broad definition of "Federal agency."<sup>146</sup>

The CRA's definition of "Federal agency" essentially covers *all* federal agencies, even "historically independent agencies."<sup>147</sup> Given as much, the CRA's presumption that federal agencies will answer major questions through major rules is not a narrow presumption limited to a small number of agencies that are elsewhere provided with major authority. Instead, the CRA's broad definition of "Federal agency" suggests that the CRA anticipates major questions being answered through major rules issued by nearly *every* federal agency. In light of the CRA's wide-reaching presumption, it is difficult for courts to maintain that the major questions doctrine is

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146. The CRA applies to each "Federal agency" as that term is defined in the Administrative Procedure Act. *See* 5 U.S.C. § 804(1) (2018) ("The term 'Federal agency' means any agency as that term is defined in section 551(1)."). The Administrative Procedure Act, in turn, defines the term quite broadly. *See id.* § 551(1) ("'[A]gency' means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—(A) the Congress; (B) the courts of the United States; (C) the governments of the territories or possessions of the United States; (D) the government of the District of Columbia; or except as to the requirements of section 552 of this title—(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them; (F) courts martial and military commissions; (G) military authority exercised in the field in time of war or in occupied territory; or (H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891–1902, and former section 1641(b)(2), of title 50, appendix.").

147. Off. of Mgmt. & Budget, Exec. Off. of the President, Memorandum for the Heads of Executive Departments and Agencies: Guidance on Compliance with the Congressional Review Act, M-19-14, 2 (Apr. 11, 2019) <https://www.whitehouse.gov/wp-content/uploads/2019/04/M-19-14.pdf> [<https://perma.cc/B2WW-WXDR>] [hereinafter *CRA Guidance*].



only a statutory canon seeking to protect a congressional desire to in most instances retain the authority to answer major questions.<sup>148</sup>

C. *Judicial Determinations of Majorness*

A second way to conceptualize the major questions doctrine is to understand it as calling for courts to determine majorness themselves. Pursuant to that understanding of the doctrine, a court's task is to exercise its own political discretion to determine whether a policy question is major. As a descriptive matter, this second theory best explains how the major questions doctrine currently works in practice. This second theory also describes how a strengthened major questions doctrine might operate in the future. Textualists should reject this understanding of the major questions doctrine as impermissibly permitting courts to insert themselves into the Article I, Section 7 lawmaking process. This objection applies to both the current and strengthened form of the major questions doctrine, albeit in slightly different ways.

In the current version of the major questions doctrine, allowing courts to decide majorness is to empower courts to selectively demand that explicit legislative language be used to delegate the authority to answer those questions that courts determine to be major. That authority is similar to how a President might threaten to veto a bill that does not satisfactorily address those topics that the President deems to be of particular political significance. But unlike a

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148. Another way to try to harmonize the CRA with the major questions doctrine is to argue that Congress did not intend the judiciary to pay much attention to OIRA's determinations of majorness. Indeed, the CRA provides that "[n]o determination, finding, action, or omission under [the CRA] shall be subject to judicial review." 5 U.S.C. § 805 (2018). But even if OIRA's determinations are not judicially reviewable, one might presume the Court to at least refer to OIRA's determinations if the Court were seeking to elucidate congressional determinations of majorness so that Congress's delegatory decision could be respected. For similar reasons, even if the Court did not understand OIRA's congressionally mandated determinations to be perfect substitutes for congressional determinations of majorness, one who understands the major questions doctrine as calling on courts to elucidate congressional determinations of majorness might expect the Court to at least note that Congress has spoken to what is "major" in the CRA. See *CRA Guidance*, *supra* note 147, at 4 (referring to OIRA's "statutory duty" to make the necessary majorness determination).

President who might threaten an overridable veto in return for different legislative language, the power exercised by courts invoking the current form of major questions doctrine is supreme. That is to say, even if all of Congress disagreed with a court as to whether a policy question was major, the court could disregard Congress's political calculation and continue to require that a particular delegation be made more clearly.

In the strengthened form of the doctrine, to allow courts to decide majorness is to similarly empower courts to selectively prohibit Congress from delegating the authority to answer those questions that courts determine to be major. In this sense, the courts are again empowered to act similarly to the President, who for idiosyncratically held political reasons may veto a bill and prevent it from becoming law. But unlike the President's veto, which may be overridden by a super-majority in Congress, the judicial veto exercised by a court invoking a strengthened major questions doctrine would be supreme. Congress could never delegate the authority to answer questions determined by the courts to be major—even if Congress made its delegation explicit, and even if all of Congress disagreed as to whether a particular question was major.

### 1. Descriptive Account

Before outlining the specific objections to a major questions doctrine empowering courts to determine majorness, it is helpful to evidence how, in practice, the major questions doctrine already empowers just that.<sup>149</sup> Take for example *MCI* and *Brown & Williamson*, which the Court has colorfully cited for the proposition that “Congress . . . does not . . . hide elephants in mouseholes.”<sup>150</sup> In both cases the Court purported to define the relevant “elephant” for itself. In neither case did the Court even suggest that it was seeking to determine what Congress would understand to be an

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149. See Loshin & Nielson, *supra* note 10, at 48 (arguing that the “elephants-in-mouseholes doctrine” places the court “on a dangerous path to ‘I know it when I see it’”).

150. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (citing *MCI Telecomms. Corp. v. Am. Tel. & Telegram Co.*, 512 U.S. 218, 231 (1994); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000)).

“elephant,” even though one might assume that to be the relevant inquiry if one were aiming to protect Congress’s unspoken desire to keep the “elephants” for itself.

“*[W]e think,*” the Court wrote in *MCI*, that “an elimination of the crucial provision of the statute for 40% of a major sector of the industry is much too extensive to be considered a ‘modification.’”<sup>151</sup> In coming to that decision, the Court determined for itself that: (1) the relevant statutory provision was more “crucial” than the rest of the statute; (2) the relevant industry sector was a “major” one; and (3) “40%” of that sector was a meaningful percent.<sup>152</sup>

Similarly, in *Brown & Williamson*, the Court noted that “*[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.*”<sup>153</sup> True, that passage refers to what “Congress . . . intended,” suggesting that the Court may have been concerned with elucidating and respecting a congressional decision. But a closer reading reveals that the Court was at most concerned with Congress’s decision to use “cryptic” text. It was the Court that determined the threshold question of majorness—that is, that regulating tobacco would be of “great economic and political significance.”<sup>154</sup> Although the Court’s “confiden[ce]” was bolstered by “the plain implication of Congress’s subsequent tobacco-specific legislation,”<sup>155</sup> those later-enacted statutes are best understood as speaking to the size of the relevant “mousehole,” not the “elephant.” Less illustratively, the Court first determined for itself that the regulation of tobacco was a major question. Then, after deciding majorness, the Court looked to the statutory grants of “drug” and “device.”<sup>156</sup> In examining those statutory grants, the Court concluded that, in light of its own majorness determination and Congress’s later-enacted statutes, the statutory grants were “cryptic” at

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151. *MCI*, 512 U.S. at 231 (emphasis added).

152. *See id.* at 131.

153. 529 U.S. at 160 (emphasis added).

154. *Id.*

155. *Id.* at 131.

156. *Id.*

best.<sup>157</sup>

Consider also *King*, where the Court determined for itself that “[t]he tax credits are among the [Affordable Care] Act’s key reforms.”<sup>158</sup> Nowhere did Congress itself identify those tax credits as being “key.” To be sure, the Court hypothesized that “had Congress wished to assign” a question of such “deep economic and political significance . . . to an agency, it surely would have done so expressly.”<sup>159</sup> This could suggest an attempt to elucidate and respect a congressional decision, at least if taken at face value. But

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157. *Id.* at 160. The *Brown & Williamson* majority cited to a 1986 article published by then-Judge Breyer, in which he argued that a “court may . . . ask whether the legal question is an important one.” Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986) [hereinafter *Judicial Review*] (emphasis added). The *Brown & Williamson* majority cited then-Judge Breyer’s article to support the proposition that, “[i]n extraordinary cases . . . there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.” *Brown & Williamson*, 529 U.S. at 159 (citing *Judicial Review*, *supra*, at 370). It is unclear whether then-Judge Breyer’s early conception of the major questions doctrine calls for judicial or congressional determinations of majorness. To be sure, the above-quoted language from his 1986 article states that “court[s]” can ask whether the legal question is major. *Judicial Review*, *supra*, at 370. But then-Judge Breyer elaborated on that rationale by arguing 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.” *Id.* (emphasis added). Regardless of what then-Judge Breyer would have thought, Justice Breyer has distanced himself from the major questions doctrine on at least one notable occasion. Dissenting in *Brown & Williamson*, Justice Breyer noted that “if there is . . . a background canon” pursuant to which courts “should assume in close cases that a decision with ‘enormous social consequences’ should be made by democratically elected Members of Congress rather than by unelected agency administrators . . . . I do not believe [such a canon] controls the outcome here.” 529 U.S. at 190 (Breyer, J., dissenting) (citation omitted) (quoting Regulation of Tobacco Products (Part 1): Hearings Before the H. Subcomm. on Health & the Env’t, 103d Cong. 69 (1994)). Scholars have described Justice Breyer’s dissent in *Brown & Williamson* as being in tension with his 1986 article. See Jonas J. Monast, *Major Questions About the Major Questions Doctrine*, 68 ADMIN. L. REV. 445, 459 (2016) (“Breyer dissented [in *Brown & Williamson*], contradicting his 1986 article by arguing that tobacco regulation is such a major political question that it is appropriately addressed by one of the politically-accountable branches—whether it be Congress or the Executive Branch—rather than the courts.”); *Chevron Step Zero*, *supra* note 50, at 242 (“[Justice Breyer’s] argument [in *Brown & Williamson*] casts serious doubt on his own claims to the contrary in 1986.”).

158. *King v. Burwell*, 576 U.S. 473, 485 (2015).

159. *Id.* at 486.

again, in practice it was the Court that first determined for itself that the question was “deep” (*i.e.*, major). Only then, after the Court had determined the question to be “deep,” did the Court look for express statutory language.<sup>160</sup> Examples such as *King* make clear that the major questions doctrine is not used to help determine whether Congress has delegated authority in the past. The doctrine is instead used to issue a forward-looking mandate establishing that now, after the Court has identified a question to be major, Congress must use judicially-preferred language (*i.e.*, explicit language) if Congress wishes to delegate the authority to decide that question.

Similarly, in *UARG*, it was again the Court itself that identified the EPA’s proposed statutory interpretation as “bring[ing] about an enormous and transformative expansion in EPA’s regulatory authority.”<sup>161</sup> The Court also determined for itself that the EPA was seeking to “regulate a significant portion of the American economy.”<sup>162</sup> Nowhere did the Court suggest that it was channeling Congress’s viewpoint as to which rules were “enormous” or “significant.”<sup>163</sup> The Court was instead concerned with declaring what it thought to be major so that Congress was put on notice of the judicial mandate to use explicit language as to certain questions.

Then-Judge Kavanaugh’s opinion in *United States Telecom Ass’n* is particularly instructive since it showcases a lower court judge seeking to faithfully apply Supreme Court precedent. Recall that then-Judge Kavanaugh considered two questions: “(1) Is the net neutrality rule a major rule? (2) If so, has Congress clearly authorized the FCC to issue the net neutrality rule?”<sup>164</sup> Note that, in the first question, then-Judge Kavanaugh asked whether the rule “[i]s” major. The second question, by comparison, focused on what “Congress” had decided to do. Juxtaposing those two questions leaves the impression that then-Judge Kavanaugh understood majorness to be

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160. *Id.*

161. *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014).

162. *Id.* (quotations omitted).

163. *Id.*

164. *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 422 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc).

something that courts determine for themselves.<sup>165</sup> Indeed, in conceding that the major questions doctrine had “a bit of a ‘know it when you see it’ quality,”<sup>166</sup> then-Judge Kavanaugh harkened back to Justice Stewart’s infamous test for the *judicial*-identification of obscene materials.<sup>167</sup>

Understanding the current major questions doctrine as a call for judicial determinations of major questions could explain why the Court has not yet cited the CRA in any major questions doctrine case. The CRA would seem to be particularly on point if one were seeking to elucidate and respect congressional determinations of major questions. As noted in Part II.B.3, both the major questions doctrine’s definition of “major question”<sup>168</sup> and the CRA’s definition of “major rule” speak to political<sup>169</sup> and economic<sup>170</sup> indications of major questions. Like the major questions doctrine’s focus on “economic and political significance,”<sup>171</sup> the CRA’s major rule requirement considers “a rule’s relative importance and economic impacts.”<sup>172</sup> In light of the similarity between the CRA and the major questions doctrine, the Court’s failure to cite the CRA in any case involving the major

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165. See also Mila Sohoni, *King’s Domain*, 93 NOTRE DAME L. REV. 1419, 1435–36 (2018) (examining then-Judge Kavanaugh’s views on major questions).

166. *U.S. Telecom*, 855 F.3d at 423 (Kavanaugh, J., dissenting).

167. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (“I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.”).

168. The major questions doctrine defines major questions as those with “economic and political significance.” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000).

169. The CRA’s definition of “major rule” includes those rules found to have “significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.” 5 U.S.C. § 804(2)(C) (2018).

170. The CRA’s definition of “major rule” also includes those rules found to have “an annual effect on the economy of \$100,000,000 or more” as well as those rules found to have “a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.” *Id.* § 804(2)(A)–(B).

171. *Brown & Williamson*, 529 U.S. at 160.

172. *CRA Guidance*, *supra* note 147, at 2. OIRA is housed within the Office of Management and Budget. See 44 U.S.C. § 3503(a) (2018).

questions doctrine suggests that the Court is not concerned with elucidating congressional determinations of majorness so that Congress's delegatory decisions may be respected.

Consider again *Brown & Williamson*, which involved an FDA tobacco rule issued less than five months after the CRA was enacted.<sup>173</sup> Pursuant to the CRA, OIRA determined the FDA's tobacco rule to be "major."<sup>174</sup> Although the Court similarly determined that the rule was of "economic and political significance," the Court made no mention of OIRA's congressionally mandated determination.<sup>175</sup> Consider also *UARG*, where the Court and OIRA were again in agreement: the rule was major.<sup>176</sup> But again, like in *Brown & Williamson*, the *UARG* Court made no reference to OIRA's determination.

The most informative case for present purposes, however, is the Supreme Court's opinion in *King*. In that case, OIRA and the Court were in disagreement. Applying Congress's definition of "major rule," OIRA determined the IRS rule at issue to be "Non-Major."<sup>177</sup> By contrast, the *King* Court determined the rule to have answered "a question of deep 'economic and political significance.'"<sup>178</sup> The *King* Court's implicit rejection of OIRA's congressionally mandated majorness determination provides even stronger evidence that,

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173. See 61 Fed. Reg. 44,395 (Aug. 28, 1996). The CRA was signed into law on March 29, 1996. Congressional Review Act, Pub. L. No 104-121, 110 Stat. 874 (1996). The FDA's Tobacco Rule was the thirty-third rule ever reviewed under the CRA. *Congressional Review Act: Database of Rules*, U.S. GOV'T ACCOUNTABILITY OFFICE, <https://tinyurl.com/y9kxocc> [<https://perma.cc/QU8C-T22C>].

174. *Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents*, U.S. GOV'T ACCOUNTABILITY OFFICE, <https://www.gao.gov/fedrules/103281> [<https://perma.cc/SEA4-B9EB>].

175. *Brown & Williamson*, 529 U. S. at 160.

176. See *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, U.S. GOV'T ACCOUNTABILITY OFFICE, <https://www.gao.gov/fedrules/161898> [<https://perma.cc/QNU8-398X>]; see generally *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302 (2014).

177. U.S. Gov't. Accountability Office, *Health Insurance Premium Tax Credit*, U.S. GOV'T ACCOUNTABILITY OFFICE, <https://www.gao.gov/fedrules/171784> [<https://perma.cc/69PP-7XNA>].

178. *King v. Burwell*, 576 U.S. 473, 486 (2015) (quoting *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

when determining majorness, the Court does not purport to be elucidating congressional determinations of majorness in an attempt to determine whether Congress has delegated authority.<sup>179</sup> As *King* illustrates, the Court is instead concerned with announcing its own majorness determination so that Congress is on notice to legislate accordingly.<sup>180</sup>

## 2. Political Veto

Having established that the current form of the major questions doctrine is best understood as tasking courts with determining majorness for themselves, this Article will now explain why textualists should reject that task. Explaining as much is of increased importance since the strengthened form of the major questions doctrine is also best understood as tasking courts with determining majorness themselves. Textualists should reject the task both as it

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179. Then-Judge Kavanaugh similarly did not cite the CRA in *U.S. Telecom Ass'n*. His non-cite is interesting because, by referring to the “major rules doctrine (usually called the major questions doctrine),” one might have expected him to acknowledge that the CRA explicitly addressed “major rules.” *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc). But then-Judge Kavanaugh may have avoided referencing the CRA for two reasons. First is that, prior to 2019, “historically independent agencies” (such as the FCC) did not submit rules for OIRA review. *See CRA Guidance, supra* note 147, at 2 (“The CRA applies to all Federal agencies, including the historically independent agencies.”). Second is that the CRA’s definition of “major rule” specifically excludes rules promulgated pursuant to the Telecommunications Act amendments, which the FCC had traced its net neutrality authority to. *See Telecommunications Act of 1996*, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of Title 47, Chapter 5 of the U.S. Code.); 5 U.S.C. § 804(2) (2018) (“The term [“major rule”] does not include any rule promulgated under the Telecommunications Act of 1996 and the amendments made by that Act.”); *U.S. Telecom*, 855 F.3d at 417 (Kavanaugh, J., dissenting) (“[B]ecause Congress never passed net neutrality legislation, the FCC relied on the 1934 Communications Act, as amended in 1996, as its source of authority for the net neutrality rule.”).

180. At the end of the day, it might be that the *King* Court failed to acknowledge the CRA because the Court was simply unaware of how the statute might interact with the major questions doctrine. Indeed, the parties failed to raise the CRA in their Supreme Court merits briefing. *See generally* Brief for Petitioners, *King v. Burwell*, 576 U.S. 473 (2015) (No. 14-114); Brief for Respondents, *King v. Burwell*, 576 U.S. 473 (2015) (No. 14-114); Reply Brief for Petitioners, *King v. Burwell*, 576 U.S. 473 (2015) (No. 14-114). Another possibility is that the Court is simply unaware of the CRA’s potential significance, or at least has not had the opportunity to formally consider the question.



exists in the current and strengthened forms of the doctrine. In both instances, the objection is that the major questions doctrine purports to provide the judiciary with an unenumerated political veto power, although that veto appears slightly different in each form of the major questions doctrine.

Before outlining the precise contours of the veto, it is critical to first explain why the veto is best understood as purporting to empower courts to act politically, rather than legally. After all, courts exercising the power of judicial review might also be understood as “vetoing” a law, although for legal (rather than political) reasons. The political nature of the veto power provided to courts in the current and strengthened forms of the major questions doctrine is therefore central to the textualist’s objection to it.<sup>181</sup>

The political nature of the major questions doctrine’s veto is perhaps most obviously exhibited by the doctrine’s explicit call to consider a question’s “political significance.”<sup>182</sup> And the doctrine’s call to additionally consider “economic” significance does not save the inquiry from being political. To the contrary, the economic inquiry highlights the majorness inquiry’s inherently political focus. In many instances, a policy question’s economic significance is the very characteristic driving its political significance. In *King*, for example, the Court appeared to define the Affordable Care Act’s tax credits as being “key” political reforms *because* they involved “billions of dollars in spending.”<sup>183</sup> Similarly, then-Judge Kavanaugh

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181. Recent textualist objections to the judicial exercise of political discretion come from Justices Gorsuch and Kavanaugh themselves. As Justice Gorsuch acknowledged in *Bostock*, “[a]s judges we possess no special expertise or authority to declare for ourselves what a self-governing people should consider just or wise.” *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1753 (2020). Writing in dissent, Justice Kavanaugh agreed with Justice Gorsuch’s distinguishing between judges and the peoples’ elected representatives: Allowing judicial decisions to be based on a judge’s “own policy views,” Justice Kavanaugh explained, would result in “the Judiciary . . . becom[ing] a democratically illegitimate super-legislature—unelected, and hijacking the important policy decisions reserved by the Constitution to the people’s elected representatives.” *Id.* at 1824 (Kavanaugh, J., dissenting).

182. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) (referring to “economic and political significance”).

183. *King*, 576 U.S. at 485.

noted that the FCC's net neutrality rule was major in part because its "financial impact" was "staggering."<sup>184</sup>

It is difficult to hypothesize a policy question that has both "major" economic significance and "non-major" political significance; political debates quite regularly turn on the relevant price tag. But should such a policy question exist, the major questions doctrine's call for a consideration of both "economic *and* political significance" ensures the inquiry is necessarily political by definition.<sup>185</sup>

Besides, even if the major questions doctrine could be reoriented so that courts could focus exclusively on economic concerns, textualists would be eager to see where in the Constitution it says that Congress's ability to delegate legislative powers turns on economic calculations. Such an argument would appear awfully close to constitutionalizing "Mr. Herbert Spencer's Social Statics."<sup>186</sup>

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184. *U.S. Telecom*, 855 F.3d at 423 (Kavanaugh, J., dissenting).

185. *Brown & Williamson*, 529 U.S. at 160 (emphasis added); see also *King*, 576 U.S. at 486 (referring to "a question of deep 'economic *and* political significance'" (emphasis added) (quoting *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014) (*UARG*))); *UARG*, 573 U.S. at 324 (referring to "decisions of vast 'economic *and* political significance'" (emphasis added) (quoting *Brown & Williamson*, 529 U.S. at 160)).

Although this Article is primarily concerned with providing a textualist critique of the major questions doctrine, empowering courts to exercise political discretion raises concerns that are shared by textualists and non-textualists alike. Consider Professor Adrian Vermeule, who is very much not a textualist. Adrian Vermeule, *Beyond Originalism*, THE ATLANTIC (Mar. 31, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/> [<https://perma.cc/V79V-LM92>] (arguing in favor of "common-good constitutionalism" and calling it a "mistake" to think "that the common good and its corollary principles have to be grounded in *specific* texts"). Because Professor Vermeule understands the "lines between law, fact, and policy discretion" to be inherently "uncertain and unstable," he takes issue with any attempt to draw a "sharp distinction between review of legal questions, on the one hand, and review of facts and discretionary policymaking, on the other." Adrian Vermeule, *Neo-?*, 133 HARV. L. REV. FORUM 103, 107 (2020). From Professor Vermeule's perspective, then, the incorrectness of a major questions doctrine's call for judicial determinations of political majorness is all the more obvious—if judicial supremacy over mixed questions of law and politics is a step too far, judicial supremacy over matters that the judiciary explicitly defines to be questions of politics should be rejected out of hand.

186. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting); see also Rebecca L. Brown, *The Art of Reading Lochner*, 1 N.Y.U. J. L. & LIBERTY 570, 572 n.3 (2005) (noting that "most readers" of Justice Holmes's *Lochner* dissent take it as "suggest[ing]

In the current major questions doctrine, the judicial exercise of a political veto takes the shape of a judicial mandate that Congress speak explicitly if it wishes to delegate the authority to answer a question that a court determines to be major. This is objectionable to textualists since it risks upsetting the legislative bargains that result in particular words being enacted into law. Like a court invoking the current form of the major questions doctrine, individual legislators (and the President) are likely to have their own views as to which policy questions are major. The culmination of those views is reflected in the final wording of a particular statute, which might have been intentionally drafted to implicitly delegate the authority to answer certain questions. Consider a hypothetical.

Assume that Congress enacts a law delegating to Agency A the authority to regulate “technological widgets.” Pursuant to that authority, Agency A promulgates a rule to regulate Widget X, which Agency A understands to be “technological.” Manufacturers of Widget X sue, alleging that its widgets are not “technological,” and thus Agency A has no statutory authority to regulate Widget X. In considering the case on appeal, the Supreme Court invokes the current form of the major questions doctrine and determines that, in the Court’s opinion, the decision to regulate Widget X is a question of major economic and political significance. For that reason, the Court concludes that Congress failed to correctly (*i.e.*, explicitly) delegate to Agency A the authority to answer the question as to whether Widget X should be regulated.

For the major questions doctrine to be doing any real work in the above hypothetical, the Court must read (or anticipate having to read) the statute as being broad enough to implicitly cover Widget X. Otherwise the Court could brush the majorness inquiry to the side and simply rule that, as a matter of straightforward statutory

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that the Court was improperly resolving a constitutional dispute by favoring a contested tenet of economic theory”). *But see* Sohoni, *supra* note 165, at 1433 (reading *King* as being limited to those instances where “the agency claims that a statute implicitly delegates to the agency the power to cause large amounts of federal money to be spent”).

interpretation, Widget X is not covered by the statutory language.<sup>187</sup> But by invoking the major questions doctrine, the Court risks favoring its political view (that the regulation of Widget X is a major policy question) over the views of legislators and the President who might have approved broad language because they considered the policy question to be a non-major question that did not need to be specifically noted.

As Professor John F. Manning explains from a textualist's perspective, "[m]uch legislation reflects the fruits of legislative compromise, and such compromises often lead to the articulation of broad policies for agencies and courts to specify through application."<sup>188</sup> By narrowing the statute to not cover Widget X, the Court in the above hypothetical "threatens to unsettle the legislative choice implicit in adopting a broadly worded statute."<sup>189</sup> Moreover, the Court's narrowing of the statute additionally distorts the political process in the future. Politicians wishing to amend the statute

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187. Even larger issues would arise if the Court truly treated the major questions doctrine as a threshold issue that must be answered before the Court even considered developing an opinion as to whether the statute is broad enough to cover Widget X. That approach would require the Court to unnecessarily announce its political determinations in cases where the Court would not need do so (that is, in cases where the statute does not cover the relevant agency action, regardless of its majorness). This approach is slightly distinguishable from *King*, where the Court ultimately concluded that the statute was broad enough to cover the IRS's proposed interpretation. See *King*, 135 S. Ct. at 2489–90.

188. John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 228 (2000) [hereinafter *Canon of Avoidance*]; see also *Substantive Canons*, *supra* note 106, at 114 (referring to Professor Manning as "the most prominent academic textualist").

189. *Canon of Avoidance*, *supra* note 188, at 228; see also *Countering*, *supra* note 106, at 71 ("[W]ithin each house, '[b]ills are shaped by a process that entails committee approval, the scheduling of a floor vote, logrolling, the threat of filibuster, the potential for presidential veto, and an assortment of other procedural obstacles.' Passing these veto gates requires proponents to compromise with opponents, and compromise can produce awkward language." (second alteration in original) (footnotes omitted) (quoting John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2417 (2003))); *Substantive Canons*, *supra* note 106, at 120–21 ("For example, Justice Scalia's suggestion that clear statement rules reflect the ordinary use of language comes at the end of a long passage characterizing them as 'dice-loading rules' that pose 'a lot of trouble' for the 'honest textualist.'" (quoting SCALIA, *supra* note 105, at 27–29)).

to explicitly cover Widget X may have to give up more political capital to earn the support of their colleagues who might have already understood the original statute to cover Widget X, but who later seize the opportunity to extract additional political deals in return for explicit Widget X language.<sup>190</sup>

The political veto power which would be exercised by courts pursuant to a strengthened form of the major questions doctrine would be even more objectionable from the textualist's perspective. An elaboration on the Widget X example helps illustrate why. Assume that after the Court ruled that regulating Widget X involved a question of major economic and political significance, Congress sought to make its delegatory intention clear. Specifically, assume that Congress amended the relevant statute to state that "Agency A's authority to regulate technology widgets includes the authority to regulate Widget X." Agency A then promulgates a new Widget X rule and litigation ensues. What now?

Pursuant to a strengthened major questions doctrine, the Court would be empowered to hold that Congress *cannot* delegate to Agency A the authority to decide whether Widget X will be regulated—even though Congress clearly expressed its intention to delegate that authority. Similar to a President who declares that a bill cannot become law for political reasons, the Court in this hypothetical would be declaring that Congress's delegation cannot be given legal effect because the Court has determined it to be too politically important.

The political veto power purportedly provided to courts in the current and strengthened forms of the major questions doctrine must be rejected by textualists because such veto power is nowhere mentioned in Article I, Section 7. That Section of the Constitution, which outlines the exclusive procedures through which federal law may be enacted,<sup>191</sup> was the subject of significant debate at the Constitutional Convention. The substantial influence that a political veto (or "negative") could exert on the legislative process was not

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190. Cf. *Countering*, *supra* note 106, at 71–72 ("[I]t may be necessary to narrow or broaden language in order to bring others on board.").

191. The text of Article I, Section 7 is provided in its entirety at note 123.

lost on the Framers. In an early draft of the Declaration of Independence, for example, Thomas Jefferson complained that King George had “prostituted his negative for suppressing every legislative attempt to prohibit or to restrain” the slave trade.<sup>192</sup> Familiar with a veto’s utility, the Framers considered creating several different veto powers at the Constitutional Convention.<sup>193</sup>

Most important for present purposes was a proposal in the Virginia Plan to vest a political veto power in a “Council of Revision” made up of the President and members of the federal judiciary.<sup>194</sup> The proposal was not entirely novel; New York’s Constitution of 1777 had vested a veto power in a similarly constituted Council of Revision.<sup>195</sup> The New York Council, which was made up of the Governor, the state Chancellor, and the state justices, could veto any legislative bill by majority vote.<sup>196</sup>

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192. Thomas Jefferson, Notes of Proceedings in the Continental Congress, (June 7–Aug. 1, 1776), in 1 THE PAPERS OF THOMAS JEFFERSON 1760–1776, at 317–18 (1950).

193. See, e.g., Alison L. LaCroix, *What if Madison Had Won? Imagining a Constitutional World of Legislative Supremacy*, 45 IND. L. REV. 41, 41–42 (2011) (“Madison argued that the United States government must be armed with a ‘negative,’ or a veto, on state legislation. The negative would be vested in Congress—most likely the Senate—and would operate as a broad check by the federal legislature on the states. Madison even went so far as to suggest that congressional approval would be the ‘necessary final step’ in the states’ legislative processes.” (footnotes omitted) (quoting ALISON L. LACROIX, THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM 138–39, 153 (2010))).

194. James T. Barry III, Comment, *The Council of Revision and the Limits of Judicial Power*, 56 U. CHI. L. REV. 235, 235 (1989) [hereinafter *The Council of Revision*].

195. See *id.* at 243. The New York Constitution of 1777 provided:

And whereas laws inconsistent with the spirit of this constitution, or with the public good, may be hastily passed: Be it ordained that the governor for the time being, the chancellor, and the judges of the supreme court, or any two of them, together with the governor, shall be and hereby are, constituted as a council to revise all bills to be passed into laws by the legislature . . . .

*Id.* at 244–45, quoted in BENJAMIN PERLEY POORE, 2 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 1332 (GPO, 2d ed. 1878).

196. See *The Council of Revision*, *supra* note 194, at 245; see also Richard H. Fallon, Jr., *Common Law Court or Council of Revision?*, 101 YALE L.J. 949, 951 (1992) (review of HARRY H. WELLINGTON, INTERPRETING THE CONSTITUTION (1990)) (noting that the federal Council of Revision “could have vetoed legislation on grounds of morality or prudence, not just irreconcilability with constitutional commands.”); Richard Albert, *The*

Modeling a federal proposal that was in part based on the New York Council, the Virginia Plan presented at the Constitutional Convention proposed in part:

Resd. that the Executive and a convenient number of the National Judiciary, ought to compose a council of revision with authority to examine every act of the National Legislature before it shall operate, & every act of a particular Legislature before a Negative thereon shall be final; and that the dissent of said Council shall amount to a rejection, unless the act of the National Legislature be again passed, or that of a particular Legislature be again negatived by [ ] of the members of each branch.<sup>197</sup>

The resolution was defeated after substantial debate.<sup>198</sup> In *The Federalist No. 73*, Alexander Hamilton provides “two strong reasons” for why the resolution was defeated.<sup>199</sup> First was that “judges, who are to be the interpreters of the law, might receive an improper bias, from having given a previous opinion in their revisionary capacities.”<sup>200</sup> Second was that “by being often associated with the Executive, [judges] might be induced to embark too far in the political views of that magistrate, and thus a dangerous combination might by degrees be cemented between the executive and judiciary departments.”<sup>201</sup>

Hamilton’s second concern might have been addressed by an alternative framework proposed by Madison, which was itself the subject of much debate.<sup>202</sup> In the end the Framers settled on an

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*Constitutional Imbalance*, 37 N.M. L. REV. 1, 22 (2007) (noting that the Council of Revision had “a very broad power of review”).

197. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (Max Farrand ed., 1911) [hereinafter FARRAND’S RECORDS].

198. See *The Council of Revision*, *supra* note 194, at 249–57.

199. THE FEDERALIST NO. 73, at 445 (Alexander Hamilton) (Clinton Rossiter ed., 2003); see also Albert, *supra* note 196, at 25 (listing “general objections” raised against the Council of Revision).

200. THE FEDERALIST NO. 73, *supra* note 199, at 445.

201. *Id.*

202. Pursuant to Madison’s proposal, bills would have been separately sent to the President and judiciary; either branch could then independently exercise a political

Article I, Section 7 framework within which the President could exercise a “qualified” veto overridable by a super-majority in Congress.<sup>203</sup> Missing from that Article I, Section 7 framework, of course, was any vesting of a veto power in the federal judiciary.

This constitutional history illustrates what textualists already assume: enacted legal text is the end result of various political bargains.<sup>204</sup> As the Supreme Court has acknowledged, “[t]he procedures governing the enactment of statutes set forth in the text of Article I were the product of the great debates and compromises that produced the Constitution itself.”<sup>205</sup> Indeed, “[f]amiliar historical materials provide abundant support for the conclusion that the power to enact statutes may only ‘be exercised in accord with a single, finely wrought and exhaustively considered, procedure.’”<sup>206</sup> Respecting—even if not fully understanding—the constitutional bargains that resulted in Article I, Section 7’s text requires textualists to reject the unenumerated political veto called for by the current and strengthened forms of the major questions doctrine.

In rejecting the major questions doctrine’s political veto, textualists are on sound precedential footing. Consider the fate of the “one-house” veto examined in *INS v. Chadha*.<sup>207</sup> In *Chadha*, Congress had granted the Attorney General the discretion to determine whether an otherwise removable alien could remain in the United

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veto power. See 2 FARRAND’S RECORDS, *supra* note 197, at 80. Presumably referring to the similarity between Madison’s proposal and the Virginia Plan’s already-rejected proposal for a council of revision, Elbridge Gerry argued that Madison’s proposal “comes to the same thing with what has been already negated.” *Id.* at 298. Charles Pinckney similarly opposed Madison’s proposal, arguing that it would lead to “the interference of the Judges in the Legislative business” by “involv[ing] them in parties” and “giv[ing] a previous tincture to their opinions.” *Id.* Perhaps unsurprisingly, then, Madison’s proposal was rejected. The *Council of Revision*, *supra* note 194, at 257.

203. See U.S. CONST. art I, § 7, cl. 2; THE FEDERALIST NO. 73, *supra* note 199, at 444.

204. See John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 59–60 n.237 (2001) (“[T]he debates concerning the Council of Revision” are not citable as “authoritative evidence of the Founders’ ‘intent,’” but “are relevant precisely because their premises fit tightly with inferences that reasonably emerge from the constitutional structure itself.”).

205. *Clinton v. City of New York*, 524 U.S. 417, 439 (1998).

206. *Id.* at 439–40 (quoting *INS v. Chadha*, 462 U.S. 919, 951 (1983)).

207. 462 U.S. 919 (1983).



States.<sup>208</sup> Wishing to retain some influence over the Attorney General's exercise of that discretion, the relevant statute purported to reserve for each house of Congress the authority to independently overrule the Attorney General's determination.<sup>209</sup> The Court referred to that power as a "veto," and concluded that it unconstitutionally empowered an individual house of Congress to exercise authority that Article I, Section 7 vested in the bicameral legislature.<sup>210</sup>

Consider also the "line-item" veto held unconstitutional in *Clinton v. City of New York*.<sup>211</sup> The President's constitutional veto is thought to be an all-or-nothing authority in that it only permits the President to accept or reject entire bills.<sup>212</sup> But in *Clinton*, Congress had sought to provide the President with the statutory authority to veto particular portions of bills.<sup>213</sup> The Court examined the "important differences between" that statutory authority and "the President's 'return' of a bill pursuant to [the veto process outlined in] Article I, § 7."<sup>214</sup> In considering whether Congress could grant the President the statutory authority to veto portions of bills, the

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208. *See id.* at 923–24.

209. *See id.* at 925.

210. *See id.* at 951–59.

211. *See Clinton v. City of New York*, 524 U.S. 417, 448 (1998).

212. *See* U.S. CONST. art. I, § 7 ("Every bill . . . shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it . . .").

213. *See id.* at 436. Some scholars have critiqued *Clinton* for focusing on Article I, Section 7 instead of the nondelegation doctrine. *See, e.g.,* Lawson, *supra* note 33, at 389 ("Under the Act [at issue in *Clinton*], the President signs the entire bill into law, but the effective dates of certain portions of the law are made contingent on subsequent presidential action. The question is whether the President's authority to determine effective dates crosses the line from execution to legislation. That has nothing to do with the procedures in Article I, Section 7 and everything to do with the nondelegation doctrine."); Michael B. Rappaport, *The Selective Nondelegation Doctrine and the Line Item Veto: A New Approach to the Nondelegation Doctrine and Its Implications for Clinton v. City of New York*, 76 TUL. L. REV. 265, 285–86, 290 (2001) (noting "the Court did not address whether the Act violated the nondelegation doctrine" despite that question being "obvious," and arguing "[t]he central problem with the Court's opinion is its failure to justify applying a stricter standard to the delegation of cancellation authority than to other delegations to the executive.").

214. *Clinton*, 524 U.S. at 439.

Court explained that there were “powerful reasons for construing constitutional silence on this profoundly important issue as equivalent to an express prohibition.”<sup>215</sup> Quoting *Chadha*, the Court concluded that the line-item veto was “not the product of the ‘finely wrought’ procedure that the Framers designed.”<sup>216</sup> Like in *Chadha* and *Clinton*, where the Court rejected two novel veto powers not referred to in Article I, Section 7, textualists should reject the political veto power purportedly vested in courts by the current and strengthened forms of the major questions doctrine.

### 3. Supreme Nature

As explained above, textualists should reject the current and strengthened forms of the major questions doctrine for providing courts with a political veto power. But the “supreme” nature of that political veto should doubly trouble textualists. Both the current and strengthened forms of the major questions doctrine purport to provide the judiciary with a supreme political veto, although each form of the doctrine presents textualists with distinct objections.

The veto provided to courts in the current major questions doctrine is supreme in the sense that it definitively withholds legal validity from implicit delegations of major authority. Consider a variation of the Widget X hypothetical mentioned above.<sup>217</sup> Assume that after the Court ruled that regulating Widget X involved a question of major economic and political significance, Congress expressed a conflicting view by amending the relevant statute to provide that “regulating Widget X is an issue of non-major political and economic significance.” Were Agency A to issue a new Widget X rule and were litigation to follow, the Court could invoke the current form of the major questions doctrine to refuse to credit Congress’s majorness determination. More concretely, the Court could point to its own identification of the Widget X decision as being major, and hold that Congress cannot delegate the authority to decide if Widget X will be regulated by Agency A—even if Congress

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215. *Id.*

216. *Id.* at 440.

217. See *supra* Part II.C.2.

disagreed with the Court as to whether that decision was of major political importance. Unlike a presidential veto, which can be overridden by a supermajority in Congress,<sup>218</sup> the Court's declaration that a particular question demands explicit legislative language could never be challenged.

The supreme nature of this judicial veto power is even more obvious in a strengthened form of the major questions doctrine. To best see how, consider one last variation of the Widget X example. Assume that after the Court initially ruled that regulating Widget X involved a question of major economic and political significance, Congress made two amendments to the relevant statute: (1) an amendment stating that "regulating Widget X is an issue of non-major political and economic significance"; and (2) an amendment stating that "even if the decision to regulate Widget X were of major political and economic significance, Agency A is hereby delegated the authority to decide whether Widget X will be regulated." Here the Court could invoke the strengthened form of the major questions doctrine to again ignore Congress's determinations. The Court could forever ban Congress from delegating to Agency A the authority to decide if Widget X should be regulated—even if Congress expressed its view that the authority involved answering only a non-major question, and *even if* Congress made the delegation explicit. The only way Congress could ever delegate such authority in the future would be if the Supreme Court, acting as what could only be described as a super-legislature, changed its own political calculation and declared the question at hand to no longer be major. For the textualist who takes the Article I, Section 7 process seriously, the strengthened major questions doctrine's supreme, unenumerated veto power—which purports to be stronger than the President's qualified, enumerated veto power—must be rejected out of hand.

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218. See U.S. CONST. art I, § 7, cl. 2. Even the veto exercised by the rejected Council of Revision was inferior in the sense that it could be overridden by Congress. See Fallon, *supra* note 196, at 958 & n.69 (citing 1 FARRAND'S RECORDS, *supra* note 197, at 21); Albert, *supra* note 196, at 22 (citing N.Y. CONST. of 1777, art. III).

## III. PRE-DECISIONAL CONSIDERATIONS OF IMPORTANCE

For the reasons outlined in Part II, textualists should reject the major questions doctrine—including what the doctrine is said to be, what the doctrine actually does in practice, and what the doctrine might soon become. But textualists need not be ignorant of the fact that some cases raise more important policy questions than others. To the contrary, judicial considerations of “importance” are statutorily permissible in at least two pre-decisional contexts.

First, the Supreme Court may consider whether a case presents an “important” question when the Court considers adding a case to its discretionary docket.<sup>219</sup> Second, federal courts of appeals may consider a case’s “importance” when considering whether the case is appropriate for en banc review.<sup>220</sup> Because the exercise of discretion in those pre-decisional contexts has been implicitly approved by Congress, those textualist jurists who wish to limit the nondelegation doctrine to “major” questions may in part do so by selecting cases that present “important” questions in the certiorari and en banc processes.<sup>221</sup> In exercising such discretion, the Supreme Court and en banc courts could largely limit their nondelegation holdings to those cases raising “important” questions.

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219. SUP. CT. R. 10(c).

220. FED R. APP. P. 35(a)(2).

221. The term “in part” is used because there may be instances where courts may nonetheless deem it appropriate to grant certiorari or en banc review in cases raising non-important nondelegation questions. For example, a case might raise an important issue unrelated to the nondelegation question in addition to raising a non-important question related to the nondelegation doctrine. While courts may sometimes limit their review to one issue at the exclusion of others, such limited review is not always appropriate or permissible. Moreover, the term “in part” is particularly appropriate in regard to courts of appeals, which more frequently decide cases through three-judge panels than through en banc sittings. Because three-judge panels do not typically have any discretion in selecting the cases they decide, those panels cannot engage in the same sort of “importance” inquiry applicable to the en banc selection process. Finally, “in part” is used to recognize those categories of cases the Supreme Court remains required to consider. *See, e.g.*, 28 U.S.C § 1253 (2018) (direct appeals from decisions of three-judge courts).

A. *Clarifying Points*

Four clarifying points should be made before turning to address how textualist jurists may consider importance in pre-decisional contexts. The first clarifying point is that this Article perceives no meaningful substantive difference between considerations of “importance” and considerations of “majorness.” Given as much, this Article must clarify why textualists can engage in the first inquiry but not the latter. This Article offers two reasons.

First, as further outlined below, there is clear (presumptively constitutional) statutory authority for courts to consider “importance” in certain pre-decisional contexts.<sup>222</sup> The judicially created major questions doctrine, by comparison, provides no clear textual foundation for a court’s consideration of “majorness” when deciding cases. A second reason is that, in considering “importance,” courts do not purport to be exercising a supreme authority. Congress could enact new statutes changing how the Supreme Court selects the cases it will hear, and changing how the courts of appeals select

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222. The phrase “presumptively constitutional” is used to acknowledge potential constitutional issues, not addressed here, regarding the judiciary’s ability to draft its own court rules and select the cases it will hear. See Edward H. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After The Judges Bill*, 100 COLUM. L. REV. 1643, 1713–30 (2000) (examining the relationship of discretionary review with the classic justification for judicial review and the rule of law); Alexander Volokh, *Judicial Non-Delegation, the Inherent-Powers Corollary, and Federal Common Law*, 66 EMORY L.J. 1391, 1408 (2017) (listing the Rules Enabling Act as an example statute that “seem[s] to grant courts wide discretion and invite or require them to engage in substantial lawmaking”); Josh Blackman, *Does the Rules Enabling Act violate the Non-Delegation Doctrine?*, JOSH BLACKMAN’S BLOG (Jan. 28, 2015), <http://joshblackman.com/blog/2015/01/28/does-the-rules-enabling-act-violate-the-non-delegation-doctrine/> [https://perma.cc/H3VU-NWE4] (“Is there much of an intelligible principle [in the Rules Enabling Act] about what kind of rules are to be prescribed for procedure and evidence? Other than the adjective ‘general,’ I think the answer is no.”); Randy J. Kozel & Jeffrey A. Pojanowski, *Discretionary Dockets*, 31 CONST. COMMENT. 221, 225–51 (2016) (examining the relationship between a court’s mode of decisionmaking, docket management, and sense of institutional role).

The narrow point here is only that, from the textualist’s perspective, pre-decisional considerations of “importance” are less objectionable than those of “majorness.”

cases for en banc review.<sup>223</sup> For now, however, Congress has granted courts the authority to exercise certain discretion over their dockets, making the judicial exercise of such discretion less objectionable from the textualist's perspective.

A second clarifying point is that, although courts may exercise political discretion in the pre-decisional contexts described below, such discretion must be distinguished from partisan behavior.<sup>224</sup> For purposes of this Article, "political discretion" means the discretion to draw lines based on policy reasons (*e.g.*, the XYZ Act affects a lot of people), not partisan reasons (*e.g.*, the XYZ Act is good for a particular political party).

The third clarifying point, related to the second, is that courts should be cognizant of the risk that judicial exercises of political discretion may be perceived as being partisan. Avoiding even the appearance of engaging in partisan behavior is important for the judiciary, a branch particularly reliant on being perceived to be legitimate. As Alexander Hamilton explained, the judiciary has "neither force nor will, but merely judgment."<sup>225</sup> To meaningfully exercise that "judgment" without the assistance of the "sword" or "purse," the judiciary's rulings must be (and be perceived to be) non-partisan.<sup>226</sup>

The fourth clarifying point is that this Article assumes without deciding that the nondelegation doctrine could be *successfully* revived. That is to say, this Article assumes that the nondelegation doctrine could be revived in a way that does not require courts to

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223. Melody Wang, *Don't Let the Court Choose Its Cases*, N.Y. TIMES (Oct. 27, 2020), <https://www.nytimes.com/interactive/2020/10/27/opinion/supreme-court-reform.html> [<https://perma.cc/JW6V-U7RX>] ("Just as Congress granted this power, so can Congress take it away.").

224. See RICHARD H. FALLON JR., LAW AND LEGITIMACY IN THE SUPREME COURT 128 (2018) ("[L]egitimacy in judicial decision making therefore requires the Justices to rely only on reasons that reasonable citizens would acknowledge as enjoying the status of reasons—as distinguished from idiosyncratic, partisan, or narrowly theistic concerns—even if they might reach different ultimate judgments.").

225. THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

226. *Id.* at 466.

exercise political discretion when deciding cases.<sup>227</sup> Developing such a revived doctrine would require much more thought than can be provided here. The discussion which follows speaks only to how a successfully revived nondelegation doctrine could at least be partially limited to “important” (*i.e.*, major) questions without upsetting the entire endeavor by requiring courts to decide “majorness” when actually deciding cases.

### B. *Discretionary Docket*

Historically, the Supreme Court was obliged to hear many cases.<sup>228</sup> Over the last two hundred years, however, Congress has gradually granted the Supreme Court the authority to exercise more discretion in selecting which cases it will hear.<sup>229</sup> In accordance with those congressional grants of discretion, today the Rules of the Supreme Court “indicate the character of the reasons the Court considers” when granting petitions for a writ of certiorari.<sup>230</sup> The rules provide that the Court is more likely to grant a petition if the underlying case involves an “important” federal question.<sup>231</sup>

The precise meaning of “important” is left undefined by the Rules of the Supreme Court.<sup>232</sup> But case law establishes that, circularly, a question is “important” when “at least four members of the Court”

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227. See *supra* Part I.A (noting that the lack of a judicially manageable standard is often attributed as a reason for the nondelegation doctrine’s underutilization).

228. See Daniel Epps & William Ortman, *The Lottery Docket*, 116 MICH. L. REV. 705, 710 (2018) (“For the first century of its existence, the Supreme Court had no authority to choose what cases it would decide.”); S. Sidney Ulmer, *Revising the Jurisdiction of the Supreme Court: Mere Administrative Reform or Substantive Policy Change*, 58 MINN. L. REV. 121, 124–26 (1973) (providing a historical account of obligatory jurisdiction).

229. For an account of the various historical statutes granting such discretion, see Epps & Ortman, *supra* note 228, at 710–11.

230. SUP. CT. R. 10(c). The Court is clear to note that its stated reasons are “neither controlling nor fully measuring the Court’s discretion.” *Id.*

231. *Id.*; Coenen & Davis, *supra* note 10, at 795 n.86 (“[T]he Court’s certiorari practice, after all, directs it to consider a case’s national importance.”).

232. See, e.g., *United States v. Muniz*, 374 U.S. 150, 151 (1963) (“[T]he decision below involves an important question in the construction of the Federal Tort Claims Act.”); *Hollingsworth v. Perry*, 558 U.S. 183, 203 (2010) (Breyer, J., dissenting) (“The technical validity of the procedures followed below does not implicate an open ‘important question of federal law.’” (quoting SUP. CT. R. 10(c))).

deem the question “important.”<sup>233</sup> And the broad judicial discretion associated with certiorari is even more apparent where parties petition the Supreme Court before a lower federal court has issued its final ruling. In those extraordinary instances, a petition will be “granted only upon a showing that the case is of such imperative public *importance* as to justify deviation from normal appellate practice and to require immediate determination in [the Supreme] Court.”<sup>234</sup>

Textualists and non-textualists alike would no doubt call on the Court to prudently exercise its discretion in the certiorari process. It is doubtful, however, that an objective reader of the relevant certiorari statutes understands those statutes as requiring the Court to select cases by figuratively throwing darts at the wall.<sup>235</sup> Indeed, given the scope of the Court’s influence, some political (not partisan) awareness may be helpful.

If the Court could decide an issue of law by granting one of two petitions—the first of which concerns an area of law that the political branches are actively reshaping, and the second of which concerns an area of the law that is relatively stable—it might be preferable for the Court to decide the case by accepting the second petition. Doing so would allow the Court to decide the relevant legal question without directly interfering with the active work of the political branches. On the other hand, some might argue that the Court should accept the first petition, on the theory that the extra political attention could attract the interest of premier legal advocates or alert the political branches to a legal requirement that might as well be addressed through the political process. Whether one would argue in favor of the Court granting the first or second petition is irrelevant. The point is only that the relevant statutes make

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233. *Rice v. Sioux City Mem’l Park Cemetery*, 349 U.S. 70, 74 (1955).

234. SUP. CT. R. 11 (emphasis added); see also BICKEL, *supra* note 1, at 126 (“The certiorari jurisdiction is professedly discretionary and based on few articulated standards.”).

235. For a proposal that could take power out of the hands of the Court, see Epps & Ortman, *supra* note 228, at 707 (“[W]e propose that the Court—or Congress, by statute—supplement the traditional certiorari docket with a small number of cases randomly selected from final judgments of the circuit court.”).



it such that textualist Justices (like their non-textualist colleagues) *may* take such considerations into account when considering petitions for writs of certiorari.

By considering importance in the certiorari context, the Court could shape its docket to in large part address only those nondelegation cases raising “important” (*i.e.*, major) questions. In doing so the Court could alert Congress to similar nondelegation issues presented in other statutes. Put differently: by holding one or two carefully selected statutes to be unconstitutional on nondelegation grounds, the Court could alert Congress to the need to correct issues of nondelegation more broadly. As Justice Scalia explained in the wake of the *Benzene* case, “[E]ven those who do not relish the prospect of regular judicial enforcement of the . . . [non]delegation doctrine might well support the Court’s making an example of one—just one—of the many enactments that appear to violate the principle. The educational effect on Congress might well be substantial.”<sup>236</sup>

The certiorari process provides the Court with an opportunity to engage in the type of limited review to which Justice Scalia referred. Encouraging Congress to address constitutional questions may sound disagreeable to modern ears accustomed to the constitutional Muzak that is judicial supremacy. But the idea is far from revolutionary: “In earlier times heated constitutional debate did take place at the congressional level.”<sup>237</sup>

### C. *En Banc Review*

Although federal courts of appeals do not exercise much discretion in deciding which cases make up their general dockets, the courts of appeals do have significant discretion in selecting cases for en banc consideration. As background, federal courts of appeals typically decide cases through randomly assembled three-judge

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236. Scalia, *supra* note 34, at 28.

237. *Id.*

panels.<sup>238</sup> Although those panels have authority to rule on behalf of the entire court, cases are sometimes heard or (more commonly) reheard by the entire en banc court.<sup>239</sup> Federal Rule of Appellate Procedure 35 permits appellate judges to order en banc review where “the proceeding involves a question of exceptional *importance*.”<sup>240</sup> Congress has given legal effect to that rule through the Rules Enabling Act—although the constitutionality of Congress’s outsourcing of rule drafting to the courts could itself be questioned on non-delegation grounds.<sup>241</sup>

Even if constitutional objections can be lodged against the Rules Enabling Act, the narrow point here is that Congress’s having given legal effect to Rule 35 makes the judicial exercise in discretion called for in Rule 35 less objectionable to textualists than the discretion exercised pursuant to the judge-made major questions doctrine. For now it suffices to say that, in determining what constitutes “a question of exceptional importance,” Congress has granted to the courts of appeals the authority to exercise broad discretion.<sup>242</sup> Indeed, a 1998 amendment to Rule 35 changed language speaking to “when

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238. See Marin K. Levy, *Panel Assignment in the Federal Courts of Appeals*, 103 CORNELL L. REV. 65, 66 (2017) (“It is common knowledge that the federal courts of appeals typically decide cases in panels of three judges.”).

239. See FED. R. APP. P. 35(a) (referring to “hearing or rehearing”); Alexandra Sadinsky, Note, *Redefining En Banc Review in the Federal Courts of Appeals*, 82 FORDHAM L. REV. 2001, 2004 (2014).

240. FED. R. APP. P. 35(a)(2) (emphasis added). In rare instances, judges may call for en banc review before a panel has considered the merits in the first instance. See, e.g., Lorelei Laird, *Hawaii asks to go straight to 9th Circuit en banc review of Trump travel ban preliminary injunction*, ABA J. (Apr. 12, 2017, 5:48 PM CDT), [https://www.abajournal.com/news/article/hawaii\\_asks\\_to\\_skip\\_straight\\_to\\_en\\_banc\\_review\\_of\\_trump\\_travel\\_ban\\_prelimin](https://www.abajournal.com/news/article/hawaii_asks_to_skip_straight_to_en_banc_review_of_trump_travel_ban_prelimin) [https://perma.cc/K74F-CE6F] (describing “the usual procedure, in which a three-judge panel makes the initial decision and the parties have the option to appeal to the full court”).

241. See 28 U.S.C. § 2071 (2018) (“The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business.”); see also A. Benjamin Spencer, *Substance, Procedure, and the Rules Enabling Act*, 66 UCLA L. REV. 654, 657 n.9 (2019) (explaining the process through which Congress oversees the judiciary’s rule creation process). But see Blackman, *supra* note 222 (questioning the constitutionality of the Rules Enabling Act).

242. See Sadinsky, *supra* note 239, at 2018–20 (describing various courts’ considerations of “importance”).

hearing or rehearing in banc *will* be ordered” to instead speak to “when hearing or rehearing en banc *may* be ordered.”<sup>243</sup> That amendment highlights the discretionary nature associated with ordering en banc review, pursuant to which courts of appeals may exercise a form of discretion similar to that exercised by the Supreme Court in the certiorari process.<sup>244</sup> By exercising such discretion, en banc courts could largely limit their nondelegation holdings to those statutes that the courts determine to present “important” (*i.e.*, major) questions.

#### CONCLUSION

A threshold question relating to the major questions doctrine has yet to be answered: Who determines majorness? One possible answer is that Congress decides what is major. Indeed, that answer appears to be an implicit presumption underlying the current major questions doctrine, pursuant to which courts are understood as determining whether Congress has delegated authority. But if Congress determines majorness, textualists should reject the major questions doctrine as calling on courts to complete a task that is ordinarily futile and statutorily suspect.

A second possible answer to the threshold question is that the courts determine majorness for themselves. That answer best describes how the major questions doctrine currently works in practice. The answer also describes how a strengthened form of the doctrine might be used in the future as part of a revived nondelegation doctrine. But if courts are to determine majorness for themselves, textualists should reject the doctrine as purporting to provide courts with a supreme political veto power upsetting the exclusive

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243. FED. R. APP. P. 35 advisory committee's note to 1998 amendment (emphasis in original) (capitalization altered).

244. The twelve geographic circuit courts of appeals each have internal operating procedures relating to en banc procedures. *See, e.g.*, 1ST CIR. R. 35(a) (referring to FED. R. APP. P. 35(a), which states that en banc review is not favored and ordinarily will not be ordered unless “the proceeding involves a question of exceptional importance”); 11TH CIR. R. 35-3 (en banc consideration is intended “to bring to the attention of the entire court a precedent-setting error of exceptional importance”).

lawmaking procedures outlined in Article I, Section 7.

For textualists interested in reviving the nondelegation doctrine, then, strengthening the major questions doctrine is the wrong way forward. Instead of burdening a revived nondelegation doctrine with the baggage accompanying the judicially crafted major questions doctrine, textualists wishing to limit the application of the nondelegation doctrine to “major” questions may find themselves more comfortable exercising the grants of discretion afforded to courts in the certiorari and en banc processes. By exercising such discretion, en banc courts could largely limit their nondelegation holdings to those statutes that the courts determine to present “important” (*i.e.*, major) questions.