DOES THE MAJOR QUESTIONS DOCTRINE GET CONGRESS RIGHT?

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INTRODUCTION

The emergence of the major questions doctrine (MQD) as a "doctrine" has generated enormous scholarly and political backlash. Advocates of the doctrine on the Supreme Court have been accused of using the doctrine to promote "judicial self-aggrandizement,"[1] and as a screen for "politically and ideologically infused judgments"[2] on important policy issues. While much of this criticism focuses on the broader policy implications of the doctrine and its role in the ongoing controversy over the administrative state,[3] the doctrine has also prompted a specific debate about Congress.

In simple terms, an emerging version of the MQD relies on a specific understanding about Congress and congressional intent.[4] That version, championed by Justice Barrett and endorsed by some scholars, rejects the notion that the doctrine is an adjunct of the nondelegation doctrine, a substantive canon used to interpret statutes narrowly to avoid constitutional problems. Instead, this version claims that the doctrine is simply a linguistic canon, a common-sense means of interpreting statutes based on a specific understanding of legislative intent.[5] That view claims that Congress does not intend to hide delegations of power to decide major questions in vague or obscure statutory provisions. When it does intend to grant such powers, it does so explicitly and clearly.[6] Thus, courts should not interpret ambiguous statutory provisions as granting authority over major questions.

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[1] Beau J. Baumann, *Americana Administrative Law*, 111 GEO. L. J. 465 (2023).

[2] Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1065 (2023).

[3] A longstanding controversy that is treated at length in JOSEPH POSTELL, BUREAUCRACY IN AMERICA (2017).

[4] Writers recognized this before the doctrine was officially embraced by the Court. *See, e.g.*, Jonas J. Monast, *Major Questions about the Major Questions Doctrine*, 68 ADMIN. L. REV. 445, 463 (2016) ("The principle of implied delegation may also explain the emergence of the major questions doctrine"); *see also* Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 232 (2006) ("The most plausible source of the idea that courts should not defer to agencies on larger questions is the implicit delegation principle, accompanied by an understanding of what reasonable legislators would prefer.").

[5] In scholarship, this view is most notably advanced by Ilan Wurman, *Importance and Interpretive Questions*, 110 VA. L. REV. 909 (2024). Justice Barrett defended the doctrine on this basis in *Biden v. Nebraska*, *see infra* Part I.B.

[6] As Justice Scalia famously put it, this view claims that Congress "does not hide elephants in mouseholes." Whitman v. American Trucking, 531 U.S. 457, 468 (2001).

Opponents of the major questions doctrine have criticized this presupposition about congressional intent as unsupported by evidence and incorrect.[7] This essay focuses on this concern. After laying out the history and development of the MQD and the emergence of the debate over congressional intent in *Biden v. Nebraska*[8] and subsequent commentary, it surveys the political science research and applies it to this debate.[9]

I. THE DOCTRINE'S HISTORY AND (CONTESTED) FOUNDATIONS

Though it was not formulated explicitly as a "Major Questions Doctrine," hints of such a doctrine or canon of statutory interpretation appeared well before 2021 in both scholarship and judicial decisions. In 1986, for instance, then-Judge Stephen Breyer wrote that when interpreting a statute, "[a] court may also ask whether the legal question is an important one. 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."[10] In the same article then-Judge Breyer claimed that courts' focus on legislative intent was "a kind of legal fiction," but a useful one that would enable courts to tailor judicial scrutiny to account for the variety of forms of congressional delegations.[11]

In support of his claim that Congress is more likely to decide "major questions" and leave "interstitial matters" to agencies, then-Judge Breyer cited a number of cases, suggesting a historical basis for this proposition.[12] Later defenders of the MQD have also cited older cases in order to rebut criticism that the doctrine is a recent judicial invention. In the Court's most recent decision involving the doctrine, Justice Barrett wrote a concurring opinion which argued that the doctrine "is neither 'made-up' or 'new'" as Justice Kagan alleged in dissent. "On the contrary," Justice Barrett claimed, "it appears in a line of decisions spanning at least 40 years."[13] In a

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[7] *See, e.g.*, Baumann, *supra* note 1, at 474, 476 (describing the doctrine as "rely[ing] on wrongheaded claims about Congress" and calling on scholars to "collaborate with experts on Congress to project reality onto the Supreme Court").

[8] 143 S. Ct. 2355 (2023).

[9] Those who are deeply familiar with the history and development of the doctrine will not find much new in the first part of this article and can freely skip ahead to Part II.

[10] Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN L. REV. 363, 370 (1986). A recent contribution to the *Yale Law Journal Forum* argues that while Justice Breyer's work inspired the Major Questions Doctrine, and even perhaps gave it its name, his version differs significantly from that employed by other justices. Thomas B. Griffith & Haley N. Proctor, *Deference, Delegation, and Divination: Justice Breyer and the Future of the Major Questions Doctrine*, 132 YALE L. J. FORUM 693 (2022).

[11] Breyer, *supra* note 10, at 370.

[12] *Id.* Then-Judge Breyer cited Montana v. Clark, 749 F.2d 740 (D.C. Cir. 1985); Mayburg v. Sec'y of Health & Hum. Servs., 740 F.2d 100 (1st Cir. 1984); Constance v. Sec'y of Health & Hum. Servs., 672 F.2d 990 (1st Cir. 1982). Then-Judge Breyer himself was the author of the opinion in *Constance*, which was decided before *Chevron*, in which he wrote: "The extent of . . . deference, on a question of law is a function of Congress's intent on the subject as revealed in the particular statutory scheme at issue. Where Congress is silent, common sense suggests that the less important the question of law, the more interstitial its character . . . the less likely it is that Congress wished the courts to remain indifferent to the agency's views." *Constance*, at 995–96 (internal citations omitted). In other words, then-Judge Breyer's iteration of the MQD in *Constance* was less about whether Congress had given an agency substantive authority, than whether Congress wished the courts to grant deference to an agency's exercise of that authority. Then-Judge Breyer also wrote the First Circuit's opinion in *Mayburg*, decided after *Chevron*, which largely parroted the language of his opinion in *Constance*.

[13] *Biden v. Nebraska*, 143 S. Ct. at 2381 (Barrett, J., concurring).

footnote, she suggested that the doctrine "may have even deeper roots" than that, citing a decision involving the Interstate Commerce Commission in 1897.[14]

Justice Barrett's history, as well as those sketched by others, highlight two important cases often cited as early applications of the doctrine.[15] In the first, a 1980 decision colloquially known as the *Benzene Case*,[16] the Supreme Court overturned an Occupational Health and Safety Association (OSHA) rule regulating exposure to benzene in the workplace. Writing for a four-justice plurality, Justice Stevens argued that OSHA's interpretation of the statute, if allowed to stand, would render the statute "such a sweeping delegation of legislative power that it might be unconstitutional . . . . A construction of the statute that avoids this kind of open-ended grant should certainly be favored."[17] In other words, OSHA's interpretation of the statute implicated the Constitution's nondelegation doctrine, and the Court would reject OSHA's interpretation to avoid such an outcome.

The second decision, *Food and Drug Administration (FDA) v. Brown & Williamson*,[18] came twenty years later. In *Brown & Williamson* the Court determined that the Food, Drug, and Cosmetic Act did not grant authority to the FDA to regulate tobacco products, in spite of the fact that the statute authorized the agency to regulate "drug[s]" and "drug delivery device[s]." Justice O'Connor, writing for the Court, analyzed the statute as a whole, as well as other subsequent congressional actions, and concluded that Congress did not intend to grant the authority in question to the FDA. Near the end of the opinion the Court acknowledged that the "inquiry . . . is shaped, at least in some measure, by the nature of the question presented."[19] While the Court will typically interpret statutory ambiguities as implicit delegations to agencies, "[i]n extraordinary cases . . . there may be reason to hesitate before concluding that Congress has intended such an implicit delegation."[20] Though the Court did not explicitly invoke a major questions doctrine, it was clearly indicating that the political significance of tobacco regulation affected the Court's reading of the statutory language. When such important issues are at stake, the Court explained, Congress would not be expected "to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[21]

A. The New Major Questions Doctrine as a Substantive Canon

In short, there were echoes of the major questions doctrine well before the Court's official embrace of the doctrine in recent years, but those cases were sporadic and did not offer robust defenses of the theoretical basis for the doctrine.

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[14] *Id.* (citing Interstate Com. Comm'n v. Cincinnati, New Orleans, & Tex. Pac. Ry. Co., 167 U.S. 479, 494–95 (1897)).

[15] Judge Thomas Griffith and Haley Proctor emphasize the importance of a third case, *MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218 (1994), which "laid the groundwork for what has become known as the major questions doctrine." Griffith & Proctor, *supra* note 10, at 696.

[16] Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607 (1980).

[17] *Id.* at 646.

[18] 529 U.S. 120 (2000); *see* Griffith & Proctor, *supra* note 10, at 694 (stating that *FDA v. Brown & Williamson* "contains the seminal statement of the major questions principle.")

[19] *Brown & Williamson*, 529 U.S. at 159.

[20] *Id.*

[21] *Id.* at 160.

The use of a major questions principle to limit agency assertions of authority went from episodic to seemingly ubiquitous in the summer of 2021 and the following term. As Professor Mila Sohoni writes, during this brief period, a "major questions quartet" of decisions, all of which addressed highly salient political issues, thrust the doctrine into the spotlight.[22] To dramatically oversimplify, in these cases, the Court imposed a requirement that, when major questions are at stake, Congress must clearly indicate its intention that the agency possesses the power to decide such questions.[23] In the final case in the quartet, *West Virginia v. EPA*,[24] Chief Justice Roberts took the final step and embraced the "label" of the major questions doctrine.[25]

This version of the doctrine differs from its earlier manifestations in then-Judge Breyer's opinions and *FDA v. Brown & Williamson* (though not from the *Benzene Case*). In those decisions the courts applied the doctrine as a principle affecting the extent of deference granted to judicial review of agencies' interpretations of statutes. The new version of the doctrine was, to be sure, a principle of statutory construction, but one which determined whether the agency had the power to act *at all*, rather than a principle determining the legally correct exercise of agency authority.[26] Both versions, however, are rooted in assumptions about congressional intent.

The Court's opinions in these cases understandably generated confusion among scholars. Professors Daniel Deacon and Leah Litman noted that "the new major questions doctrine is decidedly less textualist than its prior incarnations."[27] Justice Kagan was also quick to note the tension between the MQD and textualism in her dissenting opinion in *West Virginia v. EPA*, quipping that the doctrine now served as a "get-out-of-text-free-card[]."[28] These critics suggested that a purportedly textualist Court was now smuggling in substantive canons of statutory interpretation to justify departing from statutory text when an issue is sufficiently important.

In addition, to the doctrine's skeptics, the contours of this "New Major Questions Doctrine" ensure that it takes on a decidedly political valence. It entrenches the rule of minority parties and interest groups by putting the focus on congressional action or inaction. In today's political environment the emphasis on legislative action gives the doctrine a decidedly Republican tilt; because of structural advantages the Republican Party enjoys "the Democratic Party may be more likely to try and effectuate their preferred policies through the executive branch and administrative agencies rather than through legislation."[29]

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[22] Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 262 (2022).

[23] *Id.* at 267.

[24] 142 S. Ct. 2587 (2022).

[25] *Id.* at 2609.

[26] Professor Cass R. Sunstein discusses this difference in recent work. *See* Cass R. Sunstein, *There are Two "Major Questions" Doctrines*, 73 ADMIN L. REV. 475 (2021).

[27] Deacon & Litman, *supra* note 2, at 1040. *See also* Sohoni, *supra* note 22, at 282–90.

[28] *West Virginia*, 142 S. Ct. at 2641 (2022) (Kagan, J., dissenting).

[29] Deacon & Litman, *supra* note 2, at 1085. The "structural advantage" to which Professors Deacon and Litman refer is related to the "first past the post," single-member district system of congressional representation. In these systems, one party's national numerical majority may not translate to a congressional majority if votes are concentrated in some districts. Thus, winning control of Congress is easier for parties whose constituencies are more diffuse, as opposed to parties with high numbers of urban voters. *See, e.g.*, Jonathan S. Gould and David E. Pozen, *Structural Biases in Structural Constitutional Law*, 97 N.Y.U. L. REV. 59 (2022).

B. Justice Barrett's "Linguistic Turn"[30]

Given the doctrine's political salience and the prospect that it will consume much of the Court's attention in the years ahead, it is necessary to consider whether the doctrine rests on a coherent and defensible ground. As Professor Sohoni argues, "[t]o inflict a consequence of this scale on the political branches demands a *justification* from the Court, not a rain check. Yet a rain check is all we got" during the 2022 term.[31]

To be fair, Justice Gorsuch wrote separately in *West Virginia v. EPA* to offer a justification for the doctrine: namely, Article I's Vesting Clause and the nondelegation doctrine. Justice Gorsuch argued that the MQD is a clear-statement rule, a substantive canon that helps to "ensure that acts of Congress are applied in accordance with the Constitution in the cases that come before us."[32] By requiring Congress to speak clearly when it delegates power over matters of political and economic significance, in Justice Gorsuch's view, the Court protects the Constitution's separation of powers by preventing the executive from assuming powers not granted. As Justice Gorsuch summarized, "Much as constitutional rules about retroactive legislation and sovereign immunity have their corollary clear-statement rules, Article I's Vesting Clause has its own: the major questions doctrine."[33] In sum, Justice Gorsuch sought to ground the doctrine in the substantive provisions of the Constitution's separation of powers. Even if doing so would not follow the most natural reading of a statutory text, the Court should err on the side of protecting the Constitution when interpreting statutes in cases involving administrative agencies' assertions of authority.

Justice Gorsuch's theory of the doctrine as a substantive canon generated a response, in a later case, from Justice Barrett. Writing separately in *Biden v. Nebraska*, Justice Barrett acknowledged that "[s]ome have characterized the major questions doctrine as a strong-form substantive canon designed to enforce Article I's Vesting Clause."[34] Justice Barrett offered a different view of the doctrine, however. In her view, the doctrine is consistent with textualism, but examines text in context to reach the most common-sense reading of the text. When a principal (Congress) delegates power to an agent such as an administrative agency, one should assume that power over major issues would be explicitly granted rather than implied. Justice Barrett claimed that this assumption was "rooted in the basic premise that Congress normally intends to make major policy decisions itself, not leave those decisions to agencies."[35] It is true that Justice Barrett rejects the notion that congressional intent should be determinative of a statute's meaning.[36] However, in her view, congressional intent is relevant because it helps us determine what a reasonable interpreter would think about the major questions doctrine. As she explained, "a reasonable

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[30] Kevin Tobia, Daniel E. Walters & Brian Slocum, *Major Questions, Common Sense?*, 97 S. CAL. L. REV. (forthcoming June 2024) (manuscript at 5).

[31] Sohoni, *supra* note 22, at 266.

[32] *West Virginia*, 142 S. Ct. at 2616 (Gorsuch, J., concurring).

[33] *Id.* at 2619 (Gorsuch, J., concurring)

[34] Biden v. Nebraska, 143 S. Ct. 2355, 2377 (2023) (Barrett, J., concurring).

[35] *Id.* at 2380 (Barrett, J., concurring).

[36] Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 UNIV. CHI. L. REV. 2193, 2200 (2017).

speaker would not understand Congress to confer an unusual form of authority without saying more."[37]

This dispute between the "substantive canon" and "linguistic canon" versions of the MQD leaves the status of the doctrine in limbo, with foundations that are uncertain. As Professors Kevin Tobia, Daniel Walters, and Brian Slocum explain, "the MQD is undertheorized, and it remains a canon in search of a justification."[38] Justice Barrett's view of the doctrine as a linguistic canon, in particular, rests on claims about Congress that require further investigation and support. The remainder of this article focuses on this question.

II. CLAIMS ABOUT CONGRESS

The debate over the MQD, or at least Justice Barrett's version of the doctrine, has largely become a debate about what Congress intends when it writes statutes.[39] The question can be stated simply: does Congress "hide elephants in mouseholes?"[40] That is, does Congress typically intend to give power to agencies to assume authority over matters of economic and political significance, through vague and implicit delegations?

Defenders of the doctrine, as indicated above, argue that it gets Congress's intent right. Congress, according to this view, does not ordinarily intend to give agencies power over matters of vast economic and political significance by implication. This is a descriptive claim that needs to be evaluated. It cannot be fully evaluated in a brief article, but this Part reviews some political science theories that are relevant to the descriptive claim.

The MQD's critics have pounced on the failure of the Court thus far to defend that descriptive claim, and several claim that it cannot be defended.[41] As Professor Ronald Levin argues, the doctrine "relies heavily on a factual premise that is so much at odds with the premises underlying decades of previous decisions" involving the nondelegation doctrine, and its recent decisions "have never offered more than unadorned ipse dixits" to justify this factual premise.[42] Professors Deacon and Litman object that Justice Barrett's version of the doctrine "assumes Congress would not license agency acts with 'major' effects through broad general language. As a descriptive claim about Congress's intent, that statement is contestable, at least when applied across the board."[43]

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[37] Biden v. Nebraska, 143 S. Ct. at 2383 (Barrett, J., concurring).

[38] Tobia et al., *supra* note 30 (manuscript at 3).

[39] This is not to say that congressional intent *should* be the focus of the debate on the doctrine's foundations. Perhaps Congress's intent should not matter, and the debate should be over the meaning of text rather than intent. Perhaps the ordinary understanding of a statute's meaning should matter more than the intent of the enactor. These are legitimate questions and scholars have focused on them to some extent. *See id.* (arguing that the MQD is not grounded in the ordinary person's understanding of language and law); *see also* Barrett, *supra* note 36.

[40] The "elephants in mouseholes" formulation comes from Justice Scalia's opinion in *Whitman v. American Trucking*, 531 U.S. 457, 468 (2001).

[41] Wurman, *supra* note 5, at 952 ("A recurring criticism of the Court's major questions doctrine . . . is that Congress does in fact delegate important questions to agencies.").

[42] Ronald M. Levin, *The Major Questions Doctrine: Unfounded, Unbounded, and Confounded*, 112 CAL. L. REV. 101, 145 (forthcoming 2024). *See also id.* at 147 ("the factual premises of the major questions doctrine presumption are inherently speculative.").

[43] Deacon & Litman, *supra* note 2, at 1047.

Thankfully, there is a voluminous political science scholarship on the dynamics of congressional delegation that can help answer this question. Drawing upon this work helps to assess this underlying factual premise and close the gap between the Court's approach to statutory interpretation and the realities of congressional legislating. Unfortunately, however, this research both answers some descriptive questions and raises many more.

A. The Abdication Thesis

There is something ironic about the claim, offered by defenders of the MQD, that Congress does not hide elephants in mouseholes. For decades, it has been a standard *criticism* of Congress that it is *too inclined* to do so.

There is a longstanding "congressional abdication thesis" in the scholarship on delegation. This thesis begins with the view that members of Congress care more about re-election than about maintaining control of policymaking authority. Members, therefore, are relatively indifferent to the policy choices made by administrative agencies.[44] The chief goal of members is reelection, and delegation allows them to maximize that goal by shifting authority to less accountable actors, rendering delegation a rational response to the prioritization of popularity over policymaking. In other words, the abdication hypothesis suggested that members actually accomplished their goals through delegation, since the goal of reelection was more important to them than the goal of expanding their own power. Again, for some years, political scientists and legal scholars emphasized this rationale for delegation (and it still prevails in some circles).[45] Justice Gorsuch offered a version of this thesis when he dissented in *Gundy v. United States*.[46] There, he explained that the Sex Offender Registration and Notification Act was vaguely written because "members of Congress could not reach consensus on the treatment of pre-Act offenders," creating "one of those situations where they found it expedient to hand off the job to the executive."[47]

The abdication hypothesis yielded a relatively straightforward, oversimplified view of Congress's reasons for delegating to the administrative state. This straightforward account is summarized by a famous paragraph from Morris Fiorina's *Congress: Keystone of the Washington Establishment*:

> The nature of the Washington system is now quite clear. Congressmen (typically the majority Democrats) earn electoral credits by establishing various federal programs (the minority Republicans typically earn credits by fighting the good fight). The legislation is drafted in very general terms, so some agency, existing or newly established, must translate a vague policy mandate into a functioning program, a process that necessitates the promulgation of numerous rules and regulations and, incidentally, the trampling of numerous toes. At the next stage, aggrieved and/or hopeful constituents petition their congressman to intervene in the complex (or at least obscure) decision processes of the bureaucracy. The cycle closes when the congressman

[44] D. RODERICK KIEWIET & MATHEW MCCUBBINS, THE LOGIC OF DELEGATION (1991). Professors Kiewiet and McCubbins acknowledge the conventional wisdom that Congress loses its authority when it delegates, but they offer a provisional challenge. While they accept that Congress's ability to monitor and control the behavior of agencies is limited, they also chronicle ways in which Congress can extend greater control over the bureaucracy.

[45] *See, e.g.*, MORRIS P. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT (2d ed. 1989); DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993).

[46] 139 S. Ct. 2116 (2019).

[47] *Id.* at 2143 (Gorsuch, J., dissenting).

> lends a sympathetic ear, piously denounces the evils of bureaucracy, intervenes in the latter's decisions, and rides a grateful electorate to ever more impressive electoral showings. Congressmen take credit coming and going. They are the alpha and the omega.[48]

This account of congressional delegation emphasizes the electoral incentives that members of Congress face. Broad delegations of power to agencies give electoral credit to members of Congress because they voted for abstract goals like clean air, affordable healthcare, safe workplaces, and the like. Agencies are responsible for imposing the costs associated with achieving those benefits, but they are not electorally accountable, so members of Congress can take credit for the good achieved by legislation without suffering blame for the ill. Broad delegations, in this view, facilitate members' electoral goals.

This hypothesis casts doubt on the major questions doctrine. If members are incentivized to delegate authority over major questions because they care more about election than policy outcomes, then it is difficult to maintain that Congress does not intend to hide elephants in mouseholes.

The abdication hypothesis points to a second reason that Congress is incentivized to delegate broadly to the administrative state. Congress was deliberately designed, through structural features like bicameralism, to make legislating difficult. Furthermore, the rules of each chamber produce a number of additional "vetogates" that make passing law a challenging affair.[49] To overcome these impediments legislation has to reach some sort of broader consensus than bare majority support. Delegation helps to achieve this consensus by kicking some controversial issues to the administrative process.[50]

This conventional account offered by the abdication hypothesis, again, supports criticisms of the major questions doctrine. It suggests that Congress benefits from and is incentivized to delegate broadly to administrative agencies, and casts doubt on the presumption 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."[51] In fact, it suggests that the major questions are the ones Congress is *least* likely to address in legislation, since they are likely to be the most controversial and therefore the least electorally beneficial questions for members to answer in the statute.

B. Congress's Use of Indirect Control Mechanisms

The abdication hypothesis, however, does not adequately or fully explain congressional delegation. Although Congress does use delegation to transfer politically controversial issues to the bureaucracy, it uses numerous and indirect means to control the exercise of these powers (or at least, it used such means when most of the statutes were enacted). These means are often subtle and indirect, and they are usually exercised not by Congress as a whole, but by a small (and

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[48] FIORINA, *supra* note 45, at 46–47.

[49] *See generally* William N. Eskridge, *Vetogates*, Chevron, *Preemption*, 83 NOTRE DAME L. REV. 1441 (2008).

[50] DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS: A TRANSACTION COST APPROACH TO POLICY MAKING UNDER SEPARATE POWERS (1999). For a more extensive discussion of their specific findings, *see* Joseph Postell, *The Legislative Politics of Legislative Delegation* (Ctr. for the Study of the Admin. State, Working Paper No. 19-03, 2019) (manuscript at 17–20).

[51] Breyer, *supra* note 10, at 370.

generally unrepresentative) subset of members. In short, Congress often addresses major questions indirectly through statutory design as a whole as well as other means.

The most obvious method of congressional control over administrative policy is the use of oversight and appropriations processes. As Professor Joshua Chafetz explains in *Congress's Constitution*, Congress uses these powers and other non-statutory powers to assert its influence over policy.[52] Agencies rely on annual appropriations and ongoing authorization of their programs, both of which come from Congress, particularly the committees with jurisdiction over those matters. Thus, agencies have traditionally been highly responsive to those committees and to Congress generally.[53] Congress does not, in other words, delegate power to the bureaucracy willy-nilly. It controls the exercise of that power, even if it does not use statutory language to do so directly.

Among those *ex post* controls on agency decisionmaking, the role of the legislative veto merits special mention. The majority of major regulatory statutes were initially enacted before the Supreme Court's momentous ruling in *INS v. Chadha*,[54] which found legislative vetoes unconstitutional. When Congress passed those statutes in the pre-*Chadha* world, it was legislating under the presumption that, in many cases, agencies could be checked through one-house legislative vetoes. As Philip Wallach has recently written, "in the 1970s it became standard practice to include multiple [legislative] vetoes in a single bill, thereby giving committees many opportunities to intervene with agencies' ongoing work without having to pass new legislation."[55] The overall effect of these powers – appropriation, authorization, legislative vetoes, and oversight generally – led political scientists to suggest a "congressional dominance" model in which the Congress controlled the administrative state to a much greater extent than the other institutions of the federal government.[56]

In addition to oversight and appropriation, Congress routinely exercises control over administrative policies through the structure and procedural requirements it imposes on agencies in statutes themselves. Structurally, Congress is more likely to insulate an agency or program from presidential control when it suspects that presidents' preferences will diverge from its own.[57] Congress is often effective at using insulation to ensure that an agency will follow its preferences rather than the President's.[58] As Professor Sarah Binder and Mark Spindel have explained with regard to the Federal Reserve, so-called "independent" agencies are often

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[52] JOSHUA A. CHAFETZ, CONGRESS'S CONSTITUTION (2017). As I suggest in Part II.C, in the twenty-first-century Congress many of the powers Professor Chafetz identifies are in decline or even disuse.

[53] To be fair to advocates of the abdication thesis such as Professors Fiorina and Schoenbrod, this is something that they well understood and explained. Their point was not that Congress had completely abdicated its authority, but that delegation combined with *ex post* controls on particular policy decisions allowed Congress as a whole to avoid electoral accountability. This point is further developed by Naomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463 (2015).

[54] 462 U.S. 919 (1983).

[55] PHILIP WALLACH, WHY CONGRESS 113 (2023).

[56] *See id.* at 114, though Wallach also notes that this view was "almost certainly overstated."

[57] DAVID E. LEWIS, PRESIDENTS AND THE POLITICS OF AGENCY DESIGN 16 (2003).

[58] David E. Lewis, *The Adverse Consequences of the Politics of Agency Design for Presidential Management in the United States: The Relative Durability of Insulated Agencies*, 34 BRIT. J. POL. SCI. 377, 379, 400 (2004).

independent only of the President, and consequently more closely controlled and monitored by Congress.

In sum, while Congress often delegates power to administrative agencies, it controls and constrains the exercise of that power through indirect means such as the agency's structure. By insulating agency personnel from the President, Congress can tie agencies closer to itself.

In addition to structural features, Congress uses procedural controls to give interested parties and groups influence over the implementation of a statute in order to prevent bureaucratic drift away from the preferences of the coalition that enacted the original statute.[59]

These procedural requirements, such as those contained in the Administrative Procedure Act, National Environmental Policy Act, and Freedom of Information Act, empower outside groups to act as proxies for Congress. These laws "enhance the ability of political principals" in Congress "to solve their agency control problems."[60] They extend Congress's control over the bureaucracy indirectly. While Congress can try to make policy decisions directly, either by amending statutes or by using its oversight and appropriations processes, there are problems associated with relying exclusively on those mechanisms. Most obviously, they only control agency decisions after the fact. In addition, legislative oversight is time-intensive and requires members to expend resources. Information asymmetries between agencies and Congress exacerbate these costs.[61]

To overcome these transaction costs associated with controlling how policy is implemented, members use procedural requirements. Procedures that determine who can participate in the administrative process decide who gets to influence agency behavior. Administrative procedures that require notice-and-comment, and robust consideration and responses to public input, empower outside interest groups who may be aligned with the members of Congress who enacted the legislation in the first place.[62] These groups influence and control administrative agencies on behalf of Congress and reduce the need for active monitoring by members themselves. Procedures narrow delegations that appear to be broad in substance because, in practice, they limit the discretion and independence of administrative agencies.[63]

Scholarship suggests that Congress has acted this way for a long time. For example, Professor George Lovell notes that in enacting the Clayton Act establishing the Federal Trade Commission, "participants in the legislative process made strategic decisions that created or limited the opportunities for judges to influence labor politics." "The ability of participants to anticipate the

[59] *See* Mathew McCubbins, Roger Noll & Barry Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J. L. ECON. & ORG. 243 (1987); Mathew McCubbins, Roger Noll & Barry Weingast, *Structure and Process; Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989). *See also* Thomas Gilligan, William Marshall & Barry Weingast, "*Regulation and the Theory of Legislative Choice: The Interstate Commerce Act of 1887*, 32 J. L. ECON. 35 (1989). McCubbins, Noll, and Weingast co-authored frequently and are often referred to collectively as "McNollgast," a convention which this article will use hereafter.

[60] McCubbins et al., *supra* note 59, at 255.

[61] *Id.* at 249–53.

[62] *Id.* at 244 ("procedures can be used to enfranchise important constituents in agency decisionmaking processes, thereby ensuring that agencies are responsive to their interests.").

[63] Mathew McCubbins, *The Legislative Design of Agency Procedure*, 29 AM. J. POL. SCI. 721 (1985).

important role that judges would play allowed them to engage in a variety of strategic behaviors that made the outcomes of legislative processes ambiguous and sometimes deceptive."[64]

It is difficult to measure the effectiveness of this strategy.[65] But whether or not such strategies are effective, the evidence does suggest that members of Congress employ them and that they are indicative of legislative intent.[66] In fact, more recent research has noted that Congress uses procedure not only to solve the problem of agency control, but also to prevent subsequent congresses from disturbing the policy that the original coalition enacted.[67] The fact that Congress uses *ex post* controls to limit agency discretion is not the same thing, of course, as Congress enacting specific statutes. But it does suggest that Congress intends to retain control over agency decisions rather than leaving the agencies free to make them.

C. Implications for the Major Questions Doctrine

Where does this leave the major questions doctrine? Let's start with the most obvious implication: laws that *appear* to grant broad authority to agencies often *limit* agency authority through indirect means. Congress does not grant *carte blanche* to agencies in these statutes; it strategically and indirectly limits agencies. As a descriptive matter, it is incorrect to read these statutes as having given control over major questions entirely to agencies. When Congress gives power to agencies to decide important and controversial issues, it is careful to build mechanisms to ensure that it retains some measure of control over them. The major questions doctrine's assumption that Congress does not intend to abdicate authority through broad statutory mandates to agencies is correct. These mandates appear open-ended but are paired with control mechanisms that limit agency discretion.

To illustrate, consider the "babysitter analogy" that Justice Barrett used to support her interpretation of the MQD as a linguistic canon. In that analogy, the parents give the babysitter

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[64] GEORGE L. LOVELL, LEGISLATIVE DEFERRALS: STATUTORY AMBIGUITY, JUDICIAL POWER, AND AMERICAN DEMOCRACY 103, 253 (2003).

[65] Some studies suggest that the effect of procedures on policy outcomes is limited. *See* Steven J. Balla, *Administrative Procedures and Political Control of the Bureaucracy*, 92 AM. POL. SCI. REV. 663 (1998) (finding that the Health Care Financing Administration was more responsive to physicians than Medicare beneficiaries in spite of procedures favoring the latter); David B. Spence, *Managing Delegation Ex Ante: Using Law to Steer Administrative Agencies*, 29 J. LEG. STUD. 413 (1999) (arguing that only some of the *ex ante* political tools imposed on FERC had noticeable effects on the agency's decisions).

[66] As Professor Sean Gailmard summarizes, "on the whole this literature has found that McNollgast's arguments significantly help in explaining the contours of administrative procedure." Sean Gailmard, Mathew D. McCubbins, Roger G. Noll, and Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, *in* OXFORD HANDBOOK OF CLASSICS IN PUBLIC POLICY AND ADMINISTRATION 465, 477 (2015).

[67] As Murray Horn and Professor Kenneth Shepsle explained in a commentary on McNollgast, "the enacting coalition must try to protect the deal it has struck at enactment from the predations of *various* actors – it must worry not only about the potential for bureaucratic drift . . . but also about the influence of subsequent political coalitions." Murray J. Horn and Kenneth A. Shepsle, *Commentary on "Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies": Administrative Process and Organizational Form as Legislative Responses to Agency Costs*, 75 VA. L. REV. 499, 499 (1989). For specific studies, *see* B. Dan Wood & John Bohte, *Political Transaction Costs and the Politics of Administrative Design*, 66 J. POL. 176 (2004) (examining 141 agencies created between 1879 and 1988 and finding that Congress designs agencies to prevent future coalitions from altering policy); Matthew Potoski & Neal D. Woods, *Designing State Clean Air Agencies: Administrative Procedures and Bureaucratic Autonomy*, 11 J. PUB. ADMIN. RES. AND THEORY 203 (2001) (finding that administrative procedures imposed on state-level air pollution control agencies have significant effects on agency autonomy and interest-group influence).

their credit card and say, "Make sure the kids have fun." Congress does nothing like this when it grants authority to agencies. It issues a vague command subject to numerous structural, procedural, and other controls. A more apt metaphor would have the parents give the babysitter the credit card and say, "Make sure the kids have fun," but also require the babysitter to consult other parents before making important decisions, and routinely check in with the parents to provide updates. These procedural requirements ensure that the babysitter exercises discretion but in a limited way. The major question doctrine is consistent with this view of congressional delegation.

This conclusion, while generally correct, varies considerably across particular circumstances. Congress in general does not delegate without retaining mechanisms for control, even if those mechanisms are indirect. But Congress's intent is likely to vary across the multitude of regulatory statutes, passed by different coalitions under different circumstances. In other words, the circumstances surrounding delegation are so varied that it is difficult to discern a single, coherent congressional intent on which a doctrine could be founded. The major questions doctrine either has to be tailored to meet this variability, or it would be vulnerable to criticisms that it is based on a mistaken view of congressional intent.

One problem has to do with how Congress has evolved over time. Most of the statutes that make up the modern administrative state were enacted in the twentieth century, when Congress was a very different institution. It granted authority but used regular reauthorization, appropriation, budgeting, and oversight to control the exercise of that authority. The congresses that enacted these statutes knew they were giving significant power to the bureaucracy, but they also knew that authority was constrained by these indirect mechanisms.

That Congress is mostly gone.[68] As one recent article puts it, "the *Schoolhouse Rock!* cartoon version of the conventional legislative process is dead."[69] Today's Congress is less equipped to use and less interested in using indirect control mechanisms such as oversight, appropriations, and procedure to control the administrative process. The context in which the original regulatory statutes were enacted has changed. How does this affect the way we should understand Congress's intent in enacting these laws?

This raises another fundamental question: which Congress's intent matters? The Congress that enacted the statute in the first place, or the Congress that exists today? If we say that the enacting Congress's intent is the intention that matters, then the major questions doctrine seems to be based on an accurate model of congressional intent as it existed in the decades when most of the regulatory state was constructed. On the other hand, freezing the intention of a Congress

[68] *See generally* BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS (1997). Since the publication of Sinclair's landmark book, the trends she described have accelerated. *See generally* GARY W. COX AND MATHEW D. MCCUBBINS, SETTING THE AGENDA: RESPONSIBLE PARTY GOVERNMENT IN THE U.S. HOUSE OF REPRESENTATIVES (2005).

[69] Abbe R. Gluck, Anne Joseph O'Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1794 (2015).

that existed decades ago seems to raise concerns about democratic accountability, especially considering how difficult it is to change law in our constitutional system.[70]

In addition to this, it is necessary to consider whose intent within Congress matters. As Professor Kenneth Shepsle famously observed, "Congress is a 'They,' Not an 'It.'" Thus, to speak of legislative intent as a singular thing is to employ an "oxymoron" or a "myth."[71] Certainly many of the chief authors of the regulatory statutes that govern today, particularly the chairs of the House and Senate committees out of which they emerged, understood exactly what they were doing when they wrote procedural provisions into those statutes, conducted oversight, appropriated money, and reauthorized them. But the vast majority of the members were likely unaware of the practical effect these activities had on those programs. Thus, to say that the major questions doctrine is consistent with congressional intent because *some* members use these techniques to limit and constrain discretion is to allow the intention of some members of Congress to speak for the others.

CONCLUSION

Justice Barrett's reformulation of the major questions doctrine as a linguistic canon is premised on a correct premise about Congress: it does not simply give away authority to decide major questions.

However, the MQD also gets Congress wrong in its current form, insofar as it applies uniformly across-the-board. Congress is highly sophisticated when it delegates power, and the conditions under which it delegates power vary considerably across the variety of regulatory statutes. If the doctrine is to be based on a proper understanding of congressional intent, it will have to account for this variety, both theoretically, and in cases where the courts apply it to particular statutes.

[70] *See generally* WILLIAM N. ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION (1994). Professor Eskridge argues against the notion that a statute's meaning is fixed at the time of its enactment and should be interpreted in light of the intention of the enactors.

[71] Kenneth Shepsle, *Congress is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L. REV. L. AND ECON. 239, 239 (1992). *See also* Ryan D. Doerfler, *Who Cares How Congress Really Works?*, 66 DUKE L. J. 979, 998 (2017) (arguing that legislative intent is a fiction because "Congress as structured is reliably incapable of forming collective intentions other than the bare intention to enact text into law").