NOTE

THE MAJOR QUESTIONS DOCTRINE AND POST-ENACTMENT LEGISLATIVE HISTORY

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ABSTRACT

The major questions doctrine ("MQD") has quietly resurrected an interpretive tool that the Court foreswore during the textualist revolution: post-enactment legislative history. Starting with one of the earliest (proto) major questions cases, FDA v. Brown & Williamson*, and continuing through modern MQD cases like* Biden v. Nebraska*, the Court has relied on rejected bills, post-enactment statements by individual legislators, and congressional inaction to deny the executive branch claimed statutory authority. Justice Gorsuch defends the practice by claiming such evidence is relevant only to the antecedent inquiry of whether a question is "major." Justice Barrett, meanwhile, defends it on textualist grounds as ordinary statutory "context." But both defenses fail. Justice Gorsuch's is belied by the "antecedent" inquiry's dominant role in deciding the merits of major questions cases, and Justice Barrett's is vulnerable to the same critiques that textualists levied against earlier uses of post-enactment legislative history.*

This Note then asks whether the practice might at least serve the goal that some Justices have for the MQD—reinvigorating Congress as a lawmaking institution—by giving Congress a more flexible lawmaking tool. Post-enactment legislative history does not live up to that hope, at least as deployed in the MQD. First, where pre-textualist uses of post-enactment legislative history reflected judicial modesty in affirming the status quo (whether the existing judicial or executive construction of a statute), the MQD deploys the same evidence to displace it, reflecting judicial hubris rather than congressional empowerment. Second, the MQD's embrace of sub-bicameral signaling functions as a one-way ratchet, available only to strip the executive of authority, but never to make new law. Third, by treating rejected bills and offhand legislator remarks as evidence against executive power, the doctrine chills legislative activity. It discourages Presidents from first seeking congressional ratification before acting unilaterally, and it raises the cost of messaging legislation that serves useful informational and bargaining functions. The Court, this Note concludes, must decide whether it believes in bicameralism or not.

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* J.D. 2026, Harvard Law School; B.S. 2020, Georgetown University. I am grateful to Brian Frazelle, Todd Rakoff, Daphna Renan, Matthew Stephenson, and Ganesh Sitaraman for thoughtful comments, advice, and encouragement. Thank you to the editors of the *Harvard Journal on Legislation* for their helpful edits.

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I. INTRODUCTION

In the midst of an intra-party fight about how to accomplish student debt relief, then-Speaker of the House Nancy Pelosi claimed that President Biden would need to work with Congress—he could not go it alone.[1] But Speaker Pelosi eventually supported the President after Congress failed to act and President Biden turned to his independent statutory authority, supported by a new opinion from the Office of Legal Counsel. The Speaker must have been surprised, then, when the Supreme Court cited her earlier remark in striking down President Biden's action under the major questions doctrine ("MQD") in *Biden v. Nebraska*. Legislators who witnessed the saga play out might now think twice before questioning the authority of a President of their own party.

Legislative history usually ends when the President signs a bill into law. For purposivists, anything said up until that point should help a judge understand what Congress was thinking in enacting the law. Any legislative history past that point is, particularly in the wake of the textualist revolution at the Supreme Court, considered worthless or nearly worthless for understanding the earlier statute. But in some cases—both historically and today in MQD cases—courts have extended the timeline past the President's signature, reading congressional action short of formally amending prior legislation back onto the earlier legislation to help inform its meaning.

[1] *See infra* Parts III.C.4, IV.B.1 for a full description of this case.

The Court's embrace of such sub-bicameralism-and-presentment congressional signals—including hearings, committee reports, statements by legislators, or legislation that dies in committee or in one of the houses[2]—might at first blush empower Congress, fulfilling some jurists' goal for the MQD. By crediting low-cost signals, the MQD might help gridlocked Congress get back in the game of controlling delegations of legislative power to the executive and judiciary—particularly in construing so-called "common law statutes," where post-enactment evidence often appeared in 20th century cases. But such evidence comes with three limits that make it ill-suited to achieve the Court's goal of energizing congressional action. First, the MQD uses of post-enactment legislative history speak in the language of legislative supremacy while operating as judicial supremacy, in comparison to the judicial modesty of the 20th century cases: The former use post-enactment legislative history to enact a change in the status quo, while the latter rely on it only to affirm the status quo. Second, the "tool" is a one-way ratchet—the modern Court has only endorsed its use in MQD cases, so post-enactment legislative history can only *dis*empower the executive, in contrast to its historical role in "congressional acquiescence" cases where it could empower the executive. Third, resorting to *failed* legislative enactments to prove what the President *may not* do could end up counterproductively chilling worthwhile congressional dialogue, as legislators learn that their good ideas may be used against them in a future case to prove why the executive *cannot* exercise the power that legislators proposed. This could also, contra the hopes of the Justices, encourage Presidents to take more unilateral action rather than first go to Congress for authorization (fearing that congressional rejection will bar later unilateral action).

This Note proceeds in three parts. Part II defines "post-enactment legislative history" (also sometimes called "subsequent legislative history"[3]) and differentiates it from other similar evidence of legislative intent. Part III traces the history of post-enactment legislative history, from the height of purposivism in the second half of the 20th century, to the death of post-enactment legislative history during the textualist revolution, and finally to its surprising revival by textualist judges in the MQD. A close read of those modern cases belies Justice Gorsuch's argument that post-enactment evidence goes only to the preliminary determination of whether an action is "major," rather than the merits of what a statute authorizes. Nor, this Note concludes, does Justice Barrett's defense—that the executive's post-enactment failure to exercise a power is probative evidence that it does not exist—hold water. And Part IV explains why the Court's narrow endorsement of post-enactment legislative history will disappoint jurists hoping that the Court's MQD jurisprudence will reinvigorate congressional action.

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[2] *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 635 (1990).
[3] Sullivan v. Finkelstein, 496 U.S. 617, 632 (1990) (Scalia, J., concurring).

II. DEFINING POST-ENACTMENT LEGISLATIVE HISTORY

A brief aside before defining this Note's terms: carefully parsing the legal meaning of facially similar yet ontologically distinct pieces of evidence is crucial for sound statutory interpretation, where legal reasoning often bucks a straightforward "necessary or sufficient" logic. Instead, judges compare conflicting sources of legislative history, ascertaining the "weigh[t]" of each source and "balanc[ing]" the evidence on one side against the other.[4] As a result, good jurisprudence demands careful reasoning about which types of legislative history arguments are appropriate depending on how one thinks Congress may constitutionally change the law.

Post-enactment legislative history for this Note's purposes means (1) congressional actions or statements (including silence or acquiescence) (2) short of bicameralism and presentment (3) made after the President has signed a bill into law (4) that a court uses to inform its understanding of that law. Relevant congressional actions include actions and statements by individual members of Congress, congressional committees, or even acts by an entire chamber or by both chambers short of bicameralism and presentment. This definition of post-enactment legislative history also includes congressional silence or acquiescence, which commentators often consider separate from other congressional acts subsequent to enactment.[5] But congressional acquiescence is useful to consider as a form of post-enactment legislative history for this Note's purposes, given that neither post-enactment silence nor post-enactment speech can speak to the enacting Congress's intent.

Congressional acquiescence overlaps with another source of post-enactment evidence that is somewhat beyond this Note's scope: post-enactment executive practice. For instance, *Skidmore* (as recently reaffirmed in *Loper Bright*) provides that agency "interpretations issued contemporaneously with the statute at issue, and which have remained consistent over time, may be especially useful in determining the statute's meaning."[6] Professor Daniel Deacon has explored (and rejected) various theoretical justifications for crediting such evidence,[7] including, as relevant here, that such evidence might be probative of the enacting Congress's intent (a traditional bicameralist view) or a later Congress's acquiescence.[8] This Note overlaps with Deacon's account in identifying the MQD's reliance on post-enactment practice as difficult to square

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[4] *See, e.g.*, Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 559 U.S. 573, 595–96, 596 n.14 (2010).

[5] *Compare, e.g.*, 2A SHAMBIE SINGER & NORMAN J. SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 48:20 (7th ed. 2024) (including "Post-enactment history" in the chapter on "Extrinsic Aids—Legislative History"), *with* 2B *id.* § 49:9 (including "Legislative inaction following contemporaneous and practical interpretation" in the chapter on "Contemporaneous Construction").

[6] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2262 (2024) (citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

[7] Daniel T. Deacon, *Statutory Liquidation*, 77 ADMIN. L. REV. 503, 551–72 (2025).

[8] *See id.* at 540–41.

with modern textualism.[9] But while Deacon focuses on the power of the executive to liquidate statutory meaning, this Note focuses on the power of the legislature to liquidate meaning.

Two other types of congressional material are similar to and often considered alongside[10] post-enactment legislative history given that all three lie outside of the typical sources of legislative meaning: (1) earlier but rejected drafts of the statute being considered by the court; and (2) post-enactment amendments to the statute at issue that made it through bicameralism and presentment. But this Note does not count those types of evidence as post-enactment legislative history. Both forms of evidence rely on ratification through bicameralism and presentment, and they thus do not operate through sub-bicameral signaling like post-enactment legislative history does. Professor Anita Krishnakumar terms these two categories "drafting history" and "amendment history," respectively, and describes both together as subsets of "statutory history."[11] Statutory history is "the historical evolution of a statute"[12]—as distinguished from typical "legislative history"—"the hearings, committee reports, and debate leading up to the enactment in question."[13]

Drafting history relies on traditional understandings of congressional intent: Earlier discarded versions of a statute speak to a given Congress's intent in enacting the final version.[14] Although drafting history is vulnerable to the criticism that it only went through consideration by a single committee or one, but not both, chambers,[15] traditional legislative history (floor statements, committee reports, etc.) is vulnerable to the same criticism.[16] As Krishnakumar argues, neither drafting nor amendment history is as different from legislative

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[9] *See id.* at 503.
[10] *See, e.g.*, William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 84–85 (1988) (considering together the impact of "the rejection of [a given] interpretation by *either the enacting Congress* [what this Note categorizes as drafting history] *or a subsequent one* [what this Note categorizes as post-enactment legislative history]").
[11] Anita S. Krishnakumar, *Statutory History*, 108 VA. L. REV. 263, 271 (2022).
[12] Hubbard v. United States, 514 U.S. 695, 702–03 (1995).
[13] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 256 (2012).
[14] *See, e.g.*, Arizona v. United States, 567 U.S. 387, 405 (2012) (arguing that proposals rejected while drafting the statute at issue "underscore[d] . . . Congress['s] . . . deliberate choice . . . [and] considered judgment" regarding the question presented); *see also* Krishnakumar, *supra* note 11, at 271.
[15] *See, e.g.*, United States v. United Mine Workers of Am., 330 U.S. 258, 282–83 (1947) (arguing that any intent reflected by an amendment considered only by the Senate, but not the House, cannot be imputed onto Congress as a whole); *see also* BNSF Ry. Co. v. Loos, 139 S. Ct. 893, 906 (2019) (Gorsuch, J., dissenting) ("[T]he statutory history I have in mind here isn't the sort of unenacted legislative history that often is *neither truly legislative (having failed to survive bicameralism and presentment)* nor truly historical (consisting of advocacy aimed at winning in future litigation what couldn't be won in past statutes)." (emphasis added)).
[16] *See, e.g.*, SCALIA & GARNER, *supra* note 13, at 376 ("Floor statements may well have been (and in modern times very probably were) delivered to an almost-empty chamber . . . . As for committee reports, they are drafted by committee staff and are not voted on (and rarely even read) by the committee members, much less by the full house.").

history as the textualists who employ them would hope.[17]

But amendment history's basis in bicameralism will take longer to explain. As the Supreme Court has recognized, subsequent successful amendments to earlier legislation, unlike other sources of post-enactment legislative history, are properly enacted law which at least modify the text of a statute passed previously.[18] Those amendments might also arguably speak to the meaning of parts of an earlier law they did *not* amend—getting closer to, but not quite, exceeding typical bicameralism. Consider, for instance, *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*,[19] which held that the Fair Housing Act[20] ("FHA") recognized disparate impact liability.[21] Justice Kennedy, writing for the majority, argued in part that when Congress amended the FHA in 1988 to create certain liability exemptions,[22] it was aware that all nine circuits to have considered the disparate impact question had held that the FHA did recognize disparate impact liability.[23] Congress expressly exempting certain liability while leaving unchanged the provisions directly at issue in the case[24] served as "convincing support for the conclusion that Congress accepted and ratified the unanimous holdings of the Courts of Appeals."[25] Moreover, the liability exemptions enacted by the amendment sounded to the Court like exemptions *from disparate impact liability*, and thus would have been "superfluous" if the FHA did not provide for disparate impact liability in the first place.[26]

Justice Alito's dissent disputed the majority's broad reading of the FHA's amendment history. He argued that "[t]o change the meaning of language in an already enacted law, Congress must pass a new law amending that language. Intent that finds no expression in a statute is irrelevant."[27] Addressing the majority's superfluity point, Justice Alito argued that "what matters is what Congress *did*, not what it might have 'assumed,'" pointing out that the liability exclusions "make no reference to" the FHA provisions directly relevant to the question of disparate impact.[28]

Yet one can still hold a bicameralist view of Congress and believe that a

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[17] *See* Krishnakumar, *supra* note 11, at 315–22.
[18] Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 118 n.13 (1980) ("With respect to subsequent *legislation* . . . Congress has proceeded formally through the legislative process. A mere statement in a conference report of such legislation as to what the Committee believes an earlier statute meant is obviously less weighty.").
[19] 576 U.S. 519 (2015).
[20] 42 U.S.C. §§ 3601–3619.
[21] *Inclusive Cmtys.*, 576 U.S. at 525.
[22] *See* Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619.
[23] *Inclusive Cmtys.*, 576 U.S. at 535–36.
[24] The Court focused on 42 U.S.C. §§ 3604(a) and 3605(a), which provide that it is unlawful to "otherwise make unavailable" (which the Court read to refer to the impact, rather than intent, of an action) housing "because of" a person's protected characteristics. *Inclusive Cmtys.*, 576 U.S. at 533–35.
[25] *Inclusive Cmtys.*, 576 U.S. at 536.
[26] *Id.* at 537–38.
[27] *Id.* at 569–70 (Alito, J., dissenting).
[28] *Id.* at 571.

later amendment represented Congress's constitutionally recognized method for imbuing new statutory meaning into old law. The majority in *Inclusive Communities* envisioned a Congress surveying the statute as a whole and "ma[king] a considered judgment to retain the relevant statutory text."[29] On that view, when Congress amends a law, it updates the intent of the law with Congress's new intent by reenacting the parts of the law that live within the penumbras of the parts that Congress *does* amend (for instance, adding certain liability carveouts reenacts the FHA as to the scope of liability generally). Scholars have described this type of inference as the "reenactment rule,"[30] reflecting the view that Congress breathes new meaning into the statute by reenacting it.[31] This approach is a cousin of recent constitutional interpretation scholarship that argues the Bill of Rights should be read anew in light of the Reconstruction Amendments, the "Second Founding."[32]

The structure of Justice Kennedy's amendment history argument reveals his traditional, bicameral view. Justice Kennedy led his argument that the 1988 amendment had ratified disparate impact with the fact of the amendment itself and its legal backdrop (the unanimous courts of appeals).[33] After that lead-in, Justice Kennedy bolstered his argument with sources from the legislative history and drafting history[34] of the amendments. Without the successful amendment to cap off those sources of statutory meaning, Justice Kennedy may not have felt comfortable relying on the legislative and drafting history on its own. A House report, floor debate, hearing transcript, and rejected statutory language may have been useful to infer the purpose of the amendment that Congress ultimately adopted (and thus Congress's intent in "reenacting" the FHA), but it would require some additional justification to argue that those post-enactment sources could be useful in interpreting the FHA itself without any post-enactment amendment to ratify that history. That latter form of reasoning is the focus of this Note.

Two edge applications of the reenactment rule help define the boundary between amendment history, which can still rest on the traditional view of Congress, and post-enactment legislative history, which cannot. First, most formulations of the reenactment rule are limited to the inference that Congress

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[29] *Id.* at 536.

[30] *E.g.*, Eskridge, *Interpreting Legislative Inaction*, *supra* note 10, at 79; HENRY M. HART & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1365 (William N. Eskridge, Jr. & Philip Frickey eds., 1994); SCALIA & GARNER, *supra* note 13, at 256.

[31] *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 380–81 (1969) ("Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction.").

[32] *See, e.g.*, Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 460 (1989) ("[W]hich fragments of the Founding order were now[, post-Reconstruction,] inconsistent with the new Republican constitution? . . . [T]he Court has self-consciously struggled with the synthetic problems involved in integrating Founding (time one) and Reconstruction (time two) into a principled doctrinal whole."); William M. Carter Jr., *The Second Founding and the First Amendment*, 99 TEX. L. REV. 1065, 1065–82 (2021).

[33] *See Inclusive Cmtys.*, 576 U.S. at 535–36.

[34] *See id.* (citing H.R. REP. NO. 100-711, at 89–93 (describing a rejected amendment that would have eliminated certain disparate impact liability)).

"incorporates any settled interpretations of the statute" upon reenactment.[35] That formulation does not permit courts to infer later congressional *modification* of a statute *sub silentio*, instead only allowing the inference that Congress *ratified* the existing judicial interpretation of a statute, as recognized by its "settled" construction (which presumably reflects its original meaning). Thus, *Inclusive Communities* perhaps goes beyond the traditional "reenactment rule" if Justice Alito is correct that the original meaning of the relevant statute did not include disparate impact liability and that there was no settled interpretation for Congress to acquiesce to given that the Supreme Court had not yet weighed in.[36] Regardless, Justice Kennedy's opinion rested on the opposite view, that Congress was aware of and tacitly approved the prevailing circuit court approach by amending the statute. *Inclusive Communities* demonstrates, then, that even very aggressive uses of amendment history do not necessarily rely on a nontraditional view of Congress.

Second, some courts have used the reenactment logic when Congress has not amended the statute at issue, but rather legislated on the same general topic. The Court in *Zemel v. Rusk*[37] held that the Secretary of State could permissibly restrict where U.S. passport holders could travel under the Passport Act of 1926.[38] The Court argued that "[d]espite 26 years of executive interpretation of the 1926 Act as authorizing the imposition of area restrictions, Congress in 1952, though it once again enacted legislation relating to passports, left completely untouched the broad rule-making authority granted in the earlier Act."[39] The legislation in question was the Immigration and Nationality Act of 1952,[40] which made it unlawful to enter or leave the United States without a valid passport after the President declares war or a national emergency.[41] Assuming that that subsequent Act ratified executive practice still relies only on a bicameralist view of Congress, as it focuses on Congress positively enacting legislation and again pictures Congress looking over the existing legislation and deciding not to amend it.[42] Whether that inference is *valid* depends on how on-point the post-enactment legislation was. An amendment to the section at issue may strongly imply acquiescence, while a *Zemel*-type statute may do so weakly. But the core logic remains the same. Lower courts have reflected a similar type of logic in providing that later appropriations statutes can "change[] substantive law."[43] At

[35] *See, e.g.*, Eskridge, *Interpreting Legislative Inaction*, *supra* note 10, at 69.
[36] *See* 576 U.S. at 566, 568 (Alito, J., dissenting).
[37] 381 U.S. 1 (1965).
[38] 22 U.S.C. § 211; *Zemel*, 381 U.S. at 7.
[39] *Id.* at 12.
[40] Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.).
[41] *See* 8 U.S.C. § 1185.
[42] *See, e.g.*, Bob Jones Univ. v. United States, 461 U.S. 574, 601 (1983) ("The evidence of congressional approval of the policy embodied in [a decision by the Internal Revenue Service (IRS)] goes well beyond the failure of Congress to act on legislative proposals. Congress affirmatively manifested its acquiescence in the IRS policy when it enacted [a law subsequent to the statute at issue in the case].").
[43] Gillian E. Metzger, *Taking Appropriations Seriously*, 121 COLUM. L. REV. 1075, 1127

other times, courts have declined to recognize subsequent appropriations as overriding earlier substantive law.[44] Again, whether a court will determine that the related statute modifies the earlier statute depends on the strength of the inference about whether an appropriations bill speaks to the appropriating Congress's intent to change the earlier law (e.g., requiring the language of "futurity," like the word "hereafter," in order to have effect beyond the appropriated fiscal year).[45]

Finally, where amendment history and post-enactment legislative history are used alongside each other, it is possible to tease apart their separate logics and assert that reliance on the latter still only makes sense if one also buys some theory of non-bicameralist congressional action. While many cases employ both simultaneously,[46] at least one statement of the doctrine of congressional acquiescence expressly conditions judicial recognition of acquiescence on Congress amending (not merely trying to amend) the statute at issue subsequent to the promulgation of the judicial or executive interpretation—demonstrating that some courts have recognized that these types of evidence rely on separate rationales.[47] As a result, separating out the two and independently critiquing their logic can help distinguish valid from invalid legal reasoning.

Take *United States v. Rutherford*.[48] The Court held that the Federal Food, Drug, and Cosmetic Act of 1938 ("FDCA")[49] did not impliedly exempt medication for terminally ill patients from the Act's requirements that "[a]ny drug . . . not generally recognized . . . as *safe and effective*" be first approved for sale by the Secretary of Health, Education, and Welfare before going on the market.[50] The Court thus rejected the appellate court's holding that "'safety' and 'effectiveness' . . . have no reasonable application to terminally ill cancer patients" given they would "die of cancer regardless of what may be done."[51] The Court leveraged both amendment history and post-enactment legislative history to reach its holding: In 1962, Congress amended the FDCA to add "effective" alongside the existing "safe" requirement.[52] The Court argued that

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(2021) (quoting Tin Cup, LLC v. U.S. Army Corps of Eng'rs, 904 F.3d 1068, 1073 (9th Cir. 2018)).

[44] *Id.* at 1127–28 (citing, *inter alia*, Tenn. Valley Auth. v. Hill, 437 U.S. 153 (1978)).

[45] *Id.* at 1127 (quoting *Tin Cup*, 904 F.3d at 1073).

[46] *See, e.g.*, *Bob Jones*, 461 U.S. at 600–01 (arguing that Congress demonstrated its acquiescence both by failing to pass several introduced bills that would have repudiated the administrative interpretation at issue, *and* by amending the relevant statute without disturbing the reigning interpretation); N. Haven Bd. of Ed. v. Bell, 456 U.S. 512, 534 (1982) (same).

[47] *See* United States v. Rutherford, 442 U.S. 544, 554 n.10 (1979) ("[When] an agency's statutory construction has been 'fully brought to the attention of the public and the Congress,' and the latter has not sought to alter that interpretation *although it has amended the statute in other respects*, then presumably the legislative intent has been correctly discerned." (emphasis added)), *quoted in, inter alia*, *N. Haven*, 456 U.S. at 535.

[48] 442 U.S. 544 (1979).

[49] 21 U.S.C. §§ 301–399.

[50] *Id.* §§ 321(p)(1), 355 (1979) (emphasis added); *Rutherford*, 442 U.S. at 551.

[51] *Rutherford*, 442 U.S. at 551 (quoting Rutherford v. United States, 582 F.2d 1234, 1236–37 (10th Cir. 1978)).

[52] *Id.* at 552 n.8 (citing Drug Amendments, Pub. L. No. 87-781, 76 Stat. 780 (1962)).

the Senate and House reports on the amendment "note[d] with approval the [Food and Drug Administration's ("FDA")] policy of considering effectiveness when passing on the safety of drugs prescribed for 'life-threatening disease.'"[53] The Court also highlighted that subsequent to the 1962 amendments, the particular drug at issue in the case, Laetrile, and the FDA's decision to require premarket approval for Laetrile had been "a frequent subject of political debate," including in front of Congress.[54]

Imagine that the FDA's policy was not settled enough for the amendment to have implicitly ratified it, or imagine that Laetrile was meaningfully different from the drugs Congress considered in 1962. If so, the Court could still argue that its conclusion holds on the basis of the post-1962 evidence. But if one holds only a traditional view of the enacting Congress, such reliance would make no sense, and the majority's reasoning would fall apart given that the post-1962 evidence could not have spoken to the intent of the last Congress to amend the statute.

III. THE EVOLUTION OF POST-ENACTMENT LEGISLATIVE HISTORY

The loose doctrine of post-enactment legislative history has evolved over time. As Professor Nicholas Parrillo outlines, courts began routinely turning to any kind of legislative history around 1940, once government lawyers representing the newly expansive administrative state had the manpower, institutional incentive, and inside knowledge of statutory regimes necessary to plumb the previously impenetrable depths of legislative history.[55] From then until the 1980s, the Court relied on post-enactment legislative history from time to time, in line with its expansive approach to using legislative history generally. As Professor William Eskridge described the approach in its latter days, "almost anything that casts light upon what Congress attempted to do when it enacted a statute is potentially relevant."[56] The modern textualist revolution led by Justice Scalia in the mid-1980s[57] sought to eradicate legislative history, particularly *post-enactment* legislative history, which Justice Scalia saw as nonsensical even for purposivists. Since then, the mainstream view has been that post-enactment legislative history is worthless or next-to-worthless in statutory interpretation.[58]

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[53] *Id.* at 553 & n.9 (citing S. REP. NO. 87-1744, at 15 (1962); H.R. REP. NO. 87-2464, at 3 (1962)).

[54] *Id.* at 554 n.10 (citing, inter alia, *Banning of the Drug Laetrile from Interstate Commerce by FDA: Hearing Before the Subcomm. on Health & Sci. Rsch. of the S. Comm. on Hum. Res.*, 95th Cong. (1977)).

[55] *See generally* Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890-1950*, 123 YALE L.J. 266 (2013).

[56] Eskridge, *The New Textualism*, *supra* note 2, at 626.

[57] *See generally id.*; Stuart Minor Benjamin & Kristen M. Renberg, *The Paradoxical Impact of Scalia's Campaign against Legislative History*, 105 CORNELL L. REV. 1023 (2020) (detailing the history of the textualist revolution).

[58] *See generally* Brief of Members of Congress as *Amici Curiae* in Support of Plaintiffs at 15–20, Wilderness Soc'y v. Trump, No. 17-2587 (D.D.C. Nov. 19, 2018) (describing the modern state and evolution of the doctrine).

But post-enactment legislative history has reemerged in the MQD, with limited acknowledgment by its backers that such use is inconsistent with the rest of their textualist jurisprudence.[59] The First Circuit recognized this confusion in a recent case, responding to a litigant's reliance on post-enactment legislative history by recognizing both the Supreme Court's "eschewal of the importance of post-enactment legislative history outside the major questions context," and simultaneously "the absence of a clear statement by the Supreme Court that subsequent history has no bearing on the major questions determination."[60]

A. Post-Enactment Legislative History Before Scalia

The Court occasionally turned to post-enactment legislative history during its several decades of broader reliance on legislative history from 1940 through the mid-1980s. Many of these uses went uncriticized or unremarked, in line with the sometimes instinctual or inconsistent approaches to statutory interpretation that typified the era,[61] making it difficult to craft a coherent "doctrine" of post-enactment legislative history during this period.[62] In general, post-enactment legislative history was a weak but permissible source of congressional purpose. For instance, Professors Eskridge and Philip Frickey's hierarchy of sources of legislative history, built to reflect the pre-textualist Court's all-things-considered practice, included post-enactment legislative history but placed it at the bottom of the hierarchy—the least authoritative source.[63] This placement reflected the view that post-enactment legislative history "form[ed] a hazardous basis for inferring the intent of an earlier [Congress]."[64] Courts in this era would thus sometimes resort to such material only out of claimed necessity, where no other sources could speak to the enacting legislature's purpose.[65]

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[59] Two justices have defended the MQD's use of post-enactment legislative history. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2621 n.4 (2022) (Gorsuch, J., concurring); Biden v. Nebraska, 143 S. Ct. 2355, 2383 (2023) (Barrett, J., concurring). Both of these rationales are discussed in depth in Parts III.C.3–4.

[60] United States v. Freeman, 147 F.4th 1, 21 (1st Cir. 2025).

[61] *See* HART & SACKS, *supra* note 30, at 1169 ("The hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation.").

[62] *See* Eskridge, *Interpreting Legislative Inaction*, *supra* note 10, at 90 ("[O]ne might conclude that the Supreme Court's legislative inaction decisions are coherent . . . . These conclusions would be hasty. I have made the best effort I can to present the range of outcomes and the Court's reasoning as coherently as possible.").

[63] *See, e.g.*, Eskridge, *The New Textualism*, *supra* note 2, at 636 (citing William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 319, 353 (1990)).

[64] United States v. Price, 361 U.S. 304, 313 (1960), *quoted in, inter alia*, United States v. Phila. Nat'l Bank, 374 U.S. 321, 349 (1963); Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 117 (1980).

[65] *See* Andrus v. Shell Oil Co., 446 U.S. 657, 666 n.8 (1980) ("[W]e cannot fail to note Mr. Chief Justice Marshall's dictum that '[w]here the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived.' In consequence, while arguments predicated upon subsequent congressional actions must be weighed with extreme care, they should not be rejected out of hand . . . ." (citations omitted) (quoting United States v.

That suspicion was in line with the era's purposivism.[66] Purposivists generally care about the purpose of the *enacting* legislators, relying on the following logic: The Constitution's structure demands legislative supremacy, meaning judges must be faithful agents of the legislature.[67] But faithful to what, exactly? Because the legislative power is uniquely prone to abuse, the Framers required bicameralism and presentment to carefully circumscribe how the legislature could permissibly convey instructions to the judiciary.[68] Thus, judges should be faithful to the legislature's instructions as enacted in particular statutes.[69] As Professors Henry Hart and Albert Sacks put it: When determining statutory purpose, "a court should try to put itself in imagination in the position of the legislature which enacted the measure."[70] As a result, most of the cases from this period citing atypical sources of legislative purpose relied more heavily on amendment history, even if also citing unenacted post-enactment legislative history.[71]

Yet a few cases from this period, like the two outlined below, bucked the trend, relying on post-enactment legislative history even where it made little sense under a faithful agent model focused on the enacting Congress's purpose. The common logic visible in these cases is that the Court would recognize a congressional policy where it saw a long and consistent history of congressional activity,[72] or where Congress appeared aware of a divisive issue (through hearings and the like) even though never acting through bicameralism and

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Fisher, 6 U.S. (2 Cranch) 358, 386 (1805) (Marshall, C.J.)); *see also* Eskridge, *The New Textualism*, *supra* note 2, at 635 (When the Court considers post-enactment legislative history, its "stated reason is usually the dearth of other interpretive guides.").

[66] *See* Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. 1275, 1277 (2020) (describing the 1970s as "the heyday of purposive analysis").

[67] *See* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 58–105 (2001).

[68] *See* Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919, 951 (1983) ("It emerges clearly that the prescription for legislative action in Art. I, §§ 1, 7 [vesting clause and bicameralism & presentment], represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure."); *accord* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 539 (1983) ("A court could not treat these widely-supported but never-enacted proposals as law without dishonoring the procedural aspects of the legislative process . . . . Under article I of the Constitution, not to mention the rules of the chambers of Congress, support is not enough for legislation.").

[69] Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 288–89 (1989) ("Hence, to give legal effect to legislative intentions in the absence of any relevant statutory text would undermine the constitutional scheme. Disobedience, therefore, must relate to a text rather than merely to an unexpressed intention."). We will leave to the side the obvious next question, which has dominated most debates over statutory interpretation in the modern era: how best to adhere to the legislature's instructions—by focusing on the text, or on the purpose? *See* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 95–96 (2006).

[70] HART & SACKS, *supra* note 30, at 1378.

[71] *See, e.g.*, Red Lion Broad. Co. v. FCC, 395 U.S. 367, 380–81 ("Here, the Congress has not just kept its silence by refusing to overturn the administrative construction, but has ratified it with positive legislation.").

[72] *See* Flood v. Kuhn, 407 U.S. 258, 281 (1972).

presentment.[73] Another common thread is that the Court was willing to read congressional signaling to affirm the status quo—whether the reigning judicial or executive construction of the statute—but rarely to change the status quo.[74] Finally, both cases construed "common law statutes," where it may be even more important for judges to heed congressional signaling for fear of their own development of the statutes straying too far from congressional intent.[75] Focusing on these outliers that leaned on post-enactment legislative history alone showcases early forms of the unstated logic that has now reemerged in the MQD.

1. Flood*: Failed Bills as Acquiescence*

In *Flood v. Kuhn*,[76] the Court declined to overturn a prior decision, although acknowledging it was wrongly decided, on the basis that Congress had only ever attempted to expand, not overturn, that earlier decision. Fifty years before *Flood*, the Court in *Federal Baseball Club v. National League*[77] had exempted professional baseball from the Sherman Antitrust Act's[78] prohibition on contracts "in restraint of trade or commerce among the several States"[79] on the logic that baseball did not involve commerce between the states.[80] By the time of *Flood*, the Court recognized that reasoning was wrong: "Professional baseball is a business and it is engaged in interstate commerce."[81] And, due to *Federal Baseball*'s poor reasoning, baseball had become an "aberration" by the time of *Flood* as courts had denied litigants' requests to extend the *Federal Baseball* exemption to several other sports (football, basketball, etc.).[82]

However, the Court highlighted that since 1953 (when the Court decided another case reaffirming *Federal Baseball*), "more than 50 bills ha[d] been introduced in Congress relative to the applicability or nonapplicability of the antitrust laws to baseball."[83] Of the bills that "passed one house or the other," all "would have expanded, not restricted, the . . . exemption to other . . . sports."[84] The Court concluded that failing to overturn the exception "with full and continuing congressional awareness" demonstrated Congress's preference

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[73] *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 732–33 (1975).
[74] *See* Eskridge, *Interpreting Legislative Inaction*, *supra* note 10, at 71, 84; *but see, e.g.*, Bradley v. Sch. Bd., 416 U.S. 696, 716 n.23 (1974).
[75] *See* William N. Eskridge, *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1052 (1989) (describing Section 10(b) of the Securities Exchange Act (the statute at issue in *Blue Chip Stamps*), as a "common law statute" given it was drafted with broad wording that demands gap-filling, like the Sherman Antitrust Act (the statute at issue in *Flood v. Kuhn*), Section 1983, various civil rights laws, and others).
[76] 407 U.S. 258 (1972).
[77] 259 U.S. 200 (1922).
[78] 15 U.S.C. §§ 1–7.
[79] *Id.* § 1.
[80] *Fed. Baseball*, 259 U.S. at 209.
[81] *Flood*, 407 U.S. at 282.
[82] *Id.* at 282–83.
[83] *Id.* at 281.
[84] *Id.*

against overturning it:[85]

> [The introduced legislation], obviously, has been deemed to be *something other than mere congressional silence and passivity*. . . . Congress, by its *positive inaction*, has allowed those decisions to stand for so long and, far beyond mere inference and implication, has clearly evinced a desire not to disapprove them legislatively.[86]

Justice Douglas, in dissent, advanced the opposite reading of the post-enactment legislative history. He argued that the 50 bills' failure to survive bicameralism demonstrated Congress's *disapproval* of antitrust exemptions for sports leagues, not its approval of the status quo.[87] And Justice Douglas reminded the majority that, regardless, any reliance on congressional acquiescence is suspect.[88] Justice Marshall's dissent added an argument sounding in political economy: by exempting baseball alone from antitrust law (and the player protections that would have come with that law), the Court isolated baseball players, making them incapable of mustering the political capital needed to get Congress to care enough about the issue to overturn *Federal Baseball*.[89]

2. Blue Chip Stamps*: Failed Bills and Common Law Statutes*

Like in *Flood*, the Court in *Blue Chip Stamps v. Manor Drug Stores*[90] relied on failed legislative proposals to justify its holding that only plaintiffs who have actually purchased or sold shares that they allege were fraudulently marketed may maintain a private action under Section 10(b) of the Securities Exchange Act of 1934.[91] That is, putative plaintiffs like those in *Blue Chip*, who had some noncontractual opportunity to buy or sell shares that they rejected in reliance on allegedly misleading representations, cannot maintain an action.[92]

Just over twenty years prior, in 1952, the Second Circuit in *Birnbaum v. Newport Steel Corp.*[93] announced the initial version of that rule based on Section 10(b)'s proscription of fraudulent conduct "in connection with the purchase or sale of any security."[94] Five years later, and again two years after that, the Securities and Exchange Commission requested Congress amend Section 10(b) to overturn *Birnbaum* by extending Section 10(b)'s coverage to

[85] *Id.* at 283.
[86] *Id.* at 283–84 (emphasis added).
[87] *Flood*, 407 U.S. at 287 (Douglas, J., dissenting).
[88] *Id.* at 287 n.3.
[89] *Id.* at 292 (Marshall, J., dissenting).
[90] 421 U.S. 723 (1975).
[91] 15 U.S.C. § 78j; *Blue Chip*, 421 U.S. at 723.
[92] *Blue Chip*, 421 U.S. at 734.
[93] 193 F.2d 461 (2d Cir. 1952).
[94] *Blue Chip*, 421 U.S. at 730; 15 U.S.C. § 78j(b).

include "any attempt to purchase or sell."[95] Congress rejected both proposals.[96] Moreover, the Court pointed out, "virtually all lower federal courts facing the issue in the hundreds of reported cases presenting this question over the past quarter century" followed *Birnbaum*'s rule.[97] "The longstanding acceptance by the courts, coupled with Congress' failure to reject *Birnbaum*[] . . . argue[d] significantly in favor of acceptance of the *Birnbaum* rule by [the] Court."[98]

Notably, the Court disclaimed its role as a faithful agent of Congress, seemingly because it felt empowered by Section 10(b)'s broad language to exercise common law-esque powers. The present state of Section 10(b) law, the Court recognized, was "a judicial oak which ha[d] grown from little more than a legislative acorn."[99] As to the question presented, the Court could not "divine from the language of § 10(b) the express 'intent of Congress,'" and Section 10(b)'s contemporaneous legislative history was only moderately useful as the Court found no "indication that Congress considered the problem of private suits . . . at the time of its passage."[100] Thus, the Court considered it "proper" to weigh "policy considerations" in "flesh[ing] out the portions of the law with respect to which neither the congressional enactment nor the administrative regulations offer[ed] conclusive guidance."[101]

B. Post-Enactment Legislative History After Scalia

Although the Warren and Burger Courts already reflected skepticism of post-enactment legislative history, Justice Scalia's elevation to the Court in 1986 shifted it decisively away from such evidence. During his first term on the Court, Justice Scalia penned a scathing dissent in *Johnson v. Transportation Agency*[102] in response to a congressional acquiescence argument by the majority. Justice Brennan, writing for the Court, advanced the then-typical cautious post-enactment legislative history argument: the Court had earlier held that Title VII, which prohibits racial (and other) discrimination in employment, permits voluntary affirmative action programs.[103] In the eight years following that decision, Congress had neither amended nor even attempted to amend Title VII despite the case being "widely publicized" and "address[ing] a prominent issue of public debate," and Congress had separately amended Title VII in response to a different Court opinion.[104] As a result, the Court now "assume[d] that [its] interpretation was correct."[105] Justice Brennan acknowledged that although such evidence "may not always provide crystalline revelation, . . . it may be probative

[95] *Id.* at 732 (quoting S. 2545, 85th Cong. (1957); S. 1179, 86th Cong. (1959)).
[96] *Id.*
[97] *Id.* at 731.
[98] *Id.* at 733.
[99] *Id.* at 737.
[100] *Blue Chip*, 421 U.S. at 729, 737.
[101] *Id.* at 737.
[102] 480 U.S. 616 (1987).
[103] United Steelworkers of Am. v. Weber*,* 443 U.S. 193 (1979).
[104] *Johnson*, 480 U.S. at 629 n.7.
[105] *Id.*

to varying degrees."[106]

Justice Scalia argued that such acquiescence logic, "which frequently haunts our opinions, should be put to rest. It is based . . . on the patently false premise that the correctness of statutory construction is to be measured by what the current Congress desires, rather than by what the law as enacted meant."[107] He added that reliance on Congress's failure to legislate "ignore[s] rudimentary principles of political science" by ignoring the multiple permissible inferences that the Court could have drawn from bare congressional silence: "(1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice."[108]

Federal courts have, at least facially, come around to Justice Scalia's view. Most modern treatises agree that post-enactment legislative history is not a fruitful source of statutory meaning.[109] Modern courts will often quote[110] Justice Scalia's statement of the "law" of post-enactment legislative history, which abandoned the little weight it was afforded by purposivists in favor of no weight:

> Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation. Real (pre-enactment) legislative history is persuasive to some because it is thought to shed light on what legislators understood an ambiguous statutory text to mean when they voted to enact it into law. But post-enactment legislative history by definition "could have had no effect on the congressional vote."[111]

When federal courts do rely on post-enactment legislative history, as in the litigation over whether Title VII bars discrimination based on sexual orientation, they are often reversed.[112] Any modern federal courts that occasionally rely on

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[106] *Id.*
[107] *Id.* at 671 (Scalia, J., dissenting).
[108] *Id.* at 672.
[109] *See, e.g.*, 2A SINGER & SINGER, *supra* note 5, § 48:20 ("A legislator's post enactment statements about legislative intent have limited value to clarify a statute's meaning . . . .").
[110] *See, e.g.*, United States v. Woods, 571 U.S. 31, 48 (2013); Kisor v. Wilkie, 139 S. Ct. 2400, 2446 (2019) (Gorsuch, J., concurring in the judgment).
[111] Bruesewitz v. Wyeth LLC, 562 U.S. 223, 242 (2011) (quoting District of Columbia v. Heller, 554 U.S. 570, 605 (2008) (Scalia, J.)).
[112] *Hively v. Ivy Tech Community College*, 830 F.3d 698 (7th Cir. 2016), *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000), and other circuit panels relied on Congress "time and time again" rejecting "every attempt to add sexual orientation to the list of categories protected from discrimination by Title VII" to conclude that Title VII does not protect sexual orientation. *Hively*, 830 F.3d at 717; *see also Simonton*, 232 F.3d at 35 (similar). Both were overturned by subsequent en banc decisions of their respective circuits. *See* Zarda v. Altitude Express, Inc., 883 F.3d 100, 108 (2d Cir. 2018) (en banc); Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 341 (7th Cir. 2017) (en banc). And the other circuit opinions left standing were overturned by the Supreme Court in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), which rejected the post-enactment legislative history argument made by Justice Kavanaugh in dissent.

post-enactment legislative history should, under this logic, limit their reliance to post-enactment legislative history produced by "those who drafted or voted for the law."[113] In that context, at least, a purposivist could argue the legislative history reflected the views of legislators in the enacting Congress.[114]

The modern rejection of post-enactment history and congressional acquiescence may even undermine the landmark precedent governing the exercise of executive power, *Youngstown Sheet & Tube Co. v. Sawyer*.[115] In particular, the modern doctrine calls into question whether it is possible for "congressional inertia, indifference or quiescence"[116] to be read as enabling independent presidential action.[117] The impact on *Youngstown*, however, may still be up for grabs: the Court has been less hostile to recognizing historical gloss on the *Constitution*,[118] the focus of *Youngstown*, than it has been to recognizing historical gloss on *statutes*, the focus of this Note.

C. MQD Complicating the Modern Doctrine

Despite that near abandonment, post-enactment legislative history has made a comeback in the Court's new MQD jurisprudence. *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*,[119] what some consider the very first MQD case,[120] repudiated the use of amendment history in a majority

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Id. at 1747 (citing *id.* at 1823–24, 1830–31 (Kavanaugh, J., dissenting)). *But see* Gov't Emps. Ret. Sys. of Virgin Islands v. Gov't of Virgin Islands, 995 F.3d 66, 115 (3d Cir. 2021) (Matey, J., concurring in part and dissenting in part) (pointing out that the majority impermissibly relied on post-enactment legislative history).

[113] *Heller*, 554 U.S. at 605.

[114] Sullivan v. Finkelstein, 496 U.S. 617, 631 (1990) (Scalia, J., concurring in part) ("It seems to be a rule for the use of subsequent legislative history that the legislators or committees of legislators whose post-enactment views are consulted must belong to the institution that passed the statute.").

[115] 343 U.S. 579 (1952).

[116] *Id.* at 637 (Jackson, J., concurring in the judgment and opinion of the Court).

[117] *See* Kristin E. Eichensehr, *Courts, Congress, and the Conduct of Foreign Relations*, 85 U. CHI. L. REV. 609, 655 (2018) ("[T]raditional *Youngstown* Category 2 cases involve congressional silence, and "assigning interpretive consequences to congressional silence or inaction is perilous at best" because congressional silence may indicate agreement or simply reflect inertia . . . ." (quoting Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 451 (2012)); David B. Froomkin, *The Nondelegation Doctrine and the Structure of the Executive*, 41 YALE J. ON REGUL. 60, 94 (2024) ("Cases following *Youngstown*, in confronting situations with a less clear congressional statement, have encountered more difficulty. The Court has often presumed broad presidential authority from vague statutory language and has even sometimes taken post-enactment congressional silence to indicate congressional approval of adventurous presidential conduct. In a post-*Chadha* world, . . . relying on congressional silence to legitimate presidential action is particularly perverse . . . ." (footnotes omitted)).

[118] *See* Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. REV. 1477, 1477 (2023) ("Today's Supreme Court is committed to originalism—the idea that the Constitution's meaning is fixed at ratification. But it often rests decisions on the post-ratification practices of other actors . . . . Call this method 'living traditionalism' . . . .").

[119] 512 U.S. 218 (1994).

[120] *See* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 236 (2006) (describing *MCI*

opinion authored by Justice Scalia.[121] But several of the MQD cases since have looked to the views of subsequent Congresses at least to determine whether an issue is major, and thus whether it is subject to the MQD's requirement that Congress provide clear authorization for the agency's claimed authority.[122] And the close reading of the cases below[123] shows that the MQD cases may use post-enactment legislative history beyond the "majorness" question, instead using it to understand the meaning of an earlier statute—the same purpose as the pre-textualist revolution cases. Post-enactment evidence relied on by MQD cases has included later quasi-on-point legislation (*à la Zemel*),[124] Congress rejecting bills that would have delegated the claimed authority,[125] statements and practice by executive agencies (especially the historical failure to assert the now-claimed authority),[126] and statements by individual lawmakers.[127]

Such reliance is striking given the authors of modern MQD opinions are avowed textualists.[128] As explored below, this dissonance could be explained by the reliance on post-enactment legislative history in a foundational MQD case, *FDA v. Brown & Williamson Tobacco Corp.*,[129] written by a non-textualist. Despite the shift in methodology toward textualism, that case's initial approach persisted. Reliance on post-enactment history is especially problematic for the textualists who believe (like Justice Gorsuch) that the text is defined not by the meaning we would give to it today, but instead by its "original meaning"—the

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Telecomms. as such). *But see* Cass R. Sunstein, *Two Justifications for the Major Questions Doctrine*, 76 FLA. L. REV. 251, 262 (2024) (arguing that *MCI Telecomms.* "could have rested only on the ordinary meaning" of the relevant term, and that its "main thrust . . . was textualist, and did not involve the major questions doctrine at all"). Justice Gorsuch traces "[s]ome version of" the MQD "to at least 1897." West Virginia v. EPA, 142 S. Ct. 2587, 2619 (2022) (Gorsuch, J., concurring) (citing ICC v. Cincinnati, N. O. & T. P. R. Co., 167 U.S. 479, 499 (1897)).

[121] *See MCI Telecomms.*, 512 U.S. at 232–33.

[122] *West Virginia*, 142 S. Ct. at 2610.

[123] *Gonzales v. Oregon*, 546 U.S. 243 (2006), one of the early few major questions cases, deployed post-enactment legislative history in a brief paragraph supporting its holding rejecting the Attorney General's claim of authority. *See id.* at 266. Because its use was sparse and not mentioned by either dissent, this Note will not closely analyze the case.

[124] *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 143 (2000); *Gonzales*, 546 U.S. at 266; Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 667 (2022) (Gorsuch, J., concurring).

[125] *See Brown & Williamson*, 529 U.S. at 144; *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 668 (Gorsuch, J., concurring); *West Virginia*, 142 S. Ct. at 2610; Biden v. Nebraska, 143 S. Ct. 2355, 2373 & n.8 (2023).

[126] *See Brown & Williamson*, 529 U.S. at 144; *West Virginia*, 142 S. Ct. at 2610.

[127] *See Nebraska*, 143 S. Ct. at 2374.

[128] *See* John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 263–67 (critiquing *Brown & Williamson*'s use of post-enactment legislative history as inconsistent with textualism); Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1062 (2023); Anita S. Krishnakumar, *What the New Major Questions Doctrine Is* Not, 92 GEO. WASH. L. REV. 1117, 1149 (2024); Chad Squitieri, *Who Determines Majorness?*, 44 HARV. J.L. & PUB. POL'Y 463, 485–86 (2021).

[129] 529 U.S. 120 (2000).

meaning that the drafters or the public would have given it.[130] On that view, whatever "context" post-enactment history provides for a certain text is irrelevant to the *original* meaning of a statute. The original public meaning textualist justices have landed in the same place as the purposivists who struggled to justify post-enactment history given their focus on the purpose of the enacting Congress. Indeed, Justice Barrett's textualist defense of the MQD's use of post-enactment legislative history in *Biden v. Nebraska*[131] is liable to the same critiques to which Justice Scalia subjected the 20th century post-enactment history cases.[132]

1. Brown & Williamson*: Origins of Post-Enactment History in the MQD*

In *Brown & Williamson*, now cited by the Court as the second proto-MQD case (i.e., deploying MQD logic before the MQD label existed),[133] the Court held that the Food, Drug, and Cosmetic Act's grant of authority to the FDA to regulate "drugs" and "devices"[134] did not include the "drug" nicotine or the "device" of a cigarette, invalidating an FDA regulation of tobacco products for minors.[135] Justice O'Connor, writing for the majority, applied *Chevron*'s[136] two-step framework to determine whether the Court must defer to the FDA's interpretation of the FDCA.[137] She concluded at Step One that "Congress ha[d] directly spoken to the issue" and precluded the FDA's interpretation.[138]

Much of the Court's analysis hinged on six pieces of tobacco-related legislation that Congress enacted subsequent to the FDCA.[139] Justice O'Connor argued that such statutes were enacted against the "backdrop of the FDA's consistent and repeated statements that it lacked authority under the FDCA to regulate tobacco," and Congress's consideration and rejection of legislation that would have granted that jurisdiction.[140] She concluded that those statutes "effectively ratified the FDA's long-held position."[141] As opposed to the more modern MQD cases that claim to use post-enactment legislative history only to determine whether an issue is major, thus mitigating some of the textualist critiques, *Brown & Williamson* explicitly used such evidence to determine the merits of whether Congress delegated the claimed power. That reliance on post-

[130] *See* Victoria Nourse, *Textualism 3.0: Statutory Interpretation After Justice Scalia*, 70 ALA. L. REV. 667, 676 (2019) (explaining that originalism has seeped into textualism).
[131] 143 S. Ct. 2355 (2023).
[132] *See infra* notes 187–190 and accompanying text.
[133] *See West Virginia*, 142 S. Ct. at 2609 (citing as proto-MQD cases *MCI Telecomms.*, 512 U.S. 218 (1994), *Brown & Williamson*, 529 U.S. 120 (2000); Gonzales v. Oregon, 546 U.S. 243 (2006); Utility Air Regul. Grp. v. EPA, 573 U.S. 302 (2014); King v. Burwell, 576 U.S. 473 (2015)).
[134] 21 U.S.C. § 321(g)–(h).
[135] *Brown & Williamson*, 529 U.S. at 125–26.
[136] Chevron U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837 (1984).
[137] *Brown & Williamson*, 529 U.S. at 133.
[138] *Id.*
[139] *Id.* at 143.
[140] *Id.* at 144.
[141] *Id.*

enactment history prompted Justice Breyer's dissent to quote from a Justice Scalia opinion: "Arguments based on subsequent legislative history . . . should not be taken seriously, not even in a footnote."[142]

Although the Court's reasoning based on subsequent positive law could conceivably have been supported by *Zemel*-like logic on the border between amendment history and post-enactment legislative history,[143] the Court seemed to instead reject a traditional bicameralist view of Congress: Justice O'Connor theorized that, upon enactment, a statute "may have a range of plausible meanings" that "[o]ver time" become "shape[d] or focus[ed]" by "subsequent acts."[144] The "classic judicial task" is to reconcile those laws, which may mean "that the implications of a statute may be altered by the implications of a later statute."[145] Justice O'Connor observed that there was no evidence that the FDCA-enacting Congress considered whether the Act would apply to tobacco products.[146] However, the tobacco statutes passed over the course of thirty-five years "consistently evidenced [Congress's] intent"—together, they reflected a "collective premise" and a coherent "congressional policy."[147] Unlike the amendment history cases that rely on reenactment rule logic—that a later Congress substantially reenacts a statute upon amending it, thus imbuing it with new meaning—the *Brown & Williamson* Court seemed to instead believe that Congress could send signals of its general intent over time.

That more flexible approach to statutory interpretation accorded with the non-textualist Justice O'Connor's "practical" approach to judging.[148] And *Brown & Williamson* came a decade before John Manning wrote that textualism was "uncontroversial" at the Supreme Court.[149] It was thus not inconsistent for Justice O'Connor to deploy an atextualist source of meaning at that time. But that original consistency has bred later inconsistency. The modern MQD cases relying on post-enactment legislative history routinely cite *Brown & Williamson* while considering post-enactment legislative history,[150] disregarding the fact that the methodological foundation of the earlier reasoning has fallen away. This precedent, perhaps, is the source of the Court's confusion in the MQD doctrine.

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[142] *Id.* at 181–82 (Breyer, J., dissenting) (quoting Sullivan v. Finkelstein, 496 U.S. 617, 632 (1990) (Scalia, J., concurring)).
[143] *See supra* notes 34–42 and accompanying text.
[144] *Brown & Williamson*, 529 U.S. at 143.
[145] *Id.* (quoting United States v. Fausto, 484 U.S. 439, 453 (1988)).
[146] *Id.* at 146–47.
[147] *Id.* at 139, 157.
[148] *See* Stewart J. Schwab, Tribute, *Justice O'Connor as the Good Judge*, 137 HARV. L. REV. 1809, 1811 (2024) ("She employed a variety of approaches in her judicial opinions and was not wedded to any label, be it textualism, originalism, purposivism, or doctrinalism.").
[149] John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 114 (2012).
[150] *See* West Virginia v. EPA, 142 S. Ct. 2587, 2610 (2022) (citing *Brown & Williamson*, 529 U.S. at 159–60); *id. at* 2623 (Gorsuch, J., concurring) (citing *Brown & Williamson*, 529 U.S. at 158–59); Biden v. Nebraska, 143 S. Ct. 2355, 2383 (2023) (Barrett, J., concurring) (citing *Brown & Williamson*, 529 U.S. at 159).

2. NFIB*: More Post-Enactment History in the Proto-MQD*

The Court in *National Federation of Independent Business v. Department of Labor*[151] stayed implementation of an Occupational Safety and Health Administration ("OSHA") rule that would have required employers with at least 100 employees to implement a COVID-19 vaccine mandate for their workers on the grounds that the rule exceeded OSHA's statutory power "to set *workplace* safety standards, not broad public health measures."[152]

Although the per curiam opinion did not engage much with post-enactment legislative history,[153] Justice Gorsuch's concurrence, joined by Justices Thomas and Alito, relied heavily on such evidence to determine—as in *Brown & Williamson*—the merits of whether Congress delegated to OSHA the power to issue a vaccine mandate. Although it would be another five months until a majority of the Court, in *West Virginia v. EPA*, recognized the MQD by name, Justice Gorsuch argued that the rule counted as a major question (citing his own dissent naming the MQD in an earlier case[154]) because it would "force 84 million Americans to receive a vaccine or undergo regular testing."[155] Next, Justice Gorsuch brought in post-enactment legislative history to support his assertion that "Congress has nowhere clearly assigned so much power to OSHA": "Congress has adopted several major pieces of legislation aimed at combating COVID-19. But Congress has chosen not to afford OSHA—or any federal agency—the authority to issue a vaccine mandate. Indeed, a majority of the Senate even voted to *disapprove* OSHA's regulation."[156] His concurrence went even further than *Brown & Williamson* in leaning on this evidence: *Brown & Williamson* led with an argument about the statute's text and structure,[157] introducing the post-enactment legislative history only after first addressing the statute itself.[158] But Justice Gorsuch's concurrence appeared comfortable relying on post-enactment legislative history *alone*, only analyzing the text of OSHA's claimed statutory authority in the context of rebutting "OSHA's reply" to the otherwise conclusive argument that "OSHA's mandate fails [the MQD's] test."[159]

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[151] 142 S. Ct. 661 (2022) (per curiam).
[152] *Id.* at 662–63, 665.
[153] *See id.* at 666 (mentioning post-enactment legislative history briefly to refute the dissent's use of it).
[154] *Id.* at 667 (Gorsuch, J., concurring) (citing Gundy v. United States, 139 S. Ct. 2116, 2141 (2019) (Gorsuch, J., dissenting)).
[155] *Id.*
[156] *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 667–68 (citation omitted) (citing American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4; S.J. Res. 29, 117th Cong. (2021)).
[157] *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133–43 (2000).
[158] *See id.* at 143–59.
[159] *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 667–68. Perhaps Justice Gorsuch focused less on the text because he felt the majority had already sufficiently addressed it.

3. West Virginia v. EPA*: Separating "Majorness" and Merits*

The Court again relied on post-enactment legislative history in *West Virginia v. EPA*,[160] the first case to explicitly name the MQD[161] and (equivocally) explain its theoretical basis: "both separation of powers principles and a practical understanding of legislative intent."[162] The Court held that the Environmental Protection Agency ("EPA") during the first Trump Administration correctly concluded in rescinding an Obama-era EPA rule that the EPA could not seek to restructure the country's overall mix of electricity generation using its narrower Clean Air Act[163] authority to set topline limits on emissions by new sources of pollution.[164]

West Virginia was also the first case to frame its use of post-enactment legislative history as answering the preliminary question of whether the MQD applies to the claimed statutory authority, rather than whether the statute in fact authorized the regulation. The Court relied on two sources of post-enactment legislative history: the inconsistency between the EPA's traditional use of its Clean Air Act authority and the use now asserted, and Congress's consideration and rejection of various schemes similar to the one the EPA promulgated.[165] Chief Justice Roberts's majority opinion implied that such evidence only went to the majorness question by separating the majorness and merits inquiries into two different subsections and mentioning post-enactment legislative history only in the former. But Justice Gorsuch's concurrence made the argument explicit: to Justice Kagan's reminder in dissent that "normal principles of statutory construction" instruct the Court to "ignore" post-enactment legislative history,[166] Justice Gorsuch responded that "the Court has not pointed to failed legislation to resolve what a duly enacted statutory text means, only to help resolve the antecedent question whether the agency's challenged action implicates a major question."[167]

Despite Justice Gorsuch's protest, Chief Justice Roberts's framing of that "antecedent question" still seemed focused on the enacting Congress's intent, thus re-raising the question of how post-enactment legislative history can speak to original intent: when an agency's "discovery [of newfound power] allow[s] it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself, . . . there is every reason to 'hesitate before concluding that Congress' meant to confer on [the agency] the authority it claims under [the

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[160] 142 S. Ct. 2587 (2022).
[161] *See id.* at 2634 (Kagan, J., dissenting).
[162] *Id.* at 2609 (majority).
[163] 42 U.S.C. §§ 7401–7671q.
[164] *See West Virginia*, 142 S. Ct. at 2602, 2604–07 (citing 42 U.S.C. §7411(a)(1)).
[165] *See id.* at 2610, 2614.
[166] *See id.* at 2641 (Kagan, J., dissenting) (citing Bostock v. Clayton County, 140 S. Ct. 1731, 1747 (2020) (Gorsuch, J.); Sullivan v. Finkelstein, 496 U.S. 617, 632 (1990) (Scalia, J., concurring in part)).
[167] *Id.* at 2621 n.4 (Gorsuch, J., concurring).

relevant statute]."[168] Chief Justice Roberts's interest in the scope of power Congress *meant* to delegate indicates that whether an act is major or not turns, to some extent, on what Congress *considers* major.

4. Biden v. Nebraska*: Betraying the Majorness/Merits Divide.*

Regardless of the believability of Justice Gorsuch's cautionary note in *West Virginia*, the Court's very next MQD case failed to clearly distinguish between using post-enactment legislative history for majorness versus merits. In *Biden v. Nebraska*, the Court held that the Higher Education Relief Opportunities for Students Act of 2003[169] ("HEROES Act"), which authorizes the Secretary of Education to "waive or modify any statutory or regulatory provision applicable to . . . student financial assistance programs,"[170] did not permit the Secretary to completely cancel around $430 billion of student debt to provide relief during the COVID-19 pandemic.[171] Chief Justice Roberts's majority opinion rested on two arguments: first, that the plain text of the HEROES Act did not support the Secretary's claimed authority, and second, that the Secretary could not use the Act to answer the major question of student debt forgiveness.[172]

In its MQD analysis, the Court eschewed the clean separation between the antecedent and merits inquiries from *West Virginia*. Instead, the majority spent several pages purportedly just establishing the question's majorness,[173] followed by one paragraph on the merits:

> All this leads us to conclude [that this is a major question]. In such circumstances, we have required . . . "clear congressional authorization" . . . . And as we have already shown, the HEROES Act provides no authorization for the Secretary's plan even when examined using the ordinary tools of statutory interpretation.[174]

Nebraska thus seems to indicate that most of the MQD's work is being done by the question Justice Gorsuch described as merely "antecedent." And insofar as the Court incorporates by reference the evidence from the antecedent "majorness" question into the merits question ("as we have already shown"), post-enactment legislative history that the Court uses to determine majorness also goes to the merits, despite Justice Gorsuch's claim to the contrary.

Moreover, while notionally focused on majorness, the majority opinion's several pages of analysis still sounded in congressional intent. The Court argued that the debt cancellation program "assert[ed] . . . administrative authority . . .

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[168] *Id.* at 2610 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000)).
[169] Pub. L. No. 108-76, 117 Stat. 904.
[170] 20 U.S.C. § 1098bb(a)(1).
[171] *Nebraska*, 143 S. Ct. at 2362.
[172] *Id.* at 2368, 2372.
[173] *See id.* at 2372–75.
[174] *Id.* at 2375 (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)) (citations omitted).

that Congress has chosen not to enact itself," pointing to over eighty pieces of student loan-related legislation considered in the 116th Congress (which covered the first year of COVID-19), as well as two resolutions calling on the executive branch to cancel student debt that both "failed to reach a vote."[175] The Court argued that those modern-day "sharp debates" showed that the enacting Congress would not answer "yes" if asked whether the Secretary could cancel $430 billion in student loans using his HEROES Act authority—"Congress did not unanimously pass the HEROES Act with such power in mind."[176] The Court capped its argument by quoting then-Speaker of the House Nancy Pelosi's comment at a press conference that the President does not have authority to forgive student debt.[177] That the Court would rely on a statement made not on the floor of the House, nearly two decades after the bill's passage, by a Representative who did not sponsor the bill[178] is surprising given the Court's traditional aversion to post-enactment statements by individual legislators even when published in the Congressional Record, made shortly after enactment, by the bill's sponsor.[179] Quoting Speaker Pelosi's statement did not meaningfully advance the Court's argument that the question was a politically divisive one, nor even the Court's understanding of the enacting Congress's intent. And whether the 116th Congress succeeded or failed to pass resolutions asking the executive for debt relief could not have influenced the 108th Congress's ex ante answer to whether the HEROES Act granted such power.

Justice Barrett concurred, arguing that the MQD and its reliance on post-enactment legislative history are consistent with textualism.[180] By forthrightly defending post-enactment legislative history, Justice Barrett's approach seemed to clash with Justice Gorsuch's attempts to cabin that evidence to only the "majorness" question. Justice Barrett premised her opinion on faithful agent textualism (even citing the Third Restatement of the Law of Agency), arguing that truly faithful agents will consider the "*context* in which the principal and agent interact" alongside the plain text.[181] But rather than repudiate *Brown & Williamson*'s reliance on post-enactment legislative history, or narrow it as Justice Gorsuch did, Justice Barrett argued that such evidence went to "context": "the FDA's longstanding disavowal of authority to regulate [tobacco and] Congress's creation of 'a distinct regulatory scheme for tobacco products'" proved that "Congress could not have *intended* to delegate" authority over tobacco.[182] Justice Barrett acknowledged that "[o]f course, an agency's post-

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[175] *Id.* at 2373 & n.8.
[176] *Id.* at 2374.
[177] *Nebraska*, 143 S. Ct. at 2374 (quoting Press Conference, Office of the Speaker of the House (July 28, 2021)).
[178] *See Cosponsors: H.R.1412 — 108th Congress (2003-2004)*, CONGRESS.GOV, https://www.congress.gov/bill/108th-congress/house-bill/1412/cosponsors [https://perma.cc/8MFE-ZEV9].
[179] *See, e.g.*, Heintz v. Jenkins, 514 U.S. 291, 298 (1995).
[180] *See Nebraska*, 143 S. Ct. at 2376 (Barrett, J., concurring).
[181] *Id.* at 2378–79 (citing RESTATEMENT (THIRD) OF AGENCY § 2.02(1) (A.L.I. 2005)).
[182] *Id.* at 2382 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000)) (emphasis added).

enactment conduct does not control the meaning of a statute," but reasoned that such evidence could be "probative" because "[a] longstanding 'want of assertion of power by those who presumably would be alert to exercise it' may provide some clue that the power was never conferred."[183] She also cited *Skidmore* for the proposition that the consistency of an interpretation bears on its persuasiveness.[184]

Recast in the terms of original meaning textualism, Justice Barrett's argument might go something like the following: *Skidmore* (as incorporated into *Loper Bright*) provides that an interpretation an agency issued "contemporaneously with enactment of the statute [that] remained consistent over time" could speak to a statute's original meaning given that those promulgating the interpretation often worked with Congress to draft the statute.[185] In this context, the agency's contemporaneous decision to *not* exercise a certain power could similarly speak to how those who framed a statute understood its meaning.

This Note leaves a full treatment of post-enactment *executive* (rather than legislative) liquidation of statutory meaning to Professor Daniel Deacon's recent work.[186] One additional response here, however: Justice Barrett's view relies on both a particular set of factual circumstances that is never discussed in the MQD cases (the agency's involvement in statutory drafting) and a view of legislative action that seems at odds with the otherwise formalist separation of powers view endorsed by the MQD (legislative action puppeteered by executive drafters). Justice Barrett's approach is also subject to the same critique that dogged post-enactment legislative history: just like congressional silence, executive silence is subject to multiple permissible inferences.[187] Although the executive branch declining to exercise a certain power in the early years of a statute could mean "that the power was never conferred," it could also mean that the executive saw no need to exercise power at that time. In *Nebraska*, for instance, the predicate for issuing nationwide debt relief was the nationwide COVID-19 emergency, under which the government "declared every State, the District of Columbia, and all five permanently populated United States territories to be disaster areas."[188] Never before (and relevantly, never since the enactment of the HEROES Act) had the federal government designated the entire country as a disaster area[189]—in such circumstances, the executive might understandably

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[183] *Id.* at 2383 (citing FTC v. Bunte Bros., Inc., 312 U.S. 349, 352 (1941)).
[184] *Id.* (citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).
[185] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2258 (2024).
[186] *See supra* notes 6–9 and accompanying text.
[187] *See supra* note 108 and accompanying text.
[188] *See* Federal Student Aid Programs (Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program), 87 Fed. Reg. 61512, 61513 (Oct. 12, 2022).
[189] Justine Coleman, *All 50 States Under Disaster Declaration for First Time in US History*, THE HILL (Apr. 12, 2020, at 16:31 ET), https://thehill.com/policy/healthcare/public-global-health/492433-all-50-states-under-disaster-declaration-for-first/ [https://perma.cc/U6YR-G5LN].

assert "never previously claimed powers of this magnitude."[190]

IV. Congressional Control of Lawmaking

The MQD's narrow acceptance of post-enactment legislative history does not, in fact, reinvigorate Congress. The doctrine's choice to credit subtle congressional signaling accords with the views of some political scientists, who theorize that doing so would help courts avoid embarrassment and better track democratic will. But the MQD's use of post-enactment legislative history operates less as a genuine empowerment of Congress than as a one-way anti-executive ratchet—one that may chill productive legislative action while encouraging unilateral presidential action.

A. Post-Enactment Legislative History's Potential to Reinvigorate Congress

Both the pre-Scalia post-enactment legislative history cases and the modern MQD cases at least implicitly endorse sub-bicameral congressional signaling. Even accepting *arguendo* Justice Gorsuch's footnote that such evidence is merely probative of majorness, that use still implicates Congress wielding legislative power via sub-bicameralism: why are a subsequent Congress's views especially relevant to what makes a certain exercise of authority major, as opposed to other social or economic indicators of majorness to which the Court also turns?[191] Under Justice Barrett's view of the MQD as a form of regular statutory interpretation, whether an issue is of "vast 'economic and political significance'" such that the Court should "expect Congress to speak clearly" before delegating such issues to the executive branch should be determined, it seems, by what the enacting Congress considered to be significant.[192] One would not "expect" a Congress to explicitly delegate a power that it does not consider significant enough to explicitly delegate. For instance, as Justice Kavanaugh argued in dissent in *Learning Resources*, it should be sufficient to defeat the MQD if the *enacting* Congress did not consider the use of delegated authority to make across-the-board tariffs to be significant enough to demand more precise language than already existed.[193] Turning to evidence other than the evidence of the enacting Congress would thus appear to provide that Congress and its members can take actions to change the law without going through bicameralism and presentment.

At first blush, that endorsement would appear to *empower* Congress in the separation of powers vis-à-vis the executive—particularly because it appears to grant Congress the authority to overturn the status quo. Pre-Scalia purposivists

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[190] *Nebraska*, 143 S. Ct. at 2372 (majority).
[191] *See* Ala. Ass'n. of Realtors v. HHS, 141 S. Ct. 2485, 2489 (2021) (pointing to numerical indicators of majorness—including number of people impacted and federal funds spent—as well as the regulation's "intru[sion] into an area that is the particular domain of state law").
[192] Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000)).
[193] *See* Learning Res., Inc. v. Trump, 146 S. Ct. 628, 690 (2026) (Kavanaugh, J., dissenting).

mainly employed post-enactment legislative history to affirm the status quo, whether the existing administrative[194] or judicial[195] interpretation. In contrast, MQD cases use post-enactment legislative history to negate the status quo executive interpretation.

More generally, permitting Congress to exercise legal power without going through bicameralism and presentment—whether in the MQD or outside the MQD—could have democratic benefits. Some public choice theorists argue that it could, among other benefits: improve judicial legitimacy by allowing courts to heed democratically legitimate signals and avoid embarrassing legislative overrulings; allow legislators to save political capital for big-ticket policy goals, using cheaper speech to signal when the courts should make minor fixes that would otherwise require formal adoption;[196] and lower the ex ante transaction costs of legislating by permitting the drafting legislators to trust that later legislators can use low-cost signaling to fix any unforeseen problems.[197]

Consider, for instance, *Tennessee Valley Authority v. Hill*, which demonstrated the peril of ignoring congressional signaling.[198] Despite Congress sending the message via the relatively inexpensive (but still democratically legitimate) means of appropriations legislation that it preferred a challenged dam project to move forward despite the risk to an endangered fish, the Supreme Court blocked the project after concluding that the appropriations bill did not supersede the Endangered Species Act (ESA).[199] Following the Court's ruling, Congress not only amended the ESA to provide additional flexibility in similar situations, but also pushed the dam project forward by explicitly exempting it from the ESA.[200] Forcing such overrides not only costs Congress (and here, the

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[194] *See, e.g.*, Zemel v. Rusk, 381 U.S. 1, 12 (1965) (acquiescence to the Secretary of State's interpretation of a statute).

[195] *See, e.g.*, Flood v. Kuhn, 407 U.S. 258, 283 (1972) (acquiescence to an earlier Supreme Court interpretation of a statute).

[196] *See, e.g.*, King v. Burwell, 576 U.S. 473 (2015); Abbe R. Gluck, Comment, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 62–64, 100 (2015) (suggesting that *King* may have been a pragmatic opinion focused on helping Congress function by fixing its errors).

[197] *See, e.g.*, Edward P. Schwartz, Pablo T. Spiller & Santiago Urbiztondo, *A Positive Theory of Legislative Intent*, 57 LAW & CONTEMP. PROBS. 51, 71–74 (1994). *But see* Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 254 (1992) (arguing that public choice theory demonstrates that legislative intent is "meaningless[]" because while "[i]ndividuals have intentions and purpose and motives; collections of individuals do not"). *See generally* William N. Eskridge, Jr., *Post-Enactment Legislative Signals*, 57 LAW & CONTEMP. PROBS. 75 (1994) (applying these arguments to the practice of the Burger and Rehnquist Courts, and finding that while the Burger Court acted like these political scientists would assume, the Rehnquist Court did not). *But see* James J. Brudney & Ethan J. Leib, *Statutory Interpretation as "Interbranch Dialogue"?*, 66 UCLA L. REV. 346, 379–80 (2019) (laying out a model of interbranch dialogue that is suspicious of sub-bicameral signaling).

[198] 437 U.S. 153 (1978).

[199] *See id.* at 189–90.

[200] *See Telling the Story of Tellico: It's Complicated*, TENN. VALLEY AUTH., https://www.tva.com/about-tva/our-history/built-for-the-people/telling-the-story-of-tellico-it-s-complicated [https://perma.cc/87VC-A29P].

Tennessee Valley Authority) time and resources, but also imposes institutional legitimacy costs on the Court. In line with the reigning rejection of the use of post-enactment statutory interpretation, however, a 2002 review of the empirical literature concluded that there is no support for the theory that the Supreme Court seeks to anticipate congressional preferences in order to avoid being overturned.[201]

Post-enactment legislative history could be especially useful for checking the judiciary's implementation of "common law" statutes, as in *Blue Chip*. Common law statutes—like those governing economic competition and securities trading—often regulate complex areas of the economy where sophisticated actors could find workarounds to detailed and rigid legislative schemes. So common law statutes instead employ "brief and imprecise" language to allow courts to police the boundaries of bad behavior case-by-case—such an approach is "suitable for a vast and ever-changing array of conduct and circumstances, the effects of which might be discernible only after extensive, detailed, and case-specific factual inquiry."[202] Congress cannot be expected to amend these common law statutes as frequently as it would others, for fear of replacing simple language barring "restraint of trade"[203] or "monopoliz[ation]"[204] with something more complex and thus easier to exploit. Considering post-enactment legislative history in this context instead enables Congress to exercise oversight of the judiciary's implementation of these statutes without over-specifying the black-letter law. Just as executive agencies that implement statutes care about what congressional committees or even individual members of Congress think about their implementation, so too could the judiciary when it is entrusted with carrying out a statute.

Some on the Court might celebrate the opportunity to reinvigorate congressional power by more closely aligning the Court's decisions with what the modern Congress wants. Though scholars disagree on *why* the modern Congress is ineffective, they largely agree on the modern fact of congressional impotence as a lawmaking institution.[205] Neomi Rao, then writing as a scholar and now serving as an influential conservative jurist, argued in 2015 that congressional gridlock has incentivized Congress to delegate authority to the executive given Congress's inability to wield its own authority, and that courts ought to respond by reinvigorating the doctrine barring such expansive delegations to force Congress back into action.[206] Some Justices, Justice Gorsuch in particular, have endorsed similar reasoning in recent nondelegation

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[201] JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 326–27, 349 (2002).
[202] Michael L. Katz & A. Douglas Melamed, *Competition Law as Common Law:* American Express *and the Evolution of Antitrust*, 168 U. PA. L. REV. 2061, 2062 & n.2 (2020).
[203] 15 U.S.C. § 1.
[204] *Id.* § 2.
[205] *See* Sarah Binder, *The Dysfunctional Congress*, 18 ANN. REV. POL. SCI. 85, 86 (2015).
[206] *See* Neomi Rao, *Administrative Collusion*, 90 N.Y.U. L. REV. 1463, 1488, 1509–11 (2015).

and MQD cases.[207] In *Learning Resources, Inc. v. Trump*, for instance,[208] Justice Gorsuch described the MQD as "pro-Congress"[209] and chided those trying "to impose more tariffs" for attempting to "bypass Congress,"[210] thus pushing Congress to do its job.[211] Justice Thomas embraced similar logic in *Loper Bright Enterprises v. Raimondo*,[212] hoping that the decision to overturn *Chevron*'s regime of judicial deference to executive interpretations would protect Congress's "legislative power" from seizure by the executive branch.[213]

B. The Reality of the MQD's Institutional Incentives

But the MQD's resort to post-enactment legislative history does not, in fact, empower Congress as against the executive. Instead, it is more a trap for unwary legislators than a tool to be wielded by Congress.

First, although MQD cases do change the status quo, they do so more at the Court's behest than at Congress's. The 20th century approach reflected judicial modesty both in deferring to the executive and in leaving judicial precedent in place.[214] By using similar (weak) sources of evidence to overturn the actions of a coordinate branch, rather than merely leave them in place, the MQD instead reflects judicial hubris.[215] That the MQD is based more on the modern Court's view of a challenged presidential action, rather than the modern Congress's view, is made clear in MQD cases relying on congressional action post-

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[207] *See, e.g.*, Gundy v. United States, 139 S. Ct. 2116, 2134–35 (2019) (Gorsuch, J., joined by Roberts, C.J., and Thomas, J., dissenting) (permitting "Congress [to] pass off its legislative power" would undermine "[a]ccountability" and "deliberation" by diverse interests); West Virginia v. EPA, 142 S. Ct. 2587, 2618 (2022) (Gorsuch, J., joined by Alito, J., concurring) (similar). *See also* Daniel Farber, *The Major Question Doctrine, Nondelegation, and Presidential Power*, YALE J. ON REGUL.: NOTICE & COMMENT (Nov. 2, 2022), https://www.yalejreg.com/nc/synposium-shane-democracy-chief-executive-07/ [https://perma.cc/5ZFK-X46A] (The MQD is "not so much . . . a way of preventing Congress from giving away too much power as a way to prevent Presidents from snatching powers they were not given.").

[208] 146 S. Ct. 628 (2026).

[209] *Id.* at 654 (Gorsuch, J., concurring).

[210] *Id.* at 671–72.

[211] Catie Edmondson, *In Gorsuch's Homage to Legislative Power, a Subtle Reproach of a Neutered Congress*, N.Y. TIMES (Feb. 21, 2026) https://www.nytimes.com/2026/02/21/us/politics/gorsuch-congress-trump-tariffs.html [https://perma.cc/MA3T-3JAH] (Justice "Gorsuch made a forceful case for the sanctity of the legislative process—and an implicit critique of its current dysfunction.").

[212] 144 S. Ct. 2244 (2024).

[213] *Id.* at 2275 (Thomas, J., concurring).

[214] *See* RICHARD A. POSNER, LAW AND LEGAL THEORY IN THE UK AND THE USA 90 (1996) (describing stare decisis as a doctrine of modesty).

[215] Daniel E. Walters, *The Major Questions Doctrine at the Boundaries of Interpretive Law*, 109 IOWA L. REV. 465, 492 ("[T]he major questions doctrine runs substantial risks of a systemic judicial takeover of the legislative power that goes well beyond the bounds of the judicial power."); Jody Freeman & Matthew C. Stephenson, *The Anti-Democratic Major Questions Doctrine*, 2022 SUP. CT. REV. 1, 21 (2023) ("[T]he MQD shifts substantial policy discretion to unelected federal judges.").

enactment but pre-presidential action[216]—i.e., evidence that could speak to neither what the statutory drafters thought nor what the Congress responding to this particular action thought.

Second, the use of post-enactment legislative history cabined largely to the MQD can restrict the executive but cannot make new law. That is precisely the MQD's goal for those like Justice Gorsuch, who want to recenter lawmaking in Congress not because they want more legislating, but instead because they want less.[217] As Justice Gorsuch has argued, the Constitution intentionally makes legislating slow and arduous in order to mitigate the "threat to individual liberty" posed by heavy-handed lawmaking; the MQD is meant to enforce that constitutional design.[218] But some scholars think that sub-bicameral congressional control of the executive is normatively desirable not because it means there will always be *less* law, but instead because it means that there will be more democratically responsive law[219] or that the judicial understanding of Congress will more closely match the reality of how Congress acts.[220] As in *Youngstown* cases where the Court saw in post-enactment history either implicit congressional approval of executive action or silence as acquiescence,[221] this could sometimes mean there is *more* law. Deeming post-enactment history legally effective only when it serves to reject executive power thus implicitly embraces a libertarian "minimal-state philosophy that appears nowhere in the Constitution."[222] Yes, the Constitution embraces bicameralism and presentment. But there is no principled reason to allow Congress to skip bicameralism when

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[216] *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 143 (2000); West Virginia v. EPA, 142 S. Ct. 2587, 2614 (2022).

[217] Justice Gorsuch has separately laid out his view that there is simply "too much law." *See generally* NEIL GORSUCH & JANIE NITZE, OVER RULED: THE HUMAN TOLL OF TOO MUCH LAW (2024).

[218] *West Virginia*, 142 S. Ct. at 2618–19 (Gorsuch, J., concurring).

[219] Note, *Separating the Powers in the Administrative State: Article I*, 139 HARV. L. REV. 1139 (2026) (Proposing a novel model of "Article I agencies" that could "pass rules pursuant to statutory delegations without bicameralism and presentment," *id.* at 1147, in order to "reinvigorate[]" Congress. *Id.* at 1159. "Congressional elections might once again become independently important rather than mere referenda on the President. Thus, to the extent one's democratic sympathies lie with Congress, sending power back to Congress in this way would be a functional upgrade." *Id.* (footnote omitted)).

[220] *See* Bradley & Morrison, *supra* note 117, at 451 ("Expanding the [*Youngstown*] inquiry to include a wider array of congressional responses to executive action will substantially shrink the universe of cases where Congress can truly be said to have remained silent, which will in turn shrink the number of cases drawing inferences from such silence. That is all to the good . . . . [A]ssigning interpretive consequences to congressional silence or inaction is perilous at best. . . . [C]ourts and other interpreters should strongly prefer affirmative evidence of that understanding, [even if sub-bicameral evidence], not just silence.").

[221] *See, e.g.*, Dames & Moore v. Regan, 453 U.S. 654, 678 (1981).

[222] Andrew Koppelman, *The Mystery of Neil Gorsuch*, L.A. REV. BOOKS (Mar. 19, 2025) (reviewing GORSUCH & NITZE, *supra* note 217), https://lareviewofbooks.org/article/the-mystery-of-neil-gorsuch [https://perma.cc/NEQ8-NCPX]. *See also* David G. Savage, *On an Often Unpredictable Supreme Court, Justice Gorsuch Is the Latest Wild Card*, L.A. TIMES (July 12, 2019, at 04:00 PT), https://www.latimes.com/politics/la-na-pol-gorsuch-supreme-court-conservative-20190712-story.html [https://perma.cc/7AGS-GDQV] (describing Justice Gorsuch as a libertarian).

it wants the President to do less, but not when it wants the President to do more.

And third, the MQD's use of post-enactment legislative history may be counterproductive even for Justice Gorsuch, as it disincentivizes constructive legislative deliberation by raising the cost of political discourse. Consider *West Virginia*, which relied on rejected legislative proposals in determining that the executive did not have the authority that had been proposed and rejected. That judicial signal tells legislators to be wary of such proposals in the future unless they are certain they will be enacted, for fear that proposing that power will conversely mean stripping the President of it. This is primarily a problem for unified governments, where a congressional majority has a chance, but not a certain one, of passing legislation. In that setting, consideration of failed legislative efforts will in particular discourage two policy tools: first, as Professors Freeman and Stephenson have argued,[223] it will discourage the President from asking Congress for authority to act, in favor of acting unilaterally in the first instance. Second, it will raise the cost of so-called "messaging bills."

1. The President: Avoiding Congressional Ratification

Headline policies in the Obama, Trump I, and Biden Administrations went through similar policymaking cycles: the President first went to Congress to try to achieve his policy goal, and when Congress was too gridlocked (often stymied by the filibuster) to produce results, the President took unilateral action. That approach was typified by President Obama's statement during a speech in 2011: "Where they won't act, I will."[224] With a job bill aimed at staving off recession stuck in Congress, President Obama used the speech to kick off a series of executive actions that would provide economic relief.[225] President Obama took a similar approach to immigration reform—providing protection for "Dreamers" after Congress refused to pass the DREAM Act.[226] Same for both President Trump and President Biden: in his first term, President Trump took executive action to redirect funds to building a border wall after Congress refused to

[223] *See* Freeman & Stephenson, *supra* note 215, at 43.

[224] President Barack Obama, Remarks in Las Vegas: We Can't Wait (Oct. 24, 2011), https://www.presidency.ucsb.edu/documents/remarks-las-vegas [https://perma.cc/47C7-DNNU].

[225] Jackie Calmes, *Jobs Plan Stalled, Obama to Try New Economic Drive*, N.Y. TIMES (Oct. 23, 2011), https://www.nytimes.com/2011/10/24/us/politics/jobs-plan-stalled-obama-to-try-new-economic-drive.html [https://perma.cc/F26N-QYXN].

[226] Barack Obama, President, United States of America, Remarks by the President on Immigration (June 15, 2012), https://obamawhitehouse.archives.gov/the-press-office/2012/06/15/remarks-president-immigration [https://perma.cc/D9PL-NUR3] ("This morning, Secretary Napolitano announced new actions my administration will take to mend our nation's immigration policy . . . . I have said time and time and time again to Congress that, send me the DREAM Act, put it on my desk, and I will sign it right away. . . . [A] year and a half ago, Democrats passed the DREAM Act in the House, but Republicans walked away from it. . . . It's still the right thing to do.").

provide the level of appropriations he requested.[227] And President Biden did the same for both the COVID-19 eviction moratorium[228] and his clean energy agenda[229] when they stalled in Congress.

But that strategy of starting with Congress, and working unilaterally only if the President cannot get congressional approval, is made riskier now that Congress's decision to turn down that power could be evidence that the President does not have it. *Nebraska*'s citation to Speaker Pelosi's press conference is a useful example: when Speaker Pelosi said she did not believe President Biden could unilaterally cancel student debt, Democrats controlled both the House and Senate. At that press conference, Speaker Pelosi raised the prospect of congressional action to cancel student debt, and discussed the policy considerations that would go into that decision.[230] And she praised President Biden's eventual unilateral action[231] (the legality of which was backed up by a new Office of Legal Counsel opinion[232] not available when Speaker Pelosi made her initial comments), and decried the Supreme Court blocking that action.[233] Her statement that President Biden did not have that power, then, was potentially part of an intra-party negotiation between executive and congressional authority, with Speaker Pelosi on board for the policy outcome but defending Congress's institutional role. Her former Chief of Staff once confirmed that Speaker Pelosi "views herself as a defender of the institution of the House of Representatives."[234] But by seizing on Speaker Pelosi's statement, the Court disincentivizes similar statements that would normally be part of the give-and-take of the separation of powers. That back-and-forth will be forced, then, out of the public eye, incentivizing parties to shore up the party line, avoid spats

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[227] Jeff Mason & Roberta Rampton, *Trump Vetoes Measure to End His Emergency Declaration on Border Wall*, REUTERS (Mar. 15, 2019, at 19:00 ET), https://www.reuters.com/article/world/trump-vetoes-measure-to-end-his-emergency-declaration-on-border-wall-idUSKCN1QW29O/ [https://perma.cc/9PM8-LKC6].

[228] David Shepardson, *CDC Rebuffs Biden Bid to Reinstate COVID-19 Eviction Moratorium*, REUTERS (Aug. 2, 2021, at 19:02 ET), https://www.reuters.com/world/us/pelosi-urges-white-house-reinstate-expired-covid-19-eviction-moratorium-2021-08-02/ [https://perma.cc/P5X7-A4XE].

[229] Kelsey Tamborrino, *Biden Unveils New Wind Power Push as Congress Stalls on His Clean Energy Agenda*, POLITICO PRO (Jan. 12, 2022, at 10:31 ET), https://subscriber.politicopro.com/article/2022/01/biden-unveils-new-wind-power-push-as-congress-stalls-on-his-clean-energy-agenda-2102227 [https://perma.cc/YGD8-6W26].

[230] Press Conference, Office of the Speaker of the House (July 28, 2021), https://pelosi.house.gov/news/press-releases/transcript-of-pelosi-weekly-press-conference-today-111 [https://perma.cc/7TJ8-RDYP].

[231] Press Release, Office of the Speaker of the House (Aug. 24, 2022), https://pelosi.house.gov/news/press-releases/pelosi-statement-on-president-biden-s-historic-student-debt-relief [https://perma.cc/DV2L-6Q2Z].

[232] Use of the HEROES Act of 2003 to Cancel the Principal Amounts of Student Loans, 2022 WL 3975075 (O.L.C. Aug. 23, 2022).

[233] Press Release, Office of Speaker Emerita Nancy Pelosi (June 30, 2023), https://pelosi.house.gov/news/press-releases/pelosi-statement-on-supreme-court-decision-on-president-biden-s-student-loan [https://perma.cc/32AC-5R3Y].

[234] *Interview with John Lawrence*, FRONTLINE: PELOSI'S POWER, https://www.pbs.org/wgbh/frontline/interview/john-lawrence/ [https://perma.cc/L3JF-L2AY].

with the executive, and leave action to the President alone.

That trend may already be emerging during President Trump's second term, during which the President has preferred to start with executive action, rather than first asking Congress for permission.[235] For instance, President Trump proposed a sweeping government restructuring agenda in his first term premised on congressional approval.[236] That plan proposed, among other changes, merging the Departments of Education and Labor in line with President Trump's stated interest in closing or substantially shrinking the Department of Education.[237] President Trump pursued the same goal unilaterally in his second term, purporting to "clos[e]" the agency via Executive Order and later transferring many of its responsibilities to other agencies like the Department of Labor via interagency agreements.[238] Similarly, while President Trump sought congressional authorization for across-the-board tariff power from Congress in his first term,[239] he relied on existing authority in the International Emergency Economic Powers Act to do much the same in his second. Even after the Supreme Court rejected that initial go-it-alone approach, President Trump responded to questions about whether he would seek congressional approval for his new round of tariffs by stating: "No, I don't need to, it's already been approved."[240] As Professors Freeman and Stephenson stipulated, "it would be better—both as a matter of democratic legitimacy and as a matter of public policy—if major public problems were addressed through legislation than through unilateral agency action."[241] Between a regime where the executive acts unilaterally only after trying to achieve policy results through Congress, and one where the executive acts unilaterally and ignores Congress altogether, the former at least has the benefit of potential congressional participation in policymaking.

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[235] INTERESTING TIMES WITH ROSS DOUTHAT: *Trump Is the End of a 100-Year Experiment*, at 24:24 (Spotify, Apr. 16, 2026) ("What makes Trump kind of unique is that Joe Biden actually *did* try to move legislation about student loan debt forgiveness. . . . It failed. Obama tried to move legislation on immigration. It failed. Trump hasn't even tried. And remember before the election, in fact, he told Republicans not to vote for immigration legislation changes, because one gets the sense he wanted to do government by executive order because this is more fun.").

[236] *See* Clare Lombardo & Alexis Arnold, *White House Proposes Merging Education and Labor Departments*, NPR (June 21, 2018, at 15:51 ET), https://www.npr.org/sections/ed/2018/06/21/622189097/white-house-proposes-merging-education-and-labor-departments [https://perma.cc/DHP7-EQG4].

[237] *Id.*

[238] *See* Katharine Meyer et al., *FAQs: Checking in on the Department of Education*, BROOKINGS INST. (Feb. 20, 2026), https://www.brookings.edu/articles/faqs-checking-in-on-the-department-of-education/ [https://perma.cc/YX4B-7YQQ].

[239] *See* Gary Clyde Hufbauer & Eujin Jung, *Navarro Asks Congress to Give Trump Absolute Authority over the US Tariff Schedule*, PETERSON INST. FOR INT'L ECON. (Jan. 18, 2019, at 09:15 ET), https://www.piie.com/blogs/trade-and-investment-policy-watch/2019/navarro-asks-congress-give-trump-absolute-authority [https://perma.cc/5SGB-4FLZ].

[240] Trevor Hunnicutt & Jarrett Renshaw, *Supreme Court Checks Trump's Expansive View of Executive Power*, REUTERS (Feb. 20, 2026, at 19:59 ET), https://www.reuters.com/legal/government/supreme-court-checks-trumps-expansive-view-executive-power-2026-02-21/ [https://perma.cc/3DAX-ZGH3].

[241] Freeman & Stephenson, *supra* note 215, at 43.

Some MQD supporters might reason that the consideration of this evidence is precisely aimed at preventing the President from doing unilaterally what could only be done through Congress. Stopping at Congress first is thus evidence that the President could not take this action on his own. But this counter considers the issue at too high a level of generality. The economic relief President Obama could achieve on his own was different from the jobs program he hoped to pass through Congress.[242] And President Trump worked through alternative, but existing, statutory mechanisms to reroute already-appropriated funds to the border wall when he failed to get new money.[243] Evidence that the President asked for one specific authority does not necessarily mean that a different authority (even if addressing the same problem) does not exist.

2. *Congress: Avoiding Political Messaging*

One (perhaps, but not certainly) salutary outcome of raising the cost of public statements by Members of Congress is decreasing the use of so-called "messaging bills." As Senator Olympia Snowe of Maine explained, much of the legislation introduced in Congress today "is not intended to ever actually pass," but is instead meant to either present a façade of productivity to voters, or simply embarrass or pressure the other party.[244] The *New York Times* editorial board has complained that such efforts are a "colossal waste of time."[245] In the face of a Court that will read failed legislation as meaningful, these messaging bills may no longer be cheap political signals—rather, members could become wary of introducing legislation that fails and then later is counted against them. If messaging bills send the false signal to voters that their representative is a productive member, thus perpetuating the tenure of unproductive members, tamping down on that tactic could encourage congressional productivity. One empirical study suggests that voters do reward legislators who advance messaging bills.[246]

On the other hand, messaging bills may be unfairly maligned. First, messaging bills may enable compromise. As Christian Fong and Nicolas Hernandez Florez argue, party leaders can propose a messaging bill that takes an extreme position, knowing that they will eventually land on a bipartisan compromise.[247] The messaging bill, however, provides the political "cover"

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[242] *See* Calmes, *supra* note 225.
[243] Mason & Rampton, *supra* note 227.
[244] Olympia J. Snowe, Essay, *The Effect of Modern Partisanship on Legislative Effectiveness in the 112th Congress*, 50 HARV. J. ON LEGIS. 21, 27 (2013).
[245] Editorial, *The Bills to Nowhere*, N.Y. TIMES (June 7, 2012), https://www.nytimes.com/2012/06/08/opinion/the-bills-to-nowhere.html [https://perma.cc/JW2Z-SAWV].
[246] Nicole Huffman, John Kane & David Stack, *Worth a Try? The Electoral Consequences of Symbolic Legislation* (Feb. 3, 2025) (unpublished working paper), https://preprints.apsanet.org/engage/apsa/article-details/679daa3ffa469535b9a16b76 [https://perma.cc/H5LQ-NPGM].
[247] Christian Fong & Nicolas Hernandez Florez, *Enabling Compromise* 3 (Ctr. for Effective Lawmaking, Working Paper No. 2024-06, 2024), https://thelawmakers.org/wp-content/uploads/2024/10/Enabling_compromise.pdf [https://perma.cc/343W-ZEDN].

necessary to agree on the ultimate compromise without alienating the party's base—in particular, the relatively more extreme voters who control primary elections.[248] Second, messaging bills can help voters understand who to blame, and thus who to punish electorally. Where a majority is blocked by the filibuster in the Senate, congressional leadership may regardless bring legislation to a vote, knowing it will fail, so that voters see that the minority party is blocking important legislation.[249] And finally, messaging bills can put legislators "on the record." Majority party members can propose legislation that they know will not pass, but will force minority members to cast potentially politically unpopular votes.[250] Empirical research shows that how members vote on messaging bills closely matches how they vote on "real" legislation—that is, messaging votes reflect members' "true" preferences.[251] As a result, such forced votes on uncomfortable issues may help reveal candidate stances, providing valuable information to voters.

V. CONCLUSION

In theory, judicial consideration of post-enactment legislative history holds promise for our constitutional system. But as incorporated into the MQD, post-enactment legislative history cannot realize this promise. Instead, it will more likely quiet Congress—discouraging already weakened legislators from carrying out their constitutional obligations. And regardless of whether considering post-enactment legislative history is a normative good, there is no principled reason to consider it *only* in MQD cases. The Court should make up its mind: does it believe in bicameralism, or not?

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[248] *Id.*
[249] *See* Jim Saksa, *Messaging Bills Are Loud, But Do Voters Hear Them?*, ROLL CALL (July 25, 2024, at 16:29 ET), https://rollcall.com/2024/07/25/messaging-bills-are-loud-but-do-voters-hear-them/ [https://perma.cc/UY3D-DZN5].
[250] *Id.*
[251] Thomas R. Gray & Jeffery A. Jenkins, *Messaging, Policy and "Credible" Votes: Do Members of Congress Vote Differently When Policy Is on the Line?*, 42 J. PUB. POL'Y 637 (2022).