THE THREE MAJOR QUESTIONS DOCTRINES

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INTRODUCTION

Pythagoras called three "the noblest of all digits" because it is the only number equal to the sum of all the numbers below it.[1] Three marks time: past, present, future; beginning, middle, end. For many, three has special religious and cultural significance: the Holy Trinity, the three states of consciousness, the Three Musketeers. Even *Schoolhouse Rock!* teaches that "three is a magic number."[2] But in the law, three of something creates confusion.

After the Supreme Court's decision in *Biden v. Nebraska*,[3] we now have three interpretations of the major questions doctrine.[4] Chief Justice John Roberts, Justice Neil Gorsuch, and Justice Amy Coney Barrett have

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1. PRIYA HEMENWAY, DIVINE PROPORTION: PHI IN ART, NATURE, AND SCIENCE 53–54 (2005).

2. *Schoolhouse Rock!: Three Is a Magic Number* (ABC television broadcast Jan. 7, 1973).

3. 143 S. Ct. 2355 (2023).

4. Cass Sunstein has previously written that there are two major questions doctrines. Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475 (2021). He identifies a "weak" version that is primarily a *Chevron* carve-out and a "strong" version that operates much like a substantive canon, limiting interpretation of ambiguous authorizing statues to prevent agencies from novel assertions of broad power. *Id.* at 477. He does not divide the different versions between justices like this Essay, but we agree with his general premise that there are now multiple versions of the major questions doctrine at the Supreme Court.

each offered different justifications for the doctrine and different ideas about how it should operate. Of course, whenever three versions of the same doctrine appear in the law, at least two questions must be answered: What are they? And how are they different?

This Essay is the first to try to answer those questions.[5] By examining the Supreme Court's most recent "major questions" cases,[6] this Essay traces the origin, justification, and operation of the three different approaches. It explains each in detail below, but in short, the three versions can be identified as follows.

Justice Gorsuch offers a version of the major questions doctrine that is rooted in the constitutional requirements of separation of powers and nondelegation. As he sees it, the doctrine requires that agencies identify a clear statement from Congress before they can promulgate regulations with respect to certain social, political, or economic issues. [7] We call this the clear statement approach.

Justice Barrett articulates a variety of the major questions doctrine that does not impose a clear statement rule but purports to follow the text's most natural reading. She conceptualizes that the doctrine as simply another tool to aid courts in discerning the meaning of a statute by looking to commonsense principles of statutory interpretation and the important context of the statute, namely the principal-agent relationship between Congress and agencies.[8] We call this the contextual approach.[9]

Chief Justice Roberts puts forth a version of the doctrine that combines elements of both approaches described above, at times drawing

5. Scholars have noted "the contours of the doctrine remain unsettled" but have not been able to identify categories in the way that this piece proposes. Thomas B. Griffith & Haley N. Proctor, *Deference, Delegation, and Divination: Justice Breyer and the Future of the Major Questions Doctrine*, 132 YALE L.J. FORUM 693, 717 n.2 (2022). *See also* Eloise Pasachoff, *Executive Branch Control of Federal Grants: Policy, Pork, and Punishment*, 83 OHIO ST. L.J. 1113, 1198 n.562 (2022) ("[I]t remains to be seen how far the [major questions] doctrine will extend.").

6. This Essay specifically examines *National Federation of Independent Businesses v. Department of Labor, Occupational Safety & Health Administration*, 142 S. Ct. 661 (2022), *West Virginia v. Environmental Protection Agency*, 142 S. Ct. 2587 (2022), and *Biden v. Nebraska*, 143 S. Ct. 2355 (2023). Though there are several other cases that discuss and rely on the major questions doctrine, this Essay limits its analysis to these three as they are the most direct and pertinent articulations of the three different versions discussed here.

7. *See Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 668 (Gorsuch, J., concurring).

8. *See Biden*, 143 S. Ct. at 2376–80 (Barrett, J., concurring).

9. Beau J. Baumann, *Let's Talk About That Barrett Concurrence (on the "Contextual Major Questions Doctrine"), by Beau J. Baumann*, YALE J. REG.: NOTICE & COMMENT, (June 30, 2023), https://www.yalejreg.com/nc/lets-talk-about-that-barrett-concurrence-on-the-contextual-major-questions-doctrine-by-beau-j-baumann/ [https://perma.cc/4LSL-D6PH] (also labeling Justice Barrett's approach as "contextual").

on principles of separation of powers but also resorting to commonsense and context.[10] We therefore call this the hybrid approach.

The clear statement, contextual, and hybrid approaches overlap to a large degree. As recent cases demonstrate, the three can lead to the same end result across a range of cases. That alone might make it difficult to tease out the differences between them. But just because the differences are difficult to see does not mean they are not there. Parsing those differences is the work of Part I of this Essay.

Part II attempts to shed more light on the contours and variations of each approach by applying them to two hypothetical statutes. The way the Court would treat these different statutes—and thus the way the Court could potentially employ the major questions doctrine going forward—has significant implications for future acts of Congress and the ways in which its members legislate. It is therefore vital that government actors and private litigators alike understand how the various approaches to the major questions doctrine could operate in practice. The Essay concludes by briefly considering the options available to Congress as it contemplates future legislation.

I. THE THREE VERSIONS OF THE MAJOR QUESTIONS DOCTRINE

Over the past few terms, the Court's administrative law decisions have given scholars much to digest in the way of the "major questions doctrine." Indeed, as we posit below, scholars, lawyers, and even policymakers must now analyze and understand not just one doctrine, but three: the clear statement approach, the contextual approach, and the hybrid approach. This Part explains each one.

A. The Clear Statement Approach

In a few recent cases challenging assertions of agency power,[11] Justice Gorsuch has articulated an approach to the major questions doctrine meant to reinforce separation of powers and nondelegation principles through a clear statement rule.[12] We call this interpretation the "clear statement approach."

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10. *See West Virginia*, 142 S. Ct. at 2608; *Biden*, 143 S. Ct. at 2372–73. Though other justices joined the chief justice's opinions in these two cases, including Justice Gorsuch and Justice Barrett, we refer to this version of the major questions doctrine as Chief Justice Roberts's version for simplicity.

11. *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. 661, *West Virginia*, 142 S. Ct. 2587; *Biden*, 143 S. Ct. 2355.

12. Indeed, Justice Gorsuch specifically says that the "major questions doctrine is closely related to what is sometimes called the nondelegation doctrine." *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 668 (Gorsuch, J., concurring).

Under the clear statement approach, before a court endorses a broad delegation of authority to an administrative agency, the court must first find clear statutory language authorizing the agency's action. That is because clear statement advocates view the major questions doctrine as a "firm rule" that requires Congress to "'speak clearly' if it wishes to assign decisions 'of vast economic and political significance'" to an executive agency.[13] If that sounds like it requires a high level of specificity from Congress, that is because it does. Specificity is important to Justice Gorsuch's approach because it serves to protect the public from the potentially unauthorized acts of executive agencies: "If administrative agencies seek to regulate the daily lives and liberties of millions of Americans, the doctrine says, they must at least be able to trace that power to a clear grant of authority from Congress."[14] Consequently, the major questions doctrine "guards against unintentional, oblique, or otherwise unlikely delegations of the legislative power"[15] and "protect[s] foundational constitutional guarantees."[16]

How does Justice Gorsuch justify this rule? Why require Congress to speak clearly when delegating power to agencies? Why not just interpret the plain meaning of the text? After all, Gorsuch is a self-described textualist.[17]

Justice Gorsuch explains that every statute is interpreted against the backdrop of the Constitution,[18] so even a devout textualist does not operate in a vacuum.[19] When a textualist judge gives the words of a statute their "most natural reading," that judge must remain cognizant of constitutional

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13. *Id.* at 667 (quoting *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam) (internal quotation marks omitted)). In *OSHA*, Gorsuch cites his dissent in *Gundy v. United States*, where he perhaps most vividly contrasted the linguistic canon version of the major questions doctrine with his more substantive constitutional values–laden version: "Although it is nominally a canon of statutory construction, we apply the major questions doctrine in service of the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency." 139 S. Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting).

14. *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 668 (Gorsuch, J., concurring).

15. *Id.* at 669.

16. *West Virginia*, 142 S. Ct. at 2616 (Gorsuch, J., concurring).

17. *See Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020) ("[O]nly the words on the page constitute the law adopted by Congress and approved by the President. If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives."). *See generally* NEIL GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT (2020).

18. *West Virginia*, 142 S. Ct. at 2616 (Gorsuch, J., concurring) ("One of the Judiciary's most solemn duties is to ensure that acts of Congress are applied in accordance with the Constitution in the cases that come before us.").

19. See *infra* note 46.

limitations and principles.[20] For example, Justice Gorsuch believes that when interpreting a statute that purports to confer broad power on an executive agency, a textualist judge must not be so focused on the text that they overlook the constitutional principle that only states possess the "general power of governing."[21] And because the federal government's powers are "limited and divided,"[22] the judge must understand, too, that federal policy must originate from a "constitutionally enumerated source of authority" and that the federal government must act consistently with the "Constitution's separation of powers."[23] Or, take another, more relevant example: a textualist judge applying the major questions doctrine must also remember that Article I's Vesting Clause gives rise to the corollary principle of nondelegation, which is designed "to protect the separation of powers and ensure that any new laws . . . are subject to the robust democratic processes the Constitution demands."[24]

For Gorsuch, the major questions doctrine is rooted in the need for judges to give effect to the Constitution's vesting of "[a]ll legislative Powers" in Congress.[25] And a court should not presume that Congress meant to push the boundaries of the constitutional structure of separated and enumerated powers through ambiguous or imprecise language. Only a clear statement from Congress can overcome that presumption.[26] Gorsuch's approach to the major questions doctrine, therefore, effectively becomes a clear statement rule.

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20. This is a contested assertion. *See, e.g.*, John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1943 (2011) ("Resting as it does upon a freestanding separation of powers principle," an approach that prioritizes separation of power principles over the plain text "tends to privilege general constitutional purpose over specific textual detail.") (citation omitted); John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2004 (2009) (explaining that "[i]n recent years, the Supreme Court has embraced a freestanding federalism [principle] that is not tied to any particular clause of the Constitution," and is thus in tension with methods of interpretation that purport to confine themselves to the text).

21. *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin.*, 142 S. Ct. 661, 667 (2022) (Gorsuch, J., concurring) (quoting *Nat'l Fed'n of Indep Bus. v. Sebelius*, 567 U.S. 519, 536 (2012)).

22. *Id.* (quoting *Sebelius*, 567 U.S. at 536).

23. *Id.*

24. *Id.* at 668–69 (internal citation omitted).

25. U.S. CONST. art. I, § 1.

26. Here, Justice Gorsuch explains that judges should do as they have done throughout the history of our judiciary when protecting constitutional values: rely on a clear statement rule. "[O]ur law is full of clear-statement rules and has been since the founding." *West Virginia v. EPA*, 142 S. Ct. 2587, 2625 (2022) (Gorsuch, J., concurring). For example, the "Constitution prohibits Congress from passing laws imposing various types of retroactive liability," and it "incorporates the doctrine of sovereign immunity," so the judiciary has adopted clear statement requirements before letting Congress impose retroactivity or abrogate sovereign immunity. *Id.*

B. The (Con)Textual Approach

In *Biden v. Nebraska*, Justice Barrett offered a new version of the major questions doctrine. Concerned with recent scholarship criticizing the doctrine as inconsistent with textualism,[27] Barrett sought to place the doctrine on firmer textualist footing.[28] She began by explaining that the "major questions doctrine situates text in context, which is how textualists, like all interpreters, approach the task at hand."[29] Under that approach, a court looks to things like "the circumstances in which [a word] is used,"[30] "commonsense principles of communication,"[31] and "constitutional structure"[32] to understand the scope of any given congressional delegation. So understood, the major questions doctrine becomes "a tool for discerning—not departing from—the text's most natural interpretation."[33] We call this interpretation the "contextual approach."

According to Barrett, the major questions doctrine should be used as an interpretive tool reflecting "common sense as to the manner in which Congress is likely to delegate a policy decision of major economic and political magnitude to an administrative agency."[34] This common sense should inform the judge that the text of the statute must be situated "in context."[35] And Barrett is clear that context sweeps beyond the words on the page: "Context is not found exclusively 'within the four corners' of a statute," but rather comes from "[b]ackground legal conventions," [36] and "commonsense principles of communication."[37]

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27. *See, e.g.*, Chad Squitieri, *Major Problems with Major Questions*, LAW & LIBERTY (Sept. 6, 2022), https://lawliberty.org/major-problems-with-major-questions/ [https://perma.cc/32K4-X8NN]; Michael Rappaport, *Against the Major Questions Doctrine*, ORIGINALISM BLOG (Aug. 15, 2022), https://originalismblog.typepad.com/the-originalism-blog/2022/08/against-the-major-questions-doctrinemike-rappaport.html (arguing that the doctrine as outlined in *West Virginia v. EPA* "neither enforces the Constitution nor applies ordinary methods of statutory interpretation" and "seems like a made up interpretive method for achieving a change in the law that the majority desires").

28. *Biden v. Nebraska*, 143 S. Ct. 2355, 2376 (2023) (Barrett, J., concurring) ("I take seriously the charge that the doctrine is inconsistent with textualism."). In her view, "some articulations of the major questions doctrine on offer—most notably, that the doctrine is a substantive canon—should give a textualist pause." *Id.*

29. *Id.* at 2378. In other words, she understands the major questions doctrine "to emphasize the importance of *context* when a court interprets a delegation to an administrative agency." *Id.*

30. *Id.*

31. *Id.* at 2380.

32. *Id.*

33. *Id.* at 2376.

34. *Id.* at 2384 (quoting *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)).

35. *Id.* at 2378.

36. *Id.*

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

Barrett defines the contextual approach, at least in part, in contrast to the clear statement approach. She sees the clear statement approach as working against the text because it "overprotects" the "judicially specified value" of nondelegation and will often lead an interpreter away from "the most natural reading of a statute."[38] That approach is not just anti-textualist, it is also irreconcilable with the role of the courts in interpreting statutes. After all, courts do not "have an obligation (or even permission) to choose an inferior-but-tenable alternative that curbs the agency's authority."[39] Barrett rejects the notion that the major questions doctrine should "reflect the judgment that it is so important for Congress to exercise all legislative Powers, that it should be forced to think twice before delegating substantial discretion to agencies—even if the delegation is well within Congress's power to make."[40] Such a rule "loads the dice" so that "a plausible anti-delegation interpretation wins even if the agency's interpretation is better."[41]

Justice Barrett acknowledges that her understanding of the doctrine is consistent with the clear statement approach to the extent that both recognize that the expectation of clarity in delegations "is rooted in the basic premise that Congress normally 'intends to make major policy decisions itself, not leave those decisions to agencies.'"[42] The key difference, she believes, is that "treating the Constitution's structure as part of the context in which a delegation occurs is not the same as using a clear-statement rule to over-enforce Article I's nondelegation principle."[43] The former operates as a presumption that Congress legislates on "important subjects while delegating away only the details," while the latter wholly "discourages Congress from empowering agencies."[44]

The contextual approach seeks to assuage textualist fears about the major questions doctrine. An "honest textualist" is always permitted to use commonsense when interpreting statutes.[45] Indeed, neglecting commonsense would thwart the textualist endeavor by departing from how a reasonable person understands a statute's words. And an honest textualist is also allowed to consider context, for textualists do not operate in a vacuum.[46] Part of this context, according to Barrett, is the relationship between Congress and agencies, such that we do not lightly presume that

38. *Id.* at 2380.
39. *Id.* at 2378.
40. *Id.* at 2379.
41. *Id.* at 2377.
42. *Id.* at 2379.
43. *Id.*
44. *Id.* at 2380 (emphasis removed).
45. *Id.* at 2377.
46. *Id.* at 2382 ("[A] vacuum is no home for a textualist.").

a principal intended to confer vast authority to an agent using ambiguous language.[47]

C. The Hybrid Approach

Though Justice Gorsuch and Justice Barrett present comprehensive justifications for the major questions doctrine, the only version to garner majority support from the justices has been the approach articulated by Chief Justice Roberts, which is relatively less defined. Roberts's approach has both clear statement and contextual justifications. Indeed, Roberts relies explicitly on separation of powers principles *and* ordinary principles of statutory interpretation: In "certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us reluctant to read into ambiguous statutory text the delegation claimed to be lurking there."[48] Chief Justice Roberts's version of the doctrine thus forms a hybrid of the two views described above, situated somewhere between context and a clear statement. We therefore call it the "hybrid approach."

Under Roberts's approach to the doctrine, even when there is a "colorable textual basis" for the interpretation proffered by the agency, "common sense as to the manner in which Congress would have been likely to delegate such power to the agency at issue, [could make] it very unlikely that Congress had actually done so."[49] This reliance on "common sense" principles seems to be similar to the contextual approach offered by Barrett. But in the same paragraph, Roberts explains that in ordinary cases, "context has no great effect on the appropriate analysis,"[50] and he doubled down shortly thereafter on the requirement that an agency "point

47. The move to go beyond the four corners of the statute when searching for "context" is a move that may be controversial within textualism. It could be in tension with proper textualism if the search for context licenses the judge to move beyond the text and therefore alter the plain meaning of the text. But it could be reconciled with textualism so long as it is not used to contradict the text, operating almost like a parol evidence rule—it can be used to clarify but not to contradict. *See, e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 56–57 (2011) (acknowledging that context is important to interpreting the text but also discussing how it can be misused). A discussion about the appropriate bounds of context in textualist interpretation is rich enough to deserve its own article, so we do not go down that rabbit hole here.

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

49. *Id. See also id.* at 2607 ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.") (quoting *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989)).

50. *Id.*

to clear congressional authorization for the power it claims."[51] That sounds more like Gorsuch.

But Roberts never fully commits to a "clear statement" rule or pure "context." Instead, his description makes clear that he is thinking of something subtly different. For example, when the dissenting justices accused the *West Virginia*[52] majority of not following "normal statutory interpretation,"[53] the chief justice responded that in "extraordinary cases" there "may be reason to hesitate before accepting a reading of a statute that would, under more 'ordinary' circumstances, be upheld."[54] He continued, the "dissent attempts to fit the analysis in these cases within routine statutory interpretation, but the bottom line—a requirement of 'clear congressional authorization'—confirms that the approach under the major questions doctrine is distinct."[55]

The next Part of this Essay looks at the differences between the three approaches to try to give each a bit more definition.

II. WHAT'S THE DIFFERENCE?

So far, this Essay has offered a descriptive account of the three different approaches to the major questions doctrine. At this point, an astute reader might ask, so what? If each variant leads to the same outcome, why should we care about the differences between the three?

This Essay contends that the differences go beyond mere academic dispute. Whether the Court moves in the direction of the clear statement, contextual, or hybrid approach will have real-world consequences, particularly as it relates to the balance of power between Congress, the Executive, and the Judiciary. One need only examine the Court's decisions

51. *Id.* at 2609 (internal quotation marks omitted).

52. 142 S. Ct. 2587 (2022).

53. *Id.* at 2633 (Kagan, J., dissenting).

54. *Id.* at 2608.

55. *Id.* We note that Chief Justice Roberts's recent majority opinion in *Biden v. Nebraska* prioritized traditional principles of statutory interpretation. Unlike in *West Virginia v. EPA*, where the major questions doctrine played a dispositive role, in *Biden v. Nebraska*, the chief justice relied more on straightforward statutory interpretation to conclude that the HEROES "Act allows the Secretary to 'waive or modify' existing statutory or regulatory provisions applicable to financial assistance programs under the Education Act, not to rewrite that statute from the ground up." *Biden v. Nebraska*, 143 S. Ct. 2355, 2368 (2023). After an extensive textual analysis of "waive and modify," and a conclusion that the text of the statute did not authorize the Biden Administration's claimed power, only then did Chief Justice Roberts turn to the major questions doctrine. "Under the Government's reading of the HEROES Act, the Secretary would enjoy virtually unlimited power to rewrite the Education Act. This would 'effect a fundamental revision of the statute, changing it from one sort of scheme of regulation into an entirely different kind.'" *Id.* at 2373. Here, Chief Justice Roberts seems to be using the major questions doctrine to reinforce his statutory interpretation of "waive or modify," rather than using it to displace traditional rules of statutory interpretation.

in the past two terms to see the robust role that the major questions doctrine has played in cases impacting consequential issues as diverse as public health and vaccinations,[56] environmental protection,[57] eviction moratoriums,[58] and student loans.[59] While the hybrid approach has garnered majority support on the Supreme Court, Justice Alito joined Justice Gorsuch's *West Virginia* concurrence advocating the clear statement approach.[60] And Justice Barrett's contextual approach, though she wrote alone, has also elicited attention.[61] It is important, therefore, to understand the nuances of the various approaches and how they would operate in practice.

This Part applies each approach to hypothetical statutory provisions, based loosely on the statutory scheme at issue in *Biden v. Nebraska*. As Congress and agencies work to address pressing problems, Congress will likely pass, amend, and rely on various types of statutes to achieve their ends. Congress may legislate in broad terms that clearly delegate authority to agencies. Or, it may legislate with specific policies spelled out in the text of the law. By applying the different approaches to the same hypothetical statutory provisions, we can engage more concretely with each strain of the doctrine and better illuminate how they could either impede or permit certain types of legislation.

Consider these two hypothetical statutory provisions (exaggerated and simplified for effect):

> Statute 1: We delegate to the Secretary of Education the authority to take all necessary action needed to help those adversely affected by a national emergency.
>
> Statute 2: The Secretary of Education may, in response to a national emergency, forgive student loan debts to the extent necessary to help those adversely affected by the national emergency.

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56. *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin.*, 142 S. Ct. 661 (2022).

57. *West Virginia v. EPA*, 142 S. Ct. 2587.

58. *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485 (2021) (per curiam).

59. *Biden v. Nebraska*, 143 S. Ct. 2355.

60. *West Virginia*, 142 S. Ct. 2355.

61. *See, e.g.*, Baumann, *supra* note 9; Ian Millhiser, *How the Supreme Court Put Itself in Charge of the Executive Branch*, VOX (July 17, 2023), https://www.vox.com/scotus/23791610/supreme-court-major-questions-doctrine-nebraska-biden-student-loans-gorsuch-barrett [https://perma.cc/LKS5-C5HQ]; Andrew C. McCarthy, *Justice Barrett Helps Restore Constitutional Order*, NAT'L REV. (July 1, 2023), https://www.nationalreview.com/2023/07/justice-barrett-helps-restore-constitutional-order/ [https://perma.cc/KYQ8-Y9MR].

The first is a clear delegation to the Secretary of Education to take unspecified actions that they deem necessary to respond to an emergency. Important here, the language delegating authority to the agency is unambiguous, so an honest jurist, even a textualist, could not read the statute and conclude anything other than that Congress intended to delegate power to the agency. The second is a clear statement specifically authorizing student loan cancellation.[62] Similar to the first, this statute's language is unambiguous, but not regarding delegation; it is unambiguous concerning the specific policy of student loan relief. So, an honest jurist, especially a textualist, would have to conclude that student loan forgiveness is authorized by this statute.

Now imagine the Secretary of Education tries to cancel $10,000 in student loan debt per borrower. Applying the clear statement, contextual, and hybrid approaches, how would this play out under Statute 1 and under Statute 2? Each is evaluated below.

A. Clear Statement Application

Under the clear statement approach as articulated by Justice Gorsuch, the secretary's attempt to forgive student loans under Statute 1 would likely be rejected under the major questions doctrine. The secretary's efforts to cancel student loans under Statute 2, on the other hand, would likely be upheld.

Though Gorsuch states that courts "'expect Congress to speak clearly' if it wishes to assign to an executive agency decisions 'of vast economic and political significance,'"[63] Statute 1 would fail under Gorsuch's approach because, while it is a clear *delegation*, it is not a clear grant of authority to take the action the secretary wants to take. As explained above, the clear statement approach is derivative of the nondelegation doctrine. And Statute 1 seems to run headfirst into the nondelegation wall—*i.e.*, Congress must exercise the legislative power

62. "National emergency" would likely be defined elsewhere in statute, implying a fact-finding endeavor by the Secretary of Education about whether a national emergency actually exists before they could activate Statute 2's authority. Alternatively, the statute might define "national emergency" as only occurring when Congress declares one via statute. Either way, the "may, in response to a national emergency" language in Statute 2 should not be read to confer unfettered discretion on the secretary, but these elaborations are omitted from the statute for simplicity.

63. *Nat'l Fed'n of Indep. Bus. v. Lab., Occupational Safety & Health Admin.*, 142 S. Ct. 661, 667 (2022) (Gorsuch, J., concurring) (quoting *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam) (internal quotation marks omitted)).

and cannot divest itself of such authority.[64] As Gorsuch's *OSHA*[65] concurrence makes clear, the "nondelegation doctrine ensures democratic accountability by preventing Congress from intentionally delegating its legislative powers to unelected officials."[66] So for the secretary to be authorized to cancel $10,000 in student loans, "they must at least be able to trace that power to a clear grant of authority from Congress."[67]

This last line about a "clear grant of authority from Congress" likely requires a textual statement authorizing the secretary's proposed policy or action, not merely a clear grant of delegation. In his *West Virginia* concurrence, Gorsuch largely uses the same "clear congressional authorization" label that the majority uses to describe what is required to support an agency's action. But when describing his view of "what qualifies," he employs slightly different language, insisting on "a clear congressional statement authorizing an agency's action."[68] These formulations are noticeably different and betray the heightened specificity that Gorsuch's approach demands. And recall, too, that Gorsuch frames the major questions doctrine as "protect[ing] the Constitution's separation of powers," noting specifically that, in "Article I, the People vested all federal legislative powers in Congress."[69] Given the nondelegation concerns underpinning Gorsuch's clear statement approach, a clear statement of congressional *delegation—e.g.*, Statute 1— would likely not suffice.

But what about the second hypothetical statute? Statute 2 would likely assuage Justice Gorsuch's nondelegation concerns, because it

64. The "major questions doctrine is closely related to what is sometimes called the nondelegation doctrine. Indeed, for decades courts have cited the nondelegation doctrine as a reason to apply the major questions doctrine. Both are designed to protect the separation of powers and ensure that any new laws governing the lives of Americans are subject to the robust democratic processes the Constitution demands." *Id.* at 668–69 (internal citation omitted).

65. 142 S. Ct. 661 (2022).

66. *Id.* at 669. He goes on to say the "major questions doctrine serves a similar function by guarding against unintentional, oblique, or otherwise unlikely delegations of the legislative power." *Id.* Some might argue that Statute 1 presents an intentional and likely delegation of legislative power, and thus even Gorsuch's own formulation of the major questions doctrine could not deny that it gives the secretary vast powers. But this is one line in a context of clear nondelegation concerns. His next paragraph following the above statement reads, "Whichever the doctrine, the point is the same. Both [the major questions doctrine and nondelegation doctrine] serve to prevent government by bureaucracy supplanting government by the people." *Id.*

67. *Id.* at 668.

68. *West Virginia v. EPA*, 142 S. Ct. 2587, 2617 (2022) (Gorsuch, J., concurring).

69. *Id. See also id.* at 2618 ("Permitting Congress to divest its legislative power to the Executive Branch would . . . risk [the law] becoming nothing more than the will of the current President, or, worse yet, the will of unelected officials barely responsive to him.").

directs the secretary to cancel student loans in the case of an emergency. At that point, the secretary would not be wielding legislative power by coming up with their own policy scheme of student debt relief in reaction to an emergency; the secretary would simply be executing the law Congress wrote. Just as is the case when Congress establishes a benefits scheme and leaves it to the executive to sort out the details of distribution.[70]

The takeaway is that by bolstering the application of the major questions doctrine with the nondelegation doctrine, Gorsuch arranges a Scylla and Charybdis for agency assertions of vast power: If they claim an elliptical provision of a statute authorizes sweeping agency action, the Court can say it is not a clear authorization and thus does not pass muster. But if the agency says the text clearly gives them such sweeping power through a clear delegation, then "that law would likely constitute an unconstitutional delegation of legislative authority."[71] Justice Gorsuch even describes the major questions doctrine as a "vital check on expansive and aggressive assertions of executive authority."[72] Therefore, even if the text's delegation is clear, the clear statement approach to the major questions doctrine would limit Congress's attempt to delegate vast power to an agency.[73]

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70. *Cf. Gundy v. United States*, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting) (citing *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001)) (explaining that agencies can "fill in statutory gaps" as long as those gaps do not concern questions of "deep economic and political significance that is central to the statutory scheme").

71. *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 669 (Gorsuch, J., concurring) ("On the one hand, OSHA claims the power to issue a nationwide mandate on a major question but cannot trace its authority to do so to any clear congressional mandate. On the other hand, if the statutory subsection the agency cites really *did* endow OSHA with the power it asserts, that law would likely constitute an unconstitutional delegation of legislative authority.").

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

73. Justice Gorsuch was joined by Justice Thomas and Justice Alito in *OSHA* and joined by Alito in *West Virginia*. *Id.* at 121 (Gorsuch, J., concurring); *West Virginia*, 142 S. Ct. at 2616 (Gorsuch, J., concurring). Justice Gorsuch also wrote at length about his views on nondelegation in his dissent in *Gundy*. 139 S. Ct. at 2131 (Gorsuch, J., dissenting). There, he was joined by Chief Justice Roberts and Justice Thomas. *Id.* (Gorsuch, J, dissenting). Thus, while Justice Gorsuch has expressly stated his support of the nondelegation doctrine, Justice Thomas, Justice Alito, and Chief Justice Roberts have all implicitly endorsed this reasoning by signing onto Gorsuch's separate opinions. Justice Kavanaugh has likewise expressed sympathy for Justice Gorsuch's views on nondelegation. *See Paul v. United States*, 140 S. Ct. 342 (2019) (mem.) (Kavanaugh, J., statement respecting the denial of certiorari) (stating that "Justice Gorsuch's scholarly analysis of the Constitution's nondelegation doctrine in his Gundy dissent may warrant further consideration in future cases").

B. (Con)Textual Application

Under Justice Barrett's contextual approach, an attempt to cancel student loan debt under Statute 1 would likely be upheld under the major questions doctrine, though it might still face nondelegation or separation of powers challenges.[74] Canceling student loan debt under Statute 2 would also likely be upheld.

The secretary's action under both statutes would likely be upheld because both speak clearly and foreclose any concerns about Congress delegating power to agencies in uncommon ways. As Justice Barrett explained in her *Biden v. Nebraska* concurrence, "In some cases, the court's initial skepticism [regarding the agency's asserted power] might be overcome by text directly authorizing the agency action or context demonstrating that the agency's interpretation is convincing. . . . If so, the court must adopt the agency's reading despite the 'majorness' of the question."[75] In so writing, Justice Barrett flatly rejects any conception of the major questions doctrine that eschews "the better reading" of a statute if that better reading "leads to a disfavored result (like provoking a serious constitutional question)."[76] Such an approach would be "in significant tension with textualism insofar as [it] instruct[s] a court to adopt something other than the statute's most natural meaning."[77]

Similarly, Justice Barrett believes that the clear statement approach "overprotects the nondelegation principle by increasing the cost of delegating authority to agencies—namely, by requiring Congress to speak unequivocally in order to grant them significant rule-making power."[78] Instead, Barrett relies on context and commonsense, both of which point toward allowing the agency action under either Statute 1 or 2.[79] Indeed, when interpreting Statutes 1 and 2, it is not clear that Justice Barrett would need to move to context and commonsense. The text in both statutes is unambiguous. So, for Barrett, the inquiry might end there.[80]

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74. *See infra* note 81.

75. *Biden v. Nebraska*, 143 S. Ct. 2355, 2381 (2023) (Barrett, J., concurring).

76. *Id.* at 2377.

77. *Id.* at 2378 (internal quotation marks omitted).

78. *Id.* at 2377.

79. *See id.* at 2379–80 (explaining that "more clarity than a general instruction" will suffice to "greenlight" a broad agency action).

80. *See* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 109–10 (2010). Notably, the outcome under Statute 1 differs from the outcome in Justice Barrett's babysitter example. There, she gives the example of parents leaving instructions for a babysitter. She says if the mother were to "hand[] the babysitter her credit card and say[]: 'Make sure the kids have fun,'" and then if the "babysitter takes the kids on a road trip to an amusement park, where they spend two days on rollercoasters and one night in a hotel," then, Justice Barrett concludes, this is not a "*reasonable* understanding of the parent's instruction" given the context. *Biden*, 143 S. Ct. at 2379–80 (Barrett, J. concurring). We believe Statute 1's language is more akin to parental instructions that say,

But Justice Barrett leaves open the possibility that her interpretation of Statute 1 would not end with the major questions doctrine. In the context of Statute 1, Justice Barrett might decide that there is no major questions doctrine violation, but she would likely still find a pure nondelegation doctrine issue. This idea is grounded in the caveat from her concurrence, namely that her approach "deal[s] only with statutory interpretation, not the separate argument that a statutory delegation exceeds constitutional limits."[81] This means that Statute 1, though it is clear in its language and would likely be upheld under a pure application of the contextual version of the doctrine, may face a hurdle in the second step of Justice Barrett's analysis.

This thought experiment demonstrates that, while Justice Gorsuch and Justice Barrett disagree on the path, they will likely reach the same destination in the mine run of cases.

C. Hybrid Application

Under Chief Justice Roberts's hybrid approach, we cannot say for certain how the Secretary's attempt to forgive student loans would fare under Statute 1. Roberts's previous writings for the Court give us reason to believe he would be skeptical of such an unabashed delegation but would likely uphold an attempt to forgive student loans under Statute 2. Because an analysis of the second statute is more straightforward, we address it first.

As explained before, the hybrid approach relies on a mix of clear statement and commonsense and contextual reasoning. As such, agency action cancelling student loans under Statute 2 would likely pass muster for many of the same reasons it would pass muster under Justice Gorsuch's and Justice Barrett's approaches. In other words, the second statute satisfies both the clear statement *and* contextual approaches. As the chief justice explained in *West Virginia*, the major questions doctrine requires the agency to "point to clear congressional authorization for the power it claims."[82] The unambiguous text of Statute 2 would satisfy this requirement.

Statute 1 is not as clear; it simply delegates sweeping but unspecified power to the secretary. And Chief Justice Roberts has written that even when there is a "colorable textual basis" for the interpretation proffered by the agency, "common sense as to the manner in which Congress" delegates

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"We leave it up to you to do whatever is necessary to make sure the kids have fun." And there, that broad of an instruction could lead one to reasonably conclude that a trip to the local amusement park was appropriate.

81. *Biden*, 143 S. Ct. at 2368 (citing *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 474 (2001) (describing a delegation held unconstitutional because it "conferred authority to regulate the entire economy on the basis of [an imprecise standard]")).

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

could make it "very unlikely that Congress had actually done so."[83] Moreover, in "extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us reluctant to read into ambiguous statutory text the delegation claimed to be lurking there. To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary."[84]

Under this reasoning, one might think Statute 1's clear statutory delegation to the Secretary of Education meets the requirements laid out by the chief justice's hybrid approach. But Roberts has signed onto opinions expressing interest in reviving the nondelegation doctrine[85] and has shown skepticism when an agency asserts a power it has never claimed before.[86] Moreover, he has written that "enabling legislation is generally not an open book to which the agency may add pages and change the plot line."[87] Under the hybrid approach, courts "presume that Congress intends to make major policy decisions itself, not leave those decisions to agencies."[88]

Therefore, even though Statute 1 is clear in its delegation of authority, the chief justice has reiterated that in "extraordinary cases . . . there may be reason to hesitate before accepting a reading of a statute that would, under more 'ordinary' circumstances, be upheld."[89] And here his stated concerns about separation of powers would come into play.[90] For Roberts, the fact that context might make the text more clear is of little moment if the statute would run afoul of traditional notions of separation of powers and agency authority. Thus, though Statute 1 may survive under a pure application of the hybrid approach as articulated in *West Virginia*, we are

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83. *Id. See also id.* at 2607 ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme") (quoting *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989)).

84. *Id.* at 2608.

85. *See, e.g.*, *Gundy v. United States*, 139 S. Ct. 2116, 2131–48 (2019) (Gorsuch, J. dissenting).

86. *See Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin.*, 142 S. Ct. 661, 666 (2022) ("It is telling that OSHA, in its half century of existence, has never before adopted a broad public health regulation of this kind—addressing a threat that is untethered, in any causal sense, from the workplace. This 'lack of historical precedent,' coupled with the breadth of authority that the Secretary now claims, is a 'telling indication' that the mandate extends beyond the agency's legitimate reach."). Though this was a per curiam opinion, it is speculated that it was written primarily by Chief Justice Roberts. *See* John O. McGinnis, *Jabbing the Administrative State*, LAW & LIBERTY (Jan. 20, 2022), https://lawliberty.org/jabbing-the-administrative-state/ [https://perma.cc/2LYP-95FD] (noting that "the writing style suggested that the author [of *OSHA*] was Chief Justice John Roberts").

87. *West Virginia*, 142 S. Ct. at 2609 (internal quotation marks omitted).

88. *Id.* (internal quotation marks omitted).

89. *Id.*

90. *See id.*; *Nebraska*, 143 S. Ct. at 2375.

mindful of the clues that Chief Justice Roberts has dropped elsewhere. Those clues make us hesitant to say how the chief justice would rule on this question.

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A hypothetical application of each approach to these statutes reveals important implications for legislation going forward. The primary takeaway is that a jurist applying any of the three approaches would either reject or at least be skeptical of Statute 1. This sends an important message to Congress: If Congress wishes to pass more statutes that look like Statute 1, it should be ready to face a skeptical Supreme Court. But if Congress wishes to enact statutes that are likely to pass muster under all three approaches, it should pass statutes like Statute 2.

This puts Congress and the Court on a collision course. On the one hand, the Court has signaled its hostility toward agency actions taken under legislation resembling Statute 1. On the other, Congress routinely passes statutes that look a lot like Statute 1. The modern, gridlocked Congress may wish to pass broad statutes that leave the hard choices to the agencies. With current levels of polarization,[91] it may seem near impossible to pass detailed legislation on any important issues. One way around the logjam, legislators may think, is to avoid deciding those important issues entirely by passing the buck to federal agencies.[92] Perhaps it is too hard for Congress to agree upon the exact language that would be necessary for Statute 2, so they instead compromise around language akin to Statute 1.[93]

This analysis suggests that, under any version of the major questions doctrine, Congress should provide express context and speak clearly for its legislative authorizations. Under the scrutiny of a Court that is willing to wield the major questions doctrine in a muscular way, the safest course to authorize agency action is to speak clearly to the specific policy

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91. CLIO ANDRIS, DAVID LEE, MARCUS J. HAMILTON, MAURO MARTINO, CHRISTIAN E. GUNNING & JOHN ARMISTEAD SELDEN, THE RISE OF PARTISANSHIP AND SUPER-COOPERATORS IN THE U.S. HOUSE OF REPRESENTATIVES 10 (2015).

92. This method of legislating allows Congress to avoid taking tough votes that could haunt them with their constituents. Members of Congress, therefore, may have a selfish incentive to prefer Statute 1 so that they can remain off the record when it comes to hot-button issues. *Cf.* Josh Blackman, *Government by Blog Post*, 11 FIU L. REV. 389, 397 (2016) (describing how "executive action" "spared" Congress "the need to take a tough vote" and led it to never consider a bill addressing a controversial issue).

93. Congress may also have partisan reasons to pass bills like Statute 1 when a president of their party is in the White House. If Democrats in Congress cannot muster the votes for student loan legislation, they can pass broad delegations and hope a Democratic president will pursue that policy for them. The same is true of Republicans pursuing their policy agenda and relying on a Republican president to skirt the typical legislative process to achieve it. In this sense, it is a bipartisan problem.

Congress wants executed. Anything less runs the risk of being struck down.[94]

Importantly, this Essay makes no normative arguments about whether this approach to legislating is the "correct" or "best" approach. There are good arguments for why Congress would want to leave some play in the joints when it comes to specific policy actions or goals.[95] The only observation here is to note the likely consequence: if Congress leaves too much play in the joints, its command may not be effective at all.

CONCLUSION

There are now three major questions doctrines—or, at least, three different approaches to that doctrine. The clear statement approach relies heavily on the nondelegation doctrine, requiring Congress to speak clearly when empowering agencies. The contextual approach, on the other hand, eschews reliance on such principles, believing that resort to these considerations disobeys the commands of textualism. Instead, the contextual approach focuses on the context that surrounds the statute, then applies a healthy dose of commonsense to interpret the limits of a congressional delegation. The hybrid approach, as the name implies, mixes nondelegation principles with context and commonsense. Because it mingles the two, the hybrid approach remains the most elusive of the three approaches, as it often flows back and forth between different justifications as needed.

While only the hybrid approach has gained the support of a majority of justices, the clear statement and contextual approaches lurk in the background. As the Court applies the major questions doctrine to a variety of legal issues, which approach wins out will have important implications for future congressional and agency action. As a general matter, if the clear statement rule controls, the courts will strike down any agency action that is not directly and clearly authorized by the text of the statute. If the contextual approach prevails, courts may be more open to vast delegations so long as the delegation is discernable from the context of the authorizing

94. This discussion is limited to how these types of legislation would fare under the major questions doctrine. As we suggest above, these statutes may not survive under the Court's developing conception of the nondelegation doctrine. See generally Gundy, 139 S. Ct. at 2142 (Gorsuch, J., dissenting).

95. *See, e.g.*, Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1744–45 (2002) (defending the benefits of delegations to agencies); Christine Chabot, *The Lost History of Delegation at the Founding*, 56 GA. L. REV. 81, 157–58 (2021) (defending delegation because the scope of statutory terms is necessarily unknowable and agencies are needed to define them). Efficiency and expertise also provide reasons why Congress may pass bills like Statute 1. If Congress cannot figure out the best approach to a problem, it may wish to rely on an agency's experience in the subject matter and streamlined process in the form of notice and comment in order to address the issue.

statute. And if the hybrid approach remains predominant, courts will remain skeptical of oblique language conferring immense power to agencies; but whether the clarity required is a clear delegation or a clear authorization of a specific policy is yet to be seen.

In sum, the battle lines are now set. In an area that draws in all three branches of government, the Supreme Court has staked out its position. The Court has marched out the major questions doctrine and wielded it to strike down a trio of consequential agency actions, marking the first salvo in what will likely be a long conflict between the courts, Congress, and the Executive. The major questions doctrine will undoubtedly continue to be the Supreme Court's response to "sweeping"[96] executive policies. Which of the three approaches gains favor, however, could change what that response looks like going forward. And by understanding the various approaches, Congress and agencies can better understand how to overcome it: provide a clear statement, provide clear context, or both. But only if legislators understand what each approach demands can they legislate in a way that meets the challenge.

96. *Biden v. Nebraska*, 143 S. Ct. 2355, 2369 (2023).