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THIS SHEEP COMES AS A WOLF: WHY THE "LAWSUIT LOOPHOLE" TAKES THE BITE OUT OF THE MAJOR QUESTIONS DOCTRINE AND HOW TO FIX IT

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INTRODUCTION

"Because Title VII does not speak clearly on whether it covers discrimination because of sexual orientation and gender identity, and because this is a question of great economic and political significance, we cannot accept the agency's asserted authority to regulate" is not a real quote. But it could have been. In reality, the agencies that enforce Title VII are free to interpret it as preventing not just discrimination on the basis of sex, but discrimination on the basis of sexual orientation and gender identity as well.

But why haven't those agencies run into the buzzsaw of the Major Questions Doctrine (MQD)? MQD says that Congress must speak clearly to authorize agency actions that have "great economic and political importance." And almost everyone has recognized that whether Title VII creates protections for gay and transgender employees across the whole country is a question of great importance.

The reason why agencies haven't run into the MQD problem is because private plaintiffs cleared the way for them. In *Bostock v. Clayton County*, a group of private plaintiffs sued their employers, alleging that Title VII protected them from being fired because of their sexual orientation or gender identity. The Supreme Court agreed, and ruled for them with no mention of MQD limiting the reach of the statute.

But how can that be? While MQD's relationship to statutory interpretation remains unsettled, both major views of the doctrine suggest it should apply in private suits like *Bostock*. Justice Barrett, along with some scholars, view MQD as part and parcel of a textualist approach. In their view, MQD only requires judges to use "common sense" when interpreting unclear statutory language. That's something both judges and ordinary people already do all the

time. If MQD is part and parcel of textualism, then applying it to lawsuits would just be part of interpreting the relevant statute. Another, more common view, is that MQD is a substantive method (canon) of interpretation. It demands clarity from Congress before the Court will read a law as authorizing broad agency action. This guards against reading statutes as giving so much power to agencies that the delegation itself becomes unconstitutional. But even as a canon of constitutional avoidance, there's still good reason to think MQD should apply in lawsuits. As in *Bostock*, agencies can often enforce the "results" of lawsuits brought under the relevant statute. If MQD is a canon of constitutional avoidance, that suggests that the agency action itself is the problem. A prior lawsuit should not be able to save an agency action if the action is substantively unconstitutional.

This "lawsuit loophole" is a gap at the heart of MQD. The fact it does not apply in lawsuits suggests that *both* main interpretations of the doctrine are wrong. And more importantly, the current paradigm creates a strange "race to the courthouse." One where agencies are incentivized to do "regulation by enforcement" — enforcement lawsuits that, if successful, authorize future rulemaking.

But this loophole has a simple solution — a change in how MQD is viewed. MQD is neither a textual nor substantive canon. Instead, MQD is a unique hybrid canon. MQD combines elements of textualism with a protection of constitutional values. In particular, it takes something that resembles the absurdity canon, and makes it easier to apply in an effort to promote certain normative values. Recognizing MQD as a hybrid canon would allow the Court to resolve the "lawsuit loophole." Under this view, MQD doesn't need to be applied to any kind of lawsuit. Neither private nor agency lawsuits present the same issues as agency enforcement actions. While both the textual and substantive views of MQD suggest that it must be an "all or nothing" doctrine, this hybrid view allows the Court to apply it to some cases but not others. While this might be uncomfortable for textualists, this actually aligns with other well-established canons used by the Court.

The Court should avoid solving the "lawsuit loophole" by extending MQD to lawsuits. Doing so would call into question a huge volume of precedent and make it impossible for Congress to enact broad grants of rights. In addition, it would be a judicial infringement on the Executive's ability to carry out its executive, law

enforcement function. Lastly, it would call into question the Court's holdings about the fundamental nature of statutory interpretation.

I. MAJOR QUESTIONS DOCTRINE AND ITS RELATION TO STATUTORY INTERPRETATION

A. What is the Major Questions Doctrine

The Major Questions Doctrine (MQD) is a tool (formally a "canon") that courts use when deciding a statute's meaning.[1] It limits the power of administrative agencies to regulate matters of "vast economic and political significance."[2] Courts use MQD when an agency claims regulatory authority over an area.[3]

MQD involves a two-step process. First, the Court asks whether "the 'history and the breadth' of the authority that [the agency] has asserted," and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority.[4] If the answer is yes, then Court asks if Congress has given a "clear" blessing to the agency's claimed power.[5] At this step, only a showing of "clear congressional authorization" will allow the agency to prevail.[6]

On the first prong, the Court has not set out what exactly counts as "great economic or political significance." The current Court has considered MQD claims in four recent cases and found a major question in each one.[7] In each case, the agency either attempted to regulate a common economic activity or act in a manner that was

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[1] *See* Lisa Heinzerling, *The Power Canons,* 58 WM. & MARY. L. REV. 1933, 1933-34 (2017) (describing earlier examples of MQD as canons of statutory interpretation).

[2] West Virginia v. EPA, 142 S. Ct. 2587, 2616 (2022) (Gorsuch, J., concurring); Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014).

[3] *West Virginia*, 142 S. Ct. at 2608.

[4] *Id.*

[5] Nat'l Fed'n of Indep. Bus. v. Dep't of Lab. Occupational Safety and Health Admin., 595 U.S. 109, 122 (2022) (Gorsuch, J., concurring).

[6] *West Virginia*, 142 S. Ct. at 2614.

[7] *See West Virginia*, 142 S. Ct. at 2610 (finding that the regulation of the nation's power sources as a "system" constituted a major question); *Nat'l Fed'n of Indep. Bus.*, 595 U.S. at 119 (holding that a mandate designed to encourage widespread vaccination is a major question); Ala. Ass'n of Realtors v. Dept. of Health & Hum. Serv., 141 S. Ct. 2485, 2489 (2021) (finding that a nationwide eviction moratorium is a major question); Biden v. Nebraska, 600 U.S. 477, 502-03 (2023) (ruling that whether or not the Secretary of Education can cancel almost $500 billion in student loans is a major question).

particularly costly.[8] Lower courts have taken a broad view. They have found major questions on topics ranging from the minimum wage for federal contractors[9] to immigration enforcement,[10] to nuclear waste disposal.[11] Outside of obvious hot-button issues, it's not clear what would count as politically significant.[12] Due to this, some observers accuse the doctrine of allowing political parties to "manufacture" major questions using anger.[13]

The Court hasn't provided guidance on what might count as "clear congressional authorization" either. It has clarified that vague language, generic broad terms, or belt-and-suspenders "whatever the agency deems necessary" clauses will not suffice.[14] In other cases where the Court has demanded a "clear statement," it usually requires that the statutory language reference the particular issue. For example, in sovereign immunity cases, the Court has required that statutes use phrases like "shall not be immune, under the Eleventh Amendment [or] any other doctrine of sovereign immunity, from suit in Federal court"[15] or "[seek damages] against any employer (including a public agency)"[16] before it finds that the law overrides state sovereign immunity.[17]

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[8] *See, e.g.*, *Nebraska*, 600 U.S. at 502-03 (outlining how much money the cancellation would cost).

[9] Texas v. Biden, No. 6:22-CV-00004, 2023 WL 6281319, at *13 (S.D. Tex. Sept. 26, 2023).

[10] Texas v. United States, 50 F.4th 498, 526 (5th Cir. 2022).

[11] Texas v. Nuclear Regul. Comm'n, 78 F.4th 827, 844 (5th Cir. 2023).

[12] *See* 50 F.4th at 527 (going over the economic impacts of DACA and DAPA but assuming political importance as obvious); *see also* GenBioPro, Inc. v. Sorsaia, No. CV 3:23-0058, 2023 WL 5490179, at *4 (S.D.W. Va. Aug. 24, 2023) (assuming the legality of abortion is a question of vast political significance without further discussion).

[13] Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1010 (2023).

[14] *See Ala. Ass'n of Realtors*, 141 S. Ct. at 2489 (rejecting the government's argument that the statute allows the CDC to do anything so long as it deems it "necessary").

[15] Allen v. Cooper, 140 S.Ct. 994, 999 (2020).

[16] Nev. Dept. of Hum. Res. v. Hibbs, 538 U.S. 721, 726 (2003).

[17] *See also*: Bd. of Tr. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 364 (2001) ("A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in [a] Federal or State court of competent jurisdiction for a violation of this chapter" clear statement to abrogate state sovereign immunity); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 73-78 (2000) ("[seek backpay] against any employer (including a public agency) in any Federal or State court of competent jurisdiction" clear statement to abrogate state sovereign immunity); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Ed. Expense Bd., 527 U. S. 666, 670 (1999) (state entities "shall not be immune, under the eleventh amendment of the Constitution of the United States or

The Court has justified MQD with a line of cases that are skeptical about executive officials asserting broad statutory power.[18] In *FDA v. Brown & Williamson Tobacco Corp.*, the Supreme Court held that the FDA did not have a blank check to regulate tobacco, despite its power to regulate "drugs."[19] Similarly in *Gonzales v. Oregon*, the Court held that a belt-and-suspenders provision of the Controlled Substances Act, allowing the Attorney General to suspend the medical license of any doctor he deemed to be acting outside "the public interest," did not give him the ability to preempt Oregon's law allowing euthanasia.[20] Comparative law scholars have noted that MQD has cousins in other developed democracies. Even in countries without strict separation of powers (or ones where executive comes from the legislature), courts approach executive agencies exerting broad power over contested political topics skeptically.[21]

B. MQD's Uncertain Relationship to Statutory Interpretation

MQD's relationship to statutory interpretation remains unsettled. All agree that MQD is a canon of statutory interpretation.[22] In other words, it's a way judges determine what a statute means.[23]

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under any other doctrine of sovereign immunity, from suit in Federal court by any person, including any governmental or nongovernmental entity for any violation under this Act" a clear statement to abrogate state sovereign immunity); Fla. Prepaid Postsecondary Ed. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 632 (1999) ("Any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his official capacity, shall not be immune, under the eleventh amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court by any person…for infringement of a patent under section 271, or for any other violation under this title" clear statement to abrogate state sovereign immunity); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 57 (1996) (vest of jurisdiction "in the "United States district courts over any cause of action…arising from the failure of a State to enter into negotiations…or to conduct such negotiations in good faith" and various ancillary provisions clear statement to abrogate state sovereign immunity).

[18] *See* West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022) (defending MQD as coming from a line of precedent).

[19] FDA v. Brown and Williamson Tobacco Corp., 529 U.S. 120, 126-27 (2000).

[20] Gonzales v. Oregon, 546 U.S. 243, 243 (2006).

[21] *See* Rachel Reed, *What critics get wrong – and right – about the Supreme Court's new 'major questions doctrine'*, HARV. L. TODAY, (April 19, 2023), [https://perma.cc/4D83-TRWE] (discussing with post-doctoral fellow Oren Tamir the existence of a doctrine very similar to MQD in Germany, Israel, and the UK).

[22] *See West Virginia*, 142 S. Ct. at 2641 (Kagan, J., dissenting) (lambasting MQD but still describing it as a "canon").

[23] *Canon*, BLACK'S LAW DICTIONARY (11th ed. 2019).

Canons can be either textual or substantive.[24] Textual canons help judges determine what a statute means in a linguistic sense.[25] For example, the canon *expressio unius est exclusio alterius* says that when a statute contains a detailed list of things which are included, then the law excludes everything else by implication.[26] Substantive canons put a thumb on the scale for a certain outcome.[27] For example, the rule of lenity tells courts to interpret unclear criminal laws in the defendant's favor.[28] The canon of constitutional avoidance goes further, saying that courts should disregard a law's best reading if it would raise a serious constitutional issue (unless the law has language that makes that reading unavoidable).[29]

The clear statement rule is a common substantive canon. It demands that a statute "speak clearly" before the Court finds that it does something in particular.[30] For example, the Court has said a statute must make its "intention unmistakably clear in [its] language" before it can be read as having overridden states' traditional immunity from suit (their sovereign immunity).[31] Judges often defend these rules as protecting certain normative values.[32] For example, some have defended the sovereign immunity clear statement rule as protecting the "vital" role of sovereign immunity in the federal system.[33] The canon of constitutional avoidance is one of these clear statement rules.[34] It imposes a "clarity tax" if Congress wants to test constitutional limits.[35]

Most judges and academics view MQD as a clear statement rule. For example, Justice Gorsuch called MQD a clear statement rule that

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[24] University of Houston School of Law, *Canons of Construction (adapted from Scalia & Garner)*, [https://perma.cc/46RT-MYS3].

[25] *See* Amy Coney Barrett, *Substantive Canons and Faithful Agency,* 90 B.U. L. REV. 109, 117 (2010) ("Linguistic canons apply rules of syntax to statutes.").

[26] *Id.*

[27] *Id.* at 117-18.

[28] *Id.* at 117.

[29] *Id.* at 118.

[30] *Id.*

[31] Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985).

[32] Barrett, *supra* note 25 at 118-19.

[33] *See* West Virginia v. EPA, 142 S. Ct. 2587, 2617 (2022) (Gorsuch, J., concurring) (arguing that the Vesting Clause, no less than sovereign immunity, is "vital" to the American system of government).

[34] Barrett, *supra* note 25, at 118.

[35] *See* Biden v. Nebraska, 600 U.S. 477, 508-09 (Barrett, J., concurring) (examining how strong substantive canons impose a clarity tax on Congress when it seeks to accomplish certain ends).

"operates to protect foundational constitutional guarantees."[36] He explained that MQD makes sure that agencies do not cross potential constitutional lines critical to separation of powers.[37] By demanding a clear statement before finding a broad delegation of authority, the Court decreases the likelihood that Congress divests itself of legislative power and gives it to agencies.[38]

Some of MQD's detractors have used this to deride it as a "get out of text free" card.[39] For example, Justice Kagan argued that a majority of the Court invented MQD because it didn't like the statute's plain text.[40] She accused the majority of hiding its *real* goal — curbing the administrative state — and using MQD to bend the law to achieve that outcome.[41]

A non-textualist canon presents problems for the current Court. A majority of the Court has endorsed a textualist approach to statutory interpretation.[42] Substantive canons, in their view, run the risk overriding statutory text in favor of preferred substantive outcomes. The point can be illustrated with two canons mentioned above. The rule of lenity reflects a substantive commitment to

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

[37] *Id.* at 2620.

[38] *Id.* at 2618.

[39] *Id.* at 2641 (Kagan, J., dissenting).

[40] *Id.*

[41] *Id.*

[42] *See, e.g.*, Bartenwerfer v. Buckley, 598 U.S. 69, 74-75 (2023) (unanimous opinion beginning by stating the Court "starts with the text" and then proceeding into a plain-meaning analysis); Arellano v. McDunough, 598 U.S. 1, 8 (2023) (another unanimous opinion stating "start with the text"). *Confirmation Hearing on the Nomination of Brett M. Kavanaugh to be an Associate Justice of the Supreme Court of the United States: Hearing Before the Comm. on the Judiciary*, 115th Cong. 194 (2018) (The meaning of a statute "is what is written in the text of the statute") (Statement of Judge Kavanaugh). *Confirmation Hearing on the Nomination of Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States: Hearing Before the Comm. on the Judiciary*, 115th Cong. 253 (2017) ("…the plain text of the statute is usually a pretty good starting point, and reading it as you would expect a reasonable citizen to do so, you know, not a—not a—not a pointy-headed judge.") (Statement of Judge Gorsuch). Kagan, J., Address at The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes (Nov. 25, 2015) ("We're all textualists now"). *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the Comm. On the Judiciary*, 109th Cong. 503 (2006) ("When I interpret a statute, I do begin with the text of the statute.") (Statement of Judge Alito). *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the Comm. on the Judiciary*, 109th Cong. 319 (2005) ("But obviously when you are dealing with interpreting a statute, the most important part is the text. You begin with the text, and…in many cases, perhaps most cases, that's also where you end.") (Statement of Judge Roberts).

shielding potentially innocent persons from the coercive force of the state.[43] The canon of constitutional avoidance is grounded in the spirit of judicial modesty, providing an escape hatch for courts that do not want to be heavy-handed in policing their co-equal branches.[44]

Because a majority of the Court has endorsed a textualist approach to statutory interpretation, MQD's classification as a substantive canon would pose several thorny conceptual and doctrinal problems. Textualists focus on the plain meaning of the text when interpreting statutes.[45] Because substantive canons nudge courts toward interpretations separate from the plain meaning of statutory language, they force textualists to depart from one of their core legal values.[46] Then-professor Barrett outlined why substantive canons make committed textualists uneasy, saying a "court applying a canon to strain statutory text uses something other than the legislative will as its interpretive lodestar, and in so doing, it acts as something other than a faithful agent. The application of substantive canons, therefore, is at apparent odds with the central premise from which textualism proceeds."[47] Justice Kagan appears to share similar concerns. She went so far as to ask whether it was time to eliminate substantive canons during an oral argument in 2022.[48] And she declined to join part of a 2023 dissent that argued the Court should use a substantive canon to resolve unclear immigration laws in favor of non-citizens.[49]

But some have defended MQD as part of a textualist approach to statutory interpretation. In *Biden v. Nebraska*, the Court used MQD as part of its reason for striking down President Biden's student debt cancellation plan.[50] Justice Barrett, in a solo concurrence, outlined why she believes the doctrine is compatible with the larger textualist project.[51] She explained that MQD does nothing more than account

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[43] Barrett, *supra* note 25 at 117.

[44] *Id.* at 118.

[45] Cornell Law School Legal Information Institute, *textualism*, https://perma.cc/2RV4-MWN6.

[46] Barrett, *supra* note 25, at 110.

[47] *Id.*

[48] Will Baude, *Should Courts Stop Using "Substantive" Canons of Construction?*, VOLOKH CONSPIRACY (Mar. 8, 2022, 6:23 PM), https://perma.cc/8LUJ-HVWD.

[49] Pugin v. Garland, 599 U.S. 600, 614 (2023) (Sotomayor, J., dissenting).

[50] Biden v. Nebraska, 600 U.S. 477, 483 (2023).

[51] *Id.* at 507-08 (Barrett, J., concurring).

for context and common sense.[52] She compared MQD to other examples of statutory interpretation, writing:

> [c]onsider the classic example of a statute imposing criminal penalties on 'whoever drew blood in the streets.' Read literally, the statute would cover a surgeon accessing a vein of a person in the streets. But 'common sense' counsels otherwise, because in the context of the criminal code, a reasonable observer would 'expect the term' 'drew blood' to describe a violent act.[53]

These two views, substantive and textual, dominate the conversation around MQD. However, both fail to explain the important gap at the heart of the doctrine. In fact, both the substantive and textualist theories of MQD suggest that it would apply in cases outside the agency rulemaking context.

C. MQD Would Apply in All Cases if It Was a Textual Canon

If MQD is a textual canon, then courts should use it any time they interpret a statute. This is because textualist canons apply in all statutory cases.[54] In theory, textualist canons only help the Court determine the meaning of particular words or phrases.[55] These canons have just as much use when the Court interprets a statute itself as when it assesses an agency's reading of the law.

Indeed, nothing in Justice Barrett's defense of MQD explains why the doctrine should be cabined to cases challenging agency rulemaking. She explained in her *Nebraska* concurrence that MQD is all about "context" and "common sense."[56] She even cited non-administrative law cases to illustrate how this principle functions.[57] The Cato Institute made the same argument in its amicus brief supporting the plaintiffs in *Nebraska*. It wrote that:

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[52] *Id.* at 514.

[53] *Id.* at 512.

[54] *See* Barrett, *supra* note 25, at 117 (describing textual, or "linguistic," canons as simply rules of syntax for statutes).

[55] *Id.*

[56] Biden v. Nebraska, 600 U.S. 477, 514 (2023) (Barrett, J., concurring).

[57] *Id.* at 512-13.

> Suppose that a teenager's parents left town for the weekend, giving their teenager permission to use the family car for home improvement projects while they were gone. Could the teenager use the car to drive to Home Depot and bring home sealant for the front porch? Certainly. Could the teenager sell the car to pay for a new wing of the house? It's unlikely the parents would consider this a faithful exercise of their permission. And if the teenager protests that selling the car could technically be interpreted as falling within the letter of their instructions, that would not improve the parents' mood. . .
>
> When we interpret instructions in everyday life, we naturally understand that permission to take drastic action is given more explicitly than permission to take less consequential actions. . .
>
> Instructions and permissions have reasonable limits that we all understand based on context. The same holds true for interpreting statutes. That is the common-sense observation behind the Major Questions Doctrine and its clear-statement rule.

Nothing about this logic limits MQD to cases about agency power.[58]

In fact, courts can, and do, apply these interpretative methods in the private law context. For example, in contract law, the parties' past dealings and the background context of their deal informs the meaning of the contractual terms.[59] So does common industry practice.[60] In agency law the agent only acts within his authority when he takes an action which is something he could have

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[58] Brief for The Cato Institute and The Manhattan Institute as Amici Curiae Supporting Respondents at 2-3, Biden v. Nebraska, 600 U.S. 477 (2023) (No. 22-506).

[59] Restatement (Second) of Contracts § 5 (AM. L. INST. 1981) ("The terms of a promise or agreement are those expressed in the language of the parties or implied in fact from other conduct. Both language and conduct are to be understood in the light of the circumstances, including course of dealing or usage of trade or course of performance.").

[60] *Id.*

"reasonably" believed the principal would have allowed had he been consulted *ex ante*.[61]

However, in the context of ordinary lawsuits, parties often ask the Court to interpret statutes as having broad, unforeseen applications—ones which the parties freely admit the original "principal" would have never authorized. This was exactly the case in *Bostock*, where the Court saw no issue with extending the reach of Title VII well beyond what the law's authors likely intended. However, textual canons apply to *all* statutory cases.[62] This means that the textual view of MQD simply cannot account for the "lawsuit loophole."

Justice Barrett, in her attempt to show that MQD is a textual canon, ends up highlighting other ways in which MQD is in tension with textualism. She points us to the well-known legal hypothetical of the statute which criminalizes "those who draw blood," which everyone agrees must be read as only criminalizing those who engage in illicit violence—not the surgeon acting as a good Samaritan on the street corner.[63] But this example could just as easily be an example of the rule of lenity at work rather than a textual interpretation.[64] Her real-world example of *Nix v. Hedden*,[65] which held that tomatoes are vegetables rather than fruits for tariff purposes, is really about the difference between technical (tomatoes are fruits biologically) and popular meanings,[66] not "context" as Justice Barrett argues.[67] Her babysitter hypothetical is similarly flawed. In *Nebraska* the central issue was whether the words "waive or modify" allowed the Secretary of Education to fully cancel student debt for some borrowers. In her hypothetical, the issue was whether the words "make sure the kids have fun," directed at a babysitter, allows an overnight trip to a theme park. While on its face, this covers issues of delegation, just like MQD, the hypothetical is significantly

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[61] Restatement (Third) Of Agency § 2.01 (AM. L. INST. 2006).

[62] *See* Barrett, *supra* note 25, at 117 (describing textual, or "linguistic," canons as simply rules of syntax for statutes).

[63] Biden v. Nebraska, 600 U.S.477, 512 (2023) (Barrett, J., concurring).

[64] Wooden v. United States, 595 U.S. 360, 388 (2022) (Gorsuch, J., concurring) (explaining that when "reasonable minds could differ. . . the rule of lenity demands a judgment" in favor of the defendant.)

[65] Nix v. Hedden, 149 U.S. 304 (1893).

[66] *Id.* at 307 (recognizing that tomatoes in scientific parlance are fruits but rejecting that meaning in favor of the popular meaning).

[67] *Biden*, 600 U.S. at 512-13 (2023) (Barrett, J., concurring).

more exaggerated than the issue in *Nebraska*. Babysitters are not often trusted with such big decisions, given parents are usually very protective of who can take their children on overnight trips.

D. MQD Would Apply in Lawsuits if It Was a Canon of Constitutional Avoidance

The substantive theory of MQD similarly fails to explain why it doesn't bind courts in all contexts. If MQD is a canon of constitutional avoidance, it should apply to all cases, not just agency rulemaking. Exempting an agency from MQD because a prior lawsuit licensed the agency's broad interpretation of the law's meaning doesn't solve a constitutional issue—it just creates a race to the courthouse. If MQD is really a substantive canon, then the agency action *itself*, not its *timing*, is what implicates the constitutional question. Further, if MQD is a substantive canon, then not applying it to lawsuits may incentivize behaviors which would harm the values MQD tries to protect.

Bostock again shows why this gap in MQD is critical. If an agency had enacted a rule interpreting Title VII as proscribing discrimination based on sexual orientation and gender identity before *Bostock*, it would have been a quintessential example of a "major question."[68] However, after *Bostock*, an agency could enact the exact same rule with no MQD issue.[69] In essence, the existence of *Bostock* allows an agency to get around MQD.

This state of affairs is hard to understand if MQD is really a canon of constitutional avoidance. If an agency interpreting and enforcing Title VII in this way (before *Bostock* existed) presented a true *constitutional* issue, then the existence of *Bostock* makes no difference. The logic of MQD as a canon of constitutional avoidance is that

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[68] Bostock v. Clayton County, 140 S. Ct. 1731, 1750 (2020) (referring to discrimination against gay and transgender employees as "unexpected and important" new application of the law); *id.* at 1837 (Kavanaugh, J., dissenting) (recognizing the issue as one of great impact and importance to the LGBT community and the nation as a whole).

[69] *Cf.* Texas v. Equal Emp. Opportunity Comm'n, 633 F. Supp. 3d 824, 834 (N.D. Tex. 2022) (striking down EEOC guidance that purported to enforce *Bostock* on the basis that it exceeded *Bostock*, not that the EEOC could not enforce *Bostock*'s meaning); Tennessee v. United States Dep't of Educ., 615 F. Supp. 3d 807, 838-39 (E.D. Tenn. 2022) (striking down Department of Education guidance doing the same thing on the basis *Bostock* covered Title VII, not Title IX, and so the Department's regulation needed to go through notice and comment because it went beyond *Bostock*).

Congress must speak clearly on major agency action because if it does not, such a broad action *itself* is potentially unconstitutional.[70] But a case like *Bostock* doesn't re-write the statute to be clearer.

Further, if MQD really guards against the "wrong branch" exercising Congress's legislative authority, then MQD should apply to courts as well. Courts, like agencies, cannot exercise legislative power. [71] If the agency actions themselves in MQD cases are potentially unconstitutional, then courts should not be able to enforce the same rules.[72] If a far-reaching interpretation of the statute would be an unconstitutional exercise of legislative authority, then it doesn't matter whether it's the executive or the judicial branch doing it. The judiciary, just like the executive, cannot make up law out of whole cloth.[73]

Not applying MQD to lawsuits also creates an incentive for agencies to engage in "regulation by enforcement." In addition to promulgating rules, agencies can, and often do, bring lawsuits to enforce statutes.[74] But as with private lawsuits, the Court has not extended MQD to agency enforcement suits.[75] As a result, agencies can enforce their preferred meaning of statutes, even if those are novel interpretations with broad consequences, free from the burden

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[70] West Virginia v. Env't Prot. Agency, 97 U.S. 697, 741 (Gorsuch, J., concurring) (2022) ("In the years that followed, the Court routinely enforced 'the non-delegation doctrine' through 'the interpretation of statutory texts, and, more particularly, [by] giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional.'") (citing Mistretta v. United States, 488 U.S. 361, 373, n.7 (1989)).

[71] For an in-depth discussion of this idea, *see* Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405 (2008).

[72] *See id.* at 408 ("[T]o the extent that lawmaking by agencies triggers constitutional anxieties about the proper allocation of power among the three branches, so too should delegated lawmaking by courts.") (footnote omitted).

[73] *Id.*

[74] Molly White, *The Feds Are Coming for Crypto. Can It Survive?*, ROLLING STONE (June 10, 2023) [https://perma.cc/SA9P-P9T2] (discussing the SEC's lawsuits against various cryptocurrency exchanges for allegedly violating laws on unregistered securities); U.S. Equal Emp. Opportunity Comm'n, *EEOC Litigation Statistics, FY 1997 through FY 2022* [https://perma.cc/C3WM-Q79N] (categorizing over 7,000 EEOC lawsuits).

[75] *See* Chris Brummer, Yesha Yadav & David Zaring, *Regulation by Enforcement*, 97 S. CAL. L. REV. (forthcoming 2024) (manuscript at 33) ("So far, the major questions doctrine has only been deployed by the Supreme Court to reverse rules – which incentivizes agencies like the SEC to avoid rulemaking and make policy through enforcement.").

of MQD.[76] The agency has an obvious incentive to take this route. If it wins in court, then its interpretation stands as precedent, likely changing behavior among regulated parties. If it loses, then it's in the same position as if it had pursued its goals through rule-making and been thwarted.

In a sense, this gives Congress a way to abrogate MQD. By giving agencies more power to enforce their mandates via offensive litigation, Congress could rob defendants in those suits of their chance to raise MQD as a defense. While at least one district court has applied MQD in an enforcement suit (and rejected the defendant's argument) it does not appear that any appellate court has addressed this issue head on.[77]

But regulation by enforcement harms many of the same values MQD tries to protect. It would allow agencies to enforce the same broad regulations MQD blocks on quasi-constitutional grounds. Indeed, allowing these regulations to come from litigation rather than rulemaking would create a process that would layer less predictability and diminished accountability atop constitutional concerns. Agency enforcement actions do not have to go through the notice and comment procedure of the Administrative Procedure Act. They don't give anyone, even the targets of the lawsuits, prior notice of the rule. Judges also only consider the issues in front of them, and do not flesh out detailed rules for a variety of stakeholders and situations, as many agency rules do.[78] It is also starkly undemocratic. While agencies are unelected, the rules they enforce often change when voters select a new president.[79] But judicial opinions remain good law until a court overturns them or Congress changes the law, making successful efforts at regulation through enforcement much harder to change. In this way, regulation by enforcement allows agencies to go from enforcing temporary rules to quasi-permanent ones.

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[76] *Id.*

[77] Sec. & Exch. Comm'n v. Terraform Labs Pte. Ltd., No. 23-CV-1346 (JSR), 2023 WL 4858299, at *8-9 (S.D.N.Y. July 31, 2023).

[78] *See, e.g.*, Twitter, Inc. v. Taamneh, 598 U.S. 471, 501 (2023) (explaining that the Court did not need to flesh out detailed rules on the duties of social media companies when a much narrower opinion resolved the case).

[79] *See* West Virginia v. Env't Prot. Agency, 597 U.S. 697, 739 (2022) (Gorsuch, J., concurring) (pointing out that administrative agency rules often change with changes in the presidential administration).

Additionally, the Court's frequent reliance on the statute's history indicates that MQD is not a canon of constitutional avoidance. In deciding whether an agency's statutory interpretation runs afoul of the MQD, courts will often consider if the interpretation aligns with the agency's previous readings of the law.[80] This exercise has little value if MQD is a canon of constitutional avoidance. If the action itself is constitutionally suspect because of its sheer scope and breadth, it does not become less so just because the government has steadily inched toward this impermissible interpretation.[81] Similarly, a constitutional exercise of power isn't unconstitutional just because it is novel. Most new agency rules are "novel" or "unique" in some way or another.

II. WHAT IS MQD REALLY?

Neither the textual nor substantive views of MQD explain how the doctrine is applied in practice. Both interpretations underscore, rather than resolve, the inconsistency in MQD's application. There is a need for a fresh explanation. The doctrine should instead be understood as a hybrid canon that seeks to protect certain values surrounding administrative agencies. First, it seeks to stop agencies from changing their interpretation of the law "on a whim," especially on important issues. Second, it seeks to ensure that any major decisions are made by a democratically accountable legislature, rather than unelected bureaucrats. Lastly, MQD seeks to align the actual operations of government better with the Founding Generation's expectations of how American government would work. However, these justifications do not make MQD an impermissible exercise of judicial policymaking. Instead, MQD is in-line with other well established doctrines that put a thumb on the scale for certain values without fully abandoning the text of the law.

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[80] *See West Virginia*, 597 U.S. at 724 (saying the Court was skeptical about the EPA's interpretation because it "had rarely been used in the preceding decades"); Ala. Ass'n of Realtors v. Dep't of Health and Human Servs., 141 S. Ct. 2845, 2487 (2021) ("[T]his provision has rarely been invoked—and never before to justify an eviction moratorium."); Nat'l Fed'n of Indep. Bus. v. Dep't of Occupational Safety and Health Admin., 595 U.S. 109, 119 (2022) ("It is telling that OSHA, in its half century of existence, has never before adopted a broad public health regulation of this kind . . . .").

[81] *See* I.N.S. v. Chadha, 462 U.S. 919, 945 (1983) (invalidating the legislative veto despite its widespread use and utility).

MQD can first be thought of as a way to guard against administrators causing abrupt and frequent changes in law and policy. Justice Gorsuch, when he sat on the 10th Circuit, lamented that judicial deference to agencies left citizens at the unpredictable mercy of politics.[82] He again laid out in his concurrence in *West Virginia*[83] that MQD can be thought of as a way to guard against agencies changing the law on a "whim."[84] Agencies are tied to the President, meaning their policies may change every four or eight years. Such rapid changes may make substantive intrusions on liberty "easy and profuse."[85] This goes against the vision of policymaking laid out in the Constitution, where changes are slow, deliberate, and the result of compromise.[86]

Further, MQD may operate to increase democratic accountability in policymaking. Broad agency power raises unique issues of democratic responsiveness. Agencies benefit from political insulation in a way the President and Congress do not.[87] Agencies also make decisions without the procedural safeguards designed to ensure congressional legislation is the product of a broad consensus.[88] By not allowing agencies to have power over major questions, MQD may help make sure that decisions on those issues are made by legislators who must stand for election every two to six years.[89] And that they are made in the "light" of the legislative process, rather than opaque agency boardrooms.

MQD can also be justified by a desire to align the Court's approach with the Founders' expectations about separation of powers. The Founding Generation assumed that each branch would zealously guard its power.[90] But Congress especially has not done this. Instead, it has been ready and willing to give away huge swaths

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[82] *See* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1153 (10th Cir. 2016) (Gorsuch, J., concurring) (saying that it "is a problem for the people whose liberties may now be impaired not by an independent decisionmaker seeking to declare the law's meaning as fairly as possible—the decisionmaker promised to them by law—but by an avowedly politicized administrative agent seeking to pursue whatever policy whim may rule the day").

[83] 597 U.S..

[84] *Id.* at 739 (Gorsuch, J., concurring).

[85] *Id.*

[86] *Id.*

[87] *Id.* at 737-738.

[88] *Id.* at 738-739.

[89] *Id.* at 738.

[90] ERNEST A. YOUNG, THE SUPREME COURT AND THE CONSTITUTION 961 (2017).

of power to the executive.[91] But MQD puts a thumb on the scale against this habit. Even if Congress did not intend to do so, the Court, under MQD, assumes that Congress *will* guard its power on major issues (as the Founders assumed). This, in essence, *limits* Congress's ability to give away power and forces it, unwillingly, to conform to Founding Era assumptions about institutional behavior. In that way, the doctrine aligns the political branches with Founding-Era expectation, and constitutional values (if not constitutional law).

Thinking of MQD as a canon that guards normative values does not doom the doctrine. While textualists may feel discomfort with a normative justification for MQD, many long-established legal canons, including some broadly accepted by textualists, function similarly. These doctrines do not ignore the text of the law, but do put a thumb on the scale for certain readings of the law. Further, MQD bears some resemblance to the absurdity canon, a method endorsed by many textualists. Lastly, MQD resembles often-used administrative law doctrines in other countries.

Take, for example, the doctrine of necessity. It tells courts to read exceptions into criminal statutes if the defendant acted to prevent a greater harm.[92] Like MQD, the necessity doctrine does deal with some plausible constitutional violations. In particular, the Supreme Court has hinted at a right to self-defense—a more specific subset of the necessity defense.[93] And at least some states have recognized a similar right which creates a mandatory exception to criminal

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[91] *See, e.g.*, Russ Feingold, *It's Time to Tear Up the Executive Branch's Blank Check*, BRENNAN CTR. FOR JUST. (July 22, 2021), **[**https://perma.cc/76PV-LG24**]** (decrying congressional delegation on national security issues); William Yeatman, *The Case for Congressional Regulatory Review*, THE CATO INST. (Apr. 14, 2020), **[**https://perma.cc/4FLF-W2UQ**]** (decrying congressional delegation of oversight of agencies).

[92] *See* United States v. Katzberg, 201 F.R.D. 50, 52 (D.R.I. 2001) (laying out the typical elements of a necessity defense, and listing them as "(1) the defendant acted to prevent imminent, immediate harm; (2) the defendant had no legal alternative to violating the law; and (3) the defendant reasonably anticipated a direct causal relationship between his conduct and the avoidance of the harm").

[93] Justice Scalia's opinion in *District of Columbia v. Heller* explains why the right of self-defense was historically central to the guarantees of the Second Amendment. His analysis largely focuses on the right to self-defense as it relates to the Second Amendment. He does say that it would be "inconceivable" that the government would not allow a self-defense exception for other types of laws, but the analysis ends there. So the Court has never explicitly recognized a general self-defense right in the Constitution.

statutes.[94] Moreover, like MQD, some scholars have insisted the doctrine overlaps with certain textualist methods.[95] But necessity, at its core, protects defendants who are not morally culpable from being convicted without a clear statement from the legislature. While it might not be unconstitutional to criminalize the defendant's conduct in many necessity cases, courts have made the judgment call that allowing law enforcement to do so is undesirable without more from the legislature.

Or consider the Court's clear statement rule to override state sovereign immunity.[96] Congress often does have the power to override state sovereign immunity so long as it does so explicitly.[97] As a result, this insistence upon a clear statement may guard against some constitutional violations, but it does not exist primarily to deal with these scenarios. Instead, courts use it because of a belief that, at least as a default presumption, the Founders' embrace of sovereign immunity and the state-national compromise embodied in that doctrine is entitled to deference.[98] The Court has also required a clear statement before Congress interferes with the "historic powers of the states."[99] While some regulation may fall outside Congress's enumerated powers, this clear statement rule is justified as protecting the historic expectations that some policies will be left for the voters of each state to decide.[100] Both rules provide a precedent for canons of construction that promote not just constitutional avoidance, but certain historic constitutional values and expectations.

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[94] For example, the Oklahoma Supreme Court recently held that the state's abortion ban *must* include an exception if the woman is reasonably certain the continued pregnancy will endanger her life. Okla. Call for Reprod. Just. v. Drummond, 526 P.3d 1123, 1130 (2023).

[95] *See* Andrew S. Gold, *Absurd Results, Scrivener's Errors, and Statutory Interpretation*, 75 U. CIN. L. REV. 25, 70 (2006) (arguing that necessity grew out of a desire to address cases where the text of the law leads to an unthinkable result); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2468-69 (2003) (listing absurdity examples which are now dealt with through necessity).

[96] *See supra* Section I-A.

[97] *See*, *e.g.*, Torres v. Tex. Dep't of Pub. Safety, 597 U.S. 580 (2022); PennEast Pipeline Co. v. New Jersey, 141 S. Ct. 2244 (2021); Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356 (2006); Tennessee v. Lane, 541 U.S. 509 (2004).

[98] *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 55-56 (1996) ("This rule arises from a recognition of the important role played by the Eleventh Amendment and the broader principles that it reflects.").

[99] Gregory v. Ashcroft, 501 U.S. 452, 461 (1991).

[100] *Id.*

Yet another example is the long-standing rule of lenity. The rule, which dates back to 1600's England, tells courts to construe ambiguous criminal statutes in favor of the defendant.[101] This does not mean that courts, however, ignore the law's clear commands.[102] Much like MQD, the rule of lenity recognizes that ultimately, the legislature can accomplish its goals when it speaks clearly. But the rule of lenity, like MQD, puts a thumb on the scale. In this case, *against* criminalizing conduct.[103] It views the criminal law, and the resulting penalties, as serious matters that the legislature should clearly define—not things courts should casually impose on unsuspecting defendants.[104] MQD works in much the same way. It views broad delegations to agencies as a weighty decision that's best left to legislatures, not courts.

MQD also bears some similarities to the absurdity canon. Under the canon, when a court finds that the plain meaning of the text would lead to an "absurd" result, then it ignores that meaning and substitutes a more logical one.[105] The absurdity canon extends to cases where the statutory language appears out of step with legal convention, the rest of the statutory scheme, or common policy.[106] The Ninth Circuit confronted such a situation in *Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs., Inc.*[107] In that case, the

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[101] *The New Rule of Lenity*, 119 HARV. L. REV. 2420, 2421 (2006)

[102] *See* Bell v. United States, 349 U.S. 81, 84 (1955) (saying that Congress could have avoided the application of the rule of lenity if it fixed "the punishment for a federal offense clearly and without ambiguity").

[103] *See id.* at 83 ("It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment.").

[104] *See, e.g.*, United States v. Bass, 404 U.S. 336, 348 (1971) (outlining the two main rationales for the rule of lenity as "First, 'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed' . . . . Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies 'the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should'").

[105] *See, e.g.*, Caminetti v. United States, 242 U.S. 470, 490 (1917).

[106] Laura R. Dove, *Absurdity in Disguise: How Courts Create Statutory Ambiguity to Conceal Their Application of the Absurdity Doctrine*, 19 NEV. L.J. 741, 752 (2004) ("One prominent textualist scholar defines absurdity as 'a version of strong intentionalism' because of a common definition of an absurd result is one 'so contrary to perceived social values that Congress could not have "intended" it.'").

[107] Amalgamated Transit Union Loc. 1309 v. Laidlaw Transit Servs. Inc., 435 F.3d 1140 (9th Cir. 2006).

statute appeared to require a waiting period to file an appeal, as opposed to a time limit, with no upward limit on how long appellants could wait.[108] The Court held that while this arrangement is literally possible, such a scheme is so unusual that without legislative history to support it, the Court would ignore it.[109] Many MQD cases use a similar logic. In *Alabama Association of Realtors v. Department of Health and Human Services*, the Court considered a challenge to the CDC's "eviction moratorium," which the agency had put in place nationwide in counties with high levels of COVID. In the case, the Court emphasizes that it is out of step with usual policy for the CDC to have such broad an authority,[110] especially over an area, landlord-tenant relations, which is usually governed by state law.[111] Similarly in *Gonzales*, the Court held that it would not read the law to allow the Attorney General to make medical determinations that could preempt state euthanasia laws.[112] The Court emphasized that it would be strange, though not impossible, for Congress to delegate medical determinations to an actor, the Attorney General, who lacks any medical expertise.

Importantly, many judges and scholars view the absurdity canon as part and parcel of textualism (not as an exception to it). Justice Scalia, for example, endorsed the absurdity canon as consistent with his textualist approach.[113] In her *Nebraska* concurrence, Justice Barrett gave multiple examples of how she thinks the textualist principles of MQD work in other contexts. Consider again her example of a law which criminalizes "whoever drew blood in the streets," which is universally read to not cover surgeons responding to an emergency. She cites another example from *Bond v. United States*, which held that a skin irritant is not a "chemical weapon."[114] She also cites to *United*

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[108] *Id.* at 1145.

[109] *Id.* at 1146. This situation also closely parallels the "Scrivener's Error" because the result seems so unusual that it must have been an oversight or mistake from the legislature.

[110] Ala. Ass'n of Realtors v. Dep't of Health and Human Servs., 141 S. Ct. 2485, 2487-89 (2021).

[111] *Id.* at 2489.

[112] Gonzales v. Oregon, 546 U.S. 243, 266 (2006) ("The structure of the CSA, then, conveys unwillingness to cede medical judgments to an executive official who lacks medical expertise.").

[113] Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527-28 (1989) (Scalia, J., concurring) (endorsing using the absurdity canon even when the law's text was not logically impossible or gibberish).

[114] Biden v. Nebraska, 143 S. Ct. 2355, 2379 (2023) (Barrett, J., concurring) (citing Bond v. United States, 572 U.S. 844, 860-62).

States v. Kirby, a case where the Supreme Court rejected the idea that a federal statute which criminalized "willfully interfering with the delivery of the mail"[115] allowed for the prosecution of a sheriff who arrested a mail carrier for murder.[116] But each of Barrett's examples of "MQD in action" has been cited by scholars as example of the *absurdity canon* in action. This shows that Justice Barrett, like Justice Scalia, believes the absurdity canon *itself* is part of a textualist approach.[117]

Lastly, MQD has analogues in other countries, where similar doctrines are employed for similar substantive reasons. In Germany, for example, the Federal Constitutional Court embraces a doctrine that requires the Bundestag (legislature) to use specific language when it delegates power on "essential matters."[118] These include both issues relating to rights—what Americans might think of as liberty interests[119]—as well as issues of "great significance for state and society."[120] The rationale for this doctrine is in line with what many proponents say about MQD. Namely, that the Nazi regime's use of unlimited executive power shows that unchecked executives are more oppressive than effective.[121] Similarly, in Israel, the Supreme Court requires that the Knesset (parliament) explicitly approve executive actions relating to "highly consequential" matters.[122] In deciding whether something meets this test, Israeli courts use many of the same criteria as MQD cases do. For example, the political controversy surrounding the issue and the likely economic impact of the contemplated policy.[123]

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[115] United States v. Kirby, 74 U.S. 482, 487 (1869).

[116] *Id.*

[117] Justice Barrett appeared skeptical of the absurdity canon when she was a professor, but it appears her views may have changed. *See* Barrett, *supra* note 25, at 111 (identifying the absurdity canon as problematic because of its departure from the statutory text).

[118] Oren Tamir, *Getting Right What's Wrong with Major Questions Doctrine*, 62 COLUM. J. TRANSNAT'L L. (forthcoming 2024) (manuscript at 44).

[119] *See id.* at 45 (outlining that Germany uses the essential matters doctrine for constitutionally protected rights but that Germans conceive of this concept more broadly than Americans, encompassing "almost any governmental limitation on liberty").

[120] *Id.*

[121] *Id.* at 44.

[122] *Id.* at 47.

[123] Tamir also identifies versions of MQD in the U.K., Switzerland, Iceland, the EU, much of Latin America. *Id.* at Of course, a natural pushback to international

III. RESOLVING THE LAWSUIT LOOPHOLE

If the Court recognizes MQD as neither textual nor substantive, it can resolve the "lawsuit loophole" at the heart of the doctrine. Under this view, MQD doesn't need to apply when courts take the first look at the law because that context does not present the same problems as expansive agency rulemaking. To the extent that the "lawsuit loophole" allows agencies to get around MQD, the Court could still apply MQD to agency actions. While this paradigm would be odd, it is better than the alternatives, especially the drastic action of applying MQD to private lawsuits.

A. Why Judicial Interpretation Presents Fewer Separation of Powers Concerns than Agency Rulemaking

In a private lawsuit, no actor can exercise the kind of questionable power an overreaching agency might. Agency-initiated lawsuits might have far-reaching implications, but they present fewer issues than an agency rulemaking, even when they produce the same substantive result. Yes, courts are insulated from democratic accountability, but the Constitution's framers made that choice deliberately with an understanding that the federal judiciary's decisions would necessarily "make" law.[124] This is a less worrisome practice because courts are restricted to making law "as judges make it."[125] They do not, as agencies do, announce new legal rules every four or eight years. The binding nature of their decisions, their long

comparisons is that in parliamentary systems, the executive has a much easier time inducing legislative action on an issue that's been blocked because of an MQD-like doctrine. For one, by definition, executives in these countries are only invested with power because a majority of the legislature voted for them. Akin to the Speaker of the House in the U.S. Further, many of these countries have much more centralized party systems that mean parties (and by extension their leaders), have more control over member politicians. Thus, both those factors combine to make quick legislative action much easier in parliamentary systems. However, these criticisms fall short, because an executive that is going to court to say it can do something without further legislative approval likely cannot, for one reason or another, reliably count on majority legislative support for its actions. So, these doctrines still deal with many of the same scenarios as MQD—situations where the executive believes legislation would be risky or impossible.

[124] James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 549 (1991) (Scalia, J., concurring).

[125] *Id.*

standing nature (because of life tenure), and their retrospective nature, constrains judges.[126] The judicial power has arguably always been understood to include the ability to interpret the law in whatever way the Court deems correct.[127] In this way, there is no issue with broad, unforeseen interpretations of law because good-faith legal interpretations simply *cannot* be outside "the judicial power."[128]

In some cases, it may also simply be that courts *cannot*, as a practical matter, be bound by MQD. In some cases, like *King*,[129] someone has to make the decision about what the law means. In that case, the Court would have encountered a paradox if it tried to apply MQD to itself. It was not a case about an agency trying to broaden its rulemaking authority using a long-standing law. It was a dispute about what a brand new, confusing law even meant in the first place.[130] To apply MQD to both the agency and the Court in this scenario would have left *no one* with the ability to interpret the law. At a more philosophical level, the courts in our constitutional system are final, at least for purposes of the current dispute.[131] As Justice Robert Jackson famously quipped about the Supreme Court, "We are not final because we are infallible, but we are infallible only because we are final."[132] In this way, it might just be that courts cannot be bound by MQD because courts always get to say what the law means.

While the Court has announced substantive canons that limit the reach of statutes if a broader reading might force the court to step outside of its historic or constitutionally prescribed role, these canons are much narrower, and generally apply in truly uncommon situations. For example, where courts would be asked to decide the

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[126] *See id.*

[127] *See* Lemos, *supra* note 71, at 441 (summarizing arguments that essentially any judicial decision that resolves a case is within the "judicial power").

[128] *Id.*

[129] 576 U.S. 473 (2015).

[130] *Id.* at 479.

[131] RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 95 (7th ed. 2015).

[132] Richard J. Lazarus, *The (Non)finality of Supreme Court Opinions*, 183 HARV. L. REV. 540, 542 (2014) (quoting Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring)).

foreign policy of the United States.[133] The modern Court has generally stuck to the idea that it must follow the law, even if it leads to an undesirable result.[134]

Agency lawsuits pose more issues than private litigation but still do not raise the same magnitude of concerns as expansive agency rulemaking. While not applying MQD to agency lawsuits does present some of the issues of "regulation by enforcement" discussed *infra* Section III-C, these problems are ameliorated by the hybrid canon approach. By not allowing lawsuits to turn into *rulemaking authority*, agency "regulation by enforcement" becomes far less practical. Agencies can, of course, leverage their wins in court to functionally regulate in ways that MQD may block. But agencies have limited resources to bring enforcement lawsuits, and often decline to do so for a variety of reasons. Additionally, similar to private lawsuits, the ultimate decision as to the law's meaning rests with courts, not the agency. Further, the federal government has asked courts to interpret statutes since the Founding Era. As early as 1792, the Attorney General brought civil actions which asked courts to interpret the meaning and reach of statutes.[135] Thus, unlike broad agency power, this kind of arrangement is compatible with the Founders' understanding of the separation of powers.

B. How MQD Could Still Apply

Under the hybrid canon view, MQD would still apply to agency actions, even after a private lawsuit. Under this approach, courts would decide private lawsuits as they do currently. If an agency then tried to enact a rule in line with the results of the previous lawsuit, however, MQD would apply. The agency would not get the same deference as if it were acting in an enforcement capacity or if the case were between private litigants. In this way, agencies would not be able to "get around" MQD by relying on a prior suit.

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[133] *Cf.* Zivotofsky ex rel. Zivotofsky v. Clinton, 566 U.S. 189, 195-96 (2012) (saying that the issue in the case is *not* beyond the reach of the judiciary because it does *not* ask the courts to decide the political status of Jerusalem).

[134] *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1823 (2020) (Kavanaugh, J., dissenting) ("[O]ur role as judges is to interpret and follow the law as written, regardless of whether we like the result."); *id.* at 1753 (rejecting policy arguments to deviate from the text); Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 291 (2022) (outlining why the Court cannot be swayed by public reactions to the law when making decisions).

[135] *See* Hayburn's Case, 2 U.S. 409, 409 (1792).

The hybrid view of MQD is what permits this flexibility. Under the textual view of MQD, MQD has to be "all or nothing." It has to apply to all cases because textual canons apply in all statutory cases. The substantive view of MQD presents similar issues. Under the substantive view, MQD has to apply to all cases, because otherwise, MQD say that an agency's rulemaking raises serious constitutional issues, unless someone else acted first. And since substantive constitutional prohibitions do not turn on the happenstance of which party had the opportunity to litigate the question first, MQD cannot be a substantive canon.

Viewing MQD as a hybrid canon harmonizes the doctrine. This is because it recognizes MQD as a means of promoting certain normative values. The fact that there exists a prior lawsuit confirming the agency's interpretation does not extinguish the common concerns associated with agencies making broad, impactful rules. Nor does it remove the concerns about Congress giving away its power in a way that contravenes the Founders' vision. Protecting these values is still possible, then, even when a prior lawsuit offers support for the agency's proposed rule.

This again parallels other areas of the law. In criminal cases, the standard for conviction is "beyond a reasonable doubt."[136] Even when a criminal case has a companion civil case, the burden of proof on the government remains the same. This higher burden of proof reflects a policy concern unique to criminal trials.[137] The government is not freed from its higher burden because of a companion case. As in the criminal law context, hybrid view of MQD recognizes that the government is both a unique power and unique threat to liberty, and therefore needs particularized legal rules.

C. The Advantages of This Approach

The Court should not resolve the "lawsuit loophole" by applying MQD to private lawsuits because that would upend several decades' worth of valuable precedents. In recent years alone, the Court has interpreted the plain meaning of statutes to cover issues of massive political and economic significance. Just last term, the Court

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[136] U.S. Cts., *Criminal Cases* (accessed Jan. 7, 2023) **[**https://perma.cc/6AZJ-J3W5**].**

[137] *Cf,* Leland v. Oregon, 343 U.S. 790, 802-03 (1952) (Frankfurter, J., dissenting) (outlining the importance of a reasonable doubt standard).

interpreted Title VI to ban affirmative action in college admissions.[138] Title VI does not directly address affirmative action, and Congress never amended the law to do so. Yet the Court found that Title VI's ban on "discrimination" because of race prohibited the practice.[139] In *Bostock*, the Court interpreted "because of. . . sex" to cover sexual orientation and gender identity, settling a national hot-button political issue despite Congress trying and failing to settle the same debate on multiple occasions.[140] Other statutory decisions touch the rights of religious employers,[141] college athletics,[142] and racial gerrymandering.[143] Applying MQD to lawsuits would call into question the Court's interpretation in each of these decisions because in each case the law said nothing about the *exact* issue at hand.

Applying MQD to private lawsuits would also make it nearly impossible for Congress to grant private parties rights with any kind of wide-ranging scope. Most significant laws granting private rights use broad language to do so.[144] They use general terms such as "[n]o voting . . . practice or procedure"[145] or "because of . . . sex."[146] They often only speak to specific scenarios in order to *exempt* those scenarios.[147] Injecting MQD into lawsuits other than those challenging agency rule-making would turn broad, powerful statutes into empty letters. The Court has never, for good reason, demanded that Congress speak with such granular specificity in ordinary legislation.

The Court should not apply MQD to agency lawsuits either. Doing so would frustrate the intent of Congress and the constitutional separation of powers. When Congress allows an

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[138] Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll., 600 U.S. 181, 206 (2023).

[139] *Id.* at 198 n.2.

[140] Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1822-23 (Kavanaugh, J., dissenting).

[141] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 690 (2014).

[142] Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2156 (2021).

[143] Allen v. Milligan, 599 U.S. 1, 10 (2023).

[144] *See, e.g.*, 42 U.S.C. § 2000e–2(a)(1) (Title VII) (prohibiting discrimination "because of such individual's race, color, religion, sex, or national origin"); 52 U.S.C. § 10301(a) (Voting Rights Act) ("[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . .").

[145] 52 U.S.C. § 10301(a) (Voting Rights Act).

[146] 42 U.S.C. § 2000e–2(a)(1) (Title VII).

[147] *See, e.g.*, 20 U.S.C. § 1681 (Title IX) (enumerating specific scenarios only to exempt them from Title IX).

agency to bring a lawsuit, it allows for the agency to use an option short of formal rulemaking. Treating ordinary lawsuits like rules would subvert this intent. Further, it would subvert the appropriate separation of powers. When an agency brings an enforcement suit, it takes on a law *enforcement* role. Law enforcement is the quintessential executive function.[148] While the practical effect may be greater agency ability to enforce broad interpretations of statutes, this is the same power any executive exercises when it brings a prosecution, or makes an arrest, on a novel legal theory. Applying MQD to agency lawsuits would infringe on the executive's ability to exercise *executive* power. But the core of separation of powers law is that each branch gets to exercise its own power free from interference from the others.

At a more fundamental level, applying MQD to lawsuits contradicts what the Court has said about what constitutes faithful statutory interpretation. In private cases, the Court has said that it interprets broad statutes in line with their broad meaning.[149] It has repeatedly declined to read statutes narrowly because their broad language might lead to drastic or impactful results.[150] It has refused to recognize a "canon of donut holes" where broad statutes include exceptions because they fail to speak to a specific scenario.[151] Applying MQD to lawsuits would do more than call the results of cases into doubt, it would call into doubt the Court's recent approach to statutory interpretation.

CONCLUSION

The "lawsuit loophole" is a fundamental challenge to the Major Questions Doctrine. It is first and foremost a conceptual gap. No matter how MQD has been described by scholars and judges, their descriptions suggest MQD should apply in lawsuits. It is also a gap in practice. By not applying MQD to lawsuits, the Court presents agencies with an enticing invitation to work around the doctrine. This work-around threatens to undermine the doctrine by allowing agencies a free hand to regulate things normally blocked by MQD.

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[148] *See* Heckler v. Chaney, 470 U.S. 821, 832 (1985) (explaining that an agency decision about whether to bring an enforcement action is a decision that shares many similarities with the core executive function of deciding who to indict and not indict).

[149] Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1747 (2020).

[150] *Id.* at 1749.

[151] *Id.* at 1747.

But the hybrid view of MQD goes a long way toward solving this issue. By recognizing it as a unique, hybrid canon, MQD could be applied to agencies in limited but important ways. This would place modern administrative law on firmer doctrinal ground without losing all of the substantive benefits MQD confers.