

# THE MAJOR QUESTIONS DOCTRINE IN THE STATES

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## ABSTRACT

*In West Virginia v. EPA and Biden v. Nebraska, the Supreme Court firmly established the major questions doctrine as a tool of statutory interpretation, although debates about its legitimacy, wisdom, and administrability rage on. Commentators have argued that the doctrine has the power to change the federal regulatory landscape, dramatically limiting the ability of federal agencies to regulate subjects like the environment, labor, and food and drugs. But, even these dire predictions consider only half of the equation. Just as the federal courts are starting to adopt the major questions doctrine into federal law, state courts are starting to adopt their own versions of the doctrine under state law. Because adoption of the major questions doctrine by both federal and state courts is likely to lead to dangerous regulatory gaps, the efficacy of regulation depends in no small part on whether states adopt the major questions doctrine.*

*This Article evaluates whether state courts should adopt the major questions doctrine used in West Virginia v. EPA and Biden v. Nebraska. It examines the arguments supporting the major questions doctrine at the federal level to determine whether they have any force in the context of state court statutory interpretation. Despite some similarities, there are pervasive differences between state and federal constitutional structures that undermine the adoption of the federal major questions doctrine in the states. First, state constitutions tend to allocate policymaking power in different ways than the Federal Constitution. Second, many states maintain an approach to statutory interpretation that is inconsistent with the major questions doctrine. And third, all states have a different relationship with their constituent parts (e.g., cities and counties) than the federal government has with its constituent parts (i.e., the states). Each state court system should consider these differences before determining whether the major questions doctrine is the right fit for its state.*

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## INTRODUCTION

In *West Virginia v. EPA*<sup>1</sup> and *Biden v. Nebraska*,<sup>2</sup> the Supreme Court made one thing clear about the major questions doctrine: despite heated debate over its provenance<sup>3</sup> and wisdom,<sup>4</sup> this controversial tool of statutory interpretation is now part of the Court's interpretive toolkit. In *West Virginia v. EPA*, the Court limited the authority of the Environmental Protection Agency to regulate carbon dioxide from power plants.<sup>5</sup> Central to the Court's decision was its reliance on the major questions doctrine as an interpretive tool, or canon, of interpretation. After a year of speculation

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1. 142 S. Ct. 2587 (2022).

2. 143 S. Ct. 2355 (2023).

3. E.g., Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 1983–84 (2017) (doubting the pedigree of the major questions doctrine).

4. E.g., Blake Emerson, "Policy" in the Administrative Procedure Act: Implications for Delegation, Deference, and Democracy, 97 CHI.-KENT L. REV. 113, 117 (2022).

5. 142 S. Ct. at 2616.

about the reach of the Court's new canon, the Court again relied on the major questions doctrine in *Biden v. Nebraska*, this time to invalidate the authority of the Secretary of Education to reduce federal student debt.<sup>6</sup> As used in *West Virginia* and *Nebraska*, the doctrine is best read as a clear statement rule: when the doctrine applies, agencies are presumed *not* to have power to regulate unless Congress has clearly stated its intention to vest agencies with the authority they claim.<sup>7</sup> If other clear statement rules are any indication, then the major questions doctrine has the power to alter the federal regulatory landscape dramatically. Commentators have argued that the major questions doctrine could diminish the power of federal agencies and limit the reach of federal regulation, curtailing agency power to regulate subject matters like labor, food and drugs, and healthcare.<sup>8</sup>

But, even commentators' dire predictions about the consequences of *West Virginia* and *Nebraska* consider only half the equation. Just as federal courts are poised to apply the major questions doctrine to federal regulations, state courts are poised to adopt the doctrine into *state* law, applying the deregulatory tool to state agencies and state regulations. Indeed, a state supreme court adopted the Supreme Court's new major questions language merely one week after *West Virginia* was decided.<sup>9</sup>

The migration of the major questions doctrine from the federal courts to state courts is arguably even more momentous than *West Virginia* and *Nebraska* themselves. The adoption of the major questions doctrine at the federal level, on its own, does not diminish the power of the *states* to regulate. That is, in the absence of federal authority to regulate, states normally have the power to address a wide array of subjects, including matters related to health, safety, and welfare.<sup>10</sup> But, if the major questions doctrine is adopted at the state level, it could be used to disable state regulation as well. The doctrine's migration to state courts, therefore, might

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6. 143 S. Ct. at 2373–75.

7. *E.g.*, *West Virginia*, 142 S. Ct. at 2595.

8. *See, e.g.*, Nathan Richardson, *Antideference: Covid, Climate, and the Rise of the Major Questions Canon*, 108 VA. L. REV. ONLINE 174 (2022) (noting the limitations imposed by the major questions doctrine).

9. *Roberts v. State*, 512 P.3d 1007, 1017 (Ariz. 2022) (citing *West Virginia*, 142 S. Ct. at 2609) (holding that, because the state statute “makes no express delegation of power to anyone, . . . [i]t is highly unlikely that the legislature would choose to bestow sweeping regulatory authority upon an agency in such an oblique and indirect fashion”). As Miriam Seifter noted even before *West Virginia*, some states applied a presumption that looked like *West Virginia*'s major questions doctrine. *See* Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1749 (2021).

10. *See* Santiago Legarre, *The Historical Background of the Police Power*, 9 U. PA. J. CONST. L. 745, 794 (2007) (“[T]he phrase ‘police power’ normally refers to the authority of the states for the promotion of public health, public safety, public morals, and public welfare. But this has not always been the case.”); *see also* Stephen R. Miller, *Community Rights and the Municipal Police Power*, 55 SANTA CLARA L. REV. 675, 679, 682 (2015) (noting the central role of police powers doctrine); *Barbier v. Connolly*, 113 U.S. 27, 31–32 (1885) (associating the police power with the power to “prescribe regulations to promote the health, peace, morals, education, and good order of the people”).

not result in state primacy in the regulatory process—as some have claimed<sup>11</sup>—but rather could create dangerous regulatory gaps in which neither federal nor state agencies can regulate effectively.<sup>12</sup>

But, state courts have a choice. They are not required to follow the Supreme Court’s lead on matters of interpretive methodology.<sup>13</sup> And, although they might be persuaded to adopt the Supreme Court’s methodological practices,<sup>14</sup> they generally do not feel bound to do so.<sup>15</sup> Accordingly, now is the time to assess whether states *should* follow the Court’s new major questions doctrine. That is, before they reflexively adopt the major questions doctrine in imitation of the Supreme Court, they should consider whether the reasons given in support of the major questions doctrine at the federal level apply to the states as well.

This Article provides state courts a framework for determining whether the arguments supporting the federal major questions doctrine make sense when applied to their state. It does not evaluate the persuasiveness of the *federal* major questions doctrine, as many scholars have ably and

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11. See *West Virginia*, 142 S. Ct. at 2621 (Gorsuch, J., concurring) (“When an agency claims the power to regulate vast swaths of American life, it not only risks intruding on Congress’s power, it also risks intruding on powers reserved to the States.”); *NFIB v. OSHA*, 142 S. Ct. 661, 667 (2022) (Gorsuch, J., concurring) (contrasting broad state and local power to address public health emergencies with more limited federal power); *Gonzales v. Oregon*, 546 U.S. 243, 274 (2006) (noting that federalism principles counseled against reading a statute to allow a federal official “to regulate areas traditionally supervised by the States’ police power”).

12. The seriousness of state adoption of the major questions doctrine depends in part on the relative ease of lawmaking at the level of the state legislature. While it is difficult for Congress to abrogate a court interpretation based on the major questions doctrine because of the difficulty that attends enacting federal statutes, in some states it is considerably easier to enact statutes and even to amend the state constitution.

13. There is an active debate about whether methods of interpretation ought to have precedential effect, often called “methodological stare decisis.” For differing views of methodological stare decisis, compare Evan J. Criddle & Glen Staszewski, *Against Methodological Stare Decisis*, 102 GEO. L.J. 1573, 1581–83 (2014) (arguing that methodological stare decisis does not reflect Congress’s intentions), with Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863, 1866 (2008) (“[T]he doctrine of stare decisis is tailor-made to further [the] consistency and predictability . . . that are notoriously lacking in statutory interpretation doctrine.”).

14. Aaron-Andrew P. Bruhl, *Communicating the Canons: How Lower Courts React When the Supreme Court Changes the Rules of Statutory Interpretation*, 100 MINN. L. REV. 481, 483, 491–92 (2015) (describing circumstances under which rules of interpretation can be “communicable”); Anita S. Krishnakumar & Victoria F. Nourse, *The Canon Wars*, 97 TEX. L. REV. 163, 182–83 (2018) (noting that courts pay special attention to Supreme Court canon usage).

15. Criddle & Staszewski, *supra* note 13, at 1577 (“[C]ourts generally do not give stare decisis effect to their *methodological decisions* in statutory interpretation cases.”).

comprehensively done both before<sup>16</sup> and after<sup>17</sup> *West Virginia* and *Nebraska*. Although there are persuasive reasons to believe that the major questions doctrine rests on faulty premises even at the federal level, state courts already are starting to adopt it under state law. Accordingly, this Article will take the arguments supporting the federal major questions doctrine at face value in order to evaluate whether these arguments have force in the context of state court statutory interpretation.

This Article concludes that, when states consider their own constitutional arrangements, they likely will find that the reasons supporting the major questions doctrine at the *federal* level do not support the adoption of the doctrine at the *state* level because of the pervasive differences between state and federal constitutional structures. First, state constitutions tend to allocate policymaking power in different ways than the Federal Constitution. Second, many states take a different approach to statutory text and the search for legislative intent than do federal courts. And third, all

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16. See, e.g., Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019 (2018) (arguing that the major questions doctrine undermines democratic values); Emerson, *supra* note 4 (arguing that Congress envisions that agencies will make major policy decisions); Alison Gocke, *Chevron's Next Chapter: A Fig Leaf for the Nondelegation Doctrine*, 55 U.C. DAVIS L. REV. 955, 966–68 (2021); Aaron L. Nielson, *The Minor Questions Doctrine*, 169 U. PA. L. REV. 1181, 1194 (2021) (describing doctrinal difficulty in applying the major questions doctrine); Natasha Brunstein & Richard L. Revesz, *Mangling the Major Questions Doctrine*, 74 ADMIN. L. REV. 317, 319 (2022) (noting ambiguity in application of the doctrine); Nathan Richardson, *Keeping Big Cases from Making Bad Law: The Resurgent "Major Questions" Doctrine*, 49 CONN. L. REV. 355, 409 (2016) (recounting criticisms of the doctrine); Richardson, *supra* note 8; Chad Squitieri, *Who Determines Majorness?*, 44 HARV. J.L. & PUB. POL'Y 463, 521 (2021) (noting the tension between textualism and the major questions doctrine); Heinzerling, *supra* note 3, at 1938 (doubting the provenance of the major questions doctrine); Kent Barnett & Christopher J. Walker, *Short-Circuiting the New Major Questions Doctrine*, 70 VAND. L. REV. EN BANC 147, 150 (2017) (describing origin of major questions doctrine); Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777, 787–96 (2017) (describing the relationship between *Chevron* and the major questions doctrine).

17. See, e.g., Jonathan H. Adler, *West Virginia v. EPA: Some Answers About Major Questions*, 2021 CATO SUP. CT. REV. 37 (2022) (suggesting ways to make the major questions doctrine manageable); Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. (forthcoming 2023) (doubting basis for major questions doctrine); Mila Sohoni, Comment, *The Major Questions Quartet*, 136 HARV. L. REV. 262 (2022) (criticizing the major questions doctrine); Louis J. Capozzi III, *The Past and Future of the Major Questions Doctrine*, 84 OHIO ST. L.J. 191, 227, 232 (2023) (arguing that critiques of major questions doctrine are overstated); Beau J. Baumann, *Americana Administrative Law*, 111 GEO. L.J. 465, 527 (2023) (describing modern administrative law doctrine's tendency to aggregate power in judiciary); Nicholas Bednar, *Chevron's Latest Step*, YALE J. ON REG.: NOTICE & COMMENT (July 3, 2022), [yalejreg.com/nc/chevrons-latest-step/](https://www.yalejreg.com/nc/chevrons-latest-step/) [<https://perma.cc/2277-RD22>] (situating major questions doctrine within *Chevron* framework); Christopher J. Walker, *A Congressional Review Act for the Major Questions Doctrine*, 45 HARV. J.L. & PUB. POL'Y 773, 778 (2022) (arguing that major questions doctrine augments judicial power); Kristin E. Hickman, *The Roberts Court's Structural Incrementalism*, 136 HARV. L. REV. F. 75 (2022) (situating the major questions doctrine within broader context of administrative law). For a near-comprehensive list of work evaluating the major questions doctrine at the time of writing, see Beau J. Baumann, *Volume IV of the Major Questions Doctrine Reading List* (Aug. 14, 2023), <https://www.yalejreg.com/nc/volume-iv-of-the-major-questions-doctrine-reading-list-by-beau-j-baumann/> [<https://perma.cc/4G5M-47B2>].

states have a different relationship with their constituent parts (e.g., cities and counties) than the federal government has with its constituent parts (i.e., the several states). Accordingly, assuming that the institutional arrangements analyzed in this Article are relatively stable,<sup>18</sup> the arguments supporting the major questions doctrine at the federal level are weak when applied to the states. As a result, states should not reflexively adopt the major questions doctrine used in *West Virginia* and *Nebraska*. This conclusion is in line with Nestor Davidson's insight that courts "should resist false parallels to higher levels of government, where structural realities may be very different."<sup>19</sup>

Part I recounts the evolution of the major questions doctrine, from its introduction as a rare exception to *Chevron* through its new, powerful form as a clear statement rule. Part II argues that the major questions doctrine may be coming to a state near you; indeed, a few state courts already have relied on the doctrine in their interpretive decisions. Part III will evaluate whether state courts *should* continue to adopt the major questions doctrine under state law. That is, it will evaluate the principal justifications for the doctrine under federal law to determine whether they make sense in light of state constitutional arrangements. This Article concludes by showing how the analysis in this paper can light the way toward future research.

This Article opens a new chapter in the robust and growing scholarly literature on the major questions doctrine. The literature on the major questions doctrine has focused almost exclusively on its application to federal law.<sup>20</sup> This Article recognizes the impending migration of the major

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18. One assumption underlying this analysis is that the state constitutional structures are fixed rather than contingent. That is, in determining whether the major questions doctrine makes sense in light of state structures, this paper takes as a given the stability of state structures other than the major questions doctrine. But, just as state courts are actively deciding whether to adopt the major questions doctrine, they could also alter their doctrine related to separation of powers, statutory interpretation, and state-local relations. And more generally, there are other doctrines, such as *Chevron*, that might not make sense in the states given these same institutional arrangements. Although this paper considers these other doctrines fixed for the purposes of this paper, they merit study in their own right. Thanks to Miriam Seifter for highlighting this point.

19. Nestor M. Davidson, *Localist Administrative Law*, 126 *YALE L.J.* 564, 614 (2017). If a court adopts this Article's framework, it will have to decide how to weigh the described considerations against one another. One court might choose to weigh the separation of powers arrangements most heavily because that is the primary justification offered at the federal level. Another state court might choose to prioritize a different justification: if, for example, a state's system is strongly committed to home rule, its courts might weigh localism considerations most heavily. Moreover, there may be other good reasons for states to adopt or reject the major questions doctrine that are not captured in this Article's framework. For example, a court could reasonably conclude that no state agency's work, however important, is "major" in the sense that *West Virginia* and *Nebraska* contemplate. Similarly, as Miriam Seifter has argued, state legislatures tend to be countermajoritarian. As a result, she has argued, the major questions doctrine is not supported in the states to the extent that it is based on the assumption that state legislatures reflect majoritarianism. Seifter, *supra* note 9, at 1749, 1787.

20. Miriam Seifter's work described the major questions doctrine in the states before *West Virginia*. Seifter, *supra* note 9, at 1749, 1786–87. This work is discussed in the Conclusion.

questions doctrine to the states, asking whether states *should* follow the Supreme Court’s lead in *West Virginia* and *Nebraska* by adopting the major questions doctrine into state law. Accordingly, it intervenes at a critical time in the debate over the major questions doctrine. Where state courts go from here is not yet written. This Article’s analysis can help each state make the choice that best fits its own institutional structures.

## I. THE MAJOR QUESTIONS DOCTRINE AFTER *WEST VIRGINIA* AND *NEBRASKA*

### A. *A New Doctrine Made from Recycled Parts*

In *West Virginia v. EPA*, the Supreme Court limited the EPA’s ability to regulate carbon dioxide emissions from power plants, dealing a significant blow to the agency’s power to address climate change.<sup>21</sup> The EPA had interpreted Section 111 of the Clean Air Act to allow it to set limits on carbon emissions that would force power plants to shift their generating capacity to cleaner sources of energy—away from coal and toward natural gas and renewable energy. At one level, this case presented a fairly routine question, calling on the Supreme Court to review an agency’s interpretation of a statute that it is responsible for administering. Framed in this way, *West Virginia* appears to be the ordinary diet of the traditional *Chevron* framework. Under this framework, a court typically would have deferred to the agency’s interpretation of its authority so long as it was reasonable.<sup>22</sup> Similarly, in *Biden v. Nebraska*, the Secretary of Education interpreted the HEROES Act to permit the reduction or elimination of federal student loan debt because of hardship created by COVID-19.<sup>23</sup> As in *West Virginia*, a court traditionally would have analyzed the agency’s action under the *Chevron* two-step process.

But, in both of these cases, the Supreme Court avoided the traditional path in favor of a more controversial one—a path justified, in the *West Virginia* case, by the “extraordinary circumstances” presented by the EPA’s claimed authority. Because of the “economic and political significance” of

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21. 142 S. Ct. 2587, 2606 (2022).

22. See *Chevron, U.S.A., Inc. v. Nat’l Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984) (setting out, in the following language, what has become known as the *Chevron* two-step process for determining review of agency interpretations: “If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”).

23. *Biden v. Nebraska*, 143 S. Ct. 2355, 2374–75 (2023).

the question the agency addressed, the Court cast a skeptical look at the EPA's exercise of authority. In such an extraordinary case, the Court emphasized, it is reluctant to find the agency's claim of authority in the statutory text. Instead, because of the magnitude of the decision, "something more than mere plausible textual basis for the agency action is necessary. The agency instead must point to *clear congressional authorization* for the power it claims."<sup>24</sup> After what could fairly be described as a cursory look at the underlying statutory scheme, the Supreme Court rejected the EPA's interpretation, holding that the EPA lacked the statutory authority it asserted.<sup>25</sup> In short, the Court was not persuaded that Congress intended to give the EPA the power it claimed because there was not *clear* authorization of that authority. Similarly, in *Nebraska*, the Court invalidated the agency's authority to reduce or eliminate loan obligations in the absence of clear congressional authorization to do so.<sup>26</sup>

The major questions doctrine relied on in *West Virginia* and *Nebraska* has been called "new"<sup>27</sup>—and for good reason. Although the doctrine has been in development, on most accounts,<sup>28</sup> for more than two decades, the doctrine's current formulation is potentially far more consequential than its past iterations. The current rule, in contrast with previous versions, appears to be not just an exception to *Chevron*, but rather an inversion of *Chevron*'s regime of deference to agency interpretations; that is, where *Chevron* would counsel deference, the major questions doctrine now counsels heightened scrutiny.<sup>29</sup> And because it calls on a court to invalidate agency authority when the court's "common sense" tells it that something is amiss—even when the agency's reading is textually plausible—the doctrine is an uncomfortable fit with methods of interpretation that focus on the statutory text.

But, despite the novel aspects of the major questions doctrine, it is hard not to notice that it is made of old (or perhaps recycled) parts of previous

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24. *West Virginia*, 142 S. Ct. at 2609 (citations omitted).

25. *Id.* at 2614–16.

26. *Nebraska*, 143 S. Ct. at 2374–75.

27. Deacon & Litman, *supra* note 17 (noting novelty of major questions doctrine); Sohoni, *supra* note 17, at 272 (same); Jack M. Beermann, *The Anti-Innovation Supreme Court: Major Questions, Delegation, Chevron and More*, 65 WM. & MARY L. REV. (forthcoming 2023) (manuscript at 33) (arguing that the major questions doctrine is "built on a familiar doctrinal foundation that belies its novelty").

28. *E.g.*, Sohoni, *supra* note 17, at 272 (describing the pre-*West Virginia* major questions cases); *cf.* Brianne J. Gorod, Brian R. Frazelle & J. Alex Rowell, *Major Questions Doctrine: An Extraordinary Doctrine for "Extraordinary" Cases*, 58 WAKE FOREST L. REV. (forthcoming 2023) (manuscript at 7) ("Some scholars view '*The Benzene Case*,' decided in 1980, as articulating the earliest precursor of the major questions doctrine.").

29. *See* Richardson, *supra* note 8, at 174 (referring to the "antideference" of the major questions doctrine).

major questions cases employed in new ways.<sup>30</sup> *MCI v. AT&T*, a case widely recognized as the progenitor of the major questions doctrine, expressed the concept that the magnitude of the change from past practice would count against an inference that Congress intended to grant the agency the power it seeks.<sup>31</sup> In *Brown & Williamson*, the Court introduced the idea that the “economic and political magnitude” of the agency’s decision was relevant to the invocation of an exception to *Chevron*. And the Court suggested that it would look beyond the text of the statute to determine the scope of the agency’s authority.<sup>32</sup> In *Gonzales v. Oregon*, the Court held that federalism principles counseled against reading a statute to allow a federal official “to regulate areas traditionally supervised by the States’ police power.”<sup>33</sup> *Utility Air Regulatory Group*, although couching its conclusions in *Chevron* terms, emphasized that there was something wrong with a decision of “great economic and political significance” made without “clear congressional authorization.”<sup>34</sup> Each of these concepts was used, and expanded on, in subsequent major questions cases, like *King v. Burwell*,<sup>35</sup> *Alabama Ass’n of Realtors v. HHS*,<sup>36</sup> and *NFIB v. OSHA*.<sup>37</sup> By the time of *West Virginia* and *Nebraska*, the Court had only to rearrange the groundwork it laid in these previous cases to arrive at the modern, “more potent”<sup>38</sup> formulation of the major questions doctrine.

## B. Impact of the Major Questions Doctrine

### 1. Doctrinal Change

There is some disagreement about the impact of the major questions doctrine on the Court’s approach to reviewing agency action. One view sees the major questions doctrine as a repudiation of the traditional *Chevron* two-step analysis.<sup>39</sup> On this view, the major questions doctrine’s heightened scrutiny takes up space once reserved for *Chevron* deference. Another view

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30. See Beermann, *supra* note 27 (manuscript at 33).

31. *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994).

32. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

33. *Gonzales v. Oregon*, 546 U.S. 243, 274 (2006).

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

35. 576 U.S. 473, 483, 497 (2015) (“[T]he context and structure of the Act compel us to depart from what would otherwise be the most natural reading.”).

36. 141 S. Ct. 2485, 2489 (2021) (emphasizing the clear statement requirement and the federalism aspects of the major questions doctrine).

37. 142 S. Ct. 661 (2022) (emphasizing expansion of agency authority from past uses).

38. Sohoni, *supra* note 17, at 262.

39. *Id.* at 275. Others predicted the major questions doctrine would eviscerate *Chevron* before *West Virginia*. See, e.g., Nathan Richardson, *Deference Is Dead (Long Live Chevron)*, 73 RUTGERS U. L. REV. 441, 520 (2021) (“The major questions doctrine could grow as future cases steadily create precedent increasing its scope . . .”).

suggests that the doctrine modifies or supplements the traditional *Chevron* two-step analysis.<sup>40</sup> On this reading, the major questions doctrine is now part of *Chevron* Step 0: before interpreting statutory language at *Chevron* Step 1, the court must determine whether the agency purports to address a major question. And if it does purport to address a major question, the court must proceed with the major questions doctrine analysis set out in *West Virginia* and *Nebraska*. If, on the other hand, the court determines that the agency does not purport to address a major question, then the court proceeds with the ordinary *Chevron* analysis.<sup>41</sup>

Consistent with either view, the major questions doctrine employed in *West Virginia* and *Nebraska* appears to be a clear statement rule of statutory interpretation,<sup>42</sup> although there is some disagreement even about that conclusion.<sup>43</sup> On this reading, when the doctrine applies, an agency will be disallowed from exercising the authority it claims unless Congress's intention to grant that power is *clear*.<sup>44</sup> As the Court described in *West Virginia*, in "extraordinary cases" of "economic and political significance," the court will invalidate the agency action unless the agency can point to "clear congressional authorization" for the authority it claims.<sup>45</sup> From the context of *West Virginia* and *Nebraska*, it appears that the Court will sometimes reject a reading of a statute vesting authority in an agency even if that reading is textually plausible<sup>46</sup> or has a "colorable textual basis."<sup>47</sup> Instead of focusing on the text, major questions cases require the court to supplement the text, perhaps with "common sense,"<sup>48</sup> legislative history,<sup>49</sup> or other context that reveals likely congressional intent.<sup>50</sup> Accordingly, the

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40. Josh Chafetz, *The New Judicial Power Grab*, 67 ST. LOUIS U. L.J. (forthcoming 2023) (noting that the major questions doctrine is a *Chevron* Step 0 question).

41. Bednar, *supra* note 17.

42. Deacon & Litman, *supra* note 17, at 1 ("[T]he 'new' major questions doctrine operates as a clear statement rule"); see also Sohoni, *supra* note 17, at 275; Daniel E. Walters, *The Major Questions Doctrine at the Boundaries of Interpretive Law*, 109 IOWA L. REV. (forthcoming 2023) (manuscript at 18) (characterizing the major questions doctrine as an "avulsive change"); Chafetz, *supra* note 40; Capozzi, *supra* note 17 (noting that the major questions doctrine is a clear statement rule).

43. Natasha Brunstein & Donald L. R. Goodson, *Unheralded and Transformative: The Test for Major Questions After West Virginia*, 47 WM. & MARY ENV'T L. & POL'Y REV. 47, 48 (2022) (noting that the Court avoided explicitly calling the doctrine a clear statement rule). Moreover, in her *Nebraska* concurrence, Justice Barrett took the view that the major questions doctrine is not a "true" clear statement rule. *Biden v. Nebraska*, 143 S. Ct. 2355, 2378 (2023) (Barrett, J., concurring).

44. *West Virginia v. EPA*, 142 S. Ct. 2587, 2614 (2022).

45. *Id.*

46. *Id.* at 2609.

47. *Id.*

48. *Id.*

49. *Biden v. Nebraska*, 143 S. Ct. 2355, 2374 (2023).

50. *West Virginia*, 142 S. Ct. at 2608.

major questions doctrine, as described by the Court, follows in the footsteps of other text-distorting substantive canons of interpretation.<sup>51</sup>

This reading is bolstered by the way that Justice Gorsuch, in his *West Virginia* concurrence, explicitly connects the major questions doctrine to two other clear statement rules, the presumption against retroactive legislation and the presumption against the abrogation of state sovereign immunity.<sup>52</sup> As Justice Gorsuch described these clear statement rules, they place a heavy thumb on the interpretive scale, permitting a contrary reading only if the text is “so clear, strong, and imperative, that no other meaning can be annexed” to it.<sup>53</sup> On this reading, the presumption created by clear statement rules seems tantamount to conclusive—after all, when complex regulatory schemes are litigated, statutory language rarely permits of “no other meaning.” A major questions doctrine formed in this image may prove insurmountable when it applies. Nevertheless, it is too early to tell whether the doctrine will be applied as conclusively in future cases as *West Virginia* and *Nebraska* suggest, or whether it will be overcome by other interpretive tools that point in a different direction.<sup>54</sup>

Contrary to the view that the major questions doctrine is a clear statement rule, Justice Barrett takes the view that the major questions doctrine is not a “true” clear statement rule because it does not require the court to “depart from the best interpretation of the text.”<sup>55</sup> On this reading, the major questions doctrine asks the interpreter to consider context—including what Justice Barrett calls “common sense”—when interpreting agency claims of authority. This context helps the interpreter reach the best reading of a statute rather than “loading the dice” in favor of a particular interpretation, as do other substantive canons.<sup>56</sup> Despite this explanation, Justice Barrett does admit that the major questions doctrine requires clear congressional authorization, although she is careful to note that it does not require Congress to “speak unequivocally.”<sup>57</sup> It is somewhat difficult to reconcile Justice Barrett’s apparently contradictory remarks about the major

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51. In her *Nebraska* concurrence, Justice Barrett opined that she views the major questions doctrine as an indicator of textual meaning rather than as a substantive canon. *Nebraska*, 143 S. Ct. at 2376 (Barrett, J., concurring). For a recent critique of substantive canons from a textualist lens, see Benjamin Eidelson & Matthew C. Stephenson, *The Incompatibility of Substantive Canons and Textualism*, HARV. L. REV. (forthcoming 2023) (manuscript at 1) (“[T]extualists should either abandon their reliance on substantive canons or else concede that their textualism is not what they have often made it out to be.”).

52. *West Virginia*, 142 S. Ct. at 2617 (Gorsuch, J., concurring).

53. *Id.* at 2616.

54. The analysis in this Article would be different if the major questions doctrine turns out to be weaker than it first appears. For example, if the doctrine is relatively easy to overcome by opposing interpretive tools, it could coexist more easily with a strong nondelegation doctrine.

55. *Nebraska*, 143 S. Ct. at 2378 (Barrett, J., concurring).

56. *Id.* at 2377.

57. *Id.*

questions doctrine. On one hand, if she is right that the doctrine is nothing more than a familiar reminder to look at context to find the best meaning of the statute, it is not clear that the doctrine is doing any interpretive work at all. Indeed, on this reading, it might not even be a canon of interpretation.<sup>58</sup> But, on the other hand, this reading seems at odds with her acknowledgment that the canon requires the court to treat an agency's assertion of authority differently depending on whether it is rooted in a "clear congressional authorization."<sup>59</sup> On this latter reading, the major questions doctrine *is* doing some interpretive work; but, contrary to Justice Barrett's assertions, it appears to be acting as a substantive canon, loading the dice against the agency's claim of authority. Without resolving the tension in Justice Barrett's characterization, I consider the major questions doctrine a substantive canon and clear statement rule. For one reason, it appears to operate as a straight-forward clear statement rule in *West Virginia*, and nothing in *Nebraska* is inconsistent with this view. Furthermore, even Justice Barrett seems to admit that it is a clear statement rule (although, curiously, not a "true" clear statement rule).<sup>60</sup> And finally, even if we disregard Justice Barrett's inconsistent explanations, she appears to be alone among the Court's members in concluding that the major questions doctrine is something other than a substantive canon.

## 2. Regulatory Change

The doctrinal changes wrought by the major questions doctrine raise the specter of a dramatic alteration of the regulatory landscape. As a practical matter, Congress has not, and likely will not, legislate at the level of detail necessary to satisfy an aggressive application of the new major questions doctrine. Normally, Congress employs vague or ambiguous terms when vesting authority in agencies. As Victoria Nourse has described, leaving ambiguity in statutory language is normal because legislators often agree on language without agreeing on all specific applications of that language.<sup>61</sup> Indeed, this under-determinacy is not the exception but the norm

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58. Evan C. Zoldan, *Canon Spotting*, 59 HOUS. L. REV. 621, 660 (2022) (arguing that an interpretive principle is not a canon if it merely serves as a reminder to think about some aspect of interpretive methodology).

59. *Nebraska*, 143 S. Ct. at 2378 (Barrett, J., concurring).

60. *Id.* It is not clear what space, if any, there is between a "true" clear statement rule and a regular clear statement rule.

61. VICTORIA NOURSE, MISREADING LAW, MISREADING DEMOCRACY 25 (2016) ("[D]rafting ambiguity may be quite rational, indeed 'normal,' not because they prefer it but because the institution—and its need to act—produces conditions demanding it."); *see also id.* at 28–29 (describing how institutional demands lead rational legislatures to draft with ambiguity rather than precision); Evan C. Zoldan, *The Conversation Canon*, 110 KY. L.J. 1, 43 (2022) (noting that legislation can be "vague if it reflects agreement on language without agreement on future applications of that language").

encouraged by legislative demands.<sup>62</sup> Faced with ambiguous or vague terms, agencies often play a primary role in making statutory language precise through its application to factual situations. And it is exactly these kinds of terms that are likely to trigger the major questions doctrine.<sup>63</sup> As a result, a broad swath of agency action—regulating areas as diverse as the environment, banking, and food and drugs—is susceptible to invalidation under the major questions doctrine. Accordingly, in the aggregate, narrow judicial construction of ambiguous or vague statutes could lead to a considerable diminution of the power of federal agencies and a severe limitation on the reach of federal regulation.<sup>64</sup> Moreover, not only might federal agencies have their choices limited by the major questions doctrine directly, but the specter that courts might aggressively apply the doctrine might deter agencies even from taking action squarely within their authority.<sup>65</sup>

## II. THE MAJOR QUESTIONS DOCTRINE: COMING TO A STATE NEAR YOU

Commentators have predicted that the major questions doctrine will transform the federal regulatory landscape.<sup>66</sup> Following the Supreme Court's lead, federal courts may conclude that statutes regulating a wide variety of subjects are insufficiently clear to accord federal agencies the power they claim. The impending reorganization of the federal administrative state could severely restrict the reach of federal regulation and lead to monumental changes in policy outcomes. But, even these dire predictions consider only half the equation. An assumption underlying discussions of the major questions doctrine (and indeed one of the arguments made in favor of it)<sup>67</sup> is that the doctrine will empower the states

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62. NOURSE, *supra* note 61, at 28–29.

63. *West Virginia v. EPA*, 142 S. Ct. 2587, 2616 (Gorsuch, J., concurring) (noting that the doctrine requires courts to accept agency readings only when the language is “so clear, strong, and imperative, that no other meaning can be annexed to them”).

64. Emerson, *supra* note 16, at 2023 (“[T]he major questions doctrine has significant implications for both social policy and constitutional structure.”).

65. *E.g.*, Sohoni, *supra* note 17, at 275 (predicting that the major questions doctrine “will cause not just an actual but an *in terrorem* curtailment of regulation on an ongoing basis, while placing the onus on today’s gridlocked Congress to revisit complex regulatory schemes enacted years or decades ago”).

66. *Id.*

67. *See West Virginia*, 142 S. Ct. at 2621 (Gorsuch, J., concurring) (“When an agency claims the power to regulate vast swaths of American life, it not only risks intruding on Congress’s power, it also risks intruding on powers reserved to the States.”); *NFIB v. OSHA*, 142 S. Ct. 661 (2022) (contrasting broad state and local power to address public health emergencies with more limited federal power); *Gonzales v. Oregon*, 546 U.S. 243, 276 (2006) (noting that federalism principles counsel against reading a statute to allow a federal official “to regulate areas traditionally supervised by the States’ police power”); *see also* Capozzi, *supra* note 17, at 35 (“The clear statement rule applied in *West Virginia* has roots tracing back to the foundation of the administrative state, both within the States and at the federal level.”).

to pick up the regulatory slack. Put more provocatively, the major questions doctrine can “return” policy questions to the states in the absence of federal agency authority to regulate.

Of course, there are a number of reasons why regulation by the states is often not a substitute for federal regulation. For one reason, many problems call for national responses that cannot effectively be implemented piecemeal, like the response to communicable diseases that can cross state borders with impunity.<sup>68</sup> Some solutions can be offered only by the federal government; for example, the states are not empowered to forgive the federal loans that were the subject of *Biden v. Nebraska*. Consider also the expense of state regulation. It is often far costlier for each of the states, separately, to undertake all the tasks necessary for regulatory enforcement (like information gathering and analysis, inspections, and initiating and adjudicating enforcement actions) than for the federal government to administer nationwide programs.<sup>69</sup>

This Article considers an unexplored reason why state regulation may be an insufficient substitute for federal regulation disabled by the major questions doctrine: the establishment of the major questions doctrine by the Supreme Court suggests that state courts could adopt their *own* versions of the major questions doctrine. And indeed, some states already have done so.<sup>70</sup> The migration of the major questions doctrine to the states threatens to convert the doctrine from a tool for shifting the state-federal regulatory balance into a tool for disabling regulation altogether.

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68. Sarah H. Gordon, Nicole Huberfeld & David K. Jones, *What Federalism Means for the US Response to Coronavirus Disease 2019*, 1 JAMA HEALTH F. 510, 510 (2020) (“A global pandemic has no respect for geographic boundaries, laying bare the weaknesses of federalism in the face of a crisis.”).

69. See, e.g., Martha A. Field, *The Structures of Federalism*, 8 AM. U. J. INT’L L. & POL’Y 445, 446 (1993) (“[A] major cost of federalism that must be acknowledged is the duplication and inefficiency it entails.”). Moreover, some inefficiencies result from the transfer of funds from the federal government back to the states. Jenna Bednar, *The Resilience of the American Federal System*, in THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION 283, 291 (Mark Tushnet, Mark A. Graber & Sanford Levinson eds., 2015).

70. *Roberts v. State*, 512 P.3d 1007, 1017 (Ariz. 2022) (citing *West Virginia*, 142 S. Ct. at 2609) (“[The statute at issue] makes no express delegation of power to anyone. . . . It is highly unlikely that the legislature would choose to bestow sweeping regulatory authority upon an agency in such an oblique and indirect fashion.”); *Abbott v. Harris County*, 66 Tex. Sup. Ct. J. 1420, 2023 WL 4278763, at \*14 n.38 (June 30, 2023) (preliminary opinion) (“The enormity of the power at stake may have implications for how we would interpret the statute.”). The major questions doctrine has been debated, if not yet relied on explicitly, by other state courts as well. See, e.g., *City of Knoxville v. Netflix, Inc.*, 656 S.W.3d 106, 110 (Tenn. 2022); *County of Du Page v. Ill. Lab. Rels. Bd.*, State Panel, 2022 IL App (2d) 210271, ¶¶ 61–62, 2022 WL 4545559, at \*14 (McLaren, J., dissenting) (preliminary opinion) (“[T]he Board’s action here exceeds any grant of authority given to the Board. . . . usurp[ing] both the legislative power establishing the policy of the Act and the authority of the judiciary to determine traditional legal principles.”); *Marcellus Shale Coal. v. Dep’t of Env’t Prot.*, 292 A.3d 921, 960 (Pa. 2023) (Wecht, J., concurring) (quoting *West Virginia* for the proposition that agency interpretations are limited by their authorizing statutes); *In re J.U.*, 887 S.E.2d 859, 865 (N.C. 2023) (Earls, J., dissenting). And as Miriam Seifter noted even before *West Virginia*, some states have already applied the major questions doctrine. Seifter, *supra* note 9, at 1749.

This Part explains why the major questions doctrine may be coming to a state near you. First, tools of statutory interpretation, like the major questions doctrine, often migrate from one jurisdiction to another. Second, the migration of interpretive tools is even more likely when it is the Supreme Court that establishes them. And third, state courts already are adopting the major questions doctrine.

#### A. *Tools of Interpretation Migrate Among Jurisdictions*

Tools of statutory interpretation, such as the major questions doctrine,<sup>71</sup> are transjurisdictional—that is, they pass relatively easily across jurisdictional boundaries. Just like substantive common law rules introduced in one state can spread rapidly among different court systems,<sup>72</sup> so too do state and federal courts adopt interpretive principles from one another.<sup>73</sup> Consider an emerging example of the phenomenon of migrating interpretive principles: the judicial reliance on corpus linguistics tools to interpret statutory language.<sup>74</sup> Corpus linguistics is a methodology to help researchers analyze linguistic information in bodies of text.<sup>75</sup> It was only recently that a judge of a single state’s high court began using this

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71. Indeed, some have referred to the major questions doctrine as a *canon* of interpretation. *E.g.*, Richardson, *supra* note 8, at 174; Eli Nachmany, *There Are Three Major Questions Doctrines*, YALE J. ON REG.: NOTICE & COMMENT (July 16, 2022), <https://www.yalejreg.com/nc/three-major-questions-doctrines/> [https://perma.cc/9VUK-99SR].

72. The adoption of the doctrine of *res ipsa loquitur* is instructive. Introduced first in England in 1863, the doctrine spread to the United States and was rapidly adopted by state court judges throughout the country by the beginning of the twentieth century. Jeffrey H. Kahn & John E. Lopatka, *Res Ipsa Loquitur: Reducing Confusion or Creating Bias?*, 108 KY. L.J. 239, 260 (2019) (noting that by 1905, the doctrine of *res ipsa loquitur* had spread rapidly throughout the United States).

73. For this reason, scholars often refer to canons as part of the common law of statutory interpretation. WILLIAM N. ESKRIDGE JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 21 (2016) (“[T]he canons are also America’s common law of statutory interpretation—the nation’s ongoing experience with applying statutes to concrete circumstances.”); William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1122 (2017) (“[T]he canons stand on their own authority as a form of common law.”); *cf.* Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation: Erie for the Age of Statutes*, 54 WM. & MARY L. REV. 753, 757 (2013) (“There is also the possibility that some of the canons might be federal common law, while others might not.”).

74. Anya Bernstein, *Legal Corpus Linguistics and the Half-Empirical Attitude*, 106 CORNELL L. REV. 1397, 1399 (2021) (noting the lack of communicative context provided by typical corpus searches); Kevin Tobia, *The Corpus and the Courts*, U. CHI. L. REV. ONLINE (Mar. 5, 2021), <https://lawreviewblog.uchicago.edu/2021/03/05/tobia-corpus/> [https://perma.cc/P6FR-WYVP] (noting that the reality of corpus linguistics usage does not match the purportedly apolitical goals of its proponents).

75. Corpus linguistics techniques are not limited to the interpretation of legal texts. For descriptions of corpus linguistics in the context of statutory interpretation, see Bernstein, *supra* note 74, and Evan C. Zoldan, *Corpus Linguistics and the Dream of Objectivity*, 50 SETON HALL L. REV. 401 (2019).

methodology to interpret statutes.<sup>76</sup> Soon, corpus linguistics techniques were adopted by judges in other states.<sup>77</sup> And most recently, corpus linguistics techniques have made the leap to the federal courts. Indeed, in just the past few years, judges at all levels of the federal judiciary have used corpus linguistics methods in their opinions.<sup>78</sup> As this example shows, interpretive principles are—as Aaron Bruhl put it—“communicable”;<sup>79</sup> once introduced in a jurisdiction, they can spread to others in short order. Now that the major questions doctrine has been definitively introduced as a tool of statutory interpretation in the federal courts, it is available for transplanting to new soil in the states.

### *B. Lower Courts Follow the Supreme Court’s Lead*

The migration of an interpretive principle from one jurisdiction to another is even more likely when it is the Supreme Court that announces the new principle.<sup>80</sup> As scholars have recognized, lower federal courts and state courts emulate the practices of the Supreme Court, including mimicking their use of interpretive principles.<sup>81</sup> This should come as no surprise. On a conscious level, lower court and state court judges might conclude that the authority of the Supreme Court extends not only to binding statements of law, but also to persuasive ways of determining the law. And at a subconscious level, lower court and state court judges likely model their opinions on Supreme Court opinions because of the Court’s place in the

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76. *E.g.* J.M.W., III v. T.I.Z. (*In re* Adoption of Baby E.Z.), 266 P.3d 702, 726–28 (Utah 2011) (Lee, J., concurring) (advocating the adoption of corpus linguistics to interpret statutes).

77. *E.g.*, Murray v. BEJ Mins., LLC, 464 P.3d 80, 95 (Mont. 2020) (McKinnon, J., concurring) (favorably citing corpus data to interpret statutory language); People v. Harris, 885 N.W.2d 832, 833–34, 838–39, 849–51 (Mich. 2016) (relying on corpus linguistics techniques to interpret the statutory term “information”). For a description of the rise of corpus linguistics in statutory interpretation, see Tobia, *supra* note 74.

78. In the Supreme Court: *Carpenter v. United States*, 138 S. Ct. 2206, 2238 n.4 (2018) (Thomas, J., dissenting) (describing corpus linguistics data). In the courts of appeals: *United States v. Woodson*, 960 F.3d 852, 855 (6th Cir. 2020) (same); *Caesars Ent. Corp. v. Int’l Union of Operating Eng’rs Loc. 68 Pension Fund*, 932 F.3d 91, 95–96 (3d Cir. 2019) (same); *Wilson v. Safelite Grp., Inc.*, 930 F.3d 429, 440–42 (6th Cir. 2019) (Thapar, J., concurring) (same). In the district courts: *Buckhanon v. Opelika Hous. Auth.*, No. 3:19-cv-893-ALB, 2020 WL 1865761 (M.D. Ala. Apr. 14, 2020) (using corpus linguistic techniques in statutory interpretation); *Am. Bankers Ass’n v. Nat’l Credit Union Admin.*, 306 F. Supp. 3d 44, 68 (D.D.C. 2018) (same), *rev’d*, 934 F.3d 649 (D.C. Cir. 2019); *City of San Jose v. Trump*, 497 F. Supp. 3d 680, *vacated*, 141 S. Ct. 1231 (2020).

79. Bruhl, *supra* note 14, at 483, 523–26 (describing circumstances under which rules of interpretation can be “communicable”).

80. *Id.* (analyzing how the Supreme Court’s use of statutory interpretation tools affects lower court usage).

81. *Id.* at 491 (noting arguments that lower courts might consider their “role is to emulate what the Supreme Court, their role model, would do”); *see also* Krishnakumar & Nourse, *supra* note 14, at 182–83 (noting that lower court judges and lawyers pay special attention to the Supreme Court’s use of interpretive principles).

judicial hierarchy.<sup>82</sup> Indeed, states often adopt principles from federal law—even when they are not required to do so. Accordingly, tracking canon use by the Supreme Court and lower courts, Aaron Bruhl has found a correlation between the Supreme Court’s increased reliance on certain kinds of interpretive tools and lower court adoption of these same tools.<sup>83</sup> For this reason, there is reason to suspect that state courts will find the Supreme Court’s use of the major questions doctrine particularly compelling, leading them to consider adopting it.

### *C. State Adoption of the Major Questions Doctrine Has Begun*

Perhaps most importantly, no speculation is necessary to conclude that states are willing to adopt the major questions doctrine into their own law because some states have already begun to do so. In fact, just *one week* after the Supreme Court’s *West Virginia* opinion, the Supreme Court of Arizona cited its major questions language. In *Roberts v. State*, an Arizona state statute granted an agency authority to set rules for overtime compensation.<sup>84</sup> Pursuant to this authority, the agency interpreted the statute to incorporate federal standards for calculating overtime. In response, the Arizona Supreme Court rejected the agency’s claim of authority.<sup>85</sup> After finding that the state statute in question “makes no *express* delegation of power,” the court relied on *West Virginia* for the proposition that it was “highly unlikely that the legislature would choose to bestow sweeping regulatory authority upon an agency in such an oblique and indirect fashion.”<sup>86</sup> Based on this conclusion, the court held that the state agency had no power to authorize overtime payments to certain state employees, despite otherwise broad statutory authority. Since *West Virginia*, other state court judges have followed suit.<sup>87</sup> If these early indications prove typical, we can expect more states to consider domesticating the major questions doctrine in short order.

## III. EVALUATING THE MAJOR QUESTIONS DOCTRINE IN THE STATES

The major questions doctrine has begun to make inroads in the states. This move could have dramatic consequences, converting the major questions doctrine from a tool that shifts primary regulatory authority to the states into a tool that disables regulation generally and leaves potentially

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82. Bruhl, *supra* note 14, at 491 (noting reasons why lower courts follow the Supreme Court’s methodological choices).

83. *Id.* at 502–05 (tracking use of canons in Supreme Court and lower courts).

84. 512 P.3d 1007, 1017–18 (Ariz. 2022) (citing *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022)).

85. *Id.*

86. *Id.* at 1017 (emphasis added) (citing *West Virginia*, 142 S. Ct. at 2609).

87. See *supra* note 70 and accompanying text.

dangerous regulatory gaps throughout the law. This Part evaluates whether states should continue on the path of adopting the major questions doctrine under state law. Specifically, it evaluates whether the reasons supporting the major questions doctrine at the federal level translate to state constitutional structures. After examining the relationships between state legislatures and executive branches, state legislatures and courts, and state level and local governments, it offers a framework for state courts to use when determining whether the major questions doctrine fits with their constitutional structures. It suggests that whether a state court is justified in adopting the major questions doctrine depends on: first, the way its constitution implements the principle of separation of powers; second, how much it relies on statutory text, as opposed to other inputs into statutory meaning; and third, how its constitution arranges the relationship between state and local government powers. Although different states could reach different conclusions based on these considerations, on balance, the arguments supporting the major questions doctrine at the federal level translate poorly to the states.<sup>88</sup>

#### A. *The Major Questions Doctrine and the Separation of Powers*

The primary justification for the major questions doctrine is to preserve the separation of powers.<sup>89</sup> The doctrine, the argument goes, ensures that it is Congress, rather than administrative agencies, that makes policy decisions of major political and economic significance. On this reading, the major questions doctrine prevents the executive from intruding on Congress's constitutionally assigned lawmaking role. More precisely, the major questions doctrine is often explained as serving two related separation-of-powers functions: one, it shunts policymaking to Congress and away from other institutions; and two, it serves as a substitute for the now-dormant nondelegation doctrine. The rest of this Part will examine each of these two justifications for the major questions doctrine in the

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88. The methodology in this paper has some parallels with an analysis conducted by Aaron Saiger with respect to *Chevron*. There, Saiger concluded that state structures were a poor model for adopting *Chevron* deference. Aaron Saiger, *Chevron and Deference in State Administrative Law*, 83 *FORDHAM L. REV.* 555, 582 (2014) (“Institutional differences between the states and the federal government (and, for that matter, among the states), although they do not matter a great deal with respect to many aspects of administrative law, are central with respect to administrative deference to agency action.”).

89. Deacon & Litman, *supra* note 17, at 39 (“Yet the Court insists that the principal justification for the major questions doctrine is that it channels issues into the legislative process—forcing Congress to decide them—rather than allowing those issues to be decided elsewhere.”); Ronald M. Levin, *The Major Questions Doctrine: Unfounded, Unbounded, and Confounded*, *CALIF. L. REV.* (forthcoming 2023) (manuscript at 44) (“Chief Justice Roberts remarked that the major questions doctrine is based on separation of powers . . .” (internal citations omitted)); Randolph J. May & Andrew K. Magloughlin, *NFIB v. OSHA: A Unified Separation of Powers Doctrine and Chevron’s No Show*, 74 *S.C. L. REV.* 265 (2022) (linking the major questions doctrine with separation of powers).

context of state constitutional structures. It concludes that, despite some similarities between state and federal implementation of the principle of separation of powers, state courts are likely to find that the differences outweigh these similarities. As a result, the separation-of-powers justification for the major questions doctrine at the state level is relatively weak.

### *1. The Major Questions Doctrine and Policymaking Authority*

One persistent justification for the major questions doctrine is its purported ability to cabin policymaking authority within Congress. As in many other separation-of-powers-inflected cases, the Supreme Court's major questions cases reiterate the judiciary's preference that Congress, rather than the executive branch, make decisions of national policy.<sup>90</sup> In *West Virginia*, the Court started with the presumption that "Congress intends to make major policy decisions itself, not leave those decisions to agencies."<sup>91</sup> It was because of this presumption that the Court rejected the agency's interpretation of the statutory text—which the Court itself admitted was plausible—in favor of a narrower reading.<sup>92</sup> But, whether or not this judicial presumption actually reflects anything about Congress at all,<sup>93</sup> the presumption that Congress ought to—and intends to—make major policy decisions is closely associated with the major questions doctrine. It is a connection that the Court returned to more explicitly in *Nebraska*. There, the Court explained that the case was about "one branch of government arrogating to itself power belonging to another. . . . [I]t is the Executive seizing the power of the Legislature."<sup>94</sup> And it is a connection that Justice Gorsuch explicated at length in his *West Virginia* concurrence, in which he opined that the major questions doctrine ensures that agencies

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90. As others have noted, there are persuasive arguments that the major questions doctrine arrogates power to the courts at the expense of the political branches, compromising the separation of powers. *See, e.g.*, Emerson, *supra* note 16, at 2023.

91. *West Virginia*, 142 S. Ct. at 2609 (quoting *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc)).

92. *Id.* ("We 'typically greet' assertions of 'extravagant statutory power over the national economy' with 'skepticism.'" (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014))).

93. The work of Gluck and Bressman suggests that a large percentage of statutory drafters are familiar with *Chevron* and rely on it when drafting, although the results are mixed as to whether they leave ambiguities in statutory text because they want courts to defer to agencies. Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 995–96 (2013). However, this finding seems to be in tension with Gluck and Bressman's other finding that a large percentage of statutory drafters did not intend for agencies to fill ambiguities or gaps relating to questions of major economic and political significance. This tension suggests that it is too early to conclude that the Court is correct to presume, categorically, that Congress does not intend agencies to resolve policy ambiguities, even major ones.

94. *Biden v. Nebraska*, 143 S. Ct. 2355, 2373 (2023).

do not “exploit” a statutory ambiguity “to assume responsibilities far beyond’ those the people’s representatives [i.e., Congress] actually conferred on them.”<sup>95</sup> And previously, Justice Gorsuch made this point vividly in his *NFIB v. OSHA* concurrence: “Why does the major questions doctrine matter? It ensures that the national government’s power to make the laws that govern us *remains where Article I of the Constitution says it belongs*—with the people’s elected representatives.”<sup>96</sup>

Superficially, the separation-of-powers justification for the major questions doctrine would seem to apply to the states as well. To a significant extent, after all, state legislatures, like Congress, do set policy. Each state has a legislature that, through legislation, is primarily responsible for policymaking. And even more pointedly, most state constitutions contain explicit separation-of-powers clauses that purport to cabin legislative power in the legislative branch.<sup>97</sup> But despite these indications that state separation-of-powers principles are analogous to the federal model, each state’s constitutional text, internal structure, and judicial interpretations determine the precise scope of its separation-of-powers principle.<sup>98</sup> As a result, even if the preference for Congress to make decisions of major economic and political significance justifies the application of the major questions doctrine under federal law, it does not follow that the doctrine is justified under state law. Rather, whether the major questions doctrine is justified in any given state depends, in part, on the extent to which a state’s structures cabin policymaking power in the legislature in a way that resembles the formalist vision held by proponents of the major questions doctrine at the federal level.

The rest of this Section describes the ways that state constitutions allocate policymaking power. Because state structures differ, some states concentrate policymaking power in their legislatures more than others. But, on balance, state constitutions tend to allocate policymaking power in ways that distinguish them from the formalist model envisioned by proponents of the federal major questions doctrine. As a result, despite the variety that

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95. *West Virginia*, 142 S. Ct. at 2620 (Gorsuch, J., concurring) (quoting *NFIB v. OSHA*, 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring)).

96. 142 S. Ct. at 668 (Gorsuch, J., concurring) (emphasis added).

97. Jonathan L. Marshfield, *America’s Other Separation of Powers Tradition*, 73 DUKE L.J. (forthcoming 2023) (manuscript at 57) (on file with author) (“[T]he states have developed and practiced an alternative approach to the separation of powers.”); Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1190–91 (1999); see, e.g., N.C. CONST. art. I, § 6 (“The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.”); CAL. CONST. art. III, § 3 (“The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.”).

98. Saiger, *supra* note 88, at 560 (“[S]tate constitutions and their conceptions of separation of powers are unlike their federal counterparts.”); Marshfield, *supra* note 97 (manuscript at 57) (“[T]he states have developed and practiced an alternative approach to the separation of powers.”).

exists among the states, the preference that federal policymaking ought to be cabined in Congress translates poorly to the states.

*a. Constitutionalization of Rights*

Most state constitutions contain numerous rights provisions that divert policymaking power away from the legislature and toward other institutions. This fact distinguishes the way that policymaking is allocated in the states from the federal model—both in reality and as envisioned by proponents of the federal major questions doctrine. State constitutions generally enumerate more rights, and enumerate them in greater detail, than the Federal Constitution.<sup>99</sup> From the perspective of the individual, this enumeration of rights can be considered liberty-enhancing.<sup>100</sup> But from an institutional perspective, the greater the scope of constitutional protections, the smaller the scope of policymaking that is left to the legislature.<sup>101</sup> Put otherwise, the more conduct that a state constitution protects, the less conduct that is left for the legislature to regulate through the political process. This policymaking power, in turn, is diverted from the legislature to other institutions—normally the courts—which then provide authoritative resolution of constitutional meaning. Consider an example from Michigan’s bill of rights, which creates a constitutional defense of truth against a claim of libel.<sup>102</sup> By constitutionalizing what would otherwise be an ordinary policy decision about available legal defenses, the Michigan Constitution transfers a policy decision that is normally lodged in the legislature to the judiciary.<sup>103</sup> Similarly, most states constitutionalize a wide array of rights—including an explicit right to privacy, a right to hunt and fish,<sup>104</sup> and recent additions for reproductive rights, gender equality rights,

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99. Jessica Bulman-Pozen & Miriam Seifter, *State Constitutional Rights and Democratic Proportionality*, 123 COLUM. L. REV. (forthcoming Nov. 2023) (manuscript at 9) (“[S]tate constitutions seek to foster autonomy and human flourishing across a wider range of affairs than their federal counterpart.”); G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 9, 16 (1998) (noting the length and detail of state constitutions and differences from federal constitutional design); see also G. Alan Tarr, *Understanding State Constitutions*, 65 TEMP. L. REV. 1169, 1172 (1992) (noting greater specificity of state constitutional rights provisions); Jonathan L. Marshfield, *American’s Misunderstood Constitutional Rights*, 170 U. PA. L. REV. 853, 856 (2022) (arguing that the state proclivity for amending bills of rights “has caused state bills of rights to grow dramatically in length, scope, and detail”).

100. Bulman-Pozen & Seifter, *supra* note 99 (manuscript at 8) (arguing that state constitutional rights provisions “recognize government as both a potential violator and guardian of liberty”).

101. TARR, *supra* note 99, at 16–17 (noting the limitations on state legislative power that accompany detailed state constitutions).

102. MICH. CONST. art. I, § 19 (“In all prosecutions for libels the truth may be given in evidence to the jury; and, if it appears to the jury that the matter charged as libelous is true and was published with good motives and for justifiable ends, the accused shall be acquitted.”).

103. Legislatures normally have power over substantive elements of a claim or defense and procedure as well. Evan C. Zoldan, *The Klein Rule of Decision Puzzle and the Self-Dealing Solution*, 74 WASH. & LEE L. REV. 2133, 2150 (2017).

104. Bulman-Pozen & Seifter, *supra* note 99 (manuscript at 10–11).

and collective bargaining rights<sup>105</sup>—all of which reduce the policymaking power of their legislatures in the process.

*b. Constitutionalization of Routine Policy Decisions*

To generalize from the previous point about rights provisions, state constitutions simply deal with more substantive policy matters than the Federal Constitution—again, this arrangement diverts policymaking authority away from state legislatures.<sup>106</sup> Most state constitutions,<sup>107</sup> for example, deal extensively with policy issues related to corporations,<sup>108</sup> taxation and financing,<sup>109</sup> and education,<sup>110</sup> while other state constitutions address issues as diverse as natural resources and conservation,<sup>111</sup> dueling,<sup>112</sup> and labor and employment.<sup>113</sup> Because state constitutions contain so many provisions that address matters that would be handled, at the federal level, through the ordinary legislative processes, scholars have aptly described state constitutions as “policy-oriented” rather than

105. Amanda Powers, *Voters Amend State Constitutions to Enshrine New Rights*, BRENNAN CTR. FOR JUST. (Nov. 16, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/voters-amend-state-constitutions-enshrine-new-rights> [<https://perma.cc/2LPD-4S62>]. This is not to say, of course, that the constitutionalization of rights is *bad*; merely that it has structural consequences for the distribution of power. For more on the constitutionalization of rights, see Tarr, *supra* note 99, at 1172, noting rights codified in state constitutions that are not present in federal Constitution.

106. ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 21 (2009) (“There are many policy decisions that have been directly embedded in state constitutions.”); *see also* TARR, *supra* note 99, at 132 (noting that in the nineteenth century “state constitutions increasingly became instruments of government rather than merely frameworks for government”). For more on the distribution of power in state constitutions, see G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 N.Y.U. ANN. SURV. AM. L. 329, 330 (2003) (noting the relatively greater policymaking role of state constitutions compared with the federal Constitution); Robert A. Schapiro, *Contingency and Universalism in State Separation of Powers Discourse*, 4 ROGER WILLIAMS U. L. REV. 79 (1998) (arguing that Federal Constitution is a poor analogy for the states); Evan C. Zoldan, *Legislative Design and the Controllable Costs of Special Legislation*, 78 MD. L. REV. 415 (2019) (describing state constitutional special legislation provisions); Miriam Seifter, *Understanding State Agency Independence*, 117 MICH. L. REV. 1537, 1539 (2019) (describing distribution of policymaking authority reflected in state constitutions); Jonathan Zasloff, *Taking Politics Seriously: A Theory of California’s Separation of Powers*, 51 UCLA L. REV. 1079, 1083–84 (2004) (noting differences between state and federal separation-of-powers principles); Chad M. Oldfather, *Some Observations on Separation of Powers and the Wisconsin Constitution*, 105 MARQ. L. REV. 845 (2022) (noting that Congress is granted powers by the Federal Constitution while state constitutions limit state legislatures).

107. For a thorough discussion of the law of state constitutions, see WILLIAMS, *supra* note 106, at 20–21. *See also* Tarr, *supra* note 99, at 1176–77 (noting policy areas covered by state constitutions).

108. *E.g.*, KY. CONST. § 205; ME. CONST. art. IV, § 14.

109. *E.g.*, TEX. CONST. art. VIII; ME. CONST. art. IX, § 14; GA. CONST. art. VII; FLA. CONST. art. VII; HAW. CONST. art. VII.

110. *E.g.*, ME. CONST. art. VIII, § 1; TEX. CONST. art. VII; GA. CONST. art. VIII; FLA. CONST. art. IX; HAW. CONST. art. X.

111. HAW. CONST. art. XI (conservation, control, and development of resources); ALASKA CONST. art. XIII (natural resources).

112. ALA. CONST. art. IV, § 86 (dueling).

113. ARIZ. CONST. art. XXV (right to work).

“framework-oriented” and likened state constitutions to “long legislative codes.”<sup>114</sup> The result of this constitutionalization of routine policy decisions mirrors the result of the expansive rights provisions described above. The more policy that is resolved by a state’s *constitution*, the less leeway the state’s *legislature* has to set policy. In other words, by constitutionalizing policy decisions, state constitutions narrow the scope of the legislature’s policymaking power by transferring it to other institutions.

*c. Limitations on State Legislative Power*

Although state legislatures face fewer internal limits on their authority than does Congress,<sup>115</sup> state legislatures face greater *external* limitations. These limitations further reduce the policymaking function of state legislatures. For one reason, state constitutions restrain state legislatures in far greater detail than the Federal Constitution restrains Congress.<sup>116</sup> These restraints include single subject rules,<sup>117</sup> special legislation restrictions,<sup>118</sup> and other detailed procedural requirements<sup>119</sup> unknown at the federal level. Moreover, because federal law is supreme to state law, state legislatures always face external limitations that are wholly foreign to Congress. Because the Federal Constitution makes federal law supreme to contrary state law,<sup>120</sup> state law is preempted by inconsistent federal law.<sup>121</sup> Importantly, many state statutes preempted by federal law do not concern subjects that are particularly “national” in character. Rather, they often cover precisely those subjects that would otherwise fall into the state’s general police power—that is—its power over public health, safety, welfare, and morals.<sup>122</sup> For example, a claim that a manufacturer defectively

114. WILLIAMS, *supra* note 106, at 20–23 (noting that state constitutions contain a “wealth of nonfundamental policy matters”); *see also* Tarr, *supra* note 99, at 1181–82 (referring to state constitutional provisions as “statutory” in their “detail and specificity”).

115. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 87 (1868) (noting plenary power of state legislatures); *see also* Oldfather, *supra* note 106, at 907 (noting that states possess residual police power, unlike Congress, which possesses enumerated powers).

116. Tarr, *supra* note 106, at 335 (noting state “procedural and substantive restrictions on the legislative process” that do not “exist[] in the Federal Constitution”).

117. For a discussion of single subject rules, see Richard Briffault, *The Single-Subject Rule: A State Constitutional Dilemma*, 82 ALB. L. Rev. 1629 (2018).

118. Zoldan, *supra* note 106, at 421 (describing state prohibitions on special legislation).

119. Schapiro, *supra* note 106, at 102–03 (“[S]tate legislatures often face additional requirements, such as prohibitions on local or special legislation or germaneness requirements.”).

120. U.S. CONST. art. VI.

121. DANIEL R. MANDELKER, JUDITH WELCH WEGNER, JANICE C. GRIFFITH, EVAN C. ZOLDAN & CYNTHIA BAKER, STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM 624–28 (9th ed. 2021) (describing different subject matters in which preemption analysis arises).

122. Legarre, *supra* note 10, at 794 (“[T]he phrase ‘police power’ normally refers to the authority of the states for the promotion of public health, public safety, public morals, and public welfare. But this has not always been the case.”); *see also* Miller, *supra* note 10, at 688–89; *Barbier v. Connolly*, 113 U.S.

designed a drug is a classic tort claim normally within the purview of state law.<sup>123</sup> But, the Supreme Court has found that this kind of claim is preempted by federal law.<sup>124</sup> In these and similar cases of preemption, power is transferred away from the state legislature and to federal institutions.<sup>125</sup>

Although state legislative power is limited in the sense described above, in one practical way state legislatures are more powerful than Congress. Nevertheless, this difference also suggests the inappropriateness of the major questions doctrine at the state level. Because of electoral differences, states have an easier time enacting laws than does Congress. Congress's power to make laws is often impeded, as a practical matter, by divided government—that is, a single party fails to control the presidency and both chambers of Congress.<sup>126</sup> By contrast, most states have a “trifecta,” in which the governor's office and both chambers of the state legislature are controlled by a single party.<sup>127</sup> Indeed, as of 2023, thirty-nine of the fifty states have a trifecta—twenty-two dominated by Republicans and seventeen dominated by Democrats.<sup>128</sup> It is easier to enact legislation under trifecta conditions than under conditions of divided government, making most state legislatures more agile than Congress.<sup>129</sup>

On balance, the ease of lawmaking under trifecta conditions suggests that the major questions doctrine is not appropriate in trifecta states. The presence of trifecta conditions means that a legislature could overturn an agency's assertion of authority if it so chooses. Accordingly, trifecta conditions allow the political branches to police administrative overreach without the need for judicial oversight. Because the political branches can easily correct administrative overreach when they wish, there is little justification for the courts to rely on an interpretive principle, like the major

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27, 31 (1885) (associating the police power with the power to “prescribe regulations to promote the health, peace, morals, education, and good order of the people”).

123. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 (AM. L. INST. 1998) (“A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings.”).

124. *Mut. Pharm. Co. v. Bartlett*, 570 U.S. 472 (2013).

125. *Bartlett* is far from unique. The supremacy of federal law leads to the preemption of state law across a wide range of subject matters. MANDELKER ET AL., *supra* note 121, at 624–28 (describing different subject matters in which preemption arises).

126. Sarah Binder, *The Dysfunctional Congress*, 18 ANN. REV. POL. SCI. 85, 94–95 (2015) (“[U]nified party control of Congress and the White House reduced the frequency of deadlock. Divided government—aided by parties’ influence over the content of the floor agenda—empowers the opposition party to block agenda issues they oppose.”).

127. Dakota Thomas, *Partisan Control of States After the 2022 Election*, COUNCIL OF STATE GOV'TS (Nov. 15, 2022), <https://www.csg.org/2022/11/15/partisan-control-of-states-after-the-2022-election/> [https://perma.cc/KB3X-UQ4F].

128. *Id.*

129. *Id.*

questions doctrine, that is designed to allow the courts to protect legislative prerogatives from incursions by administrative agencies.

*d. Competition with Other Institutions*

In addition to the features described above, state constitutional structures tend to reflect a tolerance for competition among institutions for policymaking power. This preference for policymaking competition diminishes the power of the legislature relative to competing institutions. Not every state has the same level of institutional competition. But, in states in which policymaking alternatives are robust, the major questions doctrine is even less justified as an implementation of the principle of separation of powers. Institutions that compete with the legislature for policymaking power include state courts, the executive branch, and the people themselves.

First, state courts often are empowered to engage in policymaking to a greater degree, and more overtly, than are the federal courts.<sup>130</sup> As they often remind us, federal courts are courts of limited jurisdiction.<sup>131</sup> By contrast, and despite limitations on particular types of courts, a state's courts, collectively, are permitted to reach classes of cases out-of-bounds for Article III courts. Indeed, state courts often are empowered to engage in tasks that would fall outside the federal judicial power, like issuing permits or licenses.<sup>132</sup> More subtly, but equally importantly, state courts often issue advisory opinions to the political branches. While this practice does not set policy directly, it places state courts closer than their federal counterparts to the policymaking process. For example, the power to issue advisory opinions can be used strategically by governors to justify a veto, making the courts central to the policymaking process.<sup>133</sup>

Equally importantly, state judges tend to be elected.<sup>134</sup> This fact creates a fundamentally different relationship among state courts, governors, and

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130. Bernard W. Bell, *The Model APA and the Scope of Judicial Review: Importing Chevron into State Administrative Law*, 20 WIDENER L.J. 801, 824–27 (2011) (arguing that state judges have “explicit law-making functions”).

131. *E.g.*, *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (“Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute . . .”).

132. *E.g.*, N.Y. REAL PROP. ACTS. LAW § 881 (McKinney 2015) (“[A] license shall be granted by the court in an appropriate case upon such terms as justice requires.”); GA. CODE ANN. § 16-11-129 (2022) (“The judge of the probate court of each county shall, on application under oath, on payment of a fee of \$30.00, . . . issue a weapons carry license or renewal license . . .”).

133. Lucas Moench, Note, *State Court Advisory Opinions: Implications for Legislative Power and Prerogatives*, 97 B.U. L. REV. 2243, 2288–93 (2017) (describing strategic ways that governors and legislatures use advisory opinions).

134. Aaron-Andrew P. Bruhl & Ethan J. Leib, *Elected Judges and Statutory Interpretation*, 79 U. CHI. L. REV. 1215, 1249–54 (2012) (describing the effect of election of judges on judges’ relationship with the legislature).

state legislatures than exists at the federal level. As Aaron Bruhl and Ethan Leib have noted, state judges are closer to the legislature because they are not only politically accountable, but also politically connected.<sup>135</sup> This attachment to the political branches can empower them to make politically salient decisions with more comfort than federal judges. Note, however, that the political salience of state judges can cut the other way, too. Because state judges are elected, it might be more tolerable for them to exercise the kind of policymaking authority associated with the major questions doctrine. One of the objectionable features of the major questions doctrine at the federal level is that it diverts power to the judiciary at the expense of the political branches. But, in the states, this objection has less force precisely because state courts occupy a more central policymaking role.

Second, state executive branches tend to be in a better position to compete with their legislatures on policymaking issues than is the federal executive branch. While the federal executive power is vested in the President,<sup>136</sup> the vast majority of states have a constitutionally divided executive.<sup>137</sup> Their constitutions require the election of high-level executive officials separate from the governor, like attorneys general and secretaries of state.<sup>138</sup> And a minority elect other executive officials, like a treasurer, auditor, or controller.<sup>139</sup> Because they are invested with constitutional authority, these executive officials, and the inferior officers they appoint, have the formal power and incentive to take a lead role in policymaking, distinguishing them from the role required by the more centralized federal executive.<sup>140</sup>

Third, many states encourage majoritarianism and popular oversight of the legislature by allowing the people to set policy directly, empowering the people themselves to compete with the legislature for policymaking authority. Approximately 40% of state constitutions permit citizens to bypass the legislature by putting an initiative on the ballot.<sup>141</sup> In these states,

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135. *Cf. id.*

136. U.S. CONST. art. II, § 1. This is true no matter what is one's view of how unitary the executive is or ought to be.

137. Seifter, *supra* note 106, at 1552 (“Almost all states today elect some number of officials other than the governor, and the vast majority establish this arrangement in the constitution itself.”).

138. *Id.*; Zasloff, *supra* note 106, at 1146 (cataloguing the many ways that the executive is divided in the states); Patrick C. McGinley, *Separation of Powers, State Constitutions & the Attorney General: Who Represents the State?*, 99 W. VA. L. REV. 721, 724 (1997) (noting that the “vast majority” of the states have a “constitutionally designed divided executive department”).

139. Seifter, *supra* note 106, at 1552.

140. MANDELKER ET AL., *supra* note 121, at 837 (“State attorneys general have also gained prominence as entrepreneurial policy makers whose positions may or may not be in accord with the positions taken by governors . . .”).

141. Anthony Johnstone, *The Separation of Legislative Powers in the Initiative Process*, 101 NEB. L. REV. 125, 126 (2022) (“[T]he initiative power by design functions as a legislative rival to the

the voters are permitted to make law without assistance from—or interference by—the legislature.<sup>142</sup> The initiative process competes with the legislature’s role as repository of policymaking power, allowing the people to function as a “legislative rival” to the legislature.<sup>143</sup> For example, in the wake of the *Dobbs* decision overturning *Roe v. Wade*, a number of states used their newfound power and responsibility over abortion access, either by strengthening abortion restrictions or expanding access to abortion.<sup>144</sup> Indeed, the example of *Dobbs* and abortion initiatives suggests that when the people have the initiative power, they use it to decide major questions themselves. Similarly, almost half the states permit popular referenda. In these states, voters can petition to repeal a bill that was enacted into law by the state’s legislature. If the referendum disapproves of the bill, then it is considered void.<sup>145</sup>

The state constitutional practice of giving the people power over policymaking, at the explicit expense of legislative power, is longstanding. As Jon Marshfield described, many state constitutions were designed or amended to limit the legislature’s power, in large part because of a deep suspicion of legislative corruption and incompetence.<sup>146</sup> And as Miriam Seifter has argued, state legislatures tend to be countermajoritarian even today.<sup>147</sup> Accordingly, Seifter has argued that the major questions doctrine is not supported in the states to the extent that it is based on the assumption that the legislature reflects majoritarianism.<sup>148</sup>

#### *e. Capacity for Policy Development*

Not all state legislatures have the capacity to develop policy in a way that is analogous to Congress’s policymaking power. The extent to which a legislature has the capacity to contribute meaningfully to the policymaking process—often called legislative *professionalization*—varies among the

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legislature.”); see also M. DANE WATERS, THE INITIATIVE AND REFERENDUM ALMANAC 2–3 (2d ed. 2018).

142. See JOSHUA J. DYCK & EDWARD L. LASCHER JR., INITIATIVES WITHOUT ENGAGEMENT: A REALISTIC APPRAISAL OF DIRECT DEMOCRACY’S SECONDARY EFFECTS 5 (2019) (describing initiative process).

143. Johnstone, *supra* note 141, at 126.

144. In Michigan, Vermont, and California, voters added reproductive rights to their respective state constitutions through voter initiatives. Powers, *supra* note 105.

145. DYCK & LASCHER, *supra* note 142, at 20.

146. Marshfield, *supra* note 99, at 862 (arguing that state bills of rights serve the function of empowering the people over the government); see also Tarr, *supra* note 106, at 335–37 (recounting that state constitutional conventions weakened the legislative power and transferred power to other branches or to the people themselves).

147. Seifter, *supra* note 9, *passim*.

148. *Id.* at 1749, 1787.

states.<sup>149</sup> State legislatures in some larger states, like California and New York, are relatively analogous to Congress in terms of professionalization. In these states, membership in the legislature carries a significant salary, affording the member time and independence to learn about policy issues.<sup>150</sup> Moreover, professionalized legislatures have longer sessions and large, full-time staff that can develop expertise on questions that come before the legislative body.<sup>151</sup> In addition, professionalized legislatures have committees whose members develop policy expertise and convey information about complex matters to the rest of the legislature.<sup>152</sup> And some state legislatures rely on legislative services commissions, which provide nonpartisan expert policy research, bill drafting services, and policy analysis to legislators.<sup>153</sup> By contrast, other states bear few similarities to Congress in terms of professionalization. Less professionalized state legislatures meet for shorter sessions, provide for smaller staffs for their members, have lower member salaries, and have fewer support services.<sup>154</sup> These states have a diminished capacity for legislative policy-development compared with more professionalized legislatures.

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149. Christopher Z. Mooney, *Citizens, Structures, and Sister States: Influences on State Legislative Professionalism*, 20 LEGIS. STUD. Q. 47, 48 (1995) (“[T]he concept [of professionalization] generally refers to the enhancement of the legislature’s capacity to perform its role in the policymaking process with an expertise, seriousness, and effort comparable to other actors in that process.”).

150. *Cf. id.* at 48–49 (“At root, [professionalization] involves the extent to which a legislature can command the full attention of its members, provide them with adequate resources to do their jobs in a manner comparable to that of other full-time political actors, and set up organizations and procedures that facilitate lawmaking.”); Peverill Squire, *Another Look at Legislative Professionalization and Divided Government in the States*, 22 LEGIS. STUD. Q. 417, 418 (1997) (noting that professionalized legislatures “meet in unlimited sessions, pay their members well, and provide superior staff resources and facilities”).

151. Karl Kurtz, *Full- or Part-Time Legislature: Which Is Better?*, THICKET STATE LEGIS. (Feb. 14, 2013, 3:09 PM), [https://ncsl.typepad.com/the\\_thicket/2013/02/full-time-or-part-time-legislature-which-is-better.html](https://ncsl.typepad.com/the_thicket/2013/02/full-time-or-part-time-legislature-which-is-better.html) [<https://perma.cc/WM4Y-JAJT>] (describing full-time and part-time legislatures with respect to their capacity for policymaking).

152. Kristin Taylor, Marjorie Sarbaugh-Thompson & Steven Betz, *State Legislative Committee Deliberations: Why Some Issues Are Difficult and Where State Legislators Turn for Help*, 102 SOC. SCI. Q. 2863 (2021); David Arter, *Introduction: Comparing the Legislative Performance of Legislatures*, 12 J. LEGIS. STUD. 245, 248 (2006) (“Specialist committees have the means to collect information, cultivate policy expertise and reach decisions independently of other institutions.”).

153. *See, e.g., Welcome to LSC*, OHIO LEGIS. SERV. COMM’N, <https://www.lsc.ohio.gov> [<https://perma.cc/ERZ8-8Z5H>] (“LSC is a nonpartisan agency providing the Ohio General Assembly with drafting, research, budget and fiscal analysis, training, and other services.”); *About the Legislative Services Division*, MONT. LEGISLATURE, <https://leg.mt.gov/lsd/> [<https://perma.cc/Y4G7-DRRN>] (“The mission of the Legislative Services Division (LSD) is to provide bill and amendment drafting, committee staffing, policy and legal research, reference and communications, information technology, and administrative support services to the House, Senate, and other divisions of the Legislative Branch . . .”).

154. Kurtz, *supra* note 151; *see also Full- and Part-Time Legislatures*, NAT’L CONF. STATE LEGISLATURES, <https://www.ncsl.org/research/about-state-legislatures/full-and-part-time-legislatures.aspx> [<https://perma.cc/DG7B-UA4Z>].

In states with highly professionalized legislatures—where staff can develop expertise about policy issues and legislator salary is high enough to allow for independence and dedication to legislative matters—the legislature has greater capacity to make detailed policy decisions. In these states, the legislature can develop policy in a more robust way, making it less dependent on other institutions, like administrative agencies. Because of this legislative professionalization, state courts could well expect their legislatures to take a primary role in policymaking, similar to Congress. Accordingly, the major questions doctrine would be a relatively better fit in these states compared with states with less professionalized legislatures.

By contrast, in states with few resources—shorter sessions and less money for legislators and staff—the legislative capacity to make detailed policy decisions is diminished. As a consequence, in these states, policymaking power is shifted away from the legislature and toward other government institutions. Moreover, when legislative capacity is diminished, lobbyists and powerful constituents play a greater role in the policy process. Even though they do not set policy directly, they can influence the legislative process more strongly by assisting low-capacity legislatures with information gathering and legislative drafting.<sup>155</sup> In states without a professionalized legislature, accordingly, it is less reasonable for courts to conclude that the legislature expects to, or ought to, make all major policy decisions itself. The major questions doctrine would be less justified in these states than in states with more professionalized legislatures.

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Considering these features together, it appears that state legislatures are not the equivalent of Congress in terms of its role as central repository of policymaking power. Although state constitutions often state their preference for separation of powers in starkly formalist terms, the real constitutional structure of the states tells a different story. State constitutions divert policymaking from the legislature to the courts by constitutionalizing a great swath of conduct, both in the context of rights and in the context of ordinary policy decisions. Federal preemption diverts policymaking authority away from the states to Congress or federal agencies. In states that have initiative or referendum processes, it is the people themselves who are given significant authority over important policy decisions at the expense

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155. Lee Drutman & Steven M. Teles, *Why Congress Relies on Lobbyists Instead of Thinking for Itself*, ATLANTIC (Mar. 10, 2015), <https://www.theatlantic.com/politics/archive/2015/03/when-congress-cant-think-for-itself-it-turns-to-lobbyists/387295/> [<https://perma.cc/EVA8-A96T>] (arguing that lobbyists play a more important role as investment in legislative knowledge is diminished). Moreover, states sometimes disempower state agencies by vesting authority in nonexpert bodies that can interfere with the work of agency experts. Evan C. Zoldan, *Delegation to Nonexperts*, 169 U. PA. L. REV. ONLINE 100, 103 (2020) (“[T]he legislature can delegate authority to institutions without expertise in the subject matter of the delegation.”).

of the legislature. And in states with low levels of professionalization, the legislature lacks the capacity to contribute to policymaking to the same degree as professionalized state legislatures, instead leaving room for formal and informal influence from other institutions. For all of these reasons, state legislatures, by and large, do not stand in the same position as Congress with respect to policymaking power. Because state constitutional structures do not place policymaking authority in state legislatures to the degree that federal structures place policymaking authority in Congress, state structures are out-of-sync with the Court's formalist justification for the federal major questions doctrine, that the Constitution places policymaking authority in Congress to the exclusion of other institutions. As a result, the separation of powers justification for the federal major questions doctrine does not make equal sense for the states—and state courts would not be justified in adopting the major questions doctrine simply because of the Supreme Court's preference for reposing federal policymaking authority in Congress.

## 2. *State Nondelegation Doctrines*

A second separation-of-powers justification for the major questions doctrine at the federal level is that it serves as a substitute, conceptually, for the dormant nondelegation doctrine.<sup>156</sup> Even before the major questions doctrine was fully developed in *West Virginia*, scholars and jurists made this connection. Famously, Cass Sunstein referred to the major questions doctrine as an “incarnation” of the nondelegation doctrine.<sup>157</sup> This reading of the major questions doctrine was also a central part of Justice Gorsuch's pre-*West Virginia* dissent in *Gundy* and his concurrence in *NFIB v. OSHA*. In *Gundy*, Justice Gorsuch implied that the major questions doctrine was actually a constitutional rule in disguise: “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

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156. Cass R. Sunstein, *The American Nondelegation Doctrine*, 86 GEO. WASH. L. REV. 1181, 1199–1200 (2018) [hereinafter Sunstein, *American Nondelegation Doctrine*] (referring to the major questions doctrine as a promising incarnation of the nondelegation doctrine); Cass R. Sunstein, *There Are Two “Major Questions” Doctrines*, 73 ADMIN. L. REV. 475, 475 (2021) (“Both versions of the major questions doctrine can claim a connection to the nondelegation doctrine.”); John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 223 (noting that the nondelegation doctrine “now operates exclusively through the interpretive canon requiring avoidance of serious constitutional questions”); see also *Paul v. United States*, 140 S. Ct. 342 (2019) (Kavanaugh, J., statement respecting the denial of certiorari) (connecting major questions doctrine to nondelegation concerns); Levin, *supra* note 89 (manuscript at 38) (“[T]he most prominent normative explanation for the major questions doctrine is that it is in some sense an outgrowth or relative of a constitutional principle: the nondelegation doctrine.”).

157. Sunstein, *American Nondelegation Doctrine*, *supra* note 156, at 1199–1200 (connecting major questions with nondelegation).

power by transferring that power to an executive agency.”<sup>158</sup> And similarly, in *OSHA*, Justice Gorsuch elided the distinction between the two doctrines, opining that “the point” of them both was “the same.”<sup>159</sup> Justice Kavanaugh, too, connected the nondelegation doctrine to the major questions doctrine after *Gundy* brought the nondelegation doctrine back into intense public discussion, but not back to life.<sup>160</sup> And in *West Virginia* itself, it was Justice Gorsuch, again, who most explicitly connected the major questions doctrine with the nondelegation doctrine. In his concurrence, Justice Gorsuch opined that the major questions doctrine was a statutory “corollary” to the constitutional ideal embodied in the nondelegation doctrine.<sup>161</sup> Scholars, taking note of the judicial connection between nondelegation and the major questions doctrine, have largely agreed that the “most prominent normative explanation for the major questions doctrine is that it is in some sense an outgrowth or relative of” the nondelegation doctrine.<sup>162</sup>

On this fairly consistent but not universal reading,<sup>163</sup> the nondelegation doctrine and the major questions doctrine are not just connected; rather, they are substitutes for one another, sharing the common purpose of preventing overbroad delegations. In this view, the major questions doctrine can be seen as suspenders to the nondelegation doctrine’s belt: the major questions doctrine is a second-best alternative to the nondelegation doctrine, necessary only because of the relative weakness of the nondelegation doctrine. Accordingly, because *West Virginia*’s major questions doctrine has been justified as a second-best substitute for the nondelegation doctrine, whether a state is justified in adopting the major questions doctrine under state law should depend, in part, on whether the state’s courts have a viable nondelegation doctrine available to them. If the state’s courts interpret the state constitution to include a viable nondelegation doctrine, then the courts do not need to adopt a second-best tool of statutory interpretation to do the

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158. *Gundy v. United States*, 139 S. Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting) (emphasis added). This view appears also in other recent major questions cases.

159. *NFIB v. OSHA*, 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring).

160. *Paul*, 140 S. Ct. at 342 (Kavanaugh, J., statement respecting the denial of certiorari) (connecting the nondelegation doctrine to the major questions doctrine).

161. *West Virginia v. EPA*, 142 S. Ct. 2587, 2619 (2022) (Gorsuch, J., concurring) (“Much as constitutional rules about retroactive legislation and sovereign immunity have their corollary clear-statement rules, Article I’s Vesting Clause has its own: the major questions doctrine.”). Justice Gorsuch further cites *Gundy*, 139 S. Ct. at 2141–42 (Gorsuch, J., dissenting), and *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–43 (1825), cases about nondelegation, to drive the connection home. *West Virginia*, 142 S. Ct. at 2617.

162. Levin, *supra* note 89 (manuscript at 38).

163. In her *Nebraska* concurrence, Justice Barrett opined that the doctrine serves the purpose of elucidating the best meaning of the statute, not placing a substantive thumb on the interpretive scale. *Biden v. Nebraska*, 143 S. Ct. 2355, 2378–80 (2023) (Barrett, J., concurring); *see also* May & Magloughlin, *supra* note 89, at 289–93 (noting that the two doctrines play complementary roles in the prevention of overbroad delegations).

same work. If, by contrast, a state's courts have not developed an enforceable nondelegation doctrine, or have developed one that is relatively weak or limited, then the major questions doctrine would be more justified.

One caveat—as of now, we do not know whether state courts will, in fact, view the nondelegation and major questions doctrines as substitutes. States could, to the contrary, treat them as complements. On this reading, a state court anxious to limit overbroad delegations would use both the nondelegation doctrine *and* the major questions doctrine more frequently than a court less concerned about limiting overbroad delegations. It is certainly possible that courts will come to view the doctrines this way; and indeed, there is some evidence supporting both the substitute and complement models.<sup>164</sup> Although it is a possibility, a reversal of this kind would be in tension with the theoretical justifications given for the relationship between the doctrines at the federal level.

With the understanding that the major questions doctrine is most widely considered a substitute for the nondelegation doctrine, and the caveat that it is too early to tell how state courts actually will treat the two doctrines, it is instructive to investigate the strength of the nondelegation doctrine in the states.<sup>165</sup> There have been several prominent studies of this question over the decades. Gary Greco categorized the states as either strong nondelegation doctrine states, loose nondelegation doctrine states, or procedural safeguard states.<sup>166</sup> Jim Rossi noted that some states enforced a nondelegation doctrine that was weak, others strong, and still others

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164. In support of this alternate vision of the relationship between nondelegation and major questions, Stiglitz has found that “disputes over agencies’ statutory authority to make regulations appear more, not less, pronounced in states with a strong nondelegation doctrine, suggesting that the rigor in the statutory doctrinal channel is a complement rather than a substitute for rigor in the constitutional doctrinal channel.” Edward H. Stiglitz, *The Limits of Judicial Control and the Nondelegation Doctrine*, 34 J.L., ECON. & ORG. 27, 48 (2018). By contrast, Ben Silver’s work suggests that constitutional avoidance canons (like the major questions canon) do act as a substitute for nondelegation. Benjamin Silver, *Nondelegation in the States*, 75 VAND. L. REV. 1211, 1224 (2022) (“[S]tate supreme courts tend to use constitutional avoidance canons in nondelegation cases quite sparingly. Only eighty-nine state supreme court decisions since the year 1900 contain both the words ‘delegation’ and ‘avoidance’; in the same time period, those courts have heard nearly five thousand nondelegation cases.”). Ultimately, it is too early to tell how states will come to view the relationship between nondelegation and major questions.

165. For some of the excellent scholarship on nondelegation in the states, see generally Rossi, *supra* note 97, at 1191–1201 (categorizing states in terms of strength of nondelegation doctrine); Stiglitz, *supra* note 164, at 30 (comparing legislative drafting practices with strength of nondelegation); Daniel E. Walters, *Decoding Nondelegation After Gundy: What the Experience in State Courts Tells Us About What to Expect When We’re Expecting*, 71 EMORY L.J. 417, 469–70 (2022) (reporting data on nondelegation usage in the states); Jason Iuliano & Keith E. Whittington, *The Nondelegation Doctrine: Alive and Well*, 93 NOTRE DAME L. REV. 619, 645 (2017) (describing nondelegation in the states in various historical periods); Joseph Postell & Randolph J. May, *The Myth of the State Nondelegation Doctrines*, 74 ADMIN. L. REV. 263, 303–07 (2022) (describing relative vitality of nondelegation in the states); Gary J. Greco, Survey, *Standards or Safeguards: A Survey of the Delegation Doctrine in the States*, 8 ADMIN. L.J. 567, 579–80 (1994); Seifter, *supra* note 9, at 1749.

166. See Greco, *supra* note 165, at 578–80.

moderate.<sup>167</sup> Building on this older work, Jed Stiglitz has concluded that approximately 40% of the states maintain a strong nondelegation doctrine.<sup>168</sup> And measuring the rate of success for nondelegation challenges in the states, Daniel Walters found that “individual states have had wildly different experiences over time, often deviating substantially from the national average.”<sup>169</sup> As a result, although nondelegation may be “alive and well”<sup>170</sup> in the states, and although there is some disagreement as to which states count as strong, moderate, or weak,<sup>171</sup> it appears to be noncontroversial to conclude that some states have more vibrant nondelegation doctrines than others.<sup>172</sup>

#### *a. Weak Nondelegation States and Major Questions*

Among weak nondelegation doctrine states, some appear nearly as weak as the “intelligible principle” test controlling in the federal courts,<sup>173</sup> where the nondelegation doctrine has been declared well and truly dead.<sup>174</sup> Consider a Vermont case addressing the power to create and abolish school districts. There, the relevant statute granted the state board of education the power to change the boundaries of school districts “when necessary.”<sup>175</sup>

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167. Rossi, *supra* note 97, at 1198–1200.

168. Stiglitz, *supra* note 164, at 32.

169. Walters, *supra* note 165, at 453.

170. Iuliano & Whittington, *supra* note 165, at 619 (“[A]lthough the doctrine has disappeared at the federal level, it has thrived at the state level.”); Walters, *supra* note 165, at 469 (“[T]he doctrine does in fact play a much more consistently important role in the state courts than it does in the federal courts. In the U.S. Supreme Court, nondelegation challenges are few and far between, and they are almost invariably unsuccessful. In the state courts, by contrast, 18.7% of the 1,668 challenges were successful.”).

171. There is some disagreement about the extent to which state courts robustly enforce the nondelegation doctrine. Compare Postell & May, *supra* note 165, at 274 (“[S]tate nondelegation doctrines . . . are much less robust than the scholarly accounts suggest.”), with Walters, *supra* note 165, at 455, and Stiglitz, *supra* note 164, at 31–33.

172. Regardless of the strength of a particular state’s nondelegation doctrine, Schleicher and Hills have argued that state and federal nondelegation doctrines rest on similar foundations. David N. Schleicher & Roderick M. Hills, Jr., *Local Legislatures and Delegation* 6 (N.Y.U. Sch. of L., Working Paper No. 23-37, 2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4368382](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4368382) [<https://perma.cc/26C5-7NLB>] (noting that state nondelegation doctrine may be justified like federal nondelegation because “[s]tate and federal nondelegation doctrines are rooted in state constitutional text that either explicitly requires, or implies an unwritten purpose of, parceling out legislative, executive, and judicial functions among three distinct state-wide institutions”).

173. *E.g.*, Walters, *supra* note 165, at 455 (depicting state-by-state experiences with nondelegation). See generally Stiglitz, *supra* note 164; Rossi, *supra* note 97.

174. The Court’s latest explicit consideration of the nondelegation doctrine was in *Gundy*, in which the Court upheld a statute against a nondelegation challenge. *Gundy v. United States*, 139 S. Ct. 2116 (2019). *Gundy* was nevertheless widely considered to be strong evidence that the revival of nondelegation was imminent. Evan C. Zoldan, *The Fifth Vote for Non-Delegation*, JURIST (Dec. 14, 2019, 4:47 PM), <https://www.jurist.org/commentary/2019/12/evan-zoldan-the-fifth/> [<https://perma.cc/7Y9NM-9UJC>].

175. *Athens Sch. Dist. v. Vt. State Bd. of Educ.*, 237 A.3d 671, 677 (Vt. 2020).

Reviewing the statute in light of a nondelegation challenge, the Vermont Supreme Court began by acknowledging the state constitution's apparently strict separation of powers.<sup>176</sup> But, the court quickly pivoted from the constitution's formalist-sounding text to a functionalist reading of its nondelegation principle, interpreting it to be "consistent with efficient and effective governmental structures that are able to respond to the complex challenges and problems faced by today's state government."<sup>177</sup> Accordingly, the court noted that it had adopted what could be called a "relatively forgiving standard, tolerant of such overlapping institutional arrangements short of one branch virtually usurping from another its constitutionally defined function."<sup>178</sup> With this background, the court applied a streamlined version of the intelligible principle test used in the federal courts for nondelegation claims, focusing on whether the statute sets out policy goals and "reasonable standards to govern the achievement of its purpose."<sup>179</sup> Because the statute did set out the policy to implement (cost savings) and standards for the board to follow (preferred and alternative structures for the resulting districts), the court held that the legislative delegation to the board easily survived a nondelegation challenge.<sup>180</sup>

In states like Vermont, the major questions doctrine could serve as a substitute for a functionally unavailable nondelegation doctrine. Because courts cannot rely on the nondelegation doctrine to curb overbroad delegations—despite a stated constitutional commitment to separation of powers—reliance on the major questions doctrine would not be redundant. This is not to say that the Vermont courts, or courts in other states with weak nondelegation doctrines, should use the major questions doctrine frequently. Indeed, very often legislative delegations are sufficiently cabined to satisfy separation-of-powers concerns, no matter how exacting. Rather, it is better to say that in states in which the nondelegation doctrine is not realistically available, the major questions doctrine is more justified than it would be in a state with a viable nondelegation doctrine.

Moreover, it is important to note that, no matter the weakness of a state's nondelegation doctrine, it is still likely stronger than the federal nondelegation doctrine. The massive amount of literature on the federal

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176. *Id.* at 686 ("[T]he Legislative, Executive, and Judiciary departments, shall be separate and distinct, so that neither exercise the powers properly belonging to the others." (quoting VT. CONST. ch. II, § 5)).

177. *Id.*

178. *Id.* (quoting *Hunter v. State*, 865 A.2d 381, 392 (Vt. 2004)).

179. *Id.* (quoting *In re B & M Realty, LLC*, 158 A.3d 754, 764 (Vt. 2016)).

180. *Id.* at 688–92.

nondelegation doctrine notwithstanding,<sup>181</sup> the fact is that the nondelegation doctrine has been used to strike down delegations to the executive branch only twice—and for different parts of the same statute, in the same year, and not since 1935!<sup>182</sup> It has had, in an apt quip, “one good year.”<sup>183</sup> By contrast, even the vast majority of *weak* nondelegation state courts invalidate statutes from time to time on nondelegation grounds.<sup>184</sup> As a result, compared with the federal nondelegation doctrine, even weak nondelegation state doctrine looks comparatively strong. Accordingly, few states have as great a need of the major questions doctrine to protect their separation of powers as might be required at the federal level. The number of states in which the major questions doctrine is justified by separation-of-powers principles, therefore, is few.

*b. Strong Nondelegation States*

Unlike in Vermont, in other states the nondelegation doctrine is “alive and well,”<sup>185</sup> although the magnitude of its vitality is contested.<sup>186</sup> What appears beyond doubt, however, is that the nondelegation doctrine is enforced robustly in at least some states. As Daniel Walters recently found, “nondelegation challenges are far more likely to succeed across the board in state court” than in federal court.<sup>187</sup> Relatedly, Ben Silver found that the nondelegation doctrine arises at the state level in circumstances that would be “unthinkable at the federal level.”<sup>188</sup> Consider the following case from

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181. *E.g.*, DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 10 (1993); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1744–50 (2002); Sunstein, *American Nondelegation Doctrine*, *supra* note 156, at 1182.

182. *See* Pan. Refin. Co. v. Ryan, 293 U.S. 388, 433 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 550 (1935). *See generally* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000) (“Indeed, it is more accurate . . . to see 1935 as the real anomaly.”) Gary Lawson has pointed out that the Court has struck down subdelegations. Gary Lawson, “*I’m Leavin’ It (All) Up to You*”: Gundy and the (Sort-of) Resurrection of the Subdelegation Doctrine, 2018 CATO SUP. CT. REV. 31, 32 (2019).

183. Sunstein, *supra* note 182, at 322.

184. Walters, *supra* note 165, at 455 (depicting state experiences with nondelegation doctrine).

185. Iuliano & Whittington, *supra* note 165, at 619; *see also* Walters, *supra* note 165, at 455; Stiglitz, *supra* note 164, at 37–38.

186. *See* Postell & May, *supra* note 165, at 263 (arguing that nondelegation doctrine is weak in the states). *But see* Silver, *supra* note 164, at 1216 (arguing that nondelegation is more robust in the states); Walters, *supra* note 165, at 421; Stiglitz, *supra* note 164, at 455.

187. Walters, *supra* note 165, at 421.

188. Silver, *supra* note 164, at 1231 (“The SOP theory is nearly omnipresent in state nondelegation cases. Forty-eight state supreme courts have, in recent memory, invoked the separation of powers as a justification for their state’s nondelegation doctrine.”).

Michigan.<sup>189</sup> The Emergency Powers of the Governor Act provided that the governor may declare a state of emergency and then promulgate “reasonable orders, rules, and regulations as he or she considers necessary to protect life and property.”<sup>190</sup> Under this authority, Michigan’s Governor Whitmer issued executive orders, *inter alia*, closing restaurants in order to curb the spread of COVID-19.<sup>191</sup> The Michigan Supreme Court noted the breadth of the statutory language, which contained only the terms “reasonable” and “necessary” to guide the Governor’s discretion.<sup>192</sup> These terms, the court held, supplied neither “genuine guidance to the Governor as to how to exercise the authority delegated to her [by the statute]” nor any meaningful constraints on her actions.<sup>193</sup> The court concluded that the authorizing statute constituted an unconstitutional delegation under the state’s constitution.<sup>194</sup> Although the court drew heavily from federal nondelegation doctrine when formulating its test,<sup>195</sup> the court reached a result far out of step with federal law.<sup>196</sup> Federal nondelegation cases, which have upheld broad phrases such as “just and reasonable,”<sup>197</sup> and “reasonably necessary or appropriate”<sup>198</sup> would easily have encompassed the “reasonable” and “necessary” language invalidated by the Michigan Supreme Court.

Courts in states with robust nondelegation doctrines, like Michigan, already have a tool available to them to strike down delegations that they consider overbroad, should they choose to use it. Because the major questions doctrine can be viewed as a second-best alternative to the nondelegation doctrine for addressing overbroad delegations, states like

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189. I note that other scholars have classified Michigan as a “weak” nondelegation state. *See, e.g.,* Stiglitz, *supra* note 164, at 32. However, considering the Michigan Supreme Court’s recent decision invalidating the Emergency Powers of the Governor Act, this designation may need to be revised. Nothing about the subsequent analysis rests on whether a particular state is weak or strong in terms of nondelegation. They serve as paradigms or examples only.

190. Emergency Powers of the Governor Act, MICH. COMP. LAWS § 10.31(1); *see also* Midwest Inst. of Health, PLLC v. Governor (*In re* Certified Questions from U.S. Dist. Ct.), 958 N.W.2d 1 (2020).

191. The specific regulations challenged in the *Midwest Institute* case include “specific waiting-room procedures, limitations on the number of patient appointments, adding special hours for highly vulnerable patients, and establishing enhanced telehealth and telemedicine procedures.” *Midwest Inst.*, 958 N.W.2d. at 7.

192. *Id.* at 16 (citing MICH. CONST. art. 3, § 2 (“The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.”)).

193. *Id.* at 23.

194. *Id.*

195. *Id.* at 16–20 (citing standard nondelegation doctrine cases, including *Mistretta v. United States*, 488 U.S. 361, 419 (1989) (Scalia, J., dissenting), *Whitman v. American Trucking Ass’n, Inc.*, 531 U.S. 457, 475 (2001), and *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019)).

196. *Cf.* Silver, *supra* note 164, at 1216 (noting the relative strength of state nondelegation compared with federal nondelegation).

197. *See, e.g.,* *Yakus v. United States*, 321 U.S. 414, 427 (1944).

198. *Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 638 (1980) (upholding, but reading narrowly, broad delegation language).

Michigan do not need the major questions doctrine to police delegations—they already have the primary protection available to them in the form of a robust nondelegation doctrine. As a result, the major questions doctrine is less justified in these states than in states like Vermont.

In sum, although states must explore their individual constitutional structures, there are good reasons to believe that the principle of separation of powers does not support transplanting the major questions doctrine to the states. Despite formalist-sounding constitutional provisions, for the most part, state constitutional structures do not place policymaking authority in state legislatures to the degree envisioned by proponents of the federal major questions doctrine. And because one dominant vision of the major questions doctrine is that it is a substitute for a dormant nondelegation doctrine, the relatively stronger nondelegation doctrine in the states diminishes the need for state versions of the major questions doctrine. As a result, the separation-of-powers rationales for the federal major questions doctrine only weakly support the adoption of the doctrine at the state level.

#### *B. The Major Questions Doctrine and Interpretive Methodology*

Whether the major questions doctrine is a good fit with a state's law depends in part on that state's preferred methodology for interpreting statutes. As the Court made clear in *West Virginia* and *Nebraska*, the major questions doctrine discounts the plain or ordinary meaning of the text in favor of assumptions about congressional intent. Indeed, the *West Virginia* Court held that, despite a plain reading of the text of the statute, Congress does not intend to grant an agency broad authority to regulate politically and economically significant questions. As a result, only a clear statement could overcome the Court's presumption about Congress's intent. Not surprisingly, in *West Virginia* itself, the Court gave very short shrift to the text of the Clean Air Act, relegating the statutory text to the very end of its analysis. And in *Nebraska*, the Court even more explicitly resorted to real and imagined legislative intent to interpret the statutory language. Whether the major questions doctrine is a good fit with a state's interpretive practices, therefore, depends on that state's preferred methodology for resolving interpretive disputes. The rest of this part will examine the assumptions about statutory interpretation that undergird the major questions doctrine at the federal level to see whether they fit with state interpretive practices. Specifically, it will first demonstrate that the major questions doctrine has a fraught relationship with statutory text and with the traditional *Chevron* framework. Then, it will describe different varieties of state interpretive methodology, focusing on different styles of interpreting statutory text and different approaches to the *Chevron* framework. It will

then evaluate state practices to learn whether they are consistent with the adoption of the major questions doctrine.

*1. The Major Question Doctrine's Fraught Relationship with the Text and the Traditional Chevron Framework*

Despite the fact that the Supreme Court is dominated by justices with a stated commitment to textualism,<sup>199</sup> the major questions doctrine is an uncomfortable fit with an interpretive methodology that gives significant weight to statutory text.<sup>200</sup> Indeed, a close look at both *West Virginia* and *Nebraska* reveals that the doctrine rests heavily on intentionalist and purposivist views of statutory meaning.

With respect to intentionalism, the major questions doctrine is best read as a clear statement rule that relies on assumptions about congressional intent.<sup>201</sup> In *West Virginia*, the Court clarified that, when the doctrine applies, the agency will be disallowed from exercising the authority it claims unless Congress's *intention* to grant that power is clear.<sup>202</sup> From the context of the case, it appears that this clear congressional authorization must come from somewhere other than the text of the statute. According to the Court, the major questions doctrine requires the court to supplement a text-focused reading with "common sense"<sup>203</sup> or other context that reveals congressional intent.<sup>204</sup> Accordingly, the major questions doctrine, as described by the Court, follows in the footsteps of other text-distorting

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199. Consider, most saliently, the addition of Justices Gorsuch, Kavanaugh, and Barrett. *See generally* NEIL M. GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 128–29 (2019) (positing textualism as the legitimate method of statutory interpretation); *Bostock v. Clayton County*, 140 S. Ct. 1731, 1761 (2020) (Kavanaugh, J., dissenting) (claiming to interpret the text in accordance with textualism).

200. *See* Deacon & Litman, *supra* note 17, at 30 ("[T]he major questions doctrine also seems to rest on a similar kind of purposivism—specifically, the perceived majorness or significance of an agency's use of the statute supplies evidence that the agency's use of the statute is contrary to Congress's intentions."); *see also* Gorod et al., *supra* note 28 (manuscript at 5) ("Instead of putting text first, the doctrine requires courts to make political and economic appraisals that are inherently subjective . . .").

201. Sohoni, *supra* note 17, at 267 ("[T]he major questions exception [has evolved] into a new clear statement rule that operates as a presumption against reading statutes to authorize major regulatory action."); Deacon & Litman, *supra* note 17, at 1 ("[T]he 'new' major questions doctrine operates as a clear statement rule that directs courts not to discern the plain meaning of a statute using the normal tools of statutory interpretation, but to require explicit and specific congressional authorization for certain agency policies."). Reading the major questions doctrine as a clear statement rule is supported by the way that Justice Gorsuch, in his concurring opinion, explicitly connects the major questions doctrine to two other clear statement rules; these other clear statement rules, like the major questions doctrine, place a heavy thumb on the interpretive scale, supplanting the more natural textual reading. Justice Barrett disputes this characterization in her *Nebraska* concurrence, opining that the major questions doctrine is not a "true" clear statement rule. *Biden v. Nebraska*, 143 S. Ct. 2355, 2378 (2023) (Barrett, J., concurring).

202. *See* *West Virginia v. EPA*, 142 S. Ct. 2587, 2607 (2022).

203. *Id.* at 2609.

204. *Id.*

substantive canons of interpretation.<sup>205</sup> And in *Nebraska*, the Court even more explicitly indicated that it was searching for legislative intent. In rejecting the agency's claim of authority, the Court rested on a statement from then-Speaker of the House Nancy Pelosi, who had commented that Congress, rather than the President, had the power to alter student loan obligations. Most tellingly, the Court posed the following counterfactual: "But, imagine instead asking the enacting Congress [whether] the Secretary [could] use his power to abolish \$430 billion in student loans . . . [.]"<sup>206</sup> The Court answered this question by positing what it imagined Congress's intention would be, asserting that "[w]e can't believe the answer would be yes. Congress did not unanimously pass the HEROES Act *with such power in mind*."<sup>207</sup> These explicit references to legislative history and to Congress's supposed state of mind confirm that the major questions doctrine is rooted in a search for legislative intent, real or imagined.

The Court's use of the major questions doctrine rests on a search for purpose as well. A close reading of *West Virginia* reveals that the Court picked portions of the text to emphasize and deemphasize based on its view of statutory purpose.<sup>208</sup> In concluding that it was unlikely that Congress vested the EPA with the authority it claimed, the Court relied on its impression that the statutory provision at issue was "obscure" and a "backwater."<sup>209</sup> In the Court's view, the main "thrust" of Section 111 of the Clean Air Act is to allow the regulation of emissions from new and modified sources of pollution. The power to regulate existing sources not otherwise regulated was, in the Court's view, an "ancillary" power or a "gap filler."<sup>210</sup> Although the Court assiduously avoided stating expressly that it was searching for statutory purpose, its language makes clear that its goal was just that. Consider the Court's assertion that there is a "thrust" of a statute. What is the thrust of a statute other than its primary purpose? Similarly, the Court asserted that other portions of the statute are ancillary, gap-filler, or backwater provisions. This hierarchy of provisions implies that some provisions are more important and others less so; in other words, there is a central *purpose* of the statute that is not well-advanced by an ancillary, gap-filler, or backwater provision. Of course, the Court may have correctly

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205. See Eidelson & Stephenson, *supra* note 51 (manuscript at 1) ("[T]extualists should either abandon their reliance on substantive canons or else concede that their textualism is not what they have often made it out to be."); Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 110 (2010) (noting that substantive canons force courts to "strain the text of a statute").

206. *Nebraska*, 143 S. Ct. at 2374 (internal quotation marks omitted).

207. *Id.* (emphasis added).

208. Cf. Victoria Nourse, *Picking and Choosing Text: Lessons for Statutory Interpretation from the Philosophy of Language*, 69 FLA. L. REV. 1409 (2017) (identifying the textualist practice of isolating small portions of statutory text).

209. *West Virginia*, 142 S. Ct. at 2602, 2613.

210. *Id.* at 2610.

divined the purposes of the statute and their relative importance—or maybe not. But, either way, it is beside the point. The fact that the Court rested on assumptions about statutory purpose reveals the purposive methodology behind the Court’s interpretation of the statute.<sup>211</sup>

Similarly, in *Nebraska*, the Court focused as much on the purpose of the HEROES Act as on its text. Specifically, the Court expressed skepticism about the agency’s assertion of authority because, in the Court’s estimation, the agency claimed novel authority.<sup>212</sup> But, this focus on the novelty of the agency’s interpretation has little to do with the text of the statute. Rather, as the Court intimated, its concern was that the agency asserted authority at odds with the *purpose* of the statute. As the Court put it, the assertion of novel authority risks changing “the scheme of regulation into an entirely different kind” of regulatory program.<sup>213</sup> In other words, a novel assertion of authority, even if consistent with the text of the statute, is dissonant with the purpose for which the statute was enacted.

Justice Kagan captured how deeply the Court’s opinions discounted the text in her *West Virginia* and *Nebraska* dissents. In *West Virginia*, as Justice Kagan suggested, the Court cast barely a glance at the text of the statute, failing even to discuss the text until the end of opinion. Aptly, therefore, she referred to the major questions doctrine as a “get-out-of-text free” card, permitting the Court to deviate from the text to reach its desired result.<sup>214</sup> And in *Nebraska*, Justice Kagan repeated this same criticism, characterizing the Court’s interpretation as “extra-statutory.”<sup>215</sup> More generally, and as Litman and Deacon have discussed, *West Virginia*’s major questions doctrine seems to let current political controversies affect the meaning of the text.<sup>216</sup> This is a far cry from the textualist mantra, that the court begins—and often ends—with the text of the statute.<sup>217</sup>

Faced with this apparent disconnect between the text and the major questions doctrine, Justice Barrett defended the doctrine’s textualist credentials in her *Nebraska* concurrence. In her view, the major questions doctrine is not a “true” substantive canon that places a thumb on the scale

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211. Moreover, none of this suggests that the Court searched for congressional intent or statutory purpose in the only possible way or the most effective way. Surely, it could have considered different sources of legislative history or other sources. Nevertheless, the fact remains that the Court purported to be divining congressional intent and statutory purpose.

212. *Nebraska*, 143 S. Ct. at 2374.

213. *Id.* at 2373 (punctuation omitted).

214. *West Virginia*, 142 S. Ct. at 2641 (Kagan, J., dissenting).

215. *Nebraska*, 143 S. Ct. at 2391 (Kagan, J., dissenting).

216. Deacon & Litman, *supra* note 17, at 38 (“[T]he doctrine seems to allow a motivated political party to functionally amend a statute through political opposition rather than through the legislative process, despite the doctrine’s claimed focus on returning issues to the legislative process.”).

217. See, e.g., ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 16 (2012) (“Textualism, in its purest form, begins and ends with what the text says and fairly implies.”).

of interpretation, but rather a tool to contextualize statutory meaning.<sup>218</sup> On this reading, textualism is consistent with—or perhaps requires—reading statutory language in light of background linguistic, legal, or “common sense” principles.<sup>219</sup> Justice Barrett’s defense of the major questions doctrine’s textualist credentials draws heavily on scholarly work, including most explicitly that of Ilan Wurman.<sup>220</sup>

I will reserve judgment about whether textualists should or do claim that the major questions doctrine is consistent with their definitions of textualism. As a non-textualist, I will not weigh in on definitional disputes about the boundaries of textualism; and indeed, different interpreters claiming the mantle of textualism may have different interpretive commitments.<sup>221</sup> But, whether or not textualists insist that the major questions doctrine is consistent with textualism, the relationship between the major questions doctrine and statutory text remains fraught. Justice Barrett’s version of the major questions doctrine, no matter what she calls it, is rooted in assumptions about congressional intent. Indeed, as Justice Barrett acknowledged, the “basic premise” underlying her use of the major questions doctrine is “that Congress normally intends to make major policy decisions itself, not leave those decisions to agencies.”<sup>222</sup> She goes on to assert that the major questions doctrine, as she sees it, rests in part on “a practical understanding of legislative intent.”<sup>223</sup> In light of these assertions, it appears that her appeal to context is best seen as way to approximate congressional intent. As a result, no matter whether one could describe the major questions doctrine as consistent with some version of textualism, the bottom-line conclusion remains the same—the major questions doctrine is a poor fit with interpretive methodologies that reject purposivism and intentionalism in favor of an emphasis on the text.

Finally, in addition to the fact that the major questions doctrine is an uncomfortable fit with text-centered approaches to interpretation, it is also an uncomfortable fit with the traditional *Chevron* framework for

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218. *Nebraska*, 143 S. Ct. at 2378 (Barrett, J., concurring).

219. *Id.*

220. See, e.g., Ilan Wurman, *Importance and Interpretive Questions*, 109 VA. L. REV. (forthcoming 2023).

221. See Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 279 (2020) (identifying competing versions of textualism); see also *Bostock v. Clayton County*, 140 S. Ct. 1731, 1755–56 (Alito, J., dissenting) (claiming to be textualist despite applying a different methodology than majority, which also claimed to be textualist). A textualism that is capacious enough to include a canon that readily discounts the text in favor of evidence of legislative intent and purpose is largely indistinguishable from run-of-the-mill pluralism. See Barrett, *supra* note 205, at 177 (“When employed, however, to stretch plain language . . . [substantive canons] conflict with the obligation of faithful agency.”). Moreover, Justice Gorsuch has asserted that textualism rather than purposivism is a legitimate method of interpretation. See GORSUCH, *supra* note 199, at 131–32.

222. *Nebraska*, 143 S. Ct. at 2380 (Barrett, J., concurring).

223. *Id.*

interpreting statutes that vest agencies with authority.<sup>224</sup> Under *Chevron*'s two-step framework, textual silence or ambiguity leads the court to defer to an agency's interpretation.<sup>225</sup> By contrast, by demanding a clear statement of Congress's intent, the major questions doctrine takes statutory silence or ambiguity as support for invalidating the agency's claim of authority. In other words, when the major questions doctrine applies, it appears not just to supplant *Chevron*, but turn *Chevron* on its head. That is, the major questions doctrine requires heightened scrutiny in situations in which *Chevron* required deference.<sup>226</sup>

## 2. *Statutory Interpretation Considerations for the States*

Because the major questions doctrine rests so heavily on a rejection of statutory text and a rejection of the *Chevron* framework, a state court considering adopting the major questions doctrine should consider both the extent to which it is comfortable considering sources of meaning that come from outside the text and its commitment to *Chevron* deference. It is true that judges do not have to be consistent in their interpretive methodologies. That is, no enforceable rule requires a judge to adopt a certain theory or tool of interpretation in every case or reject it in every case. And indeed, judges often can best be described as pragmatists—as Thomas Merrill put it, “for most of our history, American judges have been pragmatists when it comes to interpreting statutes.”<sup>227</sup> Nevertheless, judges might aspire to internal coherence within an opinion and consistency across opinions. And for judges that do seek this kind of consistency and coherence, they should consider how the major questions doctrine fits—or does not fit—with their other interpretive commitments. If they do consider consistency and coherence, they will find that the major questions doctrine is a poor fit with a commitment to a text-centered interpretive methodology and with the traditional *Chevron* framework.

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224. See Sohoni, *supra* note 17, at 275 (noting the inconsistency with *Chevron*, that “under the new major questions doctrine, the burden of proof has again shifted, and it has shifted against the agency”).

225. See *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (setting out what has become known as the *Chevron* two-step process for determining review of agency interpretations).

226. Beermann, *supra* note 27 (manuscript at 6) (noting that the major questions doctrine inverts *Chevron*).

227. Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351 (1994).

*a. Commitment to the Text*

A state court contemplating the adoption of the major questions doctrine should consider how much weight it is comfortable giving non-textual sources of meaning that reveal legislative intent or purpose. Because the major questions doctrine rests so heavily on statutory purpose and legislative intent, a state court should be willing to adopt the doctrine only if it is comfortable considering sources of meaning that help it discern the intent of the legislature or the purpose of the statute. By contrast, a court committed to excluding evidence of legislative intent or purpose should resist the major questions doctrine. And to put a finer point on it, a state court judge that considers herself an adherent of at least some versions of textualism should have a hard time justifying the adoption of the major questions doctrine.<sup>228</sup>

There is great variety in the way that states weigh text against sources of meaning that reveal legislative intent or statutory purpose. While some states appear strongly committed to excluding evidence of legislative intent or statutory purpose, others welcome it. And, of course, there are states that occupy in-between points on the spectrum, considering evidence of legislative intent and statutory purpose in a limited way. Each state court considering adopting the major questions doctrine should examine its own level of commitment to text-based interpretations to determine whether the major questions doctrine fits its practices.

Some states employ a method of statutory interpretation that appears to focus almost exclusively on the text. Consider Texas, whose courts seem particularly intent on sticking to the text when interpreting statutes. Indeed, in a mind-bending dedication to textualism, the Texas Supreme Court even went so far as to reject a state *statute* that permits its courts to consider evidence extrinsic to the text. As the court put it, the state's Code Construction Act "beckon[s]" judges to consider legislative purpose, legislative history, and the consequences of different interpretations. But, despite the clear statutory language permitting courts to consider extra-textual sources of meaning, the court held that it will "not resort to extrinsic aids to interpret a statute that is clear and unambiguous."<sup>229</sup> For states like Texas, which exhibit a rigid, single-minded commitment to the text, the major questions doctrine is not a good fit. As noted above, the major questions doctrine calls on courts to discount the text in favor of extra-

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228. But not all. As noted above, in her *Nebraska* opinion, Justice Barrett has tried to recast the major questions doctrine as a textualist tool. *Nebraska*, 143 S. Ct. at 2378 (Barrett, J., concurring). Moreover, some textualists argue that textualism is capacious enough to include searching for meaning by using the mischief rule and by making assumptions about legislative intent. See Wurman, *supra* note 220.

229. *BankDirect Capital Fin., LLC v. Plasma Fab, LLC*, 519 S.W.3d 76, 85 (Tex. 2017).

textual sources of legislative intent and statutory purpose. This search for intent and purpose is hard to square with a rigid commitment to avoiding legislative intent, like the one expressed by the Texas Supreme Court.<sup>230</sup>

At the other end of the spectrum, some states explicitly embrace an intentionalist or purposivist attitude, searching for the intent of the legislature or the purpose of the statute.<sup>231</sup> Consider a case from Maryland's highest court.<sup>232</sup> There, the court began by affirming its view that the role of the court was "to determine the purpose and intent of the General Assembly."<sup>233</sup> Like most courts throughout the country, the court declared that it begins the interpretive process with the plain language of the statute. Nevertheless, the court continued by noting that it was free to examine sources of meaning outside of the plain language, including searching for indications of legislative intent in the legislative history.<sup>234</sup> Similarly, New York's highest court has held that the court's primary consideration is to "ascertain and give effect to the intention of the Legislature."<sup>235</sup> Accordingly, it is "appropriate to examine the legislative history even though" the statutory language is "clear."<sup>236</sup> For states that actively embrace a search for legislative intent and purpose, and that are open to searching legislative history for legislative intent, the major questions doctrine is less of a theoretical problem. Because courts in these states are open to

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230. Still other courts identify as textualist but in fact rely on statutory purpose, even if they do not say so explicitly. For example, some "textualist" courts have embraced corpus linguistics methods. By doing so, they implicitly seek the purpose of a statute by the way they structure their searches. For these courts, relying on the major questions doctrine may not be as much of a stretch practically, even if it is an uncomfortable fit rhetorically with their stated interpretive preferences.

231. Many of these states embrace legislative intent by statute. *See, e.g.*, MINN. STAT. § 645.16 (2022) ("The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature."); 1 PA. CONS. STAT. § 1921(a) (2022) ("The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly."); OHIO REV. CODE ANN. § 1.49 (LexisNexis 2022) ("[I]n determining the intention of the legislature, [the court] may consider among other matters . . . [t]he legislative history . . ."); N.D. CENT. CODE § 1-02-39 (2021) ("[I]n determining the intention of the legislature, [the court] may consider among other matters . . . [t]he legislative history . . ."); IOWA CODE § 4.6 (2022) ("[I]n determining the intention of the legislature, [the court] may consider among other matters . . . [t]he legislative history . . ."). For a thorough description of state codification of statutory interpretation principles, see Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341, 380 (2010) ("American legislatures have ratified judicial use of legislative history. Eleven states have expressed a preference with respect to legislative history, and all of them have given it the nod").

232. *Blackstone v. Sharma*, 191 A.3d 1188 (Md. 2018).

233. *Id.* at 1203.

234. *See id.* at 1203–04.

235. *Riley v. County of Broome*, 742 N.E.2d 98, 102 (N.Y. 2000).

236. *Id.* Similarly, the Supreme Court of Oregon has held that it does not require ambiguity to consider legislative history. *State v. Gaines*, 206 P.3d 1042, 1050 (Or. 2009) ("[W]e no longer will require an ambiguity in the text of a statute as a necessary predicate to the second step—consideration of pertinent legislative history that a party may proffer. Instead, a party is free to proffer legislative history to the court, and the court will consult it after examining text and context, even if the court does not perceive an ambiguity in the statute's text, where that legislative history appears useful to the court's analysis.").

interpreting statutes in accordance with legislative intent, they should be comfortable with the type of analysis required by the major questions doctrine—that is, one that seeks to glean legislative intent from non-textual sources of meaning. And just to be clear, just because a state embraces legislative intent or purpose does not *require* the use of the major questions doctrine. Rather, it's better to say that the major questions doctrine is not precluded by intentionalism or purposivism the way that it should be precluded, as a logical matter, by an interpretive methodology that focuses almost exclusively on the text.

Somewhere in the middle of these two poles exist more moderate versions of textualism—ones that are still recognizable as textualism but are less rigidly anti-legislative history than the version employed by Texas.<sup>237</sup> In an important study of statutory interpretation in the states, Abbe Gluck called some of these moderate versions “modified textualism.”<sup>238</sup> Consider Wisconsin, which has operated under a modified textualist regime for nearly two decades.<sup>239</sup> In a landmark 2004 opinion, the Wisconsin Supreme Court inaugurated a two-step process for interpreting statutes. Under the first step, courts must determine whether the plain language of the statute is ambiguous or unambiguous. If the statute is unambiguous, then the court must apply the unambiguous meaning of the statute. If and only if the statute is ambiguous does the court consider extrinsic evidence of meaning.<sup>240</sup> Although modified textualism does permit the court to examine sources extrinsic to the text, courts employing this test have made clear that they intend this test to “focus primarily on the language of the statute.”<sup>241</sup> Importantly, when courts look for ambiguity under this test, “disagreement

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237. See *Envirotest Sys. Corp. v. Comm'r of Motor Vehicles*, 978 A.2d 49, 53 (Conn. 2009) (requiring courts first to “consider the text of the statute itself and its relationship to other statutes” and, only if the meaning is ambiguous, to “look for interpretive guidance to the legislative history and circumstances surrounding its enactment, [and] to the legislative policy”); *Christensen v. Ellsworth*, 173 P.3d 228, 232 (Wash. 2007) (“[I]f the statutory language is susceptible to more than one reasonable interpretation, then a court may resort to statutory construction, legislative history, and relevant case law . . . .”); *State v. Keel*, 357 P.3d 251, 259 (Kan. 2015) (“Only if the statute’s language or text is unclear or ambiguous does the court use canons of construction or legislative history . . . [to interpret the text].”); see also N.M. STAT. ANN. § 12-2A-20 (2022) (establishing hierarchy of statutory interpretation tools).

238. Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1776 (2010) (describing modified textualism in the states); see also Alex Reed, *Beyond Bostock: Employment Protections for LGBTQ Workers Not Covered by Title VII*, 23 N.Y.U. J. LEGIS. & PUB. POL’Y 537, 555–61 (2021) (reviewing state cases to determine whether they demonstrate commitment to textualism, including modified textualism).

239. Anuj C. Desai, *Modified Textualism in Wisconsin: A Case Study*, 2022 WIS. L. REV. 1087, 1088–89 (noting that Wisconsin courts prioritize text but do not rely on it exclusively).

240. See *State ex rel. Kalal v. Circuit Court*, 681 N.W.2d 110, 124–25 (Wis. 2004). For a thorough description of the *Kalal* two-step test, see Desai, *supra* note 239, at 1090–96.

241. *Kalal*, 681 N.W.2d at 124.

about meaning alone is insufficient.”<sup>242</sup> Rather, the court will find ambiguity only if the statutory language “*reasonably* gives rise to different meanings.”<sup>243</sup> In other words, opposing parties do not create an ambiguity merely by disputing the meaning of a statute; rather, the court first must find that the interpretive dispute is a reasonable one.

For courts in modified textualist states like Wisconsin, the major questions doctrine will be appropriate sometimes, but not always. Consider how the Court used the doctrine in *West Virginia*. There, the majority applied the major questions doctrine not because of any ambiguity in the Clean Air Act, but because of its breadth. Indeed, the *West Virginia* majority intimated that the major questions doctrine comes into play even to supplement a plausible or colorable reading of the text.<sup>244</sup> In modified textualist states, a broad but unambiguous statute—like the one at issue in *West Virginia*—should be resolved without resort to real or reconstructed legislative intent. As a result, the major questions doctrine is sometimes inconsistent with the kind of modified textualism used in Wisconsin. However, unlike in the Texas case described above, there are circumstances when a modified textualism regime could accommodate the major questions doctrine. When a statute is both broad *and* ambiguous, even a modified textualist court could employ the major questions doctrine consistent with its interpretive commitments.

#### *b. Commitment to Chevron Deference*

Closely related to the previous point, whether states should be comfortable adopting the major questions doctrine should depend in part on their commitment to maintaining *Chevron* deference. As noted above, the major questions doctrine is best read to invert *Chevron* deference. While the traditional *Chevron* process would direct courts to defer to agencies in the face of statutory silence or ambiguity, the major questions doctrine directs the opposite result. Under the major questions doctrine, statutory silence or ambiguity does not evince “clear congressional authorization” and, therefore, directs courts to *reject* the agency’s interpretation. Consider *West Virginia* itself. There, the Clean Air Act was, arguably, silent on the question whether the EPA could require generation shifting as a part of its mission to reduce greenhouse gas emissions. Under a traditional *Chevron* framework, this silence would have led the Court to defer to the agency (provided that the interpretation was reasonable). By contrast, under the

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242. Desai, *supra* note 239, at 1093.

243. *Kalal*, 681 N.W.2d at 124.

244. *West Virginia v. EPA*, 142 S. Ct. 2587, 2606, 2609 (2022).

major questions doctrine, the silence militated *against* deference to the agency.

Of course, states are not required to follow *Chevron*—and indeed, there may be good reasons why a state chooses not to follow a *Chevron*-like deference regime.<sup>245</sup> Accordingly, states approach *Chevron* with a good deal of variety.<sup>246</sup> Some state courts apply a doctrine that looks quite like the traditional *Chevron* doctrine.<sup>247</sup> In Georgia, for example, state courts expressly incorporate the *Chevron* doctrine into state law.<sup>248</sup> Because *Chevron* is at odds with the major questions doctrine, if states like Georgia wish to maintain their commitment to the traditional *Chevron* standard, they should be unwilling to adopt the major questions doctrine.

Other states have explicitly or implicitly abandoned *Chevron* deference.<sup>249</sup> The Mississippi Supreme Court recently rejected *Chevron*, holding that “we abandon the old standard of review giving deference to agency interpretations of statutes.”<sup>250</sup> According to this court, deference to agency interpretations was inconsistent with the obligation of the courts to “exercise their independent judgment about what the law *is*.”<sup>251</sup> And in a surprising development, Florida’s voters amended the state’s constitution to eliminate *Chevron* deference. The state’s constitution now provides that when “interpreting a state statute or rule, a state court . . . may not defer to an administrative agency’s interpretation . . . , and must instead interpret such statute or rule *de novo*.”<sup>252</sup>

Because states adopting *Chevron* should reject the major questions doctrine, one might expect that states rejecting *Chevron* should, perforce, adopt the major questions doctrine.<sup>253</sup> This is not necessarily so. On one

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245. Aaron Saiger, *Derailing the Deference Lockstep*, 102 B.U. L. REV. 1879, 1888 (2022) (“[I]t would be a mistake for states reflexively to incorporate any federal rejection of *Chevron* into their own law.”); Saiger, *supra* note 88, at 557 (2014) (“The executives, legislatures, courts, statutes, and bureaucracies of the states are different from those of the federal government in ways that do not suit *Chevron*.”).

246. Luke Phillips, *Chevron in the States? Not So Much*, 89 MISS. L.J. 313, 315 (2020) (reviewing recent trends in *Chevron* deference in the states).

247. Saiger, *supra* note 88, at 558–59.

248. *Cook v. Glover*, 761 S.E.2d 267, 271 (Ga. 2014); *see also* *Ind. Dep’t. of Env’t Mgmt. v. Boone Cnty. Res. Recovery Sys., Inc.*, 803 N.E.2d 267, 273 (Ind. Ct. App. 2004); *Forest Ecology Network v. Land Use Regul. Comm’n*, 39 A.3d 74, 91 (Me. 2012).

249. Saiger, *supra* note 88, at 558–59.

250. *King v. Miss. Mil. Dep’t*, 245 So. 3d 404, 408 (Miss. 2018). Interestingly, the court specifically noted that it was persuaded by then-Judge Gorsuch’s arguments against *Chevron* under *federal law*. *Id.*

251. *Id.* (citing *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1158 (10th Cir. 2016) (Gorsuch, J., concurring)).

252. FLA. CONST. art. V, § 21; *see also* *Rodriguez v. Dep’t of Bus. & Pro. Regul.*, 326 So. 3d 796, 798 (Fla. Dist. Ct. App. 2021) (“We review an issue of law in a final administrative order *de novo*.”).

253. One recent analysis suggests that half of the states “either do not apply any level of deference, or the deference given is so slight as to have no consequence on the outcome of cases.” Phillips, *supra* note 246, at 315.

hand, eliminating *Chevron* deference can be viewed as merely taking the thumb off the scale, eliminating a preference for upholding agency interpretations. On this reading, departing from *Chevron* leaves courts free to rely on the major questions doctrine to read statutory language narrowly, without deference to agency views. But, this is not the only way to view the consequences of abandoning *Chevron*. Read in another way, abandoning *Chevron* can be seen as affirmatively requiring *de novo* review. This was the view of both the Mississippi Supreme Court when it abandoned *Chevron*<sup>254</sup> and the view enshrined in Florida's constitution.<sup>255</sup> And just as *de novo* review is logically inconsistent with *Chevron* deference, it appears to be logically inconsistent with the major questions doctrine as well. After all, the major questions doctrine, like *Chevron*, is a substantive canon that constrains the court's interpretive choices. As a result, a court relying on the major questions doctrine has ceded its authority to say what the law is just as much as it cedes this authority under *Chevron*. In both cases, the court's interpretive choices are limited by a substantive canon that puts a thumb on the interpretive scale. Accordingly, to the extent that *de novo* review is inconsistent with *Chevron*, it is also inconsistent with the constraints of the major questions doctrine. As a result, states rejecting *Chevron* in order to implement *de novo* review should likewise shy from the major questions doctrine.

Not all courts rest at one end or the other of the *Chevron* deference spectrum. Rather, as Aaron Saiger argued, most states fall somewhere between the extremes of fully endorsing or repudiating *Chevron*.<sup>256</sup> For these states, the major questions doctrine analysis is far from simple. Because the major questions doctrine and *Chevron* both put a thumb on the interpretive scale—albeit in opposite directions—it would seem that even a modicum of deference under *Chevron* should be inconsistent with the major questions doctrine. As a result, states that are committed to *Chevron* deference—even a little bit of deference—should be reluctant to adopt the major questions doctrine.

Finally, even though the major questions doctrine, when it applies, is inconsistent with *Chevron*, the major questions doctrine does not apply to every situation in which *Chevron* traditionally applies. Although the factors that trigger the major questions doctrine are not yet settled, the *West Virginia* Court suggested that most cases of statutory ambiguity could be resolved under *Chevron* even after the inauguration of the major questions doctrine.<sup>257</sup> Indeed, as the Court noted, the major questions doctrine should

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254. *King*, 245 So. 3d at 408.

255. FLA. CONST. art. V, § 21.

256. Saiger, *supra* note 88, at 559.

257. See Gorod et al., *supra* note 28.

be used only in “extraordinary cases,”<sup>258</sup> although the Court stepped back from this language in *Nebraska*. Of course, the Court did not explicitly equate the “ordinary” method of interpretation with *Chevron*—and indeed, there is reason to believe that the Court may be ready to dispense with *Chevron* altogether.<sup>259</sup> Nevertheless, state courts interested in adopting the major questions doctrine could do so without abandoning *Chevron* altogether, provided that they identify triggering events for the major questions doctrine that leave room for *Chevron* deference in ordinary cases.

In conclusion, the major questions doctrine requires elevating the relative importance of legislative intent and statutory purpose at the expense of statutory text. Moreover, the major questions doctrine is inconsistent with a commitment to the traditional *Chevron* framework. As a result, state courts considering adopting the major questions doctrine should consider their own commitment to the text and to *Chevron*. Although states are not required to adhere to the text or to *Chevron*—or to consistency, for that matter—to the extent that they do, the major questions doctrine is a poor fit with their other interpretive commitments.

### C. *The Major Questions Doctrine and Federalism*

A longstanding justification for the major questions doctrine is its power to promote the value of federalism by encouraging decentralization of lawmaking.<sup>260</sup> State courts considering adopting the major questions doctrine might find this decentralization justification attractive as well. After all, an analogy could be drawn between the federal-state relationship and the state-local relationship: if the major questions doctrine is adopted at the state level, then local power would be enhanced at the expense of state power. As a result, provided that one valorizes decentralization at the state

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258. *West Virginia v. EPA*, 142 S. Ct. 2587, 2595 (2022).

259. The Court has recently granted certiorari in *Loper Bright Enterprises v. Raimondo*, 45 F.4th 359 (D.C. Cir. 2022), *appeal docketed*, No. 21-5166 (U.S. Nov. 15, 2022), to resolve the question whether *Chevron* should be overturned.

260. *See, e.g., West Virginia*, 142 S. Ct. at 2616 (Gorsuch, J., concurring); *Gonzales v. Oregon*, 546 U.S. 243 (2006); *NFIB v. OSHA*, 142 S. Ct. 661 (2022); *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485 (2021).

level as well as at the federal level<sup>261</sup> (a far from universal belief),<sup>262</sup> state courts would be justified in adopting the major questions doctrine at the state level.

But the federalism justification for the federal major questions doctrine makes sense under state law only if the relationship between the federal government and the states is analogous in a relevant way to the relationship between the states and local governments. To be sure, there are some similarities between a descriptive account of federalism (the federal-state relationship) and a descriptive account of localism (the state-local relationship).<sup>263</sup> And there are normatively attractive reasons to treat local governments with a level of autonomy roughly analogous to state autonomy.<sup>264</sup> But there are also significant differences between the federal-state relationship and the state-local relationship that draw the analogy between them into question.<sup>265</sup> And because of the variety of intrastate constitutional arrangements, not all state-local relationships are the same. As a result, to determine whether the federalism arguments supporting the major questions doctrine at the federal level translate into localism arguments supporting the major questions doctrine at the state level, a state

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261. Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1 (1990) [hereinafter Briffault, *Localism I*] (describing localism as a call for greater local power); Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1128 (2007) (“[T]he more devolved power the better, as local units of government can adopt different policies to better reflect the needs or political values of their constituents.”). For some of the excellent scholarship on the relationship between state and local governments, see also Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 354 (1990) [hereinafter Briffault, *Localism II*] (contrasting different kinds of local governments); David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2263 (2003) (describing home rule as a mix of grants and limitations on local power); Nestor M. Davidson & Richard C. Schragger, *Do Local Governments Really Have Too Much Power? Understanding the National League of Cities’ Principles of Home Rule for the 21st Century*, 100 N.C. L. REV. 1385, 1419 (2022) (arguing for rebalancing state power and local autonomy); Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995 (2018) [hereinafter Briffault, *Preemption*]; Hugh Spitzer, “Home Rule” v. “Dillon’s Rule” for Washington Cities, 38 SEATTLE U. L. REV. 809 (2015); Kenneth Stahl, *Home Rule and State Preemption of Local Land Use Control*, 50 URB. LAW. 179 (2020); TRACY GORDON, RICHARD AUXIER & JOHN ISELIN, URB. INST., ASSESSING FISCAL CAPACITIES OF STATES (2016); Jesse J. Richardson, Jr., *Dillon’s Rule Is from Mars, Home Rule Is from Venus: Local Government Autonomy and the Rules of Statutory Construction*, 41 PUBLIUS: J. FEDERALISM 662 (2011); Richard Schragger & C. Alex Retzliff, *The Failure of Home Rule Reform in Virginia: Race, Localism, and the Constitution of 1971*, 37 J.L. & POL. 183 (2022); Rick Su, *Have Cities Abandoned Home Rule?*, 44 FORDHAM URB. L.J. 181 (2017).

262. As Briffault noted, “Conservative state legislators have not been shy about asserting that ‘[w]hen we talk about local control, we mean state control,’ and emphasizing that federalism is not shorthand for decentralization but is really only about the states.” Briffault, *Preemption*, *supra* note 261, at 2025.

263. Briffault, *Localism I*, *supra* note 261, at 2 (discussing localism from theoretical and practical perspectives).

264. Briffault, *Preemption*, *supra* note 261, at 2017 (“Many of the values associated with federalism are advanced as well, if not better, by local governments.”).

265. See Davidson, *supra* note 19, at 614 (“[C]ourts should resist false parallels to higher levels of government, where structural realities may be very different.”).

court should consider two kinds of relationships: its own constitutional division of labor between state and local government; and the differences between its state-local relationship and the federal-state relationship. When state courts examine these relationships, they likely will find that the differences between federalism and localism outweigh their similarities. As a result, the federalism justification for the major questions doctrine provides weak support for its adoption at the state level.

*1. The Major Questions Doctrine's Basis in Federalism*

A longstanding justification for the major questions doctrine at the federal level is that it promotes the value of federalism. By limiting the scope of federal authority at the margins, the argument goes, the states have more room to legislate within their traditional areas of authority.<sup>266</sup> This “laboratories of democracy”<sup>267</sup> justification for the major questions doctrine, although contestable as a normative matter, is attractive for those who support devolution of power to the states. Federalism is central to, at least, Justice Gorsuch’s vision of the major questions doctrine. In his *West Virginia* concurrence, Justice Gorsuch highlighted not only a separation-of-powers rationale for the major questions doctrine, but also one rooted in federalism. As he described it, erecting barriers to federal authority, including executive branch policymaking, serves the constitutional goal of preserving “room for lawmaking by governments more local and more accountable than a distant federal authority.”<sup>268</sup> Moreover, Justice Gorsuch specifically linked the major questions doctrine to another federalism-based canon, noting that the two “often travel together.”<sup>269</sup> Accordingly, when identifying circumstances in which the major questions doctrine should be invoked, Justice Gorsuch opined that the doctrine may apply when “an agency seeks to intrud[e] into an area that is the particular domain of state law.”<sup>270</sup>

*West Virginia* was not the first time that Justice Gorsuch linked the major questions doctrine with federalism concerns. In *NFIB v. OSHA*, the Court upheld an order staying the enforcement of a rule requiring, with some exceptions, employees of large employers to receive a COVID vaccine or weekly COVID test. Concurring, Justice Gorsuch connected the major questions doctrine and federalism concerns. In his view, questions of public health belong primarily to “state and local governments across the country”

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266. *West Virginia v. EPA*, 142 S. Ct. 2587, 2616 (2022) (Gorsuch, J., concurring).

267. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

268. *West Virginia*, 142 S. Ct. at 2618 (Gorsuch, J., concurring) (internal quotation marks omitted).

269. *Id.* at 2621.

270. *Id.* (alteration in original).

rather than to “an administrative agency in Washington.”<sup>271</sup> He emphasized that state and local governments “possess considerable power to regulate public health,” describing state and local power as general and broad and federal power as “limited and divided.”<sup>272</sup> In his view, the major questions doctrine serves as much to protect the states as it does to protect Congress’s role in setting policy.

There are, of course, reasons to doubt whether the federalism rationale will play a role in major questions cases in the future. It appeared to play no role in *Nebraska*, although that is understandable because the case involved federal student loans. Moreover, it is possible that Justice Gorsuch’s interest in the federalism rationale is atypical of the current Court’s majority. But, although Justice Gorsuch is without a doubt the Court’s most enthusiastic proponent of the federalism rationale, he is not wholly alone in emphasizing it. In *Alabama Ass’n of Realtors*, a *per curiam* opinion relied on federalism concerns in its major questions analysis.<sup>273</sup> There, the Court read the scope of the agency’s authority narrowly, in part, because the Court concluded that the agency’s claimed authority “intrudes into an area that is the particular domain of state law.”<sup>274</sup> It reaffirmed that Congress must “enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power.”<sup>275</sup> And despite the recent surge of references to federalism concerns in major questions cases, the connection is not new. As far back as *Gonzales v. Oregon*, an early major questions case, the Court expressed skepticism that Congress would intend to “effect a radical shift of authority from the States to the Federal Government” on an issue traditionally regulated by the states.<sup>276</sup> Ultimately, it reached a conclusion that would avoid “alter[ing] the federal-state balance.”<sup>277</sup> As a result, although the federalism rationale for the major questions doctrine has not received significant attention, it is a justification that is likely to arise again.

## 2. *The Federalism/Localism Analogy*

Because federalism concerns are a longstanding justification for the major questions doctrine at the federal level, whether states should adopt the major questions doctrine depends in part on the strength of the analogy

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271. *NFIB v. OSHA*, 142 S. Ct. 661, 667 (2022) (Gorsuch, J., concurring).

272. *Id.*

273. *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021). The Court did not use the term “major questions” but instead used the “vast economic and political significance” language traditionally used in major questions cases. *Id.*

274. *Id.* at 2489.

275. *Id.*

276. *Gonzales v. Oregon*, 546 U.S. 243, 275 (2006).

277. *Id.*

between federalism and localism—that is, whether the federal-state relationship is relevantly similar to the state-local relationship. In assessing whether this federalism-localism analogy is sound, it is helpful to return to the standard federalism justification for the major questions doctrine. Recall that Justice Gorsuch argued that the doctrine preserves “room for lawmaking by governments more local and more accountable than a distant federal authority.”<sup>278</sup> To the extent that this statement is justified, it is because states possess relatively robust power to initiate lawmaking, insulate themselves from federal intrusion, and exercise fiscal autonomy. In other words, making room for state lawmaking by employing the major questions doctrine makes sense (if it makes sense at all) only because states actually are empowered, practically and legally, to make law. Accordingly, the argument goes, when there is no federal law on a subject for whatever reason—including because of a gap in the law created by the application of the major questions doctrine—the states are well-situated to step in.

Similarly, whether analogous localism arguments justify the major questions doctrine at the state level depends on whether local governments are empowered to fill gaps created by the absence of state law—that is, whether local governments possess powers to initiate lawmaking, resist state intrusion, and exercise fiscal autonomy. Accordingly, states considering adopting the major questions doctrine under state law for localism reasons should consider the extent to which their local governments have these powers. Although states reflect a variety of internal constitutional arrangements—some of which lend themselves better than others to the federal-state analogy—there are differences between any state-local relationship and every federal-state relationship. Accordingly, a localism justification for the adoption of the major questions doctrine is relatively weak.

*a. Local Power to Initiate Lawmaking*

Whether the federalism justification for the major questions doctrine translates to the states depends, in part, on the extent to which local governments have the power to initiate lawmaking. With respect to state lawmaking authority, the absence of federal law devolves power to the states only because states are the primary source of lawmaking on a wide range of issues. States traditionally have had primary responsibility for enacting legislation covering the health, safety, welfare, and morals of their

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278. *West Virginia v. EPA*, 142 S. Ct. 2587, 2618 (2022) (Gorsuch, J., concurring) (internal quotation marks omitted); *see supra* text accompanying note 268.

citizens. For this reason, state legislatures are often said to have plenary power unless prohibited by their own constitutions or by federal law.<sup>279</sup>

On one hand, some local governments possess relatively broad powers to initiate lawmaking. By their constitutions, or by statute, many states confer “home rule” status on some of their local governments—that is, a bundle of powers and limitations that “gives some degree of permanent substantive lawmaking authority to localities.”<sup>280</sup> Although the exact nature of home rule varies, home rule normally permits some local governments to exercise some amount of power to initiate lawmaking<sup>281</sup>—including the power to exercise the police powers traditionally associated with state level government.<sup>282</sup> Although there is a great deal of variety in the way that states organize their local governments—even among home rule jurisdictions—the modern trend has been toward state delegation of power to local governments to act on local matters.<sup>283</sup> Accordingly, local governments have taken the lead in initiating lawmaking on a variety of fronts in the absence of state guidance, including passing ordinances related to environmental protection, public health, labor and employment, and many other subject matters.<sup>284</sup> The “independent lawmaking capacity” of some of these local governments makes the state-local relationship analogous, at some level, to the federal-state relationship.<sup>285</sup> As Richard Briffault has concluded, despite legal limitations on their power, “local governments

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279. That is, they are not empowered to act by their constitutions; rather, they have power to act unless limited by their constitutions. COOLEY, *supra* note 115, at 87; *see also* Oldfather, *supra* note 106, at 907 (“[S]tate legislatures have the police power, while Congress is an entity with only enumerated powers . . . Congress must ask first whether it has the power to act, whereas state legislatures are regarded as having the power to act unless something in the state’s constitution . . . prevents it.”); Wash. State Farm Bureau Fed’n v. Gregoire, 174 P.3d 1142, 1150 (Wash. 2007) (“Insofar as legislative power is not limited by the constitution it is unrestrained.”); Howard Jarvis Taxpayers Ass’n v. Padilla, 363 P.3d 628, 662 n.28 (Cal. 2016) (“Under state constitutions . . . states exercise plenary legislative power.”).

280. Diller, *supra* note 261, at 1124.

281. Barron, *supra* note 261, at 2263 (“What now passes for home rule, therefore, is not local legal autonomy. Rather, it is a mix of state law grants of, and limitations on, local power that powerfully influences the substantive ways in which cities and suburbs act.”).

282. Diller, *supra* note 261, at 1125–26.

283. *See* Briffault, *Preemption*, *supra* note 261, at 2012.

284. Davidson & Schragger, *supra* note 261, at 1391 (“[A]cross an array of pressing concerns—public health, of course, but also labor and employment, environment protection and the climate crisis, emerging technology, and many others—local governments have become a significant locus for pragmatic, evidence-based policy-making . . .”); *see also* Briffault, *Preemption*, *supra* note 261, at 2000; Lori Riverstone-Newell, *The Rise of State Preemption Laws in Response to Local Policy Innovation*, 47 PUBLIUS: J. FEDERALISM 403, 404 (2017) (“[M]any local officials have jumped into the policy vacuum left by state and federal inaction . . .”).

285. Briffault, *Preemption*, *supra* note 261, at 2022 (discussing analogy between federal-state and state-local relationships); *see also* JESSE J. RICHARDSON, JR., MEGHAN ZIMMERMAN GOUGH & ROBERT PUENTES, BROOKINGS INST., CTR. ON URB. & METRO. POL’Y, IS HOME RULE THE ANSWER? CLARIFYING THE INFLUENCE OF DILLON’S RULE ON GROWTH MANAGEMENT 11 (2003) (comparing federalism with localism).

have wielded substantial lawmaking power and undertaken important public initiatives.”<sup>286</sup>

On the other hand, local power to initiate lawmaking is not the equivalent of state lawmaking power. Even in home rule states, local governments derive whatever authority they have from within the state’s constitutional system. That is, local governments are not conceived of as possessing any sovereignty that would allow them to act in the absence of state authorization.<sup>287</sup> By contrast, states generally are believed to have some residual authority that was not granted (either by the states or the people themselves) to the federal government. In other words, the states do not need to trace their lawmaking authority to federal law in the way that local governments must trace their authority to state law.<sup>288</sup> This difference in outlook pervades the differences between state and local efforts to initiate lawmaking. For example, states always possess the police power—a residual power to initiate lawmaking in a broad swath of areas.<sup>289</sup> But, local governments “lack plenary lawmaking authority”;<sup>290</sup> accordingly, there are “often ambiguities and gaps in the initiative function” of local governments, even when they are empowered to initiate lawmaking.<sup>291</sup> Indeed, home rule provisions are better described as a mix of grants and limitations on local government authority rather than simply as grants of authority.<sup>292</sup> Moreover, state legislatures have worked to limit local authority by carefully writing statutes for the purpose of circumventing the authority that state constitutions do allocate to local governments.<sup>293</sup> And these gaps in local authority tend to be exacerbated by Dillon’s Rule, an interpretive presumption dating from the nineteenth century that directs courts to read state grants of authority narrowly.<sup>294</sup> In Dillon’s Rule states, local governments enjoy only the powers that the state grants them explicitly or powers implied by those grants of authority.<sup>295</sup> Accordingly, despite the fact that states grant local government significant responsibilities through home

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286. Briffault, *Localism I*, *supra* note 261, at 15.

287. *Cmty. Commc’ns Co. v. City of Boulder*, 455 U.S. 40, 53 (1982) (“[A]ll sovereign authority within the geographic limits of the United States resides either with the Government of the United States, or [with] the States of the Union.” (internal quotation marks omitted) (second alteration in original)).

288. Briffault, *Localism II*, *supra* note 261, at 390 (“City autonomy fell victim to the view of municipalities as inferior creatures of the states, and states became free to intervene in municipal matters.”).

289. Legarre, *supra* note 10, at 794 (describing longstanding scope of police power).

290. Briffault, *Preemption*, *supra* note 261, at 2022.

291. Davidson & Schragger, *supra* note 261, at 1392.

292. Barron, *supra* note 261, at 2263; *see also* Schragger & Retzloff, *supra* note 261, at 192–93.

293. Su, *supra* note 261, at 193.

294. Richardson, *supra* note 261, at 666.

295. Schragger & Retzloff, *supra* note 261, at 183, 194.

rule provisions, local governments normally “lack legal authority to match” the responsibilities they have been given.<sup>296</sup>

*b. Local Power to Resist State Intrusion*

Whether the federalism justification for the major questions doctrine translates to the states depends also on the extent to which local governments have the power to resist intrusion by the states. For their part, states are able to exercise a gap-filling role in large part because of their ability to resist federal intrusion into state-level policymaking. A key feature of the federal-state relationship is the suite of constitutional and interpretive doctrines that prevent the federal government from interfering with state policymaking. The anti-commandeering doctrine, for example, prevents the federal government from using state officials to implement federal policy in some circumstances.<sup>297</sup> And although the spending power is broad enough to allow the federal government to *entice* the states to act in accordance with federal preferences through financial inducements, Congress may not *coerce* the states into following its lead (a fine line, to be sure).<sup>298</sup> In the realm of statutory interpretation, federal courts are directed to avoid interpretations that interfere with state prerogatives. The traditional-state-function canon, for example, directs courts to avoid interpretations of federal statutes that would “intrude on state governmental functions” in the absence of a clear statement.<sup>299</sup> And more pervasively, the presumption against preemption directs courts to presume that Congress did not intend to preempt state law “unless that was the clear and manifest purpose of Congress.”<sup>300</sup>

296. Davidson & Schragger, *supra* note 261, at 1388.

297. Andrew B. Coan, *Commandeering, Coercion, and the Deep Structure of American Federalism*, 95 B.U. L. REV. 1, 1 (2015); David Landau, Hannah J. Wiseman & Samuel R. Wiseman, *Federalism for the Worst Case*, 105 IOWA L. REV. 1187, 1226 (2020) (“[T]he anti-commandeering doctrine . . . holds that the federal government may not order state-level executive and legislative officials to carry out federal mandates.”).

298. Landau et al., *supra* note 297, at 1233; *NFIB v. Sebelius*, 567 U.S. 519, 579–80 (2012) (holding that the Affordable Care Act unlawfully purported to coerce states to expand Medicaid coverage).

299. *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991) (“[Because] it is at least ambiguous whether Congress intended that appointed judges nonetheless be included . . . we will not attribute to Congress an intent to intrude on state governmental functions.”).

300. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (“[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”); *see also* Ernest A. Young, “*The Ordinary Diet of the Law*”: *The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 307 (2012) (describing the presumption against preemption as “the centerpiece of modern preemption doctrine”). Nevertheless, it is true that federal law can sometimes preempt state law in an entire subject matter, in what is known as field preemption. In these cases, states may be disabled from enacting even laws that would otherwise fall within the gaps of federal regulation. *See, e.g., Arizona v. United States*, 567 U.S.

It is true that some states similarly accord certain local governments a level of autonomy from state intrusion. Often, this is accomplished by the state constitution, which creates home rule municipalities. On this model, if a home rule municipality acts on matters of local concern, the constitutional home rule provision insulates the local legislation from interference from the state legislature.<sup>301</sup> In these jurisdictions,<sup>302</sup> something of a federated system exists: however narrow, there is some local authority that the state legislature is constitutionally prohibited from invading.<sup>303</sup> Consider a recent elections case from Arizona. There, the city of Tucson’s charter authorized it to determine whether to hold municipal elections off-cycle, that is, at times other than when state or national elections were to be held.<sup>304</sup> In response, the state legislature enacted a statute purporting to require local governments to consolidate local elections with state and national elections, bringing it into direct conflict with the city ordinance. Despite the state’s expectation that the state statute would take precedence over the local ordinance, the state supreme court rejected the legislature’s attempt to preempt the ordinance with state-wide legislation. Instead, the court held that the decision to schedule municipal elections is a “purely local” decision that is insulated from state interference by the state’s home rule provision.<sup>305</sup>

But local ability to resist state intrusion should not be overstated. Compared with state-level power to resist federal intrusions because of features like the anti-commandeering doctrine and the anti-coercion principle,<sup>306</sup> local governments are largely at the mercy of their states. Accordingly, states have been more than willing to take coercive, even punitive, measures to bring local government policy into line with state preferences. Indeed, even in areas nominally within the initiative power of local governments, state legislatures have acted to ensure state uniformity.<sup>307</sup> Most saliently, recent years have seen states engaged in aggressive measures to strip local governments of their lawmaking power

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387, 399 (2012) (“States are precluded from regulating conduct in a field that Congress . . . has determined must be regulated by its exclusive governance. The intent to displace state law altogether can be inferred . . . where there is a ‘federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.’” (internal citation omitted)).

301. Stahl, *supra* note 261, at 186 (“[T]he crafters of *imperio* home rule envisioned states and local governments as having distinct and mutually exclusive spheres of activity . . .”).

302. Diller, *supra* note 261, at 1125–26 (describing *imperio* home rule).

303. Spritzer, *supra* note 261, at 820–21.

304. State *ex rel.* Brnovich v. City of Tucson, 484 P.3d 624 (Ariz. 2021) (holding that municipal action on an issue of purely municipal concern is not preempted by a state statute to the contrary).

305. *Id.*

306. Coan, *supra* note 297, at 13.

307. Diller, *supra* note 261, at 1114 (“[T]he primary threat to local innovation is the charge of *intrastate* preemption: that a city’s authority in a particular area has been supplanted by state law.”).

through preemption.<sup>308</sup> This “explosion” of “targeted, and increasingly punitive”<sup>309</sup> preemption measures has revealed that local governments have little leverage in the face of a hostile state government. Recent state preemptions of local law have targeted local government’s ability to deal with pressing problems, like COVID-19, as well as preventing them from addressing long-term concerns, like gun violence and environmental degradation.<sup>310</sup> And in states that still adhere to Dillon’s Rule, the impact of preemption is even more pronounced. In these states, the federal-state presumption against preemption is turned on its head. Rather than a presumption *against* preemption, states adhering to Dillon’s Rule start with a presumption in favor of preemption—that is, by requiring the legislature to grant local power expressly, these courts read ambiguity to derogate from local government authority.<sup>311</sup>

Local government immunity from state control is threatened, moreover, by the growing trend among state legislatures punishing local governments for exercising local authority. Indeed, some states create liability for local government officials if their local ordinances merely *address* certain subject matters.<sup>312</sup> Still other states have enacted legislation to hold individual local government officers liable for exercising local government authority. Florida’s Supreme Court, for example, recently upheld a state law imposing a \$5,000 fine on local officials who pass or enforce gun regulations not enacted by the state legislature.<sup>313</sup> And in a high-profile and unconventional twist on this theme, the Florida legislature went so far as to dissolve a local government—the Reedy Creek Improvement District (Disney’s governing jurisdiction)—in retaliation for Disney’s criticism of a controversial state law.<sup>314</sup> Summing up the vulnerabilities of local government to state intrusion, Richard Briffault has noted that “[u]nlike the states, local governments are not ‘indestructible’ but rather are subject to boundary change and abolition. They are not formally represented in the structure of

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308. Riverstone-Newell, *supra* note 284, at 403; Davidson & Schragger, *supra* note 261, at 1388; Diller, *supra* note 261, at 1114; Briffault, *Preemption*, *supra* note 261, at 2000 (describing common areas of state preemption); Su, *supra* note 261, at 185–86 (describing aggressive state preemption).

309. Davidson & Schragger, *supra* note 261, at 1388.

310. *Id.* at 1392–95; *see also* Briffault, *Preemption*, *supra* note 261, at 1997 (“The new preemption runs the gamut from firearms regulation to sanctuary cities, from workplace equity to environmental protection and public health.”).

311. *E.g.*, *State ex rel. Brnovich v. City of Tucson*, 399 P.3d 663, 677 (Ariz. 2017) (“This Court has narrowly limited the concept of ‘purely municipal affairs,’ or ‘local interest or concern,’ restricting the extent to which charter city ordinances can prevail over state law.” (internal citation omitted)); *S. Constructors, Inc. v. Loudon Cnty. Bd. of Educ.*, 58 S.W.3d 706, 710–11 (Tenn. 2001).

312. Briffault, *Preemption*, *supra* note 261, at 1997, 2004–06; Su, *supra* note 261, at 186.

313. *Fried v. State*, 355 So. 3d 899 (Fla. 2023).

314. Evan Zoldan, *Disney’s Retaliation Suit Could Fare Better than Huawei’s Claims*, BLOOMBERG L. (May 5, 2023, 3:00 AM), <https://news.bloomberglaw.com/us-law-week/disneys-retaliation-suit-could-fare-better-than-huaweis-claims> [<https://perma.cc/UZZ7-659P>].

state governments.”<sup>315</sup> “Home rule,” he concludes, “is not a state-local analog to federalism.”<sup>316</sup>

*c. Local Power to Raise and Spend Revenue*

Whether the federalism justification for the major questions doctrine translates to the states depends also on the extent to which local governments have the power to raise and spend revenue. A key federalism feature that allows states to fill in gaps created by the absence of federal law is not legal, but practical. Although the amount of revenue they raise and spend varies significantly, states have the ability both to raise revenue through taxes and other charges and to direct spending through budget decisions.<sup>317</sup> This fiscal autonomy helps preserve a state’s ability to implement its policy choices,<sup>318</sup> even as states receive significant amounts of money from the federal government.<sup>319</sup> Similarly, although their level of fiscal control varies widely,<sup>320</sup> some local governments have significant power to raise revenue and spend it.<sup>321</sup> To take an (admittedly unrepresentative) example, New York City generates and spends \$100 billion annually, more than the large majority of states.<sup>322</sup> Even in more modest localities, it is a “standard” state practice to delegate the authority to raise and spend revenue to localities and, crucially, to refrain from meddling in those local decisions even when legally allowed to do so.<sup>323</sup> Consider, for example, the typical local government’s ability to raise revenue through property taxes and keep the expenditure of resources local. Relatively wealthy local governments are notoriously successful at directing money generated from local property taxes to local school districts and, concomitantly, keeping school district sizes small to limit the number of

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315. Briffault, *Preemption*, *supra* note 261, at 2022.

316. *Id.*; see also RICHARDSON ET AL., *supra* note 285, at 12 (“Within the great variety of home rule provisions, one principle consistently emerges: State legislatures retain control over local governments.”).

317. GORDON ET AL., *supra* note 261, at 1 (“State and local governments vary dramatically in how much revenue they raise and how much they spend on goods and services.”).

318. *Id.* at 4 (“[I]n the United States federal grants usually have other primary purposes apart from redistribution, such as . . . promoting policy innovation.”).

319. *Id.* (“Intergovernmental grants are one way the federal government smooths differences in what states and localities tax and spend.”).

320. *Id.* at 1 (“[S]tate and local governments vary dramatically in how much revenue they raise and how much they spend on goods and services.”).

321. Jeffrey I. Chapman, *Local Government Autonomy and Fiscal Stress: The Case of California Counties*, 35 STATE & LOC. GOV’T REV. 15, 16 (2003) (“Local government fiscal autonomy is the ability of a jurisdiction to set tax rates and establish the revenue base without outside influence as well as to ensure that the services demanded by the jurisdiction’s citizens are provided.”).

322. N.Y.C. MAYOR’S OFF. OF MGMT. & BUDGET, JANUARY 2023 FINANCIAL PLAN 3 (2023).

323. Briffault, *Localism II*, *supra* note 261, at 354.

students who benefit from the expenditures.<sup>324</sup> This is a controversial power, to be sure. Nevertheless, it is hard to dispute that this power of local government is real, pervasive, and seemingly inviolable, despite the state's ostensible legal authority to alter this arrangement.

But, of course, not all local governments stand in the same position as one another vis-à-vis the state. Local governments have a wide range of forms, powers, and resources—they include not only cities and counties, but also smaller special-purpose entities including “boards, districts, authorities and commissions” with narrow but distinct powers.<sup>325</sup> The relationship between these entities and their home state will differ from one another because of their size, authorities, fiscal autonomy, and purpose for existence.<sup>326</sup> To put a finer point on it, localism for New York City means something very different than it does for the Brighton, New York Fire District.

Equally importantly, if less obviously, there is great variety even within the category of municipalities. States, either by statute or constitutional provision, routinely classify cities and counties by population, often dividing them into groups, like “first class” or “second class” cities or counties. These municipalities are then accorded different powers, including the power to raise revenue, based on their classification.<sup>327</sup> And even outside of formal classifications, municipalities differ in their resources. The application of the major questions doctrine at the state level in Pennsylvania, for example, would affect Philadelphia, the state's only first-class city, differently than Altoona, one of the state's several dozen third-class cities.

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324. REBECCA R. SKINNER, CONG. RSCH. SERV., R45827, STATE AND LOCAL FINANCING OF PUBLIC SCHOOLS (2019).

325. Briffault, *Localism II*, *supra* note 261, at 375 (describing the “baffling array” of local governments that exist); Briffault, *Localism I*, *supra* note 261, at 114 (“Local governments differ significantly in population, area, wealth, function and fiscal capacity. Some have substantial resources and relatively few needs, while others have significant needs but are relatively poor. The same legal authorizations and restrictions may add up to real power for one set of local entities but provide only the illusion of power for the others.”).

326. RICHARDSON ET AL., *supra* note 285, at 6 (“[T]he state constitution may mandate liberal construction for grants of authority to cities, while remaining silent on counties. The legislature may pass a statute requiring use of a liberal rule of interpretation for counties, even as the courts hold Dillon’s Rule appropriate with respect to towns.”).

327. Richardson, *supra* note 261, at 671 (“Within states, different types of local governments hold different levels of authority. In addition, a local government in a particular state may possess broad authority with respect to one power or within a particular category of power, but very little authority in other areas.”); *see also, e.g.*, WASH. REV. CODE. § 35.01.010 (2023) (defining and setting out powers of first-class cities); First Class City Home Rule Act of 1949, 53 PA. STAT. AND CONS. STAT. ANN. §§ 13101–13157 (West 2023); *Local Tax Limitations Can Hamper Fiscal Stability of Cities and Counties*, PEW (July 8, 2021) [hereinafter *Local Tax Limitations*], <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2021/07/local-tax-limitations-can-hamper-fiscal-stability-of-cities-and-counties> [<https://perma.cc/MRS6-97LR>] (“The rise of home rule provisions in the early 1900s, used to extend the governing authority of local governments, has given some localities more fiscal tools than others.”).

While Philadelphia might have some ability to fill in the gaps in the law created by the major questions doctrine at the state level, a smaller, less well-funded, less professionalized city would be less able to do so. As a result, the major questions doctrine—even if justified on localism grounds with respect to some local governments—would not be justified on localism grounds with respect to every local government in a given state.

On balance, no matter the state, local governments bear only a weak resemblance to the states with regard to fiscal autonomy. While all states have a significant capacity to raise revenue from multiple sources, local governments tend to be more heavily dependent on property taxes and, to a lesser degree, on sales tax and other charges.<sup>328</sup> And, even among these traditional sources of local government taxation, states often restrict local government ability to raise revenue.<sup>329</sup> In the context of property taxes, all but four states impose restrictions both on the property tax rate and the ability of local governments to raise the assessed value of property.<sup>330</sup> In the arena of sales taxes, many states limit the tax rate.<sup>331</sup> More vexingly, states have limited local government capacity to raise revenue even as their expenses rise, thus reducing their real spending capacity. Indeed, state limitations on revenue often come with an expectation that local governments provide increasingly more expensive services.<sup>332</sup> Moreover, even when home rule provisions suggest local government fiscal autonomy, states have interpreted local government revenue-raising authority narrowly, further limiting their choices.<sup>333</sup>

And even the ability to raise and spend revenue does not necessarily equate to policymaking autonomy. Consider again the example of New York City. Although it possesses an enviable ability to raise and spend revenue, it is still highly dependent on money from beyond its borders. Of the \$100 billion in its 2023 budget, approximately \$30 billion is expected to come from federal and state grants.<sup>334</sup> Money from other sources too,

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328. *State and Local Revenue*, URB. INST., <https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/state-and-local-revenues> [<https://perma.cc/HP65-UTLH>]; see also Richardson, *supra* note 261, at 678.

329. *Local Tax Limitations*, *supra* note 327.

330. Bethany P. Paquin, *Chronicle of the 161-Year History of State-Imposed Property Tax Limitations 1* (Lincoln Inst. of Land Pol’y, Working Paper No. WP15BP1, 2015) (“All but four states limit property taxation through at least one state-imposed restriction on the growth of state and/or local property tax rates, levies, or assessments.”); *Local Tax Limitations*, *supra* note 327.

331. *Local Tax Limitations*, *supra* note 327.

332. Davidson & Schragger, *supra* note 261, at 1413–14 (“States drastically limit local revenue raising capacity while also imposing onerous unfunded mandates.”).

333. *Id.*

334. N.Y.C. MAYOR’S OFF. OF MGMT. & BUDGET, *supra* note 322.

“often comes with strings attached”—and these strings limit local government’s policy choices.<sup>335</sup>

Perhaps most pointedly, many states have made clear their willingness to assert control over local government policy decisions through their ability to control local government finances. In addition to directly preempting local policy decisions, states have begun to threaten to cut off funding for local governments that enact or enforce local laws at odds with state law.<sup>336</sup> Arizona law, for example, empowers the state attorney general to investigate whether a local ordinance violates state law; and if so, the state treasurer is required to withhold state funds that would otherwise go to the local government.<sup>337</sup> Moreover, it has become common for states to enact “super-preemption laws,” creating private rights of action to enforce state policies against local governments and permitting citizens to sue local governments for enforcing local laws.<sup>338</sup>

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All told, despite the similarities between federalism and localism—in some states, and for some local governments—state courts should not draw the federalism-localism analogy lightly. The traditional view of local governments is that they exist as creatures of the state,<sup>339</sup> and, concomitantly, that all sovereignty rests with the states and federal government rather than with local governments.<sup>340</sup> Despite the significant power that local governments exercise on a routine basis, the “formal theory of local governments as creatures, agents and delegates of the states still holds.”<sup>341</sup> Local governments have limited power to initiate lawmaking, limited defenses to resist state intrusion, and a limited financial capacity to make law. When the federal government, for whatever reason, lacks capacity to make law, the states retain robust legal and practical ability to fill in the gaps. And although the states’ ability to fill in these gaps is limited in turn, state power far outstrips local power by any measure. Because the

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335. Briffault, *Localism II*, *supra* note 261, at 350 (“But there should be no question that the fiscal dependency of many cities means that local legal authority alone is not sufficient to create real local autonomy.”).

336. Davidson & Schragger, *supra* note 261, at 1392; Riverstone-Newell, *supra* note 284, at 404 (noting state strategy of “threatening and/or withholding state funding” to rein in local government policy innovations).

337. ARIZ. REV. STAT. ANN. § 41-194.01 (2023).

338. Riverstone-Newell, *supra* note 284, at 417–18 (listing states with similar “super-preemption” laws).

339. Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1063 (1980) (“State law . . . treats cities as mere ‘creatures of the state.’”).

340. *Cnty. Commc’ns Co. v. City of Boulder*, 455 U.S. 40, 53 (1982) (“[A]ll sovereign authority ‘within the geographic limits of the United States’ resides either with ‘the Government of the United States, or [with] the States of the Union.’” (second alteration in original) (quoting *United States v. Kagama*, 118 U.S. 375, 379 (1886))).

341. Briffault, *Localism I*, *supra* note 261, at 112.

federalism justification for the major questions doctrine translates only weakly to the states, state courts should hesitate before applying the major questions doctrine based on an analogy between federalism and localism.

#### CONCLUSIONS AND FUTURE DIRECTIONS

As the dust settles from *West Virginia v. EPA* and *Biden v. Nebraska*, the contours of the regulatory landscape remain hazy. Much depends on whether these cases were meant to serve as a signal to lower courts to be more exacting when reviewing agency interpretations, a warning to agencies to be more careful when claiming authority, or merely a reflection of the Court majority's strong views about the policy issues at stake. The future is uncertain and the stakes are high. But, as dramatic as the effects of *West Virginia* and *Nebraska* could be for *federal* regulation, the impact does not stop there. State courts are entertaining the possibility of adopting the major questions doctrine into state law, a move that could hobble efforts to regulate subject matters like labor and employment, environmental quality, and healthcare. Considering the arguments that best support the major questions doctrine at the federal level in light of state constitutional structures allows us to draw a number of conclusions.

First, before adopting the major questions doctrine into state law, state courts should analyze their own institutions. Even if a state is persuaded that the major questions doctrine is justified under federal law, the significant differences between federal structures and state structures counsel that states should not reflexively adopt the doctrine. Rather, state courts should consider their own separation-of-powers doctrines, their interpretive commitments, and the relationship between their state-level and local governments. Only after determining the extent to which their state constitutional structures are relevantly similar to federal constitutional structures should states make a decision about whether to adopt the major questions doctrine. Although each state has its own unique institutional arrangement, because of the significant differences between federal and state constitutional structures, it is likely that the major questions doctrine is not a good fit for any state under the framework I propose.

Second, when state courts do the work described above, they should be prepared for some counter-intuitive results. For example, most commentators probably would not think of California as a likely adopter of the doctrine because of that state's openness to regulation. However, California has a professionalized legislature and relatively weak nondelegation doctrine. Its courts are quite comfortable searching for legislative purpose. And it has a relatively strong tradition of localism. This combination of attributes makes the case for a relatively stronger state major

questions doctrine in California compared with many states. By contrast, commentators probably *would* expect a state like Texas to adopt a major questions doctrine out of a hostility to certain kinds of regulation. And indeed, Texas courts already have expressed an interest in adopting a major questions doctrine based on the federal model.<sup>342</sup> However, Texas has a part-time legislature, a relatively robust nondelegation doctrine, a stated commitment to textualism, and a tradition of aggressively restricting local law. All of these factors suggest that the major questions doctrine would be inappropriate under Texas law. These and other surprising results may follow when state courts start to consider the applicability of the major questions doctrine.

Third, the framework described in this Article can help scholars evaluate the realist critique of the major questions doctrine. As with the examples of Texas and California described above, some states might adopt or reject the major questions doctrine in line with ideological expectations but contrary to the framework described in this Article. Should this result materialize, it will serve as support for the realist argument that the major questions doctrine is mere window-dressing, obscuring ideological decisions without constraining courts. By contrast, should states adopt or reject the major questions doctrine against ideological expectations, but in line with the framework set out in this Article, this result will serve as evidence to blunt the realist critique—that is, evidence of this kind would suggest that the major questions doctrine has some power to constrain judges.

Fourth and finally, although the defense or critique of the major questions doctrine at the federal level is largely outside the scope of this Article, there are lessons here, too, for federal courts. By isolating the assumptions that undergird the major questions doctrine, this Article highlights the fact that the doctrine is rooted in contested assumptions about the relationship among the branches of the federal government. For example, the major questions doctrine is based on the assumptions that Congress both intends to and should make major policy decisions itself. But these assumptions can be, and have been, challenged by empirical and theoretical work. Accordingly, a federal court deciding whether to employ the major questions doctrine should consider federal constitutional structures to determine whether the major questions doctrine makes sense even at the federal level.

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342. *Abbott v. Harris County*, 672 S.W.3d 1, 31 n.38 (Tex. 2023) (“The enormity of the power at stake may have implications for how we would interpret the statute.”).