Importance and Interpretive Questions

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In its past term, the Supreme Court formalized what it calls the major questions doctrine. The doctrine, as currently formulated, appears to require a clear and specific statement from Congress if Congress intends to delegate questions of major political or economic significance to agencies. The doctrine has been almost universally assailed on the right by scholars who argue that the doctrine is inconsistent with textualism and on the left by those who claim it is a recently invented, functionalist tool devised to reach anti-administrativist results. One can explain at least some of the cases, however, in a way that constructs a coherent doctrine in which importance has a significant but narrow role in resolving interpretive questions involving ambiguity or uncertainty. Thus understood, such a doctrine could be defensible, if not as a substantive canon, then as a kind of linguistic canon. Unlike other linguistic canons, such a canon would be about how people and lawmakers use language to accomplish results in a circumscribed range of contexts—namely, the delegation of important authorities, whether to other private actors, to government actors in Constitution, or to government actors in the executive department. But unlike substantive canons, it would not relate to a substantive value encoded in the Constitution or in longstanding tradition. Existing empirical work about how legislators legislate, and insights from the philosophy of language, suggest that such a doctrine may be consistent with textualism, and historical research further reveals that a canon of this type may be a longstanding feature of constitutional, contract, and statutory interpretation in related contexts. More provocatively, these same intuitions about importance may explain some substantive canons that are difficult for textualists to justify.

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INTRODUCTION

In the Supreme Court's 2021-2022 term, the Court formalized what it has labeled the major questions doctrine. The doctrine, according to Chief Justice Roberts in *West Virginia v. EPA*, "refers to an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted."[1] Courts should have "skepticism" when statutes appear to delegate to agencies questions of major political and economic significance, which skepticism the government can only overcome "under the major questions doctrine" by "point[ing] to 'clear congressional authorization' to regulate in that manner."[2] According to Justices Gorsuch and Alito's slightly different account, "courts have developed certain 'clear-statement'

[1] 142 S.Ct. 2587, 2609 (2022).
[2] Id. at 2614 (citation omitted).

rules," which "assume that, absent a clear statement otherwise, Congress means for its laws to operate in congruence with the Constitution rather than test its bounds."[3] "Article I's Vesting Clause has its own" clear-statement rule, namely, "the major questions doctrine."[4] Thus, taken at face value, the Court's major questions doctrine insists at least on unambiguous statutory authority, and perhaps even unambiguous and specific authority.

The Court's doctrine has been assailed by scholars and commentators both right and left. Many argue that the doctrine is inconsistent with textualism. Michael Rappaport has said that the doctrine "neither enforces the Constitution nor applies ordinary methods of statutory interpretation" and "seems like a made up interpretive method for achieving a change in the law that the majority desires."[5] Tom Merrill has written that the doctrine allows courts to "rewrite the scope of [agencies'] authority," and that it "will invite judges to overturn agency initiatives based on reasons other than the court's best judgment about what Congress has actually authorized the agency to do."[6] Chad Squitieri: "The major questions doctrine is a product of legal pragmatism—a theory of statutory interpretation advanced by Justice Breyer which often elevates statutory purpose and consequences over text. The doctrine is inconsistent with textualism."[7] And Jonathan Adler: the doctrine allows the Court to deploy "cursory" and "hardly compelling" arguments about statutory interpretation.[8]

Others have been even more critical. Daniel Deacon and Leah Litman argue that the doctrine "directs courts not to discern the plain meaning of a statute using the normal tools of statutory interpretation," and that "otherwise unambiguous statutes do not appear good enough when it comes to policies the Court deems 'major 2.'"[9] It "supplies an additional means for minority rule in a constitutional system that already skews toward minority rule,"[10] "provides additional

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[3] Id. at 2616 (Gorsuch, J., concurring).

[4] Id. at 2619.

[5] Michael Rappaport, "Against the Major Questions Doctrine," THE ORIGINALISM BLOG (Aug. 15, 2022), https://perma.cc/U92U-YQ7E.

[6] Thomas W. Merrill, "*West Virginia v. EPA*: Questions About 'Major Questions,'" THE VOLOKH CONSPIRACY (July 28, 2022), https://perma.cc/W65E-APE7.

[7] Chad Squitieri, "Major Problems with Major Questions," LAW & LIBERTY (Sept. 6, 2022), https://perma.cc/F73C-WWKG.

[8] Jonathan H. Adler, West Virginia v. EPA*: Some Answers about Major Questions*, Cato Supreme Court Review (forthcoming).

[9] Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 Va. L. Rev. __ (forthcoming 2023), paper at 1, 3.

[10] Id. at 1, 6

mechanisms for polarization,"[11] and "exacerbates several important institutional and political pathologies."[12] Mila Sohoni writes that the major questions doctrine has "altered the doctrine of judicial review of agency action in its method and content, in ways that will have momentous consequences"[13] and that are "disjoint[ed]" from prior precedents.[14] It "creates deep conceptual uncertainty about what" the Court is doing.[15] Daniel Walters: "the new major questions doctrine distorts the conventional form of a substantive canon" because of "its limitless scope and its weak relationship to authoritative sources of policy."[16]

These criticisms are, to a large extent, warranted. There are at least four versions of the doctrine that the Supreme Court has articulated, none fully defensible. The Court deploys one version at *Chevron*'s first step and another at *Chevron*'s preliminary "step zero." To the uninitiated (if such there are), the famous *Chevron* doctrine requires a court to decide at "step one" whether an agency's organic statute is ambiguous on the particular question at hand and, if so, at "step two" to defer to the agency's reasonable interpretation even if not the "best" interpretation.[17] "Step zero" cases then raise the question whether to deploy the *Chevron* two-step framework at all.[18] In this context, the doctrine is largely indefensible. At step one, the Court uses the doctrine to conclude that the statute is clear and unambiguous, when in reality everyone knows that the statute is ambiguous and courts should therefore defer to the agency (under the framework). At step zero, the Court uses the doctrine to conclude that the framework should not apply at all, and the Court awkwardly appears to resolve the major question for itself.

A third version of the doctrine is somewhat like what Justices Gorsuch and Alito describe in *West Virginia v. EPA*. Perhaps the major questions doctrine is simply the nondelegation doctrine deployed as a canon of constitutional avoidance, or a blend of avoidance and a clear-statement requirement. Under the modern

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[11] Id. at 6

[12] Id. at 6

[13] Mila Sohoni, *The Major Questions Quartet*, 136 Harv. L. Rev. 262, 263 (2022).

[14] Id. at 3.

[15] Id. at 5.

[16] Daniel E. Walters, *The Unprecedented Major Questions Doctrine* 2 (working paper).

[17] Chevron USA, Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842-43 & n. 11 (1984); Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 983 (2005) ("*Chevron* teaches that a court's opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative").

[18] Christensen v. Harris County, 529 U.S. 576, 586-88 (2000); United States v. Mead Corp., 533 U.S. 218, 229-31 (2001).

formulation, constitutional avoidance allows courts to adopt narrowing constructions of statutes when they have "serious doubts" as to the statute's constitutionality.[19] This version of the doctrine would be hard to defend for two reasons. First, constitutional avoidance is generally indefensible: it allows courts to rewrite statutes without having actually to decide that the statute as Congress wrote it would violate the Constitution.[20] Second, even if the canon were otherwise legitimate, we would need to know what the serious constitutional doubt is, and thus far the Court has not explained what majorness has to do with nondelegation. That's not to say there is no connection, but that the Court has not explicated it precisely because under constitutional avoidance it does not have to do so.

The fourth and most recent version, at least as most academics understand it, is that the doctrine is one among many clear statement rules, such as the demand for a clear statement to abrogate sovereign immunity,[21] to apply the Administrative Procedure Act to the President,[22] or to make regulatory requirements applicable to ships sailing under foreign flags.[23] Major questions, at least as currently theorized, also seems a poor fit for this category. Ordinarily clear statement rules exist to advance some constitutional value—like federalism or state sovereignty—and apply even against otherwise unambiguous statutes.[24] But Congress can take the relevant action so long as it speaks clearly *and* specifically.[25] That is, neither the best reading of a statute, nor an unambiguous statute, is enough; specificity is also required. In the major questions cases there is a constitutional value (nondelegation) that may be motivating the Court, but it is not fully clear how the canon relates to or advances the doctrine, and, if it does, whether Congress's delegations would be constitutional even if it did speak clearly. The clear-statement version also contradicts the *Chevron* framework (if we care about that) and appears to allow

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[19] *See* ILAN WURMAN, ADMINISTRATIVE LAW THEORY AND FUNDAMENTALS: AN INTEGRATED APPROACH 20-21 (discussing cases); *see also, e.g.*, Nielsen v. Preap, 139 S. Ct. 954, 971 (2019) ("when a serious doubt is raised about the constitutionality of an act of Congress, this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided") (cleaned up).

[20] *See* sources cited *supra* note __.

[21] Sossamon v. Texas, 563 U.S. 277, 290-91 (2011).

[22] Franklin v. Massachusetts, 505 U.S. 788 (1992).

[23] Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119, 125 (2005).

[24] *See infra* Part I.D.1.

[25] True, the degree of clarity and specificity that are required also vary from rule to rule; in my view, it remains to be seen just how much is required in this context. *See* William N. Eskridge Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 Vand. L. Rev. 593, 597 (1992).

courts to ignore even a statute's clear text.

There is a way to explain, if not all, then certainly some of the cases, however, that constructs a coherent and defensible version of the doctrine. In each, the statute was plausibly ambiguous. And, in each, the Court can be understood to have resolved the ambiguity by adopting the narrower reading of the statute on the ground that, as a matter of legislative intent, it was more plausible to think that Congress intended the narrower reading. Thus, the Court arrived at what it deemed the best reading of the statute, and not necessarily a clear or unambiguous reading. It is also possible that the Court is demanding unambiguous, though not necessarily specific, statutory language; and usually the best reading of an otherwise ambiguous statute is that it does not do major, controversial things without being clearer about it. That is just another way of saying that "Congress does not hide elephants in mouseholes."[26] But sometimes a hole is elephant sized, and the best reading of the statute suggests that it contains an elephant whether or not Congress was clear about it.[27]

In other words, when the Court asks for a clear statement, it does not have to be understood as deploying the same concept as other clear statement rules—what some have called "super strong clear statement rules"[28]—where both clarity and specificity are required. When certain constitutional values are at stake, as noted, the Court has held that the best or plain reading of a statute is not enough; the Court wants to make sure that Congress thought very clearly and explicitly about that particular issue.[29] In the major questions context, in contrast, the Court

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[26] Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001).

[27] A good example might be *King v. Burwell*, 576 U.S. 473 (2015); *see infra* Part I.B. If this is an accurate account of the Court's cases, that also raises the question of why the Court has not clearly articulated this more defensible version of the major questions doctrine, if this is in fact what the Court has been doing. Part of the answer, I suspect, is *Chevron* itself: a major questions doctrine that hinges on the existence of statutory ambiguity does not work within that framework because ambiguities are for agencies, not courts, to resolve. Hence, for a long time, the Supreme Court has deployed "major questions" the only two ways it could do so: either by falsely claiming the statute is unambiguous and clear at "step one," or by using it prior to any interpretation at all at "step zero." *See infra* Parts I.A-B. Saddled with the *Chevron* framework—and perhaps especially to litigants' adherence to that framework—the Court has had to deploy "major questions" arguments before it could even get to statutory interpretation. The Court, to the extent it took this approach in its recent term, was simply following the path of the law and the lawyers' arguments before it. The other part of the answer, though, is that if we take the Court's recent statements seriously, then the Court—or at least a plurality of it—*has* been defending the doctrine on grounds similar to those described here.

[28] Id.

[29] *See infra* Part I.D.1.

may simply be concluding that the best reading of the statute is one thing because it would have expected Congress to speak clearly if Congress had intended the other.[30] Many substantive canons do operate this way—think the rule of lenity, which ambiguity triggers but which does not demand a clear and specific statement to override—but, as I shall argue, if major questions operates in this manner then it is possible to defend it as something other than a substantive canon.

True enough, there is language in the Court's cases that militate against this account as a descriptive matter.[31] The present objective is to suggest that it is at least possible to conceptualize a similar doctrine that centers on resolving ambiguity,[32] which doctrine would be more meritorious and consistent with textualism than other possible accounts, and which might already exist in areas of constitutional, contract, and statutory interpretation. It may also be driving the Court in its current cases, even if the Court has not been altogether clear about what it has been doing. On this conceptualization, the importance of a purported grant of authority would operate as a kind of linguistic canon: ordinarily, lawmakers and private parties tend to speak clearly, and interpreters tend to expect clarity, when those lawmakers or parties authorize others to make important decisions on their behalf.

Although "linguistic" in the sense that it is about how speakers use and interpret language, such an "importance canon" is unlike other linguistic canons: it is about how people and lawmakers use language in a circumscribed range of

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[30] In this regard, it is closer in kind to what then-Professor Barrett described as most clear statement rules: "But in the normal course, clear statement rules function no differently from other canons that permit a court to forsake a more natural interpretation in favor of a less natural one that protects a particular value. Indeed, canons like avoidance and *Charming Betsy* can be rephrased as clear statement rules: absent a clear statement, a court will not interpret a statute to raise a serious constitutional question, and absent a clear statement, a court will not interpret a statute to abrogate customary international law. The choice to denominate a canon as a "clear statement" rule is of little consequence; what matters is the effect of the canon on the statutory text." Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 Bos. U. L. Rev. 109, 167 (2010).

[31] *See* infra Part I (describing four accounts of major questions that are difficult to defend).

[32] There is an important literature on different kinds of ambiguities and what constitutes ambiguity. *See, e.g.*, Richard M. Re, *Clarity Doctrines*, 86 U. Chi. L. Rev. 1497 (2019); Brian G. Slocum, *Replacing the Flawed* Chevron *Standard*, 60 Wm. & Mary L. Rev. 195 (2018); Brian G. Slocum, *The Importance of Being Ambiguous: Substantive Canons, Stare Decisis, and the Central Role of Ambiguity Determinations in the Administrative State*, 69 Md. L. Rev. 791, 799-802 (2010) (describing numerous academic approaches to defining "ambiguity"). There is no need to engage in that literature here, however, because I do not question the merits of the Court's conclusions that the relevant statutes were ambiguous. I simply accept the premise.

substantive contexts, namely, the delegation of important authorities to other parties. But it is unlike substantive canons: it does not flow from any substantive policy encoded in the Constitution or in longstanding tradition. One might call it a "quasi" linguistic canon, although the label does not much matter. Scholars have shown that the dividing line between linguistic and substantive canons is often thinner than traditionally believed,[33] and there may be ambiguity-resolving canons that defy either the linguistic or substantive label, such as the longstanding and contemporaneous interpretations canon.[34]

However labeled, such a canon may be consistent with textualism, and specifically with empirical evidence regarding how Congress operates, with insights from the philosophy of language regarding how ordinary persons interpret instructions in high-stakes contexts, with background principles of interpretation, and with historical materials in constitutional, contract, and statutory interpretation from the Founding to today. More provocatively, these arguments point to a more general conclusion about the role of importance in resolving interpretive questions. They suggest that certain substantive canons, such as the rule of lenity and the presumptions against preemption, retroactivity, and violations of international law, which are otherwise difficult for textualists to defend, could potentially be defended on the ground that the legal culture at the time of enactment considered certain matters "important" and therefore ordinary speakers would have expected more clarity before assuming related important actions had been authorized. At a minimum, the concept of "importance" has played a significant role in our legal system in resolving certain kinds of interpretive questions. That role ought to be better understood.

This Article proceeds as follows. Part I taxonomizes and criticizes four possible accounts of the major questions doctrine. The taxonomy supplied here, it is believed, provides more conceptual clarity than other taxonomies that have already been developed.[35] It suggests throughout that it is at least possible to conceive of some of the cases as deploying a kind of linguistic "importance canon"

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[33] Kevin Tobia and Brian Slocum, *The Linguistic* and *Substantive Canons*, working paper on file with author.

[34] *See infra* __.

[35] Cass Sunstein, for example, has identified only two versions of the doctrine—one as an exception to *Chevron*, the other as a clear statement rule. Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 Admin. L. Rev. 475 (2021). Blake Emerson combined all the cases into a single doctrine in which the Court decides for itself the best interpretation of the statute. Blake Emerson, *Administrative Answers to Major Questions*, 102 Minn. L. Rev. 2019 (2018).

to resolve statutory ambiguities.[36] Part II then attempts to justify such a canon, regardless of what the Court has in fact been deploying. It argues that such a canon is consistent with empirical evidence on how legislators legislate, with insights from the philosophy of language about how interpreters understand language in related contexts, and possibly with the mischief rule; such a canon may also already be a longstanding feature in constitutional, contract, and statutory interpretation in related contexts. Even if the Court has not been deploying such a canon, it would be more defensible than its existing approach. Part II concludes with the observation that the role of importance in resolving interpretive questions might provide some support for substantive canons that are otherwise difficult for textualists to justify.

I. "MAJOR QUESTIONS"

This Part taxonomizes the so-called major questions cases into four categories and critically assesses each category. In constructing a defensible doctrine, it is important to assess whether any of these versions, all of which have plausible claims to be an account of what the Court is doing, are defensible. None of the following four accounts is fully defensible. Nevertheless, it is possible that some of the cases can in fact be understood on different grounds—namely, that there was statutory ambiguity and the Court used major questions as a sort of linguistic canon to resolve that ambiguity. Although the Court has not always defended its decisions on that ground, such a defense would be more consistent with textualism, a point taken up in Part II.

A. Chevron Steps One and Two

The first two major questions cases are often thought to be *MCI Telecommunications Corp. v. AT&T Co.*[37] and *FDA v. Brown & Williamson Tobacco Corp.*[38] In both, the Court analyzed the agency regulations under the *Chevron* framework, holding at step one that the organic statute prohibited the regulations. In the former case, the agency had promulgated a rule deregulating an industry subject to an existing regulatory scheme, and in the latter, the agency asserted jurisdiction over, and attempted to regulate, tobacco. These cases are inexplicable under *Chevron*, however, because in both cases the broad statutory language did not clearly prohibit the regulations, and indeed may have supported

[36] One need not agree with the characterization of the cases in Part I to agree with the analysis of Part II. A reader already steeped in these cases could easily skip to Part II.

[37] 512 U.S. 218 (1994).

[38] 529 U.S. 120 (2000).

them. The agency's regulations should have received deference under "step two." In prior work I suggested that nondelegation concerns possibly explained the outcomes of these cases.[39] Yet now I am more convinced that rather than enforcing nondelegation concerns, the majorities in those cases were simply giving effect to what they understood to be the statutes' best readings, despite *Chevron*'s requirement that they ignore those readings.

1. Brown & Williamson[40]

Consider first *Brown & Williamson*. After decades of disclaiming authority to regulate tobacco products, in 1996 the Food & Drug Administration (FDA) asserted jurisdiction over such products and promulgated numerous regulations governing their sale and marketing.[41] The authority by which the agency asserted jurisdiction was the language of the 1938 Food, Drug, and Cosmetic Act (FDCA) defining "drug" as "articles (other than food) intended to affect the structure or any function of the body,"[42] and "device" as "an instrument, apparatus, implement, machine, [or] contrivance . . . intended to affect the structure or any function of the body."[43] FDA determined that nicotine is a drug and cigarettes are "drug delivery devices" and thus that FDA had jurisdiction over them.[44] Both the five Justices in the majority as well as the four in dissent agreed that *Chevron* governed the analysis.[45] The majority, however, stopped the analysis at *Chevron* step one—concluding that "Congress has clearly precluded the FDA from asserting jurisdiction to regulate tobacco products."[46] The dissent concluded that nicotine was clearly a drug under the statutory definition and cigarettes clearly drug-delivery devices,[47] and because the agency's finding that cigarette manufacturers objectively "intended" their products to have therapeutic effects on consumers was reasonable, the agency's interpretation was entitled to deference.[48]

What seems "clear" is that nothing was particularly clear about the statute

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[39] Ilan Wurman, *As-Applied Nondelegation*, 96 Tex. L. Rev. 975, 983 (2018).

[40] Substantial parts of the following are adapted from id. at 983-88.

[41] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 125, 128–29 (2000) (citing Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396 (Aug. 28, 1996)).

[42] *Id.* at 126 (quoting 21 U.S.C. § 321(g)(1)(C)).

[43] *Id.* at 126 (quoting 21 U.S.C. § 321(h)(3)).

[44] *Id.* at 127 (citing 61 Fed. Reg. at 44,397, 44,402).

[45] *Id.* at 125–26; *id.*at 170–71 (Breyer, J., dissenting).

[46] *Id.* at 126 (majority opinion).

[47] *Id.* at 162 (Breyer, J., dissenting).

[48] *Id.* at 170–71.

as applied to tobacco and cigarettes. Both sides marshalled various textual and contextual evidence and interpretive canons in support of their positions. The majority explained that the FDCA requires a "reasonable assurance of the safety and effectiveness of the device,"[49] which assurance could not be provided for cigarettes, and thus cigarettes would have to be removed from the market contrary to congressional intent in other statutes.[50] Additionally, the FDCA provides that a product is "misbranded" if "it is dangerous to health when used in the dosage or manner, or with the frequency or duration prescribed, recommended, or suggested in the labeling thereof,"[51] and accordingly tobacco products would all be misbranded and require removal from the market.[52] Most simply put, the fundamental purpose of the FDCA was that any regulated product not banned must be safe for its intended use, and tobacco products were not safe for their intended use.[53]

Only after this analysis, in the final subsection of its rather lengthy opinion, the majority added that its "inquiry into whether Congress has directly spoken to the precise question at issue is shaped, at least in some measure, by the nature of the question presented."[54] *Chevron* deference is "premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps."[55] "In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation."[56] Here, the majority was "confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[57]

The dissent deployed its own interpretive tools and arguments. It pointed out that tobacco literally fell within the statutory definition of "drug" and tobacco products literally fell within the statutory definition of "devices,"[58] and that the

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[49] 21 U.S.C. §§ 360c(a)(1)(A)(i), (B), (C) (2012).

[50] *Id.* at 134–41.

[51] 21 U.S.C. § 352(j).

[52] *Id.* at 141.

[53] *Id.* at 142.

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

[55] *Id.*

[56] *Id.* (citing Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986) ("A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration.")).

[57] *Id.* at 160.

[58] *Id*. at 162 (Breyer, J., dissenting).

statute's basic purpose was the protection of public health, thus supporting the regulation of tobacco.[59] There was some indication that Congress intended to delegate broad authority to reach future products such as tobacco;[60] FDA regulates other addiction, sedation, stimulation, and weight-loss products, which are difficult to distinguish from tobacco;[61] and FDA at least arguably did not need to ban an unsafe device because numerous remedial provisions provided that the Secretary "may," but was not required to, ban unreasonably dangerous products.[62]

Most reasonable observers would conclude that, given that the statutory definitions literally reached tobacco products, the statute was at a minimum ambiguous. Given ambiguity, *Chevron* counsels deference to the agency's assertion of jurisdiction.[63] Yet the majority concluded that the statute clearly precluded the agency's actions. One possibility is that the majority truly believed that no reasonable person (or agency) could disagree with their interpretation of the statute. But even if that were true, that would not mean the statute was unambiguous. It would mean only that no reasonable person could disagree about the *best* reading of what otherwise appeared to be an ambiguous statute. That would be insufficient under *Chevron*, whose threshold requirement is ambiguity, and so the majority had to say its interpretation was "clear" when it was anything but.

Scholars have suggested that something like a nondelegation concern may have been driving the Court.[64] Cass Sunstein argues that the Court may have been using a kind of clear-statement rule as a "nondelegation canon"—the Court will not read ambiguity as conferring discretion on agencies to decide major questions.[65] John Manning argues that *Brown & Williamson* may be seen as an example of the Court using the canon of constitutional avoidance to narrow statutes to avoid grave

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[59] *Id.*

[60] *Id.* at 164–66.

[61] *Id.* at 169.

[62] *Id.* at 176 (citing 21 U.S.C. §§ 360f(a), 360h(a), (b)).

[63] The Court has explained that there is no difference for *Chevron* purposes between jurisdictional and nonjurisdictional questions. City of Arlington v. FCC, 569 U.S. 290, 296–301 (2013).

[64] Wurman, *supra* note __, at 986-88; *see also* John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 Sup. Ct. Rev. 223, 236-27, 242-43; Abigail R. Moncrieff, *Reincarnating the "Major Questions" Exception to* Chevron *Deference as a Doctrine of Noninterference (or Why* Massachusetts v. EPA *Got It Wrong)*, 60 Admin. L. Rev. 593, 616–18 (2008); Cass R. Sunstein, Chevron *Step Zero*, 92 Va. L. Rev. 187, 244–45 (2006).

[65] Sunstein, *supra* note __, at 244–45; *see also* Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 330–37 (2000) (describing various other clear-statement requirements motivated by nondelegation concerns).

constitutional (here, nondelegation) concerns.[66] Abigail Moncrieff agrees that "as a positive matter [the nondelegation principle] might explain" these cases.[67] Part I.C addresses the substance of constitutional avoidance when discussing the cases in which the Court has more explicitly invoked it. For present purposes, it is sufficient to understand that "the existing literature has almost unanimously concluded that the *Brown & Williamson* rule lacks a coherent justification,"[68] and that nondelegation concerns were driving the Court.

There is a coherent justification for the Court's holding, however, if we presume for a moment that it was not really adhering to the *Chevron* framework. In the absence of *Chevron* deference, the Court would interpret the statute for itself to arrive at its best meaning. The Court's analysis could then look almost exactly like it did in *Brown & Williamson*. The opinion would require only minor tweaks, excising any reference to the doctrine and replacing the statement that "Congress has clearly precluded the FDA from asserting jurisdiction to regulate tobacco products"[69] with something like the following: "Given two possible readings of the statute, we follow the narrower reading as more consistent with the structure of the Act and because we presume that Congress would have spoken more clearly before delegating such an important question to an agency." Whether such an approach is consistent with textualism and is otherwise defensible is taken up in Part II. For present purposes, it is enough to see that this explanation is a plausible account of the Court's decisionmaking.

2. MCI

Although *MCI* was also decided under the *Chevron* framework, a similar account might also explain the Court's decision.[70] Section 203(a) of the Communications Act of 1934, the tariff-filing provision, required that "[e]very common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges . . . ."[71] Section 203(b)(2) then provided that the Commission "may, in its discretion and for good cause shown,

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[66] Manning, *supra* note __, at 242 ("Despite the Court's apparent refusal to enforce the nondelegation doctrine directly, cases such as *Brown & Williamson* illustrate the Court's modern strategy of using the canon of avoidance to promote nondelegation interests.").

[67] Moncrieff, *supra* note __, at 617.

[68] Id. at 607.

[69] *Brown & Williamson*, 529 U.S. at 126 (majority opinion).

[70] The following paragraphs are borrowed from Wurman, *As-Applied Nondelegation*, *supra* note __, at 988-89.

[71] *Id.* at 224 (quoting 47 U.S.C. § 203(a)).

modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions . . . ."[72]

At issue was a series of rules promulgated under the authority of section 203(b)(2) exempting all nondominant carriers—everyone but AT&T—from the tariff-filing requirement of section 203(a).[73] The majority held that the requirement to file rates was the "centerpiece of the Act's regulatory scheme,"[74] and that the FCC could not alter this centerpiece under its authority to "modify" requirements. The Court held that the word "modify," similar to other words with the root *mod* like "moderate," "modest," or "modicum," "has a connotation of increment or limitation," that is, to change "moderately or in minor fashion."[75] Because the FCC's regulation went "beyond the meaning that the statute can bear," it was not entitled to *Chevron* deference.[76] Thus, on the surface, this was a *Chevron* step one case. As in *Brown & Williamson*, the Court then noted that "[i]t is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to 'modify' rate-filing requirements."[77]

The dissent complicated the picture. It first noted that the purpose of the Act was to give the FCC "unusually broad discretion to meet new and unanticipated problems in order to fulfill its sweeping mandate 'to make available, so far as possible, to all the people of the United States, a rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges.'"[78] In light of this purpose "to constrain monopoly power, the Commission's decision to exempt nondominant carriers is a rational and 'measured' adjustment to novel circumstances . . . ."[79] More still, the word "modify" includes the meaning "to limit or reduce in extent or degree," and the

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[72] *Id.* (quoting 47 U.S.C. § 203(b)(2)).

[73] *Id.* at 221–23 (citing Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, First Report and Order, 85 F.C.C.2d 1 (1980); Second Report and Order, 91 F.C.C.2d 59 (1982); Fourth Report and Order, 95 F.C.C.2d 554 (1983); Fifth Report and Order, 98 F.C.C.2d 1191 (1984)).

[74] *Id.* at 220.

[75] *Id.* at 225.

[76] *Id.* at 229.

[77] *Id.* at 231.

[78] *Id.* at 235 (Stevens, J., dissenting) (quoting 47 U.S.C. § 151).

[79] *Id.* at 241; *see also id.* at 225 (majority opinion) (tracing the root *mod* to the Latin for "measure").

"permissive detariffing policy fits comfortably within this common understanding of the term."[80]

At minimum, it appears that the statute was not as clear as the majority suggested, and the ambiguity should have triggered *Chevron* deference. It is possible that the majority sought to vindicate nondelegation values through the *Chevron* framework but could not do so in a rigorous and coherent way.[81] But another plausible explanation is that the Court did not really mean it what it said when it held that the agency's interpretation was "beyond the meaning that the statute can bear." Most reasonable interpreters would conclude that the statute could in fact "bear" either meaning; the majority's point seemed instead to be that the best reading of the statute, using all the tools of statutory construction, precluded the agency's interpretation. The Court would not presume that Congress intended the more drastic of two possible meanings.

The observations of other scholars support this interpretation of the Court's cases. Daniel Deacon and Leah Litman explain that "[o]ne method of constraining *Chevron* is by embracing a kind of interpretive hegemony—the Court insists that, when deployed properly, the Court's methods of statutory interpretation resolve statutory ambiguity and that a statutory provision has a single meaning," and thus "the Court simply declines to conclude that the statute is ambiguous . . . and resolves the interpretive question itself."[82] "Taken at face value," Deacon and Litman argue, "there's nothing particularly odd about courts finding statutes to be unambiguous—it's a possibility whenever the *Chevron* framework is deployed. What's more striking is the frequency with which the Supreme Court in particular has found statutes to have only a single, unambiguous meaning in recent terms."[83] That is indeed striking. A more plausible explanation is that the Justices do not think the statutes are unambiguous, but rather are convinced that they can readily discern their best readings despite ambiguity, which they cannot acknowledge because doing so would be inconsistent with the existing framework.

3. UARG

The Court's decision in *UARG v. EPA*[84] fits this account as well. In that decision, the Court deployed major questions at the second step of the *Chevron*

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[80] *Id.* at 242 (Stevens, J., dissenting).

[81] Again, as I once argued. Wurman, supra, at __.

[82] Deacon and Litman, at 8.

[83] Id. at 9.

[84] 573 U.S. 302 (2014).

framework. After the Court's decision in *Massachusetts v. EPA* concluded that greenhouse gasses were "air pollutants" for purposes of the Clean Air Act,[85] the question in *UARG* was whether any time the statute used the term "air pollutant" it compelled the inclusion of greenhouse gasses. The ramifications were highly consequential. "Because greenhouse-gas emissions tend to be 'orders of magnitude greater' than emissions of conventional pollutants," the Court explained, "EPA projected that numerous small sources not previously regulated under the Act would be swept into the" relevant regulatory programs, "including 'smaller industrial sources,' 'large office and residential buildings, hotels, large retail establishments, and similar facilities.'"[86] EPA itself "warned that this would constitute an 'unprecedented expansion of EPA authority that would have a profound effect on virtually every sector of the economy and touch every household in the land,' yet still be 'relatively ineffective at reducing greenhouse gas concentrations.'"[87] EPA thus argued that although it was "compelled" to include greenhouse gasses within the relevant regulatory framework, it could "tailor" that framework to exclude smaller sources even though such sources would otherwise appear to come within the statute because of their emissions volume.[88]

The Court applied the *Chevron* framework and readily acknowledged at step one that the statute was ambiguous as to whether greenhouse gasses had to be included every time the statute said "air pollution."[89] This makes good sense because the statute itself seems literally to reach greenhouse gasses (at least after the Court's *Massachusetts* decision), but even the EPA thought it had to limit the reach of the relevant statutory provisions in this context. According to the majority, the agency thus had "authority to exclude greenhouse gases from the class of regulable air pollutants under other parts of the Act where their inclusion would be inconsistent with the statutory scheme," despite the "sweeping" and "capacious" interpretation of the act-wide definition of the term.[90]

Because the Court frankly admitted the statutory ambiguity, it proceeded to address whether the agency's interpretation—that it *could* nevertheless regulate greenhouse gasses and tailor the Clean Air Act's emission thresholds accordingly, even if they were not compelled to do so—was a reasonable construction of the

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[85] 549 U.S. 497 (2007).
[86] *UARG*, 573 U.S. at 310 (quoting 73 Fed. Reg. 44498-99 (2008)).
[87] Id. at 310-11 (quoting 73 Fed. Reg. at 44355).
[88] Id. at 312.
[89] Id. at 317-20.
[90] Id. at 319.

statute.[91] The Court concluded it was not. "EPA itself has repeatedly acknowledged that applying" the traditional regulatory requirements "to greenhouse gases would be inconsistent with—in fact, would overthrow—the Act's structure and design"—which is why EPA needed to "tailor" the regulations to lower emissions thresholds.[92] It was at this juncture that the Court introduced an element of "major questions" analysis: "EPA's interpretation is also unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization."[93] "When an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' we typically greet its announcement with a measure of skepticism," the Court added.[94] "We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance,'" and the "power" the EPA asserted "falls comfortably within the class of authorizations that we have been reluctant to read into ambiguous statutory text."[95] Thus the agency was "laying claim to extravagant statutory power over the national economy while at the same time strenuously asserting that the authority claimed would render the statute 'unrecognizable to the Congress that designed' it."[96]

This holding is hard to justify within the *Chevron* framework. The Court effectively held that the statute was ambiguous as to the inclusion of greenhouse gasses in the several places that the term "air pollutant" appears, and that the agency's inclusion of them in this particular regulatory program was unreasonable. That is tantamount to holding that the statute clearly precludes the inclusion of greenhouse gasses in this particular program. To that extent, the statute is therefore not ambiguous at all. True, the Court could be answering two different questions at the two different steps: in the first step, whether the statute is ambiguous in the abstract; in the second, whether it is ambiguous as to the question at issue. But to say that the agency's interpretation is not "reasonable" even on this understanding of the framework is no different than saying the statute "clearly" precludes that interpretation. There is no middle ground. The Court effectively held that there was only one statutory meaning: inclusion of greenhouse gasses was not compelled, it was moreover unreasonable to include them, and including them was therefore

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[91] Id. at 321-24.
[92] Id. at 321, 325-28.
[93] Id. at 324.
[94] Id. (quoting *Brown & Williamson,* 529 U.S. at 159).
[95] Id.
[96] Id.

precluded. The Court asserted ambiguity, while the logical conclusion of its holding is that the statute was not ambiguous.

The present reconstruction can potentially account for *UARG*, too. The Court was almost certainly resolving ambiguity as a matter of the statute's best meaning. "The power" that EPA asserted "falls comfortably within the class of authorizations *that we have been reluctant to read into ambiguous statutory text*," the majority held.[97] The statute therefore did not clearly preclude the regulation at issue. The regulation was not unreasonable. It was just wrong as a matter of the statute's best meaning. The very acknowledgment of ambiguity here should have led the Court to defer, but the Court instead resolved the ambiguity and arrived at the best meaning of the statutory text.

B. Chevron Step Zero

The previous section showed that the major questions cases in which the doctrine was deployed at one of *Chevron*'s two steps are not defensible on the terms the Court decided them because the statutes in all three cases were ambiguous as to the regulation at issue, while the framework forced the Court falsely to declare clarity. *King v. Burwell*[98] presented a different version of the major questions doctrine, one in which the Court did not deploy the *Chevron* framework at all because a major question was involved. This was a "step zero" case.

King involved the Affordable Care Act of 2009 and its healthcare exchanges, and specifically whether the statutory term "Exchange established by the State" included an exchange established by the federal government. The law permitted individuals who were required to purchase health insurance to receive important tax credits, but only when purchasing from an exchange "established by the State."[99] That raised the question what was to happen when a state refused to establish an exchange and the federal government established one in its stead. If persons enrolling in such exchanges were not eligible for tax credits, the cost of their insurance would go dramatically higher and, indeed, some individuals would thereby be permitted to forgo what was otherwise intended to be a mandatory health insurance program.[100]

The Internal Revenue Service concluded that a federal exchange qualified

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[97] Id. at 324 (emphasis added).
[98] 576 U.S. 473 (2015).
[99] Id. at 483.
[100] Id. at 482.

as one "established by the State" for purposes of the Act.[101] Instead of deploying the *Chevron* framework and asking whether the agency's interpretation was a reasonable interpretation of an ambiguous statute, the Court cited to the dictum in *Brown & Williamson* that "[i]n extraordinary cases . . . there may be reason to hesitate before concluding that Congress has intended . . . an implicit delegation" to the agency to resolve statutory ambiguities.[102] That dictum does appear to make major questions a "step zero" matter, though the Court in *Brown & Williamson* used the doctrine as part of its step one analysis. In *Burwell*, the Court takes the step zero approach: because the exchange tax credits posed "a question of deep 'economic and political significance' that is central to this statutory scheme," Chief Justice Roberts concluded, "had Congress wished to assign that question to an agency, it surely would have done so expressly."[103] Thus, "[i]t is instead our task to determine the correct reading of" the statute.[104]

The Court concluded that although the literal meaning of "established by the State" would preclude federal exchanges, "the Act clearly contemplates that there will be qualified individuals on every Exchange," and therefore "the Act may not always use the phrase 'established by the State' in its most natural sense."[105] The phrase was therefore "ambiguous,"[106] a conclusion "supported by several provisions that assume tax credits will be available on both State and Federal Exchanges."[107] Because the phrase was ambiguous, the Court "turn[ed] to the broader structure of the Act to determine"[108] its meaning and concluded that the term included exchanges established by the federal government.[109]

In an important respect, this version of the major questions doctrine may be different than the version previously described. Deacon and Litman write that "[t]he major questions doctrine did not factor into the Court's own, independent analysis."[110] That is only partly true. There is a way to read *Burwell* consistently with *MCI*, *Brown & Williamson*, and *UARG*. In each case—at least at the point where the major questions doctrine was deployed—the agency had claimed that the

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[101] Id. at 483.
[102] Id. at 485 (quoting *Brown & Williamson*, 529 U.S. at 159).
[103] Id. at 486 (citation omitted).
[104] Id.
[105] Id. at 488.
[106] Id. at 490.
[107] Id.
[108] Id. at 492.
[109] Id. at 498.
[110] Deacon & Litman, *supra* note __, at 11.

statute gave it authority and discretion to make, or not to make, regulations touching major questions of political and economic significance. The Court could not believe that if the statute were ambiguous on the point, Congress could have intended to let the agency choose whether or not, and how, to answer such major questions. Similarly, in *Burwell*, the Court could not imagine that Congress, without being clearer about the matter, would have left this question *to the agency*. It is likely to have answered the question itself.

Thus, just like in *MCI*, *Brown & Williamson*, and *UARG*—at least on the reconstructed account—the Court in *Burwell* made a conclusion about the statute's best meaning. In this case, the Court agreed with the agency on the ultimate policy, although not on the question whether the agency had discretion to adopt its reading or some other reading.

From one perspective, the decision in *Burwell* may not be particularly defensible. If the Court is to decide the statute's best meaning only when questions of major political or economic significance are at stake, then it looks like the Court may be deciding for itself such major questions even in the absence of clarity from Congress. As Deacon and Litman put it, "The Court [in *Burwell*] authorized the expenditure of the very same billions of dollars in expenditures that had been the grounds for denying the agency deference."[111] And Blake Emerson has written that this version of the doctrine "authorizes judicial policymaking on precisely those [politically salient] issues that have the highest visibility for the American public" and "therefore licenses judicial intervention in intensely political disputes."[112]

On the reconstructed account, however, the decision is defensible and in line with the prior cases. The Court in *Burwell* admitted that the statute was ambiguous, and its discussion of the major questions doctrine could be seen as eliminating one potential reading of the statute, one in which it leaves the matter to agency discretion. The statute's best reading might then either preclude entirely the agency's interpretation (as in the prior major questions cases) or compel that reading. *Burwell* seems strange because it was the first and only such case to conclude that the agency's interpretation was in fact compelled. But in its form, the exercise of judicial review was consistent with prior cases.

Burwell is important for another reason. Both that case and *MCI* suggest that an interpretive rule involving importance need not always be in the direction

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[111] Id.

[112] Blake Emerson, *Administrative Answers to Major Questions*, 102 Minn. L. Rev. 2019, 2023-24 (2018).

of deregulation. And it suggests that Congress need not always make an *unambiguous* statement that it intends a major policy consequence, so long as the structure of the legislation and other interpretive clues point in that direction. What both *King* and *MCI* suggest is that when it comes to a major question, Congress is likely to have answered the question—either by refusing to act, or by acting. In its weakest form, then, the doctrine maintains that Congress is unlikely to have delegated the answer to that question to an agency. In its slightly stronger form, Congress is also unlikely to have answered such a question for itself without being clearer.

C. Constitutional Avoidance

It is possible that in some of the above cases, the Court was using the doctrine as a canon of constitutional avoidance. Modern constitutional avoidance allows courts to narrow what otherwise would be a statute's best reading, if doing so would avoid a "serious doubt" about the statute's constitutionality.[113] Lisa Heinzerling explains that "one way to interpret the [major questions] canon[] is as applications of an exceedingly strong version of the constitutional avoidance doctrine, one that would permit judicial amendment of statutes even in the absence of an articulation of the constitutional problem the judicial adjustments are designed to avoid."[114] Constitutional avoidance is a dubious doctrine; it appears to allow courts to rewrite a statute without concluding that the statute as written would in fact violate the Constitution. John Manning argues that the Court in the major questions cases is deploying something like avoidance and concludes that narrowing a statute despite the textual permissibility of the agency's interpretation "threatens to unsettle the legislative choice implicit in adopting a broadly worded statute."[115] Heinzerling agrees: "Viewing the power [including major questions] canons as applications of a problematic variant of the doctrine of constitutional avoidance—itself a problematic interpretive canon—does not redeem them."[116]

To be clear, the Court gave no indication in the previous cases that it was using constitutional avoidance. There is some indication, however, that constitutional avoidance was at issue in *Industrial Union Department v. American*

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[113] *See* sources cited in note __ *supra*.

[114] Lisa Heinzerling, *The Power Canons*, 58 Will. & Mary L. Rev. 1933, 1939 (2017).

[115] Manning, *supra* at 228; *see also id.* at 247–57 (arguing that employing the nondelegation doctrine as an avoidance canon undermines legislative supremacy and contradicts the Court's turn toward textualism).

[116] Heinzerling, *supra* note __, at 1939.

Petroleum Institute,[117] also known as the "Benzene Case." In the *Benzene Case*,[118] the Occupational Safety and Health Act of 1970 authorized the Secretary of Labor to promulgate occupational safety and health standards, which the statute in Section 3(8) defined as requiring "conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment."[119] The statute provided a further instruction for regulations involving toxic materials in Section 6(b)(5); for such materials, the Secretary had to "set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life."[120]

Pursuant to this statute, the Secretary promulgated a rule setting the exposure limit for the chemical benzene, a carcinogen, at one part per million parts of air (1 ppm). The best available data, however, showed that benzene created health risks at levels well above 10 ppm; the Court explained that the evidence of adverse effects at an exposure level of 1 ppm was "sketchy at best."[121] Nevertheless, the Secretary had concluded that because "no safe exposure level can be determined,"[122] the exposure limit for benzene had to be set "at the lowest technologically feasible level that will not impair the viability of the industries regulated."[123] The government argued that Section 3(8), aside from a minimum requirement of rationality, imposed no limit on the agency's authority; the agency therefore looked only to Section 6(b)(5), which seemed to allow it to set exposure limits to the lowest possible levels to ensure that "no employee will suffer material impairment of health or functional capacity."[124]

The Supreme Court rejected the government's contention, and held "that § 3(8) requires the Secretary to find, as a threshold matter, that the toxic substance in question poses a *significant* health risk in the workplace."[125] The Court added,

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[117] 448 U.S. 607 (1980).

[118] The next few sentences are borrowed from WURMAN, ADMINISTRATIVE LAW THEORY AND FUNDAMENTALS, *supra* note __, at 553.

[119] *Benzene Case*, 448 U.S. at 612 (quoting 29 U.S.C. § 652(8)).

[120] *Id.* (quoting 29 U.S.C. § 655(b)(5)).

[121] Id. 631.

[122] Id. at 613.

[123] Id. at 641.

[124] Id.

[125] Id. at 615 (emphasis added).

"If the Government was correct in arguing that neither § 3(8) nor § 6(b)(5) requires that the risk from a toxic substance be quantified sufficiently to enable the Secretary to characterize it as significant in an understandable way, the statute would make such a 'sweeping delegation of legislative power' that it might be unconstitutional under the Court's reasoning" in its two nondelegation cases in which the Court had invalidated statutory provisions.[126] "A construction of the statute that avoids this kind of open-ended grant should certainly be favored."[127] Justice Rehnquist would have held outright that the statute violated the nondelegation doctrine because the feasibility standard was a "mirage."[128]

Using nondelegation as a canon of avoidance in this manner is not particularly defensible. As noted, it effectively allows the Court to rewrite the statute—avoiding what appears to be its best meaning—without having to decide that the statute as written in fact violates the Constitution. The Court in *Benzene* does not actually tell us whether or why the Occupational Safety and Health Act would violate the nondelegation doctrine. The Court merely announced that it "might" be unconstitutional.

Yet there is another part of the case that is more defensible, and more in line with the reconstruction of the other cases. Although Section 6(b) did seem quite sweeping, it required the promulgations of "standards." And Section 3(8) defined standards as "reasonably necessary or appropriate to provide *safe* or healthful employment and places of employment."[129] Thus, the standards had to be geared to providing a safe workplace, and the statute does not define what is "safe." The Court thus argued that "'safe' is not the equivalent of 'risk-free'" because "[t]here are many activities that we engage in every day—such as driving a car or even breathing city air—that entail some risk of accident or material health impairment; nevertheless, few people would consider these activities 'unsafe.'"[130] "Similarly," the Court concluded, "a workplace can hardly be considered 'unsafe' unless it threatens the workers with a significant risk of harm."[131] The Court then engaged in additional statutory interpretation before adding: "In the absence of a clear mandate in the Act, it is unreasonable to assume that Congress intended to give the Secretary the unprecedented power over American industry that would result from

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[126] Id. at 646 (citing *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); and *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935)).

[127] Id.

[128] Id. at 681 (Rehnquist, J., concurring).

[129] 29 U.S.C. § 652(8) (emphasis added).

[130] 448 U.S. at 642.

[131] Id.

the Government's view of §§ 3(8) and 6(b)(5), coupled with OSHA's cancer policy."[132]

Here it appears that the Court is not demanding a clear statement above and beyond what would otherwise be the statute's unambiguous reading. The Court had already identified a textual ambiguity in the word "safe." Because that word could plausibly bear the meaning the agency ascribed to it or the meaning the Court did, the question became which of the two was more consistent with Congress's likely intent. Absent some other indications to the contrary, it is generally unreasonable to interpret statutory ambiguities as effecting sweeping delegations to agencies. Because *Benzene* was decided before *Chevron*, the Court did not have to pretend that its interpretation of the statute was clear and unambiguous. The Court was merely trying to ascertain the statute's best reading.

D. Clear Statement?

Until the October 2021 term, every single major questions case was arguably decided on some indefensible basis—on the ground that the statute was clear and unambiguous when it in fact was not, that courts themselves should resolve major questions, or that courts can rewrite statutes if they merely have a doubt as to the statute's constitutionality. But it was also possible to explain them on other grounds: that in each, the statute was plausibly ambiguous, and in light of that ambiguity it was reasonable to presume that Congress had not intended to leave unresolved questions of major political and economic significance to agencies.

In the October 2021 term, the Supreme Court decided new major questions cases, some of which have been interpreted to create a "clear statement rule."[133] Before analyzing the cases to assess this descriptive account, it is necessary to be clear about just what a clear statement rule is. A clear statement rule, at least one of the kind at issue here, is a requirement for Congress to be not only unambiguous, but also specific, when it seeks to accomplish an objective in tension with background constitutional values. And Congress could accomplish that objective if it really wanted to do so—the Court merely requires that Congress show that it thought carefully and specifically about the constitutional values that were at stake. In other words, the statute's best reading is not enough; nor is an unambiguous statute.

1. Examples

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[132] Id. at 645.

[133] Deacon & Litman, *supra* note __, at 1, 3; Sohoni, *supra* note __, at *passim*.

A good example of a clear statement rule at work in administrative law is *Franklin v. Massachusetts*,[134] which dealt with how the President and the administration allocated overseas federal employees in the decennial census. Because the Court concluded the President's discretion was necessary at the final step of the allocation decision, the Court had to determine whether it could review the President's exercise of that discretion under the Administrative Procedure Act's abuse of discretion standard.[135] The APA's "best reading" unquestionably—unambiguously—includes the President within the definition of a covered "agency." Agency is defined as "each authority of the Government of the United States . . . but does not include—(A) the Congress; (B) the courts of the United States; (C) the governments of the territories or possessions of the United States; (D) the government of the District of Columbia."[136] Thus, the plain, ordinary meaning of "authority" would cover the President, and more still the President is not included in the list of exclusions.

That was not enough, however: "The President is not explicitly excluded from the APA's purview, but he is not explicitly included, either. Out of respect for the separation of powers and the unique constitutional position of the President," the Court held, "we find that textual silence is not enough to subject the President to the provisions of the APA. We would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion."[137] Here we see a few elements of how a clear statement rule works. The statute was unambiguous, but it did not specifically address the question at issue. The Court never stated that it would be unconstitutional to make a president's actions reviewable for abuse of discretion, or that it had doubts as to the constitutionality of doing so.[138] At issue was merely a constitutional value (the separation of powers), "out of respect for" which the Court would insist on a clear and express—that is, specific—statement.

Another example is the clear statement requirement for abrogating sovereign immunity. Here, too, Congress's power to so abrogate (under the Fourteenth Amendment) is not in question. But because sovereign immunity is such an important attribute of sovereignty, it is not enough for the best reading of statute

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[134] 505 U.S. 788 (1992),

[135] Id. at 800-01.

[136] Id. at 800 (quoting 5 U.S.C. § 551(1)).

[137] Id. at 800-01.

[138] Though there are some reasons to doubt such a law would be constitutional. Authorizing the judiciary to review the discretionary actions of the President for mere abuse of discretion starts to look like empowering the judiciary to exercise executive power.

to require that abrogation. Congress has to be not only unambiguous, but also specific. "The requirement of a clear statement in the text of the statute ensures that Congress has *specifically* considered state sovereign immunity and has intentionally legislated on the matter. . . . Without such a clear statement from Congress and notice to the States, federal courts may not step in and abrogate state sovereign immunity," the Court has explained.[139]

Another is the "internal affairs" clear statement rule that requires a "clear statement of congressional intent . . . before a general statutory requirement can interfere with matters that concern a foreign-flag vessel's internal affairs and operations."[140] The key here is that the statutes are otherwise unambiguous: "The internal affairs clear statement rule is an implied limitation on otherwise unambiguous general terms of the statute."[141] Such rules "avoid applications of otherwise unambiguous statutes that would intrude on sensitive domains in a way that Congress is unlikely to have intended had it considered the matter."[142] "These clear statement rules ensure Congress does not, by broad or general language, legislate on a sensitive topic inadvertently or without due deliberation."[143] As explained by a dissenting Justice in another case, "[c]lear-statement rules operate less to reveal *actual* congressional intent than to shield important values from an *insufficiently strong* legislative intent to displace them."[144]

Clear statement rules are potentially problematic in the abstract because once again they require courts to go against the best reading of a statute.[145] But even if clear statement rules were otherwise valid, major questions would not be a particularly good fit. That is because even if Congress were clear, it is not at all obvious that its laws would be constitutional. That is the whole nondelegation

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[139] Sossamon v. Texas, 563 U.S. 277, 290-91 (2011).

[140] Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119, 125 (2005).

[141] Id. at 139.

[142] Id.

[143] Id.

[144] EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 262 (1991) (Marshall, J., dissenting). To be sure, there are clear statement rules that seem to require unambiguous but not necessarily specific statement. *See, e.g.*, Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981) ("[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously."). In such cases, however, it could be that the Court would have required a specific statement, too, but did not reach the question because there was already ambiguity in the statute. Regardless, clear statement rules are but one type of substantive canon, and ambiguity might trigger other, less strict substantive canons.

[145] *See, e.g.*, Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 109-10 (2010).

question—a question the Court has refused to address. We simply don't know what major questions has to do with nondelegation. It likely has some relevance,[146] but it's not entirely clear.

This is a formalist criticism; the functionalist and progressive critique of the clear statement rule has less force. Scholars like Deacon and Litman point out that under the modern nondelegation doctrine, there is no question that Congress's statutes would pass constitutional muster.[147] Yet that is beside the point for clear statement rules, which presume that Congress can take the action so long as it speaks clearly. Even though Congress can abrogate sovereign immunity, there is still a constitutional value at stake. Here, similarly, Congress can delegate, but there is nevertheless a value at stake that the clear statement rule enforces. Thus, the clear statement version of major questions is not particularly defensible on formalist grounds, but it is no objection to say that Congress's law would be constitutional under the modern nondelegation doctrine.

2. OT 2021

It remains to be seen whether the Supreme Court adopted a clear statement rule in its major questions "quartet"[148] the previous term. In the Court's first case, *Alabama Association of Realtors v. Department of Health and Human Services*,[149] the Court did not do so. At issue was whether the Public Health Service Act authorized the CDC to impose a nationwide eviction moratorium during the COVID-19 pandemic. The Act authorized the Surgeon General "to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession."[150] Immediately following this provision the Act provided: "For purposes of carrying out and enforcing such regulations, the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings,

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[146] *See, e.g.*, Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42-43 (1825) (suggesting that Congress much decide on "important subjects," but not drawing the line between those and lesser subjects).

[147] Deacon & Litman, *supra* note __, at 28.

[148] Sohoni, *supra* note __ (describing OT 2021's "quartet" of cases).

[149] 141 S.Ct. 2485 (2021).

[150] Id. at 2487 (quoting 42 U.S.C. § 264(a)).

and other measures, as in his judgment may be necessary."[151]

The first sentence is a broad grant of authority that arguably, at least, reaches the eviction moratorium unambiguously because such a moratorium was in the Surgeon General's judgment "necessary to prevent the . . . spread of" a communicable disease "from one State or possession into" another. On the other hand, the second sentence refers to a set of illustrative authorities, none of which is relevant to a moratorium and all of which relate to "identifying, isolating, and destroying the disease itself."[152] At a minimum, it is plausible to believe that this second sentence creates ambiguity as to Congress's intended meaning and how the receiving public and executive officers would have understood this grant of authority when written. The Court took a stronger stance and appeared to conclude that the statute unambiguously precluded this kind of assertion of authority.[153]

It was only then that the Court brought up the major-questions doctrine. "Even if the text were ambiguous," the Court held, "the sheer scope of the CDC's claimed authority under §361(a) would counsel against the Government's interpretation. We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance. That is exactly the kind of power that the CDC claims here."[154] One might quibble with the threshold conclusions that the statute unambiguously supported the majority's reading, or the alternative possibility that it was ambiguous. The important point is that the Court deployed the major questions doctrine only on the assumption that the statute was ambiguous and as a way of resolving that ambiguity.

Next was another COVID-19 case, *NFIB v. OSHA*,[155] involving OSHA's vaccine-or-test mandate for employers with at least one hundred employees. Here, for the first time, the Court used major questions to frame the entire interpretive enterprise: "This is no 'everyday exercise of federal power.' It is instead a significant encroachment into the lives—and health—of a vast number of employees," the Court began. "'We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance.' There can be little doubt that OSHA's mandate qualifies as an exercise of such authority. The question, then, is whether the Act plainly authorizes

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[151] Id. (quoting 42 U.S.C. § 264(a)).

[152] Id. at 2488.

[153] Id. at 2489 ("Even if the text were ambiguous . . . .").

[154] Id. (quotation marks omitted; quoting UARG v. EPA, 573 U.S. 302, 324 (2014), and FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000)).

[155] 142 S.Ct. 661 (2022).

the Secretary's mandate."[156] Although the Court for the first time begins with major questions, its holding is arguably consistent with the prior cases. The Court does not seek a clear statement in the sense of a clear statement rule (specific as well as unambiguous), but rather merely a "plain[]" statement. In other words, the Court simply wants the statute to be unambiguous. Clear statement canons apply even if the statute is unambiguous.

The Court's analysis then suggests that it did not believe the statute was unambiguous or that it "plainly" conveyed the relevant authority. That is because the Act authorized OSHA to make only "*occupational* safety and health standards."[157] Just as in *The Benzene Case*, where the word "safe" in the Act was not self-defining, neither is the word "occupational." "Although COVID–19 is a risk that occurs in many workplaces, it is not an *occupational* hazard in most," the Court argued (supplying the emphasis). "COVID–19 can and does spread at home, in schools, during sporting events, and everywhere else that people gather. That kind of universal risk is no different from the day-to-day dangers that all face from crime, air pollution, or any number of communicable diseases."[158] The Court elaborated that "OSHA could regulate researchers who work with the COVID–19 virus" and "regulate risks associated with working in particularly crowded or cramped environments" because then those hazards would be occupational, i.e., have some kind of special connection to the workplace and type of work.[159]

Once again, one might disagree with the premise that the statute was in fact ambiguous, but there's little doubt that the Court deployed major questions only as a tool for resolving what the majority otherwise already believed to be statutory language that was at best ambiguous. Arguably, then, it begs the question to say as some scholars have that the Court's analysis in this case is "atextual."[160] Opponents of the Court's decision might think the Court's reasoning was unpersuasive, but for present purposes what the Court said is more important, and by that criterion the doctrine only applies to resolve statutory ambiguities. True, the canon might still be a substantive one that ambiguity triggers, like the rule of lenity, and that is not as demanding of the text as is a clear statement rule. That may or may not be defensible as a matter of textualism, but the present point is that not all substantive canons are clear statement rules in the sense of requiring unambiguous and specific

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[156] Id. at 665.

[157] Id. (quoting 29 U.S.C. § 655(b)) (emphasis in original).

[158] Id.

[159] Id. at 666.

[160] Anita Krishnakumar, Some Brief Thoughts on Gorsuch's Opinion in NFIB v. OSHA, Election L. Blog (Jan. 15, 2022), https://electionlawblog.org/?p=126944

language.

Justice Gorsuch's concurrence, which Justices Thomas and Alito joined, can be read mostly consistently with the majority's opinion. "The major questions doctrine serves a similar function" to the nondelegation doctrine "by guarding against *unintentional*, oblique, or otherwise *unlikely* delegations of the legislative power."[161] "Sometimes, Congress passes broadly worded statutes" and an agency subsequently "seek[s] to exploit some gap, ambiguity, or doubtful expression in Congress's statutes to assume responsibilities far beyond its initial assignment."[162] "The major questions doctrine," Gorsuch explains, "guards against this possibility by recognizing that Congress does not usually 'hide elephants in mouseholes.'"[163]

True, these Justices connect the canon to nondelegation concerns, which suggests that it is a substantive canon. But the paragraph is also consistent with the idea that major questions is merely a tool for resolving statutory ambiguities. This is nothing like a traditional clear statement rule. It was only after this analysis that Justice Gorsuch added off-handedly a constitutional avoidance argument: "[I]f the statutory subsection the agency cites really did endow OSHA with the power it asserts, that law would likely constitute an unconstitutional delegation of legislative authority."[164]

Next comes *Biden v. Missouri*, in which Chief Justice Roberts and Justice Kavanaugh joined the three more liberal Justices to conclude that the statute authorized the Centers for Medicare and Medicaid Services (CMS) to impose a vaccine mandate on staff at hospitals participating in the Medicare or Medicaid programs.[165] The statutory authority granted the Secretary to impose conditions on hospitals that "the Secretary finds necessary in the interest of the health and safety of individuals who are furnished services."[166] The Court explained that "[t]he rule thus fits neatly within the language of the statute."[167] In other words, the mandate seemed to fall within the plain, unambiguous statutory language. And the Secretary

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[161] Id. at 669 (Gorsuch, J., concurring) (emphasis added).

[162] Id.

[163] Id.; *see also* Randolph J. May & Andrew K. Magloughlin, NFIB v. OSHA*: A Unified Separation of Powers Doctrine and* Chevron*'s No Show*, 74 S. Carolina L. Rev. 265, 271 (2022) (understanding this case as guarding against executive abuse of its legislative authorization).

[164] 142 S.Ct. at 669 (Gorsuch, J., concurring).

[165] 142 S.Ct. 647 (2022).

[166] Id. at 652 (quoting 42 U.S.C. § 1395x(e)(9)).

[167] Id.

had exercised similar authorities in the past.[168]

The four dissenters disagreed and used the major-questions canon.[169] But before doing so, they concluded that the statute was ambiguous. That is because the provision the majority quoted reads more fully that hospitals must meet "*such other* requirements as the Secretary finds necessary in the interest of the health and safety of individuals who are furnished services."[170] And where "a more general term follows more specific terms in a list, the general term is usually understood to embrace only objects similar in nature to those objects enumerated by the preceding specific words."[171] In this statute, the preceding requirements were merely "administrative requirements" such as "provid[ing] 24-hour nursing service" and "maintain[ing] clinical records on all patients," from which a vaccine mandate is different in kind.[172] "Finally," the dissenters added after a bit more analysis, "[i]f Congress had wanted to grant CMS authority to impose a nationwide vaccine mandate, and consequently alter the state-federal balance, it would have said so clearly."[173] Here, to be sure, it is possible to interpret the dissenters as requiring a clear and specific statement, but it is also possible to interpret them as requiring merely a plain, unambiguous grant of authority.

That brings us, finally, to *West Virginia v. EPA*,[174] in which the Court elaborated upon the major questions doctrine most thoroughly and in which a majority of the Court for the first time used that term. The Court summarized the various prior cases (discussed above), and explained as follows:

> All of these regulatory assertions had a colorable textual basis. And yet, in each case, given the various circumstances, "common sense as to the manner in which Congress [would have been] likely to delegate" such power to the agency at issue made it very unlikely that Congress had actually done so. Extraordinary grants of regulatory authority are rarely accomplished through "modest words," "vague terms," or "subtle device[s]." Nor does Congress typically use oblique or elliptical language to empower an agency to make a "radical or fundamental change" to a statutory

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[168] Id. at 652-53.
[169] Id. at 658 (Thomas, J., dissenting).
[170] Id. (quoting 42 U.S.C. § 1395x(e)(9)) (emphasis in original).
[171] Id. (quoting Epic Systems Corp. v. Lewis, 138 S.Ct. 1612, 1625 (2018)).
[172] Id. (quoting 42 U.S.C. §§ 1395x(e)(2), (3), (5)).
[173] Id.
[174] 142 S.Ct. 2587 (2022).

scheme. . . .

> Thus, in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us "reluctant to read into ambiguous statutory text" the delegation claimed to be lurking there. To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to "clear congressional authorization" for the power it claims.[175]

The Court's analysis has none of the hallmarks of a "clear-and-specific-statement" rule. In each prior case, the assertion of authority had merely a "colorable" basis. The Court harps on "vague," "oblique," and "elliptical" language. The Court explicitly states that in the prior cases, "a merely plausible textual basis" and "ambiguous statutory text" was not enough. This point undermines the most prominent recent criticisms of the Court's major questions cases as creating a new clear-and-specific-statement rule.[176] True, the Chief Justice declared not only that the Court was concerned with a "practical understanding of legislative intent," but also that "separation of powers principles" make the Court reluctant to read ambiguities in a particular way. This suggests a substantive component to the canon. As the next Part explains, that component is unnecessary.

To repeat to the point of ad nauseum, one might disagree with the Court that the statutes were ambiguous. But that is an argument on the lower-order application of the doctrine; it is not an argument against the doctrine itself. Even in *West Virginia*, the question was whether the Clean Air Act's authorization to the EPA to impose a "best system of emission reduction" referred to a "system" within a plant, or the entire nationwide energy "system." The implications of the different readings are significant—one allows the agency to impose specific regulations on individual plants, the other broad authority to make energy policy nationwide on a macro level. No matter what the critics might say, it is plausible to conclude that the word "system" in this regard is ambiguous. It could plausibly refer to either an intra-plant

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[175] Id. at 2609 (citations omitted).

[176] Deacon and Litman assume that the Court, under the "new" major questions doctrine, is rewriting "otherwise unambiguous" statutory language. Deacon & Litman, *supra* note __, at 1, 3, 6, 24, 60. "[T]he core features of the new major questions doctrine resemble a clear statement rule rather than a method of resolving statutory ambiguity in the traditional sense." Id. at 23. Sohoni argues that the "old" major questions doctrine, "the agency had to be able to persuade a court on de novo review that the statute authorized the agency's action." Sohoni, *supra* note __, at 275. But under the "new major questions doctrine, the burden of proof has again shifted," requiring a clear statement. Id.

system, or to an economy-wide system.

The point is, the word "system" did not unambiguously mean one, the other, or either-or, if what we are trying to ascertain is the likely intended meaning of Congress or the meaning as would have been understood by the public at the time. The dissent argued that the majority was deploying a "get-out-of-text-free card[]."[177] And maybe the Court was playing fast and loose with statutory interpretation. (Though, in my view, the majority had the better reading.[178]) If we take the majority's account seriously, however, the majority recognized that the agency's approach was plausible as a matter of "definitional possibilities"[179]—just as, we might say, OSHA's interpretation of "safe" was certainly plausible as a matter of definitional possibilities.[180]

Justice Gorsuch's dissent, joined by Justice Alito, however, may have somewhat muddied the waters. For the first time, these Justices explicitly linked major questions to other clear-statement rules. Under the major questions doctrine, "administrative agencies must be able to point to clear congressional authorization when they claim the power to make decisions of vast economic and political significance. Like many parallel clear-statement rules in our law, this one operates

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[177] 142 S.Ct. at 2641 (Kagan, J., dissenting).

[178] The parallel Hazardous Air Pollutant Program of Section 112 provides:

> Emissions standards … applicable to new or existing sources of hazardous air pollutants shall require the maximum degree of reduction in emissions of the hazardous air pollutants … that the Administrator, taking into consideration [various factors] determines is achievable … through application of measures, processes, methods, **systems** or techniques including, but not limited to, … process changes, substitution of materials or other modifications, enclose systems or processes to eliminate emissions, collect, capture or treat such pollutants when released from a process… design, equipment, work practice, or operational standards.

Here, there is no question that "system" means processes within a plant, since it is simply another way of describing "processes," "methods" and "techniques."

[179] Id. at 2614 (majority opinion).

[180] There is also some serious risk of starting the analysis with the major questions framework, as the Court did for the first time in the vaccine case and here: it risks letting the Court too easily find or expect ambiguity where otherwise it might have found more clarity. *See infra* Part II.C. But in any case, the litigants already identified this potential ambiguity and the whole case depended on it. Perhaps there was much more statutory interpretation the majority could have done. Adler; Kagan dissent. But, purely on the opinion's own terms, little appears different in kind from prior major-questions cases.

to protect foundational constitutional guarantees."[181] They then compared this new, supposed clear-statement rule with the rule against retroactivity and abrogating sovereign immunity.[182] Not only that, but the opinion blends clear-statement rules with constitutional avoidance: "These rules assume that, absent a clear statement otherwise, Congress means for its laws to operate in congruence with the Constitution rather than test its bounds."[183] Yet, as we have seen, constitutional avoidance is different from clear-statement rules, which presume that Congress can take some action so long as it speaks both unambiguously and specifically.[184]

To repeat, if the major questions doctrine is indeed a clear-and-specific-statement rule—as the critics seem to assume, and as Justices Gorsuch and Alito suggest—then it is difficult to defend. That is because it is arguably atextual (like other such rules), it is not clear what the connection between majorness and nondelegation is, and it is not obvious (under formalist accounts) that Congress could act even if it did speak clearly. That is not to say that the doctrine would be impossible to defend. Perhaps the formalist is willing to accept that Congress can in fact delegate this power so long as it does so clearly—as Chief Justice Roberts seems to accept.[185] In which case, certainly some kind of constitutional value is being advanced, namely the idea that as a general matter Congress should be more specific about its laws. But as the doctrine now stands, if it is indeed a clear-statement rule, and even if it might be justifiable, it remains significantly undertheorized and underdeveloped.

E. Summary

Justice Kavanaugh, in two different decisions, has articulated two different versions of the major questions doctrine. As a Justice, in a statement respecting denial of certiorari in *Paul v. United States*,[186] he described it as follows:

> [T]he Court has not adopted a nondelegation principle for major questions. But the Court has applied a closely related statutory

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[181] 142 S.Ct. at 2616 (Gorsuch, J., concurring).

[182] Id. at 2616-17.

[183] Id. at 2616.

[184] Though to be fair to Justices Gorsuch and Alito, they would likely view many of the clear statement rules they discuss as second-best mechanisms for enforcing constitutional values that in an ideal world they'd prefer to see enforced directly.

[185] Id. at 2616 (majority opinion) ("A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body.").

[186] 140 S.Ct. 342 (2019).

> interpretation doctrine: In order for an executive or independent agency to exercise regulatory authority over a major policy question of great economic and political importance, Congress must either: (i) expressly and specifically decide the major policy question itself and delegate to the agency the authority to regulate and enforce; or (ii) expressly and specifically delegate to the agency the authority both to decide the major policy question and to regulate and enforce.[187]

If Kavanaugh's statement is accurate, then the major questions doctrine is indeed a clear-statement rule requiring both an unambiguous, as well as a specific, statement. But as a judge on the D.C. Circuit, Judge Kavanaugh articulated the doctrine differently. "[I]n a narrow class of cases involving major agency rules of great economic and political significance," he argued, "the Supreme Court has articulated a countervailing canon that constrains the Executive and helps to maintain the Constitution's separation of powers."[188] "For an agency to issue a major rule," he explained, "Congress must *clearly* authorize the agency to do so. If a statute only *ambiguously* supplies authority for the major rule, the rule is unlawful."[189]

These are two different doctrines. As this Part has aimed to show, it is possible to understand the Court to be using importance in this context as a rule of thumb for resolving ambiguities. This can be understood as a type of clear statement rule, of course, much like the rule of lenity is something of a clear statement rule, only weaker than those rules that require specificity in addition to clarity. It could thus be defended as a substantive canon of this type, if such substantive canons like the rule of lenity are otherwise defensible. The next Part investigates what if any role importance should have in resolving interpretive questions. It suggests that it is not necessary to defend the weaker, ambiguity-resolving canon as a substantive canon because it can be defended on textualist grounds instead.

II. IMPORTANCE AND TEXTUALIST ANALYSIS

Whether the major questions doctrine is defensible as a matter of textualism depends on its specific use and grounding. The previous Part suggested that the doctrine in its usual formulations is probably not defensible, at least not fully so.

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[187] Id.

[188] United States Telecom Ass'n v. FCC, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc).

[189] Id. (emphasis in original).

The critics, for the most part, have assumed that the cases reflect a clear-and-specific-statement requirement[190] or otherwise characterize the doctrine as a substantive canon[191] and therefore argue it cannot be defended.

This Part takes a different approach. It investigates what, if any, role importance should have in resolving interpretive questions. It suggests that an "importance canon" could be defensible as a type of linguistic canon for resolving ambiguities, the central motivation of which is an intuition about how people and lawmakers use language to delegate authority to others. True, such a canon is unlike other linguistic canons in that it applies in a circumscribed range of substantive contexts involving delegated authorities, whether to other private actors as in contracts or to public officers in the Constitution or in statutes. But it is unlike the substantive canons because it does not depend on any constitutional or traditional value that the courts enforce independently of the meaning of the legal instrument in question. If a substantive canon "purports to speak to a statute's proper legal effect in a way that is not mediated by its evidentiary bearing (if any) on what a reasonable reader would take a lawmaker to have said in enacting the statute,"[192] then an importance canon of the kind this Part will now attempt to defend is not substantive.[193]

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[190] *See, e.g.*, Deacon & Litman, *supra* note __, at 1, 3; David M. Driesen, *Does the Separation of Powers Justify the Major Questions Doctrine?*, working paper, at 17-30; Sohoni, *supra* note __, *passim*.

[191] Deacon & Litman, *supra* note __, at 32-62; Driesen, *supra* note __, at 36-58; Emerson, *supra* note __, *passim*; Heinzerling, *supra* note __, at 1980-2003; Daniel Walters, *supra* note __, *passim*. *See also* Eidelson & Stephenson, *supra* note __, at __ (describing MQD as a substantive canon, and criticizing substantive canons generally) (paper on file with author). To the extent that scholars have criticized the Court on the ground that its major questions canon does not reflect legislative intent, these criticisms have a largely cursory, question-begging feel to them. For example, Heinzerling simply presumes, with little analysis, that the Court's rulings have no basis in the relevant statutes. Heinzerling, *supra* note __, at 1938, 1939. Deacon & Litman assert that the statutes were "otherwise unambiguous." Deacon & Litman, *supra* note __, at 1, 3, 6, 24, 60. And Driesen asserts that the Court is "amending" Congress's laws. Driesen, *supra* note __, at 3. As Part I showed, however, the Court's statutory analyses are plausible. The one exception is Ronald M. Levin, *The Major Questions Doctrine: Unfounded, Unbounded, and Confounded* (paper on file with author), at 32-36, who does grapple with the question of legislative intent. *See* infra nn. __ - __ and accompanying text for additional discussion of Levin's argument.

[192] Eidelson & Stephenson, at 19 (on file with author).

[193] It is, rather, something like what Eidelson and Stephenson hypothesize: "All else equal, a reasonable reader would not take Congress as saying something anomalous through language that it would have known could also be taken as expressing something more routine." Eidelson & Stephenson, at 26. They think this hypothesis is weak because "[w]e see no particular reason to think that 'major' delegations *are* anomalous," and because the "reader must also think that the

One might therefore describe this importance canon as quasi linguistic, but it does not matter much what we label it as long as we understand how it operates. Indeed, Kevin Tobia and Brian Slocum have recently shown that many substantive canons are justified by linguistic intuitions and argue that scholars should recognize a hybrid category, or at least that the dividing line between the two is often thinner than recognized.[194] The major questions canon may be another example of this insight. Additionally, there may be other canons that defy both the linguistic and substantive labels.[195] One example is the contemporaneous and longstanding interpretation canon (*contemporanea expositio* and *interpres consuetudo*) which holds that an interpretation of a legislative enactment—for example, an executive interpretation of a statute, or a congressional interpretation of the Constitution—that is contemporaneous to the enactment and is longstanding is good evidence of what the law is.[196] This canon is not linguistic, having nothing to do with how language works, and is not substantive, having nothing to do with any constitutional or policy value (and it does not ignore the text).

This Part aims to show that narrowly using importance to resolve certain types of statutory ambiguity is compatible with various forms of textualism. Part II.A.1 begins with the critique that Congress intends to delegate important questions, and often legislates with strategic ambiguity. There is no empirical evidence to suggest that Congress legislates on important matters through ambiguity, however; the only available study suggests the opposite. Thus, if textualism requires resolving ambiguities in favor of likely legislative intent, then an importance canon of this kind would likely be consistent with textualism. Part I.A.2 then relies on the work of Ryan Doerfler and suggests that such an importance canon would arguably be consistent with how ordinary speakers use and understand language in certain contexts. Thus, if textualism requires resolving ambiguities in favor of likely public understanding, it may be consistent with textualism in this

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lawmaker *knows* that they—and everyone else whom the lawmaker intends to address—all share this perspective," which they claim is likely false for major questions. Id. at 28-29. The balance of Part II attempts to refute this claim, largely by reframing the issue: whether major delegations *through ambiguities* are anomalous. As the subsequent discussion makes clear, both lawmakers and ordinary people expect more clarity when a principal delegates important authorities to an agent.

[194] Kevin Tobia and Brian Slocum, *The Linguistic* and *Substantive Canons*, working paper on file with author.

[195] On the traditional division of the canons into linguistic and substantive, *see* Barrett, *supra* note __, at 117 ("Canons of interpretation are rules of construction that courts apply in the interpretation of statutes. They are traditionally classified as either linguistic or substantive.").

[196] For a discussion of these canons, see Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 Yale L.J. 908 (2017).

sense as well. Part I.A.3, relying on Samuel Bray's work on the mischief rule, considers whether such an importance canon could be consistent with textualism even if statutes are otherwise unambiguous.

Part II.B then demonstrates that there has been a longstanding understanding, back to the Founding and before, in matters of constitutional, contract, and statutory interpretation, that ordinarily people and lawmakers do not leave important matters to implication when delegating authority to others.[197] Part II.C briefly highlights valid concerns about how the Court has deployed these insights under what it has called the major questions doctrine and responds to the objection that some of the arguments presented here militate in favor of a clear statement rule. Part II.D, finally and briefly, raises a provocative and consequential implication: that an importance canon might explain certain substantive canons that are otherwise hard for textualists to defend.

A. Importance and Textualism(s)

In 1986, then-judge Stephen Breyer wrote that when considering whether Congress intended to delegate a question of law-interpretation to an agency, "[a] court may . . . ask whether the legal question is an important one," because "Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration."[198] Some scholars have described Breyer's language as "fairly innocuous," presumably because considering importance is indeed sensible "in cases of statutory ambiguity."[199] Part I.A defends Breyer's proposition on various grounds and definitions of textualism, assuming statutory ambiguity as a given.[200] The first two grounds assume that resolving ambiguity in favor of legislative intent or public understanding is consistent with textualism. The third ground deploys a more expansive version of textualism.

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[197] This understanding is apparently also shared by jurists in Germany and Israel. *See infra* note __.

[198] Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986).

[199] Natasha Brunstein & Richard L. Revesz, *Mangling the Major Questions Doctrine*, 74 Admin. L. Rev. 217, 218 (2022).

[200] Whether statutes are in fact ambiguous is a difficult question that is not the objective of this paper to answer. Brett Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2137 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)); *see also* Richard M. Re, *The New Holy Trinity*, 18 GREEN BAG 2D 407, 408 (2015) (noting that non-textual factors often go into a determination in the front end of whether a statute is ambiguous).

As Professor Tara Grove has noted, there are also a variety of "textualisms" on a spectrum from more formalistic and attuned purely to semantic context, to more flexible and attuned to social context and practical consequences.[201] Professor Grove prefers the more formalistic version that "downplay[s] policy concerns or the practical (even monumental) consequences of the case."[202] What this Part will suggest is that it may be impossible to separate semantic context from social context and practical consequences.

1. Congress's drafting practices

A recurring criticism of the Court's major questions doctrine, which would apply more generally to the use of importance to resolve interpretive questions, is that Congress does in fact delegate important questions to agencies. Chad Squitieri, for example, has argued that the Congressional Review Act demonstrates that Congress has evinced an intent to delegate important questions to agencies.[203] That is because the Congressional Review Act requires agencies to report to Congress their major rules, and the definition of major rules in the statute tracks very closely to the characteristics that various Justices have described as indicating majorness.[204] Ronald Levin argues that other administrative statutes—including those that authorize regulations in the "public interest," or "requisite to protect the public health"—indicate that Congress does in fact routinely delegate important questions to agencies.[205] More generally, Deacon and Litman write that "[a]s a descriptive claim about what Congress's intentions are," using "majorness or significance" as "evidence that the agency's use of the statute is contrary to Congress's intentions" is "contestable, at least in some of the applications in which the Court has invoked it."[206]

Others have pointed out that Congress often compromises with broad language. As then-Dean Elena Kagan wrote, "Sometimes Congress legislated [via broad delegations] because it recognized limits to its own knowledge or capacity to respond to changing circumstances; sometimes because it could not reach agreement on specifics, given limited time and diverse interests; and sometimes because it wished to pass on to another body politically difficult decisions."[207] Dean

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[201] Tara Leigh Grove, *Which Textualism?*, 134 Harv. L. Rev. 265-71, 279-90 (2020).

[202] Id. at 267.

[203] Chad Squitieri, *Who Determines Majorness?*, 44 Harv. J. L. Pub. Pol'y 463, 491-93 (2021).

[204] Id.

[205] Levin, *supra* note __, at 33.

[206] Deacon & Litman, *supra* note __, at 30.

[207] Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245, 2255–56 (2001)

John Manning has written that "[m]uch legislation reflects the fruits of legislative compromise, and such compromises often lead to the articulation of broad policies for agencies and courts to specify through application."[208] And Cass Sunstein argues that when "Congress has enacted a broad or general term," it is not reasonable to assume that Congress did not want the agency to exercise discretion over major questions.[209]

The inquiry, however, is not whether Congress likes to delegate important questions through broad language—it often does[210]—but rather whether it is likely to do so through ambiguous language. True, scholars have noted that Congress often compromises on ambiguous, and not only broad, language. Nathan Richardson argues, "[I]t is much harder to get legislative consensus behind explicit language. Congress may delegate to agencies not only because they have greater expertise, but also to avoid deciding a politically difficult point, or to delay doing so."[211] And empirical research has shown that Congress does often legislate with deliberate ambiguity to achieve greater consensus.[212]

Whether Congress is likely to delegate the resolution of important questions through ambiguous statutory language, however, is the question, and it is an open one.[213] The only available study suggests that the major questions canon is an accurate description of how Congress legislates.[214] Abbe Gluck and Lisa Bressman

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[208] Manning, *supra* note __, at 228.

[209] Sunstein, Two Major Questions, at 488-89.

[210] For a classic public choice explanation, see John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 131-32 (1980).

[211] Nathan Richardson, *Antideference: Covid, Climate, and the Rise of the Major Questions Canon*, 108 U. Va. L. Rev. Online 174, 201 (2022).

[212] Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 NYU L. Rev. 575, 594-97 (2002).

[213] Levin's examples involve broad but not necessarily ambiguous statutes, which appear to be quite unambiguous delegations of authority. *Supra* note __ and accompanying text. Those statutes involve questions under *State Farm*, as Justice Kavanaugh once wrote, rather than questions of interpretation. Kisor v. Wilkie, 139 S. Ct. 2400, 2449 (2009) (Kavanaugh, J. concurring in the judgment) (citing Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29 (1983)).

[214] 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, 1003 (2013) [hereinafter Gluck & Bressman, *from the Inside*] ("Our findings offer some confirmation for the major questions doctrine—the idea that drafters intend for Congress, not agencies, to resolve these types of questions. More than 60% of our respondents corroborated this assumption."); Abbe Gluck & Lisa Schultz Bressman, *Inside Statutory Interpretation*, 66 Stan. L. Rev. 725, 790 (2014) ("Our respondents resisted the idea of broader delegations to agencies,

surveyed congressional drafters and described their findings as follows:[215]

> Our findings offer some confirmation for the major questions doctrine—the idea that drafters intend for Congress, not agencies, to resolve these types of questions. More than 60% of our respondents corroborated this assumption. Only 28% of our respondents indicated that drafters intend for agencies to fill ambiguities or gaps relating to major policy questions; only 38% indicated that drafters intend for agencies to fill ambiguities or gaps relating to questions of major economic significance; and only 33% indicated that drafters intend for agencies to fill ambiguities or gaps relating to questions of major political significance (answering questions that tracked the Court's three formulations of the major questions doctrine). We also note that we did not find differences across respondents based on whether they worked for members in the majority or the minority of Congress, which suggests that, at least for our respondents, the answer did not depend on whether the respondent was a member of the same party as the President.
>
> By contrast, almost all of our respondents indicated that drafters intend for agencies to fill ambiguities or gaps relating to more "everyday" questions, such as the details of implementation (99%) and ambiguities or gaps relating to the agency's area of expertise (93%). These comments were typical: "[Major questions], never! They [i.e., elected officials] keep all those to themselves"; "We try not to leave major policy questions to an agency . . . . [They] should be resolved here"; and "We are more likely to defer when an

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emphasized the limitations that Congress puts on delegation, and even would have narrowed some of the deference doctrines currently in deployment.").

[215] The question they posed was:

> What kinds of statutory ambiguities or gaps do drafters intend for the agency to fill? a - Ambiguities/gaps relating to the details of implementation b - Ambiguities/gaps relating to major policy questions c - Ambiguities/gaps implicating questions of major economic significance d - Ambiguities/gaps implicating questions of major political significance e - Ambiguities/gaps relating to the preemption of state law f - Ambiguities/gaps relating to the division of labor between state and federal agencies when both are given implementation roles g - Ambiguities/gaps relating to omissions in the statute h - Ambiguities/gaps relating to the agency's area of expertise i - Other (explain).

Abbe R. Gluck & Lisa Schultz Bressman, Statutory Interpretation from the Inside: Methods Appendix 37 (2013), https://perma.cc/A8EG-3TQB.

> agency has technical expertise." To be sure, resolving major questions is not always possible for drafters, and distinguishing major questions from everyday ones may be difficult for courts. But our drafters did convey a surprising sense of obligation to decide certain questions themselves.[216]

That analysis makes intuitive sense. Deliberate ambiguity benefits both parties when it comes to issues that are not sufficiently important as a general matter to scuttle an entire piece of legislation. But whether to tackle climate change through CO_2 regulation, or to regulate cigarettes, or to allow a public health agency to prohibit evictions, are probably not the kinds of things legislators leave to strategic ambiguity; they are the kinds of things that one side wins and the other loses.[217]

The question remains whether resolving ambiguities in favor of legislative intent, as elucidated by congressional drafting practices, is consistent with textualism. Caleb Nelson wrote some years ago, "[J]udges whom we think of as textualists construct their sense of objective meaning from what the evidence that they are willing to consider tells them about the subjective intent of the enacting legislature."[218] "When confronting possible ambiguities in a statutory provision," he observed, "it is absolutely routine for textualists to put themselves in the shoes of the enacting Congress and to try to identify the interpretation that its members either (1) probably had in mind or (2) would have preferred if they had considered the question."[219] Larry Alexander and Sai Prakash have pointed out that context—which helps clarify meaning and to resolve ambiguities—"is universally regarded as relevant only because it is evidence of authorial intent."[220] On these accounts of

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[216] Gluck & Bressman, *from the Inside*, *supra* note __, at 1003-04.

[217] Levin is the only major questions critic to take the Gluck-Bressman study seriously. He argues that the study is not strong evidence for proponents of the major questions doctrine because almost a third of respondents *did* think that Congress intends agencies to resolve major questions through ambiguity. Levin, *supra* note __, at 34. The question, though, is why the burden here should be on proponents of the major questions doctrine. A doctrine that maintained Congress does intend to delegate through ambiguities would only be substantiated by a mere third of congressional drafters. That is certainly no better for the doctrine's opponents. Levin also argues that the survey was ambiguous as to what "major" meant. *Id.* at 34. Fair enough—but it is hardly obvious that, had the term been made clearer, more as opposed to fewer congressional drafters would have responded to the question in the affirmative.

[218] Caleb Nelson, *What is Textualism?*, 91 Va. L. Rev. 347, 348 (2005).

[219] Id. at 407.

[220] Larry Alexander & Saikrishna Prakash, *"Is That English You're Speaking?" Why Intention Free Interpretation Is an Impossibility*, 41 San Diego L. Rev. 967, 979 (2004)

textualism, using importance to resolve ambiguities in contexts where there is reason to believe the legislature would not have intended to delegate matters of importance would be consistent with textualism.

2. Ordinary readers

To the extent textualists are supposed to ignore legislative intent and focus on public understanding,[221] using importance to resolve interpretive ambiguity may also be consistent with how ordinary speakers use language. At least, insights from philosophy of language help explain why courts (and people) are more likely to find statutory ambiguities in cases involving questions of major political and economic significance. Those same insights also suggest that ordinary readers are likely to resolve such ambiguities against an agency purporting to take major and consequential actions.

As Ryan Doerfler has explained, "to say that the meaning of a statute is 'clear' or 'plain' is, in effect, to say that one *knows* what that statute means."[222] And, "[a]s numerous philosophers have observed, . . . ordinary speakers attribute 'knowledge'—and, in turn, 'clarity'—more freely or less freely depending upon the practical stakes."[223] "In low-stakes situations," Doerfler explains, "speakers are willing to concede that a person 'knows' this or that given only a moderate level of justification."[224] If the stakes are high, in contrast, "speakers require greater justification before allowing that someone 'knows' that same thing, holding constant that person's evidence."[225]

Doerfler explores the various linguistic and philosophical explanations for this phenomenon.[226] He also illustrates this proposition with intuitive examples in the law. For instance, in one form, constitutional avoidance shows that courts are less likely to believe a statute means *X*, where *X* would violate the Constitution, without stronger evidence as to that meaning relative to cases where the interpretive question has lower stakes.[227] The reasonable doubt rule in criminal cases is another example: ordinarily, people are less willing to conclude in criminal cases than in

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[221] *See, e.g.*, Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 Const. Commentary 95, 98, 102 (2010) (arguing that originalists resolve ambiguity through interpretation, the object of which is the original public meaning of the text).

[222] Ryan D. Doerfler, *High-Stakes Interpretation*, 116 Mich. L. Rev. 523, 527 (2018).

[223] Id. at 527-28.

[224] Id. at 528.

[225] Id.

[226] Id. at 544-47.

[227] Id. at 551-60.

civil cases that they "know" someone is responsible, precisely because the stakes are so high in the former.[228]

Doerfler then connects this to the question of a statute's clarity, which, again, he takes to be the same issue as whether a judge "knows" the meaning of a statute:

> [I]nsofar as something can be more or less clear, context must determine *how clear* something must be to count as "clear" for purposes of a given conversation. So construed, to claim that something is "clear" in a low-stakes situation is to say that one satisfies a moderately demanding epistemic standard in relation to the thing at issue. By contrast, to say that something is "clear" in a high-stakes situation is to claim that one satisfies a very demanding epistemic standard with respect to that thing.[229]

The application to some of the major questions cases is intuitive, at least as to the threshold question of ambiguity. The meaning of an "occupational health and safety standard" may seem straightforward in an ordinary, relatively low-stakes regulation of the workplace. We might "know" that the statute permits such regulations, or find the statute is "clear" in this regard. But when dealing with a regulation that imposes a requirement on millions of individuals, that persists beyond the workplace itself, and which requirement is itself hugely controversial, it is intuitive to think that ordinary speakers would in fact demand more epistemic confidence before concluding that the statute in fact authorizes such a requirement. In other words, ordinary readers and speakers are more likely to find the statute ambiguous in that context than in a relatively lower-stakes context.[230]

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[228] Id. at 550.

[229] Id. at 547.

[230] True enough, the empirical evidence about whether ordinary readers' interpretations are sensitive to stakes is somewhat mixed. *See* Kathryn B. Francis, Philip Beaman, and Nat Hansen, *Stakes, Scales, and Skepticism*, 6 ERGO 427, 427-30 (2019). Still, Francis et al. indicate that more studies point toward stake sensitivity than not. *Id.* at 428. And although Francis et al. themselves did not find stake-sensitivity when doing "evidence-fixed" experiments—i.e., when they tested propositions about knowledge given a fixed amount of evidence—they did find such sensitivity when conducting "evidence-seeking" experiments, i.e., when ordinary readers had the option for asking for more evidence about meaning. *Id.* at 429-30. It is not clear to me that this cashes out differently in the context of legal interpretation: after all, courts (and ordinary readers) can always demand more interpretive evidence that the agency's reading is correct. I do find the conclusion of Francis et al. to be something of a paradox, however: if ordinary readers would demand more evidence in high-stakes contexts when given the option, it stands to reason they're less likely to

Moreover, these same insights suggest that, because ordinary speakers demand clearer proofs when making assertions with high stakes generally, they would demand clearer proofs that the agency has the asserted power when the regulation involves high stakes. Doerfler's analysis of the philosophy of language, in other words, shows why ordinary speakers are more likely both to find a statute more ambiguous when the stakes are high, and also to expect the ambiguity to be resolved against a major and novel assertion of authority. In most major questions cases, the high-stakes proposition is, "the agency has authority to do *X*." It is *that* proposition that needs to be proven with great epistemic confidence; lacking that clearer evidence, the ordinary reader is more likely to reject that the statute in fact means that the agency is authorized to do *X*.[231]

This argument does assume a certain framing of the question: whether the statute authorizes the agency. It is possible to reframe the question as whether the agency's action is contrary to law, and then Doerfler's insights suggest that the judge should demand more epistemic certainty before deciding *that* question against the agency in the context of a consequential rulemaking. Neither the major questions canon nor textualism more broadly can tell us which of these two framings is correct; it is a matter of the legal system's other features. If ordinarily a plaintiff bears the burden of proof, then this second framing may be the relevant one; but in that case, if a party raises the rulemaking's invalidity as a defense to an enforcement action, the first framing would be applicable. This arbitrary difference is one reason not to have the burden of proof depend on the party's role.

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assert the high-stakes propositions are true in the absence of such desired evidence. I am grateful to James Macleod for pointing me to this study.

[231] Though the intuition about language in high-stakes contexts need not always be in the direction of deregulation. Doerfler explains that when "challenges consist of a litigant advancing an interpretation that, if accepted, would radically curtail the implementation regime of the statute at issue," ordinary interpreters are likely to demand higher more proof before concluding that the statute requires such a result. Id. at 560. "[C]ourts are epistemically rational in exhibiting extraordinary caution before accepting readings that would have such unsettling effects," he argues. Id. In King v. Burwell, for example, a reading contrary to the majority's would "destabilize the individual insurance market in any State," *King*, 135 S. Ct. at 2492–93, with a federally facilitated exchange; "[u]nder such circumstances," Doerfler explains, "it would make sense for a court to require increased epistemic justification before regarding the 'destabiliz[ing]' reading as 'clear.'" Doerfler, *supra* note __, at 564. Doerfler adds, however, that whether *King* is "best understood as a display of reasonable epistemic caution is, of course, open to question," and that it is unclear whether the Court's reading was even textually possible, even given the high stakes nature of the case. Id. Regardless, he concludes, "*King* represents is a type of case in which it would be entirely reasonable, as an epistemic matter, for a court to look at a text with more hesitation than it would in a run-of-the-mill case." Id.

Fortunately, the legal system already contingently addresses this question of framing differently: because agencies are creatures of statute, they must demonstrate authority for their actions.[232] Thus, as a matter of constitutional structure, the agencies are the asserters of the legal claim and bear the burden of proof.[233] Even if one does not buy this distribution of proof burdens, it is enough to say that the question addressed here is the meaning of the statute, which is not necessarily the same question as whether the agency has acted unlawfully; and on that former question, the insights about high-stakes interpretation militate in favor of a major questions canon of some sort.[234]

3. The mischief rule

It may be consistent with textualism to rely on the importance of a regulatory action even when interpreting statutes that otherwise appear unambiguous. Professor Sam Bray has suggested that "the major questions doctrine" is an "interpretive intuition[] that [is] widespread, even without a definitive contemporary formulation."[235] He argues that it is an application of the "mischief rule," which is a commonsense interpretive intuition that "instructs an interpreter to consider the problem to which the statute was addressed, and also the way in which the statute is a remedy for that problem."[236] The mischief rule is how we know that when a statute requires a train conductor to sound the alarm when an "animal" is on the tracks—think cows and horses—the statute does not really "mean," in the sense of conveying information to an ordinary and reasonable reader, that the conductor must signal the alarm when a flock of geese or a squirrel is on the tracks.[237] Ordinary, reasonable people interpret statutes in light of the "mischief" to which they are directed, and in light of the "way in which the statute

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[232] Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661, 665 (2022) ("Administrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided."); Michigan v. E.P.A., 268 F.3d 1075, 1081 (D.C. Cir. 2001) ("EPA is a federal agency—a creature of statute. It has no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress."); Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress.").

[233] Gary Lawson, *Legal Indeterminacy: Its Cause and Cure*, 19 Harv. J. L. Pub. Pol'y 411, 426 (1996).

[234] It is therefore also possible, although paradoxical, to think that the Court is right about the meanings of these statutes, but wrong to invalidate the contrary agency actions. The present analysis addresses only the former issue. I am indebted to Will Baude for this insight.

[235] Samuel L. Bray, *The Mischief Rule*, 109 Geo. L.J. 967, 1011 (2021).

[236] Id. at 968.

[237] Id. (discussing Nashville & K.R. Co. v. Davis, 78 S.W. 1050 (Tenn. 1902)).

is a remedy" for that mischief, whatever the literal reading might otherwise seem to allow or require.

On this account, the way the Court has used importance in its major questions cases could be justifiable regardless of any ambiguity. When Congress enacted the Clean Air Act targeting "air pollution," the interpreter must ask what was the problem to which the statute addressed itself. A reasonable interpreter could conclude that Congress addressed itself to impurities in the ambient air, rather than to a gas that is present in high concentrations throughout the atmosphere.[238] A reasonable interpreter might conclude that when Congress enacted the FDCA, the statute was addressed to ensuring medical products were in fact safe and effective for their intended use, rather than to regulating the use of a non-medical product never safe for its intended use.[239] And a reasonable interpreter could conclude that when Congress enacted the Public Health Service Act, the Act addressed itself to the problem of disease transmission by allowing quarantines and disinfection, rather than by allowing eviction moratoria, vaccine mandates, and prohibitions on interstate travel.[240] The point is in each of these cases, the majority's interpretation was arguably consistent with the mischief each statute was targeting, and the dissenting interpretations were not.

If the mischief rule is an accurate account of how drafters legislate and ordinary people interpret, then the Court's analyses in many of the major questions cases would be justifiable even had the language been unambiguous in the sense of literally authorizing the agency action. One might challenge this account and argue that the mischief rule is not textualist. But as noted, ordinary readers understand statutes in light of the problems to which they are addressed.[241] Donald Drakeman has further explained in the context of constitutional interpretation that words which in the abstract have many possible meanings sharpen significantly once the background ideas and problems to which the language was addressed become

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[238] *See* Massachusetts v. EPA, 549 U.S. 497, 558-60 (Scalia, J., dissenting). Although Part I did not discuss this as a major questions case, it was a plausible candidate for the doctrine. *UARG*, which was a major questions case, was a consequence of *Massachusetts v. EPA*.

[239] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

[240] Alabama Ass'n of Realtors v. Dep't of Health and Human Servs., 141 S.Ct. 2485 (2021).

[241] Bray, *supra* note __, at 1003 ("a reasonable reader will not understand the statute as saying that trains have to stop for squirrels and slugs").

clear.[242] And, as Amy Coney Barrett has said, textualism is not literalism.[243] Although, as Part I has made clear, the statutory language in each case was plausibly ambiguous, even if that were not the case there would still be textualist support for the major questions doctrine. To be sure, such textualism would be more expansive than the textualism assumed in Parts II.A.1-2, but it at least is a plausible contender to be included within the family of textualisms.

B. Historical evidence

An importance canon of the kind reconstructed here—a quasi-linguistic canon for the resolution of ambiguities—runs deeper than modern scholars have recognized. Such a canon appears to be an existing feature of constitutional, contract, and statutory interpretation.[244] Historical research reveals that it was commonly understood in many different contexts that, ordinarily, lawmakers and ordinary people do not delegate important authorities without being more explicit than they might be in other contexts.

1. The Necessary and Proper Clause

The Necessary and Proper Clause provides, "Congress shall have power . . . to make all laws necessary and proper for carrying into execution the foregoing powers, or any other power vested by this Constitution in the government of the United States, or in any department or officer thereof."[245] A broad reading of the Clause might suggest that Congress can do literally anything that is convenient[246] for carrying out its enumerated powers—for example, commandeering state

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[242] Donald L. Drakeman, The Hollow Core of Constitutional Theory: Why We Need the Framers __ (2020).

[243] Amy Coney Barrett, *Assorted Canards of Contemporary Legal Analysis: Redux*, 70 Case. W. Res. L. Rev. 855, 856-57 (2020); *see also* Grove, *supra* note __, at 279; ANTONIN SCALIA, A MATTER OF INTERPRETATION 24 (Amy Gutmann ed. 1997).

[244] Although beyond the scope of the present analysis, it appears that a similar doctrine exists in other jurisdictions as well, such as in Germany and Israel. *See* Oren Tamir, Getting Right What's Wrong with the Major Questions Doctrine 35-42 (paper on file with author). The U.K. may be on the verge of developing a similar doctrine, but it is not yet well defined as in these other jurisdictions. Id. To be clear, Tamir argues that the doctrine as used in these other jurisdictions is significantly narrower than the doctrine in the United States; but, I think, the doctrine as used in those jurisdictions is quite similar to the one that I am advancing here.

[245] U.S. Const., art. I, § 8, cl. 18.

[246] *See* McCulloch v. Maryland, 17 U.S. 316, 413 (1819) (the word "necessary" "frequently imports no more than that one thing is convenient, or useful, or essential to another").

officers,[247] abrogating sovereign immunity,[248] granting corporate monopolies[249]—no matter how seemingly important those powers are. But that was not generally how the Clause was understood in the Founding generation. Several of the Founders agreed that the Clause does not authorize Congress to exercise great, important prerogatives—the kind of things one would expect the people to have authorized Congress to do explicitly if the People had really intended to delegate to Congress such power. If the power to tax, to declare war, and to regulate interstate commerce had not been included in the Constitution's enumeration of power, few would think that Congress could derive those powers from a mere grant of implied powers.

That is what James Madison argued in opposition to the Bank of the United States. "It cannot be denied that the power proposed to be exercised is an important power. As a charter of incorporation the bill creates an artificial person previously not existing in law," he said.[250] "It confers important civil rights and attributes which could not otherwise be claimed. It is, though not precisely similar, at least equivalent to the naturalization of an alien, by which certain new civil characters are acquired by him. Would Congress have had the power to naturalize if it had not been expressly given?"[251] Here we see that Madison argued that incorporation of a bank is an important power, similar to the naturalization power—and we would not lightly presume that Congress had such powers without express authorization. Later in his speech, he added, "Had the power of making treaties, for example, been omitted, however necessary it might have been, the defect could only have been lamented or supplied by an amendment of the Constitution."[252] Important powers are generally not delegated through cryptic language or implication.

Madison goes on to add that the power to incorporate a bank is important because it involves "the power to make bylaws," which is "a sort of legislative power" and "is unquestionably an act of a high and important nature."[253] The proposed bill "gives a power to purchase and hold lands," which even Congress could not do within a state "without the consent of its legislature."[254] And the bill "involves a monopoly, which affects the equal rights of every citizen."[255] "From

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[247] Printz v. United States, 521 U.S. 898 (1997).
[248] Seminole Tribe of Fl. v. Florida, 517 U.S. 44 (1996).
[249] *McCulloch*, 17 U.S. at 316.
[250] 1 Annals of Cong. 1899 (statement of Rep. Madison).
[251] Id. at 1899-1900.
[252] Id. at 1900-01.
[253] Id. at 1900.
[254] Id.
[255] Id.

this view of the power of incorporation exercised in the bill," Madison concluded, "it could never be deemed an accessary or subaltern power, to be deduced by implication, as a means of executing another power; it was in its nature a distinct, an independent and substantive prerogative, which not being enumerated in the Constitution could never have been meant to be included in it, and not being included could never be rightfully exercised."[256]

Attorney General Edmund Randolph similarly opposed the bank, and although his written opinion to President Washington is a bit opaque, it can be read to support Madison. Randolph described the attributes of the corporation, and wrote, "their importance strikes the eye."[257] He went on to write, "Governments, having no written Constitution, may perhaps claim a latitude of power, not always easy to be determined. Those, which have written Constitutions, are circumscribed by a just interpretation of the words contained in them."[258] Although he is not making the point explicitly, Randolph may have been saying that it would not be just to interpret the words of a written Constitution to smuggle in important powers by implication.

None of Madison's opponents controverted the principle, although they controverted its application to the question of incorporating a bank. In Alexander Hamilton's opinion on the Bank, he notes that it was urged in the House of Representatives "that if the constitution intended to confer so important a power as that of erecting corporations, it would have been expressly mentioned."[259] Here he does seem to challenge this idea altogether by pointing to Congress's power "[t]o exercise exclusive Legislation in all Cases whatsoever" in the District of Columbia,[260] which "clearly" includes a power to erect corporations in the District, "and yet without any specification or express grant of it, further than as every particular implied in a general power, can be said to be so granted."[261] Yet Hamilton is not really tackling Madison's point head on because the District Clause is, in fact,

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[256] Id.

[257] Edmund Randolph, "Enclosure: Opinion on the Constitutionality of the Bank, 12 February 1791," *in* 7 The Papers of George Washington, Presidential Series 331-37 (Jack D. Warren, Jr. ed., 1998, pp. 331–337, *available at* Founders Online, National Archives, https://founders.archives.gov/documents/Washington/05-07-02-0200-0002.

[258] Id.

[259] Alexander Hamilton, "Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank," 23 February 1791, *in* 8 The Papers of Alexander Hamilton 97-134 (Harold C. Syrett ed., 1965, pp. 97–134, *available at* Founders Online, National Archives, https://founders.archives.gov/documents/Hamilton/01-08-02-0060-0003

[260] U.S. Const., Art. I, § 8, cl. 17.

[261] Id.

an express grant of *all* conceivable legislative powers for the government of the district. Hamilton also suggests that the power to tax "a gallon of rum" is merely "implied" in the general power to lay and collect taxes, duties, imposts, and excises, but that is simply an application of the express grant.[262] Hamilton knows this, which is why he adds after his point about the District Clause, "further than as every particular implied in a general power" can be said to be granted in Congress.[263]

Hamilton finally turns to the real argument when he suggests that Madison's "argument itself is founded upon an exaggerated and erroneous conception of the nature of the power" to erect corporations, because such a power "is not of so transcendent a kind" as Madison's reasoning supposes; therefore, "viewed in a just light it is a mean which ought to have been left to implication, rather than an end which ought to have been expressly granted."[264] Even Hamilton seemed to understand the force of the argument that great, important powers are ordinarily not left to implication. So did Chief Justice Marshall: In *McCulloch v. Maryland*, in which the Court upheld the constitutionality of the Bank, he wrote, "The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them."[265] Great and important authorities—such as the power of making war, laying taxes, and regulating commerce, cannot be left to implication.

2. Agency law

This mode of reasoning about delegated authority was not unique to the Necessary and Proper Clause. It was, and remains, everywhere in the law once one knows to look for it. Another example is agency law, which is not surprising because scholars have pointed to the connection between the Necessary and Proper Clause and agency law.[266]

In the English case *Howard v. Baillie* from 1796,[267] the executrix of an estate authorized two others "to act for her in collecting and getting in the estate of

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[262] Id.

[263] Id.

[264] Id.

[265] 17 U.S. 316, 411 (1819).

[266] Gary S. Lawson, Geoffrey P. Miller, Robert G. Natelson, & Guy I. Seidman, The Origins of the Necessary and Proper Clause (2013); Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper Clause*, 55 Case Western Reserve L. Rev. 243 (2004).

[267] 126 Eng. Rep. 737 (1796).

the deceased, and paying his debts."[268] The question was whether that authorization included the power to make the executrix personally liable for a debt on condition that the creditor wait twenty months for payment. Although this may seem like an important power by our modern lights, Lord Chief Justice Kenyon explained that such a procedure was not unusual in the administration of estates.[269] The critical point, however, is that the Lord Chief Justice recognized that by the grant of a general, principal power to pay the debts "necessarily includes . . . all the means necessary to be used, in order to attain the accomplishment of the object of the principal power,"[270] that is, "subordinate powers, though not expressly given, . . . , must be understood to be included in this power to pay debts."[271] "Subordinate" powers can be left to implication, but "principal" powers cannot be.

Joseph Story's 1839 treatise on agency law gives numerous examples of the proposition that "subordinate" powers that are "incidental" to a "primary" power are presumed to be delegated to the agent,[272] and it illustrates as well with examples of where the power was not sufficiently subordinate to be left to implication.[273] The general rule—"the largest portion of incidental powers," Story explains—"is deduced from the particular business, employment, or character of the agents themselves," and includes "[w]hatever acts" that "are *usually* done by such classes of agents," rights that are "*usually* exercised by them," and duties that are "*usually* attached to them."[274] For example, here is how he described the authorities of the master of a vessel:

> The incidental powers of the master are, however, restricted to those, which belong to the usual employment or business of the ship. Thus, if the ordinary employment of the ship has been the carrying of cargoes on the sole account of the owner, the master has no implied authority to let the ship to freight, even in a foreign port. So, if the ordinary employment has been to take goods on board on freight, as a general ship, and common carrier, the master will not be presumed to possess authority to let the ship on a charter party for a special and different business. So, if the ship has been accustomed to carry passengers only, the master will not be

[268] Id. at 737 (this is the court's formulation).
[269] Id. at 739-40.
[270] Id. at 738.
[271] Id.
[272] Joseph Story, Commentaries on the Law of Agency 58-61 (1839).
[273] Id. at 62-69.
[274] Id. at 94 (emphases added).

> presumed to possess authority to take goods on board on freight. So, if the ship has been accustomed to the coasting trade, or the fisheries, or to river navigation only, the master will not be presumed to possess authority to divert the ship into another trade, or business, or voyage, on the high seas.[275]

In other examples from England, an agent was held not to be authorized to sell stock on credit, when the usual mode was for ready money, without more specific authorization.[276] When an agent is authorized to sell goods, that does not, without more specific authorization, allow pledging those goods as security.[277] A general partnership agreement "does not authorise the partners to execute deeds for each other, unless a particular power be given for that purpose," because it "would be a most alarming doctrine to hold out to the mercantile world . . . if one partner could bind the others by such a deed as the present," as doing so "would extend to the case of mortgages, and would enable a partner to give to a favourite creditor a real lien on the estates of the other partners."[278]

In an 1826 Massachusetts case, the owner of a vessel had authorized the master of the vessel to sell cargo in the West Indies and return with other cargo. The master, under pressure from creditors, sold them the cargo instead as satisfaction of the owner's debts. When the owner sued the creditors, the creditors argued that the owner had to sue his agent because the sale was "good." The court disagreed, observing that the sale was not "made in the usual course of business," but it was rather "an extraordinary transaction, and calling for a full and particular authority."[279]

There may, perhaps, be a difference between "important" or "major" questions and authorities that are "extraordinary," or "out of the ordinary," for an agent. Justice Kagan recognized in *West Virginia v. EPA*, however, that most of the major questions cases involve agencies engaging in activities or duties that go beyond their ordinary activities. And the mischief rule instructs that how a law was intended to resolve a problem is important context to interpreting the law. Moreover, Story's treatise did not differentiate between important and extraordinary authorities. In the same section as his other examples, Story quotes a Scottish case, which the Supreme Court might have mentioned in the eviction

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[275] Id. at 111.

[276] Wiltshire v. Sims, 1 Camp 258 (1807).

[277] Paterson v. Tash, 2 Str. 1178 (1875); Shipley v. Kymer, 1 M. & Selw. 484 (1813).

[278] Harrison v Jackson, 7 T.R. 207 (1797).

[279] Peters v. Ballistier, 20 Mass. (3 Pick. R.) 495, 503 (1826).

moratorium case: "Where in general mandates, some things are specially expressed, the generality is not extended to cases of greater importance than those expressed."[280]

Versions of this rule persist to this day in modern agency law. The Third Restatement explains that "[e]ven if a principal's instructions or grant of authority to an agent leave room for the agent to exercise discretion, the consequences that a particular act will impose on the principal may call into question whether the principal has authorized the agent to do such acts."[281] For example, "[a] reasonable agent should consider whether the principal intended to authorize the commission of collateral acts fraught with major legal implications for the principal, such as granting a security interest in the principal's property or executing an instrument confessing judgment."[282] An agent might still bind the principal with regard to such matters, but at least there will be a question as to whether more clarity was required.

More generally, the Restatement explains incidental powers as follows: "If a principal's manifestation to an agent expresses the principal's wish that something be done, it is natural to assume that the principal wishes, as an incidental matter, that the agent take the steps necessary and that the agent proceed in the usual and ordinary way."[283] This, too, could have been cited in the eviction moratorium case for the proposition that the general grant of power implies authority to engage in the *usual and ordinary*, not *extraordinary*, methods of accomplishing the objective.

3. Contract law generally

A version of the same interpretive proposition persists to this day in the law of written contracts even outside the agency law context. It is presumed as a matter of intent of the parties that important terms are not left to implication. "[A]s a general rule," the Wisconsin Supreme Court has explained, "important contractual provisions are not ordinarily left to implication."[284] The court thus rejected a construction of the contract that "would result in a significant alteration of the usual duties of vendor and purchaser."[285] The Vermont Supreme Court refused to "read into the contract a significant term that does not arise by necessary implication, and which would deprive the City of an unambiguous provision inserted in the contract

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[280] Story, *supra* note __, at 69 (quoting 1 Stair, Instit. by Brodie, B. 1, tit. 12, § 15 ; Ersk. Instit. B. 3, tit. 3, § 39).

[281] Restatement (Third) Of Agency § 2.02, cmt. h (2006).

[282] Id.

[283] Id. cmt. d.

[284] Huntoon v. Capozza, 57 Wis. 2d 447, 461, 204 N.W.2d 649, 657 (1973).

[285] Id. at 462.

for its benefit."[286] Courts cannot fill an "omission of a major and valuable term, which is usually bargained for by the parties, simply by implication."[287] Although certain minor terms "ordinarily would be implied if they had been omitted from" a contract for lease, "important items . . . could not be implied into the contract and . . . had to be settled by agreement," and without such important terms there had been no meeting of the minds."[288] True, non-agency contracts are not ordinarily seen as delegations of authority, but in the relevant sense they are: contracts authorize counterparties to act in a certain way in exchange for consideration, and in that sense are similar to a principal-agent relationship.

4. State and federal statutes

In numerous cases interpreting state and federal statutes, a version of an importance canon also emerges. In one case that appears to be a precursor to the "internal affairs" clear statement rule[289]—and perhaps demonstrating how easy it is to conflate the linguistic canon with a clear statement rule—the question was whether "payment of advance wages to seamen," which was prohibited by a federal law, applied to advance payments made "on a foreign vessel in a foreign port."[290] Referring to a prior case, the Court held, "such a sweeping provision was not specifically made in the statute, and that had Congress so intended, 'a few words would have stated that intention, not leaving *such an important regulation* to be gathered from implication.'"[291] An amendment to the statute had "merely inserted the phrase 'whether made within or without the United States or territory subject to the jurisdiction thereof,'" which in context gives "full effect" the rule as "applied to American vessels," but said nothing as to foreign vessels.[292]

Louis Capozzi has cited to other doctrines in which grants of power required clear and express delegations.[293] One significant example is the Oregon Supreme

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[286] Hill v. City of Burlington, 157 Vt. 241, 247, 597 A.2d 792, 796 (1991).

[287] Swanson v. Van Duyn Chocolate Shops, Inc., 282 Or. 491, 495, 579 P.2d 239, 241 (1978).

[288] Trustees of First Presbyterian Church in Newark v. Howard Co. Jewelers, 12 N.J. 410, 414–15, 97 A.2d 144, 146 (1953).

[289] Supra.

[290] Jackson v. The Archimedes, 275 U.S. 463, 464 (1928).

[291] Id. at 470 (emphasis added).

[292] Id.

[293] Capozzi, *supra* note __, at 8-14. Not all of Capozzi's examples are relevant to the present analysis. For example, he draws attention to delegations to municipal corporations. Id. at 8-9 & nn.54-55. Courts generally required delegations to municipal corporations to be express or necessarily implied from any express delegations. Id. at nn. 54-55; see also Ilan Wurman, *The Origins of Substantive Due Process*, 87 U. Chi. L. Rev. 815, 826-37 (2020) (canvassing these antebellum cases). Those cases are only relevant if one is to make a substantive defense of a similar

Court's decision in *Board of Railroad Commissioners v. Oregon*.[294] The question was whether the statute authorized the railroad commission to determine what were just and reasonable rates and enter into proceedings to enforce those rates. The problem was the statute was a jumble. It largely gave the commission authority to investigate conditions in the railroad industry and report to the legislature.[295] Yet other parts of the statute seemed to imply that the commission had a power to set and enforce rates. For example, one section of the statute provided that whenever any railroad "shall violate or refuse or neglect to obey any lawful order or requirement of the commission in this act named, it shall be the duty of the commission, and lawful for any company or person interested in such order or requirement, to enter complaint in the circuit court of the state."[296] This section was odd because there was otherwise no indication of what a lawful order of the commission would look like, as there was no substantive grant of ratemaking authority. Hence the state supreme court concluded that the statute was "hopelessly ambiguous" on the question.[297]

The opinion's author then wrote, "[The legislature] would *not be likely* to appoint a commission for execution to precede one of inquiry; nor that *it would delegate its discretion in so important a matter* to an inferior board to be exercised."[298] The opinion went on to say, "It cannot be presumed that any legislature would confer so important a prerogative upon a board of commissioners."[299] And then: "It will not be contended that the act gives the board jurisdiction in express terms to determine when freight charges are unreasonable; and if the question is left to inference there is no limit to the extent of its jurisdiction . . . ."[300] These statements support the proposition that the legislature would not "likely" delegate such an important matter. It cannot be "presumed" that it has done so. Such an important matter cannot be left to "inference." To be sure, the opinion raises doubts whether the legislature would delegate such an important

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doctrine as applied to agencies. If one is defending major questions as a linguistic canon, however, the question is whether courts interpreted broad and at least arguably ambiguous delegations of authority narrowly when it came to matters of importance, on the ground that the legislature would not have intended such a delegation without being more explicit about it. There may be such cases, but there are not likely to be many given the general doctrine that municipal corporations only have expressly delegated or necessarily implied powers.,

[294] 17. Or. 65, 19 P. 702 (1888); Capozzi, at 9-10.

[295] 17 Or. at 67-72.

[296] Id. at 70.

[297] Id. at 74.

[298] Id. at 73 (emphasis added).

[299] Id. at 76.

[300] Id. at 77.

matter at all. But a fair reading of it suggests the judges believed, intuitively, that such important matters, at least, would be delegated expressly if at all.

At the federal level, Capozzi draws attention to *ICC v. Cincinnati N. O. & T. P. Railway Co*.[301] The Interstate Commerce Act prohibited unjust and unreasonable rates; prohibited discriminating between long-haul and short-haul routes; prohibited "undue preferences" or rebates; and prohibited pooling and price-fixing among railroad, along with requiring disclosure of rates and prices.[302] But nowhere did the act explicitly give the Interstate Commerce Commission that it created the power to *establish* maximum rates for the future.[303] This power was not "expressly given,"[304] the Court held, and "is not to be determined by any mere considerations of omission or implication."[305] The Court goes on to observe that the power to prescribe such rates is generally considered "legislative, . . . having respect to the large amount of property invested in railroads, the various companies engaged therein, the thousands of miles of road, and the millions of tons of freight carried, [and] the varying and diverse conditions attaching to such carriage," and is therefore "a power of supreme delicacy and importance."[306] The Court then concluded that it "is not to be presumed or implied from any doubtful and uncertain language" that Congress intended to delegate such a power.[307] Here again the importance of the matter militates against finding a delegation through ambiguous terms.

It bears mention, finally, that numerous other cases adopt a kind of importance canon and appear not to generate very much controversy. For example, in *U.S. Forest Service v. Cowpasture River Preservation Ass'n* from 2020,[308] at issue was the lawfulness of a right-of-way permit granted by the U.S. Forest Service to construct a pipeline in a small part of a national forest under a historic trail.[309] The argument against the permit was that the Department of Interior had delegated administrative authority over a national historic trail to the National Park Service, even though the U.S. Forest Service continued to manage the forest itself.[310]

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[301] 167 U.S. 479 (1897).
[302] Id. at 500; *see also* Interstate Commerce Act, 24 Stat. 379 §§ 1-7 (1887).
[303] *Cincinnati*, 167 U.S. at 500.
[304] Id.
[305] Id. at 502.
[306] Id. at 505.
[307] Id.
[308] 140 S. Ct. 1837 (2020).
[309] Id. at 1841.
[310] Id. at 1842-44.

The statutes themselves were silent on to whom the Department of Interior could delegate authority over administration of the national trails.[311] After interpreting the statutes and concluding that the U.S. Forest Service maintained control over the land, even if not management of the trail,[312] the Supreme Court added the following. The opposing argument, the Court explained, "requires us to accept that, without a word from Congress, the Department of the Interior has the power to vastly expand the scope of the National Park Service's jurisdiction through its delegation choices."[313] "Under our precedents," the Court went on to say, "when Congress wishes to alter the fundamental details of a regulatory scheme, as respondents contend it did here through delegation, we would expect it to speak with the requisite clarity to place that intent beyond dispute."[314] The Court "will not presume that the act of delegation, rather than clear congressional command, worked this vast expansion of the Park Service's jurisdiction and significant curtailment of the Forest Service's express authority to grant pipeline rights-of-way on lands owned by the United States."[315]

Another example is *Epic Systems Corp. v. Lewis*.[316] The Federal Arbitration Act requires courts to enforce arbitration agreements as written,[317] "save upon such grounds as exist at law or in equity for the revocation of any contract."[318] The Ninth Circuit had concluded that the Fair Labor Standards Act's prohibition on barring employees from engaging in "concerted activities" made unenforceable any arbitration agreements that nullified class action rights.[319] The Supreme Court reversed the Ninth Circuit. The Court concluded in relevant part that, even assuming the FLSA defense applied to "any contract" for purposes of the Arbitration Act, FLSA did not prohibit enforcement of these arbitration agreements.[320] That is because the protection for "concerted activities" was a guarantee of collective bargaining—not a guarantee of a class action right.[321] There was therefore no conflict between the two statutes.

After additional statutory analysis, the Court added that "the employees'

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[311] Id. at 1843.
[312] Id. at 1844-45.
[313] Id. at 1848.
[314] Id. at 1849 (quote marks, citations omitted).
[315] Id. (quote marks, citation omitted).
[316] 138 S. Ct. 1612 (2018).
[317] Id. at 1619; *see also* 9 U.S.C. § 2.
[318] 9 U.S.C. § 2.
[319] *Epic Systems*, 138 S. Ct. at 1620.
[320] Id. at 1624-27.
[321] Id. at 1624.

theory runs afoul of the usual rule that Congress 'does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.'"[322] And in the case at hand, "Union organization and collective bargaining in the workplace are the bread and butter of the NLRA, while the particulars of dispute resolution procedures in Article III courts or arbitration proceedings are usually left to other statutes and rules—not least the Federal Rules of Civil Procedure, the Arbitration Act, and the FLSA."[323] "It's more than a little doubtful," the Court concluded, "that Congress would have tucked into the mousehole of [FLSA's] catchall term an elephant that tramples the work done by these other laws; flattens the parties' contracted-for dispute resolution procedures; and seats the Board as supreme superintendent of claims arising under a statute it doesn't even administer."[324] Put simply, class actions, arbitration agreements, and judicial procedure are all important matters, and it defies belief to think that Congress meant to alter its statutes touching such matters through a narrow and ambiguous provision dealing specifically with collective bargaining.

In *Gonzales v. Oregon*,[325] the question was whether the Attorney General could "bar dispensing controlled substances for assisted suicide in the face of a state medical regime permitting such conduct."[326] Justice Kennedy, joined by Justices Stevens, O'Connor, Souter, Ginsburg, and Breyer, concluded as follows:

> Just as the conventions of expression indicate that Congress is unlikely to alter a statute's obvious scope and division of authority through muffled hints, the background principles of our federal system also belie the notion that Congress would use such an obscure grant of authority to regulate areas traditionally supervised by the States' police power. It is unnecessary even to consider the application of clear statement requirements, or presumptions again pre-emption, to reach this commonsense conclusion.[327]

No clear statement rule was required. The point was that certain things can be deemed important, and ordinarily Congress does not authorize or delegate such important things through "muffled hints." Ambiguity is not enough.

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[322] Id. at 1626-27 (quoting Whitman v. American Trucking Assns., Inc., 531 U.S. 457, 468 (2001)).

[323] Id. at 1627.

[324] Id.

[325] 546 U.S. 243 (2006).

[326] Id. at 275.

[327] Id. at 274.

Finally, *Whitman v. American Trucking Ass'ns*[328] was in the direction of more, not less, regulation. The issue was whether a statutory instruction to the EPA "to set primary ambient air quality standards 'the attainment and maintenance of which . . . are requisite to protect the public health' with 'an adequate margin of safety,'" allowed the agency to consider costs.[329] The Court though it "clear that this text does not permit the EPA to consider costs in setting the standards."[330] Responding to the argument that the terms "'adequate margin' and 'requisite' leave room to pad health effects with cost concerns,"[331] the Court added: "we find it implausible that Congress would give to the EPA through these modest words the power to determine whether implementation costs should moderate national air quality standards."[332] That is because "Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."[333]

C. Objections

This Part now considers a few further objections. A persistent criticism of the major questions doctrine, which would translate to a more general importance canon, is the difficulty of determining what is "major," and from whose perspective

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[328] 531 U.S. 457 (2001).

[329] Id. at 465 (quoting 42 U.S.C. § 7409(b)(1)).

[330] Id.

[331] Id. at 468.

[332] Id.

[333] Id. The above cases, from the Founding to the present, in matters of constitutional, statutory, and contract interpretation, and which both liberal and conservative Justices have supported, do not exhaust support for the linguistic canon. For another interesting example, see *State v. McAllister*. 18 S.E. 770 (W. Va. 1893), in which a canon of this sort was used by both majority and dissenting opinions. The question was whether a law that limited city council officeholding to freeholders within the city was constitutional. Id. at 770-71. The argument against was that the state's constitution provided that "[n]o person except a citizen entitled to vote shall be elected or appointed to any office, state, county or municipal," and the requirement to be a "citizen entitled to vote" was therefore preclusive of other qualification. Id. at 771 (Dent, J.). One judge argued that if the constitutional drafters intended to preclude the legislature from making additional qualifications, they would have said so, "for such an important matter as this would not be left to implication if the electors had considered such a provision desirable." Id. Another judge, dissenting from his colleague, used a similar canon against the law: the state constitution "does not give the legislature power to prescribe the qualifications of officers. If the convention had left open that important matter, it would be expected that it would . . . grant to the legislature the necessary function or power of prescribing such qualification." Id. at 776 (Brannon, J., dissenting). The point for the dissenter was that the legislature would have *answered* this important question.

and as of when.[334] This inquiry does have a "know it when you see it quality," as then-Judge Kavanaugh said.[335] That does not make the inquiry improper. We ask judges to make many commonsense judgments all the time, for example about what a reasonable person would have done. And, as Part II.B showed, judges have routinely relied on a matter's importance to resolve ambiguous language, from the Founding to today, in constitutional, contract, and statutory cases.[336]

Perhaps more to the point, judges should not be blind to matters of general knowledge.[337] Simply put, anyone who has been half awake in the last thirty years knows that whether CO_2 should be regulated, and how, is a huge issue of major political and economic controversy. Justice Kagan conceded in *West Virginia v. EPA* that the question of CO_2 regulation and climate change was a matter of great importance. Her very first sentence declared it to be "the most pressing environmental challenge of our time."[338] How, exactly, did she know that, without taking a poll or soliciting expert testimony? She's just a living, breathing human being like the rest of us.[339] These are matters of general notoriety, and no one disputes their importance.[340] The very controversy generated by the Court's

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[334] *See, e.g.*, Chad Squitieri, *Who Determines Majorness?*, 44 Harv. J. L. Pub. Pol'y 463, 488-89 (2021); Deacon & Litman, *supra* note __, at 27.

[335] United States Telecom Ass'n v. FCC, 855 F.3d 381, 423 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

[336] Supra Part II.B.

[337] As Justice Field once said when invalidating a San Francisco ordinance known by all in the community to be targeting the Chinese, even though it appears neutral and generally applicable on its face: "When we take our seats on the bench we are not struck with blindness, and forbidden to know as judges what we see as men . . . . We may take notice of the limitation given to the general terms of an ordinance by its practical construction as a fact in its history." Ho Ah Kow v. Nunan, 12 F. Cas. 252, 255 (C.C.D. Cal. 1879). Charles Black, who grew up in Texas, similarly wrote in defense of the school desegregation decisions that the social meaning of segregation as "the putting of the Negro in a position of walled-off inferiority" was a matter of "common notoriety," and ignoring that well known fact would be "self-induced blindness." Charles Black, *The Lawfulness of the Segregation Decisions*, 69 Yale L.J. 421, 424-27 (1960).

[338] Slip Op. at 1 (Kagan, J., dissenting).

[339] Kagan's sentence quoted from *Massachusetts v. EPA*, 549 U.S. 497, 505 (2007). The Court in *Massachusetts* simply quoted the petitioner's petition for certiorari. That petition, to be sure, quoted statement from President Bush and EPA Administrator Christine Todd Whitman, and from a National Academy of Sciences report. Petition for Certiorari, Massachusetts v. EPA, 2006 WL 558353 (U.S.), at 23. These are the exact sources that are matters of general knowledge and judicial notice. No special skill, expertise, or briefing is needed to know such things.

[340] There are, moreover, many other signals of importance. Justice Ginsburg signed on to the majority opinion in *MCI* because even she could understand that whether to exempt regulated entities from an entire statutory scheme was an important question in relation to the statute. MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218 (1994). Justice Kagan, in explaining the other major

adoption of the major questions doctrine would not be so intense were it not for the importance of the regulations and subjects at issue.

This discussion is not intended to discount the very real phenomenon that reasonable people can disagree about what is "major" or "consequential" or "important" now, let alone what was major back at the time a statute was enacted. But reasonable people disagree over many things, including application of every other tool of statutory interpretation, and over whether a particular statute is ambiguous in the first place. That is why we have majority and dissenting opinions even in non-major-questions cases. That reasonable people can disagree therefore cannot usually be a dispositive argument against application of an otherwise defensible tool. Article III solves this problem by assigning responsibility for the relevant decision to certain individuals (federal judges). It is their judicial duty, and they have the power, to decide cases notwithstanding inevitable disagreement over many issues of interpretation. As long as they can count to five—or, in most cases, to two—that is all that is required.

A more valid objection is that the major questions canon as practiced stacks the deck: if the conclusion that the matter is major and important comes first, the Court may too easily fail to recognize countervailing interpretive conventions and statutory language that suggests Congress did in fact intend to delegate the important question. The doctrine should not be used as a "get-out-of-text-free card[],"[341] as Justice Kagan argued. If Lisa Heinzerling is correct that the doctrine puts "a big, grumpy thumb on the scales in interpreting" the statutes[342] or "ignores details of statutory history and design"[343] then that, too, should be rejected. Deacon and Litman argue that the major questions doctrine used to be "one tool of statutory interpretation among equals" that "supplied one piece of evidence—alongside tools such as ordinary meaning, statutory history, and the semantic canons—about the meaning of statutory language read in its overall context."[344] "But it has become something quite different," they argue, and the doctrine now "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 instead to require explicit and

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questions cases in dissent in *West Virginia v. EPA*, could understand that "Congress does not usually grant agencies the authority to decide significant issues on which they have no particular expertise." Slip Op. 14 (Kagan, J., dissenting).

[341] *West Virginia v. EPA*, Slip Op. 28 (Kagan, dissenting).

[342] Heinzerling, Power Canons, at 1938

[343] Id. at 1939.

[344] Deacon & Litman, at 3.

specific congressional authorization for certain agency policies."[345] The readers can judge for themselves by assessing Part I's characterization of the cases. If those criticisms are true as a descriptive matter, they would have serious force. All of this is to say, there is room for legitimate criticism of the major questions doctrine as it has been articulated by the Court or a subset of the Justices, and Courts should avoid misusing an importance canon in this manner.

Finally, it might be suggested that the arguments here put forward about the role of importance in resolving interpretive questions might apply not only to ambiguity, but to broad language as well. That would militate in favor of a clear statement rule. To take a quotidian example, suppose a parent tells a nanny to "have fun with the kids for the day." Although broad and unambiguous, surely the parent did not mean to suggest that the nanny can go on a joyride or buy plane tickets and take the kids to Disneyland. Sometimes broad yet unambiguous statements are not enough to authorize such important activities.

Whether that context translates to congressional delegations to agencies is a matter of social facts about how Congress actually operates and how people understand Congress to operate—or, as in agency law, how Congress and agencies ordinarily interact. As noted previously, Congress often does delegate important questions to the agency through broad language, such as when it authorizes an agency to grant licenses "in the public interest." And more generally Congress does compromise on broad statutory delegations. Additionally, certainly in today's legal culture it has become expected that agencies undertake important functions. Thus, it would be consistent with how Congress operates, with how people interpret language, and with the mischief rule to conclude that broad language often does authorize important regulatory activities. Only if it were otherwise would a clear statement rule be justified. The claim throughout has been only that importance can and perhaps should play a role in resolving interpretive questions involving ambiguities.

D. Substantive Canons

Provocatively—and tentatively—a general importance canon as a quasi-linguistic canon for resolving ambiguities may justify other substantive canons that are otherwise hard to justify on textualist grounds. Then-Professor Barrett attempted to justify the rule of lenity on the ground that extraconstitutional values can be considered in cases of genuine equipoise, when two possible readings of a

[345] Id.

criminal statute are equally plausible.[346] As Professors Eidelson and Stephenson have recently suggested, however, "such interpretive 'ties' are so unusual as to be practically irrelevant."[347]

Professor Barrett attempted to justify a broader swath of substantive canons—such as the *Charming Betsy* canon that ambiguous statutes should not be construed to violate international law,[348] the presumption against preemption, or the clear-statement requirement for abrogating sovereign immunity—as permissible judicial "implementing" of the Constitution's values, either by compensating for values underenforced through judicial review or by prophylactically enforcing values that Congress may nevertheless override if it chooses to do so.[349] As for buttressing underenforced values, Eidelson and Stephenson make three significant responses: (1) "the very reason for underenforcement is usually that a would-be constitutional limit cannot be specified precisely in the first place;"[350] (2) "such an assessment would need to take into account the costs of requiring Congress to 'override' a misinterpretation in order to exercise constitutional authority that it legitimately possessed all along";[351] and (3) "the real challenge is to explain why *any* judicial 'clipping' of Congress's constitutional authority is permissible."[352] As for prophylactically enforcing constitutional values by narrowing statutes subject to clearer congressional overriding, Eidelson and Stephenson rightly argue that the canons are in tension with textualism precisely because the Constitution does not actually prohibit the relevant congressional action.[353]

An importance canon might supply a more prosaic defense of at least some substantive canons. The rule of lenity, for example, seems quite obviously a manifestation of this more general intuition about language: because the consequences of (many) criminal statutes are more severe, interpreters demand more clarity before concluding a statute criminalizes conduct.[354] Other substantive canons might upon closer inspection also turn out to be applications of this same

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[346] Barrett, *supra* note __, at 177-81.

[347] Eidelson & Stephenson, *supra* note __, at [69] (paper on file with author).

[348] Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804); Barret, *supra* note __, at 134-48.

[349] Barrett, *supra* note __, at 168-77.

[350] Eidelson & Stephenson, *supra* note __, at [50].

[351] Id. at [51].

[352] Id. at [52].

[353] Id. at [59]-[60].

[354] For a discussion of the rule of lenity, see Barrett, *supra* note __, at 128-34. Doerfler applies his argument to the rule of lenity. Doerfler, *supra* note __, at 568-72.

principle. The presumption against preemption was arguably first stated in *Cohens v. Virginia*, in which Justice Story claimed, "To interfere with the penal laws of a State . . . is a very serious measure, which Congress cannot be supposed to adopt lightly, or inconsiderately. The motives for it must be serious and weighty. It would be taken deliberately, and the intention would be clearly and unequivocally expressed."[355] What is an important or "very serious measure" might change over time, but to the extent Justice Story's premise remains widely shared in the legal culture (a crucial caveat), the canon might plausibly be understood as a variant of the same phenomenon, and thus justified, assuming the Supremacy Clause does not negate it.[356]

These same intuitions about importance could also explain the presumption against retroactivity for similar reasons.[357] And it could explain the *Charming Betsy* canon insofar as abrogating international law is an important matter with potentially serious consequences, and the more general antebellum canon applied in some courts that statutes ought not to be construed, if possible, to conflict with natural law or the first principles of free government.[358]

Part II.C suggested that importance could be relevant to resolving interpretive ambiguities, but that it would not necessarily be relevant to interpreting broad and unambiguous statutes given the nature or and expectations surrounding congressional-agency interactions. Aside from the rule of lenity, which similarly requires a threshold of ambiguity, these other substantive canons are clear statements rules and therefore would operate even against broad and unambiguous language. In those contexts, however, that may nevertheless be justified. Think of the parent instructing the nanny to "go have fun with the kids for a few hours"—that is broad and unambiguous, but surely does not authorize the joyrides. The presumptions against violations of international law or abrogating sovereign immunity might stem from a similar intuition, but that would depend on social facts about the legal culture. In any case, a full exploration of how importance might

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[355] Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 443 (1821); *see also* Barrett, *supra* note __, at 153.

[356] U.S. Const. art. VI, para. 2 ("the Judges in every State shall be bound" by federal laws, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."); *see* Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225 (2000).

[357] *See, e.g.*, United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801). Indeed, the consequences of applying a statute retroactively is so contrary to expectations in the Anglo-American legal tradition that ordinary readers appear linguistically to interpret statutes by default to apply only prospectively. Tobia & Slocum, *supra* note __, at [ ].

[358] Ilan Wurman, *The Origins of Substantive Due Process*, 87 U. Chi. L. Rev. 815, 861-64 (2020); Stuart Banner, The Decline of Natural Law 19-23 (2021).

justify these other substantive canons, if at all, must await another day. But it is a possibility with which scholars of interpretation must contend.

CONCLUSION

None of the Supreme Court's versions of what it has called the major questions doctrine appears fully defensible, at least not as currently theorized. Still, a plausible account of what the Court has done in several major questions cases is use importance as a tool for resolving statutory ambiguity in the context of delegations to agents. Using importance as a quasi-linguistic canon in that context may very well be consistent with textualism: it appears consistent with empirical evidence about legislative drafting practices, with how ordinary people interpret language in high-stakes contexts, and with common intuitions about how to read statutes in light of the mischiefs they are fashioned to solve. And such an importance canon may already be a longstanding feature of constitutional, contract, and statutory interpretation in the context of delegations of authority, whether to other private parties, to the government in the Constitution, or from legislatures to executive officers.