

IMPORTANCE AND INTERPRETIVE QUESTIONS

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In its October 2021 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 the 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 and statutory interpretation in related contexts and in agency law. More

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provocatively, these same intuitions about importance may explain some substantive canons that are otherwise 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’ 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. Professor Michael Rappaport has said that the doctrine—at least on the face of the Court’s current language and justification—“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 Professor 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 Professor 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 Professor

¹ 142 S. Ct. 2587, 2609 (2022).

² *Id.* at 2614 (quoting *Utility Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

³ *Id.* at 2616 (Gorsuch, J., concurring).

⁴ *Id.* at 2619.

⁵ Mike Rappaport, *Against the Major Questions Doctrine*, Originalism Blog (Aug. 15, 2022, 8:00 AM), <https://originalismblog.typepad.com/the-originalism-blog/2022/08/against-the-major-questions-doctrinemike-rappaport.html> [<https://perma.cc/U92U-YQ7E>].

⁶ Tom Merrill, *West Virginia v. EPA: Questions About “Major Questions,”* Volokh Conspiracy (July 28, 2022, 7:10 AM), <https://reason.com/volokh/2022/07/28/west-virginia-v-epa-questions-about-major-questions/> [<https://perma.cc/W65E-APE7>].

⁷ Chad Squitieri, *Major Problems with Major Questions*, Law & Liberty (Sept. 6, 2022), <https://lawliberty.org/major-problems-with-major-questions/> [<https://perma.cc/F73C-WW>].

Jonathan Adler: the doctrine allows the Court to deploy “cursory” and “hardly . . . compelling” arguments about statutory interpretation.⁸

Others have been even more critical. Professors 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 may not be good enough when it comes to policies the Court deems ‘major.’”⁹ It “supplies an additional means for minority rule in a constitutional system that already skews toward minority rule,”¹⁰ “provides an additional mechanism for courts to exercise . . . political oversight,”¹¹ and “could exacerbate institutional and political pathologies.”¹² Professor 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 create a “disjunction” between its current cases and prior precedents.¹⁴ It “creates deep conceptual uncertainty about what” the Court is doing.¹⁵ Professor Daniel Walters emphasizes “just how far the new major questions doctrine innovates with the conventional form of a substantive canon,” as the doctrine “in effect allows systemic departure from plausible readings of statutes on the basis of judicial values and preferences that are at best weakly tethered to higher sources of law.”¹⁶

These criticisms are, to some if not a large extent, warranted. There are at least four versions of the doctrine that the Supreme Court has articulated, none of which appears as of yet 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

KG]. However, Squitieri is publishing a defense of a modified major questions doctrine. Chad Squitieri, “Recommend . . . Measures”: A Textualist Reformulation of the Major Questions Doctrine, 75 *Baylor L. Rev.* 706, 710 (2023) [hereinafter Squitieri, A Textualist Reformulation].

⁸ Jonathan H. Adler, *West Virginia v. EPA*: Some Answers About Major Questions, 21 *Cato Sup. Ct. Rev.* 37, 55 (2022).

⁹ Daniel T. Deacon & Leah M. Litman, The New Major Questions Doctrine, 109 *Va. L. Rev.* 1009, 1012 (2023).

¹⁰ *Id.* at 1015.

¹¹ *Id.*

¹² *Id.* at 1049.

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

¹⁴ *Id.* at 264.

¹⁵ *Id.* at 266.

¹⁶ Daniel E. Walters, The Major Questions Doctrine at the Boundaries of Interpretive Law, 109 *Iowa L. Rev.* 465, 471–72 (2024).

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 of whether to deploy the *Chevron* two-step framework at all.¹⁸ In this context, the doctrine is probably indefensible. At step one, the Court uses the doctrine to conclude that the statute is clear and unambiguous when in reality the statute is ambiguous and courts should have deferred 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 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 formulation, constitutional avoidance allows courts to adopt narrowing constructions of statutes when they have “serious doubt[s]” 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 to decide that the statute Congress wrote violates 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.

¹⁷ *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43, 843 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 See *Christensen v. Harris County*, 529 U.S. 576, 586–88 (2000); *United States v. Mead Corp.*, 533 U.S. 218, 229–31 (2001).

¹⁹ See Ilan Wurman, *Administrative Law Theory and Fundamentals: An Integrated Approach* 20–21 (2021) (discussing cases); see also, e.g., *Nielsen v. Preap*, 139 S. Ct. 954, 971 (2019) (“[W]hen 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.” (internal quotation marks omitted) (quoting *Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018))).

²⁰ See Wurman, *supra* note 19, at 20–21.

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 appears to allow courts to ignore a statute’s plain meaning.

There is a way to explain, if not all, then certainly some of the cases, however, that constructs a more 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; 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

²¹ *Sossamon v. Texas*, 563 U.S. 277, 290–91 (2011).

²² *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992).

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

²⁴ See *infra* Subsection I.D.1.

²⁵ True, the degrees 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).

²⁶ *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001).

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”—where both clarity and specificity are required.²⁸ 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 may simply be concluding that the best reading of an otherwise ambiguous 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

²⁷ A good example might be *King v. Burwell*, 576 U.S. 473 (2015), discussed in Section 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* Sections 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 recent Terms, 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 See Eskridge & Frickey, *supra* note 25, at 597.

²⁹ See *infra* Subsection I.D.1.

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 B.U. L. Rev. 109, 167 (2010).

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 militates 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 would be more meritorious and consistent with textualism than other possible accounts, and might already exist in areas of constitutional and statutory interpretation and in agency law. 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 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 interpretation canon.³⁴

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, 1498–99 (2019); Brian G. Slocum, *Replacing the Flawed Chevron Standard*, 60 Wm. & Mary L. Rev. 195, 218 (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 with 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.

³³ Kevin Tobia and Brian G. Slocum, *The Linguistic and Substantive Canons*, 137 Harv. L. Rev. F. 70, 96 (2023).

³⁴ See Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 Yale L.J. 908, 933–37 (2017).

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 from agency law and constitutional 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” 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 of agency law and of constitutional and statutory interpretation in related contexts. Even if the Court has not

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, 477 (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: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 *Minn. L. Rev.* 2019, 2022–24 (2018).

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

been deploying such a canon, it would be more defensible than its existing approach. Part II concludes with some limitations of this approach—and some important differences between it and the similar approach that Justice Barrett has recently articulated—as well as 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. I argue that none of the following four accounts is fully defensible. Nevertheless, it is possible that some of the cases can 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.³⁷ 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.*³⁸ and *FDA v. Brown & Williamson Tobacco Corp.*³⁹ 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 them.

³⁷ Jody Freeman and Matthew Stephenson similarly categorize the cases, but for the purpose of demonstrating the novelty of the clear-statement category. Jody Freeman & Matthew C. Stephenson, *The Anti-Democratic Major Questions Doctrine*, 2022 Sup. Ct. Rev. 1, 4. My aim is to show that, although the Court has used the canon in different doctrinal contexts, there is an underlying continuity.

³⁸ 512 U.S. 218 (1994).

³⁹ 529 U.S. 120 (2000).

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.⁴⁰ 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 insistence that they do otherwise.

*I. Brown & Williamson*⁴¹

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.⁴² 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,"⁴³ and "device" as "an instrument, apparatus, implement, machine, [or] contrivance . . . intended to affect the structure or any function of the body."⁴⁴ The FDA determined that nicotine is a drug and cigarettes are "drug delivery devices" and thus that the FDA had jurisdiction over them.⁴⁵ Both the five Justices in the majority as well as the four in dissent agreed that *Chevron* governed the analysis.⁴⁶ 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."⁴⁷ The dissent concluded that nicotine was clearly a drug under the statutory definition and cigarettes clearly drug-delivery devices,⁴⁸ and because the agency's finding that cigarette manufacturers objectively "intended" their products to have therapeutic

⁴⁰ Ilan Wurman, *As-Applied Nondelegation*, 96 *Tex. L. Rev.* 975, 983 (2018).

⁴¹ Substantial parts of this Subsection are adapted from *id.* at 983–88.

⁴² *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.* 44396 (Aug. 28, 1996) (to be codified at 21 C.F.R. pts. 801, 803, 804, 807, 820, 897)).

⁴³ *Id.* at 126 (quoting 21 U.S.C. § 321(g)(1)(C)).

⁴⁴ *Id.* (quoting 21 U.S.C. § 321(h)(1)).

⁴⁵ *Id.* at 127 (citing *Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents*, 61 *Fed. Reg.* 44396, 44397, 44402 (Aug. 28, 1996)).

⁴⁶ *Id.* at 125–26; *id.* at 170–71 (Breyer, J., dissenting).

⁴⁷ *Id.* at 126 (majority opinion).

⁴⁸ *Id.* at 168–70 (Breyer, J., dissenting).

effects on consumers' bodies was reasonable, the agency's interpretation was entitled to deference.⁴⁹

What seems "clear" is that nothing was particularly clear about the statute as applied to tobacco and cigarettes. Both sides marshaled 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.⁵⁰ This 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.⁵¹ 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,"⁵² and accordingly tobacco products would all be misbranded and require removal from the market.⁵³ Most simply put, a 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.⁵⁴

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."⁵⁵ *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."⁵⁶ "In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation."⁵⁷ Here, the majority was "confident that Congress could not have intended

⁴⁹ Id. at 170–71.

⁵⁰ Id. at 134 (majority opinion) (citing 21 U.S.C. § 360c(a)(1)(A)(i), (B), (C) (1994)).

⁵¹ Id. at 134–41.

⁵² 21 U.S.C. § 352(j).

⁵³ *Brown & Williamson*, 529 U.S. at 137.

⁵⁴ Id. at 142.

⁵⁵ Id. at 159.

⁵⁶ Id.

⁵⁷ 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.")).

to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”⁵⁸

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,”⁵⁹ and that the statute’s basic purpose was the protection of public health, thus supporting the regulation of tobacco.⁶⁰ There was some indication that Congress intended to delegate broad authority to reach future products such as tobacco;⁶¹ the dissent pointed out that the FDA regulates other products causing addiction, sedation, stimulation, and weight loss, which are difficult to distinguish from tobacco;⁶² and the FDA at least arguably did not need to ban an unsafe device because numerous remedial provisions provided that the Secretary of Health and Human Services “may,” but was not required to, ban unreasonably dangerous products.⁶³

Most reasonable observers would conclude that, given that the statutory definitions literally reached tobacco products, the statute was at a minimum ambiguous.⁶⁴ Given ambiguity, *Chevron* counsels deference to the agency’s assertion of jurisdiction.⁶⁵ 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

⁵⁸ Id. at 160.

⁵⁹ Id. at 162, 169–70 (Breyer, J., dissenting).

⁶⁰ Id. at 162.

⁶¹ Id. at 164–66.

⁶² Id. at 169.

⁶³ Id. at 176 (citing 21 U.S.C. §§ 360f(a), 360h(a)–(b)).

⁶⁴ And, in my view, this ambiguity is present whether we consider *Chevron* to be two steps or just one. See Matthew C. Stephenson & Adrian Vermeule, *Chevron* Has Only One Step, 95 Va. L. Rev. 597, 599 (2009); see also Nicholas R. Bednar and Kristin E. Hickman, *Chevron*’s Inevitability, 85 Geo. Wash. L. Rev. 1392, 1433–34 (2017). The issue was not that the statute was ambiguous as a general matter, but rather that it was ambiguous as to the particular assertion of agency authority at issue.

⁶⁵ The Court has explained that there is no difference for *Chevron* purposes between jurisdictional and nonjurisdictional questions. See *City of Arlington v. FCC*, 569 U.S. 290, 296–301 (2013).

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.⁶⁶ Professor Cass Sunstein suggests 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.⁶⁷ Dean 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 constitutional (here, nondelegation) concerns.⁶⁸ Professor Abigail Moncrieff agrees that “as a positive matter [the nondelegation principle] might explain” these cases.⁶⁹ Section 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,”⁷⁰ 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”⁷¹ with something like the following: “Given two possible readings of the statute, we follow the narrower reading as more consistent

⁶⁶ See, e.g., Wurman, *supra* note 40, at 986–88; John F. Manning, The Nondelegation Doctrine as a Canon of Avoidance, 2000 Sup. Ct. Rev. 223, 236–37, 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).

⁶⁷ Sunstein, *supra* note 66, 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).

⁶⁸ Manning, *supra* note 66, 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.”).

⁶⁹ Moncrieff, *supra* note 66, at 617.

⁷⁰ *Id.* at 607.

⁷¹ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 126 (2000).

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 decision-making.

2. MCI

Although *MCI* was also decided under the *Chevron* framework, a similar account might also explain the Court’s decision.⁷² 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.”⁷³ Section 203(b)(2) then provided that “[t]he Commission may, in its discretion and for good cause shown, 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.”⁷⁴

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).⁷⁵ The majority held that the requirement to file rates was the “centerpiece of the Act’s regulatory scheme,”⁷⁶ 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.”⁷⁷ Because the FCC’s regulation went “beyond the meaning that the statute can bear,”

⁷² The following paragraphs are borrowed from Wurman, *As-Applied Nondelegation*, *supra* note 40, at 988–89.

⁷³ *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 224 (1994) (quoting 47 U.S.C. § 203(a)).

⁷⁴ *Id.* (quoting 47 U.S.C. § 203(b)(2) (1988)).

⁷⁵ *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, 20–24 (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)).

⁷⁶ *Id.* at 220.

⁷⁷ *Id.* at 225.

it was not entitled to *Chevron* deference.⁷⁸ 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.”⁷⁹

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.’”⁸⁰ 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.”⁸¹ More still, the word “modify” includes the meaning “to limit or reduce in extent or degree,” and the “permissive detariffing policy fits comfortably within this common understanding of the term.”⁸²

At a 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.”⁸³ 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.

⁷⁸ Id. at 229.

⁷⁹ Id. at 231.

⁸⁰ Id. at 235 (Stevens, J., dissenting) (quoting 47 U.S.C. § 151).

⁸¹ Id. at 241; see also id. at 225 (majority opinion) (tracing the root “mod” to the Latin for “measure”).

⁸² Id. at 242 (Stevens, J., dissenting).

⁸³ Wurman, *supra* note 40, at 989.

3. UARG

The Court's decision in *Utility Air Regulatory Group v. EPA (UARG)*⁸⁴ fits this account as well. In that decision, the Court deployed major questions at the second step of the *Chevron* 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, the "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 The 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 The 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 pollutant."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

⁸⁴ 573 U.S. 302 (2014).

⁸⁵ 549 U.S. 497, 528–29 (2007).

⁸⁶ *UARG*, 573 U.S. at 310 (quoting Regulating Greenhouse Gas Emissions Under the Clean Air Act, 73 Fed. Reg. 44354, 44498–99 (July 30, 2008)).

⁸⁷ *Id.* at 310–11 (quoting Regulating Greenhouse Gas Emissions Under the Clean Air Act, 73 Fed. Reg. at 44354, 44355 (July 30, 2008)).

⁸⁸ *Id.* at 312, 321.

⁸⁹ *Id.* at 316–20.

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 statute.⁹¹ The Court concluded it was not. The “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 the 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: the “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

⁹⁰ Id. at 319.

⁹¹ Id. at 321–24.

⁹² Id. at 321, 325–28.

⁹³ Id. at 324.

⁹⁴ Id. (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

⁹⁵ Id.

⁹⁶ Id.

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 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 the 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

⁹⁷ *Id.* at 324 (emphasis added).

⁹⁸ 576 U.S. 473 (2015).

established by the State” included an exchange established by the federal government.⁹⁹ 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.”¹⁰⁰ That raised the question of 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 dramatically increase and, indeed, some individuals would thereby be permitted to forgo what was otherwise intended to be a mandatory health insurance program.¹⁰¹

The Internal Revenue Service concluded that a federal exchange qualified as one “established by the State” for purposes of the Act.¹⁰² 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.¹⁰³ 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 took 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.”¹⁰⁴ Thus, “[i]t is instead our task to determine the correct reading of” the statute.¹⁰⁵

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.”¹⁰⁶ The phrase was therefore

⁹⁹ Id. at 479, 485.

¹⁰⁰ Id. at 483.

¹⁰¹ Id. at 482.

¹⁰² Id. at 484.

¹⁰³ Id. at 485 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

¹⁰⁴ Id. at 486 (citations omitted).

¹⁰⁵ Id.

¹⁰⁶ Id. at 488.

“ambiguous,”¹⁰⁷ a conclusion “supported by several provisions that assume tax credits will be available on both State and Federal Exchanges.”¹⁰⁸ Because the phrase was ambiguous, the Court “turn[ed] to the broader structure of the Act to determine”¹⁰⁹ its meaning and concluded that the term included exchanges established by the federal government.¹¹⁰

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.”¹¹¹ 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 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 but disagreed that the agency had any discretion on the matter.

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 Professor Blake Emerson has written, this version of the doctrine “authorizes judicial policymaking on precisely those [politically salient] issues that have the highest visibility

¹⁰⁷ Id. at 490.

¹⁰⁸ Id.

¹⁰⁹ Id. at 492.

¹¹⁰ Id. at 498.

¹¹¹ Deacon & Litman, *supra* note 9, at 1023.

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 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 *Burwell* 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 Professor 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

¹¹² Emerson, *supra* note 35, at 2023–24.

¹¹³ *Nielsen v. Preap*, 139 S. Ct. 954, 971 (2019).

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. 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—itsself 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 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

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

¹¹⁵ Manning, *supra* note 66, 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 114, at 1939.

¹¹⁷ 448 U.S. 607 (1980).

¹¹⁸ The next few sentences are borrowed from Wurman, *Administrative Law Theory and Fundamentals*, *supra* note 19, at 553–54.

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)).

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,

If the Government were 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 *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 539, and *Panama Refining Co. v. Ryan*, 293 U.S. 388.¹²⁶

The Court continued: “A construction of the statute that avoids this kind of open-ended grant should certainly be favored.”¹²⁷ Justice Rehnquist

¹²¹ *Id.* at 631.

¹²² *Id.* at 613.

¹²³ *Id.*

¹²⁴ *Id.* at 612 (quoting 29 U.S.C. § 655(b)(5)).

¹²⁵ *Id.* at 614–15 (emphasis added).

¹²⁶ *Id.* at 646. *Schechter* and *Panama Refining* were two nondelegation cases in which the Court had invalidated statutory provisions. See generally *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

¹²⁷ *Benzene Case*, 448 U.S. at 646.

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 the *Benzene Case* 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.”¹²⁹ And Section 3(8) defined standards as “reasonably necessary or appropriate to provide *safe* or healthful employment and places of employment.”¹³⁰ 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.’”¹³¹ “Similarly,” the Court concluded, “a workplace can hardly be considered ‘unsafe’ unless it threatens the workers with a significant risk of harm.”¹³² 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 the Government’s view of §§ 3(8) and 6(b)(5), coupled with OSHA’s cancer policy.”¹³³

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

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

¹²⁹ Id. at 612; 29 U.S.C. § 655(b)(5).

¹³⁰ 29 U.S.C. § 652(8) (emphasis added).

¹³¹ *Benzene Case*, 448 U.S. at 642.

¹³² Id.

¹³³ Id. at 645.

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 the *Benzene Case* 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 a basis that is hard to defend—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.”¹³⁴ 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 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.¹³⁵ 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 at stake. In other words, the statute's best reading is not enough; nor is an unambiguous statute.

1. Examples

A good example of a clear statement rule at work in administrative law is *Franklin v. Massachusetts*, which dealt with how the President and the administration allocated overseas federal employees in the decennial

¹³⁴ Deacon & Litman, *supra* note 9, at 1012; Sohoni, *supra* note 13 *passim*.

¹³⁵ See Wurman, *Administrative Law Theory and Fundamentals*, *supra* note 19, at 20.

census.¹³⁶ 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.¹³⁷ The APA's "best reading" unquestionably—unambiguously—includes the President within the definition of a covered "agency." Under the APA, 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."¹³⁸ 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."¹³⁹ Therefore, the Court held: "[W]e 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."¹⁴⁰ 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.¹⁴¹ 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.

¹³⁶ 505 U.S. 788, 790–91 (1992).

¹³⁷ *Id.* at 800–01.

¹³⁸ *Id.* at 800 (quoting 5 U.S.C. §§ 551(1), 701(b)(1)).

¹³⁹ *Id.* at 800–01.

¹⁴⁰ *Id.*

¹⁴¹ 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. Cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803) ("[W]here the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable.").

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 the statute to require that abrogation. Congress has to be not only unambiguous but also specific. The Court has explained:

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.¹⁴²

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.”¹⁴³ 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.”¹⁴⁴ 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.”¹⁴⁵ “These clear statement rules ensure Congress does not, by broad or general language, legislate on a sensitive topic inadvertently or without due deliberation.”¹⁴⁶ 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.”¹⁴⁷

¹⁴² *Sossamon v. Texas*, 563 U.S. 277, 290–91 (2011).

¹⁴³ *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 125 (2005).

¹⁴⁴ *Id.* at 139.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *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 an 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.

Clear statement rules are potentially problematic in the abstract because, once again, they require courts to go against the best reading of a statute.¹⁴⁸ 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 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,¹⁴⁹ but it is 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.¹⁵⁰ 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 the 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. *October Term 2021*

It remains to be seen whether the Supreme Court adopted a clear statement rule in its October Term 2021 major questions “quartet.”¹⁵¹ In the Court's first case, *Alabama Association of Realtors v. Department of Health and Human Services*, the Court did not do so.¹⁵² At issue was whether the Public Health Service Act authorized the CDC to impose a nationwide eviction moratorium during the COVID-19 pandemic.¹⁵³ The Act authorized the Surgeon General “to make and enforce such

¹⁴⁸ See, e.g., Barrett, *supra* note 30, at 109–10.

¹⁴⁹ See, e.g., *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–43 (1825) (suggesting that Congress must decide on “important subjects,” but not drawing the line between those and lesser subjects).

¹⁵⁰ Deacon & Litman, *supra* note 9, at 1044–45.

¹⁵¹ Sohoni, *supra* note 13, at 262–63 (describing October Term 2021's “quartet” of cases).

¹⁵² 141 S. Ct. 2485, 2486 (2021).

¹⁵³ *Id.* at 2486–87.

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.”¹⁵⁴ 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, and other measures, as in his judgment may be necessary.¹⁵⁵

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.”¹⁵⁶ 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.¹⁵⁷

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.”¹⁵⁸ One might quibble with the threshold conclusions that the statute unambiguously supported the majority’s reading or the alternative

¹⁵⁴ Id. at 2487 (quoting 42 U.S.C. § 264(a)).

¹⁵⁵ Id. (quoting 42 U.S.C. § 264(a)).

¹⁵⁶ Id. at 2488.

¹⁵⁷ Id. at 2489 (“Even if the text were ambiguous . . .”).

¹⁵⁸ Id. (citations omitted) (first quoting *Utility Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014); and then quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)).

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*, involving OSHA's vaccine-or-test mandate for employers with at least 100 employees.¹⁵⁹ 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.¹⁶⁰ "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 the Secretary's mandate.¹⁶¹ 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."¹⁶² 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.¹⁶³ "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."¹⁶⁴ 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

¹⁵⁹ 142 S. Ct. 661, 662 (2022).

¹⁶⁰ *Id.* at 665.

¹⁶¹ *Id.* (citations omitted).

¹⁶² *Id.* (quoting 29 U.S.C. § 655(b)).

¹⁶³ *Id.* at 665.

¹⁶⁴ *Id.*

those hazards would be occupational, i.e., have some kind of special connection to the workplace and type of work.¹⁶⁵

Once again, one might disagree with the premise that the statute was in fact ambiguous, but there is 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."¹⁶⁶ 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 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 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."¹⁶⁷ "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."¹⁶⁸ "The major questions doctrine," Justice Gorsuch explains, "guards against this possibility by recognizing that Congress does not usually 'hide elephants in mouseholes.'"¹⁶⁹

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

¹⁶⁵ Id. at 666.

¹⁶⁶ Anita Krishnakumar, Some Brief Thoughts on Gorsuch's Opinion in *NFIB v. OSHA*, Election L. Blog (Jan. 15, 2022, 8:06 AM), <https://electionlawblog.org/?p=126944> [<https://perma.cc/5ZSJ-EF4D>].

¹⁶⁷ *NFIB v. OSHA*, 142 S. Ct. at 669 (Gorsuch, J., concurring) (emphases added).

¹⁶⁸ Id.

¹⁶⁹ Id. (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001)); see also Randolph J. May & Andrew K. Magloughlin, *NFIB v. OSHA*: A Unified Separation of Powers Doctrine and *Chevron's* No Show, 74 S.C. L. Rev. 265, 271 (2022) (understanding this case as guarding against executive abuse of its legislative authorization).

statutory ambiguities. This is nothing like a traditional clear statement rule. It was only after this analysis that Justice Gorsuch added offhandedly 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.”¹⁷⁰

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.¹⁷¹ The statutory authority granted the Secretary the authority to impose conditions on hospitals that “the Secretary finds necessary in the interest of the health and safety of individuals who are furnished services.”¹⁷² The Court explained that “[t]he rule thus fits neatly within the language of the statute.”¹⁷³ In other words, the mandate seemed to fall within the plain, unambiguous statutory language. And the Secretary had exercised similar authorities in the past.¹⁷⁴

The four dissenters disagreed and used the major questions canon.¹⁷⁵ 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.”¹⁷⁶ 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.”¹⁷⁷ 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.¹⁷⁸ Ultimately, the dissenters added after a bit more analysis, “[i]f Congress had wanted to grant CMS

¹⁷⁰ *NFIB v. OSHA*, 142 S. Ct. at 669 (Gorsuch, J., concurring).

¹⁷¹ 142 S. Ct. 647, 648 (2022).

¹⁷² *Id.* at 652 (quoting 42 U.S.C. § 1395x(e)(9)).

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 652–53.

¹⁷⁵ *Id.* at 656, 658 (Thomas, J., dissenting).

¹⁷⁶ *Id.* at 657 (quoting 42 U.S.C. § 1395x(e)(9)).

¹⁷⁷ *Id.* (quoting *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1625 (2018)).

¹⁷⁸ *Id.* (citing 42 U.S.C. § 1395x(e)(2), (3), (5)).

authority to impose a nationwide vaccine mandate, and consequently alter the state-federal balance, it would have said so clearly.”¹⁷⁹ 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*, in which the Court elaborated upon the major questions doctrine most thoroughly and a majority of the Court for the first time used that term.¹⁸⁰ 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 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.¹⁸¹

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-

¹⁷⁹ *Id.* at 658.

¹⁸⁰ 142 S. Ct. 2587, 2607–10 (2022).

¹⁸¹ *Id.* at 2609 (citations omitted).

statement rule.¹⁸² 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 risk repeating *ad nauseam*, 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.”¹⁸³ 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 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[].”¹⁸⁴ And maybe the Court was playing fast and loose with statutory interpretation—though in my view, the majority had the better reading.¹⁸⁵ If we take the majority’s account seriously,

¹⁸² Deacon and Litman assume that the Court, under the “new” major questions doctrine, is rewriting “otherwise unambiguous” statutory language. Deacon & Litman, *supra* note 9, at 1012–13, 1037. “[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 1035. Sohoni argues that under 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 13, at 275. But under the “new major questions doctrine, the burden of proof has again shifted,” requiring a clear statement. *Id.*

¹⁸³ *West Virginia*, 142 S. Ct. at 2607.

¹⁸⁴ *Id.* at 2641 (Kagan, J., dissenting).

¹⁸⁵ The parallel Hazardous Air Pollutant provision 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,

however, the majority recognized that the agency's approach was plausible as a matter of "definitional possibilities"¹⁸⁶—just as, we might say, OSHA's interpretation of "safe" was certainly plausible as a matter of definitional possibilities.¹⁸⁷

For the first time, however, Justice Gorsuch and Justice Alito's concurrence 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 to protect foundational constitutional guarantees."¹⁸⁸ They then compared this new, supposed clear statement rule with the rule against retroactivity and abrogating sovereign immunity.¹⁸⁹ Not only that, but the opinion also 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."¹⁹⁰ 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.¹⁹¹

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 certainly more difficult to defend.

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.

Clean Air Act § 112(d)(2), 42 U.S.C. § 7412(d)(2) (emphasis added). Here, there is no question that "system" means processes within a plant, since it is simply another way of describing "processes," "methods," and "techniques."

¹⁸⁶ *West Virginia*, 142 S. Ct. at 2614.

¹⁸⁷ There is also some serious risk in 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* Section 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. See Adler, *supra* note 8, at 54; see also *West Virginia*, 142 S. Ct. at 2632 (Kagan, J., dissenting). But, purely on the opinion's own terms, little appears different in kind from prior major questions cases.

¹⁸⁸ 142 S. Ct. at 2616 (Gorsuch, J., concurring).

¹⁸⁹ *Id.* at 2616–17.

¹⁹⁰ *Id.* at 2616.

¹⁹¹ 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 would prefer to see enforced directly.

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.¹⁹² 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.¹⁹³ 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.

3. *Biden v. Nebraska*¹⁹⁴

The Court more recently decided *Biden v. Nebraska* in the 2022 October Term.¹⁹⁵ The major questions doctrine was used at a minimum as an alternative holding. The statute authorized the Secretary of Education to “waive or modify any statutory or regulatory provision applicable to the student financial assistance programs” in a national emergency, “as may be necessary to ensure” that affected “recipients of student financial assistance . . . are not placed in a worse position financially in relation to that financial assistance because of” the national emergency.¹⁹⁶ As the COVID-19 pandemic was coming to an end, the Biden Administration forgave up to \$10,000 of student debt per borrower making below a certain income. Some 43 million Americans qualified for relief, and the plan would have canceled about \$430 billion in debt principal.¹⁹⁷

Two ambiguities were apparent. First, the Secretary’s waiver of debt principal is not actually waiving a statutory or regulatory provision regulating the debt, but it could be framed as waiving the specific

¹⁹² Lou Capozzi offers a defense. See Louis J. Capozzi III, *The Past and Future of the Major Questions Doctrine*, 84 *Ohio St. L.J.* 191, 237 (2023).

¹⁹³ *West Virginia*, 142 S. Ct. at 2616 (“A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body.”).

¹⁹⁴ This Section is adapted from Ilan Wurman, *OT ’22 and the Path of Administrative Law*, 71 *Drake L. Rev.* (forthcoming 2024).

¹⁹⁵ 143 S. Ct. 2355 (2023).

¹⁹⁶ *Id.* at 2363 (quoting 20 U.S.C. § 1098bb(a)(1), (a)(2)(A)).

¹⁹⁷ *Id.* at 2364–65.

conditions for cancellation of debt provided elsewhere in the statute. Second, forgiving principal ensures that the recipient of aid is not in a “worse” position financially, but it also seems to make that person better off financially. Being better off financially than before certainly qualifies as not worse off, although making someone better off is not obviously “necessary” to ensure they are not worse off.

The Court relied in part on the major questions doctrine, although it did not lead with it. “[T]he Secretary would enjoy virtually unlimited power to rewrite the Education Act,”¹⁹⁸ the majority observed of the government’s statutory interpretation. “The economic and political significance of the Secretary’s action is staggering by any measure,”¹⁹⁹ the Court added. “In such circumstances, we have required the Secretary to point to clear congressional authorization to justify the challenged program.”²⁰⁰ And there was none.²⁰¹

Importantly for our purposes, Justice Barrett issued a concurrence that tracks some of the arguments made in this Article. Justice Barrett began by stating that she “take[s] seriously the charge that the doctrine is inconsistent with textualism,” and “that some articulations of the major questions doctrine on offer—most notably, that the doctrine is a substantive canon—should give a textualist pause.”²⁰² On that account, “the major questions doctrine [is] a strong-form substantive canon designed to enforce Article I’s Vesting Clause.”²⁰³ “[T]his ‘clear statement’ version of the major questions doctrine ‘loads the dice’ so that a plausible antidelegation interpretation wins even if the agency’s interpretation is better.”²⁰⁴

“While one could walk away from our major questions cases with this impression, I do not read them this way,” Justice Barrett wrote.²⁰⁵ She understood the doctrine instead “to emphasize the importance of context when a court interprets a delegation to an administrative agency,” and in this sense “the major questions doctrine is a tool for discerning—not departing from—the text’s most natural interpretation.”²⁰⁶ “The major

¹⁹⁸ *Id.* at 2373.

¹⁹⁹ *Id.* (internal quotation marks omitted).

²⁰⁰ *Id.* at 2375 (internal quotation marks omitted).

²⁰¹ *Id.* at 2362.

²⁰² *Id.* at 2376 (Barrett, J., concurring).

²⁰³ *Id.* at 2377.

²⁰⁴ *Id.* at 2378.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 2376 (emphasis omitted).

questions doctrine situates text in context, which is how textualists, like all interpreters, approach the task at hand.”²⁰⁷ And context is “relevant to interpreting the scope of a delegation,” Justice Barrett wrote.²⁰⁸ She then relied on agency law and the Third Restatement: “Whether an agent’s understanding is reasonable depends on ‘[t]he context in which the principal and agent interact,’ including their ‘[p]rior dealings,’ industry ‘customs and usages,’ and ‘the nature of the principal’s business or the principal’s personal situation.’”²⁰⁹

Justice Barrett argued that “[t]his is consistent with how we communicate conversationally,” and used the example of “a parent who hires a babysitter to watch her young children over the weekend” who “hands the babysitter her credit card and says: ‘Make sure the kids have fun.’”²¹⁰ Justice Barrett elaborated on the analogy, a version of which this Article discusses later.²¹¹ Justice Barrett asked whether it was consistent with the parent’s instruction for the babysitter to take the kids “on a road trip to an amusement park, where they spend two days on rollercoasters and one night in a hotel.”²¹² Justice Barrett argued that the instruction was followed “in a literal sense, because the instruction was open-ended,” but that it was not “consistent with a reasonable understanding of the parent’s instruction.”²¹³ Ordinarily, “permission to spend money on fun authorizes a babysitter to take children to the local ice cream parlor or movie theater, not on a multiday excursion to an out-of-town amusement park.”²¹⁴

Justice Barrett’s argument is a welcome development. But there remain important differences between her concurrence and the account defended below in Part II. These differences will be taken up in Section II.C.

E. Summary

Justice Kavanaugh, in two different decisions, has articulated two different versions of the major questions doctrine. As a Justice, in a

²⁰⁷ Id. at 2378.

²⁰⁸ Id. at 2379.

²⁰⁹ Id. (emphasis omitted) (quoting Restatement (Third) of Agency § 2.02 cmt. e (Am. L. Inst. 2006)).

²¹⁰ Id.

²¹¹ See *infra* Section II.C.

²¹² *Nebraska*, 143 S. Ct. at 2379 (Barrett, J., concurring).

²¹³ Id. at 2379–80.

²¹⁴ Id. at 2379.

statement respecting denial of certiorari in *Paul v. United States*,²¹⁵ 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 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.²¹⁶

If Justice 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 U.S. Court of Appeals for 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."²¹⁷ "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."²¹⁸ Justice Barrett's version of the doctrine is similar, rooting it only partly in the Constitution's separation of powers and partly in basic linguistic conventions.²¹⁹

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

²¹⁵ 140 S. Ct. 342 (2019) (Kavanaugh, J., statement respecting denial of certiorari).

²¹⁶ *Id.* at 342.

²¹⁷ *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc).

²¹⁸ *Id.* (emphases in original).

²¹⁹ *Supra* Subsection I.D.3.

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. The critics, for the most part, have assumed that the cases reflect a clear-and-specific-statement requirement or otherwise characterize the doctrine as a substantive canon and therefore argue it cannot be defended.²²⁰

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 agency 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

²²⁰ See Deacon & Litman, *supra* note 9, at 1041; David M. Driesen, *Does the Separation of Powers Justify the Major Questions Doctrine?*, U. Ill. L. Rev. (forthcoming 2024) (manuscript at 19), <https://ssrn.com/abstract=4200508> [<https://perma.cc/87WQ-YC6R>]; Emerson, *supra* note 35 *passim*; Heinzerling, *supra* note 114, at 1980–2003; Daniel Walters, *supra* note 16, at 468–72; see also Benjamin Eidelson & Matthew C. Stephenson, *The Incompatibility of Substantive Canons and Textualism*, 137 Harv. L. Rev. 515, 518–20 (2023) (describing textualist Justices’ struggles to reconcile textualism and the substantive canons). 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 asserts, with little analysis, that the Court’s rulings have no basis in the relevant statutes. Heinzerling, *supra* note 114, at 1938–39. And Driesen asserts that the Court is “amending” Congress’s laws. Driesen, *supra* (manuscript at 1). 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*, 112 Calif. L. Rev. (forthcoming 2024) (manuscript at 142–51), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4304404 [<https://perma.cc/9SYL-ZRR3>], who does grapple with the question of legislative intent. See *infra* notes 234, 241, 246 and accompanying text for additional discussion of Levin’s argument.

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 on what a reasonable reader would take a lawmaker to have said in enacting the statute,”²²¹ then an importance canon of the kind this Part will now attempt to defend is not substantive.²²²

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. 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.²²³ 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.²²⁴ One example is the contemporaneous and longstanding interpretation canon (*contemporanea expositio* and *interpretes 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.²²⁵ 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, unlike other substantive canons, 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

²²¹ Eidelson & Stephenson, *supra* note 220, at 533–34.

²²² It is, rather, something like what Eidelson and Stephenson hypothesize: “[A] reasonable reader would not take Congress as making an extravagant delegation through language that it would have known could also be taken as expressing something more routine.” *Id.* at 540. They think this hypothesis is weak because “we see little reason to think that ‘major’ delegations are anomalous.” *Id.* at 541 (emphasis omitted). 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 authority to an agent.

²²³ Tobia & Slocum, *supra* note 33, at 96.

²²⁴ On the traditional division of the canons into linguistic and substantive, see Barrett, *supra* note 30, 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.”).

²²⁵ For a discussion of these canons, see Bamzai, *supra* note 34, at 930–47.

textualism. Subsection 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. Subsection II.A.2 then relies on the work of Professor 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 sense as well. Subsection II.A.3, relying on Professor 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.

Section II.B then demonstrates that there has been a longstanding understanding, back to the Founding and before, in agency law and in matters of constitutional and statutory interpretation, that ordinarily people and lawmakers do not leave important matters to implication when delegating authority to others.²²⁶ Section 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 some objections about the present account. It also raises differences between the argument advanced here and Justice Barrett's defense in *Nebraska*. Section 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

²²⁶ This understanding is apparently also shared by jurists in Germany and Israel. See *infra* note 281.

answer themselves in the course of the statute's daily administration."²²⁷ Some scholars have described Breyer's language as "fairly innocuous," presumably because considering importance is indeed sensible "in cases of statutory ambiguity."²²⁸ Section I.A defends Breyer's proposition on various grounds and definitions of textualism, assuming statutory ambiguity as a given.²²⁹ 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.

As Professor Tara Grove has noted, there are 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.²³⁰ Grove prefers the more formalistic version that "downplay[s] policy concerns or the practical (even monumental) consequences of the case."²³¹ 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. Squitieri, for example, has argued that the Congressional Review Act demonstrates that Congress has evinced an intent to delegate precisely such questions.²³² That is because the

²²⁷ Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 *Admin. L. Rev.* 363, 370 (1986).

²²⁸ Natasha Brunstein & Richard L. Revesz, *Mangling the Major Questions Doctrine*, 74 *Admin. L. Rev.* 217, 218 (2022).

²²⁹ Whether statutes are in fact ambiguous is a difficult question that is not the objective of this paper to answer. On that question, see Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 *Harv. L. Rev.* 2118, 2137 (2016) (reviewing Robert A. Katzmann, *Judging Statutes* (2014)) ("Determining the level of ambiguity in a given piece of statutory language is often not possible in any rational way. One judge's clarity is another judge's ambiguity."); see also Richard M. Re, *The New Holy Trinity*, 18 *Green Bag 2d* 407, 408 (2015) (noting that nontextual factors often go into a determination in the front end of whether a statute is ambiguous).

²³⁰ Tara Leigh Grove, *Which Textualism?*, 134 *Harv. L. Rev.* 265, 265–71, 279–90 (2020).

²³¹ *Id.* at 267.

²³² Chad Squitieri, *Who Determines Majorness?*, 44 *Harv. J.L. & Pub. Pol'y* 463, 491–93 (2021).

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 ascribed to majorness.²³³ And Professor 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 to agencies important questions.²³⁴

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.²³⁵

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.”²³⁶ Sunstein argues that when “Congress has enacted a broad or general term,” it is unreasonable to assume that Congress did not want the agency to exercise discretion over major questions.²³⁷

The inquiry, however, is not whether Congress likes to delegate important questions through broad language—it often does²³⁸—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.²³⁹ And empirical research has shown that Congress does sometimes legislate with deliberate ambiguity to achieve greater

²³³ *Id.*

²³⁴ Levin, *supra* note 220 (manuscript at 143).

²³⁵ Elena Kagan, *Presidential Administration*, 114 *Harv. L. Rev.* 2245, 2255–56 (2001).

²³⁶ Manning, *supra* note 66, at 228.

²³⁷ Sunstein, *supra* note 35, at 488–89.

²³⁸ For a classic public choice explanation, see John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 131–32 (1980).

²³⁹ Nathan Richardson, *Antideference: COVID, Climate, and the Rise of the Major Questions Canon*, 108 *Va. L. Rev. Online* 174, 201–02 (2022).

consensus.²⁴⁰ 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.²⁴¹ The only available study suggests that the major questions canon is an accurate description of how Congress legislates.²⁴² Professors Abbe Gluck and Lisa Bressman surveyed congressional drafters and described their findings as follows²⁴³:

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

²⁴⁰ Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. Rev. 575, 594–97 (2002).

²⁴¹ Levin’s examples involve broad but not necessarily ambiguous statutes, which appear to be quite unambiguous delegations of authority. *Supra* note 234 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 (2019) (Kavanaugh, J., concurring in the judgment) (citing *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983)).

²⁴² 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 Part I*]; Lisa Schultz Bressman & Abbe Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 Stan. L. Rev. 725, 790 (2014) (“Our respondents resisted the idea of broader delegations to agencies, emphasized the limitations that Congress puts on delegation, and even would have narrowed some of the deference doctrines currently in deployment.”).

²⁴³ The question they posed was: “What kinds of statutory ambiguities or gaps do drafters intend for the agency to fill?” The possible responses were:

- 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*, 65 Stan. L. Rev. 901 app. at 37 (2013), https://review.law.stanford.edu/wp-content/uploads/sites/3/2017/01/Gluck_Bressman_65_Stan._L._Rev._Methods_Appendix.pdf [<https://perma.cc/A8EG-3TQB>].

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 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.²⁴⁴

That analysis makes intuitive sense. Deliberate ambiguity benefits both parties when it comes to issues that are not sufficiently important to scuttle an entire piece of legislation.²⁴⁵ But whether to tackle climate change through CO₂ regulation, or to regulate cigarettes, or to allow a public health agency to prohibit evictions, are usually not the kinds of

²⁴⁴ Gluck & Bressman, *From the Inside Part I*, supra note 242, at 1003–04.

²⁴⁵ This is not universally true, to be sure. To take an obvious example to my mind, the President and Congress are often strategically ambiguous as to whether the President can unilaterally engage in certain war-making activities or must first consult Congress. See, e.g., Arthur M. Schlesinger Jr., *The Imperial Presidency 159–60* (1973). But the critics of the major questions doctrine suggest that such strategic ambiguity is commonplace in delegations involving questions of serious political and economic controversy in the domestic sphere. See, e.g., Jed Handelsman Shugerman, *Biden v. Nebraska: The New State Standing and the (Old) Purposive Major Questions Doctrine*, 2023 *Cato Sup. Ct. Rev.* 209, 236 & n.93, 237–38. There is no intuitive reason to believe that to be the case, nor empirical evidence for it.

things legislators leave to strategic ambiguity; they are usually the kinds of things that one side wins and the other loses.²⁴⁶

The question remains whether resolving ambiguities in favor of legislative intent, as elucidated by congressional drafting practices, is consistent with textualism. Professor 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.”²⁴⁷ “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.”²⁴⁸ Professors Larry Alexander and Saikrishna 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.”²⁴⁹ On these accounts of 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,²⁵⁰ using importance to resolve interpretive

²⁴⁶ 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 220 (manuscript at 146). 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.* 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.

²⁴⁷ Caleb Nelson, *What is Textualism?*, 91 Va. L. Rev. 347, 348 (2005).

²⁴⁸ *Id.* at 407.

²⁴⁹ 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).

²⁵⁰ See, e.g., Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 Const. Comment. 95, 98, 102 (2010) (arguing that originalists resolve ambiguity through interpretation, the object of which is the original public meaning of the text).

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 (1) to find statutory ambiguities in cases involving questions of major political and economic significance, and (2) 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.”²⁵¹ 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.”²⁵² “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.”²⁵³ 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.”²⁵⁴ Doerfler explores the various linguistic and philosophical explanations for this phenomenon.²⁵⁵

Consider the following example from Wittgenstein, which Sunstein has recently discussed.²⁵⁶ If someone says to me, “Shew the children a game,” and I teach them a gambling game, it is natural for the requester to say, “I didn’t mean that sort of game.”²⁵⁷ Wittgenstein asks whether “the exclusion of the game” must “have come before his mind when he gave me the order?”²⁵⁸ The answer, Sunstein explains, is “no”: even though a gambling game is technically a “game,” ordinarily gambling is not included in a category of games that would be shown to children.²⁵⁹ Whether it’s showing a child a game, going to get lunch, or making a reservation, “extraordinary” or “staggering” choices, Sunstein explains, require “strong contextual justification,” otherwise the response will be “I didn’t mean that sort of lunch” or “I didn’t mean that sort of

²⁵¹ Ryan D. Doerfler, *High-Stakes Interpretation*, 116 *Mich. L. Rev.* 523, 527 (2018).

²⁵² *Id.* at 527–28.

²⁵³ *Id.* at 528.

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 544–47.

²⁵⁶ Cass R. Sunstein, *Two Justifications for the Major Questions Doctrine*, 76 *Fla. L. Rev.* 251, 254 (2024).

²⁵⁷ Ludwig Wittgenstein, *Philosophical Investigations* 33 (G.E.M. Anscombe trans., 3d ed. 1967).

²⁵⁸ *Id.*

²⁵⁹ Sunstein, *supra* note 256, at 254.

restaurant.”²⁶⁰ “[I]n ordinary conversation,” Sunstein adds, “people anticipate that response, and they do not make choices that would elicit it.”²⁶¹

Doerfler further 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.²⁶² The reasonable doubt rule in criminal cases is another example: ordinarily, people are less willing to conclude in criminal cases than in civil cases that they “know” someone is responsible, precisely because the stakes are so high in the former.²⁶³

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.²⁶⁴

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 where such a 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

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² See Doerfler, *supra* note 251, at 551–52.

²⁶³ *Id.* at 550.

²⁶⁴ *Id.* at 547.

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.²⁶⁵

More to the present point, 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*.²⁶⁶

²⁶⁵ 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 several studies do point toward stake sensitivity. *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 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.

²⁶⁶ Though the intuition about language in high-stakes contexts need not always be in the direction of deregulation. Sunstein, *supra* note 256, at 257. As Sunstein illustrates, "If a parent tells a babysitter, 'have some fun with them,' a babysitter would not have obeyed those instructions if an afternoon involved five minutes of fun and many hours of grueling math exercises." *Id.* Doerfler similarly 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 more proof before concluding that the statute requires such a result. Doerfler, *supra* note 251, 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," 576 U.S. at 475, with a federally facilitated exchange; "[u]nder such circumstances," Doerfler

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.

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.²⁶⁷ Thus, as a matter of constitutional structure, the agencies are the asserters of the legal claim and bear the burden of proof.²⁶⁸ 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

explains, "it would make sense for a court to require increased epistemic justification before regarding the 'destabiliz[ing]' reading as 'clear.'" Doerfler, *supra* note 251, 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, "what *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.*

²⁶⁷ See *NFIB v. OSHA*, 142 S. Ct. 661, 665 (2022) ("Administrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided."); *Michigan v. EPA*, 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.").

²⁶⁸ See Gary Lawson, *Legal Indeterminacy: Its Cause and Cure*, 19 *Harv. J.L. Pub. Pol'y* 411, 426 (1996).

insights about high-stakes interpretation militate in favor of a major questions canon of some sort.²⁶⁹

After a draft of this Article was posted, but before publication, Professors Kevin Tobia, Daniel Walters, and Brian Slocum published a working draft of an empirical study they conducted to test the intuition about stakes sensitivity in a few ways.²⁷⁰ They try to test examples from Doerfler’s work as well as Justice Barrett’s *Nebraska* concurrence and conclude that there is no empirical support for the claim about ordinary readers that I make here (or that Justice Barrett makes). I am not persuaded. Their framing of the questions did not account for stakes sensitivity and effectively required the participants to answer whether the babysitter *literally* violated the instruction, which is not how textualism works.²⁷¹

²⁶⁹ 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.

²⁷⁰ Kevin Tobia, Daniel E. Walters & Brian Slocum, *Major Questions, Common Sense?*, 97 S. Cal. L. Rev. (forthcoming June 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4520697 [<https://perma.cc/JBM5-DVWH>].

²⁷¹ Start with the “babysitter” hypothetical from Justice Barrett’s concurrence, a version of which I use later in this Article. Tobia, Walters, and Slocum asked participants about a situation in which young children are left with a babysitter for two days and one night and the parent hands the babysitter a credit card and says, “Use this credit card to make sure the kids have fun this weekend.” *Id.* (manuscript at 39). They pose a series of scenarios, including the babysitter using the credit card (1) to buy pizza and ice cream and to rent a movie; (2) to buy admission to an amusement park and hotel; or (3) to hire a professional animal entertainer, who brings a live alligator to the house to entertain the children. *See id.* (manuscript at 38–40). The authors then asked the study participants whether the babysitter “followed the instruction” or “violated the instruction.” *Id.* (manuscript at 40). Only 8 percent thought the babysitter violated the instruction in scenario (2), and only 10 percent thought the babysitter violated the instruction in scenario (3). *See id.* (manuscript at 39, 43). According to the authors, this challenges the intuition about the major questions doctrine. *See id.* (manuscript at 1).

Not so. As suggested above, the question’s framing effectively required the participants to answer whether the babysitter *literally* violated the instruction. And the answer is of course not. But if the question had been asked another way—“does the best reading of the parent’s instruction include authorization to undertake this action?” or “do you think the parent’s instruction was intended to include this scenario?” or “do you think ordinary, reasonable interpreters of the parent’s instruction would have interpreted it to include this scenario?”—the answer almost certainly would have been different. These alternative proposed questions are far closer to what textualists actually ask, and to what Justice Barrett asked about the babysitter hypothetical. The authors are aware of this; indeed, their experiment is apparently intended to test whether interpreters interpret instructions literally or not. But their actual question does not test that proposition because the question appears to ask whether the instruction was literally violated. In other words, these participants would have answered “no”

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. Bray has suggested that “the major questions doctrine” is an “interpretive intuition[] that [is] widespread, even without a definitive contemporary formulation.”²⁷² 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.”²⁷³ 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

to the question of whether Wittgenstein’s teaching a gambling game to a child violated the requester’s instruction.

The authors did ask the participants whether the babysitter’s response to the instruction was “reasonable.” A substantially lower number thought scenario (2) was reasonable, and participants generally thought scenario (3) was unreasonable. See *id.* (manuscript at 39, 43). The authors write that textualists should ignore this data, however, because otherwise the textualists would be “incorporating purposive reasoning, which is not clearly as relevant to ordinary people’s straightforward understanding about whether an act violates a rule.” *Id.* (manuscript at 45). I am not sure why they think that. The purpose and intent behind a rule help ordinary readers decide whether an instruction has been violated, as the Wittgenstein gambling example indicates.

The authors also use a bank example to determine whether stakes affect beliefs about clarity. The question is whether someone (Bob) knows the bank is in fact open on Saturday, when the stakes of the bank being open or not vary with the scenario. Bob’s wife looks up the bank’s policy, and the participant is provided with one of four rules: “The bank is open on Saturdays”; “The bank is closed on Sundays”; “The bank is closed only on Sundays and federal holidays”; and “The bank is open during regular business hours.” *Id.* (manuscript at 35). The authors found that the stakes of the situation “had no impact on whether people understood” the bank’s rule to be “clear or unclear” as to the question of whether it was open on Saturday. *Id.* (manuscript at 38). In conversation, Ryan Doerfler has pointed out that it does not appear that the participants were asked whether the rule was clear *to Bob*, as opposed to themselves, and Bob is the one sensitive to stakes in the example. This observation also applies to the babysitter example. It would be worth testing how many participants would agree that the instruction was followed if *they* were the parents and the example involved *their* children, or if they had been the babysitter would they have been confident that the parent in fact authorized the transaction in question. The participants were asked what they thought about the situation, but the participants themselves were not subject to any of the stakes.

²⁷² Samuel L. Bray, *The Mischief Rule*, 109 *Geo. L.J.* 967, 1011 (2021).

²⁷³ *Id.* at 968.

on the tracks.²⁷⁴ 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 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, and 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.²⁷⁵ 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 nonmedical product never safe for its intended use.²⁷⁶ 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.²⁷⁷ 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.²⁷⁸ Professor Donald Drakeman

²⁷⁴ Id. (discussing *Nashville & K.R. Co. v. Davis*, 78 S.W. 1050 (Tenn. 1902)).

²⁷⁵ 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*. See *supra* Subsection I.A.3.

²⁷⁶ See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 126 (2000).

²⁷⁷ See *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2486 (2021).

²⁷⁸ See *Bray*, *supra* note 272, at 1003 (explaining, in reference to the train statute, that “a reasonable reader will not understand the statute as saying that trains have to stop for squirrels and slugs”).

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 clear.²⁷⁹ And, as Justice Barrett has said, textualism is not literalism.²⁸⁰ 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 some textualist support for the major questions doctrine. To be sure, such textualism would be more expansive than the textualism assumed in Subsections 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 agency law and of constitutional and statutory interpretation.²⁸¹ Historical research reveals that it was commonly understood in many different contexts that lawmakers and ordinary people usually 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

²⁷⁹ See Donald L. Drakeman, *The Hollow Core of Constitutional Theory: Why We Need the Framers* 202–03 (2020).

²⁸⁰ See Amy Coney Barrett, *Assorted Canards of Contemporary Legal Analysis: Redux*, 70 *Case W. Rsr. L. Rev.* 855, 856–57 (2020); see also Grove, *supra* note 230, at 279; Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 24 (Amy Gutmann ed., 1997).

²⁸¹ 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*, 62 *Colum. J. Transnat’l L.* (forthcoming 2024) (manuscript at 43–52) (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.* at 49. To be clear, Tamir argues that the doctrine as used in these other jurisdictions is significantly narrower than the doctrine in the United States. *Id.* at 46, 48. But, I think, the doctrine as used in those jurisdictions is quite similar to the one that I am advancing here.

or officer thereof.”²⁸² A broad reading of the Clause might suggest that Congress can do literally anything that is convenient²⁸³ for carrying out its enumerated powers—for example, commandeering state officers,²⁸⁴ abrogating sovereign immunity,²⁸⁵ granting corporate monopolies²⁸⁶—no matter how seemingly important those powers are. But that probably was not how the Clause was generally 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 powers, few would think that Congress could derive those powers from a mere grant of implied powers.

In his speech in the House of Representatives in opposition to incorporating a Bank of the United States, James Madison asserted the following interpretive principle, which should sound familiar to readers of the Court’s modern cases: “In admitting or rejecting a constructive authority, not only the degree of its incidentality to an express authority is to [be] regarded, but the degree of its importance also; since on this will depend the probability or improbability of its being left to construction.”²⁸⁷ On the merits, Madison argued, “It cannot be denied that the power proposed to be exercised is an important power” because “the bill creates an artificial person, previously not existing in law.”²⁸⁸ He explained:

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

²⁸² U.S. Const. art. I, § 8, cl. 18.

²⁸³ See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413 (1819) (explaining that the word “necessary” “frequently imports no more than that one thing is convenient, or useful, or essential to another”).

²⁸⁴ See generally *Printz v. United States*, 521 U.S. 898 (1997) (holding that Congress cannot commandeer state executive officers to execute federal laws).

²⁸⁵ See generally *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (holding Congress cannot abrogate state sovereign immunity pursuant to its Article I powers).

²⁸⁶ See generally *McCulloch*, 17 U.S. at 316 (holding that Congress can, pursuant to its necessary and proper powers, incorporate a national bank).

²⁸⁷ 2 *Annals of Cong.* 1896 (1791) (Joseph Gales ed., 1834) (statement of Rep. Madison).

²⁸⁸ *Id.* at 1899.

characters are acquired by him. Would Congress have had the power to naturalize, if it had not been expressly given?²⁸⁹

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.”²⁹⁰ 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 by-laws,” which is “a sort of Legislative power” and “is unquestionably an act of a high and important nature.”²⁹¹ 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.”²⁹² And the bill “involves a monopoly, which affects the equal rights of every citizen.”²⁹³ “From this view of the power of incorporation exercised in the bill,” Madison concluded:

[I]t could never be deemed an accessory 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.²⁹⁴

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.”²⁹⁵ 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

²⁸⁹ *Id.* at 1899–1900.

²⁹⁰ *Id.* at 1900–01.

²⁹¹ *Id.* at 1900.

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ Edmund Randolph, Enclosure: Opinion on the Constitutionality of the Bank (Feb. 12, 1791), Founders Online, Nat'l Archives, <https://founders.archives.gov/documents/Washington/05-07-02-0200-0002> [<https://perma.cc/U3J6-ELT8>] (last visited Mar. 8, 2024).

have written Constitutions, are circumscribed by a just interpretation of the words contained in them.”²⁹⁶ 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 noted 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.”²⁹⁷ Hamilton asserted that “the 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 supposed; 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.”²⁹⁸ 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.”²⁹⁹ Great and important authorities—such as the power of making war, laying taxes, and regulating commerce—cannot be left to implication.³⁰⁰

²⁹⁶ *Id.*

²⁹⁷ Alexander Hamilton, Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank (Feb. 23, 1791), Founders Online, Nat’l Archives, <https://founders.archives.gov/documents/Hamilton/01-08-02-0060-0003> [<https://perma.cc/U3J6-ELT8>] (last visited Mar. 8, 2024).

²⁹⁸ *Id.*

²⁹⁹ 17 U.S. (4 Wheat.) 316, 411 (1819).

³⁰⁰ There are portions of Hamilton’s opinion where he did initially challenge this idea that important power could not be left to implication by pointing to Congress’s power “[t]o exercise exclusive Legislation in all Cases whatsoever” in the District of Columbia. U.S. Const. art. I, § 8, cl. 17. This grant “clearly” includes a power to erect corporations in the District, Hamilton argued, “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.” Hamilton,

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.³⁰¹

In the English case *Howard v. Baillie* from 1796,³⁰² the executrix of an estate authorized two others “to act for her in collecting and getting in the estate of the deceased, and paying his debts.”³⁰³ 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.³⁰⁴ 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.³⁰⁵ 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,”³⁰⁶ that is, “subordinate powers, though not expressly given . . . must be understood to be included in this power to pay debts.”³⁰⁷ “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,³⁰⁸ and it

supra note 297. Yet Hamilton was not really tackling Madison’s point head on because the District Clause is, in fact, an express grant of all conceivable legislative powers for the government of the district. Hamilton then suggested 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. *Id.* Hamilton knew this, which is why he added 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. *Id.*

³⁰¹ Gary S. Lawson, Geoffrey P. Miller, Robert G. Natelson & Guy I. Seidman, *The Origins of the Necessary and Proper Clause* 5–10 (2010); Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper Clause*, 55 *Case W. Rsrv. L. Rev.* 243, 247 (2004).

³⁰² (1796) 126 Eng. Rep. 737; 2 H. Bl. 618.

³⁰³ 126 Eng. Rep. at 737. This is the court’s formulation.

³⁰⁴ *Id.* at 737–39.

³⁰⁵ *Id.* at 739–40.

³⁰⁶ *Id.* at 738.

³⁰⁷ *Id.*

³⁰⁸ Joseph Story, *Commentaries on the Law of Agency* 58–61 (Boston, Charles C. Little & James Brown 1839).

illustrates as well with examples of where the power was not sufficiently subordinate to be left to implication.³⁰⁹ 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.”³¹⁰ 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 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.³¹¹

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.³¹² When an agent is authorized to sell goods, that does not, without more specific authorization, allow pledging those goods as security.³¹³ 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

³⁰⁹ Id. at 62–69.

³¹⁰ Id. at 94 (emphases added).

³¹¹ Id. at 111.

³¹² *Wiltshire v. Sims* (1808) 170 Eng. Rep. 949, 949; 1 Camp. 258, 258.

³¹³ *Paterson v. Tash.* (1743) 93 Eng. Rep. 1110, 1110–11; 2 Strange 1178, 1178. See *Shipley v. Kymer* (1813) 105 Eng. Rep. 181, 183; 1 M. & S. 484, 490–91 (1813).

mortgages, and would enable a partner to give to a favourite creditor a real lien on the estates of the other partners.”³¹⁴

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.³¹⁵ The master, under pressure from creditors, sold them the cargo instead as satisfaction of the owner’s debts.³¹⁶ When the owner sued the creditors, the creditors argued that the owner had to sue his agent because the sale was “good.”³¹⁷ 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.”³¹⁸

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 argued in *West Virginia v. EPA* that most of the major questions cases involve agencies engaging in activities or duties that go beyond their ordinary activities.³¹⁹ The mischief rule instructs that how a law was intended to resolve a problem is important context for interpreting the law.³²⁰ But these points merely suggest that the two ideas tend to collapse into the same inquiry. 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 moratorium case: “Where, in general mandates, some things are specially expressed, the generality is not extended to cases of greater importance than these expressed.”³²¹

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.”³²² For example, “[a] reasonable agent should

³¹⁴ *Harrison v. Jackson* (1797) 101 Eng. Rep. 935, 936–37; 7 T.R. 207, 210.

³¹⁵ *Peters v. Ballistier*, 20 Mass. (3 Pick.) 495, 495–96 (1826).

³¹⁶ *Id.* at 496–97.

³¹⁷ *Id.* at 503.

³¹⁸ *Id.*

³¹⁹ 142 S. Ct. 2587, 2633 (2022) (Kagan, J., dissenting).

³²⁰ See *supra* Subsection II.A.3.

³²¹ Story, *supra* note 308, at 69.

³²² Restatement (Third) of Agency § 2.02 cmt. h (Am. L. Inst. 2006).

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."³²³ 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."³²⁴ 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.³²⁵

3. 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 rule³²⁶—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."³²⁷ 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

³²³ *Id.*

³²⁴ *Id.* cmt. d.

³²⁵ A version of the same interpretive proposition persists to this day in the law of written contracts even outside the agency law context, although admittedly the relevance of these cases is lessened by the fact that Congress and the Executive are not contracting parties. Still, it is at least suggestive, as the Wisconsin Supreme Court has held, that "important contractual provisions are not ordinarily left to implication." *Huntoon v. Capozza*, 204 N.W.2d 649, 657 (Wis. 1973); see also *Swanson v. Van Duyn Chocolate Shops, Inc.*, 579 P.2d 239, 241 (Or. 1978) (courts cannot fill an "omission of a major and valuable term, which is usually bargained for by the parties, simply by implication"); *Trustees of First Presbyterian Church in Newark v. Howard Co. Jewelers*, 97 A.2d 144, 146 (N.J. 1953) (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).

³²⁶ See *supra* note 143 and accompanying text.

³²⁷ *Jackson v. S.S. Archimedes*, 275 U.S. 463, 464 (1928).

would have stated that intention, not leaving *such an important regulation* to be gathered from implication.’”³²⁸ 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” to the rule as “applied to American vessels,” but said nothing as to foreign vessels.³²⁹

Louis Capozzi has cited to other doctrines in which grants of power required clear and express delegations.³³⁰ One significant example is the Oregon Supreme Court’s decision in *Board of Railroad Commissioners v. Oregon Railway & Navigation Co.*³³¹ The question was whether the statute authorized the Railroad Commission to determine what were just and reasonable rates and to enter into proceedings to enforce those rates.³³² 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.³³³ Yet other parts of the statute seemed to imply that the commission had the 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.³³⁴

³²⁸ *Id.* at 470 (emphasis added) (quoting *Sandberg v. McDonald*, 248 U.S. 185, 195 (1918)).

³²⁹ *Id.*

³³⁰ Capozzi, *supra* note 192, at 200–06. Not all of Capozzi’s examples are relevant to the present analysis. For example, he draws attention to delegations to municipal corporations. *Id.* at 200–02 & nn.61–62. Courts generally required delegations to municipal corporations to be express or necessarily implied from any express delegations. *Id.* at nn.61–62; see also Ilan Wurman, *The Origins of Substantive Due Process*, 87 *U. Chi. L. Rev.* 815, 826–36 (2020) (canvassing these nineteenth century cases). Those cases are only relevant if one is to make a substantive defense of a similar 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.

³³¹ 19 P. 702 (Or. 1888); Capozzi, *supra* note 192, at 201–02.

³³² *Bd. of R.R. Comm’rs*, 19 P. at 703.

³³³ *Id.* at 703–05.

³³⁴ *Id.* at 704.

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.³³⁵

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.”³³⁶ The opinion went on to say, “It cannot be presumed that any legislature would confer so important a prerogative upon a board of commissioners”³³⁷ 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”³³⁸ 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 about whether the legislature would delegate such an important 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 *Interstate Commerce Commission v. Cincinnati, New Orleans & Texas Pacific Railway Co.*³³⁹ 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 railroads, along with requiring disclosure of rates and prices.³⁴⁰ But nowhere did the act explicitly give the Interstate Commerce Commission that it created the power to *establish* maximum rates for the future.³⁴¹ This power was not “expressly given,”³⁴² the Court held, and “is not to be determined by any mere considerations of omission or implication.”³⁴³ The Court goes on to observe that the power to prescribe

³³⁵ Id. at 706.

³³⁶ Id. (emphases added).

³³⁷ Id. at 707.

³³⁸ Id.

³³⁹ 167 U.S. 479 (1897).

³⁴⁰ Id. at 500; see also Interstate Commerce Act §§ 1–7, 24 Stat. 379, 379–82 (1887).

³⁴¹ *Cincinnati*, 167 U.S. at 500.

³⁴² Id.

³⁴³ Id. at 502.

such rates is generally considered “legislative . . . and, 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.”³⁴⁴ 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.³⁴⁵ Here again, the importance of the matter militates against finding a delegation through ambiguous terms.

Numerous other cases adopt a kind of importance canon and appear not to generate very much controversy. In *United States Forest Service v. Cowpasture River Preservation Ass’n* from 2020,³⁴⁶ 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.³⁴⁷ 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.³⁴⁸

The statutes themselves were silent on to whom the Department of Interior could delegate authority over the administration of the national trails.³⁴⁹ After interpreting the statutes and concluding that the U.S. Forest Service maintained control over the land, even if not management of the trail,³⁵⁰ 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.”³⁵¹ “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.”³⁵² The Court would “not presume that the act of delegation,

³⁴⁴ *Id.* at 505.

³⁴⁵ *Id.*

³⁴⁶ 140 S. Ct. 1837 (2020).

³⁴⁷ *Id.* at 1841–42.

³⁴⁸ *Id.* at 1842–44.

³⁴⁹ *Id.* at 1843.

³⁵⁰ *Id.* at 1844–45.

³⁵¹ *Id.* at 1848.

³⁵² *Id.* at 1849 (internal quotation marks omitted) (citations omitted).

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.³⁵³

Another example is *Epic Systems Corp. v. Lewis*.³⁵⁴ The Federal Arbitration Act requires courts to enforce arbitration agreements as written,³⁵⁵ “save upon such grounds as exist at law or in equity for the revocation of any contract.”³⁵⁶ The Ninth Circuit had concluded that the National Labor Relations Act's (“NLRA”) prohibition on barring employees from engaging in “concerted activities” made unenforceable any arbitration agreements that nullified class action rights.³⁵⁷ The Supreme Court reversed the Ninth Circuit, concluding in relevant part that, even assuming the NLRA defense applied to “any contract” for purposes of the Arbitration Act, the NLRA did not prohibit enforcement of these arbitration agreements.³⁵⁸ That is because the protection for “concerted activities” was a guarantee of collective bargaining—not a guarantee of a class action right.³⁵⁹ There was therefore no conflict between the two statutes.

After additional statutory analysis, the Court added that “the employees’ 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.’”³⁶⁰ 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.³⁶¹

“It’s more than a little doubtful,” the Court concluded, “that Congress would have tucked into the mousehole of [the NLRA’s] catchall term an

³⁵³ Id. (internal quotation marks omitted) (citation omitted).

³⁵⁴ 138 S. Ct. 1612 (2018).

³⁵⁵ Id. at 1619; see also 9 U.S.C. § 2.

³⁵⁶ 9 U.S.C. § 2.

³⁵⁷ *Epic Systems*, 138 S. Ct. at 1620.

³⁵⁸ Id. at 1624–27.

³⁵⁹ Id. at 1624.

³⁶⁰ Id. at 1626–27 (quoting *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001)).

³⁶¹ Id. at 1627.

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."³⁶² 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*,³⁶³ the question was whether the U.S. Attorney General could "bar dispensing controlled substances for assisted suicide in the face of a state medical regime permitting such conduct."³⁶⁴ 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 against pre-emption . . . to reach this commonsense conclusion.³⁶⁵

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.

Finally, *Whitman v. American Trucking Ass'ns*³⁶⁶ 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.³⁶⁷ The Court thought it "clear that this text does not permit the EPA to consider costs in setting the standards."³⁶⁸ Responding to the argument

³⁶² *Id.*

³⁶³ 546 U.S. 243 (2006).

³⁶⁴ *Id.* at 275.

³⁶⁵ *Id.* at 274 (internal citations omitted).

³⁶⁶ 531 U.S. 457 (2001).

³⁶⁷ *Id.* at 465 (quoting 42 U.S.C. § 7409(b)(1)).

³⁶⁸ *Id.*

that the terms “‘adequate margin’ and ‘requisite’ leave room to pad health effects with cost concerns,”³⁶⁹ the Court added: “[W]e 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.”³⁷⁰ 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.”³⁷¹

C. Objections

This Section 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,” from whose perspective, and as of when.³⁷² This inquiry does have a “‘know it when you see it’ quality,” as then-Judge Kavanaugh said.³⁷³ 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 Section II.B showed, judges have routinely relied on

³⁶⁹ Id. at 468 (quoting 42 U.S.C. § 7409(b)(1)).

³⁷⁰ Id.

³⁷¹ 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) (Dent, J.), 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 (quoting W.V. Const. art. 4, § 4). 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. at 771. 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.

³⁷² See, e.g., Squitieri, *supra* note 232, at 488–89.

³⁷³ U.S. Telecom Ass’n v. FCC, 855 F.3d 381, 423 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

a matter's importance to resolve ambiguous language, from the Founding to today, in agency law and in constitutional and statutory cases.³⁷⁴

Perhaps more to the point, judges should not be blind to matters of general knowledge.³⁷⁵ Simply put, anyone who has been half awake in the past thirty years knows that whether CO₂ 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 CO₂ 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.”³⁷⁶ 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.³⁷⁷ These are matters of general notoriety, and no one disputes their importance.³⁷⁸ The very controversy generated by the Court's adoption of the major questions doctrine would not be so intense were it not for the importance of the regulations and subjects at issue.

³⁷⁴ *Supra* Section II.B.

³⁷⁵ 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 (Field, Circuit Justice, C.C.D. Cal. 1879) (No. 6,546). 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 L. Black Jr., *The Lawfulness of the Segregation Decisions*, 69 *Yale L.J.* 421, 424–27 (1960).

³⁷⁶ *West Virginia v. EPA*, 142 S. Ct. 2587, 2626 (2022) (Kagan, J., dissenting) (internal quotation marks omitted) (citation omitted).

³⁷⁷ Justice 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. Petition for Writ of Certiorari at 22, *Massachusetts*, 549 U.S. 497 (No. 05-1120). That petition, to be sure, quoted statements from President Bush, EPA Administrator Christine Todd Whitman, and a National Academy of Sciences report. *Id.* 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.

³⁷⁸ There are, moreover, many other signals of importance. Justice Ginsburg signed on to the majority opinion in *MCI*, apparently understanding 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 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.” 142 S. Ct. at 2633 (Kagan, J., dissenting).

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 the 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 the 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 their 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 suggest an intent to delegate the important question. The doctrine should not be used as a “get-out-of-text-free card[],”³⁷⁹ as Justice Kagan argued. If Lisa Heinzerling is correct that the doctrine puts “a big, grumpy thumb on the scales in interpreting” the statutes³⁸⁰ or “ignores details of statutory history and design,”³⁸¹ then that, too, should be rejected. The readers can judge for themselves by assessing Part I whether they agree with these critics’ characterization of the cases. If the criticisms are true as a descriptive matter, they would have serious force.

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. This is similar to the

³⁷⁹ *West Virginia*, 142 S. Ct. at 2641 (Kagan, J., dissenting).

³⁸⁰ Heinzerling, *supra* note 114, at 1938.

³⁸¹ *Id.* at 1939.

example that Justice Barrett subsequently used—and which she argued militates in favor of the major questions doctrine.³⁸²

Whether that context translates to congressional delegations to agencies, however, 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 agencies through broad language. And more generally, Congress does compromise on broad statutory delegations.³⁸³ 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.

To be sure, Justice Barrett also cites the Gluck and Bressman study for the proposition that “[t]his expectation of clarity is rooted in the basic premise that Congress normally intends to make major policy decisions itself, not leave those decisions to agencies.”³⁸⁴ That study, however, specifically asked about “ambiguities or gaps,” not broad and open-ended delegations.³⁸⁵ And her observation that “in a system of separated powers, a reasonably informed interpreter would expect Congress to legislate on ‘important subjects’ while delegating away only ‘the details,’”³⁸⁶ is also well taken, although it is hardly clear as a descriptive matter that this remains true of Congress today.

More importantly, however, note how Justice Barrett’s description of the separation of powers seems to incorporate nondelegation values into her textualist defense of the major questions doctrine: Given our system of government, ordinary folks would surely understand Congress to decide on the important questions. Here Justice Barrett’s leading citation

³⁸² See *Biden v. Nebraska*, 134 S. Ct. 2355, 2379–80 (2023) (Barrett, J., concurring).

³⁸³ As Chad Squitieri reminds us, the President has a role in the lawmaking process too—both by recommending and vetoing legislation. Squitieri, *A Textualist Reformulation*, supra note 7, at 747–49 (pointing out that, as a result, the agencies are more like delegating to a grandparent rather than a babysitter because there is shared authority).

³⁸⁴ *Nebraska*, 143 S. Ct. at 2380 (internal quotation marks omitted) (citation omitted).

³⁸⁵ Gluck & Bressman, supra note 243, at 37.

³⁸⁶ *Nebraska*, 143 S. Ct. at 2380–81 (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825)). This paragraph and the next are adapted from Wurman, supra note 194 (manuscript at 18).

was to the Supreme Court's first serious nondelegation case.³⁸⁷ That assumption may simply not hold true as a matter of congressional intent in a world where Congress tends to agree “that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.”³⁸⁸ In short, Justice Barrett's defense is both a textual one and one that seeks better to enforce nondelegation values. The two strands of this defense may have to be justified on separate grounds, however. The claim throughout this Article 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 criminal statute are equally plausible.³⁸⁹ As Professors Benjamin Eidelson and Matthew Stephenson have recently suggested, however, such interpretive ties “are so unusual as to be practically irrelevant.”³⁹⁰

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,³⁹¹ certain federalism canons, 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.³⁹² As for buttressing

³⁸⁷ *Nebraska*, 143 S. Ct. at 2380–81 (citing *Wayman*, 23 U.S. at 43). For a discussion of *Wayman* as the first serious nondelegation case, see Ilan Wurman, *Nondelegation at the Founding*, 130 *Yale L.J.* 1490, 1497 (2021).

³⁸⁸ *Mistretta v. United States*, 488 U.S. 361, 372 (1989).

³⁸⁹ Barrett, *supra* note 30, at 177–81.

³⁹⁰ Eidelson & Stephenson, *supra* note 220, at 582.

³⁹¹ *Murray v. Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); Barrett, *supra* note 30, at 134–38.

³⁹² Barrett, *supra* note 30, at 168–77.

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”,³⁹³ (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”,³⁹⁴ and (3) “the real challenge is to explain why *any* judicial ‘clipping’ of Congress’s constitutional authority is permissible.”³⁹⁵ 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 by hypothesis the Constitution does not actually prohibit the relevant congressional action.³⁹⁶

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.³⁹⁷ Other substantive canons might upon closer inspection also turn out to be applications of this same principle. The presumption against preemption was arguably first articulated in *Cohens v. Virginia*, in which Chief Justice Marshall 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.”³⁹⁸ What is an important or “very serious measure” might change over time, but to the extent Justice Marshall’s premise remains widely shared in the legal culture (a crucial caveat), the canon might plausibly be understood as a variant of the same

³⁹³ Eidelson & Stephenson, *supra* note 220, at 565.

³⁹⁴ *Id.* at 566.

³⁹⁵ *Id.* at 567.

³⁹⁶ *Id.* at 568–69.

³⁹⁷ For a discussion of the rule of lenity, see Barrett, *supra* note 30, at 128–34. Doerfler applies his argument to the rule of lenity. Doerfler, *supra* note 251, at 568–72.

³⁹⁸ *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 443 (1821); see also Barrett, *supra* note 30, at 153 (describing *Cohens* as “an early statement of the presumption against preemption”).

phenomenon, and thus justified.³⁹⁹ These same intuitions about importance could also explain the presumption against retroactivity for similar reasons.⁴⁰⁰ 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.⁴⁰¹

Section 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 of 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 statement 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 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

³⁹⁹ Assuming the Supremacy Clause does not negate this presumption. U.S. Const. art. VI, cl. 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 also Caleb Nelson, Preemption, 86 Va. L. Rev. 225, 232 (2000) (arguing the Supremacy Clause does not require a federal judge to take a narrow construction of a statute to avoid preemption).

⁴⁰⁰ See, e.g., *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) (observing that in “private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties”). Indeed, the consequences of applying a statute retroactively are 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 33, at 86–87.

⁴⁰¹ Wurman, supra note 330, at 861–64; Stuart Banner, *The Decline of Natural Law* 19–23 (2021).

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 agency law and constitutional 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.