IN DEFENSE OF THE MAJOR QUESTIONS DOCTRINE

*Louis J. Capozzi III**

The major questions doctrine, which requires agencies claiming important powers to identify clear authority from Congress, is transforming administrative law. Breaking with recent practice, the doctrine prevents the executive branch from issuing laws addressing pressing, novel issues without Congress's affirmative consent.

In response, scholars have generally criticized the doctrine and questioned its legitimacy. Critics have alleged that the doctrine was fabricated by the Supreme Court without proper justification, is incapable of principled application, frustrates the intent of past Congresses to delegate broad power to agencies, aggrandizes judicial power, and hinders desirable executive branch lawmaking.

This Article disagrees with those criticisms and defends the major questions doctrine. It offers five arguments—though more are possible. First, the doctrine appropriately enforces Article I's requirement that Congress (not others) legislate on "important" subjects. Second, the doctrine is a straightforward application of longstanding constitutional avoidance. Third, within a textualist analysis, the doctrine reflects how readers would expect important powers to be delegated. Fourth, the major questions doctrine has deeper historical roots than most admit and is capable of continued incremental, common-law-style implementation. Finally, under a functionalist approach, the doctrine promotes a healthy balance of power within the federal government, preserves federalism, and protects the rule of law.

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INTRODUCTION

Imagine you are a member of Congress. You were just elected after promising to check the power of the President. Your party has won majorities in both houses of Congress, spurred by voter anger over presidential policy on, say, climate change. Yet just days into your term, the President announces he has directed one of his administrative agencies to change environmental law.[1] The President even calls his action "the single most important step America has ever taken in the fight against global climate change."[2]

You are confused. High school civics taught you that, in the American system of government, Congress makes the laws.[3] But the President, through the Environmental Protection Agency (EPA), has invoked a broad, open-ended statute—one that authorizes the EPA to enact the "best system of emission reduction."[4] A different Congress passed this effective blank-check delegation many decades ago—before anyone could have foreseen the current political debate over climate change.[5]

What can you do to stop the President from changing the law? Let's suppose you convince both houses of Congress to repeal the statute relied on by the EPA. The President vetoes the attempt. And that's the end of it, because the President's political party controls more than a third of one house (as has almost always been true). Next, you convince both houses to pass a bill repealing the President's new law. The President vetoes that, too. Finally, you successfully pass a bill withholding funding for the EPA if the President does not revoke his new law. The President (you guessed it) vetoes the bill—daring you to shut down the entire government to stop his lawmaking.

A reality suddenly dawns on you: the President, not Congress, plays the primary role in making law. He can make law more or less at will, relying on hundreds of statutes similar to the one invoked by the EPA.[6] Only the courts, exercising judicial review, play any real role in

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1 Agencies change the law in various ways. *See infra* Section II.E. In this hypothetical, the Environmental Protection Agency (EPA) issued a regulation that binds the public with the force of law. *See* 1 KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 4.1.3, at 507 (7th ed. 2024).

2 Andrew Rafferty, *Obama Unveils Ambitious Plan to Combat Climate Change*, NBC NEWS (Aug. 3, 2015, 8:16 PM EDT), https://www.nbcnews.com/politics/barack-obama/obama-unveils-ambitious-plan-combat-climate-change-n403296 [https://perma.cc/2292-QBRM].

3 *See* Schoolhouse Rock, *America—Three Ring Government—Schoolhouse Rock*, YOUTUBE, at 1:23 (Aug. 21, 2014), https://youtu.be/watch?v=pKSGyiT-o3o.

4 42 U.S.C. § 7411(a)(1) (2018).

5 Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676.

6 *See, e.g.*, Ronald A. Cass, *Rulemaking Then and Now: From Management to Lawmaking*, 28 GEO. MASON L. REV. 683, 694 (2021) (noting Congress issues "roughly two hundred to

stopping the President from making law. If Congress tries to do so, the President can simply veto the attempt. You have little influence on lawmaking—even though the Constitution says that Congress must make the laws that govern us.

This reality subverts our constitutional structure. The judiciary can push back on this unhealthy dynamic by applying the major questions doctrine. Under that rule, when a federal administrative agency claims a major new power, it must point to "clear congressional authorization."[7] Because past Congresses were rarely clairvoyant enough to give agencies specific authorization to solve unforeseeable problems, the major questions doctrine constrains executive branch lawmaking.[8] In just the past few years, the Supreme Court has employed the doctrine to bar agencies from establishing a federal eviction moratorium, mandating the COVID-19 vaccine, forcing a transition away from coal- and natural-gas-powered plants, and forgiving student loans.[9] One of those decisions rejected the EPA's power in a case close to our hypothetical,[10] forcing the President to collaborate (and compromise) with Congress on creating new environmental law.[11]

These decisions have generated a torrent of scholarly criticism of the major questions doctrine. Academics have faulted the doctrine as constitutionally illegitimate, incapable of principled application, inconsistent with precedent, and dangerous to the future of American

four hundred laws" every year, while "federal administrative agencies adopt something on the order of three thousand to five thousand final rules"); Cary Coglianese, *Illuminating Regulatory Guidance*, 9 MICH. J. ENVT'L & ADMIN. L. 243, 247–48 (2020) (noting agencies regularly "produce thousands, if not millions" of effectively binding guidance documents, *id.* at 247).

7 West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022) (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

8 *See id.* at 2642 (Kagan, J., dissenting) ("Congress usually can't predict the future . . . .").

9 Ala. Ass'n of Realtors v. HHS, 141 S. Ct. 2485, 2486 (2021) (per curiam) (eviction moratorium); Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 665 (2022) (per curiam) (vaccine mandate); *West Virginia*, 142 S. Ct. at 2610, 2616 (power plants); Biden v. Nebraska, 143 S. Ct. 2355, 2373 (2023) (student loans).

10 *See West Virginia*, 142 S. Ct. at 2614 (describing statutory provision at issue as "empty vessel").

11 *See* Michelle Solomon, *Inflation Reduction Act Benefits: Billions in Just Transition Funding for Coal Communities*, FORBES (Aug. 24, 2022, 7:30 AM EDT), https://www.forbes.com/sites/energyinnovation/2022/08/24/inflation-reduction-act-benefits-billions-in-just-transition-funding-for-coal-communities/ [https://perma.cc/V9M2-ZF6F] (discussing environmental provisions focused on reducing emissions).

government.[12] Simultaneously, few have defended the doctrine.[13] The literature is, unfortunately, rather one-sided.[14]

This Article cheerfully joins the debate and defends the major questions doctrine. It offers a number of distinct defenses of the doctrine, with each defense appealing to different legal philosophies and ideological priors. Within administrative law, both formalists and functionalists can get behind the ecumenical major questions doctrine.

Part I introduces the major questions doctrine. Part II then offers five arguments for the doctrine. Undoubtedly, more can be offered, but I stick with just these five: (1) enforcement of constitutional guarantees; (2) constitutional avoidance; (3) consistency with textualism; (4) fidelity to precedent and incrementalism; and (5) alignment with functionalist values. Although one can agree with all five arguments and treat them as complementary, one can support the major questions doctrine even if *only* one rationale is persuasive. Each rationale can stand alone.

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12 *See, e.g.*, Daniel E. Walters, *The Major Questions Doctrine at the Boundaries of Interpretive Law*, 109 IOWA L. REV. 465 (2024) (arguing doctrine is an illegitimate substantive canon); Ronald M. Levin, *The Major Questions Doctrine: Unfounded, Unbounded, and Confounded*, 112 CALIF. L. REV. 899 (2024) (arguing doctrine lacks basis in precedent); Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009 (2023) (arguing doctrine will frustrate majority preferences); Mila Sohoni, *The Supreme Court 2021 Term — Comment: The Major Questions Quartet*, 136 HARV. L. REV. 262 (2022) (arguing doctrine is insufficiently justified); Nathan Richardson, *Keeping Big Cases from Making Bad Law: The Resurgent "Major Questions" Doctrine*, 49 CONN. L. REV. 355, 390–409 (2016) (documenting various criticisms).

13 I previously argued that the major questions doctrine has a more robust history than many scholars have acknowledged, and that it is capable of principled application. *See* Louis J. Capozzi III, *The Past and Future of the Major Questions Doctrine*, 84 OHIO ST. L.J. 191 (2023). That article did not, however, offer a full theoretical defense of the doctrine. There are three other notable articles defending the major questions doctrine. First, Ilan Wurman offers a qualified defense of the doctrine as a good textualist method. *See* Ilan Wurman, *Importance and Interpretive Questions*, 110 VA. L. REV. 909 (2024). This Article agrees that Wurman's approach is largely persuasive. *See infra* Section II.C. Second, Brian Chen and Samuel Estreicher write from a pro-agency perspective, praising the doctrine for checking agency authority while "steer[ing] courts away from a robust nondelegation doctrine" and preserving substantial administrative power. *See* Brian Chen & Samuel Estreicher, *The New Nondelegation*, 102 TEX. L. REV. 539, 539 (2024). This Article agrees that the major questions doctrine can be understood as a "good bargain" between supporters and opponents of administrative authority. *Id.* at 577; *see infra* Section II.E. Third, Michael Ramsey defends the major questions doctrine as an example of the judiciary's traditional Article III power to underenforce statutes. Michael D. Ramsey, *An Originalist Defense of the Major Questions Doctrine*, 76 ADMIN. L. REV. 817 (2024). This Article does not address that argument, but readers should carefully consider it.

14 *See, e.g.*, Thomas W. Merrill, The Major Questions Doctrine: Right Diagnosis, Wrong Remedy 2 (May 3, 2023) (unpublished manuscript), https://ssrn.com/abstract=4437332 [https://perma.cc/JRS6-VJQM] ("The primary response of the legal academy to the major questions doctrine has been very negative.").

Section II.A takes an originalist approach. It contends that the major questions doctrine is defensible as a constitutional implementation doctrine for Article I's requirement that Congress pass laws and its concomitant limitations on Congress's ability to give away its lawmaking powers. Courts have long implemented other constitutional provisions through clear statement rules, and there are good reasons to do the same thing here.

Section II.B considers the major questions doctrine through the lens of constitutional avoidance. As Chief Justice John Marshall suggested, Article I's nondelegation rule can be understood as requiring Congress to resolve "important" policy issues while permitting administrative agencies to "fill up the details."[15] If that's right, when an agency claims a power of "vast economic and political significance" in a statute, courts can avoid deciding that statute's constitutionality by deploying the major questions doctrine.[16]

Section II.C argues that the major questions doctrine flows from standard statutory interpretation principles. Justice Barrett and Ilan Wurman have persuasively argued that, under the rules of ordinary language and the background conventions of American law, readers *expect* legal documents delegating significant powers to do so clearly.

Section II.D contends that the major questions doctrine has ample precedential support and is capable of incremental, case-by-case application.[17] This is one of the doctrine's virtues. Whereas invalidating a statute under the backward-looking nondelegation doctrine would jeopardize decades of regulations issued in reliance on that statute, the forward-looking major questions doctrine can be applied surgically without destabilizing consequences.

Finally, Section II.E defends the major questions doctrine based on a functionalist view of the separation of powers and federalism. Functionalists seek legal rules that protect and preserve the balance of power within the federal government.[18] Yet the balance of power has tilted dangerously toward the President, creating the risk of one-man rule.[19] Applying the major questions doctrine is a promising option—

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15 Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825).

16 West Virginia v. EPA, 142 S. Ct. 2587, 2605 (2022) (quoting Repeal of the Clean Power Plan, 84 Fed. Reg. 32520, 32529 (July 8, 2019)).

17 For a more extensive treatment of this point, see Capozzi, *supra* note 13, at 196–226.

18 *See, e.g.*, M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1147–49 (2000) ("[C]ourts and commentators agree on the following objective: The system of separation of powers is intended to prevent a single governmental institution from possessing and exercising too much power." *Id.* at 1148.).

19 *See, e.g.*, MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION 351 (2020) ("In recent decades the presidency has seemed to metastasize as Congress has ceased effectively to function.").

and maybe the only realistic one—to restore balance between the executive branch and Congress, extricate the judiciary from its current role as the only significant check on executive branch lawmaking, and protect the role of the states in our federalist system. At the same time, the doctrine—which can be easily understood as a compromise between pro-agency and anti-agency camps—preserves ample power for administrative agencies.

Section II.F reflects on whether and how the divergent justifications might influence their adherents' approach to the doctrinal future of the major questions doctrine. If nothing else, this Article's theoretical discussion might help people think critically about the doctrinal questions that courts will face in the coming years.

Finally, Part III addresses various counterarguments—both formalist and policy-focused. While scholars have advanced some pointed objections, none are sufficient to justify rejecting the major questions doctrine.

I. WHAT IS THE MAJOR QUESTIONS DOCTRINE?

The Supreme Court has applied the major questions doctrine four times in the past few years,[20] holding that an agency claiming the power to resolve a question of "economic and political significance" must point to "clear congressional authorization."[21] As Justice Kavanaugh has explained, the major questions doctrine holds that

> [i]n order for an [administrative] 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.[22]

As discussed below, there is scholarly consensus on some aspects of how the major questions doctrine operates, and there are also open questions about the doctrine's breadth. Understanding both requires grasping the doctrine's history. This Article offers a brief history—those interested in a longer version can read my prior article[23]—

20 *See infra* note 84 and accompanying text.

21 *West Virginia*, 142 S. Ct. at 2608–09 (first quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000); and then quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

22 Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., respecting denial of certiorari).

23 *See* Capozzi, *supra* note 13, at 196–226.

breaking it down into five subperiods: rise, overshadowing, sporadic application, partial resurgence, and the current full resurgence.

A. The First Period: The Rise

The first period began in the mid-nineteenth century, as governments established commissions—innovations that resembled modern administrative agencies in important ways—to regulate railroads.[24] In turn, courts checked those agencies' ability to issue regulations by demanding clear evidence that legislatures had delegated power to them.[25] Courts seemingly borrowed this rule from an analogous context: delegations from state governments to municipalities.[26] There too, courts demanded an "express grant" of authority from the legislature.[27]

A good example of the presumption against delegation being used to check an administrative agency comes from 1888, when the Oregon Supreme Court considered whether the legislature authorized the state railroad commission to investigate and adjudicate allegations that railroads had overcharged consumers.[28] When "creat[ing] a commission and cloth[ing] it with important functions," the court held that the state legislature needed to "define and specify the authority given it so clearly that no doubt can reasonably arise in the mind of the public as to its extent."[29] Applying that rule, the court concluded the agency lacked clear authority.[30]

In 1897, the United States Supreme Court applied a similar rule in *Interstate Commerce Commission v. Cincinnati, New Orleans & Texas Pacific Railway Co.* (*The Queen and Crescent Case*).[31] There, the Interstate Commerce Commission (ICC) claimed the power to set carriage prices for passengers and freight.[32] The Court held that Congress had not

24 *See id.* at 200.

25 *See id.* at 200–01; *see also, e.g.*, J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 68 (Chicago, Callaghan & Co. 1891); *id.* § 390 (stating rule that "all statutory powers" are "construed strictly"); FRANK J. GOODNOW, THE PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES 326–27 (1905).

26 *See* Capozzi, *supra* note 13, at 200 n.61; *see also* Clayton P. Gillette, *In Partial Praise of Dillon's Rule, or, Can Public Choice Theory Justify Local Government Law?*, 67 CHI.-KENT L. REV. 959, 963 (1991) (discussing Dillon's Rule, which limits the powers of local governments to those clearly delegated by the legislature).

27 City of St. Paul v. Laidler, 2 Minn. 190, 203 (1858); *see also* Ilan Wurman, *The Origins of Substantive Due Process*, 87 U. CHI. L. REV. 815, 826–27 (2020).

28 Bd. of R.R. Comm'rs v. Or. Ry. & Navigation Co., 19 P. 702, 703 (Or. 1888).

29 *Id.* at 708.

30 *Id.*

31 Interstate Com. Comm'n v. Cincinnati, New Orleans & Tex. Pac. Ry. Co., 167 U.S. 479 (1897).

32 *See id.* at 500.

granted such authority.[33] But rather than apply routine statutory interpretation to arrive at that result, the Court held that the ICC needed to point to statutory language that was "clear and direct"—"open to no misconstruction."[34] After all, the Court explained, "[t]he importance of the question [at stake] cannot be overestimated," because "[b]illions of dollars [were] invested in railroad properties" and "[m]illions of passengers, as well as millions of tons of freight, [were] moved each year by the railroad companies."[35] And the power to set rates was "so vast and comprehensive, so largely affecting the rights of carrier and shipper, as well as indirectly all commercial transactions."[36] Such a "power of supreme delicacy and importance" could only be conferred by Congress through a "definite and exact statement."[37] After surveying analogous state laws that had clearly granted railroad commissions the power to set rates, the Court concluded that the ICC's authority was merely "debatable" and not "expressly given."[38]

In the following decades, both the Supreme Court and state courts continued to construe statutes narrowly to limit delegations to agencies.[39]

B. The Second Period: Overshadowing

During the second period, courts shifted away from using clear statement rules as the primary tool to limit delegations.[40] Instead, the nondelegation doctrine arose as the more prominent method to preserve legislative power.[41] The Supreme Court had invoked the nondelegation doctrine a few times during the nineteenth century.[42] But it elaborated on it in greater detail in *J.W. Hampton, Jr., & Co. v. United States*.[43] Recognizing that Congress could not delegate its "power to

33 *Id.* at 501.

34 *Id.* at 505.

35 *Id.* at 494.

36 *Id.* at 494–95.

37 *Id.* at 505, 495.

38 *Id.* at 494, 500; *see id.* at 494–500.

39 *See* Capozzi, *supra* note 13, at 204–06; *see also, e.g.*, Siler v. Louisville & Nashville R.R. Co., 213 U.S. 175, 193–94 (1909) (explaining that claimed "enormous power" "must be conferred in plain language" which is "free from doubt"); Gulf & Ship Island R.R. Co. v. R.R. Comm'n, 49 So. 118, 118–19 (Miss. 1909) (holding that a railroad commission's "power must affirmatively appear, and must be given in clear and express terms, and nothing will be had by inference," *id.* at 118).

40 *See* Capozzi, *supra* note 13, at 208–09.

41 *Id.*

42 *See infra* notes 172–74 and accompanying text.

43 J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928); Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J.L. & PUB. POL'Y 147, 164–67 (2017) (analyzing *J.W. Hampton*).

make the law" but that it could delegate some "discretion as to its execution,"[44] the Court reasoned that Congress must provide an "intelligible principle" by which agencies are "directed to conform."[45] Congress could empower agencies to make rules consistent with Article I, the Court reasoned, so long as it provided sufficient policy guidance.[46]

The Court subsequently applied the nondelegation doctrine twice in 1935. In *Panama Refining Co. v. Ryan*, the Court held that a provision of the National Industrial Recovery Act of 1933 giving the President full discretion to ban the transportation of so-called "hot oil" was unconstitutional because it "establishe[d] no criterion" and "declare[d] no policy" to guide executive discretion.[47] And in *A.L.A. Schechter Poultry Corp. v. United States*, the Court set aside another provision giving the President discretion to adopt a competition code for the chicken industry.[48] The Court faulted the statute for giving the President "unfettered discretion to make whatever laws he thinks may be needed or advisable" to govern the industry.[49]

However, during the 1940s, concerns about Article I receded. After President Franklin Roosevelt appointed eight justices[50]—including some of the New Deal's most famous proponents[51]—the Court began upholding broad delegations to agencies.[52]

C. The Third Period: Sporadic Resurgence

As the nondelegation doctrine lessened in importance in the 1940s, variants of the major questions doctrine reemerged as tools to enforce Article I.[53] One example came in the 1958 case of *Kent v. Dulles*, in which the Court considered the importance of the agency's asserted power as part of an exercise in constitutional avoidance.[54] The

44 *J.W. Hampton*, 276 U.S. at 407 (quoting Cincinnati, Wilmington & Zanesville, R.R. Co. v. Comm'rs, 1 Ohio St. 77, 88 (1852)).

45 *Id.* at 409.

46 *See id.*

47 Panama Refin. Co. v. Ryan, 293 U.S. 388, 418, 415 (1935).

48 A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 521–23, 539 (1935).

49 *Id.* at 537–38, 542. The Court also arguably applied the nondelegation doctrine to invalidate a provision of the Bituminous Coal Conservation Act in *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936). *See* Jonathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 IOWA L. REV. 1931, 1933 n.7 (2020).

50 WILLIAM H. REHNQUIST, THE SUPREME COURT 134 (Vintage Books rev. ed. 2002) (1987).

51 *See* 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 25–26 (1998).

52 *See, e.g.*, Nat'l Broad. Co. v. United States, 319 U.S. 190, 225–26 (1943) (upholding statute instructing FCC to act in the "public interest," *id.* at 225).

53 *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 373 n.7 (1989); Nat'l Cable Television Ass'n v. United States, 415 U.S. 336, 342 (1974).

54 Kent v. Dulles, 357 U.S. 116, 127 (1958).

case arose when the State Department cited department regulations to deny Kent a passport due to suspected Communist activities.[55] The Court started by emphasizing the importance of passports to the "liberty" to travel.[56] It then invoked the nondelegation doctrine, explaining that only Congress could curtail such liberties and, "if that power is delegated, the standards [provided by Congress to the State Department] must be adequate to pass scrutiny" under the doctrine.[57] But instead of applying the nondelegation doctrine, the Court held that "[w]here activities . . . , natural and often necessary to the well-being of an American citizen, such as travel, are involved," courts must "construe narrowly all delegated powers that curtail or dilute them."[58] The Court thus narrowly construed the Passport Act and denied the agency's authority to deny Kent his passport.[59]

A couple decades later, the Court relied on a similar variant of the major questions doctrine in *Industrial Union Department, AFL-CIO v. American Petroleum Institute* (*The Benzene Case*).[60] There, the Occupational Safety and Health Administration (OSHA) issued a workplace safety rule in reliance on an open-ended grant of authority to adopt standards "reasonably necessary or appropriate to provide safe or healthful employment and places of employment."[61] The Court did not allow OSHA to rely on that broad language.[62] While one Justice voted against the agency on nondelegation grounds,[63] a plurality applied the major questions doctrine instead. The plurality emphasized the "unprecedented" and sweeping nature of the power OSHA claimed—the ability to issue "pervasive regulation" on American workplaces accompanied by "enormous costs that might produce little, if any, discernable benefit."[64] Having concluded that OSHA was claiming a major power, the Court demanded a "clear mandate" from Congress.[65] Explaining that under the government's interpretation, the statute "might be unconstitutional" under the nondelegation doctrine,[66] the Court read the statute narrowly and against OSHA. This narrow reading was appropriate, the Court explained, because "[a]

55 *Id.* at 117–18.

56 *Id.* at 125–27.

57 *Id.* at 129.

58 *Id.*

59 *Id.*

60 Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607 (1980) (plurality opinion).

61 *Id.* at 612, 611–12 (quoting 29 U.S.C. § 652(8) (1976)).

62 *Id.* at 662.

63 *Id.* at 675 (Rehnquist, J., concurring in judgment).

64 *Id.* at 645 (plurality opinion).

65 *Id.*

66 *Id.* at 646.

construction of [a] statute that avoids [an] open-ended grant [of power to an agency] should certainly be favored."[67]

D. The Fourth Period: Partial Resurgence and Competing Versions

The fourth period lasted from 2000 until 2021.[68] The status of the major questions doctrine during this period was uncertain—largely because it existed alongside the Supreme Court's *Chevron* doctrine.[69] Under *Chevron*, courts had to defer to agencies' interpretations of unclear statutes—even ones defining the scope of an agency's jurisdiction to regulate.[70] That rule is diametrically opposed to the doctrine applied by the Court in cases like *The Queen and Crescent Case*—at least when it comes to claimed powers of "supreme delicacy and importance."[71]

The Court addressed delegations and *Chevron* deference in *FDA v. Brown & Williamson Tobacco Corp.*, holding Congress had not delegated to the Food and Drug Administration the authority to ban cigarettes.[72] The Court rejected the government's appeal to *Chevron* deference, reasoning that "there may be reason to hesitate" in applying *Chevron* deference "[i]n extraordinary cases."[73] And, the Court continued, the FDA's claimed authority meant it was "hardly an ordinary case."[74] The Court observed that "tobacco [had] its own unique political history," that Congress had frequently debated tobacco regulation, and that Congress had "squarely rejected proposals to give the FDA jurisdiction over tobacco."[75] Therefore, the Court was "confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[76]

In the following two decades, the Court seemed to apply two versions of the major questions doctrine: a weaker variant that merely operated as an exception to *Chevron* deference and a clear statement

67 *Id.*

68 *See* Capozzi, *supra* note 13, at 212–16.

69 *See id.* at 214.

70 *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984), *overruled by* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

71 Interstate Com. Comm'n v. Cincinnati, New Orleans & Tex. Pac. Ry. Co. (The Queen and Crescent Case), 167 U.S. 479, 494–95, 505 (1897); *see* Capozzi, *supra* note 13, at 208–09.

72 FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 125 (2000), *superseded by statute*, Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776, 1786 (2009).

73 *Brown & Williamson*, 529 U.S. at 159.

74 *Id.*

75 *Id.* at 159–60.

76 *Id.* at 160.

rule.[77] An example of the weaker variant came in *King v. Burwell*, where the Court declined to give *Chevron* deference to the Internal Revenue Service's interpretation of the Affordable Care Act (ACA).[78] Whether healthcare tax credits would be available to those who bought health insurance under the ACA, the Court explained, was "a question of deep 'economic and political significance'" because it involved "billions of dollars in spending each year and affect[ed] the price of health insurance for millions of people."[79] But the rule applied in *King* was not particularly strong. After all, even though *Chevron* deference did not apply, the agency still won.[80]

An example of the stronger version came in *Utility Air Regulatory Group v. EPA*, which required the EPA to identify "clear congressional authorization" to apply Clean Air Act regulations to certain businesses and homes.[81] In ruling against the EPA, the Court cited *The Benzene Case* for the rule that "Congress [must] speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"[82]

E. The Current Period: Full Resurgence

As Cass Sunstein recognized in 2021, the Supreme Court needed to make an "exceedingly high[-stakes]" choice between the stronger and weaker versions of the major questions doctrine.[83] In the 2021 and 2022 Terms, the Court embraced the stronger variant in four cases.[84]

The seminal case was *West Virginia v. EPA*.[85] There, the EPA set emission limits for coal and natural gas power plants that were designed to force those plants to either reduce their emissions or

77 *See* Capozzi, *supra* note 13, at 214–16; Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475, 484–86 (2021).

78 King v. Burwell, 576 U.S. 473, 485–86 (2015).

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

80 *See id.* at 486 ("It is instead our task to determine the correct reading of Section 36B."); Sunstein, *supra* note 77, at 482. For another example of the weaker variant, see *Gonzales v. Oregon*, 546 U.S. 243, 262–63 (2006). *See also* Kent Barnett & Christopher J. Walker, *Short-Circuiting the New Major Questions Doctrine*, 70 VAND. L. REV. EN BANC 147, 150 n.14 (2017) (discussing *Gonzales*).

81 *Util. Air Regul. Grp.*, 573 U.S. at 324; *see* Jonathan H. Adler, West Virginia v. EPA*: Some Answers About Major Questions*, 2021–2022 CATO SUP. CT. REV. 37, 43–44 (2022).

82 *Util. Air Regul. Grp.*, 573 U.S. at 324 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000)).

83 Sunstein, *supra* note 77, at 478.

84 *See* Ala. Ass'n of Realtors v. HHS, 141 S. Ct. 2485, 2486 (2021) (per curiam); Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 665 (2022) (per curiam); West Virginia v. EPA, 142 S. Ct. 2587, 2610 (2022); Biden v. Nebraska, 143 S. Ct. 2355, 2373 (2023); *see also* Capozzi, *supra* note 13, at 216–26.

85 *West Virginia*, 142 S. Ct. at 2587.

counterbalance them by subsidizing favored clean-energy plants.[86] To accomplish this, the EPA relied on 42 U.S.C. § 7411, which allows the EPA to determine the "best system of emission reduction" for power plants through the Clean Power Plan (CPP).[87]

In a 6–3 opinion by Chief Justice Roberts, the Court rejected the EPA's arguments.[88] The Court did not do so through "routine statutory interpretation," but rather opted for a "different approach": the major questions doctrine.[89] Under that approach, a "plausible" or "colorable" statutory argument that an agency has the authority to implement a major policy is insufficient.[90] Instead, the "separation of powers . . . and a practical understanding of legislative intent" require an agency to point to "'clear congressional authorization' for the power it claims."[91]

The Court then proceeded to find that a major question was at issue because the EPA was attempting "to substantially restructure the American energy market."[92] And, the Court explained, there was "little reason to think Congress assigned" the EPA, "and it alone," the task of "balancing the many vital considerations of national policy implicated in deciding how Americans will get their energy."[93] The question of generation shifting, the Court continued, was also politically controversial because Congress had repeatedly considered and rejected laws that would have given the EPA the power it was now claiming.[94] In summary, the decision whether to promulgate the CPP was one of "such magnitude and consequence" that it must "rest[] with Congress itself, or an agency acting pursuant to a clear delegation from that representative body."[95]

Finally, the Court applied a clear statement rule and held that the EPA lacked clear authority from Congress to promulgate the CPP.[96] The Court's statutory analysis was succinct.[97] The phrase "best system of emission reduction" was "vague," effectively an "empty vessel," and thus "not close to the sort of clear authorization required by [the

86 *Id.* at 2602–03.

87 *Id.* at 2601 (quoting 42 U.S.C. § 7411(a)(1) (2018)).

88 *Id.* at 2596–97.

89 *Id.* at 2608–09.

90 *Id.* at 2609.

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

92 *Id.* at 2610.

93 *Id.* at 2612.

94 *Id.* at 2614.

95 *Id.* at 2616.

96 *Id.* at 2614, 2616.

97 *See* Adler, *supra* note 81, at 52 ("Chief Justice Roberts's opinion spent little time focused on the intricacies of statutory text . . . .").

Court's] precedents."[98] The Court pointed to other considerations, too, suggesting no clear statement was present.[99] The EPA had historically not interpreted the provision so broadly.[100] The provision had rarely been used, and never so ambitiously.[101] There was also a mismatch between the EPA's claimed power and its "comparative expertise" because the regulation implicated energy policy, a matter arguably implicating other agencies' expertise.[102]

Two separate opinions in *West Virginia* merit attention. Justice Gorsuch, joined by Justice Alito, wrote a concurrence defending the major questions doctrine as a permissible way to enforce the Constitution and providing further doctrinal clarity.[103] Justice Kagan dissented, accusing the Court of "magically" fabricating the major questions doctrine to function as a "get-out-of-text-free card[]" to advance "broader goals" like "[p]revent[ing] agencies from doing important work."[104]

The Court applied the rule from *West Virginia* again the following year in *Biden v. Nebraska*.[105] There, the Biden Administration unilaterally "canceled roughly $430 billion of federal student loan[s]."[106] To do so, it invoked the 2003 HEROES Act, which allows the Secretary of Education to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs . . . as the Secretary deems necessary in connection with a war or other military operation or national emergency."[107] Because the President had declared the COVID-19 pandemic a "national emergency," the Government argued its "waive or modify" authority meant it could eliminate student loan debts.[108]

In a 6–3 opinion by Chief Justice Roberts, the Court rejected the Biden Administration's position.[109] The Court read the phrase "waive or modify" narrowly to permit only "modest adjustments" to the student loan program.[110] Canceling so many student loans, the Court reasoned, could not "fairly be called a waiver" because "it not only nullifies existing provisions, but augments and expands them

98 *West Virginia*, 142 S. Ct. at 2614.
99 *Id.* at 2614–16.
100 *Id.* at 2613.
101 *Id.* at 2610–11, 2613.
102 *Id.* at 2613, 2612–13 (quoting Kisor v. Wilkie, 139 S. Ct. 2400, 2417 (2019)).
103 *Id.* at 2616 (Gorsuch, J., concurring).
104 *Id.* at 2641 (Kagan, J., dissenting).
105 Biden v. Nebraska, 143 S. Ct. 2355, 2373–75 (2023).
106 *Id.* at 2362.
107 *Id.* at 2363 (quoting 20 U.S.C. § 1098bb(a)(1) (2018)).
108 *Id.* at 2364.
109 *Id.* at 2361, 2368.
110 *Id.* at 2368–69.

dramatically."[111] And it could not be deemed "[a] mere modification, because it constitutes 'effectively the introduction of a whole new regime.'"[112]

The Court then invoked the major questions doctrine, focusing on "concerns over the exercise of administrative power."[113] The Court identified several reasons why the doctrine applied to bar student loan forgiveness. *First*, the Secretary of Education had not "previously claimed powers of [that] magnitude under the HEROES Act."[114] *Second*, the implication of the government's claimed power was that it would have "virtually unlimited power to rewrite the Education Act."[115] *Third*, student loan forgiveness had a "staggering" economic impact "by any measure."[116] The Court cited a study estimating the program would "cost taxpayers 'between $469 billion and $519 billion.'"[117] That amount, the Court claimed, was "ten times the 'economic impact'" the Court found sufficient to trigger the major questions doctrine in a 2021 case addressing the federal eviction moratorium.[118] *Fourth*, the Court deemed student loan forgiveness politically significant.[119] The Court cited Congress's extensive debates on debt forgiveness, concluding Congress "is not unaware of the challenges facing student borrowers."[120] Indeed, the Court cited contemporary evidence (including a speech by then–House Speaker Nancy Pelosi) suggesting the current Congress would not give the Biden Administration the power it was claiming.[121] The Court also noted student loan cancellation generated extensive debate outside "the halls of Congress" and was an "emotionally charged" issue.[122]

Having concluded that a major question was at issue, the Court held that the Biden Administration needed "to 'point to "clear

111 *Id.* at 2371.

112 *Id.* (quoting MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 234 (1994), *superseded by statute*, Telecommunications Act of 1996, Pub. L. No. 104-104, § 401, 110 Stat. 56, 128 (codified as amended at 47 U.S.C. § 160)).

113 *Id.* at 2372.

114 *Id.*

115 *Id.* at 2373.

116 *Id.*

117 *Id.* (citing PENN WHARTON BUDGET MODEL, THE BIDEN STUDENT LOAN FORGIVENESS PLAN: BUDGETARY COSTS AND DISTRIBUTIONAL IMPACT 1 (2022)).

118 *Id.* (quoting Ala. Ass'n of Realtors v. HHS, 141 S. Ct. 2485, 2489 (2021)).

119 *Id.* at 2373–74.

120 *Id.* at 2373.

121 *Id.* at 2374.

122 *Id.* at 2373 (quoting Jeff Stein, *Biden Student Debt Plan Fuels Broader Debate Over Forgiving Borrowers*, WASH. POST (Aug. 31, 2022, 6:00 AM EDT), https://www.washingtonpost.com/us-policy/2022/08/31/student-debt-biden-forgiveness/ [https://perma.cc/9CGX-C9JU]).

congressional authorization"' to justify the challenged program."[123] The Court concluded the government could not meet that standard.[124]

Two Justices wrote separately. Justice Barrett wrote a concurrence defending the major questions doctrine not as a substantive canon, but as "a tool for discerning—not departing from—[a statute's] most natural interpretation."[125] Justice Kagan dissented, arguing the statute gave the government "broad authority to give emergency relief to student-loan borrowers," and that the student loan cancellation "fit[] comfortably within that delegation."[126] And she faulted the Court for reading statutes narrowly "when Congress enacts broad delegations allowing agencies to take substantial regulatory measures."[127]

F. Where Things Stand

Although scholars disagree on the desirability and legitimacy of the resurgent major questions doctrine, there is a general consensus on what the doctrine now *is*. Most agree it is a substantive canon and a clear statement rule,[128] though some have argued it can alternatively be understood as a linguistic canon.[129] Either way, the doctrine features a two-step inquiry.[130] Courts must ask first whether the agency is claiming a major power and, if so, whether Congress clearly provided that power.

II. THE ARGUMENTS FOR THE MAJOR QUESTIONS DOCTRINE

Defending the major questions doctrine is not difficult. There are at least *five* distinct arguments for the doctrine. While the doctrine's defenders need only agree with *one* of these five contentions, its opponents must reject all of them.

123 *Id.* at 2375 (quoting West Virginia v. EPA, 142 S. Ct. 2587, 2609, 2614 (2022)).

124 *Id.*

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

126 *Id.* at 2385 (Kagan, J., dissenting).

127 *Id.*

128 *See, e.g.*, Deacon & Litman, *supra* note 12, at 1012 ("[A]fter the October term 2021, the 'new' major questions doctrine operates as a clear statement rule."); Sohoni, *supra* note 12, at 275 (identifying doctrine as a "clear statement rule that requires an express statutory statement to allow an agency to exercise major regulatory power"); Walters, *supra* note 12, at 473; Jody Freeman & Matthew C. Stephenson, *The Anti-Democratic Major Questions Doctrine*, 2022 SUP. CT. REV. 1, 4.

129 *See* Wurman, *supra* note 13, at 916.

130 *See, e.g.*, Capozzi, *supra* note 13, at 224; West Virginia v. EPA, 142 S. Ct. 2587, 2634 (2022) (Kagan, J., dissenting).

A. The Major Questions Doctrine Enforces Article I's Rules for Lawmaking

The first defense is formalist and originalist. It rests on two simple premises: (1) there are constitutional limits on Congress's ability to outsource lawmaking to others, and (2) the major questions doctrine is an appropriate tool to enforce those limits. Each premise is correct—or at least defensible.

1. The Constitution Imposes *Some* Limits on Congress's Ability to Transfer Its Lawmaking Power to Others

Let's start with what the Constitution demands. Article I "vested" "*[a]ll* legislative Powers herein granted" in "a Congress of the United States."[131] The use of the word "all"—absent in the Constitution's other two vesting clauses—was an intentional choice, making clear *only* Congress possessed "legislative Powers."[132] The phrase "legislative Powers" was originally understood to refer to the power to "formulat[e] . . . generally applicable rules of private conduct."[133]

Article I, Section 7, intentionally made it difficult for Congress to make law.[134] While Pennsylvania made lawmaking easier by establishing a more powerful single-house legislature,[135] the Framers made lawmaking more difficult by establishing *two* legislative houses and requiring both to agree before a bill can become law.[136] The Framers further tempered lawmaking by giving the President a veto, which could be overridden only by a two-thirds vote in each house.[137] Altogether, Article I's system of bicameralism and presentment "represents the Framers' decision that the legislative power of the Federal Government be

131 U.S. CONST. art. I, § 1 (emphasis added).

132 MCCONNELL, *supra* note 19, at 113; *see, e.g.*, Eli Nachmany, *Bill of Rights Nondelegation*, 49 BYU L. REV. 513, 521 (2023).

133 Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 70 (2015) (Thomas, J., concurring in judgment); *see also* Nachmany, *supra* note 132, at 524; Ilan Wurman, *Nonexclusive Functions and Separation of Powers Law*, 107 MINN. L. REV. 735, 765 (2022) ("Legislative power is the power to alter legal rights and relations prospectively . . . ."); Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1304–1305 (2003).

134 THE FEDERALIST NO. 48, at 309–12 (James Madison), NO. 73, at 441–42 (Alexander Hamilton) (Clinton Rossiter ed., 1961); Gundy v. United States, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting) ("[T]he framers went to great lengths to make lawmaking difficult.").

135 *See* PA. CONST. of 1776, § 2.

136 U.S. CONST. art. I, § 7, cl. 2.

137 *Id.* Notably, most original state constitutions did not give governors a veto power. *See, e.g.*, MCCONNELL, *supra* note 19, at 20–21.

exercised in accord with a single, finely wrought and exhaustively considered, procedure."[138]

The President, by contrast, was *not* granted the power to make law.[139] The President instead was given the responsibility to see that Congress's laws were "faithfully executed."[140] Beyond that, Article II recognizes the President's modest power to "*recommend* to [Congress's] Consideration such Measures as he shall judge necessary and expedient."[141] Indeed, "[t]he power to recommend legislation, granted to the President, serves only to emphasize that it is his function to recommend and that it is the function of the Congress to legislate."[142]

The arduous Article I process for making law was central to the Constitution's design and the separation of powers.[143] The Framers believed excess lawmaking threatened liberty.[144] Based on their own experience with colonial legislatures—which frequently legislated against property rights—the Framers worried more about the abuse of the legislative power than the executive or judicial powers.[145] Gouverneur Morris predicted "[t]he Legislature [would] continually seek to aggrandize [and] perpetuate themselves."[146] Meanwhile, Morris expected the President to "be the guardian of the people . . . [against] Legislative tyranny."[147] By making legislating difficult and giving the President a veto, the Framers thought better laws would result.[148] As Madison explained, this was done to "restrain the Legislature from encroaching . . . on the rights of the people at large [and] from passing

138 INS v. Chadha, 462 U.S. 919, 951 (1983).

139 *See* MCCONNELL, *supra* note 19, at 113.

140 U.S. CONST. art. II, § 3.

141 *Id.* (emphasis added). Chad Squitieri offers a helpful history of the Recommendation Clause. *See generally* Chad Squitieri, *"Recommend . . . Measures": A Textualist Reformulation of the Major Questions Doctrine*, 75 BAYLOR L. REV. 706, 749–58 (2023).

142 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 632 (1952) (Douglas, J., concurring); *see* MCCONNELL, *supra* note 19, at 113 (agreeing); Squitieri, *supra* note 141, at 710–11.

143 *See* Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 61 (2015) (Alito, J., concurring); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 340–41 (2002).

144 *See* THE FEDERALIST NO. 48, *supra* note 134, at 309–12 (James Madison), NO. 73, at 442–44 (Alexander Hamilton); *see also* West Virginia v. EPA, 142 S. Ct. 2587, 2618 (2022) (Gorsuch, J., concurring) ("The framers believed that the power to make new laws regulating private conduct was a grave one that could, if not properly checked, pose a serious threat to individual liberty."); MCCONNELL, *supra* note 19, at 44–45 (identifying Madison's views on this point and his influence).

145 MCCONNELL, *supra* note 19, at 22, 35, 44–45.

146 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 52 (Max Farrand ed., 1911).

147 *Id.*

148 *See West Virginia*, 142 S. Ct. at 2618 (Gorsuch, J., concurring); Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1495 (2015).

laws unwise in their principle, or incorrect in their form."[149] Because laws would effectively require supermajority support, the Framers expected that minority rights would be protected and that Congress would adequately deliberate before legislating.[150]

There was broad consensus at the Founding that Congress could not circumvent the rules of Article I, Section 7, by transferring its legislative power to other entities.[151] This view originated in English law. For centuries, kings tried to seize the power to issue laws unilaterally—without Parliament.[152] King Henry VIII achieved the high watermark of royal power when Parliament passed the Statute of Proclamations, which gave legal effect to the king's proclamations "as though they were made by act of parliament."[153] This law, however, was repealed after the King died and broad agreement eventually emerged that the bill was "one of the most abject moments in English history."[154] Indeed, when King James I tried to reclaim the proclamation power, Chief Justice Edward Coke said no, holding that "the King cannot change any part of the common law, nor create any offence by his proclamation, which was not an offence before" under Parliament's statutes.[155] By the time of the Founding, there was consensus in English law that *only* Parliament could impose new legal obligations on citizens.[156] As John Locke argued, "The *Legislative cannot transfer the Power of Making Laws* to any other hands."[157] The king could only issue proclamations governing the "manner, time, and circumstances of putting

149 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 146, at 139.

150 *See* Rao, *supra* note 148, at 1495 ("Requiring collective action by both houses of Congress reinforces the limits on the federal government, filters rash plans, and minimizes the dominance of self-interest."); Gundy v. United States, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting) ("Article I's detailed processes for new laws were also designed to promote deliberation."); GREG WEINER, MADISON'S METRONOME: THE CONSTITUTION, MAJORITY RULE, AND THE TEMPO OF AMERICAN POLITICS 48–50 (2012) (arguing these procedures promote rational lawmaking).

151 *See, e.g.*, MCCONNELL, *supra* note 19, at 112–13, 327; Philip Hamburger, *Delegating or Divesting?*, 115 NW. U. L. REV. ONLINE 88, 91–101 (2020); Cass, *supra* note 43, at 151–53.

152 *See* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 33–45 (2014).

153 Proclamation by the Crown Act 1539, 31 Hen. 8 c. 8; 1 WILLIAM BLACKSTONE, COMMENTARIES *261; *see* HAMBURGER, *supra* note 152, at 35–39.

154 HAMBURGER, *supra* note 152, at 38, 38–39.

155 Case of Proclamations (1610) 77 Eng. Rep. 1352, 1353; 12 Co. Rep. 74, 75 (KB); *see* HAMBURGER, *supra* note 152, at 45–47.

156 *See* HAMBURGER, *supra* note 152, at 48–50 (discussing views of Roger Twysden, Chief Justice Matthew Hale, Matthew Bacon, David Hume, and others).

157 JOHN LOCKE, TWO TREATISES OF GOVERNMENT 362 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690); *see* Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490, 1518–22 (2021) (discussing Locke's view of nondelegation and his influence).

[Parliament's] laws in execution," but those proclamations could not "contradict the old laws, or tend to establish new ones."[158]

Across the Atlantic, the Framers broadly understood the Constitution to reflect Blackstone's "boundary between legislative and executive power."[159] James Wilson, for example, explained that the Statute of Proclamations would be illegal under the Constitution.[160] During the Bill of Rights debate, James Madison and Roger Sherman agreed that an amendment explicitly barring Congress from delegating its powers was "altogether unnecessary" because the Constitution already established that rule.[161] While serving in Congress, former President John Quincy Adams objected to a proposed bill on nondelegation grounds and argued the Constitution forbade "transfer[ring] the power of legislation from . . . Congress to the President" or permitting the President to "make the laws for the people of this Union."[162] Beyond those specific examples, scholars have identified a host of other statements by early government officials articulating a constitutional nondelegation rule.[163] Meanwhile, scholars have identified "at most" one early government official who said "that Congress could freely delegate its legislative power, and the statement was vague."[164]

The Framers' commitment to a constitutional nondelegation rule did not mean that delegations did not occur in early American government. They did. Congress delegated to the executive branch a variety of responsibilities, including in the areas of customs, foreign policy, patents, veterans' affairs, Indian law, and steamboat travel.[165] Some have argued these laws indicate that the Framers were tolerant of

158 1 BLACKSTONE, *supra* note 153, at *261.

159 MCCONNELL, *supra* note 19, at 110, 110–14 (calling Blackstone's view "the most cogent summary of the founding-era understanding of the boundary between legislative and executive power that can be found," *id.* at 110); *see* HAMBURGER, *supra* note 152, at 49–50.

160 *See* 1 THE WORKS OF JAMES WILSON 310–11 (Robert Green McCloskey ed., 1967).

161 1 ANNALS OF CONG. 760–61 (1789) (Joseph Gales ed., 1834). (There are two printings of the first two volumes of the *Annals of Congress* with different running heads and pagination. Marion Tinling, *Thomas Lloyd's Reports of the First Federal Congress*, 18 WM. & MARY Q. 519, 520 n.2 (1961). Citations in this Article refer to the second printing (running head, "History of Congress").) While serving in Congress, "Madison consistently resisted assertions of executive authority in areas he thought properly legislative." WEINER, *supra* note 150, at 19.

162 CONG. GLOBE, 27th Cong., 2d Sess. 510 (1842).

163 *See* Wurman, *supra* note 157, at 1503–18; Aaron Gordon, *Nondelegation*, 12 N.Y.U. J.L. & LIBERTY 718, 747–50 (2019).

164 Wurman, *supra* note 157, at 1503.

165 *See, e.g.*, 1 HICKMAN & PIERCE, *supra* note 1, at 29–30; Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256, 1277–78 (2006).

extensive delegations of power by Congress.[166] Others, more persuasively in my view, have countered that early delegations (1) addressed relatively small matters, (2) permitted executive fact-finding to trigger legal consequences chosen by Congress, or (3) empowered the President to act in areas over which he was already understood to have inherent power,[167] like military affairs or foreign policy.[168] More broadly, even if the nature of some specific delegations is debatable, Congress generally kept agencies on a pretty tight leash. As then-Professor Elena Kagan summarized, "The first generation of the nation's regulatory statutes . . . contain[ed] detailed and limited grants of authority to administrative bodies."[169]

Tackling the precise strength of the Constitution's nondelegation rule is beyond this Article's scope, and unnecessary here. For purposes of this Section, one need only accept that the Constitution imposes *some* limits on Congress's ability to delegate to others the power to make law on important questions.[170]

Notably, that has been the near-universal view of American jurists since the Founding.[171] "It will not be contended," Chief Justice John Marshall said, "that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative."[172] Justice Story agreed.[173] In *Field v. Clark*, the Supreme Court said the

166 *See* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 332–56 (2021); Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288, 1302 (2021); Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, 56 GA. L. REV. 81, 88 (2021); Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379, 381 (2017); *see also* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1732–36 (2002).

167 *See* MCCONNELL, *supra* note 19, at 328–35.

168 *See* Wurman, *supra* note 157, at 1494, 1539–55 (explaining the evidence cited by Mortenson & Bagley, Parrillo, and Chabot, *supra* note 166); MCCONNELL, *supra* note 19, at 333–34; Jennifer Mascott, *Early Customs Laws and Delegation*, 87 GEO. WASH. L. REV. 1388, 1392 (2019); Cass, *supra* note 43, at 157.

169 Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2255 (2001); *see also* Wurman, *supra* note 157, at 1554; Justin Walker, *The Kavanaugh Court and the* Schechter*-to-*Chevron *Spectrum: How the New Supreme Court Will Make the Administrative State More Democratically Accountable*, 95 IND. L.J. 923, 926 (2020).

170 Most scholarly critics of the nondelegation doctrine do not go so far as to deny the existence of any nondelegation doctrine. Some, however, do. *See* Mortenson & Bagley, *supra* note 166, at 367. Such individuals can skip to the arguments in Sections II.C–II.E.

171 *See, e.g.*, Rao, *supra* note 148, at 1468 ("The Supreme Court consistently affirms the importance of the nondelegation principle to the constitutional structure."); MCCONNELL, *supra* note 19, at 327–28.

172 Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42–43 (1825) (Marshall, C.J.).

173 Shankland v. Mayor of Washington, 30 U.S. (5 Pet.) 390, 395 (1831) (Story, J.) ("[T]he general rule of law is, that a delegated authority cannot be delegated.").

nondelegation doctrine was "vital to the integrity and maintenance of the system of government ordained by the Constitution."[174] In the 1930s, the Court invalidated at least two major New Deal laws under the nondelegation doctrine.[175] Of course, the judiciary's willingness to enforce the nondelegation doctrine weakened following the New Deal. But the Supreme Court has continued to read statutes narrowly on nondelegation grounds.[176] And even jurists and scholars most tolerant of legislative delegations to agencies have acknowledged that Article I imposes *some limits*.[177]

If you accept that premise, we can proceed to the next step of the argument. Disagreements on the precise scope of the Constitution's nondelegation rule do not bear on the question of whether *some version* of the major questions doctrine is legitimate.[178] As Lawrence Sager observed, "it is possible for persons to agree as to the abstract meaning—the concept—of a norm, yet disagree markedly over the conception which ought to be adopted to realize that concept."[179] So too here, divergent perspectives on the *strength* of the nondelegation rule can lead one to favor either stronger or weaker versions of the major questions doctrine.[180]

2. The Major Questions Doctrine Appropriately Implements Article I of the Constitution

If one accepts that Article I imposes limits on Congress's ability to outsource decisions on important questions to others, then the inquiry turns to how the judiciary can enforce that demand. The major

174 Field v. Clark, 143 U.S. 649, 692 (1892); s*ee also* Ga. R.R. & Banking Co. v. Smith, 70 Ga. 694, 699 (1883) (insisting on "difference between the power to pass a law and the power to adopt rules and regulations to carry into effect a law already passed"), *aff'd on remand*, 71 Ga. 863 (1884), *aff'd*, 128 U.S. 174 (1888).

175 Panama Refin. Co. v. Ryan, 293 U.S. 388, 432–33 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 541–42 (1935); *see also* Carter v. Carter Coal Co., 298 U.S. 238, 310–12 (1936).

176 *See* Mistretta v. United States, 488 U.S. 361, 373 n.7 (1989).

177 *See, e.g.*, Gundy v. United States, 139 S. Ct. 2116, 2123 (2019) (Kagan, J., plurality opinion) ("Accompanying [Article I's] assignment of power to Congress is a bar on its further delegation."); Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303, 356 (1999) ("In the most extreme cases, open-ended grants of authority should be invalidated.").

178 *Cf.* Wurman, *supra* note 157, at 1554 ("That some originalists might be wrong about their particular test for nondelegation does not prove that there were no limits on delegation at all.").

179 Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213 (1978).

180 *See* Chen & Estreicher, *supra* note 13, at 576–78.

questions doctrine is an appropriate and useful way to implement the Constitution.

a. The Need for Constitutional Doctrine

Constitutional interpretation starts with discovering original meaning.[181] But for originalists and nonoriginalists, discovering that original meaning generally is not enough to resolve constitutional cases.[182] A few constitutional provisions—like the requirement that the President be at least thirty-five years old—are rule-like and easy to apply.[183] Most, however, are not.[184] That is why judges must develop doctrines to implement constitutional requirements.[185] Indeed, American judges have done this throughout our nation's history—from the Founding to the present day.[186]

American constitutional law is replete with examples of constitutional implementation doctrines. Courts determine whether a government official is an "officer of the United States" with a two-part test focusing on (1) the position's permanence and (2) whether the official exercises "significant authority."[187] Then there's the two-step strict scrutiny test used to implement the Constitution's guarantees of freedom of speech and religion.[188] And, for the Second Amendment, the specific-historical-analogue test—under which courts (1) consult history to determine what type of firearm restrictions were traditionally accepted and (2) analogize those restrictions to modern regulations.[189] To determine what witness statements must be excluded from trials for

181 *See, e.g.*, Michael W. McConnell, Lecture, *Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745, 1747 (2015) ("Almost all interpreters, whatever their school of thought, agree that the constitutional text (including inferences from structure) is the place to begin, and that when the text is clear it is binding.").

182 *See, e.g.*, Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 15 (2018); Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 9–12 (2004) (analyzing use of strict scrutiny to enforce Equal Protection Clause); RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 43, 58 (2001).

183 U.S. CONST. art. II, § 1, cl. 5 ("No Person . . . shall be eligible to the Office of President . . . who shall not have attained to the Age of thirty five Years . . . .").

184 *See* Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 458 (2013).

185 *See* Barnett & Bernick, *supra* note 182, at 15–18; Berman, *supra* note 182, at 9–10, 79–80.

186 *See, e.g.*, AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 297–311 (2012); Stephanie H. Barclay, *The Historical Origins of Judicial Religious Exemptions*, 96 NOTRE DAME L. REV. 55, 113–18 (2020) (describing historical origins of strict scrutiny test).

187 *See, e.g.*, Lucia v. SEC, 138 S. Ct. 2044, 2051, 2051–52 (2018).

188 *See, e.g.*, Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418, 424, 430–32 (2006).

189 *See, e.g.*, N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2131 (2022).

violation of the Confrontation Clause, the Court has distinguished (with difficulty) between "testimonial" and "nontestimonial" statements.[190] All of these doctrinal tests are not *in* the Constitution, but they were adopted by judges exercising the Article III judicial power to *implement* the Constitution.

Those doctrinal tests are all used to decide when courts will refuse to enforce a law. But courts since the Founding have also implemented the Constitution in a somewhat less dramatic way: clear statement rules.[191] Under a clear statement rule, when Congress legislates in an area that implicates constitutional requirements, courts demand clear evidence that Congress actually intended to do so. This method—aptly called a "clarity tax" on Congress[192]—prevents potential constitutional violations while also giving Congress the chance to more intentionally decide whether to test constitutional boundaries.[193] As then-Professor Amy Coney Barrett explained, "the duty to enforce the Constitution may empower a judge not only to invalidate congressional actions that violate constitutional norms, but also to resist congressional actions that threaten those norms."[194]

A couple of examples will help illustrate how constitutional clear statement rules operate.[195] The Constitution prohibits retroactive criminal laws and certain types of civil laws that impose retroactive liability.[196] But American jurists did not stop at refusing to enforce impermissibly retroactive laws. They also strained to avoid reading statutes to impose retroactive liability through the use of a clear statement rule.[197] For example, Chief Justice Marshall explained that "a court . . . ought to struggle hard against a [statutory] construction which will, by a retrospective operation, affect the rights of parties."[198] Marshall applied that rule the following year: "I will not say at this time that a retrospective law may not be made; but if its retrospective view be not clearly expressed, construction ought not to aid it."[199]

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190 *See, e.g.*, Bullcoming v. New Mexico, 564 U.S. 647, 663–65 (2011).

191 *See* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 171 (2010) (acknowledging that clear statement rules can be understood as enforcing the Constitution); Ramsey, *supra* note 13, at 837–44.

192 John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 403 (2010).

193 Barrett, *supra* note 191, at 174–77.

194 *Id.* at 169.

195 *See* West Virginia v. EPA, 142 S. Ct. 2587, 2616–17 (2022) (Gorsuch, J., concurring).

196 *See* U.S. CONST. art. I, § 9, cl. 3; Landgraf v. USI Film Prods., 511 U.S. 244, 265–66 (1994).

197 *See* Barrett, *supra* note 191, at 143–45.

198 United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801).

199 Ogden v. Witherspoon, 18 F. Cas. 618, 619 (C.C.D.N.C. 1802) (No. 10,461) (Marshall, Cir. J.).

Consider also the example of sovereign immunity. The Supreme Court has held that the Constitution preserves and guarantees the sovereign immunity of the States from private suits.[200] Since the Founding, jurists have gone to great lengths to interpret legal texts in ways that preserve state sovereign immunity.[201] In 1793, Justice Iredell refused to read Article III of the Constitution to abrogate sovereign immunity, explaining that "nothing but express words, or an insurmountable implication . . . would authorise the deduction of so high a power."[202] And after the Supreme Court held that Congress may, in certain circumstances, validly abrogate state sovereign immunity, the Court has also demanded an "unequivocal expression of congressional intent" to accomplish that result.[203]

Some judges and scholars—especially originalists—are uneasy about the idea of judges constructing constitutional implementing doctrines.[204] Justice Scalia, for example, thought it would "liberate judges from the texts" they implement.[205] I share their anxiety, as judges have undoubtedly fabricated many doctrines with insufficient grounding in constitutional or statutory law.[206] But the danger does not make the task of judicial doctrinemaking avoidable, and failing to acknowledge the task's necessity impedes transparent decisionmaking. If nothing else, perhaps the current debate over whether the Court adopted the right implementation doctrine in *Bruen* will persuade people on this point.[207]

The necessity of constitutional doctrinemaking highlights an urgent need for originalists: meaningful constraints to ensure the activity remains within appropriate bounds. Although this area of constitutional law is relatively undertheorized, Randy Barnett and Evan Bernick have offered a promising framework under which to operate.

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200 *See, e.g.*, Franchise Tax Bd. of Cal. v. Hyatt, 139 S. Ct. 1485, 1493–95 (2019).

201 *See* Barrett, *supra* note 191, at 145–50.

202 Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 450 (1793) (opinion of Iredell, J.), *superseded by constitutional amendment*, U.S. CONST. amend. XI; *see also* Barrett, *supra* note 191, at 145–46 (providing further examples of the sovereign immunity clear statement rule).

203 Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 99, 99–100 (1984).

204 *See, e.g.*, John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 783–84 (2009).

205 ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 14 (2012).

206 *See* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1128–29 (2017) ("One can't blame folks for worrying that 'construction zones' are catastrophic gaps in the law where anything might happen." *Id.* at 1129.).

207 *See, e.g.*, Nelson Lund, Bruen*'s Preliminary Preservation of the Second Amendment*, 23 FEDERALIST SOC'Y REV. 279, 291–92 (2022).

According to Barnett and Bernick, an implementing doctrine must (1) be "consistent with the letter" of the constitutional text at issue and (2) be "designed to implement the original functions of," preferably, "the provision at issue" or "the Constitution as a whole."[208] I would add a couple modest additions to that test—for situations where judges could plausibly choose between *multiple* implementation doctrines that satisfy the Barnett/Bernick test.[209] Judges can consider which doctrine (3) is more easily administrable. For example, in certain circumstances, concrete rules might make more sense than flexible standards.[210] Finally, courts can favor doctrines that (4) are compatible with traditional principles of remedial restraint and the judiciary's limited role in our government. For example, it is blackletter remedies law that courts deciding a constitutional claim should generally give the most narrowly tailored remedy that redresses the plaintiff's injury.[211] Narrower remedies also do less to exacerbate the American judiciary's countermajoritarian difficulty: the tension of unelected judges discarding decisions by elected officials.

b. The Major Questions Doctrine Is an Appropriate Constitutional Implementation Doctrine

Under that framework, the major questions doctrine is easily justified. Starting with the first prong, the major questions doctrine is consistent with Article I's text. As established, Article I imposes at least *some limits* on Congress's ability to transfer its power to others. And the major questions doctrine, consistent with that textual command, imposes limits and conditions on Congress's ability to do so. In that respect, the doctrine operates much like the retroactivity and sovereign immunity clear statement rules. But like many other constitutional

208 Barnett & Bernick, *supra* note 182, at 35.

209 *See id.* at 37 ("Good-faith construction will not always produce one and only one rule.").

210 *See, e.g.*, Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178 (1989) (arguing in favor of rule-like constitutional law). The Court has imposed concrete rules in constitutional cases before. *See, e.g.*, County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991) (imposing a forty-eight-hour time limit for a jurisdiction to issue a probable cause determination); Maryland v. Shatzer, 559 U.S. 98, 110 (2010) (imposing fourteen-day rule in Fifth Amendment case).

211 *See, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392, 2426–28 (2018) (Thomas, J., concurring) (applying traditional remedial principles to nationwide injunctions); Marshall v. Goodyear Tire & Rubber Co., 554 F.2d 730, 733 (5th Cir. 1977) (holding that injunctive relief must be narrowly "tailored" to "remedy continuing wrongs"). The Court sporadically applies this principle in constitutional law. *See, e.g.*, United States v. Salerno, 481 U.S. 739, 745 (1987) (expressing strong preference for as-applied constitutional remedies to "facial" ones).

provisions, Article I's text is sparse and leaves judges to specify a rule of decision to resolve concrete cases.

The major questions doctrine passes the second prong of the Barnett/Bernick test with flying colors. Indeed, Article I's original functions are easy to identify.[212] Article I's Vesting Clause guarantees that only Congress can make law.[213] The vesting of legislative power in Congress, in turn, protects the separation of powers by reserving lawmaking to the people's elected representatives. As James Wilson explained, the Constitution would not permit the President—like certain prior English kings—to make law by proclamation.[214] Further, the Framers adopted the rules in Article I, Section 7, to make lawmaking difficult because they feared excess legislating.[215] That is why both houses of Congress must agree on legislation and the President can veto laws. In turn, the obstacles Article I, Section 7, imposes on lawmaking protect the prerogative of state governments to legislate on subjects of local concern. Failure to faithfully implement Article I's rules "would dash the whole scheme" of the Constitution's structure.[216]

The major questions doctrine is faithful to Article I's original functions.[217] It renders lawmaking on important subjects more difficult by imposing a meaningful check on the President's power to unilaterally make law. It prevents the veto from being transformed from a law-inhibiting device into an instrument that the President uses to block Congress from interfering with *his* attempts to make law.[218] It protects bicameralism and presentment by ensuring that legislative solutions to important new problems really are approved by both houses of Congress, "enhanc[ing] the legitimacy of the lawmaking process."[219] It protects the separation of powers by ensuring the President does not exercise both legislative and executive power.[220] It safeguards

212 *See supra* subsection II.A.1.

213 *See supra* text accompanying notes 131–33.

214 *See supra* text accompanying note 160.

215 *See supra* notes 143–50 and accompanying text.

216 Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 61 (2015) (Alito, J., concurring).

217 *Cf.* Barrett, *supra* note 191, at 178 (asking if constitutional clear statement rule "promote[s] the [constitutional] value it purports to protect"); Evan D. Bernick, Canon Against Conquest 56 (Mar. 11, 2024) (unpublished manuscript), https://ssrn.com/abstract=4538633 [https://perma.cc/FRR5-U2A4] (making similar argument as to the Indian canon).

218 *See infra* Section II.E (discussing how the veto prevents Congress from stopping executive branch lawmaking).

219 RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 129 (2004); *see also* Adler & Walker, *supra* note 49, at 1941–44 (highlighting that the executive branch uses vague old statutes to enact policies never actually considered or approved by Congress).

220 *See infra* notes 385–91 and accompanying text (showing that the President currently exercises legislative, executive, and judicial power).

federalism by preventing presidential lawmaking from displacing state laws.[221] Even if Congress does intentionally and clearly delegate vast powers, the doctrine at least ensures Congress has made that choice.[222]

Of course, courts have developed another doctrine to implement Article I's requirement that Congress make important laws: the nondelegation doctrine. That doctrine, too, could pass both prongs of the Barnett/Bernick test.[223] But the major questions doctrine has certain advantages in terms of administrability and its respect for the judiciary's limited role in our republic.

Start with administrability. The primary advantage of the major questions doctrine over the nondelegation doctrine is that it is only *forward-looking*, whereas the latter threatens destabilizing consequences because of its *backward-looking* nature.[224] The federal statute books are *full* of open-ended delegations that would be jeopardized by a revived nondelegation doctrine.[225] Many of these laws have been around for decades—countless administrative regulations have been issued under their aegis.[226] A court that holds a statute unenforceable under the nondelegation doctrine threatens *all* of the regulations promulgated in reliance on that statute.[227] Decades of regulatory law could be effectively wiped out by a single court decision, upsetting

221 *Cf.* Solid Waste Agency v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 173–74 (2001) (providing example of how agency attempts to stretch their authority in vague statutes can displace "traditional" state powers).

222 *See* Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2109 (2004).

223 Justice Gorsuch's proposed version of the nondelegation doctrine passes the Barnett/Bernick test. *See* Gundy v. United States, 139 S. Ct. 2116, 2136–37 (2019) (Gorsuch, J., dissenting). I doubt the intelligible principle test—at least as formulated by the *Gundy* plurality—passes the test. *See id.* at 2123 (plurality opinion). Just as Justice Robert Jackson once understood that the implementation doctrine for the enumerated powers doctrine in *Wickard v. Filburn*, 317 U.S. 111 (1942), did not meaningfully police the line between federal and state power, *see* Barnett & Bernick, *supra* note 182, at 44–45, Justice Scalia basically admitted that the intelligible principle test does not meaningfully enforce Article I's limits on delegation, *see* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474–75 (2001). What seemed to be driving Justice Scalia's support for that underenforcement was not doubt that Article I limits Congress's ability to delegate, but his skepticism that those limits are "readily enforceable by the courts." Mistretta v. United States, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting); *see* Rao, *supra* note 148, at 1508.

224 *See* Walker, *supra* note 169, at 943 ("A return to *Schechter* would be highly disruptive."); MCCONNELL, *supra* note 19, at 335.

225 *See, e.g.*, Ilan Wurman, *As-Applied Nondelegation*, 96 TEX. L. REV. 975, 976 (2018) ("So much is at stake by finding a statute in violation of the nondelegation doctrine that the Court simply does not enforce it . . . .").

226 *See* Walker, *supra* note 169, at 943.

227 *See id.* at 943–44.

reliance interests across the country.[228] Applying the nondelegation doctrine, in other words, risks sending "water over the dam" and destabilizing certain areas of federal law.[229] The forward-looking major questions doctrine, by contrast, says nothing about the lawfulness of past actions taken in reliance on the statute at issue. Indeed, it leaves the agency free to "return to the drawing board and promulgate new rules to achieve its policy [goals]" using *the same statute*.[230] It only limits how agencies can use that statute moving forward.[231]

A good comparison on this point is the federalism canon.[232] "The Federal Government 'is acknowledged by all to be one of enumerated powers.'"[233] As James Madison put it, "The powers delegated . . . to the federal government are few and defined," while "[t]hose which are to remain in the State governments are numerous and indefinite."[234] And for a time, the Supreme Court preserved that design by refusing to enforce congressional laws not sufficiently grounded in an enumerated power.[235] But since the New Deal, the Court has generally hesitated to hold that Congress acted in excess of its powers.[236] One decision even suggested that federalism's only protection should come from the political processes.[237] All the while, the "proliferation of national legislation" continued to steadily erode the power of the States.[238]

The Court, however, partially compensated for its hesitance to enforce the enumerated powers doctrine by developing the federalism clear statement rule. As the Court explained in *Gregory v. Ashcroft*, the "Federal Government holds a decided advantage in [the] delicate balance" between federal and state authority because "Congress may

228 *See id.* (noting variety of groups that "rely" on regulations promulgated under statutes that likely violate the nondelegation doctrine, *id.* at 943).

229 *See* Gonzales v. Oregon, 546 U.S. 243, 301 (2006) (Thomas, J., dissenting).

230 Chen & Estreicher, *supra* note 13, at 576.

231 *See* Deacon & Litman, *supra* note 12, at 1088 ("Unlike a revived nondelegation approach, however, the major questions doctrine provides a more selective and targeted deregulatory tool.").

232 *See* Scott A. Keller, *How Courts Can Protect State Autonomy from Federal Administrative Encroachment*, 82 S. CAL. L. REV. 45, 51 (2008).

233 Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 534 (2012) (quoting M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819)).

234 THE FEDERALIST NO. 45, *supra* note 134, at 292 (James Madison).

235 *See, e.g.*, United States v. E.C. Knight Co., 156 U.S. 1, 11–13 (1895) (holding Congress lacked power under Commerce Clause to regulate sugar production).

236 *See, e.g.*, Rao, *supra* note 148, at 1508–10 (noting underenforcement); Barrett, *supra* note 191, at 171.

237 *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 552 (1985); *id.* at 564 n.7 (Powell, J., dissenting).

238 *Id.* at 565 n.9 (Powell, J., dissenting).

legislate in areas traditionally regulated by the States."[239] Because that "is an extraordinary power in a federalist system," it is one the Court "must assume Congress does not exercise lightly."[240] Thus, Congress must use "exceedingly clear language" in such situations.[241] The Court has repeatedly applied the federalism canon in recent Terms.[242]

The Court's preference for the federalism canon over an invalidation doctrine to implement the Constitution's enumerated powers principle helps explain why the Court has also preferred the major questions doctrine over the nondelegation doctrine.[243] Similar administrability concerns likely explain both preferences.[244] In both cases, the stakes of invalidating a statute are extraordinarily high. Both the nondelegation doctrine and the enumerated powers doctrine are *backward-looking*; applying those rules could jeopardize decades of regulations built atop the toppled statutes.[245] Applying forward-looking clear statement rules, in both contexts, allows the Court to issue lower-stakes decisions.

Additionally, the major questions doctrine will often be more consistent than the nondelegation doctrine with the judiciary's limited role in our republic. Under Article III, courts have only the power to adjudicate "Cases" or "Controversies."[246] In exercising that power, courts are supposed to narrowly tailor remedies when redressing the injury of the plaintiffs that initiated suit.[247] "Any remedy a judge authorizes must not be 'more burdensome [to the defendant] than necessary to redress the complaining parties.'"[248] And a party injured by a regulation can typically be made whole by a judicial order declining to enforce the regulation.[249] That is what the major questions doctrine provides. By contrast, a holding that the statute underlying the challenged regulation is unconstitutional affects not just the plaintiff before the court—but *many* people beyond the case.[250] A major questions

239 Gregory v. Ashcroft, 501 U.S. 452, 460 (1991).

240 *Id.*

241 Sackett v. EPA, 143 S. Ct. 1322, 1341 (2023) (quoting U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837, 1849–50 (2020)).

242 *See, e.g.*, *id.*; Ala. Ass'n of Realtors v. HHS, 141 S. Ct. 2485, 2489 (2021) (per curiam); *Cowpasture*, 140 S. Ct. at 1849–50.

243 *See* Keller, *supra* note 232, at 55–59, 80.

244 *See, e.g.*, Rao, *supra* note 148, at 1508–09 (acknowledging this problem with the nondelegation doctrine).

245 *See supra* notes 224–29 and accompanying text.

246 U.S. CONST. art. III, § 2.

247 *See supra* note 211 and accompanying text.

248 United States v. Texas, 143 S. Ct. 1964, 1985 (2023) (Gorsuch, J., concurring in judgment) (alteration in original) (quoting Califano v. Yamasaki, 442 U.S. 682, 702 (1979)).

249 *See id.* at 1978.

250 *Cf. id.* at 1980 ("If the court's remedial order affects nonparties, it does so only incidentally."); Trump v. Hawaii, 138 S. Ct. 2392, 2426–29 (2018) (Thomas, J., concurring)

doctrine holding will therefore often be a more narrowly tailored remedy than one provided under the nondelegation doctrine.[251]

Adhering to traditional principles of remedial restraint will also better safeguard judicial legitimacy.[252] Many scholars have recognized that unelected judges refusing to enforce statutes passed by elected legislatures stands in tension with representative government.[253] The nondelegation doctrine exacerbates that countermajoritarian difficulty more than the major questions doctrine.[254] Whereas the nondelegation doctrine tells Congress it *cannot* do something, the major questions doctrine is more respectful of Congress, leaving it free to choose whether to legislate close to constitutional lines.[255]

B. The Major Questions Doctrine Can Be Justified as a Doctrine of Constitutional Avoidance

Instead of conceiving of the major questions doctrine as a clear statement rule, the doctrine can also be understood as an instantiation of constitutional avoidance.

Constitutional avoidance traces its roots in American law to at least the early nineteenth century.[256] Under the rule, "when statutory language is susceptible of multiple interpretations, a court may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems."[257] As Justice Story explained, courts can adopt a "construction [of a statute], which although not favored by the exact letter, may yet well stand with the

(objecting to nationwide injunctions because they are beyond the traditional scope of remedies).

251 To be clear, sometimes a constitutional holding under the nondelegation doctrine *will be* the most narrowly tailored remedy. If a statute clearly does provide vast power to an agency without adequate legislative instruction, the judge can only remedy the plaintiff's injury by declining to enforce the statute.

252 *See Trump*, 138 S. Ct. at 2425–26 (Thomas, J., concurring) (arguing supporters of Constitution reassured those who feared excess judicial power by adhering to a "more limited construction" of courts' equitable powers, *id.* at 2426 (quoting Missouri v. Jenkins, 515 U.S. 70, 126 (1995) (Thomas, J., concurring)).

253 *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (2d ed. 1986).

254 *See* Sohoni, *supra* note 12, at 292–93; Kristin E. Hickman, Foreword, *Nondelegation as Constitutional Symbolism*, 89 GEO. WASH. L. REV. 1079, 1136–37 (2021).

255 *See* Barrett, *supra* note 191, at 171–72 (acknowledging argument that "protecting constitutional values through [substantive] canons rather than [invalidation during] judicial review is more protective of the political process," *id.* at 172).

256 *See id.* at 140 & n.144 (discussing Soc'y for the Propagation of the Gospel v. Wheeler, 22 F. Cas. 756, 769 (C.C.D.N.H. 1814) (No. 13,156) (Story, Cir. J.)); Mossman v. Higginson, 4 U.S. (4. Dall.) 12, 14 (1800).

257 Jennings v. Rodriguez, 138 S. Ct. 830, 836 (2018).

general scope of the statute, and give it a constitutional character."[258] The alternative interpretation, however, must be at least "plausible."[259]

At least some of the Supreme Court's major questions doctrine cases can be understood as applying constitutional avoidance.[260] For example, in *The Benzene Case*, the Court stated that the government's interpretation of the statute at issue "might" render it "unconstitutional under the Court's [nondelegation cases]."[261] The Court then explained that a "construction of the statute that avoids" such nondelegation problems "should certainly be favored."[262] Indeed, Justice Barrett has recognized the connection between the major questions doctrine and constitutional avoidance.[263] Notably, too, the Fifth Circuit has suggested that an agency regulation that triggers the major questions doctrine also triggers constitutional avoidance.[264]

It would not take much to reconceive the major questions doctrine as constitutional avoidance. The first step in the constitutional-avoidance inquiry questions whether the agency's interpretation of the statute "raises serious constitutional doubts."[265] The major questions doctrine's first step—identifying whether an agency has claimed a major power—is quite similar. Treating the two as equivalent only entails accepting that the nondelegation doctrine requires Congress to make major policy decisions. If one accepts that premise, it follows that a case presents a serious constitutional question if an agency claims the power to answer an important policy question. And then that case can be resolved by avoiding the constitutional issue and adopting a narrower interpretation of the statute (if the narrower interpretation is plausible). Indeed, Mila Sohoni acknowledges that an importance-focused conception of nondelegation could explain the Court's recent major questions doctrine decisions in constitutional-avoidance terms.[266]

There certainly is support for understanding the Constitution as requiring Congress to make important policy decisions. Several

258 *Wheeler*, 22 F. Cas. at 769; *accord* Barrett, *supra* note 191, at 140–41.

259 *Jennings*, 138 S. Ct. at 843 (emphasis omitted). Courts have articulated constitutional avoidance in different forms and with varying levels of strength. *See also* Sohoni, *supra* note 12, at 295–96.

260 *See* Sohoni, *supra* note 12, at 297–309.

261 Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst. (*The Benzene Case*), 448 U.S. 607, 646 (1980) (plurality opinion) (citing A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 539 (1935)).

262 *Id.*

263 *See* Biden v. Nebraska, 143 S. Ct. 2355, 2378 (2023) (Barrett, J., concurring).

264 *See* BST Holdings, L.L.C. v. OSHA, 17 F.4th 604, 616–18 (5th Cir. 2021).

265 *See* Jennings v. Rodriguez, 138 S. Ct. 830, 836 (2018).

266 *See* Sohoni, *supra* note 12, at 302–04.

scholars have argued for this approach.[267] In *Wayman v. Southard*, the Supreme Court considered a nondelegation challenge to a law permitting the federal courts to promulgate rules regulating how judicial judgments could be enforced.[268] The particular controversy in *Wayman* focused on whether a plaintiff could enforce a money judgment in hard currency or whether he had to accept paper money.[269] In rejecting a nondelegation argument, Chief Justice Marshall distinguished between "important subjects, which must be entirely regulated by the legislature itself," and "those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details."[270] In that case, Marshall deemed the power at issue merely a "power to vary minor regulations, which are within the great outlines marked out by the legislature in directing the execution."[271]

Wayman provides support for a nondelegation doctrine that distinguishes between major and nonmajor policy decisions.[272] Notably, too, almost half of the state judiciaries have adopted nondelegation doctrines that ask whether the state legislature has made the major policy decision and merely left the agency to "fill up the details."[273]

The counterargument is that the Supreme Court's modern nondelegation doctrine cases don't seem to differentiate between major and nonmajor questions.[274] Assuming that all the major questions doctrine cases don't count in the tally, this argument has some force.[275] The current—albeit tenuous—rule is that a delegation is permissible if Congress provides an "intelligible principle."[276] On its surface, that

267 *See, e.g.*, Lawson, *supra* note 143, at 360–61, 376–77; Wurman, *supra* note 157, at 1502–03; Cass, *supra* note 43, at 188–89; *see also* MCCONNELL, *supra* note 19, at 328 ("In theory—though not as a matter of judicially manageable and enforceable law—Congress has to make the key decisions in legislation and may leave only the details of execution to the executive branch.").

268 Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 21 (1825).

269 *See id.* at 2.

270 *Id.* at 43.

271 *Id.* at 45.

272 *See* Lawson, *supra* note 143, at 360–61, 376–77; Cass, *supra* note 43, at 158–61; *see also* Wurman, *supra* note 225, at 1007.

273 Daniel E. Walters, *Decoding Nondelegation After* Gundy*: What the Experience in State Courts Tells Us About What to Expect When We're Expecting*, 71 EMORY L.J. 417, 445, 447–49 (2022).

274 *See* Walters, *supra* note 12, at 516–17 ("There is no antimajorness doctrine in the Constitution . . . ." *Id.* at 516.).

275 *See* Levin, *supra* note 12, at 949–50.

276 *See, e.g.*, Gundy v. United States, 139 S. Ct. 2116, 2123 (2019) (plurality opinion) (quoting Mistretta v. United States, 488 U.S. 361, 372 (1989)).

test does not seem to differentiate between major and nonmajor questions.[277]

However, Gary Lawson has persuasively argued that the Court's discussions of discretion can be understood as ascertaining whether Congress has answered the important question or not.[278] He starts by identifying Chief Justice Marshall's test in *Wayman*.[279] He then argues that subsequent cases (like *J.W. Hampton*), which seemed to focus on whether Congress had provided sufficient guidance to agencies, continued to maintain Marshall's basic distinction.[280] More recently, the Court acknowledged that "the degree of agency discretion that is acceptable varies according to the *scope of the power* congressionally conferred."[281] So the *amount* of power given to the agency is relevant even under the intelligible principle test.[282] As Lawson summarizes, "law execution and application involve discretion in matters of 'less interest' but turn into legislation when that discretion extends to 'important subjects.'"[283] In other words, when Congress deals with a major question, it has not decided that major question unless it gives more guidance to the agency.

Even if one does not believe that the Supreme Court's current nondelegation cases can be understood to differentiate between major and nonmajor questions, the doctrinal wind is blowing in that direction.[284] Five Justices have expressed openness to strengthening the nondelegation doctrine and, in particular, orienting it around an inquiry into whether Congress has delegated a major power or not.[285] Justice Gorsuch's dissent in *Gundy*—joined by Chief Justice Roberts and Justice Thomas—acknowledged that agencies could "fill up the details," but it maintained that Congress must decide "important

277 *See, e.g.*, John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 240–42.

278 *See* Lawson, *supra* note 143, at 360–61, 376.

279 *See id.* at 358–62 ("Subsequent Supreme Court cases . . . have never significantly elaborated on Chief Justice Marshall's formulation." *Id.* at 361.).

280 *Id.* at 361–72 (arguing that Supreme Court cases between *Wayman* and *Panama Refining* did not "improve[] upon, or even elaborate[] upon, Chief Justice Marshall's 1825" articulation, *id.* at 372).

281 Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 475 (2001) (emphasis added).

282 *See, e.g.*, Cary Coglianese, *Dimensions of Delegation*, 167 U. PA. L. REV. 1849, 1851 (2019) ("[T]he nondelegation doctrine, properly understood, concerns both the degree of discretion afforded to the holder of lawmaking power and the extent of the underlying power itself." (emphasis removed)).

283 Lawson, *supra* note 143, at 377.

284 *See* Thomas A. Koenig & Benjamin R. Pontz, Note, *The Roberts Court's Functionalist Turn in Administrative Law*, 46 HARV. J.L. & PUB. POL'Y 221, 230 (2023) (arguing a nondelegation doctrine focused on "whether . . . Congress has made the important policy choice" "may be emerging").

285 *See, e.g.*, Walker, *supra* note 169, at 936–47.

subjects."[286] Justice Alito, meanwhile, has signed onto two concurrences by Justice Gorsuch suggesting that Article I requires Congress to make important decisions (or delegate them clearly).[287] And Justice Kavanaugh, too, has acknowledged the close link between the nondelegation and major questions doctrines.[288] It is thus entirely plausible that the Court will shift the nondelegation doctrine toward an importance inquiry—just as Chief Justice Marshall outlined in *Wayman*. Any move in that direction would increase the plausibility of treating the major questions doctrine as constitutional avoidance.[289]

The second step of the major questions doctrine is easier to harmonize with constitutional avoidance. After all, the end result of constitutional avoidance and applying a clear statement rule is effectively the same. If the government's opponent identifies a plausible, narrower reading of the statute that prohibits the agency's action, then the court must accept that reading.[290]

Constitutional avoidance is a widely accepted doctrine in American law.[291] If one accepts a nondelegation rule that focuses on the importance of the power allegedly delegated, the major questions doctrine can logically be understood as just another example of constitutional avoidance.

C. The Major Questions Doctrine Is Justifiable as Ordinary Statutory Interpretation

The major questions doctrine is also justified as an accurate reflection of how legal language is understood. In other words, it's just good textualism. Justice Amy Coney Barrett and Ilan Wurman have advocated variations of this approach.

The argument is straightforward. Except when enforcing the Constitution, courts ordinarily must act as "faithful agents" of the legislature and interpret laws according to their plain terms.[292] Plain

286 *See* Gundy v. United States, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting).

287 *See* West Virginia v. EPA, 142 S. Ct. 2587, 2620 (2022) (Gorsuch, J., concurring); Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 668–69 (2022) (Gorsuch, J., concurring).

288 Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., respecting denial of certiorari).

289 *See* Sohoni, *supra* note 12, at 309.

290 *See* Barrett, *supra* note 191, at 141–42.

291 *See, e.g.*, Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 345–47 (1998); *id.* at 356 (Scalia, J., concurring in judgment).

292 *See* Barrett, *supra* note 191, at 112–17.

meaning is ascertained according to a variety of tools: dictionary definitions, statutory context, and linguistic canons.[293]

Textualists accept that plain meaning is shaped by the context in which the statute is passed.[294] In her *Biden v. Nebraska* concurrence, Justice Barrett argued that the major questions doctrine reflects context that any sensible reader would consider when reading a statute delegating authority to an agency. "Context," she explained, "is not found exclusively within the four corners of a statute," but also includes "[b]ackground legal conventions."[295] Among those is "the basic premise that Congress normally 'intends to make major policy decisions itself, not leave those decisions to agencies.'"[296] "[C]onstitutional structure" and the Framers' decision to vest Congress with "all legislative Powers" also provide important context.[297]

With that context, Justice Barrett argued that "a reasonably informed interpreter" reading a statutory delegation within our "system of separated powers" would "expect Congress to legislate on 'important subjects' while delegating away only 'the details.'"[298] That is why courts must approach agency claims to major powers "with at least some 'measure of skepticism.'"[299] To "overcome" that skepticism, the agency must point to "text directly authorizing the agency action or context demonstrating that the agency's interpretation is convincing."[300] Consequently, for Justice Barrett, "the major questions doctrine is a tool for discerning—not departing from—the text's most natural interpretation."[301]

One case that illustrates Justice Barrett's approach is *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*[302] The statute at issue imposed extensive regulatory rules on communications common carriers (think telephone companies relying on physical wires running into homes).[303] But the statute also authorized the FCC to

293 *See* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 92 (2006).

294 *Id.* at 110 ("Textualists of course believe that language has meaning only in context.").

295 Biden v. Nebraska, 143 S. Ct. 2355, 2378 (2023) (Barrett, J., concurring) (internal quotation marks omitted).

296 *Id.* at 2380 (quoting U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc)).

297 *Id.* (internal brackets omitted).

298 *Id.* at 2380–81 (quoting Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825)).

299 *Id.* at 2381.

300 *Id.*

301 *Id.* at 2376.

302 MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218 (1994); *see also* Cass R. Sunstein, *Two Justifications for the Major Questions Doctrine*, 76 FLA. L. REV. 251, 256–57 (2024) (making this observation).

303 *MCI*, 512 U.S. at 224–25.

"modify any requirement made by or under . . . this section."[304] The FCC decided to effectively exempt all eligible companies except AT&T from complying with the regulatory regime.[305] The Court ruled against the FCC, holding that the power to "modify" did not include the ability to fundamentally change the statute's regulatory regime.[306] The word "modify," the Court explained, connoted incremental change.[307] As the Court put it, "It might be good English to say that the French Revolution 'modified' the status of the French nobility—but only because there is a figure of speech called understatement and a literary device known as sarcasm."[308] The Court thus found it "highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion . . . through such a subtle device as permission to 'modify' rate-filing requirements."[309] Because a big power was claimed, clear language was expected.

Ilan Wurman proposes a similar approach that he calls the "importance canon."[310] In his view, the major questions doctrine is best understood as a linguistic canon.[311] Whereas substantive canons bend the meaning of statutes according to nonlinguistic concerns, linguistic canons are rules of thumb for reading language.[312] For example, suppose your spouse asks you to go out and buy milk, cereal, and other such products. The linguistic canon *ejusdem generis* suggests the list's catchall ("other such products") refers to things similar to the list's other items ("milk" and "cereal") and thus does *not* contain a license to go buy a new car.[313] Similarly, Wurman argues that, due to the way language is typically used, jurists have long *expected* legal documents conferring major powers to do so with particular clarity.[314]

As Wurman documents, a variety of legal doctrines account for that linguistic expectation. For example, in agency law, "'principal' powers" must be expressly given, while "'[s]ubordinate' powers can be

304 *Id.* at 224 (quoting 47 U.S.C. § 203 (1988)).

305 *Id.* at 221.

306 *Id.* at 234.

307 *Id.* at 228.

308 *Id.*

309 *Id.* at 231.

310 Wurman, *supra* note 13, at 917.

311 *Id.*

312 Barrett, *supra* note 191, at 117 ("Linguistic canons pose no challenge to the principle of legislative supremacy because their very purpose is to decipher the legislature's intent.").

313 *Cf.* Cir. City Stores, Inc. v. Adams, 532 U.S. 105, 114–15 (2001) (employing the *ejusdem generis* canon).

314 *See* Wurman, *supra* note 13, at 916.

left to implication."[315] As the Supreme Judicial Court of Massachusetts explained in 1826 when holding that an agent lacked authority to sell his master's cargo in satisfaction of debts, it was "an extraordinary transaction" that "call[ed] for a full and particular authority."[316] Wurman also identifies other examples from constitutional and contract law.[317]

The Barrett-Wurman approach is plausible. There is ample historical support—in a variety of legal contexts—for the notion that legal documents must convey important powers in clear language. As T.T. Arvind and Christian Burset point out, there are "some similarities between the [major questions doctrine] and eighteenth-century approaches to identifying the limits of executive authority" in English law.[318] A good example comes from *Entick v. Carrington*, a famous privacy law case.[319] There, Lord Camden held the government to a higher standard because it was claiming a major power (to search private papers).[320] The court stated, "As this Jurisdiction of the Secretary of State is so extensive, therefore the Power ought to be as clear as it is extensive."[321] Eighteenth-century agency law is another promising comparison. Gary Lawson and Guy Seidman have found that "[i]t was settled agency law in the eighteenth century that delegated discretionary powers in an agency instrument—any relevant agency instrument—could not be subdelegated absent a specific authorization in the instrument."[322]

Further, textualist skepticism is warranted toward agency claims that Congress delegated major powers using vague statutory language "in light of our constitutional structure, which is itself part of the legal context framing any delegation."[323] In part, it is "[b]ecause the Constitution vests Congress with '[a]ll legislative powers'" that "a reasonable interpreter would expect [Congress] to make the big-time policy

315 *Id.* at 968 (analyzing Howard v. Baillie (1796) 126 Eng. Rep. 737; 2 H. Bl. 618).

316 Peters v. Ballistier, 20 Mass. (3 Pick.) 495, 503, 506 (1826).

317 *See generally* Wurman, *supra* note 13, at 949–77.

318 T.T. Arvind & Christian R. Burset, *"Major Questions" in the Common Law Tradition*, YALE J. ON REGUL.: NOTICE & COMMENT (July 7, 2023) https://www.yalejreg.com/nc/major-questions-in-the-common-law-tradition-by-t-t-arvind-christian-r-burset/ [https://perma.cc/B8JC-CAGV].

319 *See id.*

320 *See id.*

321 *See* T.T. Arvind & Christian R. Burset, *A New Report of* Entick v. Carrington *(1765)*, 110 KY. L.J. 265, 324 (2021–2022).

322 Steven G. Calabresi & Gary Lawson, *The Depravity of the 1930s and the Modern Administrative State*, 94 NOTRE DAME L. REV. 821, 855 (2018) (summarizing GARY LAWSON & GUY SEIDMAN, "A GREAT POWER OF ATTORNEY": UNDERSTANDING THE FIDUCIARY CONSTITUTION 113–17 (2017)).

323 *See* Biden v. Nebraska, 143 S. Ct. 2355, 2380 (2023) (Barrett, J., concurring).

calls itself, rather than pawning them off to another branch."[324] To the extent Justice Barrett is claiming this *should* be the expectation, her analysis overlaps with the argument in Section II.A. To the extent she is making an empirical claim, a frequently cited study by Abbe Gluck and Lisa Schultz Bressman suggests that the majority of legislative staffers, consistent with the Barrett-Wurman argument, do not understand ambiguous statutes to convey important powers.[325]

D. The Major Questions Doctrine Has Ample Support in Precedent

The major questions doctrine is also justified under a cautious, precedent-focused approach. Within our common law system of adjudication, there exists broad agreement that precedent plays an important role in the development of the law.[326] Although stare decisis is less important to constitutional law than statutory law,[327] many jurists agree precedent is still important in both contexts.[328] Indeed, some argue that constitutional law should primarily be developed "over time, not at a single moment," and that it should "be the evolutionary product of many people, in many generations."[329]

Within a precedent-focused framework, the major questions doctrine is justified. As discussed in a prior article, the doctrine traces its roots at least as far back as the mid-to-late nineteenth century.[330] Others have identified even more ancient roots.[331] And there have been cases applying variants of the doctrine—in both federal and state court—ever since.[332] Moreover, the doctrine has been applied quite frequently by the Supreme Court starting in 2000—at least eight times.[333] There are at least two major separate writings from Supreme

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324 *Id.* (quoting West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022)).

325 *See* 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); *see also* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986) (arguing Congress intends to reserve major policy decisions to itself).

326 *See generally* BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT (2016) (containing contributions from an ideologically diverse array of judges).

327 *See, e.g.*, Agostini v. Felton, 521 U.S. 203, 235 (1997).

328 *See, e.g.*, Ramos v. Louisiana, 140 S. Ct. 1390, 1414–16 (2020) (Kavanaugh, J., concurring in part).

329 *See* DAVID A. STRAUSS, THE LIVING CONSTITUTION 37 (2010).

330 *See* Capozzi, *supra* note 13, at 196–208.

331 *See, e.g.*, Arvind & Burset, *supra* note 318.

332 *See* Capozzi, *supra* note 13, at 205–08, 210–26.

333 *See id.* at 212–23; Biden v. Nebraska, 143 S. Ct. 2355 (2023) (decided after prior article).

Court Justices offering guidance on when the doctrine applies.[334] In recent years, some of the nation's most distinguished courts of appeals judges have applied the doctrine and identified its contours.[335] As discussed above, judges and scholars have now largely agreed that the doctrine entails a two-step inquiry asking (1) whether a major question is at issue and (2) whether Congress has clearly authorized a federal agency to resolve that question.[336]

Courts can therefore draw on ample precedent in continuing to refine and apply the doctrine's two steps.[337] Let's start with when a major question is at issue. The Court has provided various markers signifying when a regulation is economically or politically significant.[338] For example, when discussing economic significance, the Court has repeatedly identified the specific dollar amount of a regulation's economic impact as important.[339] Analogizing future regulations to past cases based on aggregate economic impact should be easy,[340] and some courts have already done this.[341] Courts can also look to the executive branch's own definition of what constitutes a "significant regulation."[342] Or they could look to Congress's own highly similar definition

334 West Virginia v. EPA, 142 S. Ct. 2587, 2620–22 (2022) (Gorsuch, J., concurring); *Nebraska*, 143 S. Ct. at 2381–83 (Barrett, J., concurring).

335 *See, e.g.*, *In re* MCP No. 165, 20 F.4th 264, 272 (6th Cir. 2021) (Sutton, C.J., dissenting from denial of initial hearing en banc); *In re* MCP No. 165, 21 F.4th 357, 397–99 (6th Cir. 2021) (Larsen, J., dissenting), *rev'd per curiam sub nom.* Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661 (2022); BST Holdings, L.L.C. v. OSHA, 17 F.4th 604, 617–18 (5th Cir. 2021) (Engelhardt, J.); U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 422–23 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc); Texas v. United States, 809 F.3d 134, 181 (5th Cir. 2015) (Smith, J.), *aff'd by an equally divided court*, 579 U.S. 547 (2016) (per curiam).

336 *See supra* note 130 and accompanying text.

337 *See* Capozzi, *supra* note 13, at 226–41; Chen & Estreicher, *supra* note 13, at 571–72; *see also* Sunstein, *supra* note 77, at 487 (acknowledging that some "line-drawing" is needed under the major questions doctrine but also that there are easy cases).

338 *See* Capozzi, *supra* note 13, at 228–34.

339 *See, e.g.*, *Nebraska*, 143 S. Ct. at 2373; *West Virginia*, 142 S. Ct. at 2604; Ala. Ass'n of Realtors v. HHS, 141 S. Ct. 2485, 2489 (2021); King v. Burwell, 576 U.S. 473, 485 (2015) (considering "billions of dollars" as involving a major question).

340 *Cf.* Deacon & Litman, *supra* note 12, at 1054–55 (acknowledging economic factors "differ from the more overtly values-based criteria" that can animate the doctrine).

341 *See, e.g.*, Brown v. U.S. Dep't of Educ., 640 F. Supp. 3d 644, 664 (N.D. Tex. 2022), *vacated*, 143 S. Ct. 2343 (2023); Arizona v. Walsh, No. 22-cv-00213, 2023 WL 120966, at *8 (D. Ariz. Jan. 6, 2023), *rev'd in part and vacated in part sub nom.* Nebraska v. Su, No. 23-15179, 2024 WL 4675411 (9th Cir. Nov. 5, 2024).

342 Exec. Order No. 12866, § 3(f), 3 C.F.R. 638, 641–42 (1994), *reprinted as amended in* 5 U.S.C. § 601 (2018) (noting, among other things, that a rule is significant if it has an economic impact of $100 million or more); *see also* Capozzi, *supra* note 13, at 229–30 (suggesting courts can look to this standard); David Schoenbrod, *Consent of the Governed: A Constitutional Norm That the Court Should Substantially Enforce*, 43 HARV. J.L. & PUB. POL'Y 213, 259–60 (2020); Calabresi & Lawson, *supra* note 322, at 856–57.

of what constitutes a "significant" regulation in the Congressional Review Act.[343]

As for political significance, this aspect of the doctrine admittedly has more of a "know it when you see it" quality than the economic impact prong.[344] However, the Court has established various concrete markers to guide future cases. A lengthy series of failed bills on the subject is not difficult to identify.[345] A disapproval resolution from a current house of Congress on the specific regulation at issue also provides fairly concrete evidence that a politically controversial question is at issue.[346] Additionally, as suggested by then-Judge Kavanaugh, courts can look to the number of comments submitted during a regulation's notice-and-comment procedures as a rough proxy for the public's interest in debating the issue.[347] Sometimes, too, the executive branch will make the issue easy by acknowledging how impactful its regulation is.[348]

There is also ample precedent addressing whether clear congressional authorization exists. Love them or hate them, the law is full of substantive canons that have been applied by courts for a long time.[349] Yes, these clear statement rules have different strengths.[350] And the Supreme Court has not yet identified the precise strength of the major questions doctrine's second step.[351] But lower courts have plenty of viable and legitimate precedential analogues to resort to in applying

343 *See* 5 U.S.C. § 804(2) (2018); *see also* Capozzi, *supra* note 13, at 230.

344 *See* U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 423 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

345 *See, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 144 (2000); Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 666 (2022) (per curiam); West Virginia v. EPA, 142 S. Ct. 2587, 2614 (2022).

346 *See Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 667–68 (Gorsuch, J., concurring).

347 *U.S. Telecom Ass'n*, 855 F.3d at 423 (Kavanaugh, J., dissenting from denial of rehearing en banc) ("[W]hen the issue was before the FCC, the agency received some 4 million comments on the proposed rule . . . .").

348 *West Virginia*, 142 S. Ct. at 2604 (quoting White House Fact Sheet on Clean Power Plan); *U.S. Telecom Ass'n*, 855 F.3d at 423–24 (Kavanaugh, J., dissenting from denial of rehearing en banc) ("The President's intervention only underscores the enormous significance of the net neutrality issue." *Id.* at 424.).

349 *See, e.g.*, Barrett, *supra* note 191, at 128–59; Bernick, *supra* note 217, at 35–36 (identifying eight distinct substantive canons applied in Indian law).

350 *See* Capozzi, *supra* note 13, at 236–37, 236 n.352; Wurman, *supra* note 13, at 930–31 (identifying cases with the most demanding standard of review); Barrett, *supra* note 191, at 117–19; William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 638 (1992) (distinguishing between "presumptions," "ordinary clear statement rules," and "super-strong clear statement rules").

351 *See* Capozzi, *supra* note 13, at 236 n.352 ("Although the Court's opinion in *West Virginia* is best read to require a clear-statement rule, reasonable minds can disagree on the strength of that rule.").

this step of the analysis. At the same time, there are specific markers in the caselaw—largely identified by Justice Gorsuch's concurrence in *West Virginia*—identifying when a clear statement is *not* present.[352]

In short, courts can continue to apply and develop the major questions doctrine in an incremental common law fashion that permits adjustments over time.[353] And, it bears repeating, the consequences of each ruling will not be particularly destabilizing.[354] Whereas invalidation rulings under the nondelegation doctrine can jeopardize decades of agency lawmaking, the major questions doctrine only limits agency authority looking forward.[355] Those who favor the gradual development of law have good reason to support the major questions doctrine.

E. The Major Questions Doctrine Protects a Healthy Balance of Power in the Federal Government, Federalism, and the Rule of Law

The preceding analysis has been formalist—contending that the major questions doctrine is a part of our law. It's also easy to argue that it *should* be. The major questions doctrine promotes—and may be essential to—a healthy balance of power within the federal government. It also safeguards—and, again, may be essential to—federalism and the rule of law.

One need not be a separation-of-powers formalist to support the major questions doctrine.[356] As Elizabeth Magill has explained, there is "consensus about the objective of the system of separation of powers": "prevent[ing] a single governmental institution from possessing and exercising too much power."[357] Similarly, Peter Strauss argues that "courts should view separation-of-powers cases in terms of the impact of challenged arrangements on the balance of power among the three named heads of American government."[358]

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352 *See West Virginia*, 142 S. Ct. at 2622–24 (Gorsuch, J., concurring); Capozzi, *supra* note 13, at 237–41.

353 *Cf.* Barnett & Bernick, *supra* note 182, at 35 (arguing this is a virtue); RANDY E. BARNETT, THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW 109–32 (2d ed. 2014) (identifying the evolutionary nature of the common law decision process as a discovery mechanism).

354 *See supra* notes 224–31 and accompanying text.

355 *See supra* notes 224–31 and accompanying text.

356 Thomas Koenig and Benjamin Pontz recently offered a useful discussion on the distinction between the formalist and functionalist approaches to administrative law. *See* Koenig & Pontz, *supra* note 284, at 221–27. Functionalists "eschew bright-line rules surrounding who must exercise what power" in favor of "'an evolving standard designed to advance the ultimate purposes of a system of separation of powers'—namely, the maintenance of the *balance* of powers within our constitutional system." *Id.* at 224.

357 Magill, *supra* note 18, at 1147–48.

358 Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 522 (1987); *cf.* Morrison v. Olson, 487 U.S.

Anyone worried about the balance of power between the three branches of the federal government should support the major questions doctrine. By far the most powerful of the three branches is the President. Consistent with the Constitution, the President wields vast power over the military and foreign affairs.[359] The executive branch also decides who to prosecute under the ever-increasing number of criminal laws.[360] Those powers are immense.

But that's only the beginning. The President presides over millions of federal bureaucrats.[361] These bureaucrats issue the vast majority of federal laws, leaving Congress with a relatively insignificant role in lawmaking.[362] While Congress issues only "two hundred to four hundred laws" each year, the President's agencies promulgate "something on the order of three thousand to five thousand final rules."[363] In addition, agencies regularly "produce thousands, if not millions," of guidance documents which, as a practical matter, also function as laws binding the public.[364] To illustrate the point, federal agencies in 2015 and 2016 published around 185,000 pages of regulations in the *Code of Federal Regulations*; during the same period, Congress enacted 329 laws amounting to just over 3,000 pages in the *Statutes at Large*.[365] Quantity aside, the laws enacted by the executive branch "touch[] almost every aspect of daily life,"[366] including the environment, energy, financial markets, working conditions, agricultural rules, the use of property, education, transportation, and even the type of household appliances that can be used.[367] As many as 300,000 such agency rules are

654, 699 (1988) (Scalia, J., dissenting) ("That is what this suit is about. Power. The allocation of power among Congress, the President, and the courts in such fashion as to preserve the equilibrium the Constitution sought to establish . . . .").

359 *See* MCCONNELL, *supra* note 19, at 175–212.

360 *See id.* at 146–48; PATRICK A. MCLAUGHLIN & LIYA PALAGASHVILI, COUNTING THE CODE: HOW MANY CRIMINAL LAWS HAS CONGRESS CREATED? 3 (2023), https://www.mercatus.org/research/policy-briefs/counting-the-code-congress-criminal-laws [https://perma.cc/83VX-MNEE].

361 Practically speaking, the President cannot supervise every part of his own government. But the President *could* do so. *See, e.g.*, Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 65–66 (2014) (discussing how President Obama "chose to take ownership of executive branch policy on climate change," *id.* at 65).

362 *See, e.g.*, Walker, *supra* note 169, at 923 ("Rather than elected representatives, unelected bureaucrats increasingly make the vast majority of the nation's laws . . . ."); Adler & Walker, *supra* note 49, at 1974–75.

363 Cass, *supra* note 6, at 694; *see also* Walker, *supra* note 169, at 930 ("[T]he ratio [between pages of agency laws and laws passed by Congress] is approximately 100:1.").

364 Coglianese, *supra* note 6, at 247, 247–48.

365 Adler & Walker, *supra* note 49, at 1974–75, 1974 n. 291.

366 Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 499 (2010).

367 *See, e.g.*, Kelsey Tamborrino, *House Passes Bill to Block Federal Gas Stove Ban*, POLITICO (June 13, 2023, 6:31 PM EDT), https://www.politico.com/news/2023/06/13/house-passes-bill-block-gas-stove-ban-00100492 [https://perma.cc/2LD6-ASXX].

enforceable by criminal penalties.[368] Many of these new laws are issued with few procedural protections[369]—all in the President's name and without Congress's meaningful involvement.[370]

How did this happen? Congress is partly to blame. In prior decades (primarily from the 1940s through the 1970s), Congress passed various statutes giving agencies broad, open-ended powers to solve vaguely defined problems.[371] Many of these statutes do little more than instruct agencies to issue regulations (i.e., laws) that are "in the public interest" or are "just and reasonable."[372] In fairness, Congress probably believed it could block agency regulations it disliked through legislative veto provisions, which allowed a single house of Congress to pass a resolution barring an agency from issuing a new rule.[373] However, the Supreme Court invalidated several hundred legislative veto provisions in *INS v. Chadha*.[374] That decision left agencies free to use previously enacted blank-check statutes but left Congress without a meaningful way to check agency actions.[375] Ever since, Congress has struggled to reassert control over lawmaking. It tried in the Congressional Review Act, which allows Congress to block a new agency rule without surmounting the Senate filibuster.[376] But that is a "particularly

368 Walker, *supra* note 169, at 931 ("Estimates of criminally enforceable regulations range from 10,000 to more than 300,000.").

369 *See* Gary S. Lawson & Joseph Postell, *Against the* Chenery II *"Doctrine,"* 99 NOTRE DAME L. REV. 47, 50 (2023). This is especially true for new laws contained in guidance documents. *See, e.g.*, Appalachian Power Co. v. EPA, 208 F.3d 1015, 1020 (D.C. Cir. 2000).

370 This problem is most salient in the many areas where Congress has failed to update legislation for a long time. *See* Freeman & Spence, *supra* note 361, at 5–6 (providing several examples, including banking, communications, the environment, food, drugs, and energy).

371 *See* Calabresi & Lawson, *supra* note 322, at 853 ("This is the result of decades of Congress enacting vacuous statutes and thereby subdelegating to the agencies the power to make law."); Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 474–78 (1985).

372 *See, e.g.*, Communications Act of 1934, 47 U.S.C. § 307(a) (2018) (allowing FCC to grant broadcast licenses "if public convenience, interest, or necessity will be served thereby"); Occupational Safety and Health Act of 1970, 29 U.S.C. § 652 (2018) (allowing OSHA to promulgate rules governing workplace safety that are "reasonably necessary or appropriate to provide safe or healthful employment and places of employment").

373 *See, e.g.*, Adler & Walker, *supra* note 49, at 1950 ("The legislative veto was an early effort to constrain the potential adverse consequences of expansive delegation.").

374 INS v. Chadha, 462 U.S. 919, 944–45, 959 (1983).

375 Justice White prophetically predicted the "abdicat[ion of Congress's] lawmaking function to the Executive Branch." *Id.* at 968 (White, J., dissenting). Justice Powell's concurrence also recognized the danger. *See id.* at 960 (Powell, J., concurring in judgment) ("Congress clearly views this procedure as essential to controlling the delegation of power to administrative agencies.").

376 Adler & Walker, *supra* note 49, at 1935.

limited tool" because of statutory time limits and the President's ability to veto disapproval resolutions.[377]

The effect of all that history is that past Congresses—perhaps intentionally, perhaps unwittingly[378]—effectively transferred legislative power from the current Congress to the President.[379] As Jonathan Adler and Chris Walker explain, "broad congressional delegations of authority at one time period" are now frequently used as "a source of authority for agencies to take later action" that would not currently "receive legislative support" and address problems the original Congress did not contemplate or consider.[380] For example, Congress's last legislation addressing Internet regulation was in 1996, before "'Wi-Fi' networks, let alone Facebook, Wikipedia, Netflix, or even Google."[381] Yet the FCC has repeatedly relied on that statute to impose "net neutrality," a rule that would dramatically restructure the Internet and address a problem unknown in 1996.[382] Agencies use other outdated statutes to solve a host of new problems affecting Americans' everyday lives all the time.[383] As a result, Americans could easily "be excused for thinking that it is the agenc[ies] really doing the legislating" in this nation.[384]

The executive branch's predominant role in lawmaking means that the President now exercises legislative, judicial, and executive power, creating the risk of one-man rule.[385] Start with legislative power: the President's administrative agencies make the vast majority of new law in the United States.[386] As for the executive power, the executive

377 *Id.* at 1954, 1952–54.

378 *See, e.g.*, Jonathan R. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 VA. L. REV. 471, 517 (1988); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 131–32 (1980). Some articles challenge those assumptions. *See, e.g.*, Manning, *supra* note 277, at 259; Posner & Vermeule, *supra* note 166, at 1742.

379 *See* Freeman & Spence, *supra* note 361, at 7 ("To the extent that agencies do the President's bidding, congressional weakness can also enhance presidential influence over policy.").

380 Adler & Walker, *supra* note 49, at 1936; *see also* Freeman & Spence, *supra* note 361, at 2–5.

381 Adler & Walker, *supra* note 49, at 1942.

382 *Id.* at 1941–42 & n.53; *see also* Christopher S. Yoo, *Beyond Network Neutrality*, 19 HARV. J.L. & TECH. 1, 2 (2005).

383 Adler & Walker, *supra* note 49, at 1944–46 ("The temporal lag between legislative delegation and use of delegated authority raises distinct concerns about whether delegation is consistent with democratic governance." *Id.* at 1944.).

384 City of Arlington v. FCC, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting).

385 *See, e.g.*, MCCONNELL, *supra* note 19, at 351 ("In recent decades the presidency has seemed to metastasize as Congress has ceased effectively to function."); HAMBURGER, *supra* note 152, at 13.

386 *See, e.g.*, Walker, *supra* note 169, at 930–31; MCCONNELL, *supra* note 19, at 108 ("The ability of the executive branch to make law with the delegated authority of Congress

branch enforces the laws—both those made by Congress and the many more it promulgates itself.[387] The executive branch has even seized a share of the judicial power. Agencies frequently adjudicate violations of federal laws in their own administrative "courts"—sometimes with the same agency officials who made the laws at issue sitting in judgment.[388] After those agency "courts" pass judgment—often by issuing crippling monetary punishments or closing down businesses[389]—judicial review is generally limited, with agencies receiving various types of deference from Article III judges.[390] As Chief Justice Roberts has summarized, the President's administrative agencies, "as a practical matter . . . exercise legislative power, by promulgating regulations with the force of law; executive power, by policing compliance with those regulations; and judicial power, by adjudicating enforcement actions and imposing sanctions on those found to have violated their rules."[391]

This accumulation of power should be alarming. James Madison warned that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."[392] And one of the Framers' central objectives in drafting the Constitution was to create "an effective president who would not be a king."[393] Jurists of all stripes still profess agreement with that principle. As then-Judge Ketanji Brown Jackson put it, "the primary takeaway from the past 250 years of recorded American history is that Presidents are not kings."[394] Yet today, "[t]he accumulation of [all three types of] powers in the same hands is not an occasional or

has emerged as one of the central constitutional conundrums of the modern administrative state.").

387 *See, e.g.*, Sackett v. EPA, 143 S. Ct. 1322, 1331 (2023) (documenting how the EPA threatened family "with penalties of over $40,000 per day if [it] did not comply" with executive branch's assertion of authority over property under vague environmental statute); SEC v. Terraform Labs Pte. Ltd., 684 F. Supp. 3d 170, 183–84 (S.D.N.Y. 2023) (detailing executive branch lawsuit against activities the executive branch had decided were illegal).

388 *See, e.g.*, Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 894–95 (2009).

389 *See, e.g.*, SEC v. Jarkesy, 144 S. Ct. 2117, 2127 (2024).

390 *See, e.g.*, Axon Enter., Inc. v. FTC, 143 S. Ct. 890, 897–98 (2023); *id.* at 906–07 (Thomas, J., concurring).

391 City of Arlington v. FCC, 569 U.S. 290, 312–13 (2013) (Roberts, C.J., dissenting).

392 THE FEDERALIST NO. 47, *supra* note 134, at 301 (James Madison).

393 MCCONNELL, *supra* note 19, at 7.

394 Comm. on the Judiciary, U.S. House of Representatives v. McGahn, 415 F. Supp. 3d 148, 213 (D.D.C. 2019), *rev'd sub nom.* Comm. on the Judiciary of the U.S. House of Representatives v. McGahn, 973 F.3d 121 (D.C. Cir. 2020).

isolated exception to the constitutional plan; it is a central feature of modern American government."[395]

Moreover, there are good reasons to question Congress's ability to check the executive branch's immense power over lawmaking. After all, the President can veto any attempt by Congress to repeal his laws.[396] We thus live in the strange world where something can become and remain law when "a single branch of the Government, the Executive branch, with a small minority of either House," wishes it so.[397] Even in the rare situations where some members of Congress belonging to the President's political party vote against his regulations, the President's veto will almost certainly stand.[398] Indeed, it's hard to remember (without cheating on Google) when Congress last succeeded in making (or repealing) a controversial and important law over the President's objection. Bicameralism and presentment—the twin pillars meant to prevent excess lawmaking—now ensure that it is easy for the President to make law.[399] Like antibodies that attack the human cells they are supposed to protect, Article I's rules have been transformed by broad

395 *City of Arlington*, 569 U.S. at 313 (Roberts, C.J., dissenting); *accord* MCCONNELL, *supra* note 19, at 326; Calabresi & Lawson, *supra* note 322, at 824; Gillian E. Metzger, Foreword, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 7 (2017).

396 *See* MCCONNELL, *supra* note 19, at 123.

397 13 ANNALS OF CONG. 498 (1803) (objection of Rep. John Randolph to proposed bill giving President Jefferson power to make regulations for Louisiana Territory).

398 For example, President Biden has vetoed twelve bills—all of which had bipartisan support; no bills have been enacted over President Biden's objection. *Vetoes by President Joseph R. Biden Jr.*, U.S. SENATE, https://www.senate.gov/legislative/vetoes/BidenJR.htm [https://perma.cc/JS9V-FAVY]; *Joe Biden: Vetoed Legislation*, BALLOTPEDIA, https://ballotpedia.org/Joe_Biden:_Vetoed_legislation [https://perma.cc/LQ4M-FQTL]. Presidents Trump and Obama successfully vetoed all but one bill each during their presidencies. *Vetoes by President Donald J. Trump*, U.S. SENATE, https://www.senate.gov/legislative/vetoes/TrumpDJ.htm [https://perma.cc/K8B8-QYLV]; *Vetoes by President Barack Obama*, U.S. SENATE, https://www.senate.gov/legislative/vetoes/ObamaBH.htm [https://perma.cc/DD2E-9ZH6]. I therefore respectfully disagree with the suggestion made by Jonathan Adler and Christopher Walker that "nothing stops Congress from repealing or overturning regulations, either because Congress prefers different policies or because it believes a given action is improper." Adler & Walker, *supra* note 49, at 1951; *see also* Freeman & Stephenson, *supra* note 128, at 31 (arguing major questions doctrine is not needed "because Congress already has the power to react to agency overreaching by enacting legislation that overrides the agency's rule"). As a practical matter, saying that the veto "merely increases the vote threshold for taking such actions" seems similar to saying that nothing will stop the Phillies from overcoming a 9–0 deficit in the ninth inning. Adler & Walker, *supra* note 49, at 1951.

399 Justice White made this point in his *INS v. Chadha* dissent. INS v. Chadha, 462 U.S. 919, 998–1002 (1983) (White, J., dissenting). Just as the Court was surely correct that the Constitution does not permit one house to change the law, Justice White was also surely right that discarding the legislative veto risked "abdicat[ion of Congress's] lawmaking function to the Executive Branch." *Id.* at 968.

delegations of legislative power into enablers of the very evils they were designed to avoid.

Those interested in a meaningful check on presidential power should support the major questions doctrine because it helps "achieve an appropriate balance of power among the three spheres of government."[400] To wit, the doctrine counters a recurring and important problem: agencies "exploit[ing] some gap, ambiguity, or doubtful expression" in open-ended, old statutes to solve problems Congress could not have foreseen.[401] Nor should we be surprised that the President or agencies would try to expand their power.[402] The Framers understood that those entrusted with power are often incentivized to seize more power.[403] That is the basis on which the Oregon Supreme Court long ago justified narrowly construing delegations: because "[t]here is too strong a desire in the human heart to exercise authority."[404] But when agencies rely on vague, old statutes to solve the pressing problems of the day, they issue laws that were never considered by the people's elected representatives—which should trouble those committed to representative government.[405] The major questions doctrine helps solve this problem and functions "as a vital check on expansive and aggressive assertions of executive authority."[406]

As a practical matter, without either the major questions doctrine or the nondelegation doctrine, it is hard to see how Congress could reclaim from the President its power to legislate. If Congress could somehow muster the necessary legislative support to pass a law canceling the blank checks it issued to agencies decades ago, the President could just veto it. The major questions doctrine offers a way out of that dilemma. Yes, agencies can rely on prior open-ended, blank-check statutes to resolve many matters. But no, agencies cannot continue cashing those blank checks to solve the great problems of the present day.

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400 Magill, *supra* note 18, at 1142–43; *see also* Jed Handelsman Shugerman, *Major Questions and an Emergency Question Doctrine: The Biden Student Debt Case Study in the Pretextual Abuse of Emergency Powers* 4 (Fordham L. Legal Stud. Rsch. Paper No. 4345019, 2023), https://ssrn.com/abstract=4345019 [https://perma.cc/RHJ2-6N5N] (acknowledging concerns with the "Imperial Executive").

401 Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring).

402 *See, e.g.*, *id.*

403 *See* THE FEDERALIST NO. 51, *supra* note 134, at 322 (James Madison) ("If angels were to govern men, neither external nor internal controls on government would be necessary.").

404 Bd. of R.R. Comm'rs v. Or. Ry. & Navigation Co., 19 P. 702, 707 (Or. 1888); *see also* Gulf & Ship Island R.R. Co. v. R.R. Comm'n, 49 So. 118, 119 (Miss. 1909) (same quotation).

405 *See, e.g.*, Adler & Walker, *supra* note 49, at 1936–37.

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

Just as bankruptcy gives debtors a fresh start, the major questions doctrine gives Congress a chance to do its job and, where appropriate, pass legislation to solve problems.[407]

The judiciary would also benefit from that fresh start. In the status quo, judges face immense pressure because only they can typically prevent executive branch laws from going into effect.[408] They can do so by applying either statutory or open-ended substantive review under the Administrative Procedure Act.[409] But that forces judges to referee the most politically sensitive issues of the day—opening the judiciary up to charges of partisanship.[410] By contrast, forcing *Congress* to make those decisions is a politically neutral step—one that could advantage either political party in a given case. And if Congress makes those policy decisions, they are much less vulnerable to judicial review. It's hard to imagine something more salutary than reducing the judiciary's role in politics and the lawmaking process.

There are also beneficiaries outside the federal government. The Constitution guaranteed that the federal government would possess only limited, enumerated powers.[411] Meanwhile, the States would retain the power to legislate on "all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State."[412] That arrangement offers "numerous advantages."[413] State legislators are closer to their constituents than federal legislators, which means they are better able to enact laws reflecting their citizens' "diverse interests and preferences."[414] And federalism also permits

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407 *See* Sunstein, *supra* note 77, at 492 (acknowledging major questions doctrine could be "Congress-forcing" and promote democracy); Rao, *supra* note 148, at 1518 ("Narrow judicial interpretations of statutes might force Congress to grapple with new problems, rather than allowing agencies to shoehorn new regulatory solutions under old statutes."); Adler & Walker, *supra* note 49, at 1949 (acknowledging the major questions doctrine "helps protect against the potential loss of democratic accountability resulting from unduly broad delegations").

408 *See* Freeman & Spence, *supra* note 361, at 7 (noting judges have become "more important too, since they will decide whether an agency may follow the course it has chosen").

409 5 U.S.C. §§ 551–559 (2018); *see, e.g.*, DHS v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1901 (2020) (holding that the Trump administration's change of law was substantively unreasonable).

410 *See DHS*, 140 S. Ct. at 1932 (Alito, J., concurring in judgment in part and dissenting in part) ("DACA presents a delicate political issue, but that is not our business.").

411 *See* U.S. CONST. amend. X; *see also* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 534 (2012).

412 THE FEDERALIST NO. 45, *supra* note 134, at 293, 292–93 (James Madison).

413 Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

414 Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1493 (1987) (book review); *see* Letter from the Federal Farmer No. I (Oct. 8,

states to act as laboratories of democracy, and to "try novel social and economic experiments without risk to the rest of the country."[415]

The administrative state threatens federalism, too, because "even if Congress does not directly exercise one of its enumerated powers, it can delegate its powers to administrative agencies without any significant limits."[416] Even if Congress itself did not envision a particular law encroaching on state authority, little "stop[s] agencies from moving into areas where state authority has traditionally predominated."[417] Consequently, bureaucratically imposed one-size-fits-all solutions displace laws tailored to fit local preferences and needs.[418] The laboratories of democracy are shut down and replaced by central planners.

The major questions doctrine helps solve that federalism-destroying problem. In a world where Congress is forced to legislate in response to cutting-edge problems, sometimes it will choose not to.[419] Defenders of the federal administrative state fear such instances.[420] But in such cases, states—which can empower their own administrative agencies or not[421]—will have the option to solve problems. And their solutions may very well be better ones "more sensitive to the diverse needs of [our] heterogenous society."[422]

Another benefit of a more modest administrative lawmaking system is that the law will be more stable. In the status quo, law frequently "change[s] 180 degrees every time we elect a President."[423] What was legal yesterday can suddenly be illegal tomorrow. Consider, for example, the SEC's sudden decision to target various cryptocurrency companies—after prior governments had allowed people to invest in those

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1787), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 223, 230 (Herbert J. Storing ed., 1981).

415 New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), *abrogated by* Ferguson v. Skrupa, 372 U.S. 726 (1963).

416 Keller, *supra* note 232, at 48.

417 West Virginia v. EPA, 142 S. Ct. 2587, 2618 (2022) (Gorsuch, J., concurring) (citing Solid Waste Agency v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 173–174 (2001)).

418 *Compare* Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 914 (1994) (favoring a more centralized approach), *with* Louis J. Capozzi III, *Sixth Amendment Federalism*, 43 HARV. J.L. & PUB. POL'Y 645, 695–96 (2020) (defending federalism).

419 *See, e.g.*, Rao, *supra* note 148, at 1470.

420 *See, e.g.*, Levin, *supra* note 12, at 959.

421 *See, e.g.*, Randolph J. May, *The Nondelegation Doctrine Is Alive and Well in the States*, REGUL. REV. (Oct. 15, 2020) https://www.theregreview.org/2020/10/15/may-nondelegation-doctrine-alive-well-states/ [https://perma.cc/SSM9-D54L] (documenting states' approaches to delegations).

422 Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

423 Calabresi & Lawson, *supra* note 322, at 854.

ventures.[424] As recently as 2021, SEC Chairman Gensler acknowledged that "only Congress . . . could really address" the "exchanges trading in . . . crypto assets."[425] But Chairman Gensler suddenly changed his mind and changed the law in letters threatening enforcement actions against various companies.[426] Individuals and businesses need legal "certainty" to build their lives and conduct their affairs, "and the current system does not provide that."[427] By contrast, the major questions doctrine ameliorates this legal whiplash, promoting stability and the rule of law.[428]

To be clear, administrative agencies will still possess ample power in a world with a robust major questions doctrine. Unlike the nondelegation doctrine, the major questions doctrine leaves intact the vast array of laws *already* promulgated by the administrative state.[429] Further, the major questions doctrine simply will not reach many future agency actions—those which cannot be fairly characterized as having "vast economic and political significance."[430] In short, the major questions doctrine represents a compromise and a "good bargain" for supporters of administrative power.[431] We can still have "a government powerful enough to be efficient, yet sufficiently distracted by internal competition to avoid the threat of tyranny."[432]

In short, the major questions doctrine promotes a healthier separation of powers. It enables Congress to reclaim its core lawmaking

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424 *See, e.g.*, SEC v. Ripple Labs, Inc., 682 F. Supp. 3d 308, 316–20 (S.D.N.Y. 2023) (documenting years in which Ripple Labs was allowed to operate before the SEC sued it).

425 *Game Stopped? Who Wins and Loses When Short Sellers, Social Media, and Retail Investors Collide, Part III: Virtual Hearing Before the H. Comm. on Fin. Servs.*, 117th Cong. 12 (2021) (statement of Gary Gensler, Chairman, SEC).

426 *See, e.g.*, Alex Wilhelm, *Coinbase Stock Drops After SEC Wells Notice, a Possible Prelude to 'Enforcement Action,'* TECHCRUNCH (Mar. 22, 2023, 3:15 PM PDT), https://techcrunch.com/2023/03/22/coinbase-stock-drops-after-sec-wells-notice-a-possible-prelude-to-enforcement-action/ [https://perma.cc/DEV7-5G4E].

427 Calabresi & Lawson, *supra* note 322, at 854; *see also* Nat'l Bank v. Whitney, 103 U.S. 99, 102 (1881) ("The prosperity of a commercial community depends, in a great degree, upon the stability of the rules by which its transactions are governed."); HAMBURGER, *supra* note 152, at 340–41; Merrill, *supra* note 14, at 14–16.

428 It would also help turn down the heat on presidential elections, which many people fairly perceive as dire affairs considering that the winner can unilaterally make law. *See* Calabresi & Lawson, *supra* note 322, at 855.

429 *See* Sohoni, *supra* note 12, at 267 (acknowledging the major questions doctrine could be seen as "a pragmatic type of light-touch nondelegation that pumps the brakes on the occasional instance of regulatory overreach while carefully eschewing hard constitutional limits on Congress's power to delegate").

430 West Virginia v. EPA, 142 S. Ct. 2587, 2605 (2022) (quoting Repeal of the Clean Power Plan, 84 Fed. Reg. 32520, 32529 (July 8, 2019) (internal quotation marks omitted)).

431 Chen & Estreicher, *supra* note 13, at 577.

432 Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 639 (1984).

prerogative. It guards against one-man rule. It helps shield judges from political decisionmaking. It protects federalism. It promotes legal stability. It preserves an important but legitimate role for administrative agencies. And it protects our republic's structural integrity by ensuring the people's elected representatives make the laws that govern them.

F. Doctrinal Implications of the Five Arguments

Up until now, this Article has addressed only whether there should be *any* major questions doctrine. But there are different versions of the doctrine one can support. In a prior article, I identified two significant doctrinal questions courts will need to elaborate on in the coming years: (1) What constitutes a "major" question, and (2) how "clear" must a statute be to confer a major power?[433] The theoretical approach taken by a doctrinal supporter could affect how he would answer those questions.

One's theoretical approach to the major questions doctrine can be measured both horizontally and vertically. On the horizontal level, one can agree with some of the five arguments but not others. For example, one can agree that the major questions doctrine is a legitimate constitutional clear statement rule, but not legitimate textualism or vice versa. Or one can agree with both. Any horizontal combination of the five approaches is theoretically possible. On the vertical level, one can adopt varying levels of confidence in the various positions. For example, someone could think that, from a functionalist perspective, the balance of power within the federal government is seriously off base or that it needs only modest correction.

Consider how potential theoretical differences—both horizontal and vertical—could affect doctrinal choices. Start with the first prong: what constitutes a major question. Consistent with precedent, one can define "majorness" either more broadly or more narrowly. When it comes to aggregate economic impact, for example, courts could (begrudgingly) demand a showing of fifty billion dollars of economic impact or much less.[434] I struggle to see how divergent *horizontal* approaches would necessarily require certain approaches to "majorness" questions. But different vertical perspectives will. Someone who

433 Capozzi, *supra* note 13, at 226–27.

434 *Compare* King v. Burwell, 576 U.S. 473, 485 (2015) (involving "billions of dollars" in tax credits), *with* Ala. Ass'n of Realtors v. HHS, 141 S. Ct. 2485, 2489 (2021) (identifying fifty billion dollars in economic impact); *see* Louis J. Capozzi III, Biden v. Nebraska *and the Continued Refinement of the Major Questions Doctrine*, HARV. J.L. & PUB. POL'Y: PER CURIAM, Summer 2024, No. 13, at 6 (explaining that *Biden v. Nebraska* confirmed that a regulation is economically significant when it has fifty billion dollars of economic impact).

believes in a robust constitutional nondelegation rule, interprets the precedents broadly, or thinks presidential lawmaking greatly threatens the balance of power will likely favor a broader definition of "majorness" and vice versa.

Horizontal differences may have a bigger effect on the second open doctrinal question: how clear congressional authorization must be for an agency to exercise a major power. As William Eskridge and Philip Frickey have observed, different clear statement rules have varying levels of strength.[435] Adherents to the constitutional clear statement, constitutional avoidance, precedent-based, or functionalist justifications could, in my view, plausibly support either a stronger or a weaker clear statement rule for the major questions doctrine. As for the textualist justification, Justice Barrett has claimed it does not justify "choos[ing] an inferior-but-tenable alternative [interpretation] that curbs the agency's authority."[436] Whether, in practice, her approach necessitates a rule weaker than the other four rationales is uncertain, though Justice Barrett's logic leads me to believe it will not.[437] Of course, vertical differences across all five theoretical categories would affect one's preference regarding the strength of the clear statement rule.

Going forward, courts will continue to decide how robust the major questions doctrine will be. A careful consideration of the diverse justifications for the major questions doctrine could help those courts assess their doctrinal views.

III. COUNTERARGUMENTS

Scholars have advanced counterarguments against the major questions doctrine. These criticisms are varied, but they can be divided into two categories: formalist and policy-based. Although some merit serious consideration, none justify rejecting the major questions doctrine.

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435 Eskridge & Frickey, *supra* note 350, at 638–39 (distinguishing among "presumptions," "ordinary clear statement rules," and "super-strong clear statement rules," *id.* at 638); *see also* Wurman, *supra* note 13, at 915.

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

437 Under Justice Barrett's context-focused approach, it seems an agency will *rarely* be deemed to have the better interpretation of a vague delegation when a major power is at issue. Once the doctrine is triggered, Justice Barrett says an agency can establish clear congressional authorization with "specific words in the statute" or "context." *Id.* at 2380. "Specific words in the statute" sounds like a clear statement rule. And it's unclear what Justice Barrett means by context "also do[ing] the trick" when, under her approach, context ordinarily suggests that Congress would not delegate major powers to agencies without clear language. *See id.* at 2380–81; *see also* Capozzi, *supra* note 434, at 9–10 (analyzing Justice Barrett's concurrence).

A. Formalist Counterarguments

1. The Major Questions Doctrine Is Bunk Because the Constitution Does Not Contain a Meaningful Nondelegation Rule

Return, for a moment, to the first premise in Section II.A: that the Constitution imposes limits on Congress's prerogative to outsource lawmaking. That premise implicates a robust literature on the legitimacy of the nondelegation doctrine. As discussed above, ample historical evidence supports the Constitution's nondelegation rule.[438] Others disagree. If you do, you might think the major questions doctrine is illegitimate because it implements a dubious constitutional principle.[439]

I'll concede this much: If you think the Constitution imposes *no meaningful limits* on Congress's ability to transfer its powers to others, then you need not accept that the major questions doctrine is legitimate constitutional law. You should instead consider the nonconstitutional arguments in favor of the doctrine.[440]

But most (or at least many) people familiar with Article I's text and the history of the nondelegation doctrine would acknowledge that the Constitution does contain at least *some kind* of nondelegation rule. It is hard, after all, to say James Madison, Joseph Story, John Marshall, Antonin Scalia, and many other prominent statesmen and jurists had no idea what they were talking about. And indeed, the Supreme Court has consistently defended the existence of a constitutional nondelegation rule—including in its opinions most tolerant of delegations.[441]

2. The Major Questions Doctrine Is Too Strong, or Too Weak, an Implementation Doctrine to Implement Article I's Nondelegation Rule

I suspect most critics of the major questions doctrine would acknowledge that there are at least *some* limits on Congress's ability to transfer its powers to others. The more likely rejoinder is that the major questions doctrine *overenforces* Article I's demands. After all, many

438 *See supra* subsection II.A.1.

439 *See, e.g.*, Sunstein, *supra* note 302, at 261 ("[S]ome people . . . would add that the nondelegation doctrine, as Justice Gorsuch understands it, itself has dubious constitutional roots, which raises a serious problem for his justification of the major questions doctrine . . . .").

440 *See, e.g.*, *id.* at 261–62 (acknowledging constitutional objections to the nondelegation doctrine do not foreclose the doctrine's textualist rationale).

441 *See, e.g.*, Gundy v. United States, 139 S. Ct. 2116, 2123 (2019) (Kagan, J., plurality opinion); *supra* notes 171–77 and accompanying text.

believe Congress can, should, and must delegate various responsibilities to federal administrative agencies.

The problem with this counterargument is that the major questions doctrine *does* allow Congress to delegate major policy decisions to agencies.[442] The doctrine merely ensures that Congress really did have that intent.[443]

More often than you might think, Congress sometimes *does* amend laws to give agencies express powers.[444] That is what happened after the Court held in *The Queen and Crescent Case* that the ICC lacked the power to set railroad prices.[445] Nine years later, Congress mustered the political will to expressly give the ICC that power.[446]

The Queen and Crescent Case demonstrates an important truth about the major questions doctrine: it gives Congress the final word on how much power to delegate.[447] That same consideration has proved important in other doctrinal contexts. For example, courts are especially hesitant to overrule precedents interpreting statutes because Congress can amend the law at issue in response.[448] Stricter statutory stare decisis thus respects Congress's power to have the last word. So too does the major questions doctrine, which is more respectful of Congress's lawmaking powers than an invalidation doctrine.[449]

For that reason, some might object that the major questions doctrine is *too weak* a tool to implement the Constitution's nondelegation rule. After all, the Constitution vests "all" legislative power in Congress.[450] And as discussed above, the major questions doctrine is a substantially weaker method to implement Article I than a revitalized nondelegation doctrine.[451] A crucial practical difference is that the major

442 *See, e.g.*, Kristen E. Eichensehr & Oona A. Hathaway, *Major Questions About International Agreements*, 172 U. PA. L. REV. 1845, 1856–57 (2024).

443 *See* Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., respecting denial of certiorari); *cf.* Barrett, *supra* note 191, at 176–77 (arguing that substantive canons can be used "to guard against the inadvertent congressional exercise of extraordinary constitutional powers," *id.* at 176).

444 *See* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 338 (1991); Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1960 (1997).

445 Interstate Com. Comm'n v. Cincinnati, New Orleans & Tex. Pac. Ry. Co. (The Queen and Crescent Case), 167 U.S. 479, 511 (1897).

446 *See* Hepburn Act, ch. 3591, sec. 4, § 15, 34 Stat. 584, 589–90 (1906); James W. Ely, Jr., *The Troubled Beginning of the Interstate Commerce Act*, 95 MARQ. L. REV. 1131, 1134 (2012).

447 *See* Capozzi, *supra* note 13, at 235–36; *see also* Koenig & Pontz, *supra* note 284, at 253–54.

448 *See, e.g.*, Neal v. United States, 516 U.S. 284, 295–96 (1996).

449 *See* Barrett, *supra* note 191, at 175–77.

450 *See* MCCONNELL, *supra* note 19, at 113.

451 *See supra* sub-subsection II.A.2.b.

questions doctrine is *forward*-looking, not *backward*-looking.[452] Unlike a nondelegation holding, a court that applies the major questions doctrine to interpret an open-ended delegation narrowly does not jeopardize the panoply of other regulations promulgated in reliance on that statute. Consequently, the major questions doctrine will leave untouched most of the law made by administrative agencies. For those who think administrative agencies pose an existential threat to liberty and individual rights,[453] the major questions doctrine might seem inadequate.

Between the competing wishes of the delegation minimalists and maximalists, the major questions doctrine is a compromise that will leave both camps thinking the wrong balance has been struck.[454] But that is the nature of compromise. And both camps should remember that they could do worse than the major questions doctrine.[455]

3. The Major Questions Doctrine Is Illegitimate Because Substantive Canons Should Not Be Used to Implement the Constitution

Others contend the major questions doctrine is illegitimate constitutional law because substantive canons should not be used to implement the Constitution.[456] After all, the major questions doctrine assumes the existence of an interstice between the realm of statutes Congress can pass without a clear statement and those it cannot pass at all. And, the argument goes, the judiciary has no power to apply the Constitution beyond what is unconstitutional. Otherwise, the judiciary could adopt "[p]rophylactic rules" to implement the Constitution.[457] Of course, the Court has done that before,[458] a practice which originalists (properly, in my view) denounce.[459] A famous example is *Miranda*

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452 *See supra* notes 224–31 and accompanying text.

453 *See, e.g.*, Calabresi & Lawson, *supra* note 322, at 824–25; HAMBURGER, *supra* note 152, at 466–67.

454 *Cf.* Sohoni, *supra* note 12, at 314 ("Blessings, of course, deserve to be counted, and some glasses are half full.").

455 *See* Chen & Estreicher, *supra* note 13, at 576 ("[We] should welcome—or at least begrudgingly accept—[the major questions doctrine]. The alternative would be far worse.").

456 *See, e.g.*, Walters, *supra* note 12, at 469–72 (discussing this perspective but not adopting it); Manning, *supra* note 192, at 432–39 (taking strong position against constitutional clear statement rules); Benjamin Eidelson & Matthew C. Stephenson, *The Incompatibility of Substantive Canons and Textualism*, 137 HARV. L. REV. 515, 558–77 (2023).

457 Barrett, *supra* note 191, at 175 (expressing concern about this); *see also* Eidelson & Stephenson, *supra* note 456, at 563–64.

458 *See, e.g.*, Kermit Roosevelt III, *Interpretation and Construction: Originalism and Its Discontents*, 34 HARV. J.L. & PUB. POL'Y 99, 107–08 (2011).

459 *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 446 (2000) (Scalia, J., dissenting); Barrett, *supra* note 191, at 174.

v. Arizona, which held that prosecutors cannot admit confessions at criminal trials unless the police first gave a particular warning effectively dictated by the Court.[460]

This argument, however, elides an important difference between clear statement rules and prophylactic rules. Prophylactic rules *prohibit* the government from doing something altogether, whereas clear statement rules *permit* the government to act.[461] As Justice Scalia explained in *Dickerson v. United States*, courts applying such rules claim "the power, not merely to apply the Constitution but to expand it, imposing what [the court] regards as useful 'prophylactic' restrictions upon Congress and the States."[462] Instead of creating an interstice between lawful and unlawful government actions in which Congress must legislate specifically, prophylactic rules simply prohibit legislation within the interstice.[463] That difference is an important part of what makes prophylactic rules a uniquely "bold and controversial claim of [judicial] authority."[464] While prophylactic rules like *Miranda* fully usurp legislative power, the major questions doctrine leaves Congress free "to override" a judge's decision.[465]

Further, prophylactic rules lack the historical pedigree of constitutional clear statement rules.[466] Whereas courts have only recently wielded prophylactic rules to enforce the Constitution, Founding-era jurists frequently employed substantive canons to implement the Constitution.[467]

Rightly hesitant to second-guess Chief Justice John Marshall on what Article III's "judicial power" entailed, originalists generally acknowledge that at least *some* substantive canons are legitimate.[468]

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460 Miranda v. Arizona, 384 U.S. 436, 467–74 (1966); *see also* Vega v. Tekoh, 142 S. Ct. 2095, 2106 (2022) (acknowledging *Miranda* imposed a rule not required by the Constitution).

461 *See* Barrett, *supra* note 191, at 174–75.

462 *Dickerson*, 530 U.S. at 446 (Scalia, J., dissenting).

463 Barrett, *supra* note 191, at 175 (noting prophylactic rules "wholly invalidate legislation that remains within the boundaries set by the Constitution").

464 *Vega*, 142 S. Ct. at 2106.

465 Barrett, *supra* note 191, at 175; *see* Eidelson & Stephenson, *supra* note 456, at 566–67 (acknowledging this point but still questioning power to enforce the Constitution through substantive canons).

466 *See* Barrett, *supra* note 191, at 176 (noting "pedigree" of constitutional clear statement rules gives them "stronger claim to legitimacy" than prophylactic rules).

467 *See id.* at 125–54; Bernick, *supra* note 217, at 12–15, 44–45; Ramsey, *supra* note 13, at 837–44.

468 *See* Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RSRV. L. REV. 581, 583 (1989); Barrett, *supra* note 191, at 176–81; *see also* Walters, *supra* note 12, at 471 ("Despite their surface tension with a hardline textualist approach to statutory interpretation, in practice substantive canons like these are routinely created and recognized by textualist courts." (footnote omitted)).

The only remaining question, then, is whether the major questions doctrine is one of those legitimate substantive canons. Originalist scholars have proposed roughly two different ways to draw the line: a tougher line admitting only substantive canons with a sufficiently ancient lineage—i.e., a "closed set"[469]—and a looser approach that recognizes the judiciary's limited but ongoing power to create Constitution-enforcing substantive canons.[470] The major questions doctrine satisfies both standards.

Start with the heavier lift: growing evidence suggests a presumption against the delegation of major powers in legal documents *was* established at the Founding.[471] For example, in *Entick v. Carrington*, a famous English privacy law case, Lord Camden held the government to a higher standard because it was claiming a major power (to search private papers): "As this Jurisdiction of the Secretary of State is so extensive, therefore the Power ought to be as clear as it is extensive."[472] And as discussed above, eighteenth-century agency law also prohibited the delegation of discretionary powers "absent a specific authorization in the instrument."[473] Ilan Wurman identifies similar, well-established legal rules limiting delegations in the eighteenth century.[474] The major questions doctrine thus arguably satisfies even the most rigorous originalist test for substantive canons.[475]

The major questions doctrine is even more compatible with the second originalist approach to substantive canons. Then-Professor Amy Coney Barrett has argued that constitutional clear statement rules are only justified if they satisfy a two-part test: (1) "the canon must be connected to a reasonably specific constitutional value," and (2) "the canon must actually promote the value it purports to protect."[476] Notably, this test is quite similar to the Barnett/Bernick test identified in subsection II.A.2.[477] Further, as discussed, the major questions doctrine is strongly connected with the nondelegation doctrine—and, if one adheres to Chief Justice Marshall's conception, *really* strongly connected.[478] Further, the major questions doctrine promotes the original

469 Barrett, *supra* note 191, at 161; *see also* Scalia, *supra* note 468, at 583 (acknowledging substantive canons can gain "prescriptive validity" over time).

470 *See* Barrett, *supra* note 191, at 177–81.

471 *See* Arvind & Burset, *supra* note 318.

472 Arvind & Burset, *supra* note 321, at 226, 324.

473 Calabresi & Lawson, *supra* note 322, at 855 (summarizing LAWSON & SEIDMAN, *supra* note 322, at 113–17).

474 Wurman, *supra* note 13, at 964–77.

475 *See, e.g.*, McGinnis & Rappaport, *supra* note 204, at 756 (accepting substantive canons if they were in use at the time of the Founding).

476 Barrett, *supra* note 191, at 178.

477 *See supra* text accompanying note 208.

478 *See supra* text accompanying notes 267–73.

functions of Article I: chiefly, ensuring that lawmaking is done in compliance with Article I.[479] Although Justice Barrett is apparently unsure on this point,[480] the major questions doctrine passes her own test with flying colors.

4. The Major Questions Doctrine Is Inconsistent with Textualism

Following cues from Justice Kagan, others have questioned whether the major questions doctrine is consistent with textualism.[481] The argument goes like this: when interpreting laws, courts must act as faithful agents and determine the legislature's objective intent.[482] Therefore, courts should just interpret texts according to their plain meaning rather than putting thumbs on the scale in favor of particular results.[483] And in the context of delegations, then-Professor Neomi Rao, Jacob Loshin, Aaron Nielson, and Ronald Cass have persuasively argued that Congress often does *intend* to delegate major powers to agencies using broad, open-ended statutes.[484] That move allows legislators to take credit for solving problems while avoiding accountability for difficult decisions.[485] If that is right, then applying the major questions doctrine frustrates legislative intent.[486]

There are several responses to this point.[487] *First*, this argument does not implicate the defense of the major questions doctrine as a constitutional implementation doctrine.[488] Regardless of whether Congress *wants* to delegate its lawmaking prerogatives, allowing it to do so frustrates the Constitution's system for lawmaking and

479 *See supra* subsection II.A.1.

480 *See* Biden v. Nebraska, 143 S. Ct. 2355, 2377 (2023) (Barrett, J., concurring).

481 *See, e.g.*, *id.* at 2376 ("I take seriously the charge that the doctrine is inconsistent with textualism." (citing West Virginia v. EPA, 142 S. Ct. 2587, 2641 (2022) (Kagan, J., dissenting))).

482 *See* Barrett, *supra* note 191, at 112–17; Chad Squitieri, *Who Determines Majorness?*, 44 HARV. J.L. & PUB. POL'Y 463, 482 (2021) ("[T]extualists look to the statutes' objectified intent."); Eidelson & Stephenson, *supra* note 456, at 520–21.

483 *See* Eidelson & Stephenson, *supra* note 456, at 519; ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 27 (Amy Gutmann ed., new ed. 2018).

484 *See* Rao, *supra* note 148, at 1476–91; Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19, 63 (2010); Cass, *supra* note 43, at 181.

485 *See* Rao, *supra* note 148, at 1492; Cass, *supra* note 43, at 154; Douglas H. Ginsburg & Steven Menashi, *Nondelegation and the Unitary Executive*, 12 U. PA. J. CONST. L. 251, 269–70 (2010).

486 *See, e.g.*, Manning, *supra* note 277, at 256.

487 *See* Chen & Estreicher, *supra* note 13, at 569 ("In our view, the purported tensions between the major questions doctrine and textualism are overstated.").

488 *See* Sohoni, *supra* note 12, at 262–63, 265–66 (acknowledging recent major questions doctrine cases are really "separation of powers cases in the guise of disputes over statutory interpretation," *id.* at 263).

undermines representative government.[489] As then-Professor Rao reasoned, "It hardly serves as a defense to a challenged statute that Congress *intended* to make an overbroad delegation to an agency."[490] And if courts have the greater power to not enforce a statute in that instance, it makes sense that they have a lesser power "to press Congress" when it legislates close to the constitutional line.[491] After all, constitutional implementation doctrines enforce the Constitution—not the text of the statute challenged in a particular case. In such situations, courts are not acting as faithful agents of the legislature, but as "faithful agents of the Constitution"—consistent with their judicial oaths.[492]

Second, the major questions doctrine faithfully reflects how people understand language.[493] As discussed above, this interpretive instinct is reflected in a variety of legal areas.[494] A colorful hypothetical by Justice Barrett illustrates the point: "Consider a parent who hires a babysitter to watch her young children over the weekend."[495] The parent tells the babysitter to "[m]ake sure the kids have fun."[496] But suppose that the babysitter takes the children on an out-of-town adventure at an amusement park.[497] This, Justice Barrett contends, is not how ordinary people would have understood the parent's instruction.[498]

> In the normal course, 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. If a parent were willing to greenlight a trip that big, we would expect much more clarity than a general instruction to "make sure the kids have fun."[499]

I find Justice Barrett's babysitter hypothetical plausible, and I would be surprised if ordinary parents disagreed. One recent empirical study posing her hypothetical to participants, however, contends ordinary people would find that the babysitter in Justice Barrett's

489 *See* Rao, *supra* note 148, at 1519.

490 *Id.*

491 Barrett, *supra* note 191, at 177, 176–77; *accord* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2155–56 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)).

492 West Virginia v. EPA, 142 S. Ct. 2587, 2616 (2022) (Gorsuch, J., concurring) (quoting Barrett, *supra* note 191, at 169).

493 *See, e.g.*, Sunstein, *supra* note 302, at 255.

494 *See supra* text accompanying notes 315–22.

495 Biden v. Nebraska, 143 S. Ct. 2355, 2379 (2023) (Barrett, J., concurring).

496 *Id.*

497 *Id.*

498 *Id.* at 2379–80.

499 *Id.* at 2380.

hypothetical *did* follow the instructions.[500] Even if that study accurately reflects how ordinary people would respond to the hypothetical, and I doubt it does,[501] Justice Barrett's argument stands. Linguistic expectations *in the law* often come from *legal* conventions.[502] As Justice Frankfurter explained, legal language often brings legal context—or "soil"—with it.[503] That means that when one claims a vague statute confers major powers, the claim must be assessed not by *ordinary* readers, but by readers versed in basic legal understandings about how Article I, the separation of powers, and traditional legal rules operate. As mentioned, the leading empirical study purporting to assess how a legally informed audience assesses vague delegations supports Justice Barrett's position.[504]

Third, the anti-substantive-canon objection proves too much. American law is replete with substantive canons and clear statement rules—many of which have been accepted by textualist jurists.[505] Some have ancient roots and are plausibly rooted in the Constitution.[506] Others are modern and have no apparent connection to the

500 *See* Kevin Tobia, Daniel E. Walters & Brian Slocum, *Major Questions, Common Sense?*, 97 S. CAL. L. REV. 1153, 1202 (2024).

501 A couple facts give me pause. First, the study's instructions to participants put greater weight on the parent giving a credit card to the babysitter than Justice Barrett did. *Compare Nebraska*, 143 S. Ct. at 2379 (Barrett, J., concurring) ("As she walks out the door, the parent hands the babysitter her credit card and says: 'Make sure the kids have fun.'"), *with* Tobia et al., *supra* note 500, at 1198 ("Patricia walks out the door, hands Blake a credit card, and says: 'Use this credit card to make sure the kids have fun this weekend.'"). Those instructions make the parent almost sound flippant about spending money. Second, the questions posed to the participants seem to fight the hypothetical. Justice Barrett's point was that a context-sensitive approach to text forecloses strict literalism. *See Nebraska*, 143 S. Ct. at 2378–79 (Barrett, J., concurring). Yet the study *separately* asked participants whether the babysitter followed the literal instructions and whether the overnight excursion was reasonable. Tobia et al., *supra* note 500, at 1199. While most participants agreed the babysitter followed the instructions, most also thought the overnight excursion was unreasonable. *See id.* at 1202. If the participants had been asked something like "Which of the following two actions is more reasonable under the parent's instructions—pizza or the overnight excursion?," most participants would probably have voted for the former. That would help prove Justice Barrett's point: an action can be compliant with instructions "in a literal sense" but inconsistent "with a *reasonable* understanding of the parent's instruction." *Nebraska*, 143 S. Ct. at 2379–80 (Barrett, J., concurring).

502 *Nebraska*, 143 S. Ct. at 2378–80 (Barrett, J., concurring).

503 Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947).

504 *See* Gluck & Bressman, *supra* note 325, at 1003.

505 *See* Chen & Estreicher, *supra* note 13, at 570–71; Eidelson & Stephenson, *supra* note 456, at 516–17.

506 *See, e.g.*, Barrett, *supra* note 191, at 143–45 (discussing retroactivity canon).

Constitution.[507] Proponents of the major questions doctrine certainly need not defend all these substantive canons—I would not. But those who maintain that the major questions doctrine should be discarded as inconsistent with textualism have the burden to explain what they would do with the dozens of other substantive canons, especially those with a looser connection to the Constitution than the major questions doctrine.[508] In other words, those who favor stability in the law should hesitate before discarding the major questions doctrine just because it is a substantive canon.[509]

5. The Major Questions Doctrine Is Inconsistent with Precedent

Others have criticized the major questions doctrine as insufficiently grounded in precedent. Mila Sohoni, for example, argues that the major questions doctrine is disjointed from prior precedents.[510]

Part of what motivated the precedent-focused critique of the major questions doctrine was its incompatibility with the Supreme Court's *Chevron* doctrine.[511] According to the *Chevron* doctrine, courts had to defer to reasonable agency interpretations of ambiguous statutes.[512] In *City of Arlington v. FCC*, the Supreme Court even applied that rule when an agency interpreted the statute defining its own jurisdiction.[513] That rule stood in obvious tension with cases like *West Virginia v. EPA*.

The Supreme Court just overruled *Chevron* and held that courts cannot defer to agencies' interpretations of statutes.[514] Indeed, the Court noted the tension that previously existed between the major questions doctrine and *Chevron* deference.[515] In overruling *Chevron*,

507 I am unaware, for example, of historical evidence or a constitutional basis justifying the presumption in favor of equitable tolling. *See* Holland v. Florida, 560 U.S. 631, 645–46 (2010).

508 Justice Kagan, for example, has authored or joined many opinions applying substantive canons. *See* Walters, *supra* note 12, at 471. Her textualist critique of substantive canons arguably calls those opinions into question. *See id.* at 490–91.

509 *See* Barrett, *supra* note 191, at 176 ("[T]he practice of employing such canons has been with us for so long that the sheer force of precedent counsels against abandoning it.").

510 *See* Sohoni, *supra* note 12, at 263; Deacon & Litman, *supra* note 12, at 1012; Richardson, *supra* note 12, at 390–409 (documenting various criticisms).

511 *See* Sohoni, *supra* note 12, at 263–64 (claiming *Chevron* was "silently ousted" by major questions doctrine "as the starting point for evaluating whether an agency can exert regulatory authority," *id.* at 264); Alison Gocke, Chevron*'s Next Chapter: A Fig Leaf for the Nondelegation Doctrine*, 55 U.C. DAVIS L. REV. 955, 959–60 (2021) (arguing major questions doctrine is inconsistent with *Chevron*'s "theory," *id.* at 959); Merrill, *supra* note 14, at 3–4.

512 *See, e.g.*, City of Arlington v. FCC., 569 U.S. 290, 296 (2013).

513 *Id.* at 296, 301.

514 *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024).

515 *Id.* at 2269 (noting how major questions doctrine complicated *Chevron* doctrine).

the Court ended that tension and left only the major questions doctrine standing.

In fairness to critics of the major questions doctrine, most of them leveled their precedent-based attacks before *Loper Bright* and assumed the continued validity of *Chevron* deference. That assumption has been important to their arguments. Ronald Levin, for example, began his account of the major questions doctrine with *Brown & Williamson*, which he characterized as establishing just a "narrow elaboration on the *Chevron* paradigm."[516] He then critiqued what he saw as the doctrine's evolution into a clear statement rule.[517] During that evolution, Levin objected, the Court was not clear about what it was doing.[518] And Levin contended this lack of clarity was especially bewildering because of tensions between the major questions doctrine and the *Chevron* doctrine.[519]

Two responses are in order. *First*, the major questions doctrine has deeper precedential roots than some of its critics acknowledge.[520] The doctrine traces its roots to at least the mid-to-late nineteenth century and has been applied (albeit sporadically) ever since. But even if one thinks precedents like *The Queen and Crescent Case* are irrelevant—though no one has persuasively explained why that would be true[521]—there are also more modern, better-known major questions doctrine cases that predated *Chevron* and were never overruled. For example, *The Benzene Case* demanded a "clear mandate" from Congress to give OSHA the power to impose "pervasive regulation" on workplaces.[522] Justice Scalia cited that decision when applying the major questions doctrine as a clear statement rule in *Utility Air*.[523] It is therefore unsurprising that some of the nation's most prominent federal appellate judges (including then-Judge Kavanaugh on the D.C. Circuit) recognized the existence and relevance of the major questions doctrine

516 Levin, *supra* note 12, at 905.

517 *Id.*

518 *See id.* at 934.

519 *See id.* at 929–30; *see also* Sohoni, *supra* note 12, at 315 (offering similar account).

520 *See* Capozzi, *supra* note 13, at 196–226.

521 *Cf.* Wurman, *supra* note 13, at 973–74 (acknowledging relevance of these cases); *see also* Biden v. Nebraska, 143 S. Ct. 2355, 2381 n.3 (2023) (Barrett, J., concurring) (acknowledging potential connection between *The Queen and Crescent Case* and the major questions doctrine).

522 Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst. (*The Benzene Case*), 448 U.S. 607, 645 (1980) (plurality opinion); *see also* Levin, *supra* note 12, at 954 (acknowledging that *The Benzene Case* "provide[d] a certain degree of support" for the major questions doctrine).

523 Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014) (first quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000); then citing MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 231 (1994); and then citing *The Benzene Case*, 448 U.S. at 645–46).

before the doctrine's full reemergence in the past few years.[524] Such precedents also help explain how Cass Sunstein and others, before *West Virginia v. EPA*, identified evidence of the major questions doctrine functioning as a clear statement rule and recognized that the Court could fully reembrace it.[525] In short, the revitalized major questions doctrine did not "come as a surprise."[526]

Second, one should avoid overstating the *Chevron* doctrine's viability at the time the Court issued its recent major questions doctrine decisions. In the era between *Brown & Williamson* and *West Virginia v. EPA*, the *Chevron* doctrine's status was confused and uncertain—as evidenced by the extraordinary volume of law review articles trying to make sense of the doctrine's ever-shifting domain.[527] After a brief period of stability in the 1990s, the Supreme Court steadily began carving out exceptions and adding steps to the *Chevron* doctrine.[528] Simultaneously, the Court was extremely inconsistent in applying *Chevron*. Some decisions faithfully applied the *Chevron* doctrine.[529] Others did not.[530] Most just ignored it altogether.[531] Lower court judges went out of their way to avoid applying it.[532] As many judges had called for *Chevron* to be overruled,[533] the Supreme Court had failed to apply deference altogether since 2016.[534] And the government had recently gone out of its way to avoid asking for deference.[535] For a while now, it had been apparent that the *Chevron* doctrine was effectively dead at the Supreme

524 *See supra* note 335.

525 *See* Sunstein, *supra* note 77, at 476–77; Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 1942–43 (2017); Nathan Richardson, *Antideference: COVID, Climate, and the Rise of the Major Questions Canon*, 108 VA. L. REV. ONLINE 174, 178–82 (2022); Walker, *supra* note 169, at 925.

526 Sohoni, *supra* note 12, at 264.

527 *See, e.g.*, Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 834 n.6 (2001).

528 *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 238 (2001).

529 *See* Sohoni, *supra* note 12, at 264 (identifying cases in tension with major questions doctrine precedents).

530 *See* Kavanaugh, *supra* note 491, at 2152 (noting "wildly different" approaches by various courts).

531 *See* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1138 (2008).

532 *See* Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1312–13 (2018).

533 *See, e.g.*, Pereira v. Sessions, 138 S. Ct. 2105, 2129 (2018) (Alito, J., dissenting); Michigan v. EPA, 576 U.S. 743, 760–64 (2015) (Thomas, J., concurring); Buffington v. McDonough, 143 S. Ct. 14, 21 (2022) (Gorsuch, J., dissenting from denial of certiorari).

534 Levin, *supra* note 12, at 929; *see* Cuozzo Speed Techs., LLC v. Lee, 579 U.S. 261, 276 (2016).

535 *See Buffington*, 143 S. Ct. at 21 (Gorsuch, J., dissenting from denial of certiorari).

Court.[536] Thus, few were surprised when the Court overruled *Chevron* during the 2023 Term.[537]

Admittedly, the Court could have been clearer about its rationale for revitalizing the major questions doctrine.[538] Recent decisions and separate writings have worked to remedy that lack of clarity.[539] However, even if the major questions doctrine's revitalization did not follow from "directly controlling" authority,[540] such authority provided some support for, and certainly did not foreclose, what the Court did.

In any event, even if one finds the precedent-focused critique of the major questions doctrine persuasive, the dispute seems moot. The Supreme Court has clearly reestablished the major questions doctrine; those cases are now precedent.[541]

B. Policy Counterarguments

1. The Major Questions Doctrine Is Incapable of Principled Application

Some contend the major questions doctrine cannot be applied in a principled manner.[542] Recall that the doctrine asks (1) whether an agency is claiming a new power of great economic or political significance, and (2) whether Congress clearly delegated such power to an agency.

Scholars have focused most of their ire on the first inquiry, highlighting the "difficulty of determining what is 'major.'"[543] Josh Chafetz, for example, argues that courts cannot distinguish between "major"

536 *See, e.g.*, Mexican Gulf Fishing Co. v. U.S. Dep't of Com., 60 F.4th 956, 976 (5th Cir. 2023) (Oldham, J., concurring in part) (suggesting Court no longer allows deference); Solar Energy Indus. Ass'n v. Fed. Energy Regul. Comm'n, 59 F.4th 1287, 1298 (D.C. Cir. 2023) (Walker, J., concurring in part and dissenting in part).

537 *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024).

538 *See, e.g.*, Adler, *supra* note 81, at 39 (faulting Court's "failure to bring clarity to the major questions doctrine"); Sohoni, *supra* note 12, at 264 (faulting Court for not "*clearly stating*" what it was doing).

539 *See, e.g.*, West Virginia v. EPA, 142 S. Ct. 2587, 2616 (2022) (Gorsuch, J., concurring).

540 Levin, *supra* note 12, at 928.

541 *Cf.* Collins v. Yellen, 141 S. Ct. 1761, 1799–1800 (2021) (Kagan, J., concurring in part and concurring in judgment in part) ("*Stare decisis* compels the conclusion that the FHFA's for-cause removal provision violates the Constitution.").

542 *See, e.g.*, Levin, *supra* note 12, at 965–66.

543 *See* Wurman, *supra* note 13, at 977, 977–81 (documenting criticisms).

and "nonmajor" questions without making political judgments.[544] Others have argued that the inquiry is just too indeterminate.[545]

The problem with these objections is that they prove far too much. American law—both constitutional and otherwise—is full of comparable inquiries.[546] Courts assess whether a government official is an "Officer[] of the United States" under Article II by asking whether the official exercises "significant" power.[547] Strict scrutiny, the most frequently employed implementation doctrine in constitutional law, requires courts to distinguish between "compelling" and noncompelling government interests.[548] The Supreme Court considers whether a case is "important" in deciding whether to grant certiorari,[549] and Federal Rule of Appellate Procedure 35 permits appellate judges to order en banc review of panel decisions if "the proceeding involves a question of exceptional importance."[550] And ubiquitous are the doctrines that require courts to assess whether government actions are "reasonable."[551] For example, the Administrative Procedure Act requires judges to determine whether regulations are "arbitrary and capricious"—an inquiry that has evolved into a taxing reasonableness

544 *See, e.g.*, Josh Chafetz, *Gridlock?*, 130 HARV. L. REV. F. 51, 55 (2016) ("Begin with what ought to be obvious: whether or not a particular question is 'major' is a political judgment, not a fact about the world."); *see also* Blake Emerson, *Major Questions and the Judicial Exercise of Legislative Power*, YALE J. ON REGUL. (Feb. 28, 2020), https://www.yalejreg.com/nc/major-questions-and-the-judicial-exercise-of-legislative-power-by-blake-emerson/ [https://perma.cc/7VKL-R5SS].

545 *See, e.g.*, Sohoni, *supra* note 12, at 287–88; Deacon & Litman, *supra* note 12, at 1010 (noting the doctrine is "often described as radically indeterminate"); Natasha Brunstein & Richard L. Revesz, *Mangling the Major Questions Doctrine*, 74 ADMIN. L. REV. 217, 218 (2022); Aaron L. Nielson, *The Minor Questions Doctrine*, 169 U. PA. L. REV. 1181, 1194 (2021) (noting "there is no principled way to determine whether a question is 'major' or not"); Kevin O. Leske, *Major Questions About the "Major Questions" Doctrine*, 5 MICH. J. ENVT'L & ADMIN. L. 479, 480 (2016); Kristin E. Hickman, *The (Perhaps) Unintended Consequences of* King v. Burwell, 2015 PEPP. L. REV. 56, 58; Loshin & Nielson, *supra* note 484, at 22–23; Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 233 (2006).

546 *See* Walker, *supra* note 169, at 944 (providing examples and arguing that "a blurry line compelled by the Constitution is better than no line at all"); Ronald A. Cass, *Fixing Deference: Delegation, Discretion, and Deference Under Separated Powers*, 17 N.Y.U. J.L. & LIBERTY 1, 42 (2023); *see also* Levin, *supra* note 12, at 966 ("Many administrative law doctrines implicate judgment calls . . . .").

547 Lucia v. SEC, 138 S. Ct. 2044, 2051 (2018); *see also* Lawson, *supra* note 143, at 377.

548 *See, e.g.*, Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418, 430–32 (2006).

549 SUP. CT. R. 10(c).

550 FED. R. APP. P. 35(a)(2).

551 *Cf., e.g.*, Wurman, *supra* note 13, at 977 (making a similar point).

review.[552] Yet courts have long successfully made such judgments—relying on the incremental precedent-based reasoning that defines the common law.

Courts can do the same when assessing a matter's importance. As discussed above, courts can draw upon ample precedent in conducting that inquiry.[553] For example, one district court recently had little trouble in rejecting a major questions doctrine argument by finding that the challenged regulation's economic impact was too small.[554]

Judges can also rely on common sense and need "not be blind to matters of general knowledge."[555] In *West Virginia v. EPA*, even Justice Kagan acknowledged that climate change and the question of carbon dioxide regulation was "the most pressing environmental challenge of our time."[556] It thus seems obvious that a major question was at issue in that case. And as Cass Sunstein has noted, other cases have also not featured close calls.[557] As then-Judge Kavanaugh explained, sometimes you "know it when you see it."[558]

Fewer scholars have criticized the clear statement aspect of the major questions doctrine.[559] After all, courts have ample experience in applying clear statement rules, which may help explain why then-Judge Kavanaugh advocated for replacing some ambiguity-focused doctrines with clear statement rules.[560] Admittedly, the Supreme Court has not yet precisely identified how strong the major questions doctrine clear statement rule is. And reasonable minds can legitimately reach different conclusions about whether the Court should apply a stronger or weaker clear statement rule.[561] Presumably, such guidance will come in a future case where the Court holds that Congress *did* clearly delegate a major power to an agency.[562] In the meantime, lower courts can draw upon precedents applying other clear statement rules.

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552 5 U.S.C. § 706 (2018); *see* FCC v. Prometheus Radio Project, 141 S. Ct. 1150, 1158 (2021) ("The APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained.").

553 *See supra* Section II.D.

554 *See* Arizona v. Walsh, No. 22-cv-00213, 2023 WL 120966, at *8 (D. Ariz. Jan. 6, 2023).

555 Wurman, *supra* note 13, at 978.

556 West Virginia v. EPA, 142 S. Ct. 2587, 2626 (2022) (Kagan, J., dissenting) (quoting Massachusetts v. EPA, 549 U.S. 497, 505 (2007)).

557 *See* Sunstein, *supra* note 77, at 487.

558 U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 423 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

559 *But see* Levin, *supra* note 12, at 966 ("[H]ow specific does the requisite congressional authorization have to be?").

560 Kavanaugh, *supra* note 491, at 2155–56.

561 *Compare* Josh Chafetz, *The New Judicial Power Grab*, 67 ST. LOUIS U. L.J. 635, 649–50 (2023), *and* Deacon & Litman, *supra* note 12, at 1037, *with* Wurman, *supra* note 13, at 915.

562 *Cf.* Levin, *supra* note 12, at 967.

In short, there are some open questions about how the major questions doctrine will apply going forward. But that is nothing special. And the problem will only lessen as courts continue to apply and refine the doctrine.[563]

2. The Major Questions Doctrine Weakens the Administrative State

Others object to the major questions doctrine because they think federal agencies *should* address major policy questions.[564] The administrative state, the argument goes, has "expertise" and is better positioned to solve modern problems than Congress.[565] For example, Justice Kagan argued that Congress is incapable of legislating to solve modern problems because "Members of Congress often don't know enough . . . to regulate sensibly on an issue" and they "can't know enough . . . to keep regulatory schemes working across time."[566] In Justice Kagan's view, "a rational Congress delegates" and courts should not "get in the way," at least "within extremely broad limits."[567]

To start, this argument does not prove very much against the major questions doctrine. The doctrine applies only in "extraordinary cases," when agencies claim powers to solve problems of "vast economic and political significance."[568] That descriptor does not implicate most agency decisions.

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563 *See, e.g.*, Freeman & Stephenson, *supra* note 128, at 24 ("This [workability] concern would be mitigated if the Court could articulate some reasonably objective, judicially manageable standard for determining when an issue is sufficiently 'major' to require especially clear congressional authorization.").

564 *See, e.g.*, Gocke, *supra* note 511, at 958; Lisa Heinzerling, *The Supreme Court Is Making America Ungovernable*, ATLANTIC (July 26, 2022), https://www.theatlantic.com/ideas/archive/2022/07/supreme-court-major-questions-doctrine-congress/670618/ [https://perma.cc/PR9J-ZKVT]; Jack M. Beermann, *The Anti-Innovation Supreme Court: Major Questions, Delegation,* Chevron*, and More*, 65 WM. & MARY L. REV. 1265, 1269–70, 1272 (2024) (arguing agencies should be able to innovate in response to problems Congress did not consider).

565 *See, e.g.*, Sunstein, *supra* note 545, at 246; JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 1 (1938) ("In terms of political theory, the administrative process springs from the inadequacy of a simple tripartite form of government to deal with modern problems."); Gocke, *supra* note 511, at 958; Deacon & Litman, *supra* note 12, at 1079–81; Edward H. Stiglitz, *Delegating for Trust*, 166 U. PA. L. REV. 633, 654–57 (2018) (arguing agencies are preferable to legislatures because they make evidence-based decisions); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985).

566 West Virginia v. EPA, 142 S. Ct. 2587, 2642 (2022) (Kagan, J., dissenting).

567 *Id.* at 2642–43.

568 *Id.* at 2608 (majority opinion) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)); *id.* at 2605 (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

It is also not clear that federal agencies actually have a superior claim to expertise over Congress. To start, it is unclear how often expertise drives agency decisionmaking. Much of what agencies do reflects the current administration's policy preferences—which often cannot be characterized as "expertise."[569] Further, there is extensive academic literature arguing that administrative agencies are frequently captured by special interest groups, raising the prospect that agency laws favor special interests.[570] Washington, D.C., is well-known as a revolving door, where special interest groups frequently send employees into government and then hire former agency officials when they leave office.[571] Other scholars contend agency officials are primarily motivated by personal considerations, like career advancement, and bureaucratic considerations, like securing larger budgets.[572]

But assuming *arguendo* that federal agencies often bring expertise to bear when making law, it does not follow that Congress is in an inferior lawmaking position. As Jonathan Adler and Chris Walker explain, "Congress has the capacity to enhance its institutional capacity and expertise" by retaining experts.[573] And Congress can *voluntarily* consult with agency officials on what constitutes optimal policy. Indeed, Congress regularly does just that.[574] It is therefore wrong to say that broad, open-ended delegations are essential to resolve "technically and scientifically complex issue[s]."[575] Agencies can use their expertise to persuade Congress to adopt their preferred laws.

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569 *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part) ("A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations.").

570 *See, e.g.*, Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039, 1050 (1997); Christopher S. Yoo, Thomas Fetzer, Shan Jiang & Yong Huang, *Due Process in Antitrust Enforcement: Normative and Comparative Perspectives*, 94 S. CAL. L. REV. 843, 858–59 (2021).

571 *See* Yoo et al., *supra* note 570, at 859; KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 342 (1986); Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1284–85 (2006); Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 23 (2010); Edward L. Rubin, *Bureaucratic Oppression: Its Causes and Cures*, 90 WASH. U. L. REV. 291, 316–17 (2012).

572 *See* WILLIAM A. NISKANEN, JR., BUREAUCRACY & REPRESENTATIVE GOVERNMENT 36–42 (1971) ("[T]he beginning of wisdom is the recognition that bureaucrats are people who are, at least, not entirely motivated by the general welfare or the interests of the state." *Id.* at 36.); Yoo et. al., *supra* note 570, at 857; Barkow, *supra* note 388, at 892.

573 Adler & Walker, *supra* note 49, at 1983.

574 *Id.* at 1984 (arguing agencies' role in drafting legislation "does undercut the argument that Congress lacks access to the expertise necessary to effectively legislate in these increasingly complex regulatory areas").

575 Gocke, *supra* note 511, at 958.

3. The Major Questions Doctrine Unduly Aggrandizes Judicial Power

Some argue that the major questions doctrine unduly concentrates power in the judiciary.[576] I confess to sympathizing at least somewhat with this fear. Americans should be wary of courts seizing too much power from the democratically accountable branches of government.[577]

But this critique simultaneously proves too much about the American legal system and too little about the major questions doctrine. Within our system of judicial review, federal judges—at least since the mid-twentieth century—exercise comparable power *all the time*.[578] The power to "strike down" federal or state statutes is an extraordinary one.[579] Charged with enforcing the Bill of Rights, American judges routinely prevent democratically accountable officials from making important policy decisions touching on speech, religion, firearms, privacy, criminal justice, and many other topics. Indeed, many scholars argue courts should even possess the power to enforce *unenumerated constitutional rights* they have the sole power to identify and develop.[580]

Within the context of American judicial review, those who denounce the major questions doctrine for concentrating too much power in the judiciary bear the burden of identifying principled limits to their judicial minimalism. For it is surely not a principled answer to support robust judicial power only when it advances one's preferred policies.

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576 *See, e.g.*, Freeman & Stephenson, *supra* note 128, at 21 ("[T]he MQD shifts substantial policy discretion to unelected federal judges."); Levin, *supra* note 12, at 962; Sohoni, *supra* note 12, at 266; Chafetz, *supra* note 561, at 652; Warren Grimes, *The Major Questions Doctrine: Judicial Activism That Undermines the Democratic Process*, 54 LOY. U. CHI. L.J. 825, 825–26 (2023); Blake Emerson, *The Binary Executive*, 132 YALE L.J.F. 756, 757 (2022); Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 100–01 (2022); Beau J. Baumann, *Americana Administrative Law*, 111 GEO. L.J. 465, 526–27 (2023); William N. Eskridge Jr. & John Ferejohn, *The APA as a Super-Statute: Deep Compromise and Judicial Review of Notice-and-Comment Rulemaking*, 98 NOTRE DAME L. REV. 1893, 1906–07 (2023).

577 *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 1 (1990) (noting risk of a judge "rul[ing] where a legislator should").

578 *See, e.g.*, *id.* at 69–100.

579 *See generally* BICKEL, *supra* note 253, at 16. *But see* Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933 (2018) (urging courts to think of judicial review in more modest terms).

580 *See, e.g.*, Brief for Constitutional Law Scholars Lee C. Bollinger, Erwin Chemerinsky, Sherry F. Colb, Michael C. Dorf, Daniel Farber, Joanna L. Grossman, Leah Litman, Martha Minow, Jane S. Schacter, Suzanna Sherry, Geoffrey R. Stone, David A. Strauss & Laurence H. Tribe as *Amici Curiae* Supporting Respondents at 5–17, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392).

In any event, the major questions doctrine recognizes a substantially more modest judicial power than the powers just discussed.[581] Courts employing the major questions doctrine give Congress the final word on its intent. By contrast, holding statutes unconstitutional prohibits legislatures from legislating in a particular way *altogether*.[582] That distinction matters.[583]

4. The Major Questions Doctrine Is Bad for Democracy

Several scholars argue that the major questions doctrine undermines democratic government by transferring power from administrative agencies to the judiciary.[584] This undermines democracy, the argument goes, because agencies are accountable to the President, and the President is more accountable to voters than unelected judges.[585]

Both steps of this argument are dubious. To start, the major questions doctrine does *not* transfer power from the President to the judiciary. Instead, the doctrine transfers power from the President to Congress. Rather than just letting the agency regulate based on the fiction that some past Congress made the policy choice the agency is actually making, the major questions doctrine allows the *current* Congress to have a say in lawmaking.[586] The alternative characterization is only plausible if one conceives of the major questions doctrine as a tool by which courts effectively veto laws. In a limited sense, that characterization is plausible.[587] But that is only because the executive branch is the entity that *usually makes law*.[588] If the major questions doctrine succeeds in channeling lawmaking back to Congress or the state legislatures, then the judiciary's role in blocking new laws under the major questions doctrine will substantially diminish.[589] In other words, if the

581 *See, e.g.*, Deacon & Litman, *supra* note 12, at 1084 ("In some respects the major questions decisions are minimalist, at least relative to other alternative bases for the decisions, because the decisions formally hold out the possibility that Congress may amend the statute to authorize the relevant agency action.").

582 *See* Barrett, *supra* note 191, at 174–77.

583 Eichensehr & Hathaway, *supra* note 442, at 1855.

584 *See, e.g.*, Beermann, *supra* note 564, at 1302, 1348.

585 *See, e.g.*, Freeman & Stephenson, *supra* note 128, at 2, 42.

586 *Cf.* EINER ELHAUGE, STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION 41–42, 151–55 (2008) (arguing default rules of statutory construction should favor the preferences of the current Congress—or at least elicit the current Congress's preferences).

587 *But see* Barrett, *supra* note 191, at 174–75 (explaining why and how clear statement rules function differently from invalidation rules, which function like true judicial vetoes).

588 *See supra* Section II.E.

589 *See supra* notes 408–10 and accompanying text.

doctrine is successful, the judiciary will ultimately *lose* its power to effectively decide which laws go into effect and which do not.[590]

In any event, one should not overstate the political accountability of administrative agencies. Agency officials are unelected. Many are only tenuously accountable to the President, who can neither appoint nor remove many powerful officials who serve in his name.[591] Putting those "independent" agency officials aside, it is doubtful that any President could actually supervise even a small portion of executive branch lawmaking.[592] It is even more doubtful that voters can follow and hold the President accountable for the never-ending deluge of agency-made laws.

CONCLUSION

The major questions doctrine is defensible. It faithfully implements the Constitution's limits on the delegation of legislative power—either as a constitutional clear statement rule or constitutional avoidance. It also reflects the proper way to read Congress's statutes. Either approach has ample grounding in precedent. And the doctrine is vital to restoring a healthy balance of power within the American government, safeguarding federalism, and preserving the rule of law.

In the coming years, courts will address pressing cases concerning the scope and effect of the major questions doctrine. If jurists engage carefully with the doctrine's diverse supporting rationales, I am cautiously optimistic that the major questions doctrine will ensure that our elected representatives in Congress and the state legislatures make the most "important" decisions that govern our lives and liberties—just as the Constitution requires.[593]

590 *See supra* notes 408–10 and accompanying text.

591 *See, e.g.*, Feds for Med. Freedom v. Biden, 63 F.4th 366, 390–91 (5th Cir. 2023) (Ho, J., concurring) (observing that many senior executive branch officials have "a *de facto* form of life tenure," *id.* at 391), *vacated as moot*, 144 S. Ct. 480 (2023).

592 *See, e.g.*, RICHARD P. NATHAN, THE ADMINISTRATIVE PRESIDENCY 2 (1983) (discussing President Truman); Ginsburg & Menashi, *supra* note 485, at 265 ("In the normal course, Presidents have very little contact with agency heads, let alone lesser policymakers within the agencies, and hence very little opportunity to persuade them.").

593 *See* Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825).