

The Major Questions Doctrine at the Boundaries of Interpretive Law

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ABSTRACT: The Supreme Court's apparent transformation of the major questions doctrine into a clear statement rule demanding clear congressional authorization for "major" agency actions has already had, and will continue to have, wide-ranging impacts on American public law. Not the least of these is the impact it will have on the enterprise of statutory interpretation. Indeed, while it is easy to focus on the policy repercussions of a newly constrained Congress and newly hamstrung administrative state, this Article argues that equally important is the novel precedent that is set in this particular formulation of a clear statement rule, which stands almost entirely alone in its structural features. With the exception of the much-maligned absurdity doctrine, the new major-questions-doctrine-as-clear-statement-rule is the only substantive canon that combines two extreme design elements of canons: first, a weak relationship to existing authoritative constitutional law, and, second, unbounded potential applicability. While courts and scholars have accepted or created many canons that have one or the other of these extreme features, they have conspicuously avoided combining these two features in any new canon—perhaps because the combination exponentially increases the potential interference of canons with Congress's exercise of the legislative power. This avoidance has helped to keep the Court's use of substantive canons within recognizable boundaries that preserve a limited role for the judiciary. Now that the modern Court has, for the first time, taken this step in the recognition of a new canon, it is time to assess the limits of canons in a system of limited judicial power.

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This Article undertakes that project, finding that the major questions doctrine’s novel features are a tell of serious theoretical and constitutional infirmities. If canons can take on this unique combination of features, there are no speed brakes to stop the unraveling of the faithful agent model at the center of standard textualist and intentionalist accounts of the judicial power to interpret statutes. If such canons could be justified at all, it would only be under a more dynamic statutory interpretation approach that explicitly departs from legislative supremacy, but the extremity of the major questions doctrine potentially goes beyond partnership to judicial takeover of the legislative power, putting significant pressure even on these justifications. In sum, the major questions doctrine’s novel step in the law of interpretation raises new questions about the limits of substantive canons. It is not enough for the Court and defenders of the doctrine to identify the major questions doctrine as a canon; they must explain why newly recognizing this form of canon is consistent with core theoretical, normative, and constitutional commitments in our legal system.

INTRODUCTION467

I. THE NEW TERRAIN..... 473

 A. *BIRTH: THE MAJOR-QUESTIONS-DOCTRINE-AS-EXCEPTION-TO-CHEVRON*476

 B. *METAMORPHOSIS: THE MAJOR-QUESTIONS-DOCTRINE-AS-CLEAR- STATEMENT-RULE*480

II. THE NORMAL PARAMETERS OF SUBSTANTIVE CANONS.....490

 A. *DIMENSION #1: THE POTENTIAL SCOPE OF APPLICABILITY OF CANONS*.....492

 1. Limited Subject Matter493

 2. Specific Legal Effects495

 3. Ambiguity-Dependent Trigger496

 4. Classifying Canons in Terms of Scope.....497

 B. *DIMENSION #2: THE NEXUS WITH AUTHORITATIVE LAW*.....500

 C. *THE DEARTH OF CANONS COMBINING WIDE SCOPE WITH A WEAK NEXUS TO AUTHORITATIVE LAW*.....508

III. EXTREME ON EVERY DIMENSION: THE UNPRECEDENTED MAJOR QUESTIONS DOCTRINE510

 A. *DIMENSION #1: THE MAJOR QUESTIONS DOCTRINE POTENTIALLY APPLIES TO EVERY STATUTE*511

 B. *DIMENSION #2: THE MAJOR QUESTIONS DOCTRINE HAS NO NEXUS WITH AUTHORITATIVE LAW*.....516

 C. *IN A CLASS OF ITS OWN*.....521

IV. THE MAJOR QUESTIONS DOCTRINE AND THE LIMITS OF THE JUDICIAL POWER	521
A. TEXTUALISM'S NOVELTY CHALLENGE	523
1. Searching for a Textualist Account of Canons	523
2. The Major Questions Doctrine as a Textualist and Constitutional Pandora's Box	526
B. NONTEXTUALIST DEFENSES.....	531
1. The Major Questions Doctrine and Congressional Intent.....	532
2. The Major Questions Doctrine as a Democracy-Forcing Device.....	537
CONCLUSION	540

INTRODUCTION

In two recent cases—*West Virginia v. EPA* and *Biden v. Nebraska*—the U.S. Supreme Court blessed the so-called major questions doctrine.¹ Before these cases, this doctrine, to the extent that it was recognized, operated mainly as an exception to *Chevron's* ordinary rule of deference to reasonable interpretations of ambiguous statutes,² replacing that deference with de novo review.³ Now the doctrine appears to have become not merely an exception to *Chevron*, but a clear statement rule that presumes that Congress has not

1. *West Virginia v. EPA*, 142 S. Ct. 2587, 2614 (2022); *Biden v. Nebraska*, 143 S. Ct. 2355, 2374 (2023). Several prior cases also contributed to the recent rise of the major questions doctrine. See Nathan Richardson, *Antideference: Covid, Climate, and the Rise of the Major Questions Canon*, 108 VA. L. REV. ONLINE 174, 175–76 (2022) (noting that the Court's decisions in *Alabama Ass'n of Realtors v. Department of Health & Human Services*, 141 S. Ct. 2485 (2021) (per curiam), and *National Federation of Independent Business v. Department of Labor, Occupational Safety & Health Administration*, 142 S. Ct. 661 (2022), had rendered a "significant but almost completely unheralded anti-administrative doctrinal change").

2. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (requiring courts to defer to reasonable agency interpretations of ambiguous statutory provisions).

3. Note, *Major Question Objections*, 129 HARV. L. REV. 2191, 2191 (2016) (characterizing the major questions doctrine as an "exception" to *Chevron* deference "under which the Court occasionally refuses to defer to an agency's interpretation of an economically or politically significant statutory provision"); Abigail R. Moncrieff, *Reincarnating the "Major Questions" Exception to Chevron Deference as a Doctrine of Noninterference (Or Why Massachusetts v. EPA Got It Wrong)*, 60 ADMIN. L. REV. 593, 598 (2008) (same); Jonas J. Monast, *Major Questions About the Major Questions Doctrine*, 68 ADMIN. L. REV. 445, 469 (2016) (noting that the major questions doctrine sometimes appeared to be "an exception to *Chevron*," while in other cases it functioned more "as a tool of statutory construction"). But see Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475, 477 (2021) (noting, before the Supreme Court made it explicit, that some major questions cases operated as an exception to *Chevron* while at least some judicial statements, including *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 421–22 (D.C. Cir. 2017) (en banc) (Kavanaugh, J., dissenting from denial of rehearing *en banc*), "operate[d] as a clear statement principle, in the form of a firm barrier to certain agency interpretations" (footnote omitted)).

delegated authority to agencies to address major questions, subject to rebuttal only by “clear congressional authorization.”⁴ This doctrinal transmogrification shifts the burden to agencies to prove that Congress unmistakably gave them the authority to address major questions, and it likewise shifts the burden to Congress to provide greater clarity in its statutes if it wants to have agencies implement them. Much ink has been and will be spilled on the implications of this change for modern governance as we know it,⁵ but this Article is about something else. It is about how the new major questions doctrine breaks fundamentally new ground in the law of statutory interpretation and what that novelty means for the theoretical and legal coherence of the Court’s larger approach to statutory interpretation and principles of legislative supremacy.⁶ The Supreme Court has devised a tool of statutory interpretation that is genuinely unprecedented in its structure and implications for the judicial role in statutory interpretation.⁷ That innovative form, I will argue, raises serious

4. *West Virginia*, 142 S. Ct. at 2609 (“[I]n certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us ‘reluctant to read into ambiguous statutory text’ the delegation claimed to be lurking there. To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to ‘clear congressional authorization’ for the power it claims.” (citation omitted)). Although there is an ongoing attempt to reframe the major questions clear statement rule into a more innocuous linguistic canon, and although that effort gained some steam with Justice Amy Coney Barrett’s concurrence in *Biden v. Nebraska*, most scholars (and apparently a majority of the Court, which did not join her concurrence) think of the doctrine as a clear statement rule. See *infra* Part I.

5. See Beau J. Baumann, *The Major Questions Doctrine Reading List*, YALE J. ON REGUL. (Mar. 18, 2023), <https://www.yalejreg.com/nc/the-major-questions-doctrine-reading-list-by-beau-j-baumann> [<https://perma.cc/KL7M-QP3L>] (compiling commentary); Lisa Heinzerling, *How Government Ends*, BOS. REV. (Sept. 28, 2022), <https://www.bostonreview.net/articles/how-government-ends> [<https://perma.cc/Z6U9-QL39>] (synthesizing critiques); see also Timothy Meyer & Ganesh Sitaraman, *The National Security Consequences of the Major Questions Doctrine*, 122 MICH. L. REV. 55, 59 (2023) (spelling out implications in the national security space); Walter G. Johnson & Lucille M. Tournas, *The Major Questions Doctrine and the Threat to Regulating Emerging Technologies*, 39 SANTA CLARA HIGH TECH. L.J. 137, 142 (2023) (spelling out implications in the technology space).

6. In this sense, the Article joins Ronald Levin’s call to examine whether the major questions doctrine can “be defended even on the Court’s own terms.” Ronald M. Levin, *The Major Questions Doctrine: Unfounded, Unbounded, and Confounded*, CALIF. L. REV. (forthcoming) (manuscript at 4), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4304404 [<https://perma.cc/LB92-FHFV>]. Compared with Levin, however, my analysis focuses more on how the doctrine can or cannot fit within the tradition of substantive canons of statutory interpretation, which I take to be a serious challenge for critics of the major questions doctrine, given the long-standing practice of recognizing such devices in interpretive law. See *infra* Part II.

7. Notably, Louis Capozzi has argued that the major questions doctrine, even in its clear statement rule form, can be traced back to at least 1897, when the Supreme Court limited the power of the Interstate Commerce Commission (“ICC”) to set rates prospectively without a clear statement to that effect in the Interstate Commerce Act. See Louis J. Capozzi III, *The Past and Future of the Major Questions Doctrine*, 84 OHIO STATE L.J. 191, 203–05 (2023) (citing *Interstate Com. Comm’n v. Cincinnati, New Orleans & Tex. Pac. Ry. Co.*, 167 U.S. 479 (1897)). However, the decision in this case was not actually based on a free-floating substantive canon like the new major questions doctrine, but rather on “Congress’s failure to follow an extant drafting

theoretical and constitutional questions about the move the Court has made that are independent of the effects the doctrine will have. Put simply, even for those who are persuaded of the need for the courts to rein in delegation, we need to ask whether the form of the Court's intervention is constitutionally and legally defensible as a matter of interpretive law. I argue here that it is not.

This conclusion resists a strong current of conventional thinking. At first glance, the major questions doctrine appears to be just another substantive canon. These canons instruct judges to read statutory text in light of a substantive policy preference or constitutional background principles.⁸ For instance, the rule of lenity tells judges to favor criminal defendants where statutory language could be construed for or against the criminal defendant⁹; the presumption against preemption similarly tells judges to favor an otherwise permissible reading of a statute that does not have the effect of preempting state law¹⁰; and the *Gregory v. Ashcroft* clear statement rule tells judges to

convention" that the Court expected it to use when giving the ICC ratemaking power. See *Capozzi on the Future of the Major Questions Doctrine*, ADMINWANNABE.COM (Oct. 19, 2022), <https://adminwannabe.com/?p=114> [<https://perma.cc/DS39-USVT>]. Therefore, unlike the major questions doctrine recognized by the Court in *West Virginia*, the *Interstate Commerce Commission* ("ICC") case is consistent with an identifiable tradition in interpretive law of recognizing drafting conventions. See Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 493 (2002) (discussing Progressive and New Deal-era court practices that recognized drafting conventions for delegation); Beau J. Baumann, *The Turney Memo*, 97 NOTRE DAME L. REV. REFLECTION 170, 170–72 (2022) (discussing the importance of the "Turney Memo" for grounding this practice). In addition to not really serving as a precedent, by limiting itself to the subject matter of the drafting convention, i.e., ratemaking, the doctrine Capozzi identifies is significantly cabined on one of the key dimensions analyzed later in this Article: namely, the scope of application dimension. See *infra* Part II; Levin, *supra* note 6, at 47–48 ("Read in context, the clear statement language in [ICC] refers only to the need for clarity in regard to a rate-setting power.").

8. See Anita S. Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825, 833 (2017) (contrasting substantive canons with language canons and defining them as "principles and presumptions that judges have created to protect important background norms derived from the Constitution, common-law practices, or policies related to particular subject areas"); Nina A. Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court's First Decade*, 117 MICH. L. REV. 71, 82 (2018) ("Substantive canons represent a judicial thumb on the scale in favor of a particular norm. Clear statutory language or another distinct indication of meaning is usually required to overcome the canon's default result."); Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?*, 45 VAND. L. REV. 561, 563 (1992) (preferring the term "normative canons" and defining them as "principles, created in the federal system exclusively by judges, that do not purport to describe accurately what Congress actually intended or what the words of a statute mean, but rather direct courts to construe any ambiguity in a particular way in order to further some policy objective").

9. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 296 (2012) (defining the rule of lenity as a rule that "[a]mbiguity in a statute defining a crime or imposing a penalty should be resolved in the defendant's favor"); see also *United States v. Bass*, 404 U.S. 336, 348–49 (1971) (applying the rule of lenity).

10. SCALIA & GARNER, *supra* note 9, at 290 (defining the presumption against preemption as a rule that "[a] federal statute is presumed to supplement rather than displace state law"); see also *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 518–20 (1992) (applying the presumption against preemption).

default to interpretations of statutory text that do not infringe on matters core to state sovereignty unless the statute is devoid of any ambiguity on the intent to do so.¹¹ As can be seen just from these three examples, substantive canons run the gamut from relatively weak ambiguity “tiebreakers”¹²; to clear statement rules that demand not only a lack of ambiguity to overcome a default, but an affirmative and intentional congressional override of the default¹³; and finally to full-on “super-strong clear statement rules.”¹⁴ These canons also draw their policies from diverse theories. Some are based on constitutional principles,¹⁵ while others make “quasi-constitutional law” by making policy choices that cannot be traced to actual constitutional violations but which vindicate widely shared values.¹⁶ Sometimes, they are justified not as legal requirements from the Constitution or as societal norms, but as approximations of the background principles that Congress would want judges to assume in interpreting statutes,¹⁷ with obvious affinities with intentionalist or purposivist approaches to statutory interpretation; other times, they are justified as democracy-reinforcing devices, or as a way to improve the court-Congress dialogue.¹⁸

11. *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991) (“In light of the ADEA’s clear exclusion of most important public officials, it is at least ambiguous whether Congress intended that appointed judges nonetheless be included. In the face of such ambiguity, we will not attribute to Congress an intent to intrude on state governmental functions regardless of whether Congress acted pursuant to its Commerce Clause powers or § 5 of the Fourteenth Amendment.”).

12. See Ernest A. Young, “*The Ordinary Diet of the Law*: The Presumption Against Preemption in the Roberts Court,” 2011 SUP. CT. REV. 253, 308, 317 (describing the presumption against preemption as a “tiebreaker” that is often ignored in cases where there is no ambiguity).

13. Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2155 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014)) (“[P]resumptions framed as plain statement rules require something more: they demand language directly stating Congress’s intent to wade into the area encompassed by the plain statement rule.”).

14. William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 595 n.4 (1992) (defining “super-strong clear statement rules” as rules that “require very specifically targeted ‘clear statements’ on the face of the statute to rebut a policy presumption the Court has created,” and pointing to *Gregory v. Ashcroft*’s federalism clear statement rule as an example).

15. Mendelson, *supra* note 8, at 82.

16. Eskridge & Frickey, *supra* note 14, at 597–98 (arguing that the federalism clear statement rules create “quasi-constitutional law” by shifting the burden to Congress to exercise constitutional powers only in ways that give due regard to constitutional values that the Court believes are “underenforced”).

17. Mendelson, *supra* note 8, at 83; see also *infra* Section IV.B.1 (discussing arguments that the major questions doctrine gives effect to Congress’s intent).

18. See, e.g., Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 594–95 (1995) (discussing “a new conception of democratic legitimacy in statutory interpretation that” departs from a strict requirement of legislative supremacy and faithful agency by courts); see also *infra* Section IV.B.2 (evaluating the impact of the major questions doctrine on democracy).

Despite their surface tension with a hardline textualist approach to statutory interpretation,¹⁹ in practice substantive canons like these are routinely created and recognized by textualist courts. Recognizing this, some textualists have attempted to delineate circumstances wherein substantive canons can be reconciled with textualist commitments.²⁰ Nontextualists have likewise viewed canons as consistent with their approaches,²¹ and as perhaps preferable to bringing out the heavy artillery of counter-majoritarian constitutional review.²² It is no surprise, then, that when Justice Kagan accused the majority of inventing a “get-out-of-text-free car[d]” with the major questions doctrine in *West Virginia*, Justice Gorsuch was able to invoke ten occasions when Justice Kagan had relied on substantive canons.²³

Notwithstanding the ubiquity of substantive canons and the temptation of categorizing the major questions doctrine as a banal example of them, both Justices miss just how far the new major questions doctrine innovates with the conventional form of a substantive canon. Justice Gorsuch therefore understates the radical import of this particular canon, and Justice Kagan does not go nearly far enough in her critique, confining her concerns to a more general critique of all canons that does not carry much weight in light of the Court’s (and, indeed, her own) ready embrace of canons in countless domains. This

19. See, e.g., Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 123–24 (2010) (“Substantive canons are in significant tension with textualism . . . insofar as their application can require a judge to adopt something other than the most textually plausible meaning of a statute.”); Kavanaugh, *supra* note 13, at 2135–36 (stating textualist first principles and noting that the use of substantive canons—particularly those “depend[ent] on a problematic threshold dichotomy” between ambiguous and clear statutes—is in tension with textualist commitments to the supremacy of written law). For a recent and comprehensive review of the troubled relationship between textualism and substantive canons, see generally Benjamin Eidelson & Matthew C. Stephenson, *The Incompatibility of Substantive Canons and Textualism*, HARV. L. REV. (forthcoming) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4330403 [<https://perma.cc/J79W-PR24>]. Although their project was in part inspired by the Court’s reformulation of the major questions doctrine, they find that substantive canons probably ought to go entirely. *Id.* (manuscript at 5) (“[W]e conclude that substantive canons are generally just as incompatible with textualists’ jurisprudential commitments as they first appear.”). As laid out below, I agree with Eidelson and Stephenson’s assessment of the major questions doctrine, but I do not think it is necessary to throw out all substantive canons—rather, the major questions doctrine can and should be singled out among substantive canons.

20. See *infra* Section IV.A.1.

21. See *infra* Section IV.B.

22. See Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2113 (2015) (noting that “[t]he avoidance canon developed in large part to alleviate the countermajoritarian difficulty,” but also acknowledging that it can be used in a countermajoritarian fashion). For background on the countermajoritarian difficulty, see generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962). For a modern perspective defending judicial minimalism, see generally Cass R. Sunstein, *Thayerism* (Sept. 10, 2022) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4215816 [<https://perma.cc/JZ96-XJEG>].

23. *West Virginia v. EPA*, 142 S. Ct. 2587, 2625 & n.7 (2022) (Gorsuch, J., concurring) (quoting *id.* at 2641 (Kagan, J., dissenting) (alteration in original)).

Article argues that the new version of the major questions doctrine in fact has a unique combination of structural features—specifically, a theoretically boundless potential scope of applicability coupled with a weak relationship with authoritative law—that makes the doctrine meaningfully different from almost every canon that is currently recognized by the Court. While courts have routinely deployed substantive canons that have one or the other of these extreme features,²⁴ I show that they have almost never recognized any that, like the major questions doctrine, combine extremity on both dimensions at the same time. The lone exception, and the closest structural analog to the new major questions doctrine, is the much-maligned absurdity doctrine.²⁵ While the absurdity doctrine can be tolerated by textualists due to its long history,²⁶ the major questions doctrine does not have that luxury. The major questions doctrine’s novelty should have given all of the Justices on the Court more pause, and should now make it incumbent on the Court and scholars to articulate a satisfying account of the legitimacy of the new canon.

This Article thus undertakes a search for a justification of this novel form, but there is none to be found.²⁷ Indeed, if substantive canons can take the form that the major questions doctrine takes—which in effect allows systemic departure from plausible readings of statutes on the basis of judicial values and preferences that are at best weakly tethered to higher sources of law—they could swallow commitments to faithful agency in statutory interpretation whole, in the process seriously aggrandizing the courts at the expense of Congress.²⁸ These risks both help to explain why the modern Court has never,

24. I say extreme because both features alone put significant pressure on the role of courts in statutory interpretation, see *infra* text accompanying note 233, and in combination run serious constitutional risks of judicial aggrandizement, see *infra* Part IV.

25. For a seminal textualist critique of the absurdity doctrine, see generally John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387 (2003). See also Linda D. Jellum, *But That Is Absurd!: Why Specific Absurdity Undermines Textualism*, 76 BROOK. L. REV. 917, 932–39 (2011) (differentiating between general and specific absurdity and arguing that specific absurdity, in particular, undermines textualism); Katherine Kirklin O’Brien, *Beyond Absurdity: Climate Regulation and the Case for Restricting the Absurd Results Doctrine*, 86 WASH. L. REV. 635, 644–53 (2011) (discussing the problems created by the expansion of absurdity doctrine in the context of environmental law); John C. Nagle, *Textualism’s Exceptions*, ISSUES IN LEGAL SCHOLARSHIP, 2002, at 1, 2–5 (discussing three key costs to the absurdity doctrine exception). For a nontextualist defense, see generally Glen Staszewski, *Avoiding Absurdity*, 81 IND. L.J. 1001 (2006).

26. See *infra* Section IV.A.1.

27. See *infra* Part IV.

28. See *infra* Section IV.A.2. A growing literature on judicial “aggrandizement” attests to the concerns that the Roberts Court is systematically denigrating other branches in order to justify consolidation of decision-making within the judiciary (and, in light of the Court’s aggressive use of the shadow docket to police lower court decisions, see generally STEPHEN VLADECK, *THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC* (2023), really in the Court itself). See also Allen C. Sumrall & Beau J. Baumann, *Clarifying Judicial Aggrandizement*, U. PA. L. REV. ONLINE (forthcoming) (manuscript at 18–25) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4500159 [<https://perma.cc/S5UN-3U7X>] (describing the concept of “judicial self-aggrandizement” and claiming that it is “what

until this past term, taken this step, and why it should now take a step back to restore the legislative power that it has annexed.

The Article proceeds in four parts. Part I discusses the evolution of the major questions doctrine from its exception-to-*Chevron* form to its new status as a clear statement rule against delegation, explaining what that shift means in practice. Part II puts this shift into context with the Court's broader experience with substantive canons, in general, and with clear statement rules, in particular, showing that on two key dimensions—the scope of the canon's applicability and the canon's relationship with authoritative law—the Court has carefully avoided creating canons that combine extremity on both dimensions at the same time. Part III builds the core argument of this Article: that the new major questions doctrine, as a clear statement rule that applies to every exercise of legislative power by Congress (scope) and that has a weak, if not nonexistent, relationship with hard constitutional limits on congressional delegation of legislative power (authority), takes a step that no new substantive canon since the absurdity doctrine has taken. Finally, Part IV unpacks the implications of this novelty, suggesting that the Court's longstanding avoidance of canons with the features of the major questions doctrine marks the boundaries of legitimate substantive canons—boundaries which the major questions doctrine crosses.

I. THE NEW TERRAIN

It is a bedrock principle in the law that agencies have no authority that statutes do not give them.²⁹ What this means is that the opponents of regulatory programs can transform just about any grievance that they have with an agency action into a legal question about the agency's authority to do

is distinctive about . . . the Robert's Court[]"); Josh Chafetz, *The New Judicial Power Grab*, 67 ST. LOUIS U. L.J. 635, 637–52 (2023) (examining the “judicial power grab in three areas: election law, congressional oversight, and administrative law”).

29. Kevin M. Stack, *An Administrative Jurisprudence: The Rule of Law in the Administrative State*, 115 COLUM. L. REV. 1985, 1992, 1998 (2015) (discussing the “ultra vires” principle, which requires “authorization,” and stating that it is “a cornerstone of administrative law”). This principle is frequently observed by courts as agencies push the limits of their statutory authorities. See *City of Arlington v. FCC*, 569 U.S. 290, 297 (2013) (“Both [agencies’] power to act and how they are to act is authoritatively prescribed by Congress”); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (“Regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority ‘in a manner that is inconsistent with the administrative structure that Congress enacted into law.’” (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988))); *Gulf Fishermens Ass’n v. Nat’l Marine Fisheries Serv.*, 968 F.3d 454, 462 (5th Cir. 2020) (“Instead of identifying any intent to delegate authority here, the agency can claim only that Congress did not withhold the power the agency now wishes to wield. Once again, this is the argument that presumes power given if not excluded. We have resisted that siren song before, and we again decline to be seduced.” (citation omitted)). However, “[w]hile all agree that agencies can act only within the scope of their authorization, there is wide disagreement over how that scope is to be determined.” Stack, *supra*, at 1998.

it, and that, in turn, leaves courts with the keys to the kingdom. Despite this potentially extraordinary power to interpret away entire programs or even entire agencies, courts have in practice usually used their power more modestly, enforcing only violations of clear statutory limits on agency power and leaving agencies free to operate within the ambiguous interstices of statutes.³⁰ This historical tendency has, over the course of two years, been completely reversed. In the October 2021 Term, the U.S. Supreme Court announced that agencies will have no authority under their enabling statutes to do anything “major” *unless* it is clear that Congress intended to give the agency the authority to do so.³¹ The very next year, the Court doubled down, finding that a quintessentially open-ended delegation of authority to the Secretary of Education to “waive or modify any statutory or regulatory provision applicable to the student financial assistance programs” did not give clear authority to the Secretary to cancel student debt.³² In both cases, the Court relied on the major questions doctrine.³³

This is undoubtedly one of the most consequential changes in administrative law and statutory interpretation that we have ever seen.³⁴ While other scholars

30. THOMAS W. MERRILL, *THE CHEVRON DOCTRINE: ITS RISE AND FALL, AND THE FUTURE OF THE ADMINISTRATIVE STATE* 80–99 (2022) (documenting the gradual embrace of *Chevron*’s two-step framework by courts, which in practice allows agencies to exercise discretionary power if the statute is ambiguous); Nicholas R. Bednar & Kristin E. Hickman, *Chevron’s Inevitability*, 85 GEO. WASH. L. REV. 1392, 1398, 1404–08 (2017) (detailing the “dominance” of the *Chevron* framework and noting that “[c]ourts applying *Chevron* often found statutes ambiguous and deferred to agency interpretations with little apparent effort to discern statutory meaning through examination of text, history, or purpose”).

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

32. *Biden v. Nebraska*, 143 S. Ct. 2355, 2368 (2023) (quoting 20 U.S.C. § 1098bb(a) (1) (2018)).

33. In *Biden v. Nebraska*, the majority was a bit dodgy on this question, addressing the major questions doctrine only *after* concluding that the text did not support the agency’s assertion of authority. *See Biden*, 143 S. Ct. at 2371–72; *see also id.* at 2383–84 (Barrett, J., concurring) (noting that “[t]he Court surely could have ‘hi[t] the send button’ after the routine statutory analysis set out in Part III-A. But it is nothing new for a court to punctuate its conclusion with an additional point” (second alteration in original) (citation omitted)). Yet Justice Kagan is probably right that “[w]hen a court is confident in its interpretation of a statute’s text, it spells out its reading and hits the send button.” *See id.* at 2396 (Kagan, J., dissenting). The majority’s reading of the statutory text without the major questions doctrine is in fact rather flimsy. *See* Peter M. Shane, *Unforgiven: The Supreme Court and the Student Loan Conundrum*, WASH. MONTHLY (July 7, 2023), <https://washingtonmonthly.com/2023/07/07/unforgiven-the-supreme-court-and-the-student-loan-conundrum> [<https://perma.cc/Z8SA-Z644>] (criticizing the majority’s textual analysis).

34. The ultimate impact is, of course, yet to be determined, but there is every reason to believe the change will be at least as significant as the advent of the *Chevron* doctrine, which was described as a “revolution.” *See* Bednar & Hickman, *supra* note 30, at 1400 (“*Chevron* is often described as sparking a revolution. Certainly, with its famous two-step test, *Chevron* altered the *rhetoric* of judicial deference. In case after case, judges now ask first whether the meaning of the statute at issue is clear and then, if it is not, whether the administering agency’s interpretation of that statute is ‘permissible.’ Scholars also have argued that *Chevron* meaningfully shifted interpretive power from the judicial branch to administrative agencies by calling for strong, mandatory deference to implicit as well as explicit delegations of authority to fill statutory gaps. And one can

have recently focused on classifying and unpacking the implications of this doctrinal schism,³⁵ this Part covers the same terrain only in order to provide background for the rest of the Article. I draw on these early attempts to grapple with the new major questions doctrine and conclude, along with these other scholars, that what has happened is a shift from a limited major-questions-doctrine-as-exception-to-*Chevron* to a fundamentally different major-questions-doctrine-as-clear-statement-rule.³⁶ Along the way, I explain why that shift matters not just for how much agencies will be constrained by the new major questions doctrine, but also because it much more explicitly connects the new major

easily fashion a dramatic narrative arc for *Chevron* from the thirty years of jurisprudence and commentary that followed it.” (footnotes omitted)).

35. See generally Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009 (2023) (discussing how the new major questions doctrine works and suggesting that it will worsen political polarization and entrench minority rule); Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262 (2022) (arguing that the Court’s articulation of the major questions doctrine raises serious questions about its relationship to the nondelegation doctrine and constitutional avoidance); Richardson, *supra* note 1 (discussing the major questions doctrine’s antiregulatory implications); Levin, *supra* note 6 (critiquing the major questions doctrine on multiple grounds); Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933 (2017) (anticipating the Court’s embrace of a clear statement rule formulation of the major questions doctrine and critiquing it); Capozzi, *supra* note 7 (defending the clear statement rule formulation of the major questions doctrine); Jonathan H. Adler, *West Virginia v. EPA: Some Answers About Major Questions*, 2021–2022 CATO SUP. CT. REV. 37 (arguing that the Court missed an opportunity to clarify how the major questions doctrine should work in the mine’s run of cases); Kristin E. Hickman, *The Roberts Court’s Structural Incrementalism*, 136 HARV. L. REV. F. 75 (2022) (linking the new major questions doctrine, and its silences and contradictions, to the Roberts Court’s general preference for incrementalism); Chad Squitieri, *Who Determines Majorness?*, 44 HARV. J.L. & PUB. POL’Y 463 (2021) (critiquing the major questions doctrine from a textualist perspective, since there is no such thing as a coherent “intent of Congress” on what questions are major).

36. Of course, difficult questions arise when trying to classify doctrines as particular types of canons (e.g., linguistic/semantic vs. substantive), see generally Kevin Tobia & Brian Slocum, *The Linguistic and Substantive Canons*, HARV. L. REV. F. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4186956 [<https://perma.cc/3EVL-TJJ2>] (arguing that the line between linguistic and substantive canons is fuzzy, and that many substantive canons can be justified based on the linguistic justification that ordinary readers interpret statutes in line with substantive canons), or even as a canon at all, see generally Evan C. Zoldan, *Canon Spotting*, 59 HOUS. L. REV. 621 (2022) (suggesting a criteria for establishing what is a canon and what is not). The majority opinions in *West Virginia v. EPA* and *Biden v. Nebraska* carefully avoid saying anything to predetermine the matter, but as the analysis that follows shows, the major questions doctrine is almost certainly what Justices Gorsuch and Kagan say it is: a clear statement rule. This is not to say that the major questions doctrine could not in theory be justified as something other than a clear statement rule—Ilan Wurman attempts just that in arguing that the major questions doctrine articulated by *West Virginia* and other recent cases is really a “linguistic canon” that aims to understand the best semantic meaning of statutory text, see generally Ilan Wurman, *Importance and Interpretive Questions*, 109 VA. L. REV. (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4381708 [<https://perma.cc/B7HF-9DZ4>], and Justice Amy Coney Barrett does something similar in her concurring opinion in *Biden v. Nebraska*, saying that the major questions doctrine merely “situates text in context, which is how textualists, like all interpreters, approach the task at hand,” *Biden v. Nebraska*, 143 S. Ct. 2355, 2378 (2023) (Barrett, J., concurring)—but it is to say that this is not really a plausible interpretation of what the majority of the Justices are doing with the major questions doctrine.

questions doctrine to the law of substantive canons of statutory interpretation (the limits of which I discuss in Parts II and III).

A. *BIRTH: THE MAJOR-QUESTIONS-DOCTRINE-AS-EXCEPTION-TO-CHEVRON*

From 1984 until very recently, courts confronting questions about agencies' statutory authority usually deployed the well-known *Chevron* doctrine.³⁷ Under this doctrine, courts first ask “whether Congress has directly spoken to the precise question at issue.”³⁸ In answering this question, courts will look at the “traditional tools of statutory construction.”³⁹ If, after exhausting these tools, the meaning of the statute on the question at issue is still ambiguous, courts will then ask whether the agency's interpretation is reasonable.⁴⁰ Among other potential justifications, this “deference” to reasonable agency interpretations of ambiguous statutes might be thought defensible because of a theory of implicit delegation—that is, that when a statute is irreducibly ambiguous, it is reasonable to presume that Congress intended to delegate discretion to the agency to flesh out the statute where Congress lacked specific intent.⁴¹ There are many wrinkles to *Chevron's* analysis and an entire cottage industry of law review articles and commentary about

37. MERRILL, *supra* note 30, at 94–97; *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

38. *Chevron*, 467 U.S. at 842.

39. *Id.* at 843 n.9.

40. *Id.* at 843.

41. See JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION: CASES AND MATERIALS 1118 (4th ed. 2021) (“*Chevron* itself, and subsequent cases and commentary, have grounded *Chevron* deference in a presumption (perhaps a legal fiction) about congressional intent. . . . *Chevron* pointed out that settled constitutional law allows Congress to delegate to an agency the authority to make discretionary policy decisions, so long as Congress satisfies the weak requirement of supplying a sufficiently intelligible principle In the context of such statutes, a court fulfills its responsibility to ‘say what the law is’ (for purposes of *Marbury*) or to ‘interpret . . . statutory provisions’ (for purposes of the APA) by ascertaining whether the agency has stayed within the bounds of its delegated authority.” (third alteration in original)); Ronald M. Levin, *The APA and the Assault on Deference*, 106 MINN. L. REV. 125, 186 (2021) (outlining the delegation theory supporting *Chevron* deference).

how many distinct steps are involved in this analysis⁴² and what it means to say that a statute does not speak directly to the question at issue.⁴³

One such wrinkle was the major questions doctrine circa 2000–2021. In *FDA v. Brown & Williamson Tobacco Corp.*,⁴⁴ the Court concluded “[its] inquiry into whether Congress ha[d] directly spoken to the precise question at issue”—i.e., whether the Food, Drug, & Cosmetic Act gave the Food and Drug Administration (“FDA”) authority to regulate nicotine as a drug and cigarettes as medical devices—by noting that “[i]n extraordinary cases, . . . there may be reason to hesitate before concluding that Congress has intended . . . an implicit delegation.”⁴⁵ In the case, the Court emphasized that the tobacco “industry constitut[ed] a significant portion of the American economy,” and that “the breadth of the authority that the FDA ha[d] asserted” would have altered “a distinct regulatory scheme” under which Congress had “repeatedly acted to preclude any agency from exercising significant policymaking authority.”⁴⁶

Thus was born the major questions doctrine,⁴⁷ as it came to be known.⁴⁸ Functionally, it played the role of undergirding a particularly flimsy application

42. See, e.g., Cary Coglianese, *Chevron’s Interstitial Steps*, 85 GEO. WASH. L. REV. 1339, 1359, 1361–63 (2017) (reconceptualizing *Chevron* as a multistep “staircase” on the way to deference); Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 873 (2001) (incorporating *Christensen v. Harris County*, 529 U.S. 576 (2000), into the *Chevron* framework and arguing that it creates a “step zero” before even beginning the traditional *Chevron* analysis); Daniel J. Hemel & Aaron L. Nielson, *Chevron Step One-and-a-Half*, 84 U. CHI. L. REV. 757, 760–61 (2017) (arguing for a “Step One-and-a-Half” that asks whether the agency “recognized that it was dealing with an ambiguous statute”); Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597, 598–600 (2009) (arguing that the *Chevron* doctrine boils down to one essential inquiry into whether the agency’s interpretation of the statute is “reasonable”); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 213–16 (2006) (explaining the role of *United States v. Mead Corp.*, 533 U.S. 218 (2001), in creating “the Step Zero question”).

43. See MERRILL, *supra* note 30, at 105–07.

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

45. *Id.* at 125, 159.

46. *Id.* at 159–60.

47. Some scholars trace the origins of the major questions doctrine well before *Brown & Williamson Tobacco* to *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 (1980) (“the *Benzene Case*”). See, e.g., Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2044 (2018) (“The *Benzene Case* provides the clearest precedent for the major questions doctrine.”); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 334 (2000). The *Brown & Williamson Tobacco* Court itself seemed to think that *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218 (1994), was precedent. See *Brown & Williamson Tobacco*, 529 U.S. at 160–61. However, it was only with *Brown & Williamson Tobacco* that commentators began to recognize that these tendencies were more than a blip. See Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777, 787 (2017) (“Though it had precursors, the majorness inquiry first crystallized in *FDA v. Brown & Williamson Tobacco Corp.*” (footnote omitted)); Deacon & Litman, *supra* note 35, at 1021 (“Though it has roots in earlier cases such as *MCI Telecommunications Corp. v. AT&T*, the major questions inquiry was most clearly incorporated into the *Chevron* framework in *FDA v. Brown & Williamson Tobacco Corp.*” (footnote omitted)).

48. One of the first uses of the moniker “major questions doctrine” might have been in Justice Breyer’s academic writing. See Stephen Breyer, *Judicial Review of Questions of Law and Policy*,

of *Chevron's* step one.⁴⁹ It was as if the *Brown & Williamson Tobacco* majority understood that the application of traditional tools of statutory construction was not particularly successful in eliminating ambiguity, but used the major questions doctrine as an ambiguity tiebreaker. If we take the words in the opinion literally, the Court conceptualized the major questions doctrine as an exception to the ordinary progression to step two of *Chevron* when there is an otherwise ambiguous statutory text—the Court should “hesitate” before taking that step and expand its willingness to deploy an aggressive form of statutory analysis at step one.⁵⁰

As others have documented in more detail, this is basically how the major questions doctrine functioned for two decades.⁵¹ It made sporadic appearances, providing little guidance on the questions that qualified as major.⁵² And, importantly, it always worked as an exception to *Chevron* deference: instead of deferring when a statute did not precisely speak to the question at issue, the Court would discern which of several possible readings of a statute was the best (or at least what counted as a permissible⁵³) reading of the statute. This is the case even though sometimes the Court disconnected the major questions doctrine from the application of *Chevron* deference altogether. For instance, in *King v. Burwell*, the Court drew on the major questions doctrine as a prelude to its de novo analysis of whether the Affordable Care Act had made federal tax credits available on state insurance exchanges.⁵⁴ After reciting the *Chevron* two-step framework, the Court explained that its approach was “premised on the theory that a statute’s ambiguity constitutes an implicit

38 ADMIN. L. REV. 363, 370 (1986) (“Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute’s daily administration.”). The Court itself did not use “major questions doctrine” until *West Virginia v. EPA*.

49. MANNING & STEPHENSON, *supra* note 41, at 1196 (“Perhaps *Brown & Williamson's* reliance on otherwise questionable sorts of legislative history was driven by a deeper concern about whether Congress would have delegated to the FDA the authority to regulate tobacco.”).

50. *Brown & Williamson Tobacco*, 529 U.S. at 159.

51. See Deacon & Litman, *supra* note 35, at 1020–21 (“In [major questions] cases, the Court has suggested either that an issue should not be analyzed using the *Chevron* framework because Congress did not authorize agencies to resolve the issue due to its majorness, or that the *Chevron* analysis operates differently because the agency policy is a major one.”).

52. Monast, *supra* note 3, at 448–49 (“More is unclear than clear about the bounds of the major questions doctrine at this stage. The doctrine is defined in the most general of terms, providing little guidance to courts or to federal agencies evaluating their statutory mandates.”).

53. One of the more interesting cases in the major questions doctrine line of cases is *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014) (“*UARG*”), which located the major questions doctrine in step two of *Chevron*. See Deacon & Litman, *supra* note 35, at 1022 (“[I]n *Utility Air Regulatory Group v. EPA (UARG)*, the Court also appeared to locate the major questions doctrine within *Chevron*.”). In some sense, this was the most logical place to put the major questions doctrine—much more sensible, at least, than prematurely concluding that the text was ambiguous and launching into de novo review, as the *King v. Burwell* Court did. *King v. Burwell*, 576 U.S. 473, 485–86, 490–93 (2015).

54. *King*, 576 U.S. at 485–86.

delegation,” but that “[i]n extraordinary cases . . . there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.”⁵⁵ In contrast with *Brown & Williamson Tobacco*, the *King v. Burwell* Court conceptualized the major questions doctrine as a full-fledged exception to *Chevron* that precedes the statutory analysis and directs the Court to de novo review.⁵⁶ Even though this approach ostensibly decoupled the major questions doctrine from *Chevron*, this is a difference without any meaning. The majority’s de novo statutory analysis comes nowhere close to proving, as it purports to do, that the agency’s interpretation of the statute was actually the best interpretation of the statute.⁵⁷ The majority’s analysis drew a sharp dissent and has inspired deep and persistent criticism in academic and public commentary.⁵⁸ *King v. Burwell* was a quintessential *Chevron* step two case that was stopped by operation of the major questions doctrine. Although the Court ultimately did not disagree with the agency’s own interpretation,⁵⁹ making this a somewhat gratuitous invocation of the major questions doctrine,⁶⁰ its form—an exception to *Chevron*’s ordinary order of operations in interpreting statutes—was something quite familiar.

To sum up, as best as anyone could guess by the end of the 2010s, the major questions doctrine could be fully incorporated into *Chevron*’s basic framework in one of three distinct ways: as a tiebreaker at step one (*Brown & Williamson Tobacco*)⁶¹; as a full-fledged exception to *Chevron* deference triggering de novo review (*King v. Burwell*)⁶²; or as a reason to find an agency’s

55. *Id.* at 485 (quoting *Brown & Williamson Tobacco*, 529 U.S. at 159).

56. *Id.* at 486 (“It is instead our task to determine the correct reading of Section 36B.”).

57. See Ryan D. Doerfler, *The Scrivener’s Error*, 110 NW. U. L. REV. 811, 811 (2016) (calling the majority’s textual reading of the statutes “implausible”).

58. *King*, 576 U.S. at 498–518 (Scalia, J., dissenting); see Richard M. Re, *The New Holy Trinity*, 18 GREEN BAG 2D 407, 413–15 (2015); Jonathan H. Adler & Michael F. Cannon, *King v. Burwell and the Triumph of Selective Contextualism*, 2014–2015 CATO SUP. CT. REV. 35, 35–36 (“[T]he Court effectively rewrote the statutory text . . .”). Not all commentators were so critical. See Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress’s Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 63–64 (2015) (arguing that the majority in *King v. Burwell* correctly refused to “take the bait” laid before it by a narrow focus on a few contested words, and that the majority deftly responded to “Congress’s plan”).

59. *King*, 576 U.S. at 498 (majority opinion).

60. The invocation of the major questions doctrine in *King v. Burwell* did have the effect of petrifying the Court’s/agency’s interpretation of the relevant statutes; IRS could not invoke *Chevron* to change its interpretations over time. Cf. *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) (holding, in effect, that agencies will not receive *Chevron* deference—and therefore will not be able to change policy freely, at least as long as the interpretation is reasonable—if a prior judicial decision determines that the agency has not been delegated discretion); see also Richard J. Pierce, Jr., *Chevron and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 313 (1988) (acknowledging that *Chevron* gives agencies flexibility to change their interpretations at step two, implying that they do not have this flexibility when the court resolves the issue at step one).

61. See *supra* notes 44–50 and accompanying text.

62. See *supra* notes 54–60 and accompanying text.

interpretation of an ambiguous statute unreasonable at step two (*Utility Air Regulatory Group*).⁶³ In all of these manifestations, the doctrine played the important, but limited, role of giving courts, rather than agencies, the final say in certain cases “of deep ‘economic and political significance’”⁶⁴ where, after an exhaustive application of the traditional tools of statutory construction, residual ambiguity remained. This doctrine was controversial,⁶⁵ but that controversy was nothing compared to the controversy following its eventual metamorphosis starting in the October 2021 Term.

B. METAMORPHOSIS: THE MAJOR-QUESTIONS-DOCTRINE-AS-CLEAR-STATEMENT-RULE

It is worth starting with the observation that both the major questions doctrine and *Chevron* deference at step two were almost entirely absent in the Court’s administrative law cases around the turn of the decade.⁶⁶ These two trends, which on their surface seem in tension, can be easily explained by the Court’s ability to resolve agencies’ statutory cases by concluding at *Chevron* step one, without the aid of the major questions doctrine, that the statute could not be interpreted as ambiguous.⁶⁷ These cases demonstrate the limited utility of the major-questions-doctrine-as-exception-to-*Chevron* as a constraint on agency authority. It is generally possible to assemble a coalition holding that a statute is unambiguous at step one, and particularly so when one has a solid ideological majority, as the Court’s more conservative wing more consistently did after the appointment of Justices Gorsuch, Kavanaugh, and Barrett.⁶⁸ There is just one problem with this approach: it is still quite costly

63. See *supra* note 53.

64. *King*, 576 U.S. at 486.

65. See generally Heinzerling, *supra* note 35 (critiquing the major questions doctrine on a number of grounds, including its deregulatory skew and lack of pedigree); Emerson, *supra* note 47 (critiquing the major questions doctrine’s shift of power from the executive to the judiciary on democratic and constitutional grounds); Beau J. Baumann, *Americana Administrative Law*, 111 GEO. L.J. 465 (2023) (arguing that the major questions doctrine disrespects Congress); Natasha Brunstein & Richard L. Revesz, *Mangling the Major Questions Doctrine*, 74 ADMIN. L. REV. 217 (2022) (arguing that the doctrine empowered judges to disapprove of agency actions that they did not favor).

66. Nathan Richardson, *Deference Is Dead (Long Live Chevron)*, 73 RUTGERS U. L. REV. 441, 485 (2021) (noting “a total collapse of deference to agency statutory interpretations”); *id.* at 487–91 (noting that, in the fifteen cases in which the Supreme Court actually cited *Chevron* from 2015 to 2021, the agency got deference only once (in *Cuozzo Speed Technologies, LLC v. Lee*, 136 S. Ct. 2131 (2016))); that in two of the other agency “wins” the Court held that the agency’s interpretation was required by the statute; and that in the remaining twelve cases where the agency “lost,” “[t]he most common [reason] was simple rejection of the agency interpretation as contrary to clear congressional intent at Step One, focused almost entirely on the statutory text”).

67. Richardson, *supra* note 66, at 463–64 (noting that review of statutory questions at *Chevron* step one had the potential to render *Chevron*’s rule of deference illusory); *id.* at 491 (noting “a broad consensus in favor of a robust, nearly all-encompassing, and predominantly textualist Step One”).

68. See, e.g., Ron Elving, *How the Supreme Court’s Conservative Majority Came to Be*, NPR (July 1, 2023, 10:00 AM), <https://www.npr.org/2023/07/13/1185496055/supreme-court-conservative>

for Justices to engage in the kind of public statutory analysis that would make it at least plausible to argue in a published opinion that there is little to no ambiguity in a statute. In many cases, the statute is simply not very clear, and a judge needs to invest significant energy to justify a claim that the statute is clear (particularly if the court is displacing an agency's interpretation). If the number of cases where a statute is genuinely somewhat ambiguous is at all high, it will not be very sustainable to wage a widescale attack on agency discretion via exhaustion of traditional tools of statutory construction at *Chevron* step one. One can do only so many *King v. Burwells* before it becomes obvious that judges, too, are making policy decisions within the zone of statutory ambiguity.

In what others have called “the new major questions doctrine,”⁶⁹ the Justices found a device that allows them to work around this problem by obviating much of the need for any statutory analysis at all. In just two years, the Court has managed to invoke this new device four times to strike down two federal agency policies addressing the spread of COVID-19, one federal agency policy addressing carbon dioxide pollution, and one policy canceling student loan debts. These cases are worth discussing individually, so as to illuminate the contours of this new doctrinal framework.

The first of these cases—*Alabama Ass'n of Realtors v. Department of Health & Human Services*—was a shadow docket case concerning the eviction moratorium promulgated by the Centers for Disease Control and Prevention (“CDC”).⁷⁰ Under this policy, landlords were prohibited from evicting tenants due to the CDC's conclusion that evictions during a pandemic created risk of transmission and spread of COVID-19.⁷¹ For statutory authority, the CDC drew on the Public Health Service Act (“the Act”), a 1944 statute that in relevant part delegated authority to promulgate regulations to control communicable diseases.⁷² The Court dedicated one paragraph of analysis to rebutting the CDC's claim that the Act provided the agency with the authority to promulgate the moratorium.⁷³ According to the Court, the moratorium “relate[d] to interstate infection far more indirectly” than the forms of intervention specifically mentioned in the statute.⁷⁴ Although the Court might have invoked linguistic canons, such as *ejusdem generis* or *noscitur a sociis*, to carefully explain why “other measures” should be interpreted narrowly in light of other

-majority-thomas-trump-bush [<https://perma.cc/QYL4-AX6F>] (linking “the [C]ourt's dramatic swing to the right” to “the weight of three conservative justices appointed by former President Donald Trump and confirmed by a Republican-controlled Senate during his term”).

69. Deacon & Litman, *supra* note 35, at 1014–15.

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

71. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292, 55,293 (Sept. 4, 2020).

72. *Id.* (first citing 42 U.S.C. § 264; and then citing 42 C.F.R. § 70.2).

73. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2487.

74. *Id.* at 2488.

interventions specifically mentioned,⁷⁵ it instead arrived quickly at its impressionistic conclusion that “it is a stretch to maintain that [the statute] gives the CDC the authority to impose this eviction moratorium.”⁷⁶ Then came the major questions doctrine: almost as a hypothetical, the Court noted that “[e]ven if the text were ambiguous, the sheer scope of the CDC’s claimed authority under [the statute] would counsel against the Government’s interpretation.”⁷⁷ And from this premise, the Court stated that it “expect[s] Congress to speak clearly when authorizing an agency to exercise powers of ‘vast ‘economic and political significance.’”⁷⁸

On a surface level, it is perhaps possible to attempt to square this analysis with the major questions doctrine of yore,⁷⁹ but the Court’s casual statutory analysis belies that effort.⁸⁰ It is very difficult to believe that the major questions doctrine was being used in this case as some kind of ambiguity tiebreaker or as a trigger for full-fledged de novo review; instead, the major questions doctrine is apparently the tail that wags the statute. This has the effect of alleviating the Court of the duty to explain why the statute is unambiguous, since the Court can always fall back on its conclusion that an ambiguity would not result in any deference anyway.

This change initiated by *Alabama Ass’n of Realtors* became yet clearer in *National Federation of Independent Business v. OSHA*, which concerned a less-peripheral Biden Administration effort to curb the spread of COVID-19.⁸¹

75. SCALIA & GARNER, *supra* note 9, at 199 (defining the *ejusdem generis* canon as a rule that says “[w]here general words follow an enumeration of two or more things, they apply only to persons or things of the same general kind or class specifically mentioned”); *id.* at 195 (defining the *nosctur a sociis* canon as a rule that says “[a]ssociated words bear on one another’s meaning”). For an opinion that takes this step with the Public Health Service Act (although problematically), see *Health Freedom Def. Fund, Inc. v. Biden*, 599 F. Supp. 3d 1144, 1159–60 (M.D. Fla. 2022).

76. *Ala. Ass’n of Realtors*, 141 S. Ct. at 2488.

77. *Id.* at 2489.

78. *Id.* (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000))). Note the subtle manipulation through selective quotation of what the cases had said—the quoted text from both *UARG* and *Brown & Williamson Tobacco* did not say anything about an expectation that Congress speak clearly. In full context, they simply reiterate the major-questions-doctrine-as-exception-to-*Chevron* rule that when there are questions of “vast ‘economic and political significance,’” the Court will decide what the statute means for itself. *Id.*

79. Deacon & Litman, *supra* note 35, at 1025 (“In some ways, the eviction moratorium case was in line with major questions cases that came before. The Court claimed that the text leaned against the agency’s interpretation—or perhaps foreclosed it—even absent invocation of the major questions doctrine.”); Baumann, *supra* note 65, at 467–68 (arguing that the *Alabama Ass’n of Realtors* case still treated the major questions doctrine as a tool of statutory interpretation).

80. Deacon & Litman, *supra* note 35, at 1025–26 (“But partly what was notable about the opinion was the relative space given to ostensibly interpretive tools—reading the grant of authority to the CDC in light of the statute’s specific examples of measures the agency could take—versus the Court’s reasons for concluding the rule was major, such as the novelty of the regulation and the breadth of the Government’s theory of agency authority.”).

81. *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab., OSHA*, 142 S. Ct. 661, 662 (2022).

The Occupational Safety and Health Administration (“OSHA”) promulgated an employer vaccine mandate⁸² under its authority to promulgate emergency temporary standards when the Secretary of Labor “determines that employees are subject to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and an [emergency temporary standard] is necessary to protect employees from such danger.”⁸³ Under the OSHA standard, employers with more than one hundred employees would have to ensure that all of their workers received a COVID-19 vaccination unless they could be fitted into exceptions for employees who worked at home or outdoors.⁸⁴ The mandate was immediately challenged in multiple courts of appeals, and the multicircuit lottery consolidated the case in the Sixth Circuit, which promptly lifted a stay previously imposed by the Fifth Circuit.⁸⁵ The Supreme Court then reversed the Sixth Circuit’s decision to lift the stay of the implementation of the mandate because it concluded that the challengers were “likely to succeed on the merits of their claim that the Secretary lacked authority to impose the mandate.”⁸⁶ Quoting its decision in *Alabama Ass’n of Realtors* that it “expect[s] Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance,”⁸⁷ the Court moved to the nub of the issue—“[W]hether the Act plainly authorizes the Secretary’s mandate.”⁸⁸

The Court’s analysis reveals how stringent this clear statement rule is. It was not clear enough for the Court that the mandate undoubtedly applied to a real workplace hazard—nobody disputed that COVID-19 could be spread through workplace transmission. Instead, the Court demanded that Congress specify that it wished to authorized OSHA to issue emergency temporary standards for workplace hazards that also happen to be more general hazards.⁸⁹ One might reasonably suppose a statute that gives an agency authority to regulate a hazard that occurs within the workplace would not need to specify that it *still* applies even when those hazards also exist outside the workplace. But for the Court, the term *occupational hazard* was not clear enough to support this inference, and it expressed concerns that the “universal risk” of COVID-19 would mean that OSHA could “regulate the hazards of daily life

82. COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61,402, 61,402 (Nov. 5, 2021) (to be codified at 29 C.F.R. pts. 1910, 1915, 1917, 1918, 1926, 1928).

83. *Id.* (citing 29 U.S.C. § 655(c)(1)).

84. *Id.* at 61,403, 61,419.

85. *OSHA*, 142 S. Ct. at 664.

86. *Id.* at 664–65.

87. *Id.* at 665 (quoting *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021)). Note the convenient elimination of “internal quotation marks” from the selective quotation discussed *supra* note 78. Here, the Court presents the quotation as maxim free and clear of any encumbrances, but of course this is laundered through *Alabama Ass’n of Realtors*.

88. *Id.*

89. *Id.*

... simply because most Americans have jobs and face those same risks while on the clock.”⁹⁰ There is nothing resembling ordinary statutory analysis here; indeed, there cannot be any serious argument that the OSHA standard was not within the literal scope of the statute, targeted as it was at safety and health hazards that do in fact affect workers at the workplace. Instead, the Court says if Congress wants to give OSHA authority to regulate workplace hazards that happen to also occur outside the workplace and that “cannot be undone at the end of the workday,” it needs to specify that.⁹¹ This is a clear statement rule, not an ambiguity tiebreaker. A tiebreaker would have forced the Court to grapple with the statute and show that there was in fact an ambiguity in the statute. The major-questions-doctrine-as-clear-statement-rule relieves the Court of any obligation to show convincingly that there is a genuine ambiguity in the statute. As Dan Deacon and Leah Litman have suggested, this rule seems to limit Congress’s authority to regulate even through “broadly worded, otherwise unambiguous statute[s].”⁹²

The next development in this story of transformation came in *West Virginia*.⁹³ This case concerned a regulation called the Clean Power Plan, promulgated by the U.S. Environmental Protection Agency (“EPA”).⁹⁴ Although the regulation dated back to the Obama Administration, it became newly justiciable because the D.C. Circuit invalidated the Trump Administration’s attempted rescission of the Clean Power Plan, causing it to automatically

90. *Id.*

91. *Id.* (quoting *In re MCP* No. 165, 20 F.4th 264, 274 (6th Cir. 2021) (Sutton, C.J., dissenting)).

92. Deacon & Litman, *supra* note 35, at 1037 (emphasis omitted).

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

94. The Clean Power Plan was really two separate rules, the first triggering the second under order of statute. *See id.* at 2601 (explaining that “[u]nder Section 111(d) [of the Clean Air Act], once EPA ‘has set *new* source standards addressing emissions of a particular pollutant under . . . section 111(b),’ it must then address emissions of that same pollutant by existing sources— but only if they are not already regulated under the NAAQS or HAP programs” (citation omitted) (quoting Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662, 64,711 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60)). EPA first issued standards for carbon emissions from new plants, see Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,510, 64,511–12 (Oct. 23, 2015) (to be codified at 40 C.F.R. pts. 60, 70, 71, 98), and then that triggered an obligation to regulate carbon emissions from existing sources under 42 U.S.C. § 7411(d), which EPA fulfilled by promulgating Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662, 64,941 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60). The latter is most often referred to as the “Clean Power Plan” because the most significant sources of carbon pollution are existing sources. *See* RICHARD L. REVESZ & JACK LIENKE, STRUGGLING FOR AIR: POWER PLANTS AND THE “WAR ON COAL” 30–31 (2016) (discussing the “old plant” problem under the Clean Air Act, which was created by a compromise that generally exempted existing power plants from the most stringent regulation (with provisions like 42 U.S.C. § 7411(d) being the exception that proves the rule)).

revert into legal effect.⁹⁵ Surprisingly, the Supreme Court decided to review the case despite this peculiar procedural posture and despite EPA's promise that it was actively looking to replace the Clean Power Plan and that it would not enforce the Clean Power Plan in the meantime.⁹⁶ The Clean Power Plan was premised on EPA's authority under Section 111(d) of the Clean Air Act to require states to implement emission control "system[s]" on the existing fleet of power plants.⁹⁷ In the Clean Power Plan, EPA interpreted the language "best system of emission reduction . . . adequately demonstrated" to permit it to go "beyond the fence line" of plants and regulate so-called "generation shifting" strategies—i.e., retire power plants with higher emissions (generally coal-fired power plants) and replace them with less carbon-intensive generation sources like natural gas or renewable energy or purchase emission allowances that would offset continued pollution.⁹⁸ In other words, EPA interpreted the Clean Air Act as permitting EPA to set emissions targets for states based not just on technological control standards that could be implemented at the plant, but also on what might be possible if states were to implement a cap-and-trade system or replace coal generation with natural gas or renewable generation to meet the emissions targets.

Again, the Court invoked the major questions doctrine, this time (for the first time) by name.⁹⁹ To its credit, the Court worked to package the major questions doctrine as a natural extension of the earlier ambiguity tiebreaker approach, noting that in *Alabama Ass'n of Realtors* and *National Federation of Independent Business* the "regulatory assertions had a colorable textual basis" but were rejected because the Court "presume[s] that 'Congress intends to make major policy decisions itself, not leave those decisions to agencies.'"¹⁰⁰ Yet the Court's analysis again revealed that the major questions doctrine being wielded by the Court was more akin to a clear statement rule than an ambiguity tiebreaker. The Court itself said as much when it stated that Congress would have to provide "something more than a merely plausible textual basis for the agency action"—namely, a "clear congressional authorization."¹⁰¹ It also said as much through its cursory analysis of the statutory question at the core of

95. See *West Virginia*, 142 S. Ct. at 2605–06 (citing *Am. Lung Ass'n v. EPA*, 985 F.3d 914, 995 (D.C. Cir. 2021)).

96. *Id.* at 2606; see also Jonathan H. Adler, *Supreme Court Agrees to Hear Case Challenging EPA Authority to Regulate Greenhouse Gases*, REASON: THE VOLOKH CONSPIRACY (Oct. 29, 2021, 5:03 PM), <https://reason.com/volokh/2021/10/29/supreme-court-agrees-to-hear-case-challenging-epa-authority-to-regulate-greenhouse-gases> [<https://perma.cc/U2Y2-RNDX>] (explaining why it surprised many people that the Court agreed to grant certiorari).

97. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. at 64,663–64 (citing 42 U.S.C. § 7411(d)).

98. *Id.* at 64,728–29, 64,764, 64,765 n. 497 (alteration in original).

99. *West Virginia*, 142 S. Ct. at 2609.

100. *Id.* (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)).

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

the case—whether a cap-and-trade system was a “system of emission reduction” under the Clean Air Act.¹⁰² Rather than attempting to answer the question as a matter of statutory interpretation, the Court scanned the statute for a clear statement and found that the “empty vessel” that is the word *system* could not meet that standard.¹⁰³ It concluded its brief statutory reflection by noting that the statutory arguments about how *system* could bear the meaning assigned to it by EPA “concern an interpretive question that is not at issue[.] [w]e have no occasion to decide whether the statutory phrase ‘system of emission reduction’ refers *exclusively* to measures that improve the pollution performance of individual sources.”¹⁰⁴ The Court could hardly be more transparent: under the major questions doctrine, it is irrelevant what the statute could be fairly understood to mean; the decisive factor is that Congress was not clear enough to meet the Court’s unstated standard for clarity.

Finally, about a year after *West Virginia*, the Court in *Biden v. Nebraska* broke its silence¹⁰⁵ and applied the major questions doctrine to nix the Secretary of Education’s decision to cancel between ten-thousand dollars and twenty-thousand dollars in student loan debt for eligible borrowers.¹⁰⁶ The Secretary drew for authority on the Higher Education Relief Opportunities for Students Act of 2003 (“HEROES Act”), which provided that the Secretary could “waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the [Education Act] as the Secretary deems necessary in connection with a war or other military operation or national emergency.”¹⁰⁷ Unlike in *West Virginia*, the Court began with a textual analysis, emphasizing that the term “‘modify’ d[id] not authorize ‘basic and fundamental changes in the scheme’ designed by Congress,”¹⁰⁸ and that the Secretary’s forgiveness of 430 billion dollars in federal debt could not be understood as “‘moderate’ or ‘minor.’”¹⁰⁹ Neither was what the Secretary

102. *Id.* at 2615.

103. *Id.* at 2614.

104. *Id.* at 2615.

105. In the interim, the *West Virginia* decision percolated through the lower courts. *See generally* Natasha Brunstein, *Taking Stock of West Virginia on Its One-Year Anniversary*, YALE J. ON REGUL. (June 18, 2023), <https://www.yalejreg.com/nc/taking-stock-of-west-virginia-on-its-one-year-anniversary-by-natasha-brunstein> [<https://perma.cc/MBL6-EKLZ>] (summarizing trends in the lower courts). Although these developments are important for the major questions doctrine’s ultimate impact and may ultimately lead to a very different kind of major questions doctrine than the Supreme Court has in mind, here I focus on the Supreme Court’s applications, since I am mostly interested in exploring the defensibility of the doctrine on the Court’s terms.

106. *Biden v. Nebraska*, 143 S. Ct. 2355, 2362 (2023).

107. 20 U.S.C. § 1098bb(a)(1). The HEROES Act also required the Secretary to only issue waivers “as may be necessary to ensure that . . . recipients of student financial assistance . . . who are affected individuals are not placed in a worse position financially in relation to that financial assistance because of their status as affected individuals.” *Id.* § 1098bb(a)(2)(A).

108. *Biden*, 143 S. Ct. at 2368 (quoting *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 225 (1994)).

109. *Id.* at 2369.

did a “waiver” under the statute (which carries no implied restrictions) because “the Secretary does not identify any provision that he is actually waiving.”¹¹⁰ Only after this textual analysis did the majority turn to the major questions doctrine, invoking it to rebut the government’s arguments based on congressional purpose.¹¹¹ The majority argued that the debt cancellation easily qualified as major,¹¹² and it stated that, in order to survive review under the major questions doctrine, the Secretary would have “to ‘point to “clear congressional authorization”’ to justify the challenged program.”¹¹³ The majority then concluded that “the HEROES Act provides no authorization for the Secretary’s plan even when examined using the ordinary tools of statutory interpretation—let alone ‘clear congressional authorization’ for such a program.”¹¹⁴

On the surface, the majority opinion in *Biden v. Nebraska* muddies the waters. Chief Justice Roberts claimed that the same result would have been required even without the major questions doctrine.¹¹⁵ Read for all it is worth, this might suggest that the Court prefers to invoke the major questions doctrine only *after* conducting a traditional textualist analysis. If the major questions doctrine is primarily invoked to bolster *de novo* interpretations of statutory meaning, it might seem that we are back in major-questions-as-exception-to-*Chevron* land: in particular, this order of operations might seem to be similar to the Court’s order of operations in *Brown & Williamson Tobacco* (i.e., try to determine the semantic meaning of text first, then fall back on the major questions doctrine as an ambiguity tiebreaker). However, it is far more likely that the Court still construes the major questions doctrine as a clear statement rule and simply moved it after its *de novo* statutory interpretation for political purposes. As Peter Shane notes, “[t]he structure of Roberts’s opinion may reflect the right-wing majority’s sensitivity to the apprehension that the [major questions doctrine] is a license to veto those programs out of favor with the Republican right,” and “[d]eploying ‘the ordinary tools of statutory interpretation’ to stack the deck before even mentioning [the major questions doctrine] appears to be a defensive move.”¹¹⁶ Also supporting this interpretation of what happened is the fact that none of the Justices in the majority joined Justice Barrett’s concurrence, which argued that the major questions doctrine is simply part of the textualist method of determining the semantic meaning of statutes.¹¹⁷ The majority appears to want to hold on to

110. *Id.* at 2370.

111. *Id.* at 2372–74.

112. *See id.* at 2373–75.

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

114. *Id.*

115. *Id.* at 2375 n.9 (“As we have explained, the statutory text alone precludes the Secretary’s program. Today’s opinion simply reflects this Court’s familiar practice of providing multiple grounds to support its conclusions.”).

116. Shane, *supra* note 33.

117. *See Biden*, 143 S. Ct. at 2376–81 (Barrett, J., concurring).

the idea that the major questions doctrine is more than just an application of the general principle that context can inform textualist inquiry. Finally, as in *West Virginia*, the majority's narrow textual analysis is riddled with problems, as demonstrated by the cutting dissent from Justice Kagan.¹¹⁸ The Secretary's interpretation of the broad, but semantically unambiguous, text was certainly not implausible, and thus the major questions doctrine was absolutely necessary to provide a reason to narrow this statute more than its literal terms required.

So far, most scholars have read the major questions doctrine, as articulated in these cases, as creating a new clear statement rule.¹¹⁹ There is, to be sure, a growing, but still minoritarian, trend to recast the major questions doctrine as something other than a clear statement rule. Ilan Wurman, for instance, argues that it is really a linguistic canon that aims to understand the best semantic meaning of statutory texts—the theory being that high stakes interpretive contexts can impact our willingness to attribute particular meanings to statutes.¹²⁰ For instance, we might be less likely to say that we know what a statute means (and, particularly, whether an agency has the authority it claims) if the stakes of interpretation are relatively high. Likewise, Samuel Bray has argued that “the major questions doctrine has an essential similarity with the mischief rule,” which he argues is less in tension with textualism than is commonly believed.¹²¹ On this reading, the major questions doctrine draws on the mischief (a form of context) to limit overly broad readings of imprecise text. Justice Barrett also aligned herself with the “linguistic major questions” theory in her concurrence in *Biden v. Nebraska*. Acknowledging that “strong-form canons” that impose a “clarity tax” on Congress “are ‘in significant tension with textualism’ insofar as they instruct a court to adopt something other than the statute’s most natural meaning,”¹²² and acknowledging that some had interpreted the major questions doctrine as such a clear statement rule,¹²³ Justice Barrett stated that she “do[es] not read [the Court’s major

118. *Id.* at 2391 (Kagan, J., dissenting) (“The majority picks the statute apart piece by piece in an attempt to escape the meaning of the whole. But the whole—the expansive delegation—is so apparent that the majority has no choice but to justify its holding on extra-statutory grounds.”).

119. See, e.g., Sohoni, *supra* note 35, at 264 (noting the “shift” to a clear statement rule); Levin, *supra* note 6 (manuscript at 3) (“Originally understood as a limitation on judicial deference to agency interpretations, it is now more often explained as a clear statement rule or presumption against agency authority.”); Deacon & Litman, *supra* note 35, at 1012 (“And now, after the October 2021 term, the ‘new’ major questions doctrine operates as a clear statement rule.”).

120. Wurman, *supra* note 36 (manuscript at 7–9).

121. Samuel L. Bray, *The Mischief Rule*, 109 GEO. L.J. 967, 1011, 1013 (2021). Under the mischief rule, “the generating problem is taken as part of the context for reading the statute,” *id.* at 968, and it “serves two functions. First, a stopping-point function: it offers a rationale for an interpreter’s choice about how broadly to read a term or provision in a legal text. Second, a clever-evasion function: it allows an interpreter to read a legal text a little more broadly to prevent a clever evasion that would perpetuate the mischief.” *Id.* at 970 (footnote omitted).

122. *Biden*, 143 S. Ct. at 2377 (Barrett, J., concurring).

123. *Id.* at 2377–78.

questions cases] this way.”¹²⁴ Instead, for Justice Barrett, the major questions doctrine merely “situates text in context, which is how textualists, like all interpreters, approach the task at hand.”¹²⁵ Justice Barrett argued that part of the context of delegations of authority to agencies is that “Congress normally ‘intends to make major policy decisions itself, not leave those decisions to agencies.’”¹²⁶ Notwithstanding these efforts to reframe the major questions doctrine as not a clear statement rule, none of the other Justices in the majority in *West Virginia* or *Biden v. Nebraska* have endorsed the project. Some have been quite vocal that it *is* a clear statement rule.¹²⁷

The change from major-questions-doctrine-as-exception-to-*Chevron* to major-questions-doctrine-as-clear-statement-rule may seem subtle, but it is in reality “an avulsive change.”¹²⁸ It is the difference between a court hesitating before declaring that there is an ambiguity and doing the hard work necessary to check whether there is any way of avoiding deference to an agency’s interpretation, on the one hand, and refusing to find any room for agency action unless Congress has made it indisputably clear that the agency has that authority, on the other. These are not different ways of phrasing the same requirement; they are fundamentally in tension.¹²⁹ One preserves agency authority in all cases except the one where the court, forced to decide the issue *de novo*, says that the statute does not mean what the agency says it means; the other eliminates all agency authority on issues that happen to be major except where Congress was specific enough to not even leave a judgment call for agencies and the courts. Whereas *Chevron* and the major questions doctrine of yore were directed toward agencies, helping to determine when agencies had stepped outside of the delegation of authority that the statute actually contained, the new major questions doctrine is directed at Congress, setting quality standards for legislation.

To be sure, this kind of clear statement rule directed at Congress is not entirely abnormal, but as the rest of this Article shows, certain features of this particular clear statement rule are entirely abnormal and therefore legally unjustifiable.¹³⁰

124. *Id.* at 2378.

125. *Id.*

126. *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)).

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

128. *Cf.* *United States v. Mead Corp.*, 533 U.S. 218, 239 (2001) (Scalia, J., dissenting) (describing the adoption of a *Chevron* step zero as “an avulsive change in judicial review of federal administrative action”).

129. See Alison Gocke, *Chevron’s Next Chapter: A Fig Leaf for the Nondelegation Doctrine*, 55 U.C. DAVIS L. REV. 955, 959 (2021) (arguing that the major questions doctrine, to the extent that it functions as a clear statement rule enforcing nondelegation values, is in tension with *Chevron* deference’s basic theory of legislative supremacy).

130. See *infra* Part III.

II. THE NORMAL PARAMETERS OF SUBSTANTIVE CANONS

In its new form as a clear statement rule, the major questions doctrine is an example of a substantive canon of statutory interpretation.¹³¹ These are interpretive principles that embed background policies into the task of statutory interpretation, sometimes affecting the ultimate interpretation adopted by a court.¹³² They come in all kinds of different forms, from weak presumptions to clear statement rules to “super-strong clear statement rules.”¹³³ They also cover all sorts of policies, and now we can add to their ranks the major questions doctrine’s requirement that Congress supply a clear statement of its intent to delegate major regulatory authority to agencies before a statute will be interpreted to grant that authority.¹³⁴

In *West Virginia*, both Justice Gorsuch in concurrence and Justice Kagan in dissent acknowledged that the major questions doctrine is a clear statement rule. Yet both assumed that this new major questions doctrine was par for the course. Justice Gorsuch, for his part, noted that “our law is full of clear-statement rules and has been since the founding. Our colleagues do not dispute the point. In fact, they have regularly invoked many of these rules.”¹³⁵ Justice Kagan raised a generalized concern with the legitimacy of substantive canons, arguing that “[t]he current Court is textualist only when being so suits it. When that method would frustrate broader goals, special canons like the ‘major questions doctrine’ magically appear as get-out-of-text-free cards.”¹³⁶ Justice Kagan thus did not actually answer Justice Gorsuch’s point about hypocrisy in the invocation of canons, nor could she on such broad terms. Substantive canons have been around for a long time and are probably here

131. See *supra* note 8 and accompanying text (explaining what a substantive canon is); Sohoni, *supra* note 35, at 264 (noting that the major questions doctrine will now function as a clear statement rule).

132. Barrett, *supra* note 19, at 110 (“While courts and commentators sometimes seek to rationalize these and other substantive canons as proxies for congressional intent, it is generally recognized that substantive canons advance policies independent of those expressed in the statute.”).

133. Eskridge & Frickey, *supra* note 14, at 595 n.4.

134. *West Virginia v. EPA*, 142 S. Ct. 2587, 2619 (2022) (Gorsuch, J., concurring) (“Much as constitutional rules about retroactive legislation and sovereign immunity have their corollary clear-statement rules, Article I’s Vesting Clause has its own: the major questions doctrine.”).

135. *Id.* at 2625.

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

to stay, notwithstanding some residual anxiety from certain strands of textualism¹³⁷ and some recent empirical evidence undermining their utility.¹³⁸

In the next two Parts, however, I will take issue with the idea that classification of the major questions doctrine as yet another substantive canon is all that is needed in order to anchor the major questions doctrine in the law. First, in this Part, I review the landscape of substantive canons other than the major questions doctrine.¹³⁹ My review emphasizes that substantive canons vary on two key dimensions—the potential scope of their application relative to the entirety of the statutory corpus and their lack of connection to existing and authoritative sources of law—and that the Court has almost entirely avoided canons that combine extremity on one dimension with extremity on the other in a single canon. Part III then shows that the major questions doctrine, in its new formulation as a clear statement rule requiring any major use of a statute to proceed only the basis of clear statutory authorization, goes where only the absurdity doctrine has gone before and populates this rarified quadrant.¹⁴⁰ I reserve for Part IV a full evaluation of why that novelty is problematic, but to preview it here, I show that any substantive canon with

137. Sohoni, *supra* note 35, at 283 (discussing the ways that textualists have critiqued “[t]he proliferation and the malleability of . . . interpretive rules” and the ways that they have “erode[d] the neutrality and judicial constraint that textualism is intended to promote”); *see also* Krishnakumar, *supra* note 8, at 835–36 (discussing textualist antipathy toward substantive canons). As Sohoni notes, Tara Leigh Grove has uncovered a different, more flexible tradition within textualism that is considerably less suspect of substantive canons. *See* Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 269 (2020); Sohoni, *supra* note 35, at 283–84. Justice Kavanaugh, in particular, has written in the “mend it, don’t end it” vein when it comes to clear statement rules. *See* Kavanaugh, *supra* note 13, at 2118–22 (arguing that clear statement rules are consistent with textualism as long as they do not overly depend on threshold identification of ambiguity, which allegedly gives judges too much license to reach inconsistent or policy-driven results).

138. *See* Mendelson, *supra* note 8, at 103–05.

139. There is no standard list of substantive canons, or even really standard terminology for describing them, but the canons included in my analysis do “captur[e] the most commonly discussed canons of construction.” Mendelson, *supra* note 8, at 94. One way to be sure the list is comprehensive is to examine every substantive canon (except the newest, including both the major questions doctrine and the closely-related “elephants in mouseholes” canon) that Nina Mendelson includes in her empirical overview of substantive canons—a list that was itself compiled from “a classic seven-volume treatise, Sutherland’s *Statutes and Statutory Construction*, which includes an extensive listing of canons, and Scalia and Garner’s widely referenced newer book, *Reading Law*, also a lengthy canon catalogue.” *Id.* at 90 (footnote omitted). I consulted other sources to add some canons that seemed important enough to be included. One doctrine that I do not include in the list of canons is the *Chevron* doctrine, which since 1984 has required courts to defer to agencies’ reasonable interpretations of ambiguous statutes rather than reviewing those interpretations de novo. *See Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984). While some have suggested that *Chevron* is a substantive canon, *see* Levin, *supra* note 41, at 188, that description is at the very least contested, and some contend that the doctrine is better conceptualized as a standard of review than a canon, since “[it] is an evolving judicial construction of the Administrative Procedure Act.” *See* Kristin E. Hickman & R. David Hahn, *Categorizing Chevron*, 81 OHIO ST. L.J. 611, 617–18 (2020).

140. *See infra* Part III.

features like the major questions doctrine runs substantial risks of a systemic judicial takeover of the legislative power that goes well beyond the bounds of the judicial power.¹⁴¹

A. *DIMENSION #1: THE POTENTIAL SCOPE OF APPLICABILITY OF CANONS*

Substantive canons operate on statutes, allowing judges to read statutes in a particular way that they may not otherwise have been able to justify relying on the text or other tools of interpretation alone. Because a single canon can be used across many or few statutes, a key dimension in the design and effect of substantive canons is how broadly they apply (i.e., to what fraction of statutes the canon could theoretically apply). As I will discuss in Part IV, we should care about this dimension in part because a greater scope of applicability will create more potential for substantive canons to tread on Congress's legislative power—put another way, substantive canons risk departure from the model of faithful agency to Congress in a far more consequential way than if their use was relatively isolated.¹⁴² Insofar as the legitimacy of canons depends on how they fit with the constitutional separation of powers, the footprint of a canon is a key feature for evaluating the status of canons.¹⁴³ For now, though, it is enough only to recognize that canons are indeed arrayed on that dimension. Substantive canons vary significantly in terms of just how much of the statutory corpus they potentially apply to.

Canons can be understood as having a narrow scope of applicability in one of several ways: the scope of the subject matter of the canon; a narrow focus on just one kind of legal effect of statutes; and the narrowness of the trigger of the canon (whether a judge needs to make a determination about the statute in order to determine whether the canon should be invoked). They can also be broad in all of these ways. In what follows, I classify canons according to these criteria. Since continuous or ordinal rankings of canons would introduce too much subjectivity, I rely on simpler and more dichotomous tests: a canon is narrow in subject matter if it could not in theory apply to every statute; it is narrow in terms of legal effect if there needs to be some specific legal effect that the statute has for the canon to apply; and it is narrow in terms of the trigger if it is ambiguity dependent.

141. See *infra* Part IV.

142. See *infra* Section IV.A.2. Of course, this risk would be far less acute if the substantive canon was, even when applied, highly unlikely to lead to a departure from a model of faithful agency. As I will show in Part IV, *infra*, this is why it is important to consider not only this dimension of scope of applicability, but also the second dimension I focus on in Section II.B, *infra*, which focuses on the degree to which the substantive canon is grounded in authoritative law that might *justify* a departure from the best reading of a statute.

143. See *infra* Section IV.A.2.

1. Limited Subject Matter

First, and most basically, some canons are explicitly limited to statutes that focus on particular subject matter. For instance, take the Indian affairs canons, which, excepting the canon that general statutes be interpreted liberally to the benefit of Indians,¹⁴⁴ all apply only when Congress affects tribal sovereignty.¹⁴⁵ The *Gregory v. Ashcroft* clear statement rule against federal interference with core state functions, such as the constitutional allocation of power and responsibility in the state government, is likewise narrowly focused on laws that concern only that subject matter.¹⁴⁶ Some canons concern slightly broader subject matter but are still fundamentally limited. For instance, the *Atascadero* clear statement rule against abrogation of state sovereign immunity is ultimately limited to state laws that concern rights and duties of states vis-à-vis individual litigants.¹⁴⁷ The common law canon¹⁴⁸ is another example: while there are many common law principles that may intersect with statutory programs, there are also many statutes that have nothing to do with subjects relevant to the common law.

On the flipside, some canons are clearly not limited in any way to subject matter: the presumption in favor of judicial review, for instance, applies across the board, no matter what subject the statute is dealing with,¹⁴⁹ as does the presumption against retroactivity.¹⁵⁰ The same is true with the constitutional avoidance canon¹⁵¹—since every statute must ultimately comport with the

144. See *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462–63 (2020).

145. See Alex Tallchief Skibine, *Textualism and the Indian Canons of Statutory Construction*, 55 U. MICH. J.L. REFORM 267, 268–70 (2022); Philip P. Frickey, *Marshaling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 417 (1993).

146. See *supra* note 11 and accompanying text.

147. See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242–43 (1985).

148. SCALIA & GARNER, *supra* note 9, at 318 (“A statute will be construed to alter the common law only when that disposition is clear.”).

149. *Bowen v. Mich. Acad. of Fam. Physicians*, 476 U.S. 667, 670 (1986) (“It would excite some surprise if, in a government of laws and of principle, furnished with a department whose appropriate duty it is to decide questions of right, not only between individuals, but between the government and individuals; a ministerial officer might, at his discretion, issue this powerful process . . . leaving to the debtor no remedy, no appeal to the laws of his country, if he should believe the claim to be unjust. But this anomaly does not exist; this imputation cannot be cast on the legislature of the United States.” (alteration in original) (quoting *United States v. Nourse*, 34 U.S. (9 Pet.) 8, 28–29 (1835))). Although technically separate from the presumption of judicial review, the presumption in favor of preserving courts’ remedial authority, see *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982); *South Carolina v. Regan*, 465 U.S. 367, 380–381 (1984), is similarly broad.

150. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) (“Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.”).

151. *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346–47 (1936) (Brandeis, J., concurring) (offering the canonical statement of the modern constitutional avoidance canon); see also *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S.

Constitution, the constitutional avoidance canon's subject-matter reach is coextensive with the legislative power. Likewise, both the presumption against extraterritorial application of statutes¹⁵² and the *Charming Betsy* rule against statutory interpretations that would violate international law¹⁵³ are in no way delimited by subject matter. The presumption against implied repeal¹⁵⁴ would also seem to be broad in terms of subject matter. By its very terms, it potentially applies to all statutes. Finally, the absurdity doctrine¹⁵⁵ would also theoretically apply to any statute that, in context, produces an absurd result, so it too has a broad subject matter. Some canons are more marginal but seem ultimately better classified as broad. For instance, while the rule of lenity¹⁵⁶ might seem limited in subject matter to criminal or punitive statutes, that is in fact not so much subject matter as it is the target of the canon,¹⁵⁷ and in theory any general statute could be subject to it depending on whether it has the targeted legal effect. The same could be said about the principle requiring a liberal construction of remedial statutes¹⁵⁸—this canon is in some sense the

568, 575 (1988) (discussing cases applying the constitutional avoidance canon and concluding that the canon “is beyond debate”).

152. *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949) (discussing “[t]he canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States” and basing it “on the assumption that Congress is primarily concerned with domestic conditions”).

153. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (“It has also been observed that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.”); *see also* *United States v. Ali*, 718 F.3d 929, 935 (D.C. Cir. 2013) (explaining how the *Charming Betsy* rule interacts with, but differs from, the presumption against extraterritorial effect). As the Ninth Circuit explained in *Serra v. Lappin*, the *Charming Betsy* rule is limited by its purpose, which “is to avoid the negative ‘foreign policy implications’ of violating the law of nations,” and that the canon is not operable when there is no reason to believe a statute is “likely to ‘embroil[] the nation in a foreign policy dispute.’” *Serra v. Lappin*, 600 F.3d 1191, 1198–99 (9th Cir. 2010) (alteration in original) (noting, as well, that the courts “have never employed the *Charming Betsy* canon in a case involving exclusively domestic parties and domestic acts”).

154. Mendelson, *supra* note 8, at 92 (“Where a newly enacted statute is silent regarding a previous existing one, the legislature should be presumed not to have impliedly repealed the existing one.”).

155. SCALIA & GARNER, *supra* note 9, at 234–39 (“A provision may be either disregarded or judicially corrected as an error (when the correction is textually simple) if failing to do so would result in a disposition that no reasonable person could approve.”); *see also* Manning, *supra* note 25, at 2394 (“The absurdity doctrine rests on the intuition that some . . . outcomes are so unthinkable that the federal courts may safely presume that legislators did not foresee those particular results and that, if they had, they could and would have revised the legislation to avoid such absurd results.”).

156. *See supra* note 9 and accompanying text.

157. *See infra* note 166 and accompanying text.

158. Mendelson, *supra* note 8, at 93 (“Remedial statutes shall be liberally construed.”); *see also* SCALIA & GARNER, *supra* note 9, at 364–66 (describing and critiquing this canon).

flipside of the rule of lenity in that it targets statutes that have a remedial legal effect but is otherwise unconstrained in terms of its subject matter.

2. Specific Legal Effects

Next, canons might be narrow because they apply only to statutes that are intended to have some specific legal effect (instead of applying to statutes with all kinds of effects, such as to impose primary legal obligations, direct agency action, appropriate money, spend money, etc.). The so-called federalism canons, which aim only at statutes that curtail the sovereign rights of states, are a prime example. For instance, the *Atascadero* presumption against abrogating sovereign immunity applies only to those statutes that theoretically could be construed to authorize suit against the government,¹⁵⁹ and the *Gregory v. Ashcroft* clear statement rule similarly only applies to statutes that could be construed to direct states on the delimited field of core state functions.¹⁶⁰ The presumption against preemption, the presumption against extraterritorial effect, and the *Charming Betsy* rule against interpreting statutes in a way that violates international law likewise can be understood as limited to only a narrow set of statutes that plausibly has effects on other sovereigns or conflicts with international law, which is certainly not every statute.¹⁶¹ I would also classify the rule of lenity,¹⁶² the presumption against implied repeal,¹⁶³ the common law canon,¹⁶⁴ and the liberal construction of remedial statutes principle¹⁶⁵ as narrow on this dimension. All four apply only in specified circumstances—i.e., where a statute either imposes a criminal consequence or penalty, de facto repeals an earlier statute, displaces the

159. See *supra* note 147 and accompanying text.

160. See *supra* note 11 and accompanying text.

161. See *supra* notes 9, 152–53 and accompanying text. Some may disagree with the conclusion that these canons have a narrow scope, perhaps by noting that overlapping coverage of different sources of law at the state, federal, and international level often raises potential uses of the presumption against preemption and the *Charming Betsy* rule, as well as that increasing globalization renders ordinary domestic law relevant in other jurisdictions, potentially increasing the salience of the presumption against extraterritorial effect. These features do indeed seem to move these canons down the line toward a broader scope of application, but there is a qualitative difference here between canons like these that are rendered broad by context and circumstances and those that are broad regardless of context and circumstance. It bears noting, as well, that because of the way that judges have applied these canons, the potentially quite broad scope on paper (again, depending on context and circumstance) has been substantially narrowed in practice. See, e.g., *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 621–23 (2011) (holding, in a plurality opinion, that the view advocated by Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 231–32 (2000), that the Supremacy Clause is a *non obstante* clause, bars the presumption against preemption in implied preemption cases). But see Daniel J. Meltzer, *Preemption and Textualism*, 112 MICH. L. REV. 1, 52–55 (2013) (defending a robust version of the presumption against preemption).

162. See *supra* note 9 and accompanying text.

163. See *supra* note 154 and accompanying text.

164. See *supra* note 148 and accompanying text.

165. See *supra* note 158 and accompanying text.

common law, or attempts to bestow a benefit of some kind. Notably, the presumption of retroactivity, which was quite broad in terms of subject matter, is narrower here, since only those laws with a retroactive legal effect would arguably be subject to the canon.¹⁶⁶

By contrast, the constitutional avoidance canon and the presumption of judicial review seem basically unlimited: any statute, no matter what legal or institutional effect it aimed for, would seemingly be swept into potential consideration for its constitutionality or its reviewability.¹⁶⁷ A case could be made for saying the presumption of judicial review is narrow, since it would mostly apply when Congress affirmatively attempts to strip the courts of judicial review. However, this is not strictly true—sometimes the presumption of reviewability is invoked when that legal effect is not there.¹⁶⁸ The absurdity doctrine¹⁶⁹ is likewise broad, despite typically only being invoked in a narrow set of circumstances where a statute is interpreted in absurd ways. Absurdity is a condition that can afflict any statute, depending on how it is used. It is important to distinguish the kinds of circumstances that might prompt a court to invoke a canon from the canon's relationship to the statute's legal effect. Congress may in practice refrain from testing the limits of the Constitution or of rationality, but that does not mean that the canon itself is narrow.

3. Ambiguity-Dependent Trigger

Beyond the subject matter or target of statutes, the formulation of the canon itself can determine its potential scope—specifically, a canon's scope can be widened by the degree of ambiguity required by statutes before the canon is triggered. Many of the canons discussed so far are presumptions, which are weakly ambiguity-dependent: the policy embedded in the canon is rebuttable if the statute is not ambiguous.¹⁷⁰ Others are clear statement rules or something similar: the policy is triggered unless Congress meets an independent standard for clarity that exceeds mere absence of any arguable ambiguity.¹⁷¹ These design choices have some impact on the scope of the canon. As a general matter, the more ambiguity-dependent a canon is, the narrower the canon will be in practice, since judges have different thresholds for determining ambiguity.¹⁷² That is to say, presumptions are only as

166. See *supra* note 150 and accompanying text.

167. See *supra* notes 149, 151 and accompanying text.

168. See *Abbott Lab's v. Gardner*, 387 U.S. 136, 140–42 (1967) (establishing the presumption of reviewability and applying it to generally allow pre-enforcement review of rules in a context where the statute itself did not speak to the question).

169. See *supra* note 155 and accompanying text.

170. See WILLIAM N. ESKRIDGE, JR., JAMES J. BRUDNEY & JOSH CHAFETZ, *LEGISLATION & STATUTORY INTERPRETATION* 287–90 (3d ed. 2021).

171. See *id.*

172. In some sense, this suggests something more deeply concerning about Justice Kavanaugh's influential account that the Court's use of substantive canons should be made *less* ambiguity

applicable as statutes are ambiguous.¹⁷³ Clear statement rules, such as the *Gregory v. Ashcroft* canon,¹⁷⁴ are generally more applicable because they are triggered not by a threshold finding of ambiguity, but simply by the subject matter and target of the federal statute.

4. Classifying Canons in Terms of Scope

Combining these three factors and classifying canons according to each can help distinguish canons on the scope dimension in a more dichotomous way. Although most canons might be plausibly said to be narrow on some of these factors while broad on others, I follow a simple decision rule: if the majority of the factors point in the direction of a narrow scope, then I consider them narrow overall. Table 1 shows my classification decisions and underlines those canons in boldface that would be classified as narrow under my decision rule. Of course, one need not agree that the reduction to a dichotomy is useful, but it should still be possible to array canons more continuously (for instance, by placing those canons where all three factors are either broad or narrow at the extremes of a continuum, and those with more mixed features more toward the middle)—all of the same insights can be had with this more complex scaling in mind. Nevertheless, the result from my decision rule are that the rule of lenity, the presumption against diminution of presidential power,¹⁷⁵ the *Charming Betsy* rule, the presumption against extraterritoriality, the Indian affairs canons, the presumption against preemption, the presumption against retroactivity, the *Gregory v. Ashcroft* clear statement rule, the presumption against implied repeal, the principle requiring liberal construction of remedial statutes, the common law canon, and the clear statement rule against conditioning federal funding, and the clear statement rule against abrogation of sovereign immunity are all “narrow” in scope.

On the other side of the spectrum, three substantive canons of note are broad on at least two out of the three factors. The presumption of judicial reviewability is strongly ambiguity-dependent, which gives it a narrow trigger, but it is otherwise broadly applicable to any subject matter and to a statute with any kind of operative legal effect.¹⁷⁶ This canon forms part of the

dependent. See Kavanaugh, *supra* note 13, at 2121. On Kavanaugh’s account, elimination of judges’ discretion at the ambiguity threshold should be eliminated to promote more uniformity and certainty in statutory interpretation. *Id.* at 2120–21. But as we have just seen, these benefits must be weighed against the potential cost of enlarging the footprint of the canons (which can be predicted to increase erroneous applications of the canon even assuming that some judicial manipulation of canons might be avoided by the clear statement rule formulation).

173. See, e.g., *Serra v. Lappin*, 600 F.3d 1191, 1199–200 (9th Cir. 2010) (explaining that “[t]he *Charming Betsy* canon comes into play only where Congress’s intent is ambiguous” (alteration in original) (quoting *United States v. Yousef*, 327 F.3d 56, 92 (2d Cir. 2003))).

174. See *supra* note 11 and accompanying text.

175. See *infra* notes 222–23 and accompanying text.

176. See *supra* note 149 and accompanying text.

background against which virtually any statute must be interpreted: it effects a general policy that applies across the entire statutory corpus. Arguably even more generally applicable than the presumption of reviewability is the constitutional avoidance canon. This canon, which directs courts to adopt a limiting construction of a statute if it is fairly possible to avoid a serious constitutional risk posed by an alternative interpretation of the statute, knows no boundaries—no matter the subject matter and no matter the specific legal effect intended by the statute, that statute must be constitutional.¹⁷⁷ To be sure, the constitutional avoidance canon is not as broad as it could be because of how it is defined—there must be a “serious risk” of a constitutional violation on one interpretation of the statute¹⁷⁸—but that does not mean it is not qualitatively distinct from the other narrow canons, which are all delimited so that they only theoretically apply to specific and identifiable types of statutes.¹⁷⁹ Moreover, unlike the presumption in favor of judicial review, the constitutional avoidance canon has sometimes been deployed not merely as a presumption, but as a clear statement rule, completing the rare trifecta of facial breadth.¹⁸⁰ Finally, the absurdity doctrine,¹⁸¹ while not formulated as a clear statement rule and therefore narrow on the trigger, is broad on the other two fronts and is therefore classified as broad.

Table 1: Classifying Canons in Terms of Their Potential Scope of Applicability

	Subject Matter ¹⁸²	Target of Statutes Affected ¹⁸³	Trigger of Canon ¹⁸⁴
Rule of Lenity	Broad	Narrow	Narrow
Presumption Against Diminution of Presidential Power	Narrow	Narrow	Narrow
<i>Charming Betsy</i> Rule	Broad	Narrow	Narrow

177. See *supra* note 151 and accompanying text.

178. See *infra* note 220 and accompanying text.

179. See Anthony Vitarelli, Comment, *Constitutional Avoidance Step Zero*, 119 YALE L.J. 837, 839–42 (2010) (analyzing the “serious doubt” requirement as it has been used by courts).

180. The more normal version of the canon treats it as a presumption, see *infra* note 185 and accompanying text, but the fact that the clear statement rule strand is out there waiting to be invoked should arguably be the baseline for defining breadth, since the most extreme form it can take will be what actually shapes congressional responses.

181. See *supra* note 155 and accompanying text.

182. See *supra* notes 142–58 and accompanying text.

183. See *supra* notes 159–66 and accompanying text.

184. See *supra* notes 170–74 and accompanying text.

Presumption Against Extraterritoriality	Broad	Narrow	Narrow
Indian Affairs Canons	Narrow	Narrow	Narrow
Presumption Against Preemption	Broad	Narrow	Narrow
<i>Gregory v. Ashcroft</i> Clear Statement Rule	Narrow	Narrow	Broad
Presumption Against Conditioning Federal Funding	Narrow	Narrow	Broad
Presumption Against Abrogation of Sovereign Immunity	Narrow	Narrow	Broad
Presumption Against Retroactivity	Broad	Narrow	Narrow
Presumption Against Implied Repeal	Broad	Narrow	Narrow
Liberal Construction of Remedial Statutes	Broad	Narrow	Narrow
Common Law Canon	Narrow	Narrow	Narrow
<u>Presumption of Judicial Review</u>	<u>Broad</u>	<u>Broad</u>	<u>Narrow</u>
<u>Constitutional Avoidance Canon</u>	<u>Broad</u>	<u>Broad</u>	<u>Narrow</u> ¹⁸⁵
Absurdity Canon	Broad	Broad	Narrow

As one can see even from this brief overview, substantive canons tend to fall on the narrow end of the spectrum. It is more the exception than the rule that a canon would be applicable to all statutes. And there is a perfectly good explanation of this pattern: the greater the potentially applicable scope of a canon, the more the judicial power to create that canon encroaches on the

185. This could be narrow or broad, depending on whether the constitutional avoidance canon is formulated as a clear statement rule or not. In *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 490 (1979), the majority drew criticism for its formulation of the constitutional avoidance canon as requiring an “affirmative intention of the Congress clearly expressed.” See *id.* at 509 n.1 (Brennan, J., dissenting) (quoting *McCulloch v. Sociedad Nacional de Marineros de Hond.*, 372 U.S. 10, 22 (1963)). As Justice Brennan noted, more commonly, the constitutional avoidance canon is formulated as a presumption: that is, “[w]hen the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.” *Id.* at 510 (quoting *Int’l Ass’n of Machinists v. Street*, 367 U.S. 740, 749–50 (1961) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932) (emphasis added))); see also MANNING & STEPHENSON, *supra* note 41, at 396 (“Justice Brennan’s formulation—which allows use of the canon only when there’s some pre-existing ambiguity—today seems to be the more dominant view.”).

legislative power. It is substantially less intrusive for courts to create subject-matter-specific canons, canons that affect only statutes that have some specific legal effect, or that are triggered only after a threshold determination of ambiguity is made by a court. At the same time, as this review also demonstrates, the courts have imposed very broad canons, such as the constitutional avoidance canon. Encroachment on Congress's turf is not a *per se* bar to the imposition of widely applicable canons—at least not standing alone. Yet, as can be seen from the relative paucity of more widely applicable canons, the courts appear to be at least implicitly aware that this dimension implicates important questions about the separation of powers.¹⁸⁶

B. DIMENSION #2: THE NEXUS WITH AUTHORITATIVE LAW

Substantive canons are also arrayed on another continuum: the degree to which the source of the canon's policy is, or at least reflects, authoritative law. Virtually everyone agrees that there must be at least some basis for substantive canons,¹⁸⁷ but in practice canons vary significantly in how much they hew to law. William Eskridge and Philip Frickey referred to certain substantive canons as “quasi-constitutional law,”¹⁸⁸ and that quasi-ness implies a continuum. I call this dimension the “nexus with authoritative law” dimension in order to acknowledge that in many cases the policy behind the canon is not demanded by authoritative law, but at least tracks it closely, emphasizing the same basic policies and norms that the Constitution emphasizes.

At the end of the continuum where the nexus is weakest would be substantive canons that encode policy preferences in interpretation that cannot be enforced at all as standalone constitutional values. Before her appointment as a judge, Amy Coney Barrett acknowledged a category of quasi-constitutional substantive canons that can only be described as “extraconstitutional” and rejected them because of their extremely tenuous connection with authoritative constitutional law.¹⁸⁹ The rule of lenity is an example. Although some would say that the rule of lenity is grounded in norms of fairness and democracy,¹⁹⁰ these are not policies that are explicitly encoded anywhere in the law, and therefore they could not conceivably be the basis for a freestanding

186. See *infra* Part IV (developing these implications).

187. Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285, 1287 (2014) (noting that “any canon of statutory construction that serves a substantive end . . . should find a source in history, positive law, the Constitution, or sound policy considerations”).

188. Eskridge & Frickey, *supra* note 14, at 596–97.

189. Barrett, *supra* note 19, at 164, 177.

190. See Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 886–87 (2004) (reviewing conventional justifications for the rule of lenity, which “focus[] on the perspective of criminal defendants, seeking to guarantee them fair warning and political access,” and adding a new one based on “its role in structuring the processes of criminal lawmaking and law enforcement”).

constitutional challenge of any federal statute.¹⁹¹ Barrett argues that the *Charming Betsy* canon against interpretations of statutes that would violate international law is similarly an extraconstitutional canon, since it “protect[s] international law for its own sake,”¹⁹² and she appears to imply that the canon against derogation of the common law and the canon in favor of a broad construction of remedial statutes also fit the bill.¹⁹³ While Barrett acknowledges that the distinction between constitutional canons and extraconstitutional canons “is not sharp,” she maintains that it exists and that it can be discerned on the basis of two factors: “First, the canon must be connected to a reasonably specific constitutional value. Second, the canon must actually promote the value it purports to protect.”¹⁹⁴ For Barrett, the rule of lenity’s concern with fairness does not satisfy this test because “[f]airness’ is a nebulous value susceptible to many different interpretations and applicable across a wide range of legislation.”¹⁹⁵ The consequence of failing this test is that such an extraconstitutional value can only be encoded in a canon that functions as an ambiguity tie breaker, not as a clear statement rule.¹⁹⁶ The logic behind this understanding is intuitive—“[w]hen employed . . . to stretch plain language, . . . [such canons] conflict with the obligation of faithful agency.”¹⁹⁷ Finally, two canons map faintly, but imperfectly, onto constitutional values that apply to statutes generally. The principle of liberal construction of remedial statutes,¹⁹⁸ for instance, captures a common frame for evaluating legislative rationality—specifically, a representation-reinforcing understanding of the Constitution¹⁹⁹—but would not be recognized as a standalone basis for constitutional challenge. Much the same could be said about the absurdity doctrine.²⁰⁰ With exceedingly low requirements for substantive rationality of legislation, there is ample room for statutes to comply with the Constitution while running into problems with the absurdity doctrine.

Also at this end of the continuum are canons that anoint policies that are seemingly at odds with authoritative constitutional law. The presumption against preemption, in particular, has been criticized as an inversion of the Supremacy Clause’s direction that “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any

191. Barrett, *supra* note 19, at 177.

192. *Id.* at 178.

193. *Id.* at 177.

194. *Id.* at 178.

195. *Id.* at 178–79.

196. *Id.* at 164.

197. *Id.* at 177.

198. See *supra* note 158 and accompanying text.

199. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 101–02 (1980).

200. See *supra* note 155 and accompanying text.

State to the Contrary notwithstanding.”²⁰¹ In an influential article, Caleb Nelson showed that the founding era understanding of the Supremacy Clause was likely that the last clause was a *non obstante* provision which aimed explicitly to negate any interpretive approach that would depart from the “natural meaning” of statutes.²⁰² Although the presumption against preemption continues to play some role in the Court’s preemption jurisprudence,²⁰³ it has been heavily criticized²⁰⁴ and has tended to operate much more weakly than even an ordinary presumption.²⁰⁵ This is no doubt in part because of its shaky constitutional provenance. A similar point applies to the presumption against extraterritoriality—critics have questioned the presumption’s traditional justifications,²⁰⁶ and application is inconsistent at best.²⁰⁷ After “international law evolved to permit greater extraterritorial regulation, the Supreme Court

201. U.S. CONST. art. VI, cl. 2.

202. Nelson, *supra* note 161, at 232.

203. See generally Mary J. Davis, *The “New” Presumption Against Preemption*, 61 HASTINGS L.J. 1217 (2009) (reviewing the Roberts Court’s preemption jurisprudence and arguing that the presumption against preemption is still a part of the Court’s approach in these cases, especially in express preemption cases but even in implied preemption cases, albeit in a different form).

204. See, e.g., Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2092 (2000); Richard H. Fallon, Jr., *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. CHI. L. REV. 429, 471–72 (2002) (arguing that the presumption against preemption is selectively invoked to further ideological decision-making).

205. See, e.g., Note, *New Evidence on the Presumption Against Preemption: An Empirical Study of Congressional Responses to Supreme Court Preemption Decisions*, 120 HARV. L. REV. 1604, 1604 (2007) (noting that although “the Court has claimed to apply a presumption against finding federal preemption of state law[,] . . . the Court has not reliably applied this presumption, and Justices frequently disagree about when the presumption applies and what result it requires in any given case” (footnotes omitted)); Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. REV. 967, 968 (2002) (“It is inescapable: there is a presumption in favor of preemption. Historically, the Supreme Court has said differently—that, rather, there is a presumption against preemption. There is no such presumption any longer, if, indeed, there ever really was one.”); see also Calvin Massey, *“Joltin’ Joe Has Left and Gone Away”: The Vanishing Presumption Against Preemption*, 66 ALB. L. REV. 759, 759 (2003) (arguing that the classic formulation of the presumption against preemption in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), is “no longer even hortatory”); Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 61 (2007) (discussing how the Supreme Court continues to cite *Rice*’s “conventional bromide” but, “especially since *Geier v. American Honda Motor Co.*, the Court’s decisions have frequently honored *Rice*’s ‘initial assumption’ by abandoning it, finding an intent to preempt even without anything remotely like ‘clear and manifest’ evidence of such intent” (footnote omitted)).

206. Zachary D. Clopton, *Replacing the Presumption Against Extraterritoriality*, 94 B.U. L. REV. 1, 8–21 (2014) (discussing traditional justifications of the presumption against extraterritoriality and concluding that the presumption is not supported by the normative goals that it points to for justification).

207. Jonathan Turley, *“When in Rome”: Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U. L. REV. 598, 599–601 (1990) (identifying inconsistencies in the application of the presumption against extraterritoriality); William S. Dodge, *The New Presumption Against Extraterritoriality*, 133 HARV. L. REV. 1582, 1585–86 (2020) (discussing cycles of use and disuse of the extraterritoriality canon).

kept the presumption but articulated new rationales — first, international comity and then Congress’s primary concern with domestic conditions.”²⁰⁸ Since neither comity nor a presumption that Congress only cares about domestic conduct provide much of a justification,²⁰⁹ the canon appears to be basically inconsistent with Congress’s recognized powers. Similarly, the presumption against implied repeal and the common law canon both seem utterly untethered to any constitutional limits on the legislative power; Congress unquestionably has the power to both repeal statutes and to depart from the common law (at least within the bounds of its own powers, such as the power to regulate interstate commerce).

Perhaps ever so slightly further down the continuum toward authoritative law (but not all the way there) are the so-called federalism canons developed by the Supreme Court in the 1980s. These include the clear statement rule against congressional interference with core state governmental functions announced in *Gregory v. Ashcroft*,²¹⁰ the clear statement rule against abrogation of state sovereign immunity announced in *Atascadero State Hospital v. Scanlon*,²¹¹ and the clear statement rule against conditioning federal funding announced in *Pennhurst State School & Hospital v. Halderman*.²¹² As Eskridge and Frickey argue, these canons are notable not just because of their relative strength, but also because they “protect constitutional values that are virtually never enforced through constitutional interpretation.”²¹³ In all three examples, the creation of the canons “occurred during a period in which the Court was abandoning any role in enforcing federalism values through constitutional interpretation.”²¹⁴ Barrett defends these canons by arguing that they fall on

208. Dodge, *supra* note 207, at 1585 (footnote omitted).

209. Comity has an ambiguous relationship to international and constitutional law. See *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895) (“‘Comity,’ in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.”).

210. *Gregory v. Ashcroft*, 501 U.S. 452, 460–61 (1991) (holding that “it is incumbent upon the federal courts to be certain of Congress’ intent before finding that federal law[s]” interfere with “the usual constitutional balance of federal and state powers” (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985))). To the extent that the presumption is wedded to Congress’s unexpressed intent, see *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949), that approach seems plainly at odds with modern textualist principles.

211. *Atascadero State Hosp.*, 473 U.S. at 243 (1985) (holding that “it is incumbent upon the federal courts to be certain of Congress’ intent before finding that federal law overrides the guarantees of the Eleventh Amendment”).

212. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 16 (1981) (holding that courts “should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment” because such legislation “intrudes on traditional state authority”).

213. Eskridge & Frickey, *supra* note 14, at 597.

214. *Id.* at 619. For instance, in *South Dakota v. Dole*, the Supreme Court held that there are virtually no fetters on Congress’s ability to condition federal funds on acceptance of certain restrictions. *South Dakota v. Dole*, 483 U.S. 203, 206–07 (1987). Although *Dole* postdated the

the “constitutional” side of the extraconstitutional/constitutional divide because they are more “concrete” than more “undifferentiated” values.²¹⁵ For Barrett, it is therefore acceptable to enforce these values with clear statement rules that put pressure on the faithful agency model.²¹⁶ But this line is difficult to maintain when courts are unable or unwilling to treat these federalism values as constitutionally enforceable. With such a faintly visible line determining whether clear statement formulations of a canon are legitimate, it is easy to see why the federalism clear statement rules have come in for particularly strong criticism from a diverse range of commentators who see these canons as untethered to the Constitution.²¹⁷ Arguably, the clear statement rule against abrogation of sovereign immunity may be sufficiently concretely tied to the Court’s understanding of the Eleventh Amendment that it could be considered to have a strong nexus with that law, whereas the clear statement rule against conditional funding and the clear statement rule against interference with sovereign state functions depart from established contours of those constitutional traditions so much that they should be considered to have a weak nexus with authoritative law. For our purposes, it is not too important which side of the line the federalism clear statement rules fall on.²¹⁸

By contrast, some canons are carefully crafted to track and promote the policies behind hard legal principles that could, in principle, be the basis for a noninterpretive legal question. Start with the constitutional avoidance canon. While the avoidance canon is chameleonic in the sense that it applies to many sorts of potential constitutional violations,²¹⁹ the canon is, critically, only operative when there is a serious risk of unconstitutionality of a statute.²²⁰

Pennhurst canon, it also made it clear that the *Pennhurst* canon survived the change in the constitutional enforceability of limits on the spending power. *Id.* at 207–08. With the *Gregory* canon, the dissociation of interpretive law from authoritative law was even starker, as the Court had clarified in *Garcia v. San Antonio Metropolitan Transit Authority* that Tenth Amendment limitations on federal interference with state functions were not generally subject to judicial enforcement. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531, 552 (1985) (overturning *Nat’l League of Cities v. Usery*, 426 U.S. 833 (1976)).

215. Barrett, *supra* note 19, at 176, 178–79.

216. *See id.* at 180–81.

217. *See* Abbe R. Gluck, *Our [National] Federalism*, 123 YALE L.J. 1996, 2030–43 (2014) (collecting critiques of the federalism canons, including “that they are judicially imposed policies” that cannot be justified by a fiction that Congress legislates with these policies in mind, and that they are so facially ambiguous and inconsistently applied that they have little resemblance to “law”).

218. This is so because all of them have a narrow scope per the analysis *supra* Section II.A.

219. *See supra* notes 177–80 and accompanying text.

220. Indeed, the classic constitutional avoidance doctrine required the court to find a constitutional violation before invoking the canon to endorse a narrowed interpretation of the statute. *See* Caleb Nelson, *Avoiding Constitutional Questions Versus Avoiding Unconstitutionality*, 128 HARV. L. REV. F. 331, 331–32 (2015) (distinguishing the classic and modern avoidance doctrines on the “serious risk” dimension). The classic avoidance canon would have therefore been even further down the continuum toward authoritative law than the modern constitutional avoidance

This limitation gives the constitutional avoidance canon a much more intrinsic connection with constitutional law than it might have if the only trigger for the doctrine was a potential statutory indeterminacy.²²¹ Next, consider the presumption against statutory interference with inherent presidential powers.²²² While the President's inherent powers in these areas are ill defined, nobody doubts that they exist, and the Court has not infrequently intervened to decide the constitutionality of statutes that interfere with the President's powers.²²³ The presumption serves the same purpose as the constitutional avoidance canon, allowing a court to avoid unnecessary constitutional confrontations with Congress. The Indian canons, such as the rule requiring that treaties with Indian nations be read in the light most favorable to the Indian nation, are likewise closely tethered to authoritative law. Not only are the canons tightly linked to increasingly absolute structural principles in favor of tribal sovereignty,²²⁴ but they also are probably justified on an originalist account about the origins of treaties.²²⁵ Again, the Indian canons essentially play the role of a subject-matter-specific constitutional avoidance canon—the canons track the law quite closely.

canon, but the insistence on a serious risk keeps this canon relatively tethered to authoritative constitutional law.

221. Reasonable people can disagree about how far the “serious risk” language allows courts to depart from established constitutional law. In practice, the courts have not invoked the doctrine to entertain fringe theories of constitutional law, but they have not entirely shied away from invoking avoidance in the twilight between emerging constitutional principles and established law. See Anita S. Krishnakumar, *Passive Avoidance*, 71 STAN. L. REV. 513, 563–68 (2019) (arguing that the Roberts Court has engaged in “avoidance retreat” after a brief dalliance with a more aggressive use of the doctrine); see also Vitarelli, *supra* note 179, at 839–42 (using three cases to show how the Court has a “Step Zero avoidance investigation” in statutory interpretation cases).

222. See Eskridge & Frickey, *supra* note 14, at 617 (discussing seminal cases establishing a “[s]uper-[s]trong [r]ule [a]gainst [c]ongressional [d]erogation of [p]residential [f]oreign [a]ffairs [p]ower,” such as *Dames & Moore v. Regan*, 453 U.S. 654 (1981), and *Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221 (1986)).

223. See, e.g., *Dep't of the Navy v. Egan*, 484 U.S. 518, 527–30 (1988) (holding that courts should “show[] the utmost deference to Presidential responsibilities,” including classification and security clearance (quoting *United States v. Nixon*, 418 U.S. 683, 710 (1974))).

224. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142–45 (1980) (outlining the boundaries of tribal sovereignty and concluding that interpretive inquiry should be “designed to determine whether, in the specific context, the exercise of state authority would violate federal law”); *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2476–77 (2020) (holding that Indian tribes are “free from state jurisdiction and control” because they have been promised in constitutionally binding treaties with the federal government “the right to continue to govern themselves”). But see *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2493 (2022) (holding that “a State has jurisdiction over all of its territory, including Indian country” and thereby potentially undermining decades of settled Indian law).

225. See Note, *Indian Canon Originalism*, 126 HARV. L. REV. 1100, 1101 (2013) (showing that originalism requires the Indian canons because they reflect the original understanding of what Indian treaties were doing).

Besides the constitutional avoidance canon and other subject-matter-specific canons that function as constitutional avoidance canons, there are two other canons that have a fairly strong nexus with authoritative constitutional law. First, although the Court's jurisprudence on Congress's constitutional power to legislate retroactively is murky, the presumption against retroactivity fairly tracks what the Court has said in cases like *Eastern Enterprises v. Apfel*—namely, that statutes “may impose retroactive liability to some degree” but “that legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience.”²²⁶ Next, the presumption in favor of judicial review reflects uncertainty about the “profound questions of constitutional law” that are raised by efforts to strip courts of all jurisdiction to hear constitutional claims.²²⁷ And although the application of the presumption of reviewability in the context of pre-enforcement challenges to rules may stretch well beyond existing constitutional protections,²²⁸ it is clear (and likely to become only clearer) that courts *do* see it as constitutionally problematic to substantially limit judicial review of administrative adjudication of private rights.²²⁹ Love it or hate it, the presumption of reviewability tracks the Court's constitutional anxieties in this area to a T and seems only to function as a passive tool for avoiding constitutional questions that would otherwise be decided using the heavy artillery.

226. *E. Enters. v. Apfel*, 524 U.S. 498, 528–29 (1998); *see also* *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265–67 (1994) (connecting the presumption against retroactivity to several constitutional principles, including the *Ex Post Facto* Clause, the Takings Clause, and the Due Process Clause and noting that “[a]bsent a violation of one of those specific provisions, the potential unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give a statute its intended scope”).

227. Michael J. Gerhardt, *The Constitutional Limits to Court-Stripping*, 9 LEWIS & CLARK L. REV. 347, 347–49 (2005); *see also* Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1044–52 (2010) (acknowledging that “[f]or better or for worse, many of the most mooted of . . . questions [about jurisdiction stripping in constitutional cases] remain unanswered,” but arguing “that when substantive constitutional rights exist, the Constitution requires that some court have jurisdiction to provide sufficient remedies to prevent those rights from becoming practical nullities”).

228. *See* Bagley, *supra* note 187, at 1337–39 (discussing pre-enforcement review and urging courts to use ripeness doctrine to curtail the force of the presumption in this context).

229. *See* Jennifer Dickey, *Justice Thomas and the Public/Private Rights Distinction*, U.S. CHAMBER OF COM. (Apr. 13, 2021), <https://www.chamberlitigation.com/Public/PrivateRights> [<https://perma.cc/9CTA-QNH3>] (discussing the ways that Justice Thomas has sought to revive the idea “that the adjudication of core private rights disputes lies within the Article III judicial power” and therefore judicial review cannot be denied or diluted); *see also* *Jarkesy v. SEC*, 34 F.4th 446, 455–59 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 2688 (2023) (holding that U.S. Securities and Exchange Commission adjudications violate the Seventh Amendment jury trial right because they gave a non-Article III tribunal some authority to adjudicate private rights).

Table 2: Classifying Canons in Terms of Their Relationship with Authoritative Law

	Nexus with Authoritative Law
Rule of Lenity	Weak
Presumption Against Preemption	Weak
Presumption Against Extraterritoriality	Weak
<i>Charming Betsy</i> Rule	Weak
Clear Statement Rule Against Conditional Federal Funding	Weak
<i>Gregory v. Ashcroft</i> Core State Function Canon	Weak
Liberal Construction of Remedial Statutes	Weak
Presumption Against Implied Repeal	Weak
Common Law Canon	Weak
Absurdity Canon	Weak
Presumption Against Retroactivity	Strong
Presumption in Favor of Judicial Review	Strong
Indian Affairs Canons	Strong
Clear Statement Rule Against Waiver of Sovereign Immunity	Strong
Presumption Against Diminution of Presidential Power	Strong
Constitutional Avoidance	Strong

Taking a step back and looking at the classifications in Table 2, we again see that the Court’s substantive canons vary significantly in the degree to which they cohere with identifiable and authoritative constitutional law. As with the scope of applicability dimension discussed above in Section II.A, extremity on one dimension alone has not stopped the Court from recognizing the legitimacy of substantive canons. The more concerning end of the spectrum is clearly the lack of a nexus,²³⁰ and it should not escape our notice that many substantive canons fall on this end of the spectrum. As a matter of practice, though, courts’ creation of canons with a tenuous connection to authoritative law has not been thought to be problematic even for strong textualists.²³¹

230. See *infra* notes 314–18 and accompanying text (presenting at least one textualist’s view that “extraconstitutional” canons are problematic).

231. Bradford C. Mank, *Textualism’s Selective Canons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies*, 86 KY. L.J. 527, 527–28 (1998) (finding that textualists aggressively use at least some substantive canons, especially those

C. *THE DEARTH OF CANONS COMBINING WIDE SCOPE WITH A WEAK NEXUS TO AUTHORITATIVE LAW*

With these two dimensions in mind, we can combine them to reveal a stunning reality in the Court's use of substantive canons, demonstrated in Table 3. Looking out over the corpus of substantive canons, we can see that the Court has sanctioned multiple canons in most quadrants—i.e., low applicability with a high connection to authoritative law, low applicability with a low connection to authoritative law, and high applicability with a high connection to authoritative law. By contrast, the Court has recognized only one canon combining a high degree of potential applicability with a high degree of disconnect from authoritative law: the absurdity doctrine. This is not because it is difficult to imagine canons that might fall into this quadrant. Indeed, one could take virtually any extraconstitutional value—say, fairness or kindness or coolness—and formulate a canon that would aim to vindicate this value in the interpretation of all statutes. The possibilities of this exercise are endless, yet the quadrant is conspicuously light on real-world examples.

that favor results that mostly conservative textualists prefer); Krishnakumar, *supra* note 8, at 827; *see also infra* Section IV.A.1 (recounting major textualist defenses of canon use). *But see* Krishnakumar, *supra* note 8, at 829 (reporting findings that “contrary to popular claims that textualist judges rely on substantive canons frequently, the Court’s textualist justices rarely invoked substantive canons in the opinions they authored . . . and did so no more often than their nontextualist counterparts”).

Table 3: Substantive Canons Arrayed on Both Dimensions

	Strong Nexus with Authoritative Law	Weak Nexus with Authoritative Law
Unlimited Potential Applicability	<ul style="list-style-type: none"> • Constitutional Avoidance • Presumption in Favor of Judicial Review 	<ul style="list-style-type: none"> • The Absurdity Canon
Limited Potential Applicability	<ul style="list-style-type: none"> • Indian Affairs Canons • Clear Statement Rule Against Waiver of Sovereign Immunity • Presumption Against Diminution of Presidential Power • Presumption Against Retroactivity 	<ul style="list-style-type: none"> • <i>Gregory v. Ashcroft</i> Core State Function Canon • Clear Statement Rule Against Conditional Federal Funding • <i>Charming Betsy</i> Rule • Presumption Against Extraterritoriality • Presumption Against Preemption • Rule of Lenity • Liberal Construction of Remedial Statutes • Presumption Against Implied Repeal • Common Law Canon

This finding is not only remarkable from an empirical perspective; it also carries important normative and legal implications for any attempt to populate this quadrant with new canons.²³² The pattern that is revealed through arraying substantive canons on these dimensions helps to reveal a deeper normative logic about the limits of the judicial power. Both dimensions appear to be problematic in their own distinct ways: potential breadth of application literally multiplies opportunities for courts to distort the meaning of statutes, and a disconnection from authoritative law makes the risk of distortion acute by introducing factors that are highly unlikely to have been considered constraining by the authoring Congress.²³³ In most cases, each individual concern acting alone is unlikely to give courts or commentators much pause. When combined, however, these two problematic dimensions threaten not just judicial encroachment on congressional authority to promulgate statutes within its constitutionally assigned authority, but *systemic* encroachment of the

232. For a more detailed discussion, see *infra* Part IV.

233. See *supra* Sections II.A–B.

kind that threatens the separation of powers.²³⁴ Although the Court has been hazy about where the line between the judicial power and the legislative power is, these dimensions help locate it.

Regardless of the specific way that one reads the empty space in the high applicability/high disconnect quadrant, it is hard to unsee it when you see it. Should the Court develop an interpretive canon that falls in this quadrant, it would at the very least be unprecedented. And, as the current Supreme Court has repeatedly implied, novelty may suggest limits.²³⁵ In the next Part, I show that the major questions doctrine is novel in precisely this sense—it is a high potential applicability/high disconnect canon—and Part IV then shows why this makes the doctrine unjustifiable in our constitutional system.

III. EXTREME ON EVERY DIMENSION: THE UNPRECEDENTED MAJOR QUESTIONS DOCTRINE

As Part I showed, the major questions doctrine is now clearly a substantive canon of statutory construction. Specifically, it is a clear statement rule that says that, when it comes to major agency interpretations of statutes, one plausible interpretation among others will not support agency action; the statute must clearly indicate that the agency's interpretation is correct.²³⁶ This substantive canon has the potential to upend administrative law, but that is likely the entire point for the progenitors of the doctrine.²³⁷ Consequently, it is not likely to strike the six Justices in the majority as problematic that the canon has the potential to make major regulation by agencies impossible or at least fraught with peril. These six Justices should, however, be concerned about whether their new creation fits a defensible model of substantive canons.

This Part argues that the major questions doctrine, as recently reconstituted, takes us well outside the normal parameters of ordinary interpretive doctrine. Building on the insight from Part II that the Court has rarely sanctioned a substantive canon of statutory construction that encodes free-floating policies or values across the whole sweep of the statutory corpus, and indeed only grudgingly in the case of the ancient absurdity doctrine, I argue that the major questions doctrine marks an unprecedented step in the development of the law of interpretation. By itself, this novelty ought to

234. For more development of this separation of powers point, see *infra* Section IV.A.2.

235. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 549–50 (2012) (“Legislative novelty is not necessarily fatal; there is a first time for everything. But sometimes ‘the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent’ for Congress’s action.” (alterations in original) (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 505 (2010))); see also Leah M. Litman, *Debunking Antinovelty*, 66 *DUKE L.J.* 1407, 1415–20 (2017) (collecting Supreme Court cases treating novelty as a relevant factor in assessing the constitutionality of various government actions).

236. See *supra* Part I (surveying the cases and the literature and demonstrating this shift from major-questions-doctrine-as-exception-to-*Chevron* to major-questions-doctrine-as-clear-statement-rule).

237. See Heinzerling, *supra* note 5.

“raise[] an eyebrow,”²³⁸ and at the very least it should prompt some attempt to articulate a theory that can support the institution of such a new doctrine. I undertake my own attempt in Part IV, but the first step is showing that the major questions doctrine is indeed a step into largely uncharted territory.

A. *DIMENSION #1: THE MAJOR QUESTIONS DOCTRINE
POTENTIALLY APPLIES TO EVERY STATUTE*

By its own terms, the major questions doctrine has an extraordinarily broad possible reach, potentially touching every statutory interpretation case that might arise, depending only on whether an interpreter’s reading of that text enables it to act on “major” questions. It is probably true that not every statutory interpretation case will be deemed to present an “extraordinary” question, and that the major questions doctrine will therefore not be invoked in even a majority of cases. But as I show, this limited application of the canon on the basis of what implementers happen to do with statutes does not mean the canon does not have enough facial breadth that it *could* apply to any statute. On the criteria discussed in Section II.A, the major questions doctrine is as broad as the constitutional avoidance doctrine, the presumption of reviewability, and the absurdity doctrine.

First, the doctrine is not limited to specific subject matter.²³⁹ Instead, the logic behind the major questions doctrine—an assumption “that ‘Congress intends to make major policy decisions itself, not leave those decisions to

238. *West Virginia v. EPA*, 142 S. Ct. 2587, 2636 (2022) (Kagan, J., dissenting). It is important to note that this skepticism of the major questions doctrine’s novelty is not on par with the Court’s own concern about novelty in legislation and agency interpretations of statutes. The Court justifies the major questions doctrine in part by appealing to an antinovely criterion—namely, that novel interpretations of statutes by agencies should be subject to the major questions doctrine. *Id.* at 2610 (emphasizing that the Clean Power Plan was suspect in part because it “claim[ed] to discover in a long-extant statute an unheralded power” (alteration in original) (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014))); *see also id.* at 2639 (Kagan, J., dissenting) (critiquing “[t]he majority’s claim about the Clean Power Plan’s novelty”). This antinovely rationale for the major questions doctrine is arguably part of a broader perspective animating the current Court’s decision-making, and one that has been heavily criticized. *See generally* Litman, *supra* note 235 (criticizing the Court’s acceptance of legislative novelty). But this concern about novelty in statutory law is meaningfully different from concerns about novelty in interpretive doctrine. An antinovely posture in constitutional law cases concerning the legislative power is arguably problematic insofar as it allows judges to infer from congressional inaction that Congress believed its powers to be limited. *Id.* at 1466–79. In other words, assuming that Congress has acted unconstitutionally whenever it has done something unprecedented involves one branch (the judiciary) imposing artificial limits on another branch (Congress) on the basis of nothing more than the premise that Congress has always pressed the constitutional limits of its power. An antinovely posture in interpretive law, by contrast, makes more sense since it involves the elaboration of a body of law by the *same branch* of government. That same branch can reliably understand its own propensity to push the limits of interpretive doctrine, which makes it more reasonable to assume from the normal parameters of that branch’s practices that novelty is disapproved of.

239. *See supra* Section II.A.1 (discussing the relevance of subject matter limitations on canons).

agencies”²⁴⁰—would seem to apply to statutes exercising any and all of the legislative power assigned to Congress. After all, any policy can, in theory, be major, whether it is a criminal or civil policy, or whether it concerns intergovernmental relations or primary rules of conduct. To the extent that statutory law creates policy, the major questions doctrine is quite literally coextensive with the entirety of statutory law and will depend only on what some third party decides to do with that statute.²⁴¹

Next, the major questions doctrine does not appear to be limited to statutes with particular kinds of legal effects, but rather could conceivably be in play across the full range of legal effects that statutes might theoretically have.²⁴² Some might suggest that this is an overstatement, and that the doctrine has in practice been limited to interpretations of statutes offered by agencies pursuant to a claimed statutory delegation of authority.²⁴³ If this is in fact a limitation that the Court endorses—and it is not clear that it is²⁴⁴—it is hardly enough to say that it makes the canon narrowly applicable when agency interpretations of statutes are the primary vehicle through which statutes are implemented and interpreted. Agency delegations are how the vast majority of statutory interpretation questions arise in the modern administrative state,²⁴⁵ so the major questions doctrine’s clear applicability to this class of cases is, in practical effect, universal.

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

241. In this respect, the major questions doctrine is similar to the constitutional avoidance canon’s facial breadth—not only can any statutory policy be major, but any statutory policy can also raise a constitutional question.

242. See *supra* Section II.A.2 (discussing the relevance of the target and legal effect of statutes subject to canons).

243. See *West Virginia*, 142 S. Ct. at 2607–08 (emphasizing the situation “[w]here [the] statute at issue is one that confers authority upon an administrative agency”).

244. For one thing, the happenstance that all major questions doctrine cases involve agency interpretations does not prove that the doctrine does not extend to other interpretive scenarios. Beyond that, it is presently unclear whether the Court would invoke the major questions doctrine in cases involving statutory delegations of authority to other delegates, such as courts. See Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 408 (2008) (“[T]he federal government has three branches, not two. Congress delegates authority not only to agencies, but to courts as well.”); David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 139 (2000) (“[W]hen Congress passes vague legislation without delegating discretionary authority to implementing agencies, the authority for interstitial discretionary interpretation inevitably devolves to the courts.”). In fact, it would seem odd to limit the doctrine’s effect to agency-administered statutes since it is just as unlikely that Congress would intend to delegate major policymaking discretion to courts. Thus, it is not difficult to imagine the major questions doctrine doing work in a case of ordinary statutory interpretation without the administrative law overlay.

245. Edward L. Rubin, *Modern Statutes, Loose Canons, and the Limits of Practical Reason: A Response to Farber and Ross*, 45 VAND. L. REV. 579, 581 (1992) (discussing “the directive theory of legislation,” where “statutes consist exclusively of instructions to an administrative agency” and do not typically provide “rules for private persons at all,” and arguing that it accurately describes “the world we actually inhabit”).

Finally, the major questions doctrine is now formulated as a clear statement rule, which makes the doctrine turn less on situational ambiguity and more on whether the court believes there is a policy that is major. In all respects, then, the major questions doctrine is remarkably broad; no question of policy presented by statutes is entirely safe from the major questions doctrine. The only thing that can prevent application of the doctrine is the avoidance of major uses of statutes, which is hard to do when the criteria for majorness are still inchoate.²⁴⁶ And even if these criteria were clear, they still fundamentally depend on what third parties decide to pursue with their claimed statutory authority.²⁴⁷ Perhaps it is not surprising, then, that agencies have begun to act as if any interpretation is potentially subject to the major questions doctrine,²⁴⁸ and that lower courts have begun to stretch the doctrine into more and more domains.²⁴⁹

Putting these three forms of breadth together, the major questions doctrine is one of the broadest canons ever recognized by the Court. Indeed, it is arguably broader than the constitutional avoidance doctrine in that it is always a clear statement rule, whereas the constitutional avoidance doctrine only completes the rare trifecta of breadth in the rare case that it is applied as a clear statement rule.²⁵⁰ One potential response to this line of thinking might be to emphasize that the doctrine is only strictly operable when a court deems the question the agency has answered to be “major.” There are two reasons that this narrowing condition is illusory. First, even though the doctrine is formally triggered only by a predicate finding that “the ‘history and the breadth of the authority that [the agency] has asserted[.]’ and the ‘economic and political significance’ of that assertion[.] provide a ‘reason to hesitate

246. Justice Gorsuch’s attempt to simplify the criteria that determine majorness is a step in the right direction, see *West Virginia*, 142 S. Ct. at 2620–22 (Gorsuch, J., concurring), but it still leaves the door open to additional caveats and criteria, and it is, at any rate, not controlling.

247. Indeed, I cannot think of any other canon whose actual applied scope depends so significantly on what some actor other than Congress or the courts independently do. For most canons, the scope is determined by the statute itself, not by third-party actions. This is just more reason to view the major questions doctrine as facially unlimited.

248. Will Dobbs-Allsopp, Rachael Klarman & Reed Shaw, *Guidance for Regulators on the Major Questions Doctrine*, REGUL. REV. (Nov. 29, 2022), <https://www.theregreview.org/2022/11/29/dobbs-allsopp-klarman-shaw-guidance-for-regulators-on-the-major-questions-doctrine> [<https://perma.cc/G5RG-MTKN>] (“The arrival of the ‘major questions doctrine’ in the U.S. Supreme Court’s *West Virginia v. EPA* decision has dramatically shifted the legal terrain atop which federal agencies regulate—and has left regulators perplexed about how to move forward.”).

249. Brunstein, *supra* note 105 (“My survey reveals that there is no one major questions doctrine in the lower courts. Like the Supreme Court’s cases predating *West Virginia*, judges have taken vastly different approaches to defining and applying the doctrine—even within the same circuit—illustrating that many judges view the doctrine as little more than a grab bag of factors at their disposal. The cases reflect that lower courts do not feel constrained in how they apply the doctrine, and their applications of the doctrine appear to largely track partisan lines.”).

250. See *supra* note 180 and accompanying text.

before concluding that Congress' meant to confer such authority,"²⁵¹ this predicate condition is so ill-defined (and perhaps even so undefinable) that it could be plausibly invoked in the context of any statutory interpretation.²⁵² Moreover, randomness in the application of the predicate condition will mean that agencies will have to ask whether there is a risk that a court will determine the question to be major in every decision they make. The practical reach of the major questions doctrine will, then, be most or even all agency interpretations, notwithstanding the gesture toward a limiting criterion.

Second, and even more importantly, the predicate condition of majorness goes not to the potential scope of the applicability of the canon, but rather to the animating policy of the canon. The Court invokes majorness not because it is attempting to seriously delimit the potential applicability of the canon—quite the contrary, it seems the Court would much prefer to not delimit the scope of the canon at this point in time—but because it is attempting to articulate its theory of why the canon is justified.²⁵³ Ultimately, majorness simply does not do very much to limit the potential scope of applicability of the canon because the concept of majorness is inherently chimerical and relates more to justification than to boundaries.

There is an even more important reason to view the scope of the major questions doctrine as quite broad. Even if one believes that majorness is a threshold trigger to the doctrine that does limit the scope of the doctrine, the doctrine might still apply even when a court deems a question not to be major. It is an unresolved puzzle whether limiting constructions of statutes under the

251. *West Virginia*, 142 S. Ct. at 2608 (first alteration in original) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000)).

252. Sohoni, *supra* note 35, at 287 (“The rule hinges on a finding that a given agency action is a ‘big new thing’—that it is ‘extraordinary,’ or ‘major,’ or ‘transformative.’ The opacity of this trigger was a well-ventilated criticism of the old major questions exception, and the cases in the major questions quartet do not do much to assuage this concern.” (footnotes omitted)); *see also* Stacey H. Mitchell et al., *‘Major Questions’? Supreme Court Decision in Climate Change Case Sends Ripples Across the Regulatory Landscape*, AKIN (July 6, 2022), <https://www.akingump.com/en/news-insights/supreme-court-invokes-major-questions-doctrine-in-west-virginia-v-epa-to-limit-agency-authority-to-tackle-climate-change-with-implications-for-rulemakings-across-the-regulatory-landscape.html> [<https://perma.cc/6Y6Y-RTM4>] (attempting to collect a list of factors for what counts as “major,” but failing to achieve any rule-like statement). *But see* Capozzi, *supra* note 7, at 226–36 (admitting that what counts as “major” is not clear but arguing that the Court can and will provide more rule-like statements and case law that helps narrow the reach of the canon).

253. One of the basic justifying theories that the Court offers is that it is unlikely that Congress would want to delegate major policymaking discretion, and that, if it did, it would insist on being exceedingly clear in doing so. *See* Sohoni, *supra* note 35, at 311 (“As explained far more directly by then-Judge Kavanaugh, the major questions doctrine is ‘grounded in two overlapping and reinforcing presumptions: (i) a separation of powers-based presumption against the delegation of major lawmaking authority from Congress to the Executive Branch, and (ii) a presumption that Congress intends to make major policy decisions itself, not leave those decisions to agencies.” (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))).

canons apply in other situations where the predicate criteria are not present.²⁵⁴ In *Spector v. Norwegian Cruise Line Ltd.*, the Supreme Court splintered on the question.²⁵⁵ The plurality concluded that clear statement rules (i.e., canons that are not ambiguity dependent) must be applied on an “application-by-application” basis rather than according to “[a]n all-or-nothing approach, under which a statute is altogether inapplicable if but one of its specific applications trenches on the domain protected by a clear statement rule.”²⁵⁶ The latter approach “would convert the clear statement rule from a principle of interpretive caution into a trap for an unwary Congress.”²⁵⁷ Justice Scalia and two other Justices disagreed with this approach, arguing that “the absence of a clear statement renders the statute inapplicable—even though some applications of the statute, if severed from the rest, would not require clear statement.”²⁵⁸ For Justice Scalia, adopting the plurality’s approach would be to admit that the canon was a judicially created, extratextual limitation on the statute—and therefore presumably in flagrant violation of the norm of faithful agency.²⁵⁹ For his part, Justice Thomas argued that the Court ought to embrace an application-by-application basis for clear statements as well as presumptions.²⁶⁰

Spector reveals deep uncertainty about how canons operate on statutes—according to at least a few of the Justices, canons limit the statutes they operate on across the board rather than on a case-by-case basis.²⁶¹ *Spector* therefore reveals a potential way that the major questions doctrine could limit the reach of statutes even when agencies are not invoking the statute in any major way. If Justice Scalia’s view was to prevail, then once a statute was interpreted by an agency and later deemed to have run afoul of the major questions doctrine, that statute would be limited across the board. Whether courts would actually deem a subsequent agency action to implicate major questions would be irrelevant. It is not hard to imagine how this operation of the major questions

254. See Ryan D. Doerfler, *Can a Statute Have More than One Meaning?*, 94 N.Y.U. L. REV. 213, 257–60 (2019).

255. *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 119, 123 (2005).

256. *Id.* at 138–39.

257. *Id.* at 139.

258. *Id.* at 157 (Scalia, J., dissenting).

259. *Id.* at 156–57 (Scalia, J., dissenting).

260. *Id.* at 148–49 (Thomas, J., concurring in part, dissenting in part, and concurring in the judgment in part).

261. MANNING & STEPHENSON, *supra* note 41, at 494 (“[W]e appear to have three positions on the underlying question: Justice Scalia would apply the *Clark* ‘lowest common denominator’ principle in all cases; Justice Thomas would take an application-by-application approach in all cases; and Justice Kennedy would look to whether the clear statement rule in question resolves a statutory ambiguity by favoring one textually plausible reading of the statute over another textually plausible reading (in which case the favored reading applies in all cases), or whether the clear statement rule in question reads an implied limitation into broad but otherwise unambiguous text (in which case the clear statement rule is relevant only to the problematic applications of the text).”).

doctrine would quickly ossify all statutory interpretation by agencies and demand that Congress provide a clear statement in *all* legislation. The limits of this contingency are defined only by the Court's ability to find statutes that are so categorically un-major that they could never be used by an agency in a major way. Of course, Justice Scalia's view may not prevail the next time this issue is brought to the Court, but if his view were rejected, the Court would seem to have to admit that the major questions doctrine was a judicial creation rather than "a true-to-fact presumption of congressional intent."²⁶² By contrast, if Justice Thomas's view were to prevail, then admittedly the scope of the major questions doctrine might be substantially limited—enough so, in fact, that it might be a big nothingburger that was only rarely invoked.²⁶³

For all of these reasons, the major questions doctrine is an outlier on the scope of application continuum. It is at the very least in the same ballpark as the constitutional avoidance canon and quite clearly distinguishable from the battery of canons that affect only small slices of Congress's work product.²⁶⁴ This alone might be thought to make the major questions doctrine susceptible to the same level of critique as the controversial constitutional avoidance doctrine. But there is more: the major questions doctrine is also extreme in its lack of connection to authoritative constitutional law.

*B. DIMENSION #2: THE MAJOR QUESTIONS DOCTRINE HAS NO
NEXUS WITH AUTHORITATIVE LAW*

One of the most puzzling features of the major questions doctrine is its reliance on the concept of majorness. Not only is majorness difficult to define,²⁶⁵ but it also is not itself a legally relevant category. There is no antimajorness doctrine in the Constitution, and statutes in administrative law that refer to and define majorness use that concept simply to categorize rules for the purpose of imposing heightened procedural burdens before an agency can act, not for the purpose of disallowing major action altogether.²⁶⁶

262. *Spector*, 545 U.S. at 156 (Scalia, J., dissenting).

263. *Cf. Hickman*, *supra* note 35, at 76 (outlining an argument "that the "[Major Questions] Quartet reflects 'merely responsible judicial minimalism . . . to cultivate the major questions doctrine on a rule-by-rule, statutory basis, gradually building out boundary lines that agencies must not cross, and to thereby allow the guardrails of nondelegation to accrete incrementally, in common law fashion'" (alteration in original) (quoting Sohoni, *supra* note 35, at 314)).

264. *See supra* Section II.A.

265. *See supra* note 252 and accompanying text.

266. *See, e.g.*, Congressional Review Act, 5 U.S.C. § 804(2) (defining rules as major if they have "an annual effect on the economy of \$100,000,000 or more," impose a "major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions," or if they have "significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets"). Indeed, laws like the Congressional Review Act are actually in "tension" with the major questions doctrine, since the Act "established a presumption that all 'major rules' must be given legal effect unless Congress

When the Court invokes majorness, it therefore plucks a random concept out of the ether and makes it the trigger for a clear statement rule that bars an interpreter from acting on an otherwise plausible interpretation of a statute.

Defenders of the major questions doctrine would likely invoke the nondelegation doctrine as the tether between the major questions doctrine and authoritative constitutional law.²⁶⁷ Justice Gorsuch, for his part, made this connection explicit in his concurrence in *West Virginia* when he said that “the major questions doctrine works in much the same way [as clear statement rules for statutes abrogating sovereign immunity] to protect the Constitution’s separation of powers.”²⁶⁸ There is just one problem: the Supreme Court has never linked majorness to the nondelegation doctrine. Justice Gorsuch cites to *Wayman v. Southard*, where Chief Justice Marshall, in dicta, stated that

The line has not been exactly drawn which separates those important subjects which must be entirely regulated by the legislature itself, from 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.²⁶⁹

The argument appears to be that this passage supports a distinction between major and minor questions and establishes a nondelegation test that hinges on this distinction. However, for several reasons, this conclusion is not warranted.

First, and most fundamentally, the Court has never treated this passage as relevant to the actual nondelegation inquiry.²⁷⁰ Instead, the Court has, since *J.W. Hampton*, asked whether Congress has supplied an “intelligible principle” to guide the agency’s exercise of delegated discretion.²⁷¹ Justice Gorsuch’s dissent in *Gundy*,²⁷² which critiqued the intelligible principle standard and argued to replace it with an inquiry focused, at least in part, on whether Congress has only left details to be filled, is not law—that is why it was a dissent.²⁷³ Moreover, even were we to treat Gorsuch’s test from *Gundy* as law,

affirmatively enacts a new law stating that a particular major rule should not be given legal effect.” Squitieri, *supra* note 35, at 491.

267. See Capozzi, *supra* note 7, at 208–12.

268. *West Virginia v. EPA*, 142 S. Ct. 2587, 2617 (2022) (Gorsuch, J., concurring).

269. *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825); see *West Virginia*, 142 S. Ct. at 2617 (Gorsuch, J., concurring) (referring to this passage from *Wayman*).

270. Levin, *supra* note 6, at 43 (“This fleeting remark [in *Wayman*] might have been significant to our inquiry if subsequent decisions by the Court had ever used it as a basis for elaborating on the category of ‘important’ non-delegable matters—but none ever has.”).

271. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472–73 (2001) (“[W]e repeatedly have said that when Congress confers decision-making authority upon agencies Congress must ‘lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.’” (second alteration in original) (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928))).

272. *Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting).

273. Levin, *supra* note 6, at 37 (“An initial difficulty with Gorsuch’s argument is that it seems to depend on the way he and others would like the Constitution to be interpreted, rather than

it is not clear how majorness would be relevant beyond the “fill in the details” prong of the test.²⁷⁴ For instance, while there is a plausible connection between the level of detail left to agencies under statutes and the majorness of those details (i.e., details are generally not major²⁷⁵), there is no plausible connection between majorness and the other two categories which Gorsuch says are permissible delegations. When Justice Gorsuch says in the *Gundy* dissent that “once Congress prescribes the rule governing private conduct, it may make the application of that rule depend on executive factfinding,”²⁷⁶ there is no caveat there, either express or implied, for major delegations of factfinding authority. This prong of the test offered by Gorsuch is categorical and blind to the majorness of the delegation. So too is the last category identified by Gorsuch for situations where “Congress may assign the executive and judicial branches certain non-legislative responsibilities.”²⁷⁷ In order to maintain that the concept of majorness is at all relevant to the nondelegation doctrine even under Gorsuch’s preferred nondelegation test, there would have to be carveouts to the major questions doctrine for the categories of the Gorsuch test for nondelegation that do not implicate the concept of majorness. Yet *West Virginia*, *Biden v. Nebraska*, and the other major questions cases draw no such carveouts.

Second, and somewhat relatedly, both the intelligible principle standard that the Court applies in nondelegation cases and the *Gundy/Wayman* “fill in the details” test are not actually focused on majorness, but rather at best associate majorness somewhat probabilistically with the actually relevant criterion under the nondelegation doctrine: whether there is sufficient linguistic specificity in the statute.²⁷⁸ The intelligible principle test provides that there need not be a great deal of specificity, and the *Gundy/Wayman* test requires much more. What any of this has to do with the majorness of the question the statute addresses is unclear. Indeed, it is possible to imagine details that are major and broad statutes that are not.²⁷⁹ Majorness might

the way it actually is interpreted. For now, the authoritative gloss on the nondelegation doctrine is the intelligible principle test, and relative to *that* baseline, none of the statutes that have been applied in the major questions doctrine cases looks constitutionally shaky.”).

274. *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting) (arguing “that as long as Congress makes the policy decisions when regulating private conduct, it may authorize another branch to ‘fill up the details’”).

275. Of course, few would dispute that the statutory ambiguity in *King v. Burwell* was a “detail,” and even one of exceptional granularity (some would even say it was a scrivener’s error), yet it was still considered major. See *King v. Burwell*, 576 U.S. 473, 485 (2015).

276. *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting).

277. *Id.* at 2137.

278. Cf. *Mistretta v. United States*, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting) (arguing “that a certain degree of discretion, and thus of lawmaking, *inheres* in most executive or judicial action, and it is up to Congress, by the relative specificity or generality of its statutory commands, to determine—up to a point—how small or large that degree shall be”).

279. See *supra* note 275 (identifying *King v. Burwell* as involving a major detail); 5 U.S.C. § 2301 (designating a list of rather broad “merit system principles” that are to guide implementation of

generally correlate with breadth and nonmajority with details, but this is not necessary, and in fact this lack of a necessary connection creates room for anomalies in the major questions doctrine that have drawn attention, such as the fact that it can hinder Congress's ability to delegate even through broad but otherwise unambiguous statutes.²⁸⁰ To be sure, scholars have criticized this one-dimensional test for nondelegation and its seeming disregard of other relevant "dimensions" of delegation.²⁸¹ But the fact remains, the dimension of specificity of language is what actually matters to both the currently operable law of nondelegation and to the leading candidate to replace it, and the major questions doctrine's focus on majority simply has nothing to do with the language. Nor could it: if there was a constitutional limitation on majority *qua* majority in legislation, it would be lampooned as *Lochnerism*. Indeed, there might be no other constitutional place to put such a constitutional nonmajority doctrine other than substantive due process.

To its great credit, the *West Virginia* majority did not attempt to draw this problematic connection between the nondelegation doctrine and the new major questions doctrine, and the *Biden v. Nebraska* majority simply ignored the question altogether. But the major questions majority does not ever articulate any other legal grounding that might justify the Court's direction to courts to ignore plausible, but majority-implicating, readings of statutory text offered by agencies.²⁸² The closest that the majority comes is in its suggestion that textualism counsels consideration of what a text means in context, and that this context includes indicia that might affect how plausible it is to believe that Congress meant to delegate authority through otherwise ambiguous text.²⁸³ Hence, as the Court puts it, "there are 'extraordinary cases' . . . in which the 'history and the breadth of the authority that [the agency]

federal personnel management policies by the Merit Systems Protection Board that would be highly unlikely to present any major questions). Consider also *Gundy* itself, which few would say presented "major issues" despite its broad delegation. See Levin, *supra* note 6, at 44.

280. Deacon & Litman, *supra* note 35, at 1037.

281. Cary Coglianese, *Dimensions of Delegation*, 167 U. PA. L. REV. 1849, 1851 (2019) ("How can the nondelegation doctrine still exist when the Court over decades has approved so many pieces of legislation with fairly unintelligible principles? The answer to this puzzle emerges from recognition that the intelligibility of any principle dictating the basis for lawmaking is but one characteristic defining that authority. The Court has acknowledged five other characteristics that, taken together with the intelligible principle, constitute the full dimensionality of any grant of lawmaking authority and hold the key to a more coherent rendering of the Court's application of the nondelegation doctrine.").

282. See Sohoni, *supra* note 35, at 309–310.

283. *West Virginia v. EPA*, 142 S. Ct. 2587, 2607–08 (2022) (quoting *Davis v. Mich. Dep't of the Treasury*, 489 U.S. 803, 809 (1989)); see also *Biden v. Nebraska*, 143 S. Ct. 2355, 2380 (2023) (Barrett, J., concurring) (arguing that "a reasonable interpreter would" consider the Constitution's vestment of legislative power in Congress, and that, "[c]rucially, treating the Constitution's structure as part of the context in which a delegation occurs is *not* the same as using a clear-statement rule to overenforce Article I's nondelegation principle (which, again, is the rationale behind the substantive-canon view of the major questions doctrine)").

has asserted,’ and the ‘economic and political significance’ of that assertion, provide a ‘reason to hesitate before concluding that Congress’ meant to confer such authority.”²⁸⁴ Fair enough—context does matter for how we interpret statutes.²⁸⁵ But this is nothing more than a meta-principle of statutory interpretation, and it is odd to say that a clear statement rule follows from another principle of statutory interpretation. Unlike a constitutional rule of law, like the nondelegation doctrine, a general principle of statutory interpretation does not have primacy over the plain text of statutes. But when the major questions doctrine applies, that is precisely what happens: the text at least plausibly supports what the agency is doing, yet *neither* of the plausible interpretations may be adopted by the agency, which means that context actually *does* take primacy over the statute Congress actually wrote (perfectly constitutionally, it might be added).

This is not merely a logical and constitutional conundrum; it also carries serious consequences if we ask the natural follow-on question: *In what other ways might context lead the Court to declare separate clear statement rules that require Congress to do extra work?* So far, the emphasis has been on majorness, but there is no reason it would have to be so focused. Context is, well, contextual. Lots of things provide context. For instance, the Court might decide one day that part of the context of statutes is that the 88th Congress—i.e., the Congress that passed the Civil Rights Act of 1964—was unlikely to have considered or preferred that gay, lesbian, or transgender people have rights, and that empirical premise about what Congress probably thought about these people is probably true.²⁸⁶ Now imagine if the Supreme Court proceeded from that premise to the creation of a clear statement rule that says that this particular context means that the Court will not allow an interpreter to choose an otherwise plausible textual interpretation of the language of the Civil Rights Act of 1964 that supports gay, lesbian, or transgender people in any way—the Congress today must instead provide a clear statement if it intends to overcome the contextual inference. Would this kind of clear statement rule, derived as it is from context, be distinguishable in any way from what the Supreme Court

284. *West Virginia*, 142 S. Ct. at 2608 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000)).

285. See generally Tara Leigh Grove, *The Misunderstood History of Textualism*, 117 NW. U. L. REV. 1033 (2023) (showing that “context” has always mattered to textualism).

286. Of course, this was the question in *Bostock v. Clayton County*, and Justice Alito makes a fairly strong case that neither Congress nor ordinary people in 1964 would have understood “discrimination because of sex” to reach discrimination based on sexual orientation or gender identity. See *Bostock v. Clayton County*, 140 S. Ct. 1731, 1755 (2020) (Alito, J., dissenting) (“If every single living American had been surveyed in 1964, it would have been hard to find any who thought that discrimination because of sex meant discrimination because of sexual orientation—not to mention gender identity, a concept that was essentially unknown at the time.”). Of course, in approving of Justice Alito’s understanding of the context in which the 1964 Civil Rights Act was passed, I do not mean to take his side on whether the plain text of the act compelled the result in *Bostock*.

did with the major questions doctrine in *West Virginia*? Or take a more general example: would it be different than what the Court did with the major questions doctrine for the Court to decide that context indicates that Congress rarely intends to adopt radically progressive/conservative legislation, and that the Court should therefore disallow an interpreter from choosing among plausible interpretations of a statute's text whenever the Court concludes that one of the interpretations would be radically progressive/conservative?

The quality of majorness may be linked to a plausible contextual inference about how Congress works,²⁸⁷ but lots of other contextual inferences could be had, and the Court has not even attempted to explain why majorness gets a canon while other factors do not. There is a simple explanation for why the Court has never taken any of these steps (except in the context of majorness): context alone is not law, but rather an aid to interpretation. Therefore, it is difficult to view the Court's defense of the major questions doctrine as in any meaningful way linking the major questions doctrine with authoritative law.

C. IN A CLASS OF ITS OWN

Stepping back, it is of course not damning by itself that the Court's new major questions doctrine lacks any connection to authoritative law. As Part II showed, there are other canons that similarly seem to lack any meaningful nexus to authoritative law. Similarly, it is not damning that the Court's new major questions doctrine potentially applies to every statute, depending on whether an interpreter attempts to do something major with it. Again, there are plenty of examples of substantive canons that similarly apply broadly. Combining these two features in a brand new canon, however, is entirely unprecedented in our legal system: this is the first substantive canon of statutory interpretation that systematically imposes an extralegal substantive criterion in every interpretive exercise.²⁸⁸ If the Court's practices demonstrate normal parameters to the law of interpretation and a new doctrine breaks fundamentally new ground, that new doctrine should be viewed as deeply suspect. In the next Part, I show how this novelty is in fact unjustified from a theoretical and constitutional perspective.

IV. THE MAJOR QUESTIONS DOCTRINE AND THE LIMITS OF THE JUDICIAL POWER

Thus far this Article has demonstrated that, as a factual matter, the major questions doctrine pushes interpretive doctrine into largely uncharted territory. With perhaps one exception (the absurdity doctrine)—and a

287. *But see infra* Section IV.B.1.

288. Again, the only exception is the absurdity doctrine, which is not new by any stretch of the imagination, see Manning, *supra* note 25, at 2389–90 (discussing the absurdity doctrine's "deep roots"), and has been effectively inherited into our legal system, see *infra* Section IV.A.1.

particularly controversial exception at that²⁸⁹—the Court has assiduously avoided recognizing substantive canons that combine theoretically unbounded applicability with extremely weak or nonexistent connections to authoritative constitutional law. This novelty ought to, in the Court’s words, “provide a ‘reason to hesitate’”²⁹⁰ before we endorse the doctrine as consistent with interpretive law and constitutional structure. After hesitation comes reflection, and in this Part, I reflect on whether this new turn in the Court’s elaboration of the law of interpretation can be squared with constitutional and widely held theoretical commitments.

First, in Section IV.A, I show that the Court’s historical avoidance of substantive canons with features like the major questions doctrine’s reflects the Court’s own implicit recognition of the limits of interpretive law in a separation of powers system. That is to say, from a textualist perspective, the major questions doctrine does indeed function “as [a] get-out-of-text-free card[,]”²⁹¹ although this is, importantly, because of its uniquely novel combination of features rather than because of its status as a substantive canon alone. As I show below, canons with these features run an impermissible risk of systematic judicial aggrandizement vis-à-vis Congress, and in some sense permit the Court to exercise an extraconstitutional veto of legislation.²⁹² This explains why, outside of the absurdity doctrine, they do not exist in our law of interpretation. And while the Court has tepidly accepted the absurdity doctrine despite its similarities to the major questions doctrine, that reflects the doctrine’s “sheer antiquity”²⁹³—a defense that is not available in the case of the entirely new major questions doctrine. Second, in Section IV.B, I consider whether it might be possible to mitigate or offset these constitutional problems by grounding the major questions doctrine in terms of intentionalist or dialogic models of statutory interpretation rather than on a purely textualist basis.²⁹⁴ While these approaches are more facially plausible, they too are pushed to the limits of credulity by the major questions doctrine. In sum, I suggest that the major questions doctrine’s novelty is in fact a tell-tale sign of its deep incompatibility with our established law of interpretation.

289. Manning, *supra* note 25, at 2393 (“By giving judges broad authority to displace legislative outcomes based on an unstructured identification of background social values, the absurdity doctrine permits judges to make an end run around the constitutional norms that establish those boundaries.”); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 116–18 (2001) (noting “that textualists apply the doctrine of absurdity infrequently” because of concerns that it is merely purposivism, and reviewing ways to narrow the doctrine so that it can be reconciled with legislative supremacy); Doerfler, *supra* note 57, at 830 (noting that “the absurdity doctrine is now looked upon with some skepticism”).

290. *West Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000)).

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

292. *See infra* Section IV.A.2.

293. *See infra* notes 298–305 and accompanying text.

294. *See infra* Section IV.B.

A. TEXTUALISM'S NOVELTY CHALLENGE

This Section provides an overview of the challenges that the major questions doctrine's novelty poses for textualists. Textualists' emphasis on following the plain meaning of statutory language has not stopped them from recognizing many substantive canons, despite such canons' explicit purpose of departing from the best reading of the text.²⁹⁵ Textualists have not ignored this problem and have attempted to justify substantive canons on textualist grounds, but their responses are incompletely theorized.²⁹⁶ This undertheorization comes into sharp focus with the major questions doctrine. As I show below, the major questions doctrine (and really any substantive canon with its basic features) would be difficult for textualism to absorb. Section IV.A.1 starts by examining textualists' own theories about substantive canons, how they come to be, and how they can legitimately change. Section IV.A.2 then unpacks the implicit constitutional theory that undergirds textualists' mixed acceptance of canons and demonstrates that the major questions doctrine puts significant pressure on this understanding.

1. Searching for a Textualist Account of Canons

While there are several self-avowed textualists who have expressed persistent skepticism of substantive canons,²⁹⁷ the arrival of the major-questions-doctrine-as-clear-statement-rule at an ostensibly textualist moment in the Court's history, alongside the long history of textualist use of canons in judicial opinions, suggests that all is not well in Camelot. Increasingly, textualists seem willing to accept a role for substantive canons, although there is so far no consensus account of the limits of the judicial power to recognize and deploy canons—perhaps because, as I suggest in Section IV.A.2, these limits have not been extensively tested until now.

The standard textualist defense of substantive canons focuses on tradition: there is a “closed set” of substantive canons that have effectively been absorbed into the background context “against which Congress legislates.”²⁹⁸ On this account, while many of these canons would not be legitimate if imposed for the first time now, their longstanding recognition has made it impossible to understand the semantics of text without attending to them.²⁹⁹ In effect, this argument attempts to transform substantive canons

295. Barrett, *supra* note 19, at 110–11.

296. See *infra* Section IV.A.1.

297. See, e.g., Manning, *supra* note 289, at 119–26; John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 432–49 (2010).

298. Barrett, *supra* note 19, at 159; Manning, *supra* note 25, at 2474.

299. Barrett, *supra* note 19, at 161–62; Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 583 (1989–1990) (arguing that canons have “a sort of prescriptive validity” when they become so engrained that “the legislature presumably has them in mind when it chooses its language”).

into linguistic canons.³⁰⁰ This argument does major work for textualists. Despite being open to convincing critiques for its inconsistency with textualist principles,³⁰¹ the absurdity doctrine is justified on the grounds that it is simply baked into the cake now. As Justice Scalia put it, long-existing canons are part of the canon by virtue of “sheer antiquity.”³⁰² At the same time, this theory is unforgiving when it comes to new canons that are not plausibly part of the tradition of judicial review. As John Manning puts it, “textualists [logically] . . . must largely accept the world as they find it.”³⁰³ It would be difficult, for instance, to see how this account could be used to justify the major questions doctrine. At best, the major questions doctrine briefly emerged in the late nineteenth century before receding from importance almost entirely,³⁰⁴ and even that account misses critical differences between that historical analogue and the modern major questions doctrine.³⁰⁵

Recently, William Baude and Stephen Sachs have offered a slight revision to this “sheer antiquity” approach, but one that still focuses largely on what courts have historically done. According to them, substantive canons (as well as semantic canons) are not simply tools to discern the meaning of statutory texts; instead, they are actually part of an identifiable body of law that affirmatively binds courts and determines the meaning of text as a matter of law.³⁰⁶ As they put it, “[i]nterpretation isn’t just a matter of language; it’s also governed by law,” which they call the “law of interpretation.”³⁰⁷ For Baude and Sachs, who approach the question from a positivistic lens, judges do not have the power to make (or depart from) interpretive law as they see fit. Instead, when they apply interpretive doctrine, they tap into a preexisting “general-law tradition” that is revealed through judicial practice and is widely accepted as critical to understanding statutes.³⁰⁸ This seems to be Justice Gorsuch’s view of many substantive canons.³⁰⁹

300. Barrett, *supra* note 19, at 176 n.319.

301. Manning, *supra* note 25, at 2391.

302. See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 29 (Amy Gutmann ed., 1997).

303. Manning, *supra* note 25, at 2474.

304. See *supra* note 7 and accompanying text.

305. See *supra* note 7 and accompanying text.

306. Compare William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1082–83 (2017) (arguing that there is a “law of interpretation” that helps to resolve statutory ambiguities legalistically), with Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation: Erie for the Age of Statutes*, 54 WM. & MARY L. REV. 753, 770–71 (2013) (arguing “that the principles of statutory interpretation are not currently understood as law”).

307. Baude & Sachs, *supra* note 306, at 1082.

308. *Id.* at 1138.

309. Honorable Neil M. Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 CASE W. RES. L. REV. 905, 917 (2016) (“The truth is that the traditional tools of legal analysis do a remarkable job of eliminating or reducing indeterminacy. . . . [W]hen judges pull from the same toolbox and look to the same materials to answer the same narrow question—what might a reasonable person have thought the law was at the time—we confine the range of

Compared to the “sheer antiquity” approach, this theory does build in some capacity for judges to discover and adapt aspects of the general law of interpretation that have not historically been recognized.³¹⁰ But this power is not unlimited: Baude and Sachs make clear that judges have no power to create or change law.³¹¹ Beyond this distinction between legitimate discovery and illegitimate creation, however, are a million shades of gray. They acknowledge that law is ultimately a “human artifact[,]”³¹² and that there must therefore be a first articulation of every doctrine that makes up the law of interpretation. This first articulation is not creation, however, if it is but the first step in a process of “slow accretion” through which doctrines become part of “our law of interpretation.”³¹³ While it paves the way for a more realistic account of how textualists can incorporate substantive canons into their repertoire, Baude and Sachs’s account leaves many questions about the outer limits of this process of incorporation. For instance, their account offers no clear test for whether something like the major questions doctrine—i.e., a doctrine that is genuinely new and imposed over the course of a single Supreme Court term—is consistent with textualism.

Other textualists have suggested problems with accounts like these. According to now-Justice Amy Coney Barrett, a justification that focuses on tradition and judicial practice fails because:

If the premise of the argument is that substantive canons were invalid *ab initio*, it does not explain why textualists continue to rely on them. If, on the other hand, its premise is that federal courts once possessed the power to develop substantive canons, it does not explain why that power subsequently dissipated.³¹⁴

Instead, Barrett argues that the test must hinge on whether substantive canons can be squared with the baseline model of faithful agency to the statutory text.³¹⁵ Since the entire point of substantive canons is to depart from the text, this may seem to reduce the role of substantive canons to almost nothing—and, indeed, Barrett would eliminate several well-known substantive canons from the judicial toolkit.³¹⁶ However, Barrett argues that there is a role for substantive canons in enforcing constitutional principles, since a departure from the best reading of the statutory text to favor a constitutionally mandatory

possible outcomes and provide a remarkably stable and predictable set of rules people are able to follow.”).

310. See Baude & Sachs, *supra* note 306, at 1138.

311. *Id.*

312. *Id.* at 1138–39.

313. *Id.* at 1138–42.

314. Barrett, *supra* note 19, at 160.

315. *Id.* at 160–61.

316. *Id.* at 164–67 (applying her critique to a “governmental exemption canon” and the rule of lenity, for example).

value is not in tension with legislative supremacy.³¹⁷ Importantly, though, the door for constitutionally inspired canons is not wide open. Barrett argues that clear statement rules (as distinguished from presumptions) are only justified if they meet 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.”³¹⁸ According to Barrett, this test helps distinguish “extraconstitutional” canons, which are not legitimate, from constitutional canons, which are.

Barrett’s account has the virtue of simplicity, but the vice of imprecision. There are many fully recognized substantive canons that arguably do not come close to meeting this test. The new major questions doctrine is a prime example—several of the Justices appear to believe that the doctrine can be justified as enforcing “separation of powers principles” or the nondelegation doctrine, and neither of these justifications pass Barrett’s test.³¹⁹ Perhaps it is therefore not surprising that, when Justice Barrett broke her silence about the major questions doctrine, she explicitly declined to call the doctrine a substantive canon, instead endorsing the argument that it is a linguistic canon reflecting how ordinary readers interpret delegating statutes.³²⁰ The lack of any consensus within the textualist literature about how to answer this question about new and novel canons has left substantial room for judicial experimentation with the major questions doctrine and beyond. Yet the feeling that there must be limits to textualism’s embrace of substantive canons persists. In the next Subsection, I identify a plausible stopping point based on the dimensions analyzed in Part II and argue that the findings in Part III therefore spell trouble for a textualist defense of the major questions doctrine.

2. The Major Questions Doctrine as a Textualist and Constitutional Pandora’s Box

As just discussed, textualists have struggled mightily to come to a consensus about the limits of substantive canons. As a result, there are many substantive canons that are recognized by the Court but sit uneasily among those who ascribe to these basic interpretive commitments.³²¹ Yet at least part

317. See *id.* at 163–64.

318. *Id.* at 178.

319. See *supra* notes 4, 267–81 and accompanying text.

320. See *Biden v. Nebraska*, 143 S. Ct. 2355, 2376–78 (2023) (Barrett, J., concurring); see also *supra* notes 120–24 and accompanying text (discussing Barrett’s theory in light of other attempts to rebrand the major questions doctrine as linguistic rather than substantive). That attempt ultimately fails because ordinary readers do not behave as Justice Barrett suggests, see Kevin Tobia, Daniel E. Walters & Brian Slocum, *Major Questions, Common Sense?*, 97 S. CAL. L. REV. (forthcoming 2024) (manuscript at 17), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4520697 [<https://perma.cc/ZP5X-H5BV>], but the attempt makes sense, given the continuing uncertainty about what constitutional or quasi-constitutional values are worthy of being enshrined in a substantive canon.

321. Barrett, *supra* note 19, at 110.

of what seems to undergird this détente and the widespread use of substantive canons even among textualists is a practical recognition that the otherwise raw potential of substantive canons to transform and aggrandize the role of courts in our constitutional system is significantly cabined.³²² It is cabined because most substantive canons recognized by the Court are either not widely applicable—meaning that any distortion of the text is isolated to some subset of statutes that can be explained as an exception at the very least—or are tied explicitly to a higher source of law that justifies a systemic departure from textualists’ insistence on following the best reading of the text. That is, most canons follow normal parameters in terms of the dimensions discussed above.³²³

These normal parameters have helped insulate the Court from having to answer some of the hardest questions that canons might pose about the separation of the judicial power from the legislative power. Although many canons are extreme on one dimension or the other alone, and although they consequently raise considerable risk of allowing judges to ignore or distort statutory text for little other reason than personal values and policy considerations,³²⁴ their damage is limited to a relatively small set of statutes. For the mine run of cases, the text Congress enacts still wins. Simply put, most substantive canons do not pose any systemic threat to the constitutional allocation of power because of these hydraulic limits that keep aggressive canons narrow and surgical.

When we think about any substantive canon that is structured the way the major questions doctrine is on the dimensions discussed in Parts II and III, however, the damage is not so cabined and begins to look like a constitutional

322. Cf. Eidelson & Stephenson, *supra* note 19 (manuscript at 4) (“What accounts for this disconnect [between textualist theory and practice]? An important part of the explanation, we think, is textualist theorists’ insistence that while the tension here may be real, even awkward, it is ultimately manageable within the theory’s own terms.”). Indeed, what may undergird disagreement among textualists about the permissibility of substantive canons is a different theoretical disagreement—namely, the degree to which textualists are separation of powers formalists versus separation of powers functionalists. Increasingly, it is difficult to see how textualists are not in practice functionalists who are willing to tolerate de minimis violations of the constitutional separation of powers (specifically, of limits on the judicial power). *See id.* For canonical treatments of formalism and functionalism in separation of powers, see John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1950–52, 1958–61 (2011); and Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 492 (1987).

323. *See supra* Part II.

324. Manning, *supra* note 297, at 427 (noting that “clear statement rules . . . enforce constitutional values as abstracted from the specific provisions that implement those values”); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1551 (2000) (“[T]he literature concerning normative canons has tended to waffle on the relationship between a normative canon and the underlying constitutional provision with which it is associated. . . . This ambiguity has allowed critics of normative canons to claim that they extend the underlying constitutional provision beyond its legitimate scope.”).

loophole.³²⁵ Because such a canon potentially applies across the board, a departure from the best reading of statutory text based on nonauthoritative policy preferences or values held by judges becomes harder to overlook because it becomes an opportunity for systemic departure. It is not hard to imagine an imperial judicial power were this specific combination of features constitutionally permissible in a substantive canon. Take, for instance, a Court that one day decides to make kindness an overarching virtue of our legal system and develops a canon that applies in theory to any statute to reinforce this value of kindness. What might be a bizarre judicial fixation could quickly turn to a judicial takeover of the legislative power if such a doctrine were not constitutionally prohibited. While we might suspect that textualists would object to the substance of this canon as a Dworkinian daydream, remember that textualists have already largely accepted that many substantive canons will have a very weak, and potentially even nonexistent, relationship to authoritative law³²⁶—indeed, it is not a major stretch from kindness to nonabsurdity or nonmajority in terms of the substance of a substantive canon. Once it is possible for a canon to advance values or policies that exist outside the text, implicit and self-imposed limits on the scope of applicability do serious work in preventing a runaway Court. In sum, such canons maddeningly blur the lines between the legislative and judicial power, effecting a major shift of constitutional power to the courts.³²⁷

Particularly concerning is that substantive canons with these features would give judges plenary power to disallow enforcement of otherwise plausible interpretations of statutes that are concededly constitutional. For instance, defenders of the major questions doctrine point out that it is a

325. It is not unprecedented to think of some separation of powers concerns arising from the interaction of different dimensions of institutional structures. For instance, in the context of the nondelegation doctrine, the Court has recognized “that the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred.” *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 475 (2001). Delegation of a high degree of discretion to agents under a small slice of the “legislative power” does not pose any nondelegation issue under the current intelligible principle standard, and neither does a delegation of relatively constrained choice under a broader swath of legislative power. *See Coglianese, supra* note 281, at 1876. Yet, when Congress passed the National Industrial Recovery Act during the New Deal, the Supreme Court, for only the first and last time, found that Congress impermissibly delegated power to an agency. *See id.* at 1849; *ALA Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935); *Pan. Refin. Co. v. Ryan*, 293 U.S. 388, 433 (1935). Thus, in certain domains, the Court appears to think dimensionally about the separation of powers, recognizing that more systematic violations of the assignment of powers present more serious concerns.

326. *See supra* note 321 and accompanying text.

327. Others have highlighted ways that the major questions doctrine impermissibly allows the Court to exercise the executive power. *See Blake Emerson, The Binary Executive*, 132 *YALE L.J.F.* 756, 757 (2022) (“[B]y wresting away the policymaking discretion that Congress has delegated to executive agencies, the Court *itself* exercises executive power. Its recent rulings are best understood as ‘executive’ insofar as they render particularized policy decisions without encoding general rules to govern the disposition of future cases.”). A similar story could be told about judicial encroachment on the legislative power.

feature rather than a bug that Congress can, if it wants to, authorize the EPA to set up a cap-and-trade system for carbon dioxide emissions in the electric power sector—it is just that it needs to do so clearly. However, because the Court can insist that *every* statute meet its unstated standard for clarity, the Court could actually negate any statute that it did not want to see enforced. The only thing preventing this outcome is the Court’s own decision to clip its wings, not any structural limit on its power. In a very real sense, this is a judicial veto power over statutes, yet the Constitution could not be any clearer: the only requirements for legislation to take effect are in Article I, Section 7, and they do not contemplate any role for the judicial branch.³²⁸ The only power that the Court can exercise when it comes to valid legislation is the interpretive power to say what the law is; the Constitution supplies no authority for judges to say what legislation *should be*. What we have with the major questions doctrine is the Court exercising a part of the legislative power—defining the permissible characteristics of otherwise valid legislation—in direct contradiction of the Constitution’s assignment of that power to Congress (bicameralism) and the President (veto).³²⁹ The existing clear statement rules that similarly seem to force Congress and the President to approve legislation meeting certain drafting standards are distinguishable from the major questions doctrine because they are far more circumscribed in their application, which in effect keeps this judicial veto from taking over the legislative power entirely.

Even if canons with features like the major questions doctrine were not enforced to their limits, their potential applicability would cast a large shadow over Congress’s exercise of its own legislative power. Because of the breadth of potential applicability of the major questions doctrine—which literally encompasses every action ever taken by Congress, past or future³³⁰—Congress must now do two things that it would otherwise apparently not prefer to do: (1) revisit and reauthorize any statute where there is more than zero probability that a court would conclude that some action taken by an implementing agency would implicate the major questions doctrine; and (2) adjust its drafting on a prospective basis to provide a higher level of specificity for all future lawmaking activities. While there may well be other

328. Squitieri, *supra* note 35, at 510 (“Missing from th[e] Article I, Section 7 framework, of course, was any vesting of a veto power in the federal judiciary. . . . Respecting—even if not fully understanding—the constitutional bargains that resulted in Article I, Section 7’s text requires textualists to reject the unenumerated political veto called for by the current and strengthened forms of the major questions doctrine.”); *see also* Tenn. Valley Auth. v. Hill, 437 U.S. 153, 194–95 (1978) (“Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto.”).

329. U.S. CONST. art. I, § 7.

330. *See supra* Part III.

factors that prevent Congress from reacting to these changed incentives,³³¹ the incentives are indeed changed and will inevitably be an omnipresent factor in how Congress decides to exercise its constitutionally delegated legislative powers. And if Congress fails to act according to the incentives created by the doctrine, there is of course some chance that the Court will actually intervene to disallow implementation that may have been anticipated but insufficiently mandated in a statute. Either way, the major questions doctrine is a major change in the allocation of power between Congress and the courts. When the major questions doctrine hangs over potentially every statute ever passed and gives the Court an unconstrained discretion to enforce its own preferences for the characteristics of legislation, its legislative nature cannot be mistaken for ordinary interpretation.

Of course, many doctrines and practices reallocate power across the branches, and many of these doctrines and practices do not present acute functionalist separation of powers concerns. For instance, many commentators believe that the *Chevron* doctrine reallocates power from the judiciary to the executive branch,³³² but so far, the doctrine has not been generally understood to be a grave separation of powers concern.³³³ Yet there are good reasons to think that the major questions doctrine is qualitatively different from *Chevron*. For one thing, *Chevron* was created by the Court and actually diminishes judicial power, if anything. This self-abnegation is arguably not as problematic as the judiciary's aggrandizement of its own powers vis-à-vis other branches, which better describes how the major questions doctrine operates.³³⁴ More fundamentally, the major questions doctrine (and for that matter any other imaginable canon that has the same structure as the major questions doctrine) has no limiting principle. It potentially applies to the entirety of Congress's work product and, when it is triggered, it entirely disallows Congress from exercising its powers until Congress meets the judiciary's standards for clarity. Hard cases undoubtedly exist where encroachment or aggrandizement by one branch diminishes another branch's power to some degree, but the major questions doctrine is closer to a total negation of Congress's control over the legislative power. Congress cannot ever legislate—

331. See, e.g., Daniel E. Walters & Elliott Ash, *If We Build It, Will They Legislate? Empirically Testing the Potential of the Nondelegation Doctrine to Curb Congressional "Abdication,"* 108 CORNELL L. REV. 401, 430–56 (2023) (showing that enforcement of the nondelegation doctrine in the states had only a small impact on legislative drafting compared to other political, demographic, and institutional factors).

332. See, e.g., MERRILL, *supra* note 30, at 4.

333. See generally Adrian Vermeule, *No*, 93 TEX. L. REV. 1547 (2015) (reviewing PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014)) (critiquing Hamburger's understanding of *Chevron* and the nondelegation doctrine).

334. Indeed, the doctrine is a boon to a Court that is more generally engaged in a project of building a "juristocratic separation of powers" in which the Court aggrandizes its own role in our political system. See Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L.J. 2020, 2082–83 (2022).

or even sit idly, in the case of extant statutes—without considering what the Court would want in terms of clarity of statutes. This kind of panoptic oversight and micromanagement of Congress’s discretionary drafting decisions presents a serious risk of a judicial takeover of the legislative power. There is a serious argument that it would violate Article I by arrogating to the judiciary the power to determine the form and substance of legislation.

While it might be odd to think of a judicial practice as potentially coopting the legislative power and thereby violating Article I, it should not be. When the tables are turned—i.e., when we broach the possibility of congressional determination, via statute, of judicial methods of interpretation—we easily envision challenges to these kinds of laws on the grounds that they violated Article III and the delegation of the “judicial power” to federal courts.³³⁵ In both cases, the core question is, or ought to be, whether one branch’s practice opens the door to plenary, systematic, and unconstrained control of a coordinate branch’s ability to exercise its constitutionally assigned powers.³³⁶ With substantive canons with features like the major questions doctrine, the door is wide open for systemic judicial control of the legislative power, both because they can be wielded to veto unwanted statutory language and because they would prospectively shape and constrain every exercise of legislative authority that Congress undertakes. Textualists would be wise to maintain the line here, where these impermissible risks begin to grow exponentially.

B. NONTEXTUALIST DEFENSES

As just discussed, textualists cannot defend the major questions doctrine without opening the door to the demise of both textualism and the separation of powers, whether at the hands of the major questions doctrine or the litany of possible structurally similar substantive canons that might follow in its wake. This is not as acute of a concern for nontextualists, who are used to thinking of the substantive canons and the judicial power to interpret statutes in decidedly more intentionalist and dialogic terms, and who therefore recognize greater judicial freedom to impose constraints on the exercise of the legislative power.³³⁷ Below, I canvass these theories, which generally defend substantive canons on the basis that “they approximate Congress’s drafting practices and

335. Jennifer M. Bandy, Note, *Interpretive Freedom: A Necessary Component of Article III Judging*, 61 DUKE L.J. 651, 685–89 (2011) (advancing the argument that “methodological constraints are a threat to judicial independence”).

336. See THE FEDERALIST NO. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961) (“It is agreed on all sides that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident that none of them ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers.”).

337. Mendelson, *supra* note 8, at 84 (noting that these justifications “are typically not the justifications offered by textualist interpreters, perhaps because they place the judiciary in such an activist role relative to legislative process”).

likely preferences,”³³⁸ and show that the major questions doctrine’s novelty undermines any relational or dialogic foundation for the doctrine, although for different reasons than it does for textualists. Here the major questions doctrine fails on pragmatic grounds—it is ultimately not well suited for consistent faithful agency to congressional intent, and it is unlikely to foster a constructive inter-branch dialogue.

1. The Major Questions Doctrine and Congressional Intent

While substantive canons are often thought of as reflecting policy or normative concerns that are “external” to the statutory text,³³⁹ they can also be defended as necessary for courts to be faithful agents of Congress. If, as an empirical matter, Congress does not fully encode its intent in the enacted text, an interpreter would need to draw on additional considerations besides the text to reach the decision that Congress would have intended.³⁴⁰ And if this is the case, substantive canons might be thought to be as good a tool as any, and perhaps better than other extrinsic evidence of legislative intent, such as a legislative history, that is easy manipulated.³⁴¹ The defense of substantive canons as tools for faithful agency can take two basic forms: “first-order” defenses that emphasize that substantive canons “approximat[e] Congress’s substantive policy preferences” or otherwise are likely to form part of the meaning of statutes,³⁴² and “second-order” defenses that substantive canons’ “rule-like interpretive approach could make statutory interpretation more constrained and predictable,” thereby facilitating congressional control of lawmaking.³⁴³ In both cases, substantive canons further legislative supremacy

338. *Id.* at 75.

339. Barrett, *supra* note 19, at 182.

340. Even some textualists would likely concede as much. See Manning, *supra* note 289, at 106 (arguing that, properly constrained, some consultation of “equity” is present in the context of interpretation); see also Grove, *supra* note 285, at 1075–77 (“Prominent textualists have variously pointed to the importance of ‘semantic context,’ ‘social context,’ ‘social and linguistic context,’ and ‘full context.’” (footnotes omitted)). Indeed, Eidelson and Stephenson recently helped clarify that textualists could in theory accept substantive canons if they are “justified by their probative value with respect to the statute’s *communicative content*—that is, by the light that they cast on what a reasonable reader would understand a lawmaker to have said.” See Eidelson & Stephenson, *supra* note 19 (manuscript at 18). In such cases, substantive canons might be recast by textualists as semantic in the sense that the best semantic reading of the statute would incorporate the policy considerations encoded in the canon.

341. See The Honorable Antonin Scalia & John F. Manning, *A Dialogue on Statutory and Constitutional Interpretation*, 80 GEO. WASH. L. REV. 1610, 1612 (2012) (discussing the problem of manipulation of legislative history).

342. Mendelson, *supra* note 8, at 84–85. This category can perhaps be broken into two versions, one in which “canons simply distill general background knowledge about how lawmakers naturally would and do express themselves,” and another where “[they] enjoy a kind of bootstrapped validity: they are probative of a statute’s communicative content precisely because, and to the extent that, their very existence can be presumed to have shaped that communicative content.” Eidelson & Stephenson, *supra* note 19, at 24.

343. Mendelson, *supra* note 8, at 86.

and ensure faithful agency “by letting Congress have the last word,”³⁴⁴ mainly by making it more certain to Congress how its handiwork will be reviewed by courts. The major questions doctrine can be evaluated on both first-order and second-order bases, and in both cases it does not fare well compared to many other canons, in large part because of its novelty and its potential to open the door to similarly novel canons.

Start with the first-order defense, which would go something like this: Congress generally passes statutes with the expectation that it does not intend to give agencies major powers, and that if it does want to give agencies major powers, it will do so clearly and carefully.³⁴⁵ If this sounds familiar, that is because this is more or less exactly how the majority opinion in *West Virginia* defended the major questions doctrine.³⁴⁶ The question is whether this is actually true, and that is a difficult question to answer, for many reasons familiar to textualists.³⁴⁷ The best evidence comes from Abbe Gluck and Lisa Schultz Bressman, who surveyed congressional staffers about their understanding of interpretive canons and found that, on the whole, semantic canons and substantive canons alike are a mixed bag in terms of mapping onto legislative drafters’ background expectations about court review.³⁴⁸ Although their study predated the recent transformation of the major questions doctrine from exception to *Chevron* to clear statement rule, Gluck and Bressman did ask about the older version of the major questions doctrine.³⁴⁹ What legislative drafters said makes it difficult to see the clear statement rule version of the major questions doctrine as a background understanding against which Congress legislates. Specifically, Gluck and Bressman found that only thirty-eight percent of respondents believed “drafters intend for agencies to fill ambiguities or gaps relating to questions of major economic significance,” only thirty-three percent of respondents believed “drafters intend for agencies to fill ambiguities or gaps relating to questions of major political significance,”

344. *Id.*

345. See Eidelson & Stephenson, *supra* note 19, at 26 (anticipating such a defense of the major questions doctrine).

346. *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (“We presume that ‘Congress intends to make major policy decisions itself, not leave those decisions to agencies.’” (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))); Levin, *supra* note 6 (manuscript at 34) (“[T]he Court’s defense of the major questions doctrine has largely been phrased in descriptive terms . . .”).

347. Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 547 (1983) (“Although legislators have individual lists of desires, priorities, and preferences, it turns out to be difficult, sometimes impossible, to aggregate these lists into a coherent collective choice.”); Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239, 254 (1992) (arguing from social choice theory that the idea of collective intent is incoherent and applying that insight to Congress).

348. See generally 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 (2013).

349. *Id.* at 990.

and only twenty-eight percent believed that “drafters intend for agencies to fill ambiguities or gaps relating to major policy questions.”³⁵⁰

On a surface level, this might seem somewhat supportive of a first-order defense of the major questions doctrine,³⁵¹ but that evaporates on closer inspection. First, these responses hardly demonstrate the kind of unanimity that we might expect before we enact default rules based on supposed institutional intent.³⁵² Second, and even more importantly, the data are just as likely to support only a stripped-down major-questions-doctrine-as-exception-to-*Chevron* version of the doctrine. Despite Gluck and Bressman’s claim that these “findings offer some confirmation for . . . the idea that drafters intend for Congress, not agencies, to resolve [major] questions,”³⁵³ the questions they actually asked made no distinction between Congress making the ultimate determination and courts making the ultimate determination.³⁵⁴ At the time of the survey, the default understanding, which is confirmed by other responses to other questions, was that *Chevron* deference would be applied by the courts.³⁵⁵ The major questions doctrine would have been understood to require de novo review by courts, not a clear statement by Congress. Thus, at the time, it would have been most likely that in marking “no” for intent to give agencies authority to fill “major” statutory gaps, the respondents would have been saying that they preferred courts, rather than agencies, to interpret statutes implicating major questions (not Congress, rather than agencies).³⁵⁶ The difference is important,³⁵⁷ and while we cannot say definitively that respondents had one preferred expositor of major meaning in mind, it is certainly the case that the evidence does not specifically

350. *Id.* at 1003.

351. *See* Levin, *supra* note 6 (manuscript at 35) (noting that Justice Kavanaugh, while on the D.C. Circuit, cited the Gluck and Bressman study for precisely this proposition).

352. *Id.* at 36 (“Just looking at this data on its face raises some initial doubts about Judge Kavanaugh’s thesis. The figures of 28 [percent] and 38 [percent] are not especially low. Can one defend the clear statement rule on the basis of a generalization that Congress doesn’t delegate certain decisions, if about a third of the congressional staff members say that it does delegate such decisions?”).

353. Gluck & Bressman, *supra* note 348, at 1003.

354. The base question they asked in Q55 was “What kinds of statutory ambiguities or gaps do drafters intend for the agency to fill? (mark one).” Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside: Methods Appendix*, STAN. L. REV. (May 2013), https://review.law.stanford.edu/wp-content/uploads/sites/3/2017/01/Gluck_Bressman_65_Stan._L._Rev._Methods_Appendix.pdf [<https://perma.cc/RV48-GQVT>].

355. *See supra* Part I.

356. To be sure, some individual respondents that Gluck and Bressman quote seem to have anticipated that Congress would in fact refrain from delegating major authority to agencies or courts. *See* Gluck & Bressman, *supra* note 348, at 1004 (“[Major questions], never! They [i.e., elected officials] keep all those to themselves; ‘We try not to leave major policy questions to an agency . . . [They] should be resolved here.’” (alterations in original) (footnote omitted)). But these are not necessarily representative of the reasoning of the rest of the respondents.

357. *See supra* note 129 and accompanying text.

support the major-questions-doctrine-as-clear-statement-rule over the pre-*West Virginia* status quo ante.³⁵⁸

As it turns out, this ambiguity is instructive: part of the problem with a first-order defense of the major questions doctrine is that it is highly unlikely that Congress has any stable preferences regarding substantive canons that are in the process of evolving, as the major questions doctrine is.³⁵⁹ If Congress has divergent preferences from the Supreme Court, then the degree to which the major questions doctrine accumulates power within the Court will affect Congress's own preferences about the doctrine. This is not just true with respect to the shift from the major-questions-doctrine-as-exception-to-*Chevron* to the major-questions-doctrine-as-clear-statement-rule; it is also true with respect to qualitative shifts in the enforcement of the doctrine, such as if the doctrine was stringently or weakly applied.³⁶⁰ The bottom line is that Congress's preferences in this rapidly evolving domain are also likely to be rapidly evolving and politically situated, making it quite difficult to accept at face value any claim about congressional preferences or background assumptions.³⁶¹ It is not possible to justify *new* canons on the grounds that they represent an undiscovered background assumption that animated Congress's drafting.³⁶² Relatedly, even assuming that both the doctrine and congressional preferences are now stable and could somehow be bootstrapped into validity prospectively, it makes little sense to apply the major questions doctrine to older statutes that were passed *before* the major structural shifts we have witnessed.³⁶³

Many similar concerns about the major questions doctrine's novelty arise with respect to second-order defenses. These defenses might go as follows: sure, Congress does not have any stable preferences regarding the major questions doctrine, but if courts consistently apply the major questions doctrine, Congress will learn the rules of the road and adjust accordingly. In this way, defenders of the major questions doctrine might attempt to ground it as a stable background principle that allows Congress to legislate with greater certainty. There are immediate problems here, including Karl Llewellyn's famous showing that canons are unreliably deployed, in part

358. Levin, *supra* note 6, at 37 (noting reasons to doubt that the survey "responses express any support for a clear statement rule that would resolve any ambiguities in favor of less burdensome regulation").

359. As discussed below, this is also a problem with respect to second-order defenses. See *infra* notes 365–66 and accompanying text.

360. Canons can be effectively amplified or muted by selective enforcement. See Mendelson, *supra* note 8, at 99–123, 129–30 (showing that canons are inconsistently enforced and concluding that this undermines some accounts of the legitimacy of canons).

361. This is on top of what many take to be a major inferential leap even with respect to the conventional roster of substantive canons that are not rapidly evolving now. See Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 806 (1983).

362. Eidelson & Stephenson, *supra* note 19, at 31.

363. Sohoni, *supra* note 35, at 286 ("It is unfair to Congress for courts to apply a newly crafted clear statement rule to earlier-enacted legislation.").

because they are often mutually incompatible with each other.³⁶⁴ Indeed, empirical evidence collected by Nina Mendelson provides some modern ammunition for this critique of canons generally.³⁶⁵ If anything, the problems are just worse for the major questions doctrine. The main problem is that the new major questions doctrine, and the uncertainty and controversy around it, belies this hoped-for effect. Indeed, if this is the end goal of substantive canons, it is hard to understand why the doctrine needed to be changed in the first place. *Chevron* deference fulfills this stabilizing goal as well as the major questions doctrine—indeed, its rote application was a source of criticism.³⁶⁶ But now that it has changed, many questions arise; chief among them is what is next. If the doctrine could change once, could it change again? And with what effect on Congress's ability to successfully adapt?

Empirical studies of the nondelegation doctrine's enforcement in state courts may provide clues about how the major questions doctrine would impact congressional drafting. In previous work, Elliott Ash and I found that state legislatures only slightly react to upticks in the enforcement of the nondelegation doctrine, and not always in predicted ways.³⁶⁷ While this may not necessarily translate to the context of the major questions doctrine, it is suggestive that legislatures may struggle to harmonize their legislative work with courts' unpredictable turns in enforcement of nondelegation norms. Moreover, canons must also percolate through the lower courts and be applied fairly consistently in order to generate a stabilizing effect. Empirical research again is instructive: Aaron-Andrew Bruhl examined how lower courts take up canons as they evolve or are created by the Supreme Court and found that lower court behavior is wildly unpredictable.³⁶⁸ For precisely these kinds of reasons, an important strand in literature on the legislative process and statutory interpretation urges simplification and elimination of much of the undergrowth—perhaps then substantive canons' salutary stabilizing effects

364. See generally Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950) (adopting a legal realist perspective on canons and showing that for every "thrust," there is a "parry").

365. Mendelson, *supra* note 8, at 78 ("[T]he data suggest that canon critics are right to worry about judges using canons unpredictably. Karl Llewellyn's famous point was that for every canon, there was an 'opposing' canon that could overcome it. Posner and Gluck have also argued that the Court appears to deploy no hierarchy for canon use, enabling judges freely to choose among them. This study's findings confirm Llewellyn's implication that one indeed cannot predict which of two conflicting canons the Court will apply." (footnotes omitted)).

366. Hickman & Hahn, *supra* note 139, at 615 ("To some, *Chevron* operates as a rule of decision that dictates case outcomes, forcing courts to decide cases contrary to their own perceptions of what the law requires. Indeed, some of *Chevron*'s harshest critics seem to view *Chevron* this way" (footnote omitted)).

367. Walters & Ash, *supra* note 331, at 415.

368. Aaron-Andrew P. Bruhl, *Communicating the Canons: How Lower Courts React When the Supreme Court Changes the Rules of Statutory Interpretation*, 100 MINN. L. REV. 481, 484–85 (2015); see also Mendelson, *supra* note 8, at 99–102 (showing that the Supreme Court itself does not consistently enforce its own canons or adhere to a stable roster of canons).

could truly take hold.³⁶⁹ As it is, though, the major questions doctrine is a step in the wrong direction: it introduces considerable uncertainty that might be a benefit when trying to deter regulatory action,³⁷⁰ but simultaneously makes it very difficult for Congress to preserve its own legislative supremacy. Taking the second-order intentionalist defense of substantive canons seriously means being committed to a fairly closed and stable set of substantive canons, and the major questions doctrine's novelty makes it a difficult fit for this theory.

2. The Major Questions Doctrine as a Democracy-Forcing Device

A final batch of theories defends substantive canons on very different grounds. Rather than asserting, as textualists sometimes do, that substantive canons can be reconciled with a commitment to following the text of statutes, and rather than asserting, against the weight of the empirical evidence, that canons are either good approximations of actual legislative intent or are necessary to provide a stable background against which Congress can exercise its legislative power, this final approach emphasizes that substantive canons can quite legitimately seek to force Congress to vindicate certain process values as it exercises the legislative power.

Several related lines of thinking form this tradition, which, although academically influential, has not been dominant in actual court opinions, which continue to profess a commitment to some model of faithful agency. Jane Schacter, for instance, argues that courts can legitimately deploy interpretive methods, including canons, “that are self-consciously designed to produce ‘democratizing’ effects.”³⁷¹ William Eskridge argues for a “dynamic statutory interpretation” model wherein courts are free to interpret statutes in the same way that they interpret common law judicial decisions—i.e., “in light of their present societal, political, and legal context.”³⁷² More aggressively, judges can even affirmatively inject “public values” into statutory interpretation.³⁷³ Einer Elhauge argues from more of an economic framework to the same basic conclusion: judges can and should “adopt default rules that are designed to maximize the preference satisfaction of the parties who

369. Mendelson, *supra* note 8, at 135–39 (suggesting some potential reforms, including abandoning some canons that fail to track legislative expectations and increasing drafters’ awareness of courts’ interpretive tools); KATZMANN, *supra* note 13, at 92–102 (proposing educational reforms to make both courts and Congress more aware of each other’s expectations).

370. Sohoni, *supra* note 35, at 266 (predicting that the major questions doctrine “will cause not just an actual but an *in terrorem* curtailment of regulation”).

371. Schacter, *supra* note 18, at 595.

372. William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479, 1481 (1987).

373. William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1018 & n.38 (1989) (incorporating “public values” into dynamic statutory interpretation via substantive canons).

agreed to the text being interpreted,”³⁷⁴ and sometimes these rules will elicit preferences from Congress by forcing it to draft clear text *ex ante* or by prompting overrides.³⁷⁵ On accounts like these, “judicial passivity” is a vice and “a dramatic departure from an important tradition in the Anglo-American legal system, one in which courts have a distinctive responsibility for promoting legal coherence.”³⁷⁶ Courts can fulfill their own constitutional and democratic duties only by serving “as Congress’s junior partner,”³⁷⁷ or perhaps “as diplomats, whose ordering authority is severely limited but who must often update their orders to meet changing circumstances.”³⁷⁸

This turn in the orientation of the theory of interpretation provides some avenues for a defense of something like the major questions doctrine. First, it potentially negates constitutional concerns about the intermixing of legislative and judicial powers by rejecting constitutional formalism or, as Schacter puts it, “institutional essentialism.”³⁷⁹ That is, there is no line to be drawn between these powers, and courts can therefore engage in interpretive practices that come quite close to the legislative power itself. Second, it eliminates the need to rely on empirically problematic assumptions about Congress’s expectations about canon use in the courts.³⁸⁰ The entire point of these approaches is to change something about how Congress legislates, so it is generally irrelevant if there is a major gap between judicial expectations and congressional reality. Third, and most importantly, these theories open up normative vistas for the creation and evolution of new canons as context changes. Right now, the Court sees a democratic dysfunction in the ways that Congress relies on implicit delegations of major regulatory authority, and the major questions doctrine simply forces Congress to bring these decisions into a more robust political process of dialogue and deliberation. These new dysfunctions justify new judicial responses. On the whole, novelty is much less problematic for this species of interpretive theory.

But to recognize that novel canons are not forbidden is not to say that they are always warranted at the whim of the Court. For one thing, much depends on whether the reasons that the Court offers for intervening in the legislative process hold water. Here, the implicit theory the Court has endorsed appears to sound primarily in public choice thinking: Congress has

374. EINER ELHAUGE, STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION 7 (2008).

375. *Id.* at 12.

376. Daniel J. Meltzer, *The Supreme Court’s Judicial Passivity*, 2002 SUP. CT. REV. 343, 345.

377. MANNING & STEPHENSON, *supra* note 41, at 303.

378. Eskridge, *supra* note 372, at 1482.

379. Schacter, *supra* note 18, at 595.

380. Indeed, as Eskridge argues, the “descriptive power” of more dialogic models “is superior to that of the models traditionally invoked by the Court . . . and is a more candid analysis of what the Court does.” Eskridge, *supra* note 372, at 1482.

abused statutory imprecision to escape democratic accountability³⁸¹ and to cede power to the executive branch.³⁸² Hence, the major questions doctrine can help to reinforce democracy by disallowing implicit delegation of at least major regulatory authority, thereby forcing Congress to take political ownership if it wants to use the legislative power to accomplish major regulatory goals. Yet this account is deeply contested, and that should matter as we assess which goals are potentially worthy of being “forced” on Congress.³⁸³ Jerry Mashaw and Jed Stiglitz, for instance, have questioned the public choice logic behind this account, showing that delegation is most likely a way that Congress *avoids* special interest influence and pursues the diffuse public’s interest in competent regulatory policy.³⁸⁴ While there is room to criticize the way that agencies sometimes take advantage of statutory ambiguity or vagueness, there is hardly a consensus about when and how often this practice takes place (a fact reflected in the nebulous and contested trigger for the major questions doctrine) or about whether the heavy artillery of a clear statement rule is tailored to the risks this account highlights. In fact, given the doctrine’s likely effect on Congress’s ability to regulate clearly for itself, this lack of consensus has a clear political valence. All of this might suggest a need for considerable caution and even-handedness that the Court did not display in its major questions decisions. In addition, the fact that the major questions doctrine opens the door to any number of other substantive canons that dramatically expand the judicial role by widely applying judicially imposed norms (that can be misguided or unjustified) raises independent reasons to question the most expansive versions of more dialogic theories. These theories work well enough when judges are tinkering with existing canons or making headway in uncontroversial domains, but they do not hold up as well when the Court has demonstrated a willingness to devise brand new canons to facilitate the realization of contested narratives about democratic dysfunction.

381. See, e.g., DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* 99–104 (1993). For a general summary of this literature, see Walters & Ash, *supra* note 367, at 411–22.

382. Daniel Farber, *The Major Question Doctrine, Nondelegation, and Presidential Power*, *YALE J. ON REGUL.* (Nov. 2, 2022), <https://www.yalejreg.com/nc/symposium-shane-democracy-chief-executive-07> [<https://perma.cc/L559-GQHJ>] (reviewing PETER M. SHANE, *DEMOCRACY’S CHIEF EXECUTIVE: INTERPRETING THE CONSTITUTION AND DEFINING THE FUTURE OF THE PRESIDENCY* (2022)) (arguing that though Shane does not address the major questions doctrine, “some of [his] observations in the book point toward a different understanding of the major question doctrine, one aimed more at constraining the President than at disciplining Congress for giving away too much power”).

383. See Eidelson & Stephenson, *supra* note 19, at 60–61 (noting that, in the context of the major questions doctrine, the emphasis on nonmajorness is not a consensus value).

384. JERRY L. MASHAW, *GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW* 131–57 (1997); Edward H. Stiglitz, *Delegating for Trust*, 166 *U. PA. L. REV.* 633, 649–57 (2018).

In short, these dialogic theories provide a theoretical pathway for a convincing defense of the major questions doctrine,³⁸⁵ but they also impose more of a burden than the Court or any commentator has assumed to justify the doctrine as democracy reinforcing. Moreover, if these theories are sufficient to justify a doctrine like the major questions doctrine, with its high potential to facilitate judicial aggrandizement, the theories would themselves need to be tested and qualified much more than scholars and jurists have appreciated. Perhaps proponents of these theories never contemplated the kind of Court that we now have, but now that the major questions doctrine has shown a pathway to virtually unconstrained use of substantive canons that affect the entirety of Congress's power, these theories are ripe for reconsideration on their own merits.

CONCLUSION

In the American legal system, judges are not legislators any more than they are kings. While we are just at the beginning of the major questions doctrine era, this Article has provided reason to believe that the major questions doctrine's novelty foretells likely erosion of the constitutional lines that help protect this commonsense principle. Substantive canons are, and have always been, pregnant with potential for judicial arrogation of the legislative power, but they have usually been kept within stable boundaries—boundaries that the major questions doctrine does not observe. It is impossible to know whether the major questions doctrine will survive or thrive at this stage in its development, but as this Article has argued, the dangers its novel form carries for the maintenance of a constitutionally cabined judicial role in interpretation of statutes can already be clearly seen. These observations should raise a collective eyebrow and shift the burden to defenders of the doctrine to identify where the judicial power to create substantive canons ends, if not just before the novel major questions doctrine begins.

385. Cf. Barrett, *supra* note 19, at 110 (noting that “the courts’ adoption of more aggressive substantive canons poses no problem of authority for dynamic statutory interpreters, who conceive of courts as the cooperative partners of Congress and treat the protection of social values as part of the courts’ task in statutory interpretation”).