What the New Major Questions Doctrine Is *Not*

*Anita S. Krishnakumar**

Abstract

The major questions doctrine has undergone a sea change in prominence within the span of two years. In the ten months between August 2021 and June 2022, the Court invoked the canon three times, using it aggressively to invalidate some of the signature policies implemented by the Biden Administration—including the Centers for Disease Control and Prevention's eviction moratorium, the Occupational Safety and Health Administration's attempt to impose a vaccine-or-test mandate on employees, and the Environmental Protection Agency's efforts to regulate greenhouse gas emissions. This past term, it added a fourth case to this burgeoning list, striking down the Biden Administration's student debt relief program. All eyes are now on the major questions doctrine. Several scholars have criticized the latest iteration of the doctrine, and some—including former law professor, now-Justice Amy Coney Barrett—have sought to defend it as consistent with textualism, as a linguistic canon, as part of the ordinary "common sense" context a reasonable reader would consider, or as a canon designed to protect the Constitution's nondelegation principle.

This Article seeks to cut through the confusing labels and justifications that have been offered for this relatively new, somewhat reinvented, and incredibly powerful doctrine. It argues first that the major questions doctrine is not many of the things that commentators, including the Justices, have suggested it is: it is not a proxy for the nondelegation doctrine; it is not part of the "common sense" context that the "reasonable reader" brings to identifying a statute's ordinary meaning; it is not a linguistic canon; and it is not even purposivism or intentionalism—or at least not good purposivism or intentionalism. The Article concludes by arguing that, in the end, the major questions doctrine may best be thought of as either a new multifactor test or standard of judicial review for "major" agency decisions, or as a form of naked pragmatism that uses clear statement rule rhetoric in an effort to sound more textualist than it is.

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* Agnes Williams Sesquicentennial Professor of Legislation, Georgetown University Law Center. I owe deep thanks for valuable insights and conversations to Mila Sohoni, Daniel Walters, Bijal Shah, Kevin Tobia, Thomas W. Merrill, Eloise Pasachoff, William Buzbee, Ronald Cass, Ronald Levin, Gary Lawson, Lawrence Solum, Adam Zimmerman, and participants in an American Bar Association panel hosted by The George Washington University Law School, a workshop supported by The Gray Center for the Study of the Administrative State at Antonin Scalia Law School at George Mason University, and the Power in the Administrative State online workshop. I am especially indebted to my husband, Ron Tucker, for his patience and support with this project. Special thanks also to Dean William Treanor and Georgetown University Law Center as well as The Gray Center for generous research funding. James Nance provided excellent research assistance. All errors are my own.

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Introduction

The major questions doctrine has undergone a sea change in prominence and importance within the span of just two years. Before the Supreme Court's August 2021 decision to vacate a lower court stay on the Centers for Disease Control and Prevention's ("CDC") COVID-19-related eviction moratorium,[1] the doctrine was a little-known statutory interpretation canon discussed mostly by Legislation and Administrative Law scholars. Between 1994 and 2020, the Court had employed the major questions canon only five times,[2] and it was not even widely known by that name.[3] By contrast, in the ten months between August 2021 and June 2022, the Court invoked the canon three times; moreover, it used the canon aggressively in these three instances to invalidate some of the

1 *See* Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 594 U.S. 758, 766 (2021).

2 The following were the five cases: MCI Telecomms. Corp. v. AT&T, 512 U.S. 218, 231 (1994) ("It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion . . . ."); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000) ("[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."); Gonzales v. Oregon, 546 U.S. 243, 267 (2006) ("The idea that Congress gave the Attorney General such broad and unusual authority through an implicit delegation in the [Controlled Substances Act]'s registration provision is not sustainable."); Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014) ("We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" (quoting *Brown & Williamson*, 529 U.S. at 160)); King v. Burwell, 576 U.S. 473, 485–86 (2015) ("Whether [tax] credits are available on Federal Exchanges is thus a question of deep 'economic and political significance' that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly." (quoting *Brown & Williamson*, 529 U.S. at 160)).

3 *See* West Virginia v. EPA, 597 U.S. 697, 766 (2022) (Kagan, J., dissenting) (accusing majority of "announc[ing] the arrival of the 'major questions doctrine'").

most high stakes policies implemented by the Biden Administration—including the CDC's eviction moratorium, the Occupational Safety and health Administration's ("OSHA") attempt to impose a vaccine-or-test mandate on employees, and the Environmental Protection Agency's ("EPA") efforts to regulate greenhouse gas emissions.[4] And during the 2022 term, it added a fourth case to this burgeoning list, striking down the Biden Administration's student debt relief program.[5]

All eyes are now on the major questions doctrine. Most of the attention has been negative, with some scholars focusing on the impact the doctrine will have on the separation of powers and the administrative state[6] and others criticizing the Court's interpretive methodology. In this latter camp, some have argued that the doctrine is inconsistent with textualism[7] or is a return to a form of purposive analysis that Justice Scalia and a majority of the modern Court have long sought to relegate to the statutory interpretation dustbin.[8] Others have faulted the Court for "transforming" what was once merely a factor in the *Chevron*[9] deference analysis into a super strong clear statement rule that trumps all other interpretive considerations.[10] A few scholars—and some of

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4 *Ala. Ass'n of Realtors*, 594 U.S. at 766 (eviction moratorium); Nat'l Fed'n of Indep. Bus. v. OSHA, 595 U.S. 109, 120–21 (2022) (vaccine-or-test mandate); West Virginia v. EPA, 597 U.S. at 706 (EPA regulations).

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

6 *See* Mila Sohoni, *The Major Questions Quartet*, 136 Harv. L. Rev. 262, 317–18 (2022); *see also* Nathan Richardson, Essay, *Antideference: Covid, Climate, and the Rise of the Major Questions Canon*, 108 Va. L. Rev. Online 174, 176–77 (2022); Jody Freeman & Matthew C. Stephenson, *The Anti-Democratic Major Questions Doctrine*, 2022 Sup. Ct. Rev. 1, 15 (2023); Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 Va. L. Rev. 1009, 1056 (2023).

7 *See* Chad Squitieri, *Who Determines Majorness?*, 44 Harv. J.L. & Pub. Pol'y 463, 465 (2021) [hereinafter Squitieri, *Majorness?*]; Mike Rappaport, *Against the Major Questions Doctrine*, Originalism Blog (Aug. 15, 2022), https://originalismblog.typepad.com/the-originalism-blog/2022/08/against-the-major-questions-doctrinemike-rappaport.html [https://perma.cc/U92U-YQ7E]; Deacon & Litman, *supra* note 6, at 1059; Jonathan H. Adler, West Virginia v. EPA*: Some Answers About Major Questions*, 2022–2023 Cato Sup. Ct. Rev. 37, 54 (2023); Chad Squitieri, *Major Problems with Major Questions*, L. & Liberty (Sept. 6, 2022) [hereinafter Squitieri, *Major Problems*], https://lawliberty.org/major-problems-with-major-questions/ [https://perma.cc/UYN8-BD2T].

8 *See, e.g.*, Squitieri, *Major Problems*, *supra* note 7 ("The major questions doctrine is a product of legal pragmatism—a theory of statutory interpretation advanced by Justice Breyer which often elevates statutory purpose and consequences over text."); Jed Handelsman Shugerman, Biden v. Nebraska*: The New State Standing and the (Old) Purposive Major Questions Doctrine*, 2022–2023 Cato Sup. Ct. Rev. 209, 231 (2023) ("In *Biden v. Nebraska*, Chief Justice Roberts implicitly endorsed the purposivism approach to major questions."); Deacon & Litman, *supra* note 6, at 1047 ("Today, the major questions doctrine also seems to rest on a similar kind of [purposivism]."); Samuel L. Bray, *The Mischief Rule*, 109 Geo. L.J. 967, 1011 (2021) ("[T]he major questions doctrine has an essential similarity with the mischief rule.").

9 467 U.S. 837 (1984), *overruled by* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

10 *See* Sohoni, *supra* note 6, at 268–75; Richardson, *supra* note 6, at 175–77; Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 Admin. L. Rev. 475, 476–77 (2021); Daniel E.

the Justices—have sought to *defend* the doctrine as either a linguistic "importance canon,"[11] as "context" that the "reasonable person" would take into account in determining a statute's ordinary meaning,[12] or as a canon designed to protect the Constitution's nondelegation principle.[13]

This Article seeks to cut through the confusing labels and justifications that have been offered to describe this not quite new, somewhat reinvented, and suddenly very powerful doctrine. It argues that the major questions doctrine is *not* many of the things that commentators, including the Justices, have suggested it is: it is not a proxy for the nondelegation doctrine; it is not part of the ordinary context that the "reasonable reader" brings to identifying a statute's ordinary meaning; it is not a linguistic canon; and it is not a return to the purposivism or intentionalism of old—or at least not a return to a *good* version of purposivism or intentionalism. Rather, the doctrine is best viewed as either (1) a new standard of review, or multifactor implementation test, for the judicial review of agency statutory interpretations, or (2) as a form of old-fashioned pragmatic reasoning akin to the absurd results doctrine.

The Article proceeds in two parts. Part I debunks several defenses and labels that the Justices and a few scholars have put forth to describe the new major questions doctrine. Part II argues that in the end, despite Justices Gorsuch's and Barrett's arguments to the contrary, the new major questions doctrine is best classified as a form of practical consequences analysis with an unusual trigger, or as a new implementation test that effectively displaces previous agency deference tests.

I. Some Things the New Major Questions Doctrine Is *Not*

The latest iteration of the major questions doctrine has spawned a cottage industry in legal reclassification. Either in an effort to quell criticisms that the doctrine is inconsistent with textualism, or to characterize the doctrine in familiar terms or, conversely, to point out how

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Walters, *The Major Questions Doctrine at the Boundaries of Interpretive Law*, 109 Iowa L. Rev. 465, 476–78 (2024); Deacon & Litman, *supra* note 6, at 1038–42.

11 *See* Ilan Wurman, *Importance and Interpretive Questions*, 110 Va. L. Rev. (forthcoming 2024) (manuscript at 8) (on file with author).

12 *See* Biden v. Nebraska, 143 S. Ct. 2355, 2384 (2023) (Barrett, J., concurring) ("[T]he doctrine should not be taken for more than it is—the familiar principle that we do not interpret a statute for all it is worth when a reasonable person would not read it that way.").

13 *See, e.g.*, Gundy v. United States, 588 U.S. 128, 167–68 (2019) (Gorsuch, J., dissenting); West Virginia v. EPA, 597 U.S. 697, 735, 740–44 (2022) (Gorsuch, J., concurring); Nat'l Fed'n of Indep. Bus. v. OSHA, 595 U.S. 109, 121 (2022) (Gorsuch, J., concurring); Sunstein, *supra* note 10, at 489 ("[T]he strong version of the major questions doctrine is unambiguously connected with the nondelegation doctrine."); Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 Minn. L. Rev. 2019, 2024–25, 2044 (2018) (characterizing the major questions doctrine as "a less extreme approach" that "reinforces the nondelegation doctrine").

far the textualist Roberts Court has strayed from its methodological commitments, a number of scholars—and some of the Justices—have offered competing defenses, critiques, and characterizations of the newly constituted major questions doctrine. Justice Gorsuch, for example, has suggested that the doctrine is a close cousin to the nondelegation doctrine, serving as a check "against unintentional, oblique, or otherwise unlikely delegations of the legislative power."[14] Justice Barrett has rejected that characterization, arguing instead that the doctrine is part of the ordinary "context" that a reasonable reader would take note of in determining a statute's ordinary meaning.[15] Similarly, academic Ilan Wurman has suggested that the doctrine is best viewed as a linguistic canon that requires greater clarity and certainty for statutes that deal with especially "important" matters.[16]

In the opposite direction, a handful of textualist and nontextualist scholars have charged that the newest major questions doctrine is a form of purposivism—reaching beyond the statute's text to determine whether a particular statutory reading is consistent with the statute's core goals or design.[17] Another, more sympathetic textualist scholar has analogized earlier versions of the major questions doctrine to a form of "mischief rule" analysis.[18]

This Part argues that, on closer examination, the new major questions doctrine is not any of the things the above defenders or critics have suggested it is. Section I.A explains that the doctrine is not a close cousin of the nondelegation doctrine because it does not focus on preventing excessively broad *congressional* delegations of power but rather on preventing *agency* overreach or abuse; moreover, it is both over- and underinclusive in addressing nondelegation concerns. Section I.B argues that the doctrine is not part of the ordinary "context" that "reasonable readers" take into account when determining ordinary meaning because the doctrine's triggers—i.e., the economic impact the interpretation will have, the political significance of the subject matter the agency is regulating, the agency's past practice, and so on—stray far beyond the statute's text and are not the kinds of matters a reasonable reader would instinctively be aware of or informed about. Section I.C takes issue with Wurman's claim that the doctrine should be viewed as a linguistic "importance" canon—noting that the doctrine does not share the usual features of a linguistic canon in that it is not triggered by sentence structure or grammar, and that it leaves courts too much wiggle

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14 Nat'l Fed'n of Indep. Bus. v. OSHA, 595 U.S. at 121 (Gorsuch, J., concurring).

15 *See* Biden v. Nebraska, 143 S. Ct. at 2384 (Barrett. J., concurring).

16 *See* Wurman, *supra* note 11, at 6, 39–40.

17 *See, e.g.*, Squitieri, *Major Problems*, *supra* note 7; Shugerman, *supra* note 8, at 231; Deacon & Litman, *supra* note 6, at 1047.

18 *See* Bray, *supra* note 8, at 1011.

room to determine what counts as "important." And Section I.D argues that the doctrine is not even a form of "good" purposivism because it empowers the Justices to determine a statute's core function based on their own intuitions and guesses rather than on concrete, independent evidence from the historical or legislative record.

A. A Nondelegation Proxy

Let us begin with the claim—articulated most prominently by Justice Gorsuch in a series of concurring and dissenting opinions—that the major questions doctrine is a "corollary" to the nondelegation doctrine.[19] Justice Gorsuch argues that the major questions doctrine operates "in service of the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency."[20] He has described the doctrine as a "clear-statement rule" that is a "corollary" of Article I's Vesting Clause, which is the source of the nondelegation doctrine,[21] and has even suggested that the nondelegation and major questions doctrines are interchangeable—stating that "[w]hichever the doctrine, the point is the same."[22] Commentators writing both before and after the Court's most recent major questions cases likewise have noted a connection between the major questions exception—now canon or doctrine—and the nondelegation doctrine.[23]

But if we dig beyond these surface-level correlations and look closely at the relationship between the two doctrines, some important disconnects and tensions emerge—and suggest that the major questions doctrine cannot merely be viewed as a corollary to, or an enforcement mechanism for, the nondelegation doctrine. In his concurring opinion in *National Federation of Independent Business v. OSHA* ("*NFIB v.*

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19 *E.g.*, West Virginia v. EPA, 597 U.S. 697, 735, 740–41 (2022) (Gorsuch, J., concurring).

20 Gundy v. United States, 588 U.S. 128, 167 (2019).

21 West Virginia v. EPA, 597 U.S. at 740.

22 Nat'l Fed'n of Indep. Bus. v. OSHA, 595 U.S. 109, 125 (2022) (Gorsuch, J., concurring).

23 *See, e.g.*, John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 227 (2001) (conceptualizing *Brown & Williamson* as interpreting the applicable statute "to avoid significant nondelegation concerns"); Cass R. Sunstein, *The American Nondelegation Doctrine*, 86 GEO. WASH. L. REV. 1181, 1200 (2018); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 331, 334 (2000); Sunstein, *supra* note 10, at 489 ("[T]he strong version of the major questions doctrine is unambiguously connected with the nondelegation doctrine."); Justin Walker, *The Kavanaugh Court and the* Schechter*-to-*Chevron *Spectrum: How the New Supreme Court Will Make the Administrative State More Democratically Accountable*, 95 IND. L.J. 923, 962 (2020) ("Kavanaugh's major rules doctrine addresses concerns similar to those addressed by *Schechter's* robust nondelegation. . . . A robust nondelegation doctrine would prohibit Congress from abdicating its constitutionally prescribed place in the answer to the question, 'Who decides?' And so would Justice Kavanaugh's major rules doctrine."); Sohoni, *supra* note 6, at 290–92 (noting that commentators have made this connection and questioning its validity).

OSHA"),[24] for example, Justice Gorsuch describes the nondelegation principle as a doctrine that "ensures democratic accountability by preventing Congress from *intentionally* delegating its legislative powers to unelected officials."[25] Such "intentional[]" congressional delegation is problematic, Justice Gorsuch explains, because "[i]f Congress could hand off all its legislative powers to unelected agency officials, it 'would dash the whole scheme' of our Constitution and enable intrusions into the private lives and freedoms of Americans by bare edict rather than only with the consent of their elected representatives."[26] Justice Gorsuch argues that the "major questions doctrine serves a similar function by guarding against *unintentional, oblique, or otherwise unlikely delegations* of the legislative power."[27] Notice the shift here from *intentional* to *unintentional* delegations, a shift this Article will return to in a moment. The problem in such cases, Justice Gorsuch asserts, is that Congress sometimes "passes broadly worded statutes" that leave an agency "to work out the details of implementation."[28] But the agency might later "*seek to exploit* some gap, ambiguity, or doubtful expression in Congress's statutes to assume responsibilities far beyond its initial assignment."[29] In Justice Gorsuch's telling, the major questions doctrine "guards against" such agency exploitation.[30]

Both Justice Gorsuch's concurrence and the majority opinion in *West Virginia v. EPA*[31] cast the connection between the major questions and nondelegation doctrines in a similar light. Justice Gorsuch's opinion spends a lot of time explaining what "clear statement" rules are and characterizing the major questions doctrine as a "clear statement" rule that serves as a "corollary" to the Constitution's Article I Vesting Clause, which vests "'[a]ll' federal 'legislative Powers'" in Congress.[32] And as in *NFIB v. OSHA*, Justice Gorsuch argues that the major questions doctrine ensures that "when agencies seek to resolve major questions, they at least act with clear congressional authorization and do not '*exploit some gap, ambiguity, or doubtful expression* in Congress's statutes to assume responsibilities far beyond' those [that Congress] actually conferred on them."[33] Both the majority and concurring opinions also declare that the major questions doctrine addresses

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24 595 U.S. 109 (2022).

25 *Id.* at 124 (emphasis added).

26 *Id.* at 124–25 (quoting Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 61 (2015)).

27 *Id.* (emphasis added).

28 *Id.*

29 *Id.* (emphasis added).

30 *Id.*

31 597 U.S. 697 (2022).

32 *Id.* at 740, 737 (Gorsuch, J., concurring) (quoting U.S. Const. art. I, § 1).

33 *Id.* at 742 (emphasis added) (quoting Nat'l Fed'n of Indep. Bus. v. OSHA, 595 U.S. at 125 (Gorsuch, J., concurring)).

"a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted."[34]

There are several problems with Justice Gorsuch's, and the *West Virginia v. EPA* majority's, characterization of the major questions doctrine as essentially a stand-in for the nondelegation doctrine. First, as noted above, Justice Gorsuch's characterization makes an important but veiled shift from preventing *intentional congressional* delegations of legislative power (nondelegation doctrine) to preventing *agency* exploitation of *unintentional*, *oblique*, *or otherwise unlikely* legislative delegations (major questions doctrine). While the nondelegation doctrine is about restricting Congress's ability to give away too much power, the major questions doctrine is about preventing agencies from exploiting Congress's delegation of power—i.e., from going too far and asserting powers that Congress *did not* intentionally grant them.

Second, the nondelegation doctrine does not make exceptions or allow broad delegations if Congress makes clear that it intends to give an agency broad policymaking power; rather, it acts as a brake, invalidating the broad delegation on the grounds that the *Constitution does not allow* such delegations. By contrast, the latest iteration of the major questions doctrine explicitly allows broad or significant delegations of power to administrative agencies—so long as Congress clearly and explicitly authorizes the delegation. Again, this is because the focus is on preventing administrative agencies from exploiting power not clearly given to them, not on preventing *intentional* legislative delegations of broad power. In other words, the nondelegation doctrine operates as an on-off switch; if the power delegated to an agency is significant or open-ended, the delegation is invalid, period. By contrast, the newest version of the major questions doctrine operates more like a dimmer switch, allowing more or less power to be exercised by the agency depending on the practical impact of the agency's chosen statutory reading: if the application or exercise of power adopted by an agency is significant, neither the delegation nor the agency's exercise of power is necessarily invalid—but Congress must be incredibly clear about its intention to allow the agency action at issue.

Justice Kavanaugh has recognized this tension between the major questions and nondelegation doctrines in his opinion commenting on the denial of certiorari in *Paul v. United States*.[35] Specifically, Justice Kavanaugh noted "*the Court has not adopted a nondelegation principle for major questions*"[36] and that the view of nondelegation

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34 West Virginia v. EPA, 597 U.S. at 724; *id.* at 742 (Gorsuch, J., concurring) (quoting majority opinion).

35 140 S. Ct. 342, 342 (2019) (statement of Kavanaugh, J., respecting the denial of certiorari).

36 *Id.* (emphasis added).

taken in Justice Gorsuch's *Gundy v. United States*[37] dissent "would not allow" what the major questions doctrine permits—i.e., "congressional delegations to agencies of authority to decide major policy questions—*even if Congress expressly and specifically delegates that authority*."[38] In other words, the nondelegation doctrine is a black-and-white, on-off switch for excessive delegations, while the major questions doctrine is more nuanced. Perhaps relatedly, the two doctrines ask different questions: the nondelegation doctrine asks whether Congress *can* delegate the authority at issue to an agency, whereas the major questions doctrine asks whether Congress actually *did* delegate the authority at issue to the agency.[39]

A third problem with the major-questions-as-nondelegation-proxy characterization is that the triggering factors that determine whether a particular doctrine applies in a particular case are significantly different for the nondelegation versus the major questions doctrine. The triggering factor for nondelegation is vagueness or broadness—i.e., a delegation that is loosely worded or open-ended and therefore provides too much discretion to an agency.[40] By contrast, the triggering factors for the major questions doctrine are the practical consequences that an interpretation will generate—i.e., the economic impact or political significance of the interpretation, or the extent to which it will intrude on state law, or the novelty of the interpretation as compared to the agency's past practice, and so on.[41]

Another recent not-quite-major-questions case, *Biden v. Missouri*,[42] starkly illustrates how and why this difference matters. The case involved a vaccine mandate similar to the one at issue in *NFIB v. OSHA*, except that this mandate was issued by the Secretary of Health and Human Services ("HHS"), and applied to staff employed at facilities that are Medicare and Medicaid providers—e.g., hospitals, nursing homes, ambulatory surgical centers, hospices, rehabilitation facilities, and the like.[43] A majority of the Court *upheld* this vaccine mandate—on the same day that it invalidated the OSHA vaccine mandate—despite

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37 588 U.S. 128 (2019).

38 *Paul*, 140 S. Ct. at 342 (emphasis added).

39 I am indebted to Kevin Tobia for this point.

40 *See, e.g.*, Sessions v. Dimaya, 584 U.S. 148, 216 (2018) (Thomas, J., dissenting) (describing vagueness doctrine as "a way to enforce" the nondelegation doctrine); Granados v. Garland, 17 F.4th 475, 480 (2021) (noting similarities between nondelegation and void for vagueness doctrines); State Nat'l Bank of Big Spring v. Lew, 795 F.3d 48, 52 (2015) (noting litigants' claim that statute violates nondelegation doctrine because it grants agency "broad and unchecked power"); *see also* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1806 (2012) ("Vague statutes have the effect of delegating lawmaking authority to the executive.").

41 *See* Biden v. Missouri, 595 U.S. 87, 104 (2022) (Thomas, J., dissenting).

42 595 U.S. 87 (2022).

43 *See id.* at 90–92.

similar arguments by the challengers and four dissenting Justices that HHS's mandate implicated matters of "vast economic and political significance" and that HHS lacked clear congressional authority to impose such a mandate.[44] Notably, the authorizing language at issue in the Medicare and Medicaid statute[45] is strikingly similar to the authorizing language at issue in the Occupational Safety and Health Act ("OSH Act")[46]: the OSH Act empowers the Secretary of Labor to issue emergency standards if they determine such standards are "*necessary to protect* employees" from "grave danger from exposure" to "toxic" substances or "new hazards";[47] whereas the Medicare and Medicaid statute authorizes the Secretary of HHS to promulgate "such . . . requirements as the Secretary finds *necessary in the interest of the health and safety* of individuals."[48]

Given the similar "necessary" language in both statutes, a nondelegation doctrine analysis would suggest that if one of these delegations is too broad, then so is the other. Indeed, under the robust nondelegation standard advocated in Justice Gorsuch's dissent in *Gundy v. United States*,[49] both of these delegations should have been invalidated—and the respective statutes essentially sent back to Congress to craft a narrower delegation with more detailed instructions to cabin and guide the agency's decision-making. In fact, if anything, the delegation articulated in *NFIB v. OSHA* should have held up *more favorably* than the one at issue in *Biden v. Missouri*, as the OSH Act provides greater limits on what kinds of dangers—i.e., "grave," involving exposure to "toxic" substances or "new hazards"—may be deemed "necessary" to protect the health and safety of the relevant population.[50]

But under the major questions doctrine, the relevant triggering condition is not the broadness of the delegation—i.e., whether the "as necessary" language confers too much power on the agency—but rather, the economic and political significance—i.e., the impact in dollars and cents, or number of persons affected, or political salience—that the agency's chosen policy would have. Under the major questions analysis, what matters is not so much the language of the statute—i.e., the nature of the delegation penned by Congress—but rather, the policy that the

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44 *See id.* at 92; *id.* at 104 (Thomas, J., dissenting) (quoting Ala. Ass'n. of Realtors v. Dep't of Health & Hum. Servs., 594 U.S. 758, 764 (2021)).

45 Medicare and Medicaid Act, 42 U.S.C. §§ 1395–1395lll, 1396–1396v.

46 29 U.S.C. §§ 651–678.

47 *See id.* § 655(c) (emphasis added).

48 *See* 42 U.S.C. § 1395x(e)(9) (emphasis added).

49 *See* Gundy v. United States, 588 U.S. 128, 158 (2019) (Gorsuch, J., dissenting) (stating that when Congress makes policy decisions regulating private conduct, it may authorize another branch to "fill up the details," or "make the application of the rule depend on executive fact-finding," or assign non-legislative responsibilities—placing limits on the power that Congress can delegate).

50 *See* 29 U.S.C. § 655(c).

agency chooses to adopt pursuant to that delegation and the magnitude of the impact that policy will have on the economy, political landscape, etc. Thus, even similar policy choices made by two similar agencies operating under similar authorizing language in two different statutes can be treated differently by reviewing courts. Although the per curiam opinion in *Biden v. Missouri* did not engage in a major questions analysis—only the dissenting opinions mention the doctrine[51]—the strong subtext is that the majority concluded that the vaccine mandate for staff at Medicare and Medicaid facilities was not politically significant or controversial, or did not affect a large enough number of employees to have a significant impact on the American economy.[52] It is perhaps troubling that the per curiam opinion did not bother to discuss this, but the point is that it is possible for the major questions doctrine to play no role in the Court's analysis of a given agency interpretation because the doctrine's relevance does not turn on the statute's language, subject matter, or the nature of the delegation at issue. Rather, the doctrine turns on the Justices' assessment of the practical consequences of the particular agency interpretation or application of the statute at issue.

Last, as the above analysis illustrates, the major questions doctrine should not be viewed as a proxy for the nondelegation doctrine because it allows broad, vague, and even sweeping delegations of congressional power so long as the agency action adopted pursuant to that broad delegation involves only a "minor" question. In other words, if an agency adopts a policy that has little economic or political impact, involves only small dollar amounts, impacts only a small number of people or businesses, and so on, then the major questions doctrine will not prevent that agency action—*even if the statutory delegation of power under which the agency acts is overly broad, or lacks limiting instructions*.

Thus, the major questions doctrine is both an under- and overinclusive mechanism for enforcing the nondelegation doctrine. It is underinclusive because it allows legislative delegations of significant power to administrative agencies *so long as Congress is explicit about its intention to delegate such power to the agency*; and it is overinclusive because it rejects agency actions or interpretations that regulate matters of "vast economic and political significance"[53] *even if those interpretations are adopted pursuant to a delegation that is not broad enough to violate the nondelegation doctrine*, but also is not specific enough to explicitly authorize the particular agency action at issue.

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51 Biden v. Missouri, 595 U.S. 87, 104 (2022) (Thomas, J., dissenting).

52 *See id.* at 95–96 (majority opinion) ("[A] vaccination requirement under these circumstances is a straightforward and predictable example of the 'health and safety' regulations that Congress has authorized the Secretary to impose.").

53 *Id.* at 104 (Thomas, J., dissenting) (quoting Ala. Ass'n. of Realtors v. Dep't of Health & Hum. Servs., 594 U.S. 758, 764 (2021)).

Some proponents of the major-questions-as-corollary-to-nondelegation theory have suggested that the major questions doctrine should be viewed not as a precise substitute for the nondelegation doctrine, but rather as a canon that overprotects or enforces the principles underlying the nondelegation doctrine.[54] The idea is that the major questions doctrine increases the cost of delegating significant authority to agencies—and thereby discourages significant legislative delegations—through a "clarity tax"[55] that forces Congress to speak specifically and explicitly in order to confer significant power on agencies.[56] There are two problems with this formulation. First, as others have noted, it works as a bait and switch on Congress, which enacted all of the statutes and delegations to which the major questions doctrine has been applied *decades* before the Court articulated the doctrine—let alone the "clear statement" version of the doctrine.[57] Second, even under this "clarity tax" explanation, the major questions doctrine remains an underinclusive enforcement mechanism for the nondelegation principle—because it does not disincentivize all, or even most, congressional delegations of significant authority. That is, because the major questions doctrine invalidates only those agency regulations that involve "major" policy questions—as measured by economic, political, or societal impact—any agency regulation the courts decide is a "minor" or "non-major" question will sail past this test, even if the congressional delegation confers significant, or even massive, power to the agency. Again, the contrast between *NFIB v. OSHA*, in which the Court invalidated a vaccine mandate for virtually all employees in the workforce, and *Biden v. Missouri*, in which the Court upheld a vaccine mandate that applied only to healthcare employees—despite similar statutory language delegating similar authority to the relevant agencies in both cases—illustrates this point.[58]

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54 *See, e.g.*, Sunstein, *supra* note 10, at 483–84 (asserting that recent cases apply the major questions doctrine as "a nondelegation canon"); Lisa Heinzerling, *The Power Canons*, 58 Wm. & Mary L. Rev. 1933, 1946–48 (2017) (describing the major questions doctrine as a "normative" canon that "is both a presumption against certain kinds of agency interpretations and an instruction to Congress"); Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 172–76 (2010) (explaining that a court's adoption of a clear statement rule often reflects a judicial determination that a particular constitutional principle "merits heightened protection").

55 *See* Biden v. Nebraska, 143 S. Ct. 2355, 2377–78 (2023) (Barrett, J., concurring).

56 *See id.*

57 *See* Sohoni, *supra* note 6, at 286.

58 *Compare* Nat'l Fed'n of Indep. Bus. v. OSHA, 595 U.S. 109, 117–20 (2022), *with* Biden v. Missouri, 595 U.S. 87, 89 (2022).

B. "Common Sense" Context for the Reasonable Reader

In an unusually theoretical concurring opinion in *Biden v. Nebraska*,[59] Justice Barrett rejects the theory that the new major questions doctrine should be viewed as a "strong-form substantive canon" or a "clear-statement rule" designed to enforce the nondelegation doctrine.[60] Instead, she argues that the doctrine is better understood as an interpretive tool that "emphasize[s] the importance of *context* when a court interprets a [congressional] delegation [of authority] to an administrative agency."[61] Specifically, Justice Barrett contends that the doctrine reflects "common sense as to the manner in which Congress is likely to delegate" to an administrative agency a policy decision that will have significant "economic and political" consequences.[62]

Justice Barrett ties together the concepts of *context* and *common sense* by arguing that "[t]he major questions doctrine situates text in *context*, which is how textualists, like all interpreters, approach the task at hand"[63] and adds that "[c]ontext also includes *common sense*," or things that "go[] without saying."[64] "Seen in this light," Justice Barrett contends, "the major questions doctrine is a tool for discerning—not departing from—the text's most natural interpretation."[65]

Central to Justice Barrett's argument is a focus on the "reasonable" speaker or interpreter—a favorite textualist construct that figures prominently in discussions about "plain" or "ordinary" meaning. Justice Barrett notes, for example, that "[t]he usual textualist enterprise involves 'hear[ing] the [statute's] words as they would sound in the mind of a skilled, objectively reasonable user of words.'"[66] She then provides two law professor hypotheticals, involving a grocer's instructions to a store clerk and a parent's instructions to a babysitter, which are meant to approximate congressional delegations to agencies.[67] Justice Barrett argues that when the grocer or parent determines whether the actions taken by the clerk or babysitter constitute "reasonable" interpretations of the grocer's or parents' instructions, "common sense" context such as past interactions between the clerk and the grocer or the parents and the babysitter, the identity of the babysitter, and other such atextual

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59 143 S. Ct. 2355 (2023).

60 *Id.* at 2377 (Barrett, J., concurring).

61 *Id.* at 2376.

62 *Id.* at 2378 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000)).

63 *Id.* (emphasis added).

64 *Id.* at 2379 (emphasis added).

65 *Id.* at 2376.

66 *Id.* at 2377 (quoting Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 65 (1988) (second alteration in original)).

67 *See id.* at 2379–80.

factors will play a significant role.[68] The major questions doctrine, Justice Barrett argues, operates based on similar "common sense principles of communication"—meaning that "[s]urrounding circumstances, whether contained within the statutory scheme or external to it, can narrow or broaden the scope of a delegation to an agency."[69]

The "reasonable" speaker or reader shows up again in Justice Barrett's summary of the Court's recent major questions cases when she explains that in each of those cases, the Court declined to "put on blinders" and "confine[] ourselves to the four corners of the statute," and, instead, wisely "considered context that would be important to a *reasonable observer*."[70] The "common sense" context Justice Barrett highlights includes an industry's "unique political history" or "significant role" in the American economy,[71] an agency's attempt to regulate outside its traditional "wheelhouse" or area of relative "expertise," the agency's past practice, and the relative novelty of the challenged regulation.[72] In the end, Justice Barrett argues that the "shared intuition behind these cases is that a *reasonable speaker* would not understand Congress to confer an unusual form of authority" on an agency without saying so explicitly.[73]

Justice Barrett's attempt to characterize the major questions doctrine as part of the "common sense" context surrounding congressional delegations of power to administrative agencies has already been met with significant criticism on the grounds that (1) her definition of "context" is "so broad" that it leaves no distance between textualism and the more capacious interpretive approaches she sees as problematic,[74] and (2) "judges can easily accomplish policymaking under the label of 'context.'"[75]

Both of these critiques are well-founded. The kind of "context" Justice Barrett sweeps under the umbrella of "common sense" is exceedingly pragmatic, consequentialist, and *atextual*. It also leaves enormous room for judicial discretion and policymaking. But rather than repeat arguments that others have already made, this Article seeks to add

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68 *See id.* at 2380.

69 *Id.*

70 *Id.* at 2383 (emphasis added).

71 *See id.* at 2382 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000)).

72 *See id.* at 2382–83.

73 *Id.* at 2383 (emphasis added).

74 *See* Adrian Vermeule, *Text and "Context,"* YALE J. ON REGUL.: NOTICE & COMMENT (July 13, 2023), https://www.yalejreg.com/nc/text-and-context-by-adrian-vermeule/ [https://perma.cc/C2TG-22WW]; Kevin Tobia, Daniel Walters & Brian Slocum, *Major Questions, Common Sense?*, 97 S. CAL. L. REV. (forthcoming 2024) (manuscript at 54–56).

75 Beau J. Baumann, *Let's Talk About That Barrett Concurrence (on the "Contextual Major Questions Doctrine")*, YALE J. ON REGUL.: NOTICE & COMMENT (June 30, 2023), https://www.yalejreg.com/nc/lets-talk-about-that-barrett-concurrence-on-the-contextual-major-questions-doctrine-by-beau-j-baumann/ [https://perma.cc/Z4WF-YUTY].

another criticism to the list: Justice Barrett's "common sense" context consists of a lot of background considerations that far exceed the capacity or awareness of most "reasonable readers" or users of English—the textualist guidepost for determining a statute's ordinary meaning.

Recall that Justice Barrett herself advocates that courts should "consider[] context that would be important to a *reasonable observer*" and defends the major questions doctrine on the grounds that "a *reasonable speaker* would not understand Congress to confer an unusual form of authority" on an agency without saying so explicitly.[76] However, unless Justice Barrett's measure of the "reasonable speaker" is a lawyer—and there is substantial reason to believe that it is not—it seems fanciful to suggest that the context that reader would be familiar with would include the agency's past practices, the relative novelty of the regulation at issue, the regulation's economic or political impact, the limits of the agency's expertise, or what falls within—or outside—the agency's "wheelhouse." In short, the Court has framed what constitutes an "unusual" delegation in terms and tests that presume a sophisticated understanding of the regulatory landscape that only a reader with specialized knowledge—not the average "reasonable reader" or citizen on the street—can be expected to possess.

Careful readers may note that Justice Barrett refers to a "*skilled*, objectively reasonable user of words"[77]—and may wonder if this does not imply that the reasonable reader that Justice Barrett, and other textualists, have in mind is a "reasonable lawyer." But textualists and textual*ism* have been far from clear on this point—and most textualist rhetoric actually suggests that the reasonable reader is the average citizen on the street, rather than a lawyer. Justice Scalia was notably inconsistent on this point: he once famously declared that "the acid test of whether a word can reasonably bear a particular meaning is whether you could use the word in that sense at a cocktail party without having people look at you funny"[78]—a formulation that suggests that the reasonable reader is the average person on the street. But he declared elsewhere that textualists look for "the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*"—suggesting perhaps that the ordinary reader is a lawyer familiar with the corpus juris.[79] Textualist scholar John Manning also has described the reasonable reader as a "skilled . . . user of words" who is aware of "the specialized connotations and practices" known

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76 Biden v. Nebraska, 143 S. Ct. at 2383 (Barrett, J., concurring) (emphasis added).

77 *Id.* at 2377 (emphasis added).

78 Johnson v. United States, 529 U.S. 694, 718 (2000) (Scalia, J., dissenting).

79 Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 17 (Amy Gutmann ed., 1997).

to lawyers.[80] But both Justice Scalia's corpus juris comment and John Manning's "skilled user of words" description are a few decades old—and the rhetoric employed by many of the Court's current textualist Justices contradicts both.

Indeed, textualist Justices on the Roberts Court have—clearly and repeatedly—spoken about the reasonable reader in terms that indicate that they understand that reader to be an average citizen or member of the public. In *Bostock v. Clayton County*,[81] for example, Justice Alito's dissenting opinion explicitly invoked the image of "*a group of average Americans* [who] decided to read the text of the bill with the aim of writing or calling their representatives in Congress and conveying their approval or disapproval"—and insisted that these "ordinary citizens" formed the relevant "linguistic community" for determining the statute's ordinary meaning.[82] Justice Kavanaugh's dissent similarly emphasized that "common parlance matters in assessing the ordinary meaning of a statute, *because courts heed how 'most people' 'would have understood' the text of a statute* when enacted."[83] Several other opinions authored by textualist Justices make reference to how "friends" or ordinary people speak to each other in everyday conversation as proof of what a "reasonable reader" would understand a statute to mean.[84] Still, other textualist-authored opinions analogize complex statutory language to everyday contexts or settings—and offer these comparisons as definitive evidence of what a "reasonable" or "ordinary" reader would understand the statute to mean.[85] In short, modern textualism seems to have firmly embraced a vision of the reasonable reader as the ordinary citizen—even while the newest major questions doctrine has embraced

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80 John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 434–35 (2005).

81 590 U.S. 644 (2020).

82 *Id.* at 706 (Alito, J., dissenting) (emphasis added).

83 *Id.* at 790 (Kavanaugh, J., dissenting) (emphasis added) (quoting New Prime Inc. v. Oliveira, 586 U.S. 105, 114 (2019)).

84 *See, e.g.*, Wisconsin Central Ltd. v. United States, 585 U.S. 274, 277–78 (2018) (holding ordinary meaning of "money" is "a medium of exchange"—as evinced by the fact that a "friend" would not say "his new car cost '2,450 shares of Microsoft'"); Henson v. Santander Consumer USA Inc., 582 U.S. 79, 83–84 (2017) (invoking everyday conversations between friends as evidence of the ordinary meaning of "debt[s] owed" in Fair Debt Collection Practices Act); Kansas v. Garcia, 589 U.S. 191, 204–05 (2020) ("In ordinary speech, no one would say that a person who uses an e-mail address has used information that is contained in all these places."); Bond v. United States, 572 U.S. 844, 860 (2014) ("[A]n educated user of English would not describe Bond's crime as involving a 'chemical weapon.'"); Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 589 U.S. 327, 333 (2020) (framing inquiry in terms of what "an ordinary speaker of English would say"); Sekhar v. United States, 570 U.S. 729, 738 (2013) ("No fluent speaker of English would say . . . .").

85 *See, e.g.*, Niz-Chavez v. Garland, 593 U.S. 155, 162 (2021) (analogizing to car purchase); Voisine v. United States, 579 U.S. 686, 705 (2016) (Thomas, J., dissenting) (person who strikes friend to demonstrate karate move); Abramski v. United States, 573 U.S. 169, 196 (2014) (Scalia, J., dissenting) (sending son to store to buy milk and eggs); Loughrin v. United States, 573 U.S. 351, 369 (2014) (Scalia, J., concurring in part) (child lying to parent to get a cookie).

several sophisticated tests for "majorness" that only those trained in the law can be expected to understand.[86]

Consider two of the factors the Court has considered relevant "context" for determining "majorness" in its recent major questions cases, although Justice Barrett does not explicitly mention these in her *Biden v. Nebraska* concurrence:

(1) That Congress neglected to enact legislative proposals to adopt the policy embodied in the agency's regulation.[87]

(2) That the challenged agency policy intrudes on areas traditionally regulated by the states.[88]

The former is technical, distinctly inside-baseball information about the legislative process that one cannot expect ordinary citizens on the street either to know or to intuitively consider as part of the "common sense" context for the statute. And the latter is a legal determination that only a lawyer could be expected to know or to consider as part of a regulation's background context—not a matter that the average citizen reader would be aware of, let alone intuitively consider in determining the meaning of statutory text.

Last, there is recent empirical work based on surveys of ordinary citizens that calls into question Justice Barrett's claim[89] that "a

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86 Justice Barrett has acknowledged this tension in her academic writing, and has attempted to address it by arguing (1) because lawyers act as "intermediaries" for ordinary citizens, it is not problematic to read statutes from the lawyers' perspective, and (2) the legal fiction that all citizens are on constructive notice of the law assumes that ordinary citizens "are capable of deciphering language that is sometimes specialized and technical." Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. Chi. L. Rev. 2193, 2209–10 (2017). Neither of these arguments is particularly persuasive.

87 *See* Biden v. Nebraska, 143 S. Ct. 2355, 2373 (2023) ("'More than 80 student loan forgiveness bills and other student loan legislation' were considered by Congress during its 116th session alone." (quoting Mark Kantrowitz, *Year in Review: Student Loan Forgiveness Legislation*, Forbes (Dec. 24, 2020, 9:16 PM), https://www.forbes.com/sites/markkantrowitz/2020/12/24/year-in-review-student-loan-forgiveness-legislation/ [https://perma.cc/J829-HX7A])); West Virginia v. EPA, 597 U.S. 697, 731 (2022) ("Congress, however, has consistently rejected proposals to amend the Clean Air Act to create such a program."); Nat'l Fed'n of Indep. Bus. v. OSHA, 595 U.S. 109, 122 (2022) (Gorsuch, J., concurring) ("Congress has chosen not to afford OSHA—or any federal agency—the authority to issue a vaccine mandate. Indeed, a majority of the Senate even voted to *disapprove* OSHA's regulation."); Ala. Ass'n. of Realtors v. Dep't of Health & Hum. Servs., 594 U.S. 758, 766 (2021) ("Congress was on notice that a further extension would almost surely require new legislation, yet it failed to act in the several weeks leading up to the moratorium's expiration.").

88 *See* West Virginia v. EPA, 597 U.S. at 744 (Gorsuch, J., concurring) ("[T]his Court has said that the major questions doctrine may apply when an agency seeks to 'intrud[e] into an area that is the particular domain of state law.'" (quoting *Ala. Ass'n of Realtors*, 594 U.S. at 764) (alteration in original)); *Ala. Ass'n of Realtors*, 594 U.S. at 764 ("The moratorium intrudes into an area that is the particular domain of state law: the landlord-tenant relationship."); Nat'l Fed'n of Indep. Bus. v. OSHA, 595 U.S. at 120 (noting costs to states of complying with OSHA's mandate).

89 *See* Tobia et al., *supra* note 74, at 62.

reasonable speaker would not understand Congress to confer an unusual form of authority without saying" so explicitly.[90] The experimental survey research asks survey respondents—i.e., ordinary citizens—several questions designed to test the assumptions underlying Justice Barrett's babysitter hypothetical. Survey respondents' answers suggest that, contrary to Justice Barrett's hypothetical, ordinary citizens understand even *unusual* exercises of delegated power to fall within a principal's instructions to an agent.[91] That is, survey respondents viewed even extravagant expenditures by a babysitter as fitting within a parent's instructions to the sitter to use the parent's credit card to "make sure the kids have fun."[92] If this research accurately captures the reasonable reader's views about how interpretations that push the outer bounds of delegated authority should be treated, then the major questions doctrine—which presumes that legislative delegations of power should be construed narrowly and that boundary-pushing interpretations should be presumed illegitimate—may not in fact represent the "common sense" context that Justice Barrett thinks it does.

One possible counter to this critique is that the major questions doctrine applies to regulatory statutes, and that regulatory statutes are written for a narrow audience that includes regulatory agencies, regulated industries, and the officials charged with implementing a statute—not the ordinary citizen on the street.[93] For the reasons stated above, I am not sure that this is who Justice Barrett has in mind when she invokes the "reasonable observer" or "reasonable speaker"; textualist Justices have made numerous statements suggesting that they believe the reasonable reader is the average citizen on the street.[94] But even if this is what Justice Barrett meant, there is little reason to think that the presumption underlying the major questions doctrine—i.e., that Congress does not typically delegate matters of great political or economic significance to agencies, and that Congress will be exceptionally clear if it does intend to do so—is a presumption or "common sense context" that regulatory agencies, regulated industries, or other officials charged with implementing a statute share. This is so for at least two reasons. First, Congress does not typically—or perhaps ever—regulate with the kind of specificity, or targeted language, that the Court seems to be demanding with the latest iteration of the major questions doctrine. Second, as other scholars have pointed out, Congress often deliberately speaks

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90 Biden v. Nebraska, 143 S. Ct. at 2383.

91 *See* Tobia et al., *supra* note 74, at 39–45.

92 *See id.* at 43, 49–50.

93 *See* Lawrence Solum, *Krishnakumar on the Major Questions Doctrine*, Legal Theory Blog (Apr. 11, 2024, 11:55 AM), https://lsolum.typepad.com/legaltheory/2024/04/krishnakumar-on-the-major-questions-doctrine.html [https://perma.cc/YM9C-572M].

94 *See supra* notes 82–86 and accompanying text.

ambiguously and broadly in its delegations to agencies—sometimes precisely in order to punt tough, politically controversial or high stakes issues to an agency.[95] Regulatory agencies, regulated industries, and other officials charged with implementing statutes long have operated with this knowledge and under this competing understanding; indeed, the *Chevron* doctrine that governed agency statutory interpretation for most of the past forty years is based on this idea.[96] The modern Court may disagree *normatively* with following a judicial presumption that Congress at least sometimes delegates important, politically controversial matters to agencies, or may question Congress's constitutional authority to delegate significant matters to agencies. But denying that a presumption of this kind exists and has formed part of the background context for how regulated agencies and industries understand congressional delegations for years—as Justice Barrett's defense of the major questions doctrine does—is either disingenuous or fanciful.

C. A Linguistic Canon

In a recent article, textualist scholar Ilan Wurman has offered a novel defense of the major questions doctrine that, like Justice Barrett's "common sense" context argument, seeks to characterize the doctrine as something other than a traditional "substantive canon" of statutory construction.[97] Instead, Wurman suggests that the doctrine can be viewed as a linguistic "importance canon" that helps to clarify the meaning of an otherwise ambiguous statute.[98] Specifically, Wurman argues that in each of the Court's most recent major questions cases,

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95 *See, e.g.*, Tobia et al., *supra* note 74, at 52 ("[T]here is ample evidence that Congress often *does intend* to delegate major questions to agencies through vague language . . . ."); Shugerman, *supra* note 8, at 236–37 ("Legislatures often deliberately speak unclearly . . . ."); Morris P. Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 PUB. CHOICE 33, 46–49 (1982) [hereinafter Fiorina, *Legislative Choice*] (coding as "SR," for "shift the responsibility," instances in which Congress dodged a major question); Morris P. Fiorina, *Legislator Uncertainty, Legislative Control, and the Delegation of Legislative Power*, 2 J.L. ECON. & ORG. 33, 46–47 (1986) [hereinafter Fiorina, *Legislator Uncertainty*] (noting that legislators avoid the trouble of making specific decisions by charging agencies with general regulatory mandates); Thomas W. Gilligan, William J. Marshall & Barry R. Weingast, *Regulation and the Theory of Legislative Choice: The Interstate Commerce Act of 1887*, 32 J.L. & ECON. 35, 47–48 (1989) (linking Fiorina's "SR" observation to literature on the development of the administrative state and independent agencies).

96 *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations 'has been consistently followed by this Court . . . .'" (quoting United States v. Shimer, 367 U. S. 374, 382 (1961))), *overruled by* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

97 Wurman, *supra* note 11, at 8.

98 *See id.*

the relevant regulatory statute was plausibly ambiguous—and that "the Court can be understood to have resolved the ambiguity by adopting the narrower reading of the statute on the ground that . . . it was more plausible to think that Congress intended the narrower reading."[99] Wurman bases his argument in part on Ryan Doerfler's work involving insights from the philosophy of language: Doerfler has suggested that ordinary speakers—the textualist's reference point for determining "ordinary meaning"—need to feel a higher degree of certainty to say that they "know" something in *high stakes* situations versus *low stakes* situations;[100] Wurman analogizes that when dealing with an "important" agency regulation that imposes a requirement on millions of individuals, inflicts high monetary costs on the government or private business, or is highly controversial—i.e., a *high stakes* situation—"it is intuitive to think" that ordinary speakers would "demand more epistemic confidence"—that is, greater clarity—before concluding that the statute in fact authorizes the regulation.[101]

Wurman's effort to reframe the major questions doctrine as a linguistic rather than a substantive canon is clever but ultimately untenable for a number of reasons. The first problem lies in what triggers linguistic canons, or renders such canons applicable, in particular situations. Linguistic canons by definition focus on the text of the statute and encompass rules of syntax, grammar, and sentence structure.[102] As then-Professor Barrett once put it, "Linguistic canons apply rules of syntax to statutes."[103] For this reason, linguistic canons tend to turn on simple, easy-to-identify triggers such as the presence of a particular grammatical device (e.g., a last antecedent,[104] a particular verb tense,[105]

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99 *Id.* at 6.

100 *See* Ryan D. Doerfler, *High-Stakes Interpretation*, 116 MICH. L. REV. 523, 528 (2018).

101 *See* Wurman, *supra* note 11, at 47. As Wurman acknowledges, this is not the only way to apply this insight from the philosophy of language; one could instead frame the question as whether judges should "demand more epistemic certainty" before overturning an expert agency's interpretation. *See id.* at 48–49.

102 Anita S. Krishnakumar & Victoria F. Nourse, *The Canon Wars*, 97 TEX. L. REV. 163, 180 (2018); Barrett, *supra* note 54, at 117.

103 Barrett, *supra* note 54, at 117.

104 *See, e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 144 (2012) ("A pronoun, relative pronoun, or demonstrative adjective generally refers to the nearest reasonable antecedent."); Lockhart v. United States, 577 U.S. 347, 351 (2016) (noting that when a statute includes "a list of terms or phrases followed by a limiting clause" courts apply the "rule of the last antecedent"); Barnhart v. Thomas, 540 U.S. 20, 26 (2003) ("[A] limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows.").

105 *See, e.g.*, Carr v. United States, 560 U.S. 438, 447–48 (2010) (holding statute's use of present tense form of verb *travels* "reinforces the conclusion that pre-enactment travel falls outside the statute's compass"); Dean v. United States, 556 U.S. 568, 572 (2009) (attaching significance to statute's use of passive voice in saying "to be used," stating that it "reflects 'agnosticism . . . about who does the using.'" (quoting Watson v. United States, 552 U.S. 74, 81 (2007))).

the use of the word "shall"[106]); or sentence structure (e.g., the inclusion of a list—which triggers the *noscitur a sociis* and *ejusdem generis* canons[107]); or the presence of two parallel or similarly worded statutory provisions—which triggers the meaningful variation subpart of the whole act rule.[108] By contrast, Wurman's "importance canon" has a much more complicated trigger—a determination that an agency regulation addresses an "important" or "major" question. This is problematic because what counts as "important" is a subjective, open-ended, often difficult to define inquiry—different in kind from the more straightforward determination that a statute contains a particular grammatical device or sentence structure.

Indeed, the Court's latest major questions cases have articulated a hodgepodge of factors—almost a "totality of the circumstances" type test—for determining whether an agency regulation is "major." These factors, which include economic significance,[109] whether the agency regulation falls within the agency's wheelhouse,[110] whether it intrudes on an area typically regulated by the states,[111] whether the matter regulated

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106 *See, e.g.*, Mallard v. U.S. Dist. Ct., 490 U.S. 296, 302 (1989) ("shall" connotes mandatory or compulsory behavior); SCALIA & GARNER, *supra* note 104, at 112 ("Mandatory words impose a duty.").

107 *See, e.g.*, SCALIA & GARNER, *supra* note 104, at 195 (*noscitur a sociis*); *id.* at 199 (*ejusdem generis*); Third Nat'l Bank v. Impac Ltd., 432 U.S. 312, 322 (1977) ("[W]ords grouped in a list should be given related meaning."); Cir. City Stores, Inc. v. Adams, 532 U.S. 105, 114–15 (2001) (*ejusdem generis*); James v. United States, 550 U.S. 192, 199 (2007) (*ejusdem generis*); Hughey v. United States, 495 U.S. 411, 419 (1990) (*ejusdem generis*).

108 *See, e.g.*, *Dean*, 556 U.S. at 572–74 (comparing parallel clauses of sentencing enhancement statute and attributing significance to fact that one clause expressly contains an "intent" requirement, while the other does not); United States v. Hayes, 555 U.S. 415, 421–22 (2009) (parallel criminal statutes use "elements" in the plural when they want their offense-defining provisions to require more than one element for the offense).

109 *See* West Virginia v. EPA, 597 U.S. 697, 721 (2022) (explaining "economic and political significance" of the authority an agency has asserted may "provide a 'reason to hesitate before concluding that Congress' meant to confer such authority" (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000))); Nat'l Fed'n of Indep. Bus. v. OSHA, 595 U.S. 109, 117–20 (2022) (vaccine mandate is a "significant encroachment" that will force states and employers "to incur billions of dollars in unrecoverable compliance costs"); Biden v. Nebraska, 143 S. Ct. 2355, 2373 (2023) ("The 'economic and political significance' of the Secretary's action is staggering." (quoting West Virginia v. EPA, 597 U.S. at 721)).

110 *See* West Virginia v. EPA, 597 U.S. at 729 (presuming that Congress does not task agencies with making policy judgments in areas in which it has "no comparative expertise"); Nat'l Fed'n of Indep. Bus. v. OSHA, 595 U.S. at 118 (noting that "[a]lthough COVID-19 is a risk that occurs in many workplaces, it is not an *occupational* hazard in most" and that "a vaccine mandate is strikingly unlike the workplace regulations that OSHA has typically imposed").

111 *See* Ala. Ass'n. of Realtors v. Dep't of Health & Hum. Servs., 594 U.S. 758, 764 (2021) ("The moratorium intrudes into an area that is the particular domain of state law: the landlord-tenant relationship.").

is politically controversial,[112] whether Congress has rejected "something akin" to the agency's regulation,[113] and whether the regulation is inconsistent with the agency's past practices[114]—add up to a much more open-ended, normative triggering mechanism than the kinds of linguistic devices that typically trigger the linguistic canons. It is not as simple as finding that a particular agency regulation will cost X dollars or impact Y number of people—the charitable equivalent, perhaps, of finding that a statute contains a particular verb tense or other grammatical device; the interpreter also has to make a subjective judgment call that X dollars or Y number of people is a large enough number that it renders the regulation "economically or politically significant." If one of the other triggering tests applies, the inquiry will be even more subjective and open-ended, requiring the court to determine whether an agency action falls within the agency's expertise (or "wheelhouse"), intrudes too much on areas traditionally regulated by states, is inconsistent with the agency's past practice, and so on.

A second related difficulty with Wurman's formulation is that it assumes that ordinary speakers of English will agree on what is "high

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112 *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. OSHA, 595 U.S. at 117–18 (COVID-19 vaccine mandate); *Ala. Ass'n of Realtors*, 594 U.S. at 764 (eviction moratorium); West Virginia v. EPA, 597 U.S. at 732 (noting that scheme EPA adopted "has been the subject of an earnest and profound debate across the country" and that this "makes the oblique form of the claimed delegation all the more suspect" (quoting Gonzales v. Oregon, 546 U.S. 243, 267–68 (2006))); *id.* at 743 (Gorsuch, J., concurring) (explaining that an issue may be major where "certain States were considering" the issue or "when Congress and state legislatures were engaged in robust debates"); Biden v. Nebraska, 143 S. Ct. at 2373–74 ("Student loan cancellation 'raises questions that are personal and emotionally charged, hitting fundamental issues about the structure of the economy.'" (quoting Jeff Stein, *Biden Student Debt Plan Fuels Broader Debate Over Forgiving Borrowers*, Wash. Post (Aug. 31, 2022, 6:00 AM), https://www.washingtonpost.com/us-policy/2022/08/31/student-debt-biden-forgiveness/ [https://perma.cc/9P9R-Z9NU])); *id.* at 2384 (Barrett, J., concurring) ("[A]n initiative of this scope, cost, and political salience is not the type that Congress lightly delegates to an agency.").

113 *See* West Virginia v. EPA, 597 U.S. at 724 (agency "adopt[ed] a regulatory program that Congress had conspicuously and repeatedly declined to enact itself"); *id.* at 743 (Gorsuch, J., concurring) ("[T]his Court has found it telling when Congress has 'considered and rejected' bills authorizing something akin to the agency's proposed course of action." (quoting *Brown & Williamson*, 529 U.S. at 144)); Nat'l Fed'n of Indep. Bus. v. OSHA, 595 U.S. at 121–24 (Gorsuch, J., concurring) (noting that although Congress has enacted several statutes aimed at combating COVID-19 it has "chosen not to afford OSHA—or any federal agency—the authority to issue a vaccine mandate" and that "a majority of the Senate even voted to *disapprove* OSHA's regulation"); Biden v. Nebraska, 143 S. Ct. at 2373 (Congress considered and declined to enact "[m]ore than 80 student loan forgiveness bills" (quoting Kantrowitz, *supra* note 87)).

114 *See* West Virginia v. EPA, 597 U.S. at 724–25 (invoking novelty of the regulation as an indicia of majorness); Nat'l Fed'n of Indep. Bus. v. OSHA, 595 U.S. at 119 ("This 'lack of historical precedent,' coupled with the breadth of authority that the Secretary now claims, is a 'telling indication' that the mandate extends beyond the agency's legitimate reach." (quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 505 (2010))); Biden v. Nebraska, 143 S. Ct. at 2369 (agency's past exercises of statutory authority "implemented only minor changes, most of which were procedural").

stakes" much as they would agree that a statute contains a last antecedent, or uses the past tense, or contains the word "shall." In other words, Wurman's classification sweeps under the rug one of the central criticisms leveled against the major questions doctrine—that it depends on an open-ended, subjective judgment call about what counts as "major" versus "minor" or "ordinary" agency action.

The major questions doctrine has been criticized on two different, although related, grounds: first, that it is *inappropriate*—and inconsistent with textualism—to require a clear statement from Congress before allowing agencies to adopt policies that regulate major questions;[115] and second, that what constitutes a major question is an open-ended inquiry that empowers judges to decide cases according to their own policy preferences.[116] Wurman's "linguistic" canon formulation addresses the first criticism but not the second. That is, it ignores the widespread concern that the latest iteration of the major questions doctrine is so open-ended that it leaves judges free to deem "major" and reject any agency regulation they do not like, and to deem "minor" and uphold any regulation they approve. Wurman's "linguistic importance canon" argument brushes past these concerns and seems to take for granted that the "majorness" or "importance" of a particular agency action will be self-evident to ordinary people, who will intuitively expect the relevant statute to make especially clear if and when Congress intends to authorize the agency to take such action. However, there is extant evidence that this kind of intuitive, self-evident consensus often does not exist in the real world—indeed, in the latest major questions cases, the nine Justices on the Roberts Court often could not agree on whether a particular agency action should be considered "major."[117] Lower court

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115 *See, e.g.*, Sohoni, *supra* note 6, at 283; Squitieri, *Majorness?*, *supra* note 7, at 466; Rappaport, *supra* note 7; Deacon & Litman, *supra* note 6, at 1041; Adler, *supra* note 7, at 54; Squitieri, *Major Problems*, *supra* note 7; Benjamin Eidelson & Mathew C. Stephenson, *The Incompatibility of Substantive Canons and Textualism*, 137 Harv. L. Rev. 515, 518 (2023); Walters, *supra* note 10, at 523–24.

116 *See, e.g.*, Squitieri, *Majorness?*, *supra* note 7, at 464 (stating that the major questions doctrine calls on courts to determine policy questions); Sohoni, *supra* note 6, at 287–88 (calling the doctrine "opa[que]" and "malleable"); Thomas W. Merrill, *The Major Questions Doctrine: Right Diagnosis, Wrong Remedy*, Stanford Univ., Hoover Inst. Ctr. for Revitalizing Am. Insts. (Nov. 13, 2023), https://www.hoover.org/sites/default/files/research/docs/Merrill_WebReadyPDF.pdf [https://perma.cc/FLS5-2Q97] (noting "indeterminacy" of doctrine); Walters, *supra* note 10, at 39–40 (calling the major questions doctrine "chimerical").

117 *Compare, e.g.*, Nat'l Fed'n of Indep. Bus. v. OSHA, 595 U.S. at 117 ("There can be little doubt that OSHA's mandate qualifies" as an exercise of powers of "vast economic and political significance." (quoting Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 594 U.S. 758, 764 (2021))), *with id.* at 135 (Breyer, Sotomayor, Kagan, JJ., dissenting) (arguing "[n]othing about that measure is so out-of-the-ordinary as to demand" a clear statement before OSHA may adopt it); Biden v. Missouri, 595 U.S. 87, 89 (2022) (upholding vaccine mandate for healthcare staff at Medicare and Medicaid facilities, declining to mention major questions doctrine), *with id.* at 104

judges likewise have clashed over whether particular agency regulatory actions qualify as "major" or not.[118]

Such open-endedness, or lack of clarity, about when a canon's triggering factors have been met is more a hallmark of *substantive* canons than of linguistic ones. Think, for example, of the rule of lenity, which holds that ambiguities in criminal statutes must be resolved in favor of the defendant.[119] Whether a statute is sufficiently "ambiguous" to trigger the rule—like the question whether an agency regulation involves a "major" question of the kind that requires especially clear authorization—is often open to interpretation or debate. And judges regularly have disagreed about when the triggering conditions for lenity have been met.[120] Consider also the avoidance canon, which holds that if

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(Thomas, J., dissenting) (vaccine mandate for healthcare staff "is undoubtedly significant" and requires clear statement from Congress); *Ala. Ass'n of Realtors*, 594 U.S. at 764 ("[T]he sheer scope of the CDC's claimed authority" is "exactly the kind of power" that has "vast 'economic and political significance.'" (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014))), *with id.* at 769 (Breyer, Sotomayor, Kagan, JJ., dissenting) (arguing that eviction moratoriums are less "significant" than quarantines, which statute clearly allows CDC to impose).

118 *Compare, e.g.*, Louisiana v. Biden, 55 F.4th 1017, 1028 (5th Cir. 2022) (federal contractor vaccine mandate that applies to "roughly 'one-fifth of the entire U.S. Labor Force'" involves major question (quoting *History of Executive Order 11246*, U.S. Dep't of Labor, https://www.dol.gov/agencies/ofccp/about/executive-order-11246-history [perma.cc/JZH3-PCA7])), *with id.* at 1038 (Anderson, J., concurring in part, dissenting in part) (concluding not a major question because "this is not an 'enormous and transformative expansion in' regulatory authority" but merely "a standard exercise of the federal government's *proprietary* authority" (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324)); *In re* MCP No. 165, 21 F.4th 357, 372 (6th Cir. 2021) ("The major questions doctrine is inapplicable here, however, because OSHA's issuance of the ETS is not an enormous expansion of its regulatory authority."), *with id.* at 397–98 (Larsen, J., dissenting) (OSHA's policy implicates major questions doctrine); Am. Lung Ass'n v. EPA, 985 F.3d 914, 959–60 (D.C. Cir. 2021) (per curiam) (major questions doctrine does not apply to clean power plan), *with id.* at 1001–02 (Walker, J., concurring in part, concurring in the judgment in part, and dissenting in part) (clean power plan constitutes a policy of major economic and political significance).

119 *See, e.g.*, Norman J. Singer & J.D. Shambie Singer, 3 Statutes and Statutory Construction § 59:3, at 167–75 (7th ed. 2008); Staples v. United States, 511 U.S. 600, 619 n.17 (1994) (noting that under the rule of lenity, "an ambiguous criminal statute is to be construed in favor of the accused"); United States v. Bass, 404 U.S. 336, 347 (1971) (noting that ambiguity should be "resolved in favor of lenity" (quoting Rewis v. United States, 401 U.S. 808, 812 (1971))); *see also* United States v. Granderson, 511 U.S. 39, 54 (1994) ("[W]here text, structure, and history fail to establish that the Government's position is unambiguously correct—we apply the rule of lenity and resolve the ambiguity in [the defendant's] favor.").

120 *Compare, e.g.*, Wooden v. United States, 595 U.S. 360 (2022) (declining to mention or apply rule of lenity), *with id.* at 388 (Gorsuch, J., concurring) (applying rule of lenity); United States v. Davis, 588 U.S. 445, 464 (2019) (invoking lenity), *with id.* at 496 (Kavanaugh, J., dissenting) (statute not ambiguous enough for lenity to apply); United States v. Granderson, 511 U.S. 39, 54 (1994) (invoking lenity), *with id.* at 60 (Scalia, J., concurring in the judgment) (discussing the "wretchedly drafted statute" apparently without finding need to invoke lenity), *and id.* at 69 (Kennedy, J., concurring in the judgment) (offering a different interpretation of the statute from the majority but rejecting the necessity to invoke lenity), *and id.* at 70 (Rehnquist, C.J., dissenting) (offering yet another interpretation of the disputed statute but rejecting the necessity to invoke lenity);

there are two or more plausible readings of a statute, and one of these raises serious constitutional concerns, the Court should adopt the reading that avoids the constitutional problem.[121] Judges have also regularly disagreed about if and when the avoidance canon is applicable.[122] Other substantive canons similarly turn on ambiguity determinations that are open to debate.[123] By contrast, judges typically do not disagree about the *presence* of an antecedent or the fact that a statute uses the passive voice or the present tense—although they do sometimes disagree about what inference to draw from the presence of such grammatical devices.[124]

Dowling v. United States, 473 U.S. 207, 229 (1985) (invoking lenity), *with id.* at 232 (Powell, J., dissenting) (concluding that the statute is "very broad," but not "ambiguous"); Dixson v. United States, 465 U.S. 482, 500 n.19 (1984) (declining to invoke lenity after examining the statute's legislative history), *with id.* at 506 (O'Connor, J., dissenting) (concluding that lenity should be applied); United States v. Mitchell, 39 F.3d 465, 470, 476 (4th Cir. 1994) (declining to find sufficient ambiguity to trigger the doctrine of lenity), *with id.* at 476–77 (Murnaghan, J., dissenting) (finding the disputed phrase sufficiently ambiguous to require application of the doctrine).

121 *See, e.g.*, Rapanos v. United States, 547 U.S. 715, 738–39 & n.9 (2006) (plurality opinion); Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988); United States v. Del. & Hudson Co., 213 U.S. 366, 407–08 (1909); *see also* Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 Calif. L. Rev. 397, 399–401 (2005); Frederick Schauer, Ashwander *Revisited*, 1995 Sup. Ct. Rev. 71, 82–83; Lisa A. Kloppenberg, *Avoiding Serious Constitutional Doubts: The Supreme Court's Construction of Statutes Raising Free Speech Concerns*, 30 U.C. Davis L. Rev. 1, 88–90 (1996).

122 *Compare, e.g.*, Clark v. Martinez, 543 U.S. 371, 381–82 (2005) (invoking avoidance canon), *with id.* at 395 (Thomas, J., dissenting) (criticizing majority's application of avoidance canon), *and* Jennings v. Rodriguez, 583 U.S. 281, 296 (2018) (explaining that the Ninth Circuit "misapplied" the avoidance canon); United States v. Davis, 588 U.S. 445, 463 (2019) (rejecting application of avoidance), *with id.* at 493–95 (Kavanaugh, J., dissenting) (defending and applying avoidance canon); Valenzuela Gallardo v. Lynch, 818 F.3d 808, 823 (9th Cir. 2016) (applying avoidance canon to reject the Board of Immigration Appeals' interpretation), *with id.* at 826 (Seabright, J., dissenting) (stating that the Board of Immigration Appeals' interpretation "does not raise 'grave' constitutional vagueness concerns"); United States v. Simms, 914 F.3d 229, 251 (4th Cir. 2019) (avoidance canon not applicable because statute lacks more than one plausible construction), *with id.* at 272 (Niemeyer, J., dissenting) (court should have relied on avoidance canon "to give the statute the benefit of the doubt").

123 These include, for example, the maxim that ambiguities in deportation statutes should be interpreted in favor of noncitizens. *See* INS v. St. Cyr, 533 U.S. 289, 320 (2001); INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987); *cf.* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 866 (1984) (*Chevron* deference rule that courts should defer to "reasonable" agency interpretations of ambiguous or unclear statutes), *overruled by* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

124 *Compare, e.g.*, Lockhart v. United States, 577 U.S. 347, 350–52 (2016) (noting presence of a modifying phrase and a last antecedent and concluding that the modifying phrase qualifies only the clause immediately preceding it), *with id.* at 363–67 (Kagan, J., dissenting) (noting presence of modifying phrase and last antecedent but concluding that modifier qualifies all clauses in the statutory sentence, not just the one immediately preceding the modifier); Carr v. United States, 560 U.S. 438, 447–51 (2010) (inferring meaning from a statute's use of present tense verbs), *with id.* at

Wurman seems to acknowledge that the major questions doctrine is different from traditional linguistic canons—referring to it, at times, as a "*quasi* linguistic" canon.[125] Indeed, he suggests that the doctrine may occupy a space between substantive and linguistic canons but one closer to the linguistic end of the spectrum.[126] That is, even if the doctrine is not a classic, or typical, linguistic canon, Wurman argues that it should not be considered a substantive canon because substantive canons "depend on [an underlying] constitutional or traditional value"—whereas the major questions doctrine depends on the philosophy of language insight that "ordinary speakers" of English intuitively demand greater certainty in high stakes versus low stakes situations.[127] As discussed above, one difficulty with this argument is that it begs the question what counts as a "high" versus a "low" stakes situation—and treats that complicated assessment as an intuitive determination that ordinary citizens automatically make in a manner akin to how they process language or sentence structure.[128] As noted earlier, another difficulty with this argument is that Congress often deliberately speaks unclearly—sometimes precisely in order to punt tough, politically controversial or high stakes issues to an agency.[129] Based on this political reality, one could argue, as one scholar has, that there may be "an equally plausible descriptive linguistic canon" suggesting that ordinary citizens expect Congress to speak *ambiguously* when it delegates politically contentious matters to administrative agencies.[130]

In short, the effort to characterize the major questions doctrine as a linguistic importance canon fails for two reasons. First, the major questions doctrine quite plainly has nothing to do with the syntax, grammar, or structure of a statute; and second, the doctrine requires a far more intricate and inevitably subjective analysis of the consequences and history of the agency action at issue than ordinary speakers of English can be expected to understand intuitively or to agree upon universally.

D. (Good) Purposivism

Finally, some scholars have suggested that both the early and the latest iterations of the major questions doctrine are, at bottom, a form

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463–64 (Alito, J., dissenting) (arguing that use of present tense verbs carries no meaning, in part because legislative drafting manuals encourage the use of the present tense for all statutes).

125 *See* Wurman, *supra* note 11, at 39 (emphasis added).

126 *See id.*

127 *See id.* at 39–40, 46.

128 *See supra* note 117 and accompanying text.

129 *See, e.g.*, sources cited *supra* note 95.

130 *See* Shugerman, *supra* note 8, at 237—38.

of old-fashioned, traditional purposivism.[131] Professor Jed Shugerman, for example, has argued that early major questions cases such as *FDA v. Brown & Williamson Tobacco Corp.*[132] and *King v. Burwell*[133] were highly purposive—relying on legislative history and congressional intent (*Brown & Williamson*) or the design and policy goals that motivated the statute at issue (*King*).[134] Shugerman contends that the most recent Biden-era major questions cases have continued in this vein of elevating purpose over text—noting, for example, that in *Biden v. Nebraska*, Justice Roberts discussed the scope of Congress's delegation in "distinctly purposive terms" that debated how the "enacting Congress" would have viewed the Secretary's decision to cancel $430 billion in student loans.[135] Likewise, Professor Sam Bray, writing shortly before the explosion of recent Biden-era major questions cases, suggested that "the major questions doctrine has an essential similarity with the mischief rule"—in that both require the interpreter to focus on the original social problem that the statute (or agency) was designed to address and to determine whether the statutory application (or agency action) at issue falls within or beyond the scope of that social problem.[136]

There is, at first blush, considerable support for this characterization. Many of the moves the Court has made in its recent major questions cases look a lot like traditional purposivism. For example, the Court's most recent major questions cases have consistently argued that particular policies or regulations exceed an agency's statutory authority because those policies or regulations fall outside the agency's "sphere of expertise."[137] In each case, the Court essentially determined that the relevant agency had authority to regulate certain core subjects (e.g., workplace-related hazards, emissions, public health), and then concluded that the challenged regulations were *different in kind* from—or outside the scope of—those core subjects (e.g., communicable diseases that spread outside as well as within the workplace, energy policy rather than emissions, evictions rather than public health).

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131 *See id.* at 231–32; Squitieri, *Major Problems*, *supra* note 7 ("The major questions doctrine is a product of legal pragmatism—a theory of statutory interpretation advanced by Justice Breyer which often elevates statutory purpose and consequences over text.").

132 529 U.S. 120, 125–26 (2000).

133 576 U.S. 473, 481–82 (2015).

134 *See* Shugerman, *supra* note 8, at 230–31.

135 *See id.* at 21–23 ("Congress did not unanimously pass the HEROES Act with such power in mind." (quoting Biden v. Nebraska, 143 S. Ct. 2355, 2372–73 (2023))).

136 *See* Bray, *supra* note 8, at 1011.

137 *See* Nat'l Fed'n of Indep. Bus. v. OSHA, 595 U.S. 109, 118 (2022) (OSHA imposing vaccine or test mandate to combat the alleged workplace hazard of COVID-19); West Virginia v. EPA, 597 U.S. 697, 730 (2022) (EPA citing its general authority in environmental regulation to "dictat[e] the optimal mix of energy sources nationwide"); *id.* at 747–50 (Gorsuch, J., concurring).

Moreover, the Court in each case made some form of legislative intent argument in connection with its use of the major questions doctrine. Perhaps most notably, all of the majority opinions in all of the Biden-era cases have taken special note of the fact that Congress considered and declined to enact legislative proposals similar to the challenged agency policy, or in one case, expressly disapproved the challenged agency policy.[138] In *Alabama Ass'n of Realtors v. Department of Health & Human Services*,[139] for example, the Court observed that although Congress knew that the eviction moratorium was about to expire, it had "failed to act in the several weeks leading up to the moratorium's expiration" to extend the moratorium.[140] Similarly, in *NFIB v. OSHA*, the per curiam opinion noted that a majority of the Senate had voted to enact a resolution disapproving OSHA's vaccine-or-test mandate.[141] Likewise, in *West Virginia v. EPA*, the Court noted that the EPA's new power plan "conveniently enabled it to enact a program" that Congress had considered and rejected multiple times.[142] Additionally, in *Biden v. Nebraska*, the Court observed that Congress previously considered, but declined to enact, "[m]ore than 80 student loan forgiveness bills," noting that the policy at issue was one that "Congress has chosen not to enact itself."[143]

Although all of this gesturing toward the statute's core mischief and legislative intent looks and sounds a lot like traditional purposivism, it is not. For when we look beneath the surface, the purpose and intent arguments employed in the latest major questions cases differ in important ways from traditional purposivism—or at least from *good* traditional purposivism. This is because unlike *good* purposivism, the purpose and intent-based arguments invoked in the latest major questions cases lack any external tether or concrete evidence of the statute's purpose beyond the Justices' own intuitions. That is, the agency "expertise" and even the rejected proposal arguments the Court employs in its latest major questions cases are wholly unconnected to the circumstances surrounding a statute's enactment, the policy goals set by the *enacting* Congress, or the *actual* intent of the statute's drafters. This is because instead of citing historical or legislative record evidence about the original problem the statute was designed to solve, the enacting Congress's intentions, or even legislative proposals considered and rejected by the *enacting* Congress, the latest major questions cases rely on circumstantial evidence of the *present*-day Congress's *policy views*

138 *See* cases cited *supra* note 113.

139 594 U.S. 758 (2021).

140 *Id.* at 766.

141 Nat'l Fed'n of Indep. Bus. v. OSHA, 595 U.S. at 119.

142 West Virginia v. EPA, 597 U.S. at 731.

143 Biden v. Nebraska, 143 S. Ct. 2355, 2373 (2023) (quoting Kantrowitz, *supra* note 87).

and mere judicial declarations that the regulation at issue falls outside the agency's wheelhouse.

Let us start by setting the record straight about *good* purposivism. *Good* purposivism does not make blanket assertions based on judicial intuition. Rather, *good* purposivism rests on some objective historical or legislative record evidence that establishes the core problem a statute was designed to remedy or explains Congress's goals in enacting the statute. Such evidence typically takes the form of statutory text such as a preamble or legislative findings, legislative history, contemporary newspaper articles, or historical documents.[144] Although there have undoubtedly been several cases in which courts have engaged in *bad* purposivism of the kind that is mostly based on judicial intuition and only loosely connected to objective historical sources, this has not been the dominant mode of purposivism practiced on the modern Supreme Court.[145] Indeed, since Justice Scalia joined the Court and began calling attention to the looseness of the Hart & Sacks-style purposivism[146] of the 1970s, the purposivism practiced by the modern Court has hewed much more closely to cues contained in the statute's text, legislative record, or circumstances surrounding the statute's enactment.[147]

Thus, for example, in *Brown & Williamson*, a pre-Biden-era major questions case, the Court relied on (1) congressional hearing testimony

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144 *See, e.g.*, King v. Burwell, 576 U.S. 473, 479–81 (2015) (academic book, hearing testimony, and history of state health reform efforts that preceded the Affordable Care Act); Yates v. United States, 574 U.S. 528, 535–36 (2015) (committee report); Bond v. United States, 572 U.S. 844, 848–49 (2014) (preamble to an international treaty and academic books); Lawson v. FMR LLC, 571 U.S. 429, 448–49 (2014) (newspaper articles and committee report); Adoptive Couple v. Baby Girl, 570 U.S. 637, 649 (2013) (statute's text and committee report); Jefferson v. Upton, 560 U.S. 284, 290 (2010) (precedent); Dean v. United States, 556 U.S. 568, 579 (2009) (Stevens, J., dissenting) (floor statements); Bilski v. Kappos, 561 U.S. 593, 639–40 (2010) (Stevens, J., concurring) (House and Senate committee reports).

145 *See* John F. Manning, *The New Purposivism*, 2011 Sup. Ct. Rev. 113, 118–19 (2012) (describing present-day purposivism as more "textually-constrained" than old-fashioned, *Holy-Trinity*-style purposivism); Anita S. Krishnakumar, *Backdoor Purposivism*, 69 Duke L.J. 1275, 1277 (2020) ("Modern purposivism . . . looks distinctly different from the purposivism that prevailed in the 1970s, during the heyday of purposive analysis.").

146 Henry Hart and Albert Sacks famously developed a New-Deal-inspired theory known as "The Legal Process," which posited that law is a "purposive activity" and urged judges to assume "that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably[]"—and, accordingly, to "[i]nterpret the words of the statute . . . so as to carry out the purpose as best [the Court] can." *See* William N. Eskridge, Jr., James J. Brudney, Josh Chafetz, Philip P. Frickey, & Elizabeth Garret, Cases and Materials on Legislation and Regulation: Statutes and the Creation of Public Policy 427–30 (6th ed. 2020).

147 *See* Manning, *supra* note 145, at 119 (commenting that the Court's current purposivist Justices now "rely on the text to structure and constrain their use of purpose"); *id.* at 141 ("[N]ew purposivists accept the constraints of the statutory text . . . ."); Krishnakumar, *supra* note 145, at 1344 ("[P]urposivist Justices' estimations [of statutory purpose] are at least tethered to a written legislative record created by legislators and external to themselves.").

in which Food and Drug Administration ("FDA") officials expressly disavowed the authority to regulate tobacco products and (2) rejected legislative proposals to amend the Federal Food, Drug, and Cosmetic Act ("FDCA")[148] to explicitly give the FDA authority to regulate tobacco products—to conclude that the FDA's reading of the FDCA conflicted with Congress's purpose and intent.[149] Likewise, in *King v. Burwell*, decided in 2015, the Court relied on an actuarial report and a Senate hearing describing predecessor state statutes that Congress sought to emulate when enacting the Affordable Care Act ("ACA")[150]—in order to establish the goals and policy design of the ACA.[151]

By contrast, the "sphere of expertise" and "agency wheelhouse" arguments the Court has invoked in its latest major questions cases have stemmed mostly from the Justices' own intuitions. The Court's legislative intent arguments similarly have rested on judicial intuitions and assumptions that Congress *could not possibly have intended* to give an agency certain kinds of regulatory power—rather than on concrete evidence of Congress's *actual* intent. Moreover, even when the Court has pointed to objective legislative record evidence showing that the present-day Congress considered and rejected a legislative proposal to adopt a policy similar to the agency policy at issue, that gesture toward legislative intent has focused on the *wrong* Congress—not to mention has inferred too much meaning, perhaps inaccurately, from Congress's failure to act.

Consider the following examples:

In *NFIB v. OSHA*, the Court's per curiam opinion emphasized that the OSH Act empowers the Secretary of HHS to set "*workplace* safety standards, not broad public health measures."[152] The Court seemed to base this limitation on its own intuitions about the meaning of the term "*occupational*"—a word it invoked often and italicized repeatedly.[153] In the Court's estimation, the term "occupational" refers only to "work-related" dangers—and therefore does not authorize OSHA to regulate dangers, such as COVID-19, that occur both inside and outside

148 21 U.S.C. §§ 301–392.

149 FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 145–46 (2000) (hearing testimony); *id.* at 147–48 (rejected proposals).

150 The Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119 (codified as amended in scattered sections of 25 U.S.C., 26 U.S.C, 29 U.S.C., and 42 U.S.C.).

151 King v. Burwell, 576 U.S. 473, 479–81 (2015) (citing Leigh Wachenheim & Hans Leida, The Impact of Guaranteed Issue and Community Rating Reforms on States' Individual Insurance Markets 38 (2012); *Hearing on Examining Individual State Experiences with Health Care Reform Coverage Initiatives in the Context of National Reform Before the Senate Committee on Health, Education, Labor, and Pensions*, 111th Cong. 9 (2009)).

152 Nat'l Fed'n of Indep. Bus. v. OSHA, 595 U.S.109, 117 (2022) (citing 29 U.S.C. § 655(b)).

153 *See id.* at 114, 117–19 (invoking the term "occupational" seven times and italicizing it four of those times).

the workplace.[154] In so reasoning (or intuiting), the Court ignored OSHA's own past regulatory practices, which include the adoption of rules addressing many dangers that occur both inside and outside the workplace—such as tractor safety, ladders, and asbestos.[155] In other words, the Court privileged its own intuitions about the scope of the term "occupational" over historical evidence of that term's meaning.

In *West Virginia v. EPA*, the Court again relied heavily on agency expertise and core regulatory function arguments that look like traditional purposivism, but lack any tether to external evidence of Congress' actual intent.[156] Specifically, the Court noted that the scientific judgments EPA had made in setting pollution emissions levels that would require a shift from coal and gas to clean power sources required technical and policy expertise that EPA does not have, and that differ from the kind of expertise "traditionally needed in EPA regulatory development."[157] This time, the Court cited comments EPA had made in a request for special funding[158]—a better source than the Justices' own intuition, but still a far cry from concrete evidence of *Congress's* actual intent.

In *Alabama Ass'n of Realtors*, the Court at least offered *some* concrete, text-based hook for its statutory scope argument—but even that argument rested on judicial intuitions about the underlying purpose behind the statute's text.[159] Specifically, the Court in *Alabama Ass'n of Realtors* made an *ejusdem generis* argument that several terms listed in the second sentence of the Public Health Services Act[160] (e.g., "fumigation," "disinfection," "sanitation") indicate that the CDC has authority only over actions that relate directly to "identifying, isolating, [or] destroying [a] disease"[161]—and not to housing-related matters like evictions.[162] Notably, however, that argument depended on judicial inferences about what the terms "fumigation," "disinfection," and "sanitation" have in common—i.e., the connecting theme, or organizing purpose underlying the statute's grant of authority to the CDC—not on objective, external evidence of the problem that the Public Health Services Act was designed to remedy or that the CDC was authorized to combat. As I have elsewhere argued, such judicial inferences about

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154 *Id.* at 117–18.

155 *See* Roll-over protective structures (ROPS) for tractors used in agricultural operations, 29 C.F.R. § 1928.51; Ladders, 29 C.F.R. § 1926.1053; Asbestos, 29 C.F.R. § 1910.1001.

156 *See generally* West Virginia v. EPA, 597 U.S. 697 (2022).

157 *Id.* at 729 (quoting EPA's admissions to this effect in Env't Prot. Agency, Fiscal Year 2016 Justification of Appropriation Estimates for the Committee on Appropriations 213 (2015)).

158 *See id.*

159 *See generally* Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 594 U.S. 758 (2021).

160 42 U.S.C. §§ 201–300mm-64.

161 *Ala. Ass'n of Realtors*, 594 U.S. at 763.

162 *Id.* at 763–64.

the organizing theme connecting the items in a statutory list amount at bottom to judicial speculation about a statute's underlying purpose.[163] Here, the majority concluded that the statute's goal was to empower the CDC to "identify[], isolat[e], [or] destroy[] [a] disease" as opposed to empowering the CDC to stop the spread of communicable diseases generally—or some broader purpose that might have swept in an eviction moratorium designed to prevent infected people from spreading a disease from one location to another.[164] In so extrapolating the statute's purpose from surrounding words in a statutory list, without the benefit of any contextual clues, or evidence from the legislative record or contemporary historical accounts, the Court engaged in a practice I have referred to as "backdoor purposivism"[165]—a practice that is, in many ways, the opposite of *good* purposivism.

Because of its dependence on judicial intuition, the Court's use of mischief and intent-sounding arguments in the latest major questions cases is at best a *false* form of purposive analysis—one that does not look to actual facts or circumstances surrounding an agency's creation or to record evidence created at the time of the statute's enactment but, rather, simply declares what an agency's core function is and extrapolates from there to establish the outer edges of an agency's authority.

In a similar vein, although the recent major questions cases gesture toward congressional intent, such gesturing falls short of *good* purposivism because it does not make a meaningful attempt to discern Congress's *actual* legislative design or intent. For example, all of the recent Biden-era major questions cases include a lot of figures that illustrate the sheer number of people or businesses that will be affected, or the amount of money that will have to be spent as a result of the agency regulation at issue—and then reason that it is highly "unlikely" that Congress could have intended to give the agency authority to implement a policy that would have such a large impact or cost on so many people or entities.[166] In other words, the cases use the sheer size of a regulation's impact to presume a legislative intent *not to delegate* so

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163 *See generally* Krishnakumar, *supra* note 145.

164 *Ala. Ass'n of Realtors*, 594 U.S. at 763.

165 *See generally* Krishnakumar, *supra* note 145.

166 *See e.g.*, Nat'l Fed'n of Indep. Bus. v. OSHA, 595 U.S. 109, 112 (2022) (noting that vaccine-or-test mandate "applies to roughly 84 million workers"); *Ala. Ass'n of Realtors*, 594 U.S. at 764 ("At least 80% of the country, including between 6 and 17 million tenants at risk of eviction, falls within the moratorium."); West Virginia v. EPA, 597 U.S. 697, 714–15 (2022) (commenting that the regulation at issue "would entail billions of dollars in compliance costs . . . require the retirement of dozens of coal-fired plants, and eliminate tens of thousands of jobs across various sectors. . . . [as well as reduce] GDP by at least a trillion 2009 dollars by 2040"); Biden v. Nebraska, 143 S. Ct. 2355, 2372–73 (2023) (observing challenged regulation would "release 43 million borrowers from their obligations to repay $430 billion in student loans" and noting that this "amounts to nearly one-third of the Government's $1.7 trillion in annual discretionary spending").

much authority to the agency. But such a presumption does not rest on any evidence of Congress's actual intent; rather, it imputes to Congress an intent that depends on the Justices'—rather than Congress's—judgment about how much regulatory impact is too much.[167]

In fact, the Justices may well be getting Congress's actual intent *wrong* in at least some of these cases. As noted in Section I.C above, Congress often deliberately chooses to delegate tough, politically controversial issues to an agency in order to avoid having to decide such issues itself.[168] Moreover, as textualists long have complained, it is dubious to make inferences about Congress's intent—enacting or present-day—based on actions that it fails to take[169] because there are numerous possible reasons why Congress might fail to adopt a particular legislative proposal.[170]

Finally, the Court's references to legislative action, or inaction, in the Biden-era major questions cases fall short of *good* purposivism because they focus on how subsequent, often present-day, Congresses—rather than the *enacting*-era Congress that drafted the statute—have acted when considering whether to legislate a policy similar to the

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167 This kind of use of practical reasoning to presume legislative intent is a form of what I have elsewhere called "backdoor purposivism." *See* Krishnakumar, *supra* note 145.

168 *See, e.g.*, Tobia et al., *supra* note 74, at 52; Shugerman, *supra* note 8, at 26; Fiorina, *Legislative Choice*, *supra* note 95, at 46–49 (coding as "SR," for "shift the responsibility," instances in which Congress punted a major question); Fiorina, *Legislator Uncertainty*, *supra* note 95, at 46–47; Gilligan et al., *supra* note 95, at 47–48 (linking Fiorina's "SR" observation to literature on the development of the administrative state and independent agencies).

169 *See, e.g.*, Rapanos v. United States, 547 U.S. 715, 749 (2006) (Justice Scalia opinion noting that "[f]ailed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute" (quoting Solid Waste Agency v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 169 (2001))); Halliburton v. Erica P. John Fund, 573 U.S. 258, 300 (2014) (Thomas, J., concurring) ("'Congressional inaction lacks persuasive significance' because it is indeterminate; 'several equally tenable inferences may be drawn from such inaction.'" (quoting Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 187 (1994))); Tex. Dep't. of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 571 (2015) (Alito, J., dissenting) ("Congress may legislate, moreover, only through the passage of a bill which is approved by both Houses and signed by the President. Congressional inaction cannot amend a duly enacted statute." (citations omitted) (quoting Patterson v. McLean Credit Union, 491 U. S. 164, 175 n.1 (1989))).

170 *See* William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 Mich. L. Rev. 67, 69, 85, 90 (1988) (listing several reasons); *Rapanos*, 547 U.S. at 750 (2006) (Scalia, J.) ("We have no idea whether the Members' failure to act in 1977 was attributable to their belief that the Corps' regulations were correct, or rather to their belief that the courts would eliminate any excesses, or indeed simply to their unwillingness to confront the environmental lobby."); *Solid Waste Agency*, 531 U.S. at 169–70 (Rehnquist, C.J.) ("'[F]ailed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute.' A bill can be proposed for any number of reasons, and it can be rejected for just as many others." (citations omitted) (quoting *Cent. Bank of Denver*, 511 U.S.at 187)); United States v. Est. of Romani, 523 U.S. 517, 535–36 (1998) (Scalia, J., concurring) ("Congress cannot express its will by a *failure* to legislate. The act of refusing to enact a law (if that can be called an act) has utterly no legal effect, and thus has utterly no place in a serious discussion of the law.").

agency regulation at issue. If the Court is concerned about the scope of power that Congress delegated to the agency, it should be focusing on the behavior of the *enacting* Congress that designed the statute and wrote the delegation into law, rather than on actions taken by later Congresses that had nothing to do with crafting the enabling statute. The materials the Court has cited in its most recent major questions cases—such as the disapproval resolution in *NFIB v. OSHA*—demonstrate, at best, evidence that the *present-day* Congress disapproves of the *particular agency policy at issue*, not that the *enacting* Congress failed to give the agency *authority* to adopt that policy.[171] That is, the Court's reliance on post-enactment, and often present-day, Congresses' legislative action or inaction sheds no light on the question of how much authority an enabling statute enacted by a different Congress at a different point in time delegated to the agency.

II. WHAT *IS* THE NEW MAJOR QUESTIONS DOCTRINE?

If the new major questions doctrine is not (1) a nondelegation doctrine proxy or a substantive canon that enforces the constitutional principles underlying the nondelegation doctrine, (2) part of the "common sense" context that reasonable readers take into account when determining ordinary meaning, (3) a linguistic canon that approximates how ordinary speakers understand or talk about important matters, or (4) a form of good, old-fashioned purposivism—then what exactly *is* it?

This Part explores several possible answers to that question. It concludes that while the doctrine's status and proper classification are very much still evolving—because the Court is still figuring out how it is going to use the doctrine as well as how to describe its place within the statutory interpretation toolkit—for now, the best label and closest analogy for the doctrine may be that it is a form of practical-consequences-based reasoning similar to the absurdity doctrine. That conclusion, in turn, is problematic for textualist jurists because it means the major questions doctrine is precisely the kind of open-ended, atextual interpretive tool that textualists have long decried.

A. A Substantive Canon?

The emerging conventional wisdom seems to be that the major questions doctrine is a substantive canon and, specifically, a clear statement rule form of substantive canon. Numerous scholars have described the

171 *See* Nat'l Fed'n of Indep. Bus. v. OSHA, 595 U.S. at 119 (noting that the most noteworthy action taken by Congress regarding the vaccine mandate was a majority Senate vote disapproving the regulation).

doctrine as a substantive canon or clear statement rule,[172] and Justices Gorsuch and Kavanaugh explicitly have labeled it the latter.[173] More specifically, scholars have argued that the latest iteration of the doctrine is essentially an "anti-deference" canon that turns *Chevron*'s presumption of agency reasonableness into a presumption of agency overreach that requires a clear statement from Congress to be overcome.[174]

This classification works on many levels. The major questions doctrine does effectively shift the baseline for judicial review of agency interpretations from one of deference—and a presumption that Congress has authorized all reasonable agency interpretations—to a baseline of antideference—and a presumption that agencies are prone to overreach such that agency exercises of significant power should be viewed skeptically. In that sense, the doctrine operates similarly to numerous substantive canons that impose a policy-based presumption on interpretations involving certain *kinds* of statutes.[175] Further, the major questions doctrine does look, talk, and walk like a clear statement rule—in that the antideference presumption it imposes can be rebutted by a clear statement indicating that Congress intended to authorize the agency to take the challenged action.[176]

But there is one aspect of the new major questions doctrine, or presumption, that does not quite fit the substantive canon or clear

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172 *See, e.g.*, Sohoni, *supra* note 6, at 282 (stating that in Biden-era cases the Court "enunciated a clear statement rule—the new major questions doctrine"); Christopher J. Walker, *A Congressional Review Act for the Major Questions Doctrine*, 45 HARV. J.L. & PUB. POL'Y 773, 774 (2022) (describing the doctrine as "a new substantive canon"); Josh Chafetz, *The New Judicial Power Grab*, 67 ST. LOUIS U. L.J. 635, 649 (2023) (arguing the Court has "transmogrif[ied] the doctrine into a clear statement rule"); Richardson, *supra* note 6, at 176 (describing "expansion of the 'major questions doctrine' into a substantive canon of statutory construction"); Deacon & Litman, *supra* note 6, at 1012, 1041 (calling the doctrine both a "clear statement rule" and a "substantive canon"); Walters, *supra* note 10, at 489 (similar).

173 *See* West Virginia v. EPA, 597 U.S. 697, 740 (2022) (Gorsuch, J., concurring); Brett M. Kavanaugh, *Remarks at Notre Dame Law School*, 98 NOTRE DAME L. REV. 1849, 1852 (2023).

174 *See* Richardson, *supra* note 6, at 177 (calling the major questions doctrine a "reversal" of *Chevron*); Keith W. Rizzardi, *From Four Horsemen to the Rule of Six: The Deconstruction of Judicial Deference*, 12 MICH. J. ENV'T. & ADMIN. L. 63, 80 (2022).

175 *See* ESKRIDGE ET AL., *supra* note 146, at 648 ("Traditionally, the main substantive canons were directives to interpret different types of statutes 'liberally' or 'strictly.'"). Examples include the presumption that the Sherman Act should be applied liberally, in light of its overall purpose of benefitting consumers, *see id.* at 1168 (citing Wyerhauser v. Ross-Simmons Hardwood Lumber, 549 U.S. 312 (2007)); the rule of lenity dictating that ambiguities in criminal statutes should be construed narrowly, in favor of the accused, *see id.* at 1170; the presumption that ambiguities in deportation statutes should be construed in favor of noncitizens, *see id.* (citing INS v. St. Cyr, 533 U.S. 289, 320 (2001)); the presumption that veterans' benefits statutes should be construed liberally in favor of veterans, *see id.* at 1171 (citing King v. St. Vincent's Hosp., 502 U.S. 215 (1991)); and the presumption that Internal Revenue Service tax assessments are correct, *see id.* (citing United States v. Fior D'Italia, 536 U.S. 238, 242–43 (2002)).

176 *See* ESKRIDGE ET AL., *supra* note 146, at 651 (explaining that "'clear statement rules' . . . may be overcome" by clear statutory language).

statement rule mold: that the doctrine is triggered by a multifactor practical consequences test. As discussed above, the Court has established several practical, effects-based tests for determining whether a particular agency interpretation involves a "major question"—ranging from the sheer size of the impact the interpretation is expected to have, to the political salience or controversiality of the policy effected by the interpretation, to whether Congress has rejected "something akin" to the policy adopted in the challenged interpretation.[177] No other substantive canon has a trigger quite like this. Rather, substantive canons typically are triggered by a statute's subject matter,[178] ambiguousness,[179] intrusion into matters typically regulated by states,[180] or a connection to constitutional concerns.[181] They neither require courts to analyze the impact that an interpretation will have on society nor empower courts to reject particular interpretations they believe will have significant impacts—that is, they do not turn on the practical effects a particular interpretation will have, and they do not direct courts to engage in a case-by-case practical effects analysis. Instead, substantive canons require courts merely to determine whether a statute concerns a given subject matter, whether a statute is ambiguous, whether a statute raises federalism or

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177 *See supra* notes 109–14 and accompanying text.

178 These include canons that tip the scales in cases involving immigration, Native American tribes, veterans' benefits, or antitrust statutes. *See, e.g.*, Weyerhauser v. Ross-Simmons Hardwood Lumber, 549 U.S. 312, 318–19 (2007) (Sherman Act should be applied in light of its overall purpose of benefitting consumers); INS v. St. Cyr, 533 U.S. 289, 320 (2001) (ambiguities in deportation statutes should be construed in favor of noncitizens); INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987) (same); California v. Cabazon Band of Mission Indians, 480 U.S. 202, 208 (1987) (rule against state taxation of Indian tribes and reservation activities); Hagen v. Utah, 510 U.S. 399, 411–12 (1994) (presumption against national "diminishment" of Indian lands); King v. St. Vincent's Hosp., 502 U.S. 215, 220 n.9 (1991) (presumption that veterans' benefits statutes should be construed liberally for their beneficiaries). Nor can the major questions doctrine be considered one of these subject-matter-based canons—the subject matter being agency interpretations—because it does not apply to *all* agency interpretations but only to those agency interpretations that are "major." This would be the equivalent of a subject-matter-based canon that applies only to those immigration, or Indian law, or antitrust statutes that meet "x, y, z" criteria—but there are no substantive canons that work quite that way.

179 These include canons such as the rule of lenity and the avoidance canon, discussed above. *See* sources cited *supra* notes 119, 121 and accompanying text.

180 These include preemption canons and federalism clear statement rules. *See, e.g.*, Rapanos v. United States, 548 U.S. 715, 737–38 (2006) (superstrong clear statement rule against federal intrusion upon "traditional state authority"); Gregory v. Ashcroft, 501 U.S. 452, 461–64, 470 (1991) (same); CTS Corp. v. Waldburger, 573 U.S. 1, 17–19 (2014) (presumption against federal preemption of traditional state regulation); Medtronic v. Lohr, 518 U.S. 470, 485 (1996) (same); Davis v. Mich. Dep't of Treasury, 489 U.S. 803, 810 (1989) (presumption against federal regulation of intergovernmental taxation by the states).

181 These include canons such as the clear statement rule for waivers of sovereign immunity. *See, e.g.*, Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 729–30 (2003); Raygor v. Regents of the Univ. of Minn., 534 U.S. 533, 544 (2002); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985).

other constitutional concerns, and so on.[182] If the answer is yes, then the substantive canon will apply—and will direct the Court to tip the scales in favor of a particular party or interpretive outcome *based on policy values already embedded in the canon*. In other words, substantive canons do not require the Court to engage in a fresh policy analysis in each case; they merely establish default rules based on already completed or baked-in policy judgments that apply when certain threshold conditions are met. Thus, although the triggers for substantive canons—e.g., ambiguity, subject matter, constitutional concerns—are more nuanced and open to debate than the triggers for linguistic canons, they tend to be simpler and far less focused on practical effects than the triggers for the major questions doctrine.

A second problem with the theory that the major questions doctrine is a clear statement rule is that clear statement rules, by definition, tend to trump other interpretive factors when they are invoked. That is, they direct courts to rule a certain way *unless* a statute clearly requires otherwise. For this reason, clear statement rules typically drive the Court's analysis—and are applied as a threshold inquiry in cases in which they are used. That is, the Court typically starts with the premise that a certain principle, such as federalism or state sovereignty, is so important and ingrained in our legal system that it must presume that Congress does not abrogate it—and that only a clear statement from Congress indicating an intent to override such a principle can suffice to show that a particular statute contravenes a particular principle.[183]

But that is not how the Court actually employed the new major questions doctrine in at least some of its most recent Biden-era cases. For although the Court did treat the major questions doctrine as a threshold determination in two cases—*NFIB v. OSHA* and *West Virginia v. EPA*—it did not do so in two others—*Alabama Ass'n of Realtors* and *Biden v. Nebraska*. Rather, in the latter two cases the Court began its opinions with an analysis of the statute's text, concluded that the text did not support the agency's exercise of authority, and only then mentioned the major questions doctrine as a secondary argument favoring its statutory reading.[184] This is out of step with how the Court usually employs clear statement rules.[185]

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182 *See* sources cited *supra* notes 172–74.

183 *See, e.g.*, cases cited *supra* notes 180–81.

184 *See* Biden v. Nebraska, 143 S. Ct. 2355, 2373 (2023) (noting at end of opinion, after engaging in traditional textual analysis that "[t]he 'economic and political significance' of the Secretary's action is staggering by any measure" (quoting West Virginia v. EPA, 597 U. S. 697, 721 (2022))); Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 594 U.S. 758, 764 (2021) (commenting, on second-to-last page of opinion that "Even if the text were ambiguous, the sheer scope of the CDC's claimed authority under § 361(a) would counsel against the Government's interpretation").

185 *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 460–64 (1991) (beginning with federalism clear statement analysis); Riegel v. Medtronic, 552 U.S. 312, 334 (2008) (Ginsburg, J., dissenting)

In short, then, although the new major questions doctrine does share several features in common with substantive canons, and with clear statement rules in particular, it fits awkwardly within the substantive canon mold because of its multifactor practical-consequences-based triggering test and because the Court has treated it as a secondary, rather than threshold, inquiry in at least some of its recent cases.

B. An Implementation Test?

If the major questions doctrine is not a substantive canon, it might instead be a new *implementation* test or standard of review for evaluating agency interpretations of statutes—similar to the "hard look" review test articulated in *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*,[186] or the deference test articulated in *Skidmore v. Swift & Co.*[187] that preceded *Chevron*, or the test for vote dilution claims under the Voting Rights Act[188] articulated in *Thornburg v. Gingles*.[189] Briefly, the *State Farm* test for "hard look" judicial review of agency policy decisions directs courts to consider whether an agency (1) has relied on factors that Congress has not intended it to consider, (2) entirely failed to consider an important aspect of the problem, (3) offered an explanation for its decision that runs counter to the evidence before the agency, or (4) is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[190] If the Court concludes that one or more of these factors has been met, then the agency action will be deemed "arbitrary and capricious" and the Court will invalidate it.[191] *Skidmore* similarly directs that courts should consider the following factors in determining how much weight to accord an agency's interpretation of a statute it administers: (1) the thoroughness evident in the agency's interpretation, (2) the validity of its reasoning, (3) the consistency of the interpretation with earlier and later pronouncements, and (4) all those factors which give the

("Preemption analysis starts with the assumption that 'the historic police powers of the States [a]re not to be superseded . . . unless that was the clear and manifest purpose of Congress.'" (alteration in original) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947))); Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 295 (2006) (noting that "[o]ur resolution of the question presented in this case is guided by the fact that Congress enacted the IDEA pursuant to the Spending Clause" before applying spending clause clear statement rule); *Nev. Dep't of Hum. Res.*, 538 U.S. at 726 (beginning with clear statement rule).

186 463 U.S. 29, 33 (1983).

187 323 U.S. 134, 140 (1944).

188 The Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(e), 79 Stat. 437l 439 (codified as amended in scattered sections of 52 U.S.C.).

189 478 U.S. 30, 79 (1986).

190 *See State Farm*, 463 U.S. at 43.

191 *See id.*

interpretation power to persuade.[192] *Gingles*, which concerns the Voting Rights Act rather than agency decision-making, establishes three factors for courts to consider in evaluating vote dilution claims: (1) whether the minority voting group is "sufficiently large and geographically compact to constitute a majority in a single-member district," (2) whether the minority group is "politically cohesive," and (3) whether the majority votes "sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate."[193]

Like these multifactor implementation tests, the new major questions doctrine provides a series of factors for courts to consider—(1) economic and political significance,[194] (2) novelty or consistency with past agency practices,[195] (3) whether Congress has rejected "something akin" to the agency policy,[196] (4) whether the agency regulation falls within the agency's wheelhouse,[197] and (5) whether it intrudes on an area typically regulated by the states.[198] If the Court concludes that at least some of these factors have been met—it is unclear how many suffice—then it will presume the agency action "major" and decline to defer to or uphold it.

Notably, the factors articulated in *State Farm* and *Skidmore*, like the factors articulated in the Court's Biden-era major questions cases, are open-ended and leave significant room for judicial discretion and judgment calls in application.[199] They are also similarly imprecise about how many factors must be met in a given case in order for the agency action to be deemed suspect or ineligible for deference—amounting, in essence, to a "totality of the circumstances" type evaluation of the agency's decision-making process (*State Farm*), the soundness of the agency's interpretation (*Skidmore*), or the scale of the agency's policy choice (major questions).[200] The test articulated in *Gingles* is slightly different, in that all three factors must be met in order for plaintiffs to make a valid vote dilution claim.[201]

As the above discussion shows, the major questions doctrine fits, in many ways, the patterns of an implementation test. However, the doctrine also differs in some important respects from traditional

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192 *See Skidmore*, 323 U.S. at 140.

193 *Gingles*, 478 U.S. at 50–51.

194 *See supra* note 2.

195 *See supra* note 114.

196 *See supra* note 113.

197 *See supra* note 110.

198 *See supra* note 111.

199 *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

200 *See State Farm*, 463 U.S. at 43; *see also Skidmore*, 323 U.S. at 140.

201 *See* Thornburg v. Gingles, 478 U.S. 30, 50–51 (1986) (noting that the factors under the test "are "necessary preconditions").

implementation tests like the *State Farm*, *Skidmore*, and *Gingles* tests outlined above. First, the major questions doctrine, and accompanying factors, come with a clear statement carve-out. That is, even when a court concludes that an agency action satisfies one or more of the factors the Court has outlined—e.g., economic or political significance, outside an agency's wheelhouse—it could nevertheless uphold the agency action if it concludes that Congress clearly authorized the agency to take the action. This clear statement carve-out is more theoretical possibility than realistic opt-out, as Congress is nearly never going to have clearly authorized the agency to take the specific action at issue. Nonetheless, at least in design, the major questions test differs from other implementation tests in this potentially significant way. By contrast, if a court finds that one or more of the *State Farm* factors is satisfied, the agency will fail hard look review and there is no alternate avenue through which the agency's action would be upheld anyway;[202] similarly, if the *Skidmore* factors point in the wrong direction, the court will not defer to the agency's interpretation.[203]

Second, the major questions doctrine differs from other implementation tests in that it is not necessarily employed as a threshold inquiry, or determinative test, in the Court's analysis—as other implementation tests typically are. Rather, as noted earlier, the Court in both *Alabama Ass'n of Realtors* and *Biden v. Nebraska* invoked the major questions doctrine only as a secondary factor, after concluding based on de novo statutory analysis that the statute did not permit the agency interpretation at issue.[204] This is not how the *State Farm* or *Gingles* implementation tests are employed, although the *Skidmore* multifactor test sometimes is employed in this manner.[205]

Despite the above differences, the major questions doctrine is more similar to the *State Farm*, *Skidmore*, and *Gingles* multifactor implementation tests than it is to clear statement rule substantive canons. For

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202 *See State Farm*, 463 U.S. at 43 (declaring that "an agency rule would be arbitrary and capricious" if the agency's explanation for adopting the rule meets any of the articulated factors).

203 *See, e.g.*, Johnson City Med. Ctr. v. United States, 999 F.2d 973, 983 (6th Cir. 1993) (Batchelder, J., dissenting) (reasoning Internal Revenue Service revenue ruling does not satisfy *Skidmore* factors and therefore should not receive deference).

204 Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 594 U.S. 758, 764 (2021); Biden v. Nebraska, 143 S. Ct. 2355, 2373 (2023).

205 *See, e.g.*, Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000) (mentioning *Skidmore* only as a secondary factor, after engaging in close textual analysis of contested statutory provision); Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 360 (2013) (mentioning *Skidmore* only after conducting de novo analysis of statute's text); Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 449 (2003) (citing *Skidmore* only in passing after conducting de novo analysis of meaning of statutory term "employee"); Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1, 15–16 (2011) (mentioning *Skidmore* only as secondary factor, after conducting de novo analysis of statutory term "filed"); Ky. Ret. Sys. v. EEOC, 554 U.S. 135, 150 (2008) (mentioning *Skidmore* only as passing factor at tail end of opinion, after analyzing interpretive question de novo).

although most other implementation tests the Court has adopted tend to serve as threshold inquiries, the *Skidmore* factors are not always used this way—suggesting that this may not be a necessary design feature for all implementation tests. Moreover, because the major questions doctrine's "clear statement" carve-out is unlikely to save an interpretation that satisfies the multifactor test for majorness, this difference too seems less weighty than the differences that separate the major questions doctrine from traditional substantive canons.

If the major questions doctrine is indeed best classified as a new implementation test, or judicial standard of review, that is somewhat problematic for textualists. Textualists have not historically been fond of multifactor tests or standards of review—preferring instead to determine outright the "plain" meaning of relevant statutory words and phrases.[206] Perhaps because judicially articulated multifactor tests look and feel too much like common law decision-making rather than neutral, objective textual analysis, textualists have at times excoriated such tests as vehicles for judicial policymaking.[207] Thus, if the new major questions doctrine is indeed a new form of implementation test, or standard of judicial review, textualists will need to grapple with that incongruence.

C. Plain Old Pragmatism?

A third possibility is that the major questions doctrine is a form of practical consequences reasoning or a practical-effects-based canon, like the absurdity doctrine. As I have elsewhere explained, practical consequences arguments are prevalent in the Roberts Court's statutory opinions and can take a variety of forms—including providing "facts about the world" that support one statutory reading over another, "absurd results" arguments, and "undesirable consequences" arguments that describe the negative policy outcomes that an interpretation will generate.[208]

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206 *See, e.g.*, Wooden v. United States, 595 U.S. 360, 385 (2022) (Gorsuch, J., concurring in the judgment) (criticizing majority's multifactor test as "a judicial gloss on the statute's terms" and noting that multifactor balancing tests tend to "suppl[y] notoriously little guidance" to judges); Medellín v. Texas, 552 U.S. 491, 514 (2008) (arguing that the dissent's approach would lead to "the open-ended rough-and-tumble of factors"); Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 350 (2005) (preferring clear and predictable rules over judgmental standards).

207 *See, e.g.*, Gamble v. United States, 587 U.S. 678, 724 (Thomas, J., concurring) (majority's multifactor balancing test "has resulted in policy-driven, 'arbitrary discretion' and "by frequently sweeping in subjective factors, provides a ready means of justifying whatever result five Members of the Court seek to achieve."); United States v. Mead Corp., 533 U.S. 218, 241 (2001) (Scalia, J., dissenting) (deriding such a framework as "that test most beloved by a court unwilling to be held to rules . . . th'ol' 'totality of the circumstances' test").

208 *See* Anita S. Krishnakumar, Practical Consequences in Statutory Interpretation (Oct. 11, 2023) (unpublished manuscript) (on file with author).

The new major questions doctrine invokes elements of all three of these forms of arguments but seems most similar to the "facts about the world" form. Recall that every time the Court invoked the doctrine in its 2020–2022 term cases, it cited facts and figures quantifying the economic or political effect the challenged agency policy would have.[209] Moreover, the multifactor test the Court has established for determining whether an agency interpretation involves a "major question" focuses almost entirely on qualitative facts about the world—i.e., whether the agency policy resolves an issue that is the subject of "robust" political debate, whether the agency policy is novel or inconsistent with the agency's past practice, or whether the agency policy intrudes on matters typically regulated by states.[210]

The major questions doctrine also shares features in common with the absurd results form of practical consequences argument. Notably, the upshot of the major questions analysis—i.e., the inference that *if the practical consequences generated by the agency policy are such that the policy should be considered "major," then Congress is unlikely to have authorized the agency to adopt the policy because Congress tends to resolve "major questions" itself*—is rather similar to the logical inference behind the absurdity doctrine: that if an interpretation would produce an absurd result, then Congress is unlikely to have intended that interpretation because Congress does not intend to enact statutes that produce absurd results.[211] Also worth noting is that the major questions doctrine, like the absurdity doctrine and other forms of practical consequences analysis, is open-ended, leaving it entirely up to courts to determine what counts as economic or political "significance," or as a matter of "robust" political debate, or a "novel" as opposed to typical agency practice.

Finally, the fact that the Court has been inconsistent in how and when it applies the major questions doctrine supports the theory that the doctrine most closely resembles a practical-effects-based test or

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209 *See* Nat'l Fed'n of Indep. Bus. v. OSHA, 595 U.S. 109, 112 (2022) (noting that vaccine-or-test mandate "applies to roughly 84 million workers"); Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 594 U.S. 758, 764 (2021) ("At least 80% of the country, including between 6 and 17 million tenants at risk of eviction, falls within the moratorium."); West Virginia v. EPA, 597 U.S. 697, 714–15 (2022) (commenting that regulation at issue "would entail billions of dollars in compliance costs . . . require the retirement of dozens of coal-fired plants, and eliminate tens of thousands of jobs across various sectors. . . [as well as reduce] GDP by at least a trillion 2009 dollars by 2040"); Biden v. Nebraska, 143 S. Ct. 2355, 2372–73 (2023) (noting challenged regulation would "release 43 million borrowers from their obligations to repay $430 billion in student loans" and that this "amounts to nearly one-third of the Government's $1.7 trillion in annual discretionary spending").

210 *See* sources cited *supra* notes 109–14.

211 See John F. Manning, *The Absurdity Doctrine*, 116 Harv. L. Rev. 2387, 2394 (2003) ("The absurdity doctrine rests on the intuition that some such 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.").

consideration. As noted earlier, the Court has been inconsistent concerning how and at what point in the interpretive inquiry it invokes the doctrine: in some cases, it has applied the doctrine as a threshold inquiry, as in *NFIB v. OSHA* and *West Virginia v. EPA*; in others it has mentioned the doctrine only as secondary consideration after conducting its own de novo analysis, as in *Biden v. Nebraska* and *Alabama Ass'n of Realtors*; and in others, it has not mentioned the doctrine at all, as in *Biden v. Missouri*. This is precisely how the Court employs other forms of practical consequences arguments, including the absurdity doctrine. That is, the Court (or an ancillary opinion) sometimes invokes the absurdity doctrine—or other form of practical consequences—upfront, treating it as a trump card that supersedes other interpretive tools,[212] but at other times, it invokes the absurdity doctrine—or another form of practical consequences analysis—only as a secondary, or even minimal, factor in its interpretive analysis.[213]

As the above discussion illustrates, the major questions doctrine looks, walks, and talks a lot like a practical-effects-based canon, similar to the absurdity doctrine. The chief difference between the major questions doctrine and other forms of practical consequences considerations is, as discussed *infra*, that it contains a clear statement rule carve-out. That is, even if a challenged agency interpretation will have an "economically or politically significant" impact, or meets some of the other effects-based tests the Court has adopted, the doctrine dictates that the interpretation may be upheld if the statute clearly empowers the agency to adopt it.[214] This is not how other practical consequences tests work; courts do not ordinarily conclude that an interpretation will

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212 *See, e.g.*, Borden v. United States, 593 U.S. 420, 482 (2021) (Kavanaugh, J., dissenting) ("The idea that [certain specified] offenses would fall outside of [the Armed Career Criminal Act's] scope is . . . 'glaringly absurd.'" (quoting United States v. Begay, 934 F.3d 1033, 1047 (9th Cir. 2019))); CRST Van Expedited, Inc. v. EEOC, 578 U.S. 419, 432 (2016) ("It would make little sense . . . [to impose]an on-the-merits requirement for a defendant to obtain prevailing party status [because it] would undermine . . .congressional policy . . . ."); Carr v. United States, 560 U.S. 438, 459–61 (2010) (Alito, J., dissenting) ([T]he conclusion that the Court reaches makes no sense."); Thompson v. N. Amer. Stainless, LP, 562 U.S. 170, 176–77 (2011) ("If any person injured in the Article III sense by a Title VII violation could sue, absurd consequences would follow.").

213 *See, e.g.*, Forest Grove School Dist. v. T.A., 557 U.S. 230, 245 (2009) (stating that the school district's reading of the statute would produce a rule "bordering on the irrational" after discussing other arguments); Corley v. United States, 556 U.S. 303, 317 (2009) (stating in one paragraph that the government's reading of the statute would lead to absurdities); Knight v. Comm'r, 552 U.S. 181, 190 (2008) (briefly implying that petitioner trustee's reading of a statute was impractical); McQuiggin v. Perkins, 569 U.S. 383, 394 (2013) (relying primarily on precedent, but also noting that "[i]t would be passing strange" to adopt the state's alternate reading of the statute).

214 *See* West Virginia v. EPA, 597 U.S. 697, 716 (2022) ("[C]ourts 'expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance.'" (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014))); Nat'l Fed'n of Indep. Bus. v. OSHA, 595 U.S. 109, 117 (2022) ("'We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance' . . . The question, then, is

result in undesirable, absurd, unjust, or otherwise problematic consequences and then allow for the possibility—even in theory—that the interpretation may stand if Congress clearly authorized it.

There is, however, an explanation that might reconcile this "clear statement" rule carve-out with the otherwise practical-effects-based nature of the major questions doctrine: it is widely agreed that practical consequences based tests or doctrines are antitextual.[215] Indeed, the absurdity doctrine often is described as an exception to the plain meaning rule and has been criticized as inconsistent with a textualist approach to interpreting statutes.[216] Several textualist members of the current Supreme Court have also openly disparaged the use of practical consequences as a factor in determining statutory meaning.[217] Clear statement rules, by contrast, have come to be viewed as an acceptable

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whether the Act plainly authorizes the Secretary's mandate." (quoting Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 594 U.S. 758, 764 (2021))).

215 *See, e.g.*, SCALIA & GARNER, *supra* note 104, at 353 ("[W]hen once the meaning is plain, it is not the province of a court to scan its wisdom or its policy." (quoting G. GRANVILLE SHARP & BRIAN GALPIN, MAXWELL ON THE INTERPRETATION OF STATUTES 5 (10th ed. 1953))); Scalia, *supra* note 79, at 22 (decrying notion that laws should be interpreted to "mean whatever they *ought* to mean, and that unelected judges decide what that is" (emphasis added)); Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1, 25 (1998) (arguing that the use of "judicially-selected policy norms is in clear tension with . . . textualism"); Krishnakumar & Nourse, *supra* note 102, at 176–77 (administrability-based pragmatic reasoning involves consideration of practical consequences, thus characterizing it as a rule of construction is a "bit upside down"); Manning, *supra* note 211, at 2420 (arguing consequentialist arguments such as the absurd results doctrine are, at bottom, a form of strong intentionalism and therefore incompatible with textualism).

216 *See, e.g.*, Manning, *supra* note 211, at 2395, 2420–21 (describing absurd results doctrine as an "exception" to the "'plain meaning' presumption"; absurd results doctrine is inconsistent with textualism); United States v. Rodgers, 466 U.S. 475, 484 (1984) (noting that a statute's "plain language" controls unless it produces results that are "absurd or glaringly unjust" (quoting Sorrells v. United States, 287 U.S. 435, 450 (1932))); Jonathan R. Siegel, *What Statutory Drafting Errors Teach Us About Statutory Interpretation*, 69 GEO. WASH. L. REV. 309, 326 (2001) ("[T]he existence of the absurd results exception undermines the foundation of the textualist theory of statutory interpretation."); WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 45–46 (1994) (reasoning if one embraces the absurd results exception "there is no logical reason not to sacrifice plain meaning" for other reasons, including inconsistency with Congress's intent); John Copeland Nagle, *Textualism's Exceptions*, ISSUES IN LEGAL SCHOLARSHIP, Nov. 2002, at 2–4 (arguing that correcting apparent statutory errors under the absurdity doctrine is inconsistent with modern textualism).

217 *See, e.g.*, Pereida v. Wilkinson, 592 U.S. 224, 241 (2021) (Gorsuch, J., opinion) ("It is hardly this Court's place to pick and choose among competing policy arguments like these along the way to selecting whatever outcome seems to us most congenial, efficient, or fair. Our license to interpret statutes does not include the power to engage in such freewheeling judicial policymaking."); Pac. Operators Offshore, LLP v. Valladolid, 565 U.S. 207, 220 (2012) (Thomas, J., opinion) ("[P]olicy concerns cannot justify an interpretation of [a statute] that is inconsistent with the text . . . ."); Star Athletica v. Varsity Brands, Inc., 580 U.S. 405, 413 (2017) (Thomas, J., opinion) (arguing that the Court should focus on the statute's text, not engage in a "free-ranging search for the best copyright policy"); Patel v. Garland, 596 U.S. 328, 346 (2022) (Barrett, J., opinion) ("[W]e inevitably swerve

corollary to textual analysis, and a legitimate tool in a textualist jurist's interpretive toolkit.[218] The major questions doctrine may be a product of the intersection of these two interpretive principles. That is, the modern textualist Court may have grafted the clear statement rule feature onto the latest iteration of the major questions doctrine in an effort to make what is otherwise a practical-effects-based doctrine appear more textualist. In other words, by falling back on the common textualist argument that "if Congress had intended a particular result, it could, should, or would have said so clearly in the text," the textualist Justices who have articulated the latest version of the major questions doctrine may indirectly be seeking to preserve the appearance—or perhaps to convince themselves—that what they are doing in these cases is ordinary textualism, while in reality adopting a test that is fundamentally practical and consequentialist in nature.

In short, the "clear statement" aspect of the new major questions doctrine may be confusing the classification discussion—leading observers to view the doctrine as a substantive canon when it is really just a form of consequentialism. Indeed, Justice Barrett's "common sense" context defense perhaps unwittingly highlights the consequentialist nature of the major questions inquiry: although she tries—unsuccessfully—to spin this consequentialist dimension as background context that merely informs the Court's ordinary meaning analysis, appeals to "common sense" are inherently practical in nature and this arguments thus underscores the major questions doctrine's similarity to other practical-consequences-based canons like the absurd results doctrine.

In the end, the major questions doctrine's similarity to other practical consequences-based canons leaves the doctrine in fundamental tension with modern textualism in ways that the Court's current caselaw fails to grapple with. Other commentators have noted how open-ended, standardless, and ultimately judge-empowering the Court's newly articulated tests for determining "majorness" are;[219] indeed, it is such

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out of our lane when we put policy considerations in the driver's seat . . . policy concerns cannot trump the best interpretation of the statutory text.").

218 *See, e.g.*, John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 123 (2001) (noting that "textualists have not hesitated to apply" clear statement rules); Larry J. Obhof, Note, *Federalism, I Presume? A Look at the Enforcement of Federalism Principles Through Presumptions and Clear Statement Rules*, 2004 MICH. ST. L. REV. 123, 127 (2004) (federalism-based clear statement rules "fit within an overall textualist philosophy"); Barrett, *supra* note 54, at 168–71, 182 (2010) (substantive canons, such as clear statement rules, that are "constitutionally grounded" are consistent with textualism).

219 *See, e.g.*, Sohoni, *supra* note 6, at 266 (noting that the new major questions cases "annex[] enormous interpretive power to the federal judiciary by enunciating a standard for substantive legitimacy that is so malleable that, at present, it can be said only to mean 'just what [the Court] choose[s] it to mean—neither more nor less'" (quoting Lewis Caroll, *Through the Looking-Glass and What Alice Found There*, *in* ALICE'S ADVENTURES IN WONDERLAND AND THROUGH THE LOOKING-GLASS 196 (Richard Kelly ed., 2015))); Mark A. Lemley, *The Imperial Supreme Court*,

criticisms that likely prompted textualist justices and scholars like Justice Gorsuch, Ilan Wurman, and Justice Barrett to proffer textualist-friendly characterizations of the doctrine. But if these characterizations are inapt, as this Article argues that they are, and the major questions doctrine is ultimately little more than a judge-empowering inquiry into the practical consequences an interpretation will effect—either outright or in the form of a judicial standard of review—then the doctrine is one that should be difficult for the honest textualist to embrace or defend.

Conclusion

This Article has argued that the major questions doctrine is not any of the things its textualist defenders have sought to characterize it as—neither a nondelegation proxy, a linguistic canon, nor common sense context for the reasonable reader. Instead, the doctrine most closely resembles plain old-fashioned consequentialist reasoning of a kind similar to the absurd results canon that has been maligned by many textualists. The doctrine also potentially could be categorized as a new threshold, or implementation, test for the judicial review of agency statutory interpretations—a new *Skidmore* type test that determines whether an agency interpretation will receive any deference at all, or instead be presumed invalid. Either way, it is not merely "ordinary interpretation" or an example of traditional, standard, everyday textual *or purposive* interpretation—and it deserves to be treated as the *sui generis* interpretive tool that it is.

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136 Harv. L. Rev. F. 97, 100 (2022) (the new major questions doctrine "seems to be designed to allow the Court to reject significant agency actions that are within their grant of power but that the agency implements in ways the Court doesn't like"); Deacon & Litman, *supra* note 6, at 1089 (commenting on the "manipulability" of the new major questions doctrine); Elena Chachko, *Toward Regulatory Isolationism? The International Elements of Agency Power*, 57 U.C. Davis L. Rev. 57, 106 (2023) (the new major questions doctrine "is subject to practically unfettered judicial discretion"); William N. Eskridge, Jr., Brian G. Slocum & Kevin Tobia, *Textualism's Defining Moment*, 123 Colum. L. Rev. 1611, 1675 (2023) (new major questions doctrine "has added layers of interpretive discretion for textualists"). *See generally* Richard Yates, *Unconstrained Judicial Aggrandizement: Major Questions Doctrine In* ALA v. EPA, 49 Ecology L.Q. 331 *passim* (2022) (new major questions doctrine aggrandizes judicial power); Lisa Heinzerling, *An Unequal Liberty*, Atlantic (Nov. 28, 2022, 7:00 AM), https://www.theatlantic.com/ideas/archive/2022/11/supreme-court-west-virginia-v-epa-liberty/672250/ [https://perma.cc/6YEW-L8A6] (new major questions doctrine empowers the Justices "to pick and choose between the regulations they like and those they think run afoul of this arbitrary standard").