

“RECOMMEND . . . MEASURES”: A TEXTUALIST REFORMULATION OF  
THE MAJOR QUESTIONS DOCTRINE

Chad Squitieri\*

*Following Biden v. Nebraska, defenders of the major questions doctrine (which requires administrative agencies to identify “clear congressional authorization” to regulate “major” issues) can be categorized as falling within one of two camps. The first camp includes Justices Gorsuch and Alito, who view the major questions doctrine as a substantive canon. The second camp includes Justice Barrett, who explained in Nebraska that she is “wary” of adopting new substantive canons, and indicated that she considers the major questions doctrine to be a linguistic canon. Interestingly, both camps have relied on an influential scholar to advance their positions: then-Professor (now Justice) Barrett. This Article will therefore also work within Justice Barrett’s scholarly framework, but will do so to make two points. First, that textualists have reason to object to both the substantive and linguistic conceptions of the major questions doctrine that are currently on offer. And second, that the major questions doctrine can be reformulated into a new substantive canon that textualists can embrace.*

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\*Assistant Professor of Law, Columbus School of Law, Catholic University of America. I would like to thank Beau J. Baumann, Louis J. Capozzi III, Sarah H. Duggin, Cara H. Drinan, William M. M. Kamin, Megan M. La Belle, Gary Lawson, Eli Nachmany, and Ilan Wurman for their feedback on earlier drafts. I presented aspects of this Article’s argument at a debate concerning textualism and the major question doctrines during the AALS annual conference in January 2023. I’d therefore like to offer additional thanks to Christopher J. Walker, who moderated the debate.

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## INTRODUCTION

Following *Biden v. Nebraska*, defenders of the major questions doctrine (which requires administrative agencies to identify “clear congressional authorization” to regulate “major” issues) can be categorized as falling within one of two camps. The first camp includes Justices Gorsuch and Alito, who view the major questions doctrine as a substantive canon (*i.e.*, a canon of statutory interpretation that promotes a value existing external to a statute).<sup>1</sup> The second camp includes Justice Barrett, who explained in *Nebraska* that she is “wary” of adopting new substantive canons, and indicated that she views the major questions doctrine as a linguistic canon (*i.e.*, a canon of interpretation that applies grammatical rules or speech patterns to discern a

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<sup>1</sup> *West Virginia v. EPA*, 142 S. Ct. 2587, 2616 \*2022) (Gorsuch, J., concurring) (citing Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 169 (2010) [hereinafter Barrett, *Substantive Canons*]).

statute's meaning).<sup>2</sup> Those judicial opinions, in addition to others, demonstrate that members of the Court have thought deeply about the relationship between textualism and the major questions doctrine. This Article will analyze those opinions and offer some additional considerations in order to make two points. First, that textualists have reason to object to the substantive and linguistic conceptions of the major questions doctrine that are currently on offer. And second, that the major questions doctrine can be reformulated into a new substantive canon that textualists can embrace.

To develop those two points, this Article will work within the framework provided by a scholar who has offered one of the most influential academic treatments to date regarding the relationship between textualism and the interpretative canons. That scholar is then-Professor (now Justice) Barrett.<sup>3</sup> Her seminal article, *Substantive Canons and Faithful Agency*,<sup>4</sup> has proven critical to structuring the ongoing debate concerning the major questions doctrine's relationship with textualism. To wit: Justices Gorsuch and Alito relied on Justice Barrett's article to defend the substantive canon version of the major questions doctrine in *West Virginia v. EPA*,<sup>5</sup> Justice Barrett relied on her article to defend the linguistic canon version of the doctrine in *Nebraska*,<sup>6</sup> and Justice Kagan's *Nebraska* dissent made an effort to work within Justice Barrett's influential framework as well.<sup>7</sup>

This Article will begin, then, by outlining why textualists should object to the substantive and linguistic conceptions of the major questions doctrine that are currently on offer. The first step in doing so is to consider each of the two justifications for the major questions doctrine that the Court offered in *West Virginia*. Analyzing both of those justifications reveals that they are each written at too abstract a level to be of much use—although they each act as a placeholder for more detailed arguments offered by justices in two key concurring opinions.

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<sup>2</sup> 143 S. Ct. at 2377 n.2 (Barrett, J., concurring).

<sup>3</sup> The remainder of this Article will refer to "Justice Barrett," rather than "then-Professor Barrett," even when referring to scholarship that she authored before taking the bench.

<sup>4</sup> *West Virginia*, 142 S. Ct. at 2616 (Gorsuch, J., concurring) (citing Barrett, *Substantive Canons*, *supra* note 1, at 169).

<sup>5</sup> *Id.*

<sup>6</sup> 143 S. Ct. at 2376 n.1 (Barrett, J., concurring) (citing Barrett, *Substantive Canons*, *supra* note 1, at 117).

<sup>7</sup> *Id.* at 2398 n.3 (Kagan, J., dissenting) (explaining why she "could practically rest my case on Justice BARRETT's reasoning").

The first key concurrence is offered by Justice Gorsuch in *West Virginia*. His detailed justification of the major questions doctrine, which was joined by Justice Alito, conceptualizes the major questions doctrine as a substantive canon grounded in a particular understanding of the lawmaking authority vested in Congress. The problem with that conception of the major questions doctrine is that, although it focuses on constitutional text vesting lawmaking authority in *Congress*, it does not account for constitutional text vesting lawmaking authority in the *President*.

It is tempting to think of federal legislation in an overly Congress-centric fashion. I am guilty of doing so myself.<sup>8</sup> But textualists must pay closer attention to the precise way in which the Constitution separates and vests federal lawmaking authority. As this Article reminds, Congress does not legislate alone. Instead, the President is vested with important lawmaking powers—including the power to veto legislation, and the power to influence the legislative process from the start by recommending legislative measures to Congress.<sup>9</sup> Given those powers, federal legislation should be understood as a final political compromise that has been shaped by a series of intra- and inter-branch political debates. Textualists should therefore presume that, during those debates, the President (and/or the President’s congressional allies) will sometimes be able secure “major” statutory authority for the administrative agents that exercise executive power on the President’s behalf.

To be sure, the inherent jealousies between the President and Congress will ensure that the President will sometimes *not* secure “major” authority. But a substantive canon that stacks the deck in favor of that occasional result, which is what the canon proposed by Justice Gorsuch would do, is a canon that gives short shrift to the President’s constitutionally derived influence over the federal lawmaking process. This presents a problem for textualist jurists, who are faithful agents of *the People* (not faithful agents of *Congress*), and who must avoid favoring the legislative preferences of either of the two political branches that the People’s Constitution tasks with creating federal legislation.

The second key concurring opinion to be examined by this Article is the solo concurrence offered by Justice Barrett in *Nebraska*. In that opinion, Justice Barrett explains that she views the major questions doctrine as a

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<sup>8</sup>Chad Squitieri, *Towards Nondelegation Doctrines*, 86 MO. L. REV 1239, 1245 (2021) (referring to “the people’s choice to vest legislative authority in a politically accountable Congress”).

<sup>9</sup>*Infra* Part III. The Recommendation Clause

linguistic canon that seeks to place a regulatory policy in context by accounting for the regulatory policy's "majorness." The mechanics of Justice Barrett's position are straightforward: she begins with the general proposition that ordinary people account for majorness in ordinary conversation, and she then seeks to apply that general proposition to the more specific situation concerning statutes that vest authority in administrative agencies. But as this Article will argue, a problem with that linguistic conception of the major questions doctrine is that, even if it is true that ordinary people account for majorness in ordinary conversation, majorness does not provide similar context when it comes to the *specific* task of determining whether an agency has the statutory authority to take major action. Instead, at least two sources of law (namely, the Congressional Review Act and the constitutional provisions outlining the President's role in the federal lawmaking process) place the objective reader on notice that majorness does not offer helpful context when it comes to identifying an agency's statutory authority.

After explaining why textualists should object to the two conceptions of the major questions doctrine currently on offer, this Article will turn to explaining how the major questions doctrine can be *reformulated* into a substantive canon that textualists can embrace. By paying full attention to the President's role in the federal lawmaking process, the reformulated doctrine avoids the textualist objections lodged against the two conceptions of the doctrine on offer. In particular, the reformulated doctrine seeks to enforce the precise lawmaking roles that the People's Constitution assigns to the President, House, and Senate. Accounting for those lawmaking roles, which triangulate a constitutional value in shaping statutory authority through particular political procedures, enables the reformulated doctrine to satisfy the two-factor test that Justice Barrett's scholarship proposes for identifying the sorts of constitutional values that textualists can use as foundations for substantive canons.<sup>10</sup>

When considered together, Article I, Section 7 (which speaks to the Constitution's bicameralism and present requirements) and Article II, Section 3 (which speaks to the presidential power and duty to recommend measures for Congress's consideration) demonstrate that the President, the House, and the Senate each play important, but carefully confined, roles in the federal lawmaking process. Consistent with the idea that the President's executive functions would give the President access to critical facts

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<sup>10</sup>Barrett, *Substantive Canons*, *supra* note 1, at 178.

concerning real-time problems in need of legislative solutions,<sup>11</sup> the Framers ensured that the President would be *required*<sup>12</sup> to put the President's informational advantage to work by "recommend[ing] . . . measures"<sup>13</sup> to Congress so that Congress could consider corrective legislation. And by simultaneously granting the President veto authority in Article I, Section 7,<sup>14</sup> the Constitution ensures that the federal lawmaking process has presidential bookends.

But those presidential bookends are just that—opportunities for the President to play a carefully defined role at the *start* and *end* of the legislative process, not the *middle*. The Constitution requires that the *middle* of the federal lawmaking process include formal participation by the House and Senate alone.<sup>15</sup> The modern administrative state, however, empowers a modern President (who is armed with a phone and a pen) to cut the House and Senate out of the picture by tasking executive branch agencies with creating new law (*e.g.*, regulations) themselves—no congressional input required.<sup>16</sup> By doing so, the modern President can purport to retroactively claim authority that was never granted via the final political bargain that survived all of the intra- and inter-branch negotiations inherent in the federal lawmaking process. The reformulated major questions doctrine therefore gives courts a new tool to address this modern problem relating to executive overreach.

Part I of this Article will outline the relationship between textualism and substantive canons of interpretation. In particular, Part I.A will explore textualism's conception of faithful agency, and Part I.B will provide an overview of Justice Barrett's scholarship addressing when textualists may embrace substantive canons. Part II will then turn to the major questions doctrine. Specifically, Part II.A will provide a doctrinal overview of the doctrine; Part II.B will introduce two camps of the doctrine's defenders; and Parts II.C, II.D, and II.E will explore tensions between textualism and the various conceptions of the doctrine advanced by those two camps. Finally,

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<sup>11</sup> See J. Gregory Sidak, *The Recommendation Clause*, 77 GEO. L.J. 2079, 2088–89 (1989) (referring to St. George Tucker and Joseph Story).

<sup>12</sup> See *infra* Section III.2. A Duty to Recommend Measures.2 (discussing the Constitutional Convention).

<sup>13</sup> U.S. CONST. art. II, § 3.

<sup>14</sup> U.S. CONST. art. I, § 7, cls. 2, 3.

<sup>15</sup> U.S. CONST. art. I, § 7.

<sup>16</sup> See *West Virginia v. EPA*, 142 S. Ct. 2587, 2619 (2022) (Gorsuch, J., concurring) (referring to "the explosive growth of the administrative state since 1970").

Part III will propose a reformulated major questions doctrine grounded in the relationship between Article I, Section 7 and the Recommendation Clause of Article II, Section 3. To defend that proposal, Part III.A will provide an overview of those two constitutional provisions, with special attention offered to the Recommendation Clause; Part III.B will explain how the reformulated doctrine would apply in practice; and Part III.C will conclude by explaining how the reformulated doctrine constitutes a substantive canon that textualists can embrace.

### I. TEXTUALISM’S RELATIONSHIP WITH SUBSTANTIVE CANONS

Substantive canons of interpretation—which allow background policy norms to influence a judge’s interpretation of a statute—are an often-criticized aspect of statutory interpretation. “The conventional wisdom is that substantive canons operate as an interpretive trump card, allowing judges to reject statutory readings dictated by other tools of construction in favor of readings based on external policy considerations.”<sup>17</sup> According to that critique, when a judge uses a substantive canon, the judge risks elevating into law those policy norms that the judge (but perhaps not Congress or the President) thinks to be of particular importance.<sup>18</sup>

Because textualism has been defended historically on the grounds that it constrains judicial discretion,<sup>19</sup> one might think textualists to be particularly hesitant to embrace policy-laden substantive canons. For this reason, there appears to be “significant theoretical tension between substantive canons and textualism.”<sup>20</sup> But many textualists have come to embrace substantive canons. Part I will explain one way that came to be. In particular, Part I will explain how it is that Justice Barrett came to conclude that textualism is consistent with at least some substantive canons. The remainder of this Article will then work within Justice Barrett’s scholarly framework to first demonstrate why textualists should object to the conceptions of the major

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<sup>17</sup>Anita S. Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825, 827 (2017).

<sup>18</sup>See, e.g., Benjamin Eidelson & Matthew C. Stephenson, *The Incompatibility of Substantive Canons and Textualism*, 3 (HARV. L. REV. Working Paper, No. 23-06, 2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4330403](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4330403) (referring to judicial implementation of policing in relation to the rule of lenity and noting the tension that creates with textualism).

<sup>19</sup>Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 280 n.92 (2020); *id.* at 270 (referring to “early textualists’ emphasis on constraining judicial discretion”).

<sup>20</sup>Krishnakumar, *supra* note 17, at 835; see also Eidelson & Stephenson, *supra* note 18, at 24–33.

questions doctrine currently on offer, and to then propose a reformulated major questions doctrine that textualists can embrace.

### A. *Faithful Agency*

Textualists “understand courts to be faithful agents of *the People*,” who can task their political agents to “express the [People’s] will . . . in statutes.”<sup>21</sup> The federal lawmaking process requires that the People’s will be expressed through the formal involvement of three actors: the House, the Senate, and the President.<sup>22</sup> Given that the 536 different humans that make up those three institutions might each approach proposed legislation from a different perspective, textualists interpret law by focusing primarily on the historical meaning of a statute’s *text* (*i.e.*, the only part of the statute that survived participation by the House, Senate, and President at a particular moment in time) rather than attempt to elucidate and elevate the intention of any one subset of political actors.

Other theorists seek to channel Congress’s intent when interpreting a statute.<sup>23</sup> A core idea behind this competing, non-textualist approach to interpretation is that Congress has an intent when it enacts statutes into law.<sup>24</sup> Thus, these non-textualists look to legislative history (such as committee reports and floor speeches) as a means of better understanding what Congress (or at least, some members of Congress) intended to accomplish through a

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<sup>21</sup>Chad Squitieri, *Who Determines Majorness?*, 44 HARV. J.L. & PUB. POL’Y 463, 465, 481 (2021) (cleaned up) (emphasis added) [hereinafter Squitieri, *Majorness*]; see also ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 138 (2012) (explaining that “courts are assuredly not agents of the legislature” but instead “are agents of the people”); *West Virginia*, 142 S. Ct. at 2616 (Gorsuch, J., concurring) (explaining that clear statement rules can help “courts ‘act as faithful agents of the Constitution.’”) (quoting Barrett, *Substantive Canons*, supra note 1, at 169). This Article takes the position that there is no meaningful difference between the phrase “faithful agents of the People” and the phrase “faithful agents of the Constitution.” The former is a short-hand reference to the idea that jurists seek to enforce the People’s will as it has been codified in the Constitution, as well as any legal changes brought about in accordance with the Constitution.

<sup>22</sup>U.S. CONST. art. I, § 7.

<sup>23</sup>Kevin M. Stack, *Purposivism in the Executive Branch: How Agencies Interpret Statutes*, 109 NW. L. REV. 871, 882 (2015) (“[P]urposivists treat the text as the best evidence of statutory purposes and a source of constraint, but understand interpretation as a process of implementing statutory purposes, not merely adhering to statutory text.”).

<sup>24</sup>See John F. Manning, *What Divides Textualists and Purposivists?*, 106 COLUM. L. REV. 70, 76 (2006).



particular statute.<sup>25</sup> To the extent that legislative history suggests that the text of a statute does not square with some conception of Congress's intent, many non-textualists posit that a court fulfills its obligation to act as a faithful agent of *Congress* by stretching statutory language in order to better reflect what Congress purportedly intended to accomplish.<sup>26</sup>

Textualists, by comparison, "have long objected to the use of legislative history on the ground that it is designed to uncover a *nonexistent*, and in any event *irrelevant*, legislative intent."<sup>27</sup> Textualists think legislative intent *nonexistent* (or at least unknowable)<sup>28</sup> because the 535 legislators that participate in the Article I, Section 7 lawmaking process might each have a different intent.<sup>29</sup> It follows that the legislative process is "complicated and chock-full of political bargains that cannot (and need not) be fully understood by individual legislators, let alone politically insulated jurists."<sup>30</sup> In other words, Congress is a "they" made up of many legislators with many intents, not an "it" with a single, knowable intent. It is thus nonsensical, from the textualist perspective, to refer to Congress's intent; Congress can have many intents.<sup>31</sup>

There are at least two reasons why textualists should think legislative intent *irrelevant*. First, even assuming that a single legislative intent could be identified, textualists interpret statutes from the perspective of "congressional outsiders," not "congressional insiders," to use the insightful terminology offered by Justice Barrett.<sup>32</sup> This means that textualists "approach language

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<sup>25</sup> Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. 1275, 1276 (2020) ("[M]odem purposivists regularly invoke statutory purpose, intent, and legislative history.").

<sup>26</sup> Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193, 2194–95 (2017).

<sup>27</sup> *Id.* at 2205 (emphases added) (citation omitted).

<sup>28</sup> Caleb Nelson, *A Response to Professor Manning*, 91 VA. L. REV. 451, 452–53 (2005).

<sup>29</sup> Eidelson & Stephenson, *supra* note 18, at 7 ("[A]n important strand of textualist thought stresses that legislation often embodies a bargained-for compromise among legislators with competing aims, and that for this reason the statutes that emerge may not entirely square with the purposes of any of the individual legislators.").

<sup>30</sup> Squitieri, *Majorness*, *supra* note 21, at 482 (citation omitted).

<sup>31</sup> See Eidelson & Stephenson, *supra* note 18, at 61 ("But perhaps textualists' most forceful insight—and in any event, one of their basic commitments—is that when lawmakers negotiate a compromise among conflicting values, the question whether the resulting text is 'biased' in a given direction lacks a meaningful answer.").

<sup>32</sup> Barrett, *Congressional Insiders and Outsiders*, *supra* note 26, at 2194. Unless where otherwise noted, this Article uses terms such as "congressional outsider" and "objective reader" interchangeably.

from the perspective of an ordinary English speaker—a congressional outsider,”<sup>33</sup> while other theorists “approach language from the perspective of a hypothetical legislator—a congressional insider.”<sup>34</sup> Thus, interpreting law by giving undue weight to legislative history would be to reject the standard textualist commitment to interpreting law from the perspective of a congressional outsider in order to favor the views of a few congressional insiders who happened to make their views known via floor speeches, committee reports, or other types of legislative history.

The second reason why textualists should think legislative intent is irrelevant is because focusing on the intent of the legislature gives short shrift to the intent of the President.<sup>35</sup> That is significant because the Constitution is careful to assign the President an important role in the federal lawmaking process. Two constitutional provisions make this point clear.

The first provision is Article I, Section 7, which vests in the President the authority to veto legislation.<sup>36</sup> The veto authority ensures that the President’s legislative agenda will be taken seriously, as the mere possibility of a presidential veto can influence draft legislation long before it graces the Resolute Desk.<sup>37</sup> Moreover, even if Congress were to override a presidential veto, the requirement that Congress secure a supermajority to do so means that the underlying statutory language must be written in a way that achieves the approval of a broader array of Congress than would be necessary if the underlying statutory language only had to secure an ordinary congressional majority.<sup>38</sup>

The second constitutional provision that speaks to the President’s lawmaking role is the Recommendation Clause of Article II, Section 3. That provision states that the President “shall . . . recommend to [Congress’s]

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> Squitieri, *Majorness*, *supra* note 21, at 481 n.103.

<sup>36</sup> U.S. CONST. art. I, § 7, cls. 2, 3.

<sup>37</sup> See MEGHAN M. STUESSY, CONG. RSCH. SERV., R46338, VETO THREATS AND VETOES IN THE GEORGE W. BUSH AND OBAMA ADMINISTRATIONS, at 3 (2020) (“Because Congress faces a two-thirds majority threshold to override a President’s veto, veto threats may deter Congress from passing legislation that the President opposes.”); see also Vasan Kesavan & J. Gregory Sidak, *The Legislator-In-Chief*, 44 WM. & MARY L. REV. 1, 39 (2002) (“[T]he President’s recommendation is a sort of . . . embryonic veto warning Congress not to present the President with legislation that does not comport with the President’s legislative agenda unless Congress can muster a requisite two-thirds supermajority in each House of Congress.”).

<sup>38</sup> Stuessy, *supra* note 21, at 3.

consideration such measures as he shall judge necessary and expedient.”<sup>39</sup> This provision will be analyzed in greater detail in Part III. It will suffice for now to recognize, as Justice Story did, that Article II, Section 3 enables the President “to point out the evil, and . . . suggest the remedy.”<sup>40</sup>

The President’s constitutionally assigned role in the federal lawmaking process—in addition to textualists’ commitment to interpreting laws from the perspective of congressional outsiders—should leave textualists unwilling to give significant interpretive weight to so-called congressional intent. But this is not to say that textualists ignore intent entirely.<sup>41</sup> To the contrary, “textualists look to . . . statutes’ objectified intent,”<sup>42</sup> which is “the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*.”<sup>43</sup>

How might a textualist go about elucidating a statute’s objectified intent? It will not suffice to say that a textualist simply reads a statute’s text. As Dean John F. Manning explains, “[n]ot even the most committed textualist would claim that statutory texts are inherently ‘plain on their face,’ or that all interpretation takes place within the four corners of the Statutes at Large.”<sup>44</sup> Instead, textualists often consider things like statutory structure and history in order to better uncover a statute’s meaning.<sup>45</sup> Textualists also invoke canons of statutory interpretation,<sup>46</sup> which will be examined in Part I.B below.

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<sup>39</sup>U.S. CONST. art. II, § 3.

<sup>40</sup>3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 807 (1833).

<sup>41</sup>Nor does it mean that textualists ignore legislative history entirely. To the contrary, some textualists are willing to look to legislative history in order to better understand how people speak about various topics, including topics that relate to legislation. *See, e.g., In re Sinclair*, 870 F.2d 1340, 1342 (7th Cir. 1989) (“Clarity depends on context, which legislative history may illuminate. The process is objective; the search is not for the contents of the authors’ heads but for the rules of language they used.”) (Easterbrook, J.).

<sup>42</sup>Squitieri, *Majorness*, *supra* note 21, at 482.

<sup>43</sup>Scalia, *supra* note 21, at 17.

<sup>44</sup>John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 696 (1997); Eidelson & Stephenson, *supra* note 18, at 8 (“Sophisticated textualists appreciate that a text is just an assemblage of signs, and that talk of fidelity to ‘the text itself’ can thus only be a figure of speech; the real object of fidelity is some *content* that a text is used or understood to convey.”).

<sup>45</sup>*See, e.g.,* Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 61, 64 (1994).

<sup>46</sup>*See* Cass R. Sunstein, *Two Justifications for the Major Questions Doctrine* 8 (July 7, 2023) (unpublished draft) (on file at <https://ssrn.com/abstract=4503583>) (“Any plausible defense of

### B. Substantive Canons

Canons of statutory interpretation come in at least two types: linguistic and substantive.<sup>47</sup> “Linguistic canons apply rules of syntax to statutes.”<sup>48</sup> As Justice Kagan explains, linguistic canons “formaliz[e] . . . intuitions[] about . . . how language works and how the people who write things think that language works.”<sup>49</sup> Similarly, Justice Barrett has described linguistic canons as being “designed to reflect grammatical rules (such as the punctuation canon) or speech patterns (like the inclusion of some things implies the exclusion of others).”<sup>50</sup> Linguistic canons can thus be understood as assisting a textualist in uncovering a statute’s objectified intent.<sup>51</sup>

Substantive canons, by comparison, “promote policies external to a statute.”<sup>52</sup> Justice Barrett divides substantive canons into two subcategories: tie-breaking substantive canons and strong-form substantive canons.<sup>53</sup> Tie-

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textualism will not leave substantive canons off-limits. After all, Anglo-American law has long embraced them.”)

<sup>47</sup> Barrett, *Substantive Canons*, *supra* note 1, at 117.

<sup>48</sup> *Id.*

<sup>49</sup> Harvard Law School, *The 2015 Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE at 35:42 (Nov. 25, 2015), <https://www.youtube.com/watch?v=dpEtszFT0Tg>.

<sup>50</sup> *Biden v. Nebraska*, 143 S. Ct. 2355, 2376 n.1 (2023) (Barrett, J., concurring) (citation omitted).

<sup>51</sup> Barrett, *Substantive Canons*, *supra* note 1, at 117. In *Substantive Canons and Faithful Agency*, Justice Barrett defended linguistic canons on the grounds that they help courts “decipher the legislature’s intent.” *Id.* Today, a textualist might be more likely defend a linguistic canon on the grounds that it helps decipher *objectified* intent, not the legislature’s intent. *See infra* Section I.A. Justice Barrett’s reference to “the legislature’s intent” is perhaps best explained by the fact that, at the time, she understood textualists judges as being “faithful agents of Congress.” Barrett, *Substantive Canons*, *supra* note 1, at 110 (emphasis added). Since writing that article, however, Justice Barrett has distanced herself from that view; she has since suggested that she embraces the view adopted by Justice Scalia—namely, that textualists jurists are “faithful agents of the people rather than of Congress.” Barrett, *Congressional Insiders and Outsiders*, *supra* note 26, at 2208; *see also id.* at 2194 (noting that it is the “linguistic conventions” of the “[congressional] outsider’s perspective that controls”).

<sup>52</sup> Barrett, *Substantive Canons*, *supra* note 1, at 117; *see also* Krishnakumar, *supra* note 17, at 826 (describing substantive canons as “policy-based background norms or presumptions such as the rule of lenity and the canon of constitutional avoidance”).

<sup>53</sup> *Nebraska*, 143 S. Ct. at 2376 (Barrett, J., concurring) (“Some substantive canons, like the rule of lenity, play the modest role of breaking a tie between equally plausible interpretations of a statute . . . Others are more aggressive—think of them as strong-form substantive canons. Unlike a

breaking substantive canons serve as “tie breakers between two equally plausible interpretations of a statute.”<sup>54</sup> An example is the rule of lenity, which can be used to “resolve ambiguities in criminal statutes in favor of the criminal defendant.”<sup>55</sup> Strong-form substantive canons “are more aggressive, directing a judge to forgo the most plausible interpretation of a statute in favor of one in better accord with some policy objective.”<sup>56</sup> An example of this more aggressive type of substantive canon is the *Charming Betsy* canon, which holds that “where one interpretation of a statute would compromise the international obligations of the United States, the court should adopt *any other* plausible interpretation.”<sup>57</sup> In *Nebraska*, Justice Barrett implied that the substantive canon conception of the major questions doctrine defended by Justices Gorsuch in his *West Virginia* concurrence was a strong-form substantive canon, which Justice Barrett was “wary” of adopting.<sup>58</sup>

Distinguishing linguistic from substantive canons can be difficult. As Justice Barrett explains in her scholarly work, there is a “temptation to rationalize ostensibly substantive canons” as linguistic canons, which “almost surely reflects discomfort with the application of substantive canons in a legal climate where a strong vision of legislative supremacy is the dominant view.”<sup>59</sup> One telltale sign of a strong-form substantive canon, however, is a canon’s call for heightened statutory clarity. That is because strong-form substantive canons “are often expressed as ‘clear statement

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tie-breaking rule, a strong-form canon counsels a court to *strain* statutory text to advance a particular value.” (citations omitted)).

<sup>54</sup> Barrett, *Substantive Canons*, *supra* note 1, at 117.

<sup>55</sup> *Id.* at 117–18.

<sup>56</sup> *Id.* at 118.

<sup>57</sup> *Id.* (emphasis added); *see also* Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

<sup>58</sup> *Nebraska*, 143 S. Ct. at 2377 n.2 (Barrett, J., concurring).

<sup>59</sup> Barrett, *Substantive Canons*, *supra* note 1, at 121. Although the topic is beyond the scope of this Article, if “legislative supremacy” means “congressional supremacy,” then it is unlikely that textualist jurists could embrace it—as the People’s Constitution tasks two coequal branches (*i.e.*, the President and Congress) with creating federal law. For this reason, efforts to ground the major questions doctrine in English history must account for differences between a system of Parliamentary supremacy and the Constitution’s separation of lawmaking powers. *See* T.T. Arvind & Christian R. Burset, “Major Questions” In *The Common Law Tradition*, YALE J.L. & REG. NOTICE & COMMENT BLOG (July 7, 2023), <https://www.yalejreg.com/nc/major-questions-in-the-common-law-tradition-by-t-t-arvind-christian-r-burset/> (“Of course, there are important differences between Hanoverian Britain and the modern United States—including a written constitution, different theories of legislation, and different understandings of the separation of powers—which might make a contextual approach to executive power suitable for one system but not the other.”).

rules' that require a court to interpret a statute to avoid a particular result unless Congress speaks explicitly to accomplish it."<sup>60</sup> One example of a strong-form substantive canon holds that, "absent a clear statement to the contrary, the Court will not interpret a statute to waive the federal government's immunity from suit."<sup>61</sup> In *West Virginia*, Justice Gorsuch and Alito explained that the *West Virginia* majority opinion (which those two justices joined) "confirm[ed]" that the major questions doctrine was "a clear-statement rule," *i.e.*, a type of strong-form substantive canon.<sup>62</sup>

Some jurists and scholars have suggested that substantive canons are inconsistent with textualism.<sup>63</sup> Justice Scalia, for example, once referred to substantive canons as "dice-loading" devices.<sup>64</sup> Justice Kagan has stated that "substantive canons of interpretation are . . . all over the place," leaving her to question whether "we should just toss them all out."<sup>65</sup> And Justice Barrett (writing both on and off the bench) has recognized tensions between textualism and substantive canons.<sup>66</sup>

Justice Scalia, however, would go on to embrace a variety of substantive canons during his judicial tenure.<sup>67</sup> Similarly, many justices—including Justices Thomas and Gorsuch—have adopted substantive canons in various

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<sup>60</sup> Barrett, *Substantive Canons*, *supra* note 1, at 118.

<sup>61</sup> *Id.* (citation omitted).

<sup>62</sup> *West Virginia v. EPA*, 142 S. Ct. 2587, 2620 n.3 (2022) (Gorsuch, J., concurring).

<sup>63</sup> Eidelson & Stephenson, *supra* note 18, at 24–33; *but see* William Baude & Steven E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1122 (2017) ("Legal canons don't need to be recast as a form of quasi-constitutional doctrine, because they don't need to outrank the statutes to which they apply. Instead, the canons stand on their own authority as a form of common law.").

<sup>64</sup> ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 28 (Amy Gutmann ed., Princeton 1997).

<sup>65</sup> Transcript of Oral Argument at 59–60, *Yselta del Sur Pueblo v. Texas*, 142 S. Ct. 1929 (2022) (No. 20-493).

<sup>66</sup> *Biden v. Nebraska*, 143 S. Ct. 2355, 2377 (2023) (Barrett, J., concurring) (citations omitted); Barrett, *Substantive Canons*, *supra* note 1, at 123–24 ("Substantive canons are in significant tension with textualism, however, insofar as their application can require a judge to adopt something other than the most textually plausible meaning of a statute."). I myself have previously expressed a distaste for substantive canons, although in doing so I was clear to maintain that textualists can embrace substantive canons. *See* The Federalist Society, *Welcome & Luncheon Debate [2023 Faculty Conference]*, YOUTUBE (Jan. 5, 2023), <https://www.youtube.com/watch?v=pbdN3Db-Slc&t=12m10s>.

<sup>67</sup> *See, e.g.*, SCALIA & GARNER, *supra* note 21.

contexts.<sup>68</sup> And in *Substantive Canons and Faithful Agency*, which is arguably the most influential law review article written to date regarding the relationship between textualism and the interpretive canons, Justice Barrett defends the view that textualists can embrace at least *some* substantive canons.<sup>69</sup>

In offering her textualist defense of substantive canons, Justice Barrett addresses the argument that textualist judges may be able to rely on *old* substantive canons with storied historical pedigrees, but not *new* substantive canons.<sup>70</sup> The idea behind that argument is that “[m]any of the substantive canons in use today began as judicial policy choices,” but have over time become “part of the way that lawyers think about language,” which means that “these once-substantive canons . . . are now effectively linguistic.”<sup>71</sup> Justice Barrett offers a persuasive response to that argument, stating that, “[i]f the theory is that federal courts once possessed the power to develop substantive canons, there is no reason to believe that they lost that power as time passed.”<sup>72</sup> And as the historical evidence offered in her article demonstrates, “early federal courts” did indeed “assert[] a . . . power to strain [statutory text] through the application of substantive canons.”<sup>73</sup>

After examining the historical record, Justice Barrett “posits that the Constitution affords federal courts the ability to depart from the best interpretation of a statute in favor of one that is less plausible yet still bearable.”<sup>74</sup> She grounds that potential ability in federal courts’ constitutional authority to engage in “judicial review.”<sup>75</sup> More specifically, she explains that, “when a substantive canon promotes constitutional values, the judicial

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<sup>68</sup> See, e.g., *Wooden v. United States*, 142 S. Ct. 1063, 1081–86 (2022) (Gorsuch, J., concurring) (rule of lenity); *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 345–46 (1998) (Thomas, J.) (avoidance canon).

<sup>69</sup> Barrett, *Substantive Canons*, *supra* note 1, at 110–11.

<sup>70</sup> *Id.* at 162.

<sup>71</sup> *Id.* at 111.

<sup>72</sup> *Id.*; see also *Biden v. Nebraska*, 143 S. Ct. 2355, 2377 n.2 (2023) (Barrett, J., concurring) (“[F]ederal courts have been developing and applying [strong-form] canons for as long as they have been interpreting statutes, and that is some reason to regard the practice as consistent with the original understanding of the ‘judicial Power.’” (cleaned up)).

<sup>73</sup> Barrett, *Substantive Canons*, *supra* note 1, at 110, 125–59; see also Michael D. Ramsey, An Originalist Defense of the Major Questions Doctrine (unpublished manuscript) (on file with author) (exploring the practice of federal courts shortly after the Constitution’s ratification and concluding that at least some clear statement rules can be consistent with the Constitution’s original meaning).

<sup>74</sup> *Id.* at 163–64.

<sup>75</sup> *Id.* at 169, 176.

power to safeguard the Constitution can be understood” as empowering courts to depart from a statute’s best reading in order to adopt a “bearable” reading that promotes a constitutional value.<sup>76</sup> Under that view, “the power of judicial review carries with it a subsidiary power to push—though not force—statutory language in directions that better accommodate constitutional values.”<sup>77</sup>

Working within the theory that federal courts’ derive their power to use strong-form substantive canons from federal courts’ constitutional power to engage in judicial review, Justice Barrett further posits that “a court may [rely on strong-form substantive canons] *only in pursuit of constitutional values*.”<sup>78</sup> Thus, a crucial part of her textualist defense of strong-form substantive canons concerns how to distinguish between (1) substantive canons that promote constitutional values and (2) substantive canons that promote extra-constitutional values. To distinguish between those two categories of substantive canons, Justice Barrett proposes “two factors” that could be applied to determine “whether a canon can properly be classified as constitutional for purposes of justifying its language-stretching effect.”<sup>79</sup> The first factor asks whether a canon is “connected to a reasonably specific constitutional value.”<sup>80</sup> The second factor asks whether the canon “actually promotes the value it purports to protect.”<sup>81</sup>

Part II will apply Justice Barrett’s two-factor test to the major questions doctrine. In doing so, Part II demonstrates why textualists should object to the current conceptions of the major questions doctrine on offer. Afterwards, Part III will turn to discussing how the major questions doctrine can be reformulated so as to satisfy Justice Barrett’s two-factor test.

## II. THE MAJOR QUESTIONS DOCTRINE

Part II.A will offer an abbreviated overview of the major questions doctrine leading up to the Court’s formal announcement of the doctrine in *West Virginia v. EPA*.<sup>82</sup> Readers interested in a lengthier doctrinal overview, including a description of how earlier forms of the doctrine interacted with

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<sup>76</sup> *Id.* at 164, 181.

<sup>77</sup> *Id.* at 112.

<sup>78</sup> *Id.* at 164 (emphasis added).

<sup>79</sup> *Id.* at 178.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> 142 S. Ct. 2587, 2609 (2022).



the Supreme Court's opinion in *Chevron v. NRDC*,<sup>83</sup> may wish to turn to my earlier work on the subject.<sup>84</sup> Part II.B will then identify two competing conceptions of the major questions doctrine identifiable after *Biden v. Nebraska*,<sup>85</sup> and explain why both of those conceptions are in tension with textualism.

### A. Doctrinal Overview

The Supreme Court invoked an early version of the major questions doctrine (which today requires agencies to identify “clear congressional authorization” to regulate as to “major” questions) in *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*<sup>86</sup> That case concerned the Federal Communications Commission's (“FCC's”) authority to “modify” rate-filing requirements.<sup>87</sup> Purporting to exercise its power to modify those requirements, the FCC issued a rule exempting certain telephone companies from complying with the requirements.<sup>88</sup> But the Court explained that, “in the small-scale world of ‘modifications,’ the FCC's interpretation of the statute would constitute “a big deal.”<sup>89</sup> The Court thus concluded that it would have been “highly unlikely” for “Congress [to] leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion.”<sup>90</sup>

The Court next invoked an early form of the major questions doctrine in *FDA v. Brown & Williamson Tobacco Corp.*<sup>91</sup> There, the Food and Drug Administration (“FDA”) sought to regulate tobacco under statutory references to “drugs” and “devices.”<sup>92</sup> But the Court deemed the regulation of tobacco to be a matter of major “economic and political significance.”<sup>93</sup> The Court was thus “confident” that Congress had not “intended to delegate”

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<sup>83</sup> See generally 467 U.S. 837 (1984).

<sup>84</sup> Squitieri, *Majorness*, *supra* note 21, at 472–76.

<sup>85</sup> See generally 143 S. Ct. 2355 (2023).

<sup>86</sup> 512 U.S. 218, 229 (1994). Portions of Section II.A's doctrinal overview of the major questions doctrine were first published in Squitieri, *Majorness*, *supra* note 21, at 472–76.

<sup>87</sup> *MCI Telecomm.*, 512 U.S. at 224 (quoting Communications Act of 1934, 47 U.S.C. § 203(b)(2) (1988 & Supp. IV)).

<sup>88</sup> See *id.* at 220–22.

<sup>89</sup> *Id.* at 229.

<sup>90</sup> *Id.* at 231.

<sup>91</sup> See generally 529 U.S. 120 (2000).

<sup>92</sup> *Id.* at 126 (quoting 21 U.S.C. §§ 321(g)–(h), 393 (1994 & Supp. III)).

<sup>93</sup> *Id.* at 160.

such a “significan[t]” decision “to an agency in so cryptic a fashion.”<sup>94</sup> The Court also found it relevant that the FDA had “never asserted authority to regulate tobacco products as customarily marketed until it promulgated the regulations at issue here.”<sup>95</sup>

Next up was *Utility Air Regulatory Group v. EPA* (“*UARG*”).<sup>96</sup> In that case, the Court explained that the Environmental Protection Agency’s (“EPA’s”) interpretation of a statute was “unreasonable because it would bring about an enormous and transformative expansion in EPA’s regulatory authority without clear congressional authorization.”<sup>97</sup> In a line that would prove significant to later major questions cases, the Court stated: “When an agency claims to discover in a long-extant statute an unheralded power to regulate ‘a significant portion of the American economy,’” then the Court will “typically greet [the agency’s] announcement with a measure of skepticism.”<sup>98</sup>

After *MCI, Brown & Williamson, UARG*, the rise of the major questions was clear.<sup>99</sup> But the doctrine would come to exert even larger influence during the Supreme Court’s 2021 and 2022 terms. During those terms, the Court invoked the doctrine in four critical cases, which one scholar has coined “the major questions quartet.”<sup>100</sup>

The first case in the quartet is *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*,<sup>101</sup> which concerned an effort by the Centers for Disease Control and Prevention (“CDC”) to stop landlords from evicting individuals from their dwellings.<sup>102</sup> The CDC’s stated rationale for its eviction moratorium was to limit the transmission of COVID-19.<sup>103</sup> For statutory authority, the

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 146.

<sup>96</sup> 573 U.S. 302 (2014).

<sup>97</sup> *Id.* at 324.

<sup>98</sup> *Id.* (quoting *FDA v. Brown & Williamson*, 529 U.S. 120, 159 (2000)).

<sup>99</sup> See Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 290 (2022) (referring to scholarship from as early as 2000 to support the proposition that “[c]ommentators have long recognized the connections between the old major questions exception and the nondelegation doctrine” (citations omitted)). The Supreme Court also invoked an early form of the doctrine in *King v. Burwell*, 576 U.S. 473, 486 (2015). See Squitieri, *Majorness*, *supra* note 21, at 475–76 (discussing *King*).

<sup>100</sup> See Sohoni, *supra* note 99, at 262.

<sup>101</sup> 141 S. Ct. 2485 (2021).

<sup>102</sup> *Id.* at 2486.

<sup>103</sup> *Id.* at 2486–87.

CDC relied on the Public Health Service Act, which empowered the CDC to “make and enforce such regulations . . . necessary to prevent the introduction, transmission, or spread of communicable diseases” either internationally or between states.<sup>104</sup> The statute provided further that, “[f]or purposes of carrying out and enforcing such regulations,” the CDC was authorized to “provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in [the Surgeon General’s] judgment may be necessary.”<sup>105</sup>

The Court explained that, “[e]ven if the text [of the statute] were ambiguous, the sheer scope of the CDC’s claimed authority . . . would counsel against the Government’s interpretation.”<sup>106</sup> This was in part because the Court “expect[s] Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance.”<sup>107</sup> The Court also made a point of mentioning that CDC had sought to funnel a new power into an old statute.<sup>108</sup> As the Court explained, although the statutory text in question was “[o]riginally passed in 1944, th[e] provision has rarely been invoked—and never before to justify an eviction moratorium.”<sup>109</sup> That regulatory history demonstrated that the CDC’s “claim of expansive authority under” the statute was “unprecedented.”<sup>110</sup> It followed that the statutory provision in question offered only “a wafer-thin reed on which” the CDC had sought “to rest . . . [a] sweeping power.”<sup>111</sup>

The second case in the quartet was *Nat’l Fed’n of Indep. Bus. v. Dep’t. of Lab., Occupational Safety and Health Admin.*<sup>112</sup> That case involved an Emergency Temporary Standard (“ETS”) issued by the Department of Labor’s Occupational Safety and Health Administration (“OSHA”).<sup>113</sup> The ETS would have required covered employers to “develop, implement, and

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<sup>104</sup>42 U.S.C. § 264(a).

<sup>105</sup>*Id.*

<sup>106</sup>*Ala. Ass’n of Realtors*, 141 S. Ct. at 2489.

<sup>107</sup>*Id.* (citation omitted) (internal quotation omitted).

<sup>108</sup>*Id.* at 2487.

<sup>109</sup>*Id.*

<sup>110</sup>*Id.* at 2489.

<sup>111</sup>*Id.*

<sup>112</sup>142 S. Ct. 661 (2022) (per curiam).

<sup>113</sup>*Id.* at 662–64.

enforce a mandatory COVID–19 vaccination policy.”<sup>114</sup> For statutory support, OSHA relied on a statute empowering the Secretary of Labor to promulgate an ETS when the Secretary established “(1) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (2) that the emergency standard is necessary to protect employees from such danger.”<sup>115</sup>

The Court began its statutory analysis by noting the major economic and political consequences at stake. The ETS would require “84 million Americans to either obtain a COVID–19 vaccine or undergo weekly medical testing at their own expense,” which represented “a significant encroachment into the lives—and health—of a vast number of employees.”<sup>116</sup> Given as much, “[t]here can be little doubt that OSHA’s mandate qualifies as an exercise of” a power involving “vast economic and political significance.”<sup>117</sup> And because the Court “expect[s] Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance . . . [t]he question . . . [was] whether the Act plainly authorizes [OSHA’s] mandate.”<sup>118</sup>

Like in *Ala. Ass’n of Realtors*, the Court in the OSHA case found it relevant that OSHA “ha[d] never before imposed” a mandate like the one at issue.<sup>119</sup> Indeed, “[p]rior to the emergence of COVID–19, the Secretary had used this [statutory] power just nine times before (and never to issue a rule as broad as this one).”<sup>120</sup> The Court also noted that Congress had “never before imposed such a mandate.”<sup>121</sup> And “although Congress ha[d] enacted significant legislation addressing the COVID–19 pandemic, [Congress] . . . declined to enact any measure similar to what OSHA has promulgated here.”<sup>122</sup> In the end, the Court concluded that OSHA lacked statutory authority to issue the ETS.<sup>123</sup>

On the same day that the Court issued its opinion in the OSHA case, the Court issued its opinion in the third case in the major questions quartet. In

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<sup>114</sup>*Id.* at 664 (citation omitted) (internal quotations omitted).

<sup>115</sup>*Id.* at 663 (citing 29 U.S.C. § 655(c)(1) (internal quotations omitted)).

<sup>116</sup>*Id.* at 665.

<sup>117</sup>*Id.* (citations omitted) (internal quotations omitted).

<sup>118</sup>*Id.* (citation omitted) (internal quotations omitted).

<sup>119</sup>*Id.* at 662.

<sup>120</sup>*Id.* at 663.

<sup>121</sup>*Id.* at 662.

<sup>122</sup>*Id.* at 662–63.

<sup>123</sup>*Id.* at 665 (citations omitted).

*Biden v. Missouri*,<sup>124</sup> the Court considered a rule, promulgated by the U.S. Department of Health and Human Services (“HHS”), which stated that medical facilities could only receive certain government funds if the facilities required “that their staff—unless exempt for medical or religious reasons—[be] vaccinated against COVID–19.”<sup>125</sup> To defend the legality of the rule, the HHS Secretary relied on a statute empowering the Secretary to impose such “requirements as [he] finds necessary in the interest of the health and safety of individuals who are furnished services in the institution.”<sup>126</sup>

The Court “agree[d] with the Government that the [HHS] Secretary’s rule falls within the authorities that Congress has conferred upon him.”<sup>127</sup> In coming to that conclusion, the Court referred to “the longstanding practice of [HHS] in implementing the relevant statutory authorities.”<sup>128</sup> That longstanding practice by HHS, the Court concluded, demonstrated that participating facilities “have always been obligated to satisfy a host of conditions that address the safe and effective provision of healthcare, not simply sound accounting” as the dissenting justices were thought to have suggested.<sup>129</sup> The Court also noted that the HHS “Secretary routinely imposes conditions of participation that relate to the qualifications and duties of healthcare workers themselves.”<sup>130</sup> This regulatory history demonstrated that the rule was consistent with longstanding agency practice grounded in the relevant statutory authority.<sup>131</sup>

The dissenting justices disagreed. Justice Thomas wrote that the HHS rule was “undoubtedly significant” because “it requires millions of healthcare workers to choose between losing their livelihoods and acquiescing to a vaccine they have rejected for months.”<sup>132</sup> He further explained that “[v]accine mandates” had “only rarely have been a tool of the Federal Government,” and that “[i]f Congress had wanted to grant CMS authority to impose a nationwide vaccine mandate . . . it would have said so clearly.”<sup>133</sup> And Justice Alito explained that he joined Justice Thomas’s dissent because

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<sup>124</sup> 142 S. Ct. 647 (2022).

<sup>125</sup> *Id.* at 650.

<sup>126</sup> *Id.* (citations omitted) (internal quotations omitted).

<sup>127</sup> *Id.* at 652.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 653 (citation omitted).

<sup>131</sup> *See id.*

<sup>132</sup> *Id.* at 658 (Thomas, J., dissenting).

<sup>133</sup> *Id.*

“[Justice Alito] [did] not think that the Federal Government is likely to be able to show that Congress has authorized the unprecedented step of compelling over 10,000,000 healthcare workers to be vaccinated on pain of being fired.”<sup>134</sup>

The fourth case making up the major questions quartet is *West Virginia v. EPA*.<sup>135</sup> At issue in *West Virginia* was a 2015 regulation promulgated by the EPA pursuant to the Clean Air Act.<sup>136</sup> “The Clean Air Act authorizes the [EPA] to regulate power plants by setting a ‘standard of performance’ for their emission of certain pollutants into the air.”<sup>137</sup> In particular, Section 111 of the Clean Air Act mandates that, “in each case,” the set standard of performance “must reflect the ‘best system of emission reduction’ that the [EPA] has determined to be ‘adequately demonstrated’ for the particular category.”<sup>138</sup>

In the decades since the Clean Air Act was enacted, the EPA had typically exercised its Section 111 authority “by setting performance standards based on measures that would reduce pollution by causing plants to operate more cleanly.”<sup>139</sup> But in 2015, the “EPA issued a new rule concluding that the ‘best system of emission reduction’ for existing coal-fired power plants included a requirement that such facilities reduce their own production of electricity, or subsidize increased generation by natural gas, wind, or solar sources.”<sup>140</sup> The question presented to the Court in *West Virginia* was therefore whether the “broader conception of EPA’s authority,” which was reflected in the EPA’s 2015 rule, fell “within the power granted to it by the Clean Air Act.”<sup>141</sup>

The *West Virginia* Court began its statutory analysis by explaining that the EPA had “claim[ed] to discover in a long-extant statute an unheralded power.”<sup>142</sup> That power, which the EPA tried to “locate[] . . . in the vague language of an ancillary provision,” was a power that would have permitted the EPA to “adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself.”<sup>143</sup> It was thus in part for these reasons—

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<sup>134</sup> *Id.* at 659 (Alito, J., dissenting).

<sup>135</sup> 142 S. Ct. 2587 (2022).

<sup>136</sup> *Id.* at 2599.

<sup>137</sup> *Id.* (quoting 42 U.S.C. § 7411(a)(1)).

<sup>138</sup> *Id.* (quoting 42 U.S.C. §§ 7411(a)(1), (b)(1), (d)).

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 2600.

<sup>142</sup> *Id.* at 2610 (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

<sup>143</sup> *Id.* (citations omitted) (internal quotations omitted).

*i.e.*, it was in part because (1) the EPA had sought to squeeze a new power into an old statute, and (2) the new power in question was one that Congress had declined to grant the EPA in the past—that the Court thought it should “hesitate before concluding” that the EPA had the authority to promulgate the 2015 rule.<sup>144</sup>

The majority opinion in *West Virginia* represented the first time that a Supreme Court majority invoked the major questions doctrine by name. The Court used the occasion to justify the major questions doctrine on two grounds. As the Court explained:

[I]n certain extraordinary cases, both [1] *separation of powers principles* and [2] *a practical understanding of legislative intent* make us reluctant to read into ambiguous statutory text the delegation claimed to be lurking there. To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to clear congressional authorization for the power it claims.<sup>145</sup>

The Court has not yet expanded upon these two justifications. But as Part II.B will explain, Justice Barrett’s concurrence in *Biden v. Nebraska* suggests that the two justifications offered by the *West Virginia* majority opinion (which Justices Alito, Gorsuch, and Barrett all joined) are best understood as *alternative* justifications that different justices embrace differently.<sup>146</sup> Specifically, the concurrence in *West Virginia* indicates that Justices Gorsuch and Alito are more comfortable embracing the major questions doctrine as a strong-form substantive canon grounded in a particular component of the separation of powers, while Justice Barrett’s *Nebraska* concurrence suggests that she is more comfortable embracing the major questions doctrine as a linguistic canon that seeks to uncover objectified intent.

### *B. Two Camps*

Justice Gorsuch authored a concurring opinion in *West Virginia*, which was joined by Justice Alito.<sup>147</sup> That concurrence described the *West Virginia* majority opinion (which Justices Gorsuch and Alito also joined) as adopting

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<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 2609 (citations omitted) (internal quotations omitted) (emphasis added).

<sup>146</sup> 143 S. Ct. 2355 (2023) (Barrett, J., concurring).

<sup>147</sup> 142 S. Ct. at 2616 (Gorsuch, J., concurring).

a substantive canon version of the major questions doctrine. Specifically, Justice Gorsuch's *West Virginia* concurrence cites Justice Barrett's scholarship to explain that:

At times, this Court applied the major questions doctrine more like an ambiguity canon. *See . . . Brown & Williamson. . .* Ambiguity canons merely instruct courts on how to “choos[e] between equally plausible interpretations of ambiguous text,” and are thus weaker than clear-statement rules. But our precedents have usually applied the [major questions] doctrine as a clear-statement rule, and the Court today confirms that is the proper way to apply it.<sup>148</sup>

Although that passage technically reflects the views of only Justices Gorsuch and Alito, note how it purports to describe the *majority* opinion in *West Virginia*. This statement cannot be written off as wishful thinking; the *West Virginia* majority was made up of only six justices—two of which were Justices Gorsuch and Alito.<sup>149</sup> The views of Justices Gorsuch and Alito are therefore crucial because, without those two justices, the *West Virginia* majority would have not been a majority at all. Instead, it would have been a four-justice plurality.

The passage from Justice Gorsuch's *West Virginia* concurrence block-quoted above is explicit in labeling the major questions doctrine as a clear statement rule—*i.e.*, as a type of strong-form substantive canon, and not a weaker tie-breaking substantive canon that only helps judges decide “choos[e] between equally plausible interpretations of ambiguous text.”<sup>150</sup> Justices Gorsuch and Alito thus fall within one camp of major questions defenders, which sees the major questions doctrine as a strong-form substantive canon.

In *Biden v. Nebraska*, Justice Barrett placed herself within a second camp of major questions defenders.<sup>151</sup> At issue in *Nebraska* was whether the Higher Education Relief Opportunities for Students Act of 2003 (“HEROES Act”) gave the Secretary of Education the authority to forgive “roughly \$430 billion of federal student loan balances.”<sup>152</sup> A majority of the Court concluded that

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<sup>148</sup> *Id.* at 2620 n.3 (quoting Barrett, *Substantive Canons*, *supra* note 1, at 109) (citation omitted).

<sup>149</sup> *Id.* at 2596.

<sup>150</sup> *Id.* at 2620 n.3 (Gorsuch, J., concurring).

<sup>151</sup> 143 S. Ct. 2355 (2023).

<sup>152</sup> *Id.* at 2362.



the HEROES Act did not.<sup>153</sup> The majority relied on ordinary tools of statutory interpretation to come to that conclusion.<sup>154</sup> But after doing so, the majority then went on to explain how the major questions doctrine further justified its holding.<sup>155</sup>

In the portion of its opinion addressing the major questions doctrine, the *Nebraska* majority “imagine[d] . . . asking the enacting Congress a . . . pertinent question: ‘Can the Secretary use his powers to abolish \$430 billion in student loans, completely canceling loan balances for 20 million borrowers, as a pandemic winds down to its end?’”<sup>156</sup> The majority could not “believe the answer would be yes.”<sup>157</sup> That was because “Congress did not unanimously pass the HEROES Act with such power in mind,” and a “decision of such magnitude and consequence on a matter of earnest and profound debate across the country must rest with Congress itself, or an agency acting pursuant to a clear delegation from that representative body.”<sup>158</sup>

Justice Barrett joined the majority in *Nebraska*, but also authored her own solo concurrence in which she explained how she understood the major questions doctrine.<sup>159</sup> Relying on her previous scholarship, Justice Barrett began the crux of her concurrence by introducing three different types of canons: linguistic canons, tie-breaking substantive canons, and strong-form substantive canons.<sup>160</sup> She wrote that “[w]hether the creation or application of strong-form canons exceeds the ‘judicial Power’ conferred by Article III is a difficult question,” and she was for that reason “wary of adopting new” strong-form substantive canons.<sup>161</sup> She then was clear in stating that, “if the major questions doctrine were a newly minted strong-form canon, I would not embrace it.”<sup>162</sup>

Importantly, Justice Barrett’s uneasiness with adopting a new strong-form substantive canon did not prevent her from embracing the major questions doctrine. That was because she believed “the major questions

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<sup>153</sup> *Id.* at 2375.

<sup>154</sup> *See id.* at 2375 & n.9.

<sup>155</sup> *Id.* at 2372–73.

<sup>156</sup> *Id.* at 2374.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* (cleaned up).

<sup>159</sup> *Id.* at 2376 (Barrett, J., concurring).

<sup>160</sup> *Id.* at 2376 & n.1.

<sup>161</sup> *Id.* at n.2.

<sup>162</sup> *Id.*

doctrine is neither new nor a strong-form canon.”<sup>163</sup> Instead, she indicated that she thinks the major questions doctrine is a linguistic canon that serves as a “a tool for discerning—not departing from—the text’s most natural interpretation.”<sup>164</sup> At least one scholar has defended the major questions doctrine on similar terms.<sup>165</sup>

Under Justice Barrett’s view, the major questions doctrine merely permits courts to account for “the legal context framing any delegation” from Congress to an agency.<sup>166</sup> To better establish that point, Justice Barrett analogized to a hypothetical involving a babysitter:

Consider a parent who hires a babysitter to watch her young children over the weekend. As she walks out the door, the parent hands the babysitter her credit card and says: “Make sure the kids have fun.” Emboldened, the babysitter takes the kids on a road trip to an amusement park, where they spend two days on rollercoasters and one night in a hotel. Was the babysitter’s trip consistent with the parent’s instruction? Maybe in a literal sense, because the instruction was open-ended. But was the trip consistent with a reasonable understanding of the parent’s instruction? Highly doubtful. In the normal course, permission to spend money on fun authorizes a babysitter to take children to the local ice cream parlor or movie theater, not on a multiday excursion to an out-of-town amusement park. If a parent were willing to greenlight a trip that big, we would expect much more clarity than a general instruction to “make sure the kids have fun.”

But what if there is more to the story? Perhaps there is obvious contextual evidence that the babysitter’s jaunt was permissible—for example, maybe the parent left tickets to the amusement park on the counter. Other clues, though less obvious, can also demonstrate that the babysitter took a reasonable view of the parent’s instruction. Perhaps the parent showed the babysitter where the suitcases are, in the event that she took the children somewhere overnight. Or

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<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 2376.

<sup>165</sup> Ilan Wurman, *Major Questions as Linguistic Canon*, 110 VA. L. REV. (forthcoming 2024) (manuscript at 1), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4381708](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4381708).

<sup>166</sup> *Nebraska*, 143 S. Ct. at 2380.

maybe the parent mentioned that she had budgeted \$2,000 for weekend entertainment. Indeed, some relevant points of context may not have been communicated by the parent at all. For instance, we might view the parent's statement differently if this babysitter had taken the children on such trips before or if the babysitter were a grandparent.

In my view, the major questions doctrine grows out of these same commonsense principles of communication. Just as we would expect a parent to give more than a general instruction if she intended to authorize a babysitter-led getaway, we also “expect Congress to speak clearly if it wishes to assign to an agency decisions of vast ‘economic and political significance.’”<sup>167</sup>

We thus leave *Nebraska* with two camps of major questions doctrine defenders. The first camp (which includes Justices Gorsuch and Alito) views the major questions doctrine as a clear statement rule, *i.e.*, as a strong-form of a substantive canon. The second camp (which includes Justice Barrett) views the major questions doctrine as a linguistic canon that helps courts account for legal context. Parts II.C, II.D, and II.E will explain why the various justifications put forward for the major questions doctrine to date prove problematic for textualists.

### C. *Objections to the West Virginia Majority*

Assume that Justices Gorsuch and Alito are correct to label the major questions doctrine announced in *West Virginia* a strong-form substantive canon.<sup>168</sup> Can textualists embrace the doctrine by using the justifications offered in the *West Virginia* majority? Part II.C will argue that textualists cannot. The problem lies in the two justifications that the *West Virginia* majority gave in defense of the major questions doctrine. Those justifications are, as previously mentioned, (1) a practical understanding of legislative intent and (2) separation of powers principles.

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<sup>167</sup>*Id.* at 2379–80 (cleaned up).

<sup>168</sup>*See West Virginia v. EPA*, 142 S. Ct. 2587, 2620 n.3 (2022) (Gorsuch, J., concurring).

### 1. Practical Understanding of Legislative Intent

Consider first the *West Virginia* majority's effort to justify the major questions doctrine on the grounds that it represents "a practical understanding of legislative intent."<sup>169</sup> That justification is problematic from a textualist perspective because, as explained previously in Part I.A, textualists think such intent *nonexistent* (or at least unknowable) and *irrelevant*. To repeat, textualists think such intent nonexistent because the 535 legislators that participate in the Article I, Section 7 lawmaking process might each have a different intent.<sup>170</sup> And textualists should think such intent is irrelevant for at least two reasons: First, even assuming that a single legislative intent could be identified, it would represent the views of "congressional insiders" rather than "congressional outsiders," and second, because focusing on the intent of the legislature gives short shrift to the intent of the President, who also plays an important role in the lawmaking process.<sup>171</sup>

To be sure, it would be easier to harmonize textualism and the *West Virginia* majority's reliance on "a practical understanding of legislative intent" if one were to read that reference as a (perhaps unfortunately worded) reference to "objectified intent."<sup>172</sup> That is because objectified intent, which is "the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*," is the very sort of intent that textualists seek to uncover when interpreting a statute.<sup>173</sup> But note what happens if the *West Virginia* majority's reference to "a practical understanding of legislative intent" is interpreted charitably to mean "objectified intent." It would transform the major questions doctrine into a linguistic canon that seeks to interpret text as an objective congressional outsider would. The "practical understanding of legislative intent" justification for the major questions doctrine would therefore collapse into the type of linguistic canon defended by Justice Barrett in *Nebraska* (which might, of course, explain why she was willing to join the *West Virginia* majority). Objections to the linguistic approach will be addressed in Part II.D.

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<sup>169</sup> *Id.* at 2609.

<sup>170</sup> See *supra* Part I.A.

<sup>171</sup> See *supra* Part I.A.

<sup>172</sup> Cory R. Liu, Note, *Textualism and the Presumption of Reasonable Drafting*, 38 HARV. J.L. & PUB. POL'Y 711, 726 (2015) ("Textualists therefore refuse to go beyond the legislature's textually-recorded intent, a concept Justice Scalia has called 'objectified intent.'").

<sup>173</sup> SCALIA & GARNER, *supra* note 21, at 92.

## 2. Separation of Powers Principles

Consider next the *West Virginia* majority's effort to justify the major questions doctrine on the grounds that it supports "separation of powers principles."<sup>174</sup> Adopting this justification requires recognizing that the major questions doctrine is a substantive canon that promotes a particular value (*i.e.*, the separation of powers) that exists outside of any particular statute under review. And because the principle that this form of the major questions doctrine purports to promote (*i.e.*, the separation of powers) is a constitutional principle, the canon is susceptible to Justice Barrett's two-factor test for determining "whether a canon can properly be classified as constitutional for purposes of justifying its language-stretching effect."<sup>175</sup>

As a reminder, the first of Justice Barrett's two factors maintains that, for a canon to qualify as constitutional, "the canon must be connected to a reasonably specific constitutional value."<sup>176</sup> And Justice Barrett was clear in stating that "a canon designed to protect the constitutional separation of powers . . . is probably stated at too great a level of generality" to satisfy the first factor.<sup>177</sup> Her tentative conclusion is not surprising—indeed, it is consistent with other leading textualist scholarship, such as that offered by Dean Manning.

As Dean Manning explains, "constitutional values do not . . . exist in the abstract," but instead "find concrete expression in many discrete constitutional provisions, which prescribe the means of implementing the value in question."<sup>178</sup> The Constitution, for example, did not ratify a freestanding conception of federalism into law.<sup>179</sup> Instead, "federalism is implemented by a number of constitutional provisions that divide and structure the relationships between federal and state governments in rather particular ways."<sup>180</sup>

The situation is similar for the separation of powers, where "abstracting from particular clauses to freestanding separation of powers doctrines . . .

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<sup>174</sup>*West Virginia*, 142 S. Ct. at 2609.

<sup>175</sup>Barrett, *Substantive Canons*, *supra* note 1, at 178.

<sup>176</sup>*Id.*

<sup>177</sup>*Id.* at 179 n.331.

<sup>178</sup>John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 404 (2010).

<sup>179</sup>Chad Squitieri, *Towards Nondelegation Doctrines*, 86 MO. L. REV. 1239, 1292 (2021) (citing *Clear Statement Rules*, *supra* note 178, at 434).

<sup>180</sup>*Id.* at 1292–93 (citing *Clear Statement Rules*, *supra* note 178, at 434).

disregard[s] precise constitutional provisions and the realities of the constitution making process.”<sup>181</sup> The Constitution does not contain a separation of powers clause; indeed, such a clause was rejected by the Framers.<sup>182</sup> A textualist seeking to defend the use of a substantive canon on the grounds that it supports the separation of powers must therefore identify a more *specific* constitutional value, within the broader separation of powers family, that promotes the separation of powers in a specific way.<sup>183</sup> Part III will argue that such a specific constitutional value can be found in the relationship between Article I, Section 7 and Article II, Section 3. But before turning to that proposal, Parts II.D and II.E will first address textualist objections to the more specific defenses of the major questions doctrine put forward in the *West Virginia* and *Nebraska* concurrences.

#### *D. Objections to the West Virginia Concurrence’s Substantive Canon*

Perhaps recognizing the need to ground the major questions doctrine in a specific component of the separation of powers, rather than “separation of powers principles” writ large, Justice Gorsuch offers a more detailed justification for the major questions doctrine. That justification is offered in his *West Virginia* concurrence, which was joined by Justice Alito.

The concurrence argues that the major questions doctrine promotes a new version of another legal doctrine called the nondelegation doctrine. The

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<sup>181</sup> John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 2039 (2011).

<sup>182</sup> NCC Staff, *On this day: James Madison introduces the Bill of Rights*, NAT’L CONST. CTR. (June 8, 2022), <https://constitutioncenter.org/blog/on-this-day-james-madison-introduces-the-bill-of-rights> (referring to Madison’s proposed separation of powers clause).

<sup>183</sup> Other scholars have critiqued the *West Virginia* majority for seeking to justify the major questions doctrine with only a generalized reference to the separation of powers. See, e.g., John Yoo & Robert Delahunty, *The Major-questions Doctrine and the Administrative State*, NAT’L AFFS. (Fall 2022), <https://www.nationalaffairs.com/publications/detail/the-major-questions-doctrine-and-the-administrative-state> (explaining that the *West Virginia* majority offered only a “single reference to ‘separation of powers principles,’” which demonstrates a “lack of justification” that will “leave[] lower courts in the dark on applying the doctrine to novel circumstances”); Sohoni, *supra* note 99, at 266 (stating that “[t]o inflict” something as “consequen[tial]” as the major questions doctrine “on the political branches demands a justification from the Court, not a rain check,” and concluding that “a rain check is all we got”) (emphasis omitted); see also Wurman, *supra* note 165, at 4–5 (considering whether “the major questions doctrine is simply the nondelegation doctrine deployed as a canon of constitutional avoidance,” and stating that “even if the canon were otherwise legitimate, we would need to know what the serious constitutional doubt is, and thus far the Court has not explained what majorness has to do with nondelegation”).

precise relationship between the major questions doctrine and the nondelegation doctrine is in flux (as opinions such as Justice Gorsuch's *West Virginia* concurrence demonstrate). But in general, the major questions doctrine is thought to be a statutory doctrine speaking to whether Congress *has* delegated authority to an agency, while the nondelegation doctrine is thought to be a constitutional doctrine speaking to whether Congress *can* delegate such authority.<sup>184</sup> For present purposes, what is important to recognize is that Justice Gorsuch's justification for the major questions doctrine demonstrates that he and Justice Alito understand the major questions doctrine to be a clear statement rule (*i.e.*, a type of strong-form substantive canon) which works to promote a constitutional value (*i.e.*, a new version of the nondelegation doctrine) that exists external to any statute.

Justice Gorsuch's concurrence begins by leveraging the historical pedigrees associated with two unrelated clear statement rules. "Much as constitutional rules about [1] retroactive legislation and [2] sovereign immunity have their corollary clear-statement rules," Justice Gorsuch explains after detailing how those two rules have long been a part of American jurisprudence, "Article I's Vesting Clause has its own [clear-statement rule]: the major questions doctrine."<sup>185</sup> He expands upon that point with the following:

The major questions doctrine works . . . to protect the Constitution's separation of powers. In Article I, "the People" vested "[a]ll" federal "legislative powers . . . in Congress." As Chief Justice Marshall put it, this means that "important subjects . . . must be entirely regulated by the legislature itself," even if Congress may leave the Executive "to act under such general provisions to fill up the details."<sup>186</sup>

There are at least two objections to this justification for the major questions doctrine.

The first objection is that Justice Gorsuch relies too heavily on Chief Justice Marshall's "important subjects" statement, which is mere judicial dicta that is not law.<sup>187</sup> The current nondelegation doctrine holds that

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<sup>184</sup>See Squitieri, *Majorness*, *supra* note 21, at 465, 467.

<sup>185</sup>*West Virginia v. EPA*, 142 S. Ct. 2587, 2619 (2022) (Gorsuch, J., concurring).

<sup>186</sup>*Id.* at 2617 (Gorsuch, J., concurring) (citations omitted).

<sup>187</sup>Daniel E. Walters, *The Major Questions Doctrine at the Boundaries of Interpretive Law*, 109 IOWA L. REV. (forthcoming 2023) (manuscript at 42), <https://papers.ssm.com/sol3/papers.cfm>

Congress can delegate authority so long as Congress cabins that authority by offering an “intelligible principle.”<sup>188</sup> To be sure, Justice Gorsuch has signaled an interest in replacing the “intelligible principles” test with an “important subjects” test.<sup>189</sup> But he did so in a dissenting opinion that did not earn support from a majority of the Court.<sup>190</sup> Even then, his dissent only went so far as to suggest that the “important subjects” test could serve as *one of three* “guiding principles” for a *new*, reinvigorated nondelegation doctrine.<sup>191</sup>

If the Court wishes to adopt a variation of Justice Gorsuch’s views on the nondelegation doctrine, and thus transform the “intelligible principle” nondelegation doctrine into a new “important subjects” nondelegation doctrine, the Court should do so explicitly. This means that, before the major questions doctrine can be justified on the grounds that it enforces a *new* “important subjects” version of the nondelegation doctrine, the Supreme Court should make clear that it has reversed its existing nondelegation precedent and has adopted a new “important subjects” version of the nondelegation doctrine. Other scholars have made similar points.<sup>192</sup>

The second objection to Justice Gorsuch’s justification for the major questions doctrine is more fundamental. Not only is the “important subjects” test not currently the law, textualists should object to the “important subjects” test *becoming* the law for at least two reasons. The first reason is that the “important subjects” test calls on Article III jurists to inappropriately exercise political discretion (rather than legal discretion). As Justice Scalia explained:

Once it is conceded, as it must be, that no statute can be entirely precise, and that some judgments, even some judgments involving policy considerations, must be left to

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?abstract\_id=4348024 (explaining that “the Court has never treated” the important subjects dicta “as relevant to the actual nondelegation inquiry”).

<sup>188</sup>Whitman v. Am. Trucking Ass’ns, 531 U.S. 457, 472–73 (2001) (“[W]e have repeatedly said that when Congress confers decisionmaking authority upon agencies Congress must ‘lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.’” (quoting J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928))) (cited in Walters, *supra* note 187, at 42–43).

<sup>189</sup>Gundy v. United States, 139 S. Ct. 2116, 2135–36 (2019) (Gorsuch, J., dissenting).

<sup>190</sup>*Id.* at 2131.

<sup>191</sup>*Id.* at 2136.

<sup>192</sup>See, e.g., Sohoni, *supra* note 99, at 266 (arguing that the Supreme Court’s recent major questions doctrine cases are based on an “inchoate theory of nondelegation”); Wurman, *supra* note 165, at 5 (stating that “thus far the Court has not explained what majorness has to do with nondelegation”).



the officers executing the law and to the judges applying it, the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree.<sup>193</sup>

Because the nondelegation doctrine (as Justice Scalia understood it) required courts to answer questions of degree (*e.g.*, “How intelligible is intelligible enough?”), Justice Scalia concluded that “while the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts.”<sup>194</sup>

One might not go as far as Justice Scalia in suggesting that there can be *no* judicially manageable means of enforcing the nondelegation doctrine. But replacing the “intelligible principle” test with an “important subjects” test would only seem to fall more squarely within the crosshairs of Justice Scalia’s objection.<sup>195</sup> Put more concretely: determining how “important” a policy matter has to be before it is deemed too “important” is more obviously an exercise of political discretion that is better left to the “common sense” of “Congress,” not politically-insulated courts.<sup>196</sup> And once one moves from referring to “important” subjects to the major question doctrine’s more precise reference to major “*political* significance,”<sup>197</sup> Justice Scalia’s objection is even more obvious yet.<sup>198</sup>

The second reason why textualists should object to the “important subjects” test becoming the law is that it is in tension with the Constitution’s structure. It is here that textualists, including myself, need to more fully recognize the implications of the People’s decision to separate and vest

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<sup>193</sup> *Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting).

<sup>194</sup> *Id.*; see also Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 354 (2002) (“[Justice Scalia] made clear [in *Mistretta*] that he regards the degree of discretion to be vested in administrators as essentially a political question that cannot (at least in the normal run of cases) be evaluated by courts.”).

<sup>195</sup> Squitieri, *Towards Nondelegation Doctrines*, *supra* note 8, at 1251 (“[T]he ‘important subjects’ test—which is derived from judicial dicta rather than the Constitution, and which necessitates unconstrained considerations of policy—is a poor substitute to replace the failed ‘intelligible principle’ test.”).

<sup>196</sup> *Mistretta*, 488 U.S. at 415 (Scalia, J., dissenting).

<sup>197</sup> See, *e.g.*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) (referring to “economic and political significance”) (emphasis added).

<sup>198</sup> See Squitieri, *Majorness*, *supra* note 21, at 465 (“Different legislators (and the President exercising the veto power) have different understandings as to which policy questions are major.”).

federal lawmaking authority in *both* Congress and the President. Given the inherent jealousies between the President and Congress,<sup>199</sup> textualists should expect that federal legislation will sometimes favor the President by vesting the President’s agents with important/major authority. Similarly, textualists should *also* expect that federal legislation will sometimes favor Congress by *not* vesting the President’s agents with important/major authority. And it is precisely because legislation will sometimes favor the President and sometimes favor Congress that textualists (who are faithful agents of the People, rather than Congress alone)<sup>200</sup> should reject any substantive canon that stacks the deck against the President’s ability to obtain major/important authority. Justice Gorsuch’s conception of the major questions doctrine, however, would do just that.

The problem with Justice Gorsuch’s conception of the major questions doctrine begins with a slight misreading of the Article I Vesting Clause, which quickly unravels into an overly Congress-centric conception of the federal lawmaking process. How so? Look more closely at the work that the ellipses are doing in Justice Gorsuch’s above-quoted statement. As a reminder, the statement and ellipses appear in his concurrence as follows:

In Article I, “the People” vested “[a]ll” federal “legislative powers . . . in Congress.”<sup>201</sup>

Now consider the Article I Vesting Clause in full:

All legislative powers **herein granted** shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.<sup>202</sup>

As the bolded words in the above-quote indicate, the Constitution does not vest *all federal legislative powers* in Congress. Instead, the Article I

<sup>199</sup> See THE FEDERALIST NO. 51, at 1 (James Madison) (George Stade ed., 2006) (“Ambition must be made to counteract ambition.”).

<sup>200</sup> Quoting Justice Barrett’s scholarship, Justice Gorsuch explained that clear statement rules can help “courts ‘act as faithful agents of the Constitution.’” *West Virginia v. EPA*, 142 S. Ct. 2587, 2616 (2022) (Gorsuch, J., concurring) (quoting Barrett, *Substantive Canons*, *supra* note 1, at 169); see also SCALIA & GARNER, *supra* note 21, at 138 (2012) (explaining that “courts are assuredly not agents of the legislature” but instead “are agents of the people”). As explained above, *supra* note 21, this Article takes the position that there is no meaningful difference between the phrase “faithful agents of the People” and the phrase “faithful agents of the Constitution.”

<sup>201</sup> *West Virginia*, 142 S. Ct. at 2617 (Gorsuch, J., concurring) (ellipses in original) (citing U.S. CONST. pmb1; *id.* art. I, § 1).

<sup>202</sup> U.S. CONST. art. I, § 1 (emphasis added).

Vesting Clause vests an enumerated subset of legislative powers—namely, “[a]ll legislative powers herein granted.”<sup>203</sup> Other components of legislative power, such as the President’s recommendation and veto authority, are vested elsewhere—and of course, some aspects of legislative power (such as the sort of general police powers reserved to the States) are not vested in the federal government at all.<sup>204</sup> Textualists should pay attention to the distinct text that the Constitution uses to separate and vest federal lawmaking authority—particularly when that text is juxtaposed against the Article II Vesting Clause (which vests all of “*the* executive power”<sup>205</sup> in the President), and the Article III Vesting Clause (which vests all of “*the* judicial power”<sup>206</sup> in the federal courts). Something special is going on, as a textual matter, when it comes to how the Constitution vests lawmaking authority.<sup>207</sup> And the distinctness of that text is not fully accounted for in Justice Gorsuch’s *West Virginia* concurrence.

From that slight (and perhaps common) misreading of the Article I Vesting Clause, Justice Gorsuch goes on to offer an overly Congress-centric conception of the federal lawmaking process. He writes, for example, that “[t]he [major questions] doctrine . . . ensur[es] that . . . agencies . . . do not ‘exploit some gap, ambiguity, or doubtful expression in *Congress*’s statutes . . . .”<sup>208</sup> And borrowing from the full Court’s opinion, he states that “the [major questions] doctrine addresses ‘a particular and recurring problem: agencies asserting highly consequential power beyond what

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<sup>203</sup>U.S. CONST. art. I, § 1.

<sup>204</sup>U.S. CONST. art. I, § 7 (veto); *id.* art. II, § 3 (recommendations); *Bond v. United States*, 572 U.S. 844, 854 (2014) (“In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder. The States have broad authority to enact legislation for the public good—what we have often called a ‘police power.’ The Federal Government, by contrast, has no such authority and can exercise only the powers granted to it . . . .” (quotations and citations omitted)).

<sup>205</sup>U.S. CONST. art. II, § 1 (emphasis added).

<sup>206</sup>U.S. CONST. art. III, § 1 (emphasis added).

<sup>207</sup>*See* Rob Natelson, *How to Correct the Context of the “Non-delegation” Debate*, THE ORIGINALISM BLOG (Jan. 20, 2020), <https://originalismblog.typepad.com/the-originalism-blog/2020/01/how-to-correct-the-context-of-the-non-delegation-debaterob-natelson.html> (“It is fundamental that the Constitution does not delegate to Congress ‘the legislative power.’ Rather, it delegates about thirty discrete legislative powers—seventeen (clarified by the Necessary and Proper Clause) in Article I, Section 8, and others scattered throughout the document.”).

<sup>208</sup>*West Virginia v. EPA*, 142 S. Ct. 2587, 2620 (2022) (Gorsuch, J., concurring) (citation omitted) (emphasis added).

*Congress* could reasonably be understood to have granted.”<sup>209</sup> Those Congress-centric conceptions of federal statutes are in tension with the text of the Constitution, which makes clear that Congress does not legislate alone. Given as much, federal statutes should not be conceptualized as “*Congress’s* statutes,” nor should they be viewed as reflecting the understanding of *Congress* alone. A substantive canon that promotes such a Congress-centric conception of federal lawmaking is a substantive canon that fails to account for the broader federal lawmaking process required by the Constitution’s text.

Although recognizing the President as exercising significant legislative authority might seem controversial to some scholars and jurists, it is a constitutional reality that is already reflected in the way that the objective congressional outsider (from whose perspective textualists interpret statutory text) perceives federal legislation.<sup>210</sup> The objective congressional outsider, for example, can be expected to learn regularly of the President’s legislative agenda as it announced at the State of the Union address.<sup>211</sup> Relatedly, the objective congressional outsider is more likely familiar with terms such as “Obamacare” and the “Bush Tax Cuts” than the “Patient Protection and Affordable Care Act” or the “Economic Growth and Tax Relief Reconciliation Act.”<sup>212</sup>

The objective congressional outsider’s familiarity with the President’s influence over the lawmaking process cannot be dismissed as an unwelcome hangover from the excesses of the post-New Deal presidency. Instead, the objective congressional outsider’s familiarity with the President’s influence over the lawmaking process finds support in two important constitutional provisions. Those two provisions, which speak to the President’s authority to recommend legislative proposals as well as the President’s authority to veto

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<sup>209</sup>*Id.* (citation omitted).

<sup>210</sup> See *supra* Part I.A. (discussing the congressional outsider perspective).

<sup>211</sup> See, e.g., *27.3 Million Watched the 2023 State of the Union Address*, NIELSEN (Feb. 8, 2023), <https://www.nielsen.com/news-center/2023/27-3-million-watched-the-2023-state-of-the-union-address/>.

<sup>212</sup> See Kyle Dropp & Brendan Nyhan, *One-Third Don’t Know Obamacare and Affordable Care Act Are the Same*, N.Y. TIMES (Feb. 7, 2017), <https://www.nytimes.com/2017/02/07/upshot/one-third-dont-know-obamacare-and-affordable-care-act-are-the-same.html>. To be sure, the presumption that the objective congressional outsider is familiar with the President’s influence over federal legislation should be based on the legal reality concerning the Constitution’s lawmaking procedures, not empirical evidence concerning the colloquial names that voters give legislation. See Tara Leigh Grove, *Testing Textualism’s “Original Meaning”*, 90 GEO. WASH. L. REV. 1053, 1063 (2022) (contending that “there is a strong basis for treating ‘ordinary meaning’ as primarily a legal concept” rather than simply an empirical fact).

legislative proposals, will be explored in greater detail in Part III. For now, it will suffice to recognize what the objective congressional outsider already does: the President is empowered to influence legislation at both the start (through recommendations) and the end (through vetoes) of the lawmaking process. Given the President's constitutionally derived influence over the federal lawmaking process, a faithful agent of the People should not use a substantive canon that stacks the interpretive deck against the President's ability to secure major authority from federal legislation. A faithful agent should instead serve as a neutral referee who recognizes that, because federal legislation will sometimes favor the President and sometimes favor Congress, neither political branch should be put at a political disadvantage by being required to secure extra-clear statutory language to advance their interests.

### *E. Objections to the Nebraska Concurrence's Linguistic Canon*

Placing herself in contrast with the substantive canon conception of the major questions doctrine adopted by Justices Gorsuch and Alito, Justice Barrett indicated in her *Nebraska* concurrence that she views the major questions doctrine as a linguistic canon.<sup>213</sup> Specifically, she “understand[s] the

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<sup>213</sup>Technically Justice Barrett was not explicit in categorizing the major questions doctrine as a linguistic canon. Instead, she made clear that she would not embrace the major questions doctrine if it were a strong-form substantive canon, *Biden v. Nebraska*, 143 S. Ct. 2355, 2377 n.2 (2023) (Barrett, J., concurring), and she explained how the major questions doctrine offers “context” of the sort that would seem to fall within the type of “speech patterns” that she describes as being reflected in “linguistic . . . canons.” *Id.* at 2376 n.1, 2378; see also Adrian Vermeule, *Text and Context*, YALE J. REG. NOTICE & COMMENT (July 13, 2023), <https://www.yalejreg.com/nc/text-and-context-by-adrian-vermeule/> (describing Justice Barrett's linguistic-substantive canon dichotomy as being “in direct tension with her main argument about ‘background legal conventions’ and ‘historical and governmental context’”); Chad Squitieri (@ChadSquitieri), TWITTER (June 30, 2023, 4:01 PM), <https://twitter.com/ChadSquitieri/status/1674870900468899841> (describing Justice Barrett's treatment of the three categories of canons in *Nebraska*).

For the sake of simplicity, this Article will refer to Justice Barrett's *Nebraska* concurrence as indicating that the major questions doctrine is a linguistic (rather than substantive) canon. But this Article leaves open the possibility that, in *Nebraska*, Justice Barrett described a new type of canon that does not fall cleanly into either the linguistic or substantive categories. Similarly, this Article refers to the reformulated major questions doctrine as a substantive canon because it seeks to promote a value (*i.e.*, the constitutional value in shaping statutory authority through particular political procedures) that exists external to a statute. But note how, if Justice Barrett's “contextual” conception of the major questions doctrine is neither linguistic or substantive, this Article's reformulated major questions doctrine could also fall within that same “contextual” gray area. Indeed, the reformulated major questions doctrine is very similar to Justice Barrett's “contextual” conception of the major questions doctrine—the main difference between the two conceptions is

major questions doctrine] to emphasize the importance of context when a court interprets a delegation to an administrative agency.”<sup>214</sup> When “[s]een in this light, the major questions doctrine is a tool for discerning—not departing from—the text’s most natural interpretation.”<sup>215</sup>

Justice Barrett’s linguistic canon can be thought of as seeking to assist a textualist jurist “discern” a statute’s objectified intent—which again, is “the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*.”<sup>216</sup> The problem with using the major questions doctrine as a tool for elucidating objectified intent, however, is that there is an important statute, within the relevant “*corpus juris*,”<sup>217</sup> that a “reasonable person”<sup>218</sup> should account for when considering what role (if any) a regulatory measure’s “majorness” should play when determining whether an agency has the statutory authority to pursue that regulatory measure. That important statute, which operates as a super-statute reaching across the administrative state, is the Congressional Review Act (“CRA”).<sup>219</sup>

Enacted in 1996, the CRA provides that “[b]efore a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress . . . a report containing—(i) a copy of the rule; (ii) a concise general statement relating to the rule, including whether it is a major rule; and (iii) the proposed effective date of the rule.”<sup>220</sup> The CRA’s definition of “major rule” is strikingly similar to the judge-made major questions doctrine’s definition of “major questions”; both the CRA and the Court define “major” to include economic and political factors.<sup>221</sup>

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that the reformulated major questions doctrine gives fuller attention to the President’s lawmaking role and, in part for that reason, does not call on courts to calculate political and economic majorness in the name of protecting Congress’s purported interests.

<sup>214</sup>*Nebraska*, 143 S. Ct. at 2376 (Barrett, J., concurring) (emphasis omitted).

<sup>215</sup>*Id.*

<sup>216</sup>SCALIA & GARNER, *supra* note 21, at 17.

<sup>217</sup>*Id.*

<sup>218</sup>*Id.*

<sup>219</sup>5 U.S.C. §§ 801–808 (2018). Portions of this Article’s discussion of the CRA were first published in Squitieri, *Majorness*, *supra* note 21, at 491–95.

<sup>220</sup>*Id.* § 801(a)(1)(A).

<sup>221</sup>*Compare* *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) (referring to “economic and political significance”) *with* 5 U.S.C. § 804(2) (2018) (defining “major rule” to include “(A) an annual effect on the economy of \$100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (C) significant adverse effects on competition, employment, investment,

Crucially, rules determined to be “major” under the CRA *must* be given legal effect (absent other legal infirmities) sixty days after the agency transmits the rule to Congress or publishes the rule in the Federal Register; the only exception mentioned in the CRA is if a brand new statute affirmatively disapproves of the major rule.<sup>222</sup> The CRA even goes so far as to outline the specific procedural steps that may be taken to disapprove of a major rule.<sup>223</sup> In particular, the CRA states that a new law disapproving of a major rule should state “[t]hat Congress disapproves the rule submitted by the \_\_\_ relating to \_\_\_, and such rule shall have no force or effect.” (The blank spaces being appropriately filled in).<sup>224</sup> This new law would then be set to the President for approval or veto.

Why is the CRA relevant to elucidating objectified intent? The CRA tells a reasonable congressional outsider to *expect* for “agencies” (which the CRA defines broadly)<sup>225</sup> to issue major rules that are to be given legal effect *unless* Congress and the President enact a new statute stating that the *specific* major rule in question should not be given legal effect. In this sense, the CRA operates as a default “law of interpretation” of the sort identified by Professors William Baude and Stephen E. Sachs.<sup>226</sup> Such “[d]efault rules let legislatures focus on the problem at hand . . . and not any of the other myriad problems that past legislatures have already tried to address.”<sup>227</sup> For example, “Congress can enact a conspiracy statute ahead of time, to avoid having to consider the problem anew for each separate criminal prohibition.”<sup>228</sup> The CRA acts similarly by making clear that, when deciding whether a regulation fits within the meaning of statutory text that empowers the agency to regulate, the regulation’s purported majorness should *not* be taken to suggest that the regulation is inappropriate. Instead, the CRA indicates that, not only are

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productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets”).

<sup>222</sup> See 5 U.S.C. § 801(a)(3). Rules determined to be non-major are also set to go automatically into effect, although they do so without any added delay. See *id.* § 801(a)(4).

<sup>223</sup> See *id.* § 801 (a)(3)(B) (referring to a “joint resolution” and the presidential veto process).

<sup>224</sup> *Id.* § 802(a) (parenthetical in original).

<sup>225</sup> The CRA applies to each “Federal agency” as that term is defined in the Administrative Procedure Act. See *id.* § 804(1). The Administrative Procedure Act defines the term broadly. See *id.* § 551(1). The takeaway is that the CRA places congressional outsiders on notice to expect major rules from essentially *all* administrative agencies.

<sup>226</sup> William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1082 (2017).

<sup>227</sup> *Id.* at 1102.

<sup>228</sup> *Id.* at 1101.

major rules to be *expected*, those major rules are to be given legal effect as a default basis (assuming the rules are not otherwise unlawful).

The CRA therefore places the reasonable congressional outsider (who interprets text alongside the remainder of the *corpus juris*, which includes the CRA) on notice that agencies might answer major questions through major rules, and that those major rules *must* be given legal effect (as far as the CRA is concerned) unless Congress and the President enact a new law stating that the major rule should not be given legal effect.<sup>229</sup> So long as the CRA remains unamended, it would be unreasonable for a congressional outsider to maintain the belief that a rule's purported majorness presents an independent reason to conclude that the rule should not be given legal effect. And it is for at least this reason that efforts to reconceptualize the major questions doctrine as a linguistic canon ultimately run into trouble.

Consider the thorough defense of the linguistic canon version of the major questions doctrine offered by Professor Ilan Wurman.<sup>230</sup> Drawing on research relating to the philosophy of language, Professor Wurman concludes that, “because ordinary speakers demand clearer proofs when making assertions with high stakes *generally*, [ordinary speakers] would demand clearer proofs that the agency has the asserted power when the regulation involves high stakes.”<sup>231</sup> But that conclusion does not account for the *specific* state of affairs presented by the CRA. In other words, it might certainly be the case that, in *general*, an ordinary reader would say that Person X “knows” a “train will arrive at 7:00 a.m. as scheduled” when the stakes of missing the train are low and Person X has checked “the train schedule.”<sup>232</sup> And it might also be the case that an ordinary reader would be less likely to say that Person X “knows”

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<sup>229</sup>Of course, a major rule could not be given legal effect if it runs afoul of some other legal limitation—such as a constitutional provision. Some theories of the nondelegation doctrine, for example, might hold that a “major” rule is unconstitutional because it violates the Constitution’s nondelegation doctrine. Pursuant to that understanding of the nondelegation doctrine, a “major” rule could not be given legal effect regardless of what the CRA instructs. But the current Court has not adopted such an understanding of the nondelegation doctrine. To the contrary, the Court in *West Virginia* is clear in stating that the major questions doctrine does *not* prohibit Congress from delegating the authority to answer “major” questions, so long as Congress makes that delegation clear. *West Virginia v. EPA*, 142 S. Ct. 2587, 2616 (2022) (“A decision of [major] magnitude and consequence rests with Congress itself, *or an agency acting pursuant to a clear delegation* from that representative body.” (emphasis added)).

<sup>230</sup>Wurman, *supra* note 165.

<sup>231</sup>*Id.* at 45 (emphasis added).

<sup>232</sup>Ryan D. Doerfler, *High-Stakes Interpretation*, 116 MICH. L. REV. 523, 528 (2018); *see also* Wurman, *supra* note 165, at 43–45 (citing Professor Doerfler).



the train will arrive on time when, all else being equal, there is evidence that a late train is for some reason a matter of very high stakes.<sup>233</sup> But although accounting for major importance might prove sensible “in areas of constitutional, contract, and statutory interpretation”<sup>234</sup> *generally*, it does not follow that accounting for major importance is helpful in the *specific* context relating to the major questions doctrine. Put differently, it does not follow that considerations of majorness are of any use when determining whether an agency rule *subject to the CRA* is unlawful because of the rule’s purported “majorness.” The CRA offers the objective reader special context indicating that “majorness” does not offer the sort of context that majorness might offer in other contexts.

To be sure, it could be the case that, although the CRA reflects the President’s and Congress’s views that major rules should be given legal effect as a default basis, there may be reason to think that major rules will nonetheless be rare. But it would take a rather cramped reading of the CRA to hold that, although the CRA makes clear that major rules are to be given legal effect as a default basis, there is nonetheless reason to flip that default on its head in order to withhold giving a rule legal effect *because* of the rule’s purported majorness. At minimum, the tension between (1) the CRA’s instruction to give major rules legal effect, and (2) the judge-made major questions doctrine instruction to *not* give major rules legal effect, is a tension that courts should address. But more importantly, even if the major questions doctrine could be harmonized with the CRA, two key *constitutional* provisions (which are of course also part of the relevant *corpus juris*) provide a second and more fundamental reason for textualists to object to the linguistic conception of the major questions doctrine.<sup>235</sup>

The two key constitutional provisions, which were outlined briefly above and which will be described in more detail below in Part III, are Article I, Section 7 and Article II, Section 3. Together, those provisions empower the President to play a role at the start of the lawmaking process (by offering legislative recommendations) and the end of the lawmaking process (by flexing veto authority). To see why those presidential lawmaking authorities present an issue for the linguistic conception of the major questions doctrine,

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<sup>233</sup> Doerfler, *supra* note 232, at 528.

<sup>234</sup> Wurman, *supra* note 165, at 7.

<sup>235</sup> Indeed, it is perhaps *because* of those constitutional provisions that the President was able to secure a status quo (codified in the CRA) pursuant to which major regulatory measures taken by the President’s agents are given legal effect on a default basis.

let us return to the babysitter analogy relied on by Justice Barrett in her *Nebraska* concurrence.<sup>236</sup>

Justice Barrett may be correct that, in everyday conversation, a babysitter instructed to “[m]ake sure the kids have fun” may not be a babysitter with the authority to “take[] the kids on a road trip to an amusement park, where they spend two days on rollercoasters and one night in a hotel.”<sup>237</sup> But it does not follow, as Justice Barrett would have it, that “a reasonable interpreter would expect [Congress] to make the big-time policy calls itself, rather than pawning them off to another branch.”<sup>238</sup> To the contrary, the “reasonable interpreter” would be familiar with the President’s constitutionally derived influence over the legislative process. And the fact that “majorness” might influence the context of real-world babysitting authority, but not the legal authority vested by a federal statute is not surprising. As Professor (and textualist) Tara Leigh Grove explains, “once we consider federal statutes as distinctively legal documents, it is not at all surprising that . . . legal rules and presumptions may not translate to ordinary conversation.”<sup>239</sup>

The situation presented by federal legislation is therefore more akin to an alternative hypothetical that Justice Barrett introduces later on in her concurrence: where “one parent left the children with the other parent for the weekend,” in which “we would view the same [amusement park] trip differently because the *parents share authority over the children*.”<sup>240</sup> That alternative hypothetical is more applicable because Congress does not have sole authority over federal agencies. Instead, agencies are staffed with administrators who exercise executive power on behalf of the President. Similarly, Congress does not have sole authority over the federal legislation that empowers federal agencies. Instead, federal legislation is created pursuant to a lawmaking process that mandates that the President have the opportunity to exercise considerable legislative influence.<sup>241</sup> Like two parents

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<sup>236</sup>*Biden v. Nebraska*, 143 S. Ct. 2355, 2379 (2023) (Barrett, J., concurring).

<sup>237</sup>*Id.*

<sup>238</sup>*Id.* at 2380.

<sup>239</sup>Tara Leigh Grove, *Is Textualism at War with Statutory Precedent?*, 101 TEX. L. REV. (forthcoming 2024) (manuscript at 29), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4583510](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4583510).

<sup>240</sup>*Nebraska*, 143 S. Ct. at 2381 (Barrett, J., concurring) (emphasis added).

<sup>241</sup>In addition to playing a role in the lawmaking process used to enact legislation empowering agencies, the President is ultimately responsible for supervising all exercises of federal executive power. Some scholars and jurists maintain that administrative agencies may exercise executive

who share authority over their children, the President and Congress should be recognized as sharing authority over federal agencies and the legislation that empowers those agencies.

Given that both the President and Congress share responsibility over federal agencies and the federal statutes that empower those agencies, the everyday “intuition that the parent is in charge and . . . so if a judgment is significant, we expect the parent to make it” does not support a major questions doctrine that elevates the decisions of one “parent” (*i.e.*, Congress) over another “parent” (*i.e.*, the President).<sup>242</sup> Thus, while Justice Barrett may be correct to start with the general proposition that “the balance of power between those in a relationship inevitably frames our understanding of their communications,” the relationship between Congress and the President actually counsels *against* supporting the type of major questions doctrine that she proposes.<sup>243</sup>

The federal lawmaking process is one in which two coequal branches (*i.e.*, Congress and the President) work together to hammer-out a legislative solution on behalf their shared principal (*i.e.*, the People). Respectfully, Justice Barrett is therefore mistaken to state that, “when it comes to the Nation’s policy, the Constitution gives Congress the reins—a point of context that no reasonable interpreter could ignore.”<sup>244</sup> Congress and the President *share* the reins—something the ordinary congressional outsider already recognizes. It is similarly somewhat misguided to suggest, as Justice Barrett does, that “[b]ecause the Constitution vests Congress with ‘[a]ll legislative Powers,’ Art. I, § 1, a reasonable interpreter would expect it to make the big-time policy calls itself, rather than pawing them off to another branch.”<sup>245</sup> Instead, the Constitution separates and vests aspects of lawmaking authority in *both* the President and Congress.<sup>246</sup> A faithful agent of the People should therefore be careful to avoid adopting a canon that expects Congress to exercise unilaterally the sort of “big-time policy” discretion that the People’s Constitution vests in *both* Congress and the President as a pair.

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power outside of the President’s oversight. The task of rejecting that conception of executive power lies outside the scope of this Article.

<sup>242</sup> *Nebraska*, 143 S. Ct. at 2381 (Barrett, J., concurring).

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Id.* at 2380

<sup>246</sup> *See supra* Part II.D (juxtaposing the Article I Vesting Clause with the Article II and Article III Vesting Clauses).

Given the unique way that the Constitution separates and vests lawmaking authority, the reasonable interpreter understands that both the President and Congress have been tasked with developing national policy *together*. And so, similar to how one would not doubt that a parent has the authority to make major babysitting decisions “because the parents share authority over the children,”<sup>247</sup> the objective congressional outsider should not doubt that the President—who shares responsibility over federal agencies and the federal statutes that empower them—often secures major statutory authority for the administrative agents that exercise executive power on the President’s behalf.

### III. THE RECOMMENDATION CLAUSE

Although “the separation of powers” is too abstract a constitutional value to serve as a proper foundation for a substantive canon, at least one constitutional value within the broader separation of powers family could satisfy Justice Barrett’s two-factor test. That value, captured in the relationship between Article I, Section 7 and the Recommendation Clause of Article II, Section 3, is the value in shaping statutory authority through the particular political procedures described in the Constitution.

Of the two provisions at hand, Article I, Section 7 is perhaps more familiar to readers. Thus, only a brief overview of Article I, Section 7 will be offered here. The provision contains two requirements: bicameralism (which requires proposed legislation to undergo consideration by both the House and Senate) and presentment (which requires proposed legislation to be presented to the President for signature or veto).<sup>248</sup> Together those requirements speak to the President’s role at the *end* of the federal lawmaking process (*i.e.*, presentment) and the House and Senate’s role during the *middle* of the federal lawmaking process (*i.e.*, bicameralism).<sup>249</sup> But what Article I, Section 7 fails to speak to directly, of course, is the President’s role at the *start* of the federal lawmaking process.

The President’s role at the start of the federal lawmaking process is outlined by the Recommendation Clause. The Recommendation Clause thus deserves to be considered as part of the “single, finely wrought and exhaustively considered, procedure”<sup>250</sup> that the Constitution requires for

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<sup>247</sup>*Nebraska*, 143 S. Ct. at 2381 (Barrett, J., concurring).

<sup>248</sup>U.S. CONST. art. I, § 7.

<sup>249</sup>*Id.*

<sup>250</sup>*I.N.S. v. Chadha*, 462 U.S. 919, 951 (1983).

addressing national problems through federal statutes. Put differently, the Constitution requires a particular process for enacting federal statutes, and that process is made up of a careful vesting of powers and duties in the President, House, and Senate. When any of those three actors either oversteps or falls short of their federal lawmaking role, the Constitution's chosen means for addressing national problems through federal statutes can be distorted. The remainder of Part III will thus offer a detailed analysis of an important (but often overlooked) constitutional provision that outlines both a presidential power and duty within the federal lawmaking process: the Recommendation Clause of Article II, Section 3.

### A. *The Clause Explained*

Article II, Section 3 of the Constitution states that the President:

shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient.<sup>251</sup>

The first part of that provision—the State of the Union Clause—is no doubt familiar.<sup>252</sup> Most years in Washington, the modern President travels down Pennsylvania Avenue to Capitol Hill in order to give a State of the Union address to Congress, within which the President often dedicates considerable time to legislative proposals.<sup>253</sup> Perhaps less well-known is the second part of Article II, Section 3—the Recommendation Clause.<sup>254</sup>

#### 1. Presidential Fact Finding

The Recommendation Clause ensures that the President plays a role at the start of the federal lawmaking process by requiring that the President

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<sup>251</sup>U.S. CONST. art. II, § 3. I credit Vasan Kesavan and J. Gregory Sidak for their detailed history and analysis of the President's role in the federal lawmaking process, which I relied on when authoring this Article. *See generally* Sidak, *supra* note 11; Kesavan & Sidak, *supra* note 37.

<sup>252</sup>*Id.*

<sup>253</sup>*See, e.g.,* Rebecca Shabad, *Biden to Deliver his State of the Union Address on Feb. 7*, NBC NEWS (Jan. 13, 2023, 2:09 PM), <https://www.nbcnews.com/politics/congress/biden-deliver-state-union-address-feb-7-rcna65743>; MICHAEL GREENE & MARIA KREISER, CONG. RSCH. SERV., R44770, *History, Evolution, and Practices of the President's State of the Union Address: Frequently Asked Questions* at 2 (updated Jan. 24, 2023).

<sup>254</sup>U.S. CONST. art. II, § 3.

recommend measures for Congress to consider turning into law. Why might the Framers have imposed such a duty on the President? The answer could stem from the Framers' prescient prediction that the President could provide Congress with on-the-ground facts.<sup>255</sup> Given the nature of the office, the President is well-positioned to put those facts to work by identifying problems and suggesting to Congress those remedial measures that the President thinks should be enacted into law.

Justice Story, for example, wrote that “[f]rom the nature and duties of the executive department, [the President] must possess more extensive sources of information, as well in regard to domestic as foreign affairs, than can belong to [C]ongress.”<sup>256</sup> He further wrote that “[t]he true workings of the laws; the defects in the nature or arrangements of the general systems of trade, finance, and justice; and the military, naval, and civil establishments of the Union, are more readily seen, and more constantly under the view of the executive” than either the Congress or the federal courts.<sup>257</sup> In light of this informational advantage, Justice Story thought the President was “responsible, not merely for due administration of the existing systems, but for due diligence and examination into the *means of improving* them.”<sup>258</sup>

To be sure, it is often the President's *agents*, and not the President, who are most likely to have relevant information concerning on-the-ground facts. But the Constitution elsewhere ensures that those agents will provide the President with information they acquire. Specifically, the Opinion Clause of Article II, Section 2 states that the President “may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices.”<sup>259</sup> Both

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<sup>255</sup> See Sidak, *supra* note 11, at 2089 (“[T]he recommendation clause revealed a design by the Framers that Congress give due consideration to the President’s expertise acquired from the execution of laws.”); see also Kesavan & Sidak, *supra* note 37, at 22–23 (referring to the State of the Union Clause).

<sup>256</sup> 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 807 (1833), *cited in* Sidak, *supra* note 11, at 2088–89.

<sup>257</sup> *Id.*, *cited in* Sidak, *supra* note 11, at 2089.

<sup>258</sup> *Id.* (emphasis added), *cited in* Sidak, *supra* note 11, at 2089.

<sup>259</sup> U.S. CONST. art. II, § 2.

Alexander Hamilton<sup>260</sup> and Joseph Story<sup>261</sup> thought the Constitution's explicit reference to the President's power to obtain information from inferior executive officials was relatively redundant, as the power could be implied by the nature of the President's office. Nonetheless, the Constitution is explicit in ensuring via the Opinion Clause that the President will have access to information acquired throughout the executive branch.<sup>262</sup> And from George Washington on, presidents have relied upon that access to information to govern effectively.<sup>263</sup>

## 2. A Duty to Recommend Measures

Records from the Constitutional Convention reveal two important aspects of the Recommendation Clause. First is that the Clause has long been thought to not only vest the President with the *authority* to recommend measures to Congress, but also the *duty* to make such recommendations. During the Constitutional Convention, initial language stating that the President "may" make recommendations to Congress was amended, leaving the language that survives today.<sup>264</sup> The surviving language, which was ratified into law, makes clear that the President "shall" make recommendations to Congress.<sup>265</sup> James Madison's notes from the Constitutional Convention provide insight as to why "may" was changed to "shall":

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<sup>260</sup>THE FEDERALIST NO. 74, at 385 (Alexander Hamilton) (George Stade ed., 2006) ("The President may require the opinion, in writing, of the principal officer in each of the executive departments . . . This I consider as a mere redundancy in the plan, as the right for which it provides would result of itself from the office.").

<sup>261</sup>3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 769 (1833) (stating that the right "would result from the very nature of the office").

<sup>262</sup>Indeed, the text of the Clause might "impl[y] that only the President, and not Congress, can obtain information from principal officers," which would further underscore the important role the President plays at the start of the federal lawmaking process. See Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1207 (1992) (emphasis omitted).

<sup>263</sup>See generally LINDSAY M. CHERVINSKY, THE CABINET 5 (2020) (describing President Washington's cabinet); Neil Thomas Proto, *The Opinion Clause and Presidential Decision-Making*, 44 MO. L. REV. 185, 196 (1979) ("Presidents since George Washington have gathered around them persons of wisdom, knowledgeable in the affairs of government or in matters of politics, whom they trust and may consult regularly and in confidence.").

<sup>264</sup>J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 526 (G. Hunt & J. Scott eds., 1987), cited in Sidak, *supra* note 11, at 2081 n.14.

<sup>265</sup>*Id.*

On motion of Mr. Govr Morris, “he may” was struck out, & “shall” inserted before “recommend” in the clause 2d. sect 2d art: . . . in order to make it the *duty* of the President to recommend, & thence prevent umbrage or cavil at his doing it.<sup>266</sup>

Consistent with Madison’s notes concerning the reason behind the Recommendation Clause’s precise wording, the Recommendation Clause has long been understood as imposing a duty on the President. In his first address to Congress, President Washington explained that “[b]y the article establishing the executive department it is made the *duty* of the President ‘to recommend to your consideration such measures as he shall judge necessary and expedient.’”<sup>267</sup> Similarly, Justice Story explained that, in light of the President’s informational advantage, “[t]here is great wisdom . . . in not merely allowing, but in *requiring*, the president to lay before congress all facts and information, which may assist their deliberations.”<sup>268</sup>

The policy rationale promoted by imposing a duty on the President appears straightforward enough. Even in situations when the President (perhaps due to political reasons) may not wish to recommend a measure for Congress’s consideration, the Recommendation Clause ensures that potential legislative remedies for correcting the People’s problems will nonetheless be brought to Congress’s attention. And by requiring the President to recommend measures to Congress, the Recommendation Clause increases the likelihood that the People’s problems will be remedied via statutes, rather than mere presidential policy. This is significant because statutes, as compared to presidential policy, are more stable and (due to the bicameralism and presentment conditions imposed by Article I, Section 7) must earn acceptance by a wider set of the People’s political representatives.

A second feature of the Recommendation Clause, which shines through from the records of the Constitutional Convention, is that the Clause requires the President to do more than simply point out societal ills that Congress should consider remedying. Instead, the President is required to recommend legislative *solutions* to those societal ills. An earlier formulation of the Clause proposed at the Constitutional Convention would have only required the

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<sup>266</sup> *Id.* (emphasis added).

<sup>267</sup> Sidak, *supra* note 11, at 2085 (quotations omitted).

<sup>268</sup> JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 807 (1833) (emphasis added).



President to recommend “Matters” for Congress’s consideration.<sup>269</sup> But the word “Matters” was replaced with the term “Measures,” which remains in the Clause today.<sup>270</sup>

The term “Matters” refers to the mere “[s]ubject of complaint.”<sup>271</sup> By comparison, the term “Measures” refers to the “[m]eans to an end.”<sup>272</sup> Thus, as one scholar writes, “[t]o the extent that a ‘measure’ connotes the formulation of a proposed solution to an identified condition, the submission of ‘measures’ implies greater presidential participation in the lawmaking process than would the mere submission of ‘matters’ to Congress for its rumination.”<sup>273</sup> In sum, the Recommendation Clause can be understood as requiring the President to propose specific measures to Congress, so that Congress can consider enacting those measures into law.

### 3. Necessary and Expedient

Of course, the President is not required to recommend all measures that might come to the President’s attention. Instead, the Recommendation Clause only addresses those measures that the President deems “necessary and expedient.”<sup>274</sup> The phrase “necessary and expedient,” used to outline the President’s lawmaking role in the Recommendation Clause, is similar to the phrase used to condition Congress’s lawmaking authorities. Specifically, Congress is empowered to make only those “Laws which shall be *necessary and proper* for carrying into Execution” powers vested elsewhere by the Constitution.<sup>275</sup>

It would seem that the phrases “necessary and expedient” and “necessary and proper” capture similar ideas, thus imposing similar conditions on the President’s and Congress’s interrelated lawmaking roles. One definition of “expedient,” for example, provides:

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<sup>269</sup>2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 158, 171 (M. Farrand ed., 1911), *cited in* Sidak, *supra* note 11, at 2084 n.21.

<sup>270</sup>*Id.*; U.S. CONST. art. II, § 3, *cited in* Kesavan & Sidak, *supra* note 37, at 49.

<sup>271</sup>*Matter*, WEBSTERS DICTIONARY 1828, <https://webstersdictionary1828.com/Dictionary/Matter>.

<sup>272</sup>*Measure*, WEBSTERS DICTIONARY 1828, <https://webstersdictionary1828.com/Dictionary/Measure>.

<sup>273</sup>Sidak, *supra* note 11, at 2084; *see also* Kesavan & Sidak, *supra* note 37, at 49–51.

<sup>274</sup>U.S. CONST. art. II, § 3.

<sup>275</sup>U.S. CONST. art. I, § 8, cl.18 (emphasis added).

Literally, hastening; urging forward. Hence, tending to promote the object proposed; fit or suitable for the purpose; proper under the circumstances. Many things may be lawful, which are not expedient.<sup>276</sup>

A second definition defines “expedient” as “Useful; profitable.”<sup>277</sup> Those definitions are strikingly similar to Chief Justice Marshall’s interpretation of “necessary and proper,” pronounced in *McCullough v. Maryland*,<sup>278</sup> which is described traditionally “as [an] expansive” interpretation that “permit[s] Congress to make laws that, although not strictly necessary, are ‘convenient or useful.’”<sup>279</sup>

The similarity between “necessary and expedient” and “necessary and proper” provides additional insight into how courts should engage with the Recommendation Clause. Whatever the precise meaning of “necessary and expedient” might be, the phrase no doubt affords the President some discretion in determining what “measures” are “necessary and expedient.” But the existence of this discretion should not be understood as preventing all judicial inquiries into whether the President has run afoul of the Recommendation Clause any more than the term “necessary and proper” should not be understood as preventing the Court from reviewing the constitutionality of federal legislation more generally.

There is, however, at least one important distinction between the text of the Recommendation Clause and the text of the Necessary and Proper Clause. Although the Necessary and Proper Clause mandates that laws “shall” be necessary and proper,<sup>280</sup> the Recommendation Clause refers to only those measures “as *he* [*i.e.*, the President] shall judge necessary and expedient.”<sup>281</sup> Juxtaposing those two clauses further indicates that the Recommendation Clause entitles the President to some discretion in determining what is necessary and expedient—at least more discretion than Congress might be afforded in determining what “shall” be necessary and proper.<sup>282</sup> For this

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<sup>276</sup> *Expedient*, WEBSTERS DICTIONARY 1828, <https://webstersdictionary1828.com/Dictionary/Expedient> (emphasis omitted).

<sup>277</sup> *Id.*

<sup>278</sup> 17 U.S. (4 Wheat.) 316 (1819).

<sup>279</sup> Squitieri, *Towards Nondelegation Doctrines*, *supra* note 8, at 1268 (citing Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183, 220 (2003)).

<sup>280</sup> U.S. CONST. art. I, § 18.

<sup>281</sup> U.S. CONST. art. II, § 3 (emphasis added).

<sup>282</sup> I thank Professor Gary Lawson for bringing this textual distinction to my attention.

reason, and as explained below,<sup>283</sup> the reformulated major questions doctrine focuses not on determining what a *court* might think to be necessary and expedient, but on what the *President* (or typically, the President's agents acting on behalf of the President) thinks to be necessary and expedient.<sup>284</sup> Judicial considerations of past executive actions—such as an agency's historical interpretation of statutory authority—can assist courts in elucidating such executive branch conclusions.

Despite the slight difference in wording, the similarity between the Necessary and Proper Clause and the Recommendation Clause is informative in that it demonstrates that the judicial inquiry required by the reformulated major questions doctrine is similar to the judicial inquiry already performed by courts reviewing the lawfulness of legislation. When Congress (with the President's participation) enacts a statute into law that, say, is intended to be a necessary and proper means of regulating interstate commerce, courts routinely examine the statute to ensure that the statute is indeed a necessary and proper means of regulating interstate commerce.<sup>285</sup> Courts are equally capable of reviewing the President's actions to see if the President has fallen short of the lawmaking function assigned to the President in the Recommendation Clause.<sup>286</sup> Thus, like how courts routinely review the constitutionality of federal legislation (rather than blindly accept that laws are “necessary and proper”), courts should not turn a blind eye to a President who fails to make “necessary and expedient” recommendations. Instead,

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<sup>283</sup> *Infra* Part III.B.

<sup>284</sup> Kesavan and Sidak argue that “[t]he verb ‘judge’ in the Recommendation Clause also signifies that the President is the indeed last and only word on what recommendations he shall make.” Kesavan & Sidak, *supra* note 37, at 57. Because the reformulated major questions doctrine focuses on identifying evidence speaking to *presidential* considerations of necessity and expediency, the reformulated doctrine is arguably consistent with such a view. *See also id.* at 59 (“[T]he President’s discretion . . . has bounds. The executive discretion of the Recommendation Clause may not swallow up the executive duty of the same clause. There should be some constitutional standard to prevent the President from sitting on her laurels and judging that nothing is necessary and expedient.” (citation omitted)).

<sup>285</sup> *See* U.S. CONST. art. I, § 8, cl. 3; *United States v. Lopez*, 514 U.S. 549, 588 (1995) (Thomas, J., concurring) (referring to judicial review of Congress’s authority to legislate pursuant to the Commerce Clause and the Necessary and Proper Clause); William Baude, *Sharing the Necessary and Proper Clause*, 128 HARV. L. REV. F. 39, 42 (2014) (“The courts have shared the task of interpreting the Necessary and Proper Clause too.”). *But see* John F. Manning, *Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 5–6 (2014) (stating that the Necessary and Proper Clause “delegates to Congress broad and explicit (though not limitless) discretion to compose the government and prescribe the means of constitutional power”).

<sup>286</sup> *Supra* Part III.A.2.

courts should play a role in ensuring that the President does not run afoul of the Recommendation Clause by ensuring that the President does not unlawfully promulgate a measure pursuant to authority that the President does not have, but which the President should recommend that Congress grant.

#### 4. Congressional Consideration

Importantly, the Recommendation Clause only permits the President to “recommend to [Congress’s] *Consideration* such Measures as he shall judge necessary and expedient.”<sup>287</sup> As President Zachary Taylor explained, “[t]he Executive has the authority to recommend (not to dictate) measures to Congress.”<sup>288</sup> President Grant expressed a similar view, explaining that:

On all leading questions agitating the public mind I will always express my views to Congress and *urge* them according to my judgment . . . . I shall on all subjects have a policy to *recommend, but none to enforce against the will of the people.*<sup>289</sup>

Justice Story explained similarly that the Recommendation Clause only empowers the President with the authority to “*suggest* the remedy” for resolving the “evil[s]” that come to the President’s attention.<sup>290</sup>

The takeaway here is that the President’s power to make recommendations for Congress’s consideration is just that—a power to *recommend* measures for Congress’s *consideration*. It is not a power to *dictate* retroactively what measures were granted via the intra- and inter-

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<sup>287</sup> U.S. CONST. art. II, § 3 (emphasis added).

<sup>288</sup> President Zachary Taylor, First Annual Message of Zachary Taylor (Dec. 4, 1849) (transcript available at <https://millercenter.org/the-presidency/presidential-speeches/december-4-1849-first-annual-message>), *cited in* Kesavan & Sidak, *supra* note 37, at 36; *see also* Kesavan & Sidak, *supra* note 37, at 35 (“The President’s recommendations under the Recommendation Clause are recommendations, not regal edicts.”).

<sup>289</sup> President Ulysses S. Grant, First Inaugural Address of Ulysses S. Grant (Mar. 4, 1869) (transcript available at <https://millercenter.org/the-presidency/presidential-speeches/march-4-1869-first-inaugural-address>) (emphases added), *cited in* Kesavan & Sidak, *supra* note 37, at 46.

<sup>290</sup> 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 807 (emphasis added). Sidak distinguishes the Congress’s duty to “consider” presidential recommendations with the Senate’s authority to “ratify” treaties and presidential appointments. *See* Sidak, *supra* note 11, at 2082 (“[T]he President submits recommendations to Congress for its ‘Consideration’—not for its ratification as in the case of Senate confirmation of treaties or presidential appointments.”).

branch political bargains that culminated in final statutory text. By participating at the start of the lawmaking process (through recommendations) as well as the end (through vetoes), the President can influence statutory text.<sup>291</sup> But the President is merely one actor out of the five hundred and thirty-six actors involved in the federal lawmaking process.<sup>292</sup> Given as much, the President's lawmaking agenda is not dispositive.

The Constitution ensures that the People are to be governed by the statutes that survive the political wheeling and dealing inherent in getting 536 individuals to turn a proposal into law. When a President seeks to dictate retroactively the meaning of statutory text, the President risks upsetting the intra- and inter-branch political bargains that resulted in specific statutory text. By policing the line between presidential recommendations and presidential dictations, courts can better ensure that the President, House, and Senate each stay within the specific lawmaking roles assigned to them by the Constitution.

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In sum, the Recommendation Clause works to leverage the President's informational advantage by *requiring* the President to recommend *measures* (not mere matters) to Congress so that Congress can *consider* adopting those measures into law. When viewed in such terms, the Recommendation Clause seems like a sensible way to ensure that the People's problems are addressed by their political representatives' collective lawmaking efforts. One might therefore conclude, as Justice Story did, that the Recommendation Clause "may well be presumed to be above all real objections."<sup>293</sup>

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<sup>291</sup>U.S. CONST. art. II, § 3, cl. 2 (recommendations); U.S. CONST. art. I, § 7, cl. 2, 3 (veto authority); *see also* Meghan M. Stuessy, *Veto Threats and Vetoes in the George W. Bush and Obama Administrations*, CRS (Apr. 30, 2020), [https://www.everycrsreport.com/files/20200430\\_R46338\\_a7b4e73fb8350e2a0aa2bc91991a656a644656c9.pdf](https://www.everycrsreport.com/files/20200430_R46338_a7b4e73fb8350e2a0aa2bc91991a656a644656c9.pdf), at 3 ("Because Congress faces a two-thirds majority threshold to override a President's veto, veto threats may deter Congress from passing legislation that the President opposes.").

<sup>292</sup>The other actors involved in the Article I, Section 7 lawmaking process are the one hundred senators that make up the Senate, *see* U.S. CONST. art. I, § 3, cl. 1, and the four hundred and thirty-five representatives that make up the House, *see* U.S. CONST. art. I, § 2, cl. 3; Permanent Apportionment Act of 1929, 2 U.S.C. § 2a.

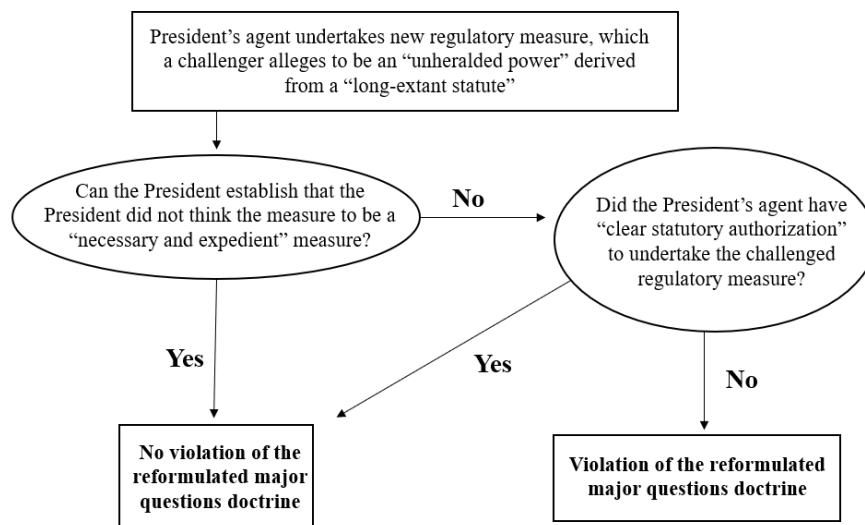
<sup>293</sup>3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 807 (1833), *cited in* Sidak, *supra* note 11, at 2088–89.

### B. The Reformulated Major Questions Doctrine

Having explained in Part III.A what the Recommendation Clause is and how it relates to Article I, Section 7, Part III.B will now demonstrate how the major questions doctrine can be reformulated so as to be grounded in the constitutional value captured by the relationship between those two constitutional provisions. Pursuant to the reformulated doctrine, courts must focus less on Congress and focus more on the President. Specifically, courts must focus less on how courts “expect *Congress* to speak,”<sup>294</sup> and focus more on the *President’s* attempt “to discover in a long-extant statute an unheralded power.”<sup>295</sup>

To assist with Part III.B’s overview of the reformulated major questions doctrine, consider **Figure 1**, which offers a visual depiction of how the reformulated doctrine would work in practice:

**Figure 1: The Reformulated Major Questions Doctrine**



<sup>294</sup>West Virginia v. EPA, 142 S. Ct. 2587, 2605 (2022) (emphasis added) (quotation omitted).

<sup>295</sup>*Id.* at 2610 (quotation omitted). This focus on the President, rather than the Congress, is similar to the proposal put forth by Professor Daniel Farber. See Daniel Farber, *The Major Question Doctrine, Nondelegation, and Presidential Power*, YALE J. REG. NOTICE & COMMENT. BLOG (Nov. 2, 2022), <https://www.yalejreg.com/nc/symposium-shane-democracy-chief-executive-07/>. In reviewing a recent book authored by Professor Peter Shane, Professor Farber hypothesizes a “different understanding of the major question doctrine, one aimed more at constraining the President than at disciplining Congress for giving away too much power.” *Id.* (reviewing PETER

As **Figure 1** demonstrates, the Recommendation Clause operates as a sort of constitutional tripwire. Namely, when the President relies on an administrative agent to unilaterally enact a new measure, the reformulated major questions doctrine calls on courts to pause and ask whether the Recommendation Clause required the President to instead pursue that measure by first *recommending* that Congress grant new statutory authority. The effect is to funnel more national policymaking through the cooperative lawmaking process that requires the President to work with Congress.

### 1. Unheralded Powers in Long-Extant Statutes

A legal challenge brought under the reformulated major questions doctrine would begin the same way that challenges begin under the current major questions doctrine: the President (or more precisely, one of the President's agents)<sup>296</sup> undertakes a new regulatory measure, such as a new regulation. A party purporting to be injured by that new measure could then bring a lawsuit challenging the measure under any number of legal theories, including the reformulated doctrine. The reformulated doctrine would then function as a substantive canon that takes special care to ensure that, *in a limited subset of instances*, the President has not exercised more statutory authority than that granted via the final legislative compromise enacted at a particular moment in time.

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SHANE, DEMOCRACY'S CHIEF EXECUTIVE (2022)). A focus on the President, rather than Congress, is also consistent with the arguments put forward by Professor Michael Ramsey. *See, e.g.*, Michael Ramsey, *T.T. Arvind & Christian Buset on History and the Major Questions Doctrine*, ORIGINALISM BLOG (July 14, 2023), <https://originalismblog.typepad.com/the-originalism-blog/2023/07/arvind-buset-major-questions.html> (“As I’ve commented here a number of times . . . , the [major questions] doctrine is really about limiting executive power, and people who worry about executive overreach should look on it favorably.”).

<sup>296</sup>This Article presumes that any federal official capable of exercising federal executive power is an executive official who reports, ultimately, to the President. This Article thus does not address regulatory measures promulgated by federal officials who purport to operate “independent” of the President’s control. Nonetheless, a fuller understanding of the Recommendation Clause, of the sort provided in this Article, casts additional doubt on the argument that a federal official can exercise executive power independent of the President. Specifically, the risk that such an “independent” official might trigger a violation of the President’s Recommendation Clause duty provides an additional reason to conclude that the President’s obligation to “take Care that the Laws be faithfully executed,” also ratified in Article II, Section 3, does not leave room for “independent” officials to exercise executive power. *See* U.S. CONST. art. II, § 3 (speaking both to the President “recommend[ing] . . . measures” and “tak[ing] Care that the Laws be faithfully executed”).

What limited subset of instances does the reformulated doctrine apply to? The subset consisting of those legal challenges alleging that the President has sought to derive (to borrow terms from the existing major questions doctrine) an “unheralded power” from a “long-extant statute.”<sup>297</sup> That allegation can be presumed at the initial stage of the reformulated major questions doctrine analysis (although it will be tested later). The initial judicial task is simply to determine whether the difference in time between (1) when the agency was vested with statutory authority, and (2) when the agency claims to find a purportedly new power, is such that closer judicial scrutiny is warranted.

Why dedicate special judicial attention to the subset of cases involving efforts to squeeze new powers out of old statutes? When the President purports to find a particularly new power in a particularly old statute—rather than recommend that Congress work with the President to grant new authority—there is increased reason to suspect that the constitutional value in shaping statutory authority through particular political procedures has been undermined. As a substantive canon, the reformulated major questions doctrine therefore seeks to enforce that constitutional value (*i.e.*, the value in shaping statutory authority through particular political procedures) even if doing so requires a court to slow down and dedicate special attention to claims of agency authority that the court might ultimately determine to be lawful.<sup>298</sup> In short, the idea is that, when a President seeks to locate a new power in an old statute, courts might be skeptical and thus check to see if the President was instead required to recommend that Congress grant the President new authority.

## 2. Presidential Determinations of Necessity and Expediency

A President faced with a reformulated major questions doctrine challenge will have at least two opportunities to defeat the challenge. First, the President can establish that, although the regulatory measure was (1) important enough for the President’s agents to pursue, the measure was not (2) “necessary and expedient” enough to warrant making a recommendation to Congress.

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<sup>297</sup> *West Virginia*, 142 S. Ct. at 2604 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

<sup>298</sup> The reformulated major questions doctrine would work to remedy what Professors Jonathan A. Adler and Chris J. Walker refer to as “the temporal problems of congressional delegation.” Jonathan A. Adler & Chris J. Walker, *Delegation and Time*, 105 IOWA L. REV. 1935, 1936 (2020).



A President might naturally be hesitant to make such an argument in a public court proceeding. After all, doing so would suggest to the public that, although the challenged regulation is important enough to justify regulatory burdens, it is actually not *too* important—or at least not important enough to qualify as “necessary and expedient.” Nonetheless, if the President did make that argument, the reviewing court would have to determine whether the President’s statements and actions fairly suggest that the President truly did not conclude the regulation to be “necessary and expedient.”

Note here that the focus is on whether the *President* thinks a particular measure to be necessary and expedient. That focus is intended to avoid a court supplanting the President’s view with the court’s own view about necessity and expediency. Relatedly, the formulated major questions doctrine’s focus on the subset of instances involving particularly new powers and particularly old statutes helps to narrow the opportunity for courts to inject themselves into what is, at its core, a presidential decision. For textualists, these efforts to reduce judicial interference into presidential affairs are important because the text of the Recommendation Clause makes clear that the President has the obligation to recommend only those measures “as *he* shall judge necessary and expedient.”<sup>299</sup>

With a focus on the *President*, courts may consider a variety of different forms of evidence which shed light on what the President thinks to be necessary and expedient. Such evidence can include information such as White House press statements, which often speak to a regulation’s importance, and which the Supreme Court already considers in the major questions context.<sup>300</sup> Similar evidence can be found in presidential speeches and statements, as well as statements made by executive branch officials. The latter can be thought to be representing the President’s position unless a higher-ranking executive branch official, including the President him or herself, states otherwise.

### 3. Identifying Clear Statutory Authorization

A second way that a President could defeat a reformulated major questions doctrine challenge is by demonstrating clear *statutory* authorization to promulgate the challenged measure. Note that this is a

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<sup>299</sup> U.S. CONST. art. II, § 3.

<sup>300</sup> See, e.g., *West Virginia*, 142 S. Ct. at 2604 (“The White House stated that the Clean Power Plan would ‘drive a[n] . . . aggressive transformation in the domestic energy industry.’” (quoting a White House Fact Sheet)).

slightly different inquiry than the inquiry required by the current major questions doctrine, which looks for “clear *congressional* authorization.”<sup>301</sup> The reformulated doctrine’s reference to “statutory” authorization, rather than “congressional” authorization, is intended to reflect the fact that the Constitution assigns both the President and Congress a role in the federal lawmaking process.

At bottom, the idea behind requiring courts to check for clear statutory authority is that, when the President’s agents already have such authorization, the President has no Recommendation Clause obligation to recommend that Congress agree to *re-grant* that authorization. But by the other side of that same coin, if a reviewing court concludes that the President did *not* have “clear statutory authorization,” then the court could conclude that the President has violated the narrow recommendation authority (and duty) vested in the President by the Recommendation Clause. In such a scenario, the President can be thought of as having fallen short of the duty to make a recommendation to Congress and, in so doing, as having sought to transform the President’s limited power to “*recommend*”<sup>302</sup> measures for Congress’s “[c]onsideration,”<sup>303</sup> into the much stronger power to *dictate* retroactively what measures must be treated as law.

How might a court applying the reformulated major questions doctrine identify whether the President has “clear statutory authorization” to undertake the challenged regulatory measure? It is here that the initial judicial presumption concerning a regulatory measures “unheralded-ness” can be tested. Three of the factors offered in Justice Gorsuch’s concurring opinion in *West Virginia* may provide a helpful means of performing the necessary analysis.<sup>304</sup>

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<sup>301</sup> *Id.* at 2609 (citations omitted) (quotations omitted) (emphasis added).

<sup>302</sup> U.S. CONST. art. II, § 3 (emphasis added).

<sup>303</sup> *Id.*

<sup>304</sup> Justice Gorsuch’s *West Virginia* concurrence contains a fourth factor that this Article does not embrace. The fourth factor states that “courts must look to the legislative provisions on which the agency seeks to rely with a view to their place in the overall statutory scheme,” on the grounds that agencies may not “seek to hide elephants in mouseholes.” *West Virginia*, 142 S. Ct. at 2622 (Gorsuch, J., concurring) (internal quotations) (citations omitted). This “elephants in mouseholes” factor is susceptible to critiques of the current major questions doctrine that I have published elsewhere. Specifically, determining how “big” or “major” (or elephant-sized) a problem might be presents a political question that federal courts are poorly positioned to answer. See Chad Squitieri, *Can Major-Questions Doctrine Actually Get Congress to Legislate Again?*, NAT’L REV. (July 5, 2022, 12:05 PM), <https://www.nationalreview.com/bench-memos/can-major-questions-doctrine-actually-get-congress-to-legislate-again/> (“[B]ecause federal judges are constitutionally insulated

The first of Justice Gorsuch's factors concerns the "focus of the statute the agency invokes in relation to the problem the agency seeks to address."<sup>305</sup> As an example of this factor at work, Justice Gorsuch offers the Court's decision in *Nat'l Fed'n of Indep. Bus.*<sup>306</sup> In that case, the "Court found a clear statement lacking when OSHA sought to impose a nationwide COVID-19 vaccine mandate based on a statutory provision that was adopted 40 years before the pandemic and that focused on conditions specific to the workplace rather than a problem faced by society at large."<sup>307</sup> In other words, the idea is that the Occupational Safety and Health Act of 1970 ("OSH Act") could not have given the President any specific power to address the COVID-19 pandemic, which arose nearly 50 years after the OSH Act was enacted.<sup>308</sup>

When applying this first factor within the confines of the reformulated major questions doctrine, a court would note that, if the President thought it "necessary and expedient" to undertake a regulatory measure to address a new issue, then the President was required to recommend that Congress agree to grant new legal authority to address that new issue—not seek to bypass congressional input by purporting to "discover" a new power in an old statute that was enacted pursuant to legislative compromises that never contemplated the new power in question. Moreover, a court applying the reformulated major questions doctrine could note (like the Court did in *Nat'l Fed'n of Indep. Bus.*) that multiple bills had been presented and rejected by Congress, which would have empowered the executive branch to address the

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from politics, they are particularly ill-suited to identify which questions are of enhanced political importance."). As Judge Willett explains, "[t]he elephants-hiding-in-mouseholes canon/doctrine/principle supplants textualism with purposivism." *Thomas v. Reeves*, 961 F.3d 800, 825 (5th Cir. 2020) (Willett, J., concurring). That is in part because "[r]easonable judicial minds can, and do, differ" as to what makes an elephant. *Id.* "Perhaps what lurks in the mousehole is, actually, a rather plump mouse." *Id.* (quotation and citation omitted). "Or perhaps what some take for a mousehole is, actually, a rather cramped circus tent." *Id.* (quotation and citation omitted). In short, "pachyderms and rodents are in the eye of the beholder." *Id.* But see Michael Rappaport, *The Unnecessary Major Questions Doctrine*, L. & LIBERTY BLOG (July 27, 2023), <https://lawliberty.org/the-unnecessary-major-questions-doctrine/> (arguing that originalists can embrace the "elephants in mouseholes canon").

<sup>305</sup> *West Virginia*, 142 S. Ct. at 2623 (Gorsuch, J., concurring).

<sup>306</sup> *Id.* (discussing *Nat'l Fed'n of Indep. Bus. v. OSHA*, 595 U.S. 109 (2022)).

<sup>307</sup> *Id.*

<sup>308</sup> Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590.

issue in question.<sup>309</sup> Such bills are relevant to a court applying the reformulated major questions doctrine because the bills can serve as additional evidence that Congress has not previously agreed to grant the authority that the President purports to find in an old statute.<sup>310</sup>

Note that this first factor is *not* asking what *Congress* intended to accomplish via the statute in question. That sort of analysis would be in tension with textualism on the grounds that it seeks to elucidate congressional intent.<sup>311</sup> This first factor is distinct from that sort of inquiry into congressional intent because the first factor considers the types of harms that a reasonable congressional *outsider* would understand the statute in question to be remedying. In this sense, the first factor is similar to what Professor Samuel L. Bray has referred to as the “mischief rule.”<sup>312</sup>

As Professor Bray explains, “[t]he mischief rule instructs an interpreter to consider the problem to which the statute was addressed, and also the way in which the statute is a remedy for that problem.”<sup>313</sup> For example, a statute requiring a train conductor to blow a train whistle and apply the train brakes when the conductor discovers an “animal” on the train tracks does not require the conductor to blow the whistle and apply the breaks for “[s]nakes, frogs, and fishing worms.”<sup>314</sup> That is because the “mischief” sought to be corrected by the animals-on-the-train-tracks statute is “train derailments,” which the ordinary reader recognizes as occurring when a train encounters animals such as cows and buffalo, but not frogs and fishing worms.<sup>315</sup>

Professor Bray defends the mischief rule as being consistent with textualism on the grounds that the legal “context” that an interpreter can consider when giving meaning to statutory text “includes the setting of legal enactments, one aspect of which is the mischief” that the legal enactment

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<sup>309</sup> See *Nat’l Fed’n of Indep. Bus.*, 595 U.S. at 113 (“Indeed, although Congress has enacted significant legislation addressing the COVID–19 pandemic, it has declined to enact any measure similar to what OSHA has promulgated here.”).

<sup>310</sup> *Id.*

<sup>311</sup> See *supra* Part I.A.

<sup>312</sup> Samuel L. Bray, *The Mischief Rule*, 109 *GEO. L.J.* 967, 968 (2021); see also Rappaport, *supra* note 304 (“[T]he Supreme Court does not need to employ a [major questions] doctrine that conflicts with originalism in order to limit agency excesses. Instead, those excesses can be constrained through various originalist methods, such as . . . the mischief canon.”).

<sup>313</sup> Bray, *supra* note 312, at 968.

<sup>314</sup> *Id.* (quoting *Nashville & K. R. Co. v. Davis*, 78 S.W. 1050, 1050 (Tenn. 1902)).

<sup>315</sup> *Id.*

seeks to remedy.<sup>316</sup> Justice Gorsuch's first factor can thus be understood as an application of the type of mischief rule that Professor Bray defends. Like how a textualist jurist can determine if frogs and fishing worms fall within the "mischief" that the animals-on-the-train-tracks statute was designed to remedy, a judge can consider, say, whether regulating apartment evictions was the sort of "mischief" that the Public Health Services Act sought to remedy when it vested authority in the CDC.<sup>317</sup> Put more clearly in terms of the reformulated major questions doctrine: if the President is relying on statutory authority addressing mischiefs *X* and *Y* in order to address mischief *Z*, then the President needs to recommend to Congress that Congress agree to grant the authority to address mischief *Z*. This would prevent the President from bypassing congressional input (which, if not bypassed, might have resulted in granting an agency the authority to, say, regulate mischief *Z – 1* or mischief *Z + 4*) in an effort to unilaterally squeeze a new power out of an old statute.

A second factor from Justice Gorsuch's *West Virginia* concurrence considers "the agency's past interpretations of the relevant statute."<sup>318</sup> In offering an example of this second factor, Justice Gorsuch again points to *Nat'l Fed'n of Indep. Bus.*, where "the Court found it telling that OSHA, in its half century of existence, had never before adopted a broad public health regulation under the statute that the agency sought to invoke as authority for a nationwide vaccine mandate."<sup>319</sup> Justice Gorsuch also notes that the Court deemed it relevant in *Brown & Williamson* "that for decades the FDA had said it lacked statutory power to regulate cigarettes."<sup>320</sup> The idea behind this second factor, as Justice Gorsuch put it, is that "the want of an assertion of power by those who presumably would be alert to [the power] is significant in determining whether such power was actually conferred."<sup>321</sup>

From a textualist perspective, this second factor can be defended on two grounds. First, an agency's historical interpretation of a statute constitutes evidence concerning what congressional outsiders *in general* thought a

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<sup>316</sup>*Id.* at 973 (italics omitted). Unlike Justice Barret's consideration of "context," which accounts for a particular type of "majorness," *see supra* Part I.E, identifying the "mischief" targeted by a statute does not require weighing economic and political significance.

<sup>317</sup>*Ala. Ass'n of Realtors v. Dep't of Health and Hum. Servs.*, 141 S. Ct. 2485, 2486 (2021); 42 U.S.C. § 264(a).

<sup>318</sup>142 S. Ct. at 2623 (Gorsuch, J., concurring).

<sup>319</sup>*Id.* (quotations omitted) (brackets omitted) (citation omitted).

<sup>320</sup>*Id.* (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 158–59 (2000)).

<sup>321</sup>*Id.* (quotations omitted) (brackets omitted) (citation omitted).

statute meant at the time the statute was enacted. In other words, the agency's perspective is evidence of what other congressional outsiders would take the statute to mean.<sup>322</sup> If an agency's interpretation of a statute suggests that the agency does not have the authority to regulate as to *X*, then that is evidence that congressional outsiders in general would agree that the statute does not empower the agency to regulate as to *X*. And the closer in time that an agency's interpretation of a statute is to when the statute was enacted, the stronger the evidence.<sup>323</sup>

A second textualist grounds upon which Justice Gorsuch's second factor can be defended is that an agency's historical interpretation constitutes evidence concerning what a *specific* group of congressional outsiders thought a statute meant at the time the statute was enacted. As Justice Barrett explains, "[i]t is not clear . . . that textualists must pick a single perspective applicable across all statutes."<sup>324</sup> Under that view, some statutes might call for the perspective of a "layperson," but other statutes—such as those employing technical terms regarding a substantive area that an agency has expertise in—might call for interpreting the law from a narrower set of congressional outsiders. Thus, an agency's historical interpretations could constitute evidence concerning what a particularly relevant subset of congressional outsiders (which includes expert agency officials) thought a statute meant. And again, the closer in time an agency's interpretation of a statute is to when the statute was enacted, the stronger the evidence. Put in terms of the reformulated major questions doctrine, Justice Gorsuch's second factor thus focusses on an agency's own interpretations in order to glean evidence concerning whether the agency is seeking to claim statutory authority that the agency does not have, but that the President must recommend for Congress's consideration.

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<sup>322</sup>Some readers might contend, however, that agencies are in some sense congressional insiders themselves because of the significant role agencies play in shaping legislative language. See Christopher J. Walker, *Legislating in the Shadows*, 165 UNIV. PA. L. REV. 1377, 1378–79 (2017) (noting that "[f]ederal agencies help draft statutes" by "propos[ing] substantive legislation to Congress that advances agency and Administration objectives . . . weigh[ing] in substantively . . . on pending legislation," and "providing 'technical drafting assistance' on legislation that originates from congressional staffers").

<sup>323</sup>See Rappaport, *supra* note 304 ("Another originalist canon that would promote the same concerns as the [major questions doctrine] is that of contemporaneous exposition, which holds that interpretations reached near the time of a statute's enactment are entitled to greater weight than later interpretations.").

<sup>324</sup>Barrett, *Congressional Insiders and Outsiders*, *supra* note 26, at 2202.

Finally, a third factor offered by Justice Gorsuch in his *West Virginia* concurrence concerns potential “mismatch[es] between an agency’s challenged action and” the agency’s “assigned mission and expertise.”<sup>325</sup> Here Justice Gorsuch explains that “[w]hen an agency has no comparative expertise in making certain policy judgments,” the agency would “presumably . . . not” be statutorily “task[ed] . . . with” making such policy judgments.<sup>326</sup> Thus, in *Ala. Ass’n of Realtors*, “th[e] Court rejected an attempt by a public health agency to regulate housing.”<sup>327</sup> And in *Nat’l Fed’n of Indep. Bus.*, “the Court rejected an effort by a workplace safety agency to ordain broad public health measures that fell outside its sphere of expertise.”<sup>328</sup>

From a textualist perspective, this third factor can be defended on the grounds that, if a statute employs specialized language that is used by a specialized subset of congressional outsiders, and the agency is within that specialized subset of congressional outsiders, then the agency’s understanding of the statute is of particular significance. Viewed through the lens of the reformulated major questions doctrine, this third factor is thus highly relevant because it suggests that, when a President purports to find a power to take an administrative agency in a new substantive direction, it is a signal that the President may perhaps be overstepping the President’s limited authority to seek *Congress’s buy-in* to take an agency in that new substantive direction.

A statute constitutes the final culmination of particular political bargains (struck by the 536 actors in the federal lawmaking process) to assign a particular agency with the authority to regulate (and thus develop expertise) in regards to particular substantive topics. Empowering an agency to also regulate and develop expertise in regards to a new substantive topic might be a good idea. But it is not up to the President to make that decision alone. Instead, the President must work with Congress if the President wishes to grant an agency new statutory authority. And by working with Congress, the President might have to make political compromises to curtail, or perhaps further empower, the agency’s new authority in ways that the President might not have approved of had the President been free to act alone.

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<sup>325</sup> *West Virginia*, 142 S. Ct. at 2623 (Gorsuch, J., concurring).

<sup>326</sup> *Id.*

<sup>327</sup> *Id.* (citation omitted).

<sup>328</sup> *Id.* (quotations omitted) (brackets omitted) (citation omitted).

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In sum, the above-mentioned three factors from Justice Gorsuch's *West Virginia* concurrence may offer a helpful roadmap for courts seeking to identify "clear statutory authorization" within the meaning of the reformulated major questions doctrine. When a President seeks to discover an unheralded power in a long-extant statute, the reformulated major questions doctrine enables the President to defend that discovery by identifying clear statutory authorization. And to determine whether clear statutory authorization exists, courts may look to the mischief that the statute in question was designed to remedy, the agency's past interpretations of that statute, and whether the unheralded power falls within the substantive topic(s) that the statute assigned the agency to regulate and develop expertise in.

### C. Substantive Canon Textualists Can Embrace

Having explained how the reformulated major questions doctrine would work in practice, Part III.C will conclude by demonstrating how the reformulated major questions doctrine satisfies Justice Barrett's two-factor test and is thus a substantive canon that textualists can embrace.

#### 1. Reasonably Specific Constitutional Value

As to the first of Justice Barrett's two factors, the reformulated major questions doctrine is "connected to a reasonably specific constitutional value."<sup>329</sup> Specifically, the reformulated doctrine is grounded in the relationship between two constitutional provisions (Article I, Section 7 and Article II, Section 3) which work together to triangulate a value in addressing national problems through a specific lawmaking process. In *Substantive Canons and Faithful Agency*, Justice Barrett defends the first factor of her test on two grounds. Both grounds serve to demonstrate that the constitutional value exhibited by the relationship between Article I, Section 7 and Article II, Section 3 qualifies as a "reasonably specific constitutional value."<sup>330</sup>

Justice Barrett first explains that, "[t]he more specific the value, the more even its application will be across a range of cases—lessening the concern that a court will invoke [the value] to tweak legislative bargains in the case-

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<sup>329</sup>Barrett, *Substantive Canons*, *supra* note 1, at 178.

<sup>330</sup>*Id.*



by-case fashion that the rule of law norm counsels against.”<sup>331</sup> For example, the concept of “fairness,” which “[a]t some point . . . rises to the level of a constitutional concern,” is “a nebulous value susceptible to many different interpretations.”<sup>332</sup> One could make (and indeed, many have made) a similar argument regarding the current major questions doctrine’s focus on economic and political “majorness,” which is a nebulous concept that is difficult to define.<sup>333</sup>

By comparison, a concept such as “[s]tate sovereignty . . . is far more concrete,” and “[i]ts specificity ameliorates the rule of law concern about uneven, *ad hoc* statutory applications.”<sup>334</sup> So too with the constitutional value captured by the relationship between Article I, Section 7 and Article II, Section 3. A court considering whether the President has run afoul of the specific lawmaking functions afforded to the President by those two constitutional provisions would not be required to exercise any judgment as to whether the President *should* have undertaken a regulatory measure. Nor would the court have to determine what a *better* regulatory measure might have looked like. Those value-laden inquiries could be described as nebulous, and thus would be poor candidates for a substantive canon’s foundation. But a court applying the reformulated major questions doctrine would look for evidence speaking to more concrete questions: namely, whether the *President* thought a measure to be necessary and expedient, and whether the President’s administrative agents had clear authority to undertake the measure in question.

The second grounds on which Justice Barrett defended the first factor in her test is that “the more specific the value, the better Congress can anticipate its effect on a statute’s subsequent interpretation.”<sup>335</sup> For example, “even if Congress could not have initially predicted that the Supreme Court would deem state sovereignty to be worthy of extra protection, the articulation of the canon in the case law has put Congress on notice of how this value will affect the interpretation of its legislation.”<sup>336</sup> An example on the other end of

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<sup>331</sup> *Id.*

<sup>332</sup> *Id.* at 179.

<sup>333</sup> *E.g.*, Kevin O. Leske, *Major Questions About the “Major Questions” Doctrine*, 5 MICH. J. ENV’T & ADMIN. L. 479, 481 n.5, 499 (2016) (listing critiques concerning the difficulty in identifying an objective standard of majorness).

<sup>334</sup> Barrett, *Substantive Canons*, *supra* note 1, at 179.

<sup>335</sup> *Id.* at 178.

<sup>336</sup> *Id.* at 179.

the specificity-spectrum is the more abstract “absurdity doctrine,”<sup>337</sup> which permits judges to “deviate from even the clearest statutory text when a given application would otherwise produce” a result that the judge thinks “absurd.”<sup>338</sup> Because Congress can never be sure as to what any one judge might think be absurd, “the absurdity doctrine, even once stated in case law, cannot, by its very nature, provide Congress with . . . clear direction.”<sup>339</sup>

The current major question doctrine’s focus on “majorness” is more akin to the absurdity doctrine (which leaves lawmakers unable to anticipate judicial rulings) than the state sovereignty canon (which leaves lawmakers better able to anticipate judicial rulings). Even if lawmakers could be said to be on notice after *West Virginia* that they must make “major” delegations explicit, majorness still has, to use the words of then-Judge Kavanaugh, “a bit of a ‘know it when you see it’ quality” to it.<sup>340</sup> By comparison, the reformulated major questions doctrine’s policing of the line separating presidential recommendations from presidential dictations is designed to protect Congress’s authority to “[c]onsider[]”<sup>341</sup> the President’s recommendations. Given as much, “Congress can anticipate” the reformulated major questions doctrine’s “effect” because the reformulated doctrine is designed specifically to protect Congress’s deliberative processes from presidential encroachments. In this sense, the reformulated major questions doctrine actually *strengthens* Congress’s ability to anticipate what the law is because the reformulated doctrine protects the value that the Constitution places in giving Congress the opportunity and President-supplied information that Congress can use to deliberate. The reformulated doctrine thus satisfies the first of Justice Barrett’s two factors.

## 2. Actual Promotion

Applying Justice Barrett’s second factor to the reformulated major questions doctrine requires asking whether the reformulated doctrine “actually promote[s]” the constitutional value captured by the relationship between Article I, Section 7 and the Recommendation Clause of Article II,

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<sup>337</sup> *See id.*

<sup>338</sup> John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2388 (2003).

<sup>339</sup> Barrett, *Substantive Canons*, *supra* note 1, at 179.

<sup>340</sup> *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 423 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing *en banc*).

<sup>341</sup> U.S. CONST. art. II, § 3.

Section 3.<sup>342</sup> The application of this second factor thus turns in part on one's understanding of the Recommendation Clause itself. That is because, as Justice Barrett explains, "[o]ne's approach" to determining whether a canon actually promotes a particular constitutional provision "depends upon one's view of the substantive meaning of the provision involved."<sup>343</sup>

If one concludes, as was demonstrated in Part II.A, that the Recommendation Clause seeks to leverage the President's fact-finding powers by *requiring* the President to recommend measures for Congress's *consideration*, then the reformulated major questions doctrine easily satisfies Justice Barrett's second factor. By policing the line between presidential recommendations and dictations, the reformulated major questions doctrine works to ensure that the President stays within the limited (but important) federal lawmaking role assigned to the President by Article I, Section 7 and Article II, Section 3. In other words, the reformulated major questions doctrine "actually promotes" the constitutional value contained in the relationship between those two constitutional provisions because it helps courts ensure that the President's involvement at the start of the federal lawmaking process is limited to making recommendations, not retroactive dictations.

Note, however, that the reformulated major questions doctrine does *not* permit courts to force the President to make recommendations if the President does not determine it "necessary and expedient" to do so. To the contrary, the reformulated major questions doctrine only applies *after* the President has taken regulatory action (*i.e.*, after the President's actions signal *prima facie* evidence that the President determined a measure to be "necessary and expedient"). If a President does not think a measure "necessary and expedient" enough to deserve federal attention, then the President does not need to make a recommendation to Congress—and the reformulated major questions doctrine could not be used to force the President to make any such recommendation. If the reformulated major questions doctrine could be used to force the President to make a recommendation (which it cannot), then the reformulated doctrine could be criticized as failing to "actually promote" the constitutional value captured by relationship between Article I, Section 7 and Article II, Section 3 on the grounds that the Recommendation Clause leaves it to the President, and not the courts, to determine when a recommendation is "necessary and expedient."

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<sup>342</sup>Barrett, *Substantive Canons*, *supra* note 1, at 178.

<sup>343</sup>*Id.* at 181.

But the reverse also holds true: the reformulated major questions doctrine ensures that a President who does *not* make a recommendation does *not* simultaneously act as if the President (or one of the President's predecessors) has already successfully convinced Congress to approve of such a recommendation. In other words, the reformulated doctrine *would* apply when the President has already determined to act through a regulatory measure, thus presenting to a reviewing court the question of whether the agency had the authority to act through that regulatory measure rather than require the President to ask Congress to agree to vest the agency with new statutory authority.

### 3. Potential Critiques

Having defended the reformulated major questions doctrine as being consistent with Justice Barrett's two-factor test, Part III.C.3 will now respond to four potential critiques. The first critique is that Justice Barrett's defense of substantive canons is not itself consistent with textualism. On this front, consider recent scholarship by Professors Benjamin Eidelson and Matthew C. Stephenson, which critiques Justice Barrett's efforts to ease the tensions between textualism and substantive canons.<sup>344</sup>

Professors Eidelson and Stephenson are correct in explaining that Justice Barrett (among other textualist justices) has sought to ease the tensions between textualism and substantive canons by recognizing courts as faithful agents of the *Constitution*, rather than faithful agents of *Congress*.<sup>345</sup> Faithful agents of Congress might balk at using substantive canons to stretch the words that Congress enacted into law because doing so is in tension with the idea that Congress is the principal and courts are Congress's faithful agents. But as this Article's focus on the President's lawmaking role reminds, textualist jurists should not think of themselves as faithful agents of Congress. The federal judiciary is coequal to Congress and the President, not an agent of either. Textualist jurists should think of themselves as faithful agents of the Constitution—or to use the terminology I prefer, faithful agents of the People (who, of course, have expressed their will through the Constitution).<sup>346</sup> Faithful agents of the People can more readily embrace constitutionally inspired substantive canons that stretch statutory language in

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<sup>344</sup> See Eidelson & Stephenson, *supra* note 18, at 43–63.

<sup>345</sup> *Id.* at 5, 43.

<sup>346</sup> Squitieri, *Majorness*, *supra* note 21, at 481 (quotations omitted).

the name of defending constitutional values.<sup>347</sup> The idea is that, by promoting a constitutional value, federal jurists are still interpreting law consistent with their obligations as a faithful agent to the People.

But Professor Eidelson's and Professor Stephenson's critique of Justice Barrett goes slightly awry when they suggest that, if a constitutionally inspired substantive canon is not directly enforcing a constitutional requirement, then the canon must be protecting broad constitutional "penumbras."<sup>348</sup> To be sure, Professors Eidelson and Stephenson are correct to note that many textualists openly reject enforcing broad constitutional penumbras in other contexts—such as in the Fourth Amendment context.<sup>349</sup> But in understanding substantive canons as necessarily protecting broad penumbras, Professors Eidelson and Stephenson put too little weight in Justice Barrett's first factor, which calls explicitly for a focus on reasonably *specific* constitutional values.

Justice Barrett's requirement that substantive canons be grounded in reasonably *specific* constitutional values helps ensure that legitimate substantive canons will avoid promoting the type of broad, penumbra-like values that Professors Eidelson and Stephenson refer to. In any event, even if Professors Eidelson and Stephenson are correct to read Justice Barrett as approving of substantive canons grounded in generalized values in some settings, their critique does not undermine the reformulated major questions doctrine proposed in this Article. That is because the reformulated major questions doctrine is a substantive canon that serves to promote a specific constitutional value tied directly to two specific constitutional *provisions*. Whatever the dividing line separating specific and general constitutional values might be, the value captured by the interplay between Article I, Section 7 and Article II, Section 3 (which together triangulate the precise procedures for addressing national problems through federal statutes) no doubt falls on the specific side of the divide.<sup>350</sup>

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<sup>347</sup> See Barrett, *Substantive Canons*, *supra* note 1, at 168–69.

<sup>348</sup> Eidelson & Stephenson, *supra* note 21, at 58, 62.

<sup>349</sup> *Id.* at 58–61.

<sup>350</sup> Grounding the reformulated doctrine in precise constitutional provisions also assists the reformulated doctrine avoid a critique lodged by Professor Daniel E. Walters against the current major questions doctrine. Professor Walters contends that the current doctrine's focus on majorness demonstrates that the current doctrine is too unmoored from authoritative law, which indicates in his view that the current doctrine is notably different from the sorts of substantive canons that jurists have previously embraced. See Walters, *supra* note 187, at 42 (arguing that the current major questions doctrine has no nexus with authoritative law).

A second critique one might raise is that the reformulated doctrine leaves too much discretion to judges to determine how old a statute must be before it is “long-extant,” or how unexpected a power must be before it is “unheralded.” To be sure, those inquiries leave judges significant room to maneuver. But the judicial discretion exercised in those inquiries is the type of *legal* discretion that textualists routinely recognize as being inherent in elucidating the historical context surrounding a statute’s enactment.<sup>351</sup>

It is entirely consistent with textualism for a judge to take note of the fact that a statute is particularly old, and is thus—for that very reason—unlikely to empower the President’s administrative agents to remedy a new problem that came into existence long after the statute was enacted. The discretion inherent in such an inquiry is different than the type of *political* discretion that a judge must exercise to determine just how significant a political question must be before it is of “major” significance.<sup>352</sup> In short, so long as a canon asks a judge to exercise legal discretion, rather than political discretion, the canon can be accepted by textualists.

A third critique one might raise is that the reformulated major questions doctrine has no historical pedigree. A stronger version of the critique might even stress that courts have not relied historically on the Recommendation Clause to limit the President’s regulatory power. But this critique seems premised on the mistaken idea that textualists are for some reason prohibited from embracing new things. They are not.

As Justice Barrett explains, if “federal courts once possessed the power to develop substantive canons” such as the rule of lenity, “there is no reason to believe that [federal courts] lost that power as time progressed.”<sup>353</sup> Under that line of thought, the Article III judicial power vested in federal courts empowers federal courts to develop new substantive canons *today*—just as Article III empowered federal courts to develop older substantive canons *long ago*. And when developing new substantive canons, federal courts would be wise to account for how new changes in the world risk upsetting constitutional values in new ways. One such change, which is relevant to adopting the reformulated major questions doctrine, is the rise of the modern

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<sup>351</sup> See Grove, *supra* note 19, at 280 n.92.

<sup>352</sup> See Squitieri, *Majorness*, *supra* note 21, at 465, 468; see also *Mistretta v. United States*, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting) (stating that “a certain degree of discretion, and thus of lawmaking, inheres in most executive or judicial action.” (emphasis omitted)).

<sup>353</sup> Barrett, *Substantive Canons*, *supra* note 1, at 111.

administrative state—which gives modern Presidents new opportunities to overstep their roles.

The modern administrative state empowers modern Presidents to evade the constitutional value in in shaping statutory authority through particular political procedures in ways that past Presidents could not.<sup>354</sup> When faced with a new problem, Presidents of yore had to recommend that Congress work with the President to grant executive agents new power. But the modern President, armed with a phone and a pen, can cut Congress out of the picture. Today, a President faced with a new problem can simply task executive branch agencies with creating new law (*e.g.*, regulations) themselves—no congressional input required. This state of affairs allows the modern President to undermine the Constitution’s specific lawmaking procedures. And so while it may be true that courts have not always had reason to create something like the reformulated major questions doctrine, today such a reason exists—and textualists need not be hesitant to recognize as much.

Finally, a fourth potential critique of the reformulated major questions doctrine is that the doctrine interferes with efforts to *intentionally* delegate broad authority to an agency so that the agency can later use that broad authority to address new problems in the future. The response to this third critique is simple: Yes, the reformulated major questions doctrine does prevent those types of delegations. One idea behind the reformulated doctrine is that, even when the President and Congress are perfectly content to have a President conveniently “discover” a new power in an old statute, the Constitution demands that the President and Congress nonetheless abide by specific procedures when creating new “measures” to address new problems. Those procedures empower the President to recommend measures for Congress’s consideration; but the procedures do not empower Congress to forego their duty to “consider,” and ultimately approve, those recommended measures if Congress wishes those recommended measures to become law. The Constitution may require that new problems be addressed through inefficient or even unwise procedures, but those procedures are required nonetheless.

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<sup>354</sup> See *West Virginia v. EPA*, 142 S. Ct. 2587, 2619 (2022) (Gorsuch, J., concurring) (referring to “the explosive growth of the administrative state since 1970”); Rappaport, *supra* note 304 (“In the last generation, administrative agencies have not merely exercised tremendous power but exploited statutory authority that was designed for one set of problems to address other problems.”).

## CONCLUSION

Textualists have important reasons to object to both the substantive and linguistic conceptions of the major questions doctrine that are currently on offer. But as this Article has demonstrated, the major questions doctrine can be reformulated so as to be consistent with the textualist framework offered by Justice Barrett in her influential scholarship. The key to reformulating the major questions doctrine is to ground the reformulated doctrine in what Justice Barrett labeled a “reasonably specific constitutional value.”<sup>355</sup> And that constitutional value can be located in the relationship between Article I, Section 7 and the Recommendation Clause of Article II, Section 3. Together, those two constitutional provisions triangulate a value in shaping statutory authority through the precise lawmaking roles assigned to the President, House, and Senate.

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<sup>355</sup>Barrett, *Substantive Canons*, *supra* note 1, at 178.