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The Role of Importance in Resolving Questions of Agency Authority *

by

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I. Introduction and Summary

In the Supreme Court's 2021-2022 term, the Court formalized what it has labeled the major questions doctrine. The doctrine, according to Chief Justice Roberts in *West Virginia v. EPA*, "refers to an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted."[1] Courts should have "skepticism" when statutes appear to delegate to agencies questions of major political and economic significance, which skepticism the government can only overcome "under the major questions doctrine" by "point[ing] to 'clear congressional authorization' to regulate in that manner."[2]

According to Justices Gorsuch and Alito's slightly different account, "courts have developed certain 'clear-statement' rules," which "assume that, absent a clear statement otherwise, Congress means for its laws to operate in congruence with the Constitution rather than test its

[1] 142 S.Ct. 2587, 2609 (2022).
[2] Id. at 2614 (citation omitted).

bounds."[3] "Article I's Vesting Clause has its own" clear-statement rule, namely, "the major questions doctrine."[4]

Taken at face value, the Court's major questions doctrine insists at least on unambiguous statutory authority, and perhaps even unambiguous and specific authority, if Congress intends to delegate questions of major political or economic significance to agencies. The doctrine has been almost universally assailed on the right by scholars who argue that the doctrine is inconsistent with textualism and on the left by those who claim it is a recently invented, functionalist tool devised to reach deregulatory results.

One can explain at least some of the cases, however, in a way that constructs a coherent doctrine in which importance has a significant but narrow role in resolving interpretive questions involving ambiguity or uncertainty. Thus understood, such a doctrine could be defensible, if not as a substantive canon, then as a kind of linguistic canon. Unlike other linguistic canons, such a canon would be about how people and lawmakers use language to accomplish results in a circumscribed range of contexts – namely, the delegation of important authorities, whether to other private actors, to government actors in the Constitution, or to government actors in the executive department. But unlike substantive canons, it would not relate to a substantive value encoded in the Constitution or in longstanding tradition. Existing empirical work about how legislators legislate, and insights from the philosophy of language, suggest that such a doctrine may be consistent with textualism, and historical research further reveals that a canon of this type may be a longstanding feature of constitutional, contract, and statutory interpretation in related contexts.

A certain type of "importance doctrine," when properly applied, therefore has a legitimate role to play in interpretation, and particularly in interpreting legal instruments that delegate authority to others. Such a doctrine could play a narrow, albeit important, role in keeping agents – and agencies – in their proper lanes. When agencies exercise power that is "extraordinary," at least in the sense of being outside their ordinary expertise or methods, judges should be skeptical of their actions because ordinary people and ordinary legislators would be, too.

Thus, when the FDA asserts authority to regulate tobacco, when the CDC asserts authority over landlord-tenant relations, or when the FCC purports to have the power to decide whether, how, and to what extent to regulate the Internet, the importance of the matters and the extraordinary nature of the action are useful considerations when judging the legality of the agencies' actions.

II. Major Questions and Its Critics

As noted, the Court's major questions doctrine has been assailed by scholars and commentators both right and left. Many argue that the doctrine is inconsistent with textualism. Michael Rappaport has said that the doctrine "neither enforces the Constitution nor applies

[3] Id. at 2616 (Gorsuch, J., concurring).
[4] Id. at 2619.

ordinary methods of statutory interpretation" and "seems like a made up interpretive method for achieving a change in the law that the majority desires."[5] Tom Merrill has written that the doctrine allows courts to "rewrite the scope of [agencies'] authority," and that it "will invite judges to overturn agency initiatives based on reasons other than the court's best judgment about what Congress has actually authorized the agency to do."[6] Others have been even more critical. Daniel Deacon and Leah Litman argue that the doctrine "directs courts not to discern the plain meaning of a statute using the normal tools of statutory interpretation," and that "otherwise unambiguous statutes do not appear good enough when it comes to policies the Court deems 'major.'"[7] It "supplies an additional means for minority rule in a constitutional system that already skews toward minority rule,"[8] "provides additional mechanisms for polarization,"[9] and "exacerbates several important institutional and political pathologies."[10]

These criticisms are, to a large extent, warranted. There are at least four versions of the doctrine that the Supreme Court has articulated, none fully defensible. The Court deploys one version at *Chevron*'s first step and another at *Chevron*'s preliminary "step zero."[11] At step one, the Court uses the doctrine to conclude that the statute is clear and unambiguous, when in reality everyone knows that the statute is ambiguous and courts should therefore defer to the agency (under the framework). At step zero, the Court uses the doctrine to conclude that the framework should not apply at all, and the Court awkwardly appears to resolve the major question for itself.

A third version of the doctrine is somewhat like what Justices Gorsuch and Alito describe in *West Virginia v. EPA*. Perhaps the major questions doctrine is simply the nondelegation doctrine deployed as a canon of constitutional avoidance, or a blend of avoidance and a clear-statement requirement. Under the modern formulation, constitutional avoidance allows courts to adopt narrowing constructions of statutes when they have "serious doubts" as to the statute's constitutionality.[12] This version of the doctrine would be hard to defend because invoking constitutional avoidance is generally indefensible: it allows courts to rewrite statutes without having actually to decide that the statute as Congress wrote it would violate the Constitution.

The fourth and most recent version, at least as most academics understand it, is that the doctrine is one among many clear statement rules, such as the demand for a clear statement to abrogate sovereign immunity, to apply the Administrative Procedure Act to the President, or

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[5] Michael Rappaport, "Against the Major Questions Doctrine," THE ORIGINALISM BLOG (Aug. 15, 2022), https://perma.cc/U92U-YQ7E.
[6] Thomas W. Merrill, "*West Virginia v. EPA*: Questions About 'Major Questions,'" THE VOLOKH CONSPIRACY (July 28, 2022), https://perma.cc/W65E-APE7.
[7] Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 Va. L. Rev. __ (forthcoming 2023), paper at 1, 3.
[8] Id. at 1, 6.
[9] Id. at 6.
[10] Id. at 6.
[11] Chevron USA, Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984); Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).
[12] *See* ILAN WURMAN, ADMINISTRATIVE LAW THEORY AND FUNDAMENTALS: AN INTEGRATED APPROACH 20-21 (discussing cases).

to make regulatory requirements applicable to ships sailing under foreign flags. Major questions, at least as currently theorized, also seems a poor fit for this category. Ordinarily clear statement rules exist to advance some constitutional value—like federalism or state sovereignty—and apply even against otherwise unambiguous statutes. But Congress can take the relevant action so long as it speaks clearly *and* specifically. In the major questions cases there is a constitutional value (nondelegation) that may be motivating the Court, but it is not fully clear how the canon relates to or advances the doctrine, and, if it does, whether Congress's delegations would be constitutional even if it did speak clearly and specifically.

There is a way to explain, if not all, then certainly some of the cases, however, that constructs a coherent and defensible version of the doctrine. In each, the statute was plausibly ambiguous. And, in each, the Court can be understood to have resolved the ambiguity by adopting the narrower reading of the statute on the ground that, as a matter of legislative intent, it was more plausible to think that Congress intended the narrower reading. Thus, the Court arrived at what it deemed the best reading of the statute, and not necessarily a clear or unambiguous reading. It is also possible that the Court is demanding unambiguous, though not necessarily specific, statutory language; and usually the best reading of an otherwise ambiguous statute is that it does not do major, controversial things without being clearer about it. That is just another way of saying, as Justice Scalia did, that "Congress does not hide elephants in mouseholes."[13] But sometimes a hole is elephant sized, and the best reading of the statute suggests that it contains an elephant whether or not Congress was clear about it.[14]

In other words, when the Court asks for a clear statement, it does not have to be understood as deploying the same concept as other clear statement rules – what some have called "super strong clear statement rules"[15] – where both clarity and specificity are required. When certain constitutional values are at stake, as noted, the Court has held that the best or plain reading of a statute is not enough; the Court wants to make sure that Congress thought very clearly and explicitly about that particular issue. In the major questions context, in contrast, the Court may simply be concluding that the best reading of the statute is one thing because it would have expected Congress to speak clearly if Congress had intended the other. Many substantive canons do operate this way – think the rule of lenity, which ambiguity triggers but which does not demand a clear and specific statement to override –but, as I shall argue, if major questions operates in this manner then it is possible to defend it as something other than a substantive canon.

True, there is language in the Court's cases that militate against this account as a descriptive matter. But consider the following statements from both older and recent cases. In *UARG v. EPA*, in striking down the EPA's action, Justice Scalia wrote, in part: "We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance,'" and the "power" the EPA asserted "falls comfortably within the class of authorizations that we have been reluctant to read into *ambiguous* statutory text."[16] In the eviction moratorium case, the Court held in the alternative, "Even if the text were *ambiguous*,

[13] Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001).
[14] A good example might be *King v. Burwell*, 576 U.S. 473 (2015).
[15] Id.
[16] 573 U.S. 302, 324 (2014) (emphasis added).

the sheer scope of the CDC's claimed authority under §361(a) would counsel against the Government's interpretation. We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance. That is exactly the kind of power that the CDC claims here."[17] In the vaccine-or-test case, Justices Gorsuch and Alito wrote that the doctrine guards "against *unintentional*, oblique, or otherwise *unlikely* delegations of the legislative power."[18] "Sometimes, Congress passes broadly worded statutes" and an agency subsequently "seek[s] to exploit some gap, ambiguity, or doubtful expression in Congress's statutes to assume responsibilities far beyond its initial assignment."[19] "The major questions doctrine," Gorsuch explains, "guards against this possibility by recognizing that Congress does not usually 'hide elephants in mouseholes.'"[20]

And in *West Virginia v. EPA*,[21] the Court elaborated upon the major questions doctrine and a majority of the Court for the first time used that term. The Court summarized the prior cases as follows:

> All of these regulatory assertions had a colorable textual basis. And yet, in each case, given the various circumstances, "common sense as to the manner in which Congress [would have been] likely to delegate" such power to the agency at issue made it very unlikely that Congress had actually done so. Extraordinary grants of regulatory authority are rarely accomplished through "modest words," "vague terms," or "subtle device[s]." Nor does Congress typically use oblique or elliptical language to empower an agency to make a "radical or fundamental change" to a statutory scheme. . . .
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> Thus, in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us "reluctant to read into ambiguous statutory text" the delegation claimed to be lurking there. To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to "clear congressional authorization" for the power it claims.[22]

The Court's analysis has none of the hallmarks of a "clear-and-specific-statement" rule. In each prior case, the assertion of authority had merely a "colorable" basis. The Court harps on "vague," "oblique," and "elliptical" language. The Court explicitly states that in the prior cases, "a merely plausible textual basis" and "ambiguous statutory text" was not enough. True, the Chief Justice declared not only that the Court was concerned with a "practical understanding of legislative intent," but also that "separation of powers principles" make the

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[17] Alabama Ass'n of Realtors v. Dep't of Health and Human Servs., 141 S.Ct. 2485, 2489 (2021) (emphasis added; quotation marks omitted; quoting UARG v. EPA, 573 U.S. 302, 324 (2014), and FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000)).
[18] NFIB v. OSHA, 142 S.Ct. 661, 669 (2022). (Gorsuch, J., concurring) (emphasis added).
[19] Id.
[20] Id.; *see also* Randolph J. May & Andrew K. Magloughlin, NFIB v. OSHA*: A Unified Separation of Powers Doctrine and* Chevron*'s No Show*, 74 S. Carolina L. Rev. 265, 271 (2022) (understanding this case as guarding against executive abuse of its legislative authorization).
[21] 142 S.Ct. 2587 (2022).
[22] Id. at 2609 (citations omitted).

Court reluctant to read ambiguities in a particular way. This suggests a substantive component to the canon. As the next section explains, that component is unnecessary.

III. Importance and Textual Analysis

What I have aimed to show thus far is that it is at least possible to conceptualize a doctrine that centers on resolving ambiguity. In this section I argue that the major questions doctrine so conceptualized would be more meritorious and consistent with textualism than other possible accounts, and which might already exist in areas of constitutional, contract, and statutory interpretation. It may also be driving the Court in its current cases, even if the Court has not been altogether clear about what it has been doing. On this conceptualization, the importance of a purported grant of authority would operate as a kind of linguistic canon: ordinarily, lawmakers and private parties tend to speak clearly, and interpreters tend to expect clarity, when those lawmakers or parties authorize others to make important decisions on their behalf.

Although "linguistic" in the sense that it is about how speakers use and interpret language, such an "importance canon" is unlike other linguistic canons: it is about how people and lawmakers use language in a circumscribed range of substantive contexts, namely, the delegation of important authorities to other parties. But it is unlike substantive canons: it does not flow from any substantive policy encoded in the Constitution or in longstanding tradition. One might call it a "quasi" linguistic canon, although the label does not much matter. Scholars have shown that the dividing line between linguistic and substantive canons is often thinner than traditionally believed,[23] and there may be ambiguity-resolving canons that defy either the linguistic or substantive label, such as the longstanding and contemporaneous interpretations canon.[24] However labeled, such a canon may be consistent with textualism, and specifically with empirical evidence regarding how Congress operates, with insights from the philosophy of language regarding how ordinary persons interpret instructions in high-stakes contexts, with background rules of interpretation, and with historical materials in constitutional, contract, and statutory interpretation from the Founding to today.

Congress's Drafting Practices

A recurring criticism of the Court's major questions doctrine, which would apply more generally to the use of importance to resolve interpretive questions, is that Congress does in fact delegate important questions to agencies. Empirical research has also shown that Congress does often legislate with deliberate ambiguity to achieve greater consensus.[25] The inquiry, however, is not whether Congress likes to delegate important questions through broad language—it often does—but rather whether it is likely to do so through ambiguous language.

The only available study on that question suggests that the major questions canon is an

[23] Kevin Tobia and Brian Slocum, *The Linguistic* and *Substantive Canons*, working paper on file with author.
[24] For a discussion of these canons, see Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 Yale L.J. 908 (2017).
[25] Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 NYU L. Rev. 575, 594-97 (2002).

accurate description of how Congress legislates.[26] Abbe Gluck and Lisa Bressman surveyed congressional drafters and described their findings as follows:

> Our findings offer some confirmation for the major questions doctrine—the idea that drafters intend for Congress, not agencies, to resolve these types of questions. More than 60% of our respondents corroborated this assumption. Only 28% of our respondents indicated that drafters intend for agencies to fill ambiguities or gaps relating to major policy questions; only 38% indicated that drafters intend for agencies to fill ambiguities or gaps relating to questions of major economic significance; and only 33% indicated that drafters intend for agencies to fill ambiguities or gaps relating to questions of major political significance (answering questions that tracked the Court's three formulations of the major questions doctrine). We also note that we did not find differences across respondents based on whether they worked for members in the majority or the minority of Congress, which suggests that, at least for our respondents, the answer did not depend on whether the respondent was a member of the same party as the President.
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> By contrast, almost all of our respondents indicated that drafters intend for agencies to fill ambiguities or gaps relating to more "everyday" questions, such as the details of implementation (99%) and ambiguities or gaps relating to the agency's area of expertise (93%). These comments were typical: "[Major questions], never! They [i.e., elected officials] keep all those to themselves"; "We try not to leave major policy questions to an agency . . . . [They] should be resolved here"; and "We are more likely to defer when an agency has technical expertise." To be sure, resolving major questions is not always possible for drafters, and distinguishing major questions from everyday ones may be difficult for courts. But our drafters did convey a surprising sense of obligation to decide certain questions themselves.[27]

That analysis makes intuitive sense. Deliberate ambiguity benefits both parties when it comes to issues that are not sufficiently important as a general matter to scuttle an entire piece of legislation. But whether to tackle climate change through CO_2 regulation, or to regulate cigarettes, or to allow a public health agency to prohibit evictions, or whether to regulate the Internet the same way a 1930s statute regulates telephones, are probably not the kinds of things legislators leave to strategic ambiguity; they are the kinds of things that one side wins and the other loses. That is why in many of the major questions cases Congress has *in fact* debated the important and controversial issues—whether to institute a cap-and-trade program,

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[26] Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 Stan. L. Rev. 901, 1003 (2013) ("Our findings offer some confirmation for the major questions doctrine—the idea that drafters intend for Congress, not agencies, to resolve these types of questions. More than 60% of our respondents corroborated this assumption."); Abbe Gluck & Lisa Schultz Bressman, *Inside Statutory Interpretation*, 66 Stan. L. Rev. 725, 790 (2014) ("Our respondents resisted the idea of broader delegations to agencies, emphasized the limitations that Congress puts on delegation, and even would have narrowed some of the deference doctrines currently in deployment.").

[27] Gluck & Bressman, *from the Inside*, *supra* at 1003-04.

to regulate cigarettes, or to regulate the Internet—and either failed to come to consensus or chose to regulate outside the statute the agency was invoking.

The question remains whether resolving ambiguities in favor of legislative intent, as elucidated by congressional drafting practices, is consistent with textualism. Caleb Nelson wrote some years ago, "[J]udges whom we think of as textualists construct their sense of objective meaning from what the evidence that they are willing to consider tells them about the subjective intent of the enacting legislature."[28] "When confronting possible ambiguities in a statutory provision," he observed, "it is absolutely routine for textualists to put themselves in the shoes of the enacting Congress and to try to identify the interpretation that its members either (1) probably had in mind or (2) would have preferred if they had considered the question."[29] Larry Alexander and Sai Prakash have pointed out that context—which helps clarify meaning and to resolve ambiguities—"is universally regarded as relevant only because it is evidence of authorial intent."[30] On these accounts of textualism, using importance to resolve ambiguities in contexts where there is reason to believe the legislature would not have intended to delegate matters of importance would be consistent with textualism.

Ordinary Readers

To the extent textualists are supposed to ignore legislative intent and focus on public understanding, using importance to resolve interpretive ambiguity may also be consistent with how ordinary speakers use language. At least, insights from philosophy of language help explain why courts (and people) are more likely to find statutory ambiguities in cases involving questions of major political and economic significance. Those same insights also suggest that ordinary readers are likely to resolve such ambiguities against an agency purporting to take major and consequential actions.

As Ryan Doerfler has explained, "to say that the meaning of a statute is 'clear' or 'plain' is, in effect, to say that one *knows* what that statute means."[31] And, "[a]s numerous philosophers have observed, . . . ordinary speakers attribute 'knowledge' – and, in turn, 'clarity' – more freely or less freely depending upon the practical stakes."[32] "In low-stakes situations," Doerfler explains, "speakers are willing to concede that a person 'knows' this or that given only a moderate level of justification."[33] If the stakes are high, in contrast, "speakers require greater justification before allowing that someone 'knows' that same thing, holding constant that person's evidence."[34] Think of the reasonable doubt rule: ordinarily, people are less willing to conclude in criminal cases than in civil cases that they "know" someone is responsible, precisely because the stakes are so high in the former.[35] Or, relatedly, think of the

[28] Caleb Nelson, *What is Textualism?*, 91 Va. L. Rev. 347, 348 (2005).
[29] Id. at 407.
[30] Larry Alexander & Saikrishna Prakash, *"Is That English You're Speaking?" Why Intention Free Interpretation Is an Impossibility*, 41 San Diego L. Rev. 967, 979 (2004)
[31] Ryan D. Doerfler, *High-Stakes Interpretation*, 116 Mich. L. Rev. 523, 527 (2018).
[32] Id. at 527-28.
[33] Id. at 528.
[34] Id.
[35] Id. at 550-60.

rule of lenity: all else being equal, interpreters tend to demand more clarity of a statute the violation of which leads to severe criminal consequences.

The application to some of the major questions cases is intuitive, at least as to the threshold question of ambiguity. The meaning of an "occupational health and safety standard" may seem straightforward in an ordinary, relatively low-stakes regulation of the workplace. We might "know" that the statute permits such regulations, or find the statute is "clear" in this regard. But when dealing with a regulation that imposes a requirement on millions of individuals, that persists beyond the workplace itself, and which requirement is itself hugely controversial, it is intuitive to think that ordinary speakers would in fact demand more epistemic confidence before concluding that the statute in fact authorizes such a requirement. In other words, ordinary readers and speakers are more likely to find the statute ambiguous in that context than in a relatively lower-stakes context.

Moreover, these same insights suggest that, because ordinary speakers demand clearer proofs when making assertions with high stakes generally, they would demand clearer proofs that the agency has the asserted power when the regulation involves high stakes. Doerfler's analysis of the philosophy of language, in other words, shows why ordinary speakers are more likely both to find a statute more ambiguous when the stakes are high, and also to expect the ambiguity to be resolved against a major and novel assertion of authority. In most major questions cases, the high-stakes proposition is, "the agency has authority to do *X*." It is *that* proposition that needs to be proven with great epistemic confidence; lacking that clearer evidence, the ordinary reader is more likely to reject that the statute in fact means that the agency is authorized to do *X*.

This argument does assume a certain framing of the question: whether the statute authorizes the agency to act. It is possible to reframe the question as whether the agency's action is contrary to law, and then Doerfler's insights suggest that the judge should demand more epistemic certainty before deciding *that* question against the agency in the context of a consequential rulemaking. Neither the major questions canon nor textualism more broadly can tell us which of these two framings is correct; it is a matter of the legal system's other features. If ordinarily a plaintiff bears the burden of proof, then this second framing may be the relevant one; but in that case, if a party raises the rulemaking's invalidity as a defense to an enforcement action, the first framing would be applicable. This arbitrary difference is one reason not to have the burden of proof depend on the party's role.

Fortunately, the legal system already contingently addresses this question of framing differently: because agencies are creatures of statute, they must demonstrate authority for their actions.[36] Thus, as a matter of constitutional structure, the agencies are the asserters of the legal claim and bear the burden of proof.[37] Even if one does not accept this distribution of proof burdens, it is enough to say that the question addressed here is the meaning of the statute, which is not necessarily the same question as whether the agency has acted

[36] Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661, 665 (2022); Michigan v. E.P.A., 268 F.3d 1075, 1081 (D.C. Cir. 2001); Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988).
[37] Gary Lawson, *Legal Indeterminacy: Its Cause and Cure*, 19 Harv. J. L. Pub. Pol'y 411, 426 (1996).

unlawfully; and on that former question, the insights about high-stakes interpretation militate in favor of a major questions canon of some sort.

This Mischief Rule

It may be consistent with textualism to rely on the importance of a regulatory action even when interpreting statutes that otherwise appear unambiguous. Professor Sam Bray has suggested that "the major questions doctrine" is an "interpretive intuition[] that [is] widespread, even without a definitive contemporary formulation."[38] He argues that it is an application of the "mischief rule," which is a commonsense interpretive intuition that "instructs an interpreter to consider the problem to which the statute was addressed, and also the way in which the statute is a remedy for that problem."[39] The mischief rule is how we know that when a statute requires a train conductor to sound the alarm when an "animal" is on the tracks—think cows and horses—the statute does not really "mean," in the sense of conveying information to an ordinary and reasonable reader, that the conductor must signal the alarm when a flock of geese or a squirrel is on the tracks.[40] Ordinary, reasonable people interpret statutes in light of the "mischief" to which they are directed, and in light of the "way in which the statute is a remedy" for that mischief, whatever the literal reading might otherwise seem to allow or require.

On this account, the way the Court has used importance in its major questions cases could be justifiable regardless of any ambiguity. When Congress enacted the Clean Air Act targeting "air pollution," the interpreter must ask what was the problem to which the statute addressed itself. A reasonable interpreter could conclude that Congress addressed itself to impurities in the ambient air, rather than to a gas that is present in high concentrations throughout the atmosphere.[41] A reasonable interpreter might conclude that when Congress enacted the FDCA, the statute was addressed to ensuring medical products were in fact safe and effective for their intended use, rather than to regulating the use of a non-medical product never safe for its intended use.[42] And a reasonable interpreter could conclude that when Congress enacted the Public Health Service Act, the Act addressed itself to the problem of disease transmission by allowing quarantines and disinfection, rather than by allowing eviction moratoria, vaccine mandates, and prohibitions on interstate travel.[43] The point is in each of these cases, the majority's interpretation was arguably consistent with the mischief each statute was targeting, and the dissenting interpretations were not.

If the mischief rule is an accurate account of how drafters legislate and ordinary people interpret, then the Court's analyses in many of the major questions cases would be justifiable even had the language been unambiguous in the sense of literally authorizing the agency action.

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[38] Samuel L. Bray, *The Mischief Rule*, 109 Geo. L.J. 967, 1011 (2021).
[39] Id. at 968.
[40] Id. (discussing Nashville & K.R. Co. v. Davis, 78 S.W. 1050 (Tenn. 1902)).
[41] *See* Massachusetts v. EPA, 549 U.S. 497, 558-60 (Scalia, J., dissenting).
[42] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).
[43] Alabama Ass'n of Realtors v. Dep't of Health and Human Servs., 141 S.Ct. 2485 (2021).

IV. Historical Support

An importance canon of the kind reconstructed here – a quasi-linguistic canon for the resolution of ambiguities – runs deeper than modern scholars have recognized. Such a canon appears to be an existing feature of constitutional, contract, and statutory interpretation. Historical research reveals that it was commonly understood in many different contexts that, ordinarily, lawmakers and ordinary people do not delegate important authorities without being more explicit than they might be in other contexts. The reader will have to consult my *Virginia Law Review* article, from which this essay is adapted, for a fuller picture of the historical evidence. But here is a smattering.

The Necessary and Proper Clause provides, "Congress shall have power . . . to make all laws necessary and proper for carrying into execution the foregoing powers, or any other power vested by this Constitution in the government of the United States, or in any department or officer thereof."[44] A broad reading of the Clause might suggest that Congress can do literally anything that is convenient for carrying out its enumerated powers – for example, commandeering state officers, abrogating sovereign immunity, granting corporate monopolies – no matter how seemingly important those powers are. But that was not generally how the Clause was understood in the Founding generation. Several of the Founders agreed that the Clause does not authorize Congress to exercise great, important prerogatives—the kind of things one would expect the people to have authorized Congress to do explicitly if the People had really intended to delegate to Congress such power. If the power to tax, to declare war, and to regulate interstate commerce had not been included in the Constitution's enumeration of power, few would think that Congress could derive those powers from a mere grant of implied powers.

That is what James Madison argued, for example, in opposition to the Bank of the United States. "It cannot be denied that the power proposed to be exercised is an important power. As a charter of incorporation the bill creates an artificial person previously not existing in law," he said.[45] "It confers important civil rights and attributes which could not otherwise be claimed. It is, though not precisely similar, at least equivalent to the naturalization of an alien, by which certain new civil characters are acquired by him. Would Congress have had the power to naturalize if it had not been expressly given?"[46] Here we see that Madison argued that incorporation of a bank is an important power, similar to the naturalization power—and we would not lightly presume that Congress had such powers without express authorization. Later in his speech, he added, "Had the power of making treaties, for example, been omitted, however necessary it might have been, the defect could only have been lamented or supplied by an amendment of the Constitution."[47] Important powers are generally not delegated through cryptic language or implication

This proposition is well established in agency law more generally. Joseph Story's 1839 treatise gives numerous examples of the proposition that "subordinate" powers that are

[44] U.S. Const., art. I, § 8, cl. 18.
[45] 1 Annals of Cong. 1899 (statement of Rep. Madison).
[46] Id. at 1899-1900.
[47] Id. at 1900-01.

"incidental" to a "primary" power are presumed to be delegated to the agent, and it illustrates as well with examples of where the power was not sufficiently subordinate to be left to implication. The general rule – "the largest portion of incidental powers," Story explains – "is deduced from the particular business, employment, or character of the agents themselves," and includes "[w]hatever acts" that "are *usually* done by such classes of agents," rights that are "*usually* exercised by them," and duties that are "*usually* attached to them."[48]

In an 1826 Massachusetts case, the owner of a vessel had authorized the master of the vessel to sell cargo in the West Indies and return with other cargo. The master, under pressure from creditors, sold them the cargo instead as satisfaction of the owner's debts. When the owner sued the creditors, the creditors argued that the owner had to sue his agent because the sale was "good." The court disagreed, observing that the sale was not "made in the usual course of business," but it was rather "an extraordinary transaction, and calling for a full and particular authority."[49] And Story quotes a Scottish case, which the Supreme Court might have mentioned in the eviction moratorium case: "Where in general mandates, some things are specially expressed, the generality is not extended to cases of greater importance than those expressed."[50]

Versions of this rule persist to this day in modern agency law. The Third Restatement explains that "[e]ven if a principal's instructions or grant of authority to an agent leave room for the agent to exercise discretion, the consequences that a particular act will impose on the principal may call into question whether the principal has authorized the agent to do such acts."[51] For example, "[a] reasonable agent should consider whether the principal intended to authorize the commission of collateral acts fraught with major legal implications for the principal, such as granting a security interest in the principal's property or executing an instrument confessing judgment."[52] An agent might still bind the principal with regard to such matters, but at least there will be a question as to whether more clarity was required.

There is much other evidence of such a doctrine in contract law generally, and in the interpretation of state and federal statutes.[53]

V. Conclusion

None of the Supreme Court's versions of what it has called the major questions doctrine appears fully defensible, at least not as currently theorized. Still, a plausible account of what the Court has done in several major questions cases, such as when the FDA asserts authority to regulate tobacco or when the CDC asserts authority over landlord-tenant relations, is to use "importance" as a tool for resolving statutory ambiguity in the context of delegations to agents. If the FCC once again purports to assert the power to decide whether, how, and to

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[48] Joseph Story, Commentaries on the Law of Agency 94 (1839) (emphases added).
[49] Peters v. Ballistier, 20 Mass. (3 Pick. R.) 495, 503 (1826).
[50] Story, *supra* at 69 (quoting 1 Stair, Instit. by Brodie, B. 1, tit. 12, § 15 ; Ersk. Instit. B. 3, tit. 3, § 39).
[51] Restatement (Third) Of Agency § 2.02, cmt. h (2006).
[52] Id.
[53] For a fuller discussion, see Ilan Wurman, "Importance and Interpretive Questions," 109 Va. L. Rev. __ (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4381708.

what extent to regulate the Internet, the Court may legitimately invoke "importance" when interpreting the scope of the agency's authority.

Using importance as a quasi-linguistic canon in that context may very well be consistent with textualism: it appears consistent with empirical evidence about legislative drafting practices, with how ordinary people interpret language in high-stakes contexts, and with common intuitions about how to read statutes in light of the mischiefs they are fashioned to solve. And such an "importance" canon may already be a longstanding feature of constitutional, contract, and statutory interpretation in the context of delegations of authority, whether to other private parties, to the government in the Constitution, or from legislatures to executive officers.

* This essay is adapted from a longer law review article, "Importance and Interpretive Questions," forthcoming in volume 109 of the *Virginia Law Review* and which can be accessed here.

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