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## THE MAJOR QUESTIONS QUARTET

*Mila Sohoni\**

*Beware the Jabberwock, my son!  
The jaws that bite, the claws that catch!  
Beware the Jubjub bird, and shun  
The frumious Bandersnatch!*

— Lewis Carroll, *Jabberwocky*<sup>1</sup>

Begin with what is uncontroversial: nobody *likes* to see “agencies asserting highly consequential power *beyond* what Congress could reasonably be understood to have granted.”<sup>2</sup> The challenge is how to determine when that is occurring, not how to feel about it when it does. That challenge has existed for as long as agencies have, and so it’s one that our law has developed many tools to address. But in four important cases decided during the summer of 2021 and last Term, the Court crafted a new approach to tackling that problem by adopting a different and more potent variant of one of these older tools: the “major questions” exception to *Chevron*<sup>3</sup> deference.

This Comment describes and evaluates the major questions quartet: the CDC eviction moratorium case,<sup>4</sup> the OSHA vaccine mandate case,<sup>5</sup> the CMS vaccine mandate case,<sup>6</sup> and the EPA Clean Power Plan case.<sup>7</sup> Because none of these cases reached a constitutional holding, they are overshadowed by the Term’s blockbuster decisions involving fundamental rights.<sup>8</sup> But no one should mistake these cases for anything but what

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<sup>1</sup> LEWIS CARROLL, *Through the Looking-Glass and What Alice Found There, in ALICE’S ADVENTURES IN WONDERLAND AND THROUGH THE LOOKING-GLASS* 196 (Richard Kelly ed., 2015).

<sup>2</sup> *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (emphasis added).

<sup>3</sup> *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

<sup>4</sup> *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485 (2021) (per curiam).

<sup>5</sup> *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab.*, 142 S. Ct. 661 (2022) (per curiam).

<sup>6</sup> *Biden v. Missouri*, 142 S. Ct. 647 (2022) (per curiam).

<sup>7</sup> *West Virginia v. EPA*, 142 S. Ct. 2587.

<sup>8</sup> See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022); *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111 (2022).

they are: separation of powers cases in the guise of disputes over statutory interpretation.

The quartet can be easily summarized.<sup>9</sup> In the CDC case, the Court held that the Centers for Disease Control and Prevention lacked authority to impose a nationwide moratorium on evictions in order to combat the spread of COVID-19.<sup>10</sup> In the OSHA case, the Court held that the Occupational Safety and Health Administration lacked authority to compel large private employers — those with a hundred or more employees — to require that their employees be vaccinated against COVID-19 or else take weekly tests and wear masks.<sup>11</sup> In the CMS case, decided the same day, the Court held that the Centers for Medicare & Medicaid Services *had* authority to mandate that facilities receiving Medicare or Medicaid funding require their staff to be vaccinated against COVID-19.<sup>12</sup> In the EPA case, the Court held that the Environmental Protection Agency lacked authority to adopt the Clean Power Plan, which imposed caps on greenhouse gas emissions at a level that would force power plants to transition away from the use of coal to generate electricity.<sup>13</sup>

The first crucial thing to understand about the major questions quartet is what it did to administrative law. While ostensibly applying existing major questions case law, the quartet in actuality altered the doctrine of judicial review of agency action in its method and content, in ways that will have momentous consequences. To begin with, the quartet unhitched the major questions exception from *Chevron*, which

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<sup>9</sup> Easily summarized, that is, for the purposes of serving as fodder for the arguments made in this Comment. Many extremely important questions raised by the major questions quartet lie outside the scope of this Comment. To list a few, I do not discuss questions of justiciability, federalism, environmental or public health policy, or administrative procedure. *See, e.g.*, *West Virginia v. EPA*, 142 S. Ct. at 2606–07 (assessing justiciability); *id.* at 2621 (Gorsuch, J., concurring) (raising issue of federalism); *id.* at 2610–12 (majority opinion) (discussing environmental policy); *Ala. Ass'n of Realtors*, 141 S. Ct. at 2491–94 (Breyer, J., dissenting) (highlighting public health policy implications of decision); *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 665–66 (analyzing administrative procedure). I briefly touch on questions of remedial scope at *infra* notes 376–377 and accompanying text.

<sup>10</sup> *See Ala. Ass'n of Realtors*, 141 S. Ct. at 2486. Justice Breyer, joined by Justices Sotomayor and Kagan, dissented. *Id.* at 2490 (Breyer, J., dissenting).

<sup>11</sup> *See Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 663–65. Justice Gorsuch wrote a concurrence, joined by Justices Thomas and Alito. *Id.* at 667 (Gorsuch, J., concurring). Justices Breyer, Sotomayor, and Kagan issued a joint dissent. *Id.* at 670 (Breyer, Sotomayor & Kagan, JJ., dissenting).

<sup>12</sup> *See Biden v. Missouri*, 142 S. Ct. at 650, 652 (per curiam). The CMS vaccine mandate required that facilities allow workers to claim religious and medical exemptions, and it did not cover staff who teleworked full time. *Id.* at 651. Justice Thomas, joined by Justices Alito, Gorsuch, and Barrett, dissented, arguing that CMS lacked statutory authority to adopt a vaccine requirement. *Id.* at 655 (Thomas, J., dissenting). Justice Alito penned a separate dissent, which was joined by Justices Thomas, Gorsuch, and Barrett, arguing that even if CMS had statutory authority, the vaccine requirement was improper because the agency did not follow the requisite notice-and-comment procedure before issuing its rule. *Id.* at 659 (Alito, J., dissenting).

<sup>13</sup> *See West Virginia v. EPA*, 142 S. Ct. at 2616. Justice Gorsuch, joined by Justice Alito, filed a concurring opinion. *Id.* at 2616 (Gorsuch, J., concurring). Justice Kagan, joined by Justices Breyer and Sotomayor, dissented. *Id.* at 2626 (Kagan, J., dissenting).

has been silently ousted from its position as the starting point for evaluating whether an agency can exert regulatory authority. Instead, the CDC case initiated, and the OSHA and EPA cases completed, a transition to a new order of operations for evaluating the legality of major regulatory action. Under the test that the quartet has now designated as the “major questions doctrine,”<sup>14</sup> the Court will not sustain a major regulatory action unless the statute contains a clear statement that the action is authorized. The import of this shift can be measured by the yardstick of earlier cases. If the method enunciated by the quartet is the law, *King v. Burwell*<sup>15</sup> and *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*<sup>16</sup> (among others) cannot possibly have been right, and *Massachusetts v. EPA*<sup>17</sup> is standing on quicksand.<sup>18</sup> Yet no Justice acknowledged, let alone defended, the disjunction between such precedents and the method charted in the quartet.

There’s no small irony in the fact that the major questions quartet made this shift in the methodology of deference — a matter of “vast economic and political significance”<sup>19</sup> if ever there was one — without *clearly stating* it was doing so.<sup>20</sup> To knowledgeable observers, however — frankly, to anyone who was paying any attention whatsoever to recent developments in administrative law — the Court’s fortification of the old major questions exception into this new clear statement rule would not have come as a surprise. It was a predictable development, and indeed it was more or less predicted.<sup>21</sup> Surprise or not, last Term

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<sup>14</sup> The EPA case marked the first occasion that the Court stated that it was applying what it referred to as the “major questions doctrine.” See *id.* at 2609 (majority opinion); cf. *infra* note 90 (describing earlier concurring and dissenting opinions referencing the concept). As will be explained below, see *infra* Part I, pp. 267–90, what the Court labeled as the “major questions doctrine” is a clear statement rule that materially differs from the doctrine that the Court applied to major questions in the past. Notably, in 2017, then-Judge Kavanaugh used the term “[t]he major rules doctrine” to refer to this clear statement rule. See *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 417 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc) (“The major rules doctrine helps preserve the separation of powers and operates as a vital check on expansive and aggressive assertions of executive authority.”); *id.* at 421 (“If an agency wants to exercise expansive regulatory authority over some major social or economic activity . . . an *ambiguous* grant of statutory authority is not enough. Congress must *clearly* authorize an agency to take such a major regulatory action.”).

<sup>15</sup> 576 U.S. 473 (2015).

<sup>16</sup> 515 U.S. 687 (1995).

<sup>17</sup> 549 U.S. 497 (2007).

<sup>18</sup> See *infra* section I.B.1, pp. 276–82.

<sup>19</sup> *Ala. Ass’n of Realtors*, 141 S. Ct. at 2489 (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

<sup>20</sup> Cf. Mila Sohoni, *A Fuller Picture of Internal Morality*, YALE J. ON REGUL.: NOTICE & COMMENT (Apr. 14, 2021), <https://www.yalejreg.com/nc/law-leviathan-redeeming-the-administrative-state-part-03> [<https://perma.cc/4CJX-YBYH>] (faulting aspects of the Court’s administrative law doctrine for its deficits of clarity and transparency).

<sup>21</sup> See, e.g., Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 1942–43 (2017); Nathan Richardson, Essay, *Antideference: COVID, Climate, and the Rise of the Major*

should be flagged as the moment in which prediction and prophecy became reality and rule — both in administrative law and outside of it, too.<sup>22</sup>

There is one prediction, though, that the Court notably did *not* fulfill last Term. The world of administrative law has recently been on tenterhooks, awaiting with bated breath the Court’s revival of the nondelegation doctrine.<sup>23</sup> Yet, strikingly, this did not occur, despite the obvious opening for a nondelegation renaissance that these cases supplied.<sup>24</sup> As to the nondelegation doctrine, it is still “[j]am yesterday (yesterday being 1935), and jam tomorrow, but never jam today.”<sup>25</sup> Rather than saying anything of substance about what the law (of nondelegation) is, the Court instead told us that it is emphatically the province of the judicial branch to say what the law must say clearly. Congress and the executive branch must “beware the jabberwock” of nondelegation — but what exactly that creature looks like remains as much left to our imagination as was Carroll’s own invention.<sup>26</sup>

The Court’s evasion of nondelegation in these decisions may presage how the Court will — or, more precisely, will not — develop constitutional doctrine in the future. As three of these cases exemplify,<sup>27</sup> a sufficiently robust major questions doctrine greatly reduces the need to

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*Questions Canon*, 108 VA. L. REV. ONLINE 174, 178 (2022); Cass R. Sunstein, *There Are Two “Major Questions” Doctrines*, 73 ADMIN. L. REV. 475, 476–77 (2021); Justin Walker, *The Kavanaugh Court and the Schechter-to-Chevron Spectrum: How the New Supreme Court Will Make the Administrative State More Democratically Accountable*, 95 IND. L.J. 923, 925 (2020).

<sup>22</sup> Compare Dan Mangan, *Trump: I’ll Appoint Supreme Court Justices to Overturn Roe v. Wade Abortion Case*, CNBC (Oct. 19, 2016, 10:00 PM), <https://www.cnbc.com/2016/10/19/trump-ill-appoint-supreme-court-justices-to-overturn-roe-v-wade-abortion-case.html> [https://perma.cc/5XYB-3NU7] (noting that President Trump promised his new Justices would “automatically” overturn *Roe*), with *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022) (overturning *Roe*).

<sup>23</sup> See *Gundy v. United States*, 139 S. Ct. 2116, 2131–43 (2019) (Gorsuch, J., dissenting); *id.* at 2130–31 (Alito, J., concurring in the judgment) (stating that he would “support” an “effort” to “reconsider” case law that has allowed “agencies to adopt important rules pursuant to extraordinarily capacious standards”); *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., respecting the denial of certiorari) (referring to “important points” in Justice Gorsuch’s *Gundy* dissent and noting that its treatment of the nondelegation doctrine “may warrant further consideration in future cases”); Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288, 1294 (2021) (“But now, for the first time in nearly a century, the Supreme Court is poised to reformulate the nondelegation doctrine, opening the possibility of a revolution in separation of powers and administrative law.”).

<sup>24</sup> In all four cases, challengers to the agencies’ actions raised nondelegation arguments. See *infra* notes 239–245 and accompanying text.

<sup>25</sup> Adrian Vermeule, *Never Jam Today*, YALE J. ON REGUL.: NOTICE & COMMENT (June 20, 2019), <https://www.yalejreg.com/nc/never-jam-today-by-adrian-vermeule> [https://perma.cc/HPH2-JVP8]; cf. CARROLL, *supra* note 1, at 231 (“‘You couldn’t have [jam] if you *did* want it,’ the Queen said. ‘The rule is, jam to-morrow and jam yesterday — but never jam *to-day*.’”).

<sup>26</sup> See CARROLL, *supra* note 1, at 196–98.

<sup>27</sup> *Ala. Ass’n of Realtors*, 141 S. Ct. 2485; *Nat’l Fed’n of Indep. Bus.*, 142 S. Ct. 661; *West Virginia v. EPA*, 142 S. Ct. 2587.

formally revive the nondelegation doctrine. The most important work that the nondelegation doctrine would perform can be accomplished on an ad hoc, agency-by-agency, rule-by-rule basis through the mechanism of the quartet's new clear statement rule — a subconstitutional device that congenially skirts the need for the Court to specify what, if anything, the nondelegation doctrine actually prohibits. Equally congenially, as the fourth of these cases exemplifies,<sup>28</sup> the new major questions doctrine allows the Court ample leeway to *preserve* major rules when the muse so moves it — even when those rules rest on statutory authority as contestable to the naked eye as the authority that underwrites rules that fail to pass muster. In both respects, the major questions quartet annexes enormous interpretive power to the federal judiciary by enunciating a standard for substantive legitimacy that is so malleable that, at present, it can be said only to mean “just what [the Court] choose[s] it to mean — neither more nor less.”<sup>29</sup>

Hopeful citations to cases in the major questions quartet have already begun to pop from thin air, like so many Cheshire cats' grins, in complaints and briefs involving matters as diverse as immigration<sup>30</sup> and nuclear waste.<sup>31</sup> Major questions challenges will load the Court's docket for years to come. And the impact of this doctrine will extend well beyond what is observable from federal court filings. The quartet, with its inchoate theory of nondelegation in tow, will cause not just an actual but an *in terrorem* curtailment of regulation on an ongoing basis, while placing the onus on today's gridlocked Congress to revisit complex regulatory schemes enacted years or decades ago.

To inflict a consequence of this scale on the political branches demands a *justification* from the Court, not a rain check. Yet a rain check is all we got. In none of the three cases in which it ruled against the government did the Court say that a nondelegation doubt (let alone obstacle) would exist if Congress had delegated to the agency the authority that the agency claimed. In none of the three cases in which the government lost did the Court adequately ground its momentous and new clear statement rule with a meaningful constitutional justification.

This is not a mere drafting issue, nor is it the judicial minimalism that it may at first blush appear to be. Rather, the Court's reticence creates deep conceptual uncertainty about what exactly it was doing in the quartet — a conceptual uncertainty that will matter for future cases.

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<sup>28</sup> *Biden v. Missouri*, 142 S. Ct. 647.

<sup>29</sup> CARROLL, *supra* note 1, at 244–45 (“When I use a word, Humpty Dumpty said, in rather a scornful tone, ‘it means just what I choose it to mean — neither more nor less.’”).

<sup>30</sup> Letter from Judd E. Stone II, Solicitor General of Texas, to Lyle W. Cayce, Clerk of Court, United States Court of Appeals for the Fifth Circuit, *Texas v. United States*, No. 21-40680 (5th Cir. July 5, 2022).

<sup>31</sup> Letter from Michael R. Abrams, Assistant Solicitor General of Texas, to Lyle W. Cayce, Clerk of Court, United States Court of Appeals for the Fifth Circuit, *Texas v. Nuclear Regul. Comm'n*, No. 21-60743 (5th Cir. July 6, 2022).

It is not clear what theory of nondelegation, *if any*, underlies and justifies the major questions quartet.<sup>32</sup> And without knowing what that underlying theory is, it becomes much harder to sensibly apply a rule that ostensibly exists “in service of” that underlying doctrine.<sup>33</sup> The major questions quartet may seem to be a pragmatic type of light-touch nondelegation that pumps the brakes on the occasional instance of regulatory overreach while carefully eschewing hard constitutional limits on Congress’s power to delegate. But whenever the Court — especially a supposedly textualist Court — imposes a requirement on Congress that it legislate with special clarity, the Court should articulate a concrete and specific constitutional value that justifies that rule. The Court chose not to do that in the quartet and — as argued below — serious reasons exist to doubt whether it could.

This Comment proceeds as follows. Part I describes the evolution of the major questions exception into a new clear statement rule that operates as a presumption against reading statutes to authorize major regulatory action. It then explores how the quartet broke ties with one landmark case (*Chevron*) and silently ignored the methodology of many others, and it closes with an examination of the hard questions posed by the quartet concerning the Court’s commitment to textualism. Part II turns to the dog that didn’t bark in these cases — nondelegation — and the relationship of the major questions quartet to nondelegation. It explains that the collective upshot of these cases may be to reduce significantly the set of cases in which it will be necessary to reach a full-dress constitutional nondelegation holding while still allowing nondelegation doctrine to be effectively resurrected, though less visibly, on a retail level. It then evaluates whether the quartet’s clear statement rule can be justified by the principle of constitutional avoidance or as a device to protect constitutional values. In the brief conclusion that follows, the quartet is situated in a broader historical arc as the latest installment of a longer pattern in which the Court has used interpretive methods to promote, and now to curtail, administrative governance.

## I. THE PATH TO THE NEW MAJOR QUESTIONS DOCTRINE

Here are some of the things that have been held to be matters of great significance as to which Congress must speak clearly if an agency

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<sup>32</sup> See *infra* pp. 290–92 (explaining that the relationship between nondelegation and the new major questions quartet remains unclear).

<sup>33</sup> *Gundy v. United States*, 139 S. Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting) (“[W]e apply the major questions doctrine in service of the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency.”).

is to regulate them pursuant to its delegated authority: tobacco products,<sup>34</sup> eviction moratoria,<sup>35</sup> and vaccine mandates at large private employers.<sup>36</sup> And here are some of the (much longer list of) things that have been held to be matters that agencies may regulate even if Congress has *not* spoken clearly in its delegation to the agency: the destruction of habitats of endangered species,<sup>37</sup> cable television,<sup>38</sup> and “the scope of the agency’s statutory authority (that is, its jurisdiction).”<sup>39</sup>

Some agency regulations are strikes; others are balls — that much is clear.<sup>40</sup> Less clear are the rules of the game and (therefore) whether the umpire has made fair calls.

This Part traces how the rules of this game have evolved over time.<sup>41</sup> Section I.A reviews the old major questions cases, showing that in those cases, the fact that a question was a “major” one was generally one factor among many in the Court’s process of statutory construction and had the effect of negating *Chevron* deference. The remainder of this Part describes and evaluates the change to this doctrine wrought by the major questions quartet. Section I.B begins by explaining that in these cases, the Court converted the major questions analysis into a new clear

<sup>34</sup> See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 126 (2000).

<sup>35</sup> See *Ala. Ass’n of Realtors*, 141 S. Ct. at 2486.

<sup>36</sup> See *Nat’l Fed’n of Indep. Bus.*, 142 S. Ct. at 663, 665.

<sup>37</sup> See *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 708 (1995).

<sup>38</sup> See *United States v. Sw. Cable Co.*, 392 U.S. 157, 160–61 (1968).

<sup>39</sup> *City of Arlington v. FCC*, 569 U.S. 290, 296–97 (2013).

<sup>40</sup> See *Roberts*: “*My Job Is to Call Balls and Strikes and Not to Pitch or Bat*,” CNN (Sept. 12, 2005, 4:58 PM), <https://www.cnn.com/2005/POLITICS/09/12/roberts.statement/> [<https://perma.cc/UP46-AUEY>] (“[M]y job [is] to call balls and strikes and not to pitch or bat.”).

<sup>41</sup> The corpus of scholarship on *Chevron* and on the major questions exception is so vast that it would be impossible for me to cite all the excellent contributions to that literature. Even referring to all the relevant writings of Professor Cass Sunstein would be difficult. In addition to scholarship cited elsewhere in this Comment, a too-short selection of notable contributions includes THOMAS W. MERRILL, *THE CHEVRON DOCTRINE* (2022); CASS R. SUNSTEIN & ADRIAN VERMEULE, *LAW & LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE* (2020); Jonathan H. Adler, *A “Step Zero” for Delegations*, in *THE ADMINISTRATIVE STATE BEFORE THE SUPREME COURT* 161 (Peter J. Wallison & John Yoo eds., 2022); Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 *YALE L.J.* 908 (2017); David J. Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 *SUP. CT. REV.* 201 (2002); Natasha Brunstein & Richard L. Revesz, *Mangling the Major Questions Doctrine*, 74 *ADMIN. L. REV.* 217 (2022); Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 *MINN. L. REV.* 2019 (2018); Abbe R. Gluck, *What 30 Years of Chevron Teach Us About the Rest of Statutory Interpretation*, 83 *FORDHAM L. REV.* 607 (2014); Kevin O. Leske, *Major Questions About the “Major Questions” Doctrine*, 5 *MICH. J. ENV’T & ADMIN. L.* 479 (2016); Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 *GEO. L.J.* 833 (2001); Gillian E. Metzger, *The Supreme Court, 2016 Term — Foreword: 1930s Redux: The Administrative State Under Siege*, 131 *HARV. L. REV.* 1 (2017); Chad Squitieri, *Who Determines Majorness?*, 44 *HARV. J.L. & PUB. POL’Y* 463 (2021); Note, *Major Question Objections*, 129 *HARV. L. REV.* 2191 (2016); see also Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 *ADMIN. L. REV.* 363, 370 (1986) (“Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute’s daily administration.”). I have written about *King v. Burwell* and the major questions exception in Mila Sohoni, *King’s Domain*, 93 *NOTRE DAME L. REV.* 1419 (2018).

statement rule: a special presumption that statutes do not authorize major exercises of regulatory authority that can be overcome only if the statute contains clear congressional authorization for the agency action. Section I.B.1 then maps the novelty and the scale of this interpretive shift by looking back at a line of cases in which the Court upheld major exercises of regulatory authority that would not pass muster under the quartet’s new clear statement rule. Section I.B.2 closes by explaining the serious difficulties presented by efforts to reconcile the Court’s new clear statement rule with its professed commitment to textualism.

#### A. *The Old Major Questions Exception*

In 1984, in *Chevron*, the Court held that courts must defer to interpretations of statutory ambiguities by the agency charged with implementing the statute if the agency interpretation is reasonable.<sup>42</sup> What scholars would come to call the “major questions exception” to *Chevron* deference made its debut a decade thereafter.<sup>43</sup> In *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*,<sup>44</sup> the Court invalidated a Federal Communications Commission (FCC) regulation that allowed companies not to file rate tariffs — a regulation that interpreted a statutory term (“modify”) in a way that would have radically altered the scheme set out by the Communications Act of 1934.<sup>45</sup> Six years on, in *FDA v. Brown & Williamson Tobacco Corp.*,<sup>46</sup> the Court invalidated a Food and Drug Administration (FDA) regulation that would have authorized the FDA to regulate tobacco products, holding that tobacco products were not “drugs” or “devices” within the meaning of the Federal Food, Drug, and Cosmetic Act.<sup>47</sup> Six years after that, *Gonzales v. Oregon*<sup>48</sup> invalidated an interpretive rule issued by the Attorney General that prohibited doctors from prescribing drugs for use

<sup>42</sup> *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844, 865–66 (1984); see also *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2397 (2020) (Kagan, J., concurring) (“*Chevron* instructs that a court facing statutory ambiguity should accede to a reasonable interpretation by the implementing agency. The court should do so because the agency is the more politically accountable actor. And it should do so because the agency’s expertise often enables a sounder assessment of which reading best fits the statutory scheme.” (citation omitted)).

<sup>43</sup> Cass R. Sunstein, *Chevron as Law*, 107 GEO. L.J. 1613, 1669 (2019) (“There is the ‘major question’ exception, a kind of *Chevron* carve-out for issues of great social and economic importance.”). This section discusses the five cases that the EPA majority mentioned. See *West Virginia v. EPA*, 142 S. Ct. at 2609 (citing *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218 (1994); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000); *Gonzales v. Oregon*, 546 U.S. 243 (2006); *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302 (2014); *King v. Burwell*, 576 U.S. 473 (2015)). Of course, there is no official list of the “old major questions exception” cases, and other post-*MCI* cases also have light to shed on the major questions doctrine. See, e.g., *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687 (1995); *Massachusetts v. EPA*, 549 U.S. 497 (2007); see also *infra* section I.B.1, pp. 276–82 (discussing these cases).

<sup>44</sup> 512 U.S. 218 (1994).

<sup>45</sup> 47 U.S.C. §§ 151–646; see *MCI*, 512 U.S. at 234.

<sup>46</sup> 529 U.S. 120 (2000).

<sup>47</sup> *Id.* at 125–26.

<sup>48</sup> 546 U.S. 243 (2006).

in physician-assisted suicide, relying in part on the importance of the question at issue.<sup>49</sup>

In all three cases, the Court declined to defer under *Chevron* to the agency's interpretation of the statute. And in all three cases the fact that the question was a "major" one formed just one consideration in the Court's construction of the relevant statutes. *MCI*, for example, consulted text and dictionaries to conclude that the statutory term — "modify" — meant modest changes before turning to discuss whether the FCC's new rule was a modest change or one with "enormous importance to the statutory scheme."<sup>50</sup> *Brown & Williamson* offered "twenty-five pages of analysis of statutory context and legislative history"<sup>51</sup> to back up its reading of the statute, before adding — "as a passing final thought"<sup>52</sup> — the famous language that thereafter became a shorthand for the major questions inquiry.<sup>53</sup> The *Gonzales* Court carefully described over a dozen pages the statutory text, design, and purposes; the statute's relationship with other statutes; and postenactment congressional commentary<sup>54</sup> before adding, as a final consideration, that Congress could not have implicitly delegated to the Attorney General "such broad and unusual authority."<sup>55</sup>

Eight years later, the Court invoked the major questions exception in *Utility Air Regulatory Group v. EPA*<sup>56</sup> (*UARG*), a case that challenged EPA regulations that applied certain permitting provisions of the Clean Air Act<sup>57</sup> to stationary sources that emit greenhouse gases.<sup>58</sup> *UARG* spent nine pages documenting the total lack of fit between the statutory text and the EPA's new regulatory foray,<sup>59</sup> including the fact that the EPA's reading of the statute entailed rewriting clear statutory terms (that is, tailoring statutory thresholds of 100 or 250 tons per year upward to 100,000 tons per year).<sup>60</sup> Only after setting out multiple reasons why the EPA's interpretation was unreasonable did the *UARG* Court add — in a soon-to-be-momentous line that attached a new clear statement rule to the front of an older clause — "We expect Congress to speak clearly

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<sup>49</sup> *Id.* at 267.

<sup>50</sup> *MCI*, 512 U.S. at 225–28, 231.

<sup>51</sup> Kristin E. Hickman, *The (Perhaps) Unintended Consequences of King v. Burwell*, 2015 PEPP. L. REV. 56, 63.

<sup>52</sup> *Id.*

<sup>53</sup> See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) ("Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.").

<sup>54</sup> See *Gonzales*, 546 U.S. at 255–69.

<sup>55</sup> *Id.* at 267 ("The idea that Congress gave the Attorney General such broad and unusual authority through an implicit delegation in the CSA's registration provision is not sustainable.").

<sup>56</sup> 573 U.S. 302, 324 (2014).

<sup>57</sup> 42 U.S.C. §§ 7401–7671q.

<sup>58</sup> *Util. Air*, 573 U.S. at 314.

<sup>59</sup> See *id.* at 316–24.

<sup>60</sup> *Id.* at 325.

if it wishes to assign to an agency decisions of vast ‘economic and political significance.’”<sup>61</sup>

A year later, in *King v. Burwell*,<sup>62</sup> the Court invoked the major questions exception to decline to apply the *Chevron* framework altogether to the interpretation of the Internal Revenue Service (IRS) that the Affordable Care Act (ACA) authorized tax credits on the federal health insurance exchange.<sup>63</sup> After engaging in an exhaustive analysis of the ACA’s “legislative plan,”<sup>64</sup> *King* ultimately affirmed the result sought by the agency — despite the fact that the ACA did not contain a clear authorization for that “major” result.<sup>65</sup>

In these cases scattered over the course of twenty-two years, the Court negotiated the relationship between *Chevron* deference and major questions. It did so in varying ways, to be sure.<sup>66</sup> Yet the common thread connecting these cases is that if the Court regarded a major question to be implicated, the agency’s interpretation of the statute would not receive *Chevron* deference.<sup>67</sup> Instead, the Court reclaimed the “law-interpreting function”<sup>68</sup> from the agency and itself supplied the best reading of the statute. Sometimes that inquiry wound up at the same endpoint that a search for a clear statement in the statute would reach.<sup>69</sup>

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<sup>61</sup> *Id.* at 324 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)); *see also id.* (finding the EPA’s interpretation to be “unreasonable because it would bring about an enormous and transformative expansion in EPA’s regulatory authority without clear congressional authorization”).

<sup>62</sup> 576 U.S. 473 (2015).

<sup>63</sup> *See id.* at 485–86.

<sup>64</sup> *Id.* at 498; *see id.* at 486–97.

<sup>65</sup> *See id.* at 498.

<sup>66</sup> Much ink, for example, has been spilled on whether various cases applied the major questions exception at “Step Zero,” “Step One,” or “Step Two” of the *Chevron* analysis. *See, e.g.*, Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 231–47 (2006); Kent Barnett & Christopher J. Walker, Response, *Short-Circuiting the New Major Questions Doctrine*, 70 VAND. L. REV. EN BANC 147, 150 (2017); Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777, 787–96 (2017); Sohoni, *supra* note 41, at 1420–22.

<sup>67</sup> Justice Kagan’s dissent in *West Virginia v. EPA* somewhat overstates the claim by saying that “in the relevant cases, the Court has done statutory construction of a familiar sort,” by “consider[ing] — without multiple steps, triggers, or special presumptions — the fit between the power claimed, the agency claiming it, and the broader statutory design.” 142 S. Ct. at 2634 (Kagan, J., dissenting) (emphasis added). The old major questions exception cases are linked to the elephants-in-mouseholes canon. *See Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001) (“Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions — it does not, one might say, hide elephants in mouseholes.”); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) (“Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”). That canon could fairly be called a “special presumption.” With that said, however, the Court has used the canon as one among several tools within an ordinary process of “statutory construction of a familiar sort,” *West Virginia v. EPA*, 142 S. Ct. at 2634 (Kagan, J., dissenting), whereby the Court reads the statute de novo rather than with deference to the agency. *See Gonzales v. Oregon*, 546 U.S. 243, 267 (2006) (quoting *Whitman*, 531 U.S. at 468); *King*, 576 U.S. at 485 (quoting *Brown & Williamson*, 529 U.S. at 159).

<sup>68</sup> Breyer, *supra* note 41, at 370.

<sup>69</sup> *See, e.g.*, *Brown & Williamson*, 529 U.S. at 159–61.

But the endpoints were not always the same — as *King* shows — and (more importantly) the route the Court took to get to that endpoint encompassed far more terrain than a binary inquiry into whether the statute contained a clear statement that authorized the agency to achieve the result sought.

*B. The New Major Questions Doctrine*

In the major questions quartet, the Court took the major questions exception in a new direction — but it did not say it was doing so. Taking pains to stress the continuity between its approach and the precedents just described, the Court in the EPA case asserted it was applying “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.”<sup>70</sup> Justice Gorsuch, in his concurrence in the EPA case, constructed an even grander history by snipping out a few lines from a nineteenth-century case about the Interstate Commerce Commission<sup>71</sup> and by assimilating the Court’s approach to decisions of the Marshall Court concerning retroactivity and Founding-era opinions concerning state sovereign immunity.<sup>72</sup>

A closer look at the quartet, however, reveals not genuine continuity, but the kind of continuity with which a pawn is advanced across a chessboard until it is queened. The pawn here is the key lever of the quartet — its treatment of “one cryptic sentence”<sup>73</sup> of the eight-year-old decision in *UARG*.<sup>74</sup> In this passage, as noted above, *UARG* said: “We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast ‘economic and political significance.’”<sup>75</sup> Read with a squint and for all it was worth, this part of *UARG* recognized a clear statement rule that Congress must explicitly authorize “enormous and transformative” regulatory action.<sup>76</sup> But, for good reason, that language

<sup>70</sup> *West Virginia v. EPA*, 142 S. Ct. at 2609.

<sup>71</sup> *See id.* at 2619 (Gorsuch, J., concurring) (quoting *ICC v. Cincinnati, New Orleans & Tex. Pac. Ry.* 167 U.S. 479, 505 (1897)).

<sup>72</sup> *See id.* at 2616–17.

<sup>73</sup> *Id.* at 2635 (Kagan, J., dissenting).

<sup>74</sup> *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (holding that the EPA’s interpretation was “unreasonable because it would bring about an enormous and transformative expansion in EPA’s regulatory authority without clear congressional authorization”); *id.* (“When an agency claims to discover in a long-extant statute an unheralded power to regulate ‘a significant portion of the American economy,’ we typically greet its announcement with a measure of skepticism.” (citation omitted) (quoting *Brown & Williamson*, 529 U.S. at 159)).

<sup>75</sup> *Id.* (quoting *Brown & Williamson*, 529 U.S. at 160).

<sup>76</sup> *Id.*

was not generally read so exuberantly.<sup>77</sup> For one thing, the EPA effectively “admit[ted]” in *UARG* that the statute was “not designed” to give it the “expansive power” it asserted — hardly a recipe for litigation success.<sup>78</sup> For another, that language was phrased as a supplemental consideration; after several pages of statutory analysis,<sup>79</sup> the *UARG* Court had already concluded that the EPA’s reading would require overriding clear statutory terms and that “[t]he fact that EPA’s greenhouse-gas-inclusive interpretation . . . would place plainly excessive demands on limited governmental resources is *alone* a good reason for rejecting it.”<sup>80</sup> Moreover, the clear statement flourish in *UARG* was swiftly undercut just one year later by *King*. In *King*, the Court read *admittedly unclear* statutory language as authorizing the expenditure of billions in tax credits — a major question — though without deferring to the agency.<sup>81</sup>

As matters stood after *King*, then, extant doctrine did not clearly state that a clear statement was necessary.<sup>82</sup> This is why, writing as recently as 2021, Professor Cass Sunstein could discern “two versions” of the major questions doctrine, point out that they worked in “radically different ways” and had “radically different implications,” and highlight that “the choice between them” was a choice with “exceedingly high” stakes “[f]or both theory and practice.”<sup>83</sup>

Then came the quartet, which made that exceedingly high-stakes choice.<sup>84</sup> The CDC case, the OSHA case, and the EPA case adopted

<sup>77</sup> See, e.g., *Gundy v. United States*, 139 S. Ct. 2116, 2141 (2019) (Gorsuch, J., dissenting) (describing the “major questions doctrine” as articulated in, inter alia, *UARG* as negating deference, rather than as setting out a clear statement rule — “*we’ve rejected agency demands that we defer to their attempts to . . . assume control over millions of small greenhouse gas sources*” (emphasis added) (citing *Util. Air*, 573 U.S. at 324)).

<sup>78</sup> *Util. Air*, 573 U.S. at 324 (“[I]t would be patently unreasonable — not to say outrageous — for EPA to insist on seizing expansive power that it admits the statute is not designed to grant.”).

<sup>79</sup> See *id.* at 321–23.

<sup>80</sup> *Id.* at 323–24 (emphasis added).

<sup>81</sup> *King v. Burwell*, 576 U.S. 473, 485, 492, 498 (2015) (“Given that the text is ambiguous, we must turn to the broader structure of the Act to determine the meaning of Section 36B.” *Id.* at 492).

<sup>82</sup> Sunstein, *supra* note 21, at 483 (noting that *UARG*’s clear statement rule “is not at all what the Court said in *King v. Burwell*”).

<sup>83</sup> *Id.* at 477–78. It was not until *UARG*, as Sunstein wrote, that “we may fairly say that the major questions doctrine, in its strong form, fully arrived.” *Id.* at 486 (noting that the clear statement passage of *UARG* “reiterates and broadens” a clear statement principle presaged in earlier decisions, “evidently turning [it] into a general principle of administrative law”); *id.* at 484–86 (discussing *Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst. (Benzene)*, 448 U.S. 607 (1980) (Stevens, J.) (plurality opinion); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000)). But, for the reasons described in the text, the significance of this part of *UARG* remained uncertain; thus, as Sunstein recognized, both the “weak” and “strong” versions of the major questions doctrine were on the table when he wrote in 2021, *id.* at 477; see *id.* at 477–80.

<sup>84</sup> See *West Virginia v. EPA*, 142 S. Ct. at 2609 (“The dissent attempts to fit the analysis in these cases within routine statutory interpretation, but the bottom line — a requirement of ‘clear congressional authorization’ — confirms that the approach under the major questions doctrine is distinct.” (citation omitted) (quoting *Util. Air*, 573 U.S. at 324)); see also *id.* at 2620 n.3 (Gorsuch, J.,

*URG*'s clear statement language as the touchstone. Calling the agency's reading of the statute "a stretch," the CDC case quoted the critical sentence from *URG*: "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."<sup>85</sup> A few months on, the OSHA case reviewed the sweeping breadth of the OSHA vaccine mandate and then repeated that language: "We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance.' There can be little doubt that OSHA's mandate qualifies as an exercise of such authority."<sup>86</sup> The OSHA concurrence repeated the statement and called it a "firm rule" that "this Court has established."<sup>87</sup> The agency prevailed in the CMS case, of course, but the dissent nonetheless seized the opportunity to stress that *URG*'s clear statement principle was one enunciated by "our precedents": "[O]ur precedents confirm that the Government has failed to make a strong showing on the merits. 'We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance.'"<sup>88</sup> The EPA case, twice quoting *URG*, again embraced that principle and repackaged it in its own words: "[I]n certain extraordinary cases . . . 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>89</sup>

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concurring) (acknowledging that "[a]t times, this Court applied the major questions doctrine more like an ambiguity canon"; explaining that "[a]mbiguity canons merely instruct courts on how to 'choos[e] between equally plausible interpretations of ambiguous text,' and are thus weaker than clear-statement rules"; asserting — without support, and incorrectly — that "our precedents have usually applied the doctrine as a clear-statement rule"; and then stating that "the Court today confirms that [a clear statement rule] is the proper way to apply [the major questions doctrine]" (third alteration in original) (quoting Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U.L. REV. 109, 109 (2010))).

<sup>85</sup> *Ala. Ass'n of Realtors*, 141 S. Ct. at 2488–89 (citations omitted) (quoting *Util. Air*, 573 U.S. at 324).

<sup>86</sup> *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 665 (citation omitted) (quoting *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489).

<sup>87</sup> *Id.* at 667 (Gorsuch, J., concurring) ("Not only must the federal government properly invoke a constitutionally enumerated source of authority to regulate in this area or any other. It must also act consistently with the Constitution's separation of powers. And when it comes to that obligation, this Court has established at least one firm rule: 'We expect Congress to speak clearly' if it wishes to assign to an executive agency decisions 'of vast economic and political significance.' We sometimes call this the major questions doctrine." (citation omitted) (quoting *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489) (citing *Gundy v. United States*, 139 S. Ct. 2116, 2141 (2019) (Gorsuch, J., dissenting))).

<sup>88</sup> *Biden v. Missouri*, 142 S. Ct. at 658 (Thomas, J., dissenting) (quoting *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489).

<sup>89</sup> *West Virginia v. EPA*, 142 S. Ct. at 2609 ("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. *Util. Air*, 573 U.S. at 324. 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. [*Id.*]" (citation omitted)).

The EPA case marked the first occasion that the Court stated that it was applying what it referred to as the “major questions doctrine.”<sup>90</sup> Ironically, though, the thing the EPA case labelled as the major questions doctrine is actually *not* what commentators earlier called the “major questions exception.”<sup>91</sup> The new major questions doctrine is not a carve out from *Chevron* deference that prompts de novo review, nor is it one canon among many for resolving residual statutory ambiguity. It is instead a clear statement rule that requires an express statutory statement to allow an agency to exercise major regulatory power.<sup>92</sup>

To better understand this point, let us briefly recapitulate the progression just described. *Chevron* allowed agencies to exercise significant regulatory authority on the basis of ambiguous statutory authority — *Chevron* itself is a case in point<sup>93</sup> (and far from the only case in point<sup>94</sup>). The old major questions exception cases occasionally negated the agency’s claim to *Chevron* deference: when a major question was implicated, the agency had to be able to persuade a court on de novo review that the statute authorized the agency’s action.<sup>95</sup> That was a heavier burden for the agency to carry, though *King* proved it was not impossible.<sup>96</sup> Now, under the new major questions doctrine, the burden of proof has again shifted, and it has shifted against the agency. “To convince us,” the EPA case said, the agency must produce “something more than a merely plausible textual basis for the agency action . . . . The agency instead must point to ‘clear congressional authorization’ for the power it claims.”<sup>97</sup> If the statutory text does not surmount this clear statement

<sup>90</sup> See *id.* Before the EPA case, the term “major questions doctrine” appeared in three concurring or dissenting opinions. *Nat’l Fed’n of Indep. Bus.*, 142 S. Ct. at 668–69 (Gorsuch, J., concurring); *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1925 (2020) (Thomas, J., concurring in the judgment in part and dissenting in part); *Gundy*, 139 S. Ct. at 2141–42 (Gorsuch, J., dissenting).

<sup>91</sup> See *supra* section I.A, pp. 269–70.

<sup>92</sup> See Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. (forthcoming 2023) (manuscript at 23–24), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4165724](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4165724) [<https://perma.cc/349K-LY42>] (similarly describing the effects of these cases); *id.* (manuscript at 61) (“The major questions doctrine thus seems to embed deregulatory preferences in the Court’s methods of statutory interpretation.”); Sunstein, *supra* note 21, at 493 (“[T]he strong version holds that if an agency is exercising power in some novel or transformative way . . . [the agency] must be able to show explicit congressional authorization. If a statute is ambiguous, agencies will lose. They do not merely lose deference; they lose.”).

<sup>93</sup> See Sunstein, *supra* note 66, at 232.

<sup>94</sup> See *infra* section I.B.1, pp. 276–82.

<sup>95</sup> See Sunstein, *supra* note 21, at 493 (“The weak version holds that if agencies are resolving a question of fundamental importance about the meaning of federal law, they will not receive *Chevron* deference. They might nonetheless win, but only if a court has decided, independently, that they should.”).

<sup>96</sup> See *King v. Burwell*, 576 U.S. 473, 498 (2015).

<sup>97</sup> *West Virginia v. EPA*, 142 S. Ct. at 2609 (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

hurdle, the inquiry is over, and the agency loses.<sup>98</sup> The old major questions exception was a check on executive power; in contrast, the new major questions doctrine directs how Congress must draft statutes and is therefore a check on congressional power as well.

*I. Tensions with Precedent.* — The foregoing discussion has shown how the quartet parted ways with the old major questions exception cases. This section offers another way to perceive the change wrought by the quartet: a look at past cases where the Court upheld major exercises of regulatory authority by applying ordinary methods of statutory construction, rather than a clear statement test.<sup>99</sup> Such cases extend from before the Administrative Procedure Act and continue through *Chevron* to the recent past.<sup>100</sup>

In *NBC v. United States*,<sup>101</sup> for instance, the Court upheld the FCC's power to regulate chain broadcasting by radio networks.<sup>102</sup> This was a subject of "extreme importance in the life of the nation."<sup>103</sup> The FCC had told Congress its "authority . . . to deal with networks is rather limited" and that it has "no jurisdiction over networks as such."<sup>104</sup> And it was "[t]rue enough," the Court acknowledged, that the Communications Act of 1934<sup>105</sup> "does not explicitly say that the Commission shall have power to deal with network practices found inimical to the public interest."<sup>106</sup> But, the Court reasoned, "Congress was acting in a field of regulation which was both new and dynamic,"<sup>107</sup> and it had entrusted the

<sup>98</sup> See Deacon & Litman, *supra* note 92 (manuscript at 23); Sunstein, *supra* note 21, at 477 ("The idea is not merely that courts will decide questions of statutory meaning on their own. It is that such questions will be resolved unfavorably to the agency. When an agency is seeking to assert very broad power, it will lose, because Congress has not clearly granted it that power." (footnote omitted)).

<sup>99</sup> The point, to be clear, is not that the prequartet cases described in this section are entitled to "interpretive method stare decisis." Rather, the point is that a clear statement test for major exercises of regulatory authority was not heretofore the lodestar.

<sup>100</sup> Several of the cases discussed in this section were decided before textualism became ascendant (not even nominally, as it presently is), and they were influenced by reliance on legislative history and other now-*verboten* sources. That said, the approach adopted by the quartet is not particularly faithful to textualist precepts, either. See *infra* section I.B.2, pp. 282–90. So changes in interpretive methodology cannot alone account for the difference between the older cases and the modern ones.

<sup>101</sup> 319 U.S. 190 (1943).

<sup>102</sup> See *id.* at 196, 217–18, 224.

<sup>103</sup> *Id.* at 228 (Murphy, J., dissenting).

<sup>104</sup> See Comment, *The Impact of the FCC's Chain Broadcasting Rules*, 60 YALE L.J. 78, 84 n.32 (1951) (quoting Letter from Wayne Coy, Chairman, FCC, to Senator Edwin C. Johnson, Chairman, Senate Comm. on Interstate & Foreign Com. (Feb. 25, 1949), in 1 PIKE & FISCHER RADIO REG. 91:125, 91:131 (1949), saying "that the authority of the Commission to deal with networks is rather limited. The Commission has no jurisdiction over networks as such and the Commission does not have the authority to license or regulate networks.").

<sup>105</sup> 47 U.S.C. §§ 151–646.

<sup>106</sup> *NBC*, 319 U.S. at 218–19.

<sup>107</sup> *Id.* at 219.

FCC with broad authority to regulate a “fluid and dynamic” area.<sup>108</sup> The dissent protested that the statute “does not in terms give the Commission power to regulate the contractual relations between the stations and the networks,” and that the Commission claimed authority to regulate chain broadcasting “only as an incident of the power to grant or withhold licenses to individual stations.”<sup>109</sup> Yet the Court upheld the FCC’s chain broadcasting rules, despite the importance of the issue,<sup>110</sup> the novelty of the FCC’s legal position,<sup>111</sup> the agency’s reliance on power “incident[al]” to its express statutory grant,<sup>112</sup> and the statute’s failure to “explicitly” give the power claimed.<sup>113</sup>

Two decades on — still, mind you, in a time before *Chevron* — the FCC extended its regulatory reach again. The FCC had express statutory authority over broadcasting,<sup>114</sup> but what about cable television, which was unforeseen by the Congress that enacted the Communications Act? The FCC had initially disavowed the power to regulate cable television.<sup>115</sup> Indeed, the FCC had twice “sought legislation that would have explicitly authorized such regulation,” and those efforts failed in Congress.<sup>116</sup> Rather than treat that failure as a point *against* the agency, though, the Court stated that the FCC’s lobbying of Congress “evidently reflected in each instance both its uncertainty as to the proper width of its authority and its understandable preference for more detailed policy guidance” than the statute provided — an impulse that, to the Court’s eye, should be encouraged, not held against the

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<sup>108</sup> *Id.*; *see id.* at 218–20 (“We would be asserting our personal views regarding the effective utilization of radio were we to deny that the [FCC] was entitled to find that the large public aims of the [Act] comprehend the considerations which moved the Commission in promulgating the Chain Broadcasting Regulations. . . . Congress did what experience had taught it in similar attempts at regulation, even in fields where the subject-matter of regulation was far less fluid and dynamic than radio. The essence of that experience was to define broad areas for regulation and to establish standards for judgment adequately related in their application to the problems to be solved.”).

<sup>109</sup> *Id.* at 228–29 (Murphy, J., dissenting) (“But nowhere in these sections, taken singly or collectively, is there to be found by reasonable construction or necessary inference, authority to regulate the broadcasting industry as such, or to control the complex operations of the national networks.” *Id.* at 229).

<sup>110</sup> *Id.* at 228.

<sup>111</sup> *See Comment, supra* note 104, at 84 n.32.

<sup>112</sup> *NBC*, 319 U.S. at 228 (Murphy, J., dissenting).

<sup>113</sup> *Id.* at 218–19 (majority opinion).

<sup>114</sup> *See* 47 U.S.C. §§ 301, 303 (granting authority to “[m]ake such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this chapter,” *id.* § 303(f)).

<sup>115</sup> *United States v. Sw. Cable Co.*, 392 U.S. 157, 164 (1968) (“The Commission declared that it had not been given plenary authority over ‘any and all enterprises which happen to be connected with one of the many aspects of communications.’ It refused to premise regulation of CATV upon assertedly adverse consequences for broadcasting, because it could not ‘determine where the impact takes effect, although we recognize that it may well exist.’” (citation omitted)).

<sup>116</sup> *Id.* at 169–70.

agency.<sup>117</sup> The Court ultimately sustained the FCC's authority to regulate cable television.<sup>118</sup>

Jump forward about three decades, and another example appears in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*. The Endangered Species Act of 1973<sup>119</sup> made it unlawful to "take" an endangered species, and it defined the word "take" to include a litany of actions that one would not want to encounter if one were a red-cockaded woodpecker or a spotted owl.<sup>120</sup> The question, though, was whether a person "takes" an endangered species by destroying its habitat, as the Department of the Interior had specified in its regulation.<sup>121</sup> As the dissent noted, habitats can be destroyed by "[a] large number of routine private activities — for example, farming, ranching, roadbuilding, construction and logging."<sup>122</sup> And if the law prohibited habitat destruction, it could impose "financial ruin — not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoological use."<sup>123</sup> On top of that, knowing violations of the statute carried criminal and civil penalties.<sup>124</sup> Was this chilling regulatory interference with millions of acres of private property,<sup>125</sup> with the land of the rich and the poor, with its administrative criminalization of the innocent laboring of the "simplest farmer" and the yeoman rancher, *clearly* or *unambiguously* authorized by the statute? In sustaining the regulation, the Court did not find it necessary to so hold.<sup>126</sup> Quite the contrary, in fact: the Court noted that the statute did not unambiguously support the *challengers'* view and that the regulation was a reasonable construction of the statute

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<sup>117</sup> *Id.* at 170 ("We have recognized that administrative agencies should, in such situations, be encouraged to seek from Congress clarification of the pertinent statutory provisions." (citing *Wong Yang Sung v. McGrath*, 339 U.S. 33, 47 (1950))).

<sup>118</sup> *See id.* at 161.

<sup>119</sup> 16 U.S.C. §§ 1531–1544.

<sup>120</sup> *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 691–92 (1995) ("Section 3(19) of the Act defines the statutory term 'take': 'The term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.'" (quoting 16 U.S.C. § 1532(19))). If white rabbits were endangered, Alice might have been in serious legal trouble.

<sup>121</sup> *See id.* (noting that the definition of take "may include significant habitat modification or degradation" (quoting 50 C.F.R. § 17.3 (1994))).

<sup>122</sup> *Id.* at 721 (Scalia, J., dissenting).

<sup>123</sup> *Id.* at 714.

<sup>124</sup> *Id.* at 721.

<sup>125</sup> According to one upset commentator, the spotted owl alone had a habitat spanning twenty-four million acres of privately owned timberland across three states. Ike C. Sugg, *Worried About That Owl on Your Land? Here's Good News*, WALL ST. J., Apr. 6, 1994, at A15.

<sup>126</sup> *See Babbitt*, 515 U.S. at 703 ("We need not decide whether the statutory definition of 'take' compels the Secretary's interpretation of 'harm,' because our conclusions that Congress did not unambiguously manifest its intent to adopt respondents' view and that the Secretary's interpretation is reasonable suffice to decide this case.").

by an agency to which Congress had delegated “broad discretion” over “wise policy.”<sup>127</sup>

Decades later, *King v. Burwell* likewise did not insist on a clear statement.<sup>128</sup> This case presented a “breathtakingly important” question<sup>129</sup> — did the ACA authorize billions of dollars of federal tax credits to be paid to those who bought their policies on the clearinghouse established by the federal government, or did it limit payment of the tax credits only to those who purchased plans on an exchange “established by [a] State”?<sup>130</sup> The Court acknowledged the question to be a major one.<sup>131</sup> The Court recognized that the statute was “ambiguous”<sup>132</sup> and that the challengers had “strong” arguments about the “plain meaning” of the statute.<sup>133</sup> Nonetheless, the Court held that the ACA must be read “[i]f at all possible . . . in a way that is consistent” with “what we see as Congress’s plan.”<sup>134</sup> It therefore read concededly ambiguous statutory text in a manner that allowed tax credits to be paid to buyers on the federal exchange.<sup>135</sup>

The hardest case to reconcile with the logic of the quartet’s new doctrine is, perhaps, *Massachusetts v. EPA*. In that case, a group of private organizations petitioned the EPA to regulate greenhouse gases as “air pollutants,” and the Court had to decide whether the EPA had that authority and should have granted the petition.<sup>136</sup> For the EPA to have authority to regulate greenhouse gases would obviously be a matter of “vast economic and political significance”<sup>137</sup> — “[r]egulating greenhouse gases is obviously an ‘elephant.’”<sup>138</sup> Under the methodology of the new major questions doctrine, the Court would have demanded a clear statement in the Clean Air Act. In a 5–4 holding, the Court did discover that unambiguous authority in the statute, declaring the Clean Air Act to include carbon dioxide and rejecting the EPA’s reliance on *Brown &*

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<sup>127</sup> *Id.* at 708; *see id.* (“The proper interpretation of a term such as ‘harm’ involves a complex policy choice. When Congress has entrusted the Secretary with broad discretion, we are especially reluctant to substitute our views of wise policy for his.”).

<sup>128</sup> *See* 576 U.S. 473, 498 (2015).

<sup>129</sup> John F. Manning, Essay, *Without the Pretense of Legislative Intent*, 130 HARV. L. REV. 2397, 2397 (2017).

<sup>130</sup> 26 U.S.C. § 36B; 42 U.S.C. § 18031(b)(1) (“Each State shall . . . establish an American Health Benefit Exchange . . . for the State”); *see King*, 576 U.S. at 485–86.

<sup>131</sup> *See King*, 576 U.S. at 485.

<sup>132</sup> *Id.* at 490 (“The upshot of all this is that the phrase ‘an Exchange established by the State under [42 U.S.C. § 18031]’ is properly viewed as ambiguous.” (alteration in original)).

<sup>133</sup> *Id.* at 497 (“Petitioners’ arguments about the plain meaning of Section 36B are strong.”).

<sup>134</sup> *Id.* at 498.

<sup>135</sup> *See id.* at 490, 498.

<sup>136</sup> *Massachusetts v. EPA*, 549 U.S. 497, 510–11, 528 (2007).

<sup>137</sup> *See* Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 75 (2008).

<sup>138</sup> Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19, 63 (2010).

*Williamson*.<sup>139</sup> Yet it is hard to imagine that, applying the quartet's methodology today, the Court would reach the same outcome.<sup>140</sup> One can easily imagine a quartet-guided opinion, modeled on portions of Justice Scalia's *Massachusetts v. EPA* dissent, that distinguishes "regulating the buildup of CO<sub>2</sub> and other greenhouse gases in the upper reaches of the atmosphere" from the assertedly quite different task of "regulating the concentration of some substance that is *polluting* the air."<sup>141</sup> A Court unwilling to regard COVID-19 as an "*occupational hazard*"<sup>142</sup> (italics in original) may not be inclined to treat as unambiguous the proposition that carbon dioxide is a substance that is "*polluting* the air" (same).

That ambiguity over whether carbon dioxide is an "air pollutant" within the meaning of the Clean Air Act would have led a judge in the mold of Justice Scalia — a staunch defender of *Chevron*<sup>143</sup> — to defer to the EPA: "No matter how important the underlying policy issues at stake," he wrote, "this Court has no business substituting its own desired outcome for the reasoned judgment of the responsible agency."<sup>144</sup> But Justice Scalia is no longer on the Court, the politics of deference have shifted drastically,<sup>145</sup> and today's new major questions doctrine would call for a different result. A finding of ambiguity in the Clean Air Act concerning whether carbon dioxide is an air pollutant would not trigger *Chevron* deference for a court applying the new major questions doctrine; instead, that ambiguity would be sufficient reason to disallow the EPA from exerting an "expansive regulatory authority," because "an *ambiguous* grant of statutory authority is not enough"<sup>146</sup> in a matter of such importance.

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<sup>139</sup> *Massachusetts v. EPA*, 549 U.S. at 528, 531 (rejecting EPA's reliance on *Brown & Williamson* and finding "no reason, much less a compelling reason" to read the term "air pollutant" not to include greenhouse gases); see Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,928 (Sept. 8, 2003) (notice of the EPA) (contending that treating the Clean Air Act to allow regulation of carbon dioxide as an air pollutant would have "greater economic and political implications than FDA's attempt to regulate tobacco," referencing *Brown & Williamson*).

<sup>140</sup> See Sunstein, *supra* note 21, at 491 ("It must, however, be acknowledged that the Court's language in *Utility Air Regulatory Group* could easily have been used to justify the opposite outcome in *Massachusetts v. EPA* itself . . .").

<sup>141</sup> *Massachusetts v. EPA*, 549 U.S. at 559 (Scalia, J., dissenting).

<sup>142</sup> *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 665.

<sup>143</sup> See, e.g., *City of Arlington v. FCC*, 569 U.S. 290, 304–05 (2013).

<sup>144</sup> *Massachusetts v. EPA*, 549 U.S. at 560 (Scalia, J., dissenting) ("This is a straightforward administrative-law case, in which Congress has passed a malleable statute giving broad discretion, not to us but to an executive agency. No matter how important the underlying policy issues at stake, this Court has no business substituting its own desired outcome for the reasoned judgment of the responsible agency.").

<sup>145</sup> Craig Green, *Deconstructing the Administrative State: Chevron Debates and the Transformation of Constitutional Politics*, 101 B.U. L. REV. 619, 647–48 (2021).

<sup>146</sup> See *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 421 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc) ("If an agency wants to exercise expansive regulatory authority over some major social or economic activity . . . an *ambiguous* grant of statutory authority is not enough.").

To cut a long story short, if the clear statement rule embraced by the quartet is the law, a string of cases from the 1940s to just a few years ago cannot have been right, and the results in *Massachusetts v. EPA* and *King v. Burwell* appear secure only to the extent that doctrines of statutory stare decisis would shield them. Yet the Court did not acknowledge, let alone justify, these discrepancies.

Last but not least, it is worth mentioning that nowhere in the quartet did the Court discuss how the major questions doctrine relates to *Chevron*. It is important to recall that the old major questions exception was so called because it functioned as an exception to *Chevron* deference.<sup>147</sup> In contrast, the new major questions doctrine does not begin with *Chevron*. The new major questions doctrine does not operate as a factor within the *Chevron* framework, nor is it described as an exception to that framework. None of the quartet even cites *Chevron*. The decision that has loomed over administrative law for almost four decades was essentially erased, as if it never existed.

It is not just the Court that has left *Chevron* a derelict.<sup>148</sup> Before the Court, the government did not ask for *Chevron* deference in these cases, not even as a fallback option.<sup>149</sup> In all four cases, the government staked

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<sup>147</sup> See, e.g., Sunstein, *supra* note 43, at 1669 (“There is the ‘major question’ exception, a kind of *Chevron* carve-out for issues of great social and economic importance.”).

<sup>148</sup> See James Kunhardt & Anne Joseph O’Connell, *Judicial Deference and the Future of Regulation*, BROOKINGS (Aug. 18, 2022), <https://www.brookings.edu/research/judicial-deference-and-the-future-of-regulation> [https://perma.cc/ET68-TASE] (surveying the language of Biden Administration regulatory actions and describing the evidence that agencies may be “shying away from explicitly citing *Chevron*” and “giving *Chevron* shorter shrift”); Kristin E. Hickman & Aaron L. Nielson, Foreword, *The Future of Chevron Deference*, 70 DUKE L.J. 1015, 1015–16 (2021) (discussing the reluctance of litigants to cite *Chevron*).

<sup>149</sup> In the CDC case, the government included *Chevron* deference as a fallback argument before the district court. See Motion for Summary Judgment at 9, *Ala. Ass’n of Realtors v. U.S. Dep’t of Health & Hum. Servs.*, 557 F. Supp. 3d 1 (D.D.C. 2021) (No. 20-cv-3377) (“[E]ven if the Court were to determine that the statute is ambiguous, CDC’s reasoned interpretation warrants deference.”). The government did not seek *Chevron* deference in the Supreme Court, though it did contend that the Court owed “‘significant deference’ to public officials charged with responding to the COVID-19 pandemic.” Response in Opposition to Applicants’ Emergency Application to Vacate the Stay Pending Appeal at 13, *Ala. Ass’n of Realtors*, 141 S. Ct. 2485 (No. 21A23) (quoting *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 716 (2021) (Roberts, C.J., concurring in the partial grant of application for injunctive relief)).

In the OSHA case, the government included *Chevron* deference as a fallback argument in the Sixth Circuit. See Respondents’ Emergency Motion to Dissolve Stay at 17, *Mass. Bldg. Trades Council v. U.S. Dep’t of Lab.* (*In re MCP* No. 165), 21 F.4th 357 (6th Cir. 2021) (No. 21-7000) (“Even if there were some statutory ambiguity, this Court should defer to OSHA’s reasonable interpretation of the statute.”). The government did not seek *Chevron* deference in the Supreme Court. See Response in Opposition to the Applications for a Stay at 5, *Nat’l Fed’n of Indep. Bus.*, 142 S. Ct. 661 (No. 21A244).

In the CMS case, the government did not claim *Chevron* deference before either the Supreme Court or before the lower courts. See Application for a Stay of the Injunction at 19, *Biden v. Missouri*, 142 S. Ct. 647 (No. 21A240) (“Here, the Secretary’s authority to adopt the rule flows directly from the unambiguous text of the statute.”); Defendants’ Memorandum in Opposition to

its arguments before the Court not upon *Chevron* but upon the contention that the statute at issue unambiguously authorized its regulatory action.<sup>150</sup> In a poignant grace note, the brief for the government in the EPA case cited *Chevron* a single time — not for a proposition of law, but for that case’s explanation of the “‘bubble’ or ‘netting concept.’”<sup>151</sup> *Chevron*, though not overruled, is “shun[ned]”<sup>152</sup> — administrative law’s own frumious Bandersnatch.

2. *Tensions with (and Within) Textualism.* — Apart from its ramifications for administrative law, the quartet raises — and leaves unanswered — challenging questions concerning whether the Court’s new clear statement rule is compatible with its commitment to textualism.<sup>153</sup>

In each of the three cases (CDC, OSHA, and EPA) in which the government lost, strong textualist arguments existed to support the result the Court reached.<sup>154</sup> In each case, the Court could have, if not without some difficulty, crafted a textualist opinion that would have grappled squarely with statutory language, and *only* grappled with that language.

The Court did not do that. Instead, over the course of these three cases, it enunciated a clear statement rule — the new major questions doctrine. This doctrine, recall, “‘greet[s]’ assertions of ‘extravagant statutory power over the national economy’ with ‘skepticism.’”<sup>155</sup>

Plaintiffs’ Motion for a Preliminary Injunction at 12, *Louisiana v. Becerra*, 571 F. Supp. 3d 516 (W.D. La. 2021) (No. 21-CV-03970); Defendants’ Memorandum in Opposition to Plaintiffs’ Motion for a Preliminary Injunction at 20, *Missouri v. Biden*, 571 F. Supp. 3d 1079 (E.D. Mo. 2021) (No. 21-cv-1329).

The government did not seek *Chevron* deference before the Supreme Court in the EPA case. See Brief for the Federal Respondents, *West Virginia v. EPA*, 142 S. Ct. 2587 (No. 20-1530).

<sup>150</sup> See sources cited *supra* note 149.

<sup>151</sup> See Brief for the Federal Respondents, *supra* note 149, at 25 (“Cf. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 863 n.37 (1984) (explaining the “‘bubble’ or ‘netting’ concept”).”).

<sup>152</sup> James Romoser, *In an Opinion that Shuns Chevron, the Court Rejects a Medicare Cut for Hospital Drugs*, SCOTUSBLOG (Jun. 15, 2022, 2:24 PM), <https://www.scotusblog.com/2022/06/in-an-opinion-that-shuns-chevrons-the-court-rejects-a-medicare-cut-for-hospital-drugs> [https://perma.cc/QL2T-BKL2] (“Rather than a single, decisive blow or a continued death by a thousand cuts, the court might simply snuff out *Chevron* with the silent treatment.”).

<sup>153</sup> No citation should be necessary to support the assertion that textualism is at least ostensibly the interpretive methodology embraced by the Court; see anyway John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 125 (2012); and Thomas W. Merrill, Essay, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 355–57 (1994), which trace the embrace of textualism by the Court.

<sup>154</sup> Strong textualist arguments also existed in each case for the opposite result. To set my own cards on the table, I would think that a purely textualist approach would have resulted in the government losing the CDC case, losing the CMS case, winning the EPA case, and prevailing in the OSHA case at least on the threshold statutory issue of OSHA’s authority to impose a vaccine mandate in some workplaces. I should emphasize that *none* of the Justices cast his or her votes in this way. That utter lack of overlap could indicate that either I am lousy at textualism or all nine of them are. Then again, in my defense, it might also indicate the extent to which textualism is not doing the work of deciding these cases.

<sup>155</sup> *West Virginia v. EPA*, 142 S. Ct. at 2609 (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

Overcoming that “skepticism” requires “something more than a merely plausible textual basis for the agency action” — “[t]he agency instead must point to ‘clear congressional authorization’ for the power it claims.”<sup>156</sup> As articulated by the quartet, the new major questions doctrine leaves open the possibility that a statement contained in a statute will nonetheless be disregarded because it falls short of being a “clear” statement,<sup>157</sup> or one that is “express[] and specific[.]”<sup>158</sup> The quartet demands not just that Congress speak, but that Congress yell.

Is this good textualism? Justice Kagan’s already-famous retort encapsulates one concern, indeed a cluster of concerns: “The current Court is textualist only when being so suits it. When that method would frustrate broader goals, special canons like the ‘major questions doctrine’ magically appear as get-out-of-text-free cards.”<sup>159</sup>

Here, Justice Kagan put her finger on a fracture within textualism. One school of textualists has urged that textualism requires that courts apply the ordinary meaning of statutory text, rather than bend and inflect it in accordance with clear statement rules and substantive canons.<sup>160</sup> The proliferation and the malleability of such interpretive rules erode the neutrality and judicial constraint that textualism is intended to promote.<sup>161</sup> This strain of textualism views substantive canons and clear statement rules as “get-out-of-text-free cards” and accordingly treats them with suspicion.

There is another strain of textualism, however, that allows such rules, though with limits.<sup>162</sup> This “flexible” strain of textualism,<sup>163</sup> to borrow Professor Tara Leigh Grove’s terminology, regards the application of clear statement rules and substantive canons as in keeping with the broader textualist commitments to serving as a faithful agent to

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<sup>156</sup> *Id.* (quoting *Util. Air*, 573 U.S. at 324).

<sup>157</sup> *See id.*

<sup>158</sup> *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., concurring in the denial of certiorari).

<sup>159</sup> *West Virginia v. EPA*, 142 S. Ct. at 2641 (Kagan, J., dissenting).

<sup>160</sup> *See* John F. Manning, *The Supreme Court, 2013 Term — Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 72–73 (2014) (noting that “an ever-expanding array of clear statement rules” allow courts to depart from “the conventional meaning of the text in order to serve extratextual values or purposes, at times identified by the Court rather than Congress”); Anita S. Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825, 835 (2017) (noting the “significant theoretical tension between substantive canons and textualism”); Note, *Clear Statement Rules, Federalism, and Congressional Regulation of States*, 107 HARV. L. REV. 1959, 1959 (1994) (noting that clear statement rules “erect potential barriers to the straightforward effectuation of legislative intent”); *see also* ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 27–29 (1997) (warning against “presumptions and rules of construction that load the dice for or against a particular result” and saying that some of these “dice-loading rules” might effectuate “a sheer judicial power-grab”).

<sup>161</sup> *See* sources cited *supra* note 160.

<sup>162</sup> *See* Barrett, *supra* note 84, at 112.

<sup>163</sup> Tara Leigh Grove, *The Supreme Court, 2019 Term — Comment: Which Textualism?*, 134 HARV. L. REV. 265, 269 (2020).

Congress and to judicial constraint.<sup>164</sup> Because many such canons and rules are well known, the argument goes, one can assume that Congress knows them too and takes them into account when it drafts legislation.<sup>165</sup> But even flexible textualists acknowledge courts should treat such substantive canons gingerly because of their evident potential to encourage departures from plain text when judges discern abstract “values” in constitutional text, structure, and principles. As urged by one defender of textualists’ use of substantive canons — then-Professor Amy Coney Barrett — a substantive canon or clear statement rule should seek to protect “more specific” constitutional values — “state sovereign immunity,” for example, which is specific, rather than “fairness,” which is vague.<sup>166</sup> When a substantive canon is linked to a “reasonably specific” constitutional value, “the more even [the canon’s] application will be across a range of cases,” and “the more specific the value, the better Congress can anticipate its effect on a statute’s subsequent interpretation.”<sup>167</sup> While flexible textualists need not abjure such clear statement rules and canons, then, they must use them responsibly — and they must adopt and craft *new* rules of this ilk *very* responsibly.

The real bite, then, of Justice Kagan’s criticism of the Court’s supposed adherence to textualism is that it attacks not simply the bare propriety of clear statement rules and substantive canons, nor simply the risk of their selective application, but also the propriety of the Court’s creation of *new* clear statement rules and substantive canons that lack crisp boundaries and that are linked only vaguely to the Constitution. A new substantive canon or a new clear statement rule must be justified as serving some “reasonably specific” constitutional value in a predictable way.<sup>168</sup> In other words, it is not enough *for even a flexible textualist* to respond that *some* old and specific clear statement rules and substantive canons are legitimate interpretive tools, full stop (which is all that

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<sup>164</sup> See *id.* at 269, 279, 285–90 (“[T]his version of textualism authorizes interpreters to make sense of the statutory language by looking at social and policy context, normative values, and the practical consequences of a decision. I dub this strand of textualist practice ‘flexible textualism.’” *Id.* at 286.).

<sup>165</sup> See, e.g., John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2467 (2003); Barrett, *supra* note 84, at 159 (describing the argument that “substantive canons comprise a ‘closed set’ of background assumptions against which Congress legislates”). For empirical explorations of which canons Congress knows about, see Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside — An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 949 (2013); and Abbe R. Gluck, *The Supreme Court, 2014 Term — Comment: Imperfect Statutes, Imperfect Courts: Understanding Congress’s Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 82–83 (2015).

<sup>166</sup> Barrett, *supra* note 84, at 178–79.

<sup>167</sup> *Id.* at 178. Strikingly, Barrett cautioned that “a canon designed to protect the constitutional separation of powers — a function that can be attributed to a host of canons — is probably stated at too great a level of generality to justify departures from a text’s most natural meaning.” *Id.* at 179 n.331. We will return to this point below, *infra* section II.B.2, pp. 309–15.

<sup>168</sup> See Barrett, *supra* note 84, at 178–79.

Justice Gorsuch undertook to do, by pointing to retroactivity and state sovereign immunity<sup>169</sup>); the challenge, rather, is to justify why a new substantive canon or clear statement rule should be created — “magically appear”<sup>170</sup> — and to ensure that the new rule is capable of predictable application.

An attempted justification for the creation of new constitutionally inspired clear statement rules can be discerned in the academic writings of the inventor of the new major questions doctrine himself — Justice Kavanaugh. As then-Judge Kavanaugh wrote in this publication in 2016, many interpretive tools used by courts “depend on an initial evaluation of whether the statutory text is clear or ambiguous. But because it is so difficult to make those clarity versus ambiguity determinations in a coherent, evenhanded way, courts should reduce the number of canons of construction that depend on an initial finding of ambiguity.”<sup>171</sup> *MCI* and *Brown & Williamson* — two major questions cases — were examples he cited of such judicial skirmishing over ambiguity and clarity.<sup>172</sup> Then-Judge Kavanaugh argued that “ambiguity-dependent” principles of statutory interpretation left too much scope for judicial discretion and failed to promote the “neutral, impartial rule of law”<sup>173</sup> — values important to textualism.<sup>174</sup> His proposed solution was that interpretive rules that pivot on a finding of ambiguity should be replaced by clear statement (or “plain statement”) rules, or else jettisoned.<sup>175</sup> As he explained: “[I]f some constitutional or quasi-constitutional value is sufficiently important that we will presume that Congress did not mean to abrogate that value, then we should require Congress to speak directly to that issue in order to overcome it.”<sup>176</sup>

The new major questions doctrine, inasmuch as it replaces a more forgiving ambiguity-dependent canon with a more demanding clear statement test,<sup>177</sup> would seem to accomplish the sort of shift that then-Judge Kavanaugh advocated. But three characteristics of this particular clear statement rule show that the new major questions doctrine is not in fact faithful even to the textualist precepts to which then-Judge Kavanaugh alluded.

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<sup>169</sup> See *West Virginia v. EPA*, 142 S. Ct. at 2616–17 (Gorsuch, J., concurring).

<sup>170</sup> *Id.* at 2641 (Kagan, J., dissenting).

<sup>171</sup> Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2121 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014)).

<sup>172</sup> See *id.* at 2141 (devoting some discussion to *MCI* and also citing *Brown & Williamson*).

<sup>173</sup> *Id.* at 2154–55.

<sup>174</sup> See *id.* at 2118–19, 2154–55.

<sup>175</sup> See *id.* at 2155–56 (“In my view, the solution to the clarity versus ambiguity conundrum . . . is either to apply the presumption in question as a plain statement rule, or to eliminate it entirely.” *Id.* at 2156.)

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

<sup>177</sup> See sources cited *supra* note 84 (tracing the transition of the major questions doctrine into a clear statement rule).

One issue, which then-Judge Kavanaugh acknowledged in his book review,<sup>178</sup> ties to the concern just mentioned about applying *new* canons and clear statement rules. It is unfair to Congress for courts to apply a newly crafted clear statement rule to earlier-enacted legislation. A textualist should “attempt to identify and apply the conventions in effect at the time of a statute’s enactment,” not create new interpretive rules and apply them retroactively.<sup>179</sup> “[W]hen the Court applies a new canon retroactively to an old statute, it imposes a cost rather than a benefit on the unsuspecting legislature”<sup>180</sup> — what Professor William Eskridge calls a “bait and switch.”<sup>181</sup> As Professor Lisa Heinzerling says, Congress has no “crystal ball” that it could use to anticipate and legislate around “future problems”<sup>182</sup> — including future avulsions in interpretive regimes.

The timeline of the statutes involved in the quartet brings this problem into sharp relief. The Congresses that wrote the Public Health Service Act<sup>183</sup> (1944), the Occupational Safety and Health Act of 1970<sup>184</sup> (OSH Act), and the modern Clean Air Act (1970, amended in 1977 and 1990), were operating in an interpretive regime in which this clear statement rule did not exist and could not have been anticipated.<sup>185</sup> As the cases reviewed above (and many others) illustrate, the Congresses that wrote these statutes were operating in a legal milieu that did not just

<sup>178</sup> See Kavanaugh, *supra* note 171, at 2156 n.188 (“Perhaps courts could adopt this change only for statutes enacted after the date on which the court announces the shift to a plain statement rule.”).

<sup>179</sup> Manning, *supra* note 165, at 2474 n.318 (“[T]extualists should still interpret a previously enacted statute based on the interpretive rules in effect at the time of its passage.”); see also Heinzerling, *supra* note 21, at 1982. Just last Term, in *Kemp v. United States*, 142 S. Ct. 1856 (2022), the Court looked back to the understandings of 1938 and 1946 to assess the meaning of “mistake” in Rule 60(b)(1) of the Federal Rules of Civil Procedure. See *id.* at 1862; see also *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 167–68 (2015) (Thomas, J., dissenting).

<sup>180</sup> Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2142 (2002); see also William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 683–84 (1990); William S. Dodge, *The New Presumption Against Extraterritoriality*, 133 HARV. L. REV. 1582, 1584 (2020); Brian G. Slocum, *Overlooked Temporal Issues in Statutory Interpretation*, 81 TEMP. L. REV. 635, 640, 647–48 (2008).

<sup>181</sup> William N. Eskridge, Jr., *Textualism, The Unknown Ideal?*, 96 MICH. L. REV. 1509, 1541 n.115 (1998) (reviewing ANTONIN SCALIA, *A MATTER OF INTERPRETATION* (Amy Gutmann ed., 1997)) (“I think retroactive application of an exclusionary rule in this way would be unconscionable as a dirty bait and switch on poor Congress.”).

<sup>182</sup> Heinzerling, *supra* note 21, at 1948 (“Congress must not only be clear, but also clairvoyant. . . . Congress then must use statutory language that pellucidly covers the future problems and gives the agency the power to address them. The Court might as well have instructed Congress to fabricate a crystal ball.”).

<sup>183</sup> 42 U.S.C. §§ 201 to 300mm-61.

<sup>184</sup> 29 U.S.C. §§ 651–678.

<sup>185</sup> Note that the D.C. Circuit’s decision in the CDC case looked to the understanding of “Congress in 1944” concerning the statute. See *Ala. Ass’n of Realtors v. U.S. Dep’t of Health & Hum. Servs.*, No. 21-5093, 2021 WL 2221646, at \*2 (D.C. Cir. June 2, 2021) (“That language makes clear that HHS has even the exceptional authority to take measures carrying out its regulations that Congress in 1944 had reason to believe required express congressional authorization under the Fourth Amendment.”).

grudgingly allow administrative power but rather relied upon and even fortified it.<sup>186</sup> Expansive exercises of agency power — even those with major consequences — were regarded as a feature of that regime, not as the system going haywire.<sup>187</sup> By now flipping the burden of proof on what statutes must say, the Court has retroactively altered the rules of the road for Congresses that couldn't have anticipated, let alone complied with, such a rule.<sup>188</sup> But isn't Congress, like everyone else, entitled to fair notice of the law that governs it?<sup>189</sup>

A second issue ties to the susceptibility of this new clear statement rule to selective application and judicial discretion — which are, ironically, the very pathologies that then-Judge Kavanaugh argued would be *reduced* by adopting clear statement rules instead of “ambiguity-dependent” principles.<sup>190</sup> The rule hinges on a finding that a given agency action is a “big new thing”<sup>191</sup> — that it is “extraordinary,” or “major,”<sup>192</sup> or “transformative.”<sup>193</sup> The opacity of this trigger was a well-ventilated criticism of the old major questions exception,<sup>194</sup> and the cases in the major questions quartet do not do much to assuage this concern. The decisions in this (bent) line of cases, up to and including the quartet, revealed “a number of factors” that a court might consult to determine whether an agency action is “major.”<sup>195</sup> As then-Judge

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<sup>186</sup> See *supra* pp. 276–79.

<sup>187</sup> See *supra* pp. 276–79.

<sup>188</sup> See *Finley v. United States*, 490 U.S. 545, 556 (1989) (“What is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts.”).

<sup>189</sup> *Chevron* itself performed a retroactive interpretive regime change. See Manning, *supra* note 165, at 2474; Sunstein, *supra* note 66, at 188–89. It may have done so unconsciously: at the time it was decided, *Chevron* was not thought to be a watershed. See Hickman, *supra* note 51, at 71 & n.93 (describing *Chevron* as “unintentionally revolutionary,” *id.* at 71, and noting a “scholarly consensus” that “neither Justice Stevens, who wrote the *Chevron* decision, nor any of his colleagues, who joined his opinion, had any notion whatsoever of saying anything unique or pivotal about judicial deference,” *id.* at 71 n.93). Dean John Manning has argued that textualists may regard retroactive alterations of background conventions as defensible if the new rule of construction is constitutionally grounded and has contended that *Chevron* is “explicitly” so grounded. See Manning, *supra* note 165, at 2474 n.318.

<sup>190</sup> See Kavanaugh, *supra* note 171, at 2118–19, 2121, 2135–36.

<sup>191</sup> *West Virginia v. EPA*, 142 S. Ct. at 2638 (Kagan, J., dissenting).

<sup>192</sup> *Id.* at 2609 (majority opinion).

<sup>193</sup> *Id.* at 2610.

<sup>194</sup> See, e.g., Loshin & Nielson, *supra* note 138, at 23; Heinzerling, *supra* note 21, at 1984; Richardson, *supra* note 21, at 195; Sunstein, *supra* note 21, at 487 (“[N]o clear line separates enormous expansions from mere expansions.”).

<sup>195</sup> *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 422–23 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) (“The Court has not articulated a bright-line test that distinguishes major rules from ordinary rules. As a general matter, however, the Court’s cases indicate that a number of factors are relevant, including: the amount of money involved for regulated and affected parties, the overall impact on the economy, the number of people affected, and the degree of congressional and public attention to the issue. The Court’s concern about an agency’s issuance of a seemingly major rule is heightened, moreover, when an agency relies on a long-extant statute to support the agency’s bold new assertion of regulatory authority.” (citations omitted)).

Kavanaugh acknowledged, “determining whether a rule constitutes a major rule sometimes has a bit of a ‘know it when you see it’ quality.”<sup>196</sup>

In an effort to create some guideposts for this malleable inquiry, Justice Gorsuch’s concurring opinion in the EPA case attempted to distill some considerations relevant to determining “when an agency action involves a major question for which clear congressional authority is required”<sup>197</sup> — among them, “when an agency claims the power to resolve a matter of great ‘political significance’”<sup>198</sup> or “end an ‘earnest and profound debate across the country’”;<sup>199</sup> when the agency acts after Congress has rejected “something akin to the agency’s proposed course of action”;<sup>200</sup> or when the agency action reaches “a significant portion of the American economy,”<sup>201</sup> requires “billions of dollars in spending,”<sup>202</sup> or “intrud[es] on powers reserved to the States.”<sup>203</sup> This smorgasbord is a nonexhaustive set of considerations that courts may balance and weigh.<sup>204</sup> Nothing on that list is necessary. Nothing on that list is sufficient. The same goes for Justice Gorsuch’s other buffet table — his list of factors for determining “what qualifies as a clear congressional statement.”<sup>205</sup> Taken together, these clusters of “triggers”<sup>206</sup> and “telling clues”<sup>207</sup> invite courts to perform exactly the kind of all-things-considered, open-ended inquiry that textualism was meant to teach courts to avoid like the plague.<sup>208</sup>

One way to see this is to consider a loose hypothetical that presents some of these factors and not others. Consider, for example, a fairly old statute. Let us say the problem the agency seeks to tackle is a new one — say, a new pandemic, or a newly invented technology, or a massive upheaval in the legal landscape occasioned by a new Supreme Court decision. Let us say the agency is the agency tasked to address problems

<sup>196</sup> *Id.* at 423.

<sup>197</sup> *West Virginia v. EPA*, 142 S. Ct. at 2620 (Gorsuch, J., concurring).

<sup>198</sup> *Id.* (quoting *Nat’l Fed’n of Indep. Bus.*, 142 S. Ct. at 665).

<sup>199</sup> *Id.* (quoting *Gonzales v. Oregon*, 546 U.S. 243, 267–68 (2006)).

<sup>200</sup> *Id.* at 2620–21.

<sup>201</sup> *Id.* (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

<sup>202</sup> *Id.* (quoting *King v. Burwell*, 576 U.S. 473, 485 (2015)).

<sup>203</sup> *Id.* (citing *Solid Waste Agency v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 162 (2001)).

<sup>204</sup> *Id.* (“[T]his list of triggers may not be exclusive . . .”).

<sup>205</sup> *Id.* at 2622. “[C]ourts must look to the legislative provisions on which the agency seeks to rely ‘with a view to their place in the overall statutory scheme,’” *id.* (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)); they may “examine the age and focus of the statute the agency invokes in relation to the problem the agency seeks to address,” *id.* at 2623; they “may examine the agency’s past interpretations of the relevant statute,” *id.*; and “skepticism may be merited when there is a mismatch between an agency’s challenged action and its congressionally assigned mission and expertise,” *id.*, though this last factor is “relevant” but not “necessary,” *id.* at 2623 n.5.

<sup>206</sup> *Id.* at 2621.

<sup>207</sup> *Id.* at 2622.

<sup>208</sup> *See, e.g., Morrison v. Olson*, 487 U.S. 654, 733 (1988) (Scalia, J., dissenting) (criticizing “the ‘totality of the circumstances’ mode of analysis” for inviting “ad hoc judgment”); *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment).

of this ilk. Let us also assume that Congress has *not* considered and rejected amendments to the agency’s statutory authority that would specifically address the new issue and that the agency action will *not* require “billions of dollars in spending”<sup>209</sup> by private parties nor reach “a significant portion of the American economy.”<sup>210</sup> On the other hand, let us assume that the agency action *does* regulate millions of individuals on a matter of great significance, on which there is sharp political disagreement and debate, and in a way that the agency has never before exerted regulatory power — and let us add, too, that the agency is relying on statutory language that is more “oblique” or “broad” rather than direct or specific.<sup>211</sup>

Could one conclude that such a rule would be a major rule within the meaning of the new major questions doctrine and fail for lack of express congressional authorization? Sure.<sup>212</sup> Or maybe not.<sup>213</sup> The point is that it’s anyone’s guess, including under Justice Gorsuch’s multifactor test.<sup>214</sup>

The third and perhaps most profound difficulty with reconciling the new major questions doctrine and textualism is that this doctrine, like other clear statement rules, only springs into action once one has made an implicit determination of what “constitutional or quasi-constitutional value[s] [are] sufficiently important that we will presume that Congress did not mean to abrogate that value.”<sup>215</sup> In his book review, then-Judge Kavanaugh bracketed this question, noting that “determining which constitutional or quasi-constitutional values justify a presumption or plain statement rule” is a “hotly disputed” matter.<sup>216</sup> That is perfectly fine for a piece of academic writing. But the major questions quartet is not a book review. It does not permit abstention on the question of what “constitutional or quasi-constitutional value is sufficiently important that we will presume that Congress did not mean to abrogate that

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<sup>209</sup> *West Virginia v. EPA*, 142 S. Ct. at 2621 (Gorsuch, J., concurring) (quoting *King v. Burwell*, 576 U.S. 473, 485 (2015)).

<sup>210</sup> *Id.* (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

<sup>211</sup> *See id.* at 2622.

<sup>212</sup> *See Biden v. Missouri*, 142 S. Ct. at 656, 658 (Thomas, J., dissenting) (stating that the government “proposes to find virtually unlimited vaccination power, over millions of healthcare workers, in definitional provisions, a saving clause, and a provision regarding long-term care facilities’ sanitation provisions,” *id.* at 656; noting that the rule is “undoubtedly significant,” for it “requires millions of healthcare workers to choose between losing their livelihoods and acquiescing to a vaccine,” *id.* at 658; and stating that a statute must contain a clear statement to authorize such a mandate because “[w]e presume that Congress does not hide ‘fundamental details of a regulatory scheme in vague or ancillary provisions,’” *id.* at 656 (quoting *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001))).

<sup>213</sup> *See id.* at 650 (per curiam) (staying lower court injunctions of the CMS vaccination mandate despite all these features of its propounding and apparently not deeming this to be a major question requiring a clear congressional authorization).

<sup>214</sup> *See West Virginia v. EPA*, 142 S. Ct. at 2620–21 (Gorsuch, J., concurring).

<sup>215</sup> Kavanaugh, *supra* note 171, at 2156.

<sup>216</sup> *Id.*

value.”<sup>217</sup> Instead, the major questions quartet required the Court to commit, in the moment in which it adopted the clear statement rule, to the constitutional or quasi-constitutional “value” at stake. The next Part examines whether the Court fulfilled that obligation.

## II. NONDELEGATION JABBERWOCKY

What is the relationship between the new major questions quartet and nondelegation? Commentators have long recognized the connections between the old major questions exception and the nondelegation doctrine<sup>218</sup> and more recently have also perceived the nondelegation doctrine’s overlap with the new major questions doctrine.<sup>219</sup> Various Justices have stressed these linkages as well. The major questions doctrine exists, wrote Justice Gorsuch in his dissent in *Gundy v. United States*,<sup>220</sup> “in service of the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency.”<sup>221</sup> It is a doctrine of statutory interpretation “closely related” to “a nondelegation principle for major questions,”<sup>222</sup> wrote Justice Kavanaugh in *Paul v. United States*.<sup>223</sup> Justice Gorsuch, in his concurrence in the EPA case, described the doctrine as a “clear-statement rule[.]” that is a “corollary” of the Vesting Clause in Article I and a rule that “operates to protect foundational constitutional guarantees,” among them “self-government, equality, fair notice, federalism, and the

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

<sup>218</sup> See, e.g., John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 227 (2001) (conceptualizing *Brown & Williamson* as interpreting the applicable statute “to avoid significant nondelegation concerns”); Cass R. Sunstein, *The American Nondelegation Doctrine*, 86 GEO. WASH. L. REV. 1181, 1200 (2018); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322, 334 (2000) [hereinafter Sunstein, *Nondelegation Canons*]; Loshin & Nielson, *supra* note 138, at 23 (“[T]he elephants-in-mouseholes doctrine is an attempt to address nondelegation concerns indirectly without actually having to decide whether Congress has delegated too much authority to an agency.”).

<sup>219</sup> See Sunstein, *supra* note 21, at 489 (“[T]he strong version of the major questions doctrine is unambiguously connected with the nondelegation doctrine.”); Walker, *supra* note 21, at 962 (“Kavanaugh’s major rules doctrine addresses concerns similar to those addressed by *Schechter*’s robust nondelegation. . . . A robust nondelegation doctrine would prohibit Congress from abdicating its constitutionally prescribed place in the answer to the question, ‘Who decides?’ And so would Justice Kavanaugh’s major rules doctrine.”).

<sup>220</sup> 139 S. Ct. 2116 (2019).

<sup>221</sup> *Id.* at 2142 (Gorsuch, J., dissenting).

<sup>222</sup> *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., concurring in the denial of certiorari).

<sup>223</sup> 140 S. Ct. 342 (2019); see also *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc) (describing the “major rules doctrine” or “major questions doctrine” as “grounded in” a “separation of powers–based presumption against the delegation of major lawmaking authority” and a “presumption that Congress intends to make major policy decisions itself” (citation omitted)).

separation of powers.”<sup>224</sup> Concurring in the OSHA case, Justice Gorsuch asserted that “[w]hichever the doctrine, the point is the same.”<sup>225</sup>

The quartet offers a good occasion to reexamine this relationship, which is more problematic than it may appear at first blush. Five Justices have expressed openness to abandoning the nearly century-old “intelligible principle” test for nondelegation and an interest in reconsidering the nondelegation doctrine from the ground up.<sup>226</sup> The quartet afforded these Justices the opportunity to implement new metes and bounds on nondelegation; litigants pressed nondelegation as a ground of decision alongside their statutory arguments.<sup>227</sup> But the Court did not take that opportunity. Indeed, the Court did not ground the quartet in nondelegation at all: in none of the three cases in which the government lost did the Court say that a nondelegation concern — let alone actual obstacle — would exist if Congress had delegated to the agency the authority that the agency claimed, or even that it would threaten a constitutional value if Congress had delegated to the agency the authority that the agency claimed.<sup>228</sup> Yet in these three cases the Court still demanded “clear congressional authorization” and invalidated the agency’s action due to the absence of that clear authorization.<sup>229</sup>

When these omissions and outcomes are viewed collectively, an awkward lacuna comes into view: the quartet has required Congress to make a clear statement to authorize an agency to exercise delegated power in a way that — for all we know — a majority of the Court regards as constitutionally unproblematic. This simple lacuna, as will be explained below, is why it is essentially incorrect to regard the new major questions doctrine as merely a familiar sort of constitutional avoidance or constitutionally tethered clear statement rule. To put a twist on a famous line

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<sup>224</sup> *West Virginia v. EPA*, 142 S. Ct. at 2616, 2619–20 (Gorsuch, J., concurring).

<sup>225</sup> *Nat’l Fed’n of Indep. Bus.*, 142 S. Ct. at 669 (Gorsuch, J., concurring); cf. CARROLL, *supra* note 1, at 217 (“[W]herever the road divided, there were sure to be two finger-posts pointing the same way, one marked ‘TO TWEEDLEDUM’S HOUSE’ and the other ‘TO THE HOUSE OF TWEEDLEDEE.’ ‘I do believe,’ said Alice at last, ‘that they live in the *same* house! I wonder I never thought of that before . . . .’”).

<sup>226</sup> See *Gundy*, 139 S. Ct. at 2131–42 (Gorsuch, J., dissenting); *id.* at 2131 (Alito, J., concurring in the judgment) (“If a majority of this Court were willing to reconsider the approach [to the nondelegation doctrine that] we have taken for the past 84 years, I would support that effort.”); *Paul*, 140 S. Ct. at 342 (Kavanaugh, J., concurring in the denial of certiorari) (“Justice Gorsuch’s scholarly analysis of the Constitution’s nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases.”).

<sup>227</sup> See *infra* pp. 293–94.

<sup>228</sup> See *infra* pp. 297–99, 310.

<sup>229</sup> *Nat’l Fed’n of Indep. Bus.*, 142 S. Ct. at 665; *West Virginia v. EPA*, 142 S. Ct. at 2609, 2614, 2616; see *Ala. Ass’n of Realtors*, 141 S. Ct. at 2489–90. I say “invalidated,” though technically speaking the CDC case addressed whether to vacate a lower court’s stay of that court’s vacatur of the CDC’s action, see *Ala. Ass’n of Realtors*, 141 S. Ct. at 2486, and the OSHA case addressed whether to stay the OSHA rule pending appeal, see *Nat’l Fed’n of Indep. Bus.*, 142 S. Ct. at 663.

from Professor John Hart Ely,<sup>230</sup> the major questions doctrine is not really simple constitutional avoidance nor is it simply a “[c]onstitutionally inspired”<sup>231</sup> clear statement rule, though it gives the impression of badly wanting to be.

This Part begins by explaining that as a functional matter the new major questions doctrine will afford courts a great deal of discretion to invalidate agency action without having to reach a full-dress constitutional nondelegation holding. It then argues that, despite that functional truth, the quartet engaged in a version of constitutional avoidance so undisciplined that it becomes hard to regard it as constitutional avoidance at all. It next sets out the analytical conundrums generated by the Court’s total silence as to nondelegation. Finally, it assesses whether the new major questions doctrine can legitimately claim justification as a constitutionally inspired clear statement rule, ultimately finding unsatisfactory the Court’s opaque justification for the new major questions doctrine.

### A. Substitution

The nondelegation doctrine, as Sunstein famously noted,<sup>232</sup> has been formally defunct since 1935.<sup>233</sup> Many have called for its resurrection.<sup>234</sup> But a forthright revival of the nondelegation doctrine faces many pitfalls. It may fail to achieve the result — increased lawmaking by Congress — it ostensibly aims to achieve.<sup>235</sup> It would be analytically challenging for courts to formulate.<sup>236</sup> It would be daunting in its

<sup>230</sup> See John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 947 (1973) (“[*Roe*] is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be.”); see also *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2270 (2022) (citing Ely, *supra*).

<sup>231</sup> Sunstein, *Nondelegation Canons*, *supra* note 218, at 331.

<sup>232</sup> See *id.* at 322 (“We might say that the conventional doctrine has had one good year, and 211 bad ones (and counting).”).

<sup>233</sup> On two occasions in 1935, the Court invalidated a statute on nondelegation grounds. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541–42, 551 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 430 (1935). The Court also invalidated a delegation of power to private parties in 1936. See *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936).

<sup>234</sup> See, e.g., DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY* 13–14 (1993); PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* 386–88 (2014); *Gundy v. United States*, 139 S. Ct. 2116, 2135–37 (2019) (Gorsuch, J., dissenting); *id.* at 2130–31 (Alito, J., concurring in the judgment) (expressing support for reconsidering cases that have allowed broad delegations); *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 575 U.S. 43, 90–91 (2015) (Thomas, J., concurring in the judgment) (criticizing the “intelligible principle” test).

<sup>235</sup> See Sunstein, *supra* note 21, at 491–92 (noting current gridlock in Congress); Richardson, *supra* note 21, at 201 (“Political polarization and the rise of the filibuster have made legislating difficult.”).

<sup>236</sup> *United States v. Grimaud*, 220 U.S. 506, 517 (1911) (“It must be admitted that it is difficult to define the line which separates legislative power to make laws, from administrative authority to make regulations.”); *Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting) (“Once it is conceded, as it must be, that no statute can be entirely precise . . . the debate over

potential consequences.<sup>237</sup> It might even exacerbate political polarization and augment concerns regarding the Court's political credibility.<sup>238</sup>

The new major questions doctrine enables courts to skirt these pitfalls. In practical terms, a sufficiently robust major questions doctrine — which, thanks to the quartet, our law now boasts — will provide grounds for invalidating the most important exercises of delegated authority without requiring a finding that a statute is an unconstitutional delegation. The new major questions doctrine enables the Court to effectively resurrect the nondelegation doctrine without *saying* it is resurrecting the nondelegation doctrine.

The quartet illustrates this dynamic, for these cases show both how nondelegation arguments and major questions arguments travel together and how only the latter need be embraced to stop agency power in its tracks. Litigants raised nondelegation arguments against these agency actions, and these arguments sometimes succeeded in winning approval in the lower courts. The plaintiffs in the CDC case argued that under the CDC's reading of the Public Health Service Act, the statute would be “an unconstitutional delegation,”<sup>239</sup> an argument that had proved successful in similar challenges to the CDC's moratorium.<sup>240</sup> In the OSHA case, the Fifth Circuit said that the OSH Act “was not — and likely *could* not be, under the Commerce Clause and nondelegation doctrine — intended to authorize a workplace safety administration in the deep recesses of the federal bureaucracy to make sweeping pro-

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unconstitutional delegation becomes a debate not over a point of principle but over a question of degree.”); *see also* Manning, *supra* note 218, at 241 (noting that the Court's reluctance to enforce stringent limits on nondelegation “reflects serious concerns about its own competence to draw appropriate lines between permissible and impermissible delegations”).

<sup>237</sup> *Gundy*, 139 S. Ct. at 2130 (plurality opinion) (“Indeed, if SORNA's delegation is unconstitutional, then most of Government is unconstitutional . . .”); *Mistretta*, 488 U.S. at 372 (“[O]ur jurisprudence has been driven by a practical understanding that in our increasingly complex society . . . Congress simply cannot do its job absent an ability to delegate power under broad general directives.”).

<sup>238</sup> Kristin E. Hickman, *Foreword: Nondelegation as Constitutional Symbolism*, 89 GEO. WASH. L. REV. 1079, 1136 (2021) (noting that an “outright” replacement of the intelligible principle test “likely would generate both strong positive and negative reactions — reflecting, and perhaps exacerbating, our present political polarization as well as concerns about the Court's political credibility”).

<sup>239</sup> *Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs.*, 539 F. Supp. 3d 29, 34–35 (D.D.C. 2021) (describing nondelegation count of the plaintiffs' complaint); Emergency Application to Vacate the Stay Pending Appeal at 26, *Ala. Ass'n of Realtors*, 141 S. Ct. 2485 (No. 21A23) (“[T]he CDC's view of its own authority, if adopted, would render § 264(a) an unconstitutional delegation of legislative power.”).

<sup>240</sup> *See* *Tiger Lily, LLC v. U.S. Dep't of Hous. & Urb. Dev.*, 525 F. Supp. 3d 850, 863 (W.D. Tenn.), *aff'd*, 5 F.4th 666 (6th Cir. 2021) (“Upholding the [CDC] Order . . . would amount to an impermissible delegation by Congress authorizing the CDC to make law.”); *Tiger Lily*, 5 F.4th at 672 (reasoning that under the government's reading of the law, the CDC director would have “near-dictatorial power for the duration of the pandemic, with authority to shut down entire industries as freely as she could ban evictions”).

nouncements on matters of public health affecting every member of society in the profoundest of ways.”<sup>241</sup> In the CMS case, one district court held that the plaintiffs were likely to succeed on the merits of their non-delegation claim.<sup>242</sup> In the EPA case, the D.C. Circuit rejected the major questions argument,<sup>243</sup> but Judge Walker stated in a separate writing that a statute that expressly allowed the EPA to choose to issue the Clean Power Plan would likely violate the nondelegation doctrine.<sup>244</sup> The state petitioners in the EPA case subsequently argued to the Court that the D.C. Circuit’s reading of the Clean Air Act “endorses an improper delegation of legislative power.”<sup>245</sup>

By the simple expedient of opting to rely on the new major questions doctrine, the Court had no need to reach the merits of these nondelegation claims. Instead, in the three cases in which it ruled against the government, the Court was able to resolve the case without laying a finger on the Constitution by deciding that Congress had not supplied a clear statement authorizing the challenged agency action.<sup>246</sup> Conversely, as the CMS case exemplifies, the new major questions doctrine allowed sufficient leeway to the Court that it was able to preserve that agency action<sup>247</sup> — even though the CMS rule rested on statutory authority as contestable as the three rules that failed to pass muster.<sup>248</sup>

This substitution of a constitutional nondelegation holding with a subconstitutional major questions holding is a move that can readily be replicated in the most significant cases that will raise nondelegation challenges.<sup>249</sup> Instead of articulating a rule-like nondelegation principle

<sup>241</sup> *BST Holdings, L.L.C. v. Occupational Safety & Health Admin.*, 17 F.4th 604, 611 (5th Cir. 2021) (footnote omitted).

<sup>242</sup> *Louisiana v. Becerra*, 571 F. Supp. 3d 516, 542 (W.D. La. 2021), *vacated*, No. 21-30734, 2022 WL 2116002 (5th Cir. June 13, 2022); *see also* Response to Application for a Stay Pending Appeal at 27, *Biden v. Missouri*, 142 S. Ct. 647 (No. 21A240) (“[I]f §1302(a) or any other provision authorizes the Secretary to legislate the vaccination schedules of 10.4 million healthcare workers, it is an unconstitutional delegation of legislative authority.”).

<sup>243</sup> *Am. Lung Ass’n v. EPA*, 985 F.3d 914, 959 (D.C. Cir. 2021).

<sup>244</sup> *Id.* at 1002 (Walker, J., concurring in part, concurring in the judgment in part, and dissenting in part) (stating that “if Congress merely *allowed* generation shifting (it didn’t), but did not clearly *require* it, I doubt doing so was constitutional,” and questioning the constitutionality of a hypothetical statute that said: “The EPA *may* choose to consider off-site solutions for its best system of emission reduction, but the EPA may choose *not* to consider off-site solutions.” In that instance, Congress has clearly delegated to the EPA its legislative power to determine whether generation shifting should be part of the best system of emission reduction — a ‘decision[] of vast economic and political significance.’” (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014))).

<sup>245</sup> Brief for Petitioners at 45, *West Virginia v. EPA*, 142 S. Ct. 2587 (No. 20-1530).

<sup>246</sup> *See Ala. Ass’n of Realtors*, 141 S. Ct. at 2489; *Nat’l Fed’n of Indep. Bus.*, 142 S. Ct. at 665; *West Virginia v. EPA*, 142 S. Ct. at 2616.

<sup>247</sup> *See Biden v. Missouri*, 142 S. Ct. at 652.

<sup>248</sup> *See id.* at 658 (Thomas, J., dissenting).

<sup>249</sup> Litigants did not hesitate to point this out. Brief of Respondent National Mining Ass’n in Support of Petitioners at 29, *West Virginia v. EPA* (No. 20-1530) (“So, in almost all challenges to a major administrative rule on nondelegation grounds, a court could resolve the case without invalidating the statute by concluding that, under the major questions doctrine, Congress had not unambiguously directed the agency to answer that major question in the first place.”).

that would logically apply across *all* statutory delegations to *all* agencies under administrations headed by presidents of *either* party, the Court can apply the new major questions doctrine on a retail basis, proceeding agency by agency and rule by rule to determine whether a given regulation promulgated by a given administration can survive. Unless the Court wishes to invalidate *minor* delegations (those that allow agencies to “fill up the details” or to enforce statutory standards through case-by-case adjudications) — and there is seemingly little appetite for that<sup>250</sup> — the new major questions doctrine will accomplish the most important work that the nondelegation doctrine would perform.<sup>251</sup>

In other decisions this Term, this Court has been willing to reach intensely controversial constitutional holdings with respect to abortion, guns, and religion<sup>252</sup> — yet it seems to have bitten its tongue when it came to resurrecting the nondelegation doctrine. The difference between these domains, however, is critical: in those substantive areas of law, no subconstitutional technique could have been as effective a substitute for a constitutional holding. In administrative law, by contrast, where much the same bang could be obtained for a subconstitutional buck, the Court has taken that option. In that respect, among others, the quartet is no ordinary set of administrative law cases; its use of the major questions doctrine arguably aligned with the Court’s own institutional interests in that it has allowed the Court to exert effective authority over the other branches without proclaiming that fact in a *Marbury*-style constitutional holding — a move that, at least at the margin, may serve to husband the Court’s own power.<sup>253</sup>

### B. Evasion

As just explained, the new major questions doctrine will, as a functional matter, allow courts to avoid formally reviving the constitutional nondelegation doctrine. Doesn’t that entail that this new doctrine must simply be an incarnation of constitutional avoidance or that it must at least deserve to be accepted as a constitutionally inspired clear statement rule? Perhaps surprisingly, that does not follow.

To background this discussion, it is useful to begin with a brief overview of avoidance, clear statement rules, and the relationship between them. Recall that there are two types of avoidance: classical avoidance

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<sup>250</sup> See *Gundy v. United States*, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting).

<sup>251</sup> A scenario is imaginable in which Congress enacts a statute that really does convey in explicit and pellucid terms the unbridled discretion to an agency to regulate, as it chooses, a major question. In that case, a court might not be able to avoid reaching the constitutional nondelegation question by relying on the major questions doctrine. Thanks to Aaron Nielson for emphasizing this point.

<sup>252</sup> See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2284–85 (2022); *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2156 (2022); *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2432–33 (2022).

<sup>253</sup> Grove, *supra* note 163, at 298–99 (describing how the Court’s choice of interpretive methodology may affect the Court’s legitimacy).

and modern avoidance. Under the classical version of avoidance, the court reads a statute to avoid a constitutional obstacle.<sup>254</sup> Under the modern version of avoidance, in contrast, the court reads a statute to avoid a “serious” constitutional problem or a constitutional “doubt.”<sup>255</sup> In addition to these forms of avoidance, our law contains many clear statement rules that “apply even though the outcomes avoided by such rules would not themselves violate the Constitution”<sup>256</sup> — for example, clear statement rules concerning federalism, retroactivity, and the presumption of judicial review.<sup>257</sup> Congress *can* intrude on areas traditionally governed by the states, impose retroactive civil liability, make agency action unreviewable, and so forth — it just must speak clearly if it wishes to do so. Such clear statement rules “insist upon exceptional legislative clarity as a collateral method of enforcing the values implicit in constitutional provisions.”<sup>258</sup> Constitutional avoidance differs from such clear statement rules in that it “leave[s] open the possibility that the Court will find the questionable policy unconstitutional if Congress later recasts it in sufficiently clear terms,”<sup>259</sup> but constitutional avoidance, too, has been applied to avoid outcomes later held to be not unconstitutional.<sup>260</sup> Thus, both “generic” constitutional avoidance and other “subject-specific” clear statement rules operate to make certain constitutionally sensitive terrain more difficult for Congress to reach<sup>261</sup> — even though Congress may be able to reach that terrain if it speaks sufficiently clearly.

<sup>254</sup> See *Hooper v. California*, 155 U.S. 648, 657 (1895) (“[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality.” (citing *Parsons v. Bedford*, 28 U.S. (3 Pet.) 430, 448–49 (1830); *United States v. Coombs*, 37 U.S. (12 Pet.) 72, 76 (1838); *Lessee of Brewer v. Blougher*, 39 U.S. (14 Pet.) 178, 198 (1840); *Grenada Cnty. Supervisors v. Brogden*, 112 U.S. 261, 268–69 (1884); *Presser v. Illinois*, 116 U.S. 252, 263 (1886))).

<sup>255</sup> See *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring) (“When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.” (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932))); Manning, *supra* note 218, at 255 (“[B]ecause the avoidance canon is triggered by constitutional doubt (rather than unconstitutionality), any such intrusions upon the legislative prerogative merely protect a constitutional buffer zone, rather than a definite claim of constitutional right.”).

<sup>256</sup> John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 399 (2010).

<sup>257</sup> See *id.*

<sup>258</sup> *Id.* at 406.

<sup>259</sup> *Id.* at 414.

<sup>260</sup> See Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1960 (1997) (“The real force of modern avoidance is that it avoids constitutional questions even when the question would have been answered by rejecting the constitutional claim. . . . The case law is rife with constitutional questions that the Court has avoided by construction, only later to hold, when forced to confront the question under a different statute, that the constitutional claim should not prevail.” (emphasis omitted)).

<sup>261</sup> Manning, *supra* note 256, at 405; see also Sunstein, *Nondelegation Canons*, *supra* note 218, at 316–17 (defending clear statement rules as serving a nondelegation function because they require Congress to speak explicitly when it wishes to enter constitutionally disfavored terrain).

With that background in hand, let us turn to evaluate the quartet — first, from the perspective of constitutional avoidance and second, through the lens of a clear statement rule tethered to constitutional values.

*I. Constitutional Avoidance?* — In all four cases in the quartet, as earlier canvassed, the litigants raised constitutional nondelegation claims, and some lower court judges found those claims persuasive.<sup>262</sup> At the Court, however, those claims did not succeed on the merits, nor were they used to anchor an avoidance holding — either in the form of a constitutional obstacle or in the form of a constitutional doubt. To point this out is not just to pick at nits in the Court’s wordsmithing: the Court’s failure to say anything about nondelegation creates genuine conceptual uncertainty about what exactly it was doing in these cases, a conceptual uncertainty that will matter for future cases.

In the CDC case, the Court gestured at the lack of an intelligible principle<sup>263</sup> — but the Court did not respond to the government’s contention that the statutory standard “is more specific” than other standards that the Court had held to state intelligible principles.<sup>264</sup> Nor did the Court say that if Congress *had* delegated to the CDC the power to order eviction moratoria to prevent the spread of communicable diseases, that such a delegation would run afoul of, or pose a serious problem under, some version of the nondelegation doctrine different than the intelligible principle test.

In the OSHA case, the Court did not say that the OSH Act failed the intelligible principle test — which is understandable, given the wording of that law<sup>265</sup> — nor did it say that a nondelegation obstacle, nondelegation doubt, or “nondelegation question”<sup>266</sup> would exist *if* the statute *had* delegated to OSHA the power to impose a vaccine requirement on large employers. A sentence might have at least broached the point — something along the lines of “if we accepted OSHA’s reading,

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<sup>262</sup> See *supra* notes 2395–245 and accompanying text.

<sup>263</sup> See *Ala. Ass’n of Realtors*, 141 S. Ct. at 2489 (“[T]he Government has identified no limit in § 361(a) beyond the requirement that the CDC deem a measure ‘necessary.’”).

<sup>264</sup> Response in Opposition to Applicants’ Emergency Application to Vacate the Stay Pending Appeal, *supra* note 149, at 23 (“[T]he Court has upheld statutes that empower agencies to regulate in the ‘public interest,’ see *National Broad. Co. v. United States*, 319 U.S. 190, 225–226 (1943); to set prices that are ‘fair and equitable,’ see *Yakus v. United States*, 321 U.S. 414, 420 (1944); and to establish air-quality standards to ‘protect the public health,’ see *Whitman v. American Trucking Ass’n*, 531 U.S. 457, 472–476 (2001) (citation omitted). The standard set out in Section 264(a) — ‘necessary to prevent the [international or interstate] introduction, transmission, or spread of communicable diseases,’ 42 U.S.C. § 264(a) — is more specific than those standards.”).

<sup>265</sup> 29 U.S.C. § 655(c)(1) (“The Secretary shall provide, without regard to the requirements of chapter 5 of title 5, for an emergency temporary standard to take immediate effect upon publication in the Federal Register if he determines (A) 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 (B) that such emergency standard is necessary to protect employees from such danger.”).

<sup>266</sup> *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (plurality opinion).

it might well amount to an unconstitutional delegation of power because [fill in the blank]” — yet no such sentence, or anything resembling it, appears in the majority decision. Three Justices in a concurrence said just that by identifying (what they regarded as) the failure of the OSH Act to impose any constraints on the agency’s discretion: “[I]f the statutory subsection the agency cites really *did* endow OSHA with the power it asserts, that law would likely constitute an unconstitutional delegation of legislative authority.”<sup>267</sup> Three of the Justices in the majority had the opportunity to, but conspicuously chose not to, endorse that sentiment.

In the EPA case, no identification of a nondelegation obstacle or doubt is apparent. The only inkling of it in the Court’s opinion is the statement that “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.”<sup>268</sup> At a later point, the Court stated: “On EPA’s view of Section 111(d), Congress implicitly tasked it, and it alone, with balancing the many vital considerations of national policy implicated in deciding how Americans will get their energy.”<sup>269</sup> For a Court concerned about nondelegation, it would have been natural at that point to say: “If that is what Congress had done expressly, such a delegation would strain or exceed the bounds of even our permissive nondelegation doctrine, or some new version of nondelegation that we will now proceed to describe.” Instead, however, the Court immediately fell back upon statutory interpretation: “There is little reason to think Congress assigned such decisions to the [EPA].”<sup>270</sup> To reiterate, the stated reasoning of the EPA majority is not that Congress *couldn’t*, or even that it *probably couldn’t*, assign such decisions to the EPA because of a nondelegation problem; the reasoning is that Congress *didn’t* (or, anyway, that there’s “little reason” to think Congress did). In fact, far from saying that it doubted that Congress could delegate such an important decision to the EPA, the Court came close to saying the opposite: the Court concluded its opinion by stating, “A decision of such magnitude and consequence rests with Congress itself, *or an agency acting pursuant to a clear delegation from that representative body*”<sup>271</sup> — a dictum that

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<sup>267</sup> *Nat’l Fed’n of Indep. Bus.*, 142 S. Ct. at 669 (Gorsuch, J., concurring) (“Under OSHA’s reading, the law would afford it almost unlimited discretion — and certainly impose no ‘specific restrictions’ that ‘meaningfully constrai[n]’ the agency. OSHA would become little more than a ‘roving commission to inquire into evils and upon discovery correct them.’” (citation omitted) (quoting *Touby v. United States*, 500 U.S. 160, 166–67 (1991); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935) (Cardozo, J., concurring))). This sounds most like an argument that the OSH Act fails the intelligible principle test. *But see infra* note 283 (explaining why that claim would be difficult to justify).

<sup>268</sup> *West Virginia v. EPA*, 142 S. Ct. at 2609 (emphasis added) (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

<sup>269</sup> *Id.* at 2612.

<sup>270</sup> *Id.*

<sup>271</sup> *Id.* at 2616 (emphasis added).

reflects that *no* nondelegation problem would exist if Congress *had* (clearly) tasked the EPA with adopting a regulatory scheme “of such magnitude and consequence.” Likewise, Justice Gorsuch’s concurrence in the EPA case, while extolling the virtues of the nondelegation doctrine for fairness, accountability, etcetera, did not assert — as Judge Walker did in his separate opinion in the court below<sup>272</sup> — that a statute that allowed the EPA to choose or not choose to implement the Clean Power Plan would be constitutionally suspect, or invalid, under Justice Gorsuch’s understanding of the nondelegation doctrine.<sup>273</sup>

We can see how the Court might have proceeded by contrasting how earlier Courts have proceeded. In the *Benzene* case<sup>274</sup> plurality, Justice Stevens said that if the OSH Act were read not to require that “the risk from a toxic substance be quantified sufficiently to enable the Secretary to characterize it as significant in an understandable way,” then “the statute would make such a ‘sweeping delegation of legislative power’ that it might be unconstitutional under the Court’s reasoning in *A.L.A. Schechter Poultry Corp. v. United States* and *Panama Refining Co. v. Ryan*.”<sup>275</sup> He then adopted the narrowing construction that saved the Act from this constitutional doubt. Justice Rehnquist’s concurrence in that case did not simply gesture at “separation of powers principles” as the EPA case did; instead, Justice Rehnquist stated firmly, “[T]he legislation at issue here . . . fails to pass muster. . . . I have no doubt that the provision at issue, standing alone, would violate the doctrine against uncanalized delegations of legislative power.”<sup>276</sup> Similarly, in *Gundy*, the plurality — though it adopted a saving construction of the statute under review — stated that reading the statute to grant the Attorney General “plenary power” to “require [sex offenders] to register, or not, as she sees fit, and to change her policy for any reason and at any time” would create “a nondelegation question.”<sup>277</sup> While reasonable observers may differ on whether these opinions should have identified a nondelegation problem, there is no question that they at least did. Each opinion

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<sup>272</sup> *Am. Lung Ass’n v. EPA*, 985 F.3d 914, 1002 (D.C. Cir. 2021) (Walker, J., concurring in part, concurring in the judgment in part, and dissenting in part) (questioning the constitutionality of a hypothetical statute that said: “The EPA *may* choose to consider off-site solutions for its best system of emission reduction, but the EPA *may* choose *not* to consider off-site solutions”).

<sup>273</sup> See *West Virginia v. EPA*, 142 S. Ct. at 2619–22 (Gorsuch, J., concurring).

<sup>274</sup> *Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst. (Benzene)*, 448 U.S. 607 (1980).

<sup>275</sup> *Id.* at 646 (Stevens, J.) (plurality opinion) (citations omitted) (quoting *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 539 (1935)).

<sup>276</sup> *Id.* at 675 (Rehnquist, J., concurring in the judgment). Similarly, the D.C. Circuit in *American Trucking Ass’ns v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999), *aff’d in part, rev’d in part sub nom. Whitman v. American Trucking Ass’ns*, 531 U.S. 457 (2001), held that the statutory language of the Clean Air Act *was* an unconstitutional delegation of power before tasking the agency with the job of redoing its interpretation. See *id.* at 1034, 1038, 1040.

<sup>277</sup> *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (plurality opinion) (quoting Brief for Petitioner at 42, *Gundy* (No. 17-6086)).

expressly links the relevant statute with the nondelegation issue perceived by its author — either with the absence of a statutory standard that would meaningfully guide the agency<sup>278</sup> or with the problematic scope of the authority delegated to the agency.<sup>279</sup>

The Court did not do that in the quartet. We have been told time and again that the major questions doctrine is but a handmaiden, or a reflection, or a cognate, of nondelegation. Yet the Court did not tether its new and stronger variant of that doctrine to an identification of any nondelegation doubt, let alone obstacle. Now, it is one thing to invoke constitutional avoidance to avoid intrusions on constitutionally doubtful terrain.<sup>280</sup> It is quite another, though, to invoke constitutional avoidance *untethered* to any constitutionally doubtful exercise of congressional power. The latter sort of avoidance would be no different than invoking avoidance so as not to read a law to authorize the building of an interstate highway, or invoking it to avoid reading a law to name a federal post office after Lewis Carroll.

This matters not just because this is a strange, uncabined species of avoidance — either so strong a version of avoidance,<sup>281</sup> or so attenuated a version of it, that it is a strain to call it constitutional avoidance at all. It also matters because different versions of the nondelegation doctrine (or different “theories” of it, if we must use the tedious locution of legal academic writing) would call for different versions of the clear statement rule that the Court is now committed to applying. It is not clear which theory of the nondelegation doctrine, if any, underlies the quartet. And without knowing what that underlying theory is, it becomes much harder to accurately apply a rule that ostensibly exists “in service of” that underlying doctrine.<sup>282</sup>

For example, was the theory of nondelegation at work in these cases that twentieth-century bulwark, that Ford truck of administrative law, the intelligible principle test? The Court did not say so, and it seems impossible that it was. Under extant intelligible principle doctrine,

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<sup>278</sup> See *Benzene*, 448 U.S. at 675 (Rehnquist, J., concurring in the judgment) (noting that the statute “gives the Secretary absolutely no indication where on the continuum of relative safety he should draw his line”); *Gundy*, 139 S. Ct. at 2123.

<sup>279</sup> *Benzene*, 448 U.S. at 645–46 (citing “unprecedented power over American industry” and the possibility of “pervasive regulation limited only by the constraint of feasibility”).

<sup>280</sup> Some scholars contest even that, but set that aside for now. See generally, e.g., Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71 (1996).

<sup>281</sup> Heinzerling, *supra* note 21, at 1939 (describing “an exceedingly strong version” of the avoidance doctrine that allows invalidation of rules “even in the absence of an articulation of the constitutional problem”).

<sup>282</sup> *Gundy*, 139 S. Ct. at 2142 (Gorsuch, J., dissenting) (“[W]e apply the major questions doctrine in service of the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency.”).

there's *no* intelligible principle obstacle to, or dubiety in, *any* of the statutes implicated in the quartet.<sup>283</sup> If, on the other hand, the silent implication of the quartet is that three of these statutes pose serious problems under the intelligible principle test, or fail to satisfy it, that would represent a sharp break with extant understandings of the intelligible principle inquiry. These decisions cannot fairly be read to work such a shift *sub silentio*, and therefore they do not explain why a major questions inquiry was warranted. Nor do they help us to understand whether it would be warranted in future cases in which the statute states an intelligible principle.

Was, alternatively, the theory of nondelegation in play a more categorical conception of nondelegation under which the act of formulating legally binding rules for private parties is not delegable?<sup>284</sup> The quartet doesn't seem to line up around the difference between formulating and not formulating legally binding rules for private parties. If the Court's underlying theory of nondelegation is that the power to make legally binding rules for private parties is not delegable, it would have been impossible for the Court to have said in the OSHA case that it entertained "no[] doubt" that "OSHA could regulate researchers who work with the COVID-19 virus" and that "OSHA [could] regulate risks asso-

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<sup>283</sup> Hickman, *supra* note 238, at 1091 ("[M]ore recent Supreme Court cases have demonstrated the near impossibility of any statute failing to satisfy the intelligible principle standard."); *see, e.g.*, *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472–76 (2001); *Mistretta v. United States*, 488 U.S. 361, 371–79 (1989).

In his concurrence in the OSHA case, Justice Gorsuch appeared to be saying that the OSH Act did not satisfy the intelligible principle test. *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 669 (Gorsuch, J., concurring). But that is difficult to square with the relevant caselaw. *See Gundy*, 139 S. Ct. at 2140 n.62 (Gorsuch, J., dissenting) (noting that the intelligible principle test erects a "ludicrously low" bar (quoting HAMBURGER, *supra* note 234, at 378)). The OSH Act requires OSHA to issue an emergency temporary standard if it determines "(A) 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 (B) that such emergency standard is necessary to protect employees from such danger." 29 U.S.C. § 655(c)(1). The Court has sustained far looser standards as supplying an intelligible principle. *See, e.g., Whitman*, 531 U.S. at 474 ("In the history of the Court we have found the requisite 'intelligible principle' lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'"); *id.* at 474–75 (collecting authorities).

<sup>284</sup> *See INS v. Chadha*, 462 U.S. 919, 952 (1983) (defining an action as legislative if it has "the purpose and effect of altering the legal rights, duties, and relations of persons . . . outside the Legislative Branch"); *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 70 (2015) (Thomas, J., concurring in the judgment) ("The function at issue here is the formulation of generally applicable rules of private conduct."); *Gundy*, 139 S. Ct. at 2133 (Gorsuch, J., dissenting) ("[T]he framers understood [the legislative power] to mean the power to adopt generally applicable rules of conduct governing future actions by private persons — the power to 'prescrib[e] the rules by which the duties and rights of every citizen are to be regulated,' or the power to 'prescribe general rules for the government of society.'" (third alteration in original) (footnotes omitted) (quoting THE FEDERALIST NO. 78, at 464 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810))).

ciated with working in particularly crowded or cramped environments.”<sup>285</sup> And it would be extremely strange — if the Court were committed to the view that the power to formulate binding rules for private parties cannot be delegated — for the Court to have said, as it did in a concluding dictum in the EPA case, that the authority to adopt a scheme like the Clean Power Plan “rests with Congress itself, *or an agency acting pursuant to a clear delegation* from that representative body.”<sup>286</sup> Consider, too, the CMS case. The agency there issued a rule that required millions of health care workers to be vaccinated under the auspices of broad statutory parameters.<sup>287</sup> Congress did not state in the statute that workers at federally funded health care facilities must be vaccinated; it just authorized the agency to impose conditions on funding that “the Secretary finds necessary in the interest of the health and safety of individuals who are furnished services.”<sup>288</sup> In Professor Gary Lawson’s terms, this would be “a naked delegation”<sup>289</sup> to prescribe those conditions, as “the statute straightforwardly authorizes the agency to make law” as to the conditions with which private parties must comply.<sup>290</sup> But the Court did not invoke its new clear statement rule in the CMS case and instead sustained the agency action.<sup>291</sup> In sum, the legally-binding-rules-for-private-parties theory of nondelegation does not account for the quartet any better than the intelligible principle theory of nondelegation. Nor does it help us in figuring out what kinds of cases should trigger a clear statement requirement in the future.

A third possibility is that the theory of nondelegation in play here is structured around the scope of the delegated power being exercised.<sup>292</sup>

<sup>285</sup> *Nat’l Fed’n of Indep. Bus.*, 142 S. Ct. at 666.

<sup>286</sup> *West Virginia v. EPA*, 142 S. Ct. at 2616 (emphasis added); *see also id.* at 2622 (Gorsuch, J., concurring) (“[W]e look for clear evidence that the people’s representatives in Congress have actually afforded the agency the power it claims.”).

<sup>287</sup> *See Biden v. Missouri*, 142 S. Ct. at 652 (per curiam) (discussing statutory provisions authorizing agency to set such conditions on funding as “the Secretary finds necessary in the interest of the health and safety of individuals who are furnished services” (quoting 42 U.S.C. § 1395x(e)(9))).

<sup>288</sup> 42 U.S.C. § 1395x(e)(9).

<sup>289</sup> Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 379 (2002).

<sup>290</sup> *Biden v. Missouri*, 142 S. Ct. at 653. The fact that the condition CMS imposed involved participation in a government program does not entail it was *not* the making of a “legally binding rule.” *See Texas v. Comm’r*, 142 S. Ct. 1308, 1309 (2022) (Alito, J., concurring in the denial of certiorari) (objecting on nondelegation grounds to an agency rule that set “the actuarial standards that a State must meet in order to participate in Medicaid” and describing the rule as “essentially a legislative determination”). On the other hand, some scholars take the view that imposing conditions on the receipt of federal benefits or money may not be the formulation of a legally binding rule for private parties. *See Philip Hamburger, Nondelegation Blues*, 91 GEO. WASH. L. REV. (forthcoming 2023) (manuscript at 85), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3990247](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3990247) [<https://perma.cc/NZP5-GB4J>].

<sup>291</sup> I say “sustained,” though technically speaking the CMS Court stayed lower court injunctions against the CMS rule. *See Biden v. Missouri*, 142 S. Ct. at 650.

<sup>292</sup> *See Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 475 (2001) (“[T]he degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred.”).

In *Wayman v. Southard*,<sup>293</sup> Chief Justice Marshall stated that a “line” exists (though it “has not been exactly drawn”) between “those important subjects, which must be entirely regulated by the legislature itself” and “those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.”<sup>294</sup> Congress, he said, may not delegate authority over “powers which are strictly and exclusively legislative,”<sup>295</sup> but “Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself.”<sup>296</sup> The theory of nondelegation under which certain unspecified “important subjects . . . must be entirely regulated”<sup>297</sup> by Congress has been justly criticized by Lawson as “pretty lame” and “absurdly self-referential”: “[I]n essence, ‘Congress must make whatever decisions are important enough to the statutory scheme in question so that Congress must make them.’”<sup>298</sup> Is this “ephemeral” and “circular” test for nondelegation<sup>299</sup> — which, it’s worth stressing, Lawson says *is*, in fact, the test, notwithstanding its circularity and in the teeth of its vagueness<sup>300</sup> — the theory of nondelegation that underpins the major questions quartet?

At first blush, it seems a promising candidate: “major questions” does sound an awful lot like “important subjects,” a parallel pointedly drawn by Justice Gorsuch’s EPA concurrence.<sup>301</sup> And the three cases in which the government lost do line up with that view: the Court held that Congress, not the agency, had to make the decision, in clear terms, to empower an agency to impose a vaccine mandate on large employers,<sup>302</sup> impose an eviction moratorium,<sup>303</sup> or impose the Clean Power Plan,<sup>304</sup> and one could regard all three as “important subjects.” The CMS case, however, is harder to square with the “important subjects” test (insofar as it is a test). As just noted, Congress did not state in the statute that

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<sup>293</sup> 23 U.S. (10 Wheat.) 1 (1825).

<sup>294</sup> *Id.* at 43.

<sup>295</sup> *Id.* at 42–43.

<sup>296</sup> *Id.* at 43.

<sup>297</sup> *Id.*

<sup>298</sup> Lawson, *supra* note 289, at 361 (“As constitutional tests go, this one certainly sounds pretty lame — not to mention absurdly self-referential. . . . Surely, one might think, the constitutionality of legislative authorizations to executive and judicial actors cannot turn on something as ephemeral, and ultimately circular, as a distinction between ‘important subjects’ and matters of ‘less interest.’”).

<sup>299</sup> *Id.*

<sup>300</sup> See *id.* at 376–78; see also Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1239 (1994) (“[T]he core of the Constitution’s nondelegation principle can be expressed as follows: Congress must make whatever policy decisions are sufficiently important to the statutory scheme at issue so that Congress must make them. Although this circular formulation may seem farcical, it recognizes that a statute’s required degree of specificity depends on context . . . .” (footnote omitted)).

<sup>301</sup> See *West Virginia v. EPA*, 142 S. Ct. at 2617 (Gorsuch, J., concurring).

<sup>302</sup> See *Nat’l Fed’n of Indep. Bus.*, 142 S. Ct. at 665–66.

<sup>303</sup> See *Ala. Ass’n of Realtors*, 141 S. Ct. at 2490.

<sup>304</sup> See *West Virginia v. EPA*, 142 S. Ct. at 2614.

workers at federally funded health care facilities must be vaccinated; the agency did.<sup>305</sup> But if authorizing an agency to mandate vaccines qualifies as an “important subject” to which Congress must speak, as this theory would treat the OSHA case to indicate, then why would mandating vaccines for workers at federally funded health care facilities not be an “important subject” to which Congress must speak, too? Mandating vaccinations, even for “just” the ten million health care workers implicated by the CMS case<sup>306</sup> — as opposed to the eighty-four million private-sector workers implicated by the OSHA case<sup>307</sup> — is still a long way from designing oleomargarine tax stamps or specifying standards for imported tea.<sup>308</sup> Viewed collectively, the quartet is hard to explain solely by reference to an “important subjects” theory, though that theory seems on its face a natural fit. That, in turn, leaves open hard questions for future courts that have to decide what types of agency exercises of power must be specifically spelled out by Congress.

A fourth possibility worth considering is that the theory of nondelegation at work here is structured around the distinction between public rights and private rights, or between “privileges” and “rights.”<sup>309</sup> One agency action in the quartet regulated facilities that received federal funding — while three agency actions regulated private parties and industry without regard to receipt of federal funding. The first rule therefore arguably had a nexus with “public rights,” while the rest did not. The Court applied its new clear statement test to invalidate the three rules affecting private rights, but it let stand the rule affecting public rights.<sup>310</sup>

<sup>305</sup> See *Biden v. Missouri*, 142 S. Ct. at 651 (per curiam).

<sup>306</sup> *Id.* at 655 (Thomas, J., dissenting).

<sup>307</sup> *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 662.

<sup>308</sup> See *Gundy v. United States*, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting) (framing the oleomargarine case, *In re Kollock*, 165 U.S. 526, 532 (1897), and the tea case, *Buttfield v. Stranahan*, 192 U.S. 470, 496 (1904), as cases that did not involve agencies deciding “important subjects”).

<sup>309</sup> These categories, the contours of which are hard to define, have played an important role in the complex body of doctrine governing review by Article III courts of agency adjudication. For relevant background, see *Crowell v. Benson*, 285 U.S. 22 (1932), noting that “[f]amiliar illustrations of administrative agencies created for the determination of such [public rights] matters are found in connection with the exercise of the congressional power as to interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions and payments to veterans,” *id.* at 51; and RICHARD H. FALLON, JR., ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 332–33 (6th ed. 2009). See also Mila Sohoni, *Agency Adjudication and Judicial Nondelegation: An Article III Canon*, 107 NW. U. L. REV. 1569, 1585 (2013) (“Much confusion arises simply from the loaded terminology that the Court applies to rights. What sense is there in using the term ‘public’ to refer to the interest of a government employee in retaining her job, or a welfare claimant his status as a welfare recipient? Conversely, what sense is there in calling one’s interest in receiving a worker’s compensation payment set by federal statute a ‘private’ right?”).

<sup>310</sup> I say “invalidate,” though technically speaking the CDC case addressed whether to vacate a lower court’s stay of that court’s vacatur of the CDC’s action, see *Ala. Ass’n of Realtors*, 141 S. Ct. at 2486, and the OSHA case addressed whether to stay the OSHA rule pending appeal, see *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 663.

These results, if not their stated rationale, map on rather neatly to the categories of public and private rights that some have argued have been and should be important in structuring the nondelegation inquiry.<sup>311</sup> A difficulty with this formulation, though, is that the CMS case did not *just* involve an agency regulating the conferring of privileges in a domain in which *no* private right was implicated.<sup>312</sup> The agency's new rule *also* impinged on private rights by compelling participating facilities to require their workers be vaccinated<sup>313</sup> — a requirement that affected the private rights of these facilities as well as (indirectly) the core private rights of their workers. The private-versus-public-rights line can be regarded as the unstated logic underpinning the new major questions analysis only if this sort of proximate and ultimate effect on private rights should be disregarded, and it's not clear that it should be.<sup>314</sup> If, however, the private-versus-public-rights line *is* the unstated logic behind the new major questions doctrine, then hard questions will follow. Drawing a firm distinction between public and private rights is notoriously difficult, as the CMS case illustrates and the Article III cases attest.<sup>315</sup> Immigration, for example, is one area that involves both sweeping delegations and interests that can be plausibly

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<sup>311</sup> See Aditya Bamzai, *The Supreme Court, 2018 Term — Comment: Delegation and Interpretive Discretion: Gundy, Kisor, and the Formation and Future of Administrative Law*, 133 HARV. L. REV. 164, 180–81 (2019) (“This aspect of the [Grimaud] Court’s reasoning suggested that a distinction between ‘rights’ and ‘privileges’ was relevant to the nondelegation doctrine. . . . The distinction between ‘rights’ and ‘privileges’ may seem unusual in the context of the nondelegation doctrine. But it is a familiar distinction in other areas of administrative law.”).

<sup>312</sup> An example of such a “pure” public rights scenario might be an agency exercising delegated power to specify the paperwork that must be submitted to receive a federal benefit — a “privilege” to which no private right exists.

<sup>313</sup> *Biden v. Missouri*, 142 S. Ct. at 650 (per curiam).

<sup>314</sup> Notably, Justice Alito made no mention of public rights in a recent statement concerning a case involving the setting of actuarial standards for states’ participation in Medicaid. See *Texas v. Comm’r*, 142 S. Ct. 1308, 1309 (2022) (Alito, J., concurring in the denial of certiorari). Flagging a private nondelegation problem with the agency’s rule, he stressed the millions of dollars in costs that the states had incurred when what was “essentially a legislative determination” was handed off by the agency to a private group. See *id.* (describing the setting of “the actuarial standards that a State must meet in order to participate in Medicaid” as “essentially a legislative determination” that had cost the states “hundreds of millions of dollars”). Some scholars, however, take the contrary view that nondelegation may impose no constraint when the executive branch regulates receipt of federal monies. See Hamburger, *supra* note 290 (manuscript at 54).

<sup>315</sup> See *supra* note 309; see, e.g., *Stern v. Marshall*, 564 U.S. 462, 494 (2011) (“We recognize that there may be instances in which the distinction between public and private rights — at least as framed by some of our recent cases — fails to provide concrete guidance as to whether, for example, a particular agency can adjudicate legal issues under a substantive regulatory scheme.”). A possible reformulation would be to say that the receipt of privileges can be conditioned on the waiver of recipients’ constitutional right not to be regulated through an unconstitutional delegation. The question whether the government “may condition privileges on one’s waiver of legal rights, especially constitutional rights,” is one addressed by the unconstitutional conditions doctrine, which poses famously difficult questions of its own. See William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1579 & n.472 (2020). Thanks to Professor Ilan Wurman for noting the potential connection of the unconstitutional conditions doctrine to the Court’s approach in the quartet.

characterized as *either* public rights *or* private rights.<sup>316</sup> Must an agency be able to point to “clear congressional authorization” if it seeks to address a major question in the area of immigration? What about a major question in the area of taxation, which likewise has long been described as falling within the category of Article III public rights but that also obviously implicates private property?<sup>317</sup> The answers to these and similar questions will depend on whether the theory of nondelegation underpinning the Court’s new clear statement rule turns on the distinction between private rights and public rights, or privileges and rights.

A fifth and final possibility is the most startling: the theory in play may not really be the nondelegation doctrine at all but rather what Professor Thomas Merrill calls the *exclusive* delegation doctrine.<sup>318</sup> Merrill has contended that the Vesting Clause of Article I<sup>319</sup> can be read as encompassing two separate principles that “are in significant tension with one another”: “The first says only Congress may exercise legislative power. The second says only Congress may delegate legislative power.”<sup>320</sup> The first principle is nondelegation; the second principle is *exclusive* delegation.<sup>321</sup> These two principles, as Merrill explains, can both be seen as rooted in the Vesting Clause and in legislative supremacy.<sup>322</sup> Yet they rest on diametrically opposed views of Congress’s power to delegate, and the choice between them has very different consequences for the legitimacy of administrative lawmaking: selecting the

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<sup>316</sup> See *Crowell v. Benson*, 285 U.S. 22, 51 (1932) (including immigration in the public rights category); cf. James E. Pfander & Theresa R. Warden, *Reclaiming the Immigration Constitution of the Early Republic: Prospectivity, Uniformity, and Transparency*, 96 VA. L. REV. 359, 433–40 (2010) (arguing that immigration does not fall squarely within the “public rights” category); Sohoni, *supra* note 309, at 1589 (“[I]mmigration is best treated as implicating what I will call a *quasi-private* right, not a public right.”).

<sup>317</sup> Compare Ann Woolhandler, *Public Rights and Taxation: A Brief Response to Professor Parrillo* 7 (Univ. of Va. Sch. of L. Pub. L. & Legal Theory Rsch. Paper Series, Paper No. 2022-09, 2022), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4003530](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4003530) [<https://perma.cc/KP8Z-JT2C>] (arguing that taxation falls in the public rights category and that “in areas of public rights — implying plenary legislative control — legislatures could rather easily delegate to administrators the legislature’s own authority to make intermediate rules as well as particularized decisions”), with Hamburger, *supra* note 290 (manuscript at 51 n.215) (“In a nation founded on the principle of No Taxation without Representation, is it to be believed that Congress could give the taxing power to some unelected agency head?”).

<sup>318</sup> Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2109 (2004).

<sup>319</sup> U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States . . .”).

<sup>320</sup> Merrill, *supra* note 318, at 2099.

<sup>321</sup> See *id.* at 2109 (“This ‘exclusive delegation doctrine’ includes both an anti-inherency principle — that agencies have no inherent authority to act with the force of law — and a transferability principle — that this inherent lack of authority can be filled by a delegation of power from Congress.”).

<sup>322</sup> See *id.* at 2098–99.

former would drastically undercut it, while selecting the latter would treat it as constitutional.<sup>323</sup>

If the constitutional principle that is being enforced here is not *non-delegation*, but instead *exclusive* delegation, then that would explain all four cases in the quartet. As discussed,<sup>324</sup> in the three cases in which the government lost, the Court nowhere articulated or embraced the principle that agencies may not exercise legislative power or that Congress may not delegate legislative power — the ideas embraced by proponents of a more stringent nondelegation doctrine.<sup>325</sup> Instead, these three decisions align better, or at least equally well, with the exclusive delegation principle — the principle that *only* Congress can delegate legislative power. By requiring an explicit statement in the relevant statutes in the CDC, OSHA, and EPA cases, the Court did craft a buffer around the exclusive delegation principle by demanding special assurance that Congress had, in fact, delegated the power the agency claimed. And in the fourth case — CMS — the Court apparently found that Congress *had* delegated the enormously consequential power in question, which would be perfectly fine under the exclusive delegation model. Thus, the quartet might be conceptualized as crafted “in service of”<sup>326</sup> not the *nondelegation* principle but instead the *exclusive* delegation principle. The decisions, surprisingly, were not wholly devoid of support for this reformulation. The EPA case contained language that acknowledged the “anti-inherency” rule, which Merrill describes as a key “subsidiary principle” entailed by the exclusive delegation principle<sup>327</sup>: “Agencies have only those powers given to them by

<sup>323</sup> See *id.* at 2100–01; *id.* at 2101 (“If, however, it turns out that Article I, Section 1 is correctly understood to incorporate the exclusive delegation postulate rather than the nondelegation postulate, this legitimacy problem largely goes away. Congress has created the administrative state and has given its far-flung agencies extensive powers to adopt legislative rules. But there is nothing constitutionally problematic about this if Article I, Section 1 tells us not that only Congress can legislate, but only Congress can delegate.”).

<sup>324</sup> See *supra* p. 291.

<sup>325</sup> See, e.g., *Gundy v. United States*, 139 S. Ct. 2116, 2134–35 (2019) (Gorsuch, J., dissenting) (“If Congress could pass off its legislative power to the executive branch, the ‘[v]esting [c]lauses, and indeed the entire structure of the Constitution,’ would ‘make no sense.’” (alterations in original) (quoting *Lawson*, *supra* note 289, at 340)); *id.* at 2130 (Alito, J., concurring in the judgment) (“The Constitution confers on Congress certain ‘legislative [p]owers,’ Art. I, § 1, and does not permit Congress to delegate them to another branch of the Government.” (alteration in original)); *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 487 (2001) (Thomas, J., concurring) (“[T]he Constitution does not speak of ‘intelligible principles.’ Rather, it speaks in much simpler terms: ‘All legislative Powers herein granted shall be vested in a Congress.’”); *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 575 U.S. 43, 66–91 (2015) (Thomas, J., concurring in the judgment) (“[T]he discretion inherent in executive power does *not* comprehend the discretion to formulate generally applicable rules of private conduct.” *Id.* at 70.); *Hamburger*, *supra* note 290 (manuscript at 3) (“[T]he Constitution bars any transfer of its powers, whether legislative, judicial, or executive.”); *SCHOENBROD*, *supra* note 234, at 20.

<sup>326</sup> *Gundy*, 139 S. Ct. at 2142 (Gorsuch, J., dissenting).

<sup>327</sup> Merrill, *supra* note 318, at 2101 (“[A]n exclusive delegation doctrine would entail two subsidiary principles. First, that executive and judicial officers have no inherent authority to act with the force of law, but must trace any such authority to some provision of enacted law. I call this the anti-inherency principle.”)

Congress . . . .<sup>328</sup> And, intriguingly, the fossil of a case cited by Justice Gorsuch as the nineteenth-century ancestor of the major questions doctrine — *ICC v. Cincinnati, New Orleans & Texas Pacific Railway*,<sup>329</sup> also known as the *Queen and Crescent Case*<sup>330</sup> — is cited by none other than Merrill as a key example of the rare decision that “actually enforce[d] the exclusive delegation doctrine.”<sup>331</sup>

The issue with reframing the major questions quartet around exclusive delegation is not really conceptual, then, but rather doctrinal, historical, and cultural. At this point in American law, it would be awkward — as Merrill points out<sup>332</sup> — to reorient the understanding of the Vesting Clause away from the nondelegation model to the exclusive delegation model. Many, many cases have paid lip service, at least, to the principle that Congress cannot delegate legislative power.<sup>333</sup> The Justices most committed to increasing the stringency of the nondelegation doctrine have stated repeatedly that Congress *cannot* delegate legislative power, *not* that *only* Congress can delegate legislative power.<sup>334</sup> To now embrace the exclusive delegation paradigm, these Justices would have to accept that the tentpole principle of nondelegation that they have been seeking to resurrect — the principle that Congress cannot delegate legislative power — need not, in fact, be resurrected. Setting aside that (probably insuperable) transition issue, however, it is worth at least absorbing the point that the exclusive delegation theory does as good a job as any theory of nondelegation in explaining the quartet.

We will return to the possibility that *exclusive* delegation, rather than *nondelegation*, is the best conceptual tether for the quartet, as well as to the separate question whether the clear statement rule embraced by the Court is overprotective of exclusive delegation. For now, it suffices to say that whichever theory of nondelegation, assuming there is any, is

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<sup>328</sup> *West Virginia v. EPA*, 142 S. Ct. at 2609.

<sup>329</sup> (*THE Queen and Crescent Case*), 167 U.S. 479 (1897); see *West Virginia v. EPA*, 142 S. Ct. at 2619 (Gorsuch, J., concurring) (citing the *Queen and Crescent Case*, 167 U.S. 479).

<sup>330</sup> Merrill, *supra* note 318, at 2111.

<sup>331</sup> *Id.* (“Thus, the *Queen and Crescent Case* squarely holds that Congress must delegate the power to make legislative rules to an agency before such power can be exercised, and must do so in unequivocal language.”).

<sup>332</sup> See *id.* at 2104 (“One significant recent development is that the nondelegation doctrine has become firmly implanted in the Vesting Clause of Article I.”); *id.* at 2181 (noting that the concept of exclusive delegation is infrequently invoked and “often ignored” by courts because it is “in serious tension” with the “orthodox understanding” that Congress cannot delegate legislative power).

<sup>333</sup> See, e.g., *Loving v. United States*, 517 U.S. 748, 758 (1996) (“The fundamental precept of the delegation doctrine is that the lawmaking function belongs to Congress, U.S. Const., Art. I, § 1, and may not be conveyed to another branch or entity.”); *Touby v. United States*, 500 U.S. 160, 165 (1991) (“[T]he Court has derived the nondelegation doctrine: that Congress may not constitutionally delegate its legislative power to another branch of Government.”).

<sup>334</sup> See sources cited *supra* note 325.

driving the application of the new major questions doctrine, it would have helped if the Court told us what it was.<sup>335</sup> Instead, as matters stand, agencies and Congress are meant to understand that they must beware a jabberwock of nondelegation that the Court left unidentified and undefined. But by failing to set out the contours of the nondelegation problem, the major questions quartet has created a shadow nondelegation doctrine that is more formless and discretionary, and therefore potentially more dangerous, than a precise articulation of a nondelegation problem would have been.

2. *A Clear Statement Rule?* — What of substance changes if the new major questions doctrine is assessed not as premised on nondelegation avoidance but as a constitutionally inspired clear statement rule designed to shield a constitutional value? It is true, of course, that the quartet canonized a new clear statement rule in our law: “We expect Congress to speak clearly when authorizing an agency to exercise powers of ‘vast “economic and political significance.”’”<sup>336</sup> And it is also true that some clear statement rules, unlike constitutional avoidance, do not pivot on the identification of a constitutional doubt or obstacle.<sup>337</sup> The justification for the lion’s share of clear statement rules is, however, very similar to constitutional avoidance: clear statement rules help to shield constitutional values through statutory interpretation.<sup>338</sup>

This conceptualization of the quartet faces an initial objection that resembles one earlier navigated. A clear statement rule imposes a “clarity tax” on Congress.<sup>339</sup> For such a clarity tax to be legitimate, it cannot come from nowhere. Rather, “the Court must . . . articulate a meaningful legal ground upon which to insist upon extra legislative clarity in

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<sup>335</sup> It is worth underscoring that the four nondelegation options just described fall far short of covering all the possibilities. These categories may be combined in various ways and new categories introduced: that Congress may not delegate authority over important subjects involving private rights; or that Congress may not delegate the power to make legally binding rules for important subjects; or that Congress may not delegate the power to make legally binding rules for important subjects unless foreign affairs is involved — and so on. The point is that the quartet did not tell us, and it is not easy to see, which possibility might be the theory underlying the new major questions doctrine.

<sup>336</sup> *Ala. Ass’n of Realtors*, 141 S. Ct. at 2489 (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)); see also *Nat’l Fed’n of Indep. Bus.*, 142 S. Ct. at 665 (quoting *Ala. Ass’n of Realtors*, 141 S. Ct. at 2489); *Biden v. Missouri*, 142 S. Ct. at 658 (Thomas, J., dissenting) (quoting *Ala. Ass’n of Realtors*, 141 S. Ct. at 2489); *West Virginia v. EPA*, 142 S. Ct. at 2605 (quoting Repeal of the Clean Power Plan, 84 Fed. Reg. 32,520, 32,529 (July 8, 2019)).

<sup>337</sup> See *supra* p. 296; sources cited *infra* note 343.

<sup>338</sup> William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 631 (1992) (“One way to articulate and protect underenforced constitutional norms is through interpretive presumptions, clear statement rules, and super-strong clear statement rules — canons of statutory construction.”). See generally Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978). I am grateful to Professor Zach Clopton for his thoughts on this point.

<sup>339</sup> Manning, *supra* note 256, at 403.

some contexts but not others.”<sup>340</sup> That is the “burden of justification”<sup>341</sup> that the Court must meet before it can impose on Congress the special requirement that it legislate with exceptional clearness instead of just plain language.<sup>342</sup> Sometimes, if relatively rarely, the Court has not met that burden of constitutional justification.<sup>343</sup> But it is truly remarkable to think that the Court could have failed to fulfill that baseline obligation in minting a clear statement rule of such consequence as this one.

Yet that is just what occurred here: the quartet does not meaningfully articulate a constitutional value that the clear statement rule serves in any of the three majority opinions in which that rule was enforced against the government.<sup>344</sup> The exception is a fleeting reference in the EPA decision to “separation of powers principles”<sup>345</sup> — a reference that fails to take heed of then-Professor Amy Coney Barrett’s argument that textualist precepts require that a substantive canon be linked to a “reasonably specific constitutional value,”<sup>346</sup> or of her caution that “a canon designed to protect the constitutional separation of powers — a function that can be attributed to a host of canons — is probably stated at too great a level of generality to justify departures from a text’s most natural meaning.”<sup>347</sup>

This is not just a drafting issue — a matter of the Court merely neglecting, forgivably, to spell out an obvious constitutional value, perhaps because it is so obvious. Instead, the issue is that the constitutional values at stake can be conceptualized in many ways,<sup>348</sup> at least one of which would make the Court’s new clear statement rule unnecessary.

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<sup>340</sup> *Id.* at 418.

<sup>341</sup> *Id.* at 425.

<sup>342</sup> See Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 YALE L.J. 2, 40 (2008) (“[J]udicial demands for a clear congressional statement . . . can serve to increase legislative enactment costs for constitutionally problematic policies.”).

<sup>343</sup> See Manning, *supra* note 256, at 425–26 & n.136 (noting “canons such as those requiring courts to resolve ambiguities in favor of federal taxpayers or service members or veterans,” *id.* at 425); *id.* at 426 (“[W]hile the Court has in the past recognized certain clear statement rules that implement social rather than constitutional values, such authority seems not to have taken root on a generalized basis. If it had, the Court presumably would not take such pains to ground modern clear statement rules in constitutional values, which — if legitimately invoked — would seem to justify imposing constraints upon legislative prerogatives in a way that ordinary judicial preferences would not.”).

<sup>344</sup> Justice Gorsuch, concurring in the EPA case and joined by Justice Alito, tied the rule to “foundational constitutional guarantees,” *West Virginia v. EPA*, 142 S. Ct. at 2616 (Gorsuch, J., concurring), among them the Vesting Clause and the Framers’ intent, *see id.* at 2618–19. In addition, Justice Gorsuch, joined by Justices Thomas and Alito, concurred in the OSHA case, citing nondelegation concerns. *See Nat’l Fed’n of Indep. Bus.*, 142 S. Ct. at 667 (Gorsuch, J., concurring). Yet that is three of nine Justices in two of three cases.

<sup>345</sup> *West Virginia v. EPA*, 142 S. Ct. at 2609.

<sup>346</sup> Barrett, *supra* note 84, at 178.

<sup>347</sup> *Id.* at 179 n.331.

<sup>348</sup> See Manning, *supra* note 160, at 32, 48. Manning criticizes the Court for drawing from the Constitution “abstract structural inferences about which reasonable people can doubtless differ,”

With respect to the Court's conceptualization, it seems obvious that the new major questions doctrine starts from the unarticulated premise that the Constitution treats major delegations of regulatory power to agencies as constitutionally suspect. As telegraphed obliquely by the Court in the EPA case, the Court "greet[s] assertions of 'extravagant statutory power over the national economy' with 'skepticism.'"<sup>349</sup> As explained far more directly by then-Judge Kavanaugh, the major questions doctrine is "grounded in two overlapping and reinforcing presumptions: (i) a separation of powers-based presumption against the delegation of major lawmaking authority from Congress to the Executive Branch, and (ii) a presumption that Congress intends to make major policy decisions itself, not leave those decisions to agencies."<sup>350</sup> These presumptions — as well as the skepticism they underwrite — state important propositions about the Constitution and the values it seeks to shield. Neither presumption is written into Article I. Nor is either one entailed by it. One could attempt to set forth a theory to justify these propositions,<sup>351</sup> for example by asserting that the Constitution is designed to prevent intrusions on individual liberty by making it difficult

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*id.* at 48, and for deciding cases on the basis of these abstract inferences and values rather than in a text- and clause-bound way, *see id.* at 48–49. The new major questions doctrine offers a vivid illustration of the risks pointed to by Manning. The Court selected among several possible inferences or presumptions concerning the separation of powers and then crafted a clear statement rule that enforced its chosen inference against the executive branch and Congress.

<sup>349</sup> *West Virginia v. EPA*, 142 S. Ct. at 2609 (citing *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

<sup>350</sup> *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc) (citations omitted) (citing *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst. (Benzene)*, 448 U.S. 607, 645–46 (1980) (plurality opinion)); *see id.* ("[I]n a narrow class of cases involving major agency rules of great economic and political significance, the Supreme Court has articulated a countervailing canon that constrains the Executive and helps to maintain the Constitution's separation of powers.")

<sup>351</sup> Insofar as such a theory would rest on claims concerning original meaning, it faces a serious scholarly challenge. *See West Virginia v. EPA*, 142 S. Ct. at 2641–42 (Kagan, J., dissenting) (citing new scholarship about Founding-era delegations by Congress to the Executive). In recent years, the originalist case for nondelegation has been undermined by pathbreaking scholarship. *See, e.g.,* Kevin Arlyck, *Delegation, Administration, and Improvisation*, 97 NOTRE DAME L. REV. 243, 246, 248 (2021); Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 282 (2021); Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, 56 GA. L. REV. 81, 87–88 (2021); Parrillo, *supra* note 23, at 1301–02. The overall picture that has emerged from these accounts is that at the time of the Founding, Congress gave significant power and policymaking latitude to the executive branch in a number of important domains — among them, tax law, patent law, and the repayment of the public debt — and the Founding-era debates reflect almost no concern that such laws violated the principle of nondelegation. Proponents of a more stringent nondelegation doctrine have responded vigorously. *See, e.g.,* Aaron Gordon, *Nondelegation Misinformation: A Rebuttal to "Delegation at the Founding" and Its Progeny*, BAYLOR L. REV. (forthcoming) (manuscript at 3), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3561062](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3561062) [<https://perma.cc/2SMD-3CHN>]; Philip Hamburger, *Delegating or Divesting?*, 115 NW. U. L. REV. 88, 108–10 (2020); Hamburger, *supra* note 290 (manuscript at 61); Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490, 1494 (2021). Taken collectively, the latter set

for either the executive branch or Congress to regulate private conduct.<sup>352</sup> It is easy to see why that conception of constitutional structure would be appealing to a perspective that regards the Constitution as enshrining a certain subset of libertarian principles<sup>353</sup> — as well as to see how embracing that conception might lead to the setting aside of textualist methodological commitments when adhering to those commitments might conflict with the aim of securing that chosen vision of the Constitution. But it is far harder to see how the Constitution encodes that particular libertarian subset of substantive values, and in any event the Court did not say that it did. Yet these presumptions undergird the clear statement rule announced in the quartet.

Now consider an alternative and less substantively freighted conceptualization of the relevant constitutional values: the one articulated by Merrill, whose theory of the *non*-nondelegation doctrine — exclusive delegation — explains the quartet as neatly as any theory of nondelegation.<sup>354</sup> Article I, as Merrill explains, can be understood to reflect the principle that Congress *can* delegate legislative power, and that *only* Congress can delegate legislative power.<sup>355</sup> This theory *also* states an

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of accounts has emphasized that Founding-era thinking as to nondelegation may have turned on numerous distinctions, including whether the power delegated involved “exclusive legislative power” or “non-exclusive legislative power,” Wurman, *supra*, at 1534, private or public rights, domestic or foreign affairs, important subjects or unimportant ones, or whether it involved various amalgams of the foregoing.

For the purposes of this Comment, it suffices to say that in the quartet the Court did not attempt to articulate an originalist justification for nondelegation or its new clear statement rule, notwithstanding Justice Kagan’s originalist critique. See *West Virginia v. EPA*, 142 S. Ct. at 2641–42 (Kagan, J., dissenting). Justice Gorsuch’s concurrence in the *EPA* decision offered only a dismissive string cite acknowledging an ongoing “battle of the law reviews” without engaging with the debate or explaining which side had the better of it. *Id.* at 2625 n.6 (Gorsuch, J., concurring).

<sup>352</sup> See *Nat’l Fed’n of Indep. Bus.*, 142 S. Ct. at 669 (Gorsuch, J., concurring) (justifying the major questions doctrine as a safeguard against “intrusions into the private lives and freedoms of Americans by bare edict”); *West Virginia v. EPA*, 142 S. Ct. at 2618 (Gorsuch, J., concurring) (“The framers believed that the power to make new laws regulating private conduct was a grave one that could, if not properly checked, pose a serious threat to individual liberty. . . . [T]he framers deliberately sought to make lawmaking difficult.”); *id.* (“[If Congress could] divest its legislative power to the Executive Branch . . . agencies could churn out new laws more or less at whim. Intrusions on liberty would not be difficult and rare, but easy and profuse.”).

<sup>353</sup> See Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 402 (2015) (describing the classical liberal or libertarian thesis that “the American Constitution is, or should be interpreted to be, libertarian in character, in the sense of protecting a specific set of rights — especially property rights and economic rights — from government intrusion” and associating this position with the view that “the Constitution is in some sense ‘lost’ or ‘in exile’”); *id.* at 403 (noting that a libertarian understanding of the Constitution “would have dramatic implications, throwing much of the modern administrative state into the dustbin”). I am grateful to Professor Richard Fallon for his thoughts on this point.

<sup>354</sup> See *supra* p. 306–09.

<sup>355</sup> Merrill, *supra* note 318, at 2099; *id.* at 2165 (explaining that the “first and most evident implication” of embracing the exclusive delegation doctrine “is that the nondelegation doctrine, as a general requirement that Congress must circumscribe the discretion of administrative agencies,

important proposition about the Constitution.<sup>356</sup> Exclusive delegation is not written explicitly into Article I, nor is it necessarily entailed by it.<sup>357</sup> But nothing in the Constitution rules this theory *out*, and a powerful case can be made that it “provid[es] better congruence with institutions and more continuity with our history” than the principle that Congress *cannot* delegate legislative power.<sup>358</sup> Yet if exclusive delegation *is* the correct principle to be drawn from the Constitution, and the libertarian conception of the Constitution implicitly reflected in then-Judge Kavanaugh’s two presumptions<sup>359</sup> are *not*, then the choice to delegate legislative power to agencies is not a venture by Congress into constitutionally problematic terrain but simply a choice allowed by the Constitution to Congress.<sup>360</sup> When Congress exercises its power to delegate, it is doing what it is fully entitled to do — utilizing a resource made available to it by the Constitution.<sup>361</sup> And, if that is so, what is the constitutional value that would justify a “presumption against” major delegations,<sup>362</sup> or the regarding of a major delegation with “skepticism”<sup>363</sup> — or the clear statement rule that trails in their wake? Having a clear statement rule in this context would be no different than saying that Congress must speak clearly to authorize the building of a really *long* interstate highway — or saying that Congress must speak clearly to name a *very large and important* post office after Lewis Carroll.

In sum, it is not a trivial matter to infer from the Constitution a unique constitutional value that would warrant the Court’s new clear statement rule. It is innocuous enough to say that separation of powers is a constitutional value, or that legislative supremacy is, or that democracy is<sup>364</sup> — but those general principles do not self-evidently require applying skeptical presumptions, or clear statement rules, that have the consequence of limiting the meaning of statutes that Congress has enacted.<sup>365</sup> Doing so, and especially doing so retroactively, has the potential to profoundly undermine the very values — separation of powers,

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should be rejected” and further urging that the Court “jettison both the requirement that Congress lay down an intelligible principle to constrain executive discretion and the canon favoring narrow constructions of statutes to avoid nondelegation questions”).

<sup>356</sup> See *id.* at 2100.

<sup>357</sup> See *id.* at 2164–65.

<sup>358</sup> *Id.* at 2165.

<sup>359</sup> See *supra* p. 311.

<sup>360</sup> See Merrill, *supra* note 318, at 2163.

<sup>361</sup> See *id.*

<sup>362</sup> U.S. Telecom Ass’n v. FCC, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc).

<sup>363</sup> *Id.* at 421.

<sup>364</sup> See *West Virginia v. EPA*, 142 S. Ct. at 2620 (Gorsuch, J., concurring) (“At stake [are] . . . basic questions about self-government, equality, fair notice, federalism, and the separation of powers.”).

<sup>365</sup> See Manning, *supra* note 160, at 32 (critiquing “free-form structural inference” that “distill[s] . . . an abstract shared value — such as property, privacy, federalism, nationalism, or countless

legislative supremacy, democracy — that the clear statement rule is proffered as promoting.

One thing does seem evident: there is a lack of agreement or certainty on the Court, or at least across five Justices, concerning the precise contours of the underlying doctrine of nondelegation that the new major questions doctrine is advertised as serving.<sup>366</sup> And because of this uncertainty, the Court landed not on a nondelegation holding, nor even on a nondelegation avoidance holding, but instead upon the nondelegation-ish jabberwocky of the major questions quartet.

Some may conclude that in light of this uncertainty the course of the quartet was the only prudent one. It is merely responsible judicial minimalism,<sup>367</sup> it might be said, to cultivate the major questions doctrine on a rule-by-rule, statutory basis, gradually building out boundary lines that agencies must not cross, and to thereby allow the guardrails of nondelegation to accrete incrementally, in common law fashion. If the Court had jumped in feet first to a nondelegation decision, or even set out its nondelegation concerns in strongly worded dicta, it could have been far worse.

Blessings, of course, deserve to be counted, and some glasses are half full. With that said, however, the problem with that depiction is that it elevates too highly the Court's own institutional constraints (or interests<sup>368</sup>) over the legitimate claims of both Congress and the executive branch. On a cursory glance, the major questions quartet may seem like a prudent halfway compromise between opponents of regulatory power and proponents of it. But the major questions doctrine, with its inchoate theory of nondelegation (or exclusive delegation?) in tow, will cause both an actual and an *in terrorem* curtailment of regulation, while abruptly rewriting the ground rules for how courts today read regulatory statutes enacted decades ago in a very different interpretive world. The quartet threatens the dual harms of allowing courts to freely decide how stringently to enforce perceived nondelegation concerns through the mechanism of the new major questions doctrine, while also leaving Congress and agencies essentially no notice about what they can and cannot do — both of which together will conduce not just to the enforcement of nondelegation but to the overenforcement of it.<sup>369</sup> The Court should have

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others"); *id.* (noting that the purposes underlying the doctrines of federalism and separation of powers are "diverse, unranked, and often self-contradictory"); *id.* at 72–73 ("[T]he Court uses an ever-expanding array of clear statement rules that insist upon supernormal levels of statutory clarity before the Court will read a law as intruding upon vaguely defined values, which are often of the Court's own creation."); Barrett, *supra* note 84, at 116 (articulating the tension between substantive canons and textualist values, such as legislative supremacy).

<sup>366</sup> See *supra* pp. 290–91.

<sup>367</sup> See Deacon & Litman, *supra* note 92 (manuscript at 58) ("Because the major questions doctrine rests on a rule of statutory interpretation, the decisions invoking the major questions doctrine sometimes end up being described as minimalist.")

<sup>368</sup> See *supra* notes 252–53 and accompanying text.

<sup>369</sup> I am grateful to Spencer Livingstone for his comments on this point.

stayed its hand before applying, and indeed it had no business creating, a new clear statement rule with such grave consequences for two coequal branches of government (and for society as a whole) that is so opaque in both its application and its justification. If the Court could not agree on which way to leap on nondelegation, the Court should not have leapt halfway to who knows where in the major questions quartet.

#### CONCLUSION: INTERPRETATION AND POWER

Reticence about the scope of and justifications for an exertion of power is itself a type of exertion of power. The major questions quartet has not told us what rules are major,<sup>370</sup> or whatever happened to that *Chevron* case we used to hear so much about.<sup>371</sup> The Court has not told us what became of its commitment to textualism,<sup>372</sup> or whether it still believes that the nondelegation doctrine can be adequately justified, either on originalist grounds or on some other basis.<sup>373</sup> The Court did not tell us what theory of nondelegation motivates the new major questions doctrine, and it has therefore left unanswered basic, critically important questions about how that doctrine should apply.<sup>374</sup> The Court did not adequately ground its momentous clear statement rule with a meaningful constitutional justification.<sup>375</sup> And the Court has not spoken a word about the remedies that the quartet will inevitably cause lower courts to issue in spades;<sup>376</sup> by sidelining *Chevron* and embracing the new major questions doctrine, the Court has given fresh artillery to lower courts to hold rules facially invalid and to enjoin them nationwide, even as a powerful bloc of the Court professes to abjure such forms of relief.<sup>377</sup>

<sup>370</sup> See *supra* p. 288.

<sup>371</sup> See *supra* pp. 281–82.

<sup>372</sup> See *supra* section I.B.2, pp. 282–90.

<sup>373</sup> See *supra* note 351.

<sup>374</sup> See *supra* pp. 300–09.

<sup>375</sup> See *supra* pp. 310–14.

<sup>376</sup> Where merits lead, remedies follow. As of this writing, the Court has left unchanged the law of *remedies* against agency action, but the new major questions doctrine altered the law of *merits review* of agency action in a way that will inevitably increase the issuance of universal remedies against federal rules.

<sup>377</sup> Justices Thomas, Alito, and Gorsuch have criticized nationwide injunctions, arguing that as a categorical matter Article III courts lack the power to offer relief that extends beyond the plaintiffs to a suit. See *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring in the grant of a stay, joined by Thomas, J.); *Trump v. Hawaii*, 138 S. Ct. 2392, 2424–25 (Thomas, J., concurring); *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2090 (2017) (Thomas, J., concurring in part and dissenting in part, joined by Alito and Gorsuch, JJ.). But in the quartet these three Justices did not voice Article III concerns regarding relief that extended beyond the plaintiffs. Instead, they (a) made no objection to a per curiam decision that allowed a universal vacatur to go into effect, see *Ala. Ass'n of Realtors*, 141 S. Ct. at 2490, and (b) joined and concurred in a decision that stayed an agency rule nationwide, see *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 664, 667. Still more notably, these Justices dissented in the CMS case. In that case, two district courts issued preliminary injunctions against the CMS rule that (together) enjoined the rule

Rather, what the Court has said, and all that it has said, is that in some set of cases, and presumably for some set of reasons, Congress must speak clearly.<sup>378</sup>

The new major questions doctrine is but one piece of a larger set of changes, many of them avulsive, that the Court has recently wrought in the law.<sup>379</sup> The fact that this particular piece of the mosaic is a clear statement rule — an interpretive regime shift, rather than a substantive constitutional regime shift — makes this piece seem to recede in importance behind the rest. But judicial power over interpretive method is still the exercise of judicial power, perhaps all the more potent because it is less visible.

The history of administrative and constitutional law is replete with examples both of the obscurity of such shifts and of their power.<sup>380</sup> To choose one I have elsewhere explored,<sup>381</sup> the New Deal Court reworked a set of interpretive doctrines seemingly unrelated to substantive exercises of power — the due process notice doctrines of vagueness, lenity, and retroactivity.<sup>382</sup> These doctrines appeared in the backdrop of some of the most notorious cases decided in the run-up to the New Deal constitutional moment. The two landmark nondelegation decisions — *A.L.A. Schechter Poultry* and *Panama Refining* — “faulted the vagueness of the statutes under attack.”<sup>383</sup> When the Court invalidated minimum wage laws for interfering with liberty of contract, it complained

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nationwide. See *Louisiana v. Becerra*, 571 F. Supp. 3d 516, 543–44 (2021) (preliminary injunction limited to forty states, including twenty-six nonplaintiff states, in a suit by fourteen states); *Missouri v. Biden*, 571 F. Supp. 3d 1079, 1104 (2021) (preliminary injunction limited to ten plaintiff states only). The dissenters in the CMS case said they would “deny a stay” of those injunctions, *Biden v. Missouri*, 142 S. Ct. at 655 (Thomas, J., dissenting), meaning that they would have voted to leave the CMS rule enjoined nationwide by dint of the lower courts’ injunctions — one of which extended beyond the fourteen plaintiff states to twenty-six other nonplaintiff states.

The approach of these three Justices, and especially their failure to address remedial scope in their CMS dissent, is puzzling. Their votes cannot be reconciled with their earlier articulated positions concerning the unconstitutionality of nationwide injunctions as an Article III matter. For my own views concerning the legality of nationwide or universal injunctions and universal vacatur, see Mila Sohoni, *The Lost History of the “Universal” Injunction*, 133 HARV. L. REV. 920, 924 (2020); and Mila Sohoni, *The Power to Vacate a Rule*, 88 GEO. WASH. L. REV. 1121, 1126 (2020). See also Ronald M. Levin & Mila Sohoni, *Universal Remedies, Section 706, and the APA*, YALE J. REG.: NOTICE & COMMENT (July 19, 2020), <https://www.yalejreg.com/nc/universal-remedies-section-706-and-the-apa-by-ronald-m-levin-mila-sohoni> [https://perma.cc/FAY5-BDQD]; Mila Sohoni, *A Reply to Bray’s Response to The Lost History of the “Universal” Injunction*, YALE J. REG.: NOTICE & COMMENT (Oct. 10, 2019), <https://www.yalejreg.com/nc/a-reply-to-brays-response-to-the-lost-history-of-the-universal-injunction-by-mila-sohoni> [https://perma.cc/VK45-FU5C].

<sup>378</sup> See *West Virginia v. EPA*, 142 S. Ct. at 2609.

<sup>379</sup> See, e.g., *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022); *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111 (2022).

<sup>380</sup> See, e.g., *Hickman*, *supra* note 51, at 71 & n.93.

<sup>381</sup> Mila Sohoni, *Notice and the New Deal*, 62 DUKE L.J. 1169 (2013).

<sup>382</sup> *Id.* at 1172.

<sup>383</sup> *Id.* at 1182.

of the vagueness of those laws as well.<sup>384</sup> In the pre–New Deal period, lenity wasn’t “‘last’ among interpretive conventions.”<sup>385</sup> And retroactivity had sharper teeth.<sup>386</sup>

The New Deal Court subsequently relaxed all three doctrines of due process notice, and it did so to promote the building of the administrative state.<sup>387</sup> The New Deal Court gradually came to regard rights not as prepolitical entitlements but rather as the products of legislative choice.<sup>388</sup> And it similarly came to “embrace the view that legislative and regulatory clarity and prospectivity are inherently matters of legislative or administrative choice rather than abstract values that courts can reliably police in a vacuum.”<sup>389</sup> The retooling of these doctrines helped to secure legislative and regulatory power by supplying a “diffuse boost to the project of building the modern regulatory state.”<sup>390</sup> This was not the only way in which the New Deal Court harnessed interpretive technique to build the administrative state; the Court’s “interpretive revolution” in the use of legislative history likewise served as a “key element of its larger acceptance of an agency-centered vision of governance.”<sup>391</sup>

The endeavor of deploying interpretive methods to *fortify* the regulatory state and to *promote* “agency-centered . . . governance” is fast dwindling into memory.<sup>392</sup> We have long since bid farewell to legislative history,<sup>393</sup> and a decade ago it was evident that resistance was developing to aspects of the New Deal relaxation of due process notice doctrine.<sup>394</sup> Whereas the Court once encouraged the burgeoning of the

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<sup>384</sup> *Id.* at 1182–83 (describing *Adkins v. Child. ’s Hosp.*, 261 U.S. 525 (1923), and *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936)).

<sup>385</sup> *Id.* at 1206 (quoting Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 386 (1995) (“Ranking lenity ‘last’ among interpretive conventions all but guarantees its irrelevance.”)).

<sup>386</sup> *See id.* at 1199.

<sup>387</sup> *See id.* at 1210.

<sup>388</sup> *Id.* at 1215; *see also* Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 874, 903 (1987).

<sup>389</sup> Sohoni, *supra* note 381, at 1215.

<sup>390</sup> *Id.* at 1217.

<sup>391</sup> Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890–1950*, 123 YALE L.J. 266, 283, 285 (2013). Professor Nicholas Parrillo demonstrated that the use of legislative history by New Deal lawyers, and its gradual acceptance by the Court, had the effect of helping to augment administrative power. As he explains, “legislative history was — at least in its origin — a statist tool of interpretation.” *Id.* at 284.

<sup>392</sup> *Id.* at 285.

<sup>393</sup> *Id.* at 270.

<sup>394</sup> *See* Sohoni, *supra* note 381, at 1218 (describing “judicial contests over the boundaries of due process notice and over the appropriate role of federal courts in shielding notice values from impermissible exertions of legislative and executive power”); *see also, e.g.*, *Sessions v. Dimaya*, 138 S. Ct. 1204, 1229 (2018) (Gorsuch, J., concurring in part and concurring in the judgment) (arguing that vague civil statutes are also constitutionally problematic because they carry penalties that are often

administrative state through its interpretive method and sources, the Court is now tightening the joints.

This Court, this newly bold Roberts Court, like its bold predecessor a century ago, well understands that “methods of policing language are methods of allocating political power among the branches.”<sup>395</sup> The new major questions doctrine enunciated in the quartet is one very consequential way that the Court is “embrac[ing], and indeed manipul[at]ing” that principle<sup>396</sup> — though, this time around, it is doing so in a very different way: not to assist, but to curtail, the power and the promise of the regulatory state.

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as harsh as criminal statutes); *Wooden v. United States*, 142 S. Ct. 1063, 1084 (2022) (Gorsuch, J., concurring in the judgment) (“[T]his Court’s early cases did not require a ‘grievous’ ambiguity before applying the rule of lenity.”).

<sup>395</sup> Sohoni, *supra* note 381, at 1217 (“The New Deal constitutionalism of due process notice renders visible a Court coming to embrace, and indeed manipulate, the principle that methods of policing language are methods of allocating political power among the branches.”).

<sup>396</sup> *Id.*