OT ’22 AND THE PATH OF ADMINISTRATIVE LAW

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ABSTRACT

This symposium piece reflects on the Supreme Court’s October 2022 term and what it reveals for the direction of administrative law. It argues first that the nondelegation doctrine is dead but not for the reason functionalists have been arguing for so long. It is dead rather because the causes of its revival have been effectively removed. Nondelegation concerns are most felt when there is significant executive unilateralism; in the past such unilateralism was encouraged by the Chevron doctrine, which allows the executive branch to interpret statutes creatively and, so long as those interpretations are plausible, requires courts to defer to that branch’s interpretation. Part I describes this legal framework and how it contributes to executive unilateralism.

In the Court’s two most important administrative law decisions this past term, Sackett v. EPA and Biden v. Nebraska, involving executive interpretations of statutes, not once did the Supreme Court mention Chevron; indeed, not once did the parties mention Chevron. The doctrine is therefore dead, at least at the Supreme Court, and the Court will be giving the statutes their best readings. That alone would go a long way to deflating concerns about nondelegation. But the Court has gone even further: in both cases, the Court deployed a version of the “major questions doctrine” to conclude that the statutes did not authorize the politically and economically significant regulations in question. That doctrine requires a clear statement from Congress when delegating questions of major political or economic significance. In short, the Court will no longer defer, and in fact will demand, a clear statement that Congress intended major delegations. Between the two phenomena, there will likely be no reason to address nondelegation in the near future. Part II explains this shift.

Importantly, however, the removal of serious nondelegation challenges is not because the Court’s new approach to statutory interpretation enforces the nondelegation doctrine, at least not directly. Rather, the Court’s new approach is consistent with textualism and only incidentally affects the nondelegation concern. This Article concludes with a positive evaluation of Justice Amy Coney Barrett’s concurrence in Biden v. Nebraska, which tracked the view the present Author has defended at length elsewhere that the major questions doctrine is a linguistic rather than substantive canon. At times, however, Justice Barrett’s defense of the major questions doctrine serves to enforce the nondelegation doctrine more than it lets on. Part III elaborates on these observations.

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I. **CHEVRON AND UNILATERALISM**

The doctrine announced in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* requires courts to defer to an agency’s reasonable interpretation of an ambiguous statute that it administers, even if that interpretation is not the best reading that the court would adopt, and even if that reading is novel.\(^1\)

Deference to changing agency interpretations of statutes, at least in this form and as we know it today,\(^2\) originated during the conservative Reagan Administration as a response to a perceived liberal judiciary that was interpreting statutes in a way that hamstrung conservative priorities.\(^3\)

From the conservatives’ perspective, they were solving the problem of what one might call “judicial unilateralism”: a perceived activist judiciary that was advancing liberal priorities through adventurous interpretations of statutory (not to mention constitutional) language.\(^4\) Jack Balkin has explained the shifting perspectives on judicial review:

\[^{1}\text{467 U.S. 837, 842–43 (1984).}\]

\[^{2}\text{Aditya Bamzai has reminded us that two canons of interpretation, the contemporaneous and longstanding usage canons, directed courts to give great “weight” to executive interpretations of statutes that were adopted near in time to the law’s enactment and that have persisted over time. Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 942 (2017). Modern deference, however, allows agencies to shift their interpretations at any time, as long the statute is ambiguous. See id. at 920–21.}\]


\[^{4}\text{See id.; see also JEFFREY ROSEN, THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA 8 (Oxford Univ. Press 2006) (defining judicial unilateralism as “a court’s decision to strike down federal or state laws in the name of a constitutional principle that is being actively and intensely contested by a majority of the American people”).}\]
At the beginning of the twentieth century, progressives grew increasingly skeptical of judicial review, while conservatives embraced judicial review to limit federal and state regulation and protect property rights. After the New Deal, these positions gradually flipped. By midcentury, liberals in both parties had begun to defend strong courts and judicial review, while conservatives began to denounce judicial activism and preach judicial restraint.5

Looking at the last few decades, the positions have once again flipped.6 An important reason is the “partisan entrenchment” of the judiciary with one’s political allies.7 For present purposes, the point is that the liberals controlled the judiciary in the mid-twentieth century, and conservatives perceived that these judges were hamstringing the executive branch with adventurous statutory interpretations.8

Although there is no question that partisan entrenchment helps to explain the conservatives’ attitudinal shift on judicial review since then, it also warrants mention that conservatives increasingly realized that they had replaced judicial unilateralism with another kind of unilateralism, namely executive unilateralism.9 As a result of *Chevron* deference, the executive branch could squeeze major policies out of statutory ambiguities and change those policies with each new administration.10

The “net neutrality” saga is one obvious example. Net neutrality rules would prohibit the “blocking, throttling, [or] paid prioritization” of content on the part of the internet access providers—providers of internet access such as Comcast or Verizon could not treat preferentially (or “edge”) some content providers over others.11 The validity of these net neutrality rules center on whether the Federal Communications Commission (FCC) can plausibly classify internet access providers as “offering” a “telecommunications service,” which involves the transmission of data unaltered from one user to another, as opposed to providing

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6. *Id.* at 216.
7. *Id.* at 218.
8. See *id.* at 215–18, 223.
an “information service” that allows for content manipulation, under Section 706 of the Telecommunications Act of 1996 and Title II of the Communications Act of 1934. For the rules to be valid, providers must be classified as telecommunications services so that they can be subject to the common carrier regulations of Title II.

In the early 2000s, the FCC concluded that “[b]ecause Internet access provides a capability for manipulating and storing information,” as opposed to merely transmitting data “without change in the form or content,” it was an information service not subject to common-carrier regulations; the Supreme Court upheld this interpretation as a reasonable interpretation of an ambiguous statute. In 2015, however, under pressure from the Obama Administration, the agency reversed course and found that internet access providers were offering a telecommunications service because most internet users did not manipulate the data transmitted or received; they simply used it, for example, to watch videos on YouTube or Netflix. The United States Court of Appeals D.C. Circuit upheld the reclassification from information services to telecommunication services under the Chevron doctrine. Then in 2017, under pressure from the Trump Administration, the FCC reversed course yet again and scuttled the net neutrality


17. U.S. Telecom Ass’n, 825 F.3d at 697, 701–06.

regulations. The Biden Administration then reversed course yet again, promulgating an executive order “encourag[ing]” the FCC once again to promulgate net neutrality rules. Those efforts initially have stalled, however, because the nomination of the administration’s choice to fill a vacancy on the commission stalled. The FCC formally voted to re-promulgate the net neutrality rules on April 25, 2024.

Although the net neutrality saga may be the most famous example, students of administrative law have come to learn that as a result of Chevron deference administrations change policies on major issues every few years. Take the Waters of the United States rule, which in 2015, under the Obama Administration, expanded the Environmental Protection Agency’s (EPA) jurisdiction over wetlands under its authority to regulate “navigable” waters of the United States. The previous, narrower rule was promulgated in 1986 during the Reagan Administration. The Trump Administration sought to reverse the 2015 rule. The Biden Administration then reversed the Trump Administration’s reversal.

25. Id. at 37056 (first citing 33 C.F.R. § 328.3 (1986); and then citing 40 C.F.R. § 122.2 (1986)).
Supreme Court had previously declared the relevant statutory term to be ambiguous.28

Whatever one thinks of the justifications for the *Chevron* doctrine, the impression one gets is of executive unilateralism, whereby every four or eight years new major policy changes are made by the executive rather than by Congress.29 One obvious solution to the problem is to eliminate *Chevron* deference and to fix the meanings of the relevant statutory terms.30 But another solution would be to revive the nondelegation doctrine.31 This latter solution recognizes that the problem is not merely that the executive branch can often find ambiguity where others might not, but also that Congress’ statutes are often genuinely broad and grant significant discretion to agencies.

To be sure, as I and others have written, there is a difference between truly interpretive questions and those which call upon agencies to exercise policymaking discretion.32 In his concurrence in *Kisor v. Wilkie*, a case about deference to an agency’s interpretation of its own regulations (so-called *Auer* deference), Justice Brett Kavanaugh pointed to the difference:

> [S]ome cases involve regulations that employ broad and open-ended terms like “reasonable,” “appropriate,” “feasible,” or “practicable.” Those kinds of terms afford agencies broad policy discretion, and courts allow an agency to reasonably exercise its discretion to choose among the options allowed by the text of the rule. But that is more *State Farm* than *Auer*.33

*Motor Vehicle Manufacturers Ass’n of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.* deals with arbitrary and capricious review of an agency’s policy choices and reasoning rather than its interpretation of statutory terms.34

Nevertheless, particularly when executive agencies are relatively adventurous in finding statutory ambiguities, the concern becomes that the agencies are in fact exercising legislative power, rather than executive power, or

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30. See *id*.
truly interpreting their statutory authorities.\footnote{35} Thus, \textit{Chevron} deference has often been connected to the nondelegation doctrine.\footnote{36} With that background in mind, let us assess the Court’s two central administrative law cases during the 2022 term.

II. OCTOBER TERM 2022

The two most important administrative law cases this past term were \textit{Sackett} \textit{v. EPA}, involving the meaning of “waters of the United States,” and \textit{Biden v. Nebraska}, involving student debt cancellation.\footnote{37} This Part makes three brief observations. First, not a single merits brief used \textit{Chevron} deference, even though such deference clearly ought to have applied (if the doctrine still mattered).\footnote{38} Second, the nondelegation doctrine was not raised in either case, even though the doctrine might have been raised as a canon of avoidance.\footnote{39} Third, the Court deployed a version of what is now called the major questions doctrine.\footnote{40}

A. Sackett v. EPA

At issue in \textit{Sackett} was the Clean Water Act’s (CWA) definition of “the waters of the United States,” to which the Act’s prohibitions applied.\footnote{41} The Sacketts purchased land in 2004 near Priest Lake in Idaho, an intrastate navigable body, and began backfilling their property with dirt and rocks.\footnote{42} The EPA sent a compliance letter, informing the Sacketts that their property was on protected wetland and threatening the Sacketts with tens of thousands of dollars a day in fines if they continued to build on their land.\footnote{43} The agency also claimed that there was no final agency action and that the Sacketts could not bring suit against it, leading to a unanimous loss for the agency in the Supreme Court in 2012.\footnote{44} This


\footnote{38} See \textit{Chevron}, 476 U.S. at 842–44.

\footnote{39} See generally \textit{Sackett}, 598 U.S. 651; \textit{Biden}, 143 S. Ct. 2355.

\footnote{40} \textit{See Sackett}, 598 U.S. at 713–14 (Kagan, J., concurring).

\footnote{41} Id. at 661 (quoting 33 U.S.C. §§ 1311(a), 1362(7), (12)(A) (2018)).

\footnote{42} Id. at 662.

\footnote{43} Id.

\footnote{44} See id. at 663.
past term the Court reached the merits: whether the CWA covered the Sacketts’ land.45

As the Court explained, the Sacketts’ land is “adjacent to” an “unnamed tributary’ on the other side of a 30-foot road. That tributary feeds into a non-navigable creek, which, in turn, feeds into Priest Lake . . . .”46 According to the EPA’s interpretation, the Act reached not just navigable waters but any waters “that could affect interstate or foreign commerce,” as well as “[w]etlands adjacent” to those waters.”47 “Adjacent,” in turn, was defined to include “neighboring,” and the agency guidance from 2007 adopted the “significant nexus” test, which provided that such wetlands could be regulated if “alone or in combination with similarly situated lands in the region, [such land] significantly affect[ed] the chemical, physical, and biological integrity” of traditional navigable waters.48 The significant nexus test was taken from Justice Anthony Kennedy’s concurrence in Rapanos v. United States.49 The EPA concluded that although the Sacketts’ land on its own may not affect the integrity of Priest Lake, in combination with a large nearby wetland complex, it did.50 The Sacketts’ land was generally dry.51

Whether wetlands are covered by the term “waters” would seem to call for Chevron deference.52 The ambiguity is in the name: “wetlands” are “land,” but they are also “wet,” which can make them hard to distinguish from other waters. Thus when the Supreme Court first assessed the agency’s authority in United States v. Riverside Bayview Homes, Inc.,53 it deferred to the agency’s definition under Chevron, observing that the agency “must necessarily choose some point at which water ends and land begins” and “common experience tells us that this is often no easy task: the transition from water to solid ground is not necessarily or even typically an abrupt one.”54 In 2023, however, not a single party utilized

45. Id. at 671.
46. Id. at 662–63.
47. Id. at 662 (alteration in original) (quoting 40 C.F.R. § 230.3(s)(3), (7) (2008)).
48. Id. (first quoting 40 C.F.R. § 230.3(s)(3), (7); then quoting § 230.3(b); and then quoting EPA & U.S. ARMY CORPS OF ENG’RS, CLEAN WATER ACT JURISDICTION FOLLOWING THE U. S. SUPREME COURT’S DECISION IN RAPANOS v. UNITED STATES & CARABELL v. UNITED STATES 7–11 (2007) (available with 2008 amendments: https://www.epa.gov/sites/default/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf)).
50. Sackett, 598 U.S. at 663.
51. See id. at 680 (observing that wetlands include lands that are “generally dry”).
54. Id. at 132; see id. at 131–35 (upholding definition under Chevron).
Chevron in its brief, except to point out that the Court in Riverside Bayview Homes had relied on the case. The Court itself did not mention Chevron a single time—neither in the majority nor in the concurring opinions.

Nor did any party or the Court so much as mention the nondelegation doctrine, which easily could have been raised as a canon of avoidance. The Court pointed out that “the scope of the EPA’s conception of ‘the waters of the United States’ is truly staggering when this vast [wetland] territory is supplemented by all the additional area, some of which is generally dry, over which the Agency asserts jurisdiction.” One could imagine the Court finding that if Congress had truly given the agency such a choice—whether to extend (or not) its jurisdiction over such a vast territory—that might raise nondelegation concerns. Instead of deploying nondelegation as a canon of avoidance, or finding a nondelegation violation, it deployed a version of the “major questions doctrine.” Immediately after the above-quoted sentence, the Court held, “[p]articularly given the CWA’s express policy to ‘preserve’ the States’ ‘primary’ authority over land and water use, this Court has required a clear statement from Congress when determining the scope of ‘the waters of the United States.”

Simplifying a bit, the Court concluded that “waters of the United States” principally refers “to bodies of navigable water like rivers, lakes, and oceans.” However, a subsequent statutory amendment allowed states to permit discharges into “waters of the United States,” but excluding “traditional navigable waters” and “wetlands adjacent thereto.” This implies that waters of the United States are broader than navigable waters, and include “relatively permanent body of water connected to traditional interstate navigable waters,” and that wetlands “adjacent” to certain waters are included within “waters of the United States.” If wetlands were not within “waters of the United States,” the exclusion would not

55. See Sackett, 598 U.S. at 651; Brief for Petitioners, Sackett, 598 U.S. 651 (No. 21-454); Brief for Respondents, Sackett, 598 U.S. 651 (No. 21-454); Petitioner’s Reply Brief, Sackett, 598 U.S. 651 (No. 21-454); Petition for Writ of Certiorari, Sackett, 598 U.S. 651 (No. 21-454).
56. See generally Sackett, 598 U.S. 651.
57. See sources cited supra note 55.
58. Sackett, 598 U.S. at 680.
59. See id. at 684.
60. See id. at 713–14 (Kagan, J., concurring).
61. Id. at 680 (citations omitted).
62. Id. at 672.
63. Id. at 675 (quoting 33 U.S.C. § 1344(g)(1)).
64. Id. at 678.
65. Id. at 678–79.
make sense.\textsuperscript{66} And if they are included within the term “waters of the United States,” such wetlands “must qualify as ‘waters of the United States’ in their own right,” meaning “they must be indistinguishably part of a body of water that itself constitutes ‘waters’ under the CWA.”\textsuperscript{67} Wetlands, “separate from traditional navigable waters cannot be considered part of those waters.”\textsuperscript{68} Here, again, the Court relied on a version of the major questions doctrine.\textsuperscript{69} It would be odd to interpret the subsequent amendment granting state discharge authority as incidentally expanding the very definition of “waters of the United States.”\textsuperscript{70} The Court held, “it would be odd indeed if Congress had tucked an important expansion to the reach of the CWA into convoluted language in a relatively obscure provision concerning state permitting programs.”\textsuperscript{71} The better reading of the amendment is that Congress had assumed “that certain ‘adjacent’ wetlands are part of ‘waters of the United States.’”\textsuperscript{72} In sum, the Court concluded that a wetland is covered by the Act if it “has a continuous surface connection” with “a relatively permanent body of water connected to traditional interstate navigable waters,” which makes “it difficult to determine where the ‘water’ ends and the ‘wetland’ begins.”\textsuperscript{73} The concurring Justices would have held that “adjacent” wetlands do not necessarily require a continuous surface connection to a navigable water,\textsuperscript{74} but that here the Sacketts’ land was under no reasonable definition “adjacent” to a navigable water.\textsuperscript{75}

B. Biden v. Nebraska

\textit{Biden} was more explicitly a major questions case.\textsuperscript{76} The statute authorized the Secretary of Education to “waive or modify any statutory or regulatory provision applicable to the student financial assistance programs” in a national emergency, “as may be necessary to ensure that [affected] ‘recipients of student financial assistance . . . are not placed in a worse position financially in relation to that financial assistance because of [the national emergency].’”\textsuperscript{77} As the COVID-
19 pandemic was coming to an end, the Biden Administration forgave up to $10,000 of student debt per borrower making below a certain income. Some 43 million Americans qualified for relief, and the plan would have canceled about $430 billion in debt principal.

Once again, two ambiguities were apparent. First, on the one hand, the Secretary’s waiver of debt principal is not actually waiving a statutory or regulatory provision; on the other, it can be framed as waiving the specific conditions for cancellation of debt provided elsewhere in the statute. Second, forgiving principal surely ensures that the recipient of aid is not “in a worse position financially” but it also seems to make that person better off financially. Being better off financially than before certainly qualifies as not worse off, although it is hardly clear that making someone better off is “necessary to ensure” they are not worse off. These ambiguities would have ordinarily counseled for Chevron deference. Yet the parties did not, in any part of the briefing, so much as mention the case. And the Court did not mention it a single time—neither in the majority nor in the other opinions.

Nor was the nondelegation doctrine even mentioned (except to reject it as a potential justification for the major questions doctrine, discussed in Part III below). Ordinarily, one might think a statute authorizing the President to relieve, or not, half a trillion dollars in student debt at his discretion might raise nondelegation concerns.

78. See id. at 2364.
79. Id. at 2365.
80. Id. at 2370.
81. See id. at 2363.
82. See id.
84. See Brief for Petitioner, Biden, 143 S. Ct. 2355 (Nos. 22-506, 22-535); Brief for Respondents, Biden, 143 S. Ct. 2355 (No. 22-506); Reply Brief for the Petitioners, Biden, 143 S. Ct. 2355 (Nos. 22-506, 22-535); Application to Vacate the Injunction Entered by the United States Court of Appeals for the Eighth Circuit, Biden, 143 S. Ct. 2355 (No. 22A444); Response to Application to Vacate Injunction, Biden, 143 S. Ct. 2355 (No. 22A444); Reply in Support of Application to Vacate the Injunction Entered by the United States Court of Appeals for the Eighth Circuit, Biden, 143 S. Ct. 2355 (No. 22A444).
85. See Biden, 143 S. Ct. at 2355.
86. See id.; infra Part III.
The Court instead relied on the major questions doctrine. The Court noted “the Secretary would enjoy virtually unlimited power to rewrite the Education Act. . . The economic and political significance of the Secretary’s action is staggering by any measure.” In such circumstances, [the Court has] required the Secretary to point to clear congressional authorization to justify the challenged program. And here there was none.

In short, these two cases reveal the direction of administrative law. Chevron deference is dead at the Supreme Court, whether or not the Court chooses also to eliminate such deference in the circuit courts next term. In its place, not only will the Court be interpreting statutes for itself, but it will be demanding clear statements for certain consequential delegations under its major questions doctrine. As a result, there will likely be less need to raise the nondelegation doctrine in future cases. But what precisely is the connection between major questions and nondelegation remains to be explored. The final Part takes up that task.

III. MAJOR QUESTIONS: A DEFENSE, AND A NOTE ON JUSTICE BARRETT’S CONCURRENCE*

My final observations are on the theoretical connection between the new major questions doctrine and the nondelegation doctrine. That is to say, there is an empirical and logical connection in the sense that the rise of one will lead to the diminished importance of the other. But the nondelegation doctrine does not justify the major questions doctrine. As I have written elsewhere, and in more depth, the major questions doctrine is best understood as kind of linguistic canon. After an

88. See Biden, 143 S. Ct. at 2373–76.
89. Id. at 2373 (quotation marks omitted).
90. Id. at 2375 (quotation marks omitted).
91. Id.
92. See Loper Bright Enters., Inc. v. Raimondo, 45 F.4th 359 (D.C. Cir. 2022), cert. granted, 143 S. Ct. 2429 (2023) (granting certiorari on a D.C. Circuit Court of Appeals case featuring in-depth Chevron deference analysis).
93. See, e.g., Sackett v. EPA, 598 U.S. 651, 677–79 (2023) (interpreting a statute); Biden, 143 S. Ct. at 2375 (demanding a clear statement).
94. See also Mila Sohoni, The Major Questions Quartet, 136 Harv. L. Rev. 262, 265–66 (2022) (making similar observations).
95. See infra Part II.
** Portions of this Part were taken from, or also appear in, the Author’s upcoming Virginia Law Review Article, Importance and Interpretive Questions. In some instances, traditional attribution and style conventions are not used.
early draft was posted online,\textsuperscript{97} and after this symposium,\textsuperscript{98} the Court issued its opinion in \textit{Biden}.\textsuperscript{99} In that opinion, Justice Amy Coney Barrett published a concurrence that adopted similar arguments.\textsuperscript{100}

Although no other justice joined the opinion, it provides an important conceptual framework for thinking about major questions in the future and clarifies the connection (or absence thereof) to the nondelegation doctrine.\textsuperscript{101} Here, I briefly summarize my earlier defense of the doctrine\textsuperscript{102} and then defend parts of Justice Barrett’s concurrence. At times, however, Barrett’s defense of the major questions doctrine is more connected to enforcing nondelegation than it lets on. To that extent it may have to be rejected. At a minimum, the two strands of defense should be disentangled.

\textbf{A. Importance and Interpretive Questions}\textsuperscript{103}

My overall claim is that importance is a legitimate tool for resolving statutory ambiguities in the context of delegating authority. If that is right, then a version of the major questions doctrine can be justified as a matter of both textualism and history.\textsuperscript{104} It would not be a linguistic canon in the sense that those canons deal with rules of grammar or syntax; rather, it is a canon that applies in certain substantive contexts.\textsuperscript{105} Namely, the delegation of authorities to others, whether in private agency law (in delegations from we the people to officials in the Constitution), or from Congress to the executive.\textsuperscript{106} But it is not a substantive canon because it does not, at least not in this version of it, necessarily relate to any

\begin{footnotesize}
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\item \textsuperscript{99} See Biden v. Nebraska, 143 S. Ct. 2355 (2023).
\item \textsuperscript{100} \textit{Id.} at 2376 (Barrett, J., concurring).
\item \textsuperscript{101} \textit{See id.} at 2376–84.
\item \textsuperscript{102} And, therefore, a lot of the material below appears in the full piece.
\item \textsuperscript{103} Again, much of the material in this subpart summarizes the article of the same title. Wurman, \textit{supra} note 96.
\item \textsuperscript{104} See Wurman, \textit{supra} note 97, at 38–63.
\item \textsuperscript{105} \textit{See id.} at 1.
\item \textsuperscript{106} \textit{See id.} at 71.
\end{itemize}
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particular substantive value supposedly encoded by the Constitution.\textsuperscript{107} Contrast that with the presumption against preemption, which supposedly advances federalism values.\textsuperscript{108}

The strongest contender to this version is that the major questions doctrine is a substantive canon that operates as a clear statement rule with the aim of advancing nondelegation values.\textsuperscript{109} Such a rule requires both clear and specific language because some constitutional value is at stake. \textit{Franklin v. Massachusetts} is a good illustration.\textsuperscript{110} The Court held that the Administrative Procedure Act (APA) does not apply to the President, even though the President fell within the definition of “agency” or “authority” and was excluded from the list of the Act’s exclusions.\textsuperscript{111} The statute in other words quite unambiguously covered the President. But there was no clear and specific language to that effect—no language mentioning the President specifically—which the Court chose to require out of concerns for the separation of powers.\textsuperscript{112} Clear statement rules apply even against otherwise unambiguous statutory language.\textsuperscript{113}

The problem with major questions as a substantive clear statement rule would be that it would allow the Court to ignore a statute’s best and even unambiguous meaning, and it is not at all clear what kind of constitutional value it would be advancing.\textsuperscript{114} The nondelegation doctrine may have some connection of importance, but it is not clear what that connection is.\textsuperscript{115} More to the point, clear statement rules generally allow Congress to take the relevant action, so long as Congress is clear; whether the majority on the Supreme Court is willing to concede that in the contexts in which it has applied the major questions doctrine remains to be seen.\textsuperscript{116}

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\textsuperscript{107} See id. at 1.
\textsuperscript{108} See id. at 69–70.
\textsuperscript{109} See id. at 69–70.
\textsuperscript{111} See 505 U.S. 788 (1992).
\textsuperscript{112} Id. at 800–01.
\textsuperscript{113} Id.
\textsuperscript{115} See Sohoni, supra note 94, at 267.
\textsuperscript{116} See id. at 300.
\textsuperscript{116} See Franklin, 505 U.S. at 800–01; Biden v. Nebraska, 143 S. Ct. 2355, 2376–78 (2023) (Barrett, J., concurring).
Fortunately, the major questions doctrine, as best understood, is not a clear statement rule of that kind. At least, it ought not to be a doctrine of that kind. In the major questions cases, the language was always ambiguous—and usually the Court said so, at least when it was not hamstrung by the *Chevron* doctrine.

Consider for example the recent Centers for Disease Control and Prevention (CDC) eviction moratorium case from the previous term. The Court first concluded that the statute foreclosed the CDC’s action altogether because the general authority in the first clause—to adopt measures “necessary to control the spread of” disease—was modified and narrowed by the types of authorities in the second clause—“inspection, fumigation, disinfection, sanitation, pest extermination”—none of which is anything even remotely like an eviction moratorium. It was only then that the Court said, “[e]ven if the text were ambiguous, the sheer scope of the CDC’s claimed authority . . . would counsel against the Government’s interpretation.”

In other words, the Court actually thought the statute was unambiguous. But on the assumption that it might be ambiguous, it then deployed the major questions doctrine. One might disagree with the Court’s interpretation of the statute; but if we take the Court at its word, then this is no substantive canon, and a specific statement is not required. So major questions is deployed here as a type of quasi-linguistic canon for resolving ambiguity—for figuring out what Congress likely meant as a matter of the language it used.

Now consider the Occupational Safety and Health Administration (OSHA) vaccine-or-test case. The Court said it was looking to see whether the statute “plainly authorizes” the agency action. It was looking for an unambiguous

\[117. \text{See Sohoni, supra note 94, at 285.} \]
\[118. \text{See, e.g., Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021).} \]
\[119. \text{See generally id.} \]
\[120. \text{Id. at 2488.} \]
\[121. \text{Id. at 2489.} \]
\[122. \text{See id. at 2488–89.} \]
\[123. \text{See id. at 2489.} \]
\[124. \text{See id.; Wurman, supra note 97, at 1.} \]
\[125. \text{See Ala. Ass’n of Realtors, 141 S. Ct. at 2489.} \]
\[126. \text{See id. at 2488–89.} \]
\[128. \text{Id. at 117.} \]
statement, perhaps, but not necessarily a specific statement.\textsuperscript{129} This was no substantive canon—it was a tool for resolving ambiguities. And reasonable people can conclude that an occupational health and safety standard—such as a requirement for fire exits or regulating risks associated with a particular type of work—are those kinds of regulations that you leave behind when you leave the office.

And in \textit{West Virginia v. EPA}, the majority said: “Extraordinary grants of regulatory authority are rarely accomplished through ‘modest words,’ ‘vague terms,’ or ‘subtle device[s].’ Nor does Congress typically use oblique or elliptical language to empower an agency to make a ‘radical or fundamental change’ to a statutory scheme.”\textsuperscript{130} Thus, the Court is sometimes “reluctant to read into ambiguous statutory text” an extraordinary delegation claimed to be lurking there.\textsuperscript{131} It is about ambiguity, no more no less, and the word “system” in that case was at least ambiguous.\textsuperscript{132} It could mean a system within a plant or the national energy system.\textsuperscript{133} That makes it ambiguous.\textsuperscript{134}

\textsuperscript{129} See \textit{id}.
\textsuperscript{130} 597 U.S. 697, 723 (2022) (alteration in original) (first quoting Whitman v. Am. Trucking Ass’ns, 531 U.S. 457, 468 (2001); and then quoting MCI Telecomm. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 229 (1994)).
\textsuperscript{131} \textit{Id.} (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).
\textsuperscript{132} See \textit{id.} at 734–35.
\textsuperscript{133} See \textit{id.} at 706, 734–35.
\textsuperscript{134} The majority probably had the better reading. The parallel Hazardous Air Pollutant Program of Section 112 provides:

\begin{quote}
Emissions standards . . . applicable to new or existing sources of hazardous air pollutants shall require the maximum degree of reduction in emissions of the hazardous air pollutants . . . that the Administrator, taking into consideration [various factors] . . . determines is achievable . . . through application of measures, processes, methods, systems or techniques including, but not limited to . . . (A) . . . process changes, substitution of materials or other modifications, (B) enclose systems or processes to eliminate emissions, (C) collect, capture or treat such pollutants when released from a process . . . (D) . . . design, equipment, work practice, or operational standards[.]
\end{quote}

42 U.S.C. § 7412(d)(2)(A)–(D) (1999). Here, there is no question that “system” means processes within a plant, since it is simply another way of describing “processes,” “methods” and “techniques.” \textit{See id}. 

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42 U.S.C. § 7412(d)(2)(A)–(D) (1999). Here, there is no question that “system” means processes within a plant, since it is simply another way of describing “processes,” “methods” and “techniques.” See id.
Consider finally this term’s cases described above.\textsuperscript{135} They were both (in their own ways) major questions cases, but there were apparent ambiguities in both statutes.\textsuperscript{136}

Suppose that is all correct and the doctrine requires a threshold of ambiguity. It would seem that textualism can then justify the doctrine. To start, if textualists resolve ambiguities by trying to ascertain which of multiple possible meanings the legislature likely intended, then the major questions doctrine, at least on this description, accurately accounts for the legislative process.\textsuperscript{137} It is true Congress often likes to pass the buck on tough policy questions, and it is also true legislators often engage in deliberate or strategic ambiguity.\textsuperscript{138}

But the question is whether legislators are likely to pass the buck on tough questions through ambiguities (through oblique language).\textsuperscript{139} There has been only one empirical study bearing on that question.\textsuperscript{140} And in that study, Abbe Gluck and Lisa Schultz Bressman found that “[m]ore than 60%” of the legislative drafters that responded to their survey “corroborated” the “assumption” that “drafters intend for Congress, not agencies, to resolve” major questions.\textsuperscript{141} Results also showed respondents believe that ambiguous language should not be interpreted as delegating such questions to agencies.\textsuperscript{142}

That makes sense. Deliberate ambiguity benefits both parties when it comes to issues that are not sufficiently important to scuttle an entire piece of legislation. But whether to tackle climate change through CO2 regulation, to regulate cigarettes, or to allow a public health agency to prohibit evictions, are not the kinds of things legislators leave to strategic ambiguity; they are the kinds of things that one side wins and the other loses.\textsuperscript{143}

\begin{itemize}
\item \textsuperscript{135} See generally Sackett v. EPA, 598 U.S. 651 (2023); Biden v. Nebraska, 143 S. Ct. 2355 (2023).
\item \textsuperscript{136} See Sackett, 598 U.S. at 663; Biden, 143 S. Ct. at 496–98.
\item \textsuperscript{137} See Wurman, supra note 97, at 38–41.
\item \textsuperscript{138} See id. at 43–45.
\item \textsuperscript{139} See id. at 43.
\item \textsuperscript{140} See id.
\item \textsuperscript{142} See Wurman, supra note 97, at 44–45; Gluck & Schultz Bressman, supra note 141, at 1003.
\item \textsuperscript{143} Wurman, supra note 97, at 44–45.
\end{itemize}
Now, suppose textualists resolve ambiguities by trying to ascertain which of multiple possible meanings the reading public would have understood. Even then, the major questions doctrine is an accurate account of how ordinary readers understand language, and particularly how they understand the need for more linguistic clarity to accomplish dramatic and high-stakes consequences.

As Ryan Doerfler has explained in his paper *High-Stakes Interpretation*,

to say that the meaning of a statute is “clear” or “plain” is, in effect, to say that one knows what that statute means. As numerous philosophers have observed, ... ordinary speakers attribute “knowledge”—and, in turn, “clarity”—more freely or less freely depending upon the practical stakes. In low-stakes situations, speakers are willing to concede that a person “knows” this or that given only a moderate level of justification.144

If the stakes are high, in contrast, “speakers require greater justification before allowing that someone ‘knows’ that same thing, holding constant that person’s evidence.”145

To bring the point back down to earth, the meaning of, say, an “occupational health and safety standard” may seem straightforward in an ordinary, relatively low-stakes regulation of the workplace. We might “know” that the statute permits fire exit regulations or find the statute “clear” in this regard. But when dealing with a regulation that imposes a vaccine requirement on millions of individuals in one fell swoop, that persists beyond the workplace itself, and which the requirement is itself hugely controversial, it is intuitive to think that ordinary speakers would in fact demand more epistemic confidence before concluding that the statute in fact authorizes such a requirement.146

There is also historical support for this common-sense intuition about how legislators legislate and how people understand language, which has manifestations in many other areas of law, from contract interpretation to agency law to constitutional interpretation. To take just one example, in early debates over the Necessary and Proper Clause, which was a grant of implied powers, there was a question of whether incorporating a national bank was too great and important a power to be left to implication.147 Everyone in this debate agreed that some authorities—like the power to tax or declare war—were too important to be left to

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implication, and the national government would not have had those powers had they not been expressly enumerated in the Constitution.\textsuperscript{148}

“Would Congress have had the power to naturalize, if it had not been expressly given?”\textsuperscript{149} James Madison asked rhetorically in this debate. “Had the power of making treaties . . . been omitted,” he said later in the same debate, “however necessary it might have been, the defect could only have been lamented, or supplied by an amendment of the Constitution.”\textsuperscript{150} This intuition still persists in agency law to this day. The Third Restatement of Agency Law states: “Even if a principal’s instructions or grant of authority to an agent leave room for the agent to exercise discretion, the consequences that a particular act will impose on the principal may call into question whether the principal has authorized the agent to do such acts.”\textsuperscript{151} For example, “[a] reasonable agent should consider whether the principal intended to authorize the commission of collateral acts fraught with major legal implications for the principal, such as granting a security interest in the principal’s property or executing an instrument confessing judgment.”\textsuperscript{152} Some things just matter too much to be left to guess work. That is the exact intuition we find in the major questions doctrine.

One point must be reemphasized in conclusion, particularly in light of Justice Barrett’s concurrence.\textsuperscript{153} The major questions doctrine makes sense in the context of ambiguity, but it may not make sense in the context of broad and open-ended delegations.\textsuperscript{154} A lot of the justifications described above would seem to apply to broad language as well as ambiguous language. To take an example from the longer paper, suppose a parent tells a nanny to “have fun with the kids for the day.”\textsuperscript{155} Although broad and unambiguous, surely the parent did not mean to suggest that the nanny can go on a joyride or buy plane tickets and take the kids to Disneyland. Sometimes broad yet unambiguous statements are not enough to authorize such important activities.\textsuperscript{156}

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\textsuperscript{148} ANNALS OF CONG. 1949 (1791) (Joseph Gales ed., 1834).
\textsuperscript{149} Id. (statement of Rep. Madison).
\textsuperscript{150} Id. at 1950.
\textsuperscript{151} RESTATEMENT (THIRD) OF AGENCY § 2.02 cmt. h (AM. L. INST. 2006).
\textsuperscript{152} Id.
\textsuperscript{153} See Biden v. Nebraska, 143 S. Ct. 2355, 2376–84 (2023) (Barrett, J., concurring).
\textsuperscript{154} See Wurman, supra note 97, at 68 (citing Gluck & Schultz Bressman, supra note 141, app. at 37).
\textsuperscript{155} Id. at 70; see Biden, 143 S. Ct. at 2379–80 (Barrett, J., concurring).
\textsuperscript{156} Wurman, supra note 97, at 67; see Biden, 143 S. Ct. at 2379–80 (Barrett, J., concurring).
\end{flushleft}
Yet, in the context of the administrative state, Congress does often make precisely such broad delegations as Justice Kavanaugh recognized in *Kisor*.157 Congress often does delegate important questions to the agency through language such as “reasonable,” “feasible,” or in the public interest.158 And more generally, Congress does compromise on broad statutory delegations.159 In such contexts, the major questions doctrine would be far more difficult to justify.160

**B. Justice Barrett’s Concurrence**

Justice Barrett’s concurrence in *Biden* largely tracked the argument just presented, though no other Justice joined her opinion.161 Justice Barrett begins by stating that she “take[s] seriously the charge that the doctrine is inconsistent with textualism,” and “that some articulations of the major questions doctrine on offer—most notably, that the doctrine is a substantive canon—should give a textualist pause.”162 On that account she noted, “[s]ome have characterized the major questions doctrine as a strong-form substantive canon designed to enforce Article I’s Vesting Clause.”163 “[T]his ‘clear statement’ version of the major questions doctrine ‘loads the dice’ so that a plausible antidelegation interpretation wins even if the agency’s interpretation is better.”164

“While one could walk away from our major questions cases with this impression, I do not read them this way,” Justice Barrett writes.165 She summarizes that she understands the doctrine instead “to emphasize the importance of *context* when a court interprets a delegation to an administrative agency,” and in this sense “the major questions doctrine is a tool for discerning—not departing from—the text’s most natural interpretation.”166 “The major questions doctrine situates text in context, which is how textualists, like all interpreters, approach the task at

158. *See id.*
160. *See id.*
162. *Id.* at 2376.
163. *Id.* at 2377.
164. *Id.* at 2378.
165. *Id.*
166. *Id.* at 2376.
hand.”167 And context is “relevant to interpreting the scope of a delegation,” Justice Barrett writes.168 She then relies on agency law and the Third Restatement: “Whether an agent’s understanding is reasonable depends on ‘[t]he context in which the principal and agent interact,’ including their ‘[p]rior dealings,’ industry ‘customs and usages,’ and ‘the nature of the principal’s business or the principal’s personal situation.’”169

Justice Barrett notes, quite rightly, that “[t]his is consistent with how we communicate conversationally,” and uses the example of “a parent who hires a babysitter to watch her young children over the weekend” who “hands the babysitter her credit card and says: ‘Make sure the kids have fun.’”170 Justice Barrett elaborates on the analogy:

Emboldened, the babysitter takes the kids on a road trip to an amusement park, where they spend two days on rollercoasters and one night in a hotel. Was the babysitter’s trip consistent with the parent’s instruction? Maybe in a literal sense, because the instruction was open-ended. But was the trip consistent with a reasonable understanding of the parent’s instruction? Highly doubtful. In the normal course, permission to spend money on fun authorizes a babysitter to take children to the local ice cream parlor or movie theater, not on a multiday excursion to an out-of-town amusement park.171

Here I will note some disagreement. Justice Barrett uses a similar example to the nanny hypothetical,172 but draws a different conclusion. The parent’s instruction does not seem ambiguous at all; rather, it is broad and quite unambiguous.173 Barrett is absolutely correct that ordinarily such broad language does not authorize major and consequential actions in everyday interactions.174 But it seems highly likely to be the opposite when it comes to congressional delegations to make regulations that are “reasonable” or “fair and equitable” and so on.175

167. Id. at 2378.
168. Id. at 2379.
169. Id. (alteration in original) (quoting RESTATEMENT (THIRD) OF AGENCY § 2.02 cmt. e (AM. L. INST. 2005)).
170. Id.
171. Id. at 2379–80.
172. See id.; Wurman, supra note 97, at 70; supra pp. 453–54.
173. See Biden, 143 S. Ct. at 2379–80 (Barrett, J., concurring).
174. See id.
175. Id. at 2380.
To be sure, Justice Barrett also cites the Gluck and Schultz Bressman study for the proposition that “[t]his expectation of clarity is rooted in the basic premise that Congress normally ‘intends to make major policy decisions itself, not leave those decisions to agencies.’” 176 That study, however, specifically asked about “ambiguities or gaps,” not broad and open-ended delegations. 177 And her point that “in a system of separated powers, a reasonably informed interpreter would expect Congress to legislate on ‘important subjects’ while delegating away only ‘the details,’” 178 is also well taken, although it is hardly clear as a descriptive matter that this remains true of Congress today.

The bottom line is that Justice Barrett appears to justify a major questions doctrine when Congress’ statutes are ambiguous, as well as when they are unambiguous but broad. 179 In the former context, the doctrine makes sense in light of how Congress legislates and how ordinary people understand language in the context of delegations. 180 But in the latter context, the doctrine seems to be doing the work of nondelegation in the form of textualism: Given our system of government, ordinary folks would surely understand Congress to decide on the important questions. 181 In fact, her leading citation was to the Supreme Court’s first serious nondelegation case. 182 That assumption may simply not hold true as a matter of congressional intent in a world where Congress tends to agree “that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.” 183 In short, Justice Barrett’s defense is both a textual one, and one that seeks better to enforce nondelegation values. 184 The two strands of this defense may have to be justified on separate grounds.

IV. CONCLUSION

The Court’s new methods of statutory interpretation will obviate the need for a serious nondelegation challenge in the near future. Chevron deference is irrelevant at the Supreme Court, and the Court will demand clear statements before

176. Id. (citing Gluck & Schultz Bressman, supra note 141, at 1003–06).
177. Gluck & Schultz Bressman, supra note 141, at 1003–06.
179. See id. at 2377–80.
180. Id. at 2378–79.
181. Id.
182. See id. at 2380–81 (citing Wayman, 23 U.S. at 43).
184. See Biden, 143 S. Ct. at 2377–78 (Barrett, J., concurring).
major delegations are upheld. The Court’s two major administrative law cases this past term demonstrate that this is the path administrative law is likely to take in the coming years. The Court’s methods of statutory interpretation, however, although they incidentally help to enforce the nondelegation doctrine, are not defensible because of that feature. Rather, the Court’s methods are defensible on textual grounds. Justice Barrett, at least, appears to agree with that proposition; whether other Justices will join her approach to major questions cases in the future remains to be seen.

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186. See generally Sackett, 598 U.S. 651; Biden, 143 S. Ct. 2355.
187. See Biden, 143 S. Ct. at 2376–84 (Barrett, J., concurring).