REPLACING THE MAJOR QUESTIONS DOCTRINE WITH ORIGINALIST STATUTORY INTERPRETATION

MICHAEL B. RAPPAPORT*

As the basis for many recent politically salient Supreme Court cases that have restrained administrative agency authority, the Major Questions Doctrine (MQD) has become an important topic of legal discussion.[1] Although the doctrine has been endorsed by the more conservative Supreme Court Justices, originalist and textualist commentators have disagreed about its validity. Some have defended it either as a substantive canon or linguistic canon,[2] while others have criticized it.[3]

In this essay, I expand on my previous work to argue against the MQD.[4] I argue that the leading version of the MQD—understood as a substantive canon that limits the delegation of legislative authority—is inconsistent with originalist statutory interpretation and therefore should be abandoned. While I sympathize with those who seek to justify the MQD on linguistic grounds and agree with much of their argument, I believe it is best to dispense with the doctrine and instead to rely on originalist statutory interpretation. This originalist approach provides a cleaner and stronger basis for limiting unjustified agency authority.

Although I criticize the substantive canon version of the MQD, it is not because I disagree with its objectives. In the last generation, administrative agencies have not merely exercised tremendous power but attempted to exploit statutory authority that was designed for one set of problems to address a different set of problems. Whether it be agency actions regarding COVID

* Hugh & Hazel Darling Professor of Law, University of San Diego. The author would like to thank John McGinnis, Michael Ramsey, and participants at the Pacific Legal Foundation conference on "Doctrinal Crossroads: Major Questions, Nondelegation & *Chevron* Deference" for their helpful comments.

[1] *See, e.g.*, Ilan Wurman, *Importance and Interpretive Questions*, 110 VA. L. REV. (forthcoming 2024); Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262 (2022); Cass R. Sunstein, *There are Two "Major Question" Doctrines*, 73 ADMIN L. REV. 475 (2021); Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009 (2023).

[2] Michael D. Ramsey, *An Originalist Defense of the Major Questions Doctrine* (unpublished manuscript) (on file with author) (substantive canon); Ilan Wurman, *Importance and Interpretive Questions*, 110 VA. L. REV. (forthcoming 2024) (linguistic canon).

[3] *See* Chad Squitieri, *Who Determines Majorness?*, 44 HARV. J. L. PUB. POL'Y 463 (2021); *see also infra* note 4.

[4] *See* Mike Rappaport, *Against the Major Questions Doctrine*, THE ORIGINALISM BLOG (Aug. 15, 2022), [https://perma.cc/HSB2-TUJ9]; Mike Rappaport, *The Unnecessary Major Questions Doctrine*, LAW & LIBERTY (Jul. 27, 2023), [https://perma.cc/F49V-AEKV]. This essay is a significant expansion on the latter online essay.

regulations,[5] greenhouse gases,[6] or student loan forgiveness,[7] such legal manipulations seem to call out for a judicial response. But establishing a substantive canon for major questions is inconsistent with originalist statutory interpretation. Under an originalist approach, the courts do not have the authority to protect certain values of their own choosing.

Fortunately, it is not necessary for the courts to depart from originalist statutory interpretation to address unwarranted assertions of administrative authority. As advocates of the linguistic canon version of the MQD have argued, it is a legitimate interpretive move not to find "'elephants in mouseholes.'"[8] Thus, courts should generally recognize very significant agency power only when authorized by a relatively clear statement in the statute.

But this mouseholes canon is just one aspect of the limits on agencies that an originalist approach would impose. Under a genuine originalism, Chevron deference would be abandoned because such deference conflicts with the original meaning of the APA. Similarly, canons such as contemporaneous exposition and the mischief rule would place limits on agency authority. An originalist approach that incorporates these various canons would strongly limit agency attempts to manipulate their authority.

Unfortunately, strict word limits prevent me from elaborating and substantiating many of the claims in this essay. Thus, readers should understand the essay as more of a sketch of an argument, a set of brief claims that suggest that the MQD should be replaced with a form of originalist statutory interpretation.

In Part I, I briefly discuss the Court's existing MQD, noting that the Court has not been particularly clear about the precise basis or content of the doctrine. In Part II, I address and reject the argument made by some commentators and justices that the MQD can be justified as a substantive canon of interpretation. While it is conceivable that a MQD that could be justified as enforcing delegations against legislative power, the current doctrine cannot be justified on that basis.

In Part III, I explore how the courts could apply an originalist statutory interpretive approach and argue that this approach would often operate to deny agencies' broad claims of statutory power that are not genuinely authorized.

I. THE MAJOR QUESTIONS DOCTRINE

In a series of cases over the years, the Court has applied what has come to be called the major questions doctrine.[9] The MQD holds that "there are 'extraordinary cases' . . . in which the 'history and breadth of the authority [that the agency] has asserted' and 'the economic and political significance' of that assertion, 'provide a reason to hesitate before concluding that Congress'

[5] *See, e.g.*, Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485 (2021); Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661 (2022).

[6] West Virginia v. EPA, 142 S. Ct. 2587 (2022).

[7] Biden v. Nebraska, 143 S. Ct. 2355 (2023).

[8] Wurman, *supra* note 2 (quoting Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001)); *see also* Biden v. Nebraska, 143 S. Ct. 2355, 2378–82 (2023) (Barrett, J., concurring).

[9] *See* Biden v. Nebraska, 143 S. Ct. 2355, 2374–74 (2023); West Virginia v. EPA, 142 S. Ct. 2587, 2609–10 (2022); Nat'l Fed'n of Indep. Bus., 142 S. Ct. at 664–65 (2022) (per curiam); Ala. Ass'n of Realtors, 141 S. Ct. at 2489 (2021) (per curiam).

meant to confer such authority."[10] In these cases, "the agency . . . must point to 'clear congressional authorization' for the authority it claims."[11] In short, the doctrine requires a clear statement to find a delegation of vast or substantial authority in certain cases.

While the Court has sketched the broad outlines of the doctrine, it has not been clear as to the two basic aspects of the doctrine. First, the Court has not articulated a precise standard for what claims of agency authority are covered by the MQD. In other words, how does one determine whether the "history and breadth of the authority" asserted by agency and the "economic and political significance"[12] of that authority are sufficient to require a clear statement? Second, the Court has also not been clear about how explicit Congress must be in conferring the agency authority. Must Congress provide clear authority with specific statutory language (what has been termed a "super-strong clear statement rule[]")[13] or is it sufficient for the statute merely to provide some strong indication that the authority has been conveyed?

In this paper, I am not concerned with exploring the details of how to read the Court's doctrine. Nor am I concerned with determining whether the MQD cases are best read as establishing a substantive canon, a linguistic canon, or some mixture. Instead, I will be exploring two issues involving the MQD and statutory originalism. First, I will argue that the substantive canon version of the MQD should be abandoned because it is inconsistent with originalist statutory interpretation. Second, I will explain how originalist statutory interpretation would operate as a replacement for the MQD.

While many formalist commentators on the MQD assess the doctrine from a textualist perspective, I employ an originalist approach. As in the constitutional context, it is the original meaning of the legal provisions that should be applied.[14] A textualist approach may often coincide with the original meaning but it can diverge. If the interpretive rules that are widely accepted during the period when statutes are enacted do not adopt a strict form of textualism, then textualism will diverge from the original meaning. This is true even if a divergence from textualism risks courts misinterpreting compromises reached by Congress. Congress will have operated against a backdrop of interpretive rules that are not purely textualist, and departing from those rules will both surprise Congress and depart from the original meaning. For example, while some textualists reject the absurdity rule,[15] its historical acceptance indicates that Congress enacted legislation against the backdrop of that rule.

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[10] West Virginia v. EPA, 142 S. Ct. at 2608 (alteration in original) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 123 (2000)).

[11] *Id.* (quoting Utility Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014).

[12] *Id.* (quoting *Brown & Williamson*, 529 U.S. at 123).

[13] William N Eskridge, Jr., & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, VAND. L. REV. 593, 597 (1992).

[14] JOHN O MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION Ch. 7-8 (2013); John O McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NORTHWESTERN UNIV. SCHOOL OF LAW 751 (2009).

[15] John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2390–91 (2003).

II. A CRITIQUE OF THE MAJOR QUESTIONS DOCTRINE AS A SUBSTANTIVE CANON

One way to understand the MQD is as a substantive canon that interprets a statutory provision not to find its original meaning but instead to protect certain substantive values. For example, the federalism canon interprets statutes, not to determine what the language that Congress drafted would mean to a knowledgeable and reasonable reader at the time of its enactment, but instead to protect a traditional balance between federal and state authority.[16]

Substantive canons are inconsistent with an originalist approach to statutory interpretation. While substantive canons that were widely accepted at the time of a statutory enactment can inform the original legal meaning since Congress is presumed to know the law of interpretation, substantive canons that are announced after the time of enactment are vulnerable to criticism as judicial lawmaking. If the Court has the power to establish *new* substantive canons, then that power is very much like a living constitutionalist approach to statutory interpretation. Thus, a new substantive canon like the MQD, which has been followed only for a limited period, appears to be inconsistent with an originalist approach.

A. Substantive Canons that Enforce the Constitution

While substantive canons that merely seek to enforce certain values supported by judges are problematic, not all substantive canons fall under this category. Some substantive canons might be defended as enforcing the Constitution. Since the Constitution takes priority over statutes, such defenses avoid the critique of substantive values as judicial lawmaking.

One justification offered for MQD is that it enforces the Constitution's nondelegation doctrine.[17] Since many statutes that provide significant delegations of authority to agencies might violate the Constitution's nondelegation doctrine, the MQD might seem to be enforcing the Constitution's original meaning.

But upon examination this argument is open to serious objections. To enforce the nondelegation doctrine, the Court would need to define the original meaning of the prohibition on delegation of legislative power. The Court, however, has not done that. Instead, it has simply applied a clear statement requirement to all major questions, whether or not they violate the nondelegation doctrine.

Without defining the nondelegation doctrine, the major question doctrine risks both over–enforcing and underenforcing the nondelegation doctrine. The major questions doctrine would over enforce the nondelegation doctrine by being applied to laws that do not unconstitutionally delegate. For example, some theories of the nondelegation doctrine only apply it to laws that implicate private rights,[18] yet the Court applies the major questions doctrine to laws more

[16] *See, e.g.* Gregory v. Ashcroft, 501 U.S. 452, 460–1(1991).

[17] *See* Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 668–69 (2022) (Gorsuch, J., concurring) (justifying the major questions doctrine as a means of enforcing the nondelegation doctrine); West Virginia v. EPA, 142 S. Ct. 2587, 2616–17 (2022) (Gorsuch, J., concurring) (justifying the major questions doctrine as a substantive canon that protects against unconstitutional delegations).

[18] *See* Michael B. Rappaport, *A Two Tiered and Categorical Approach to the Nondelegation Doctrine*, *in* THE ADMINISTRATIVE STATE BEFORE THE SUPREME COURT: PERSPECTIVES ON THE NONDELEGATION DOCTRINE 123, 125 (Peter J. Wallison & John Yoo eds., 2022); *c.f.* DOT v. Ass'n of Am. R.Rs., 575 U.S. 43, 70 (2015) (Thomas, J., concurring in judgment).

generally, such as laws involving spending or the forgiving of debt.[19] On the other hand, the major questions doctrine would underenforce the nondelegation doctrine by allowing delegations that are clearly authorized by Congress but nevertheless unconstitutional.[20]

Another possible justification for the MQD is as an instance of the avoidance doctrine, a substantive canon that avoids interpretations of statutes that would render them unconstitutional–.[21] On this view, the MQD enforces the nondelegation doctrine indirectly by avoiding interpretations that might cause nondelegation concerns. But using the classic avoidance doctrine–for this purpose has the same problem as using other substantive canons. Since the Court has not defined the original meaning of the Constitution's delegation prohibition, classic avoidance risks over–enforcing and underenforcing that prohibition.

Perhaps the strongest argument for the substantive canon view of the MQD derives not from the classic avoidance doctrine but from the modern avoidance doctrine. Under the modern avoidance doctrine, courts avoid interpreting statutes to raise "serious constitutional question[s]."[22] Still, there are serious problems with this justification.[23] One basic problem with modern avoidance from an originalist perspective is that it allows courts to not apply the most accurate interpretation of a statute without concluding that that interpretation was unconstitutional.[24] While modern avoidance justifies itself as a form of judicial restraint, it is actually quite activist.

Another problem with basing the MQD on modern avoidance is that the failure of the Court to articulate the original meaning of the nondelegation doctrine makes it difficult to know whether a delegation by Congress raises serious constitutional questions under the original meaning.[25]

Given these problems with the substantive canon justification for the MQD, it would appear that this version cannot be justified. But if that is the case, what explains the support for this

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[19] *See* Biden v. Nebraska, 143 S. Ct. 2355 (2023).

[20] While this underenforcement aspect of the major questions doctrine is a problem for fully enforcing the nondelegation doctrine, one might argue that fully enforcing the nondelegation doctrine would create tremendous disruption because Congress has been legislating broad delegations for several generations that are inconsistent with a strict nondelegation doctrine, *see* John O. McGinnis & Michael B. Rappaport, *An Originalist Approach to Prospective Overruling*, 99 Notre Dame L. Rev. 425, 427–428, 481 (2023). But underenforcing the nondelegation doctrine in this way is neither transparent nor accountable since the Court does not indicate when it is not enforcing the nondelegation doctrine. A more transparent and accountable way would involve having the Court define the original meaning of the nondelegation doctrine. The Court could then avoid the disruption of fully applying that original meaning by employing precedent doctrine to mitigate the disruption. *Id.* at 427. For example, one might apply the nondelegation doctrine only prospectively to future statutes that Congress enacted. *Id.* at 481–82. One might then apply the existing doctrine or a doctrine less strict than the original meaning but stricter than the existing doctrine to existing statutes.

[21] John Copeland Nagle, Delaware & Hudson *Revisited*, 72 NOTRE DAME L. REV. 1495, 1496 (1997) (discussing the classic and modern versions of the avoidance canon, but using different names), *discussed in* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 138–39 (2010).

[22] Barrett, *supra* note 21 (citing Nagle, *supra* note 21).

[23] Interestingly, the modern avoidance doctrine does not appear to be an especially common basis for defending the MQD.

[24] *See, e.g.*, Neal Kumar Katyal & Thomas P Shmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2110, 2116–17 (2015).

[25] Another problem with modern avoidance doctrine is that the Court appears to apply it unevenly. See William N. Eskridge, Jr., & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 612–15, 619–28 (1992) (discussing uneven application of the avoidance doctrine, among other canon).

version from the originalist justices on the Court? One explanation is that the MQD allows the Court to cut back on constitutionally questionable delegations in a politically convenient way. It does so in at least four ways.

First, the doctrine allows the Court to limit delegations without defining the original meaning of the nondelegation doctrine. Such a definition would be controversial since both the idea that the Constitution restricts delegations and the precise content of the any such restriction are disputed. Second, the doctrine allows the Court to restrain delegations without assuming too much responsibility, since it can explain that Congress can always authorize the delegation if it does so clearly.

Third, the doctrine permits the Court to allow the enforcement of what are arguably the most strongly supported delegations—those that Congress has most clearly delegated to the agencies––and therefore to reduce opposition to the Court's actions. Finally, the doctrine permits the Court to avoid a situation in which it says a law is unconstitutional but allows it to be enforced because not enforcing it would cause too much disruption, a result that would be awkward for the Court (if it did not provide further explanation). While the MQD has the virtue of political convenience, such convenience conflicts with originalist principles.

B. Are Substantive Canons Really Problematic?

While I have argued that new substantive canons are inconsistent with originalist statutory interpretation, Justices Gorsuch and Amy Coney Barrett offer a defense of substantive canons. Relying on evidence that substantive canons were employed in the early years of the republic, they suggest that this evidence indicates that federal courts have legitimate authority to apply substantive canons.[26] Here, I want to challenge this argument to the extent it suggests that federal courts have authority to establish *new* canons that protect constitutional values.

Since Barrett's argument, published in an article while she was a professor, is more developed, I will focus upon it. Her main argument relies upon evidence that five canons were followed in the federal courts in the early days of the republic: the *Charming Betsy* canon, the avoidance canon, the presumption against retroactivity, the sovereign immunity clear statement rule, and the Indian canon.[27]

The force of this evidence, however, is much weaker than this description suggests. First, at least two of these canons existed in England[28] and therefore do not suggest the federal courts had the power to invent new canons, as opposed to the power simply to apply traditional canons established at common law. Second, another canon—the Indian canon—had very weak evidence for its existence in the early years of the republic.[29] But even putting aside the weakness of the

[26] West Virginia v. EPA, 142 S. Ct. 2587, 2616–17 (2022); Barrett, *supra* note 21, at 110–11. While Barrett suggests that courts had the power to apply these canons, she argues that textualism requires that substantive canons only be applied under limited circumstances. *See id.* at 177–81.

[27] *See id.* at 128, 134–53. She also notes that the rule of lenity was followed, but states that it was only employed as a tie breaker and therefore does not constitute a canon that displaces the stronger reader of the text. *Id.* at 128–34, 158.

[28] *See id*. at 143, 146–48 (showing that the presumption against retroactivity and the sovereignty immunity clear statement rule, understood as a rule against applying general rules to the government, existed in England).

[29] *See id.* at 151–52 and accompanying notes (the Indian canon only applied a few times to *treaties* prior to its application to a statute in the twentieth century).

evidence for these canons, good reasons exist to question whether they are best understood as substantive canons.

One alternative explanation for the early invocations of these rules is that they were regarded as reflecting Congress's intent. Barrett acknowledges numerous instances of court statements to this effect.[30] But Barrett dismisses this explanation in part because textualism does not accept evidence of intent apart from text and because the courts also gave values-based explanations for the canons.[31] For example, Barrett recognizes that the presumption against retroactivity was sometimes justified based on Congress's presumed intent but also because retroactive legislation seemed unfair.[32]

But these arguments are problematic. First, while textualists express extreme skepticism about being able to determine Congress's intent, their skepticism is too strong for an originalist statutory interpretation. Where a value is very widely accepted, then there is a strong argument that the Congress as a whole followed that value. It is not a perfect correlation, but it is a strong one that should not be lightly rejected.

Second, the fact that judges did not merely speak of Congress's intent but also of the value that the canon promoted does not necessarily negate the intent explanation. Mentioning a value that the interpretation supports is not necessarily inconsistent with an intent-based explanation for the interpretation.

To see this, consider an example taken (but modified) from Ludwig Wittgenstein: A parent says to the babysitter of her children, "Show the children a game when I'm gone."[33] The babysitter teaches them a drinking game, Russian roulette, or some other inappropriate game for children. Did the babysitter follow the instruction of the parent? In a literal sense, perhaps. But in context, probably not. The parent obviously intended that the babysitter teach the children an age-appropriate game.

Similarly, if a judge or some other interpreter were to point out that this widely held value supported important interests, such as raising psychologically healthy children or not encouraging them to engage in dangerous pursuits, that would not mean that the interpreter did not believe the parent had intended to exclude inappropriate games for children. Rather, these widely held values explain why it makes sense to understand the parent as intending to exclude these games.

Of course, this is not to say that these decisions were correctly decided based on Congress's intent. Nor is it to say that significantly later decisions did not rely on the substantive values rather than on presumed congressional intent. But the arguments in this section do raise serious questions about the claim that federal courts in the early years of the republic generally acted as if they had the power to establish new substantive canons of interpretation.

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[30] *See* Barrett, *supra* note 21, at 137, 142 (noting that the Court "invoked the language of faithful agency insofar as [it] cast the canon[s] as a means of effecting legislative intent" and highlighting that avoidance is premised on "presumed legislative intent.")

[31] *Id.* at 158–59.

[32] *Id.* at 144–45.

[33] LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 38 (P.M.S. Hacker and Joachim Shulte eds., G.E.M. Anscombe et al. trans., 4th ed 2009) (1953); *see also* Biden v. Nebraska, 143 S. Ct. 2355, 2379–80 (Barrett, J., concurring) (using a similar example to illustrate the major questions doctrine).

While the substantive canon version of the MQD conflicts with originalism, happily that doctrine is not needed to constrain agencies from using aggressive interpretations to seize political powers that Congress did not genuinely confer. These aggressive interpretations often rely on interpretive moves that are inconsistent with originalism. In many of the MQD cases, the arguments for expansive agency authority ignore that the language is ambiguous and that other indications of its original meaning cut against the agency's assertion of authority. Thus, applying originalist interpretive moves can do much to constrain these aggressive interpretations without sacrificing originalist principles. While it is possible that the originalist canons will not duplicate the results in all of the major questions cases, in those few cases where originalist canons diverge from the results produced by the MQD, the agency should prevail because the statute's original meaning provided the authority.

III. A GENUINE STATUTORY ORIGINALISM

While the substantive canon version of the MQD conflicts with originalism, happily that doctrine is not needed to constrain agencies from using aggressive interpretations to seize political powers that Congress did not genuinely confer. These aggressive interpretations often rely on interpretive moves that are inconsistent with originalism. In many of the MQD cases, the arguments for expansive agency authority ignore that the language is ambiguous and that other indications of its original meaning cut against the agency's assertion of authority. Thus, applying originalist interpretive moves can do much to constrain these aggressive interpretations without sacrificing originalist principles. While it is possible that the originalist canons will not duplicate the results in all of the major questions cases, in those few cases where originalist canons diverge from the results produced by the MQD, the agency should prevail because the statute's original meaning provided the authority.

A. The Elephants in Mouseholes Canon

One feature of originalist statutory interpretation is that the words of the statute should be read not merely based on literal semantic meanings but also based on patterns of usage of ordinary and legal language. One of the patterns of language usage, both ordinary and especially of legal language, is that the larger the power that is being conveyed, the more likely that the power will be explicitly or unambiguously conveyed.

This is true in a wide variety of areas. Under the Constitution, both Federalists and Jeffersonian Republicans held that a large or great power needed to be made explicit and could not be found under the Necessary and Proper Clause.[34] Similarly, James Madison held that the larger the power, the more likely that it would have been made explicit rather than left to

[34] *See* William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L. J. 1738, 1751–54 (2013) (discussing views of Alexander Hamilton, James Madison, and Edmund Randolph that great or significant powers should not be found under the necessary and proper clause).

inference.[35] Under agency principles as well, similar patterns of language usage apply.[36] Most significantly, this pattern of usage has also been found under statutory provisions.[37]

In her concurrence in *Biden v. Nebraska*, Justice Barrett sought to show that ordinary language followed this pattern of language usage with an example of a parent hiring a babysitter to watch her young children over the weekend, leaving the babysitter with a credit card, and saying "make sure the children have fun."[38] I agree with Barrett's analysis that this instruction in many contexts would not authorize the babysitter to take the children overnight to an amusement park and to stay at a hotel. That activity is so large and unusual that a more explicit authorization would be required.

Barrett's analysis has been criticized in a recent article on the ground that ordinary speakers do not agree that the weekend trip was not authorized.[39] While I do not have the space to offer the various criticisms of the paper that I think justified, I will just note that the paper has produced a result that is so ridiculous that it suggests that the methodology of the paper is flawed. According to the authors, only 10 percent of the responders say that the babysitter hiring an animal trainer who brings a live alligator to the house would be violating the parent's instruction.[40] It is hard to believe that a parent would have believed that he or she had authorized such an action. Instead, it is much more likely that ordinary speakers who were polled were responding to the literal meaning rather than the contextual meaning of the instruction.

But while Barrett's argument here is strong, she makes some other arguments that seem problematic. First, she claims that the fact that the Constitution assigns the legislative power to the Congress suggests it will not be quick to delegate to the agency.[41] But if Congress regularly delegates legislative type power to the agencies, then the fact that the Constitution assigns legislative power to Congress does not suggest that Congress is unlikely to delegate this authority. Sometimes those with authority choose to give it away, especially when such delegations are useful to the delegators. Second, she claims that Congress "normally intends to make major policy decisions itself."[42] But this is questionable. It is a common perception that Congress regularly delegates broad authority to agencies, and Barrett does not present any evidence to the contrary.

But neither of these questionable claims is necessary for Barrett to make her case. All she needs to claim is that Congress does not use ambiguous or unclear statutory language to delegate

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[35] *See* James Madison, Speech on the Bank Bill (Feb. 2, 1791). This is true of the Constitution, even though it is a short document and therefore is more reasonably read as containing implicit authority, *see also* McCulloch v. Maryland, 17 U.S. 316, 410–11 (1819).

[36] *See* Biden v. Nebraska, 143 S. Ct. 2355, 2380 (2023) (Barrett, J., concurring).

[37] *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001) (requiring "a textual commitment of authority [from Congress] to the EPA" to consider costs in setting National Ambient Air Quality Standards) ; Gonzales v. Oregon, 546 U.S. 243, 267 (2006) (holding that Congress would not "cede medical judgments to an executive official who lacks medical expertise" in a merely "implicit delegation").

[38] 143 S. Ct. at 2379-80 (Barrett, J., concurring).

[39] Kevin Tobia et al., *Major Questions, Common Sense?*, 97 UNIV. S. CAL. L. REV. (forthcoming July 2023).

[40] *Id.* at 43.

[41] Biden v. Nebraska, 143 S. Ct. at 2380 (Barrett, J., concurring).

[42] *Id.* (quoting United States Telecomm. Ass'n v. FCC, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting)).

broad authority.[43] And that is an entirely plausible claim about congressional practice, especially given that ordinary language users appear to follow this practice. To falsify it, one would need to show that Congress had enacted ambiguous statutory language with the intent of conferring extraordinary authority under that language. In the absence of such evidence, it is reasonable to conclude that Congress follows the normal ordinary language and legal language usage of conferring significant authority only through clear language.

While the elephants in mouseholes canon does cut against reading a statute to confer broad authority without a clear indication, it does not yield the MQD in the form of a clear statement rule. One reason is that most interpretations of the MQD seem to require either a specific textual statement or at least an unambiguous textual statement. But an originalist interpretive approach would not insist on a such clear textual statements. For example, if a law provided moderate textual support in the form of general language, one might still conclude that it conferred wide ranging authority if structural inferences and the purpose of the statute strongly support that authority. Another reason is that even if unambiguous textual support were not required, it is still not clear that the mouseholes canon would require as strong support for broad authority as the MQD seems to require. The failure to ground the MQD in originalist principles suggests that the degree of support it requires is not calibrated to determining the original meaning.

B. An Illustration of Ordinary Statutory Interpretation

Although the mouseholes canon does not yield the major questions doctrine, it does cut back on broad claims of authority based on ambiguous statutory language. But the limits on such authority that an originalist statutory interpretation would establish are not restricted to this canon. Originalist statutory interpretation would also cut back on *Chevron* deference and would employ contemporary exposition and the mischief rule to prevent agencies from exploiting language to exercise authority that Congress did not convey.

But before discussing these particular canons, it is useful to illustrate how ordinary interpretation would often limit agency authority, especially if the courts do not bend over backwards to promote agency authority, with the case of *Alabama Assoc. Realtors v. Dep't of Health & Hum. Servs*.[44]

In this case, the Center for Disease Control sought to impose an eviction moratorium during COVID that Congress would not pass, relying upon statutory authority enacted in 1944 that authorized it to make "such regulations as in [its] judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from . . . one State or possession into any other State or possession."[45]

The provision immediately continued:

> For purposes of carrying out and enforcing such regulations, the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or

[43] *See* Wurman, supra note 1 at 44.
[44] 141 S. Ct. 2485, 2486 (2021).
[45] *Id.* at 2487 (quoting 42 U.S.C. § 264(a)).

> articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary.[46]

Agreeing with the agency, Justice Breyer's dissent argued that the eviction moratorium complied with the statute since it was, in the judgment of the CDC, "necessary to prevent" the "spread" of COVID from one state to another.[47]

But this argument can be rejected without reference to the MQD or the mouseholes canon. First, while the first sentence might seem to confer broad authority, this sentence must be read in conjunction with the second sentence to avoid reading the second sentence to be superfluous. The two sentences together are best understood as authorizing the CDC to take the actions listed in the second sentence, including the last catch all provision, authorizing "other measures, as in [its] judgment may be necessary."[48]

Second, that last catch all provision authorizing "other measures" should be read to only include other measures similar in type to the listed measures. Traditionally, courts have so interpreted this sort of provision with the *ejusdem generis* canon. The powers on the list are all designed to narrowly detect or eradicate diseases, with the exception of sanitation which is a narrow and traditional means of preventing the growth and transmission of disease agents.

By contrast, the eviction moratorium would impose an economic regulation on landlords designed to protect individuals even though they neither had COVID or had been exposed to it—a regulation much broader than the narrow category of powers on the list. As the Court wrote, under the agency's interpretation "it is hard to see what measure this interpretation would place outside the CDC's reach," including potentially "requir[ing] manufacturers to provide free computers to enable people to work from home."[49] So the MQD was not needed to strike down the CDC's eviction moratorium.

Ordinary originalist interpretation is even more limiting if the interpreter does not adopt, as he or she should not, what might be regarded as the opposite of the MQD: an approach that interprets delegations of agency authority broadly. For example, if one treats Congress's decision to use an agency with rulemaking authority to suggest that Congress intended the agency to have broad authority in the area, even though the language is more limited—as the *Chevron* case appeared to do[50]—this will unjustifiably expand agency authority.

C. Other Originalist Canons

While ordinary originalist statutory interpretation often limits agency authority, such limits can be even stronger when combined with three originalist interpretive moves. The first involves eliminating *Chevron* deference. One important function of the MQD concerns *Chevron* deference. In simplified form, the *Chevron* doctrine requires courts to defer to agency interpretations of statutes. *Chevron* thus has allowed agencies to exercise significant power based

[46] *Id.*
[47] *Id.* at 2491 (Breyer, J., dissenting) (citing 42 U.S.C. § 264(a)).
[48] 42 U.S.C. § 264(a).
[49] 141 S. Ct. at 2489 (2021).
[50] *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–843 (1984).

on questionable interpretations. For that reason, a majority of the Court appears to have become dissatisfied with the *Chevron* doctrine, refusing to invoke it but not overruling it.[51]

The MQD allows the courts to bypass *Chevron* in many cases. By requiring that a statute clearly authorize significant exercises of authority, the Court can conclude that an agency interpretation asserting such authority without a clear statement is an unreasonable interpretation. So, as with the nondelegation doctrine, the MQD allows the Court to reach a result— avoiding the *Chevron* doctrine—without having to overrule it.

But the proper originalist method for dealing with *Chevron* is to overrule it. In a recent article, I have argued that *Chevron* is inconsistent with the original meaning of the Administrative Procedure Act, the statute that generally governs administrative agencies.[52] *Chevron* deference is inconsistent with the language of the APA and did not exist when the APA was enacted. Thus, originalism justifies eliminating *Chevron* and does not require the MQD workaround.

Another originalist canon that would that would often limit agency authority and would promote the same concerns as the MQD is that of contemporaneous exposition, which holds that interpretations reached near the time of a statute's enactment are entitled to greater weight than later interpretations.[53] By weighting contemporaneous interpretations, this canon would constrain an agency from interpreting a statute one way in its early years, only to change the interpretation in later years when the agency seeks to use the statute's language to accomplish goals never contemplated by the statute's enactors. This canon is also consistent with originalism because an agency interpreting a statute near the time of the statute's enactment is better able to understand its original meaning.

Finally, an interpretive rule that would impose a similar limitation on agencies is one that considers the mischief that the statute appeared intended to address.[54] This rule can be illustrated with the case of *Massachusetts v. EPA*, where the Supreme Court interpreted the term "air pollutant" in the Clean Air Act to include not merely traditional pollution in the lower atmosphere but also global greenhouse gases in the upper atmosphere.[55] But when the Clean Air Act was enacted, Congress was not concerned with greenhouse gases but only with traditional air pollution in the lower atmosphere. Since the Act's language defining air pollutant could be reasonably construed to cover emissions into either the lower atmosphere or both the lower and upper atmosphere, the mischief canon supports the narrower definition.

To conclude, let me illustrate the power of these various originalist canons by reference to *West Virginia v. EPA*, which relied on the MQD to interpret the Clean Air Act to prohibit EPA from imposing pollution controls that would operate at the industry level rather than on an

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[51] Eli Nachmany, *SCOTUS Demonstrates why we No Longer Need Chevron Deference*, NEWSWEEK (Jul. 6, 2022).

[52] *See generally*, Michael B. Rappaport, Chevron *and Originalism: Why Chevron Deference Cannot be Grounded in the Original Meaning of the Administrative Procedure Act*, 57 WAKE FOREST L. REV. 1281 (2023).

[53] Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L. J. 908, 930–941; Rappaport, *supra* note 43 at 1291–92.

[54] Some people question whether the mischief canon is consistent with textualism (or originalism). But if the language of the statute is ambiguous, then the problems that were widely understood to have motivated the legislation, which might be deemed evidence of purpose, are a permissible means of resolving the ambiguity.

[55] 549 U.S. 497, 532 (2006).

individual plant basis.[56] While I do not have a position on the correct interpretation, which involves intricate and technical issues, my point here is that one did not need the MQD to make a plausible case against EPA's authority. First, there is the interpretation of the statutory language, which authorizes EPA to require the "'best system of emission reduction' that—taking into account cost, health, and other factors—it finds 'has been adequately demonstrated.'"[57] The "best system of emission reduction" control was not clear—and was thus ambiguous—as to whether it applied to emission limitations that operated in a single plant or throughout the entire industry. Certainly, people who intended the single plant meaning might have described it as a system of emission reduction.

Second, while modern administrative law might be thought to have conferred *Chevron* deference to support the EPA, eliminating *Chevron* would prevent that from occurring. Third, early interpretations of this and related provisions adopted a single entity approach, suggesting that this was the proper interpretation of the provision.[58] Fourth, the mouseholes canon also provides some support for this result, since EPA would be interpreting ambiguous language to convey substantial authority to eliminate certain types of energy production. Finally, the EPA's attempt to greatly limit certain types of energy production is arguably motivated by climate change, a type of pollution problem that was largely not on the radar screen when the Clean Air Act provisions were enacted.

D. Originalism Rather Than A Linguistic Canon

Given the defects of the substantive canon, some commentators and judges defend the MQD as a linguistic canon. Under this view, judges would treat the MQD as a generalization about how people use language. While the MQD as a linguistic canon is far superior to the doctrine as a substantive canon because the linguistic canon attempts to follow how language is actually used, the best overall approach is simply to dispense with a separate MQD and employ originalist statutory interpretation directly.

First, a separate doctrine makes it seem as if the MQD is a departure from originalist statutory interpretation, which opens originalists and textualists to the charge of inconsistency. Applying originalist statutory interpretation directly makes its consistency with originalism evident. Second, a separate doctrine makes it harder to conform to originalism. In defining and applying a separate doctrine, the tendency is to consider the doctrine itself rather than to consistently focus on determining the original meaning.

For example, the existing MQD applies to certain extraordinary cases identified based on the vague standards of the history and breadth of the authority an agency has asserted and the economic and political significance of that assertion. But rather than attempt to define what these criteria of extraordinary cases mean more specifically, the Court should simply ask whether the original meaning of the statute authorizes the agency authority, which is the actual question raised in these cases.

[56] West Virginia v. EPA, 597 U.S. 697, 732–35 (2022).
[57] *Id.* at 720 (quoting 42 U.S.C. § 7411(a)(1)).
[58] *See id.* at 725–27.

CONCLUSION

Overall, then, the Supreme Court does not need to employ a doctrine that conflicts with originalism in order to limit agency excesses. Instead, those excesses can be constrained through various originalist methods, such as the mouseholes canon, the elimination of *Chevron*, contemporaneous exposition, and the mischief canon. If the Court employed these methods, it would significantly constrain agency authority without compromising originalism.