STRUCTURAL IMPLEMENTATION AND THE MAJOR QUESTIONS DOCTRINE

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INTRODUCTION

The major questions doctrine has thoroughly captured Supreme Court watchers' attention. Supporters cheer its arrival as necessary to curb the ever-expanding administrative state. Detractors protest the legitimacy of such a sweeping doctrine and worry about its potential to derail regulatory policy in an era of congressional gridlock. Still others who may be inclined to support the doctrine question its compatibility with interpretive commitments such as textualism or originalism. No matter where one stands, the major questions doctrine will likely dominate administrative law discussions for the foreseeable future.

The doctrine's controversial nature has generated competing justifications. In his *West Virginia v. EPA* concurrence,[1] Justice Gorsuch offered one view of the major questions doctrine, rooted in a history of clear-statement rules that protect constitutional values. In her *Biden v. Nebraska* concurrence,[2] Justice Barrett presented an alternative theory. She explains the major questions doctrine as a natural element of ordinary statutory interpretation, completely in accord

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1. 142 S. Ct. 2587, 2613 (2022) (Gorsuch, J., concurring).

2. 143 S. Ct. 2355, 2376 (2023) (Barrett, J., concurring).

with modern textualism. Chief Justice Roberts, the author of the majority opinion in both cases, has carefully avoided endorsing either view.[3]

In Part I, this Note will trace the background and history of the major questions doctrine. It will show that the doctrine is not as "new" or "unprecedented" as some objectors claim. Nonetheless, the doctrine's scope has expanded beyond its original application. Part II outlines the cases in which Justices Gorsuch and Barrett present competing defenses of the major questions doctrine. Part III examines possible critiques of these theories, which suggest that either theory threatens to undermine the stated goals of textualist statutory interpretation. In Part IV, this Note proposes a reconciliation of Justice Barrett's "plain reading" with Justice Gorsuch's "constitutional values" argument that also responds to the textualist critiques. On this reading, the major questions doctrine is the most natural way to read and implement *constitutional structure*, a key component of constitutional text. Finally, Part V will illustrate how the Supreme Court utilizes clear-statement rules in other contexts to implement constitutional structure in a similar fashion. Taken together, this approach harmonizes the competing theories of the major questions doctrine with a familiar constitutional tradition of implementing constitutional structures through clear-statement rules.

I. MAJOR QUESTIONS DOCTRINE: BACKGROUND AND HISTORY

Although some might label the major questions doctrine novel or unprecedented, the intuitions underlying the doctrine have lurked in the background since the inception of modern administrative agencies.[4] Thus, what has changed over time is not the theory, but

3. *See West Virginia*, 142 S. Ct. at 2609 (majority opinion) (resting the major questions doctrine on both "separation of powers principles" and "a practical understanding of legislative intent").

4. *See, e.g.*, Interstate Com. Comm'n v. Cincinnati, N. O. & T. P. R. Co., 167 U.S. 479, 505 (1897) ("That congress has transferred such a power to any administrative body is not to be presumed or implied from any doubtful and uncertain language. . . . [I]f congress had intended to grant such a power to the interstate commerce commission, it

its scope and application, particularly as the theory evolved in tandem with the Court's now-defunct *Chevron* framework.[5]

The modern major questions doctrine likely originated in *Food & Drug Administration v. Brown & Williamson Tobacco Corp*.[6] The FDA sought to regulate tobacco products as "drug[s]" which are "intended to affect the structure or any function of the body."[7] Despite this plausible reading of the statute, the FDA had previously disavowed any authority to regulate tobacco.[8] Applying *Chevron* "step one," the Court asked "whether Congress has directly spoken to the precise question at issue."[9] To resolve this inquiry, the Court first reviewed the relevant statutory text "as a whole."[10] It then considered the enacting history of the FDA's organic statute along with other relevant statutory schemes.[11] Finally, the majority noted that in "extraordinary cases," there may be "reason to hesitate before concluding that Congress has intended" to delegate certain authority to an agency, even where a "statute's ambiguity" would otherwise constitute an "implicit delegation" under *Chevron*.[12]

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cannot be doubted that it would have used language open to no misconstruction, but clear and direct."); Packard Motor Car Co. v. NLRB., 330 U.S. 485, 500 (1947) (Douglas, J., dissenting) ("[The NLRB's order] has profound implications throughout our economy. It involves a fundamental change in much of the thinking of the nation on our industrial problems. The question is so important that I cannot believe Congress legislated unwittingly on it.")

5. This Note makes frequent reference to the *Chevron* framework. While it has since been overruled in *Loper Bright Enter. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024), understanding what was *Chevron* is essential to unraveling the history of the major questions doctrine. *Chevron* had two steps. At "step one," the Court employed traditional tools of statutory interpretation to determine "whether Congress ha[d] directly spoken to the precise question at issue." Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 (1984). If statutory ambiguity remained, the Court proceeded to "step two." There, "the question for the court [was] whether the agency's answer [was] based on a permissible construction of the statute." *Id.* at 843. The Court deferred when the agency's interpretation was permissible—that is, reasonable.

6. 529 U.S. 120 (2000).

7. *Id.* at 126 (citing 21 U.S.C. § 321(g)(1)(C)).

8. *Id.* at 125.

9. *Id.* at 132 (citing *Chevron*, 467 U.S. at 842).

10. *See id.* at 133–43.

11. *See id.* at 143–59.

12. *Id.* at 159.

A quotation from Justice Breyer's academic work may be the true origin of the major-questions moniker: "A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, *major questions*, while leaving interstitial matters to answer themselves in the course of the statute's daily administration."[13] Ultimately, the Court concluded that this was "not an ordinary case," and that the "significant" economic impact and "unique political history" of tobacco counseled against accepting the FDA's new interpretation.[14] The Court was "confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[15]

Fourteen years later, the major questions doctrine appeared again in *Utility Air Regulatory Group v. EPA*.[16] After *Massachusetts v. EPA* held that the Clean Air Act applied to greenhouse gas emissions,[17] the EPA issued regulations that would incorporate this new understanding into existing rules regarding stationary sources.[18] The new regulations would sweep a massive and unprecedented number of existing sources into the EPA's regulatory scheme. But the Court held that the EPA was not required to apply the "greenhouse gas emissions as air pollutants" holding in the stationary sources context. At *Chevron* "step two,"[19] the Court asked whether the EPA's interpretation was a "reasonable construction of the statute."[20] The Court examined the text, structure, and overall statutory scheme to find the EPA's interpretation unreasonable.[21] Yet, that was "not the only reason" to reject the EPA's interpretation as unreasonable.[22]

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13. *See* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986) (emphasis added).
14. *Brown & Williamson*, 529 U.S. at 159–60.
15. *Id.* at 160.
16. 573 U.S. 302 (2014).
17. *See* Massachusetts v. EPA, 549 U.S. 497 (2007).
18. *See Utility Air*, 573 U.S. at 310–14.
19. *See supra* note 5.
20. *Utility Air*, 573 U.S. at 321.
21. *See id.* at 316–24.
22. *Id.* at 324.

The regulation was also "unreasonable" because of the "enormous and transformative expansion [of] regulatory authority without clear congressional authorization."[23] In an oft-cited passage, the Court remarked:

> When an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast "economic and political significance."[24]

The following year, Chief Justice Roberts applied the theory of *Brown & Williamson* and *Utility Air*, but in a novel way. *King v. Burwell*[25] asked whether the Court should defer to an Internal Revenue Service regulation implementing the Affordable Care Act. To guide the Court's decision, Chief Justice Roberts invoked the familiar *Chevron* framework.[26] Yet, rather than relying on the major questions doctrine at *Chevron*'s "step one" (as in *Brown & Williamson*) or its "step two" (as in *Utility Air*), the Court opted out of the *Chevron* framework entirely. Because this was an "extraordinary case" of "deep economic and political significance," it was "unlikely that Congress would have delegated this decision to the IRS."[27] Thus, the Court decided it was "not a case" where *Chevron* even applies.[28]

In the wake of the COVID-19 pandemic, federal agencies clambered to issue regulations to deal with that crisis. Accordingly, two major-questions cases soon arrived at the Supreme Court on the "shadow docket."[29] The first case, *Alabama Association of Realtors v. Department of Health & Human Services*,[30] challenged the

23. *Id.*

24. *Id.* (citing *Brown & Williamson*, 529 U.S. at 159).

25. 576 U.S. 473 (2015).

26. *Id.* at 485–86.

27. *Id.* at 486.

28. *Id.*

29. For a description of the Supreme Court's so-called "shadow docket," see generally William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1 (2015).

30. 141 S. Ct. 2485 (2021) (per curiam).

controversial eviction moratorium imposed by the Center for Disease Control. The Court first found that the CDC lacked authority to impose the moratorium under the statute.[31] It then added that "[e]ven if the text were ambiguous, the sheer scope . . . would counsel against the Government's interpretation. We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance."[32]

Similarly, in *National Federation of Independent Businesses v. Department of Labor, Occupational Safety & Health Administration*,[33] the Court struck down OSHA's vaccine mandate. It first noted that "[t]his is no everyday exercise of federal power."[34] Due to the "significant encroachment" on American life, Congress must "speak clearly when authorizing an agency to exercise powers of vast economic and political significance."[35] Having determined this case "qualifie[d] as an exercise of [significant] authority," the Court asked "whether the Act plainly authorizes the . . . mandate."[36] The answer: "It does not."[37] The Court failed to mention or discuss the *Chevron* framework in either COVID-19 emergency case.

In summary, prior to its "formal debut" in *West Virginia v. EPA*, the Court applied the major questions doctrine in at least five distinct ways. It applied the doctrine as part of *Chevron* "step one;"[38] it applied the doctrine as part of *Chevron* "step two;"[39] it applied the doctrine to entirely preempt *Chevron*;[40] it applied the doctrine to

31. *Id.* at 2488.

32. *Id.* at 2489 (quoting Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000), and Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)) (cleaned up).

33. 142 S. Ct. 661 (2022) (per curiam).

34. *Id.* at 665 (quoting In re MCP No. 165, 20 F.4th 264, 272 (6th Cir. 2021) (Sutton, C.J., dissenting)).

35. *Id.* (quoting *Alabama Ass'n*, 141 S. Ct. at 2489).

36. *Id.*

37. *Id.*

38. *See generally* Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

39. *See generally* Util. Air Regul. Grp. v. EPA, 573 U.S. 302 (2014).

40. *See generally* King v. Burwell, 576 U.S. 473 (2015).

supplement its statutory analysis with no mention of *Chevron*;[41] and it applied the doctrine to precede its statutory analysis, again with no mention of *Chevron*.[42] In nearly all cases, the Court ultimately disagreed with the agency's interpretation.[43]

II. RECENT CASES

Two recent cases expressly invoked the major questions doctrine. The first was *West Virigina v. EPA*,[44] and the second was *Biden v. Nebraska*.[45]

A. West Virginia v. EPA

After more than seven years of litigation, the Court in 2022 delivered *West Virginia v. EPA*.[46] The case involved the Clean Power Plan, which would require "generation shifting" towards clean energy sources. The rule had been stayed, replaced, reinstated, and stayed once more, thus never actually taking effect.

The litigation concerned Section 111(d) of the Clean Air Act, which requires the EPA to craft regulations for certain "existing sources" of air pollution.[47] The EPA must set a limit which reflects the results achievable through the "best system of emission reduction" applicable to that source.[48] The Clean Power Plan found that the "best system" for reducing emissions was "generation shifting"—shifting production to cleaner energy sources through direct investments in new plants or, alternatively, through a cap-and-trade system.

While this reading of the term "system" is textually possible, it proved too much for the Court. Invoking the major questions doctrine—now by name—Chief Justice Roberts held that the Clean Air

41. *See generally* Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485 (2021).

42. *See generally* NFIB v. OSHA, 142 S. Ct. 661 (2022).

43. *But see King*, 576 U.S. 473 (2015).

44. 142 S. Ct. 2587 (2022).

45. 143 S. Ct. 2355 (2023).

46. 142 S. Ct. 2587.

47. 42 U.S.C. § 7411(d).

48. 42 U.S.C. § 7411(a)(1).

Act did not authorize generation shifting. After reviewing the history and cases discussed above, Chief Justice Roberts formulated the rule as follows:

> Thus, in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us "reluctant to read into ambiguous statutory text" the delegation claimed to be lurking there. . . . To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to 'clear congressional authorization' for the power it claims.[49]

He ascribes the major-questions label to the fact that an "identifiable body of law . . . has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted."[50]

In his concurring opinion, Justice Gorsuch provides a theory for the major questions doctrine. In his view, the major questions doctrine is simply a clear-statement rule. Clear statement rules "assume that, absent a clear statement otherwise, Congress means for its laws to operate in congruence with the Constitution."[51] Justice Gorsuch provides other examples, such as the presumption against retroactivity and the doctrine of sovereign immunity, which protect other constitutional values. Likewise, according to Justice Gorsuch, the major questions doctrine "protect[s] the Constitution's separation of powers."[52]

Justice Gorsuch ties this to Article I's vesting clause.[53] Hearkening back to Chief Justice Marshall, Justice Gorsuch argues that inherent in the "legislative powers" is the duty for Congress to decide on "important subjects" while leaving the executive branch to, at most,

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

50. *Id.*

51. *Id.* at 2616 (Gorsuch, J., concurring).

52. *Id.* at 2617.

53. *Id.*; *see also* U.S. CONST. Art. I § 1.

"fill up the details."[54] Otherwise, a "ruling class of largely unaccountable 'ministers'" might subjugate the people.[55] Thus, the Constitution entrusts legislative power to "the people's elected representatives" through a process "designed . . . to capture the wisdom of the masses."[56]

Beyond the vesting clause, Justice Gorsuch finds further support for the major questions doctrine in the constitutional lawmaking process of bicameralism and presentment.[57] This "admittedly . . . difficult" procedure of lawmaking promotes important values.[58] It safeguards "individual liberty," ensures that laws "enjoy widespread acceptance," promotes "stab[ility]," "protect[s] minorities," and preserves federalism by "allowing States to serve as laboratories for novel social and economic experiments."[59] Consequently, Justice Gorsuch concludes that "[p]ermitting Congress to divest its legislative power to the Executive Branch would 'dash this whole scheme.'"[60] Liberty, accountability, stability, and federalism would be sacrificed to "the will of the current President, or, worse yet, the will of unelected officials barely responsive to him."[61]

Thus, the major questions doctrine preserves the constitutional benefits that flow from the vesting clause by "ensur[ing] that the government does 'not inadvertently cross constitutional lines.'"[62] This result is justified because "the constitutional lines at stake here are surely no less important than those this Court has long held

54. *West Virginia*, 142 S. Ct. at 2617 (Gorsuch, J., concurring) (quoting Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42–43 (1825)).

55. *Id.* (quoting THE FEDERALIST NO. 11, at 85 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

56. *Id.* (citing PHILLIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 502–03 (2014)).

57. *Id.* at 2618.

58. *Id.*

59. *Id.* (internal citations omitted).

60. *Id.* (quoting Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 61 (2015) (Alito, J., concurring)) (cleaned up).

61. *Id.*

62. *Id.* at 2620 (quoting Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 175 (2010)).

sufficient to justify parallel clear-statement rules."[63] Justice Gorsuch offers the following summary: "It is the peculiar province of the legislature to prescribe general rules for the government of society" and the major questions doctrine "helps safeguard that foundational constitutional promise."[64]

This application of the major questions doctrine in *West Virginia* represents a subtle shift from prior cases. Rather than applying the major questions doctrine in conjunction with an independent statutory analysis, the Court simply invalidated the agency's interpretation without providing any guidance on the correct reading of the statute.[65] Additionally, the Court's previous focus on the implicit *interpretive* delegation enshrined in *Chevron* seemingly transformed into skepticism of the *substantive* powers of the agency itself.

This shift animates Justice Gorsuch's theory. His separation-of-powers argument centers on Article I's legislative powers and *not* Article III's judicial power. If the major questions doctrine was merely confined to answering the interpretive *Chevron* question (that is, whether Congress "delegate[ed the] authority to the agency to elucidate a specific provision of the statute"[66]), Article I is irrelevant. The "elucidation" view of *Chevron* may evince concerns of Congress and agencies conspiring to violate Article III by usurping the power of statutory interpretation, but that problem hardly raises the concerns posed in Justice Gorsuch's concurring opinion. Instead, Justice Gorsuch's justification for the major questions doctrine only has purchase if the constitutional concern is with the agency's legislative powers, not its interpretive powers.

Thus, a second reading of the then-prevailing *Chevron* doctrine could explain both the Court's shift in *West Virginia* and Justice

63. *Id.*

64. *Id.* at 2626 (quoting Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 136 (1810)) (cleaned up).

65. *West Virginia*, 142 S. Ct. at 2615–16 (majority opinion) ("[T]he only interpretive question before us, and the only one we answer, is . . . whether the 'best system of emission reduction' identified by EPA in the Clean Power Plan was within the authority granted to the Agency in Section 111(d) of the Clean Air Act. For the reasons given, the answer is no.")

66. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984).

Gorsuch's concurring opinion. Beyond "elucidation," *Chevron* also recognized that administration of statutory programs "necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."[67] Under this view, *Chevron* was not read as delegating the interpretive question to agencies, but rather as Congress granting agencies a gap-filling, legislative authority. It concerned the agency's substantive authority, as the agency both *creates* and *administers* the substantive law in question. This substantive understanding of *Chevron* more squarely justified and explained the Court's shift and Justice Gorsuch's concurrence.[68]

B. Biden v. Nebraska

The following term, the Supreme Court decided another major-questions case. As the COVID-19 pandemic waned, President Biden tried to effectuate student loan relief that had stalled in Congress. Relying on the HEROES Act, President Biden's Secretary of Education announced in August of 2022 that the administration would eliminate up to $10,000 of federal student loan debt for qualified borrowers.[69]

The HEROES Act permitted the Secretary to "waive or modify any statutory or regulatory provision" of the Higher Education Act during a nationally declared emergency.[70] While the Secretary of Education under President Trump had concluded that the HEROES Act did not authorize blanket student loan debt forgiveness, President Biden's secretary rescinded the former opinion and reached the opposite conclusion.[71] He read the words "waive or modify" as authorizing the elimination of student loan debt.

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67. *Id.* at 843 (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974)).

68. Neither the majority nor Justice Gorsuch mentioned *Chevron*, so it is difficult to parse exactly which view of *Chevron* they espoused at the time. *Chevron* has since been overruled. *See* Loper Bright Enter. v. Raimondo, 144 S. Ct. 2244, 2273 (2024). And Justice Thomas explicitly acknowledged the substantive reading of *Chevron* as a ground for repudiating it. *See id.* at 2275 (Thomas, J., concurring).

69. Biden v. Nebraska, 143 S. Ct. 2355, 2364 (2023).

70. *Id.* at 2363 (quoting 20 U.S.C. § 1098bb(a)(1)).

71. *Id.* at 143 S. Ct. at 2364.

The Court first addressed the question using traditional tools of statutory interpretation. The Court found that the word "modify" "does not authorize 'basic and fundamental changes in the scheme' designed by Congress."[72] Rather, it "must be read to mean 'to change moderately or in minor fashion.'"[73] The Court looked to prior "modifications" promulgated by the Secretary of Education to confirm that past practice supported the narrower understanding.[74] Moreover, as to "waive," the Court noted that "the Secretary does not identify any provision that he is actually waiving."[75] Because the substance of the debt forgiveness plan could not result from the elimination of any combination of concrete legal requirements, the statute's text precluded reliance on the term "waive."[76] Thus, the Secretary's proposed plan fell outside of the statutory text.

The Court turned to the major questions doctrine as an alternative "ground[] to support its conclusion."[77] Quoting *West Virginia*, the Court restated the rule: "Given the history and the breadth of the authority that the agency ha[s] asserted, and the economic and political significance of that assertion, . . . there [is] reason to hesitate before concluding that Congress meant to confer such authority."[78] The Court noted that "[u]nder the Government's reading of the HEROES Act, the Secretary would enjoy virtually unlimited power" and that "[t]he 'economic and political significance' of the Secretary's action is staggering by any measure."[79] Thus, "indicators from our previous major questions cases are present" in this case as well.[80] The Court dismissed the dissent's "attempt to relitigate *West Virginia*" because "the issue now is not whether [*West Virginia*] is

72. *Id.* at 2368 (quoting MCI Telecomm. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 225 (1994)).
73. *Id.*
74. *Id.* at 2369.
75. *Id.* at 2370.
76. *Id.*
77. *Id.* at 2375 n.9.
78. *Id.* at 2372 (cleaned up).
79. *Id.* at 2373.
80. *Id.* at 2374 (quoting *id.* at 2384 (Barrett, J., concurring)).

correct. The question is whether that case is distinguishable from this one. And it is not."[81]

The structure of the majority opinion reflects a return to the pre-*West Virginia* applications of the major questions doctrine, where the Court performed a statutory analysis independent of its major-questions analysis. Yet, the substantive non-delegation concerns that animated *West Virginia* also feature prominently here. In responding to the dissent, the majority asserts: "The question here is not whether something should be done; it is who has the authority to do it."[82] Here, "the Executive [is] seizing the power of the Legislature."[83] But with no mention of *Chevron* (by either the majority, the concurring opinion, or the dissent), the Court fully detached the major questions doctrine from the *Chevron* framework—an important step in light of *Chevron*'s eventual demise.[84]

Justice Barrett concurred. First, she set out to refute Justice Kagan's characterization of the major questions doctrine in *West Virginia* as a "get-out-of-text free card[]."[85] Second, she challenged Justice Gorsuch's theory of the major questions doctrine and provided her own. In Justice Barrett's view, Justice Gorsuch justifies the major questions doctrine as a "substantive canon," which is a "rule[] of construction that advance[s] values external to [the] statute."[86] So far, this characterization seems to fit. This worries Justice Barrett. After all, "[w]hile many [substantive] canons have a long historical pedigree, they are in significant tension with textualism insofar as they instruct a court to adopt something other than the statute's most natural meaning."[87] As a committed textualist, Justice Barrett sees the major questions doctrine as "an interpretive tool reflecting 'common sense as to the manner in which Congress is likely to

81. *Id.* (quoting Collins v. Yellen, 141 S. Ct. 1761, 1800 (2021) (Kagan, J., concurring in part and concurring in judgment)) (alteration original).

82. *Id.* at 2373.

83. *Id.*

84. *See* Loper Bright Enter. v. Raimondo, 144 S. Ct. 2244, 2273 (2024).

85. West Virginia v. EPA, 142 S. Ct. 2587, 2641 (2022) (Kagan, J., dissenting).

86. *Biden*, 143 S. Ct. at 2376 (Barrett, J., concurring).

87. *Id.* at 2377 (internal citations omitted).

delegate a policy decision of such economic and political magnitude to an administrative agency.'"[88]

Her theory rests on a common textualist refrain: "In textual interpretation, context is everything."[89] After highlighting various examples where context is relevant to the statutory question, she argues that "context is also relevant to interpreting the scope of a delegation."[90] Citing agency law, she notes that "[w]hen an agent acts on behalf of a principal, she 'has actual authority to take action designated or implied in the principal's manifestations to the agent . . . as the agent reasonably understands [those] manifestations.'"[91] She then offers the now-famous example of a general delegation to a babysitter to "make sure the kids have fun."[92] She posits that if the babysitter took the children on an extended vacation, we would be shocked because "we would expect much more clarity than a general instruction to 'make sure the kids have fun.'"[93]

Justice Barrett extends this "commonsense principle[] of communication" to Congress.[94] "Just as we would expect a parent to give more than a general instruction if she intended to authorize a babysitter-led getaway, we also expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance."[95] This "expectation" is "rooted in the basic premise that Congress normally intends to make major policy decisions itself, not leave those decisions to agencies."[96] That premise "makes eminent sense in light of our constitutional structure" because "a reasonable interpreter" of the Constitution "would expect

88. *Id.* at 2378 (quoting Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000)).

89. *Id.* (quoting ANTONIN SCALIA, A MATTER OF INTERPRETATION 37 (1997)).

90. *Id.* at 2379.

91. *Id.* (quoting Restatement (Third) of Agency § 2.02(1) (2005)) (alterations original).

92. *Id.* at 2380.

93. *Id.* at 2379–80.

94. *Id.* at 2380.

95. *Id.* (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

96. *Id.* (internal citations omitted).

[Congress] to make the big-time policy calls itself, rather than pawning them off to another branch."[97]

Her view operates differently than a clear-statement rule because courts cannot "choose an inferior-but-tenable alternative that curbs the agency's authority," which she reads the other formulation to authorize.[98] Thus, "the court's initial skepticism might be overcome by text directly authorizing the agency action or context demonstrating that the agency's interpretation is convincing."[99] At bottom, Justice Barrett believes that the major questions doctrine cannot be used to "exchange the most natural reading of a statute for a bearable one more protective of a judicially specified value."[100] Reviewing the major-questions precedents, Justice Barrett concludes that those cases pass her test.[101]

III. CRITIQUES OF THE COMPETING THEORIES

Both theories purport to explain the major questions doctrine, its congruence with precedent, and its faithfulness to important jurisprudential values. For Justice Gorsuch, the lodestar is constitutional separation of powers; for Justice Barrett, textualism. Commentators have questioned whether Justice Gorsuch's opinion is consistent with textualism. They have also questioned the accuracy of Justice Barrett's characterization. Both critiques are examined below.

A. Critique: Justice Gorsuch's Approach is Inconsistent with Textualism

One of the most salient criticisms levied against the major questions doctrine is its incompatibility with textualism. In her scathing dissent, Justice Kagan remarked:

> Some years ago, I remarked that "[w]e're all textualists now." . . . It seems I was wrong. The current Court is textualist only when

97. *Id.*

98. *Id.* at 2381.

99. *Id.*

100. *Id.* at 2383 (quoting Barrett, *supra* note 62, at 111).

101. *Id.* ("[B]y my lights, the Court arrived at the most plausible reading of the statute in these cases.").

> being so suits it. When that method would frustrate broader goals, special canons like the "major questions doctrine" magically appear as get-out-of-text-free cards.[102]

Justice Gorsuch barely acknowledges the attack. He simply replies: "[O]ur law is full of clear-statement rules and has been since the founding."[103] With a feeble wave towards the tradition of clear-statement rules and substantive canons, he fails to adequately grapple with the tension.

Professors Eidelson and Stephenson have recently tested the compatibility of Justice Gorsuch's theory with textualism.[104] They grapple seriously with Justice Gorsuch's "constitutionally inspired" theory, suggesting "perhaps [it] can still be reconciled with textualism because—and to the extent that—[it] derives [its] authority from the Constitution itself."[105] They focus their analysis on the following passage:

> One of the Judiciary's most solemn duties is to ensure that acts of Congress are applied in accordance with the Constitution in the cases that come before us. To help fulfill that duty, courts have developed certain "clear-statement" rules. These rules assume that, absent a clear statement otherwise, Congress means for its laws to operate in congruence with the Constitution rather than test its bounds. In this way, these clear-statement rules help courts "act as faithful agents of the Constitution."[106]

This can be read in two ways. First, focusing on the use of "accordance," the major questions doctrine may guard against *actual* violations of the Constitution.[107] Alternatively, looking to the term "congruence," the major questions doctrine may simply promote "constitutional values" by disfavoring statutory delegations that

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102. *West Virginia*, 142 S. Ct. at 2641 (Kagan, J., dissenting) (internal citations omitted).

103. *Id.* at 2625 (Gorsuch, J., concurring).

104. Benjamin Eidelson & Matthew Stephenson, *The Incompatibility of Substantive Canons with Textualism*, 137 HARV. L. REV. 515 (2023). Professors Eidelson and Stephenson address "substantive canons" broadly, yet the clear inspiration for the paper was the rise of the major questions doctrine.

105. *Id.* at 558.

106. West Virginia v. EPA, 142 S. Ct. 2587, 2616 (2022) (Gorsuch, J., concurring).

107. Eidelson & Stephenson, *supra* note 104, at 559.

admittedly lie within Congress's constitutional powers.[108] According to Eidelson and Stephenson, neither reading squares with textualism.

On the "actual violation" reading, Eidelson and Stephenson query whether such a canon is necessary when the Court possesses the traditionally reliable tool of judicial review.[109] Still, they suggest three possible explanations. First, perhaps the Constitution itself contains a "clarity requirement."[110] This argument fails because the application of such a requirement would be merely a straightforward application of judicial review, not necessarily the application of a canon.

The second possibility is that the major questions doctrine polices constitutional "underenforcement."[111] Where the Court lacks "judicially manageable standards," it may be unable to stop Congress from transgressing *real* constitutional limitations. To Justice Gorsuch, the obvious example here is the nondelegation doctrine.[112] The major questions doctrine may police the constitutional boundaries to catch the cases that slip past the nondelegation doctrine. The major issue with this theory is that it looks and sounds a lot like the "prophylactic"[113] constitutional rules that textualists typically eschew.[114]

Eidelson and Stephenson call the third variation "concessions to precedent."[115] If Justice Gorsuch feels that the nondelegation precedents have gone astray,[116] but feels bound to some extent by *stare decisis*, the major questions doctrine may provide an alternative route. Thus, "applying a 'constitutionally inspired' substantive canon might provide the Court with [an alternative to overruling

108. *Id.* at 559–60.

109. *Id.* at 560–61.

110. *Id.* at 561–63.

111. *Id.* at 563–67.

112. *See* Gundy v. United States, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting) (criticizing the "intelligible principle" test and proposing a new test).

113. *See, e.g.*, Miranda v. Arizona, 384 U.S. 486 (1966).

114. Eidelson & Stephenson, *supra* note 104, at 565.

115. *Id.* at 567–61.

116. Hint: he does. *See Gundy,* 139 S. Ct. at 2131 (Gorsuch, J., dissenting).

precedent]: Congress may still exercise the power that the Court's precedents mistakenly gave it, but Congress must at least do so clearly or explicitly." Eidelson and Stephenson admit this is the "strongest defense" of a constitutionally inspired major questions doctrine they could muster.[117] Yet, by their lights, it still falls short.

The logic unfolds as follows: "(1) determine that a statute actually would be invalid under (what they take to be) the correct understanding of constitutional law; but then (2) forbear from announcing as much; and (3) cite a hazier, 'constitutionally inspired' [major questions doctrine] as justification for reaching the same result."[118] This process "requires the Justices not to articulate the reasons that they actually endorse as legally sufficient to warrant their decisions" and leads to "constitutional law on the cheap."[119] Were this an accurate description of the major questions doctrine, such obfuscation would clearly conflict with the major aims of textualism: plain meaning and fair notice.

Finally, an alternative reading of Justice Gorsuch's concurrence is that the major questions doctrine simply promotes "congruence" by favoring certain "constitutional values."[120] Setting aside the difficult question of determining *which* constitutional values to favor, this view might be palatable to those who think that constitutional guarantees are not "dichotomous," rather they "phase in over some range," or cast "penumbras."[121] The problem here is obvious: Textualists "explicitly reject[] the premises from which it proceeds."[122] Because "the Constitution is, at its base, democratically enacted written law . . . textualists thus ought to approach the Constitution like any other legal text."[123] Thus, openly espousing a theory that rests on mere "values"—as opposed to text—threatens to undermine the entire formal textualist project.

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117. Eidelson & Stephenson, *supra* note 104, at 568.

118. *Id.* at 569–70.

119. *Id.* at 570 (citing John Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 449 (2010)).

120. *Id.* at 571–75.

121. *Id.* at 572.

122. *Id.*

123. *Id.* at 573 (cleaned up).

Eidelson and Stephenson raise serious concerns about the major questions doctrine and Justice Gorsuch's commitment to textualism. Without identifying the textual source of the constitutional requirements that Justice Gorsuch envisions, it is difficult to ascertain from where his constitutional inspiration derives.

B. Critique: Justice Barrett's Approach Rests on an Uncertain Premise

Eidelson and Stephenson address the justification for the major questions doctrine put forward by Justice Barrett as well. They probe whether the major questions doctrine is simply a "guide[] to the 'natural' meaning of legal texts."[124] Ultimately, they conclude that Justice Barrett's theory is similarly implausible.

At the onset, Justice Barrett's theory seems unproblematic. As Eidelson and Stephenson agree, "[i]n ordinary speech, the practical context in which an assertion is made often tacitly restricts its domain."[125] From this premise springs Justice Barrett's famous babysitter example. The practical context (a babysitting instruction) restricts the meaning of the assertion (make sure the kids have fun). Again, so far, most people would agree. Now, extending this example one step further, "a reasonable reader would not take Congress as making and extravagant delegation through language that it would have known could also be taken as expressing something more routine."[126]

What Justice Barrett does not explain is *why* the babysitter example works as it does. Operating silently in the background is a "putative shared understanding"[127] about what babysitters are *supposed* to do. Without saying it out loud, her example only works because her audience (ordinary Americans) shares a cultural understanding of the role of a babysitter, what actions would be considered "in bounds" for the babysitter, and what actions would be considered "extravagant." When it comes to something as universal as

124. *Id.* at 539.
125. *Id.*
126. *Id.* at 540.
127. *Id.*

babysitting, perhaps this is a safe assumption. But can the same be said of Congress?

For the babysitter example to be analogous to congressional delegations, it would require a similar shared understanding of *what* Congress does, *how* it typically delegates, and what delegations would be considered "extravagant." As Eidelson and Stephenson point out, there is "little reason to think that 'major' delegations *are* anomalous, for instance, especially in statutes specifying the authorities of a regulatory agency charged with addressing some complex and evolving problem."[128] While ordinary Americans may learn the relatively simple "School House Rock" version of lawmaking, any law student who has taken an administrative law course knows that potentially "major" and ambiguous delegations of power to agencies are a dime a dozen. Thus, it is doubtful that a consensus about how Congress "normally" delegates has emerged in any way comparable to the shared cultural understanding of babysitters.

Thus, the objection to Justice Barrett's theory is not that it is incompatible with textualism. Rather, the objection is that she is making a claim of an empirical nature. How confident is she that Americans broadly share her "common sense" as to how Congress "naturally" operates? Is such a shared understanding salient enough that, as a matter of *ordinary language*, courts can presume that Congress reserves "major questions" for itself? The premise on which she rests her conclusions is vulnerable to refutation.

Another critique of Justice Barrett's theory centers on her novel use of "context." Her opinion implicitly proceeds from the oft-quoted Scalia maxim: "[T]he good textualist is not a literalist."[129] Context is key, and context features prominently in many classic textualist opinions.[130] As typically deployed, context refers to the historical backdrop against which the statute was drafted, or the statutory scheme in which the particular provision is situated. That

128. *Id.* at 541.

129. SCALIA, *supra* note 89, at 24.

130. *See, e.g.*, Smith v. United States, 508 U.S. 223 (1993); *see also id.* (Scalia, J., dissenting).

is not how Justice Barrett uses context. Rather, she deploys what might be termed "meta-context." Rather than focusing on the context of a particular statute, she zooms out to the backdrop against which *all* statutory drafting takes place. This "meta-context" informs her "common sense" presumption against "major" delegations.

The line between "meta-context" and "purpose" is blurry.[131] While context is undoubtedly important, a core tenet of textualism is that no other consideration can override the plain meaning of a legal text—be it purpose, legislative history, or context. Despite her assurance that the major questions doctrine does not lead the Court to reject textually preferred statutory interpretations, introducing "meta-context" into the analysis might further obscure the plain meaning of the text. When "meta-context" overrides text, the tail is truly wagging the dog.

Thus, the problems with Justice Barrett's theory are twofold. First, her theory may comport with textualism, but the real-world basis on which it rests is hazy. Second, the introduction of "meta-context" may itself be unfaithful to textualism.

IV. STRUCTURAL IMPLEMENTATION AND THE MAJOR QUESTIONS DOCTRINE

Given the critiques leveled at both approaches, this Note proposes another way of understanding the major questions doctrine. The major questions doctrine is a structural implementing doctrine in the form of a clear-statement rule. It reflects how a "reasonable interpreter" would give meaning to constitutional structural choice, the same way an interpreter must give meaning to a word choice.

This theory proceeds as follows: As a baseline, textualists should agree that the text of a legal document is not limited to the words that appear on the page. Rather, the structure of a text represents

131. *See, e.g.*, Transcript of Oral Argument at 83–86, Pulsifer v. United States, 143 S. Ct. 978 (2023) (No. 22-340) (various justices comparing "context," "common sense," and "purposivi[sm]").

an additional drafting choice of which an interpreter must take note. After all, legal documents rarely (if ever) appear as a string of unbroken words. Instead, legal texts are carefully structured in a way that reflects the organization of ideas and concepts that the drafters had in mind. Structure and word choice are woven together to become "the text."[132] A faithful interpreter should strive to understand and give meaning to *all* textual choices of the drafters.

Implementing word choice is relatively straightforward. Suppose a legal text is limited in scope by the word "commerce." A legal interpreter first probes the meaning of "commerce" using a variety of tools, such as dictionaries. She then looks to the facts of the given case to determine whether they fall within the range of meaning communicated by the word "commerce." Applying the word choice faithfully means deciding which cases fall within the meaning of "commerce" and which cases fall without.

By contrast, implementing a structural choice is not as simple or straightforward. An interpreter cannot look up the meaning of a structural choice in a dictionary. That does not give the interpreter license to ignore the structural choice. Rather, she must rely on inferences drawn from the structural choice to give it meaning. Textualists generally prefer the "original public meaning" of a particular text. Thus, the interpreter might ask: what was the original implication of a particular structure? What inferences would an ordinary reader of this structure draw?

The challenge then is applying those structural inferences to a given set of facts. A word choice is usually susceptible to a small range of concrete meaning, and an interpreter can determine with some level of confidence whether the facts are within the meaning or not. By contrast, even where strong inferences can be drawn

132. The word "text" comes from the Latin "*textus*" meaning "a web" or "structure," which comes from the past participle of *texere*: "to weave, . . . to twine together, intertwine, plait," or to "construct, build." CASSELL'S LATIN DICTIONARY 602 (5th ed. 1968); *see* AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1801 (5th ed. 2011).

from a structural choice, it is more difficult to say with confidence that a given set of facts falls outside of the particular structure.[133]

Consider federalism. It is often remarked that there is no "federalism clause" in the Constitution. Yet, federalism clearly informed many of the drafters' structural choices.[134] The text of the Tenth Amendment alone does not get you very far. Rather, the Court typically relies on structural inferences that *point* to federalism. Although the Constitution lacks a "federalism clause," the Court is not unfaithful to the text when it considers federalism. Structure is a part of the text as much as word choice.

Another example is the non-delegation doctrine. Searching for a textual hook, most point to the Vesting Clause. Yet squeezing such a powerful doctrine into so few words has proven difficult. Thus, commentators joke that the non-delegation doctrine had "one good year"—1935.[135] In the past 88 years, no statute has been formally struck down under the non-delegation doctrine. Rather, the Court has denied every subsequent challenge under the mostly defanged "intelligible principle" test.[136]

Justice Gorsuch has recently attempted to revive the non-delegation doctrine.[137] He explicitly ties this doctrine to the text of the vesting clauses.[138] But implicitly, Justice Gorsuch invokes the *structure* of the constitution—*i.e.*, the separation of powers—rather than relying solely on the words. He notes that the "Constitution . . . vest[s]

133. Some structural provisions appear to present binary choices, while disguising a range of outcomes. Take the removal power of the president. The Constitution is silent, but unitary executive theorists argue that structural inferences require full removal power. *See, e.g.*, Myers v. United States, 272 U.S. 52 (1926). While this may appear to be a binary choice (the president has the removal power, or he doesn't), there are a range of possibilities. The president may have the removal power, or removal may require the advice and consent of the senate. *See* THE FEDERALIST NO. 77 (Alexander Hamilton). Alternatively, the question may simply be left open for Congress to decide. Any structural inferences may lead to a range of outcomes, rather than a binary choice.

134. *See, e.g.*, THE FEDERALIST NO. 10 (James Madison).

135. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935).

136. *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001); J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394 (1928).

137. *See* Gundy v. United States, 139 S. Ct. 2116 (2019) (Gorsuch, J., dissenting).

138. *Id.* at 2133–35.

the authority to exercise different aspects of the people's sovereign power in distinct entities."[139] He refers to the separation of powers as the "system of government ordained by the Constitution," the "framers' . . . particular arrangement," and the "framers' design."[140] The separation of powers inheres in the structural choices of the framers, not just the word "vested."

After drawing careful inferences from the structural choice of the founders to separate powers, Justice Gorsuch asks the million-dollar question: "What's the test?"[141] He invokes the founders' sentiments on this: "Madison acknowledged that 'no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces—the legislative, executive, and judiciary.' Chief Justice Marshall agreed that policing the separation of powers 'is a subject of delicate and difficult inquiry.'"[142] Madison and Marshall recognized the exact difficulty presented in this Note. Giving meaning to a constitutional structural choice is not as straightforward as giving meaning to a word choice.

In the 88 years since 1935, reliance on the "intelligible principle" test reflects this inherent difficulty. While the structural inferences are clear—*i.e.*, the separation of powers exists[143]—the means of implementing and enforcing these inferences are anything but. Whereas a word choice is more susceptible to binary bright-line tests—either the facts fall within the meaning of the word, or they do not—a structural choice can rarely be applied in the same way.[144]

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139. *Id.* at 2133.

140. *Id.* at 2133–35.

141. *Id.* at 2135.

142. *Id.* at 2136 (internal citations omitted).

143. *See* INS v. Chadha, 462 U.S. 919, 946 (1983) ("The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the documents that they drafted in Philadelphia in the summer of 1787.").

144. In reference to nondelegation, Justice Rehnquist remarked:

> The rule against delegation of legislative power is not, however, so cardinal of principle as to allow for no exception. The Framers of the Constitution were practical statesmen, who saw that the doctrine of separation of powers was a two-sided coin. James Madison, in

Justice Gorsuch proposes such a form of binary test. He suggests there are three categories in which delegation is constitutional, and any delegation falling outside of these categories violates the non-delegation doctrine.[145]

One advantage of the "intelligible principle" test is that, although it presents itself as a binary (either Congress communicated an intelligible principle, or it didn't), the test is so forgiving that the Court will rarely—if ever—need to draw a line with any exactness. It is simple enough to say *Schechter Poultry* falls on *that* side of the line, while everything else falls on *this* side. By contrast, Justice Gorsuch's *Gundy* formulation would require *real* line drawing in the future. But when is an agency simply "filling in the details?"[146] When is it simply engaged in "fact-finding?"[147]

Though sound in theory, there are two potential wrinkles with his proposed test. The first is practical difficulty. The questions posed above are not susceptible to easy or clean answers. How are lower courts supposed to find the line? How will Congress identify the line? How will an agency know when it crosses the line? The second difficulty is the lack of a textual hook in the Constitution. If non-delegation imposes an enforceable limit which Congress may not cross, that line must be found in the text of the Constitution. It is unclear whether the word "vested" somehow encodes the three categories Justice Gorsuch proposes, and whether these categories were generally understood at the time of the founding.

> Federalist Paper No. 48, for example, recognized that while the division of authority among the various branches of government was a useful principle, "the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained."

Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 673 (1980) (The Benzene Case) (Rehnquist, J., concurring).

145. Justice Gorsuch describes the three kinds of permissible delegations as follows: 1) Congress "may authorize another branch to 'fill up the details'"; 2) Congress "may make the application of [a] rule depend on executive fact-finding"; and 3) Congress "may assign the executive and judicial branches certain non-legislative responsibilities." *Gundy*, 139 S. Ct. at 2136–41 (Gorsuch, J., dissenting).

146. *Id.* at 2136.

147. *Id.*

And yet, his theory does not proceed from a specific word in the Constitution; rather, it implicitly rests on the structural separation of powers. Despite this structural hook, it is difficult to see how these inferences can form the basis of the firm rule Justice Gorsuch imagines. Certainly, there are easy cases, such as *Schechter Poultry*, which fall far beyond the line. But the challenge is drawing lines at the margins, where the structural inferences do not provide easy answers.

Here the major questions doctrine can provide some assistance. The major questions doctrine has been described elsewhere as a "non-delegation canon."[148] Justice Gorsuch also recognizes it as such: "Although it is nominally a canon of statutory construction, we apply the major questions doctrine in service of the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency."[149] Because the formal nondelegation doctrine is impotent in its current form and potentially unmanageable in the form Justice Gorsuch proposes, the major questions doctrine provides an alternative means of implementing the same constitutional rule. But this is not a free-floating power, unconnected to the text of the Constitution. As Justice Barrett notes, this rule "makes eminent sense in light of our constitutional structure."[150] The structure is a core component of the text, and the major questions doctrine is a faithful and judicially manageable implementation of that text.

Combining elements of both theories, the Court should embrace the major questions doctrine as a clear-statement nondelegation implementing doctrine. Far from a "second best" non-delegation doctrine, the major questions doctrine is a workable alternative for implementing the separation of powers implied by the constitutional structure. This approach builds off the important constitutional

148. *See* Cass R. Sunstein, *There Are Two "Major Question" Doctrines*, 73 ADMIN. L. REV. 475, 484 (2021).

149. *Gundy*, 139 S. Ct. at 2142 (Gorsuch, J., dissenting). *See also* West Virginia v. EPA, 142 S. Ct. 2587, 2619 (2022) (Gorsuch, J., concurring) ("Much as constitutional rules about retroactive legislation and sovereign immunity have their corollary clear-statement rules, Article I's Vesting Clause has its own: the major questions doctrine.").

150. Biden v. Nebraska, 143 S. Ct. 2355, 2380 (2023) (Barrett, J., concurring).

interests identified by Justice Gorsuch. It provides a coherent response to textualist critiques raised by Justice Barrett and others. And it fits within a constitutional tradition of using clear-statement rules to implement other structural constitutional provisions.

First, this approach builds off Justice Gorsuch's theory. He identifies a host of values preserved by the Constitution: democratic accountability, individual liberty, protection of minority rights, stability of the laws, and federalism.[151] He ties these values to two constitutional structures. First, he points to the vesting of powers in three co-equal branches of government—that is, the separation of powers. Second, he looks to the structure of the lawmaking process—bicameralism and presentment. By placing the lawmaking power in a diverse representative body and making the process deliberately difficult, these constitutional structures protect the values described above. Thus "[p]ermitting Congress to divest its legislative power to the Executive Branch would 'dash this whole scheme.'"[152]

His theory is vulnerable to textualist critiques because he anchors his analysis on the values protected by the Constitution (the ends), rather than the text and structure of the Constitution itself (the means).[153] This vulnerability leads Eidelson and Stephenson to wonder whether the major questions doctrine was simply policing "constitutional underenforcement" or making "concessions to precedent," rather than squarely applying the text of the constitution.[154] By sharpening the analysis to focus on applying the structure, rather than protecting certain values, the proposed approach engages with these textualist objections.

Treating the major questions doctrine as a structural implementing doctrine responds to Eidelson and Stephenson's critiques. When styled as guarding against "constitutional

151. *See* discussion, *supra* Part I.A.

152. *West Virginia*, 142 S. Ct. at 2618 (Gorsuch, J., concurring).

153. *See id.* at 2626 (quoting Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 136 (1810)) (cleaned up) (The major questions doctrine "helps safeguard that foundational constitutional promise.").

154. *See* discussion, *supra* Part II.A.

underenforcement," a concerned textualist may worry about the creation of extra-textual "prophylactic" constitutional protections.[155] But a structural implementing doctrine does not look outside the text of the constitution; rather, it seeks to faithfully apply the text—including the structural components. As discussed above, structure doesn't lend itself to binary choices. While the inferences may be strong, these can't always be applied in the form of a strict rule. Applying structure through clear-statement presumptions rather than a firm rule accounts for uncertainty as to how far the inference extends.

A textualist may also worry that the major questions doctrine is simply applied as a "concession to precedent."[156] Justice Gorsuch hinted that it may have been applied this way in the past.[157] Adopting the structural implementation approach ameliorates these concerns. Although Justice Gorsuch may believe that the "intelligible principle" precedents were wrongly decided, it does not necessarily follow that the major questions doctrine is merely a workaround designed to avoid overturning these erroneous precedents. Rather, it is the independent application of a constitutional text which *includes* structure.

By focusing on structure—as opposed to abstract constitutional values or benefits—the Court can anchor the major questions doctrine in the text of the Constitution. Framing the major questions doctrine in this way also addresses concerns about a mismatch with textualism, because the doctrine focuses on giving meaning to the full text of the constitution, including structure.

The structural approach also reconciles with Justice Barrett's model. At bottom, her theory rests on "commonsense principles of

155. Eidelson & Stephenson, *supra* note 104, at 565.

156. *Id.* at 567.

157. *See* Gundy v. United States, 139 S. Ct. 2116, 2141 (2019) (Gorsuch, J., dissenting) ("When one legal doctrine becomes unavailable to do its intended work, the hydraulic pressures of our constitutional system sometimes shift the responsibility to different doctrines. And that's exactly what's happened here. We still regularly rein in Congress's efforts to delegate legislative power; we just call what we're doing by different names.").

communication."[158] "Common sense" dictates that generally worded grants of authority should not be understood to contain extraordinary grants of power. That this "commonsense principle" can be extended to understanding congressional delegations is "rooted in the basic premise that Congress normally intends to make major policy decisions itself, not leave those decisions to agencies."[159] However, as demonstrated above, this "basic premise" may not reflect real-world expectations of how Congress operates and is thus vulnerable to empirical refutation.[160]

Yet, adopting a structural implementation approach does not require the acceptance of this "basic premise." Rather, it simply adopts the latter half of Justice Barrett's formulation: "[I]n light of our constitutional structure," "a reasonable interpreter" of the Constitution "would expect [Congress] to make the big-time policy calls itself, rather than pawning them off to another branch."[161] Here, Justice Barrett essentially describes the approach to constitutional structure proposed by this Note. Although she raises this to supplement her "commonsense" understanding of the major questions doctrine, the two ideas are not joined at the hip. One can readily accept that a "reasonable interpreter" of the constitutional structure would draw the inferences represented by the major questions doctrine without accepting that Congress *actually* operates this way.

This approach combines elements of both theories by asking: how would a "reasonable interpreter" understand and give meaning to the constitutional structure?[162] This approach takes a milder path

158. Biden v. Nebraska, 143 S. Ct. 2355, 2380 (2023) (Barrett, J., concurring).

159. *Id.* (internal citations omitted).

160. *See* discussion, *supra* Part II.B.

161. *Biden*, 143 S. Ct. at 2380 (Barrett, J., concurring).

162. This approach operates independently of *Chevron*. All members of the Court have implicitly recognized that the major questions doctrine no longer fits within the *Chevron* framework. The proposed approach uses the major questions doctrine to implement the structure of Constitution, rather than answer the questions raised by the *Chevron* analysis.

than a hardline nondelegation doctrine.[163] When presented with a broadly worded statute, a reasonable interpreter applies the text of the constitution (both words and structure) and makes an informed presumption about the scope of any congressional delegations. The interpreter looks for a "clear statement" to overcome the structural inference that "Congress normally intends to make major policy decisions itself, not leave those decisions to agencies."[164]

V. OTHER CLEAR-STATEMENT RULES AS STRUCTURAL IMPLEMENTATION DOCTRINES

The Court has implemented other constitutional structures using similar clear-statement rules. Take, for example, *Gregory v. Ashcroft*.[165] This case centered on whether a federal anti-age-discrimination statute preempted a state constitutional provision. Justice O'Connor's majority opinion takes the approach proposed by this Note. First, she notes the Constitution creates a "federalist structure of joint sovereigns."[166] Then, like Justice Gorsuch, she describes the benefits achieved by the federalist system:

> This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile

163. While Justice Gorsuch requires a clear statement under the major questions doctrine, his approach to nondelegation would not permit some delegations of law-making power even if clearly articulated. *See* Paul v. United States, 140 S. Ct. 342 (2019) (Statement of Kavanaugh, J.) (discussing *Gundy*'s nondelegation doctrine). By contrast, Justice Barrett's approach seems to accept that delegations to agencies would be permissible if sufficiently clear by text or context. This Note does not take a position on whether the nondelegation doctrine might apply as a separate limitation.

164. *Biden*, 143 S. Ct., at 2380 (Barrett, J., concurring).

165. 501 U.S. 452 (1991).

166. *Id.* at 458. *See also id.* at 457 ("As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government. This Court also has recognized this fundamental principle.").

> citizenry. . . . Perhaps the principal benefit of the federalist system is a check on abuses of government power.[167]

Importantly, she does not rest her analysis on the presumed benefits alone. She ties this back to structure: "One fairly can dispute whether our federalist system has been quite as successful in checking government abuse as Hamilton promised, but *there is no doubt about the design*."[168] This cashes out as a clear-statement rule: "This plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere."[169] Like Justice Barrett, Justice O'Connor can be best understood to mean that a "reasonable interpreter" would read the "constitutional scheme" to imply that Congress doesn't unintentionally preempt state law. Thus, the Court implemented a constitutional structure through a clear-statement presumption.

In *Tafflin v. Levitt*,[170] the Court employed a similar approach when tackling the question of whether "state courts have concurrent jurisdiction over civil RICO claims."[171] The Court rooted its analysis in constitutional structure:

> We begin with the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause. Under this system of dual sovereignty, we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States.[172]

This presumption arises from the constitutional structure known as the "Madisonian Compromise." Article III empowers—but does not require—Congress to create lower federal courts.[173] Concurrent

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167. *Id.* (internal citations omitted).
168. *Id.* at 459 (emphasis added).
169. *Id.* at 461.
170. 493 U.S. 455 (1990).
171. *Id.* at 458.
172. *Id.*
173. *See* U.S. CONST. art. III, § 1.

state court jurisdiction is an inference drawn from this constitutional structure, but it is not a hardline rule. "This deeply rooted presumption in favor of concurrent state court jurisdiction is, of course, rebutted if Congress affirmatively ousts the state courts of jurisdiction over a particular federal claim."[174] To implement this, the Court looks for an "explicit statutory directive—that is, a clear statement—to determine whether Congress has overridden the most natural reading of the constitutional structure."[175]

In *Webster v. Doe*,[176] the Court took a similar approach but in fewer words. The Court held that the APA and the National Security Act did not preclude courts from determining the constitutionality of a firing based on homosexuality. It found that:

> [W]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear. . . . We require this heightened showing in part to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim.[177]

Though left unsaid, the "serious constitutional question" is not raised by the words of any specific constitutional clause. Rather, Justice Rehnquist read the constitutional structure to imply that Article III courts presumptively review constitutional questions.[178] His implemented his structural reading through a clear-statement requirement.

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174. *Tafflin*, 493 U.S. at 459.

175. *Id.* at 460. In *Tafflin*, the Court also asked whether concurrent jurisdiction was ousted "by [an] unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests." *Id.* Justice Scalia would have limited the inquiry to a traditional clear-statement requirement. *Id.* at 800–03 (Scalia, J., concurring). The Court later endorsed Justice Scalia's view in *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820 (1990).

176. 486 U.S. 592 (1988).

177. *Id.* at 603.

178. *Cf.* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

CONCLUSION

The major questions doctrine reflects how a "reasonable interpreter" would understand and implement the constitutional separation of powers. It was not recently invented as a "get-out-of-text free card"; rather, it has long factored into the Court's opinions as a means of interpreting congressional delegations. It faithfully implements constitutional text—both word choice and structure. The structure-first approach responds to textualist critiques by anchoring the analysis to the structural components of the text. And it reflects a long tradition of giving meaning and application to constitutional structure through clear-statement rules. The Court should recognize the structural roots of the major questions doctrine as an anchor and guide in future major-questions cases.