

TWO JUSTIFICATIONS FOR THE MAJOR QUESTIONS DOCTRINE

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Abstract

There are two justifications for the major questions doctrine. The first justification, vigorously offered by Justice Neil Gorsuch, might be described as Lockean; it sees the doctrine as an effort to preserve legislative primacy and to reduce the policymaking authority of the executive branch. On the Lockean view, the major questions doctrine is a clear-statement principle, and it is in evident tension with textualism. The second justification, vigorously offered by Justice Amy Coney Barrett, might be described as Wittgensteinian; it sees the doctrine as an effort to capture Congress's likely instructions. The Wittgensteinian justification fits comfortably with textualism, and it does not operate as a clear-statement principle at all. The Court can be seen as having adopted an incompletely theorized agreement in favor of the major questions doctrine, but at some point, the two justifications might lead in different directions. While neither justification is implausible, both of them run into serious objections.

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I. A SUBSTANTIVE CANON?

Under the major questions doctrine, as it is now called, agencies are not allowed to act in ways that have extraordinary¹ or staggering² “economic and political significance”³ unless Congress has clearly authorized them to do so.⁴ What underlies this idea? There are two possible answers.⁵

The first, most clearly developed by Justice Neil Gorsuch, involves the separation of powers.⁶ The basic idea is inspired by a particular understanding of John Locke, who wrote:

The legislative cannot transfer the power of making laws to any other hands, for it being but a delegated power from the people, they who have it cannot pass it over to others. . . . And when the people have said, “We will submit, and be governed by laws made by such men, and in such forms,” nobody else can say other men shall make laws for them; nor can they be bound by any laws but such as are enacted by those whom they have chosen and authorized to make laws for them.⁷

1. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000), *superseded by statute*, Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111–31, 123 Stat. 1776 (2009) (codified at 21 U.S.C. § 387).

2. *Biden v. Nebraska*, 143 S. Ct. 2355, 2373 (2023).

3. *West Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022).

4. See generally Ilan Wurman, *Importance and Interpretive Questions*, 109 VA. L. REV. (forthcoming 2023) (manuscript at 1–35), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4381708 [<https://perma.cc/TZ3N-F6EE>] (providing a valuable, immensely clarifying overview of the major questions doctrine).

5. See generally Cass R. Sunstein, *There Are Two “Major Questions” Doctrines*, 73 AD. L. REV. 475 (2021) (explaining that when an issue has a very high degree of economic and social significance, judicial deference to agency authority does not apply). Until recently, there were two major questions doctrines. See *id.* The first was a carve-out from *Chevron* deference on the theory that for certain questions, it would be wrong to think that Congress implicitly delegated law-interpreting authority to the agency. See *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). On this view, the Court decides the legal issue independently. See *id.* The second was much more than a *Chevron* carve-out; it was a doctrine that would deny the agency the relevant authority. See Sunstein, *supra*, at 490–91. It now seems clear that there is just one major questions doctrine, and it is the second one. One reason might be that *Chevron* seems to have suffered an odd death; the Court never refers to it, and so there is no need for a *Chevron* carve-out. In short, *Chevron* has been ghosted. The formal fate of *Chevron* is at issue in *Loper Bright Enterprises v. Raimondo*. See Brief for Petitioners at 18, *Loper Bright Enterprises v. Raimondo*, No. 22–451 (filed July 17, 2023).

6. See *Gundy v. United States*, 139 S. Ct. 2116, 2133–34 (2019) (Gorsuch, J., dissenting).

7. JOHN LOCKE, TWO TREATISES ON CIVIL GOVERNMENT § 141 (George Routledge & Sons ed., Ballantone Press 1884) (1689); see also *Gundy*, 139 S. Ct. at 2133–34 (quoting Locke). Note, however, that the meaning of Locke’s words is disputed; it is not at all clear that he had anything

On Justice Neil Gorsuch's view, the major questions doctrine "operates to protect foundational constitutional guarantees."⁸ According to Justice Gorsuch, the doctrine is a clear-statement principle, akin to the presumption against retroactivity and the presumption against abrogation of sovereign immunity.⁹ Justice Gorsuch urges that "Article I's Vesting Clause has its own [clear-statement principle]: the major questions doctrine."¹⁰ As he puts it, "The Court has applied the major questions doctrine for the same reason it has applied other similar clear-statement rules—to ensure that the government does 'not inadvertently cross constitutional lines.'"¹¹ The goal of the doctrine is thus to ensure congressional primacy by avoiding a situation in which agencies exercise authority that the national legislature has not clearly granted them. On this view, the major questions doctrine is best understood as a nondelegation canon, akin to the presumption against retroactivity.¹² Its apparently recent creation is a serious challenge for the view that it is a product of Article I's Vesting Clause, but efforts have been made to suggest that it is not as novel and freewheeling as it appears.¹³

Justice Amy Coney Barrett rejects this view and offers a different and more low-key defense of the major questions doctrine.¹⁴ On her account, it has little or nothing to do with the separation of powers, at least in the first instance.¹⁵ Instead it has everything to do with how communication

like the modern American nondelegation doctrine in mind. See Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 307–08 (2021). I am (mostly) bracketing here the constitutional foundations of that doctrine.

8. *West Virginia*, 142 S. Ct. at 2616 (Gorsuch, J., concurring).

9. *Id.*

10. *Id.* at 2619.

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

12. On the nondelegation canon in general, see Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 318–20 (2000). I am bracketing the difficulty of deciding what makes a question "major," or what makes an interpretation "extraordinary." Justice Gorsuch has attempted to offer a framework to answer that question. See *West Virginia*, 142 S. Ct. at 2620–22.

13. Natasha Brunstein & Donald R. Goodson, *Unheralded and Transformative: The Test for Major Questions After West Virginia*, 47 WM. & MARY ENVTL. L. & POL'Y REV. 47 (2022).

14. For a similar account, see Wurman, *supra* note 4, at 7–8 ("On this conceptualization, the importance of a purported grant of authority would operate as a kind of linguistic canon: ordinarily, lawmakers and private parties tend to speak clearly, and interpreters tend to expect clarity, when those lawmakers or parties authorize others to make important decisions on their behalf. . . . However labeled, such a canon may be consistent with textualism, and specifically with empirical evidence regarding how Congress operates, with insights from the philosophy of language regarding how ordinary persons interpret instructions in high-stakes contexts, with background principles of interpretation, and with historical materials in constitutional, contract, and statutory interpretation from the Founding to today."). Wurman draws on the highly instructive analysis in Ryan D. Doerfler, *High-Stakes Interpretation*, 116 MICH. L. REV. 523, 527 (2018).

15. *Biden*, 143 S. Ct. at 2380–81.

ordinarily works.¹⁶ To see what she has in mind, consider this footnote from Wittgenstein: “Someone says to me: ‘Shew the children a game.’ I teach them gaming with dice, and the other says ‘I didn’t mean that sort of game.’ Must the exclusion of the game with dice have come before his mind when he gave me the order?”¹⁷

The answer to Wittgenstein’s question is “no.” If someone asks me to show a “game” to children, gambling is not ordinarily taken to be included in the category of “game,” even though it is technically a game. The same is true of Russian roulette, spin-the-bottle, and boxing. We can understand Wittgenstein to be using a form of the major questions doctrine, applied to ordinary conversation. If someone asks me to show the children a game, to go get lunch at the grocery store, or to make a restaurant reservation for Wednesday night, “extraordinary” or “staggering” choices, on my part, require strong contextual justification. “I didn’t mean that sort of lunch” or “I didn’t mean that sort of restaurant”—in ordinary conversation, people anticipate that response, and they do not make choices that would elicit it.

Whether or not she was aware of it, Justice Barrett’s motivating example is exceedingly close to Wittgenstein’s. It involves “a parent who hires a babysitter to watch her young children over the weekend.”¹⁸ The parent tells the babysitter the following: “Make sure the kids have fun.”¹⁹ Suppose that the babysitter takes the children on an overnight adventure, complete with rollercoaster rides.²⁰ Justice Barrett urges, sensibly enough, that the parent might think: “I didn’t mean that sort of fun.”²¹ Justice Barrett writes:

In the normal course, permission to spend money on fun authorizes a babysitter to take children to the local ice cream parlor or movie theater, not on a multiday excursion to an out-of-town amusement park. If a parent were willing to greenlight a trip that big, we would expect much more clarity than a general instruction to “make sure the kids have fun.”²²

Justice Barrett is keenly aware, of course, that context matters.²³ We might learn that the parent left out suitcases or that history shows that the babysitter is authorized to take the kids on such an outing.²⁴ In Justice

16. *Id.* at 2380.

17. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 33 (G.E.M. Anscombe trans., Basil Blackwell Ltd. 3d ed. 1967).

18. *Biden*, 143 S. Ct. at 2379.

19. *Id.*

20. *Id.*

21. *See id.* at 2380.

22. *Id.*

23. *Id.* at 2378.

24. *Id.* at 2380.

Barrett’s view, the major questions doctrine operates in the same way.²⁵ “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.”’”²⁶ Thus far, then, we are speaking of ordinary principles of communication; there is no need to invoke the Constitution. Nonetheless, and notably, Justice Barrett fortifies her approach by reference to “the basic premise that Congress normally ‘intends to make major policy decisions itself, not leave those decisions to agencies.’”²⁷ In light of Article I, Section One, “a reasonable interpreter would expect [Congress] to make the big-time policy calls itself, rather than pawning them off to another branch.”²⁸

Nonetheless, Justice Barrett’s approach is meaningfully different from Justice Gorsuch’s.²⁹ In her view, the major questions doctrine is emphatically *not* a clear-statement rule.³⁰ It is not “a normative rule that *discourages* Congress from empowering agencies.”³¹ It imposes no “clarity tax” on Congress.³² Far from it. Under her approach (and unlike under Gorsuch’s), courts do not have permission “to choose an inferior-but-tenable alternative that curbs the agency’s authority—and that marks a key difference between [her] view and the ‘clear statement’ view of the major questions doctrine.”³³ For Justice Barrett, courts must always choose the best interpretation; they do not require a clear statement.³⁴ In short: The major questions doctrine is relevant to what the best interpretation is, but if Congress is best understood to have said, “Actually I meant that sort of game,” or perhaps better, “I meant the sort of game that the relevant agency deemed to be a game,” then the fact that a major question is involved is neither here nor there.

25. *Id.*

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

27. *Id.* (quoting *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of reh’g en banc)).

28. *Id.* This view is not simple to defend as a matter of history. See *Mortenson & Bagley*, *supra* note 7, at 331–32; JERRY MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* 291 (2012). The terms “big-time” and “pawning off” do not fit well with longstanding practice. From the earliest days of the Republic, Congress granted broad discretion to executive authorities. See MASHAW, *supra*, at 33; *Mortenson & Bagley*, *supra* note 7, at 332–49.

29. She was evidently influenced by an article to which she frequently refers in her opinion, by an author whom she appears to know well. See generally Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109 (2010) (discussing the tension between substantive canons and fidelity to the text).

30. *Biden*, 143 S.Ct. at 2380–81.

31. *Id.* at 2381.

32. *Id.* at 2377–78.

33. *Id.* at 2381.

34. *Id.*

On this view, the major questions doctrine is emphatically not a substantive canon.³⁵ Justice Barrett is a textualist, and she is cautious about the whole idea of substantive canons.³⁶ As she explains, such canons, seen as “rules of construction that advance values external to a statute,” may operate either as tiebreakers or as far more than that.³⁷ “[S]trong-form” canons require a clear statement.³⁸ Some strong-form canons have a long pedigree; consider constitutional avoidance and the presumption against retroactivity.³⁹ Justice Barrett is aware that strong-form canons are “in significant tension with textualism,” and she is evidently uncomfortable with them.⁴⁰ Speaking directly to arguments like Justice Gorsuch’s, she adds, “[E]ven assuming that the federal courts have not overstepped by adopting such canons in the past, I am wary of adopting new ones—and if the major questions doctrine were a newly minted strong-form canon, I would not embrace it.”⁴¹

II. CHALLENGES AND CONCERNS

Who is right? Both? Neither?⁴² It would be possible, of course, to think that Justice Barrett is right about how communication works but also to insist that Justice Gorsuch is right about the need for, and the legitimacy of, a strong-form substantive canon. Justice Barrett has an objection to Justice Gorsuch, but Justice Gorsuch need not have an objection to Justice Barrett except to the extent that she has an objection to him. Let us begin, in that light, with Justice Barrett.

Her strongest argument points to how communication normally operates. An extraordinary or staggering interpretation of a term might well produce the reaction of “I did not mean that sort of game.” Take the use of the word “modify” in the *MCI* case.⁴³ The governing statute requires communications common carriers to file tariffs with the Federal

35. *Id.* at 2376.

36. *See id.* at 2376. In my view, she is too cautious about them. *See* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 504 (1989) (arguing that canons of construction “must occupy a prominent place in the theory and practice of statutory interpretation”). I should add that the present author does not agree with everything said by the young author of *id.*

37. *Biden*, 143 S. Ct. at 2376.

38. *See id.*

39. *Id.* at 2376–77.

40. *Id.* (quoting Barrett, *supra* note 29, at 123–24).

41. *Id.* at 2377 n.2.

42. My main goal here is to make sense of the two justifications for the major questions doctrine, not to evaluate the doctrine as such. For more in the way of (skeptical) evaluation, see generally Sunstein, *supra* note 5 (describing the two radically different understandings of the major questions doctrine).

43. *MCI Telecomms. Corp. v. Am. Tel. & Tel. Corp.*, 512 U.S. 218, 225 (1994), *superseded by statute*, Telecomms. Act of 1996, Pub. L. No. 104–104, 110 Stat. 128 (codified at 47 U.S.C. § 160(a)(1)).

Communications Commission (FCC), but also authorizes the Commission to “modify any requirement made by or under . . . this section”⁴⁴ The FCC decided to make tariff filing optional for all “nondominant” long distance carriers.⁴⁵ (The only dominant carrier was American Telephone and Telegraph Company.)⁴⁶ Much of the Court’s opinion was textualist.⁴⁷ “Modify,” in the Court’s view, connotes incremental change.⁴⁸ As the Court put it: “It might be good English to say that the French Revolution ‘modified’ the status of the French nobility but only because there is a figure of speech called understatement and a literary device known as sarcasm.”⁴⁹ Pointing to “the enormous importance to the statutory scheme of the tariff-filing provision,”⁵⁰ the Court declined to allow the FCC to read “modify” so broadly.⁵¹ In other words: Congress didn’t mean that sort of “modify.”⁵² So understood, *MCI* did not create a new clear-statement principle or use heavy constitutional artillery to constrain the FCC’s discretion. It was simply applying Wittgenstein’s point about how communication works.

An analysis of this sort could plausibly make sense of other major questions cases, including *Biden v. Nebraska*⁵³ itself (which also involved the term “modify”).⁵⁴ Note as well that if the major questions doctrine is understood in this way, it is not only an obstacle to what might be seen as regulatory excess; it is an obstacle to regulatory retrenchment or deregulation as well. If a parent tells a babysitter, “have some fun with them,” a babysitter would not obey those instructions if an afternoon involved five minutes of fun and many hours of grueling math exercises. The relevant neutrality of Justice Barrett’s approach is a point in its favor; it suggests that she is not wielding the major questions doctrine in what might be seen as a political or ideological manner—or as a form of *Lochnering*.⁵⁵

44. *Id.* at 224–25 (quoting 47 U.S.C. § 203(b)(2)).

45. *Id.* at 231.

46. *Id.*

47. Wurman, *supra* note 4, at 13–15 (offering a sharp criticism of *MCI* when the opinion is taken purely as a textualist opinion).

48. *MCI Telecomms. Corp.*, 512 U.S. at 225.

49. *Id.* at 228.

50. *Id.* at 231.

51. *Id.* at 231–32.

52. *Id.* at 232.

53. 143 S. Ct. 2355 (2023).

54. *See, e.g., id.* at 2369.

55. Though I will not explore the point here, there is an uncomfortable relationship between the major questions doctrine as understood by Justice Gorsuch compared with the old, discredited ideas that “statutes in derogation of the common law will be narrowly construed.” *See generally* Jefferson B. Fordham & J. Russell Leach, *Interpretation of Statutes in Derogation of the Common*

Nonetheless, there is a possible weakness in Justice Barrett's argument. It lies in her endorsement of "the basic premise that Congress normally 'intends to make major policy decisions itself, not leave those decisions to agencies.'"⁵⁶ As we will soon see, that basic premise might well be doubted as an empirical matter. But at first glance, it is not clear that she needs that "premise." We might agree that words are ordinarily understood not to entail staggering or extraordinary conclusions without making judgments about what an abstraction called "Congress" normally intends. But Justice Barrett evidently believed that the "premise" is helpful or perhaps even necessary. Perhaps it is. If Congress intends agencies to make major policy decisions, then Congress *wants* agencies to figure out what sort of game to play, and Justice Barrett's argument runs into serious difficulty.

Is the example of the parent instructing the babysitter really helpful? Is Congress like a parent, and is an agency like a babysitter? Might that example load some dice?⁵⁷ More concretely: What is the foundation of the "premise" that Congress intends to make major policy decisions itself? What kind of "premise" is it? It sounds like an empirical claim.⁵⁸ If so, is it true? A great deal depends on the meaning of the words "normally" and "major."⁵⁹ But there is a good argument that the premise is not true or at least that it is overstated and misleading. In ordinary language, Congress often (whether or not "normally") *does* intend to leave major policy decisions to agencies. Certainly, this is so if we consider the text of prominent regulatory statutes. Consider, for example,

Law, 3 VAND. L. REV. 438 (1950) (providing a historical understanding of the derogation canon). We could easily understand some versions of the major questions doctrine to fall in the same category as constitutional and statutory decisions of the *Lochner* era. I am keenly aware that Justice Gorsuch would reject this suggestion and that I have not defended it here.

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

57. We could imagine a different example in which, for example, the principal is a patient and the agent is a doctor. In such a case, a doctor's surprising choices might be welcome rather than forbidden.

58. Justice Kagan offered a powerful and maybe even devastating response:

Here is a fact of the matter: Congress delegates to agencies often and broadly. And it usually does so for sound reasons. Because agencies have expertise Congress lacks. Because times and circumstances change, and agencies are better able to keep up and respond. Because Congress knows that if it had to do everything, many desirable and even necessary things wouldn't get done. In wielding the major-questions sword, last Term and this one, this Court overrules those legislative judgments. The doctrine forces Congress to delegate in highly specific terms—respecting, say, loan forgiveness of certain amounts for borrowers of certain incomes during pandemics of certain magnitudes. Of course Congress sometimes delegates in that way. But also often not.

Biden, 143 S. Ct. at 2397 (Kagan, J., dissenting).

59. Regrettably.

a key provision of the Clean Air Act,⁶⁰ which instructs the Environmental Protection Agency (EPA) to set standards “the attainment and maintenance of which . . . are requisite to protect the public health” with “an adequate margin of safety.”⁶¹ Or consider the National Traffic and Motor Vehicle Safety Act of 1966⁶² (Act), which directs the Secretary of Transportation to issue motor vehicle safety standards that “shall be practicable, meet the need for motor vehicle safety, and be stated in objective terms.”⁶³ Or consider this statute:

Not later than 12 months after the date of the enactment of this Act, the Secretary shall initiate a rulemaking to revise Federal Motor Vehicle Safety Standard 111 (FMVSS 111) to expand the required field of view to enable the driver of a motor vehicle to detect areas behind the motor vehicle to reduce death and injury resulting from backing incidents, particularly incidents involving small children and disabled persons. The Secretary may prescribe different requirements for different types of motor vehicles to expand the required field of view to enable the driver of a motor vehicle to detect areas behind the motor vehicle to reduce death and injury resulting from backing incidents, particularly incidents involving small children and disabled persons. Such standard may be met by the provision of additional mirrors, sensors, cameras, or other technology to expand the driver’s field of view.⁶⁴

What is noteworthy about this statute is that Congress has clearly given the Secretary the power to make “major policy choices.”⁶⁵ The Secretary can choose additional mirrors, sensors, cameras, or other technology.⁶⁶ Granting the Secretary that authority *was* Congress’ intent.

These are not, of course, atypical examples, from the founding period to the present.⁶⁷ While Congress often does seek to make the major policy choices, it often decides, for one reason or another, not to do that. One reason might involve a lack of information about facts. (What is the best technology to reduce backing incidents?) Another reason might involve a lack of information not simply about facts, but about the proper

60. Pub. L. No. 159-360, 69 Stat. 322 (1955) (codified as amended at 42 U.S.C. §§ 7401–7671).

61. 42 U.S.C. § 7409(b)(1).

62. Pub. L. No. 89-563, 80 Stat. 718 (1966) (codified as amended at 49 U.S.C. § 30111).

63. 49 U.S.C. § 30111(a).

64. Cameron Gulbransen Kids Transportation Safety Act of 2007, Pub. L. No. 110-189, § 2(b) (2008) (codified at 49 U.S.C. § 30111 note).

65. See Cass R. Sunstein, *Rear Visibility and Some Unresolved Problems for Cost-Benefit Analysis*, 10 J BENEFIT-COST ANALYSIS 317, 317 (2019).

66. 49 U.S.C. § 30111 note.

67. See Mortensen & Bagley, *supra* note 7, at 332–49 (providing a long list of examples from the early Republic).

resolution of complex policy issues. (With different costs and benefits, how should government choose among mirrors, sensors, cameras, or other technologies?) Another reason might involve the inevitability of changing circumstances. (What if cameras turn out to be much less expensive than anticipated?) Another reason might be a belief that political pressures will lead to bad choices; a more insulated body might do better. (Should Congress specify standards for exposure to silica in the workplace?) Another reason might involve a desire not to take the political heat. (Should Congress specify the value of a statistical life? Should Congress say that it is \$8 million, or \$10 million, or \$30 million?⁶⁸ That is certainly a major policy choice.) Yet another reason might involve an inability to achieve consensus. In short, and to invoke Wittgenstein once more, Justice Barrett appears to have been held captive by a picture⁶⁹—a picture about what an abstraction called Congress normally intends.

Perhaps what Justice Barrett describes as the “basic premise”⁷⁰ is not an empirical claim at all, but a normative one. It might be in the nature of a legal fiction, or an article of faith, grounded on Article I, Section One. If it is a legal fiction, perhaps it is a benign one, or a constitutionally motivated one. If so, it starts to converge with the Lockean argument; it is no longer so Wittgensteinian. It does not involve a linguistic canon anymore; it starts to look like a clear-statement principle. The analogy to the parent and the babysitter tends to fall apart, unless we think that Congress must, as a matter of constitutional principle or at least constitutional “premise,” be taken to be the kind of parent who does not delegate a lot of discretion to babysitters. The claim might be that courts rightly assume that Congress does want to make the major policy choices, and the reason is the Constitution itself. Under the founding document, that is, Congress is like a parent who is presumed not to want to give a great deal of discretion, or the power to make very surprising (or major) choices, to a delegate.

At this point, Justice Gorsuch might have two things to say to Justice Barrett. *First*: She really should not worry so much about the relationship between textualism and substantive canons. While textualism is fundamentally the right approach, he might continue, it has always been qualified by substantive canons that operate as clear-statement

68. I once testified before a congressional committee and suggested that Congress should introduce greater uniformity by specifying the figure. Members looked at me as if I had lost my mind. (Maybe I had.)

69. See WITTGENSTEIN, *supra* note 17, at 48.

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

principles.⁷¹ The rule of lenity is one example;⁷² so is the presumption against extraterritoriality;⁷³ so is the presumption against retroactivity; so is the Avoidance Canon.⁷⁴ Textualism is an approach, not a religion, and while it is an approach, it must be defended as such. Any plausible defense of textualism will not leave substantive canons off-limits. After all, Anglo-American law has long embraced them. For that reason, Justice Gorsuch might accept Justice Barrett's Wittgensteinian argument, but he might add that she should accept his Lockean argument and insist that she actually needs it to make her "premise" something other than an empirical claim in (desperate?) search of empirical justification.

Second: The Wittgensteinian defense of the major questions doctrine will not be sufficient in cases in which the court thinks (1) that the agency's claim of statutory authorization is more likely than not to be right but (2) that the agency's claim of statutory authorization is not clearly right. In such cases, Justice Gorsuch would contend that the agency should lose. Justice Barrett obviously disagrees on that score. In her view, the idea of new substantive canon, in the form of the major questions doctrine, is legally unmoored. Its creation cannot be squared with textualism; it lacks sources in any legal text or in tradition. And some people (probably not Justice Barrett) would add that the nondelegation doctrine, as Justice Gorsuch understands it, itself has dubious constitutional roots,⁷⁵ which raises a serious problem for his justification of the major questions doctrine (though not for Justice Barrett's).

Here is one effort at accommodation. The Avoidance Canon is a clear-statement principle, and no one should object to its status as such. If an agency argues in favor of an interpretation that would raise a serious nondelegation problem, that interpretation should be rejected.⁷⁶ So too, no one should object to the status of the Absurdity Canon as a clear-statement principle.⁷⁷ If an agency argues in favor of an interpretation that would be absurd, that interpretation should be rejected.⁷⁸ Patently unreasonable interpretations should also be rejected, unless Congress has clearly authorized them.⁷⁹ And if an agency argues in favor of an interpretation that really would be "startling"—perhaps because it would

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

72. See David S. Romantic, *Reconstructing the Rule of Lenity*, 40 CARDOZO L. REV. 523, 524 (2018).

73. See *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

74. See *West Virginia*, 142 S. Ct. at 2616–17.

75. See *Mortenson & Bagley*, *supra* note 7, at 331–49.

76. That idea helps explain *Kent v. Dulles*, 357 U.S. 116, 129 (1958), which could be seen as an early use of something like the major questions doctrine, though which is (in my view) best taken as a simple application of the Avoidance Canon.

77. John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2388–89 (2003).

78. See *Church of the Holy Trinity v. United States*, 143 U.S. 457, 460 (1892).

79. *Michigan v. EPA*, 576 U.S. 743, 750–51 (2015).

produce a radical transformation in longstanding practice, perhaps because it would give the agency authority that no one had ever thought it had—courts might reject that interpretation on Justice Barrett’s ground, unless there is contextual evidence in favor of the agency’s view. Such contextual evidence could include a broad term, such as “unreasonable risk” or “public interest.”⁸⁰

That approach should give Justice Gorsuch, and those who approve of his approach, most of what they want. And under that approach, the major questions doctrine would have an important but cabined role. It would not operate as a broad or general restriction on the authority of administrative agencies. It need not be motivated by any large-scale doubts about the legitimacy of those agencies. It would be part of the judicial toolbox used, as Justice Barrett urges, as part of ordinary interpretation.

III. STEPPING BACK, STEPPING FORWARD

Is there any need for a major questions doctrine? We could readily imagine a parallel world, not so very different from ours, in which there was no such doctrine. It is reasonable to insist that this parallel world was ours, certainly before the twenty-first century,⁸¹ and perhaps before 2023, when the doctrine was first announced.⁸² In fact *all of the cases now said to constitute the major questions canon could have come out the same way without the doctrine*. Almost all of the analysis in *Brown & Williamson* focused on congressional instructions and had nothing to do with the major questions doctrine.⁸³ The little seed, planted there, seemed like an afterthought. As we have seen, both *MCI* and *Biden v. Nebraska* could have rested only on the ordinary meaning of the word “modify.”⁸⁴ Indeed, the main thrust of both opinions was textualist, and did not involve the major questions doctrine at all.⁸⁵ *West Virginia* could easily have turned, and largely did turn, on the Court’s interpretation of the

80. See *Env’t Def. Fund v. Ruckelshaus*, 439 F.2d 584, 592–94 (D.C. Cir. 1971) (requiring the EPA to regulate DDT).

81. The doctrine is sometimes traced to *Industrial Union Department v. American Petroleum Institute*, 448 U.S. 607, 645 (1980) (plurality opinion). The connection is not impossible to defend, but the plurality opinion is better taken to reflect the Avoidance Canon and the Absurdity Canon.

82. *West Virginia v. EPA*, 142 S. Ct. 2587, 2610 (2022).

83. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 130 (2000), *superseded by statute*, Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111–31, 123 Stat. 1776 (2009) (codified at 21 U.S.C. § 387).

84. *MCI Telecomms. Corp. v. Am. Tel. & Tel. Corp.*, 512 U.S. 218, 225 (1994), *superseded by statute*, Telecomms. Act of 1996, Pub. L. No. 104–104, 110 Stat. 128 (codified at 47 U.S.C. § 160(a)(1)).

85. *MCI Telecomms. Corp.*, 512 U.S. at 225; *Biden v. Nebraska*, 143 S. Ct. 2355, 2368 (2023).

relevant provision of the Clean Air Act.⁸⁶ Something similar could be said about most and perhaps all of the major questions cases, though they would be a bit easier with the help of the Wittgensteinian argument.

In this light, the major questions doctrine seems a bit like a makeweight, which raises a serious question: What is the Court doing with it? Why does the Court need it? Why has the Court essentially invented it?

Justice Gorsuch gives the clearest answer: Some members of the Court are gravely concerned, from the standpoint of separation of powers, about the idea of a discretion-wielding administrative state, seizing on ambiguous language to take action that Congress did not specifically authorize.⁸⁷ More generally, some members of the Court appear to have serious constitutional doubts about the administrative state in its current form. From that point of view, the major questions doctrine is an important way of maintaining faith with original constitutional commitments. Justice Barrett lightly makes a similar point,⁸⁸ and may have a broadly similar motivation, but her Wittgensteinian analysis certainly lowers the volume on the debate. Whatever the justification for the major questions doctrine, it would have a role to play in cases in which the agency's interpretation is either reasonable or right, given the standard sources of statutory interpretation, but in which the extraordinary or startling nature of the agency's action requires either (1) clear contextual support (Justice Barrett's approach)⁸⁹ or (2) clear congressional authorization (Justice Gorsuch's approach).⁹⁰ The line between (1) and (2) would appear to be very thin.

We could readily imagine decisions, in the Supreme Court and in the lower courts, that do not choose between Justice Gorsuch and Justice Barrett and that reflect an incompletely theorized agreement on behalf of the major questions doctrine.⁹¹ In most cases, the different justifications will not lead to different outcomes. Both Justice Gorsuch and Justice Barrett agree with all the various cases now taken to constitute the doctrine, and while some of those cases tend to lean toward Justice Gorsuch's position,⁹² they cannot easily be read to make an authoritative

86. *West Virginia*, 142 S. Ct. at 2615–16.

87. *Id.* at 2617–18 (Gorsuch, J., concurring).

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

89. *Id.* at 2376.

90. *West Virginia*, 142 S. Ct. at 2616.

91. See Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1735–36 (1995).

92. See *West Virginia*, 142 S. Ct. at 2609 (majority opinion) (“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

decision between them. As I have noted, the different analyses will produce a different outcome only when a court believes that the best interpretation is consistent with the agency's approach, but also that the statute does not clearly give the agency the authority to do what it seeks to do. In such cases, Justice Barrett would rule in favor of the agency (because she would not impose a "clarity tax"); Justice Gorsuch would not (because Congress has not spoken clearly).

But how often will that happen? It is reasonable to say: Not often.

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." This statement refers to both the Lockean ("separation of powers") and the Wittgensteinian ("a practical understanding of legislative intent") justifications. *Id.*; see also *Indus. Union Dep't v. Am. Petroleum Inst.*, 448 U.S. 607, 646 (1980) (plurality opinion) (invoking the canon of constitutional avoidance). By contrast, *Alabama Ass'n of Realtors v. Department of Health & Human Services*, 141 S. Ct. 2485 (2021), can be understood to fit with Justice Barrett's position: "We expect Congress to speak clearly when authorizing an agency to exercise powers of 'vast economic and political significance.' . . . That is exactly the kind of power that the CDC claims here." *Id.* at 2489. This statement does not reject Justice Gorsuch's view, but it could be taken to channel Wittgenstein on games. *National Federation of Independent Business v. OSHA*, 142 S. Ct. 661, 667 (2022) (Gorsuch, J., concurring), can be similarly taken.