CONSTITUTIONAL CONCEITS IN STATUTORY INTERPRETATION

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For all its talk about textualism, the Roberts Court has a recent habit of ignoring statutory texts in highly politicized cases. In National Federation of Independent Business v. Occupational Safety and Health Administration, West Virginia v. Environmental Protection Agency, *and* Brnovich v. Democratic National Committee, *the Supreme Court steered around broad statutory language to narrow important federal legislation. In each case, the Court brushed aside inconvenient statutory texts, focusing instead on background constitutional concerns. Significantly, though, the policies at issue were not unconstitutional under current doctrine. The challenged policies, then, did not violate constitutional law so much as the conservative Justices' constitutional sensibilities.*

Admittedly, the Court has long interpreted statutes in light of constitutional anxieties, employing a variety of Constitution-based canons of statutory interpretation. The cases examined here, however, either applied those canons unusually aggressively or departed from them altogether. NFIB *and* West Virginia *ostensibly relied on the major questions doctrine but transformed it from a modest interpretive aid into something far more intrusive.* Brnovich *did not even bother to invoke any of the constitutional canons, though amorphous federalism principles drove that decision.*

While the Constitution-based canons of statutory interpretation have always afforded courts substantial discretion, these recent cases go much further. Rather than using constitutional canons to resolve statutory ambiguities, these decisions swept aside clear

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statutory language to advance the Justices' constitutional conceits—that is, to further inchoate libertarian values inconsistent with contemporary constitutional law. Collectively, these cases paint an unflattering portrait of a Court willing to navigate around statutory text and constitutional doctrine to limit the scope of federal power.

INTRODUCTION

For all its talk about textualism, the Roberts Court sometimes interprets statutes with barely a nod to their texts. This trend is especially evident in recent cases involving highly politicized policies. In *National Federation of Independent Business (NFIB) v. Occupational Safety and Health Administration (OSHA)*,[1] *West Virginia v. Environmental Protection Agency (EPA)*,[2] and *Brnovich v. Democratic National Committee (DNC)*,[3] the Supreme Court steered around broad statutory language to limit important federal programs. In so doing, the Court significantly curtailed the federal government's ability to tackle serious problems.

1. 142 S. Ct. 661 (2022).
2. 142 S. Ct. 2587 (2022).
3. 141 S. Ct. 2321 (2021).

When viewed through a statutory-interpretation lens, this atextualism seems surprising. After all, many current Justices embrace textualism as *the* method of statutory interpretation. The Court's notable departures from the statutory texts, however, make more sense when we view them as part of a larger constitutional project to reduce federal governmental power.

Indeed, the Court in these cases cared more about background constitutional ideas than statutory language. In the two cases involving administrative agencies—*NFIB* and *West Virginia*—the Court expanded the so-called major questions doctrine to reject administrative action. Revamping and (for the first time) identifying this doctrine by name, the Court required super-specific statutory delegations before agencies may address "major" political or economic issues. Driven by nondelegation concerns, the Court, in both cases, reinterpreted generous statutory delegations into stingy ones.

Scholars have already begun critiquing these major questions cases,[4] but the Court's atextualism significantly extends beyond the administrative law sphere. In *Brnovich*, the Court ignored the text of the Voting Rights Act (VRA) to diminish federal protections against racial discrimination in voting. Whereas nondelegation principles largely animated *NFIB* and *West Virginia*, federalism concerns drove *Brnovich*. Notwithstanding the text of the VRA, the Court wanted state and local officials, not federal courts, to shape election policy.

The irony is glaring. In the major questions cases, the Court insisted that Congress, not agencies, should be addressing national crises. In *Brnovich*, though, Congress *had* acted, but the Court *still* rewrote the statute to suit its preferences. As commentators have noted, the Court's reformulation of the major questions doctrine is a crucial development in American public law.[5] *Brnovich*, however, makes clear that the Court's project is even broader and more ambitious. Today's Supreme Court seeks to rein in not only administrative authority but national power more generally.

Constitutional concerns underlie the Court's assault on federal authority, but these were statutory cases. Given the Court's preferred interpretive methodology, however, these opinions are deeply problematic. For years, many Justices—especially the conservatives—have insisted that textualism

4. *See, e.g.*, Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4165724; Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262 (2022); Richard L. Revesz, *SCOTUS Ruling in West Virginia Threatens All Regulation*, BLOOMBERG L. (July 8, 2022, 4:00 AM), https://news.bloomberglaw.com/environment-and-energy/scotus-ruling-in-west-virginia-v-epa-threatens-all-regulation (arguing the decision "casts an omnious pall over the nation's regulatory future.").

5. *See supra* note 4.

is the only legitimate method of statutory interpretation.[6] Nevertheless, the majority in each case only weakly gestured toward the statutes' texts.[7] These cases call into question the genuineness of that methodological commitment to textualism. If there is a faithful textualist on the Supreme Court today, it is probably Justice Kagan.[8]

The opinions look no better through the lens of constitutional law. Nondelegation and federalism concerns largely drove these decisions, but the federal policies at issue were not unconstitutional under contemporary doctrine. In fact, the constitutional arguments against the statutes would generally falter under the ordinary modalities of constitutional interpretation—judicial precedent, past practices, structure, originalism, and so on. The challenged policies, then, did not violate constitutional *law* so much as the conservative Justices' constitutional *sensibilities*.

Indeed, the Court itself barely mounted constitutional arguments, alluding to inchoate constitutional principles without actually developing them. Evidently, the conservative Justices felt that broad congressional delegations to administrative agencies implicated nondelegation norms. They likewise believed that the VRA infringed on state officials' election administration. In each case, the Justices objected to an energetic federal government trying to solve the nation's problems. Significantly, though, the Court did not argue that the policies violated the Constitution—perhaps because, under contemporary constitutional law, they didn't. Nevertheless, the Court let these underdeveloped constitutional *conceits* drive its statutory interpretation.[9]

The word "conceit" conveys multiple meanings relevant here. Most obviously, a "conceit" is an individual opinion.[10] More to the point, literary critics use the word to refer to an extended rhetorical device rooted in the imaginary but nevertheless essential to a story.[11] In this sense, a conceit is a fictitious assumption that a reader must accept for a plot to seem plausible.[12]

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6. *See, e.g.*, Victoria Nourse, *The Paradoxes of a Unified Judicial Philosophy: An Empirical Study of the New Supreme Court, 2020–2022*, 38 CONST. COMMENT. (forthcoming 2023) (manuscript at 3), https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=3507&context=facpu.

7. *See infra* Part I.B.

8. One empirical study found that of the eleven Justices to serve on the Court from 2005 to 2011, Justice Kagan relied on textualism the second most. *See* Anita S. Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825, 849 (2017). Only Justice Thomas relied on textualism more, though it is worth noting that he joined the atextualist opinions in the three cases here. *See id.*

9. *See infra* Parts II.A, II.C.

10. *See Conceit*, WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (10th ed. 1990).

11. *See generally* K.K. RUTHVEN, THE CONCEIT (1969).

12. A literary "conceit" can also refer to an elaborate, unexpected comparison. *See* J.A. CUDDON, A DICTIONARY OF LITERARY TERMS AND LITERARY THEORY 147 (5th ed. 2013).

Here, the Justices' statutory interpretation requires invoking constitutional ideas disconnected from contemporary constitutional doctrine. Like a literary conceit, these constitutional conceits are essential to the story (i.e., to the Court's decisionmaking) and yet fictitious (i.e., they do not reflect constitutional law).

Finally, "conceit*ed*" means an "excessive appreciation of one's own worth or virtue."[13] This meaning fits the bill, too. Supreme Court Justices are justifiably proud of their accomplishments. They have all risen to the pinnacle of their profession and deservedly have confidence in their legal acumen. Today's Court, though, pushes past confidence to arrogance, casting aside plain statutory text and longstanding constitutional doctrine to blaze new legal trails. In the cases examined here, the Justices did so even though most legal evidence cut against their preferred outcomes.[14]

In fairness, the Court has long interpreted statutes in light of constitutional concerns, applying a variety of Constitution-based canons of statutory interpretation.[15] The constitutional avoidance canon is the most venerable of these, but there are others, including clear statement rules, nondelegation canons, and, more recently, the major questions doctrine.[16] *NFIB*, *West Virginia*, and *Brnovich*, however, are unusually aggressive in their uses of constitutional ideas in statutory interpretation. Though they fit within the broad tradition of reading statutes in light of the Constitution, these decisions either do not purport to apply these constitutional canons at all (*Brnovich*) or stretch the pre-existing canons almost beyond recognition (*NFIB* and *West Virginia*).

Like some earlier cases applying the constitutional canons, though, the decisions here may foreshadow future changes to constitutional law. The Rehnquist Court, for instance, repeatedly invoked a super-clear-statement rule in service of federalism principles that were probably inconsistent with then-contemporary constitutional doctrine.[17] Within a decade, the Rehnquist Court had issued a series of constitutional decisions vindicating the federalism principles underlying those interpretations. The clear-statement-rule cases, then, portended future changes to constitutional doctrine.[18] Perhaps *NFIB*, *West Virginia*, and *Brnovich* also forecast the shape of constitutional law to come.

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13. *Conceit*, WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (10th ed. 1990).

14. *See* Eric Berger, *The Rhetoric of Constitutional Absolutism*, 56 WM. & MARY L. REV. 667, 680–97 (2015); *infra* Part II.B.

15. *See* WILLIAM N. ESKRIDGE, JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 316–42 (2016); *infra* Part III.

16. *See, e.g.*, William N. Eskridge Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 636 (1992).

17. *See id.* at 635.

18. *See infra* Part III.B.4.

Judicial opinions, though, should be evaluated not as soothsayers but by their own internal rigor. Viewed through any legal lens—statutory texts, constitutional doctrines, or constitutional canons of statutory interpretation—these cases reflect an unusually activist Court. To be sure, the constitutional canons historically have afforded the Court discretion to reframe federal statutes. The recent cases, then, depart from past ones more in degree than kind. Nevertheless, these recent cases exemplify a new and especially ambitious effort in this vein.

The goals and effects of these decisions are to limit national power. They make it harder for the federal government to address serious and emerging crises, including, in these cases, COVID-19, climate change, and the degradation of democracy. The policy implications, however, extend beyond these areas. Barring an unexpected composition change, the Court's anti-regulatory inclinations will likely jeopardize other important federal policies for the foreseeable future.

Part I of this Article argues that *NFIB*, *West Virginia*, and *Brnovich* were atextual decisions. Whatever else might explain these cases, it is not the statutory texts.

Part II identifies the constitutional conceits driving those decisions, contending that those conceits were inconsistent with contemporary constitutional law. Indeed, most familiar modalities of constitutional interpretation would vindicate the policies' constitutionality.

Part III situates these cases within pre-existing constitutional canons of statutory interpretation, arguing that these decisions either ignored the canons or wielded them unusually aggressively.

Part IV explores the legal, political, and policy implications of an ostensibly textualist Court that is so willing to rewrite statutory texts to accomplish its ideological goals.

I. STATUTORY INTERPRETATION ON THE ROBERTS COURT

A. The Would-Be Textualists

More than seven years since his death, Justice Antonin Scalia still looms over the Supreme Court. For three decades, Scalia pushed his fellow Justices to rethink their methodological assumptions.[19] Probably his most important contribution was his insistence that text—and text alone—drives statutory interpretation.[20] While textualism includes numerous

19. *See, e.g.*, Matthew L.M. Fletcher, *Muskrat Textualism*, 116 NW. U. L. REV. 963, 974 (2022).

20. *See generally* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW viii (Amy Gutmann ed., 1997).

variants and complications,[21] its basic commitment is to the language of the statute Congress passed, not a judge's intuitions about legislators' supposed policy objectives.[22]

Most Justices today, especially the conservatives, claim to embrace textualism.[23] In opinions, articles, speeches, and confirmation hearings, they repeatedly swear fealty to the statutory text, often with an explicit nod to Scalia.[24]

Justice Scalia and others offered many reasons for affording the statutory text interpretive primacy.[25] The Constitution requires that federal legislation be passed by both Houses of Congress and be presented to the President.[26] All other interpretive factors, like legislative history, fail to satisfy these bicameralism and presentment requirements. They, therefore, lack the status of law under the Constitution.[27]

Moreover, the statutory text alone has survived the onerous journey through numerous congressional vetogates (i.e., through the many points during the legislative process where proposed legislation can be killed).[28] The statutory text, therefore, best reflects the compromises struck by members of Congress.[29] Other factors, such as legislative history, only tell us what *some* members of Congress may have been thinking. The text, by contrast, reflects

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21. *See, e.g.*, Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 279 (2020) (arguing that textualism is not a unified theory); Benjamin Eidelson & Matthew C. Stephenson, *The Incompatibility of Substantive Canons and Textualism*, 137 HARV. L. REV. (forthcoming 2023) (manuscript at 16), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4330403 ("'[T]extualism' can certainly mean different things in the hands of different theorists and jurists . . . .").

22. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS xxvii (2012).

23. *See, e.g.*, Nourse, *supra* note 6 (manuscript at 3) ("Six of the Supreme Court's Justices publicly claim to be follow [sic] a philosophy known as 'original public meaning' of statutory and constitutional texts.").

24. *See id.* at 11–12, 41.

25. This Article does not take a position on the normative desirability of textualism, though here it briefly rehearses some arguments in its favor.

26. *See* U.S. CONST. art. I, § 7, cl. 2.

27. *See* SCALIA, *supra* note 20, at 35.

28. *See, e.g.*, William N. Eskridge, Jr., *Vetogates and American Public Law*, 31 J.L. ECON. & ORG. 756, 756 (2015).

29. *See, e.g.*, VALERIE C. BRANNON, MICHAEL JOHN GARCIA & CAITLAIN DEVEREAUX LEWIS, CONG. RSCH. SERV., R46562, JUDGE AMY CONEY BARRETT: HER JURISPRUDENCE AND POTENTIAL IMPACT ON THE SUPREME COURT 17–18 (2020) (quoting then-Judge Barrett); Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 65 (1988).

the actual legislative deal.

Furthermore, the statutory text is objective and consequently less easily manipulated than other indicia of statutory meaning.[30] Citing legislative history is like "look[ing] over the heads of the crowd and pick[ing] out your friends."[31] There is, by contrast, just one statutory text.

In light of these and other arguments, other Justices have extolled Scalia's textualism, none more so than Justice Gorsuch.[32] Before he joined the Supreme Court, then-Judge Gorsuch lauded Justice Scalia for his attention to the statutory text.[33] Once on the Court, Justice Gorsuch continued to promote textualism. In perhaps his most famous opinion, *Bostock v. Clayton County*, Justice Gorsuch pronounced, "Only the written word is the law . . . ."[34] In a different opinion, he wrote, "It is not our function 'to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have' intended."[35]

Justice Gorsuch may be the most outspoken textualist, but he is not alone. Justice Barrett, too, has proclaimed her fidelity to textualism.[36] "A judge," she insists, "must apply the law as written."[37] Legislators, she has explained, decided to "writ[e] down and fix[] the law," and judges should follow that text.[38] Then-Judge Kavanaugh echoed these sentiments, too, simply stating, "The text of a law is the law."[39]

The commitment to textualism is not limited to the newer Justices. Justice Thomas, the Court's most-senior member, has long insisted that

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30. *See, e.g.*, SCALIA, *supra* note 20, at 31; Stuart Minor Benjamin & Kristen M. Renberg, *The Paradoxical Impact of Scalia's Campaign Against Legislative History*, 105 CORNELL L. REV. 1023, 1046 n.45 (2020).

31. *See* SCALIA, *supra* 20, at 36 (citing Judge Leventhal).

32. *See generally* Hon. Neil M. Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 CASE W. RSRV. L. REV. 905, 905 (2016).

33. *See id.* at 906–07.

34. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020).

35. Wis. Cent. Ltd. v. United States, 138 S. Ct. 2067, 2073 (2018).

36. *See* Evan Bernick, *Judge Amy Coney Barrett on Statutory Interpretation: Textualism, Precedent, Judicial Restraint, and the Future of Chevron*, YALE J. OF REG.: NOTICE & COMMENT (July 3, 2018), https://www.yalejreg.com/nc/judge-amy-coney-barrett-on-statutory-interpretation-textualism-precedent-judicial-restraint-and-the-future-of-chevron-by-evan-bernick/ ("Judge Barrett is a Textualist.").

37. BRANNON, GARCIA & DEVEREAUX, *supra* note 29, at 2, (quoting then-Judge Barrett).

38. Ed Whelan, *Judge Barrett on Textualism and Originalism*, NAT'L REV. (Sept. 25, 2020, 12:13 PM), https://www.nationalreview.com/bench-memos/judge-barrett-on-textualism-and-originalism/.

39. Brett M. Kavanaugh, *Keynote Address: Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 NOTRE DAME L. REV. 1907, 1910 (2017).

judges must "turn first . . . to the text of the statute."[40] Justice Alito has gotten into the textualism game, too. Though he did not claim to be a textualist in *Bostock*, that case nevertheless pitted his understanding of the text against Justice Gorsuch's.[41]

Significantly, liberals can champion textualism, too. Justice Kagan celebrated Justice Scalia's legacy in remarks at Harvard Law School when she stated, "[W]e're all textualists now."[42] Before Justice Scalia joined the Court, Justice Kagan explained, judges might have asked, "Gosh, what should this statute be?"[43] Thanks to Justice Scalia, they now ask, "[W]hat do the words on the paper say?"[44]

At least if we take the Justices' own statements seriously, textualism is the order of the day. Justice Scalia seems to have won.

B. Atextual Interpretations

On closer examination, though, it's not so clear that the Court is nearly as textualist as it claims. In each of the high-profile cases examined here—*NFIB*, *West Virginia*, and *Brnovich*—the Court departed significantly from the statutory texts. More specifically, the Court interpreted broad statutes narrowly, effectively rewriting them.

1. NFIB v. OSHA

The Occupational Safety and Health Act provides:

> The Secretary shall provide . . . for an emergency temporary standard to take immediate effect . . . if he determines (A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger.[45]

As the COVID pandemic raged in late 2021, the Department of Labor,

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40. Shannon v. United States, 512 U.S. 573, 580 (1994).

41. *See, e.g.*, Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1766 (2020) (Alito, J., dissenting) (arguing that courts should interpret statutes based on how the language would "have been understood by ordinary people at the time of enactment").

42. Harvard Law School, *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg.

43. *Id.*

44. *Id.* Justice Kagan went on to explain that her primary focus in statutory cases is on the text; however, unlike Justice Scalia, she is willing to consider other sources like legislative history when the text is ambiguous. *See id.*

45. 29 U.S.C. § 655(c)(1) (emphasis added).

acting through the Occupational Safety and Health Administration (OSHA), announced a temporary emergency standard pursuant to this statutory authority.[46] Under the Standard, employers with at least 100 employees had to ensure that their employees were fully vaccinated for COVID or, alternatively, that they mask at work and test weekly for COVID.[47] The Standard included some exemptions, such as for employees who work remotely or exclusively outdoors.[48]

The Biden Administration's COVID plan focused on vaccination "because vaccines are the best tool we have to prevent hospitalization and death."[49] Medical experts widely agreed that vaccines were essential to protecting Americans from severe disease and death.[50] Some studies also indicated that unvaccinated persons were more likely to spread COVID to others.[51] By late 2021, however, vaccine hesitancy had become a serious

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46. *See generally* COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61,402 (Nov. 5, 2021) (codified at 29 C.F.R. pts. 1910, 1915, 1917, 1918, 1926, 1928) [hereinafter Emergency Temporary Standard]; Remarks on the COVID-19 Response and National Vaccination Efforts, 2021 DAILY COMP. OF PRES. DOC. 2 (Sept. 9, 2021).

47. *See* Emergency Temporary Standard, *supra* note 46, at 61,402.

48. *See id.* at 61,419 (explaining why individuals who work outside or remote face less danger of exposure).

49. *See National COVID-19 Preparedness Plan*, THE WHITE HOUSE, https://www.whitehouse.gov/covidplan/ (last visited Aug. 13, 2023).

50. *See How to Protect Yourself and Others*, CTRS. FOR DISEASE CONTROL & PREVENTION: COVID-19, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html (July 6, 2023) (noting that vaccines are effective against severe COVID symptoms such as hospitalization).

51. *See* Sophia T. Tan, Ada T. Kwan, Isabel Rodríguez-Barraquer, Benjamin J. Singer, Hailey J. Park, Joseph A. Lewnard, et al., *Infectiousness of SARS-CoV-2 Breakthrough Infections and Reinfections During the Omicron Wave*, 29 NATURE MED. 358, 362 (2023) (arguing that vaccines reduce the infectiousness of persons with Omicron variant); *see also* Christopher Baker & Andrew Robinson, *Your Unvaccinated Friend Is Roughly 20 Times More Likely to Give You COVID*, THE CONVERSATION (Oct. 27, 2021, 3:13 PM), https://theconversation.com/your-unvaccinated-friend-is-roughly-20-times-more-likely-to-give-you-covid-170448 (describing how COVID is contracted and transmitted more by unvaccinated individuals); Laura Kurtzman, *COVID-19 Vaccines, Prior Infection Reduce Transmission of Omicron*, UNIV. CAL. S.F. (Jan. 2, 2023), https://www.ucsf.edu/news/2022/12/424546/covid-19-vaccines-prior-infection-reduce-transmission-omicron (summarizing a study finding that vaccinated people with breakthrough infections were less likely to transmit COVID than unvaccinated persons). Other studies suggested that vaccination did not reduce transmissibility. *See* Chris Stokel-Walker, *What Do We Know About Covid Vaccines and Preventing Transmission?*, BMJ (Feb. 4, 2022), https://www.bmj.com/content/376/bmj.o298 (suggesting that transmission rates between infected vaccinated and unvaccinated individuals is the same). Given how quickly COVID mutated,

obstacle to widespread vaccination. A year after vaccines first became available, over a third of the nation remained unvaccinated.[52]

The Administration hoped that the Standard would result in the vaccination of about 100 million Americans, roughly two-thirds of all workers.[53] While the plan admittedly was part of a larger effort to vaccinate the public, it applied only in the workplace. As the government explained, "unvaccinated individuals remain at much higher risk of severe health outcomes from COVID-19 . . . [and] are much more likely to contract and transmit COVID-19 in the workplace than vaccinated workers."[54]

The Supreme Court in *NFIB* rejected the Standard.[55] The six-Justice per curiam opinion imposed a stay that effectively nullified the program. "Administrative agencies are creatures of statute," the Court explained, and Congress had not provided OSHA with specific enough authority to promulgate the Standard.[56]

In so holding, the Court faulted OSHA for creating too blunt a regulation.[57] Specifically, the Court concluded that the regulation transcended OSHA's jurisdiction over "'occupational' hazards and the safety and health of 'employees.'"[58] Though workers are at risk of transmitting COVID at work, they can also catch it elsewhere in society.[59] Accordingly, the Court determined that COVID "is not an *occupational* hazard in most."[60]

The Court's opinion was notably thin on textual analysis. It attempted to justify its departure from the text by contending that "[t]his [was] no 'everyday exercise of federal power.'"[61] Because the Standard was "a significant encroachment into the lives—and health—of a vast number of

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it is possible that vaccines had different effects on infectiousness at different points in the pandemic.

52. *See* Emily Barone, *What We Can Learn from America's Most Recent COVID-19 Vaccine Converts*, TIME (Mar. 16, 2022, 2:59 PM), https://time.com/6156945/covid-19-vaccine-hesitancy-us/ (describing the decline in people getting vaccines after early 2021).

53. *See* Emergency Temporary Standard, *supra* note 46, at 61,403 (noting how the Standard would reach two-thirds of private sector workers in the country).

54. *Id.*

55. *See* Nat'l Fed'n of Indep. Bus. (NFIB) v. Occupational Safety & Health Admin. (OSHA), 142 S. Ct. 661, 665 (2022) (holding that the Standard exceeded OSHA's authority).

56. *Id.*

57. *See id.* at 664 (noting that only nine percent of landscapers qualified for the exception).

58. *Id.* at 665.

59. *See id.*

60. *Id.* (emphasis in original).

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

employees,"[62] it was not enough that the statute appeared to grant the agency broad authority to address workplace health threats. Rather, the Court insisted that Congress legislate to address COVID vaccines specifically.[63] "'We expect Congress to speak clearly,'" the Court summarized, "if it wishes to assign to an executive agency decisions 'of vast economic and political significance.'"[64]

This idea that an agency may not regulate important matters without specific congressional authorization is at the heart of today's major questions doctrine. Though the majority did not explicitly invoke it, the doctrine clearly drove its decision. Instead of parsing the relevant statutory language, the Court instead emphasized the policy's significance. Because the policy was important, the Court then asked, "whether the Act plainly authorizes the Secretary's mandate."[65] The answer, of course, was no. After all, Congress wrote the statute decades before COVID.

In his concurrence, Justice Gorsuch reasoned similarly, though he identified the major questions doctrine by name. Like the majority, he concluded that Congress had not spoken clearly enough.[66] In response to the argument that the relevant statute actually *did* give OSHA broad emergency authority to address infectious diseases, Justice Gorsuch responded that a "lone statutory subsection" was insufficient, especially since it "was not adopted in response to the pandemic, but some 50 years ago . . . ."[67]

Both the majority and concurrence waved away the statutory language. Because the agency was doing something significant and the statute itself did not address COVID specifically, the agency's action was invalid. The textual contours of Congress' statutory delegation were, apparently, irrelevant.

In so ruling, the Justices declined to engage with capacious statutory language granting OSHA broad authority to address threats to workplace health. The statute's purpose section provides that Congress intends to "assure . . . safe and health[y] working conditions . . . by authorizing the Secretary of Labor to set mandatory occupational safety and health standards"[68] and "by developing *innovative* methods . . . for dealing with occupational safety and health problems."[69] These standards could include

62. *Id.*

63. *Id.* at 665–66.

64. *Id.* at 667 (quoting Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021)).

65. *Id.* at 665.

66. *See id.* at 667 (Gorsuch, J., concurring).

67. *Id.* at 668.

68. 29 U.S.C. § 651(b)(3).

69. § 651(b)(5) (emphasis added).

measures "encouraging employers and employees . . . to institute new . . . programs for providing safe and healthful working conditions."[70]

This language clearly announces Congress's broad intentions to promote workplace health, including through "innovative" programs.[71] At a minimum, these provisions should inform how judges read the rest of the statute. Nowhere, though, did the majority grapple with this language.

Nor did it really wrestle with the statute's operative language. Under the statute, the COVID virus clearly qualified as a "new hazard" and a "physically harmful" "agent."[72] As the dissent pointed out, a "hazard" is a "source of danger," and an "agent" is a "chemically, physically, or biologically active principle."[73] Given that a virus is a "causative *agent* of an infectious disease," the statutory language quite plainly authorized the OSHA standard.[74]

The majority placed substantial weight on the argument that because employees cannot undo their vaccinations when they go home, the vaccine requirement extended beyond OSHA's authority.[75] OSHA's authority, it contended, reaches only *workplaces*. By contrast, according to the Court, the Standard extended beyond workplaces.

This argument was divorced from the plain language of both the regulation and the statute. The regulation itself explicitly allowed workers to choose between vaccination, on the one hand, and masking and testing, on the other.[76] If a worker objected to vaccination, they could test weekly and mask at work.[77] It is not really accurate, then, to claim, as the majority did, that the Standard necessarily reached beyond the workplace. It only did for those workers who selected the vaccine option.

More importantly, the majority conjured limitations that appear nowhere in the statutory language. The majority complained that "[a]lthough COVID-19 is a risk that occurs in many workplaces," it is not uniquely an employment hazard.[78] Rather, it is also a hazard that appears "everywhere

70. § 651(b)(1).

71. *See* § 651(b)(3), (5).

72. § 655(c)(1)(A); NFIB v. OSHA, 142 S. Ct. 661, 673 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting).

73. 142 S. Ct. at 672 (Breyer, Sotomayor & Kagan, JJ., dissenting) (citing MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2005)) (definitions of "agent" and "hazard").

74. *See id.* (emphasis added) (citing MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2005)) (definition of virus).

75. *Id.* at 665 (quoting *In re* MCP No. 165, 20 F.4th 264, 274 (6th Cir. 2021) (Sutton, C. J., dissenting)).

76. *See* Emergency Temporary Standard, *supra* note 46, at 61,551–53.

77. *See id.* at 61,552–53.

78. *NFIB*, 142 S. Ct. at 665.

else that people gather."[79] As a result, the Court reasoned that OSHA's jurisdiction did not extend to COVID.[80]

Nothing in the statutory text, however, limits OSHA to address only dangers that appear in the workplace and nowhere else.[81] Nor is such a reading consistent with common usage of "occupational" and "workplace" hazards in employment law. Indeed, the terms "workplace" or "occupational" hazards ordinarily encompass dangers workers face in the workplace, even if those same hazards also exist in the broader world.[82] A workplace danger to human health does not cease to be an "occupational" hazard simply because it also exists elsewhere in society.

2. West Virginia v. EPA

The Clean Air Act Amendments of 1970 transformed the nation's environmental regulatory framework.[83] The statute authorized the development of comprehensive regulations to limit airborne emissions from stationary sources, like industrial factories, and mobile sources, like automobiles.[84] Congress subsequently amended the law in 1977 and again in 1990.[85]

Section 111 of the Act instructs the EPA to regulate stationary sources—that is, non-movable sources of air pollution like industrial smokestacks.[86] The Act prescribes different but interrelated regulatory approaches for new or modified sources of air pollution, on the one hand, and existing sources,

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79. *Id.*

80. The Court, by a 5–4 vote, did uphold a different agency's vaccine policy stipulating that in order to receive Medicare and Medicaid funding, hospitals must ensure that their staff are (mostly) vaccinated against COVID. *See* Biden v. Missouri, 142 S. Ct. 647, 653 (2022) (per curiam). A significant difference between that case and *NFIB* was that OSHA's Standard had a broader reach than the medical vaccine policy. *Compare Biden*, 142 S. Ct. at 652–53 *with NFIB*, 142 S. Ct. at 665–66.

81. *See* 29 U.S.C. § 655(c)(1) (requiring the Secretary to adopt "an emergency temporary standard" to protect employees "exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards.").

82. *See* STEVEN L. WILLBORN, STEWART J. SCHWAB & GILLIAN L. L. LESTER, EMPLOYMENT LAW: CASES AND MATERIALS 968 (7th ed. 2022).

83. *See* ROBERT V. PERCIVAL, CHRISTOPHER H. SCHROEDER, ALAN S. MILLER & JAMES P. LEAPE, ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 449 (9th ed. 2021).

84. *Evolution of the Clean Air Act*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/clean-air-act-overview/evolution-clean-air-act (Nov. 28, 2022).

85. *See* PERCIVAL, SCHROEDER, MILLER & LEAPE, *supra* note 83, at 455.

86. *See* 42 U.S.C. § 7411(b)(1(B) ("[T]he Administrator shall publish proposed regulations, establishing Federal standards of performance for new sources [of air pollution] . . . .").

on the other. Section 111(b) requires the EPA to determine whether a new or modified industrial source of air pollution "causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare."[87] If so, the statute sets new source performance standards for the emission of air pollutants based on the "best system of emission reduction" (BSER) to limit such pollution.[88] Each state then "may develop and submit to the Administrator a procedure for implementing and enforcing standards of performance for new sources located in such State."[89]

Section 111(d) mandates that performance standards also be set for existing sources of air pollution. More specifically, when the EPA regulates a pollutant (say, carbon dioxide) from *new* power sources, § 111(d) requires the EPA also to regulate that same pollutant's emissions from existing sources.[90] Once again, the EPA establishes guidelines for these performance standards based on what it determines to be the "best system of emission reduction."[91] States then submit a plan to the EPA to comply with such EPA guidelines.[92] The EPA, in turn, decides whether to accept the state's plan or reject it and create its own.[93]

Pursuant to this statutory authority, the EPA, under President Barack Obama, issued the Clean Power Plan in 2015.[94] Historically, under the Clean Air Act, the EPA had set emissions limits under § 111 based on the performance of technology that reflected the BSER (e.g., a certain amount of pollution per hour).[95] Industries often installed new technology to help it comply with those emissions limits. For example, many coal plants use "scrubbers" to reduce emissions of certain pollutants like sulfur dioxide.[96]

However, the approach that proved effective for sulfur dioxide was less promising for greenhouse gases like carbon dioxide.[97] The EPA determined

87. § 7411(b)(1)(A).

88. § 7411(a)(1), (c)(1).

89. § 7411(c)(1).

90. § 7411(d)(1); West Virginia v. EPA, 142 S. Ct. 2587, 2602 (2022).

91. *See* 42 U.S.C. § 7411(a)(1), (d)(1).

92. § 7411 (d)(1)(A).

93. *See* § 7411(d)(2).

94. *See* U.S. ENV'T PROT. AGENCY, OVERVIEW OF THE CLEAN POWER PLAN: CUTTING CARBON POLLUTION FROM POWER PLANTS 1 (2015).

95. *See* PERCIVAL, SCHROEDER, MILLER & LEAPE, *supra* note 83, at 482.

96. *See id.* at 518.

97. Though Congress likely did not have climate change in mind in 1970, greenhouse gases "may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7411(b)(1)(A); *see also* Massachusetts v. EPA, 549 U.S. 497, 528 (2007) (holding that the Clean Air Act's text "forecloses" reading that carbon dioxide is not air pollutant).

that technological adjustments to existing stationary sources would be very costly and yield only small reductions in greenhouse gas emissions.[98] Consequently, the EPA redefined the BSER to include "generation shifting"—that is, a shift from, for example, coal-based power to renewable energy, like wind and solar power.[99] The Clean Power Plan then identified an emissions limit in the guidelines based on this "best system."[100]

The Clean Power Plan never went into effect. First, the Supreme Court stayed its implementation.[101] Then, Donald Trump won the presidency, and his Administration repealed the rule altogether. By the time Joe Biden became president, market forces had rendered the Clean Power Plan obsolete. Due to technological advancements, most of the Plan's proposed emissions targets had already been satisfied.[102] The EPA, therefore, abandoned it to pursue a new plan.[103]

Though the Clean Power Plan never had been and never would be in effect, the Supreme Court in *West Virginia v. EPA* nevertheless pronounced its illegality.[104] The majority framed the issue as "whether restructuring the Nation's overall mix of electricity generation, to transition from 38% coal to 27% coal by 2030, can be the '[best system of emission reduction]' within the meaning of [§ 111]."[105] Writing for the Court, Chief Justice Roberts held that such generation shifting did not constitute the "best system of emissions reduction" and that the EPA therefore lacked such authority.[106]

As in *NFIB*, the Court skimped on textual analysis.[107] Rather than parsing the phrase "best system of emission reduction" or the other key statutory language, the Chief Justice instead contended that this was an "extraordinary" case that ought not be decided "within routine statutory interpretation."[108] As a result, textual evidence supporting the EPA's

98. *See* Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,661, 64,727–28 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60) [hereinafter Emission Guidelines].

99. *See id.* at 64,510, 64,728–29.

100. *See id.* at 64,723–36.

101. *See* West Virginia v. EPA, 577 U.S. 1126 (2016) (staying rule).

102. *See* Jonathan H. Adler, *West Virginia v. EPA, Some Answers About Major Questions*, 2022 CATO SUP. CT. REV. 37, 48 (2022) ("[T]he relevant emission reduction targets had been met or surpassed in much of the country.").

103. For a more comprehensive discussion of the Clean Power Plan and the statutory background, see PERCIVAL, SCHROEDER, MILLER & LEAPE, *supra* note 83, at 538–40.

104. *See infra* Part IV.A.4

105. West Virginia v. EPA, 142 S. Ct. 2587, 2607 (2022).

106. *See id.* at 2615–16.

107. *See, e.g.*, Adler, *supra* note 102, at 38.

108. *West Virginia*, 142 S. Ct. at 2608.

assertion of authority was insufficient.[109] Instead, the EPA needed "clear congressional authorization" for the precise regulation.[110]

Like *NFIB*, the Court treated this as a major questions doctrine case,[111] only this time it did so explicitly.[112] Restructuring the country's energy production from thirty-eight percent coal to twenty-seven percent coal was an important political and economic issue.[113] Accordingly, Congress had to speak specifically to this precise exercise of the EPA's authority.[114] "A decision of such magnitude and consequence," the Court concluded, "rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body."[115]

Citing earlier "major questions" cases—even though the Court had not previously labeled them as such—the Court acknowledged that those earlier "regulatory assertions had a colorable textual basis."[116] Translation: when the Court believes an agency is doing something "major," broad statutory delegations don't cut it. The Court instead requires that Congress specifically authorize the regulation at issue.[117]

To the extent the Court engaged with the statutory text, it contended that § 111(d) was an "ancillary" provision invoked by the EPA only "a handful of times."[118] Because § 111(d) was really just a "[statutory] backwater,"[119] the EPA could not rely upon it.[120] Rather than offering an alternative reading, the Chief Justice instead emphasized that the EPA was invoking § 111(d) to seize previously unclaimed authority.[121] In other words, even though the Act

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109. *See id.* at 2609 ("[S]omething more than a merely plausible textual basis for the agency action is necessary.").

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

111. As in *NFIB*, Justice Gorsuch, this time joined only by Justice Alito, added a concurrence emphasizing the constitutional pedigree of the major questions doctrine. *See West Virginia*, 142 S. Ct. at 2616–26 (Gorsuch, J., concurring).

112. *See id.* at 2610 ("[T]his is a major questions case.").

113. *See id.* at 2612 (arguing that the EPA was claiming the authority to "demand much greater reductions in emissions").

114. *See id.* at 2609, 2615.

115. *Id.* at 2616.

116. *Id.* at 2607–09.

117. *See* Deacon & Litman, *supra* note 4 (manuscript at 30).

118. *See West Virginia*, 142 S. Ct. at 2602.

119. *Id.* at 2613.

120. *See id.*

121. *Id.* at 2610 ("In arguing that Section 111(d) empowers it to substantially restructure the American energy market, [the] EPA 'claim[ed] to discover in a long-extant statute an unheralded power' representing a 'transformative expansion in [its] regulatory authority.'" (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

seemed to authorize the EPA to require shifts to cleaner energy, we ought not take that language seriously because the EPA hadn't done so before.

As in *NFIB*, the majority's argument isn't meritless. Once again, though, the argument isn't textual. To say that the EPA has rarely invoked a provision is not to elucidate that provision's language.

The Court, indeed, conspicuously neglected to explain why the EPA's authority to select the "best system of emission reduction" cannot include generation shifting. The EPA had found that a transition from coal to renewable energy sources would reduce emissions significantly more than technological adjustments to power plants.[122] Whereas scrubbers effectively reduce certain kinds of stationary source emissions, such as sulfur dioxide, there was no comparably affordable and effective technology for reducing greenhouse gases at the emissions source.[123] In theory, carbon capture and sequestration may reduce carbon dioxide; however, at the time of the Clean Power Plan, that technology was much more expensive than scrubbers—and, indeed, than renewable energy.[124]

Significantly, the statute defines the "best system of emission reduction" with reference to both "cost" and the extent to which the best system's merits have "been adequately demonstrated."[125] Carbon capture and sequestration may have been theoretically plausible approaches to reducing greenhouse gases at the time of the Clean Power Plan, but at the time, they were more expensive and less effective than renewable energy sources.[126] Generation shifting, then, was a more cost-effective method of reducing greenhouse gas emissions and, therefore, the "best system of emission reduction" under the

122. *See* Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units, 70 Fed. Reg. 28,606, 28,618–19 (May 18, 2005) (to be codified at 40 C.F.R. pts. 60, 72, 75).

123. *See* Emission Guidelines, *supra* note 98, at 64,883 (noting that carbon capture and sequestration would entail substantial costs that "would be expected to affect the cost and potentially the supply of electricity on a national basis").

124. *See, e.g.*, Wendy B. Jacobs & Michael Craig, *Legal Pathways to Widespread Carbon Capture and Sequestration*, 47 ENV'T L. REP. 11022, 11023 (2017) (citing "high cost of capturing and compressing carbon dioxide" as major reason why carbon capture and sequestration has not been widely adopted); Heather Payne, *Chasing Squirrels in the Energy Transition*, 52 ENV'T L. 237, 237 (2022); Charles Harvey & Kurt House, *Every Dollar Spent on This Climate Technology Is a Waste*, N.Y. TIMES (Aug. 16, 2022), https://www.nytimes.com/2022/08/16/opinion/climate-inflation-reduction-act.html. The technology, however, keeps evolving. A recent EPA proposed rule would rely heavily on carbon capture and sequestration. *See* Press Release, Env't Prot. Agency, EPA Proposes New Carbon Pollution Standards for Fossil Fuel-Fired Power Plants to Tackle the Climate Crisis and Protect Public Health (May 11, 2023).

125. *See* 42 U.S.C. § 7411(a)(1).

126. *See* Harvey & House, *supra* note 124.

statute. The majority, however, conveniently sidestepped the statutory language considering cost and efficacy.

Moreover, as in *NFIB*, the majority ignored provisions announcing the statute's broad purposes. Those provisions found that "the growth in the amount and complexity of air pollution . . . has resulted in mounting dangers to the public health and welfare"[127] and that federal "leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution."[128] The "primary goal" was to "encourage…reasonable Federal, State, and local governmental actions . . . for pollution prevention."[129] Of course, purposivist arguments are often distinct from textual ones, except here, Congress included in the statutory text the law's primary goal: reducing air pollution.

As in *NFIB*, the argument is not that there were no plausible arguments in support of the majority's conclusion. The Clean Air Act is admittedly confusing, so even good-faith textualists can disagree about its meaning. The point here, though, is that the Court glossed over the language, focusing instead on the dangers of agency overreach. As a result, the Court took another broad statutory delegation and rewrote it into a narrow one.

3. Brnovich v. DNC

Brnovich v. Democratic National Committee (DNC) illustrates that the Court also narrowly reads broad statutes outside the administrative law sphere. Not long after the Fifteenth Amendment promised that the right to vote should not be abridged on account of race,[130] states began devising measures to disenfranchise Black people and other racial minorities. States adopted grandfather laws, poll taxes, literacy tests, and other measures to prevent African Americans from voting.[131] These practices continued in one form or another for nearly a century.

After decades of inaction and half-measures, Congress passed the Voting Rights Act of 1965. Section 2 of the VRA "guarantee[d] that members of every racial group will have equal voting opportunities."[132] In *City of Mobile v. Bolden*,[133] the Supreme Court construed § 2 to apply to facially neutral voting practices "only if [they were] motivated by a discriminatory

127. 42 U.S.C. § 7401(a)(2).

128. § 7401(a)(4).

129. § 7401(c).

130. *See* U.S. CONST. amend. XV.

131. *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS 30–31 (2004).

132. Brnovich v. Democratic Nat'l Comm. (DNC), 141 S. Ct. 2321, 2350 (2021) (Kagan, J., dissenting).

133. 446 U.S. 55, 62 (1980).

purpose."[134] Congress in 1982 responded to *Bolden* by passing VRA amendments to clarify that disparate impact, not only discriminatory purpose, could create a violation.[135]

Under the 1982 amendments, which remain in place today, § 2(a) stipulates:

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which *results* in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . .[136]

Subsection (b) clarifies that a violation of subsection (a) exists:

> [I]f, based on the totality of circumstances, it is shown that the political processes leading to nomination or election . . . are not equally open to participation by members of [a racial group] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.[137]

Brnovich involved the application of § 2 to two Arizona regulations governing the collection and counting of votes—that is, to the time, place, and manner of elections. One Arizona provision discards votes cast by eligible voters who cast their ballots in the wrong precinct.[138] Another makes it a crime for most people to collect an early ballot (with some limited exemptions).[139]

Despite strong evidence that the provisions disproportionately impacted minority voters,[140] the Court upheld both provisions. Though earlier decisions, like *Thornburg v. Gingles*,[141] had already construed § 2 in the vote-dilution context (e.g., district lines that reduce the political power of certain racial minority groups), the Court emphasized that it had never before decided a § 2 time, place, manner case. The Court, therefore, found the vote-dilution precedent irrelevant.[142]

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134. *Id.*

135. Though the majority and dissent in *Brnovich* disagreed about the significance of these amendments, the consensus among scholars and lower courts is that Congress deliberately displaced *Bolden*'s discriminatory intent requirement. *See, e.g.*, Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After Shelby County*, 115 COLUM. L. REV. 2143, 2163–68 (2015); Justin Levitt, *Quick and Dirty: The New Misreading of the Voting Rights Act*, 43 FLA. ST. U.L. REV. 573, 587 n.69 (2016) (collecting cases).

136. 52 U.S.C. § 10301(a) (emphasis added).

137. § 10301(b).

138. *See* ARIZ. REV. STAT. ANN. § 16-584(E) (2018).

139. *See* § 16-1005(H)–(I).

140. *See infra* Part IV.A.3.

141. 478 U.S. 30 (1986).

142. *See* Brnovich v. DNC, 141 S. Ct. 2321, 2333 (2021) ("In the years since *Gingles*, we

From there, the Court proceeded to reject a disparate-impact analysis.[143] Like *NFIB* and *West Virginia*, its analysis was atextual. Notwithstanding the statute's "results in" language, Justice Alito, writing for the majority, emphasized that a disparate-impact analysis would burden states too much. Justice Alito argued that requiring States to demonstrate that they could not protect their legitimate interests in ways that did not disproportionately burden voters of a particular race would "have the effect of invalidating a great many neutral voting regulations with long pedigrees that are reasonable mean of pursuing legitimate interests."[144]

This reading fundamentally altered the statute. The 1982 Amendment categorically prohibited voting rules "which result[] in a denial or abridgement of the right . . . to vote on account of race or color."[145] As Justice Kagan put it in dissent, this "'results in' language . . . tells courts that they are to focus on the law's effects."[146] The Court waved away that language, contending that § 2(b) "sets out what must be shown to [establish] a § 2 violation."[147]

Whereas *NFIB* and *West Virginia* steered around inconvenient language, *Brnovich* rewrote the statute altogether. To determine whether voting was "equally open" to all "based on the totality of the circumstances" under § 2(b),[148] the Court invented several factors. The Court's newly created factors included "the size of the burden imposed by a challenged voting rule;" "the degree to which a voting rule departs from what was standard practice when § 2 was amended in 1982;" "the size of any disparities in a rule's impact on members of different racial or ethnic groups;" "the opportunities provided by a State's entire system of voting;" and "the strength of the state interests served by a challenged voting rule . . . ."[149] Admittedly, some of these factors, like the size of the disparate impact, seem like reasonable glosses on the statute. After all, magnitude inquiries appear in other disparate-impact analyses.[150] However, other factors, such as comparing voting rules against 1982 standards and evaluating other voting opportunities, seem not only contrived but flatly inconsistent with the VRA's text, which tries to ensure

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have heard a steady stream of § 2 vote-dilution cases, but until today, we have not considered how § 2 applies to generally applicable time, place, or manner voting rules." (citing Thornburg v. Gingles, 478 U.S. 30 (1986))).

143. *See id.* at 2340.

144. *Id.* at 2341.

145. 52 U.S.C. § 10301(a).

146. 141 S. Ct. at 2357 (Kagan, J., dissenting).

147. *Id.* at 2332.

148. 52 U.S.C. § 10301(b).

149. *Brnovich*, 141 S. Ct. at 2338–41.

150. *See* Kevin Tobia, *Disparate Statistics*, 126 YALE L.J. 2382, 2395 (2017) (noting that statistical "magnitude inquiry" is important component of disparate-impact analysis).

that racial minorities do not have "less opportunity than other members of the electorate to participate in the political process."[151]

When the Court applied its new factors to Arizona, it found that both challenged provisions passed § 2 muster. The out-of-precinct rule, which required voters to identify their correct polling place and travel there, did not exceed "the usual burdens of voting" and, according to the Court, produced only a small racial disparity.[152] The Court was likewise skeptical that the ballot collection measure produced a racial disparity. It argued that "differences in employment, wealth, and education may make it virtually impossible for a State to devise rules that do not have some disparate impact."[153] But, even if there *were* a racial disparity, Justice Alito found that the State's compelling interest in deterring voter fraud sufficed to avoid § 2 liability.[154]

The Court's reading canceled out § 2's "results in" language. Justice Alito was correct that § 2(b) clarifies what counts as a violation under § 2(a), but § 2(b)'s language nowhere erases § 2(a)'s results test.[155] Justice Alito's convoluted analysis of subsection (b), though, ended with just such a conclusion. Indeed, he called the dissent's focus on "disparate impact" a "radical project,"[156] even though results-based analysis is precisely what the statutory language commands. As Justice Kagan wrote, § 2 "tells courts . . . to eliminate facially neutral . . . electoral rules that unnecessarily create inequalities of access to the political process."[157]

While some of Justice Alito's factors may be justified as part of a disparate-impact analysis, they collectively undo § 2's text. For example, he cited the prevention of fraud as a "strong and entirely legitimate state interest . . . ."[158] In theory, this may seem fair enough. In practice, however, the Court required no empirical showing about the risk of fraud.[159] Under *Brnovich*, then, a State's mere *assertion* of fraud prevention is apparently sufficient to uphold voting procedures against VRA challenges.[160] In other words, under the majority's approach, the VRA *does* permit a state to enact voting

151. 52 U.S.C. § 10301(b).

152. 141 S. Ct. at 2343–46.

153. *Id.* at 2343.

154. *Id.* at 2347 (citing Purcell v. Gonzalez, 549 U.S. 1, 4 (2006) (per curiam)).

155. *See* 52 U.S.C. § 10301(a)–(b).

156. *Brnovich*, 141 S. Ct. at 2341.

157. *Id.* at 2361 (Kagan, J., dissenting).

158. *Id.* at 2340.

159. Such a showing would be difficult given that numerous studies have found no evidence of widespread voter fraud. *See, e.g.*, Anthony J. Gaughan, *Illiberal Democracy: The Toxic Mix of Fake News, Hyperpolarization, and Partisan Election Administration*, 12 DUKE J. CONST. L. & PUB. POL'Y, 57, 101–02 (2017) (reviewing and summarizing several studies).

160. *See Brnovich*, 141 S. Ct. at 2343.

procedures that "result" in diminished voting opportunities for racial minorities, so long as it is motivated to combat fraud (or, presumably, another important state interest). Apparently, policy trumps text.[161]

Brnovich is so unmoored from the VRA's text that the dissent described it as "mostly inhabit[ing] a law-free zone."[162] Justice Alito responded that the "five relevant circumstances . . . all stem from the statutory text . . . ."[163] It is utterly unclear, though, how they do. Justice Alito likely sidestepped the text because its breadth did not permit his holding. As Kagan put it, "To read [the VRA] fairly, then, is to read it broadly. And to read it broadly is to do much that the majority is determined to avoid."[164]

C. Summary: Atextual Statutory Interpretation

The statutes in these three cases were broad, but they were reasonably clear as these things go.[165] Nevertheless, in each case, textual analysis took a backseat to the Court's crusade against what it sees as excessive federal power. As a result, the Court was able to rewrite or ignore broad statutory language.

To be fair, the Court's arguments were not entirely frivolous. From the Court's standpoint, each of these situations involved governmental efforts to apply old statutes to new problems.[166] The Occupational Safety and Health Act wasn't enacted with COVID in mind (though it did empower OSHA to protect against new threats to workplace health and safety).[167] The 1970 Clean Air Act Amendments predated contemporary preoccupations with climate change (though whether the 1990 amendments did is debatable, and the Supreme Court has held that the Act *does* authorize the EPA to regulate greenhouse gases).[168] The VRA was passed when most Southern states

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161. *See, e.g.*, Gonzalez v. City of Aurora, 535 F.3d 594, 597 (7th Cir. 2008) (emphasizing "results in" language).

162. 141 S. Ct. at 2361 (Kagan, J., dissenting).

163. *Id.* at 2342.

164. *Id.* at 2361 (Kagan, J., dissenting).

165. Admittedly, the Clean Air Act is complicated, but it also grants the EPA broad authority. *See* PERCIVAL, SCHROEDER, MILLER & LEAPE, *supra* note 83, at 450–56.

166. *See* Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 72 (2014).

167. *See supra* Part I.B.1.

168. *See* Massachusetts v. EPA, 549 U.S. 497, 528 (2007); West Virginia v. EPA, 142 S. Ct. 2587, 2608 (2022); Emission Guidelines, *supra* note 97. *Compare* Adler, *supra* note 102, at 40 (noting that "[s]omewhat conspicuously" Congress did not pass Clean Air Act amendments specifically to mitigate global warming), *with* J. Christopher Baird, *Trapped in the Greenhouse?: Regulating Carbon Dioxide after* FDA v. Brown & Williamson Tobacco Corp., 54 DUKE L.J. 147,

systematically denied African Americans the right to vote (though this argument is weaker for the 1982 amendments).[169] In the conservative Justices' eyes, if Congress wants to address new situations, it should pass new statutes.

This aversion to using old statutes to solve new problems may not be crazy, but in these cases, it was atextual. The statutes at issue were all broad. Presumably, Congress wanted to deal with workplace safety, air pollution, and voting rights in ways that would not require future Congresses to pass new legislation when new problems in those areas arose.[170] The conservative Justices may disapprove of such sweeping legislation, but genuine textualists would respect Congress's language.

The cases here, it should be said, are not necessarily representative of the Roberts Court's statutory interpretation more generally. Anita Krishnakumar's 2017 empirical study of the Roberts Court concluded that the Court rarely relied on substantive canons as an "escape valve" for textualism but instead used other considerations, such as precedent and practical consequences.[171] To the extent they rely heavily on substantive canons (i.e., the major questions doctrine) or other substantive norms to shape statutory interpretation,[172] the cases examined here appear to be outliers.

These cases may also be outliers in their atextualism. As Victoria Nourse puts it, the Roberts Court's statutory interpretation often includes "minute dissection of text."[173] The three cases here, then, may be somewhat unusual in just how little the statutory texts mattered.

On the other hand, textualism may be doing less to decide statutory cases today than the Justices like to admit. Professor Nourse also finds that, while frequently invoked, textualism often did not constrain the Court's outcomes because the Justices frequently interpret texts differently.[174] Indeed, the textualist Justices themselves often openly disagreed about which particular part of the text counted and what it meant.[175] In those cases where the Justices do not agree on the text's meaning, they typically embrace consequentialism (i.e., results-motivated reasoning) to guide their decisionmaking.[176] While the three cases' atextualism may be unusual, these cases *do* employ consequentialist

157 (2004) (arguing that by 1990 Congress was well aware of global climate change and had it in mind when it passed 1990 amendments).

169. *See supra* Part I.B.3.

170. *See infra* Part II.B.1.a.iii.

171. *See* Krishnakumar, *supra* note 8, at 829–30, 886.

172. *See supra* Part II.A.

173. Nourse, *supra* note 6 (manuscript at 15).

174. *See id.* (manuscript at 22–23).

175. *See id.* (manuscript at 21, 29–31).

176. *See id.* (manuscript at 31–33).

reasoning. In at least that regard, these cases are consistent with both Nourse's and the broader literature's findings.[177]

Regardless of whether the three cases here fit neatly into larger patterns, they tell a crucial story. Significantly, the political and policy stakes were very high in each. It may be easier for Justices to follow their methodological preferences in more run-of-the-mill cases. However, cases about COVID vaccines, climate change, and voting rights are hardly run-of-the-mill.

To be sure, there are other recent highly politicized cases in which the Court *does* purport to engage in textual analysis. *Bostock* is a good example.[178] Significantly, though, the *Bostock* majority and dissent interpreted the relevant text in radically different ways. Some commentators have even contended that textualism actually did little real work there.[179] To that extent, while *Bostock* at least purported to analyze the statutory text, that case also suggests important variations within textualism.

Most striking about the instant cases is how little the Court looked at text at all. The Court's readings, indeed, were so atextual that Justice Kagan took the extraordinary step in *West Virginia* of calling out the majority's hypocrisy. Recalling her earlier statement that "we're all textualists now,"[180] Kagan revised her views. "It seems I was wrong," she wrote, "The current Court is textualist only when being so suits it."[181]

II. CONSTITUTIONAL CONCEITS IN STATUTORY INTERPRETATION

Though the Court never said the statutes in these cases were unconstitutional, it let constitutional anxieties about expansive federal power drive its statutory interpretation. In that regard, these cases are hardly

177. *See generally* LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998) (applying strategic analysis and examining judicial decisions at the Supreme Court); William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083 (2008) (surveying 1,014 Supreme Court cases between *Chevron* and *Hamdan* involving an agency's interpretation of a statute).

178. Bostock v. Clayton Cnty., Ga., 140 S. Ct. 1731, 1754 (2020) (holding that the Civil Rights Act protects employees against discrimination because they are gay or transgender).

179. *See* Anuj C. Desai, *Text Is Not Enough*, 93 U. COLO. L. REV. 1, 2 (2022) ("*Bostock* . . . has nothing to do with textualism."); Mitchell N. Berman & Guha Krishnamurthi, Bostock *was Bogus: Textualism, Pluralism, and Title VII*, 97 NOTRE DAME L. REV. 67, 72 (2021) ("[T]extualism . . . do[es] not license the results that Justice Gorsuch reached in *Bostock* . . . .").

180. West Virginia v. EPA, 142 S. Ct. 2587, 2641 (2022) (Kagan, J., dissenting) (quoting Harvard Law School, *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg).

181. *Id.*

anomalous. To borrow from Gillian Metzger, the Court's recent statutory and administrative law cases feature a "heavy constitutional overlay."[182]

This Section explores the constitutional conceits driving the Court's statutory interpretation.[183] Part A introduces the primary conceits driving these cases: nondelegation concerns in *NFIB* and *West Virginia*, federalism concerns in *Brnovich*. It, then, briefly turns to some secondary conceits that also informed the Court's thinking: individual rights and democratic accountability. Part B argues that the constitutional ideas behind these conceits are inconsistent both with contemporary constitutional doctrine and with most standard modalities of constitutional interpretation. Part C briefly concludes that the Court abandoned the statutory texts in these cases to vindicate inchoate constitutional values that are not, in fact, constitutional law.

A. Constitutional Conceits Driving Statutory Interpretation

1. Primary Constitutional Conceits

a. Nondelegation Conceits

In *NFIB* and *West Virginia*, the Court's principal constitutional concern was the delegation of broad authority to administrative agencies.[184] In the majority's eyes, Congress, not administrative agencies, should make policy. Executive policymaking by agencies like OSHA and the EPA raises separation of powers concerns. The Court's invocation of the major questions doctrine, explicitly in *West Virginia* and implicitly in *NFIB*, reflected these anxieties.[185]

As formulated in *NFIB* and *West Virginia*, the major questions doctrine is a cousin of the nondelegation doctrine.[186] Under the nondelegation doctrine, courts will strike down congressional delegations of rulemaking authority to administrative agencies if Congress has not provided the agency with a sufficiently "intelligible principle."[187] Historically, this doctrine has been

182. Gillian E. Metzger, *The Supreme Court 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 34 (2017).

183. *See supra* notes 9–15 and accompanying text.

184. *See supra* Parts I.B.1–2.

185. *See* Sohoni, *supra* note 4, at 263 (describing these as "separation of powers cases in the guise of disputes over statutory interpretation").

186. Earlier major questions cases do not reflect nondelegation concerns to the same extent. *See infra* Part III.A.4.

187. *See, e.g.*, Whitman v. Am. Trucking Ass'n., Inc., 531 U.S. 457, 472 (2001); Nathan Richardson, *Antideference: COVID, Climate, and the Rise of the Major Questions Canon*, 108 VA. L REV. ONLINE 174, 177 (2022).

very deferential,[188] but that may change. Dissenting in *Gundy v. United States*, Justice Gorsuch, joined by Chief Justice Roberts and Justice Thomas, proposed breathing new life into the nondelegation doctrine.[189] Justices Alito and Kavanaugh, too, have signaled interest in this project.[190] Therefore, at least five Justices seem ready to reconsider this area of law.

The Court has yet to do so, but *NFIB* and *West Virginia* took steps in that direction via the major questions doctrine. Those cases nullified administrative action and required far more specific legislative delegations before agencies can act. Like constitutional nondelegation holdings, these decisions expressed a strong preference for congressional, rather than agency, policymaking.

To be sure, there are significant differences between the nondelegation doctrine and the major questions doctrine. A constitutional nondelegation holding would sweep far more broadly, applying beyond "major" agency to *all* agency action under a given statute. A nondelegation holding, thus, disempowers the agency far more completely, effectively prohibiting any agency rulemaking pursuant to a particular statutory authority.[191] A major questions holding, by contrast, merely invalidates a particular agency action and, presumably, applies only when the Court believes the agency is doing something very important.

Nevertheless, a judicial invalidation of agency rulemaking on either nondelegation or major questions grounds forces Congress back to the legislative drawing board. In both cases, the agency cannot promulgate the regulation in question until Congress passes a new statute with more specific delegated authority.[192] Despite the important differences, both doctrines give judges tools to undermine broad statutory delegations to agencies.

In concurrences in both *NFIB* and *West Virginia*, Justice Gorsuch elaborated on the connections between the nondelegation and major questions doctrines and on their ostensible constitutional pedigrees.[193] Because administrative bureaucrats, unlike members of Congress, are unelected, Justice Gorsuch argued, the major questions doctrine helps

188. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 354 (6th ed. 2019); *infra* Part II.B.1.a.i.

189. *See* Gundy v. United States, 139 S. Ct. 2116, 2141 (2019) (Gorsuch, J., dissenting).

190. *See id.* at 2130–31 (Alito, J., concurring); Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., *cert. denied*) ("Justice Gorsuch's scholarly analysis of the Constitution's nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases.").

191. *See, e.g.*, Kristen E. Hickman, *The Roberts Court's Structural Incrementalism*, 136 HARV. L. REV. F. 75, 85 (2022).

192. *See* Deacon & Litman, *supra* note 4 (manuscript at 30).

193. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2616–26 (2022) (Gorsuch, J. concurring); NFIB v. OSHA, 142 S. Ct. 661, 667–70 (2022) (Gorsuch, J., concurring).

protect democracy. The doctrine, thus, helps the Court "fulfill" its "solemn" duty to "ensure that acts of Congress are applied in accordance with the Constitution."[194] The major questions doctrine, Gorsuch wrote, thus helps preserve "self-government, equality, fair notice, federalism, and the separation of powers."[195]

Though the majority opinions in these cases were less explicit, they too seemed to rely on these same ideas.[196] Indeed, the majorities and concurrences justified their approaches by citing the same precedents.[197] Rather than engaging with the statutory texts, the conservative Justices instead pointed to the constitutional problems created by today's behemoth administrative state.[198]

b. Federalism Conceits

In *Brnovich*, the Court drew heavily on the federalism-based conviction that states, not the federal government, should control elections. Justice Alito's opinion repeatedly worried that the textualist reading favored by the dissent would intrude on states' autonomy to set their own voting rules.[199] For example, one of Justice Alito's factors was "the degree to which a voting rule departs from what was standard practice when § 2 was amended in 1982 . . . ."[200]

Justice Alito's solicitude for existing state practices is odd, given that Congress passed both the VRA and the 1982 amendments to *displace* state voting rules.[201] Those rules, after all, often discriminated against racial

194. *West Virginia*, 142 S. Ct. at 2616 (Gorsuch, J., concurring); *see also id.* at 2620 (arguing that major questions doctrine helps "to ensure that the government does 'not inadvertently cross constitutional lines.'" (quoting Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 175 (2010))).

195. *West Virginia*, 142 S. Ct. at 2619–20.

196. *See supra* Parts I.B.1–2.

197. These cases include Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000); MCI Telecomms. Corp. v. AT&T, 512 U.S. 218 (1994); Util. Air Regul. Grp. v. EPA, 573 U.S. 302 (2014); Gonzales v. Oregon, 546 U.S. 243 (2006); King v. Burwell, 576 U.S. 473 (2015); Ala. Ass'n of Realtors v. HHS, 141 S. Ct. 2485, 2489 (2021).

198. *See, e.g.*, *West Virginia*, 142 S. Ct. at 2619 (Gorsuch, J., concurring) (lamenting "the explosive growth of the administrative state since 1970").

199. *See* Brnovich v. DNC, 141 S. Ct. 2321, 2343 (2021).

200. *Id.* at 2338–39.

201. *See* U.S. COMM'N ON CIV. RTS., THE VOTING RIGHTS ACT: UNFULFILLED GOALS 29–37 (1981) (finding that in 1981 despite improvements, minority voters were still inhibited from voting by several state laws and practices); Orville Vernon Burton, *Tempering Society's Looking Glass: Correcting Misconceptions About the Voting Rights Act of 1965 and Securing American*

minorities.[202] Justice Alito's presumption, then, is exactly the reverse of what Congress was trying to do. His approach privileges federalism concerns over the statute.

Though *NFIB* and *West Virginia* focused on separation of powers concerns, a federalism thread ran through them as well. Justice Gorsuch emphasized that "[t]he federal government's powers . . . are not general but limited and divided."[203] The federal government, he reminded us, must "properly invoke a constitutionally enumerated source of authority to regulate . . . ."[204] The major questions doctrine, Justice Gorsuch explained, "seeks to protect [federalism] against 'unintentional, oblique, or otherwise unlikely' intrusions . . . ."[205] Phrased differently, by making it more difficult for agencies—and, therefore, the federal government—to act, the major questions doctrine leaves more matters to the states.

2. Secondary Constitutional Conceits

In addition to its primary constitutional concerns, the Court's opinions also gestured toward other constitutional ideas. Though less central to the Court's decisions, these conceits also merit brief attention.

a. Individual-Rights Conceits

NFIB and *West Virginia* identified individual liberty norms. This sentiment was strongest in *NFIB*, where the majority and concurrence seemed concerned that individuals might be forced to get vaccines against their will. The OSHA policy, the Court lamented, was "a significant encroachment into the lives—and health—of a vast number of employees."[206] Justice Gorsuch's concurrence likewise complained that the emergency standard attempted to "govern the lives of 84 million Americans."[207] Justice Alito echoed these sentiments at oral argument when he noted that the policy affected "people who have chosen independently not to be vaccinated and

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Democracy, 76 LA. L. REV. 1, 18 (2015) (noting that Congress passed the Voting Rights Act (VRA) to respond to tactics used to disenfranchise African Americans).

202. *See, e.g.*, Travis Crum, *The Superfluous Fifteenth Amendment?*, 114 NW. U. L. REV. 1549, 1564–65 (2020).

203. NFIB v. OSHA, 142 S. Ct. 661, 667 (2022) (Gorsuch, J., concurring) (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819)).

204. *Id.* (Gorsuch, J., concurring).

205. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2620 (2022) (Gorsuch, J., concurring).

206. 142 S. Ct. at 665.

207. *Id.* at 670 (Gorsuch, J., concurring).

do not want to be vaccinated[.]"[208]

Similarly, *West Virginia* explained that the Clean Power Plan would have forced coal plants to shift their business plans or stop making power. The majority especially objected to a ruling that could require power plants to change their business models.[209] Justice Gorsuch, for his part, explicitly invoked liberty principles, writing, "the power to make new laws regulating private conduct [is] a grave one that could, if not properly checked, pose a serious threat to individual liberty."[210] In short, liberty norms, though not central to the Court's opinions, help animate these decisions.

b. Democratic-Accountability Conceits

Democracy and accountability principles also played a role. Justice Gorsuch waxed eloquent on the democratic norms underpinning the major questions doctrine. The Constitution, he wrote, vested the legislative power in Congress "because the framers believed that a republic—a thing of the people—would be more likely to enact just laws than a regime administered by a ruling class of largely unaccountable 'ministers.'"[211] The Constitution "placed its trust not in the hands of 'a few, but [in] a number of hands,' so that those who make our laws would better reflect the diversity of the people they represent . . . ."[212] When elected lawmakers delegate, then, they relinquish their constitutional obligation to make policy. Delegation, Justice Gorsuch continued, further threatens accountability because lawmakers sometimes are tempted "to delegate power to agencies to 'reduc[e] the degree to which they will be held accountable for unpopular actions.'"[213]

In light of these concerns, the major questions doctrine "ensures that the national government's power to make the laws that govern us remains where Article I of the Constitution says it belongs—with the people's elected representatives."[214] The administrative state, Justice Gorsuch told us, lacks the accountability of democracy, because it is "'government by bureaucracy

208. Transcript of Oral Argument at 23–24, NFIB v. OSHA, 142 S. Ct. 661 (2022) (Nos. 21A244 & 21A247).

209. 142 S. Ct. at 2613 n.4.

210. *Id.* at 2618.

211. *Id.* at 2617 (Gorsuch, J., concurring) (quoting THE FEDERALIST NO. 11, at 85 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

212. *Id.* (Gorsuch, J., concurring) (quoting THE FEDERALIST NO. 52, at 327 (James Madison) (Clinton Rossiter ed., 1961)).

213. NFIB v. OSHA, 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring).

214. *Id.* at 668 (Gorsuch, J., concurring).

supplanting government by the people.'"[215]

Though less overt, *Brnovich* also seems animated by these concerns. The problem with a more robust reading of the VRA, the majority explained, is that it "bring[s] about a wholesale transfer of the authority to set voting rules from the States to the federal courts."[216] These decisions, the Court indicated, should be made by politically accountable state and local legislatures, not unelected federal judges.

B. Debunking the Conceits

The constitutional conceits driving these decisions reflect the conservative Justices' deeply held convictions. They do not amount, however, to black letter law—at least, not yet. In other words, the Court could not have relied on these constitutional ideas to strike down the policies as unconstitutional without dramatically changing constitutional doctrine.

To be sure, the Court *can* change constitutional doctrine.[217] This subsection, however, argues that most of the usual modalities of constitutional law cut against such doctrinal transformations or are, at best, close calls with evidence pointing in different directions.[218] In short, the majority in these cases relied not on constitutional law but their rather inchoate constitutional sensibilities.

1. Debunking the Court's Primary Constitutional Conceits

The first subsection here debunks the nondelegation conceits underlying *NFIB* and *West Virginia* through the lenses of five major modalities of constitutional interpretation: judicial precedent, past practices, pragmatism, structure, and originalism. The next subsection uses the same analysis to debunk the Court's theory of federalism underlying *Brnovich*.

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215. *Id.* at 669 (quoting Antonin Scalia, *A Note on the Benzene Case*, REGUL., July–Aug. 1980, at 27).

216. Brnovich v. DNC, 141 S. Ct. 2321, 2343 (2021).

217. *See infra* Part III.B.4.

218. *See generally* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 11–22 (1991) (enumerating various "modalities" of constitutional interpretation). This subsection does not purport to provide comprehensive analysis under any of these modalities, many of which merit entire articles themselves. The analyses of some modalities necessarily somewhat overlap with each other.

a. Debunking the Court's Nondelegation Conceit

i. Judicial Precedent

Nondelegation anxieties clearly animated *NFIB* and *West Virginia*, but those concerns are not reflected in current law. To the contrary, the Court has not struck down agency action on nondelegation grounds since 1935.[219] The common wisdom since the late 1930s has been that Congress has broad authority to delegate.[220] To paraphrase Cass Sunstein, the nondelegation doctrine "has had one good year and [235] bad ones."[221]

To the extent the nondelegation doctrine remains part of our constitutional law, it is extremely deferential.[222] If Congress wishes to delegate matters to administrative agencies, it must do so with an "intelligible principle."[223] Courts have accepted even very broad and vague statutory delegations as sufficiently "intelligible."[224] As one prominent commentator summarized, "Descriptively . . . a successful challenge to a federal law as an impermissible delegation of legislative power seems unlikely."[225] Indeed, until recently, the constitutional critique of the administrative state was widely considered "off the wall."[226]

Another significant precedent also confirms broad administrative authority: *Chevron U.S.A. v. Natural Resources Defense Council*.[227] That decision, of course, is not a constitutional decision, but it has shaped administrative law for over a generation.[228] *Chevron* requires courts to defer to reasonable agency interpretations of the statutes they administer.

Chevron is not a nondelegation doctrine case, but it presumes the legitimacy

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219. *See* Pan. Refin. Co. v. Ryan, 293 U.S. 388 (1935); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

220. *See, e.g.*, Yakus v. United States, 321 U.S. 414, 424–25 (1944) ("The Constitution as a continuously operative charter of government does not demand the impossible or the impracticable . . . [And it] 'has never been regarded as denying to the Congress the necessary resources of flexibility and practicality . . . to perform its function.'" (quoting Currin v. Wallace, 306 U.S. 1, 15 (1939))); Metzger, *supra* note 182, at 60.

221. Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000).

222. *See, e.g.*, Mistretta v. United States, 488 U.S. 361 (1989).

223. *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474 (2001).

224. *See id.*

225. CHEMERINSKY, *supra* note 188, at 356.

226. *See* Metzger, *supra* note 182182, at 68.

227. 467 U.S. 837 (1984).

228. *See* STEPHEN G. BREYER, RICHARD B. STEWART, CASS R. SUNSTEIN, ADRIAN VERMEULE & MICHAEL HERZ, ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES 256 (8th ed. 2017).

of delegations based on ambiguous or vague statutory language.[229] Agencies under *Chevron* not only have authority to craft policy but also to interpret the scope of their own authority when the legislative delegation is unclear.[230] *Chevron* recognizes that ambiguous statutes delegate interpretative authority to agencies rather than courts.[231]

The notion that the nondelegation doctrine seriously constrains congressional delegations is in deep tension with *Chevron*. The Court may soon revisit *Chevron*,[232] but it had not done so before deciding *NFIB* or *West Virginia*. Like the nondelegation doctrine, *Chevron* then remained good law. The constitutional conceits underpinning *NFIB* and *West Virginia* are inconsistent with those precedents.

ii. Past Practices

Courts often find past governmental practices constitutionally relevant.[233] In this instance, they do not help the conservative Justices' position either. Administrative agencies have played a substantial role in American government since the founding and a major role since the late nineteenth century.[234] The Progressive Era growth of railroads, manufacturing, industrialism, and modern banking all provoked significant expansions of administrative regulation.[235] Administrative action grew even more dramatically during and after the New Deal.[236] The 1960s and 1970s saw the addition of still more major programs, like Medicare and Medicaid, and new regulations addressing problems like the environment, workplace safety, and consumer protection.[237] More recently,

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229. *See* Sunstein, *supra* note 221, at 329 (referring to *Chevron* as "an emphatically prodelegation canon").

230. *See id.*

231. *Chevron*, 467 U.S. at 843–44.

232. *See* Loper Bright Enters. v. Raimondo, 45 F.4th 359 (D.C. Cir. 2022), *cert. granted*, 2023 WL 3158352 (U.S. May 1, 2023) (No. 22-451).

233. *See, e.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819); Youngstown Steel & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

234. *See* Metzger, *supra* note 182, at 52; *infra* Part II.B.1.a.v.

235. *See, e.g.*, STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877–1920 15 (1982); THEDA SCKOPOL, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES (1992); DANIEL CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862–1928 (2001); Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1216–29 (1986).

236. *See, e.g.*, Sandra B. Zellmer, *The Devil, the Details, and the Dawn of the 21st Century Administrative State: Beyond the New Deal*, 32 ARIZ. STATE L.J. 941, 960–61 (2000).

237. *See* Rabin, *supra* note 235, at 1272–95.

administrative governance has grown in other areas, including national security, financial regulation, and health care.[238]

Delegations have been not only plentiful but also broad.[239] The point here isn't to defend or attack these practices. Rather, it is simply to point out that the practice has existed since the founding and proliferated for well over a century. These longstanding practices cut in favor of their constitutional validity.

iii. Pragmatism

The conservative Justices' anti-administrative constitutionalism also has the potential to profoundly disrupt American law and government. "Modern government is administrative government."[240] In many cases, government would be unable to function if it could not delegate broad authority to administrative agencies.[241]

There are sound pragmatic reasons to permit delegation. Agencies often possess a policy expertise that Congress lacks. Congress delegates because it "knows what it doesn't and can't know."[242] Congress also often delegates to empower agencies to address not only current but also future problems. "A key reason Congress makes broad delegations . . . is so an agency can respond, appropriately and commensurately, to new and big problems."[243]

Congress, of course, also knows better than anyone that vetogates often prevent it from acting quickly or at all. Historically, Congress has believed that agencies were a crucial tool to addressing the nation's problems.[244] Delegation, in short, is essential to effective modern governance.

iv. Structure

The conservative Justices question whether the administrative state is consistent with constitutional structure. Justice Gorsuch argued that "[i]f Congress could hand off all its legislative powers to unelected agency officials,

238. *See* Metzger, *supra* note 182, at 63.

239. *See, e.g.*, Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 475 (1985) ("Many recently enacted statutes contain only lists of decisional factors or goals to guide agency actions."); David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1253 (1985).

240. BREYER, STEWART, SUNSTEIN, VERMEULE & HERZ, *supra* note 228, at 1.

241. Metzger, *supra* note 182, at 24.

242. West Virginia v. EPA, 142 S. Ct. 2587, 2628 (2022) (Kagan, J., dissenting).

243. *Id.*; *see also* Craig Volden, *Delegating Power to Bureaucracies: Evidence from the States*, 18 J. L. ECON. & ORG. 187, 187 (2002).

244. *See* LISA SCHULTZ BRESSMAN, EDWARD L. RUBIN & KEVIN M. STACK, THE REGULATORY STATE 9–11 (2d. ed. 2013).

it 'would dash the whole scheme' of our Constitution . . . ."[245] Accordingly, the major questions doctrine helps preserve legislative power and check administrative authority.

Some serious arguments underlie this line of thought. Article I of the Constitution vests the legislative power—the power to make law—in Congress.[246] Article II empowers the executive branch to carry out those laws.[247] Whereas the last three factors (precedent, past practices, and pragmatism) cut unequivocally against the conservatives, this factor offers some support for their views.

The problem is that this account of separation of powers is incomplete, reading a bit like an essay by a precocious student who has done only half the reading. Contrary to Justice Gorsuch's assumptions, the Constitution's structure serves more than one end.[248] The framers sought to reconcile two problems. On the one hand, as conservatives emphasize, the framers sought to divide power to minimize the possibility that government would threaten liberty.[249] On the other hand, given the weak and incompetent national government under the Articles of Confederation, the framers also hoped to create a more powerful and effective federal government that could protect the public welfare.[250] Justice Gorsuch's vision of separation of powers emphasizes the former but ignores the latter.

Yet the latter was important, too. Most of the founders were not rigid ideologues but practical statesmen who wanted government to work.[251] As Alexander Hamilton put it, "[G]overnment ought to contain in itself every power requisite to the full accomplishment of the objects committed to its care . . . free from every other control but a regard to the public good and to the sense of the people."[252] The founders were, as Justice Gorsuch reminds us, concerned about governmental oppression, but they also believed government should promote the public welfare.[253] And while Hamilton's

245. NFIB v. OSHA, 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring) (quoting Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 61 (2015) (Alito, J., concurring)).

246. *See* U.S. CONST. art. I, § 1.

247. *See* U.S. CONST. art. II, § 1.

248. *See* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 281 ("[T]he Founders thought of the separation of powers in nonexclusive and relational terms.").

249. *See* PETER L. STRAUSS, ADMINISTRATIVE JUSTICE IN THE UNITED STATES 9 (2002).

250. *See id.*

251. *See* Jack N. Rakove, *The Great Compromise: Ideas, Interests, and the Politics of Constitution Making*, 44 WM. & MARY Q. 424, 424–25 (1987).

252. THE FEDERALIST NO. 31, at 194 (Alexander Hamilton) (C. Rossiter ed., 1961).

253. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787 609 (1969).

vision of national power was especially robust, other framers shared his notion that the centralized government should have sufficient power and flexibility to protect the people against threats.[254]

Justice Gorsuch's rigid view of separation of powers is inconsistent with this intellectual heritage. It would limit functional governance, notwithstanding the founders' plans to the contrary. Had the founders really wanted a neutered central government, there would have been less urgent need to abandon the Articles.[255]

Moreover, as John Manning has argued, the Constitution not only separates powers but blends them.[256] The Framers made various choices about different branches of government at various levels of generality.[257] Sometimes, the Constitution speaks in specific terms about a particular power's placement, but many structural provisions are open-ended.[258] While the Constitution does vest the legislative power in Congress,[259] no provision expressly denies Congress authority to delegate that power. The assumption that such delegation is constitutionally problematic, then, is in tension with Chief Justice Marshall's contention that the Constitution subjects Congress's exercise of authority to "no limitations, other than are prescribed in the Constitution."[260] Indeed, a formalist like Justice Gorsuch who treats delegation as a violation of some amorphous separation-of-powers principle "attribute[s] to parts of the [Constitution] a specificity of purpose that the text may not support."[261]

Relatedly, the conservative theory here ignores important ways in which the administrative state's internal bureaucratic structures actually advance the Constitution's structural concerns.[262] Notice-and-comment rulemaking, for example, invites a range of policy perspectives.[263] In some senses, the rulemaking process is more democratic than legislation insofar as agencies, unlike Congress, must consider the comments of anyone who offers suggestions.[264] So too do agencies' internal policies help foster deliberation,

254. *See, e.g.*, Nicholas Pedersen, *The Lost Founder: James Wilson in American History*, 22 YALE J. L. & HUMANS. 257, 266–67 (2010) (discussing James Wilson's constitutional views).

255. *See* WOOD, *supra* note 253, at 464–67.

256. *See* John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1945 (2011).

257. *See id.*

258. *See id.*

259. *See* U.S. CONST. art. I, § 1.

260. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824).

261. *See* Manning, *supra* note 256, at 1945.

262. *See* Metzger, *supra* note 182, at 78.

263. *See* Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2082 (2020).

264. *See id.* at 2081.

ensuring that policymakers consider a range of perspectives before setting policy.[265] Thus, delegation to administrative agencies may actually *improve* the responsiveness of government to the electorate's wishes.[266]

There are also important external checks on agencies that render them more politically accountable than the conservatives suggest. The heads of executive agencies (including OSHA and the EPA) are appointed and removable by the President.[267] To this extent, many administrative agencies, unlike Congress itself, are responsive to the only public official elected by a national constituency.[268] Congress, furthermore, can check rogue agencies through hearings, appropriations, and, of course, legislation.[269] Collectively, these mechanisms limit agencies' power and render them more accountable.[270] Agencies, to be sure, suffer *some* accountability deficit, but not nearly to the extent Justice Gorsuch suggests.

v. Originalism

The conservatives' interest in reviving the nondelegation doctrine also relies on originalism. The historical record, however, seriously complicates this argument. While some academic studies cast doubt on the administrative state's constitutionality as an original matter,[271] this is contested ground. If anything, the Constitution's original meaning and understanding probably permitted substantial delegation.

There are, of course, different variants of originalism.[272] For the original-

265. *See id.* at 2073–86 (discussing procedures to ensure agencies deliberate with public before making policy).

266. *See* Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 95 (1985).

267. *See, e.g.*, Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477 (2010); Myers v. United States, 272 U.S. 52 (1926).

268. *See, e.g.*, Chevron U.S.A., Inc., v. Nat'l Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984) ("While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.").

269. *See* Jonathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 IOWA L. REV. 1931, 1958 (2020).

270. *See* Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 400 (2019).

271. *See* PHILLIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 26–29 (2014) (analogizing the administrative state to English absolutism that the Framers disdained); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327 (2002); Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490 (2021).

272. *See, e.g.*, Eric Berger, *Originalism's Pretenses*, 16 U. PA. J. CONST. L. 329, 332–40 (2013).

public-meaning originalist,[273] the Constitution's text offers no direct support for the proposition that Congress may not delegate lawmaking authority. Article I vests legislative power in Congress, but not in exclusive terms.[274]

Like the structural argument examined above,[275] the original-public-meaning argument against delegation understands the terms "legislative" and "executive" narrowly. On this view, Articles I and II collectively erected a high barrier between the legislative and executive powers. Congressional delegation of lawmaking authority to executive agencies, then, would be improper because the executive branch would be doing something (lawmaking) that the Constitution instead requires of Congress.[276]

This argument, however, is likely inconsistent with the founding generation's use of language. As Julian Mortenson and Nicholas Bagley explain, administrative rulemaking in the Founders' parlance would have constituted an exercise of *both* executive and legislative power.[277] Indeed, while the conservative critique assumes that agency rulemaking exercises delegated legislative authority, it is "no less accurate" to say that the agency there is "executing the law."[278] The founding generation's own terminology complicates an original-public-meaning argument hinging on rigid boundaries between the legislative and executive powers. Nor does the original Constitution specify rules of statutory interpretation instructing courts to construe legislative delegations stingily.[279]

Original practices undermine the nondelegation argument even more.[280] As Jerry Mashaw explains, "From the earliest days of the Republic, Congress delegated broad authority to administrators…and specifically authorized administrative rulemaking."[281] Early Congresses, in fact, adopted dozens of statutes that empowered executive actors—what we today would call "agencies"—to adopt binding rules.[282]

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273. *See* Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. REV. 1953 (2022) (focusing on the original public meaning of the Constitution's text).

274. *See* U.S. CONST. art. I, § 1.

275. *See supra* Part II.B.1.a.iv.

276. For a rigorous and thoughtful development of this argument, see Lawson, *supra* note 271, at 335–355.

277. *See* Mortenson & Bagley, *supra* note 248, at 331–32.

278. Manning, *supra* note 256, at 2020.

279. *Cf.* Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 397 (2005).

280. Original practices might be relevant as indications of original public meaning or of original intentions, understandings, or applications.

281. JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 5 (2012).

282. *See id.*

From the very beginning, Congress delegated rulemaking authority.[283] The First Congress delegated legislative authority in a variety of areas including the administration of federal territories; the articulation of standards for the granting of patents; the regulation of commerce with indigenous tribes; the rules surrounding pensions for Revolutionary War veterans; the strategy for restructuring the nation's sizable foreign debt; the assessment and enforcement of taxes; naturalization standards; and more.[284] Perhaps most famously, when it created the First Bank of the United States, Congress delegated substantial authority to the Bank's directors (some private, some public) to adopt regulations.[285]

The practice of delegation continued. Within the Constitution's first decade, Congress had created a substantial government with a range of administrative bodies. Many enjoyed substantial authority to create rules.[286]

Early Congresses, then, did not believe that the Constitution inhibited its authority to delegate legislative power.[287] While these Congresses' views are not constitutionally decisive, their members were uniquely acquainted with the Constitutional Convention and ratifying debates. If delegation really were inconsistent with the Constitution's original meaning or understanding, it is unlikely the First Congress would have delegated so often.[288]

If there were a serious constitutional problem with delegation, one would also think that legislators would have cried foul more often than they did.[289] James Madison mounted the most famous nondelegation objection when he questioned whether Congress could constitutionally delegate the authority to establish postal roads.[290] Madison's view, however, was in the minority. During the debates, other members of Congress rejected Madison's logic, pointing out that some of Congress's powers could not be exercised *without*

283. *See id.*; Mortenson & Bagley, *supra* note 248, at 281; Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, 56 GA. L. REV. 81 (2022); Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288 (2021).

284. For a more detailed discussion of these delegations, see Mortenson & Bagley, *supra* note 248, at 332–66.

285. *See* MASHAW, *supra* note 281, at 47.

286. *See id.* at 34.

287. *See id.* at 45.

288. *See* Mortenson & Bagley, *supra* note 248, at 282 ("You can be an originalist or you can be committed to the nondelegation doctrine. But you can't be both.").

289. *See id.* at 282, 349 ("We are unaware of *any* evidence that *any* member of the First Congress objected to *any* of [these] laws . . . on the ground that Congress had unconstitutionally surrendered its legislative power.").

290. *See* JAMES MADISON, POST OFFICE AND POST ROADS, [7 DECEMBER] 1791.

delegation.[291] Congress then proceeded to delegate substantial discretion to determine the location of both postal roads and post offices themselves.[292] For all of Madison's importance, this was one of many instances in which his contemporaries rejected his constitutional judgment.[293]

To be sure, some scholars, like Ilan Wurman, have contended that originalism bolsters the nondelegation doctrine. At best, Wurman establishes that the historical account is messy, a point he himself makes.[294] That messiness hurts the nondelegation case; judges should be reluctant to overrule longstanding precedent based on deeply contested originalist arguments.[295]

Indeed, it is telling that not even Justice Gorsuch, a self-proclaimed originalist,[296] wrestles with this history. In response to Justice Kagan's historical arguments, which cited scholarship, Justice Gorsuch snarked, "if a battle of law reviews were the order of the day, it might be worth adding to the reading list."[297] He proceeded to list some articles, including Wurman's, to signal (correctly) that scholars disagree on the history.[298] He did not, though, engage with the articles' ideas. If the historical record convincingly supported a robust nondelegation doctrine, surely an originalist Justice should explain why.

Finally, if we must follow originalism, it's not clear that the conservatives' preference for vigorous judicial review over separation of powers is consistent with original meanings or understandings.[299] While the founders were

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291. *See* 3 ANNALS OF CONG. 232 (1791) (noting, by Representative Sedgwick, that Congress was empowered to coin money and that without delegation, members of Congress would have to "work in the Mint themselves"); Mortenson & Bagley, *supra* note 248, at 352.

292. *See* Postal Service Act §§ 2, 3, 1, 1 Stat. 232, 233–34 (1792); DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789–1801 149 (1997); MASHAW, *supra* note 281, at 46; Mortenson & Bagley, *supra* note 248, at 353.

293. *See* David S. Schwartz & John Mikhail, *The Other Madison Problem*, 89 FORDHAM L. REV. 2033, 2065–76 (2021) (showing how Madison's argument was not universally accepted by his fellow contemporaries).

294. *See* Wurman, *supra* note 271, at 1510 ("[H]istory is messy . . . .").

295. *See, e.g.*, DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS 13 (2002). *But see* Lawson, *supra* note 271, at 334–35 (arguing that Constitution's original meaning included nondelegation principle but not calling "for courts to revive the nondelegation doctrine.").

296. *See* Justice Neil Gorsuch, *Why Originalism Is the Best Approach to the Constitution*, TIME (Sept. 6, 2019, 8:00 AM), https://time.com/5670400/justice-neil-gorsuch-why-originalism-is-the-best-approach-to-the-constitution.

297. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2625 n.6 (2022) (Gorsuch, J., concurring) (listing law review articles without discussing their content).

298. *See id.*

299. *See generally* LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 35–92 (2004).

familiar with the concept of judicial review, they likely did not believe themselves to be vesting the federal courts with broad authority to second-guess the political branches.[300] As Gordon Wood has argued, judicial review at the founding was "something to be invoked only on the rare occasions of flagrant and unequivocal violations of the Constitution. It was not to be exercised in doubtful cases of unconstitutionality and was not yet accepted as an aspect of ordinary judicial activity."[301]

To be sure, judicial review has long been a part of our system; I do not question its legitimacy. Nevertheless, the Judiciary did not start playing a substantial role in defining separation of powers until 1926, and the Constitution's text nowhere clearly vests the Court with this role.[302] In light of this history, the faithful originalist would at least question whether they ought to wield the judicial power so aggressively.

b. Debunking the Court's Election-Federalism Conceit

i. Judicial Precedent

Brnovich repeatedly expressed concern that § 2 of the VRA, read as the dissent did (i.e., read as written), intruded too much on state prerogatives.[303] Supreme Court precedent, however, supports § 2's constitutionality. *City of Rome v. United States*[304] held that the VRA was a constitutional exercise of Congress's authority under § 2 of the Fifteenth Amendment to protect voting rights against racial discrimination.[305] Citing *McCulloch v. Maryland*, *Rome* indicated that Congress's Fifteenth Amendment enforcement power was similar in scope to its considerable power under the Necessary and Proper Clause.[306]

Rome, moreover, expressly rejected the contention that Congress may not legislate under the Fifteenth Amendment to "outlaw voting practices that are discriminatory in effect."[307] Relying on *South Carolina v. Katzenbach*,[308] which interpreted the VRA shortly after its passage, *Rome* held so even though on the same day the Court decided in *City of Mobile v. Bolden* that the Fifteenth

300. *See, e.g.*, *id.* at 128–44.

301. Gordon S. Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More out of Less*, 56 WASH. & LEE L. REV. 787, 795–99 (1999).

302. *See* Nikolas Bowie & Daphna Renan, *The Separation of Powers Counterrevolution*, 131 YALE L.J. 2020, 2025 (2022).

303. *See supra* Part II.A.1.b.

304. 446 U.S. 156 (1980)

305. *Id.*

306. *Id.* at 175 (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819)).

307. *Id.* at 173.

308. 383 U.S. 301 (1966).

Amendment only prohibits "purposeful discrimination."[309] In other words, even though *Bolden* refused to find a Fifteenth Amendment violation without evidence of discriminatory intent, *Rome* nevertheless permitted Congress to "prohibit changes that have a discriminatory impact."[310] *Rome*, then, allows Congress to protect voting rights against practices that would not themselves violate the Constitution, setting a deferential standard for reviewing laws enforcing the Fifteenth Amendment.[311]

If there is an argument that *Rome* and *South Carolina* no longer control, it presumably would rely on *City of Boerne v. Flores*.[312] Under *Boerne*, when Congress legislates to enforce the Fourteenth Amendment, it may not create new rights or expand the scope of existing rights.[313] Rather, Congress's legislation must be "congruent" and "proportional" to the constitutional violation it seeks to remedy.[314]

Given that the Constitution stipulates Congress's powers to enforce the Fourteenth and Fifteenth Amendments in nearly identical language, *Boerne* arguably informs the scope of Congress's Fifteenth Amendment enforcement authority.[315] To this extent, *Boerne* may call *Rome* into question. Accordingly, one might argue that because *Bolden* held that the Fifteenth Amendment only prohibits "purposeful discrimination,"[316] Congress lacks the authority to prohibit changes that have only a discriminatory impact. On this view, a statutory results-based test would flunk *Boerne*'s congruence-and-proportionality requirement.

The Court, however, has not extended *Boerne* to the Fifteenth Amendment. *Rome*, therefore, remains good law. Indeed, *Boerne* itself approvingly cited precedent acknowledging "the necessity of using strong remedial and preventive measures to respond to the widespread and

309. City of Mobile v. Bolden, 446 U.S. 55, 66 (1980).

310. *See Rome*, 446 U.S. at 177.

311. *See id.* at 178 (holding that courts should uphold such legislation so long as it is a "rational means [of] effectuat[ing]" the Fifteenth Amendment (quoting South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966))).

312. 521 U.S. 507 (1997). This, in fact, *was* an argument advanced in the petitioners' Supreme Court brief. *See* Brief for Petitioners at 39–42, Brnovich v. DNC, 141 S. Ct. 2321 (2021) (Nos. 19-1257 & 19-1258) 2020 WL 7121775, at *39.

313. *See Boerne*, 521 U.S. at 508 (stating that the "power 'to enforce' is only preventive or 'remedial'").

314. *Id.* at 519–20.

315. *See* Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After* Flores, 39 WM. & MARY L. REV. 725, 725–26 n.5 (1998) ("[B]ecause the two amendments are rough contemporaries and their enforcement power provisions are articulated in similar terms, the analysis surely carries over.").

316. City of Mobile v. Bolden, 446 U.S. 55, 65 (1980).

persisting deprivation of [voting] rights."[317] *Boerne*, in other words, acknowledged the VRA's constitutionality.[318]

To be sure, when the Court invalidated the VRA's preclearance process in *Shelby County v. Holder*,[319] it argued that voter discrimination is no longer a serious problem.[320] It is therefore possible that the Court would find that today's facts also no longer justify VRA § 2. The Court, however, has not done so.

Such a holding, indeed, would be hard to justify given that § 2 litigation is only successful if a jurisdiction makes racially discriminatory election changes.[321] In other words, whereas *Shelby County* faulted VRA § 5 for applying to some jurisdictions that no longer practiced discrimination, § 2 only burdens jurisdictions that actually practice discrimination.[322] Section 2, therefore, should fit within Congress's remedial authority even under *Boerne*'s more stringent test.

Moreover, given the Fifteenth Amendment's narrow focus on racial discrimination in voting, it makes sense that Congress's power to enforce it would be broader than its power to enforce the Fourteenth Amendment. Because the Fourteenth Amendment extends to numerous topics, the Court is wary of construing Congress's enforcement powers too broadly.[323] If Congress had expansive authority to enforce the Fourteenth Amendment, its reach would include many topics traditionally left to the states. By contrast, Fifteenth Amendment enforcement power encompasses one subject: racial discrimination in voting. There's a good argument, then, that *Boerne* ought not apply to the Fifteenth Amendment at all.[324]

Finally, a separate line of precedent confirms that Article I's Elections Clause gives Congress sweeping authority to regulate federal elections.[325] In

317. *Boerne*, 521 U.S. at 526.

318. *See id.* at 533. As this Article went to press, the Court reaffirmed *Rome*'s holding that § 2 is constitutional under the Fifteenth Amendment, at least in the redistricting context. *See* Allen v. Milligan, 143 S. Ct. 1487, 1516 (2023).

319. 570 U.S. 529 (2013).

320. *See id.* at 547. For more on *Shelby County*, see *infra* Part II.B.1.b.ii.

321. *See* Karlan, *supra* note 315, at 741.

322. *See id.* at 552–54, 557.

323. *Cf.* Tennessee v. Lane, 541 U.S. 509, 554–55 (2004) (Scalia, J., dissenting) (questioning the relevance of Fifteenth Amendment precedent to scope of Congress's power under § 5 of Fourteenth Amendment in part because "the Fourteenth Amendment, unlike the Fifteenth, is not limited to denial of the franchise").

324. *See, e.g.*, Evan H. Caminker, *"Appropriate" Means-Ends Constraints on Section 5 Powers*, 53 STAN. L. REV. 1127, 1191 (2001).

325. Admittedly, the Elections Clause only grants Congress power to regulate *federal*

Arizona v. Inter Tribal Council of Arizona, Inc.,[326] Justice Scalia, usually a strong supporter of states' rights, penned a majority opinion emphasizing the Clause's "broad" substantive scope.[327] Quoting a nineteenth century precedent, Justice Scalia wrote, "The power of Congress over the 'Times, Places and Manner' of congressional elections 'is paramount, and may be exercised at any time, and to any extent which it deems expedient; and so far as it is exercised . . . the regulations effected supersede those of the State which are inconsistent therewith.'"[328] Thus, *Inter Tribal Council*, provides yet further doctrinal support for the VRA's constitutionality, at least in the context of federal elections.

ii. Past Practices and Pragmatism

Pragmatic arguments also militate in favor of § 2's constitutionality.[329] Quite simply, when the federal government does not protect minority voting rights, some jurisdictions make voting harder for racial minorities. Whereas past practices in the administrative law context confirm that delegations of agency authority and power have long been considered constitutional, in the voting rights context, they demonstrate the continuing need for a robust VRA.

The VRA halted facially neutral laws that southern whites systematically used to disenfranchise Black people or dilute the power of Black voters.[330] However, as Orville Burton puts it, "[T]he victories of the Voting Rights Act are far from complete."[331] A brief history of voting regimes since *Shelby County* in 2013 helps prove the point.[332] Before that decision, the VRA required covered jurisdictions (i.e., jurisdictions with a history of voting discrimination) to request permission from the Department of Justice (DOJ) or a federal judge before instituting changes to their election processes.[333] The idea was that covered jurisdictions would think twice before enacting

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elections, but as a practical matter, those federal regulations usually also help shape state election practices, too, because states usually hold their state elections on the same day and ballot as their federal elections.

326. 570 U.S. 1 (2013).

327. *Id.* at 8.

328. *Id.* at 9 (quoting *Ex parte* Siebold, 100 U.S. 371, 392 (1880)).

329. This subsection combines past practices and pragmatism for ease of presentation.

330. *See* Burton, *supra* note 201, at 43.

331. *See id.* at 4.

332. *See* Kareem Crayton & Kendall Karson, Shelby County v. Holder *Turns 10, and Voting Rights Continues to Suffer from It*, BRENNAN CTR. FOR JUST. (June 20, 2023), https://www.brennancenter.org/our-work/research-reports/shelby-county-v-holder-turns-10-and-voting-rights-continue-suffer-it.

333. *See Shelby* County v. Holder, 570 U.S. 529, 535 (2013).

changes that disadvantaged minority voters.[334] If they *did* institute such changes, the DOJ or a judge could block them before they took effect.[335]

After *Shelby County* effectively killed this preclearance process, some jurisdictions immediately made changes that disadvantaged minority voters.[336] Within *hours* of the Supreme Court's decision, Texas put into effect a law that a federal district court had previously denied preclearance because of its potential to harm minority voters.[337] Within months, other states—including Alabama, Virginia, North Carolina, and Mississippi—had themselves passed similarly problematic measures.[338]

Without preclearance, VRA § 2 remains even more vital.[339] To be sure, § 2 litigation is expensive and cumbersome; the VRA is not as strong without preclearance.[340] Nevertheless, while § 2 litigation is unlikely to address all practices that limit voting rights,[341] courts have still used § 2 after *Shelby County* to invalidate laws burdening the right to vote.[342] As a practical matter, then, § 2 is the lone surviving statutory bulwark against voter suppression.[343]

Finally, it is worth emphasizing other practical reasons why courts should

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334. *See* Richard L. Hasen, *Race or Party?: How Courts Should Think About Republican Efforts to Make It Harder to Vote in North Carolina and Elsewhere*, 127 HARV. L. REV. F. 58, 64 (2014) (discussing South Carolina example).

335. *See* 42 U.S.C. § 1973(c) (laying out preclearance terms). The Justice Department under President George W. Bush did preclear two controversial voting changes that raised questions about whether the Bush DOJ was making preclearance decisions "as a result of partisan political concerns . . . [rather than] a good faith application of the law to the facts."). Mark A. Posner, *The Real Story Behind the Justice Department's Implementation of Section 5 of the VRA: Vigorous Enforcement, as Intended by Congress*, 1 DUKE J. CONST. L. & PUB. POL'Y 79, 149–50 (2006).

336. *See, e.g.*, Elmendorf & Spencer, *supra* note 135, at 2145 ("A number of states that had been subject to the preclearance process quickly adopted or implemented new, restrictive voting laws.").

337. *See* Texas v. Holder, 888 F. Supp. 2d 113 (D.D.C. 2012) (finding that Texas law violated VRA § 5).

338. *See* Elmendorf & Spencer, *supra* note 135, at 2145–46; Burton, *supra* note 201, at 5.

339. *See* JAMES A. GARDNER & GUY-URIEL CHARLES, ELECTION LAW IN THE AMERICAN POLITICAL SYSTEM 399 (2018) (noting that after *Shelby County*, "Section 2 stands as the primary operative component of the VRA").

340. *See, e.g.*, NAACP Legal Def. Fund, *The Cost (in Time, Money, and Burden) of Section 2 of the Voting Rights Act Litigation*, LEGAL DEFENSE FUND (Aug. 13, 2018), https://www.naacpldf.org/wp-content/uploads/Section-2-costs-08.13.18_1.pdf.

341. *See* Nicholas Stephanopoulous, *The South After* Shelby County, 2013 SUP. CT. REV. 55, 57.

342. *See, e.g.*, N.C. State Conf. of NAACP v. McCrory, 831 F.3d 204 (4th Cir. 2016); Veasy v. Abbott, 830 F.3d 216 (5th Cir. 2016) (en banc); One Wis. Inst., Inc. v. Nichol, 186 F. Supp. 3d 958 (W.D. Wis. 2016).

343. *See* GARDNER & CHARLES, *supra* note 339, at 399–401.

take seriously § 2's "results in" language.[344] It can be impossible to prove that state voting rules are intentionally discriminatory, even if they in fact are. Evidence is usually messy, and legislators know enough to hide invidious intentions.[345] Judges also are often reluctant to tar public figures with the "brush of bigotry,"[346] given that they inhabit the same social and professional circles.[347] Disparate-impact standards, thus, help guard against intentional but well concealed discrimination. They also can address discrimination that may be very real but not apparent to the ruling class.[348] In light of these practical realities, VRA § 2 is constitutional because it is necessary to achieving the Fifteenth Amendment's promise.

iii. Structure

Conservatives sometimes object to a robust VRA § 2 on the grounds that it offends federalism.[349] However, like the separation-of-powers concerns discussed above, the federalism anxieties here are inchoate; the Court never links them concerns to specific constitutional provisions. Its objections instead are an example of what John Manning has called "freestanding federalism," an amorphous yet vigorous theory of states' rights that transcends the Constitution's text.[350]

The Fifteenth Amendment, indeed, undermines the structural argument against the VRA. It forbids states from denying or abridging the right of U.S. citizens to vote "on account of race."[351] Section 2 of the Amendment further empowers Congress to enforce the Amendment.[352] The structural argument against the VRA would read this Amendment out of the Constitution.[353]

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344. *See* 52 U.S.C. § 10301(a).

345. *See, e.g.*, Edward B. Foley, *Due Process, Fair Play, and Excessive Partisanship: A New Principle for Judicial Review of Election Laws*, 84 U. CHI. L. REV. 655, 739 (2017).

346. *See* United States v. Windsor, 570 U.S. 744, 776 (2013).

347. *See* Karlan, *supra* note 315, at 735.

348. *See generally* Khiara M. Bridges, *The Supreme Court 2021 Term—Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23, 109–33 (2022) (arguing that the Roberts Court systematically defines racism narrowly and then refuses to see it); *infra* Part IV.B.3.

349. *See* Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195, 1202–03 (2019).

350. *See* John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2004–05 (2009).

351. U.S. CONST. amend. XV, § 1.

352. *See id.* § 2.

353. Precedent and originalist history both dispel the notion that Congress's legislation under the Fifteenth Amendment must be proportionate to a particular violation. *See supra* Part II.B.1.b.i; *infra* Part II.B.1.b.iv.

Moreover, as noted above, Article I's Elections Clause also grants Congress very broad authority to regulate federal elections.[354] While that provision grants state legislatures the authority to prescribe the times, places, and manners of federal elections, it also provides that "Congress may at any time by Law make or alter such Regulations."[355] Here too, the Constitution clearly confers upon Congress the authority to regulate federal elections within the states.[356] The argument that the VRA offends the Constitution's structure, then, is weak.

iv. Originalism

Original public meaning does not help the conservative argument here either. The Fifteenth Amendment's original public meaning empowers Congress to protect against racial discrimination in voting. As we have seen, § 1 stipulates that "[t]he right of citizens of the United States shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."[357] The language protects not only against outright denials of the right to vote but also more modest "abridgements."

Section 2 of the Amendment provides that "Congress shall have power to enforce this article by appropriate legislation."[358] As noted above, the term "appropriate" referenced the Supreme Court's decision in *McCulloch v. Maryland*,[359] which broadly interpreted Congress's power to legislate under the Necessary and Proper Clause.[360] To understand the original language, we must take seriously this reference to *McCulloch*.[361] The Fifteenth Amendment's original public meaning, then, confers upon Congress broad authority to ensure that states and localities do not restrict voting rights on the basis of race.

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354. *See* U.S. CONST. art. I, § 4.

355. *Id.*

356. *See* Tolson, *supra* note 349, at 1219 (arguing that the Elections Clause delegates to Congress "the power to alter state electoral arrangements").

357. U.S. CONST amend. XV, § 1.

358. *Id.* § 2.

359. 17 U.S. (4 Wheat.) 316 (1819).

360. *See* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 825–26 (1999) (drawing historical connections between the term "appropriate" and *McCulloch*); Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 188 (1997) (tracing the word "appropriate" to the discussion of congressional power in *McCulloch*).

361. *See* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947) ("[I]f a word is obviously transplanted from another legal source . . . it brings the old soil with it.").

The original *intent* behind the Fifteenth Amendment is admittedly more equivocal. Republicans supported the Fifteenth Amendment for a variety of reasons.[362] Some believed Black soldiers' sacrifices during the Civil War merited suffrage.[363] Others were convinced that Black men were crucial to their future electoral prospects, especially after the surprisingly close election of 1868.[364] Southern white Democrats mostly did not object for strategic reasons because the Reconstruction Acts had already granted African Americans voting rights in most of the former Confederacy.[365] By contrast, Northerners and Westerners were often hostile to the proposal because they wanted to keep disenfranchising unpopular groups, such as people of Chinese and Irish descent.[366]

The proposed Fifteenth Amendment went through multiple iterations. Some early versions included more sweeping protections for voting rights, such as universal manhood suffrage.[367] In the end, though, only a more limited amendment garnered the necessary support.

People in 1868 recognized that the Amendment opened the door to literacy tests, grandfather clauses, and other devices that could be used to disenfranchise African Americans and other racial minorities.[368] This history might cut against a robust Fifteenth Amendment today. There is a non-frivolous argument that only modest voting rights protections survived the onerous amendment process.

That said, even if § 1's protections are limited, § 2 still granted Congress broad authority to legislate in the field. Indeed, the likely original understanding was that Congress, rather than the Judiciary, was to take the lead in enforcing the Reconstruction Amendments, including protecting against racial discrimination in voting.[369] Section 2 of the Thirteenth Amendment, then, empowers Congress to legislate voting protections where

362. *See* Crum, *supra* note 202, at 1597 (noting Reconstruction Framers' "ideological, partisan, and pragmatic" motives for supporting the Fifteenth Amendment).

363. *See* Vikram David Amar & Alan Brownstein, *The Hybrid Nature of Political Rights*, 50 STAN. L. REV. 915, 933 (1998).

364. *See* MICHAEL PERMAN, THE ROAD TO REDEMPTION: SOUTHERN POLITICS, 1869–1879, at 1010–21 (1984); Amar & Brownstein, *supra* note 363, at 943.

365. *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877, 271–91 (1988).

366. *See* ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION 101 (2019).

367. *See id.* at 105.

368. *See id.*

369. *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 361–63, 399 (2005) (emphasizing Congress's role in Reconstruction Amendment enforcement including its "sweeping enforcement powers under the Fifteenth Amendment's second section").

§ 1 falls short.[370] In all events, though complicated, the historical record hardly overrides Congress's repeated judgments that the VRA is both necessary and constitutional.

2. Debunking the Court's Secondary Constitutional Conceits

Just as the primary conceits driving these decisions are legally weak, so too are the secondary conceits. This subsection briefly debunks the individual rights and democratic accountability conceits that also informed the Court's decisions.

a. Debunking the Court's Individual-Rights Conceits

Individual rights ideas play a background role in *NFIB* and *West Virginia*, but current doctrine would not vindicate individual rights claims. Some Justices in *NFIB* intimated that a vaccine mandate implicated Fourteenth Amendment liberties.[371] Under current doctrine, however, the OSHA COVID policy does not violate substantive due process.[372] For one, OSHA's Standard was not a vaccine mandate.[373] Even if it were, though, *Jacobson v. Massachusetts*[374] upheld vaccine mandates against a Fourteenth Amendment challenge over a century ago.[375]

While individuals typically do have a Fourteenth Amendment right to refuse medical treatment,[376] the Court held that vaccination is different because it impacts entire communities.[377] *Jacobson* explained that if each individual could opt out of a vaccination mandate, "the welfare and safety of an entire population [would be] subordinated to the notions of a single

370. *See, e.g.*, Archibald Cox, *The Supreme Court 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 114 (1966) (arguing that the Reconstruction Amendments removed political disabilities on basis of race); John E. Nowak, *The Gang of Five & the Second Coming of an Anti-Reconstruction Supreme Court*, 75 NOTRE DAME L. REV. 1091, 1105 (2000) ("When Section 2 of the Fourteenth Amendment failed to spur Southern states to grant black persons the right to vote, there was enough Reconstruction sentiment left in the North for ratification of the Fifteenth Amendment, guaranteeing a right to vote for all persons (at least men) regardless of race and granting Congress the power to take steps to enforce that right.").

371. *See* NFIB v. OSHA, 142 S. Ct. 661, 668–69 (2022) (Gorsuch, J., concurring).

372. *See supra* Part II.A.2.a.

373. *See supra* note 46 and accompanying text.

374. 197 U.S. 11 (1905).

375. *Id.* at 29–30.

376. *See, e.g.*, Cruzan v. Mo. Dep't of Health, 497 U.S. 261, 278–79 (1990); Washington v. Harper, 494 U.S. 210, 221–22 (1990).

377. *See Jacobson*, 197 U.S. at 37–38.

individual."[378] While a federal vaccine mandate arguably raises different issues than a state one, *Jacobson* makes clear such mandates do not create Fourteenth Amendment problems. Moreover, the Court had ample opportunity to revisit *Jacobson* during the COVID pandemic and did not.[379]

Of course, narrower objections to vaccine mandates might be successful, especially Free Exercise challenges.[380] *NFIB*, though, was not a Free Exercise challenge. The conservative Justices' more general individual rights concerns about vaccination mandates in *NFIB*, then, were not grounded in contemporary constitutional law.

Individual rights objections to the Clean Power Plan also find no support in current law. Under a *Lochner v. New York*-style substantive due process, perhaps such environmental regulation might interfere with a power plant's liberty to run its business.[381] Of course, *West Coast Hotel v. Parrish*[382] buried *Lochner* in 1937.[383] Since then, the Court has reviewed economic liberty challenges to regulations very deferentially.[384] A Fourteenth Amendment liberty challenge to the Clean Power Plan, then, would find virtually no support in contemporary constitutional doctrine either.

b. Debunking the Court's Democratic-Accountability Conceits

The Justices' concerns about democratic accountability are likewise problematic. Justice Gorsuch's discussions of accountability seemed to privilege majoritarian decisionmaking.[385] However, this anxiety in the administrative agency context is inconsistent with the Court's attitude toward voting rights in *Brnovich*.[386] In that case, the Court rendered state legislatures *less* democratic by upholding laws making it harder for racial minorities to vote. In a different case, the Court was similarly insensitive to democratic-accountability concerns, finding partisan gerrymandering claims non-justiciable.[387] As Brandon Johnson argues, "By failing to safeguard considerations of democratic accessibility in its election law jurisprudence, the Court undermines its stated goal of ensuring that

378. *Id.*

379. *See, e.g.*, Klaassen v. Ind. Univ., 7 F.4th 592 (7th Cir. 2021).

380. *See, e.g.*, Tandon v. Newsome, 141 S. Ct. 1294 (2021).

381. Lochner v. New York, 198 U.S. 45 (1905).

382. 300 U.S. 379 (1937).

383. *See id.* at 392.

384. *See, e.g.*, *id.* at 392 n.1; Williamson v. Lee Optical, 348 U.S. 483, 487–88 (1955).

385. *See* Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1745 (2021).

386. *See* Brandon J. Johnson, *The Accountability-Accessibility Disconnect*, 58 WAKE FOREST L. REV. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4224942.

387. *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2508 (2019).

voters can hold their elected policy makers accountable."[388]

This irony seems lost on Justice Gorsuch, who cited Justice Kagan's *Rucho v. Common Cause* dissent objecting to the Court's holding that partisan gerrymandering claims are nonjusticiable.[389] In some cases, the conservative Justices celebrate the majoritarian virtues of the legislature. In others, they uphold election practices that compromise majoritarian decisionmaking.

Nor did the Court acknowledge the additional irony that the Justices themselves are unelected and unaccountable.[390] Whatever their accountability shortcomings, administrative agencies are still more accountable than federal judges.[391] Nevertheless, it is judges here who are making important policy determinations. These cases' most significant accountability problem, then, is one of the Court's own making.

C. Summary: Constitutional Conceits, Not Constitutional Law

It would be one thing if the constitutional principles driving the Court's statutory interpretation in these cases reflected actual constitutional law. That, however, is not the case. To the contrary, the libertarian constitutional conceits in these cases find little support in contemporary constitutional doctrine. The Court, of course, could change constitutional law, as it has already done recently in several areas.[392] However, the building blocks for such doctrinal transformations here are meager.[393]

Indeed, the Court in these cases notably did not purport to revise constitutional law. Except for Justice Gorsuch's concurrences, the Justices mostly avoided constitutional arguments.[394] Instead, they gestured towards amorphous constitutional ideas without offering constitutional reasoning.

What should we make of opinions that rely heavily on constitutional

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388. Johnson, *supra* note 386 (manuscript at 1); *see also* United States. v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

389. 139 S. Ct. 2484 (2019). *See* West Virginia v. EPA, 142 S. Ct. 2587, 2624–25 (2022) (Gorsuch, J., concurring) (quoting 139 S. Ct. at 2511 (Kagan, J., dissenting)).

390. *See* NFIB v. OSHA, 142 S. Ct. 661, 676 (2022) (Breyer, J., dissenting) ("[This Court's] Members are elected by, and accountable to, no one.").

391. *See supra* note 268.

392. *See, e.g.*, Student for Fair Admissions, Inc. v. Presidents & Fellows of Harvard College, 143 S. Ct. 2141 (2023); Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022); Carson *ex rel* O.C. v. Makin, 142 S. Ct. 1987 (2022); Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018).

393. *See supra* Part II.B.

394. *See NFIB*, 142 S. Ct. at 667–68 (Gorsuch, J., concurring); *West Virginia*, 142 S. Ct. at 2619 (Gorsuch, J., concurring).

principles that are assumed but not defended? One possibility is that the Justices thought it unnecessary to offer constitutional elaborations in statutory cases. Perhaps . . . but this explanation isn't terribly persuasive given the centrality of constitutional concepts to these atextual statutory decisions.

Another possibility is that the Justices believed their statutory interpretations vindicated under-enforced constitutional norms.[395] That, however, is not what the Court claimed to be doing, and that position would have been a strange one for textualist Justices to take.[396] Protecting ostensibly under-enforced constitutional norms through statutory interpretation also runs the risk of over-enforcement, a concern that at least Justice Barrett has recognized.[397]

Perhaps the most convincing explanation is that these opinions reflected the points on which the conservative Justices could agree.[398] Maybe some of the conservative Justices (presumably Justices Thomas, Alito, Gorsuch, and possibly Barrett) would be willing to reinvigorate the nondelegation doctrine to invalidate broad statutory delegations to agencies. Other conservatives (most likely Chief Justice Roberts and Justice Kavanaugh) share the intuition that agencies sometimes act too ambitiously but are unwilling to sign onto such an aggressive constitutional holding. One might imagine a similar split among the conservatives about the VRA's meaning and constitutional legitimacy.[399] The instant decisions, on this account, may have reflected the compromises inherent in the opinion writing process.

III. CONSTITUTIONAL CANONS OF STATUTORY INTERPRETATION ON THE ROBERTS COURT

If *NFIB*, *West Virginia*, and *Brnovich* are unconvincing through the lenses of statutory text and constitutional doctrine, perhaps Constitution-based canons of statutory interpretation—or "constitutional canons"—justify them. Courts have long applied a variety of constitutional canons when they interpret statutes. Subsection A briefly introduces these inter-related

395. *See generally* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

396. *See* Eidelson & Stephenson, *supra* note 21, at 54.

397. *See* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 172 (2010).

398. *See* CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 60 (1998) (discussing undertheorized agreements).

399. *See, e.g.*, Allen v. Milligan, 143 S. Ct. 1487, 1544 (2023) (Thomas, J., dissenting, joined on this point by Gorsuch, J., and Barrett, J.) (arguing that because the VRA is not "remedial, preventive legislation," it "cannot be upheld under the Constitution" (quoting City of Boerne v. Flores, 521 U.S. 507, 532 (1997))).

canons.[400] Subsection B assesses the recent Roberts Court decisions in light of this tradition. Subsection C concludes that while the instant cases fit into this broad tradition, they deploy the constitutional canons unusually aggressively to reach the majorities' preferred outcomes.

A. The Constitutional Canons: An Overview

1. The Constitutional Avoidance Canon

The constitutional avoidance canon seems easy enough to state: courts should interpret statutes to avoid difficult constitutional issues.[401] However, there are numerous formulations of this canon.[402] Adrian Vermeule breaks these variations into two broad categories: "classical" and "modern" constitutional avoidance.[403]

Classical avoidance stipulates that "as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, [the Court's] plain duty is to adopt that which will save the Act."[404] Modern avoidance, by contrast, provides that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."[405]

The primary difference is that the classical version requires courts to determine that a plausible interpretation of the statute would be unconstitutional before selecting the other reading.[406] The modern version, by contrast, requires only a determination that a plausible reading would

400. A comprehensive review of the constitutional canons of statutory interpretation is beyond the scope of this Article.

401. *See, e.g.*, Caleb Nelson, *Avoiding Constitutional Questions Versus Avoiding Unconstitutionality*, 128 HARV. L. REV. F. 331, 331 (2015).

402. *Compare* Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804) (when one interpretation of an ambiguous statute would be unconstitutional, courts should select another reading that would pass constitutional muster), *with* United States *ex rel.* Att'y Gen. v. Del. & Hudson Co., 213 U.S. 366 (1909) (when one interpretation would raise serious constitutional problems, choose the one that would not), *and* McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963) (when one interpretation presents constitutional difficulties, do not impose it unless Congress has affirmatively indicated that it is required); *see also* ESKRIDGE, *supra* note 15, at 317–22 (discussing avoidance canon variants).

403. *See* Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1949 (1997).

404. Blodgett v. Holden, 275 U.S. 142, 148 (1927) (Holmes, J., concurring).

405. Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (citing NLRB v. Cath. Bishop of Chi., 440 U.S. 490, 499–501 (1979)).

406. *See* Vermeule, *supra* note 403, at 1949.

raise serious constitutional problems.[407] In other words, classical avoidance avoids unconstitutional interpretations; modern avoidance steers away from difficult constitutional questions altogether.[408]

2. Clear Statement Rules

Other constitutional canons include clear statement rules of varying strength.[409] For instance, in the federalism context, clear statement rules provide that courts should not construe a statute to intrude on state sovereignty unless Congress had indicated a "super-strong clear" intent to do so.[410] Federalism-clear-statement rules demand legislative clarity before allowing federal statutes to invade state prerogatives.

In *Gregory v. Ashcroft*,[411] for example, the Court considered whether Missouri's mandatory retirement age of seventy for most state judges violated the federal Age Discrimination in Employment Act (ADEA).[412] The ADEA included state governments as employers, but it exempted most high-ranking state government officials.[413] *Gregory* turned on whether state judges were among those exempted officials.

The statutory language did not clearly settle the matter. 29 U.S.C. § 630(f) provided that an employee did "not include . . . *an appointee on the policymaking level* . . . ."[414] The key question was whether judges were appointees "on the policymaking level."[415] If state judges *were* on a policymaking level, then the ADEA did not protect them.

Writing for the Court, Justice O'Connor decided the case without resolving that textual question. Instead, she wrote, "We will not read the ADEA to cover state judges unless Congress has made it clear that judges are included."[416] In other words, even if the statutory language likely covered judges, that wasn't good enough. Because of the underlying federalism principles, the Court would not so construe the statute unless it *clearly* covered them. The Court, thus, indicated it will avoid reading federal statutes to clash directly with federalism principles unless Congress very clearly

407. *See id.*

408. *See* Nelson, *supra* note 401, at 331–32.

409. For a comprehensive discussion of the numerous clear statement rules, see Eskridge & Frickey, *supra* note 16, at 598–610.

410. *See id.* at 619.

411. 501 U.S. 452 (1991).

412. *Id.* at 455–56.

413. *See id.*

414. 29 U.S.C. § 630(f) (emphasis added).

415. *Gregory*, 501 U.S. at 465.

416. *Id.* at 467.

indicates it actually intended such a collision.

Clear statement rules are controversial because they impose a "clarity tax" on Congress.[417] In other words, such rules demand "that Congress legislate exceptionally clearly when it wishes to achieve a statutory outcome that threatens to intrude upon some judicially identified constitutional value."[418] Whatever their wisdom, though, clear statement rules are among the Court's interpretive tools.

3. Nondelegation Canons

Nondelegation canons may be thought of as a sort of clear statement rule. Though the Supreme Court has not invalidated a congressional delegation to an administrative agency under the nondelegation doctrine since 1935,[419] as Cass Sunstein has demonstrated, it has protected nondelegation norms through narrower nondelegation canons.[420] Rather than finding delegations unconstitutional, courts use these nondelegation canons to shape statutory interpretation. For example, courts usually require congressional clarity before permitting agencies to preempt state law.[421] Likewise, courts presume that agencies do not have the authority to promulgate retroactive rules unless Congress has clearly delegated such authority.[422]

In both instances, the Court erects a high bar before agencies can do things implicating other constitutional principles. Preemption, of course, implicates federalism values.[423] Retroactivity implicates separation of powers and due process.[424] Given these constitutional concerns, the idea is that we will presume that agencies may not take certain actions without clear congressional authorization.[425]

4. The Early Major Questions Doctrine

Today's major questions doctrine draws from both nondelegation canons

417. John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 419 (2010).

418. *Id.* at 399.

419. *See supra* Part II.B.1.a.i.

420. *See* Sunstein, *supra* note 221, at 316.

421. *See* Wyeth v. Levine, 555 U.S. 555, 565 (2009).

422. *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988).

423. *See, e.g.,* Nina A. Mendelson, Chevron *and Preemption*, 102 MICH. L. REV. 737, 737–38 (2004) ("To one who values federalism, federal preemption of state law may significantly threaten the autonomy and core regulatory authority of states.").

424. *See* Ann Woolhandler, *Public Rights, Private Rights, and Statutory Retroactivity,* 94 GEO. L.J. 1015, 1019, 1025–27 (2006).

425. *See* Sunstein, *supra* note 221, at 332–35.

and clear statement rules. That said, the major questions doctrine has morphed over time.[426] Though *West Virginia* was the first Supreme Court majority opinion to identify it by name, the Court tried to justify the doctrine by citing cases from roughly the past quarter century.[427]

One such decision is *FDA v. Brown & Williamson Tobacco Corp*.[428] The Food, Drug, and Cosmetic Act (FDCA) grants the Food and Drug Administration (FDA) the authority to regulate "drugs" and "devices."[429] Pursuant to that authority, FDA asserted jurisdiction to regulate tobacco. Nicotine, after all, is a drug, and cigarettes are "devices" delivering nicotine to the body. [430]

The Supreme Court held that the FDA lacked that authority.[431] Though the plain text of the statute seemed to grant the FDA the jurisdiction it claimed, Justice O'Connor's majority opinion found that thirty-five years of congressional history instructed otherwise.[432] Congress, in fact, had enacted six separate pieces of legislation addressing tobacco use and human health.[433] Each time, Congress assumed that the FDA lacked authority over tobacco.[434] Thus, while the FDA mounted a plausible textual argument that it had jurisdiction over tobacco, the Court concluded that Congress never intended such a delegation. Indeed, it found that Congress had "spoken directly" to the question and denied the FDA that authority.[435]

Another early major questions case was *Gonzales v. Oregon*.[436] The Attorney General asserted he could rescind the licenses of physicians who prescribed a controlled substance for assisted suicide, even in Oregon, which had legalized physician-assisted suicide.[437] The Attorney General argued that this license revocation came within his authority under the Controlled

426. *See* Deacon & Litman, *supra* note 4 (manuscript at 3).

427. *See* Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777, 787 (2017); Beau J. Baumann, *Americana Administrative Law*, 111 GEO. L. J. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4033753. *But see* Louis J. Capozzi III, *The Past and Future of the Major Questions Doctrine*, 84 OHIO ST. L.J. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4234683 (arguing that the ideas underpinning the major questions doctrine extend back to the mid-to-late nineteenth century).

428. 529 U.S. 120 (2000).

429. *See* 21 U.S.C. §§ 321(g)–(h), 393.

430. *See* 529 U.S. at 126.

431. *See id.*

432. *Id.* at 144, 155.

433. *Id.* at 137.

434. *Id.* at 144.

435. *See id.* at 143–56.

436. 546 U.S. 243 (2006).

437. *See id.* at 248–49.

Substances Act (CSA), which regulates the applicable drugs.[438] The CSA further empowers the Attorney General to revoke medical licenses when a doctor acts "inconsistent with the public interest."[439]

The Court rejected the "idea that Congress gave [the Attorney General] such broad and unusual authority through an implicit delegation."[440] The Court's fundamental insight was that physician-assisted suicide was wholly unrelated to Congress's project when it passed the CSA.[441] The Act was intended to control "recreational drugs," not the practice of medicine.[442] To this extent, the major questions doctrine in *Oregon* amounted to the unremarkable assertion that agencies ought not grab power outside their sphere of expertise.

Finally, in *MCI Telecommunications v. AT&T*,[443] the Court rejected the Federal Communications Commission's (FCC's) decision to make tariff filing optional for non-dominant long-distance phone carriers. The statute only permitted FCC to "modify" filing requirements.[444] Per Justice Scalia, the Court held that the decision to exempt non-dominant carriers from onerous filing requirements imposed on dominant carriers was too important to count as mere "modification."[445] Hence, the FCC overstepped its delegated authority.

Brown & Williamson, *Oregon*, and *MCI*, then, function like ordinary statutory interpretation cases. In all three, the statutory language arguably granted the agencies a certain power. The surrounding context, however, strongly indicated that Congress had *not* delegated such authority. That context necessarily informed the textual analysis. The Court rejected the agencies' actions not because administrative action addressing "major" issues was presumptively illegitimate but rather because the evidence *in toto* indicated that Congress had denied the agencies the powers in question.[446] In other words, these cases faulted the agencies for acting beyond the authority Congress had delegated to them. As we shall see, more recent

438. S*ee id.* at 253.

439. 21 U.S.C. § 823(f).

440. 546 U.S. at 267.

441. *See id.* at 269–70.

442. *See id.* at 272.

443. 512 U.S. 218 (1994).

444. 47 U.S.C. § 203(b)(2).

445. *See MCI*, 512 U.S. at 231 ("[E]limination of the crucial provision of the statute for 40% of a major sector of the industry is much too extensive to be considered a 'modification.'").

446. *MCI* did fault the FCC for adopting a "major" change, but that was because the statute permitted only *modifications*, which the Court interpreted to mean small, not large, changes. *See id.* at 227–31. *MCI*, therefore, does not support a more general presumption against "major" agency-made policies.

major questions cases do something quite different.[447]

5. Functions of the Constitutional Canons

The constitutional canons are multifarious and necessarily serve various functions, but a few ostensible goals bear special mention. First, courts sometimes conceive of some canons as tiebreakers to resolve statutory ambiguities.[448] Courts generally agree that they ought not invoke canons to indulge all possible constructions of a statute but merely *reasonable* ones.[449] The alternative would give courts too much license to rewrite statutory language themselves.[450] When courts do use them to override a statute's text, it is often in cases like *Brown & Williamson* where the context makes abundantly clear that Congress clearly and repeatedly has rejected a particular interpretation.

Second, courts also often use the canons to further judicial minimalism by enabling courts to avoid the counter-majoritarian problem inherent in judicial review.[451] In other words, the canons enable the Court to protect the Constitution without the friction of judicial invalidation.[452] Of course, it is debatable whether courts always deploy canons with such modesty, but in theory they promote judicial restraint.[453]

Third, constitutional canons of statutory interpretation can advance substantive goals.[454] The clear statement rules discussed above, for example, further federalism principles. To this extent, they inject values into a case beyond those in the relevant statutory text. In a pre-textualist era in which courts sometimes considered themselves partners of Congress, this approach, while contestable, fits with a broader notion of the court's equitable

447. *See infra* Part III.B.3.a.

448. *See, e.g.*, Brian G. Slocum, *Rethinking the Canon of Constitutional Avoidance*, 23 U. PA. J. CONST. L. 593, 596 (2021) (noting that the Court claims the constitutional avoidance canon is a "mere tie-breaking principle").

449. *See* Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988).

450. *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 841 (1986) ("'Although this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute . . . or judicially rewriting it.'" (quoting Aptheker v. Secretary of State, 378 U.S. 500, 515 (1964))).

451. *See Sunstein*, *supra* note 221, at 317.

452. *See id.*

453. *See* Trevor Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1207 (2006).

454. *See* Eskridge & Frickey, *supra* note 16, at 596.

authority.[455] For a textualist judge, though, it seems more problematic to rely on substantive canons to displace reasonably clear statutory language.[456]

B. Constitutional Canons on the Roberts Court

Commentators have long critiqued the Court's use of the constitution-based canons,[457] but *NFIB*, *West Virginia*, and *Brnovich* reflect unusually aggressive use of constitutional conceits to shape statutory interpretation. This subsection explores the important ways in which these recent cases distort the constitutional canons or depart from them altogether. It begins by examining whether the Court's recent decisions serve the canons' ostensible tiebreaking and minimalism functions. It then asks whether the recent decisions' analyses might fit within any of the distinct, pre-existing canons. It concludes by observing that these decisions invoke constitutional ideas to advance substantive goals in ways that might foreshadow future changes to constitutional law.

1. Constitutional Canons as Tiebreakers

NFIB, *West Virginia*, or *Brnovich* did not use constitutional canons to resolve ambiguities in the statutory texts.[458] To the contrary, the Court used them to rewrite the statutes. The tiebreaking model, then, does little to explain these cases.[459]

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455. *See* William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 1101 (2001).

456. *See* Barrett, *supra* note 397, at 110; Eidelson & Stephenson, *supra* note 21, at 43–61.

457. *See, e.g.*, Eskridge & Frickey, *supra* note 16, at 629–44 (criticizing the Rehnquist Court as "unusually activist in the way it does statutory interpretation, crating clear statement rules and super-clear statement rules as means by which the Court can read constitutional values into statutes"); Eric S. Fish, *Constitutional Avoidance as Interpretation and as Remedy*, 114 MICH. L. REV. 1275, 1275 (2016) (arguing that the Court has used the avoidance canon to "rewrite laws"); Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CALIF. L. REV. 397, 399–400 (2005) (noting that the avoidance canon empowers courts to revise statutes without clear limitations); William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 832 (2001) (arguing that constitutional avoidance canon "frequently results in questionable statutory interpretations"); Frederick Schauer, Ashwander *Revisited*, 1995 SUP. CT. REV. 71, 94–95 (contending that constitutional avoidance canon promotes judicial activism).

458. *See supra* Part I.

459. *Cf.* Brian Taylor Goldman, *The Classical Avoidance Canon as a Principle of Good-Faith Construction*, 43 J. LEGIS. 170, 189–90 (2016) (arguing that constitutional avoidance canon should be used only as a tiebreaker).

To be sure, earlier incarnations of some constitutional canons also involved some statutory revision. Often, though, those were "moderately activist" procedures.[460] The recent Roberts Court, by contrast, engaged in major surgery.[461]

Consider, for instance, the constitutional avoidance canon, which ostensibly applies when the statute is unclear.[462] In *United States v. Delaware & Hudson Co.*,[463] the Court explained that the avoidance canon could be applied to a statute "susceptible of two constructions."[464] By contrast, the Roberts Court in these cases made no real attempt to identify textual indeterminacy before allowing its constitutional concerns to shape its statutory interpretation.[465]

Admittedly, some other constitutional canons, such as the federalism clear statement rule, theoretically might apply to statutes that are clear—but just not clear enough. In *Gregory*, for instance, the Court inverted the statute's plain language on its head.[466] The ADEA created a broad rule (state employees are covered) and then carved out narrow exceptions.[467] By insisting that the statute should not cover state judges unless Congress had clearly included them, the Court was inverting the text's instructions.[468] The constitutional canons, then, don't always operate as tiebreakers.[469]

The Roberts Court's approach, though, is even less respectful of statutory text than *Gregory*. Significantly, the ADEA *was* ambiguous; it's unclear whether state judges are officials "on the policymaking level."[470] Because the statute in *Gregory was* ambiguous, it invited application of a constitutional canon.[471] By contrast, in the more recent cases, the Court rewrote statutory language that was not similarly under-determinate.

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460. Eskridge & Frickey, *supra* note 16, at 598; *see also supra* Part III.A.

461. *See supra* Part I.B.

462. *See, e.g.*, Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346–48 (1936) (Brandeis, J., concurring).

463. 213 U.S. 366 (1909).

464. *Id.* at 408.

465. *See supra* Part I.B.

466. *See* Gregory v. Ashcroft, 501 U.S. 452 (1991).

467. *See* 29 U.S.C. § 630(f).

468. *See* 501 U.S. at 467.

469. *See, e.g.*, NLRB v. Cath. Bishop of Chi., 440 U.S. 490, 504–07 (1978) (reversing National Labor Relations Act's statutory presumption that covered all employers unless exempted by holding that religious schools were exempted because they were not explicitly covered).

470. 29 U.S.C. § 630(f).

471. *See* 501 U.S. at 479-86 (White, J., concurring).

2. Constitutional Canons as Minimalism

The constitutional canons also can further judicial minimalism by enabling courts to avoid unnecessarily invalidating statutes.[472] One could plausibly defend these decisions on such grounds. For example, rather than revitalizing the nondelegation doctrine in *NFIB* and *West Virginia*, the Court took the more modest step of deciding those cases by issuing statutory holdings.[473] As Kristen Hickman puts it, such a case-by-case approach may be "limited in its reach to curtail either congressional delegations or agency policymaking [too] much."[474]

On the other hand, as noted above, the delegations at issue in these cases were not unconstitutional under current doctrine.[475] Nor did most of the modalities of constitutional interpretation suggest a serious constitutional problem. It hardly seems minimalist to rewrite a statute to avoid a fanciful constitutional issue.

Indeed, the instant cases seem to rely on constitutional canons regardless of the seriousness of the constitutional issue. Recall that classical avoidance applies when one possible interpretation of a statute would be unconstitutional.[476] Modern avoidance applies when the statute raises a serious constitutional issue.[477] In either case, the constitutional issue should be, at a minimum, *colorable*.

Even in the clear statement cases, the constitutional issues often raise genuinely serious questions. Take *Gregory* again. Had the ADEA applied to state judges, Congress would have forbidden states from setting retirement ages for their judges. Even under the existing precedent, the application of the ADEA to state judges would have raised a serious Tenth Amendment issue.[478] By contrast, the constitutional objections motivating the conservative Justices in *NFIB*, *West Virginia*, and *Brnovich* could only be vindicated by making dramatic changes to constitutional law.[479]

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472. *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 164–69 (2d ed. 1986).

473. *See, e.g.*, Hickman, *supra* note 191, at 84.

474. *Id.* at 85.

475. *See supra* Part II.B.1.a.

476. *See supra* Part III.A.1.

477. *See id.*

478. While *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), did uphold the application of the Fair Labor Standards Act to city transit workers, that case did not involve high-ranking officials like judges. Moreover, the law surrounding the application of federal statutes to state employees was in a state of flux. *Compare id. and* Maryland v. Wirtz, 392 U.S. 183 (1968), *with* Nat'l League of Cities v. Usery, 426 U.S. 833 (1976).

479. *See supra* Part II.B.

3. Constitutional Canons as Distinct Doctrines

While the constitutional canons share certain commonalities, they also can be divided into distinct doctrines. It is therefore worth examining whether the recent decisions faithfully applied any of those individual canons.[480]

a. The New Major Questions Doctrine and Nondelegation Canons

The major questions doctrine drove the decisions in both *NFIB* and *West Virginia*, but those cases applied the doctrine quite differently than the doctrine's foundational cases.[481] In the earlier cases, the agencies in question were regulating an area Congress never intended for them to regulate.[482] As Justice Kagan explained it, the agencies were acting outside their delegated "lane, so that it had no viable claim of expertise or experience."[483]

For example, when the FDA moved to regulate tobacco, the Court intervened because it was quite plain from both statutory structure and history that Congress had never intended the FDA to have that authority.[484] The FDA's job was to ensure the safety of medical drugs and devices.[485] Tobacco doesn't heal people; it kills them. Thus, the agency transgressed its authority.[486]

Indeed, one damning piece of evidence was that *if* the FDA had jurisdiction over tobacco, then the FDCA would have required the FDA to ban tobacco altogether.[487] Congress for decades, though, had clearly indicated tobacco should be legal.[488] The conclusion followed that the FDA had overstepped.[489]

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480. I address these distinct doctrines in a different order than above because of their relative importance to the cases examined here.

481. Because the major questions doctrine might be considered a kind of nondelegation canon, I group them together here.

482. *See supra* Part III.A.4.

483. West Virginia v. EPA, 142 S. Ct. 2587, 2633 (2022) (Kagan, J., dissenting).

484. *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 155 (2000) ("Congress has enacted several statutes addressing the particular subject of tobacco and health, creating a distinct regulatory scheme for cigarettes and smokeless tobacco.").

485. *Id.* at 126.

486. *See, e.g.*, Tom Merrill, West Virginia v. EPA*: Getting to Actual Delegation*, REASON: THE VOLOKH CONSPIRACY (July 29, 2022), https://reason.com/volokh/2022/07/29/west-virginia-v-epa-getting-to-actual-delegation/.

487. *See* 529 U.S. at 136–37.

488. *See id.*

489. *See* Lisa Schultz Bressman, *Deference and Democracy*, 75 GEO. WASH. L. REV. 761, 761

Similarly, in *Oregon*, the Attorney General was trying to regulate what many considered the practice of medicine.[490] While the Attorney General enjoys rulemaking authority under the CSA, that power did not extend to "declaring illegitimate a medical standard for care and treatment of patients that is specifically authorized under state law."[491] Regulating medical practice was far outside the Attorney General's lane, and the enacting Congress never understood itself to be conferring such authority.[492]

The Roberts Court itself recently applied something closer to this "classic" version of the major questions doctrine in *Alabama Association of Realtors v. Department of Health and Human Services*.[493] The Court there denied the Centers for Disease Control (CDC) authority to impose a moratorium on evictions.[494] While the CDC contended convincingly that halting evictions could help reduce the spread of COVID, the authorizing statute did not give the CDC authority over housing.[495] Housing policy, the Court concluded, is very far from the CDC's core expertise and jurisdiction.[496]

As the majority pointed out, the statute itself gives the Surgeon General power to "provide for such inspection, fumigation, disinfection, sanitation, [and] pest extermination."[497] While the statute also empowers the Surgeon General to take "other measures[] as in his judgment may be necessary" "to prevent the introduction, transmission, or spread of communicable diseases,"[498] the litany of particulars indicates that the CDC's authority primarily involves "identifying, isolating, and destroying the disease itself."[499] Halting evictions did not resemble anything else within this litany. The majority's reading basically employed the textual canon *noscitur a sociis*—it shall be known by its associates.[500] *Alabama Association*, then, rooted its analysis in the statute itself, concluding that its text foreclosed the agency action.[501] To this extent, *Alabama Association* more resembles the early major

(2007) (arguing that cases like *Brown & Williamson* are best understood as instances where the agencies were acting in ways "too extraordinary for Congress implicitly to have delegated").

490. *See* Gonzales v. Oregon, 546 U.S. 243, 251–53 (2006).

491. *Id.* at 258.

492. *See id.* at 260–61.

493. 141 S. Ct. 2485 (2021) (per curiam).

494. *See id.*

495. *See* 42 U.S.C. § 264(a).

496. *See Ala. Ass'n*, 141 S. Ct. at 2486.

497. *Id.* at 2488.

498. *See id.* (quoting 42 U.S.C. § 264(a)).

499. *Id.*

500. *See* ESKRIDGE, *supra* note 15, at 118–20.

501. While this Article is critical of the conservative Justices, in *Alabama Association* their

questions doctrine cases.[502]

To be sure, the case also has some new major questions doctrine features. For example, like *NFIB* and *West Virginia*, *Alabama Association* emphasized that the eviction moratorium was an important, "unprecedented" policy that implicated constitutional values.[503] Drawing inspiration from *Utility Air Regulatory Group v. EPA*,[504] another Roberts Court decision, it also insisted that Congress "speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"[505] To that extent, *Alabama Association* was a hybrid case, incorporating elements of both the early and new major questions doctrines.[506]

By contrast, *NFIB* and *West Virginia* are emphatically *new* major questions cases.[507] Unlike earlier major questions cases like *MCI*, they do not engage carefully with the statutory texts.[508] Also unlike the earlier cases, they fault the agencies for promulgating policies that fall squarely within their area of expertise. The statute in *NFIB* empowered OSHA to issue "occupational safety and health standards" to try to ensure healthful working conditions.[509] The Standard at issue did precisely that: it protected *workers* from the workplace spread of COVID.[510]

Likewise, the EPA's core function under the Clean Air Act is to regulate sources of air pollution.[511] Power plants are a major source of air pollution; the EPA has been regulating them for decades.[512] The Clean Power Plan was squarely within the EPA's wheelhouse.[513]

NFIB and *West Virginia*, then, expanded the major questions doctrine

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construction of the statutory text was more persuasive than the dissenters'. *Compare Ala. Ass'n*, 141 S. Ct. at 2485–90 (per curiam), *with id.* at 2490–94 (Breyer, J., dissenting). The Court's decision to block the policy as an emergency matter without full briefing or argument, however, is a separate question. *See id.* at 2490 (Breyer, J., dissenting).

502. *See* Deacon & Litman, *supra* note 4 (manuscript at 15) ("In some ways, the eviction moratorium case was in line with major questions cases that came before.").

503. *See Ala. Ass'n*, 141 S. Ct. at 2489.

504. 573 U.S. 302 (2014).

505. *Ala. Ass'n*, 141 S. Ct. at 2489 (quoting *Util. Air*, 573 U.S. at 324).

506. *Cf.* Cass R. Sunstein, *There Are Two 'Major Questions' Doctrines*, 73 ADMIN. L. REV. 475, 477–78 (2021) (identifying different ways of understanding the major questions doctrine).

507. *See* Sohoni, *supra* note 4, at 264.

508. *See* MCI Telecomms. Corp. v. AT&T, 512 U.S. 218, 230–34 (1994) (construing statutory term "modify").

509. 29 U.S.C. § 651(b)(3).

510. *See* Emergency Temporary Standard, *supra* note 46; *supra* Part I.B.1.

511. *See* 42 U.S.C. §§ 7402, 7411.

512. *See* § 7411(b)(1); *supra* Part I.B.2.

513. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2633 (2022) (Kagan, J., dissenting).

significantly, extending it to cover cases where agencies *were* acting within their traditional areas of authority. The Court focused primarily on the importance of the agency policies and the lack of specific statutory authorizations to address the precise problems at issue. Whereas the major questions doctrine used to operate as a modest interpretive tool to ensure that agencies did not venture far beyond their delegated spheres of authority, it now functions as a barrier to administrative action even within agencies' core areas.[514] Under the new major questions doctrine, even when agencies do stay in their lanes, they aren't allowed to issue "major" policies unless Congress has specifically delegated that authority, which Congress almost never does.[515]

This doctrinal transformation from *Brown & Williamson* and *Oregon*, on the one hand, to *NFIB* and *West Virginia*, on the other, is significant.[516] In essence, the Court has taken a narrow canon of statutory interpretation and refashioned it into something with far more libertarian bite.[517]

b. Clear Statement Rules

Brnovich did not expressly invoke any of the constitutional canons. To that extent, it may be the most puzzling case here. Constitutional norms obviously drove the majority's statutory interpretation, and yet it did not even bother justifying its atextual statutory interpretation with reference to the traditional constitutional canons of statutory interpretation.

Had the Court tried to do so, its best bet might have been federalism clear statement rules. As in those cases, the Court was protective of state

514. *See, e.g.*, Natasha Brunstein & Richard L. Revesz, *Mangling the Major Questions Doctrine*, 74 ADMIN. L. REV. 217, 224 (2022).

515. *See* Richardson, *supra* note 187, at 177 (likening the major questions doctrine to a "super-*Marbury*"); Emerson, *supra* note 263, at 2024 (noting that the major questions doctrine "enlarges the judiciary's policymaking power").

516. *MCI* also does not support *NFIB* and *West Virginia*, but for somewhat different reasons. *MCI* is basically a straightforward statutory interpretation case about the meaning of the word "modify." MCI Telecomms. Corp. v. AT&T, 512 U.S. 218, 231 (1994). The Court rejected the FCC's action there not because "major" agency action is presumptively illegitimate but rather because it concluded the statute only permitted less significant "modifications." *See id.* To conclude that *MCI* forbids all "major" agency policies without super-specific congressional authorization is to overread it. *Cf.* Daniel E. Walters, *The Major Questions Doctrine at the Boundaries of Interpretive Law*, 109 IOWA L. REV. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4348024 (arguing that the new major questions doctrine is "extreme on every dimension").

517. *See* Richardson, *supra* note 187, at 192; Sohoni, *supra* note 4, at 293 ("The new major questions doctrine enables the Court to effectively resurrect the nondelegation doctrine without saying it is resurrecting the nondelegation doctrine.").

sovereignty. Nevertheless, *Brnovich* also goes beyond the clear statement rule cases, which might explain why it didn't invoke that canon.

The VRA, in fact, *did* include a clear statement that states cannot enact voting rules that *result* in disproportionately fewer voting opportunities for racial minorities.[518] The ADEA in *Gregory*, by contrast, really was not clear as to whether it should apply to state judges.[519] While *Gregory*'s holding is a plausible interpretation of the ADEA, *Brnovich* completely rewrote the VRA.[520]

c. The Constitutional Avoidance Canon

The constitutional avoidance canon does not illuminate these recent decisions any better. The avoidance canon, recall, instructs that courts should resolve a statutory ambiguity by selecting the interpretation that avoids an unconstitutional interpretation or a serious constitutional issue.[521] The Court in these cases, however, didn't really claim to be avoiding a difficult constitutional issue in any of these cases. As noted above, the constitutional arguments against the policies in these cases were weak.[522]

Nor did the Court purport to be choosing between competing plausible interpretations of the text.[523] To the contrary, the Court paid little attention to the statutory texts. The opinions in *NFIB*, *West Virginia*, and *Brnovich*, then, really don't fit within either the classical or modern constitutional avoidance canon.

4. Constitutional Conceits as Constitutional Foreshadowing

The Court's recent uses of constitutional conceits are especially aggressive, but they may be instructive about the future of constitutional law. *NFIB* and *West Virginia* may signal an impending revival of the nondelegation doctrine.[524] *Brnovich* could herald the eventual constitutional demise of the

518. *See* 52 U.S.C. § 10301(a).

519. *See supra* Part III.A.2.

520. *See* Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *The Court's Voting-Rights Decision Was Worse Than People Think*, ATLANTIC (July 8, 2021), https://www.theatlantic.com/ideas/archive/2021/07/brnovich-vra-scotus-decision-arizona-voting-right/619330/ ("*Brnovich* is so troubling and potentially destructive because it is not operating within the confines of the VRA project. The decision is a repudiation of the core aims of that project.").

521. *See supra* Part III.A.1.

522. *See supra* Part II.B.

523. *See supra* Part I.B.

524. *See, e.g.*, Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 5 (anticipating potential revival of nondelegation doctrine).

VRA or a further narrowing of congressional power.[525] On this account, the canons may foreshadow future constitutional change more than they explain anything about statutory interpretation.

There is historical precedent for the canons serving as constitutional prognosticators. For example, in the 1980s and early 1990s, the Court protected federalism principles primarily through its statutory interpretation. The clear statement rule in cases like *Gregory* and *Atascadero State Hospital v. Scanlon*[526] vindicated federalism principles that had not yet prevailed consistently in the Supreme Court.[527] By the early 2000s, though, the Court had substantially revised much constitutional doctrine in areas such as the Commerce Clause,[528] Tenth Amendment,[529] and Eleventh Amendment.[530] By then, it was clear that statutory cases like *Atascadero* and *Gregory* had signaled a pending constitutional revolution.[531]

Another more recent example occurred in the context of the VRA. In *Northwest Austin Municipal Utility District Number One v. Holder*,[532] a utility district sought an exemption from VRA § 5's preclearance provision.[533] The lower court concluded that the district was not a political subdivision within the terms of the statute. Therefore, it was not statutorily eligible to bailout from the preclearance process.[534]

In its ruling, the Supreme Court expressed constitutional skepticism about preclearance. VRA § 5, it noted, "goes beyond the prohibition of the Fifteenth Amendment by suspending all changes to state election law—however innocuous—until they have been precleared by federal authorities."[535] In light of these constitutional questions, the Court interpreted the VRA to allow

525. *See* Travis Crum, *Deregulated Redistricting*, 107 CORNELL L. REV. 359, 434–43 (2022) [hereinafter *Deregulated Redistricting*]. *But see* Allen v. Milligan, 143 S. Ct. 1487, 1502 (2023).

526. 473 U.S. 234 (1985).

527. *See supra* Part III.A.2.

528. *See* United States v. Lopez, 514 U.S. 549 (1995); United States v. Morrison, 529 U.S. 598 (2000).

529. *See* New York v. United States, 505 U.S. 144 (1992); Printz v. United States, 521 U.S. 898 (1997).

530. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996); Alden v. Maine, 527 U.S. 706 (1999).

531. *See* Thomas W. Merrill, *Chief Justice Rehnquist, Pluralist Theory, and the Interpretation of Statutes*, 25 RUTGERS L.J. 621, 655–56 (1994) (noting the iterative development of Rehnquist's federalism jurisprudence from earlier, less-heralded opinions).

532. 557 U.S. 193 (2009).

533. *See* 52 U.S.C. §§ 10303–04.

534. *See* Nw. Austin Mun. Util. Dist. No. One v. Mukasey, 573 F. Supp. 2d 221, 232 (2008).

535. *See Northwest Austin*, 557 U.S. at 202.

political subunits to bailout out of preclearance requirements.[536] A few years later, the Court in *Shelby County* struck down the VRA's coverage formula in its entirety.[537] *Northwest Austin* foreshadowed *Shelby County*.

Perhaps something similar is now afoot. The implications could be dramatic. The most extreme approach to the nondelegation doctrine could call into question the constitutionality of the entire administrative state. Even a more limited revival of the nondelegation doctrine would create profound legal instability. Likewise, an entirely state-centric model of elections could effectively nullify the VRA.[538]

If the Court goes down these paths, it might support such constitutional holdings by citing the cases examined here—even though these three cases are conspicuously lacking in constitutional reasoning! *Shelby County* did exactly that, citing *Northwest Austin* extensively.[539] Today's statutory decisions could provide the foundation for tomorrow's constitutional precedents.

On the other hand, the Court also may feel that significant constitutional changes are unnecessary.[540] After all, the instant statutory decisions accomplish some of what a constitutional revolution could, perhaps obviating the need for future constitutional rulings.[541] It's also possible only a minority of Justices wish to revive the nondelegation doctrine or bring down the VRA. Only Justice Gorsuch bothered to sketch out a separation-of-powers theory to defend the major questions doctrine in *West Virginia*, and only one of his colleagues (Justice Alito) actually joined that concurrence.[542] Likewise, the Court's recent decision in *Allen v. Milligan*[543] seems to suggest that there are not five votes to invalidate what remains of the VRA, at least in the vote-dilution context.[544] From that perspective, *NFIB*, *West Virginia*, and *Brnovich* might reflect compromise positions that weaken federal

536. *See id.*

537. *See* Shelby Cnty. v. Holder, 570 U.S. 529, 556–57 (2013).

538. *See* Rebecca Aviel, *Remedial Commandeering*, 54 U.C. DAVIS. L. REV. 1999, 2031 (2022); Crum, *supra* note 202, at 1630; *Deregulated Redistricting*, *supra* note 525, at 434–43.

539. *See Shelby Cnty.*, 570 U.S. at 538–40, 542, 544–56.

540. *See* Sohoni, *supra* note 4, at 265–66 (arguing that the nondelegation doctrine's "most important work" can be accomplished by major questions doctrine).

541. *See* Christopher J. Walker, *A Congressional Review Act for the Major Questions Doctrine*, 45 HARV. J.L. & PUB. POL'Y 773, 775–76 (2022) (noting that the Court may retreat from calls to revive nondelegation doctrine and instead accomplish the same goals via statutory interpretation); Chad Squitieri, *Who Determines Majorness?*, 44 HARV. J.L. & PUB. POL'Y 463, 469 (2021).

542. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2625 (2022) (Gorsuch, J., concurring).

543. 143 S. Ct. 1487 (2023).

544. *See id.*

authority without completing dismantling existing legal structures.[545]

Of course, numerous factors, such as the Court's future composition, will affect whether the Court builds on these opinions to create new constitutional law. For the time being, though, constitutional scholars and lawyers would be wise to remember these statutory decisions.

C. Summary: Conceits, Not Canons

The instant cases' uses of constitutional conceits in statutory interpretation are exceptionally aggressive. Whereas earlier cases sometimes relied on constitutional canons to resolve statutory ambiguities, the instant decisions use constitutional conceits to brush aside clear statutory language. Whereas earlier cases sometimes used the canons to avoid serious constitutional issues, the instant cases gesture towards constitutional conceits without providing constitutional reasoning.

To be sure, the Court's earlier uses of constitutional canons also invited criticism. Judge Friendly complained that the avoidance canon is "one of those rules that courts apply when they want and conveniently forget when they don't."[546] John Manning accused the Court of using clear statement rules to create "constitutional law on the cheap."[547] Then-Professor Barrett, who as a scholar wrestled thoughtfully with these issues, warned that "those canons that permit a court to qualify clear text run headlong into the obligation of faithful agency and are inconsistent with the constitutional structure."[548]

The Court, then, has refashioned old canons before, applying them inconsistently and controversially.[549] To that extent, the recent decisions' use of canons differs from earlier uses more in degree than in kind. The difference in degree, though, reflects an unusually ideological Court determined to reshape American public law and invalidate federal policies it does not like.

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545. *See supra* note 457 and accompanying text.

546. HENRY J. FRIENDLY, *Mr. Justice Frankfurter and the Reading of Statutes*, *in* BENCHMARKS 211 (1967).

547. *See* Manning, *supra* note 417, at 449.

548. Barrett, *supra* note 397, at 164. Barrett ultimately concluded, though, that courts *can* push statutory language "in a direction that better accommodates constitutional values." *See id.* at 181.

549. *See* FRIENDLY, *supra* note 546, at 211; Barrett, *supra* note 397, at 119 ("[A] canon's purpose often lies in the eyes of the beholder."); Aaron-Andrew P. Bruhl, *Communicating the Canons: How Lower Courts React When the Supreme Court Changes the Rules of Statutory* Interpretation, 100 MINN. L. REV. 481, 495 (2015); *supra* note 457 and accompanying text.

IV. IMPLICATIONS AND CRITIQUES

A. Legal Critiques

1. Atextual Statutory Interpretation

The Court's approach in all three cases veered far from the statutes Congress wrote. This is notable in all events but especially given the Justices' supposed commitments to textualism.[550] By contrast, the atextualism in cases like *Gregory* reflected the interpretive preferences of an earlier era.[551] While Justice Gorsuch is correct that "our law is full of clear-statement rules," the use of substantive canons is inconsistent with his stated preferences for textualist statutory interpretation.[552] Indeed, as Professors Eidelson and Stephenson contend, those past judicial past practices "have long operated from premises that textualism repudiates."[553]

To be sure, good-faith textualists sometimes disagree about how to proceed. Textualism is complicated, requiring numerous analytical steps about which good-faith textualists can differ.[554] The opinions here, though, do not reflect disagreements about how to do textualism as in, say, *Bostock*.[555] Nor do they apply constitutional canons to resolve statutory ambiguities. To the contrary, they barely wrestled with texts at all.

Decisions like these both undermine the Court's credibility and render the law even more under-determinate than usual.[556] If judges can interpret statutes merely by gesturing toward vague constitutional notions, they can steer statutory meaning wherever they please. Prominent textualists, in fact,

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550. *See supra* Part I.A.

551. *See* Krishnakumar, *supra* note 8, at 891–92 (noting that legislative history use has declined significantly).

552. West Virginia v. EPA, 142 S. Ct. 2587, 2625 (2022) (Gorsuch, J., concurring).

553. Eidelson & Stephenson, *supra* note 21, at 63. For fascinating discussions of whether textualism can be reconciled with substantive canons, compare *id.*, with Barrett, *supra* note 397.

554. *See generally* William N. Eskridge, Jr., Brian Slocum & Kevin Tobia, *Textualism's Defining Moment*, 123 COLUM. L. REV. (forthcoming 2023) (manuscript at 13–64), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4305017 (exploring twelve distinct analytical steps requiring choices from textualist judges); Grove, *supra* note 21, at 267 (discussing competing textualisms); Nourse, *supra* note 6 (manuscript at 5, 30) (identifying that "Justices who shared a [textualist] philosophy conflicted among themselves about the meaning of text").

555. *See* Bostock v. Clayton County, 140 S. Ct. 1731 (2020).

556. *Cf.* Eskridge et al., *supra* note 554, at 58 ("Is the post-*West Virginia v. EPA* Court even listening to these rule-of-law concerns . . . ?").

have recognized this problem. Justice Scalia once complained that substantive canons amounted to "dice-loading rules" that were problematic for the "honest textualist."[557]

Then-Professor Barrett, too, found that substantive canons were in "significant tension" with textualism because they abandon not only the statute's text "but also the more fundamental textualist insistence that a faithful agent must adhere to the product of the legislative process, not strain its language to account for abstract intention or commonly held social values."[558] While Professor Barrett did conclude that textualists could still use *constitutional* canons, she also noted that such canons more appropriately protect "reasonably specific" constitutional values (i.e., state sovereign immunity) as opposed to more amorphous constitutional ideas.[559] Thus, she continued, "a canon designed to protect the constitutional separation of powers . . . is probably stated at too great a level of generality to justify departures from a text's most natural meaning."[560]

It's hard to square the cases here with Professor Barrett's scholarly analysis. The major questions doctrine purports to protect vague separation-of-powers ideas—just the sort of open-ended constitutional notion that Professor Barrett thought was too general to justify departing from the statutory text.[561] Likewise, the federalism principles underlying *Brnovich* were amorphous, not specific. The use of the constitutional canons in these cases, then, seem at odds with textualists' usual jurisprudential commitments.[562]

Moreover, even if we reject the textualist premise that statutory language is the North Star of statutory interpretation, most judges and scholars agree that *some* textual analysis is a necessary component of the interpretive

557. SCALIA, *supra* note 20, at 28.

558. Barrett, *supra* note 397, at 123–24. As this Article went to press, Justice Barrett penned an interesting concurrence elaborating on her theoretical defense of the major questions doctrine. *See* Biden v. Nebraska, 143 S. Ct. 2355, 2378-83 (2023) (Barrett, J., concurring) (defending major questions doctrine against charges that it is atextual by arguing that it "situates text in context"). For a powerful critique of Justice Barrett's argument, see Adrian Vermeule, *Text and "Context,"* NOTICE & COMMENT (July 13, 2023), https://www.yalejreg.com/nc/text-and-context-by-adrian-vermeule/ ("Either the notion of 'context' is so capacious as to include the very same substantive canons, principles and maxims that Barrett would hive off as 'external to the statute' and hence problematic, or else she would have to try to identify a subcategory of strictly linguistic context, shorn of the rich historical and governmental background of the legal order.").

559. Barrett, *supra* note 397, at 168–79 n.331.

560. *Id.* at 179.

561. *See* Manning, *supra* note 256, at 1945.

562. *See* Eidelson & Stephenson, *supra* note 21, at 5.

process.[563] Taking statutory texts seriously means reading narrow statutes narrowly and broad statutes broadly. The majority Justices couldn't bring themselves to do that—or even really wrestle with the statutory language much at all. In short, these decisions practice bad statutory interpretation.

2. Stealth Constitutional Decisionmaking

They also practice bad constitutional law. Perhaps the constitutional arguments in favor of the Court's approaches are stronger than I have credited, but it would be hard to know because the Court didn't show its work.[564] The Court relied on constitutional ideas without providing constitutional analyses.[565]

Nevertheless, even though these weren't constitutional cases, they do have constitutional implications. Neutering a statute through statutory interpretation has a similar practical effect to striking it down as unconstitutional. While Congress in theory can pass a new statute overriding the Court's statutory interpretation, in practice Congress is too gridlocked nowadays to respond.

This stealthy constitutional decisionmaking is not new,[566] but in these cases, it was unusually aggressive. When Justices vaguely gesture toward inchoate constitutional conceits to rewrite statutes, constitutional precedent becomes only marginally relevant and constitutional interpretation becomes increasingly indeterminate. By smuggling constitutional conceits into its statutory interpretation, the Court not only rewrote federal statutes but also opened the door to potential massive transformations in constitutional law.

3. Judicial Epistemology, Judicial Politics

In addition to ignoring statutory texts and twisting constitutional principles, the Court facilitated its attack on federal powers by selectively viewing the facts in these cases.[567] Specifically, the Court minimized the problems the government was trying to address and instead emphasized the harms resulting

563. *See, e.g.*, ESKRIDGE, *supra* note 15, at 9 ("Text and purpose are like the two blades of a scissors; neither does the job without the operation of the other."); Nelson, *supra* note 279, at 352–53 (discussing overlap between textualists and intentionalists).

564. *See supra* Part II.

565. *Cf.* Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2122 (2015) ("The avoidance canon enables—even demands—sloppy and cursory constitutional reasoning.").

566. *See* Eric Berger, *Deference Determinations and Stealth Constitutional Decision Making*, 98 IOWA L. REV. 465, 472–98 (2013); Eric Berger, *Individual Rights, Judicial Deference and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. REV. 2029, 2038–54 (2011).

567. *See* Allison Orr Larsen, *Constitutional Law in an Age of Alternative Facts*, 93 N.Y.U. L. REV. 175 (2018); Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255, 1274 (2012).

from the policies. That selective treatment of facts not only provided helpful atmospherics for the majority opinions but also facilitated the Court's conclusion that the statutes did not contemplate the policies at issue.

For example, in the COVID context, the majority focused not on pandemic's dangers but on the harm suffered by people who get a vaccine they don't want.[568] The *NFIB* per curiam opinion emphasized that the policy forced unwilling employees to vaccinate.[569] By sidestepping the argument that unvaccinated workers posed a danger to workplace health, it was easier for the majority to conclude that the vaccine policy fell outside OSHA's ambit.[570]

Likewise, in *West Virginia*, the majority downplayed the dangers of climate change. While the majority likely believed the EPA lacked authority under § 111(d) to promulgate the Clean Power Plan regardless of the threat posed by climate change, it was easier for the Court to write the opinion without engaging with those threats. After all, the Clean Air Act empowers the EPA to regulate stationary sources contributing to "air pollution which may reasonably be anticipated to endanger public health or welfare."[571]

Most egregiously, *Brnovich* never grappled with important Arizona-specific facts upon which the plaintiffs' claims rested. Arizona's law banning most third-party ballot collection imposed serious voting obstacles for rural Native American communities.[572] Many rural indigenous voters in Arizona lack access to post offices and mail service.[573] As a result, the district court noted, "The rate at which registered voters have home mail service is over 350 percent higher for non-Hispanic whites than for Native Americans."[574] Justice Alito brushed away this crucial factual issue in a footnote, finding these hardships "mitigated" by the amount of time voters have to vote before an election.[575]

Likewise, Arizona's out-of-precinct policy had a racially disparate impact for reasons the majority ignored. For one, some Arizona counties "moved polling [places] in African American and Hispanic neighborhoods 30% more often than in white ones."[576] Polling place locations also required minority voters to travel longer average distances than whites to vote.[577] Moreover, minority voters were more likely than whites to be assigned polling locations

568. *See supra* Part II.A.2.a.

569. NFIB v. OSHA, 142 S. Ct. 661, 665 (2022) (quoting *In re* MCP No. 165, 20 F.4th 264, 272 (6th Cir. 2021) (Sutton, C. J., dissenting)).

570. *See id.* at 672 (Breyer, Sotomayor & Kagan, JJ., dissenting).

571. 42 U.S.C. § 7411(b)(1)(A).

572. *See* Brnovich v. DNC, 141 S. Ct. 2321, 2370 (2021) (Kagan, J., dissenting).

573. *See* DNC v. Reagan, 329 F. Supp. 3d. 824, 869 (2018).

574. *Id.*

575. *See* 141 S. Ct. at 2348 n.21.

576. *Id.* at 2369 (Kagan, J., dissenting).

577. *See id.* at 2366.

other than those closest to their homes.[578] The cumulative result was that Arizona's out-of-precinct policy threw away ballots at eleven times the rate of the next-most-frequent state ballot discarder (Washington)—and racial minorities were more likely to have their ballots thrown away than white voters[579]

The plaintiffs' case hinged on these facts, but Justice Alito mostly ignored them. Instead of really engaging with these complications, Alito insisted repeatedly that Arizona's voting rules were inherently benign.[580] He therefore could claim that VRA § 2 was not doing important enough work to merit its intrusion into state sovereignty.

None of this is to argue that there were not facts supporting the majorities' outcomes. There were—and the Court made use of them. Its selective treatment of key facts, though, helped it construe the statutes stingily.

4. The Passive Virtues and the Aggressive Court

The Court likes to project itself as an impartial, passive institution.[581] Among the Court's supposed passive virtues is its propensity to avoid unnecessary decisions,[582] but the Court went out of its way to decide *West Virginia*. The EPA had already abandoned the Clean Power Plan.[583] The Court, in other words, ruled needlessly on a policy that never had been and never would be in effect. While the EPA could have promulgated new emissions limits, the rule against advisory opinions usually means that courts review current policies, not policies government may someday erect.[584]

The Court also need not have decided *NFIB*. OSHA's policy was a

578. *See id.* at 2369.

579. *See id.* at 2366.

580. *See* Cristina M. Rodríguez, *The Supreme Court 2022 Term—Foreword: Regime Change*, 135 HARV. L. REV. 1, 144 (2022).

581. *See Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (statement of then-Judge Roberts).

582. *See* Alexander M. Bickel, *The Supreme Court 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 42 (1961); Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 668 (2012).

583. *See* West Virginia v. EPA, 577 U.S. 1126 (2016) (granting stay preventing rule from taking effect); Repeal of the Clean Power Plan, 84 Fed. Reg. 32,520, 32,523, 32,561–62 (July 8, 2019); *supra* Part I.B.2.

584. *See* RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 52–59 (7th ed. 2015); *West Virginia*, 142 S. Ct. at 2628 (Kagan, J., dissenting) ("The Court may be right that doing so does not violate Article III mootness rules . . . . But the Court's docket is discretionary, and . . . there was no reason to reach out to decide this case.").

temporary emergency standard.[585] By statute, it would have expired in a few months anyway.[586] Admittedly, it would have required unwilling employees to get vaccinated in the short term, but it was not an ongoing measure that would have survived the pandemic.

NFIB also came to the Court on an expedited basis.[587] While the Court deserves credit for holding argument and writing opinions in the case, it also treated the case as though it were on the merits docket—even though petitioners sought emergency relief.[588] Though the Court disclaimed any role weighing the costs of compliance against the benefits of the policy,[589] as Steve Vladeck argues, such weighing is precisely judges' role when parties come to them for emergency relief.[590] Vladeck concludes that the Court here was unusually aggressive in conflating its shadow and merits dockets, using "truncated means of achieving the desired merits result faster, with less transparency, and with less scrutiny than the merits docket . . . ."[591]

It is harder to fault the Court for hearing *Brnovich*; no justiciability, procedural, or prudential obstacles existed there. That said, the Court's approach to the VRA was hardly passive. To the contrary, *Brnovich* appeared to be part of a broader judicial assault on the VRA.[592] Before *Brnovich* weakened § 2, *Shelby County* effectively invalidated the Act's preclearance requirement, "thus nullif[ying] the most important provision ever passed to combat racial vote denial (and racial vote dilution)."[593]

The Court in *Shelby County* tried to minimize the significance of its decision, offering assurances that its "decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2."[594] Don't worry, the majority said, § 2 would continue to protect against racial discrimination in voting . . . but then *Brnovich* substantially narrowed § 2. So much for the Court's assurance that the country did not need § 5 because § 2 remained.

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585. *See* Emergency Temporary Standard, *supra* note 46.

586. *See* 29 U.S.C. § 655(c)(3) (requiring the Secretary to promulgate a new standard "no later than six months after publication of the emergency standard").

587. *See* NFIB v. OSHA, 142 S. Ct. 661, 662 (2022).

588. *See* STEPHEN VLADECK, THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC 252–53 (2023).

589. *See NFIB*, 142 S. Ct. at 666 ("It is not our role to weigh such tradeoffs.").

590. *See* VLADECK, *supra* note 588, at 253.

591. *Id.* at 254.

592. *But see* Allen v. Milligan, 143 S. Ct. 1487, 1502 (2023).

593. Nicholas O. Stephanopoulos, *The Anti-*Carolene *Court*, 2019 SUP. CT. REV. 111, 168; *see also* Elmendorf & Spencer, *supra* note 135, at 2143 (describing § 5 of the VRA as "widely regarded as an effective, low-cost tool for blocking potentially discriminatory changes to election laws and administrative practices").

594. Shelby Cnty. v. Holder, 570 U.S. 529, 557 (2013).

Admittedly, the Court abided by the passive virtues in these cases in one important respect: it did not issue sweeping constitutional rulings that would have completely foreclosed future governmental action. As noted above, a major questions holding will usually be substantially narrower than a nondelegation one.[595] Likewise, *Brnovich*'s statutory narrowing of the VRA did less damage than a decision striking down § 2 would have. The Court certainly could have acted more aggressively than it did.[596]

However, it would be a mistake to conclude that this is a minimalist Court—or even a normal one.[597] While these decisions were not as extreme as they could have been, the Court still did plenty to change the law so that it could undermine national policy. Alexander Bickel famously argued that courts should exercise caution when they strike down public policies because doing so overrides the determinations of officials who are both elected and charged with policymaking authority in our system of separation of powers.[598] The Court in these cases declined to heed this advice, refusing to defer to the government's policy judgments.[599] Instead, the Court substituted the political branches' policy determinations with its own. These are not the actions of a Court dedicated to the passive virtues.

B. Political and Policy Implications

1. Neutered Government

Beyond the legal implications, *NFIB*, *West Virginia*, and *Brnovich* also carry important political and policy implications. They make it harder for the federal government to address the nation's problems.[600] An immediate consequence is that it will be more difficult for the EPA to address climate change and for OSHA to prevent disease in the workplace.[601] Similarly, the Court has effectively left many voting rules with states and localities, even though some of those political entities have a long history of racial

595. *See supra* note 190–192 and accompanying text.

596. *See supra* Part III.B.2.

597. *See, e.g.*, Deacon & Litman, *supra* note 4 (manuscript at 58) (arguing that the "new major questions doctrine gives rise to an air of faux minimalism . . . .").

598. *See* BICKEL, *supra* note 472, at 20 ("Judicial review . . . is the power to apply and construe the Constitution, in matters of the greatest moment, against the wishes of a legislative majority, which is, in turn, powerless to affect the judicial decision.").

599. *See, e.g.*, NFIB v. OSHA, 142 S. Ct. 661, 666 (2022).

600. *See* Richardson, *supra* note 187, at 204.

601. *See, e.g.*, Revesz, *supra* note 4 (noting that *West Virginia* will have "significant but not cataclysmic" impact on the EPA's authority to regulate greenhouse gas emissions in power sector).

discrimination in voting.[602]

To be sure, the decisions don't *eliminate* the federal government's ability to tackle problems as constitutional rulings might have.[603] OSHA, for instance, has a program to protect employees in high-hazard industries from COVID, as well as other potentially relevant policies.[604] The EPA, likewise, has various tools to fight climate change.[605] Moreover, *West Virginia* distinguished between rules that may cause "an incidental loss of coal's market share" and ones that "simply announc[e and] . . . then requir[e] plants to reduce operations or subsidize their competitors to get there."[606] The Court's point here seems to be that more modest regulations are less vulnerable to major questions doctrine attacks.

Outside the agency context, VRA § 2 is certainly weaker than it was but presumably still applies to the most egregious intentional voting discrimination.[607] It also still applies to redistricting efforts that dilute the voting power of racial minorities.[608] The three cases examined here, then, didn't entirely kill regulation in these areas.

That said, the implications of these decisions are significant. For one, the Court undermined the policies that the government believed were the most effective mechanisms to address the serious problems at hand. To that extent, the decisions probably exacerbated the pandemic, climate change,

602. *See, e.g.*, Bridges, *supra* note 348, at 120–33, 164–67.

603. *See* Hickman, *supra* note 191, at 96 (contending that major questions cases' consequences for "reality of administrative governance" are "pretty limited").

604. *See* WILLBORN, SCHWAB & LESTER, *supra* note 82, at 968.

605. *See What EPA Is Doing About Climate Change*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/climate-change/what-epa-doing-about-climate-change (Nov. 8, 2022). The Inflation Reduction Act added to these governmental tools. *See Inflation Reduction Act Programs to Fight Climate Change by Reducing Embodied Greenhouse Gas Emissions of Construction Materials and Products*, U.S. ENV'T PROT. AGENCY (June 1, 2023), https://www.epa.gov/inflation-reduction-act/inflation-reduction-act-programs-fight-climate-change-reducing-embodied (June 1, 2023).

606. West Virginia v. EPA, 142 S. Ct. 2587, 2614 n.4 (2022); *see also* Biden v. Missouri, 142 S. Ct. 647, 653 (2022) (per curiam) (upholding U.S. Department of Health and Human Services policy requiring health care workers at facilities that participate in Medicare and Medicaid to get COVID vaccinations).

607. *See* Michael S. Kang, *The Post-Trump Rightward Lurch in Election Law*, 74 STAN. L. REV. ONLINE 55, 61 (2022) ("In the end, the Court significantly narrowed the application of Section 2 in *Brnovich* while stopping short of absolutely gutting Section 2 in the vote-denial context.").

608. *See* Allen v. Milligan, 143 S. Ct. 1487, 1506–17 (2023).

and voting discrimination.[609]

They also make it harder for government to address problems at all. *NFIB* and *West Virginia* question the legitimacy of agency regulations relying on broad congressional delegations, especially when agencies address particularly important questions.[610] Congress, the Court tells us, should make important policy itself, though it provided scant guidance on how to distinguish between a "major" question and an ordinary one.[611]

Realistically, though, Congress can't address every important issue that arises. Contemporary partisan gridlock makes it very difficult for Congress to address problems at all.[612] Even in less divisive partisan times, however, Congress *needs* to delegate to agencies because it can't possibly oversee all the different policy areas itself.[613] Agencies' expertise and capacity to gather information are superior to Congress's.[614] Moreover, Congress knows it cannot foresee new situations and that agencies are far better positioned to adapt policy areas to new facts and unforeseen circumstances.[615]

An administrative state in today's complex society, then, is all but inevitable. Government cannot really function without one.[616] Nevertheless, as Blake Emerson argues, today's administrative law developments take steps towards deconstructing the administrative state.[617] As a result, administrative agencies worry that many existing regulations are now vulnerable to challenges on

609. *See* James Goodwin, Kevin Bell, Rachael Lyle & Andrew Rosenberg, *In the Wake of* West Virginia v. *EPA: Legislative and Administrative Paths Forward for Science-driven Regulation*, UNION OF CONCERNED SCIENTISTS (Oct. 6, 2022), https://www.ucsusa.org/resources/west-virginia-vs-epa#read-online-content ("This case is a massive setback for efforts to avoid the worst consequences of climate change."); William Harrison, *The Supreme Court's Vaccine Mandate Decision is a Deadly Power Grab*, ALL FOR JUST. (Feb. 2, 2022), https://www.afj.org/article/the-supreme-courts-vaccine-mandate-decision-is-a-deadly-power-grab/ ("By enjoining the OSHA standard, the Court worsened the public health crisis just as the pandemic hit a new peak."); Charles & Fuentes-Rohwer, *supra* note 520 (discussing dangers to voting rights and American democracy after *Brnovich*).

610. *See* Sohoni, *supra* note 4, at 266.

611. *See* Deacon & Litman, *supra* note 4 (manuscript at 49–54) (discussing indicia of majorness).

612. *See* Freeman & Spence, *supra* note 166, at 2 ("Congress is more ideologically polarized now than at any time in the modern regulatory era, which makes legislation ever harder to pass.").

613. *See* Zellmer, *supra* note 236, at 951.

614. *See* JAMES LANDIS, THE ADMINISTRATIVE PROCESS 1–5 (1938).

615. *See, e.g.*, Jonathan Lewallen, *Emerging Technologies and Problem Definition Uncertainty: The Case of Cybersecurity*, 15 REG. & GOVERNANCE 1035, 1048 (2021).

616. *See* Metzger, *supra* note 182, at 16.

617. *See* Blake Emerson, *The Binary Executive*, YALE L.J. FORUM 756, 758 (2022).

major questions or other grounds.[618] While a major questions doctrine holding, unlike a nondelegation holding, preserves the possibility of future agency action, it also leaves the scope of agency authority quite unsettled. The result is more litigation and legal uncertainty.[619]

In addition to making things harder for regulators, this uncertainty also will make it more difficult for regulated industries to plan.[620] While businesses sometimes favor deregulation, they also prize predictability. Businesses want law to remain stable so that they can organize their practices in compliance with it.[621] These decisions make that harder.

Finally, while the broadest implications of these cases are in the administrative law realm, they extend beyond agencies. In *Brnovich*, there was no delegation to worry about, and yet the Court's statutory interpretation was also stingy. Even when Congress chooses *not* to delegate to agencies, then, the Court might interpret away its work. The cumulative result is that the federal government will have more difficulty addressing serious problems.

2. Conservative Justices and the Republican Party

These decisions assist a broader conservative political movement. Most obviously, *Brnovich* might make it easier for Republicans to win elections by permitting states to enact restrictive voting laws that make it harder for racial minorities to vote.[622] Those minorities—notwithstanding important exceptions and recent demographic shifts—tend to vote Democratic.[623] State legislatures

618. *See* Revesz, *supra* note 4 ("This doctrine casts an ominous pall over the nation's regulatory future.").

619. *See, e.g.*, Motion to Dismiss at 27–39, SEC v. Wahi, No. 22-cv-01009 (W.D. Wash. Feb. 6, 2023) (arguing that major questions doctrine forecloses SEC enforcement action); Sohoni, *supra* note 4, at 266 ("Major questions challenges will load the Court's docket for years to come.").

620. *See, e.g.*, Jonas J. Monast, *Major Questions About the Major Questions Doctrine*, 68 ADMIN. L. REV. 445, 478–80 (2016).

621. *See, e.g.*, Harvey L. Reiter, *Expanding 'Major Questions Doctrine' Risks Regulatory Stability*, BLOOMBERG L. (July 12, 2022, 4:00 AM), https://news.bloomberglaw.com/environment-and-energy/expanding-major-questions-doctrine-risks-regulatory-stability.

622. *See generally* Anthony Gaughan, *The Influence of Partisanship on Supreme Court Election Law Rulings*, 36 NOTRE DAME J.L., ETHICS & PUB. POL'Y 553, 554 (2022) (finding that since 2000 "election law cases have divided the justices along partisan lines to an unprecedented degree").

623. *See, e.g.*, Ruth Igielnik & Abby Budiman, *The Changing Racial and Ethnic Composition of the U.S. Electorate*, PEW RSCH. CTR. (Sept. 23, 2020), https://www.pewresearch.org/2020/09/23/the-changing-racial-and-ethnic-composition-of-the-u-s-electorate/ ("Black, Hispanic and Asian registered voters historically lean Democratic.").

enacting restrictive voting laws are controlled by Republicans.[624] Such laws plausibly could affect an election's outcome, at least in swing states.[625]

The cases also help advance conservative ideological goals more generally. Republicans today view skeptically the notion that government—especially the federal government—can ameliorate society's problems.[626] The decisions, therefore, channel the contemporary Republican Party's libertarian agenda.

Obviously, a decision like *Brnovich* that limits the reach of an important federal law serves that libertarian end. The expansion of the major questions doctrine does, too. Republicans recognize that partisan gridlock and congressional vetogates make it hard to pass legislation.[627] Because they understand that the administrative state is often the only realistic way to regulate society's problems, contemporary conservatives often place administrative agencies in their crosshairs. These attacks on the administrative state take various forms. Some Republican politicians in recent years have called for the elimination of the EPA, IRS, and various cabinet departments.[628] The conservative legal movement supplements these attacks by developing new legal doctrines making it harder for agencies to act.[629] *NFIB* and *West Virginia*, then, complement the conservative

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624. *See* Elaine Karmack, *Voter Suppression or Voter Expansion? What's Happening and Does It Matter?*, BROOKINGS (Oct. 26, 2021), https://www.brookings.edu/blog/fixgov/2021/10/26/voter-suppression-or-voter-expansion-whats-happening-and-does-it-matter/; Jane C. Timm, *19 States Enacted Voting Restrictions in 2021. What's Next?*, NBC NEWS (Dec. 21, 2021, 5:02 AM), https://www.nbcnews.com/politics/elections/19-states-enacted-voting-restrictions-2021-rcna8342.

625. *See* Brnovich v. DNC, 141 S. Ct. 2321, 2367 (2021) (Kagan, J., dissenting) ("[E]lections are often fought and won at the margins—certainly in Arizona.").

626. *See* MATT GROSSMAN & DAVID A. HOPKINS, ASYMMETRIC POLITICS: IDEOLOGICAL REPUBLICANS AND GROUP INTEREST DEMOCRATS 255–56 (2016); Jonathan S. Gould & David E. Pozen, *Structural Biases in Structural Constitutional Law*, 97 N.Y.U. L. REV. 59, 94 (2022).

627. *See* Gould & Pozen, *supra* note 626, at 105–06.

628. *See* Emily Cochrane & Alan Rappeport, *House Republicans Vote to Rescind I.R.S. Funding*, N.Y. TIMES (Jan. 9, 2023), https://www.nytimes.com/2023/01/09/us/politics/house-republicans-irs-funding.html; Avalon Zoppo, *Meet the Four Republican Lawmakers Who Want to Abolish the EPA*, NBC NEWS (Feb. 5, 2017, 6:26 PM), https://www.nbcnews.com/news/us-news/meet-4-republican-lawmakers-who-want-abolish-epa-n717061; Brad Plumer, *Rick Perry Once Wanted to Abolish the Energy Department. Trump Picked Him to Run It*, VOX (Dec. 13, 2016, 12:10 PM), https://www.vox.com/energy-and-environment/2016/12/13/13936210/rick-perry-energy-department-trump; Kevin Mahnken, *Back to the Future: GOP Pledge to Abolish Education Department Returns*, YAHOO (Sept. 26, 2022), https://www.yahoo.com/video/back-future-gop-pledge-abolish-111500590.html.

629. *See, e.g.*, Brunstein & Revesz, *supra* note 514, at 219 (noting that Trump Administration used major questions doctrine expansively to invite courts to strike down

movement's broader assault on the administrative state.[630]

Significantly, these decisions are not two-way streets that will also likely threaten Republican policies. Republicans often oppose legislation and regulation (except to cut taxes), so when they control government, they usually erect fewer regulations.[631] As a result, there are fewer Republican national policies for judges to invalidate. Moreover, courts usually don't strenuously review agency decisions declining to enforce laws.[632] Agencies, therefore, face heightened judicial review when they act, but minimal scrutiny when they don't.[633] These judicial practices, therefore, create Republican-friendly legal structures.

The Justices themselves would likely disagree with charges of partisan bias. Several, indeed, have recently publicly denounced such criticisms.[634] They presumably do so earnestly; I doubt most believe themselves to be political actors.

Nevertheless, most of today's Republican-appointed Justices came of age in the law when the Federalist Society dominated conservative legal thought.[635] The Federalist Society helped inculcate their approach to the law. It refined legal arguments that would further conservative political goals.[636] By any measure, the Federalist Society has been extraordinarily successful at reshaping American legal debate, laying the legal groundwork for conservative political ideology.

All the conservative Justices inhabited this world during their impressive careers, and Justices Gorsuch, Kavanaugh, and Barrett came of legal age in it.[637] The Federalist Society, indeed, helped secure their nominations and

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regulations); Metzger, *supra* note 182, at 4 (describing the "contemporary anti-administrativism").

630. *See* Emerson, *supra* note 617, at 785 (arguing that the Court's new administrative law "opens the door for episodic judicial breaches into executive departments, explicable not in terms of doctrine or principle but rather naked political preference").

631. *See* Gould & Pozen, *supra* note 626, at 92–93.

632. *See, e.g.*, Heckler v. Chaney, 470 U.S. 821, 831 (1985) (noting a presumption against judicial review when agencies decline to take enforcement actions).

633. *See* Bagley, *supra* note 270, at 360; Daniel E. Walters, *Symmetry's Mandate: Constraining the Politicization of American Administrative Law*, 119 MICH. L. REV. 455, 495 (2020).

634. *See* Jessica Gresko, *Supreme Court Justices Spar Over Court Legitimacy Comments*, ASSOCIATED PRESS (Oct. 26, 2022), https://apnews.com/article/abortion-us-supreme-court-elena-kagan-samuel-alito-government-and-politics-10bf92ae6830573054da5f756a029d1c.

635. *See* Emma Green, *How the Federalist Society Won*, NEW YORKER (July 24, 2022), https://www.newyorker.com/news/annals-of-education/how-the-federalist-society-won.

636. *See generally* AMANDA HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION (2015).

637. *See* Green, *supra* note 635.

confirmations. It's no surprise that these conservative Justices are now writing these conservative ideas into law. Whether or not the Justices consciously try to vindicate Republican Party goals, conservative ideology defines their legal visions.

3. The Court's Eroding Reputation

The neat alignment between the Court's recent rulings and Republican Party priorities raises serious questions about the Court's legitimacy. The Court's use of constitutional conceits looks like a judicial power grab displacing the political branches' policies.[638] The more the Court aggrandizes itself, though, the more its reputation suffers.

Political scientists have argued for decades that political preferences drive Supreme Court decisionmaking.[639] The Court's work is inevitably intertwined with politics. Hot-button constitutional cases, in particular, almost necessarily fan political flames.[640]

In some respects, though, cases like those here do even more to feed the narrative that the Justices do politics, not law. Constitutional cases often involve broad principles and under-determinate constitutional language that will inevitably divide both judges and the public. We are, quite simply, used to judges drawing on their own values to interpret the Constitution.[641]

By contrast, statutory cases usually present reasonably detailed legal texts for the Court to interpret. When the Court pays little attention to those texts, it is especially vulnerable to criticism, especially when the Court's own Justices have told us for years that the text is the law. This atextual statutory interpretation is even worse when the Court relies on constitutional conceits without providing constitutional reasoning; ignores crucial facts; departs from the passive virtues; and furthers the political objectives of the party that appointed the majority of Justices. In such circumstances, reasonable people

638. *See, e.g.*, Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 97–98 (2022).

639. *See, e.g.*, EPSTEIN & KNIGHT, *supra* note 177, at xi–xii; Allison P. Harris & Maya Sen, *Bias and Judging*, 22 ANN. REV. POL. SCI. 241, 243–46 (2019) ("[J]udicial politics literature is clear in its documentation that ideology is a significant factor in judicial decision making."); *see also* ERIC J. SEGALL, SUPREME MYTHS: WHY THE SUPREME COURT IS NOT A COURT AND ITS JUSTICES ARE NOT JUSTICES 185 (2012).

640. *See, e.g., Positive Views of Supreme Court Decline Sharply Following Abortion Ruling*, PEW RSCH. CTR. (Sept. 1, 2022), https://www.pewresearch.org/politics/2022/09/01/positive-views-of-supreme-court-decline-sharply-following-abortion-ruling/.

641. *See* SEGALL, *supra* note 639, at 185–88.

might think something other than law is driving outcomes.[642]

It's important not to overstate the critique. As this Article went to press, the Court issued some decisions that surprised observers because they rejected conservative arguments.[643] Commentators also have pointed to disagreements among the Republican-appointed Justices to point out that political ideology doesn't always guide the Court's decisionmaking.[644] Chief Justice Roberts was in the majority in each of the three cases examined here, but, concerned about the Court's institutional reputation, he sometimes resists pushing the law too far too fast.[645] That said, all six conservative Justices joined *NFIB*, *West Virginia*, and *Brnovich*, and in those cases the alignment between the conservative Justices' likely political priors and their decisions was especially close.

The Justices themselves are playing defense against such charges. Chief Justice Roberts recently asserted that "simply because people disagree with opinions, is not a basis for questioning the legitimacy of the court."[646] Justice Barrett, appearing alongside Senator Mitch McConnell, too insisted that the Court is not partisan.[647] Justice Alito angrily denounced critics who questioned the Court's legitimacy, including implicitly his own colleague, Justice Kagan. While Justice Alito acknowledged that people are always going

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642. *See, e.g.*, Richard L. Hasen, *The Supreme Court's Pro-Partisanship Turn*, 109 GEO. L.J. ONLINE 50 (2020); Robert Reich, *There is No Doubt Any More: The US Supreme Court is Run by Partisan Hacks*, GUARDIAN (Dec. 2, 2021, 6:33 AM), https://www.theguardian.com/commentisfree/2021/dec/03/no-doubt-us-supreme-court-partisan-hacks; Joan Biskupic, *Supreme Court Justices are Showing Their Willingness to Boost Conservative Causes*, CNN (Jan. 18, 2023, 5:01 AM), https://www.cnn.com/2023/01/18/politics/supreme-court-conservative-politics-analysis/index.html.

643. *See, e.g.*, Allen v. Milligan, 143 S. Ct. 1487 (2023); Moore v. Harper, 143 S. Ct. 2065 (2023); Haaland v. Brackeen, 143 S. Ct. 1609 (2023).

644. *See* Nourse, *supra* note 6 (manuscript at 5); David Lat & Zachary B. Shemtob, *Trump's Supreme Court Picks Are Not Quite What You Think*, N.Y. TIMES (Feb. 12, 2023), https://www.nytimes.com/2023/02/12/opinion/gorsuch-barrett-kavanaugh-conservative.html (arguing that Trump appointees are not as consistently conservative as Justices Thomas and Alito).

645. *See* Nourse, *supra* note 6 (manuscript at 23).; Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2310–17 (2022) (Roberts, C.J., concurring) (joining to uphold Mississippi abortion restriction but voting not to overrule *Roe v. Wade*).

646. Herb Scribner, *Chief Justice Roberts Defends SCOTUS' Legitimacy Ahead of New Term*, AXIOS (Sept. 10, 2022), https://www.axios.com/2022/09/10/john-roberts-constitution-supreme-court-roe-v-wade.

647. *See* Greg Stohr, *Barrett, Flanked by McConnell, Says Supreme Court Isn't Partisan*, BLOOMBERG (Sept. 13, 2021, 10:20 AM), https://www.bloomberg.com/news/articles/2021-09-13/barrett-flanked-by-mcconnell-says-supreme-court-not-partisan.

to criticize Supreme Court decisions, he denounced critics who "say that the court is exhibiting a lack of integrity."[648] "Someone also crosses an important line when they say that the court is acting in a way that is illegitimate. I don't think anybody in a position of authority should make that claim lightly."[649] Even Justice Breyer, who dissented in each of these cases, recently argued that the Court is doing something quite different from politics.[650]

The Justices' protests are falling on deaf ears. The American public increasingly sees the Court as a partisan institution.[651] The Supreme Court's approval ratings, in fact, have recently reached historic lows, deepening the perception that what the Court does isn't really law.[652]

CONCLUSION

Notwithstanding their professed commitments to textualism, the conservative Justices in these cases interpreted the statute with little attention to the actual texts. Instead, the Court reinterpreted the relevant statutes in light of constitutional conceits—that is, according to their own constitutional sensibilities. While federal statutes must comply with the Constitution, the laws in question did not violate constitutional doctrine. Nevertheless, amorphous constitutional concerns drove the Court's statutory interpretation. These cases find their closest analogue in other cases applying Constitution-based canons of statutory interpretation, but these cases push those canons into new territory.

The Supreme Court's practices in these cases exacerbate the growing sentiment that it is a partisan institution. The conservative Justices themselves vigorously dispute these charges, and it is true that the decisions were not as extreme as they could have been. However, when the Court

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648. Ann Marimow, *Justice Alito Says Leak of Abortion Opinion Made Majority 'Targets for Assassination'*, WASH. POST (Oct. 25, 2022, 9:43 PM), https://www.washingtonpost.com/politics/2022/10/25/justice-alito-says-leaked-abortion-opinion-made-majority-targets-assassination/.

649. *Id.*

650. *See* STEPHEN BREYER, THE AUTHORITY OF THE COURT AND THE PERIL OF POLITICS (2021).

651. *See* Daniel De Visé, *The American Public no Longer Believes the Supreme Court is Impartial*, THE HILL (Jan. 11, 2023, 6:00 AM), https://thehill.com/regulation/court-battles/3807849-the-american-public-no-longer-believes-the-supreme-court-is-impartial/.

652. *See, e.g.*, Jeffrey M. Jones, *Supreme Court Trust, Job Approval at Historical Lows*, GALLUP: NEWS (Sept. 29, 2022), https://news.gallup.com/poll/402044/supreme-court-trust-job-approval-historical-lows.aspx.

departs so much from statutory texts and constitutional doctrine, it invites the attack that what it is doing is no longer really law.