AN ORIGINALIST DEFENSE OF THE MAJOR QUESTIONS DOCTRINE

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According to the U.S. Supreme Court, the major questions doctrine requires "clear congressional authorization" for agencies to exercise delegated authority over "major policy decisions." But where can the Court find constitutional authority to announce such a rule? That question divides originalist-oriented scholars and judges. Some have criticized the doctrine sharply as departing from a court's obligation to apply a law's textual meaning. Others have defended it as arising from congressional intent, ordinary linguistic conventions, or a constitutionally based rule against delegation of legislative power.

This Article undertakes a broader originalist defense. First, it describes the major questions doctrine as a substantive canon—that is, an interpretive rule based not on linguistic conventions but on an extra-textual value of protecting the separation of powers. Second, it assumes that the major questions doctrine need not be derived from a direct constitutional command against delegation. It then argues instead that the major questions doctrine can be seen as part of a broader power of courts to read ambiguous federal laws narrowly to avoid erroneously undermining core founding-era structural assumptions. The article explores early post-ratification judicial practice in support. It concludes that the early judicial practice indicates a discretionary authority, uncontested at the time, to underenforce ambiguous laws in this manner. It thus links early interpretive canons such as the presumption against violations of international law and the presumption against civil retroactivity, with the modern Court's longstanding presumptions protecting federalism and the present Court's recent invocation of the major questions doctrine.

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INTRODUCTION

Courts invoke an array of "canons" to aid their interpretation and application of legal texts.[1] Their authority to do so remains contested and underdeveloped.[2] The debate over judicial canons has been rekindled by the major questions doctrine, applied by the U.S. Supreme Court in *West Virginia v. EPA* and related cases.[3] According to the Court, the major questions

1. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 53–339 (2012) (describing fifty-seven canons used in legal interpretation).

2. *See* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 163–81 (2010) (providing a cautious defense of interpretive canons); John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 404–05, 427–49 (2010) (criticizing canons that operate as clear statement rules); *see also* ANTONIN SCALIA, A MATTER OF INTERPRETATION; FEDERAL COURTS AND THE LAW 25–29 (Amy Gutmann ed., 1997) (endorsing some canons and expressing doubt about others); SCALIA & GARNER, *supra* note 1, at 53–339 (generally not providing a comprehensive explanation of the judicial authority to develop canons); William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1118–20 (2017) (discussing canons as part of a larger inquiry into the foundation of rules of interpretation).

3. West Virginia v. EPA, 142 S. Ct. 2587, 2607–09 (2022); Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 665 (2022) (per curiam); Ala. Ass'n of Realtors v. Dep't of

doctrine requires "clear congressional authorization" for administrative or executive agencies to exercise delegated authority over "major policy decisions."[4]

The Court's major questions doctrine has been criticized from various perspectives, including by originalist- and textualist-oriented scholars.[5] This Article addresses part of that criticism—specifically, the question of whether the Constitution's original meaning permits courts to adopt clear statement canons such as the major questions doctrine.[6] It concludes that these canons are sometimes constitutionally permissible (though not necessarily advisable), even if they allow courts to depart from a statute's most plausible original meaning. In particular, it argues that courts in the early post-ratification period embraced this judicial practice without material objection, suggesting that it is part of the "judicial Power" vested in federal courts by Article III.[7]

Health & Hum. Servs., 141 S. Ct. 2485, 2487 (2021) (per curiam); *see also* Biden v. Nebraska, 143 S. Ct. 2355, 2369–72 (2023) (applying the major questions doctrine as well as ordinary statutory interpretation to find agency action unauthorized).

4. *West Virginia*, 142 S. Ct. at 2609.

5. For originalist/textualist criticism, see, for example, Michael B. Rappaport, *Replacing the Major Questions Doctrine with Originalist Statutory Interpretation*, 2024 HARV. J.L. & PUB. POL'Y PER CURIAM 1, 4–8 [hereinafter Rappaport, *Replacing the Major Questions Doctrine*]; Chad Squitieri, *Who Determines Majorness?*, 44 HARV. J.L. & PUB. POL'Y 463, 480–513 (2021); Chad Squitieri, *Major Problems with Major Questions,* L. & LIBERTY (Sept. 6, 2022), https://lawliberty.org/major-problems-with-major-questions/ [https://perma.cc/9APN-JLY7]; and Mike Rappaport, *Against the Major Questions Doctrine*, THE ORIGINALISM BLOG (Aug. 15, 2022), https://originalismblog.typepad.com/the-originalism-blog/2022/08/against-the-major-questions-doctrinemike-rappaport.html [https://perma.cc/N936-ATXG]. For more general commentary and criticism, see, for example, Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262 (2022); Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009 (2023); Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475 (2021); and Ronald M. Levin, *The Major Questions Doctrine: Unfounded, Unbounded, and Confounded*, 112 CALIF. L. REV. 899 (2024). For defenses taking a somewhat different approach from this Article, see Brian Chen & Samuel Estreicher, *The New Nondelegation*, 102 TEX. L. REV. 539 (2024); and Louis J. Capozzi III, *In Defense of the Major Questions Doctrine*, 100 NOTRE DAME L. REV. (forthcoming 2024) [hereinafter Capozzi, *Defending the Major Questions Doctrine*], https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4741118 [https://perma.cc/K5X8-7X6Z].

6. This Article does not address the related question whether clear statement rules are consistent with statutory textualism. *See* Benjamin Eidelson & Matthew C. Stephenson, *The Incompatibility of Substantive Canons and Textualism*, 137 HARV. L. REV. 515, 521–38 (2023); Brian G. Slocum & Kevin Tobia, *The Linguistic and Substantive Canons*, 137 HARV. L. REV. F. 70, 74–81 (2023); Barrett, *supra* note 2, at 112–25.

7. U.S. CONST. art. III, § 1.

The Article proceeds in four parts. Part I provides an overview of judicial canons and the major questions doctrine. Part II summarizes the originalist case against the major questions doctrine, based on the Judicial Branch's constitutional power and duty to interpret and apply legal texts. Part III outlines historical examples of clear statement rules and related canons, with focus on the longstanding presumptions against violating international law and against retrospective application of nonpenal laws. Part IV develops a constitutional account of those presumptions and applies it to the major questions doctrine. It concludes that the major questions doctrine is consistent with judicial practice dating to the founding era and that the doctrine is likely consistent with the original meaning of the judicial power.

I. OVERVIEW: SUBSTANTIVE CANONS AND THE MAJOR QUESTIONS DOCTRINE

A. Substantive Canons and Linguistic Canons

To begin, canons can be divided (not always neatly) between linguistic canons and substantive canons.[8] Linguistic canons seek to determine the original meaning of a legal text, akin to rules of grammar; they track (or purport to track) the way language is actually used.[9] For example, the negative implication canon (*expressio unius est exclusion alterius*) identifies a common method of expression: specifying one thing tends to exclude other things not specified.[10] Stating that a store is closed on Sunday implies it is open other days.[11] Judicial invocation of linguistic canons is easily justified (assuming the canons do in fact reflect background linguistic conventions) as part of the judicial task of determining a text's original meaning.[12]

But other canons seem to go beyond this modest goal. The Court has said, for example, that it will not construe federal statutes to interfere with core state institutions absent a clear statutory direction to do so.[13] That

8. *See* Barrett, *supra* note 2, at 117. *But see* Slocum & Tobia, *supra* note 6, at 73–75 (offering a more complex account).

9. *See* Slocum & Tobia, *supra* note 6, at 70 ("Linguistic canons are presumptions about language usage meant to help courts determine ordinary meaning.").

10. SCALIA & GARNER, *supra* note 1, at 107–11.

11. *Id.* at 107 ("When a car dealer promises a low financing rate to 'purchasers with good credit,' it is entirely clear that the rate is *not* available to purchasers with spotty credit.").

12. *See id.* (noting that the negative implications canon must be tempered by common sense attention to context: "'No dogs allowed' cannot be thought to mean that no other creatures are excluded").

13. Gregory v. Ashcroft, 501 U.S. 452, 459–60 (1991) (courts must "be certain of Congress' intent" before finding that Congress "legislate[d] in areas traditionally regulated by the

approach seems difficult to justify merely as pursuit of original meaning. It is doubtful that Congress typically avoids interference with state institutions, and the Court did not principally justify the presumption in that way. Rather, it said that the presumption protected the autonomy of state institutions needed for a vital federal system.[14] Canons of this nature have been labeled substantive (or normative) canons rather than linguistic (or descriptive) canons; they are justified by reference to a substantive value rather than by the pursuit of linguistic meaning.[15] But that shift in justification raises a serious question of judicial authority. Courts' authority to pursue a statute's original meaning is self-evident; their authority to pursue an extra-statutory substantive value, even in the modest form of a presumption, is much less so.[16]

Canons also may carry different weights.[17] Some might act merely as tiebreakers where two readings of a text seem equally plausible.[18] Others may be described as clear statement rules, meaning that a court will not apply a specified interpretation unless the text clearly commands it.[19] Thus any textual ambiguity—even if that ambiguity could be resolved with a fair degree of confidence from extra-textual sources—will prompt application of the

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States"); *see also* Bond v. United States, 572 U.S. 844, 856, 858 (2014) (federal statutes "must be read consistent with principles of federalism inherent in our constitutional structure" and thus "when legislation 'affects the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision'") (quoting United States v. Bass, 404 U.S. 336, 349 (1971)); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985) (requiring displacement of state sovereign immunity to be "unmistakably clear in the language of the statute"); Manning, *supra* note 2, at 407–10 (describing federalism-protecting clear statement rules). These federalism canons are discussed further in Part II.C *infra*.

14. *See Gregory*, 501 U.S. at 457–60, 464.

15. *See* Barrett, *supra* note 2, at 168; Manning, *supra* note 2, at 403.

16. *See* Barrett, *supra* note 2, at 110 ("A court applying a canon to strain statutory text uses something other than the legislative will as its interpretive lodestar, and in so doing, it acts as something other than a faithful agent. The application of substantive canons, therefore, is at apparent odds with the central premise from which textualism proceeds."); *see also* SCALIA, *supra* note 2, at 27–29 (expressing doubt about judicial authority to adopt "presumptions and rules of construction that load the dice for or against a particular result").

17. On the varieties and strengths of substantive canons, see William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 612–28 (1992); and Louis J. Capozzi III, *The Past and Future of the Major Questions Doctrine*, 84 OHIO ST. L.J. 191, 236–37 (2023) [hereinafter Capozzi, *Past and Future of the Major Questions Doctrine*].

18. *See e.g.*, Barrett, *supra* note 2, at 117–18 (describing the rule of lenity as a tiebreaker).

19. *See* Manning, *supra* note 2, at 402–03 (describing this approach as a "clarity tax" that "direct[s] courts to select something other than the most natural and probable reading of a statute").

clear statement rule. Other canons might carry some presumptive weight but could be rebutted by various considerations of context. Either of the latter approaches—but especially the clear statement rule—may push a court to a result that is not otherwise the most plausible reading of the text. As described below, the most troubling from the perspective of judicial authority are substantive, clear statement rules.

B. The Major Questions Doctrine as a Substantive Clear Statement Rule

While the types of canons can be distinguished in the abstract, it may not always be easy to categorize particular canons as substantive or linguistic, and canons may draw on multiple justifications. For example, the presumption against statutes having extraterritorial effect[20] may be explained by the observation that Congress, as a domestic lawmaking authority, is ordinarily concerned only with domestic applications—which suggests that it is a linguistic canon.[21] The presumption might also be justified by the observation that applying U.S. law to foreign conduct is likely to upset foreign countries, a result that courts should avoid in cases of statutory ambiguity even if it is not always a congressional priority.[22] The latter justification suggests that it is a substantive canon, founded not on how Congress actually legislates but on how the Court thinks Congress should legislate.[23] It may also be unclear how much weight a canon carries (whether it is a tiebreaker, a presumption rebuttable by context, or a clear statement rule). For example, the rule of lenity—discussed further below—has been described as a tiebreaker but also as a presumption of some greater weight.[24]

This Article addresses the major questions doctrine as a substantive clear statement canon. Other commentary has defended it as a linguistic canon based on the proposition that Congress would not lightly delegate its legislative authority or on the observation that, more generally, ordinary speakers

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20. Morrison v. Nat'l Austl. Bank, 561 U.S. 247, 253 (2010).

21. *Id.* at 255; SCALIA & GARNER, *supra* note 1, at 268.

22. *See* William S. Dodge, *The New Presumption Against Extraterritoriality*, 133 HARV. L. REV. 1582, 1640–53 (2020) (describing the presumption partially in these terms); *see also* RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2100 (2016) (noting that the presumption "serves to avoid the international discord that can result when U.S. law is applied to conduct in foreign countries").

23. *See* Eskridge & Frickey, *supra* note 17, at 595–98 (describing substantive canons as representing "value choices by the Court").

24. *Compare* Barrett, *supra* note 2, at 117–18 (describing the rule of lenity as a tiebreaker), *with* SCALIA & GARNER, *supra* note 1, at 299 (noting various versions of the rule of lenity and concluding that it should be invoked where "after all the legitimate tools of interpretation have been applied, a reasonable doubt persists") (internal quotation omitted).

do not understand nonspecific conveyances of authority to include authority to decide important matters.[25] And some authorities have suggested that it might best operate as a tiebreaker or a weak presumption rather than a clear statement rule.[26] But the Court's recent description and application of the doctrine supports a stronger substantive view. As the Court put it in *West Virginia*:

> Thus, in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us reluctant to read into ambiguous statutory text the delegation claimed to be lurking there. To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to clear congressional authorization for the power it claims.[27]

Or as the Court's opinion later acknowledged, the "requirement of clear congressional authorization" shows that "the approach under the major questions doctrine is distinct" from "routine statutory interpretation."[28]

II. THE ORIGINALIST CASE AGAINST SUBSTANTIVE CANONS

A. Judicial Power and Duty

This Section outlines the originalist case against substantive canons to set the stage for an originalist response. The apparent problem with substantive canons is that courts employing them appear to be doing something other than (or in addition to) finding a text's most plausible original meaning.[29] Linguistic canons, which provide a framework for assessing original meaning, do not face this difficulty and are easily justified as part of a court's

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25. *E.g.*, Ilan Wurman, *Importance and Interpretive Questions*, 110 VA. L. REV. 909, 914–17 (2024); Biden v. Nebraska, 143 S. Ct. 2355, 2377–80 (2023) (Barrett, J., concurring); *see also* Rappaport, *Replacing the Major Questions Doctrine*, *supra* note 5, at 8–10 (arguing that aspects of the major questions doctrine can be understood as linguistic canons such the "elephants in mouseholes" canon); Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001) (noting the "elephants in mouseholes" canon); Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring) (associating the major questions doctrine with the "elephants in mouseholes" canon).

26. *E.g.*, *Nebraska*, 143 S. Ct. at 2377 (Barrett, J., concurring). For commentary on the differing versions of and justifications for the major questions doctrine, see, for example, Austin Piatt & Damonta D. Morgan, *The Three Major Questions Doctrines*, 2024 WISC. L. REV. FORWARD 19 (2024); and Sunstein, *supra* note 5.

27. West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022) (internal quotations and citations omitted).

28. *Id.* (internal quotations omitted).

29. Barrett, *supra* note 2, at 121.

judicial power to say what the law is[30] (as are, for example, applications of rules of grammar). Substantive canons—especially clear statement rules—may be harder to justify because it is not evident to an originalist how the judicial power conveys authority to do anything other than to determine a text's original meaning.[31] As Justice Scalia observed: "[W]hether these dice-loading rules are bad or good, there is also the question of where the courts get the authority to impose them. Can we really just decree that we will interpret the laws that Congress passes to mean less or more than what they fairly say?"[32]

To put the point more precisely, consider that in the usual case the potential effect of clear statement rules is that a court may unduly limit a statute's scope. Suppose, for example, a statute appears to cover situations X and Y, but its extension to Y is not clearly stated and not free from doubt. Using a clear statement rule or other similar substantive presumption, a court might apply the statute only to situation X, while an original meaning analysis would apply it to both X and (with a little less confidence) Y. The question, then, is whether federal courts' constitutionally granted "judicial Power" conveys this authority to, in effect, underenforce the law.[33]

It is also important to state precisely why this is a potential constitutional problem. It is not simply a matter of the scope of the judicial power. In itself, the Constitution's grant of judicial power likely does not obligate courts to exercise that power in all cases within their jurisdiction. The Constitution vests legislative power in Congress,[34] but (apart from a few specific instances) that grant does not obligate Congress to exercise its power. Likewise the Constitution's grant of executive power to the President[35] does not appear in itself to obligate the President to exercise that power; a separate provision, the Take Care Clause, imposes that obligation.[36]

Similarly, the federal courts' constitutional duty to enforce the law arises from separate constitutional provisions. Article VI declares that "[t]his Constitution and the Laws of the United States made in Pursuance

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30. U.S. CONST. art. III, § 1; *see* Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

31. *See* Barrett, *supra* note 2, at 121–25 (raising these concerns). Although Barrett's article expresses a strictly textualist perspective, the concerns she raises about substantive canons should resonate with other forms of originalism as well.

32. SCALIA, *supra* note 2, at 28–29.

33. *See* William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 992, 997 (2001) (posing the question this way).

34. U.S. CONST. art. I, § 1.

35. U.S. CONST. art. II, § 1.

36. U.S. CONST. art. II, § 3; *see* MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION 269–70 (2020).

thereof . . . shall be the supreme Law of the Land."[37] Thus, as a constitutional matter, constitutionally enacted federal statutes are supreme law. Article VI then imposes a judicial oath to "support this Constitution"[38]—including the Constitution's direction that constitutionally enacted federal statutes are supreme law. Thus courts have a constitutional duty imposed by Article VI to use their judicial power to apply constitutional statutes as supreme law.[39]

This conclusion poses serious constitutional difficulties for substantive canons. As discussed, substantive canons potentially underenforce statutes; that is, they may fail to treat as supreme law some applications of constitutionally enacted statutes. And neither the supremacy clause nor the judicial oath suggests the possibility of exceptions that would allow underenforcement.[40]

There is, however, a response. The courts' judicial power might allow a limited degree of underenforcement in certain circumstances. It is generally accepted that the President's executive power to enforce the law includes the power of prosecutorial discretion, even in the face of the Take Care Clause.[41] Despite the apparently unqualified duty imposed by the Take Care Clause, the historical understanding of the executive power indicates that the take-care duty is not absolute.[42]

We can now frame the inquiry precisely: whether the courts' judicial power allows some relaxation of the duty to enforce statutes imposed by Article VI. For an originalist inquiry, the central question is whether founding-era materials suggest this understanding of the judicial power.

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37. U.S. CONST. art. VI, para. 2.

38. *Id.* art. VI, para. 3.

39. See *id.* art. VI, paras. 2–3. By negative implication, statutes not made "in pursuance" of the Constitution (that is, unconstitutional statutes) are not supreme law—an important textual foundation of judicial review. *See* THE FEDERALIST NO. 33, at 151 (Alexander Hamilton) (Terence Ball ed., 2003) (Article VI "*expressly* confines this supremacy [of federal law] to laws made *pursuant to the Constitution*").

40. This Article addresses and defends only judicial underenforcement of statutes. What one might call judicial "overenforcement"—that is, using canons to apply statutes more broadly than their original meaning might indicate—raises distinct constitutional and interpretive issues. *See* Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RSRV. L. REV. 581, 581–86 (1990) (sharply objecting to the supposed canon that remedial statutes should be construed broadly).

41. *See* MCCONNELL, *supra* note 36, at 269–70 (acknowledging the power of prosecutorial discretion despite the Take Care Clause).

42. *See id.*

B. The Major Questions Doctrine and Judicial Duty

The major questions doctrine illustrates the foregoing question of the judicial power to underenforce the law. Both the majority and dissent in the *West Virginia* case seemed to understand the major questions doctrine as distinct from ordinary statutory interpretation. The issue in the case (greatly oversimplified) was whether Congress's delegation to the EPA of authority to set air pollution standards included authority to establish industry-wide standards for greenhouse gas emissions in the power generation sector as a whole.[43] Although the statute was not clear on the point, the dissent thought the most plausible reading of the statute included the broader delegation claimed by the EPA.[44] Rather than meeting this view head-on, the majority invoked the major questions doctrine to say that the agency's claimed delegation failed due to the statute's lack of clarity.[45]

In terms of the foregoing discussion, the EPA claimed the statute covered situations X and Y, which was arguably correct as a matter of the statute's most plausible original meaning. But the majority invoked the major questions doctrine to limit the statute to situation X, because the statute's extension to situation Y, while perhaps the most plausible reading of the statute, was insufficiently clear.[46] The Court's majority thus chose to underenforce the statute.[47]

In dissent, Justice Kagan memorably faulted the majority for using the major questions doctrine as a "get-out-of-text-free card[]."[48] That may be a correct if unsympathetic description, but it does not in itself show the move to be constitutionally illegitimate. Her observations indicate that the major questions doctrine is a substantive canon functioning as a clear statement rule, resulting in potential underenforcement of the law.[49] So described, it is not unusual. As discussed, modern practice contains an array of substantive canons, notably the federalism canons.[50] But that merely raises the stakes—all of these canons, not just the major questions doctrine, are vulnerable to the claim that they violate the courts' duty to apply supreme law. The question again is whether the canons are consistent with the courts' constitutional duty—and that is a question about the courts' judicial power to underenforce the law.

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43. West Virginia v. EPA, 142 S. Ct. 2587, 2600–06 (2022).

44. *Id.* at 2626, 2628–33 (Kagan, J., dissenting).

45. *Id.* at 2609 (majority opinion); *see id.* at 2633–34 (Kagan, J., dissenting).

46. *See id.* at 2609–10, 2616.

47. *See id.* at 2616 (majority opinion) (holding that Congress did not give EPA "the authority to adopt on its own such a regulatory scheme").

48. *Id.* at 2641 (Kagan, J., dissenting).

49. *See id.* at 2633–34 (Kagan, J., dissenting).

50. *See id.* at 2616–17 (Gorsuch, J., concurring).

C. Three Incomplete Defenses

This Section considers three defenses that have been advanced for the use of the major questions doctrine as a substantive canon: precedent, protection of constitutional values, and avoidance of constitutional doubt. It concludes that while each has some force, none is fully persuasive from an originalist perspective.

1. Precedent

With the major questions doctrine debate framed as a question whether the federal courts' judicial power includes the power to develop limiting substantive canons, we can see that substantial precedent supports this power. Substantive canons limiting the scope of federal statutes in cases of uncertainty are common and have been endorsed by Justices across a range of methodological and ideological perspectives.[51] At minimum, this suggests that the tenor of the debate over the major questions doctrine is somewhat overstated—in developing the major questions doctrine as a substantive canon, the Court may not be doing anything particularly novel. Further, the practice might suggest that the Court's power to develop substantive canons can rest on entrenched precedent, regardless of its originalist merits.

As noted, the modern Court's approach to federal-state relations rests on a series of substantive canons developed relatively recently.[52] For example, in *Pennhurst State School v. Halderman*,[53] the Court held that federal statutes should not be read to override state sovereign immunity absent an "unequivocal expression of congressional intent."[54] As the Court made clear, this was

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51. *See* Barrett, *supra* note 2, at 125–55 (providing a history of the use of substantive canons by a variety of judges).

52. *See infra* Part I.A.

53. 465 U.S. 89 (1984).

54. *Id.* at 99; *accord* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 246 (1985) (concluding that "[a] general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment"); *see* SCALIA & GARNER, *supra* note 1, at 288–89, describing the *Pennhurst* rule as a substantive canon:

> This rule requiring "unequivocal" designation of the states [as the proper subject of suits] cannot be attributed to the mere doctrine of sovereign immunity itself (or to the presumed intent of the legislature for the sovereign whose immunity is at issue). Rather, the Supreme Court of the United States has made clear the federal structural consideration that is the proper basis for assuming that state immunity has not been eliminated unless that result is founded on clear expression.

Scalia and Garner do not elaborate on the source of the Court's power to insist on this "clear expression," but they do not criticize the approach. *See id. But see* SCALIA, *supra* note 2, at 29 (somewhat half-heartedly suggesting that "perhaps" the "congressional elimination of state

a substantive canon invoked to protect state sovereignty, not a canon based on a claim that Congress was particularly protective of state sovereignty: "Our reluctance to infer that a State's immunity from suit in the federal courts has been negated stems from recognition of the vital role of the doctrine of sovereign immunity in our federal system."[55] Building on *Pennhurst*, the Court (with Justice Scalia in the majority) further required in *Gregory v. Ashcroft*[56] that Congress use a clear statement to regulate core aspects of state government. The issue in *Gregory* was whether the general language of the Age Discrimination in Employment Act displaced a Missouri state statute requiring judges to retire at age seventy. The statute had an exception for policymaking positions, whose application to judges was debated.[57] Justice O'Connor wrote for the Court that the Justices did not need to definitively resolve the statutory question because in any event the language was unclear "Congressional interference with this decision of the people of Missouri, defining their constitutional officers, would upset the usual constitutional balance of federal and state powers. For this reason, "it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides" this balance."[58]

Applying this requirement, the majority concluded that for the claimants to prevail, "it must be plain to anyone reading the Act that it covers judges" and found instead that "we cannot conclude that the statute plainly covers appointed state judges."[59] Concurring, Justice White objected to the Court's invocation of a substantive canon to resolve the case; he would instead have used ordinary linguistic tools of statutory interpretation.[60]

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sovereign immunity is such an extraordinary act, one would normally expect it to be explicitly decreed rather than offhandedly implied").

55. *Pennhurst*, 465 U.S. at 99–100; *accord* Dellmuth v. Muth, 491 U.S. 223, 230 (1989) (requiring an "unmistakably clear" statement to override state sovereign immunity).

56. 501 U.S. 452 (1991).

57. *See id.* at 465–67.

58. *Id.* at 460 (quoting *Atascadero*, 473 U.S. at 243). The *Gregory* majority later discussed *Pennhurst* and concluded "[t]he *Pennhurst* rule looks much like the plain statement rule we apply today." *Id.* at 470.

59. *Id.* at 467.

60. *Id.* at 474 (White, J., concurring in the judgment) ("The majority, however, chooses not to resolve that issue of statutory construction. Instead, it holds that whether or not the ADEA can fairly be read to exclude state judges from its scope, '[w]e will not read the ADEA to cover state judges unless Congress has made it clear that judges are *included*.' I cannot agree with this 'plain statement' rule . . . .") (alteration in original); *see* Rappaport, *Replacing the Major Questions Doctrine*, *supra* note 5, at 4 (describing *Gregory* as an approach that "interprets statutes, not to determine what the language that Congress drafted would mean to a knowledgeable and reasonable reader at the time of its enactment, but instead to protect a traditional balance between federal and state authority").

More recently in this line of cases, the Court in *Bond v. United States*[61] extended *Gregory* to require a clear statement from Congress to regulate in areas of primarily local concern.[62] *Bond* involved the purported application of the federal Chemical Weapons Convention Implementation Act to a woman who placed a chemical irritant on a neighbor's mailbox as part of a romantic altercation.[63] Chief Justice Roberts wrote for the Court that given the purely local concerns involved, the Court would require a clear statutory statement before accepting this claimed broad application: "[W]hen legislation 'affect[s] the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.'"[64] Thus, "[w]e conclude that, in this curious case, we can insist on a clear indication that Congress meant to reach purely local crimes, before interpreting the statute's expansive language in a way that intrudes on the police power of the States."[65]

The *Pennhurst/Gregory/Bond* line of cases imposes a series of related clear statement rules, in lieu of ordinary statutory interpretation, to protect what the Court called the "federal balance."[66] None of the cases explains how the Court has power to impose these rules—a question posed sharply by Justice White's concurrence in *Gregory*.[67] But that power now seems well-entrenched, at least in federalism cases.[68] And a substantive canon to protect separation of powers, such as the major questions doctrine, seems little

61. 572 U.S. 844 (2014).

62. *Id.* at 866.

63. *Id.* at 852–53.

64. *Id.* at 858 (quoting United States v. Bass, 404 U.S. 336, 349 (1971)).

65. *Id.* at 860.

66. *Id.* at 858 (quoting *Bass*, 404 U.S. at 349).

67. Gregory v. Ashcroft, 501 U.S. 452, 478 (1991) (White, J., concurring in the judgment).

68. No Justice in *Bond* objected to the majority's clear statement rule; Justices Scalia, Thomas, and Alito concurred in the judgment, finding that the statute's reach was clear and unambiguous (but unconstitutional). *See also* U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837, 1849–50 (2020) (Thomas, J.) ("Our precedents require Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property.") (citing *Gregory*, 501 U.S. at 460).

A further federalism canon potentially in this category is the longstanding presumption against preemption of state law by federal statute. *See* SCALIA & GARNER, *supra* note 1, at 290–94. However, this canon is perhaps better understood as an implication of the Supremacy Clause, U.S. CONST. art. VI, para. 2, which would seem to allow concurrent federal and state regulation unless the laws conflict.

different in this regard from substantive canons that protect federalism.[69] Thus, there is nothing particularly new about the Court developing a substantive major questions canon: it follows from the course the Court has been pursuing in federalism for decades. It could be argued, therefore, that the judicial power underlying the major questions doctrine can be sustained as a matter of precedent, whatever its legitimacy as a matter of the Constitution's original meaning.

This argument from precedent should not, however, be persuasive from an originalist perspective. The judicial power to create substantive canons has been sharply criticized on originalist grounds.[70] A bedrock principle of originalist views of precedent is (or ought to be) that nonoriginalist precedent should not be extended.[71] Thus, existing substantive canons such as those in the federalism area might be appropriately retained in the face of conflict with original meaning, but new ones should not be created absent a showing that substantive canons are consistent with original meaning.

An alternative precedential defense is that the major questions doctrine itself rests on longstanding application. Justice Gorsuch in *West Virginia* pointed to an apparent application of the doctrine from the late nineteenth century, and there may be additional examples.[72] If the doctrine were sufficiently entrenched in judicial practice, precedent might counsel—even to originalists—retaining it despite worries about its lack of foundation in the Constitution's original meaning.

It seems doubtful, however, that the major questions doctrine rests on a sufficiently entrenched judicial practice. While the modern cases may have some historical antecedents, the doctrine does not appear to have been

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69. Other separation of powers substantive canons have been suggested, including a presumption that generally worded criminal statutes do not extend to the President's exercise of core presidential powers. *See* Michael K. Velchik, *The Presidential Avoidance Canon*, 102 NEB. L. REV. 279 (2023). *But see* Trump v. United States, 144 S. Ct. 2312, 2353 n.3 (2024) (Barrett, J., concurring in part) (declining to apply this canon in a case addressing presidential immunity from criminal prosecution).

70. *See* sources cited *supra* note 5.

71. *See* Michael D. Ramsey, *The Supremacy Clause, Original Meaning and Modern Law*, 74 OHIO ST. L.J. 559 (2013) (arguing for a narrow view of stare decisis combined with an originalist view of the Supremacy Clause to advance this objective); Josh Blackman, *Originalism and Stare Decisis in the Lower Courts*, 13 N.Y.U. J.L. & LIBERTY 44, 52–57 (2019) (generally arguing against extension of nonoriginalist precedent); Garza v. Idaho, 139 S. Ct. 738, 756–57 (2019) (Thomas, J., dissenting) (same).

72. West Virginia v. EPA, 142 S. Ct. 2587, 2619 (2022) (Gorsuch, J., concurring) (citing Interstate Com. Comm'n v. Cincinnati, New Orleans & Tex. Pac. Ry. Co., 167 U.S. 479, 499 (1897)); Capozzi, *Defending the Major Questions Doctrine*, *supra* note 5 (discussing the doctrine's origins).

consistently applied for substantial periods thereafter.[73] The mid-twentieth century in particular saw frequent open-ended congressional delegation to executive agencies, with the major questions doctrine rarely invoked.[74] Regardless of the appropriate view of originalism and precedent, it seems likely that a nonoriginalist precedent would need to be deeply entrenched—in a way the major questions doctrine is not—to be defensible to originalists on purely precedential grounds.[75]

In sum, while some substantive canons may be defended against originalist challenges as entrenched nonoriginalist precedent, the major questions doctrine cannot. At minimum, originalists should not accept extensions of entrenched nonoriginalist precedent or further entrenchment of inconsistently applied nonoriginalist precedent.

2. Constitutional Values

A second potential defense is that substantive canons such as the major questions doctrine can arise from the Constitution. Concurring in the *West Virginia* case, Justice Gorsuch offered this principal defense of the major questions doctrine:

> Like many parallel clear-statement rules in our law, [the major questions doctrine] operates to protect foundational constitutional guarantees. . . .
>
> One of the Judiciary's most solemn duties is to ensure that acts of Congress are applied in accordance with the Constitution in the cases that come before us. To help fulfill that duty, courts have developed certain "clear-statement" rules. These rules assume that, absent a clear statement otherwise, Congress means for its laws to operate in congruence with the Constitution rather than test its bounds. In this way, these clear-statement rules help courts "act as faithful agents of the Constitution."[76]

Similarly, then-Professor Barrett suggested in her prominent article on substantive canons that they (or at least some of them) could be defended as protecting "constitutional values."[77] As developed in the next Section, and as Justice Gorsuch argued in *West Virginia*, the "constitutional value" protected by the major questions doctrine is that Congress, rather than the Executive, exercises legislative power.[78]

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73. *See* Capozzi, *Past and Future of the Major Questions Doctrine*, *supra* note 17, at 202–05.

74. *See* Sohoni, *supra* note 5, at 292.

75. *See, e.g.*, John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803, 829–54 (2009).

76. *West Virginia*, 142 S. Ct. at 2616 (Gorsuch, J., concurring) (quoting Barrett, *supra* note 2, at 169).

77. Barrett, *supra* note 2, at 163–64, 168–70. Elsewhere in the article she described these canons as "constitutionally inspired." *Id.* at 174. It should be noted that Barrett's article is extremely cautious in advancing this defense. *Id.*

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

Stated as the proposition that the major questions doctrine (or other substantive canons) directly enforce the Constitution, the argument is puzzling. To the extent that the purported delegations rejected by the major questions doctrine would be unconstitutional, the Court should not validate them—but that is simply a matter of constitutional law unrelated to a Court-created clear statement rule.[79] Indeed, describing the analysis as imposing a clear statement rule indicates that if Congress does draft a clear statement, that would be a valid exercise of Congress's constitutional power. Moreover, to conclude that the delegations barred by the major questions doctrine are unconstitutional, we would need much more explanation of and agreement upon the Constitution's nondelegation rule, on which little consensus exists.[80]

Alternatively, it might be said that the major questions doctrine and other substantive canons protect "constitutional values"—meaning values implied by but not actually contained in the Constitution.[81] Although, as discussed in the next Section, there is something to be made of this argument, on its face it does not seem promising. If the canons do not directly enforce the Constitution, it is unclear how they can arise from the Constitution. A

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79. Marbury v. Madison, 5 U.S. 137, 178 (1803).

80. *See* Rappaport, *Replacing the Major Questions Doctrine*, *supra* note 5, at 4 (making this argument and concluding that "[w]ithout defining the nondelegation doctrine, the major question doctrine risks both overenforcing and underenforcing the nondelegation doctrine"). The Court's current nondelegation doctrine, as described in *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474–75 (2001), is permissive (much more so than the major questions doctrine), requiring only that Congress provide an "intelligible principle" to guide executive discretion. Although a number of current Justices have advocated revisiting this approach, *see Gundy v. United States*, 139 S. Ct. 2116, 2139–40 (2019) (Gorsuch, J., dissenting), they have not provided a fully developed alternative, nor is it clear that if they did, that alternative would correspond with the major questions doctrine.

For similar reasons, the major questions doctrine could not be justified as an instance of the constitutional avoidance canon, by which statutes may be read narrowly when a broad reading would make them unconstitutional. *E.g.*, Mossman v. Higginson, 4 U.S. 12, 14 (1800). To invoke this canon, one would need to know that the purported delegation would in fact be unconstitutional. Of course, individual Justices might believe in a strong nondelegation doctrine but support the major questions doctrine as a second-best alternative. *Cf.* Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring) (in major questions doctrine case, observing that "if the statutory subsection the agency cites really *did* endow [the agency] with the power it asserts, that law would likely constitute an unconstitutional delegation of legislative authority"). *See* Piatt & Morgan, *supra* note 26, at 21–23 (discussing Justice Gorsuch's views of the major questions doctrine as enforcing a strong version of the nondelegation doctrine).

81. Both Justice Gorsuch's major questions doctrine concurrences and Justice Barrett's article at times appear to make this argument. *See West Virginia*, 142 S. Ct. at 2620 (Gorsuch, J. concurring); Barrett, *supra* note 2, at 175.

purported constraint on Congress is either contained in the Constitution or not contained in the Constitution. If it is not contained in the Constitution, it does not restrict Congress, even if it resembles a constraint that is contained in the Constitution. Specifically considering the major questions doctrine, to the extent the Constitution prohibits delegation, the Court should enforce the Constitution; to the extent the Constitution does not prohibit delegation, it is not clear how delegation could be limited by "constitutional values" that the Constitution does not contain. As Professor Manning argues:

> [I]f the legitimacy of constitutionally inspired clear statement rules depends on the plausibility of tracing them meaningfully to the Constitution, that burden cannot be met. Such rules seek to enforce constitutional values in the abstract, standing apart from the constitutional provisions from which they are derived. Indeed, the defining feature of constitutionally inspired clear statement rules is that even when a given interpretation of a statute would *not* violate the constitutional provision(s) from which the triggering value emanates, that interpretation might still be said to collide with the background value itself.
>
> But constitutional values do not, I argue, exist in the abstract. Values such as federalism, nonretroactivity, and the rule of law, do not exist in freestanding form. Rather, like all constitutional values, they find concrete expression in many discrete constitutional provisions, which prescribe the *means* of implementing the value in question. . . . [O]ne cannot meaningfully speak of a *constitutional* value without reference to the constitutionmakers' decisions about how to put that value into effect.[82]

A third version of a constitutionally based defense of the major questions doctrine views it as a second-best option. Even if the Constitution's original meaning contains a strong nondelegation rule, as a practical matter, courts may have difficulty enforcing it. In *Whitman*, the modern Court's leading nondelegation case, Justice Scalia, writing for the Court, expressed doubts about judges' ability and willingness to determine, in effect, how much delegation is too much.[83] On this basis, Scalia found it necessary for courts to defer substantially to Congress on the appropriate extent of delegation.[84] One might therefore view the major questions doctrine as a counterweight to the Court's underenforcement of the nondelegation doctrine.[85] This

82. Manning, *supra* note 2, at 404.

83. *Whitman*, 531 U.S. at 474–75 ("[W]e have 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'") (quoting Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)).

84. *Id.*

85. *See* Capozzi, *Defending the Major Questions Doctrine*, *supra* note 5 (developing this argument as applied to the major questions doctrine); Chen & Estreicher, *supra* note 5, at 575–78 (describing the major questions doctrine as a less-intrusive and more flexible alternative to a court-enforced nondelegation doctrine); Barrett, *supra* note 2, at 171–72 (noting this argument

approach, however, depends on finding a strong nondelegation rule in the Constitution, a proposition that is sharply debated.[86] This Article seeks instead to defend the major questions doctrine without needing to defend a strong conclusion as to the nondelegation doctrine.

3. Constitutional Doubt

A third potential defense of the major questions doctrine rests on the canon of avoiding constitutional doubt. By this canon, courts construe unclear federal statutes to not raise serious doubts about the statutes' constitutionality.[87] The canon is longstanding, at least in the sense of being traceable to the early twentieth century,[88] and is at least reasonably well entrenched.[89]

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in connection with federalism canons). *But see* Rappaport, *Replacing the Major Questions Doctrine*, *supra* note 5, at 5–6 (noting and rejecting this argument as inconsistent with originalism). Although not expressly stated, one may sense this idea behind Justice Gorsuch's concurrences in the major questions doctrine cases. *See West Virginia*, 597 U.S. at 2616–17 (Gorsuch, J., concurring); *Nat'l Fed'n of Indep. Bus.*, 595 U.S. at 669 (Gorsuch, J., concurring); *cf.* Gundy v. United States, 139 S. Ct. 2116, 2139–41 (2019) (Gorsuch, J., dissenting) (arguing for replacing *Whitman* with a stronger nondelegation rule).

86. Whether the Constitution's original meaning imposes a strong nondelegation rule is sharply debated. *See, e.g.*, MCCONNELL, *supra* note 36, at 326–35 (arguing for a nondelegation rule); Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490 (2021) (same); Aaron Gordon, *Nondelegation*, 12 N.Y.U. J.L. & LIBERTY 718 (2019) (same); Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021) (finding practice in the early post-ratification era to undercut arguments for a constitutional nondelegation rule); Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, 56 GA. L. REV. 81 (2021) (same); 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) (same). This Article takes no position on that debate.

87. SCALIA & GARNER, *supra* note 1, at 247–51.

88. *See* Att'y Gen v. Del. & Hudson Co., 213 U.S. 366, 416–17 (1909) (reading statute narrowly to avoid concerns about it exceeding Congress's commerce power); Crowell v. Benson, 285 U.S. 22, 62 (1932) ("[I]f a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."). *See* John Copeland Nagle, Delaware *&* Hudson *Revisited*, 72 NOTRE DAME L. REV. 1495, 1498–1516 (1997) (discussing origins of the constitutional doubt canon).

89. The Court has called the canon "beyond debate," *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988), although the nonetheless has been sharply criticized. *See* Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?*, 73 U. COLO. L. REV. 1401, 1405–06 (describing the canon as "wholly illegitimate"); Neal Kumar Katyal & Thomas P. Shmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109 (2015); Frederick Schauer, Ashwander *Revisited*, 1995 SUP. CT. REV. 71; *see also* SCALIA & GARNER, *supra* note 1, at 249–50 (acknowledging criticism but calling the doctrine "well established").

And some clear statement rules analogous to the major questions doctrine have at times been justified as specific instances of the constitutional doubt canon, as has on occasion the major questions doctrine itself.[90]

A constitutional doubt defense of the major questions doctrine would run as follows. When Congress purportedly delegates decisionmaking power over important lawmaking matters, that at least raises a substantial question about constitutionality. Whether and to what extent the Constitution establishes a robust rule of nondelegation remains sharply debated.[91] In the Court's most recent encounter with nondelegation claims, four Justices appeared to favor rethinking the Court's permissive approach to nondelegation.[92] At minimum, then, there seems to be doubt that broad delegations, such as those claimed by the agencies in the Court's recent major questions doctrine cases, would be constitutional. Invoking the major questions doctrine allowed the Court to avoid the constitutional issue by reading the statutes narrowly. Viewed this way, the major questions doctrine is simply a routine application of the constitutional doubt canon.

The principal problem with justifying the major questions doctrine as an application of the constitutional doubt canon is that the constitutional doubt canon itself is dubious on textualist and originalist grounds. It is, to begin, a substantive canon, not a linguistic canon.[93] There is no reason to suppose that Congress drafts statutes to avoid constitutional doubt, nor does Congress have any obligation to do so. Congress might well prefer to pursue a maximalist policy in a statute even at some risk that the statute (or parts of it) might be found unconstitutional. Thus, the canon necessarily rests on substantive judicial policy. As Justice Scalia and Bryan Garner commented in their treatise on legal interpretation:

> Perhaps this long-standing principle of interpretation is based, or at least was originally based, on a genuine assessment of probable meaning. In the texts that it enacts, a legislature should not be presumed to be sailing close to the wind, so to speak . . . . But with respect to federal legislation at least—where the canon is routinely applied—that is

90. *See* Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (invoking federalism clear statement rule as a way to read statute narrowly to avoid addressing constitutional questions); Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 646 (1980) (in a case regarded as an antecedent to the major questions doctrine, ruling against a broad reading of the relevant statute and concluding that if read as proposed, "the statute would make such a 'sweeping delegation of legislative power' that it might be unconstitutional. . . . A construction of the statute that avoids this kind of open-ended grant should certainly be favored.").

91. *See* sources cited *supra* note 86.

92. *See* Gundy v. United States, 139 S. Ct. 2116, 2130–31 (2019) (Alito, J., concurring); *id.* at 2141–42 (Gorsuch, J., dissenting).

93. *See supra* Part. I.A.

> today a dubious rationale. The modern Congress sails close to the wind all the time. . . .
>
> A more plausible basis for the rule is that it represents judicial policy—a judgment that statutes *ought not* to tread on questionable constitutional grounds unless they do so clearly, or perhaps a judgment that courts should minimize the occasions on which they confront and perhaps contradict the legislative branch.[94]

The canon is therefore subject to the objections levied against substantive canons in general.

Moreover, although the canon is longstanding in the sense of dating to the early twentieth century, it does not appear to have antecedents in the founding era.[95] As a result, the constitutional doubt canon itself, without more, seems difficult to justify on the basis of original meaning. Appealing to it merely re-asks the question whether substantive canons are consistent with the Constitution's original meaning.

A stronger argument might be developed by combining appeal to the constitutional doubt canon and appeal to precedent. If the constitutional doubt canon is entrenched and longstanding, and if it encompasses by its longstanding terms the major questions doctrine—that is, if the major questions doctrine is simply an application of the constitutional doubt canon—then perhaps it should be retained as a nonoriginalist precedent.

Although this retention would be neither an extension of nonoriginalist precedent nor an entrenchment of inconsistently applied nonoriginalist precedent,[96] it nonetheless appears difficult to justify from an originalist perspective. Most originalist approaches to precedent likely require a showing that overruling a nonoriginalist precedent would have some degree of disruption to the legal system (the extent of likely disruption may be a subject of intra-originalist debate). Abandoning the constitutional doubt canon would seem to entail very little disruption—probably not enough under any prominent originalist theory of precedent. Therefore, the constitutional doubt canon seems insufficient to sustain an originalist defense of the major questions doctrine.

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94. SCALIA & GARNER, *supra* note 1, at 248–49.

95. *See* Nagle, *supra* note 88, at 1496–97. The constitutional doubt canon is distinct from the somewhat related judicial practice of reading statutes narrowly to avoid finding them unconstitutional. *See* SCALIA & GARNER, *supra* note 1, at 247–48 (making this distinction). The latter approach has roots in early post-ratification practice, *see* Barrett, *supra* note 2, at 130–42, but it requires a determination that the broader application of the statute would be unconstitutional, not merely that it might be.

96. This assumes that the doubt canon has actually been consistently applied, which may be disputed. *See* Eskridge & Frickey, *supra* note 17, at 612–28.

III. ORIGINAL MEANING AND CLEAR STATEMENT RULES IN THE EARLY POST-RATIFICATION ERA

Having posed the originalist challenge to the major questions doctrine and rejected several potential defenses, this Section turns to the central question of historical justification. For an originalist defense of the major questions doctrine as a substantive canon, the inquiry is whether the original meaning of the "judicial Power" included power to develop and apply limiting canons that potentially underenforce federal law. As set forth below, there is evidence from early judicial practice to support an underenforcement power, and grounds to conclude that the major questions doctrine is a permissible exercise of that power.

Federal courts in the early post-ratification era apparently believed their judicial power allowed them to adopt clear statement rules and other substantive canons that resulted in the underenforcement of federal laws.[97] This Section examines two of these rules in detail: the presumption against violating international law and the presumption against civil retroactivity. The apparently uncontested use of these canons (and others discussed more briefly below) indicates that they were not understood to be outside the Constitution's judicial power. The subsequent Section then considers whether the historical practice supports the power to develop additional substantive canons such as the major questions doctrine.

A. The Charming Betsy *Canon*

The most familiar of the Supreme Court's early nineteenth-century canons is the so-called *Charming Betsy* canon, which directs that courts not apply unclear statutes in ways that violate international law. The canon is most directly stated in (and derives its name from) the 1804 case *Murray v. Schooner Charming Betsy*,[98] although as discussed below, the Court had applied it earlier.

In considering a claim for wrongful seizure of the ship *Charming Betsy*, Chief

97. Justice Gorsuch and Justice Barrett, in defending substantive canons, rely in part on the application of substantive canons in the early post-ratification period. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2616–17 (2022) (Gorsuch, J., concurring); Barrett, *supra* note 2, at 110–11. For a brief response, see Rappaport, *Replacing the Major Questions Doctrine*, *supra* note 5, at 6–7 (arguing that the historical canons as originally developed were linguistic rather than substantive).

98. 6 U.S. 64 (1804). *See* Curtis A. Bradley, *The* Charming Betsy *Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 485–95 (1998) [hereinafter Bradley, Charming Betsy *Canon*]; CURTIS A. BRADLEY, INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM 15–19 (2013) [hereinafter BRADLEY, INTERNATIONAL LAW]. For discussion of *Charming Betsy* as a precedent for modern substantive canons, see Barrett, *supra* note 2, at 134–38.

Justice Marshall wrote for the Court that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . ."[99] Marshall's language appears to describe what today we would call a clear statement rule. In his formulation, the narrower statutory scope that complies with the law of nations (as international law was called at the time) is preferred if it is just a "possible" reading; it need not be equally plausible, or nearly equally plausible, as a more expansive reading. A reading complying with international law would not be "possible" only if the statute had a clear statement requiring the violation. And this direction is, at least in most cases, an underenforcement rule.[100] Ordinarily a court will face an arguable broad reading of a statute that in some applications would violate international law and a narrower reading that conforms to international law. Marshall's formulation calls for courts to adopt the narrower one, even if it is not the most plausible.

As applied in *Charming Betsy*, the presumption may have had wider scope (although Marshall did not say so directly). The issue in the case was whether the U.S. Navy's seizure of the ship *Charming Betsy* was authorized by a federal statute prohibiting trade with France by persons "resident within the United States or under their protection."[101] The ship was suspected of trading with France; its owner, Jared Shattuck, had been born a U.S. citizen but moved to the Danish Virgin Islands and swore allegiance to Denmark.[102] The relevant statute authorized seizure of his ship only if he was "under the protection of the United States"—that is, if he remained a U.S. citizen despite his apparent expatriation.[103] Marshall stated the presumption against violating international law at the outset of his analysis but ultimately reserved the question whether applying the statute to Shattuck would have been an

99. 6 U.S. at 118. The quote continues: "and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country." That might appear to say that a statute can never be applied to violate neutral rights, but in light of the first part of the sentence, presumably Marshall meant that it can never be applied to violate neutral rights where another possible construction exists.

100. *See* Bradley, Charming Betsy *Canon*, *supra* note 98, at 487–90 (noting that courts use the *Charming Betsy* canon "primarily as a braking mechanism . . . to restrain the scope of federal enactments").

101. *Id.* at 486.

102. *Charming Betsy*, 6 U.S. at 115–16.

103. *Id.* at 119–20 ("*Jared Shattuck* having been born within the *United States*, and not being proved to have expatriated himself according to any form prescribed by law, is said to remain a citizen, entitled to the benefit and subject to the disabilities imposed upon *American* citizens; and, therefore, to come expressly within the description of the act which comprehends *American* citizens residing elsewhere.").

international law violation.[104] Rather, he appears to have read the statute narrowly to avoid the *possibility* of violating international law.

Prior to *Charming Betsy*, Marshall had applied the presumption even more forcefully in the 1801 case *Talbot v. Seeman*.[105] There the question was whether the claimant, a U.S. naval captain, was entitled to salvage[106] for recapturing a neutral ship from its French captors. A federal statute provided salvage when a ship was recaptured "from the enemy."[107] The relevant events took place during the United States's "Quasi-War" with France, and the Court had previously held that France was an "enemy" during this conflict for purposes of federal law.[108] Thus the claimants in *Talbot* seemed to have a strong case on the face of the statute.[109]

Marshall held otherwise. First, he noted that international law did not permit a claim of salvage for recapturing neutral ships (the logic being that the initial seizure was wrongful under international law and so the neutral owner would have a legal remedy against the captor).[110] Next, he recited the presumption against violating international law in terms similar to those he used later in *Charming Betsy*: "[T]he laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations."[111] Finally, he concluded that it was possible to read the statute narrowly to avoid an international law violation:

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104. *Id.* at 120. *See* Bradley, Charming Betsy *Canon*, *supra* note 98, at 487 ("It is not entirely clear from the opinion how international law actually influenced the Court's conclusion, particularly given that the Court reserved judgment on whether the United States had the *power* under international law to punish Shattuck.").

105. 5 U.S. 1 (1801). *See* Bradley, Charming Betsy *Canon*, *supra* note 98, at 485–86 (discussing *Talbot*).

106. *See Talbot*, 5 U.S. at 27–28. Salvage referred to the right to a percentage of the ship's value, granted to a person who recovered the ship for the owners. *See* Act of Mar. 2, 1799, ch. 24, 1 Stat. 709, 716.

107. *Talbot*, 5 U.S. at 27–28; Act of Mar. 2, 1799, ch. 24, 1 Stat. at 715–16.

108. Bas v. Tingy, 4 U.S. 37, 45–46 (1800).

109. Marshall acknowledged that: "It has been contended that the case before the court is in the very words of the act. That the owner of the Amelia is a citizen of a state in amity with the United States, re-taken from the enemy. That the description would have been more limited, had the intention of the act been to restrain its application to a re-captured vessel belonging to a nation engaged with the United States against the same enemy." *Talbot*, 5 U.S. at 43.

110. *Id.* at 36–37. The ship in question, *The Amelia*, was owned by citizens of the German city-state of Hamburg, which was not involved in the conflict between the United States and France. *Id.*

111. *Id.* at 43.

> On inspecting the clause in question, the court is struck with the description of those from whom the vessel is to be re-taken in order to come within the provisions of the act. The expression used is *the enemy*. A vessel re-taken from the enemy. The enemy of whom? The court thinks it not unreasonable to answer, of both parties. By this construction the act of congress will never violate those principles which we believe, and which it is our duty to believe, the legislature of the United States will always hold sacred.[112]

That seems quite strained, and could be justified only by a very strong presumption against violating international law. On an ordinary reading, it seems straightforward to read "enemy" in the statute to mean "enemy of the United States," particularly as to a statute passed by the U.S. Congress during a U.S. armed conflict against a particular enemy.

The Marshall Court applied the presumption from *Talbot* and *Charming Betsy* in subsequent cases, most notably in another maritime case, *The Schooner Exchange v. McFaddon*.[113] In that case, the Court read Congress's general grant of federal maritime jurisdiction not to grant jurisdiction in cases where the law of nations indicated foreign sovereign immunity.[114] Marshall wrote for the Court: "[U]ntil such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be breach of faith to exercise."[115]

It is possible that the Marshall Court understood the *Charming Betsy* presumption as a linguistic canon reflecting an assumption that Congress typically would not want to violate international law. Even if that view of Congress might not seem plausible today, in the eighteenth and nineteenth centuries, international law played a more prominent role in moral and policy debates, and the nation's weaker geostrategic position made violations more problematic.[116] However, Marshall did not describe the presumption as arising from Congress's intent other than in a very generalized way, and his emphasis seemed instead to be that *courts* should avoid international law

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112. *Id.* at 44.

113. 11 U.S. 116 (1812).

114. *Id.* at 146.

115. *Id. Schooner Exchange* involved a claim brought against a French warship located in a U.S. harbor. *Id.* For other early cases that may have involved an application of the presumption against violating international law, see David L. Sloss, Michael D. Ramsey & William S. Dodge, *International Law in the Supreme Court to 1860*, *in* INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE 7, 37–41 (David L. Sloss et al. eds., 2012) [hereinafter Sloss et al.].

116. *See* David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 936–46 (2010).

violations whenever they could.[117] *Talbot* and *Charming Betsy* stated the presumption in strong terms that seemed to foreclose inquiry into context that might suggest contrary congressional considerations in specific instances.[118] *Talbot* in particular adopted a strained reading of the statute to avoid an international law violation.[119] Thus the *Charming Betsy* presumption seems to illustrate a judicial power to read statutes narrowly to protect a substantive value, even where the most plausible reading of the statute might be broader. As one commentary concludes: "There was broad consensus [in the early nineteenth century] that the courts shared responsibility for upholding the nation's obligations and its honor when matters implicating international law came within their jurisdiction."[120]

B. Civil Retroactivity and the Schooner Peggy

If the *Charming Betsy* presumption had been the only clear statement rule developed by early post-ratification courts, one might attribute it to the unique status of international law as a binding national obligation of great importance in that era.[121] However, *Charming Betsy* did not stand alone. For example, a similar clear statement canon, applied by the Supreme Court about the same time, concerned civil retroactivity.

The Constitution bars Congress from enacting ex post facto laws,[122] but that restriction was understood in the founding era to apply only to

117. Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804).

118. *See id.*; Talbot v. Seeman, 5 U.S. 1, 44 (1801).

119. *See Talbot*, 5 U.S. at 33.

120. Sloss et al., *supra* note 115, at 50; *see also* Bradley, Charming Betsy *Canon*, *supra* note 98, at 507, 518 (noting that "[c]ommentators typically classify the *Charming Betsy* canon with the normative canons" and adding that "an intent-based account of the *Charming Betsy* canon would have to confront problematic empirical evidence suggesting that compliance with international law is often not the political branches' paramount concern"). For modern applications, see, for example, McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21 (1963) (requiring clear statement before applying U.S. law to internal operations of foreign-flagged ships, based on "rule of international law that the law of the flag state ordinarily governs the internal affairs of a ship"); Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119, 150 (2005) (Scalia, J., dissenting) (quoting and applying *McCulloch*). Curiously, Scalia's treatise on interpretive canons does not discuss the presumption against violating international law, *see* SCALIA & GARNER, *supra* note 1, at xi–xvii, although Scalia applied it in his judicial opinions. *See Spector*, 545 U.S. at 150 (Scalia, J., dissenting); Hartford Fire Ins. v. California, 509 U.S. 764, 814–15 (1993) (Scalia, J., dissenting) (quoting and applying *Charming Betsy*).

121. Sloss et al., *supra* note 115, at 7 (noting the importance of international law in the founding era).

122. U.S. CONST. art. I, § 9.

retroactive penal laws.[123] In *United States v. Heth* in 1806, the Court considered a claim of civil retroactivity.[124] With Marshall recused, the Justices delivered seriatim opinions, most of which held for the claimant on the basis of some form of a presumption against retroactive application of noncriminal laws.[125] Justice Paterson (a former member of the Constitutional Convention) put it most clearly:

> Words in a statute ought not to have a retrospective operation, unless they are so clear, strong, and imperative, that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied. This rule ought especially to be adhered to, when such a construction will alter the preexisting situation of parties, or will affect or interfere with their antecedent rights, services, and remuneration; which is so obviously improper that nothing ought to uphold and vindicate the interpretation, but the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.[126]

As with *Charming Betsy,* Paterson's formulation seems to go beyond ordinary interpretation to invoke what today we would call a clear statement rule.[127] And in its application in *Heth*, the Court seemed not to follow the most natural reading of the statute; indeed Attorney General Breckinridge, arguing on behalf of the United States for a retrospective application, observed that "the words of the act appeared to him so plain that they could not be elucidated by argument."[128] The Court nonetheless ruled against him.[129]

The discretionary nature of the *Heth* presumption is strongly reinforced by an earlier Marshall opinion. In *United States v. Schooner Peggy*—another Quasi-War case—the question was whether a treaty should be given retroactive effect.[130] Marshall acknowledged the presumption against retroactive

123. *See* SCALIA & GARNER, *supra* note 1, at 261.

124. 7 U.S. 399 (1806). *Heth* involved the retrospective application of a statute providing compensation for collectors of customs. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2616–17 (2022) (Gorsuch, J., concurring) (relying in part on *Heth*).

125. *Heth*, 7 U.S. at 408–14.

126. *Id.* at 413 (Paterson, J.); *see also id.* at 408 (Johnson, J.) ("Unless, therefore, the words are too imperious to admit of a different construction, it will be gratifying to the Court to be able to vindicate the justice of the government, by restricting the words of the law to a future operation."); *id.* at 414 (Cushing, J.) ("[I]t being unreasonable, in my opinion, to give the law a construction, which would have such a retrospective effect, unless it contained express words to that purpose.").

127. *See* Manning, *supra* note 2, at 410–12 (discussing the presumption against retroactivity as a substantive canon).

128. *Heth*, 7 U.S. at 399 (argument of counsel).

129. *See id.* at 409–13.

130. 5 U.S. 103 (1801).

statutes in the strong terms later invoked by Paterson but, he continued, retroactivity of a treaty was a different matter:

> It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns where individual rights, acquired by war, are sacrificed for national purposes, the contract, making the sacrifice ought always to receive a construction conforming to its manifest import . . . .[131]

Thus, in interpretation of treaties (and perhaps of other public laws), the Court would not apply the clear statement rule of *Heth* and instead would use ordinary tools of interpretation. That approach confirms two central points. First, the Court saw the presumption as a judicially imposed thumb on the scale against civil retroactivity, and second, the Court saw it as discretionary, capable of being judicially lifted as circumstances changed. In *Heth*, the Justices departed from ordinary interpretive principles to disfavor civil retroactivity; in *Schooner Peggy*, the Court applied ordinary interpretive principles.

C. Other Early Post-Ratification Era Presumptions

At least two other early post-ratification-era presumptions should probably be classified along with *Charming Betsy* and *Heth* as examples of judicial underenforcement. The first is the rule of lenity—the doctrine that ambiguous penal statutes should be read "strictly."[132] As Chief Justice Marshall described it:

> The rule that penal laws are to be construed strictly . . . is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.[133]

By invoking a rule of strict construction, Marshall seemed to be calling for ambiguous penal statutes to be given a more narrow application than they might be understood to have under ordinary principles of interpretation. And his reference to the respective roles of the courts and the Legislature may suggest a concern about courts erroneously going beyond what the Legislature decreed.[134]

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131. *Id.* at 110.

132. SCALIA & GARNER, *supra* note 1, at 296.

133. United States v. Wiltberger, 18 U.S. 76, 95 (1820); *see* 1 WILLIAM BLACKSTONE, COMMENTARIES 88 (1765) (stating in similar terms that "[p]enal statutes must be construed strictly"); Barrett, *supra* note 2, at 129–30 (documenting broad use of the rule of lenity in early English and U.S. cases).

134. Some courts and commentators describe the rule of lenity as merely a tiebreaker employed only in cases of otherwise irresolvable ambiguity. *See* Barrett, *supra* note 2, at 117–18 (describing the rule as a "tiebreaker"); Johnson v. United States, 529 U.S. 694, 713 n.13

A second possible presumption in this category involved the application of the Constitution rather than statutes. A number of early courts and commentators said that a constitutional violation needed to be clear before a court would find a law unconstitutional.[135] The force and extent of this principle remain somewhat in doubt, but at minimum it seems to suggest a degree of judicial underenforcement (in this case of the Constitution). Again, it would not be evident why courts thought they could adopt these interpretive positions unless they thought the judicial power contained some power to underenforce the law.[136]

IV. IMPLICATIONS OF EARLY PRACTICE FOR THE MAJOR QUESTIONS DOCTRINE

The uncontroversial use of underenforcement canons in the early post-ratification period suggests that they were, to some extent, an aspect of the courts' judicial power and consistent with judges' duties under Article VI. This Section considers whether the early canons provide an originalist foundation for the major questions doctrine.

(2000) (noting that the rule should be invoked only when ambiguity "cannot otherwise be resolved"). *But see* SCALIA & GARNER, *supra* note 1, at 299 (describing the rule as requiring that "when the government means to punish, its commands must be reasonably clear."). Regardless of how the rule is deployed in modern times, Marshall's "construed strictly" formulation (likely derived from Blackstone) indicates a strong version in use in the early nineteenth century. Marshall further emphasized that "though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature." *Wiltberger*, 18 U.S. at 96. The reference to "obvious intention" as the limiting factor similarly suggests a strong version of the rule. *But see* Barrett, *supra* note 2, at 132–33 (arguing for a narrower view).

135. *See* John O. McGinnis, *The Duty of Clarity*, 84 GEO. WASH. L. REV. 843, 880–904 (2016) (collecting authorities). Professor McGinnis, however, treats the clarity rule as a constitutional obligation rather than an underenforcement canon. *See id.* at 861–62.

136. Other presumptions from the early post-ratification era may or may not qualify as examples of judicial underenforcement canons. Justice Gorsuch in the *West Virginia* case also relied on the long-standing requirement that waivers of federal sovereign immunity must be stated clearly. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2616–17 (2022) (Gorsuch, J., concurring) (invoking this canon); *see also* Barrett, *supra* note 2, at 145–47 (discussing historical foundations of the canon). However, this immunity canon might be more easily justified as linguistic, as it seems plausible to say that Congress is unlikely to, in effect, waive its own immunity. Also sometimes invoked in this context are canons relating to relationships with Native American Tribes. Again, these canons may be distinguishable in origin and effect from the substantive canons. *See* Evan D. Bernick, *Canon Against Conquest*, 2024 U. ILL. L. REV. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4538633 [https://perma.cc/XDV6-V97K].

A. Three Aspects of the Judicial Power to Underenforce the Law

The nineteenth-century judicial use of substantive canons can be assessed in terms of their scope, justification, and development. This Section considers each of these aspects, first in general and then specifically in relation to the major questions doctrine.

Scope. Each of the substantive canons identified in the prior Section operates largely or exclusively to limit the application of laws that are not clear and specific on their face. Each of them acknowledges that (at minimum) the canon cannot displace clear and specific language in the law's text. *Charming Betsy*'s formulation, for example, required not applying a statute to violate international law if "any other possible construction remains"[137]—by negative implication, requiring a court to enforce a statute unambiguously violating international law.[138] Similarly, Justice Paterson's description of the retroactivity canon in *Heth* was that the canon could only be overcome by statutory directions "so clear, strong, and imperative, that no other meaning can be annexed to them."[139] Thus the canons only came into play if the language was not clear; as to clear language, the judicial duty of full enforcement remained.

Further, as applied in the nineteenth century the canons under discussion did not expand the reach of text beyond its most plausible meaning. They only allowed courts to give an ambiguous text something less than its most plausible meaning. *Charming Betsy*, for example, declined to apply the relevant statute to the shipowner, Shattuck, even though the statute could be read to extend to him.[140] *Talbot* declined to apply the relevant statute to the recapture of the ship *Amelia*, even though the most natural reading of the statute seemed to support that application.[141] The retroactivity canon directed only prospective applications of statutes even where a statute could be read to include retrospective applications.[142] Each canon served to give a text a lesser application than the text's original meaning might justify; they did not give a text a greater application than the text's original meaning might justify. They are appropriately understood as limiting canons—aspects of judicial restraint.

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137. Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804).

138. The negative implication was confirmed in *The Schooner Adeline and Cargo*, 13 U.S. 244, 287 (1815), and *The Marianna Flora*, 24 U.S. 1, 39–40 (1826), both of which enforced unambiguous statutes arguably in violation of international law.

139. United States v. Heth, 7 U.S. 399, 413 (1806) (Paterson, J.).

140. *Charming Betsy*, 6 U.S. at 120.

141. Talbot v. Seeman, 5 U.S. 1, 43–44 (1801); *see also* Schooner Exchange v. McFaddon, 11 U.S. 116, 146 (1812) (applying canon to narrow application of generally worded jurisdictional statute to avoid violating the international law of foreign sovereign immunity).

142. *Heth*, 7 U.S. at 413 (Paterson, J.).

Justification. Although early nineteenth-century practice indicates that federal courts sometimes thought themselves empowered to declare and apply limiting canons, it is less clear why they thought themselves so empowered. None of the leading cases included any generalized discussion of when limiting canons were appropriate. From early practice alone, it seems difficult to say more than that courts sometimes developed limiting canons to avoid what these courts thought were systemically bad results—the wrongfulness and danger of violating international law, the unfairness of retroactivity or lack of notice, the undermining of democratic institutions by the excessive use of judicial review. In each case there is caution, recognizing that in applying unclear statutes courts may err—and the error should, in these cases, be in the direction of avoiding these bad results. Thus, in keeping with their function as limiting canons, they are canons of judicial restraint invoked to avert potentially costly judicial errors.

As discussed,[143] some modern justices and commentators seek to defend the limiting canons as implementing "constitutional values."[144] This label does not seem useful in explaining the early post-ratification canons. First, it is uncertain what counts as a constitutional value, apart from things actually encompassed in the Constitution. For example, Justice Gorsuch argued in the *West Virginia* case that the retroactivity presumption implements a constitutional value.[145] The Constitution, however, only limits retroactivity in criminal cases (through the ex post facto clause). By negative implication, it allows civil retroactivity; the framers could easily have included a ban on civil retroactivity if they chose—and the retroactivity canon itself acknowledges that civil retroactivity is constitutionally permissible if clearly stated.[146] Civil retroactivity may well be unfair and destabilizing, but generalized fairness and stability are moral and practical values, not constitutional ones. It is not clear what it means to say that avoiding civil retroactivity is a constitutional value, other than that it has some indirect relationship with criminal retroactivity.

Further, nineteenth-century courts did not explain their canons in terms of constitutional values. *Charming Betsy*, for example, implemented values connected to harmonious international relations—a worthy goal, but one distinct from direct constitutional considerations. Commentators have

143. *See supra* Part II.C.2.

144. Barrett, *supra* note 2, at 111–12; West Virginia v. EPA, 142 S. Ct. 2587, 2616–17 (2022) (Gorsuch, J., concurring). *But see* Manning, *supra* note 2, at 404 (sharply criticizing the concept of "constitutional values" not reflected in actual constitutional provisions).

145. *West Virginia*, 142 S. Ct. at 2616–17 (Gorsuch, J., concurring).

146. *See* Manning, *supra* note 2, at 410–12 (disputing that civil nonretroactivity can be called a constitutional value).

attempted to recharacterize it as implementing separation of powers, specifically the control of foreign relations by the political branches.[147] But there does not seem to have been a general canon against court involvement in cases implicating foreign affairs in the early post-ratification period, if foreign affairs-related cases were appropriately presented.[148] And nothing in *Charming Betsy* or related cases alludes to constitutional concerns. In sum, the limiting canons appear to have protected important, widely shared values, but not necessarily ones linked to the Constitution.

Development. A third core question concerning the limiting canons is the extent to which courts have authority to create new ones. Perhaps the early nineteenth-century courts thought they could use then-longstanding presumptions as background aspects of their "judicial Power" but could not develop others.[149] Several of the key early canons, notably the rule of lenity and (likely) the rule against civil retroactivity, have roots in earlier English law.[150] However, it is not clear why this would disqualify them as foundations for a broader power. To the contrary, the existence in English law of judicial power to develop limiting canons, such as the presumption against retroactivity, may suggest that engaging in this development is part of the historical understanding of the Constitution's "judicial Power." Moreover, it does not appear that early U.S. courts saw longstanding roots as a prerequisite for limiting presumptions. None of the major early U.S. decisions cited longstanding precedent, even though in some cases precedent was available. Moreover, for the leading limiting canon of the period, *Charming Betsy*, the prior historical practice is thin. Some cases prior to *Talbot* had some language anticipating the *Talbot/Charming Betsy* approach.[151] But it is hard to say that there was a robust set of precedents.[152] It seems more likely that the Marshall Court itself developed the *Charming Betsy* canon to protect against erroneous

147. *E.g.*, Barrett, *supra* note 2, at 173; Bradley, Charming Betsy *Canon*, *supra* note 98, at 524–29.

148. *See* MARTIN S. FLAHERTY, RESTORING THE GLOBAL JUDICIARY: WHY THE SUPREME COURT SHOULD RULE IN FOREIGN AFFAIRS 67–90 (2019); Michael D. Ramsey, *Courts and Foreign Affairs: 'Their Historic Role'*, 35 CONST. COMM. 173, 180–82 (2020); Sloss et al., *supra* note 115, at 13–51.

149. *See* Rappaport, *Replacing the Major Questions Doctrine*, *supra* note 5, at 6 (suggesting this limit).

150. *See* SCALIA & GARNER, *supra* note 1, at 261, 296.

151. *See* Sloss et al., *supra* note 115, at 10, 37 (first citing Rutgers v. Waddington (1784), *in* 1 JULIUS GOEBEL, THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY 405–17 (1964); and then Miller v. The Ship Resolution, 2 U.S. 1, 3–4 (Fed. Ct. App. 1781)).

152. *See* BRADLEY, INTERNATIONAL LAW, *supra* note 98, at 16 n.82 (discussing various theories of the canon's antecedents).

judicial interpretations that might jeopardize the country's international status and security.[153] That view of the matter points to a broader ongoing judicial authority to develop additional limiting canons.

In sum, early post-ratification practice appears to support an understanding of the Constitution's "judicial Power" as including some power to develop and apply substantive canons. Because the power to develop substantive canons may seem inconsistent with a modest judicial role, it is important to reemphasize and illustrate the limitations of the early post-ratification precedents. First, the power arose only in cases where statutory language was unclear. Thus, judicial use of substantive canons would always be subject to correction by Congress. Second, the relevant judicial practice only involved potential underenforcement of statutes—that is, potentially failing to give statutes their full scope. Some presumptions, by contrast, might lead courts to go beyond the intended scope of the statute. One modern example is the (purported) veterans canon, by which it is said that "statutes that provide benefits to veterans are to be construed 'in the veteran's favor.'"[154] Application of this principle as a substantive canon might lead courts to give more benefits than a statute, if interpreted without the presumption, would allow. A presumption applied in this way is more difficult to justify and in any event is not supported by the early post-ratification canons.[155]

Third, the early practice was premised upon avoiding great harms that might arise from judicial error. What would constitute a sufficiently great harm is, of course, necessarily subjective. But some modern presumptions seem clearly to fall short. Consider the constitutional doubt canon discussed earlier: that courts should construe an ambiguous statute not to raise doubts about its constitutionality.[156] The supposed harm which this presumption targets is difficult even to describe, much less to describe as one of great magnitude.[157] One can, therefore, accept a judicial power to develop substantive

153. *See* Barrett, *supra* note 2, at 136–37 (describing the canon as "an American creation" and "an innovation upon existing interpretive practice occasioned by the international situation then confronting the young nation").

154. Rudisill v. McDonough, 144 S. Ct. 945, 959 (2024) (Kavanaugh, J., concurring) (quoting Brown v. Gardner, 513 U.S. 115, 118 (1994)).

155. *See id.* at 961 (Kavanaugh, J., concurring) (criticizing the purported veterans canon and concluding that "any canon that construes benefits statutes in favor of a particular group—rather than just construing the statutes as written—appears to be inconsistent both with actual congressional practice on spending laws and with the Judiciary's proper constitutional role in the federal spending process").

156. *See supra* Part II.C.3.

157. Scalia and Garner somewhat half-heartedly defend the presumption on the ground that "courts should minimize the occasions on which they confront and perhaps contradict the legislative branch." SCALIA & GARNER, *supra* note 1, at 249. But confronting and

canons based on early post-ratification practice and yet remain dubious of the constitutional doubt canon. In sum, the historical practice supports some, but not all, types of substantive canons.

B. Implications for the Major Questions Doctrine

This Section turns specifically to the major questions doctrine, which it assesses in terms of the three key aspects discussed above: scope, justification, and development. The central inquiry is whether the courts' use of limiting canons in the early post-ratification period suggests an originalist constitutional defense of the major questions doctrine.

Scope. To begin, the major questions doctrine operates in a similar manner to both longstanding and modern limiting presumptions. In the absence of clear statutory direction, it limits a statute's reach: In the *West Virginia* case, for example, the consequence was to exclude a broad reading of the authority arguably conferred by the statute.[158] In at least some major questions doctrine cases, the law may be unclear, but a careful analysis of context would suggest that a broad reading is on balance more plausible. (This was the dissent's claim in *West Virginia*).[159] It should be apparent from the foregoing that there is nothing novel about this idea of judicial underenforcement. It is the same effect produced by historical limiting canons such as *Charming Betsy* and the antiretroactivity presumption, which early American courts thought were within their judicial power.[160] On this ground, at least, the major questions doctrine is consistent with early judicial practice and early understandings of the judicial power.

Justification. Like the early presumptions, the major questions doctrine operates to protect against costly judicial error in applying ambiguous statutes. A core principle of separation of powers is the separation of lawmaking (legislative) and law enforcement (executive) power.[161] Perhaps the most-repeated maxim of Montesquieu in the founding era was that "[w]hen the

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contradicting the Legislative Branch, by determining whether or not statutes are constitutional, is a crucial and necessary part of the courts' role in a constitutionally limited government with judicial review. Fulfilling this role is not a harm but an aspect of the constitutional structure. The more likely practical justification may be making courts' jobs easier, which does not seem like much of a justification.

158. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2615–16 (2022).

159. *See id.* at 2628–33 (Kagan, J., dissenting) (arguing that the statutory language plainly granted "regulatory flexibility and discretion").

160. *See supra* Part III. It also has the same effect as a broader array of modern presumptions that do not have the same historical pedigree, especially the federalism presumptions reflected in cases such as *Gregory v. Ashcroft*. *See West Virginia*, 142 S. Ct. at 2621 (Gorsuch, J., concurring).

161. *See* W.B. GWYN, THE MEANING OF THE SEPARATION OF POWERS 114 (1965).

legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty."[162] Similarly, Blackstone wrote:

> The magistrate may enact tyrannical laws, and execute them in a tyrannical manner, since he is possessed, in quality of dispenser of justice, with all the power which he as legislator thinks proper to give himself. But, where the legislative and executive authority are in distinct hands, the former will take care not to entrust the latter with so large a power, as may tend to the subversion of it's own independence, and therewith of the liberty of the subject. With us therefore in England this supreme power is divided into two branches; the one legislative . . .; the other executive . . . .[163]

Reflecting this idea, the Constitution centrally vests legislative power in Congress and executive power in the President.[164] Experience under the Constitution suggests that the Legislature cannot resolve every detail by legislation, and thus, it must leave some flexibility in implementation to the law enforcement power.[165] But that practice, carried too far, threatens the core of separation of powers, if the Legislature were to delegate large parts of its lawmaking authority to the Executive. In that situation, one would have the tyranny described by Montesquieu, albeit one approved by the Legislature.[166]

Two possible approaches might mitigate the threat. First, courts might enforce, as a matter of constitutional law, a rule against (some degree of) delegation. The U.S. Supreme Court has occasionally suggested this idea, most notably in a few cases in the 1930s, but it has now largely abandoned it.[167] No less an originalist than Justice Scalia appeared to conclude that principled judicial enforcement of the nondelegation doctrine was not feasible.[168] While some Justices and commentators have called for the doctrine's revival,[169] that

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162. BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 151 (Thomas Nugent trans., Hafner Publ'g Co. 1949) (1748); *see* GWYN, *supra* note 161, at 104–06.

163. BLACKSTONE, *supra* note 133, at 142–43.

164. U.S. CONST. art. I, § 1; *id.* art. II, § 1.

165. *See* Mortenson & Bagley, *supra* note 86, at 294–96.

166. *See* BLACKSTONE, *supra* note 133, at 261 ("[B]y the statute 31 Hen. VIII. c. 8. it was enacted, that the king's proclamations should have the force of acts of parliament: a statute, which was calculated to introduce the most despotic tyranny; and which must have proved fatal to the liberties of this kingdom, had it not been luckily repealed . . . about five years after."); *see also* West Virginia v. EPA, 142 S. Ct. 2587, 2617–19 (2022) (Gorsuch, J., concurring) (discussing the major questions doctrine as responding to these values).

167. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474–76 (2001).

168. *Id.* at 474–75 ("[W]e have 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'") (quoting Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)).

169. Gundy v. United States, 139 S. Ct. 2116, 2131, 2135 (2019) (Gorsuch, J., dissenting).

has not yet happened, and revival may continue to be deterred by the inability to articulate manageable and textually grounded standards. And as noted, it remains sharply contested whether and to what extent the Constitution's original meaning contains a strong rule against legislative delegation.[170]

Another response to the delegation threat is to rely on political safeguards—notably, the idea that Congress is unlikely to forego too large an amount of its power, and if it does, it can reclaim it. Whatever their thoughts about a judicially enforceable nondelegation doctrine, the Constitution's framers likely had this dynamic in mind, as reflected in Madison's famous observation that in a separated-power system, ambition would counteract ambition.[171]

The political safeguards solution encounters difficulties in practice, however. Congress may not be sufficiently jealous of its power (and indeed may be anxious to send difficult, politically fraught choices to another branch). And of greater concern, the Executive—anxious to enhance its own power—will claim delegated authority from ambiguous (or purportedly ambiguous) statutes. Statutes being necessarily somewhat imprecise, opportunities for self-aggrandizing readings will be legion—as recent cases suggest.[172] Thus, the central structural problem to which the major questions doctrine responds is not so much delegation in itself, but unauthorized expansion of executive power.

Courts may respond to these executive claims by parsing the text and context of each supposedly delegating statute. But this process entails substantial risk of judicial error. Courts may erroneously find a delegation the statute does not actually contain. And that error will be difficult to correct, as it would require a supermajority of both Houses of Congress to enact a statute reclaiming the power, over the President's presumed veto.[173]

The major questions doctrine addresses this risk of structural harm arising from judicial error with a limiting canon that accepts only clear delegations

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170. *See* sources cited *supra* note 86.

171. THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961). *Cf.* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 552 (1985) (in federalism context, emphasizing protection of state interests through the political structure of the national government).

172. *See* Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring) ("Sometimes, Congress passes broadly worded statutes seeking to resolve important policy questions in a field while leaving an agency to work out the details of implementation. Later, the agency may seek to exploit some gap, ambiguity, or doubtful expression in Congress's statutes to assume responsibilities far beyond its initial assignment. The major questions doctrine guards against this possibility . . . .").

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

in important matters. It has thus been rightly called "a vital check on expansive and aggressive assertions of executive authority."[174] This assures that only delegations enacted by Congress are judicially approved. To be sure, this strategy sets up potential error in the other direction—courts will sometimes refuse to validate delegations actually contained in statutes that seem ambiguous. But this is a lesser harm, and crucially, is more easily corrected by Congress working with a friendly President. In this sense the major questions doctrine parallels *Charming Betsy*, which protects against a greater harm (violation of international law) at the expense of a lesser and more easily correctable one (underenforcing the statute).

Crucially, this account of the major questions doctrine does not depend on the Constitution actually containing a robust nondelegation rule.[175] Those who believe there is such a rule may accept the major questions doctrine as a second-best substitute for a constitutional nondelegation rule that the courts are unwilling or unable to enforce.[176] But the major questions doctrine need not be understood as indirectly enforcing a constitutional rule of nondelegation. As discussed, neither of the leading nineteenth-century canons, *Charming Betsy* and the antiretroactivity presumption, enforces a constitutional rule.[177] Rather, they protect against harms arising from judicial overreading of ambiguous statutes. The harms the major questions doctrine protects against are blurring of separation of powers and aggrandizement of the Executive. While related to the Constitution's separation of powers design, they need not arise directly from a constitutional rule to merit judicial protection through a limiting canon.[178]

Development. The power to develop new limiting canons is especially critical to modern judicial practice. Many modern limiting canons appear to lack historical roots—including the federalism canons, discussed above, and the major questions doctrine, which does not appear to have doctrinal roots in the founding era. The majority opinion in the *West Virginia* case relied on

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174. *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 669 (Gorsuch, J., concurring) (quoting U.S. Telecomm. Ass'n v. FCC, 855 F.3d 381, 417 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc)).

175. Whether the Constitution's original meaning imposes a strong nondelegation rule is sharply debated. *See* sources cited *supra* note 86. This Article takes no position on that debate. *Cf.* Capozzi, *Defending the Major Questions Doctrine*, *supra* note 5 (offering a defense of the major questions doctrine that appears to rest on a robust constitutional nondelegation rule).

176. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2616–18 (2022) (Gorsuch, J., concurring); *supra* Part II.C.2.

177. *See supra* Part III.A–B.

178. One might say that the major questions doctrine protects a "constitutional value," but as discussed, that characterization seems neither necessary nor helpful. *See* Part II.C.2; Manning, *supra* note 2, at 427.

only relatively recent cases;[179] in concurrence Justice Gorsuch pointed to a case from the late nineteenth century.[180] Even if those cases are correctly understood as antecedents of the major questions doctrine (and they may not be),[181] they do not establish that the major questions doctrine had origins in the immediate post-ratification period or earlier. Leading originalists such as Justice Scalia have invoked the deep roots of key canons such as the antiretroactivity presumption to justify their use.[182] If ancient roots are a prerequisite, the major questions doctrine seems on shaky ground.[183]

There is, however, another way to approach the matter. Perhaps the question is not whether the canon had long been applied by courts but whether the value it protects was recognized and widely held at the founding. Consider again the *Charming Betsy* canon. Although there are hints of a similar presumption being applied prior to the Constitution, these instances are scattered and may not be enough to satisfy a demanding standard of ancient judicial use. The better view appears to be that *Charming Betsy* emerged as a new canon in the early post-ratification period—that is, it was not a longstanding presumption at the time U.S. courts adopted it. Nonetheless, the value the *Charming Betsy* canon protects—amicable relations among nations through a system of mutual legal obligations—was longstanding and deeply held at the founding, dating at least to the works of Hugo Grotius in the seventeenth century.[184] In the eighteenth century numerous authorities well-known to the framers extolled this system; the founding generation in America particularly embraced Emer de Vattel's mid-century work *Droit des Gens* (Law of Nations).[185] Respect for and obedience to the law of nations

179. *West Virginia*, 142 S. Ct. at 2607–09 (principally citing FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000) and Utility Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014) in addition to more recent cases).

180. *Id.* at 2619 (Gorsuch, J., concurring) (citing Interstate Com. Comm'n v. Cincinnati, New Orleans & Tex. Pac. Ry. Co., 167 U.S. 479, 499 (1897)); Capozzi, *Past and Future of the Major Questions Doctrine*, *supra* note 17, at 202–08 (tracing the origins of the doctrine to several slightly earlier cases).

181. *See* Sohoni, *supra* note 5, at 268–90 (describing the modern major questions doctrine as a recent innovation); *West Virginia*, 142 S. Ct. at 2634–36 (Kagan, J., dissenting) (same).

182. *See* SCALIA & GARNER, *supra* note 1, at 296–97 (endorsing the rule of lenity); Kaiser Aluminum & Chem. Co. v. Bonjorno, 494 U.S. 827, 840–44 (1990) (Scalia, J., concurring) (endorsing the presumption against civil retroactivity as a rule imposed "since the beginning of the Republic and indeed since the early days of the common law").

183. *But see* Capozzi, *Past and Future of the Major Questions Doctrine*, *supra* note 17, at 202–05 (suggesting some possibly analogous nineteenth-century rules).

184. HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE (A.C. Campbell trans., M. Walter Dunne 1901) (1625).

185. EMER DE VATTEL, THE LAW OF NATIONS (Béla Kapossy & Richard Whatmore eds., Liberty Fund 2008) (1758).

was a central consideration in the founder's constitutional design.[186]

This approach may support other modern limiting canons that lack a long record of judicial application. For example, the courts' federalism canons—as in *Gregory*, *Pennhurst*, and *Bond*[187]—may not seem to have roots in founding-era judicial practice. But they assuredly have roots in longstanding values prevalent at the framing and relating to the constitutional design. The idea of states as distinct power centers exercising a check on the national government and providing local control was a core part of the framer's vision.[188] This is not to say the federalism canons protect actual constitutional rules—perhaps they substitute for underenforced rules, but perhaps they merely reinforce the idea that federalism protections would arise mostly from structure and the political process. The key is that the presumptions rest on founding-era structural values.

Put this way, the major questions doctrine is consistent with *Charming Betsy* and the federalism canons. Separation between the Executive and the Legislature is—like respect for international law and federalism—a core founding-era value. As noted, the framers associated it especially with Montesquieu, but it was the centerpiece of English separation of powers theory extending back to the mid-seventeenth century.[189] Even if the framers did not embed a robust nondelegation rule in the Constitution, excessive delegation of lawmaking authority to the Executive threatens a core principle of separation of powers. The Constitution's framers may have expected structural and institutional considerations to check excessive delegation, but that approach makes it even more important that the judiciary not ratify erroneous claims of delegation through mistakenly broad interpretations of statutes. Thus the major questions doctrine can be understood as an aspect of the courts' judicial power to underenforce statutes to protect core founding-era values from judicial error.

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186. *See* Golove & Hulsebosch, *supra* note 116, at 981. To be clear, my point here is not that the Constitution incorporated the law of nations—a claim some have made but which is not supported by the Constitution's text, *see* Michael D. Ramsey, *The Constitution's Text and Customary International Law*, 106 GEO. L.J. 1747 (2018)—but rather that the creation of a national government provided a way to overcome state violations of the law of nations which had plagued the Articles of Confederation.

187. *See supra* Part II.C.1.

188. *See* Gregory v. Ashcroft, 501 U.S. 452, 457–59 (1991).

189. *See* GWYN, *supra* note 161, at 37–81; *see also* MARCHAMONT NEDHAM, THE EXCELLENCIE OF A FREE-STATE (1656), *reprinted in id.* app. 1 (showing an early version of this principle).

CONCLUSION

The wider question posed by the major questions doctrine is this: when a statute is not entirely clear as to its scope, what authority do courts have to apply something less than their best assessment of the statute's meaning? Article VI declares that laws passed in pursuance of the Constitution are part of supreme law, and it further requires judges to take an oath to support the Constitution.[190] How can potential judicial underenforcement of statutes, through judicially developed mechanisms such as clear statement rules, be consistent with the duty Article VI appears to impose?

This Article argues that the major questions doctrine may be defended on originalist grounds principally by analogy to doctrines applied by courts in the early post-ratification period. Most notably, the presumption against violating international law (adopted in *Murray v. Charming Betsy*[191] and *Talbot v. Seeman*[192]) and the presumption against civil retroactivity (identified in *Schooner Peggy*[193] and *Heth*[194]) are best understood as clear statement rules protecting important structural values and assumptions. The noncontroversial application of these presumptions in the early post-ratification period indicates that the original meaning of the Constitution's "judicial Power" contained some flexibility to develop limiting canons despite the apparently unqualified commands of Article VI.

Like the nineteenth-century canons, the major questions doctrine is a limiting canon that protects a core structural value. Delegation of what amounts to lawmaking authority to the Executive undermines the separation of legislative and executive power. An aggrandizing executive will use statutory ambiguity to claim ever greater power. Courts can combat this impulse by applying a constitutional nondelegation doctrine or by reading statutes carefully to be sure they contain the claimed delegation. But both approaches have drawbacks. The Constitution's original meaning may not contain a judicially enforceable nondelegation doctrine, or, even if it does, courts may be unwilling to apply it. And courts may interpret unclear statutes erroneously to give the President lawmaking power that the statute does not actually convey—and that error may be very difficult for Congress to correct. The major questions doctrine protects against executive aggrandizement by requiring a clear statement of delegation from Congress, mitigating harms that might arise from judicial error in reading ambiguous statutes. In this

190. U.S. CONST. art. VI, paras. 2–3.
191. 6 U.S. 64 (1804).
192. 5 U.S. 1 (1801).
193. 5 U.S. 103 (1801).
194. 7 U.S. 399 (1806).

sense, it is analogous to the early nineteenth-century presumptions.[195]

The most difficult part of the originalist defense is the question whether the nineteenth-century limiting canons indicate a judicial power to develop new limiting canons such as the major questions doctrine in the modern era. In support, the *Charming Betsy* presumption appears to be an example of a presumption largely developed after ratification—thus suggesting a judicial power to develop new canons. Further, to the extent nineteenth-century canons, such as the rule of lenity and the presumption against civil retroactivity carried over substantive canons developed by English courts, that may suggest that the Constitution's judicial power similarly carries over a power to develop substantive canons. And, for what it is worth, the modern Court (with the support of prominent originalists Scalia and Thomas) has already decided that question in the federalism context, by developing substantive canons to protect state autonomy against judicial misreading of ambiguous assertions of federal authority. As a result, the major questions doctrine as a substantive canon has plausible (though not uncontestable) originalist foundations.

195. The argument here is stronger if one believes that the Constitution's original meaning contains a strong nondelegation rule and that the major questions doctrine redresses judicial underenforcement of that rule. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2616–17 (2022) (Gorsuch, J., concurring); Capozzi, *Defending the Major Questions Doctrine*, *supra* note 5. However, as noted, the original meaning on this point is contested, and this Article pursues a defense of the major questions doctrine that does not depend on it.