When Canons Can Corrupt: Clear Statement Rules in Administrative Law

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Administrative law is emerging as a major focus of the Roberts Court's efforts to reshape American society. And the primary vehicle for the Court's transformation of administrative law is the clear statement rule, which provides that federal agencies must point to clear language in their enabling statutes when they address issues that trigger the clear statement rules. In administrative law, those issues include federalism, major questions, and property rights. The demise of the Chevron doctrine is unlikely to disturb this trend, because the normative clear statement rules examined in this article go beyond nondeference to agency statutory interpretation to limit Congress' power to enact statutes containing broad language empowering agencies to adapt to changing circumstances.

This article explores the virtues and disadvantages of aggressive judicial deployment of clear statement rules and concludes that the considerable disadvantages outweigh the modest virtues. The clear statement rules have no textual basis in the Constitution or statute. They are instead built on norms that are putatively located somewhere in the Constitution, but in fact are mirages that appear concrete from a distance, yet disintegrate on close inspection. They are therefore easily manipulable to achieve policy outcomes preferred by the judges applying them. At the same time, they unjustifiably limit Congress' power to use broad language in statutes to allow implementing agencies to adapt to changing conditions, technological advances, and attempts by regulated entities to circumvent implementing regulations. Furthermore, the high bar

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for clarity that the Supreme Court has established and the vanishingly small likelihood that Congress will react to a judicial remand with legislation specifically empowering the agency to take the judicially rejected action ensures that clear statement rules are in reality weapons in a broader assault on the administrative state. As such, they are undermining the legitimacy of judicial review.

The article briefly probes possible responses to the judicial aggrandizement represented by clear statement rules in administrative law. Among other things, Congress could amend the Administrative Procedure Act to prescribe a standard for judicial review of agency statutory interpretation that precludes judicial use of clear statement rules. Because it is highly unlikely that proponents of protective federal regulation will persuade Congress to act in an era of extreme political polarization, however, the article concludes that the best way for the Court to restore the legitimacy of judicial review is to approach the task of statutory interpretation with greater humility and less enthusiasm for advancing a libertarian agenda.

I. INTRODUCTION

In *Sackett v. EPA*, the Supreme Court took up for the fourth time the elusive meaning of the term "waters of the United States"(WOTUS) in the Clean Water Act (CWA).[2] The phrase was important because it determined the scope of the authority of the United States Army Corps of Engineers (COE) and the Environmental Protection Agency (EPA) to prevent the destruction of the wetlands that are critical to preserving and enhancing surface water quality in the United States.

The Clean Water Act prohibits "the discharge of any pollutant" into "navigable waters," which are in turn defined to be the "waters of the United States."[3] But discharges are permissible if done pursuant to a permit issued by COE or EPA, depending on the nature of the discharge.[4] Because obtaining permits can be time-consuming and expensive, land developers would prefer to avoid the permit process. They have therefore pursued a narrow definition of WOTUS that would largely exclude activities that affect wetlands from the permit requirement. In 2004, Michael and Chantell Sackett, private landowners who wanted to build a home near Priest Lake in Bonner County, Idaho, forced the issue when they began backfilling their property with dirt and rocks. That precipitated a letter from EPA informing them that their actions violated the Clean Water Act, because they were filling protected wetlands. EPA warned that if the Sacketts did

2. Sackett v. EPA, 598 U.S. 651, 657 (2023).
3. 33 U.S.C. §§ 1311(a), 1362(12)(a).
4. *Id*. §§ 1342, 1344.

not cease their filling activities and come up with a restoration plan, they would be subject to civil and criminal penalties.[5]

Relying upon the statutory language and prior Court precedent, EPA at that time interpreted WOTUS to include all waters that "could affect interstate or foreign commerce," as well as wetlands "adjacent" to those waters.[6] EPA regulations defined the word "adjacent" to mean "bordering," "contiguous," or "neighboring."[7] Agency guidance relied on the "significant nexus" test that the Supreme Court had earlier articulated for determining "adjacency" to require a scientific approach. The guidelines provided that a significant nexus existed when "wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity" of traditionally navigable waters.[8] EPA concluded that the Sacketts' land was adjacent to the lake.

The Sacketts and the conservative funders who financed the litigation disagreed. They sued EPA in a federal district court in Idaho, claiming that EPA's definition of WOTUS did not comply with the statute.[9] After litigating for seven years over whether EPA's threat was a final agency action subject to judicial review, both the district court and Ninth Circuit Court of Appeals upheld EPA's action, and the Supreme Court granted certiorari.[10] The Court agreed with the Sacketts that EPA's definition of WOTUS was too broad, and it provided its own "continuous surface connection" test for determining whether wetlands were adjacent to navigable waters, a test that was considerably less encompassing than EPA's definition.[11]

In rejecting EPA's significant nexus test, Justice Samuel Alito, joined by four other justices, invoked a "clear statement rule" under which "this Court 'require[s] 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.'"[12] At first glance, this clear statement rule appears to be one of several "federalism" clear statement rules that the Court has invented over the years to guide its interpretation of federal statutes that could affect state-federal relations. But the inclusion of "the power of the

5. *Sackett*, 598 U.S. at 661.
6. 40 C.F.R. §§ 230.3(s)(3), (7) (2008).
7. *Id.* at § 230.3(b).
8. *Sackett*, 598 U.S. at 661.
9. *Id.* at 662.
10. *Id.*
11. *Id.* at 682.
12. *Id.* at 678.

Government over private property" in the phrase suggests a separate clear statement rule under which Congress must employ "exceedingly clear language" if it wishes to alter the power of federal agencies over private property rights.

Taking this startling proposition as a portent of things to come, this Article examines the Court's clear statement rules as they apply to federal agency interpretations of their enabling statutes. In addition to the federalism clear statement rule and the nascent property rights clear statement rule, the Court has articulated a clear statement rule for agency attempts to exercise regulatory authority over issues that raise "major questions" of "vast economic and political importance." This Article will probe the theoretical and doctrinal basis for these clear statement rules, none of which have any clear textual foundation in statute or the Constitution. While the Court has advertised these clear statements as neutral approaches to divining the meaning of statutory text, this Article will conclude that they are in reality tools for limiting the reach of existing federal law and confining its expansion. As such, clear statement rules in administrative law represent judicial aggrandizement at the expense of Congress and federal agencies in the executive branch.

Scholars have devoted a great deal of attention to canons of statutory construction, and the subset of those canons that consists of clear statement rules has received some scholarly attention. This Article takes up the narrower question of the clear statement rules that courts employ to interpret statutes administered by executive branch agencies. For forty years, federal courts deferred to reasonable agency interpretations of ambiguous statutory language under the so-called *Chevron* doctrine. While the Court has recently assigned *Chevron* deference to the dustbin of history,[13] that move may be of little consequence because the Court has, through the aggressive use of clear statement rules, already rendered *Chevron* irrelevant to a large swath of administrative law cases. More important, the Court's aggressive and normatively unbalanced application of clear statement rules in administrative law cases poses a greater threat to the administrative state than overruling *Chevron*. For those who have been advocating its deconstruction, this is no doubt an encouraging development. But for those who depend on regulatory agencies to provide the protections that Congress created in federal environmental,

13. Loper Bright Enterprises v. Raimondo, 603 U.S. 369 (2024).

worker safety, and consumer protection laws, this move represents a terrible loss.

Part II of this Article will identify and describe the clear statement rules that most affect administrative law and situate them among other canons of statutory construction that courts frequently invoke. Part III will highlight the virtues of clear statement rules in administrative law. Their insistence that agencies point to clear and precise statutory authorization for their actions ensures that the critical policy decisions are made by democratically accountable members of Congress and not by an unaccountable bureaucracy. By preventing bureaucracies from assuming power that Congress did not grant, clear statement rules can also protect state autonomy, private property rights, and individual freedom. Finally, clear statement rules can advance constitutional norms that are otherwise underenforced through constitutional adjudication.

Part IV of the Article explores the considerable disadvantages of aggressive judicial employment of clear statement rules in administrative law. The clear statement rules are based on so-called "constitutional norms" that in reality are mirages—they appear concrete from a distance but disintegrate on close inspection. Lacking any textual basis in the Constitution or agency statutes, the clear statement rules are easily manipulated to achieve policy outcomes preferred by the judges applying them. As applied by the Supreme Court, clear statement rules intrude on Congress' power to use broad language in enabling statutes to allow implementing agencies to adapt to changing conditions, technological advances, and attempts by regulated entities to circumvent implementing regulations. As such, they are vehicles for judicial aggrandizement at the expense of Congress and executive branch agencies. Finally, the high bar for clarity that the Supreme Court has established and the vanishingly small likelihood that Congress will react to a judicial rejection with legislation specifically empowering the agency to take the contested action ensures that clear statement rules are in reality weapons in a broader assault on the administrative state. In the end, the Supreme Court's aggressive use of clear statement rules to rein in regulatory agencies is undermining the legitimacy of judicial review of administrative action.

Part V briefly probes possible responses to the judicial aggrandizement represented by clear statement rules in administrative law. Among other things, Congress could amend the Administrative Procedure Act to prescribe a standard for judicial review of agency statutory interpretation that precludes judicial use of clear statement rules

in performing that role. Because it is highly unlikely that proponents of protective federal regulation will persuade Congress to adopt such legislation in an era of extremely polarized partisanship, however, the Article concludes that the best way to ensure the legitimacy of judicial review is for courts to approach the task of statutory interpretation with greater humility and less enthusiasm for advancing a libertarian agenda.

II. CANONS AND CLEAR STATEMENT RULES

The clear statement rules affecting administrative law are a subset of the clear statement rules that courts employ in interpreting statutes, which are in turn a subset of the canons of statutory construction that Anglo-American courts have relied upon since at least the sixteenth century to ascertain the meaning of statutory language.[14] Canons of construction are "background norms and conventions that are used by courts when interpreting statutes."[15] They come in two varieties—linguistic canons (sometimes called textual, language, or descriptive canons) and normative canons (sometimes called substantive canons).[16] Linguistic canons like *noscitur a sociis* (the meaning of a word can be determined from its context) and *inclusio unis est exclusio alterius* (a list's inclusion of items in a category is meant to exclude other items) have a long history, and they have generated little controversy because they tend to be neutral aids to divining the meaning of words in statutes.[17]

Normative canons, by contrast, are rules of construction that reflect certain background policy norms that the courts derive from "the Constitution, the common law, or some other element of the legal system" that the courts invoke to justify judicial action.[18] Importantly, a court applying a normative canon is not exercising the traditional judicial

14. Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 188 YALE. L. J. 64, 67 (2008); Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 155 (2010); Bradford Mank, *Textualism's Selective Canons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies*, 86 KY. L. J. 527, 542 (1997-98).
15. Anita S. Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825, 833 (2017).
16. Anita S. Krishnakumar & Victoria F. Nourse, *The Canon Wars*, 97 TEX. L. REV. 163, 180 (2018); Krishnakumar, *supra* note 15, at 833; Barrett, *supra* note 14, at 117.
17. Krishnakumar & Nourse, *supra* note 16, at 180; Barrett, *supra* note 14, at 117.
18. Krishnakumar & Nourse, *supra* note 16, at 181. *See* Daniel B. Rodriguez, *The Presumption of Reviewability: A Study in Canonical Construction and Its Consequences*, 45 VAND. L. REV. 743, 744 (1992) (normative canons enable courts "to articulate, in the context of their responsibility to interpret the words and history of the statute, critical public values and to implement legislative policy in light of these values").

authority to interpret and apply the Constitution. It is putatively employing a canon of construction as an aid to interpreting the meaning of a statute enacted by Congress, which has the power to declare what the law is within the range of its constitutional powers. Since the courts choose the norms upon which normative canons are based and since normative canons are by their nature policy-driven, courts creating and applying normative canons are subtly engaging in the policymaking process.[19]

Perhaps the most frequently invoked normative canon of construction is the so-called "avoidance canon," under which courts avoid interpreting a statute in a way that would raise serious doubts about the statute's constitutionality if another plausible interpretation is available.[20] That canon protects the values underlying the constitutional provision that the avoided interpretation would have threatened, even when the provision may not have been violated had the court actually reached the constitutional question.[21] It may also reflect an implicit congressional preference for avoiding judicial invalidation of its statutes.[22] Other examples of normative canons include the "rule of lenity" that penal statutes should be narrowly construed,[23] the *Charming Betsy* canon that courts should not construe statutes to violate the law of nations,[24] and the presumption that courts construe statutes to preserve tribal immunity from state regulation.[25]

These canons manifest "important, often constitutionally inspired principles that there is reason to think Congress, for a variety of

19. William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 595–96 (1992). *See also* Rodriguez, *supra* note 18, at 749 ("normative cannons may or may not coincide with legislators' values or intentions").

20. Almendarez-Torres v. United States, 523 U.S. 224, 237 (1988); Crowell v. Benson, 285 U.S. 22, 62 (1932); Hooper v. California, 155 U.S. 648, 657 (1895); Barrett, *supra* note 14, at 138–39; David M. Driesen, *Loose Canons: Statutory Construction and the New Nondelegation Doctrine*, 64 U. PITT. L. REV. 1, 15 (2002); Eskridge & Frickey, *supra* note 19, at 599.

21. Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L. J. 833, 915 (2001). Some textualists argue that the courts should abandon the avoidance canon because it directs the courts to reach a result that does not reflect the best reading of the statutory language. *Id.*; Amanda Frost, *Congress in Court*, 59 UCLA L. REV. 914, 936–37 (2012). Others, however, maintain that the canon reflects Congress's implicit desire to avoid judicial invalidation of its statutes. Barrett, *supra* note 14, at 142.

22. Cass Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 457 (1989).

23. Barrett, *supra* note 14, at 128.

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

25. Bamberger, *supra* note 14, at 72; Eskridge & Frickey, *supra* note 19, at 609. See N.C. Coastal Fisheries Reform Grp. v. Capt. Gaston, LLC, 76 F.4th 291 (4th Cir. 2023) (listing the rule of lenity, constitutional avoidance, presumptions against implied repeal, liberal constructions to benefit Indians or soldiers, and the presumptions against retroactive or extraterritorial application as normative canons).

reasons, will not safeguard adequately" and are "traditionally underenforced by courts."[26] Normative canons are thus designed to achieve some abstract policy goal apart from ascertaining the meaning of the text or the purpose of the statute.[27] Unlike linguistic interpretive aides, courts employ normative canons "to override even apparent legislative intent."[28] Courts can and do create entirely new normative canons and apply them to pending cases."[29] Some normative canons act as tie-breakers when statutory language is ambiguous or when it is difficult for the court to determine which of two or more interpretations is the "best" interpretation.[30] But others put a thumb on the scales in favor of a particular substantive outcome.[31]

Normative canons are typically expressed as presumptions for the court to apply when interpreting statutes in various situations. The presumptions can be rebutted by the statutory text, the statute's structure, the statute's history, and even congressional acquiescence in administrative or judicial interpretation.[32] The Supreme Court has, however, crafted some of the normative canons as clear statement rules requiring it to interpret a statute a certain way absent exceptionally clear language in the statute demanding another interpretation.[33] What distinguishes clear statement rules from other normative canons is the fact that they "can only be trumped by statutory text."[34] When a court employs a clear statement rule, the operational issue subtly shifts from what is the best interpretation of the words that Congress used to whether those words are sufficiently clear to support the governmental action.[35] As detailed below, clear statement

26. Bamberger, *supra* note 14, at 72. See also Krishnakumar, *supra* note 16, at 833 (normative canons reflect "principles and presumptions that judges have created to protect important background norms derived from the Constitution, common law practices, or policies related to particular subject areas").
27. Bamberger, *supra* note 14, at 66; Barrett, *supra* note 14, at 109–10; Krishnakumar, *supra* note 15, at 827; Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?* 45 VAND. L. REV. 561, 563 (1992). *See also* William N. Eskridge, Jr., *Textualism, the Unknown Ideal?* 96 MICH. L. REV. 1509, 1542, 1545–46 (1998) (book review).
28. Mank, *supra* note 14, at 543.
29. *Id.*
30. Krishnakumar, *supra* note 15, at 833–34. *See generally* Krishnakumar & Nourse, *supra* note 16, at 169.
31. Krishnakumar, *supra* note 15, at 834–35.
32. Bowen v. Mich. Acad. of Fam. Physicians, 476 U.S. 667, 673 & n.4 (1986) (quoting Block v. Cmty. Nutrition Inst., 467 U.S. 340, 349 (1984)) (presumption favoring judicial review of administrative action can be overcome by language, legislative history, legislative scheme, judicial construction and congressional acquiescence); Eskridge & Frickey, *supra* note 19, at 616.
33. Krishnakumar, *supra* note 15, at 834.
34. Eskridge & Frickey, *supra* note 19, at 616.
35. *See, e.g.,* Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1038 (2023).

rules are especially powerful canons because they limit the power of Congress to use broad language authorizing agencies to advance protective policies.

Courts have recognized many clear statement rules in recent decades,[36] including rules requiring clear language in statutes purporting to abrogate state sovereignty or tribal treaty rights,[37] to apply new requirements retroactively,[38] and to give extraterritorial effect to domestic law.[39] The clear statement rules with the greatest impact on administrative law are the longstanding "federalism" clear statement rule requiring especially clear language in a federal statute that purports to intrude into "core" state functions or upset the "balance of federalism," the more recent "major questions" clear statement rule that requires especially clear language in a federal statute that purports to assign to a federal agency the authority to resolve major questions of vast economic and political significance, and the nascent "property rights" clear statement rule that requires especially clear language in a statute that purports to interfere with private rights in land and water.

A. The Federalism Clear Statement Rule

In *Jones v. Rath Packing Co*., the Supreme Court began its analysis with the assumption that "the historic police powers of the States were not to be superseded by [federal statutes] unless that was the clear and manifest purpose of Congress."[40] This assumption provided "assurance that 'the federal-state balance,' will not be disturbed unintentionally by Congress or unnecessarily by the courts."[41] After the Court in *Garcia v. San Antonio Metropolitan Transit Authority* held that courts had "no license to employ freestanding conceptions of state sovereignty" to declare acts of Congress unconstitutional on federalism grounds,[42] the Rehnquist Court during the late 1980s and 1990s crafted several federalism clear statement rules requiring Congress to employ unmistakably clear statutory language in "regulating state

36. Amanda Frost, *Congress in Court*, 59 UCLA L. REV. 914, 920 (2012); John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 401, 407 (2010).
37. Barrett, *supra* note 14, at 118–19.
38. *Id.*; Manning, *supra* note 36, at 410–12; Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 332 (2000).
39. Eskridge & Frickey, *supra* note 19, at 615–16.
40. Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).
41. *Id.* (citation omitted).
42. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 550 (1985).

functions or displacing state law."[43] Familiar federalism clear statement rules require clear statutory grants of power for agencies to abrogate state sovereign immunity under the Eleventh Amendment,[44] to preempt a state's exercise of its police power under the Supremacy Clause,[45] and to attach conditions to state expenditures of federal monies.[46]

The federalism clear statement rule of interest to administrative law provides that federal agencies may not write regulations or take other action that interferes with core state functions or threatens to upset the "balance of federalism" without clear authorization from Congress.[47] As noted at the outset of this Article, the Supreme Court invoked the federalism clear statement rule in support of its rejection of EPA's "significant nexus" test for determining whether wetlands were adjacent to navigable waters and therefore "waters of the United States."[48] Justice Alito pointed out that "[r]egulation of land and water use lies at the core of traditional state authority," and "[a]n overly broad interpretation of the CWA's reach would impinge on this authority."[49] Since the statutory language did not mention a "significant nexus" test, EPA had "no statutory basis to impose it."[50]

Health and safety regulation can be another core state function. For example, in *Kentucky v. Biden*, three states challenged the Biden

43. Manning, *supra* note 36, at 406–07. *See* Krishnakumar, *supra* note 15, at 829; Mank, *supra* note 14, at 552–53; Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1605 (2000). *See also* Dellmuth v. Muth, 491 U.S. 223, 230 (1989) (requiring "evidence of congressional intent" to intrude into traditional state functions to be "both unequivocal and textual").
44. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 100 (1984).
45. P.R. Dep't of Consumer Affs. v. Isla Petroleum Corp., 485 U.S. 495, 503–04 (1988); Ray v. Atl. Richfield Co., 435 U.S. 151, 157 (1978); Bates v. Dow Agrosciences LLC, 544 U.S. 431, 448–49 (2005); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).
46. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981); Kentucky v. Yellen, 54 F.4th 325, 348 (6th Cir. 2022).
47. Will v. Mich. Dep't of State Police, 491 U.S. 58, 65 (1989) ("[I]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985))); *Pennhurst*, 451 U.S. at 17 (Congress must "speak with a clear voice" and grant the agency's authority "unambiguously"); Eric Berger, *Constitutional Conceits in Statutory Interpretation*, 75 ADMIN. L. REV. 479, 533 (2023); Mank, *supra* note 14, at 555–56; John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2025 (2009) ("Congress may regulate the states in the way that the clear statement rule disfavors, so long as the statute does so with an exceptional degree of clarity.").
48. Sackett v. EPA, 598 U.S. 651, 678–79 (2023).
49. *Id.* at 1341.
50. *Id.* at 1342. *See also* N.C. Coastal Fisheries Reform Grp. v. Capt. Gaston, LLC, 76 F.4th 291, 298–99 (2022) (court applies the federalism clear statement rule to the question whether fishing boats needed a Clean Water Act permit from EPA for dumping dead bycatch back into state waters).

administration's vaccine mandate for federal contractors. The administration relied on the Federal Property and Administrative Services Act ("Property Act"), which facilitates the economical and efficient purchase of goods and services on behalf of the federal government.[51] The Sixth Circuit Court of Appeals invoked the federalism clear statement rule because "'States, not the Federal Government, are the traditional source of authority over safety, health, and public welfare.'"[52] This was an extraordinary claim in the context of the COVID-19 pandemic, given the fact that the federal government's Centers for Disease Control and Prevention (CDC) had since its creation in 1946 assumed the primary role in addressing interstate epidemics. Moreover, federal agencies like the Food and Drug Administration, the Occupational Safety and Health Administration (OSHA), EPA, and the National Highway Traffic Safety Administration had been exercising authority over safety, health, and public welfare for more than half a century.

B. The Major Questions Clear Statement Rule

In *West Virginia v. EPA*, the Supreme Court in 2022 declared that in "extraordinary cases" that pose questions of "'vast economic and political significance,'" "something more than a merely plausible textual basis for the agency action is necessary."[53] Instead, the agency must "point to 'clear congressional authorization' for the power it claims."[54] In other words, "the court will not sustain a major regulatory action unless the statute contains a clear statement that the action is authorized."[55] The Court originally applied this "major questions" doctrine as a vehicle for avoiding the application of the *Chevron* doctrine, which since the early 1980s had required courts to defer to reasonable agency interpretations of ambiguous provisions in their authorizing statutes.[56] Under this original version of the major questions doctrine, when an agency has resolved a question of "vast economic and political significance," a reviewing court did not have to defer to the agency's interpretation of its authorizing statute, but instead had to undertake its own de novo interpretation of the relevant statutory provision using dictionaries, relevant canons of construction,

51. Kentucky v. Biden, 23 F.4th 585, 589 (6th Cir. 2022).
52. *Id.* at 609 (citation omitted).
53. West Virginia v. EPA, 142 S. Ct. 2587, 2595, 2609 (citations omitted).
54. *Id.* at 719.
55. Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 263 (2022).
56. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 842–43 (1984); *id.* at 264, 269–70.

and other applicable tools of statutory interpretation without giving any weight to the agency's interpretation.[57]

The Court has subsequently deployed the major questions doctrine much more aggressively as a bulwark against expansion of the administrative state.[58] A court must presume that Congress did not delegate to the agency the power to resolve issues of vast economic and political significance absent an explicit delegation of power to resolve the precise legal question at issue.[59] Only when the court is convinced by clear statutory language that Congress has empowered the agency to decide the precise question at issue will the court allow the agency's action to stand.[60] The bulwark is incomplete, because Congress may always respond to judicial invalidation of agency action with legislation explicitly empowering the agency to take that action.[61] But the rule effectively prevents Congress from using broad language in statutes to allow agencies to address problems that Congress did not anticipate.[62]

Because it requires clear statutory language to rebut the presumption that Congress does not delegate to agencies the authority to resolve questions of vast economic and political significance, the major questions doctrine is appropriately classified as a clear statement rule.[63] That conclusion is supported by language in the Court's major questions cases. In *UARG v. EPA*, Justice Antonin Scalia said: "[w]e expect Congress to speak clearly if it wishes to assign to an agency decisions of 'vast economic and political significance.'"[64] In his concurring

[57]. King v. Burwell, 135 S. Ct. 2480, 2489 (2015); FDA v. Brown & Williamson Tobacco Corp. 529 U.S. 120, 159 (2000); Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2036 (2018); Jonas J. Monast, *Major Questions about the Major Questions Doctrine*, 68 ADMIN. L. REV. 445, 449 (2016); Daniel E. Walters, *The Major Questions Doctrine at the Boundaries of Interpretive Law*, 109 IOWA L. REV. 465, 476–480 (2024).

[58]. Nat'l Fed'n of Indep. Bus. v. OSHA, 142 S. Ct. 661,669 (2022) (Gorsuch, J., concurring) (major questions doctrine serves as "'a vital check on expensive and aggressive assertions of executive authority'"); Thomas O. McGarity, *The Major Questions Wrecking Ball*, 41 VA. ENV. L. J. 1, 10–16 (2023).

[59]. Monast, *supra* note 57, at 447.

[60]. McGarity, *supra* note 58, at 15; John O. McGinnis & Xiaorui Yang, *The Counter-Reformation of American Administrative Law*, 58 WAKE FOREST L. REV. 387, 394 (2023).

[61]. McGarity, *supra* note 58, at 15–16.

[62]. *Id.* at 36–37. *See* Berger, *supra* note 47, at 491 (the "idea than an agency may not regulate important matters without specific congressional authorization is at the heart of today's major questions doctrine").

[63]. Walters, *supra* note 57, at 480–92.

[64]. Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014). *See also* Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) ("[i]f a federally imposed eviction moratorium is to continue, Congress must specifically authorize it"); U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc) (calling the major questions doctrine a clear statement rule).

opinion in *West Virginia v. EPA,* Justice Neil Gorsuch called the doctrine a "clear-statement rule."[65] Administrative law scholars have likewise characterized the major questions doctrine as a clear statement rule.[66]

Justice Amy Coney Barrett, however, insists that that the major questions doctrine is not a clear statement rule but merely a textualist tool for ascertaining the meaning of statutory language.[67] Justice Barrett, a committed textualist, no doubt feels compelled to demonstrate that the major questions doctrine is not a clear statement rule, because she believes that clear statement rules (which she dubs "strong form canons") "are 'in significant tension with textualism' insofar as they instruct a court to adopt something other than the statute's most natural meaning."[68] Indeed, she has allowed that "if the major questions doctrine were a newly minted strong-form canon, I would not embrace it."[69] As discussed below, Justice Barrett's explanation for why the major questions doctrine is not a clear statement rule is unconvincing.[70]

C. The Property Rights Clear Statement Rule

The Supreme Court in *Sackett v. EPA* appeared to invoke a "property rights" clear statement rule to justify its refusal to accept EPA's "significant nexus" test for determining whether wetlands were "adjacent" to navigable waters.[71] The Court borrowed language from its previous decision in *United States Forest Service v. Cowpasture River Preservation Association*, a case involving a challenge to the Forest Service's grant of a right-of-way for a pipeline through national forests traversed by the Appalachian Trail.[72] In that case, the issue was whether the Leasing Act of 1920 enabled the Forest Service to grant a subterranean right-of-way to place the pipeline 600 feet under the

65. West Virginia v. EPA, 142 S. Ct. 2587, 2620 (2022).
66. Louis J. Capozzi III, *The Past and Future of the Major Questions Doctrine*, 84 OHIO STATE L. J. 191, 223 (2023); Deacon & Litman, *supra* note 35, at 1035; William N. Eskridge & John Ferejohn, *The APA as a Super-Statute: Deep Compromise and Judicial Review of Notice-and-Comment Rulemaking*, 98 NOTRE DAME L. REV. 1893, 1906 (2023); McGinnis & Yang, *supra* note 60, at 394; Sohoni, *supra* note 55, at 275.
67. Biden v. Nebraska, 600 U.S. 477, 507–08 (2023) (Barrett, J., concurring).
68. *Id.* at 2377.
69. *Id.* at 2377 n.2.
70. See text accompanying notes 195–217, *infra*; Deacon & Litman, *supra* note 35, at 1044 (finding that Justice Barrett's attempts to ground the major questions doctrine in textualism are "unconvincing").
71. Sackett v. EPA, 598 U.S. 651, 679 (2023).
72. U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837 (2020).

trail.[73] The challengers argued that the National Trails System Act had transferred the land occupied by the trail to the Department of the Interior, which had in turn delegated control to the National Park Service to administer as part of the National Parks System. Therefore, the right-of-way was prohibited under a carve-out in the Leasing Act for lands in the National Park System. The Court held that the National Trails System Act did not transfer jurisdiction over the lands crossed by the Appalachian Trail from the Forest Service to the Department of the Interior. It only created an easement for the trail under land that the Forest Service continued to own.[74]

Even if the Leasing Act had transferred the land underlying the trail to the Department of the Interior, the Court was unwilling to presume that the Secretary of the Interior could, by delegating the authority to administer the trail to the National Park Service, rather than to Bureau of Land Management, remove it from the Leasing Act in the absence of a clear congressional command. The Court pointed out that the Forest Service's theory had "striking implications for federalism and private property rights."[75] The twenty-one trails in the national trails system crossed privately owned property as well as government-owned property. Under the challengers' view, these privately held lands would also become a part of the National Park System. The Court found that "[o]ur 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."[76] The only authority the Court cited for this proposition was *Gregory v. Ashcroft*, a fountainhead case for the federalism clear statement rule.[77] However, nowhere in *Ashcroft* did the Court mention a clear statement requirement for Congress to significantly alter the power of government over private property.

The Court in *Alabama Association of Realtors v. Department of Health and Human Services* quoted the private property phrase from *Cowpasture* in support of its holding that the Centers for Disease Control and Prevention (CDC) lacked the authority to prescribe a nationwide moratorium on evictions from rental properties in high-COVID-19 infection areas.[78] The Public Health Services Act empowered the CDC "to make and enforce such regulations as in [its] judgment are

[73]. *Id.* at 1843–44.
[74]. *Id.* at 1847.
[75]. *Id.* at 1849.
[76]. *Id.* at 1849–50.
[77]. *Id.* at 1850. *See* text accompanying notes 107–11, *infra*.
[78]. Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485 (2021).

necessary to prevent the introduction, transmission, or spread of communicable diseases . . . from one state or possession into any other state or possession."[79] In a per curium opinion that also invoked the major questions doctrine,[80] the Court stated that "[o]ur 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."[81] Since the moratorium "intrud[ed] into an area that is the particular domain of state [property] law: the landlord-tenant relationship," Congress was required "to enact exceedingly clear language" to empower the agency to impose the moratorium.[82] The language granting CDC the authority to issue regulations that were "necessary to prevent the introduction, transmission, or spread of communicable diseases" was insufficiently clear in that regard, even though that was what was necessary in the agency's judgment. Apparently, Congress would have had to anticipate the need to prevent landlords from expelling persons sheltering in place to prevent the spread of the disease and to specifically authorize CDC to impose a moratorium on evictions before the Court would have been satisfied that the agency had this "breathtaking amount of authority."[83]

In her concurring opinion in *Sackett*, Justice Elena Kagan expressed her concern that Justice Alito's majority opinion had adopted a property rights clear statement rule. Accusing Justice Alito's majority opinion of "shelv[ing] the usual rules of [statutory] interpretation," she showed how the opinion relied on "a judicially manufactured clear-statement rule" as a "back-up plan."[84] She read Justice Alito's opinion to articulate a rule that "[w]hen Congress . . . exercises power 'over private property'—particularly, over 'land and water use'—it must adopt 'exceedingly clear language.'"[85] In her view, this clear statement rule placed "a thumb on the scale for property owners–no matter that the Act (i.e., the one Congress enacted) is all about stopping property owners from polluting."[86]

79. 42 U.S.C. § 264(a).
80. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489.
81. *Id.*
82. *Id*.
83. *Id*.
84. Sackett v. EPA, 598 U.S. 651, 713 (2023) (Kagan, J., concurring).
85. *Id*.
86. *Id*. at 1361.

III. THE VIRTUES OF CLEAR STATEMENT RULES IN ADMINISTRATIVE LAW

Administrative law's clear statement rules have several virtues. By demanding clear statutory language to empower agency actions that affect federalism and property rights and have major economic and political impacts, the clear statement rules in administrative law ensure that these decisions are made by the democratically elected Congress and not by unaccountable bureaucrats.[87] Justice Gorsuch worries that "lawmakers may be tempted to delegate power to agencies to 'reduc[e] the degree to which they will be held accountable for unpopular actions.'"[88] The requirement that Congress speak clearly puts pressure on Congress to reach consensus on future public policy questions and forces it to revisit past broad delegations of power to regulatory agencies.[89] Administrative law's clear statement rules can preserve state autonomy, private property rights, and economic liberty by preventing the unauthorized expansion of the administrative state.[90] Proponents argue that clear statement rules are necessary to cabin the incentive that agencies naturally feel to expand their turf by interpreting their statutes to give them more power than Congress intended.[91] Supporters of clear statement rules believe that such

87. Nat'l Fed'n of Indep. Bus. v. OSHA, 142 S. Ct. 661, 668 (2022) (Gorsuch, J., concurring), (major questions clear statement rule "ensures that the national government's power to make the laws that govern us remains . . . with the people's elected representatives"); Bamberger, *supra* note 14, at 82; Sunstein, *Nondelegation Canons*, *supra* note 38, at 335; Phillip A. Wallach, *Will West Virginia v. EPA Cripple Regulators? Not If Congress Steps Up*, Brookings (July 1, 2022), https://www.brookings.edu/articles/will-west-virginia-v-epa-cripple-regulators-not-if-congress-steps-up/ [https://perma.cc/8ZTL-DMPU]; Jennifer L. Mascott & Eli Nachmany, *"The Supreme Court Reminds the Executive Branch: Congress Makes the Laws*, WASH. POST (July 1, 2022), https://www.washingtonpost.com/opinions/2022/07/01/west-virginia-epa-supreme-court-ruling-carbon-emissions-congress-laws/ [On File with the Columbia Journal of Environmental Law] ("Congress must serve as the institutional actor reaching consequential policy choices by majority vote").

88. Nat'l Fed'n of Indep. Bus. v. OSHA, 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring).

89. Mascott & Nachmany, *supra* note 87. *See also* George F. Will, *The EPA Decision Is the Biggest One of All, and the Court Got It Right*, WASH. POST (June 30, 2020), https://www.washingtonpost.com/opinions/2022/06/30/supreme-court-decision-environmental-protection-agency/ [On File with the Columbia Journal of Environmental Law] (major questions doctrine could "revive Congress by compelling it to resume its proper responsibilities").

90. Nat'l Fed'n of Indep. Bus. v. OSHA, 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring); McGarity, *supra* note 58, at 16–18; Mila Sohoni, *The Trump Administration and the Law of the Lochner Era*, 107 GEO. L. J. 1323, 1328 (2019); Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 AD. L. REV. 475, 492 (2021); Daniel E. Walters, *Symmetry's Mandate: Constraining the Politicization of American Administrative Law*, 199 MICH. L. REV. 455, 503-04 (2020).

91. Monast, *supra* note 57, at 462–63; Aaron L. Nielson, *The Minor Questions Doctrine*, 169 U. PA. L. REV. 1181, 1191 (2021); Sunstein, *supra* note 90, at 488.

agency aggrandizement poses a grave threat to economic liberty. [92] Chief Justice John Roberts has decried federal agencies "poking into every nook and cranny of daily life[.]"[93] And Justice Gorsuch has observed that "[i]f administrative agencies seek to regulate the daily lives and liberties of millions of Americans," the clear statement rules say "they must at least be able to trace that power to a clear grant of authority from Congress."[94]

Proponents of clear statement rules further argue that they are useful vehicles for implementing underenforced constitutional norms.[95] According to this view, the Supreme Court has historically been reluctant to enforce unwritten constitutional norms, like federalism, separation of powers, and property rights, by declaring laws unconstitutional.[96] Clear statement rules allow courts to enforce those norms by setting aside regulations that are not clearly authorized by statutory language without attracting the criticism that would flow from declaring a statute unconstitutional.[97] This, of course, assumes that the constitutional norm being enforced is a legitimate one, despite its not being clearly articulated in the text of the Constitution.

Proponents maintain that clear statement rules assist courts in interpreting statutes in ways that accurately reflect congressional intent.[98] In the case of normative clear statement rules, however, this position is based on the assumption that Congress intended to protect the values that the clear statement rules instantiate. In the case of the clear statement rules relevant to administrative law, the assumptions are that Congress does not intend to interfere with core state functions, to interfere with private property rights, or to delegate to agencies the power to decide questions of great economic and political significance. These assumptions are consistent with a conservative view of the proper role of the federal government, but they have no solid empirical basis. During the past sixty years, Congress has quite intentionally interfered with core state functions and private property rights in the civil rights laws and environmental statutes, and it has employed broad language in those statutes because it wanted

92. Nathan Richardson, *Keeping Big Cases from Making Bad Law: The Resurgent "Major Questions" Doctrine*, 49 CONN. L. REV. 355 (2016), at 397–401.
93. City of Arlington v. FCC, 133 S. Ct. 1863, 1877 (2013) (Roberts, J., dissenting).
94. Nat'l Fed'n of Indep. Bus. v. OSHA, 142 S. Ct. 661, 668 (2022) (Gorsuch, J., concurring).
95. Bamberger, *supra* note 14, at 68; Eskridge & Frickey, *supra* note 19, at 631; Frost, *supra* note 36, at 927; McGinnis & Yang, *supra* note 60, at 394–95.
96. Mank, *supra* note 14, at 608; Sunstein, *supra* note 22, at 469.
97. Berger, *supra* note 47, at 537; Frost, *supra* note 36, at 927; Monast, *supra* note 57, at 463–64.
98. McGarity, *supra* note 58, at 16.

agencies to have sufficient flexibility to respond to newly emerging problems.[99]

IV. WHY CLEAR STATEMENT RULES ARE PROBLEMATIC IN ADMINISTRATIVE LAW

Despite these virtues, clear statement rules are deeply problematic in the context of administrative law. The supposed constitutional norms underlying the rules are mirages that dissolve on close inspection. For that reason, the clear statement rules are inconsistent with textualism. They also demonstrate a disturbing disrespect for Congress. Their easy malleability is an open invitation for judicial aggrandizement. And the high bar they erect for statutory "clarity," along with the general reluctance on the part of a majority of the Roberts Court to permit federal agencies to pursue their statutory missions, have turned the clear statement rules in administrative law into a powerful weapon in the conservative assault on the administrative state. Not surprisingly, academic commentary on the clear statement rules of interest to administrative law has been overwhelmingly negative.[100]

A. Constitutional Norms as Mirages

The administrative law clear statement rules are not grounded in any discernable source of law. Neither the Administrative Procedure Act nor any other statute tells the federal courts to set aside agency actions based on interpretations of statutes that interfere with core state functions or property rights or raise major questions when Congress has not clearly authorized those actions with explicit statutory language. Although many of the linguistic canons and perhaps a few of the normative canons have clear common law antecedents, the administrative law clear statement rules are not among them. Instead, the Court has tended to base clear statement rules on certain norms that the Court has located in the structure but not the text of the Constitution.[101] The primary norms upon which the administrative law clear statement rules are based are the federalism norm, the separation-of-powers norm, and the private ordering norm. Professor John

99. *Id*.
100. Ronald M. Levin, *The Major Questions Doctrine: Unfounded, Unbounded, and Confounded* (Ctr. for the Stud. of the Admin. State, Dec. 15, 2022), at 104. (reporting that the great majority of the academic commentaries on the major questions doctrine have been critical).
101. RICHARD POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 285 (1985); Berger, *supra* note 47, at 530; Manning, *supra* note 36, at 406–07; Sohoni, *supra* note 55, at 284, 309.

Manning, however, concludes that "the values enforced by clear statement rules do not properly count as constitutional values for the simple reason that the Constitution does not adopt values in the abstract."[102] Therefore, "if the legitimacy of constitutionally inspired clear statement rules depends on the possibility of tracing them meaningfully to the Constitution, that burden cannot be met."[103] The constitutional norms underlying the clear statement rules are in fact mirages that appear concrete from a distance, but disintegrate on closer examination. They are what the judges applying them want them to be.[104]

1. The Federalism Norm

The federalism clear statement rule is based on a federalism norm that the courts discovered in the Tenth Amendment[105] and "the evident constitutional commitment to a federal structure."[106] In the seminal 1991 case of *Gregory v. Ashcroft*,[107] the Court held that the federal Age Discrimination in Employment did not apply to a provision in the Missouri Constitution requiring state judges to retire at the age of seventy years.[108] On the way, Justice Sandra Day O'Connor provided an exegesis on federalism in which she relied on the Tenth Amendment and stressed that "a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."[109] Therefore, "[i]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in

102. Manning, *supra* note 36, at 432.
103. Manning, *supra* note 36, at 404. *See also* Berger, *supra* note 47, at 510 (major questions clear statement rule relies "not on constitutional law but [the judges'] rather inchoate constitutional sensibilities").
104. Berger, *supra* note 47, at 549 ("[i]f judges can interpret statutes merely by gesturing toward vague constitutional notions, they can steer statutory meaning wherever they please"); Barrett, *supra* note 14, at 119 (finding it "difficult to isolate a single policy objective behind any substantive canon, for a canon's purpose often lies in the eyes of the beholder").
105. U.S. CONST. amend. X; Harkless v. Brunner, 545 F.3d 445, 454 n.5 (6th Cir. 2008).
106. Sunstein, *supra* note 38, at 331. *See* Bamberger, *supra* note 14, at 73 (the federalism canons "reflect structural values of constitutional dimension involving protection from the aggrandizement of federal power against the sovereign states"); Manning, *supra* note 36, at 411 (concluding that the Court in *Gregory* "teased from the constitutional structure as a whole a federalism value").
107. Gregory v. Ashcroft, 501 U.S. 452 (1991).
108. *Id.* at 470.
109. *Id.* at 458. *See* Manning, *supra* note 47, at 2027–28 (arguing that the federalism clear statement rule protects individual liberty).

the language of the statute.'"[110] Justice O'Connor concluded that "[t]his plain statement rule is nothing more than an acknowledgment that the states retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere."[111]

This assumption, however, has no empirical basis. While some participants in the congressional debates over legislation will no doubt raise federalism concerns when the proposed legislation appears to intrude on core state functions, there is no empirical basis for the assumption that the supporters of bills that are ultimately enacted into law are overly concerned with the extent to which their provisions intrude into areas that states have historically regulated. In the environmental laws, for example, Congress explicitly intervened into areas previously regulated exclusively by the states because the states were not exercising their powers to provide adequate protection for human health and the environment.

If Justice O'Connor's assumption is baseless, the more likely underpinning for the federalism clear statement rules is the Court's assertion in *Will v. Michigan State Department of Police*, upon which the *Gregory* Court relied,[112] that "Congress *should* make its intention 'clear and manifest' if it intends to pre-empt the historic powers of the States."[113] That, however, is a normative claim that does not describe what Congress does, but reflects what the justices in the majority believe it should do.[114] Nor can the normative claim be based on the Constitution, because "both the text and political history of the Constitution make clear that the document embraces not only the value of federalism, but also that of a stronger, more effective national government."[115] Unmoored from the text of the Constitution,[116] the federalism norm is what the judges want it to be. It is the policy preferences of the judges, not a Constitutional federalism mirage, that compels a conclusion that courts must insist that Congress anticipate and use

110. *Ashcroft*, 501 U.S., at 460 (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985)).
111. *Id.* at 461.
112. *Id. See also* Will v. Mich. Dep't of State Police, 491 U.S. 58, 65 (1989).
113. Will v. Mich. Dep't of State Police, 491 U.S. 58, 65 (1989) (emphasis added).
114. *See* Eskridge & Frickey, *supra note* 19, at 624–25 (citing *Gregory* as "a breathtaking example of the Rehnquist Court's transformation from constitutional to interpretive activism on questions of federalism").
115. Manning, *supra* note 36, at 433.
116. Manning, *supra note* 47, at 2029 ("the court [in Gregory] rested its authority on the abstraction of a freestanding federalism found nowhere in the text").

unequivocally clear language in addressing federalism issues that may arise in the implementation of the statutes it enacts.[117]

2. The Separation of Powers Norm

The major questions clear statement rule is based in large part on a separation of powers norm derived from the vesting clauses and the tripartite structure of government that the Constitution envisions.[118] In a much-quoted passage in *West Virginia v. EPA*, Chief Justice Roberts wrote that "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."[119] To overcome that reluctance, "the agency must . . . point to 'clear congressional authorization' for the power it claims."[120] In his concurring opinion, Justice Gorsuch referred to a major questions "clear statement rule" that "operates to protect foundational constitutional guarantees," and in particular the "separation of powers."[121]

Under a formal separation of powers regime, legislatures write the laws, the executive branch administers and enforces those laws, and the judiciary interprets those laws and adjudicates disputes over their application.[122] Because the vesting clauses of the Constitution assign legislative power to Congress, executive power to the President, and judicial power to the Supreme Court and the inferior courts, Congress may not delegate legislative power to the president or the judiciary, even if it deems such delegation desirable.

The Supreme Court has assigned to the judiciary the role of ensuring that all three branches remain within the bounds created by their

117. To be sure, Justice O'Connor in her *Gregory* exegesis pointed to many desirable aspects of "our federalism," including her conclusion that federalism "promotes innovation, experimentation, competition, and greater sensitivity to a heterogeneous society." Manning, *supra note* 36, at 410. But these are policy considerations that may support a federalism norm that others might reject for equally compelling policy reasons like preventing invidious discrimination or protecting the environment.

118. U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 419 (D.C. Cir 2017), (Kavanaugh, J., dissenting) (major questions doctrine is "grounded in . . . a separation of powers-based presumption against the delegation of major lawmaking authority from Congress to the Executive Branch"); Jack M. Beermann, *The Anti-Innovation Supreme Court: Major Questions, Delegation, Chevron and More*, 65 WILLIAM & MARY L. REV. 1265, 1287–88 (2024); Levin, *supra* note 100, at 5–6; Sohoni, *supra* note 55, at 310; David Zaring, *Toward Separation of Powers Realism*, 37 YALE. J. REG. 708, 720 (2020).

119. West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022).

120. *Id.*

121. *Id.* at 2617, 2620 (Gorsuch, J., concurring).

122. McGinnis & Yang, *supra note* 60, at 103-04.

prescribed functions,[123] and it has on two occasions applied the "nondelegation doctrine" to declare acts of Congress unconstitutional.[124] Under the Court's current understanding of the nondelegation doctrine, Congress may delegate to the executive branch the power to "fill up the details" in statutes that provide an "intelligible principle" for accomplishing that task.[125] Although the Supreme Court has generally shied away from employing the nondelegation doctrine to hold congressional delegations of legislative power unconstitutional,[126] it has recently enforced the separation of powers norm through the major questions clear statement rule,[127] which "guard[s] against unintentional, oblique, or otherwise unlikely delegations of the legislative power."[128] But this rationale suffers from many of the same practical infirmities as the nondelegation doctrine itself. Congress lacks the information-gathering capacity and the expertise to craft the standards needed to protect citizens from the vicissitudes of the unregulated marketplace. To provide the needed protections, Congress needs to delegate to executive branch agencies the authority to provide the details of the necessary rules and regulations.[129] And it needs to use broad language to empower the agencies to adapt to changes in economic conditions, technological developments, and the constant efforts by regulated entities to circumvent those rules and regulations.

Proponents of the separation of powers norm argue that it plays a vital role in promoting individual liberty.[130] It does this by insisting that legislative intrusions into the private sector are achieved only by

123. West Virginia v. EPA, 142 S. Ct. at 2616 (Gorsuch, J., concurring) ("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"); Nicholas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L. J. 2020, 2024–25 (2022); McGinnis & Yang, *supra* note 60, at 391.

124. Panama Refining Co. v. Ryan, 293 U.S. 388, 430 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529–42 (1935).

125. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394. 409 (1928).

126. Levin, *supra* note 100, at 38; Sohoni, *supra* note 55, at 292–93; Zaring, *supra* note 118, at 745.

127. Gundy v. United States, 139 S. Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting) ("we apply the major questions doctrine in service of the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency"); Emerson, *supra* note 57, at 2044; McGinnis & Yang, *supra* note 60, at 394; Nathan Richardson, *Antideference: Covid, Climate, and the Rise of the Major Questions Canon*, 108 VA. L. REV. ONLINE 174, 190 (2022); Sunstein, *supra* note 90, at 480.

128. Nat'l Fed'n of Indep. Bus. v. OSHA, 142 S. Ct. 661, 669 (2022). *See* Aaron L. Nielson, *Minor Questions Doctrine*, 169 U. PA. L. REV. 1181, 1192–93 (2021) (under the major questions doctrine, "courts should address nondelegation concerns by reading statutes narrowly").

129. CASS R. SUNSTEIN & ADRIAN VERMUELE, LAW AND LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE ch. 1 (2020).

130. Berger, *supra* note 47, at 508; Bowie & Renan, *supra* note 123, at 2033; McGinnis & Yang, *supra* note 60, at 390–91.

running the gauntlet of bicameralism and presentment.[131] Limited government advocates therefore support a strong separation of powers norm that limits Congress' capacity to delegate regulatory authority to executive branch agencies.[132] Professor Mila Sohoni, however, finds it hard "to see how the Constitution encodes that particular libertarian subset of substantive values."[133] Professor Eric Berger agrees that the framers sought to divide power among the three branches to preserve liberty, but they "also hoped to create a more powerful and effective federal government that could protect the public welfare."[134]

Supporters of the a strong separation of powers norm argue that it enhances democracy by ensuring democratic accountability for agency action.[135] In his *National Federation of Independent Business* concurrence, Justice Gorsuch proclaimed that the administrative state lacks accountability, because it is "government by bureaucracy supplanting government by the people."[136] Judicial application of a strong separation of powers norm will "ensure that any new laws governing the lives of Americans are subject to the robust democratic processes that the Constitution demands."[137] That argument, however, is severely undercut by the fact that the president is just as democratically accountable as Congress, and perhaps more so.[138] Indeed, in cases overturning agency action as unconstitutional under the appointment and removal clauses, the Court has insisted that the president must have greater control over the decision-making process for precisely that reason.[139] The executive branch agencies that serve the president are far more democratically accountable than judges who have not been elected and cannot be fired.

Finally, supporters of the separation of powers norm presume that Congress intends to make important policy decisions itself, not leave

131. Capozzi III, *supra* note 66, at 198; Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 AD. L. REV. 19, 55 (2010); McGinnis & Yang, *supra note* 60, at 395, 400–01.
132. McGinnis & Yang, *supra* note 60, at 400–01. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2618 (2022) (Gorsuch, J., concurring) ("the power to make new laws regulating private conduct [is] a grave one that could, if not properly checked, pose a serious threat to individual liberty").
133. Sohoni, *supra* note 55, at 312.
134. Berger, *supra* note 47, at 514.
135. Bamberger, *supra* note 14, at 80; Berger, *supra* note 47, at 509; McGinnis & Yang, *supra* note 60, at 423.
136. Nat'l Fed'n of Indep. Bus. v. OSHA, 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring).
137. *Id.* at 668–69 (Gorsuch, J., concurring).
138. Jodi l. Short & Jed H. Shugerman*, Major Questions About Presidentialism: Untangling the "Chain of Dependence" Across Administrative Law*, B.C. L. REV. 511, 517 (2024).
139. *Id.* at 518.

those decisions to agencies."[140] As with the federalism norm, however, this assumption lacks an empirical basis. Certainly, some members of Congress would prefer that Congress resolve all ascertainable policy issues in the statute's language, but history clearly demonstrates that other members of Congress, often those in the majority, are quite comfortable with allowing regulatory agencies to resolve large controversial issues that members of the enacting Congress may not have anticipated.[141]

Like the federalism norm, the separation of powers norm is a mirage.[142] Professors Nicholas Bowie and Daphna Renan's exhaustive historical study persuasively concludes that "separation of powers" comprises "a set of broad, vague, conflicting, and contested political ideas (thinly connected to sparse and ambiguous constitutional text) and a set of overlapping, interacting institutions that participate in the messy work of national governance."[143] It is therefore next to impossible to draw clear lines separating legislative, executive, and judicial powers in a principled fashion. For example, one of the primary reasons the Court has been very reluctant to declare statutes unconstitutional under the nondelegation doctrine is because "no method has been created that can police the boundary between law execution and legislation in an analytically coherent and principled way."[144] The line-drawing process is in practice arbitrary and policy-driven. While it appears at a distance to mandate a distinct set of institutional arrangements, upon closer examination, the apparent clarity of the distinctions between legislative, executive, and judicial disappears. As with the federalism norm, the separation of powers norm means what the judges applying it want it to mean.[145]

3. The Private Ordering Norm

Although the emerging property rights clear statement rule has received scant scholarly attention, it appears to be implementing what

140. U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).
141. Alison Gocke, *Chevron's Next Chapter: A Fig Leaf for the Nondelegation Doctrine*, 55 U.C. DAVIS L. REV. 955, 972–73 (2021); Levin, *supra* note 100, at 935–37.
142. See John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1943 (2011) (the Constitution contains no "freestanding separation of powers principle").
143. Bowie & Renan, *supra* note 123, at 2028–29.
144. Loshin & Nielson, *supra* note 131, at 56.
145. Bowie & Renan, *supra* note 123, at 2104 (as administered by the Court, separation of powers "privileges the ideological commitments of individual jurists . . . not some collective understanding of constitutional constraints").

Professor Cass Sunstein has referred to as a "private ordering" norm.[146] Under this norm, "the constitutional system leaves citizens free to conduct their affairs without governmental interference, and that basic principle requires courts to interpret statutes to extend only as far as their explicit language and history require."[147] This rarely addressed norm is "merely the most recent incarnation of the view, set out in the early twentieth century and before, that statutes in derogation of the common law should be read against a laissez-faire baseline and narrowly construed."[148] As such, it is the "statutory analog to the constitutional principle in *Lochner v. New York*, in which the court treated certain statutory measures as impermissible deviations from the 'neutral' principles reflected in the common law."[149]

The private ordering norm has the obvious advantage of protecting investment-backed expectations in private property, an attribute that it shares with the takings clause of the Fifth Amendment, which prohibits government from taking private property for public use without just compensation.[150] The private ordering norm also allows judges who share the *Lochner*-era view of the sanctity of common law property rights to implement that view, despite its general unpopularity, by interpreting statutes that impinge on property rights narrowly, rather than reviving long-discredited *Lochner*-era constitutional prohibitions on such statutes.[151]

The Roberts Court has relied on this private ordering norm on too few occasions thus far to gain a good sense of its full nature and scope, but it appears to share mirage-like aspects with the federalism and separation of powers norms. There is, of course, a degree of vagueness in deciding what constitutes property, but even with respect to well-accepted property interests, like ownership of real property, which has been the exclusive focus of the emerging property rights clear statement rule thus far, it is not at all apparent in the sparce case law what kinds of governmental interference is of sufficient magnitude to warrant application of the property rights clear statement rule. The Supreme Court cases have involved fairly extensive intrusions into landowners use and enjoyment of real property. In *Sackett,* Mr. and Ms. Sackett alleged that they were prevented from building a

146. Sunstein, *supra* note 22, at 443.
147. *Id.* at 443.
148. *Id.* at 444.
149. *Id.* at 444, n.136.
150. U.S. CONST. amend. V.
151. Sunstein, *supra* note 22, at 473.

house on the land that the government claimed to be wetlands.[152] In *Cowpasture*, the Court worried that if the government's theory was correct, the private property over which at least some of the nation's twenty-one national trails passed would have become part of the National Park System.[153] And the eviction moratorium in *Alabama Association of Realtors* constituted a significant, albeit temporary government-imposed modification of the landlord-tenant relationship.[154]

If requiring a permit to fill wetlands on private property sufficiently invokes the private ordering norm to require clear congressional authorization in the permitting agency's enabling statute, is the same clear statement necessary to authorize a permit to discharge pollutants into the air or water, an experimental use permit to grow novel genetically modified crops on private property, or a license to market a drug or pesticide? If the landlord-tenant relationship is protected by the private ordering norm, what about the employer-employee relationship, the landowner-tenant farmer relationship, or the internet service provider-user relationship? The private ordering norm as applied to property rights is vague enough to subject a large proportion of federal regulation to the property rights clear statement rule, or a court could limit it to serious restrictions on the use of real property.

Beyond its inherent vagueness, the private ordering norm has no conceivable basis in the language of the Constitution. Even under the broadest reading of the takings clause, the vast bulk of federal regulation directly or indirectly limiting the use of private property does not even arguably take property for a public use.[155] Professor Manning suggests that the Constitution "doesn't protect privacy or property or even democracy in the abstract; it does so in specific context through specified means."[156] And Professor Sunstein finds the private ordering norm to be inconsistent with "the values that underline modern government."[157] The long-discredited nineteenth century private ordering notions are discredited for a reason. They yield a world in which employers can exploit child labor, butchers can market adulterated meat, and companies can pollute air and water with impunity.[158]

152. Sackett v. EPA, 598 U.S. 651, 662 (2023).
153. U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837, 1849–50 (2020).
154. Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021).
155. Manning, *supra* note 36, at 435.
156. *Id.* at 438–39 (emphasis added).
157. Sunstein, *supra* note 22, at 444.
158. *See generally* THOMAS O. MCGARITY, FREEDOM TO HARM ch. 1 (2013); Sunstein, *supra* note 22, at 444, n.136.

B. Indeterminacy and Manipulability

At the same time that they are based on constitutional mirages, the clear statement rules in administrative law are themselves indeterminate and malleable.[159] Their indeterminacy makes it difficult for agencies and those affected by agency actions to know what the law is and to plan accordingly.[160] And their malleability invites judges to interpret statutes in ways that are consistent with their ideological preferences.[161]

In the case of the federalism clear statement rule, the Court has not articulated clear criteria for identifying "core" state functions that the rule seeks to protect.[162] Those functions include everything from qualifications to hold public office,[163] to domestic relations law,[164] to land and water use regulation,[165] to health and safety regulation.[166] It is in fact difficult to imagine any state function that a court could not plausibly characterize as a "core" state function. The "federal-state balance" that the federalism clear statement rule protects is an even more elusive concept. As with most balancing approaches in law, determining the proper balance between state and federal functions is a highly subjective exercise that judges can employ to fit their ideological views on state-federal relations.[167] The content of the federalism clear statement rule is as malleable as the term "our federalism" that the courts frequently employ to invoke it.[168]

If anything, the major questions clear statement rule is even less determinate and more subject to manipulation than the federalism clear statement rule. The "impenetrable vagueness of 'majorness' and the defining criterion of 'vast economic and political significance'"[169]

159. Berger, *supra* note 47, at 551.
160. *Id.* at 549.
161. Deacon & Litman, supra note 35, at 1057; Sohoni, *supra* note 55, at 283.
162. Eskridge & Frickey, *supra* note 19, at 634; Mank, *supra* note 14, at 557.
163. Hayden v. Pataki, 449 F.3d 305, 326 (2d Cir. 2006) (quoting Gregory v. Ashcroft, 501 U.S. 452, 463 (1991)).
164. Perez v. Cuccinelli, 949 F.3d 865, 875 (4th Cir. 2020) (citing Ojo v. Lynch, 813 F.3d 533, 540 (4th Cir. 2016).
165. Rapanos v. United States, 547 U.S. 715, 738 (2006); Solid Waste Mgmt. Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 173 (2001).
166. Kentucky v. Biden, 23 F.4th 585, 609 (6th Cir. 2022) (quoting Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021)).
167. Mank, *supra* note 14, at 610.
168. Eskridge & Frickey, *supra* note 19, at 612, 634; Mank, *supra* note 14, at 610 (arguing that cases enforcing the federalism norm use such a vague and overly broad language and categories to protect 'traditional' or 'core' State interests that the danger now lies with the under enforcement of federal statutes").
169. McGarity, *supra* note 58, at 19.

renders the doctrine's boundaries "unclear, unpredictable, and arbitrary."[170] Justice Brett Kavanaugh has candidly observed that "determining whether a rule constitutes a major rule sometimes has a bit of a 'know it when you see it' quality."[171] While the Court might identify some objective parameters for determining whether an action has vast economic significance, such as the "major rule" threshold of $100 million impact on the economy in the Congressional Review Act,[172] determining the "political" significance of an action is entirely subjective and subject to manipulation not only by judges, but also by litigants. It is easy enough for a robust public relations campaign by an affected corporation or a consciousness-raising initiative by an activist group to generate political controversy.[173] The focus on political significance effectively permits "entities to functionally amend statutes through political opposition rather than by doing what would otherwise be required: passing legislation."[174]

C. Inconsistency with Textualism

The clear statement rules are generally inconsistent with a textualist approach to statutory interpretation. The essence of textualism is a judicial commitment to the text of the statute, even when it might appear to be inconsistent with the statute's overall purpose. That is because only the text has survived the constitutionally prescribed process of bicameralism and presentment, which "grant[s] political minorities extraordinary power to block legislation or insist upon compromise as the price of assent."[175] Textualists argue that "the final wording of a statute may reflect an otherwise unrecorded legislative compromise, one that may—or may not—capture a coherent set of

170. Richardson, *supra* note 127, at 195. *See* Lisa Heinzerling, *Nondelegation on Steroids*, 29 N.Y.U. ENV. L. J. 379, 390 (2021) (Supreme Court has not explained how it determines whether a question is major); Monast, *supra* note 57, at 469 (noting that "there is scant indication when the Court may choose to invoke major questions"); Sohoni, *supra* note 55, at 288; Sunstein, *supra* note 90, at 487 (noting that "courts have no simple way to separate major from nonmajor questions.").

171. U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 423 (D.C. Cir. 2017). *See* Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777, 780 (2017) (suggesting that "the Court knows a major question when it sees it, applying and all-things-considered judgment based upon . . . a felt sense of the legal and political times").

172. 5 U.S.C. § 804(2).

173. McGarity, *supra* note 58, at 19.

174. Deacon & Litman, *supra* note 35, at 1057.

175. John F. Manning, *What Divides Textualists From Purposivists?*, 106 COLUM. L. REV. 70, 73, 77. *See* Barrett, *supra* note 14, at 112; Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 267, 273 (2020).

purposes."[176] Instead of the "fanciful" aspiration of capturing the "intent" of the multi-member House and Senate,[177] the judges should focus on how an objectively reasonable reader of the language would have understood it to mean in the context in which it was enacted.[178] According to then-Professor Amy Coney Barrett, "the principle of legislative supremacy restrains federal courts from expanding and contracting unambiguous statutes to account for diffuse social values."[179] Following a textualist approach, only when the text is hopelessly ambiguous should the judges resort to indicia of statutory purpose.[180]

1. The Tension Between Clear Statement Rules and Textualism

There is an obvious tension between clear statement rules that implement policy norms, however derived, and the textualist approach to statutory interpretation that purports to confine the court's attention to the language that Congress employed and the relevant context.[181] Because clear statement rules advance substantive goals, they "inject values into a case beyond those in the relevant statutory text."[182] To serious textualists, it is deeply problematic for judges to employ policy-driven clear statement rules to substitute for the most plausible reading of the statutory text.[183] Professor Manning observes that "because clear statement rules direct courts to select something other than the most natural and probable reading of a statute, they … displace congressional choice, even if their application does not result in the statute's formal invalidation."[184] He finds it highly inappropriate for judges to "insist upon exceptional legislative clarity as a collateral method of enforcing the values implicit in constitutional provisions that do not directly require such clarity."[185]

The problem with the federalism clear statement rule, for example, is that the Court has taken a decidedly non-textualist approach to divining a general constitutional policy of preserving core state

176. Manning, *supra* note 175, at 74.
177. *Id.* at 73–74.
178. Frost, *supra* note 36, at 924; Manning, *supra* note 175, at 75; Mank, *supra* note 14, at 533–34.
179. Barrett, *supra* note 14, at 116.
180. Manning, *supra* note 175, at 75–76, 84–85.
181. Krishnakumar, *supra* note 15, at 836–37; *Clear Statement Rules, Federalism, and Congressional Regulation of States*, 107 HARV. L. REV. 1959, 1959 (1994).
182. Berger, *supra* note 47, at 537.
183. Berger, *supra* note 47, at 538; Grove, *supra* note 175, at 287; Loshin & Nielson, *supra* note 131, at 64.
184. Manning, *supra* note 36, at 402.
185. *Id.* at 406.

functions from "numerous discrete provisions that, in particular ways, divide sovereign power between state and federal governments and, in so doing, preserve a measure of state autonomy."[186] Professor Manning argues that "it blinks reality for the Court to talk about free-standing federalism, as distinct from the many particular ways in which the founders chose to define and structure the relationships between the federal and state governments in the United States Constitution."[187]

Similarly, the major questions clear statement rule is inconsistent with textualism, because it often substitutes a highly controversial separation of powers mirage for the most plausible reading of the statute's text. If the agency action presents a major question, the court need not engage in the hard work of grappling with the text to determine its most plausible meaning; it need only decide whether Congress used sufficiently clear language to authorize that action.[188] When Congress uses unclear language to delegate decision-making power to regulatory agencies, it may well be because of bargains struck between the supporters and opponents of the legislation. Professors Jacob Loshin and Aaron Nielson question whether it is "really the Court's place to upend Congress's bargain by reading a statute to mean something other than what Congress understood it to mean, as expressed in the text."[189] In an unusually candid assessment of the major questions clear statement rule, Justice Kagan's dissent in *West Virginia v. EPA* accused the majority of being "textualist only when being so suits it. When that method would frustrate broader goals, special canons like the 'major questions doctrine' magically appear as get-out-of-text-free cards."[190]

2. Clear Statement Rules as Background Rules

Defenders of clear statement rules argue that they are legitimate because Congress legislates against a background of clear statement rules, the content of which Congress is acutely aware.[191] This provides some flexibility to textualism when clear statement rules have clear constitutional underpinnings or are limited to a "closed set" of

186. Manning, *supra* note 47, at 2006.
187. Manning, *supra* note 47, at 2061.
188. Deacon & Litman, *supra* note 35, at 1012; Richardson, *supra* note 127, at 199; Walters, *supra* note 57, at 489 (Part II(B)).
189. Loshin & Nielson, *supra* note 131, at 63.
190. West Virginia v. EPA, 142 S. Ct. 2587, 2625 (2022) (Kagan, J., dissenting).
191. Barrett, *supra* note 14, at 160; Grove, *supra* note 175, at 291; McGinnis & Yang, *supra* note 60, at 433; Sohoni, *supra* note 55, at 284.

canons.[192] Hence, some textualists are not opposed to judges exercising some discretion in "high stakes cases" to achieve results that are inconsistent with the statutory text.[193] It is, however, by no means clear as an empirical matter that members of Congress are familiar with the Supreme Court's clear statement rules when they introduce and vote for legislation.[194] Furthermore, this application of what Professor Tara Grove dubs "flexible textualism" is subject to abuse as judges rely on the unproven assumption that members of Congress are fully aware of the Court's clear statement rules to justify substituting result-oriented clear statement rules for the best reading of the statutory text.[195] And the background rules assumption is plainly inapplicable to more recent clear statement rules like the major questions and private property clear statement rules that were not in existence when Congress enacted most of the important regulatory statutes.

3. Professor Barrett's Defense of Some Clear Statement Rules

Then-Professor Amy Coney Barratt originally took the position that substantive canons, including those expressed as clear statement rules, were "in significant tension with textualism… insofar as their application can require a judge to adopt something other than the most textually plausible meaning of a statute."[196] She reported that it was "generally recognized that substantive canons advance policies independent of those expressed in the statute."[197] The canons, and especially the canons expressed as clear statement rules, were by no means surrogates or proxies for legislative intent.[198] In particular, "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

192. Barrett, *supra* note 14, at 161, 168; Grove, *supra* note 175, at 292, 296.
193. Grove, *supra* note 175, at 296.
194. Beau J. Baumann, *Americana Administrative Law*, 111 GEO. L. J. 465, 469 (2023) (major questions clear statement rule "cannot rest on a descriptive claim about how Congress actually legislates"); Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. Rev. 575, 600 (2002) ("delving deeply into interpretive law as a way to maximize clarity does not seem to be part of what [congressional] staffers do on a regular basis").
195. Grove, *supra* note 175, at 296–303. *See also* Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 600 (1995) (pointing out that Llewellyn "showed how courts pick and choose from among the many inconsistent cannons to legitimate result-oriented decisions").
196. Barrett, *supra* note 14, at 123–24.
197. *Id.* at 110.
198. *Id.* at 109.

acts as something other than a faithful agent" of Congress.[199] And that is inconsistent with textualism.

"Constitutionally inspired" clear statement rules, however, are acceptable to textualists because they "have the virtue of promoting an identifiable (and, short of constitutional amendment, closed) set of norms that have been sanctioned by a super-majority as higher law."[200] Therefore, "[t]he grounding of these canons in the constitution does render their effect on statutes both more predictable and more democratically legitimate than that of open-ended doctrines."[201] Furthermore, "when a substantive canon promotes constitutional values, the judicial power to safeguard the constitution can be understood to qualify the duty that otherwise flows from the [textualist] principle of legislative supremacy."[202]

Recognizing the significant risk that constitutionally inspired clear statement rules will over-enforce constitutional norms "by handicapping Congress in the exercise of powers that it legitimately possesses,"[203] Professor Barrett concluded that the risk is acceptable because Congress can always react to a court's overturning executive action by enacting legislation providing clear authorization for that action.[204] Thus, the clear statement rules "function as 'stop and think' measures that discipline Congress to consider carefully the constitutional implications of its policies."[205] In sum, "when constitutional values are at stake, it seems prudent to interpret the Constitution as flexible enough to permit federal courts to press Congress on the point."[206]

While Professor Barrett strived mightily to distinguish norms derived from the Constitution from other policy considerations external to the statutory text, the effort ultimately fails because those norms are mirages. As explained above, the federalism, separation of powers and private ordering norms relevant to administrative law are not ascertainable and capable of objective and consistent application. They

199. *Id.* at 110.
200. *Id.* at 168–69.
201. *Id.* at 168–69.
202. Barrett, *supra* note 14, at 181.
203. *Id.* at 174.
204. *Id.* at 174–75.
205. *Id.* at 175.
206. *Id.* at 176–77. Then-professor Barrett argued that "the practice of employing [constitutionally derived] cannons has been with us for so long that the sheer force of precedent councils against abandoning it." *Id*., at 176. That argument may or may not support the legitimacy of the federalism clear statement rule, which came into full force in the 1980s, but it cannot possibly justify the new major questions clear statement rule or the emerging property rights clear statement rule.

are what the judges applying them want them to be.[207] As Professor Manning, the indefatigable textualist, has astutely observed, "constitutional values, abstracted from the concrete provisions that defined them, are no longer *constitutional* values; they are just values."[208] Judges, like now-Justice Barrett, can convince themselves that they are justifiably departing from statutory text when they employ "constitutionally derived" clear statement rules to achieve outcomes different from those that the best reading of the statutory language would yield, but they are departing from the demands of textualism when they do.

Moreover, Professor Barrett did not explain where the courts find the authority to "press" Congress, a constitutionally co-equal branch, by rejecting agency statutory interpretations that the judges disapprove of solely because they are inconsistent with the judges' interpretation of some vaguely articulated "constitutional norm" like federalism, separation of powers or private ordering. This must be part of the "disciplining" function that Barrett believes the Constitution assigns to the judiciary. But this disciplining function is itself quite inconsistent with separation of powers and the rule of law. And it "has no basis in the Administrative Procedure Act or prior law."[209] In the end, Professor Barrett's attempt to rationalize certain constitutionally derived clear statement rules leaves much room for judicial mischief.[210]

More recently, Justice Barrett has defended the Court's invocation of the major questions clear statement rule not by relying on the separation of powers norm, but by denying that it is a clear statement rule in the first place. In her concurring opinion in *Biden v. Nebraska*, Justice Barrett defended the majority's application of the major questions clear statement rule to overturn the Biden administration's cancellation of student loans during the pandemic.[211] When one took into account "the importance of *context* when a court interprets a delegation to an administrative agency," she argued, it became clear that "the major questions doctrine is a tool for discerning–not departing from–the text's most natural interpretation."[212]

Justice Barrett insisted that none of the Court's major questions cases "require[d] an unequivocal declaration from Congress

207. *See supra* Part II(A).
208. Manning, *supra* note 36, at 438.
209. Beermann, *supra* note 118, at 1266.
210. Schacter, *supra* note 195, at 636.
211. Biden v. Nebraska, 600 U.S. 477, 507 (2023), (Barrett, J., concurring).
212. *Id.* at 508.

authorizing the precise agency action under review," even though that appears to be the clear import of the Court's language in previous major questions cases, as noted above.[213] The Court in *West Virginia v. EPA*, for example, stated that to decide a question of vast economic and political importance, an agency "must point to 'clear congressional authorization' for the power it claims," quoting the majority opinion in *Utility Air Regulatory Group v. EPA*.214 Unless the meaning of "clear" differs substantially from the meaning of "unequivocal," Justice Barrett's claim that the major questions doctrine is not a clear statement rule seems mistaken. Had the Court been referring all along to "unequivocally clear congressional authorization," Justice Barrett would presumably have gotten off the major questions bandwagon.

Justice Barrett was confident that the major questions doctrine was not a clear statement rule because it "situates text in context, which is how textualists, like all interpreters, approach the task at hand."215 Many textualists agree with Justice Barrett that it is appropriate to consider the context in which a statute was enacted, though they often disagree about what counts as "context."216 While textualists may consider context, apparently courts applying clear statement rules may not. Yet, if "all interpreters" consider context as well as text in interpreting statutes, then the Court must have been considering context as well as text in applying the clear statement rules in interpreting statutes.

Justice Barrett did not cite any major question cases in which a court relied on context to conclude that the statute authorized the agency action when the text did not clearly do so.217 Nor did Justice Barrett offer an example of a court relying on context to conclude that the statute failed to authorize the agency action when the text clearly did so. Instead, she offered a story about parents authorizing babysitters to spend money to ensure that the children have fun to show that

213. *See supra* Part II(B).
214. West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022) (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).
215. Biden v. Nebraska, 600 U.S. 477, 511 (2023) (Barrett, J., concurring).
216. Grove, *supra* note 175, at 279–80; Manning, *supra* note 175, at 79–80.
217. In the only case in which the Supreme Court has applied the major questions doctrine and concluded that the statute authorized the agency action, the Court found it "especially unlikely that Congress would have delegated this decision to the *IRS*, which has no expertise in crafting health insurance policy." King v. Burwell, 576 U.S. 473, 486 (2015). But that was to support the Court's conclusion that *Chevron* deference was not appropriate, not to situate the statutory language in context. The court independently interpreted the statutory language to authorize IRS's decision to make tax credits under the Patient Protection and Affordable Care Act available in states that had a federal exchange instead of a state exchange. *Id.* at 498.

context can give meaning to words, a proposition with which few would disagree. The hypothetical possibility that context may someday have a significant impact on the Court's resolution of a major question case does not demonstrate that the courts are not employing the major questions doctrine as a clear statement rule. Although the textualist in Justice Barrett desperately wanted the major questions doctrine not to be a clear statement rule, her efforts ultimately failed. Most scholars agree that the major questions doctrine, as recently applied by the Court, is in fact a clear statement rule.[218]

D. Disrespect for Congress

In articulating and applying clear statement rules, the Court has demonstrated an unhealthy disrespect for Congress.[219] Throughout the clear statement cases, individual justices "have reserved their worst disdain for Congress and the realities of the legislative process."[220] That disdain, however, is unwarranted, and aggressive application of clear statement rules is deeply problematic for two reasons. First, clear statement rules limit the ability of Congress to make national policy by delegating to agencies the power to address the nation's most pressing problems.[221] Second, applying new clear statement rules to old statutes is unfair to the Congresses that enacted those statutes and the beneficiaries of those statutes.

1. Limiting Congress's Ability to Delegate

Clear statement rules in administrative law do not just affect the ability of agencies to carry out their statutory missions. They also limit the degree to which Congress can address social problems by authorizing agencies to address those problems guided by intelligible principles articulated in enabling statutes.[222] In Professor Manning's metaphor, clear statement rules impose a "clarity tax" on Congress when it enacts statutes addressing certain topics that makes it more difficult for Congress to enact protective legislation.[223] If it wants to

218. *See supra* text accompanying notes 62–65.
219. Schacter, *supra* note 195, at 636.
220. Baumann, *supra* note 194, at 491.
221. McGarity, *supra* note 58, at 24.
222. Eskridge & Frickey, *supra* note 19, at 638; Frost, *supra* note 21, at 926–28; Sohoni, *supra* note 55, at 276.
223. Manning, *supra* note 36, at 403. *See also* Biden v. Nebraska, 600 U.S. 477, 508–09 (2023) (Barrett, J., concurring) (arguing that clear statement rules "effectively impose a 'clarity tax' on Congress").

authorize agencies to address those topics, Congress must speak with exceptional clarity in the text of the statute. Professor Manning rightly insists that courts should "articulate a meaningful legal ground upon which to insist upon extra legislative clarity in some contexts but not others."[224] Thus far, the Supreme Court has not done so in the area of administrative law, beyond the unproven assumption that Congress wants to decide issues that have a significant impact on federalism, separation of powers, or private ordering norms.[225]

Recognizing that reviving the nondelegation doctrine would deeply disturb existing reliance interests and attract undesirable political opposition,[226] a Supreme Court majority bent on limiting the reach of the modern administrative state[227] has strategically created clear statement rules to accomplish that result while putatively allowing Congress to delegate regulatory authority to executive branch agencies so long as it "delegate[s] not just clearly but also micro-specifically."[228] Justice Gorsuch is perhaps the most forthright in his contempt for Congress when he argues (without any empirical basis) that aggressive judicial application of clear statement rules is necessary to shield Congress from its disturbing impulse to delegate authority to decide controversial questions to executive branch agencies.[229]

For the most part, Congress delegates broadly not because it is lazy or because it wants to avoid accountability for tough decisions, as cynics like Justice Gorsuch maintain,[230] but because it knows that "if it had to do everything, many desirable and even necessary things wouldn't get done."[231] Congress is "ill-suited to the iterative, ongoing

224. Manning, *supra* note 36, at 418.
225. *See supra* text accompanying notes 105–158.
226. McGinnis & Yang, *supra* note 60, at 391, 437; Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 278 (2021).
227. McGinnis & Yang, *supra* note 60, at 438.
228. Biden v. Nebraska, 600 U.S. 477, 549 (2023) (Kagan, J., dissenting). *See* Gundy v. United States, 588 U.S. 128, 165–69 (2022) (Gorsuch, J., dissenting) (rejecting the "intelligible principle" test for the nondelegation doctrine and concluding that the major questions doctrine will accomplish the same result as expanding the nondelegation doctrine); Deacon & Litman, *supra* note 35, at 1070 (major questions doctrine has become "a potent deregulatory tool that will do much of the work—if a more selective and ideologically targeted form of the work—that a revived nondelegation doctrine would do").
229. Nat'l Ass'n of Indep. Bus. v. OSHA, 595 U.S. 109, 124-25 (2022) (Gorsuch, J., concurring); Baumann, *supra* note 194, at 470 (arguing that Justice Gorsuch offered no empirical basis for his assertion).
230. Baumann, *supra* note 194, at 471–74, 493.
231. Biden v. Nebraska, 600 U.S. 477, 544 (2023) (Kagan, J., dissenting).

task of making every important regulatory choice."[232] Even if it wanted to legislate in great detail, Congress could not possibly envision every potential major question, intrusion on state-federal relations, or imposition on property rights that might call for special clarity in the authorizing language.[233] If for no other reason than the power of a minority of senators representing a tiny fraction of the nation's population to prevent legislation through merely the threat of a filibuster, Congress cannot be in the business of delegating iteratively with micro-specificity.[234] Nevertheless, it appears that a majority of the Supreme Court agrees with Justice Gorsuch's disdain for Congress and presumably for the people who elected its members.[235]

2. Applying New Rules to Old Statutes

Clear statement rules that the Court invents as its ideological composition changes are especially troublesome when the Court applies them to existing statutes.[236] The Congresses that enacted the Clean Air Act of 1970, the Clean Water Act of 1972, and most of the other important regulatory statutes could not possibly have known that the Court would later subject agency interpretations of those statutes to the federalism, major questions, and property rights clear statement rules.[237] They had no notice of the recent Court majority's demand for particularized attention to the details of agency implementation of those statutes. They used broad language to give the implementing agencies latitude to address emerging problems. The Court's application of those recently minted clear statement rules to those statutes therefore demonstrates an unhealthy disrespect for a coordinated branch of government as well as the people and places those statutes were meant to protect.[238]

E. Judicial Aggrandizement

At the same time that they demonstrate disrespect for Congress, administrative law clear statement rules represent a shift in power from

232. David B. Spence, *Naïve Administrative Law: Complexity, Delegation and Climate Policy*, 39 YALE J. REG. 964, 1001 (2022). *See also* Richardson, supra note 127, at 204 ("[W]hile it might be ideal" if Congress authorized "every policy measure . . . with specific new legislation, that is difficult in normal times and likely impossible in a crisis.").
233. Berger, *supra* note 47, at 557; Deacon & Litman, *supra* note 35, at 1084.
234. Deacon & Litman, *supra* note 35, at 1063; Richardson, *supra* note 127, at 201.
235. Baumann, *supra* note 194, at 471, 493, 498.
236. Krishnakumar, *supra* note 15, at 883.
237. Baumann, *supra* note 194, at 468–69; Mank, *supra* note 14, at 565.
238. Deacon & Litman, *supra* note 35, at 1084; Sohoni, *supra* note 55, at 286–87.

Congress and the executive branch to the judiciary. During the *Lochner* era, Professor James Landis "warned that the 'real difficulty' in statutory interpretation was that 'strong judges prefer to override the intent of the legislature in order to make law according to their own views.'"[239] That is exactly what has happened with the Supreme Court's creation and application of clear statement rules in administrative law.[240] The Court has substituted judicially selected extra-statutory norms for congressional policy as manifested in the text and purpose of regulatory statutes.[241] The Court has attempted to "elevate the judiciary as a nonpartisan and uninterested referee in separation-of-powers conflicts."[242] But the clear statement rules that it applies are not nonpartisan, and they are not uninterested.[243] In the end, they lead to the outcomes that the judges want to reach.[244] And that represents a judicial intrusion into legislative domain.[245]

In applying the federalism clear statement rule, the Court has elevated state interests over the national interests protected by federal regulatory statutes.[246] And it has accomplished this policy preference by relying on a federalism norm that is untethered to the text of the Constitution.[247] Unconstrained by the Constitution or any statute, federal judges substitute their policy judgments on issues touching on federalism for those of the agencies and Congress.[248]

The Roberts Court's aggressive employment of the major questions clear statement rule likewise elevates the Court's policy preferences

239. Ross, *supra* note 27, at 562 (quoting James M. Landis, *A Note on "Statutory Interpretation*," 43 HARV. L. REV. 866, 890 (1930)). See also Mank, *supra* note 14, at 545 (noting that legal realists accused judges who employed normative canons of using them "as post hoc rationalizations disguising the true reasons for their decisions").
240. Deacon & Litman, *supra* note 35, at 1015; Mank, *supra* note 14, at 548; Ross, supra note 27, at 562.
241. Bamberger, *supra* note 14, at 68; Berger, *supra* note 47, at 555; Krishnakumar, *supra* note 15, at 837; Manning, *supra* note 36, at 402; Schacter, *supra* note 195, at 600.
242. Baumann, *supra* note 194, at 491.
243. *See, e.g.*, Beermann, *supra* note 118, at 1271 (finding that "the current Court's actions coincide with important elements of Republican party political positions"); Deacon & Litman, *supra* note 35, at 1067 (finding that in the vast majority of cases in which the Court invoked the major questions doctrine, the agency adopted a position that was opposed by Republicans while the cases in which the Supreme Court did not identify major questions were cases in which the agency's policy was supported by Republicans).
244. Bowie & Renan, *supra* note 123, at 2085.
245. Walters, *supra* note 57, at 526 (Part IV(A)(2)).
246. Mank, *supra* note 14, at 609–10; Ross, *supra* note 27, at 564.
247. Manning, *supra* note 47, at 2005; Sohoni, *supra* note 55, at 315.
248. Lisa Heinzerling, *The Power Canons*, 58 WILLIAM & MARY L. REV. 1933, 1987, 1999 (2017).

over those of the Congress and the executive branch.[249] Framed as neutral judicial "skepticism" of agency exercises of broadly delegated power, the major questions clear statement rule is an exercise of judicial power because it puts the courts, rather than agencies, in charge of interpreting statutes in important cases[250] and because it prevents Congress from employing broad language to delegate authority to agencies to allow them to address questions of vast economic and political significance that arise in the future.[251] The Constitution does not assign to the Supreme Court the role of disciplinarian to bring the other co-equal branches "back into line"[252] when it perceives that they have strayed beyond their assigned roles.[253]

In any event, it is by no means clear that norm-applying courts are better at interpretating statutes than agencies.[254] Agencies have expertise not only in the subject matter of their regulations but also in the history their statutes, the purpose and design of those statutes, and the expectations of the political branches with respect to the implementation of those statutes.[255] Given the balancing of values that statutory interpretation often requires, it is by no means clear that judges are more qualified to discern the meaning of statutory language than the agency attorneys who work with their authorizing statutes on a day-to-day basis.[256]

Supporters of clear statement rules deny that they represent a judicial power grab. Professor Ernest Young argues that judicial application of normative clear statement rules is a good thing because it

249. Baumann, *supra* note 194, at 471–72, 496; Berger, *supra* note 47, at 485; Bowie & Renan, *supra* note 123, at 2033–34; Deacon & Litman, *supra* note 35, at 1065; Driesen, *supra* note 20, at 2; Eskridge & Ferejohn, *supra* note 66, at 1906 (referring to the major questions clear statement rule as "judicial lawmaking on steroids"); Marla D. Tortorice, *Nondelegation and the Major Questions Doctrine: Displacing Interpretive Power*, 67 BUFF. L. REV. 1075, 1130 (2019).
250. McGinnis & Yang, *supra* note 60, at 431.
251. Biden v. Nebraska, 600 U.S. 477, 543 (2023) (Kagan, J., dissenting) ("The new major questions doctrine works not to better understand—but instead to trump—the scope of a legislative delegation."); McGarity, *supra* note 58, at 51; Monast, *supra* note 57, at 489; Peter Strauss, *How the Administrative State Got to This Challenging Place*, DAEDALUS, Summer 2021, at 17; Tortorice, *supra* note 249, at 1077.
252. McGinnis & Yang, *supra* note 60, at 401.
253. Beermann, *supra* note 118, at 1272. Professors Nikolas Bowie & Daphna Renan argue that Congress and the president are also capable of drawing the lines separating governmental powers. It is, therefore, wholly inappropriate for the courts to step in when Congress and the President have agreed on the appropriate language in legislation signed by the President. Bowie & Renan, *supra* note 123, at 2024.
254. Bamberger, *supra* note 14, at 68; Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 7 (2014).
255. Levin, *supra* note 100, at 57; Mank, supra note 14, at 611.
256. Coenen & Davis, *supra* note 171, at 808; Emerson, *supra* note 57, at 2049; McGarity, *supra* note 58, at 9–10; Nathan Richardson, *Keeping Big Cases from Making Bad Law: The Resurgent "Major Questions" Doctrine*, 49 CONN. L. REV. 355, 393–394 (2016).

advances otherwise underenforced constitutional values like federalism and separation of powers.[257] He understands that judges applying clear statement rules are not attempting to function as agents of Congress.[258] They are instead "using the enterprise of statutory construction as a means of furthering values external to the legislative process itself."[259] But that is appropriate when those values are derived from the Constitution.[260] The value promoted by a clear statement rule (or what Young calls a "resistance canon") is the value embodied in "whatever constitutional provision creates the underlying constitutional 'doubt' that is being avoided" by applying the canon.[261] The problem with this argument is the previously discussed reality that the federalism, separation of powers, and private ordering norms upon which the administrative law clear statement rules are based are mirages that are not derived from any "constitutional provision." They mean what the judges applying them want them to mean.[262] The "constitutional values" inherent in those norms are not easily ascertainable and are therefore not easily applied in any objective way to particular questions of statutory interpretation.

Perhaps the strongest response to the judicial aggrandizement argument is the fact that Congress may always respond to a judicial invalidation of an agency's interpretation of its authorizing statute with legislation clearly authorizing the agency to take that action.[263] The clear statement rules just create a desirable pause and an incentive for Congress make the effort to speak clearly when it addresses issues that implicate the federalism, separation of powers, and private ordering norms.[264] And these "resistance norms" are "not only perfectly legitimate, but a useful mechanism for realizing important constitutional values."[265] Rather that representing a judicial power grab, the clear statement rules serve the "fundamentally conservative function of maintaining the traditional balance of government in an evolving institutional context."[266]

257. Young, *supra* note 43, at 1604.
258. *Id.* at 1586.
259. *Id.* at 1587.
260. *Id.* at 1587.
261. *Id.* at 1593.
262. *See supra* Part IV(A).
263. Capozzi III, *supra* note 66, at 235; Young, *supra* note 43, at 1552; *Clear Statement Rules, Federalism, and Congressional Regulation of States*, 107 HARV. L. REV. 1959, 1967-68 (1994).
264. Young, *supra* note 43, at 1597.
265. *Id.* at 1585.
266. *Id.* at 1613.

This argument, of course, ignores the difficulty of enacting legislation in a divided government.[267] Using game theory, Professor Jerry Mashaw shows how difficult it is to enact legislation in response to a court's misinterpretation of its enabling statute in ordinary times.[268] The issues that trigger the clear statement rules in administrative law tend to be "highly polarized by ideological and partisan divisions."[269] Consequently, in the current era of divided government, the prospect of overturning a court's aggressive application of a clear statement rule to trim back an agency's authority is a phantom, and the justices know that.[270] Moreover, even if a sufficiently large coalition of Republicans and Democrats could be assembled to pass legislation, the drafters would have to come up with the magic words that convey their intent clearly enough to persuade a skeptical court when the agency interprets those words.[271] In the real world, the clear statement rules allow the courts to achieve the same result as declaring a statute unconstitutional under the nondelegation doctrine without the political and scholarly blowback that such a declaration would precipitate.[272]

Supporters of clear statement rules are not troubled by the difficulty of passing clarifying legislation in response to judicial rejection of agency interpretations. Justice Gorsuch acknowledges that "lawmaking under our constitution can be difficult," but he argues that the authors of the Constitution made it difficult to fend off "a serious threat to individual liberty."[273] Critics of clear statement rules

267. Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S. CAL. L. REV. 205, 210 (2013) ("congressional overrides of Supreme Court statutory interpretation precedents have become exceedingly rare").
268 JERRY MASHAW, GREED, CHAOS, AND GOVERNANCE 105 (1997). *See also* Bamberger, *supra* note 14, at 92 (stressing "the reality that 'only occasionally and adventitiously will Congress respond to judicial statutory interpretations at odds with original intent or purpose,' and only then if the issue implicates the interests of highly organized and influential groups"); Mank, *supra* note 14, at 565 ("powerful interest groups, a presidential veto, or sheer inertia in Congress may obstruct override efforts"); Schacter, *supra* note 195, at 605 ("legislators have a strong incentive to avoid taking up a question that has been provisionally settled by a court and have a little incentive to spend precious political capital vindicating the claimed 'real' intention of the prior legislature that enacted the law"); Sunstein, *supra* note 38, at 339 ("in most cases, congressional inertia, and multiple demands on Congress's time, will mean that the results ordained by the cannon will prevail for the foreseeable future").
269. Levin, *supra* note 100, at 52.
270. Berger, *supra* note 47, at 551; Deacon & Litman, *supra* note 35, at 1085; Frost, *supra* note 21, at 928; Levin, *supra* note 100, at 6, 50; Adam Liptak, *Gridlock in Congress Has Amplified the Power of the Supreme Court*, N.Y. TIMES (July 2, 2022), https://www.nytimes.com/2022/07/02/us/politics/supreme-court-congress.html [On File with the Columbia Journal of Environmental Law] (quoting Richard Lazarus of Harvard Law School).
271. Deacon & Litman, *supra* note 35, at 1086; Schacter, *supra* note 195, at 606.
272. Sohoni, *supra* note 55, at 295.
273. West Virginia v. EPA, 142 S. Ct. 2587, 2618 (2022) (Gorsuch, J., concurring).

respond that an amorphous constitution-based concern for liberty does not justify departures from the best reading of the statutory text and the statute's overall purposes.[274]

F. The High Bar for Clarity

In practice, the courts have erected a high bar for clarity in statutes subject to clear statement rules.[275] If the grant of power in the agency's enabling act is not pellucidly clear in authorizing the particular agency action at issue, a court is highly likely to set aside the agency action and remand the issue to Congress for further clarification.[276] In applying the federalism clear statement rule in *Gregory v. Ashcroft*, for example, the Supreme Court said that the agency's authority must be "unmistakably clear in the language of the statute."[277] The Court held that the definition of "employee" in the Age Discrimination in Employment Act, which excluded all elected and most high-ranking state officials, including "appointees on the policymaking level," did not clearly include appointed state supreme court justices. The Court found that judges were "certainly in a position requiring the exercise of discretion concerning issues of public importance, and therefore might be said to be 'on the policymaking level.'"[278] Apparently, if it "might be said" that the statute has one meaning, that is sufficient to undermine the clarity with which the statute expresses the meaning adopted by the agency.[279] Although there are cases in which courts have found that the statutory language was sufficiently clear to authorize the agency action,[280] they are few and far between.

274. Manning, *supra* note 36, at 418, n. 101.
275. Capozzi III, *supra* note 66, at 225; Krishnakumar, *supra* note 15, at 839; Schacter, *supra* note 195, at 646.
276. Heinzerling, *supra* note 248, at 1948.
277. Gregory v. Ashcroft, 501 U.S. 452, 460 (1991).
278. *Id*. at 453.
279. By contrast, the court in N.C. Coastal Fisheries Reform Grp. v. Capt. Gaston LLC, 76 F.4th 291 (2022) held that a "plausible textual basis" for the agency's exercise of power was an insufficiently clear authorization under the major questions clear statement rule.
280. Kovac v. Wray, 2023 WL 2430147, at *5 (N.D. Tex. 2023) (finding clear legislative authority for the Transportation Security Administration's terrorist watchlist in broad language authorizing the Administrator and the Director of the Federal Bureau of Investigation jointly to "assess current and potential threats to the domestic air transportation system" and to "decide on and carry out the most effective method for continuous analysis and monitoring of [those] security threats"); Nevada v. U.S. Dep't of Lab., 275 F. Supp. 3d 795, 803 (E.D. Tex. 2017) (finding federalism clear statement rule inapplicable because the statute is "unmistakably clear").

1. Justice Gorsuch's Factors

Although Judge Frank Easterbrook has concluded that "[t]here is no metric for clarity" in the application of clear statement rules,[281] Justice Gorsuch has suggested factors for courts to consider.[282] With one possible exception, those factors offer scant help in the real world or unduly constrain agency action. One test (the statute's "place in the overall statutory scheme")[283] is too vague to be of any real assistance, as is the "elephants in mouseholes" metaphor that it employs.[284] Two of the factors ("the age and focus of the statute the agency invokes in relation to the problem the agency seeks to address" and "the agency's past interpretations of the relevant statute")[285] come close to imposing an unwarranted expiration date on regulatory statutes that prevents an agency from innovatively addressing newly emerging problems or changing its mind.[286] The fourth test (whether "there is a mismatch between an agency's challenged action and its congressionally assigned mission and expertise")[287] bears no particular relation to statutory clarity.[288] It does, however, acknowledge that agencies do have missions, and it reflects the common-sense proposition that Congress has probably not assigned to an agency a task that is inconsistent with its mission or beyond its expertise.

2. Broad Language as Unclear Language

In determining clarity, courts have frequently conflated broad language with unclear language.[289] Justice Kagan has on more than one occasion called this to the attention of the Supreme Court. Noting that Congress used the broad word "system" in the Clean Air Act to empower EPA to employ innovative approaches to reducing pollution from existing power plants, Justice Kagan insisted in her dissent in *West Virginia v. EPA* that "a broad term is not the same thing as a

281. Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J. L. & PUB. POLICY 59, 62 (1988).
282. West Virginia v. EPA, 142 S. Ct. 2587, 2622–24 (2022) (Gorsuch, J., concurring).
283. *Id.* at 2622–23.
284. McGarity, *supra* note 58, at 21.
285. West Virginia v. EPA, 142 S. Ct. at 2623 (Gorsuch, J., concurring).
286. McGarity, *supra* note 58, at 21.
287. West Virginia v. EPA, 142 S. Ct. at 2623 (Gorsuch, J., concurring).
288. McGarity, *supra* note 58, at 21–22.
289. West Virginia v. EPA, 142 S. Ct. at 2622–24 (Gorsuch, J., concurring) (suggesting that "broad" language is not sufficiently clear to support an agency's authorization claim); Berger, *supra* note 47, at 503.

'vague' one."[290] Similarly, in her concurring opinion in *Sackett*, Justice Kagan found no ambiguity in the broad term "adjacent," which meant "neighboring, whether or not touching," and she accused the majority of using the property rights clear statement rule "not to resolve ambiguity or clarify vagueness, but instead to 'correct' breadth."[291] In a remarkably explicit display of judicial candor, Justice Kagan ventured that the majority's "pop-up clear-statement rule is explicable only as a reflexive response to Congress's enactment of an ambitious scheme of environmental regulation."[292]

As Professor Eric Berger appropriately notes, "[t]aking statutory texts seriously means reading narrow statutes narrowly and broad statutes broadly."[293] But it is becoming increasingly clear that the current Supreme Court majority is not so much concerned with clarity as it is with preventing agencies from implementing broad delegations of power to achieve results that a majority of the justices disfavor.[294] The predictable result will be fewer federal public protections coming from Congress.[295]

3. The Clarity Barrier to Innovation

The Supreme Court's general unwillingness to find that broad statutory grants of authority are clear grants of authority operates as a barrier to innovation in federal regulatory programs when challengers to innovations successfully invoke clear statement rules.[296] When changed circumstances arise that call for innovative federal action, agencies naturally seek authority in broad statutory language, and the Supreme Court has in the past accepted (or at least deferred to) agency claims that Congress' use of broad authorizing language was precisely for the purpose of empowering agencies to innovate in response to change. In holding that the Clean Air Act's use of the broad term "pollutants" authorized EPA to regulate greenhouse gases, the Court in *Massachusetts v. EPA* noted that Congress "might not have appreciated the possibility that burning fossil fuels could lead to global

290. West Virginia v. EPA, 142 S. Ct. at 2630 (Kagan, J. dissenting).
291. Sackett v. EPA, 598 U.S. 651, 713 (2023) (Kagan, J., concurring).
292. *Id.*
293. Berger, *supra* note 47, at 551.
294. *See* Deacon & Litman, *supra* note 35, at 1012 ("Even broadly worded, otherwise unambiguous statutes may not be good enough when it comes to policies the Court deems 'major'").
295. Richardson, *supra* note 127, at 202.
296. Beermann, *supra* note 118, at 1272 (characterizing the major questions doctrine as "a new judicial creation designed to suppress regulatory innovation"); Deacon & Litman, *supra* note 35, at 10.

warming," but Congress "did understand that without regulatory flexibility, changing circumstances and scientific developments would soon render the [statute] obsolete."[297] Congress' use of "broad language . . . reflect[ed] an intentional effort to confer the flexibility necessary to forestall such obsolescence."[298] Had the court applied a clear statement rule to the statute, it would probably have concluded that the broad statutory term "pollutant" did not expressly authorize EPA to regulate greenhouse gases.[299]

The Court's recent major questions opinions have expressed reluctance to allow agencies to rely on broad statutory grants of authority to address changing circumstances by exercising power they have not exercised in the past.[300] In *Biden v. Nebraska*, for example, the Supreme Court invoked the major questions clear statement rule to support its conclusion that Congress had not authorized the Department of Education to cancel up to $10,000 in student loan debt per person (for a total of around $430 billion in cancellations) under the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act).[301] The statute authorized the Secretary of Education to "waive or modify" any loan repayment requirement as the Secretary "deem[ed] necessary in connection with a . . . national emergency."[302] During the COVID-19 national emergency, the Secretary of Education issued the loan cancellation, arguing that it constituted a waiver and modification of the various loan repayment requirements in Title IV of the Education Act.[303] In an opinion written by Chief Justice Roberts, the Supreme Court (6-3) disagreed. Applying the major questions clear statement rule to a question with "staggering" economic and political significance,[304] the Court emphasized that the Secretary had "never previously claimed powers of this magnitude" under the HEROES Act.[305] Of course, no Secretary had faced the economic

297. Massachusetts v. EPA, 549 U.S. 497, 532 (2007).
298. *Id. See also* Nat'l Broad., Inc. v. United States, 319 U.S. 190, 219 (1943) (finding that Congress properly delegated to the Federal Communications Commission broad authority to regulate in the "fluid and dynamic" area of telecommunications regulation).
299. Levin, *supra* note 100, at 34–35; Sohoni, *supra* note 55, at 279–80.
300. Beermann, *supra* note 118, at 1268; McGarity, *supra* note 58, at 36; Sunstein, *supra* note 90, at 493. *But see* Biden v. Missouri, 595 U.S. 87, 94 (2022) (Court recognizes the ability of Congress to use broad language to allow agencies to react to unforeseen developments in upholding the Department of Health and Human Services' vaccine mandate for institutions receiving Medicare and Medicaid funds).
301. Biden v. Nebraska, 600 U.S. 477 (2023).
302. 20 U.S.C. § 1098bb(a)(1).
303. Biden v. Nebraska, 600 U.S. at 493.
304. *Id.* at 502.
305. *Id.* at 500.

disruption caused by a worldwide pandemic during the relatively brief lifetime of the program.

In a dissent joined by Justices Sotomayor and Jackson, Justice Kagan argued that the statute provided "broad authority to give emergency relief to student-loan borrowers, including by altering usual discharge rules," and the Department's action "fits comfortably within that delegation."[306] Justice Kagan noted that Congress "delegates to agencies often and broadly," and it "usually does so for sound reasons," one of which is "[b]ecause times and circumstances change, and agencies are better able to keep up and respond."[307] She observed that since it is "hard to identify and enumerate every possible application of a statute to every possible condition years in the future, Congress delegates broadly."[308] In applying the major questions clear statement rule to such delegations, the Court "won't let it reap the benefits of that choice."[309]

Congress lacks a crystal ball through which it can foresee every possible permutation of the issues that it is addressing in a bill, much less every possible strategy regulated entities might employ to evade subsequently promulgated implementing regulations. [310] Agencies, by contrast, can act with alacrity to changing circumstances, and they have the expertise to adapt to change with greater dexterity than Congress.[311] Indeed, the ability to adapt to changing conditions is one of the reasons that Congress creates agencies, and it is a powerful rational underlying the legitimacy of the regulatory state.[312] Consequently, Congress frequently employs broad language "to empower agencies to address not only current but also future problems."[313] Clear statement rules therefore create a clarity barrier to innovative efforts by agencies to address unanticipated problems, changing conditions, and evasive maneuvers by regulated entities.[314] Importantly, this barrier can be erected by any reviewing court that the opponents of innovative regulatory action call on for assistance.[315] Clear

306. *Id.* at 522 (Kagan, J., dissenting).
307. *Id.* at 543 (Kagan, J., dissenting).
308. *Id.*
309. *Biden v. Nebraska*, 600 U.S. at 543.
310. Heinzerling, *supra* note 248, at 1948; Richardson, *supra* note 127, at 204.
311. Berger, *supra* note 47, at 557; Deacon & Litman, *supra* note 35, at 1080; Freeman & Spence, *supra* note 254, at 81.
312. Deacon & Litman, *supra* note 35, at 1093.
313. Berger, *supra* note 47, at 513.
314. Deacon & Litman, *supra* note 35, at 1086; Heinzerling, *supra* note 248, at 1917, 1991; Richardson, *supra* note 127, at 201; Chad Squitieri, *Who Decides Majorness*, 44 HARV. J. L. & PUB. POLICY 463, 503 (2021).
315. Coenen & Davis, *supra* note 171, at 804–05; Richardson, *supra* note 127, at 201.

statement rules thus guarantee statutory obsolescence.[316] And the likelihood that a court will disallow Congress's use of broad language to address changing circumstances will discourage agencies from innovating in the future.[317]

In the end, the clarity standard is sufficiently malleable that judges who are so inclined can find insufficient clarity in almost any authorizing statute. This, of course, creates a great deal of uncertainty for regulatory agencies as they decide whether to undertake actions based on statutory authority that its arguably unclear.[318] Professor Ryan Doerfler notes that "[i]f 'clarity' judgments are mere reflections of partisan attitudes, . . . adherence to 'clear' text doctrines undermines the rule of law."[319]

G. Assault on the Administrative State

The clear statement rules in administrative law reflect a particular normative view of the role of government in society. Frequently framed as a quasi-constitutional concern for individual liberty, that view is one of limited government–Congress should not be empowering federal agencies to interfere with private ownership and distribution of resources.[320] The prominence of that view among the federal judiciary is the product of a longstanding project of conservative activists, think tanks, and jurists to roll back the administrative state.[321] It is no secret that in recent years presidents have selected lawyers to be judges precisely because of their political and ideological views.[322] Thirteen of the past eighteen Supreme Court Justices were appointed by Republican presidents,[323] and they were chosen because of their views on issues like federalism, nondelegation, and private property

316. Richardson, *supra* note 127, at 198.
317. Heinzerling, *supra* note 248, at 2004; Monast, *supra* note 57, at 476, 478.
318. Ryan D. Doerfler, *How Clear is "Clear"?,* 109 VA. L. REV. 651, 669 (2023); Heinzerling, *supra* note 248, at 2004; Sohoni, *supra* note 55, at 266.
319. Doerfler, *supra* note 318, at 657.
320. Craig Green, *Deconstructing the Administrative State: Chevron Debates and the Transformation of Constitutional Politics*, 101 B. U. L. REV. 619, 682 (2021) ("When conservatives speak of 'structure,' they are talking about limiting the power of regulatory agencies"); Justin Walker, *The Kavanaugh Court and the Schechter-to-Chevron Spectrum: How the New Supreme Court Will Make the Administrative State More Democratically Accountable*, 95 IND. L. J. 923 (2020) (urging the Supreme Court to overrule the Chevron doctrine, restore the nondelegation doctrine, and eliminate independent regulatory agencies).
321. Berger, *supra* note 47, at 560–61.
322. Grove, *supra* note 175, at 268.
323. Green, *supra* note 320, at 681–82.

rights.[324] The current majority on the Roberts Court has made no bones about its contempt for federal agencies, blaming them for "poking into every nook and cranny of daily life,"[325] "laying claim to extravagant statutory power over the national economy,"[326] and constantly seeking "to exploit some gap, ambiguity, or doubtful expression in Congress's statutes to assume responsibilities far beyond its initial assignment."[327] It is, therefore, not surprising to see scholars refer to "the Roberts Court's assault on the modern administrative state through its new super-strong clear statement rule[s]."[328]

1. Trim the Power of Federal Agencies

Clear statement rules create a presumption against agency exercises of power that run counter to the norms underlying those rules.[329] They, therefore, make it far more difficult for agencies to achieve their statutory missions.[330] Indeed, they can have an *in terrorem* effect on agencies, discouraging them from using the authority that Congress has given them with broad language that a reviewing court might decide is insufficiently clear.[331] While this development is lamented by those who favor strong protective federal regulation, it is welcomed by conservative activists and Republican politicians.[332] Unable to persuade Congress to limit the reach of the administrative

324. Coral Davenport, *Republican Drive to Tilt the Courts Against Climate Action Reaches a Crucial Moment*, N.Y. TIMES (June 19, 2022), https://www.nytimes.com/2022/06/19/climate/supreme-court-climate-epa.html [On File with the Columbia Journal of Environmental Law] (quoting White House Counsel, Don McGahn, who was responsible for judicial selection during the Trump administration) ("the judicial selection and the deregulatory efforts are really the flip side of the same coin").
325. City of Arlington v. FCC, 569 U.S. 290, 315 (2013). See also *id*., at 351 (warning that "the danger posed by the growing power of the administrative state cannot be dismissed").
326. Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014).
327. Nat'l Fed'n of Indep. Bus. v. OSHA, 142 S. Ct. 661, 669 (2022).
328. Eskridge & Ferejohn, *supra* note 66. See also Deacon & Litman, *supra* note 35, at 1011 ("the major questions doctrine has emerged as a powerful weapon wielded against the administrative state").
329. Berger, *supra* note 47, at 484, 544 (the new major questions doctrine "now functions as a barrier to administrative action even within agencies' core areas"); McGarity, *supra* note 58, at 10–16; Monast, *supra* note 57, at 474; Richardson, *supra* note 127, at 177.
330. Deacon & Litman, *supra* note 35, at 1012, 1083; Emerson, *supra* note 57, at 2075–76; Levin, *supra* note 100, at 55; McGarity, *supra* note 58, at 22–23; Tortorice, *supra* note 249, at 1077.
331. Levin, *supra* note 100, at 56; Sohoni, *supra* note 55, at 266.
332. Berger, *supra* note 47, at 558–60; Alex Guillen, *Impact of Supreme Court's Climate Ruling Spreads*, POLITICO (July 20, 2022), https://www.politico.com/news/2022/07/20/chill-from-scotus-climate-ruling-hits-wide-range-of-biden-actions-00045920 [On File with the Columbia Journal of Environmental Law] (opponents of regulation say "the court has opened the door to a broad rollback of the kinds of agency actions that judges have tolerated for decades").

state, they have accomplished that result through the vehicle of judicial review.[333]

One of the primary reasons that Congress makes broad delegations of regulatory authority to executive branch agencies is that agencies possess the necessary expertise to address the highly complex scientific, technical, and economic issues that must be resolved to accomplish important statutory goals.[334] Yet the administrative law clear statement rules reduce the power of agencies to address issues, like protecting workers from COVID-19 infections and reducing emissions from power plants, that beg for agency expertise.[335] Referring to the major questions clear statement rule, Professor Beerman argues that clear statement rules prevent agency action "when agencies are needed most, i.e., when expertise and insulation from politics contribute to the value of agency action."[336]

2. Facilitate Deregulation

Clear statement rules facilitate efforts by presidential administrations bent on deregulation to repeal existing regulations because they do not appear to be available to overturn deregulatory actions or decisions not to regulate.[337] An agency attempting to rescind a regulation issued by a previous administration can justify that action by locating it within the scope of one of the clear statement rules and arguing that the statutory language upon which the previous administration relied did not clearly authorize the action.[338] If the agency never had the power to take the action in the first place, it should not be difficult to justify repealing it without having to undertake the extensive factual and policy analysis required under the Administrative Procedure Act's "arbitrary and capricious" test.[339] Clear statement rules are, therefore, inconsistent with the Administrative Procedure

333. Beermann, *supra* note 118, at 1282; Berger, *supra* note 47, at 548; Heinzerling, *supra* note 248, at 1938–39; Jonathan Bernstein, *Obstruction Is Still the Main Republican Strategy*, BLOOMBERG NEWS (Mar. 30, 2021), https://www.bloomberg.com/opinion/articles/2021-03-30/gridlock-is-still-the-main-republican-political-strategy [On File with the Columbia Journal of Environmental Law]; Alex Garlick, *A Method to the Gridlock Madness*, U.S. NEWS & WORLD REPORT (Dec. 2, 2014), https://www.usnews.com/opinion/articles/2014/12/02/republicans-use-gridlock-because-it-works [On File with the Columbia Journal of Environmental Law].
334. Biden v. Nebraska, 600 U.S. 477, 544 (2023) (Kagan, J., dissenting).
335. Berger, *supra* note 47, at 543.
336. Beermann, *supra* note 118, at 1310.
337. Heinzerling, *supra* note 170, at 386; Heinzerling, *supra* note 248, at 1938; Levin, *supra* note 100, at 58; Walters, *supra* note 90, at 458.
338. McGarity, *supra* note 58, at 47–48.
339. Motor Vehicle Mfrs. Assn. of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

Act's symmetrical treatment of agency actions and failures to act.[340] In crafting the clear statement rules for the administrative state, the Court seems overly concerned with over-regulation and not at all concerned with under-regulation. [341]

3. Privilege Private Ordering

Clear statement rules in administrative law are designed to limit the power of the federal government to address critical questions of social policy in much the same way that the Supreme Court invoked the Constitution to limit the power of government in the discredited *Lochner* years.[342] During that period, the private ordering norm reigned supreme as the courts saw themselves as bulwarks against government interventions into private economic and social arrangements.[343] More recently, the Court's major questions and federalism clear statement rules have likewise had the effect of privileging private ordering. [344] And protecting private ordering as reflected in common law property rights from government interference is the avowed goal of the emerging property rights clear statement rule.[345] With the advent of clear statement rules in administrative law, courts are free to invalidate agency intrusions into private sector arrangements by applying clear statement rules to broad statutory authorizations.[346]

H. Harm to the Public

The Supreme Court's aggressive application of clear statement rules has predictably inspired a large outpouring of challenges to a wide variety of agency actions, alleging that they were not clearly authorized by enabling statutes.[347] The malleability of threshold requirements like vast economic and political significance, the balance between federal and state power, and the power of the government over private property ensures that almost any challenger to government

340. 5 U.S.C. § 706; Walters, *supra* note 90, at 461.
341. Levin, *supra* note 100, at 59.
342. Eskridge & Frickey, *supra* note 19, at 598; Sunstein, *supra* note 22, at 409–10.
343. Heinzerling, *supra* note 99, at 1980; Sunstein, *supra* note 22, at 408.
344. Eskridge & Frickey, *supra* note 19, at 640; Schacter, *supra* note 194, at 610, 637.
345. *See supra* Part IV(A)(3).
346. Berger, *supra* note 47, at 547.
347. McGarity, *supra* note 58, at 54.

regulatory action will allege that the action was not specifically authorized by clear language in the agency's enabling act.[348]

Defenders of clear statement rules argue that they merely "compel Congress to decide explicitly whether to sacrifice a specific constitutional value in its pursuit of a regulatory objective."[349] As discussed above, however, it is doubtful that Congress will routinely refresh older statutes or enact new statutes to address newly emerging problems.[350] The gridlocked state of Congress and the ability of a minority of Senators to block legislation by invoking the threat of a filibuster ensure against rapid congressional responses to aggressive judicial applications of clear statement rules. Referring to recent cases in which the Supreme Court has invoked the major questions clear statement rule to set aside major initiatives by Democratic presidents, Professors McGinnis & Yang note that "Congress has not yet authorized OSHA to address public health emergencies, CDC to create eviction moratoria, or EPA to regulate the power grid to change the mix of energy sources."[351] And it is not likely to so long as there are enough senators to defeat a cloture vote.

The Court's insistence on clear language betrays a corresponding lack of interest in the overall purpose of the statutes it is interpreting. Statutes like the Clean Air Act, the Clean Water Act, the Public Health Service Act, and the Occupational Safety and Health Act were enacted to protect public health, worker health and safety, and the environment. They represented conclusions by Congress that abuses of private property rights were causing serious social problems, that state action alone was insufficient to address those problems, and that expert executive branch agencies implementing broad statutory authorizations were necessary to prevent those problems from recurring. The clear statement rules applicable to administrative law implement unmoored values that run in precisely the opposite direction of values embodied in those statutes. The limits that clear statement rules place on the implementing agencies' ability to advance their statutory missions in response to newly arising threats and their potential to roll back existing protections are depriving the beneficiaries of regulatory

348. Capozzi, *supra* note 66, at 225; Alex Guillen, *Impact of Supreme Court's Climate Ruling Spreads*, POLITICO (July 20, 2022), https://www.politico.com/news/2022/07/20/chill-from-scotus-climate-ruling-hits-wide-range-of-biden-actions-00045920 [On File with the Columbia Journal of Environmental Law].
349. Manning, *supra* note 36, at 402–03.
350. *See* text accompanying notes 266–71, *supra*; McGarity, *supra* note 58.
351. McGinnis & Yang, *supra* note 60, at 432.

programs of the protections that those statutes put into place.[352] The predictable results will be more deaths and injuries in the workplace, more illness in unprotected communities, shrinking wetlands, and a rapidly warming planet, all of which the Congresses that enacted the relevant statutes were trying to prevent.

I. Harm to the Courts

Constitutional scholars, members of Congress, and media commentators have all questioned the legitimacy of the current Supreme Court.[353] Critics of the Court have argued that President Trump appointed Neil Gorsuch to a seat that was "stolen" from President Obama by Senate Majority Leader Mitch McConnell.[354] They also charge that the confirmation of Justice Kavanaugh was rushed through despite charges that the Trump administration withheld critical information on Kavanaugh's time in the White House, that Congress failed adequately to investigate credible claims of sexual assault, and that Kavanaugh offered partisan testimony that demonstrated his lack of judicial temperament.[355] And Justice Barrett was appointed by a president two weeks before he failed to achieve a second term.[356] The Court's aggressive application of clear statement rules to prevent agencies from accomplishing their statutory missions has further undermined the Court's legitimacy.[357]

352. McGarity, *supra* note 58, at 54–56. *See* Beermann, *supra* note 118, at 1275 ("when the court uses its power to suppress innovative government action, it tends to exacerbate serious social problems in favor of those whose narrow interests are advanced by preserving the status quo"); Vivienne Pismarov, *The Elephant Named "Climate Change": Why the Major Questions Doctrine After Bostock Shouldn't Prohibit Extensive Climate Action Under the Clean Air Act*, 45 U. CAL. DAVIS L. REV. 35, 66 (2021) (the major questions doctrine "may halt environmental policy altogether"); Richard Lazarus, *The Supreme Court Just Upended Environmental Law at the Worst Possible Moment*, WASH. POST (June 30, 2022), https://www.washingtonpost.com/opinions/2022/06/30/supreme-court-just-upended-environmental-law-worst-possible-moment/ [On File with the Columbia Journal of Environmental Law] (upshot of the major questions doctrine is "the unraveling of the national government's ability to safeguard the public health and welfare just as the United States and all nations face the greatest environmental challenge of all: climate change").

353. Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2240 (2019).

354. Eskridge & Ferejohn, *supra* note 66, at 1960; Grove, *supra* note 353, at 2242.

355. Grove, *supra* note 353, at 2242.

356. Eskridge & Ferejohn, *supra* note 66, at 1960.

357. Berger, *supra* note 47, at 561; Ryan D. Doerfler, supra note 318, at 657; Eskridge & Ferejohn, *supra* note 66, at 1960; Levin, *supra* note 100, at 57–58; Michael A. Livermore & Daniel Richardson, *Administrative Law in an Era of Partisan Volatility*, 69 EMORY L. J. 1, 57 (2019).

It is no secret that public respect for the Supreme Court is declining.[358] In many people's minds, "the Court has become an institution whose primary role is to force a right-wing vision of American society on the rest of the country."[359] The Court's recent decisions preventing EPA from addressing emissions of greenhouse gases from power plants, OSHA from protecting essential workers from a devastating pandemic, and the COE from protecting millions of acres of precious wetlands will only exacerbate the disrespect that the erstwhile beneficiaries of those government actions have for the Court.[360] Despite the determined efforts of the current majority on the Court to disguise judicial activism as objective application of constitutional norms, the beneficiaries of regulatory programs know when the Court is elevating libertarian ideology over their interests.[361] And they are not going to be persuaded to accept that result by the assurances of the writers of the majority opinions that outcomes that run contrary to common understandings of the agencies' missions were necessitated by clear statement rules made up by judges appointed by presidents who were unsympathetic to those missions. In the eyes of those who suffer lost protections at the hands of the Court's unconvincing invocation of clear statement rules, the Court has lost its legitimacy. Professor Tara Leigh Grove observes, "When a government institution or organization lacks legitimacy, it may no longer be worthy of respect or obedience."[362]

V. ELUSIVE SOLUTIONS

This is the juncture at which the typical law review article provides an analysis of "solutions" to the problems it addresses or "suggestions

358. Jesse Wegman, *How to Teach Students About a Politicized Supreme Court*, N.Y. TIMES (Mar. 3, 2024), [On File with the Columbia Journal of Environmental Law], at SR 10; Daniel De Vise, *The American Public No Longer Believes the Supreme Court is Impartial*, THE HILL (Jan. 11, 2023), https://thehill.com/regulation/court-battles/3807849-the-american-public-no-longer-believes-the-supreme-court-is-impartial/ [On File with the Columbia Journal of Environmental Law]; *Public's Views of Supreme Court Turned More Negative Before News of Breyer's Retirement*, PEW RSCH. CTR. (Feb. 2, 2022), https://www.pewresearch.org/politics/2022/02/02/publics-views-of-supreme-court-turned-more-negative-before-news-of-breyers-retirement/ [https://perma.cc/52RJ-MG2W] (favorable ratings of Supreme Court declined from 69 percent in August 2019 to 54 percent in 2022, and unfavorable views increased from 30 percent to 44 percent).

359. Adam Serwer, *The Constitution Is Whatever the Right Wing Says It Is*, ATLANTIC (June 25, 2022), https://www.theatlantic.com/ideas/archive/2022/06/roe-overturned-supreme-court-samuel-alito-opinion/661386/ [https://perma.cc/97E9-Y2JH].

360. Berger, *supra* note 47, at 561–62; Deacon & Litman, *supra* note 35, at 1091.

361. *See* Levin, supra note 100, at 59 (expressing concern about "the Court's use of the major questions doctrine to 'weaponize' administrative law in the service of an ideological end").

362. Grove, *supra* note 353, at 2240.

for change." Scholars have offered some suggestions for limiting the Supreme Court's assault on the administrative state through the clear statement rules. Professor Bamberger urges the courts to work the clear statement rules into the traditional Step 2 *Chevron* analysis of ambiguous statutes in determining whether agency interpretations are reasonable.[363] That sensible suggestion is no longer viable now that the Court has overruled *Chevron*.

Professor Grove's solution is for the courts to stick to formalistic textualism, which is "a relatively rule-bound method that promises to better constrain judicial discretion and thus a judge's proclivity to rule in favor of the wishes of the political faction that propelled her into power."[364] In particular, formalistic textualism considers context, but only semantic context, not social or policy context, and it "downplays the practical consequences of a decision."[365] While that suggestion will no doubt resonate with the Court's textualists, it is unlikely to persuade them to relinquish the power to rein in administrative agencies they have so enthusiastically assumed. A purely textualist solution will not allow the courts to consider the purpose of the statutes they are interpreting, which in many cases will run counter to the values the Court has adopted in its clear statement rules.

Members of Congress who support the efforts of regulatory agencies to address current crises with innovative interpretations of existing statutes know that "judicial policymaking through the guise of statutory interpretation is illegitimate."[366] They see the Court's aggressive use of clear statement rules to overturn protective agency actions as "an instrument for imposing limits on regulation that cannot be imposed legislatively."[367] Rather than obediently responding to judicial invitations to speak more clearly, they may elect to limit the power of the judges to set aside agency interpretations with which they disagree.

Congress could pass legislation aimed at decreasing the occasions where courts invoke clear statement rules to invalidate agency action. It could, for example, amend the judicial review language of section 706 of the Administrative Procedure Act to require courts to defer to reasonable agency interpretations of their enabling acts. While such legislation is unlikely in a time of partisan gridlock, it might be feasible at some future time when proponents of strong regulatory

363. Bamberger, *supra* note 14, at 68.
364. Grove, *supra* note 175, at 269, 298.
365. Grove, *supra* note 175, at 269.
366. Rodriguez, *supra* note 18, at 744.
367. Spence, *supra* note 232, at 1011.

protections are in a position to enact it. However, it is not certain that the Supreme Court would pay attention to even that powerful signal.

Congress could, of course, enact legislation expanding the court membership, thereby empowering the sitting president to appoint justices less inclined toward judicial aggrandizement. However, such controversial legislation is likewise highly unlikely in a Congress that has great difficulty passing legislation to keep the federal government funded. And it would only weaken the legitimacy of the Court in the eyes of conservative Court observers.[368]

VI. CONCLUSION

There may be no magic bullet solutions to the courts' application of clear statement rules to important assertions of federal authority. This Article has demonstrated that the clear statement rules applicable to administrative law are built upon normative mirages and are eminently manipulable, giving federal judges enormous discretion to set aside a wide variety of agency interpretations of enabling statutes. In the theoretical world, they are inconsistent with textualism. In the policymaking realm, they diminish the power of Congress and the president and elevate the judiciary. The high bar for clarity that the Supreme Court has erected for the clear statement rules biases them against federal regulation.[369] As a result, federal agencies are failing to deliver the protections promised in federal legislation.

Ultimately, the courts' aggressive application of clear statement rules to undo important agency regulatory initiatives will undermine the legitimacy of judicial review. Justice Alito warns that people "cross an important line when they say that the Court is acting in an illegitimate way."[370] However, the Court itself crossed an important line when it attempted to disguise in unmoored clear statement rules an agenda that includes weakening the ability of regulatory agencies to provide the protections that Congress intended for public health, worker safety, consumer welfare, and the environment. It may be that the only way for the Court to restore the legitimacy of judicial review is for the justices to approach the task of statutory interpretation with

368. Grove, *supra* note 353, at 2274.
369. Heinzerling, *supra* note 248, at 1958 (referring to "the Chief Justice's evident desire to trim the power of administrative agencies"); McGarity, *supra* note 58, at 22–23.
370. Ann Marimow, *Justice Alito Says Leak of Abortion Opinion Made Majority "Targets for Assassination*," WASH. POST (Oct. 25, 2022), https://www.washingtonpost.com/politics/2022/10/25/justice-alito-says-leaked-abortion-opinion-made-majority-targets-assassination/ [On File with the Columbia Journal of Environmental Law].

greater humility and less enthusiasm for advancing a libertarian agenda.