FOREWORD

The American Nondelegation Doctrine

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ABSTRACT

An American nondelegation doctrine is flourishing. Contrary to the standard account, it does not forbid Congress from granting broad discretion to executive agencies. Instead it is far narrower and more targeted. It says, very simply, that executive agencies cannot make certain kinds of decisions unless Congress has explicitly authorized them to do so. In so saying, the American nondelegation doctrine promotes the central goals of the standard doctrine, by preventing Congress from shirking and by requiring it to focus its attention on central questions, and also by protecting liberty. The abstract idea of "certain kinds of decisions" is currently filled in by, among other things, the canon of constitutional avoidance; the rule of lenity; and the presumptions against retroactivity and extraterritoriality. More recent nondelegation canons, not yet firmly entrenched, require agencies to consider costs and forbid them from interpreting statutes in a way that produces a large-scale increase in their regulatory authority. The cost-consideration canon makes a great deal of sense, especially as a way of disciplining the modern regulatory state; the "major questions doctrine," as it is sometimes called, is less obviously correct, and its proper provenance depends on the nature of the relevant statute.

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I. A FLOURISHING DOCTRINE

In the United States, there is a nondelegation doctrine. Far from being a dead letter, it is flourishing. In terms of administrative law and regulatory practice, it greatly matters. It affects administrative behavior; it produces multiple losses for agencies in court. Contrary to the more familiar version,[1] it does not forbid Congress from granting open-ended discretion to executive agencies.[2] Instead the American nondelegation doctrine is far narrower and more targeted.[3] It says, very simply, this:

> *Executive agencies cannot make certain kinds of decisions unless Congress has explicitly authorized them to do so.*

Thus understood, the American nondelegation doctrine, as it is actually implemented, fulfills some of the central goals of the more familiar version. It prevents Congress from shirking (though in a restricted way), and it requires Congress, rather than the executive branch, to make central decisions of policy. It also safeguards liberty.

At the same time, it has several major advantages over the familiar version. First, it does not force courts to answer a singularly difficult question: *how much discretion is too much discretion*? That

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1 *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935).

2 Philip Hamburger appears to see the nondelegation doctrine in a quite different way. If I read him correctly, he sees the doctrine as a barrier to congressional efforts to make agency action "binding," as through rulemaking whose violations trigger sanctions. *See* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 5 (2014). On that view, a grant of authority to make binding rules would apparently be unconstitutional even if the agency's substantive discretion were very sharply constrained by the governing statute. I do not engage that unusual view here except to note that binding regulations have a long historical pedigree. *See* Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467 (2002).

3 By denominating it "the American nondelegation doctrine," I do not mean to suggest that it is uniquely American. Other nations have similar principles, and a comparative project would be extremely informative.

question is not readily subject to judicial assessment. It involves a matter of degree, not one of kind.[4] For that reason, any serious revival of the doctrine would likely mean that the "how much is too much" question would be answered in an ad hoc way, with a serious risk that judicial policy preferences would affect ultimate judgments.

Second, and more fundamentally, the American nondelegation doctrine does not have the uncertain constitutional pedigree of the more familiar version.[5] Those who favor that version must answer difficult questions about its legitimacy in light of the absence of clear roots, for that version, in the text and in founding-era debates,[6] and also in view of actual practice during the early period of the American republic, when Congress granted open-ended discretion to executive officials.[7] On originalist grounds, the familiar version is not easy to defend. There is a plausible argument that the familiar nondelegation doctrine is a creation of the twentieth century (and a kind of free-form constitutional law).

Third, it is not clear that revival of the familiar doctrine would promote social welfare.[8] On plausible assumptions, any requirement of congressional specification might turn out to be harmful on welfarist grounds.[9] On all of these counts, our nondelegation doctrine is far better.

It is true that the American nondelegation doctrine can be specified in many different ways. We could easily imagine specifications that would be hard to defend—as in, for example, the idea that agencies may not take account of costs unless Congress has explicitly authorized them to do so, or that agencies may not regulate New England without a specific statutory provision to that effect. To understand and to evaluate the operation of the doctrine, we need to know

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4 *See* Mistretta v. United States, 488 U.S. 361, 375 (1989) (Scalia, J., concurring). Justice Scalia's skepticism about judicial implementation of the nondelegation doctrine can be fit with his general skepticism about rule-free, case-by-case constitutional law. *See* Antonin Scalia, *Common-Law Courts in a Civil-Law System*, *in* A MATTER OF INTERPRETATION 5–15 (Amy Gutmann ed., 1997); *see also* Richard B. Stewart, *Beyond Delegation Doctrine*, 36 AM. U. L. REV. 323, 324–28 (1987).

5 *See* Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 82 (1985); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1723 (2002).

6 *See* Posner & Vermeule, *supra* note 5.

7 *See* JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION 5 (2012) (demonstrating that open-ended grants of authority were common in the early Republic). Mashaw's important book has not received the attention that it deserves.

8 *See* Posner & Vermeule, *supra* note 5, at 1745–48.

9 *See* Cass R. Sunstein, *The Most Knowledgeable Branch*, 164 U. PA. L. REV. 1607, 1647–48 (2016).

which kinds of decisions call for explicit congressional authorization. The nondelegation doctrine, as understood here, consists of a set of clear statement principles or (as I shall call them) nondelegation canons,[10] and they change over time. In short, the doctrine is an umbrella concept, where the phrase "certain kinds of decisions" is a placeholder for a list. At any given time, the list can be specified with considerable accuracy.

As applied to administrative agencies, for example, the old idea that "a statute in derogation of the common law is to be strictly construed"[11] is best understood as a nondelegation canon. At one point, it was exceedingly important. Unless Congress had specifically authorized agencies to act in derogation of the common law, they were not entitled to do so. Right or wrong,[12] this idea did not forbid open-ended grants of authority. Instead it required clear congressional authorization for certain actions by the executive branch.[13]

Of the current examples, the least controversial and most obvious is the Avoidance Canon: ambiguous statutes will be construed so as to avoid serious constitutional problems.[14] The Avoidance Canon has been understood and defended in many ways; any particular defense remains contested. For example, Judge Posner has objected that the

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10 *See* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 316 (2000). Some of this Essay overlaps with the treatment there, but with significant reorientation and a new focus on the cost-consideration canon and the major questions doctrine.

11 *See* Jefferson B. Fordham & J. Russell Leach, *Interpretation of Statutes in Derogation of the Common Law*, 3 VAND. L. REV. 438, 438 (1949).

12 No one currently seems to have much enthusiasm for the canon, and far be it from me to attempt to disrupt the consensus. But for those who think that the common law is a repository of wisdom, and that it promotes both liberty and welfare, the canon is anything but random. Consider Burke's own words, challenging the primacy of abstract theories:

> And first of all, the science of jurisprudence, the pride of the human intellect, which, with all its defects, redundancies, and errors, is the collected reason of ages, combining the principles of original justice with the infinite variety of human concerns, as a heap of old exploded errors, would be no longer studied. Personal self-sufficiency and arrogance (the certain attendants upon all those who have never experienced a wisdom greater than their own) would usurp the tribunal.

Edmund Burke, *Reflections on the Revolution in France*, *in* THE PORTABLE EDMUND BURKE 416, 456–57 (Isaac Kramnick ed., 1999).

13 The "in derogation of the common law" canon has an evident resemblance to the major questions doctrine insofar as the latter also forbids agencies from undertaking large-scale transformations without clear congressional authorization. Indeed, the "in derogation of the common law" canon can be seen as a precursor of the major questions doctrine, writ very large. If the common law is seen as having special status, perhaps for Burkean reasons, *see supra* note 12, any effort to negate or supersede it might be taken as both transformative and suspect, such that unambiguous legislative authorization would be required.

14 *See, e.g.*, Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

canon creates a kind of penumbral Constitution, in the form of emanations from the real Constitution, authorizing what he sees as an excessive judicial role in American government.[15] John Manning has elaborated a related objection with considerable care.[16] What I am emphasizing here is that insofar as it limits the power of executive authorities and requires clear legislative authorization for decisions having constitutional sensitivity, the Avoidance Canon is best seen as a nondelegation canon.

In some ways, the Avoidance Canon is the most important incarnation of the American nondelegation doctrine. For certain outcomes to occur, the canon requires an explicit decision from the national legislature, not merely from the executive branch. Thus understood, the Avoidance Canon has a *structural* function. It insists that Congress, with its distinctive form of democratic accountability and its special constitutional status, must specifically choose to act in a way that raises serious constitutional problems, whether the issue involves individual rights, federalism, or presidential power. Agencies cannot make those choices on their own.

The Avoidance Canon is of course time honored. There are two quite recent nondelegation canons, and I shall devote special attention to them here. The first holds, very simply, that *unless Congress has explicitly said otherwise, agencies are required to consider the costs of regulatory interventions*.[17] If it likes, Congress can forbid the executive branch from considering costs when protecting public health or safety. But agencies cannot undertake that decision on their own. The cost-consideration canon is not constitutionally inspired; it is best seen as a way of disciplining the administrative state by avoiding a particular form of absurdity.

The second is the "major questions doctrine," which forbids agencies from interpreting ambiguous statutory language in a way that "would bring about an enormous and transformative expansion in [their] regulatory authority without clear congressional authorization."[18] The basic idea is that if agencies are to exercise authority over some large sector of the economy, it must be because Congress has explicitly said that they can do so—at least if the authority was not clearly granted when the statute was initially enacted. Thus under-

15 *See* Richard A. Posner, The Federal Courts 285 (1985).

16 *See* John F. Manning, *Clear Statement Rules and the Constitution*, 110 Colum. L. Rev. 399, 399 (2010).

17 *See* Michigan v. EPA, 135 S. Ct. 2699, 2711 (2015).

18 Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2444 (2014).

stood, the major questions doctrine is reminiscent of the "in derogation of the common law" canon, and subject to similar objections, but because of its narrowness and its insistence on legislative authorization for transformative expansions in authority, it can reasonably claim a democratic pedigree.

A clarification before we embark: the familiar nondelegation doctrine forbids what it sees as "delegation," understood as the grant of open-ended discretion to agencies.[19] Our nondelegation doctrine does something different. It does not forbid *Congress* from doing anything at all. Instead it forbids *agencies* from acting in particular ways, on the ground that they have not been (clearly) given, or delegated, the authority to do so. Our nondelegation doctrine is a scalpel. It does not say that "legislative powers may not be delegated." It says that "the relevant power has not been delegated explicitly enough." Those words may not seem inspiring or majestic, but as we shall see, they have a majesty of their own.

II. A Defining Case

The American nondelegation doctrine, as I am understanding it here, can be traced to the earliest days of the American republic.[20] But in the modern era, the defining case is *Kent v. Dulles*,[21] decided in 1958. I emphasize that decision here not only because of its defining status but also for a more personal reason. In the 1980s, I was privileged to teach a two-week administrative law course in Beijing, exploring some of the central rulings in the subject, of which *Kent v. Dulles* was then taken to be one. Among American law students, that decision had become a bit of a yawn, to the point where class discussion was boring, an exploration of distant history, lacking much contemporary relevance. (The case is no longer featured in the leading administrative law textbooks.) But among my Chinese students, almost all of whom were members of the Communist Party, *Kent v. Dulles* was like a shock of electricity, and also a beacon. One of them

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19 I put the word "delegation" in quotation marks because as Posner and Vermeule have explained, *see supra* note 5, at 1723, it is reasonable to see open-ended grants of authority as an *exercise* of legislature power, rather than as a "delegation" of that power. When Congress grants broad discretion to agencies, it need not be seen as "delegating" legislative power; the power that agencies exercise is "executive," and it is exercised pursuant to a legislative grant. On this view, whether an authority counts as legislative or executive depends on who is exercising it.

20 *See, e.g.*, United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820); Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

21 357 U.S. 116 (1958).

said to me after the session, "After reading *Kent v. Dulles*, China seems very dark."

I was flabbergasted by the students' reaction. Why did that case, above all others, have such an impact on them? Decades after, I think I know the answer. And for the United States, the decision may perhaps seem less dated in 2018 than it was in the 1980s.[22]

The case arose when the Secretary of State, John Foster Dulles, exercised what seemed to be his statutory authority to deny a passport to Rockwell Kent, on the ground that Kent was a member of the Communist Party.[23] The underlying statute reads like an open-ended grant of discretion: "The Secretary of State may grant and issue passports . . . under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports."[24] (Is that an unconstitutional delegation under the standard understanding of the nondelegation doctrine? A good question, for another day.[25]) Pursuant to this provision, the Secretary issued a regulation that read as follows:

> In order to promote the national interest by assuring that persons who support the world Communist movement of which the Communist Party is an integral unit may not, through use of United States passports, further the purposes of that movement, no passport, except one limited for direct and immediate return to the United States, shall be issued to:
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> (a) Persons who are members of the Communist Party or who have recently terminated such membership under such circumstances as to warrant the conclusion—not otherwise rebutted by the evidence—that they continue to act in furtherance of the interests and under the discipline of the Communist Party . . . .[26]

At first glance, and also at second and third, the statute seems to give Dulles the power to issue that regulation, and hence to do exactly what he did.

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22 *See, e.g.*, States' Brief Regarding Rehearing En Banc at 28, 32, Washington v. Trump, No. 17-35105 (9th Cir. Feb. 26th, 2017), http://cdn.ca9.uscourts.gov/datastore/general/2017/02/16/17-35105%20-%20States%20supplemental%20brief.pdf [https://perma.cc/RL8H-5UQA] (citing *Kent v. Dulles* in support of preliminary injunction issued against President Trump's Travel Ban).

23 *See Kent*, 357 U.S. at 116.

24 *Id.* at 123 (alteration in original) (quoting 22 U.S.C. § 211a (2012)).

25 The likely answer is that there would be no problem under the standard doctrine. The open-ended words would be interpreted in context to mean that the secretary could act for some reasons but not others. For example, he could protect national security, but he could not punish political opponents of the president.

26 *Kent*, 357 U.S. at 117 n.1 (quoting 22 C.F.R. § 51.135 (1956)).

Nonetheless, the Supreme Court ruled that Dulles had exceeded his statutory authority. It emphasized, repeatedly and above all, that the right to travel was implicated. In its words, that right "is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment."[27] Invoking the Avoidance Canon, the Court found it unnecessary to "decide the extent to which it can be curtailed. We are first concerned with the extent, if any, to which Congress has authorized its curtailment."[28] The Court emphasized that in the past, the grounds for refusing a passport had involved one of two factors: (1) doubts about an applicant's citizenship or allegiance and (2) criminal or unlawful conduct.[29] In enacting the provision at issue, Congress had proceeded against the background established by that practice and essentially codified it.[30]

That idea seems singularly odd. The statutory language is exceedingly broad, and it is hardly limited to cases that involve (1) and (2). If Congress had wanted to cabin the Secretary's authority to such cases, surely it could have done so. Indeed, an enactment of such breadth, following a narrow exercise of the authority to withhold passports, might be thought to suggest that Congress wanted to allow the Secretary to exercise his discretion however he saw fit. Nonetheless, the Court ruled that the background had binding authority. It explained: "Since we start with an exercise by an American citizen of an activity included in constitutional protection, we will not readily infer that Congress gave the Secretary of State unbridled discretion to grant or withhold it."[31] An intrusion on liberty "must be pursuant to the lawmaking functions of the Congress," and when

> activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them. We hesitate to find in this broad generalized power an authority to trench so heavily on the rights of the citizen.[32]

In short, *Kent v. Dulles* holds that executive agencies may not intrude on liberty unless Congress, with its distinctive form of accountability, has explicitly authorized the intrusion. "Broad genera-

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27 *Id.* at 125.

28 *Id.* at 127.

29 *Id.* at 128.

30 The dissent challenged this depiction of longstanding practice. *See id.* at 138–43 (Clark, J., dissenting).

31 *Id.* at 129.

32 *Id.* (citation omitted).

lized power" is not enough.[33] In China in the 1980s, that holding was electric, and for four reasons. First, it confirmed the authority of a genuinely independent judiciary, willing to say a firm "no" to the highest of political officials. Second, the ruling cabined the authority of the executive, which was acting against political dissidents. Third, it involved Communists and communism, well-known (in China) to be antithetical to American values. Fourth, it safeguarded the right to travel internationally—a right that was prized by citizens, and not respected by government, in China at the time.[34] Seeing the case through the eyes of those who read it in an altogether different political context, we can perhaps see anew how remarkable, and what a tribute to the American legal system, the decision really was.

We should also emphasize the comparative modesty of the ruling. *Kent v. Dulles* holds only that clear legislative authorization is required for the relevant restriction.[35] It does not say that with such authorization, the Constitution would be violated; it leaves that question open. In that way, the Avoidance Canon is a form of judicial minimalism. It does not disable the federal government from acting at all. It says only that Congress must say that it wants the executive branch to have the authority to do what it wants to do. And indeed, a later case tested the scope of the right to international travel—and the Court upheld broad national authority to limit it.[36]

III. Nondelegation in Action

A. *Goals and Values*

Kent v. Dulles helps to illuminate the relationship between the nondelegation doctrine as it is conventionally understood and the American doctrine as it is actually practiced. Above all, the standard doctrine is designed to ensure that Congress does not "delegate" its lawmaking functions and that it supplies an "intelligible principle" for the executive branch to follow.[37] Its most important goal is to ensure a certain kind of accountability—the kind that comes from the special safeguards to which Congress is subject.[38] It is true that the executive branch is accountable as well, above all because of the role of the

33 *See id.*

34 *See, e.g.*, Gabrielle Jaffe, *How the Chinese Learned to Embrace Independent Travel*, Atlantic (Oct. 21, 2013), https://www.theatlantic.com/china/archive/2013/10/how-the-chinese-learned-to-embrace-independent-travel/280737/ [https://perma.cc/ZR7U-WNHW].

35 *See Kent*, 357 U.S. at 130.

36 Zemel v. Rusk, 381 U.S. 1, 7 (1965).

37 *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001).

38 *See* Sunstein, *supra* note 10, at 323 ("Congress has a distinctive form of accountability,

elected (and highly visible) president, who broadly oversees the executive branch.[39] But presidential action is not constrained by the distinct procedural mechanisms that discipline the decisions of a two-house legislature composed of many hundreds of people. If the Constitution creates a deliberative democracy,[40] including institutional arrangements designed to ensure deliberation among diverse people, then the standard nondelegation doctrine can be seen as essential to its intended operation.

The doctrine serves other functions as well. In an important respect, it protects liberty: before government intrudes on the private sector, it must receive democratic authorization, not by convincing executive officials, but by doing something far more difficult, which is to obtain a consensus on an intelligible principle from Congress. It may be relatively easy to persuade the executive branch to issue a regulation or to embark on some kind of project that constrains people in the private sphere. But with its multiple veto points, and the sheer diversity of relevant voices, Congress is a harder nut to crack. To the extent that liberty is understood as immunity from national intervention, the standard doctrine is a great ally of liberty.

The standard doctrine also protects the rule of law, understood as a set of constraints on the discretion of public officials.[41] We can see those constraints as serving two different values. First, they promote fair notice.[42] With constrained discretion, citizens know what they are supposed to do.[43] Second, they reduce the risk of arbitrariness, understood as either (1) inexplicably random choices (subjecting citizens to a kind of law or policy lottery) or (2) illegitimately motivated choices (as when people are targeted because of their skin color, their wealth, or their political preferences). If the standard doctrine were enforced, the rule of law would be well served (or so it might be thought).

Critics have objected to all of these arguments.[44] With respect to accountability and deliberative democracy, Congress must itself make

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through the mechanisms for representation and the system of bicameralism, and it is that form of accountability, not accountability in the abstract, that justifies a nondelegation doctrine.").

39 I am bracketing here the questions raised by independent agencies, which enjoy some degree of immunity from presidential oversight.

40 On the general idea, see DELIBERATIVE DEMOCRACY (Jon Elster ed., 1998).

41 *See* JOSEPH RAZ, *The Rule of Law and its Virtue*, *in* THE AUTHORITY OF LAW 210 (1979).

42 *See id.* at 222.

43 *See id.*

44 See the superb discussion in Posner & Vermeule, *supra* note 5, at 1744–54; Mashaw, *supra* note 5, at 84.

any grant of discretion through some kind of law that has gone through the proper channels; isn't that authorization a reflection of deliberative democracy in practice?[45] Liberty can be compromised not only by national intervention, but also by private depredations that go unaddressed (as in the form of violence or discrimination).[46] To the extent that the standard doctrine makes it more difficult to address those depredations, it might not protect liberty at all—a judgment that helps to account for the rise of the modern regulatory state.[47] The due process clause is available to protect the rule of law, and if agencies have not given people fair notice,[48] or if they have acted on the basis of illicit motives,[49] their actions will be invalidated.

Whether or not the critics' arguments are convincing, the American nondelegation doctrine promotes all of the goals of the doctrine's supporters, even if in a less than complete way, and it does so without running into the strongest objections from the critics. Suppose that we are concerned about the risk of legislative shirking and that we seek particular legislative judgments on policy questions. If so, the American nondelegation doctrine addresses precisely that concern, by requiring Congress to make the relevant judgments. *Kent v. Dulles* is an obvious illustration. If we focus on liberty, our nondelegation doctrine is equally responsive insofar as it requires a focused congressional decision to compromise the value of liberty—as *Kent v. Dulles* also makes clear.[50] In terms of rule of law values, the American nondelegation doctrine says that executive officials cannot seize on vague or general language to produce specified kinds of outcomes. The legislature must authorize those outcomes in advance, and with a high level of particularity.

To be sure, those who embrace the standard doctrine will see the actual one as an inadequate second-best. *Kent v. Dulles* does not forbid Congress from granting open-ended authority to the executive. In that respect, the American nondelegation doctrine might plausibly be called "the explicit delegation doctrine." Defenders of the standard doctrine will see it as a pale echo. As we have seen, however, the

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45 *See* Posner & Vermeule, *supra* note 5, at 1751–52.

46 *See* Mashaw, *supra* note 5, at 86.

47 *See id.*

48 *See* City of Chicago v. Morales, 527 U.S. 41, 56 (1999); Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972).

49 Admittedly, this is rare as a constitutional matter. *See* U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534–35 (1973). It is more common as a matter of standard administrative law.

50 *See* Kent v. Dulles, 357 U.S. 116, 129 (1958).

standard doctrine runs into formidable difficulties in terms of both administrability and pedigree.

It is also true that those who roundly object to the standard doctrine might not have much enthusiasm for the actual one. A fair question for them to ask: on what authority do courts require Congress to speak clearly when the legal materials, fairly read in light of other interpretive principles, authorize the executive to do what it wants to do? Before answering that question, let us consider some examples.

B. Guided Tour

The American nondelegation doctrine can be found in multiple places. Cases that invoke the Avoidance Canon are legion, and the same is true of those that invoke other nondelegation canons. Instead of listing them, I will offer simple, stylized versions here—cartoons, really, designed to illustrate the scope of our nondelegation doctrine and also its limits. But for every cartoon, there are numerous real-world rulings that embody the same principles.[51]

1. A statute governing the protection of endangered species could be construed in two different ways. With the broader interpretation, it would create a serious problem under the takings clause; with the narrower interpretation, there would be no such problem. Seeking to maximize the protection of endangered species, the Department of Interior chooses the broader interpretation. It invokes the rule from *Chevron v. NRDC*,[52] urging that in the face of statutory ambiguity, it is entitled to proceed as it sees fit. The Department will not prevail. If a serious constitutional question is to be raised, it must be because Congress has explicitly chosen to raise it.[53] Note that this conclusion follows from the analysis in *Kent v. Dulles*, but it involves ambiguity, not generality, which could be seen as relevantly different.[54]

2. Same as (1), except that the constitutional problem turns out not to be serious. To be sure, a takings objection is available, but

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51 The catalogue here is meant to be illustrative rather than exhaustive. For example, federalism principles, requiring a clear congressional statement before agencies may preempt state law, are also nondelegation canons, though their precise relationship with *Chevron* has yet to be sorted out.

52 467 U.S. 837, 843–45 (1984).

53 Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (citing NLRB v. Catholic Bishop, 440 U.S. 490, 499–501, 504 (1979)).

54 In my view, generality can pose a problem of ambiguity, at least in cases in which general language authorizes an outcome that is highly unlikely to have occurred to those who voted for it, and that seems absurd or clearly unreasonable. But this is a controversial position in cases like *Kent v. Dulles*, in which general language seems deliberately broad.

under existing doctrine, it is quite clear that the regulation does not run afoul of the Fifth Amendment.[55] The Department will prevail because the Avoidance Canon requires the constitutional problem to be serious: explicit congressional attention is required only when there is a genuine constitutional doubt.[56] The existence of a plausible argument is not enough.[57] That conclusion makes sense insofar as nondelegation canons are limited to situations with such constitutional sensitivity that a focused decision, from the national legislature, is taken to be mandatory.

3. Same as (1), except that the statute is far more naturally understood in the way that the Department understands it. Nondelegation concerns are irrelevant. The fate of the regulation will depend on resolution of the constitutional question; Congress has done the necessary work. The court cannot and will not avoid deciding that question. Use of the Avoidance Canon is out of bounds in light of what is clearly the best understanding of the statute.[58]

4. A federal statute imposes criminal sanctions on those who pollute in violation of the Clean Air Act. One of its provisions is ambiguous, but the Environmental Protection Agency interprets it in a way that makes it applicable to small agricultural polluters. The EPA's interpretation will be invalidated. The reason is the rule of lenity, which holds that in the face of doubt, statutes will be construed favorably to criminal defendants.[59]

The Court has not given a clear explanation for the rule of lenity. One justification, rooted in the due process clause, involves the rule of law and in particular the idea of fair notice: people should be given a clear understanding of what would subject them to criminal punishment, and if the law is ambiguous or vague, they have not (by defini-

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55 *Cf.* Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 693, 697 (1995) (holding that the text of the Act supported the Department's interpretation).

56 *See* Rust v. Sullivan, 500 U.S. 173, 191 (1991) ("Applying the canon of construction under discussion as best we can, we hold that the regulations promulgated by the Secretary do not raise the sort of 'grave and doubtful constitutional questions' that would lead us to assume Congress did not intend to authorize their issuance. Therefore, we need not invalidate the regulations in order to save the statute from unconstitutionality." (citation omitted) (quoting United States *ex rel.* Attorney Gen. v. Del. & Hudson Co., 213 U.S. 366, 408 (1909))).

57 *See id.* at 184.

58 *But see* United States v. X-Citement Video, Inc., 513 U.S. 64, 68–69 (1994) (finding that an unnatural reading of the statute was favorable because it avoided a constitutional question).

59 *See, e.g.*, Adamo Wrecking Co. v. United States, 434 U.S. 275, 284–85 (1978) (applying the rule of lenity to interpret the Clean Air Act); United States v. Bass, 404 U.S. 336, 347 (1971); Bell v. United States, 349 U.S. 81, 83–84 (1955).

tion) been given that clear understanding.[60] Even if an agency's view would not technically violate the due process clause, and even if there is no sufficient reason to invoke the Avoidance Canon, the idea of fair notice means that criminal defendants should be given the benefit of the doubt. Another justification, consistent with my theme here, involves a structural idea: if people are to be subject to the force of the criminal law, it must be because the legislature has specifically decided that they ought to be. The wishes and convictions of the executive branch are not enough; it lacks the relevant lawmaking authority.

In that sense, the criminal law can be invoked only when there is the requisite agreement between the legislative and the executive branches. The legislature must have explicitly decided that some action should be treated as a crime. The executive must explicitly decide to take enforcement action. The fact that both are required is a great safeguard of liberty.

5. The Department of Interior administers a statute that imposes certain environmental restrictions on private lands. It is not clear if the statute applies to Native American tribes; if it does so, it will impose significant costs and burdens on them. By regulation, the Department applies the statute to Native American tribes, emphasizing the immense national importance of the environmental values at stake.

There is a strong chance that as applied, the regulation will be invalidated. A longstanding nondelegation canon holds that in the face of ambiguity, statutes and treaties will be interpreted favorably to Native American tribes.[61] One foundation for this canon is historical and frankly normative: in view of the shameful mistreatment of Native American tribes, they will be given the benefit of the legal doubt. Another foundation fits with my argument here: in view of the relevant history, the national legislature must speak clearly if it seeks to impose burdens on Native American tribes. So understood, the canon is a kind of rule of lenity, adapted for the purpose.

6. A statute governing discrimination on the basis of disability does not say whether it applies to American companies doing business abroad. An American company, doing business in France, has allegedly engaged in discrimination on the basis of disability. The Depart-

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60 *See* Mila Sohoni, *Notice and the New Deal*, 62 DUKE L.J. 1169, 1169 (2013).

61 *See* Williams v. Babbitt, 115 F.3d 657, 660 (9th Cir. 1997); Ramah Navajo Chapter v. Lujan, 112 F.3d 1455, 1455 (10th Cir. 1997); Tyonek Native Corp. v. Sec'y of the Interior, 836 F.2d 1237, 1239 (9th Cir. 1988); *see also* Seneca-Cayuga Tribe of Okla. v. Nat'l Indian Gaming Comm'n, 327 F.3d 1019, 1038 n.31 (10th Cir. 2003); United States v. 162 MegaMania Gambling Devices, 231 F.3d 713, 723 (10th Cir. 2000).

ment of Justice has issued a regulation stating that the statute does indeed apply extraterritorially. Invoking that regulation, the Department brings suit. The regulation will be invalidated. A statute does not apply extraterritorially unless Congress has unambiguously said that it should.[62]

Here, then, is a nondelegation canon, but one that cannot claim to be motivated by the principle of constitutional avoidance. In a variation on our recurring theme, the central idea is that if American law is to apply extraterritorially, it cannot be merely because the executive branch has so decided. That decision requires the kind of legitimation that comes from the national legislature. Extraterritorial application of U.S. law can raise sensitive issues because it involves foreign policy and relationships with the nation's partners (and adversaries).[63] It can also have harmful economic consequences for U.S. businesses, which might face a serious comparative disadvantage if they have to comply with a body of law that does not affect their competitors. It is true that on many foreign relations issues, the Commander in Chief has the constitutional lead, but the canon against extraterritoriality reflects a judgment that with respect to the scope of American law, the central choices must be made by the central American lawmaker.

7. In 2018, the Environmental Protection Agency issues a new regulation, which imposes limits on water pollution and also sanctions for violations of those limits. As is standard practice, the regulation imposes sanctions on violations that occur after its issuance. But it also imposes sanctions on actions that occurred six months before because (1) those actions "endangered the public health" and (2) polluters "knew, or should have known," that those actions would violate a regulation that would be issued in the near future. In defense of (2), the EPA notes that it proposed the regulation over a year ago, and hence finalization of the regulation was predictable.

In principle, the EPA's arguments are not outlandish. But to the extent that it applies retrospectively, the rule is unlawful, because it exceeds the agency's authority,[64] even if Congress has said nothing at all about whether an agency may apply a rule retroactively, and even if nothing in the due process clause, or the Constitution generally, forbids the agency's action. The reason, announced in 1988, is a nondelegation canon: unless Congress explicitly authorizes retroactive

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62 *See, e.g.*, EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991).

63 *See* McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 20–22 (1963).

64 *See, e.g.*, INS v. St. Cyr, 533 U.S. 289, 320–21 n.45 (2001).

application of rules, agencies may not apply rules retroactively.[65] The reasoning is simple: retroactivity is disfavored in the law,[66] and the national legislature must decide to authorize it.

C. *A Note on Legitimacy*

Those who embrace the standard nondelegation doctrine contend that it is mandated by the Constitution, properly understood.[67] As a matter of text and history, they may not be right, but their view has an attractive simplicity. To both the supporters and critics of the standard doctrine, it is fair to pose a question about the actual one: what makes it legitimate?

The answer cannot be a clear constitutional mandate. The most straightforward answer is not even unitary; it points to several points. To some extent, it is Burkean in nature: in general, the nondelegation canons are firmly rooted in tradition.[68] The Avoidance Canon has a long historic pedigree;[69] the same is true for the rule of lenity.[70] For all of the canons, the tradition is accompanied by attractive substantive ideas. As we have seen, the rule of lenity and the antiretroactivity canon are built on the concerns about fair notice, and the canon against extraterritorial application can be rooted in ideas about foreign relations and about the sensitivity of imposing special burdens on American companies doing business abroad.

It would be nonetheless possible to object that courts have been making up some of these ideas—that they cannot sufficiently root them in some source of positive law.[71] If some such root is mandatory, then our nondelegation doctrine is not legitimate. But in every legal

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

66 *Id.*

67 *See, e.g.*, Christopher DeMuth, *Can the Administrative State be Tamed?*, 8 J. LEGAL ANALYSIS 121, 128 (2016).

68 *See* Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 356 (2006).

69 *See, e.g.*, Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804); Mossman v. Higginson, 4 U.S. (4 Dall.) 12, 14 (1800); *Ex Parte* Randolph, 20 F. Cas. 242, 254 (Marshall, Circuit Justice, C.C.D. Va. 1833) (No. 11,558) ("[I]f the case may be determined on other points, a just respect for the legislature requires, that the obligation of its laws should not be unnecessarily and wantonly assailed.").

70 *See* United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.) ("The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment."); *see also* Note, *The New Rule of Lenity*, 119 HARV. L. REV. 2420, 2420 (2006).

71 *See Bowen*, 488 U.S. at 221–25 (Scalia, J., concurring in the judgment) ("The issue is not whether retroactive rulemaking is fair; it undoubtedly may be, just as may prospective adjudica-

system, some principles of interpretation are likely to reflect substantive judgments, generated not randomly, but after engagement with traditions, structural commitments, and hard-won wisdom with respect to problems of unfairness and arbitrariness.[72] Our nondelegation doctrine reflects that engagement.

IV. The Modern Era

I now turn to two quite modern nondelegation canons. The first is simple, precise, and easily administered. The second is complex, vague, and difficult to administer—but it has its own appeal.

A. The Cost-Consideration Canon

As we have seen, the cost-consideration canon holds that unless Congress explicitly says otherwise, an agency must consider costs in deciding whether and how to proceed. The canon has a long history; it grows out of a series of cases in the D.C. Circuit, first allowing and then mandating consideration of cost.[73] In an important decision involving mercury regulation, all nine members of the Supreme Court converged on the new canon.[74]

The decision involved a provision of the Clean Air Act that requires the EPA to list hazardous pollutants, for subsequent regulation, if it is "appropriate and necessary" to do so.[75] The EPA contended that it had the authority to base its listing decision only on considerations of public health (and hence to decline to consider costs).[76] In its view, the words "appropriate and necessary" were ambiguous, and a cost-blind interpretation was legitimate.[77]

By a five-to-four vote, the Court disagreed. It held that the "EPA strayed far beyond" the bounds of reasonableness in interpreting the statutory language "to mean that it could ignore cost when deciding whether to regulate power plants."[78] In the passage of greatest relevance to the topic here, the Court added,

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tion. The issue is whether it is a permissible form of agency action under the particular structure established by the APA. The Secretary provides nothing that can bring it within that structure.").

72 *See, e.g.*, Cass R. Sunstein, After the Rights Revolution 1–10 (1990).

73 For background and citations, see Cass R. Sunstein, *Cost-Benefit Default Principles*, 99 Mich. L. Rev. 1651, 1656–82 (2001).

74 *See* Michigan v. EPA, 135 S. Ct. 2699, 2711 (2015).

75 *Id.* at 2704–05.

76 *Id.* at 2705–06.

77 *Id.*

78 *Id.* at 2707.

> One would not say that it is even rational, never mind "appropriate," to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits. . . . Consideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions.[79]

While rejecting the majority's particular conclusion, Justice Kagan's dissent, joined by three other members of the Court, was even more explicit on the general point, contending, "Cost is almost always a relevant—and usually, a highly important—factor in regulation. *Unless Congress provides otherwise, an agency acts unreasonably in establishing 'a standard-setting process that ignore[s] economic considerations*.'"[80] The dissent added that "an agency must take costs into account in some manner before imposing significant regulatory burdens."[81] All members of the Court clearly adopted a nondelegation canon that requires agencies to consider costs unless Congress has explicitly prohibited them from doing so.

To be sure, the cost-consideration canon is not without ambiguity,[82] and its announcement in just one case makes it hazardous to claim that it is here to stay. But on the central point, the Court's unanimity is certainly a strong signal. Whenever a statute does not explicitly forbid agencies to take account of costs, they will almost certainly be required to take account of costs.

B. Major Questions

The major questions doctrine can be understood in two different ways. The first, noteworthy but not my focus here, suggests a kind of "carve out" from *Chevron* deference when a major question is involved. The basic idea is that *Chevron* rests on a theory of implicit delegation, to the effect that a grant of rulemaking authority carries with it a grant of authority to interpret ambiguous terms.[83] (So *Chevron* is, in essence, a prodelegation canon, predictably troublesome to

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79 *Id.*

80 *Id.* at 2716–17 (Kagan, J., dissenting) (alteration in original) (emphasis added). The dissent rejected the majority's conclusion in large part because the EPA had considered costs at a later stage in its processes, when it was deciding on the appropriate level of stringency. *See id.* at 2719–21.

81 *Id.* at 2717.

82 *See id.* at 2707–08.

83 *See* United States v. Mead Corp., 533 U.S. 218, 227 (2001).

those who favor the standard nondelegation doctrine.[84]) In the view of some people, that theory of *Chevron* is least contentious when the agency is resolving a legal question that appears interstitial, or that cannot be answered without applying the kinds of technical expertise that agencies develop over time.[85] But when an agency is interpreting a major question (the theory goes), it is hazardous to infer any such authority. In such cases, the best inference is that Congress wants courts to decide issues of law independently. The "*Chevron* carve-out" theory of the major questions doctrine is supported by several cases, the most conspicuous of which involved tax subsidies under the Affordable Care Act.[86]

It is important to see that the carve-out theory does not necessarily mean that the agency will lose; it means only that the question of law will be resolved independently by courts. Even so, the carve-out theory can be seen as a kind of nondelegation canon: courts will not lightly take a statutory grant of rulemaking power to be a grant of authority to resolve major questions. So understood, the doctrine is a "soft" nondelegation canon. It does not say that agencies cannot produce certain substantive outcomes. Instead it says that whether agencies can produce certain substantive outcomes will be decided by courts, not agencies.

But the doctrine has a different and (in my view) more intriguing incarnation, one that fits more directly with my central argument here. *FDA v. Brown & Williamson Tobacco Corp.*[87] can be taken as the leading statement. In that case, the FDA interpreted its governing statute to allow it to exercise authority over tobacco products.[88] The

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84 *See* Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 464–65 (1989).

85 *See* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 371–372 (1986).

86 *See, e.g.*, King v. Burwell, 135 S. Ct. 2480, 2488–89 (2015) ("'In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.' This is one of those cases. The tax credits are among the Act's key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people. Whether those credits are available on Federal Exchanges is thus a question of deep 'economic and political significance' that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly. It is especially unlikely that Congress would have delegated this decision to the *IRS*, which has no expertise in crafting health insurance policy of this sort. This is not a case for the IRS." (first quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000); then quoting *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014)) (citing *Gonzales v. Oregon*, 546 U.S. 243, 266–267 (2006)).

87 529 U.S. 120 (2000).

88 *See id.* at 120.

relevant provision, defining "drugs" as "articles (other than food) intended to affect the structure or any function of the body," seemed to support the FDA's view, or at worst to be ambiguous, and hence under *Chevron*, the FDA's interpretation appeared to be lawful.[89]

The Court struggled mightily to explain why it was not.[90] In a key passage, it moved back from the particulars:

> This is hardly an ordinary case. Contrary to its representations to Congress since 1914, the FDA has now asserted jurisdiction to regulate an industry constituting a significant portion of the American economy. In fact, the FDA contends that, were it to determine that tobacco products provide no "reasonable assurance of safety," it would have the authority to ban cigarettes and smokeless tobacco entirely. Owing to its unique place in American history and society, tobacco has its own unique political history. . . .
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> . . . Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.[91]

The passage is not without ambiguity, but it is best read to suggest that whenever an agency asserts authority to regulate "a significant portion of the American economy," it will run into trouble unless it can identify a clear, rather than cryptic, grant of authority from Congress. The key words are "a decision of such economic and political significance," understood in the context of the "significant portion of the American economy" language. When a decision of that kind is involved, clear congressional authorization is mandatory. This, then, is a nondelegation canon, forbidding the agency from seizing on ambiguous language to aggrandize its own power (in some sufficiently major and transformative way).

Thus understood, *Brown & Williamson* is a linear descendent of an important pre-*Chevron* case that it did not cite: *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, also known as the *Benzene* case ("*Benzene*").[92] The legal issue arose as a result of the Occupational Health and Safety Administration's ("OSHA") argument that so long as its regulation did not exceed the bounds of "feasibility," it was entitled to regulate workplace risks, even if those risks

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89 *Id.* at 126.

90 *See id.* at 133–59.

91 *Id.* at 159–60 (citation omitted).

92 448 U.S. 607 (1980).

could not be shown to be significant. The text of the relevant statute strongly supported its conclusion. It states:

> The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that *no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life*.[93]

The words "no employee will suffer material impairment" suggest a zero-impairment mandate, such that the agency would be authorized, or even required, to act even if the risk was insignificant, in the sense that it was, for each employee, *1/X*, where *X* was very large.

In the plurality opinion, ruling that the agency must demonstrate that the risk it seeks to regulate is "significant," Justice Stevens squarely invoked both the standard nondelegation doctrine and the Avoidance Canon. In fact, he combined the two. In his words,

> If the Government were correct in arguing that [the statute does not] require[] that the risk from a toxic substance be quantified sufficiently to enable the Secretary to characterize it as significant in an understandable way, the statute would make such a 'sweeping delegation of legislative power' that it might be unconstitutional . . . . A construction of the statute that avoids this kind of open-ended grant should certainly be favored.[94]

In the abstract, the logic seems clear and appealing, but it disintegrates on inspection. Suppose that Congress enacted a statute that said that whenever American workers face a risk, OSHA must regulate it, to the extent feasible. That would be an aggressive, even draconian statute, but it would hardly offend the (standard) nondelegation doctrine. The reason is that it would not grant open-ended discretion to the agency. On the contrary, it would sharply cabin that discretion, by requiring it to take aggressive action. It would not be unlike some other provisions of health and safety law, which call for such action, and which do not create a (standard) nondelegation problem.[95]

Read in light of *Brown & Williamson*, however, Justice Stevens' reasoning starts to make more sense. The basic idea is that without a

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93 29 U.S.C. § 655(b)(5) (2012) (emphasis added).

94 *Benzene*, 448 U.S. at 646.

95 *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 473–77 (2001).

clear statement from Congress, the Court will not authorize the agency to exercise that degree of (draconian) authority over the private sector. The Avoidance Canon was not really in play—but our nondelegation doctrine was. In an earlier paragraph of his opinion, which sounds a lot like *Brown & Williamson*, Justice Stevens stated as much:

> In the absence of a clear mandate in the Act, it is unreasonable to assume that Congress intended to give the Secretary the unprecedented power over American industry that would result from the Government's view . . . , coupled with OSHA's cancer policy. Expert testimony that a substance is probably a human carcinogen—either because it has caused cancer in animals or because individuals have contracted cancer following extremely high exposures—would justify the conclusion that the substance poses some risk of serious harm no matter how minute the exposure and no matter how many experts testified that they regarded the risk as insignificant. That conclusion would in turn justify pervasive regulation limited only by the constraint of feasibility. In light of the fact that there are literally thousands of substances used in the workplace that have been identified as carcinogens or suspect carcinogens, the Government's theory would give OSHA power to impose enormous costs that might produce little, if any, discernible benefit.[96]

Understood in this way, the *Benzene* Case stands for the proposition that an agency may not assert such broad authority over American workplaces unless Congress has unambiguously granted it that authority. And understood in that way, it is the bridge between the major questions doctrine, writ large, and the cost-consideration canon.

In *Utility Air Regulatory Group v. EPA*,[97] the Court specified and concretized this understanding of the major questions doctrine. The issue was the legality of EPA's decision to include greenhouse gases under certain permitting provisions of the Clean Air Act. As in *Brown & Williamson*, the text of the statute seemed to favor the EPA's interpretation, or at the very least, to make it plausible enough to deserve *Chevron* deference. But the Court nonetheless invalidated that interpretation. In the key passage, the Court said that the EPA's interpretation is "unreasonable because it would bring about an enormous

96 *Benzene*, 448 U.S. at 645.

97 134 S. Ct. 2427 (2014).

and transformative expansion in EPA's regulatory authority without clear congressional authorization."[98] Speaking more broadly, it added,

> When an agency claims to discover in a long-extant statute an unheralded power to regulate "a significant portion of the American economy," we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast "economic and political significance."[99]

And at that point, the Court cited not only *Brown & Williamson* but also the *Benzene* Case. With *Utility Air Regulatory Group*, we may fairly say that the major questions doctrine, understood as a nondelegation canon, has fully arrived.

C. Some Words of Evaluation

If the American nondelegation doctrine is seen as I have understood it here, it should not be especially controversial, at least not in abstract form. Surely there are some steps that agencies ought not to be allowed to take without clear congressional authorization. One of the major advantages of nondelegation canons, as opposed to the standard nondelegation doctrine, is that it is usually simple to administer. The canons usually do not present terrible line-drawing problems; the standard doctrine (if it were enforced) would put courts in precisely that muck. For federal judges, it is one thing to say that an agency may not interpret an ambiguous term in such a way as to raise a serious constitutional problem. It is quite another to say that (for example) the terms "requisite to protect the public health" are unacceptably open-ended, whereas the words "reasonably necessary or appropriate" are not.

For our nondelegation doctrine, then, the real question is what belongs on the list. I focus here on the two most recent additions.

D. Avoiding Absurdity

Under modern circumstances, the cost-consideration canon makes a great deal of sense. It is an important way to discipline administrative discretion, and it echoes principles endorsed by both Republican and Democratic presidents.[100]

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98 *Id.* at 2444.

99 *Id.* (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000)).

100 *See* Exec. Order No. 12,291, 3 C.F.R. § 127 (1982) (revoked 1993); Exec. Order No. 12,866, 3 C.F.R. § 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 802–06 (2012);

As a general rule, it is irrational, even absurd, to impose regulation without giving some kind of consideration to costs. Suppose, for example, that the benefits of a regulation are $10 million, but the costs are $120 million. On what rationale could an agency refuse even to consider the costs? It is true that with some statutes, Congress has flatly prohibited agencies from giving consideration to costs[101]—most plausibly on the ground that regulation will be undertaken in a multistage process, with costs being considered during some but not others.[102] Congress has the constitutional authority to make that judgment. But even if a multistage process is involved, forbidding consideration of costs is not easy to defend. Whenever federal agencies are going to impose significant burdens on the American people, it makes sense to say that they should at least give consideration to that fact.

It should be clear that the cost-consideration canon is quite modest and that it leaves many questions unresolved. Suppose again that a regulation would have benefits of $10 million and costs of $120 million. Suppose too that the agency announces that it will proceed anyway and that the objects of regulation contend that the agency has acted arbitrarily. By itself, the cost-consideration canon does not say whether the contention is convincing. In my view, the agency will face a burden of explanation, and with those numbers, offering a sufficient one will not be easy. But defending that claim would take us beyond the cost-consideration canon itself.[103]

E. What's Major? What's Transformative?

The major questions doctrine is more contentious. The first concern is that the line between "major" and "nonmajor" questions is not exactly obvious. Whenever an agency exercises jurisdiction over activity, its decision could be characterized as major, and yet no one on the Court has indicated an interest in drawing a line between jurisdictional and nonjurisdictional questions. On the contrary, the effort to create a jurisdictional carve-out attracted exactly zero votes, partly on the stated ground that the line between jurisdictional and nonjurisdictional questions is illusory.[104] The major question doctrine, as I am

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Exec. Order No. 13,563 § 1(b), 3 C.F.R. § 215 (2012), *reprinted as amended in* 5 U.S.C. § 601 app. at 816–17 (2012).

101 *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 471 (2001).

102 *See* Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303 (1999).

103 For discussion, see Cass R. Sunstein, *Cost-Benefit Analysis and Arbitrariness Review*, 41 HARV. ENVTL. L. REV. 1, 30–36 (2017).

104 *See* City of Arlington v. FCC, 569 U.S. 290, 296–301 (2013).

understanding it here, seems to be based on the same considerations that once led lower courts to deny *Chevron* deference to jurisdictional determinations, and it is predictably sowing confusion.[105]

To be sure, the distinction between major and nonmajor question is not illusory. But it is one of degree rather than one of kind, and to administer the distinction, courts have to engage in the same kinds of difficult line-drawing that revival of the standard nondelegation doctrine would require.[106] To be sure, the idea of "an enormous and transformative expansion in"[107] regulatory authority does provide help.[108] A question might be major, but the agency's resolution might not result in such an expansion. Even so, no clear line separates enormous expansions from merely significant expansions. But we can fairly read *Utility Air Regulatory Group* to hold that the nondelegation canon will apply only in extreme cases, in which an agency is seizing on some "unheralded" term to produce a massive increase in its own authority.[109]

The second objection to the canon is that in cases in which it is invoked, agencies are working with broad or ambiguous terms, adaptable to new circumstances, and it makes sense to allow them to understand those terms in a way that fits those circumstances, rather than to require Congress to make a specific and focused decision on the point. Return to *Brown & Williamson* itself. Congress did not offer a list of drugs and direct the FDA to refer to that list. Instead it provided a broad statutory definition of "drug" as any article that is "intended to affect the structure or any function of the body."[110] That phrase plainly authorizes the FDA to act in cases that Congress could not have anticipated (because it lacked the relevant information). If it turns out that tobacco is reasonably taken to fall within the statutory definition, hasn't Congress done the requisite work?

The point applies to the problem of climate change as well. *Utility Air Regulatory Group* was decided in the wake of *Massachusetts v. EPA*,[111] where the Court held that the term "pollutant," in the Clean

105 *See* U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 418–26 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

106 Note that this is unambiguously true for the *Chevron* carve-out theory.

107 Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2444 (2014).

108 But it does not apply to the Chevron carve-out theory. See King v. Burwell, 135 S. Ct. 2480, 2488–89 (2015) (invoking the Chevron carve-out theory without applying or engaging with that language).

109 *Util. Air Regulatory Grp.*, 134 S. Ct. at 2444.

110 FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 126 (2000).

111 549 U.S. 497 (2007).

Air Act, included carbon dioxide, a greenhouse gas.[112] After all, an air pollutant is explicitly defined as "any air pollution agent or combination of such agents . . . which is emitted into or otherwise enters the ambient air."[113] Greenhouse gases, and carbon dioxide in particular, seem to fit the statutory definition. Under the reasoning of *Brown & Williamson* and *Utility Air Regulatory Group*, that would not be sufficient. Under that reasoning, the EPA would lack the authority to regulate greenhouse gases because any effort to do so would result in "an enormous and transformative expansion in" its "regulatory authority without clear congressional authorization."[114] And while briefs in *Massachusetts v. EPA* made that very argument,[115] no member of the Court accepted or even mentioned it.

If *Utility Air Regulatory Group* was right, was *Massachusetts v. EPA* wrong? Not necessarily. In the former case, the EPA agreed that the particular program at issue was a poor fit for the greenhouse gas problem, so much so that it had to make some awkward adjustments, which were inconsistent with the statutory text, to avoid what it saw as absurdity.[116] *Utility Air Regulatory Group* could be seen as resting principally on a narrow ground, to the effect that in light of the agency's inability to comply with statutory requirements when applying the program to greenhouse gases, it was clear that Congress did not intend that program to apply to greenhouse gases.

Whether or not that view is convincing, its centrality to the Court's holding suggests that we should take the "enormous and transformative expansion" language in that context. Indeed, the Court's own analysis is easily understood in this narrower way. As the Court put it, "Since, as we hold above, the statute does not compel EPA's interpretation, it would be patently unreasonable—not to say outrageous—for EPA to insist on seizing expansive power that it admits the statute is not designed to grant."[117] In this light, the decision can comfortably coexist with *Massachusetts v. EPA*, which did not present that problem.

It must, however, be acknowledged that the Court's language in *Utility Air Regulatory Group* could easily have been used to justify the opposite outcome in *Massachusetts v. EPA* itself, and that in successor

112 *Id.* at 513.

113 42 U.S.C. § 7602(g) (2018).

114 *Util. Air Regulatory Grp.*, 134 S. Ct. at 2432.

115 Brief for the Federal Respondent at 21–35, *Massachusetts*, 549 U.S. 497 (No. 05-1120); Brief for the Petitioners at 18–26, *id.* (No. 05-1120).

116 *Util. Air Regulatory Grp.*, 134 S. Ct. at 2442–47.

117 *Id.* at 2444.

cases, it could easily be used to create a robust limitation on agency authority—not merely a *Chevron* carve-out, but a prohibition on any agency interpretations of ambiguous terms that produce an "enormous and transformative expansion" in agency authority.[118] Would such a limitation be a good idea?

The answer depends on statutory language and context. If Congress has chosen to use a broad term—for example, by prohibiting "unreasonable risks" from pesticides—it is entirely legitimate for the agency to understand that term to reach activities to which Congress had no objection, even if the result can be an enormous and transformative expansion in agency authority.[119] But if the agency is seizing on an old provision (such as a definition of "drug") that had never been thought to apply to a large and apparently distinct sector of the economy (such as tobacco), it is at least plausible to say that a more explicit kind of congressional authorization should be mandated.

Conclusion

To say the least, the standard nondelegation doctrine does not have a glorious past. In all of American history, it has had just one good year.[120] Recent research has raised serious doubts about its constitutional pedigree.[121] On originalist and historical grounds, it rests on insecure foundations.[122] Nonetheless, it has a great deal of intuitive appeal. Among some academic observers,[123] some critics of the administrative state,[124] and some judges,[125] the standard nondelegation doctrine is part of the Constitution in Exile, and it must be returned to the throne.

Amidst the clamor, we have neglected our actual nondelegation doctrine, for which every year is a good year. Time and again, it imposes sharp constraints on the administrative state, not by applying the heavy artillery of the Constitution or the requirements of the Ad-

118 *See supra* note 98 and accompanying text.

119 *See* Envtl. Def. Fund, Inc. v. EPA, 489 F.2d 1247, 1254 (D.C. Cir. 1973).

120 *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529–30 (1935) (applying the nondelegation doctrine); Pan. Ref. Co. v. Ryan, 293 U.S. 388, 421 (1935).

121 *See* Posner & Vermeule, *supra* note 5, at 1722.

122 *See* Mashaw, *supra* note 7, at 4–5.

123 *See* David Schoenbrod, Power Without Responsibility 4–8 (1993) (arguing that delegation allows rules that hurt consumers to remain in effect and that Congress is shielded from blame).

124 *See* Hamburger, *supra* note 2, at 1–3.

125 *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 487 (2001) (Thomas, J., concurring) (expressing broad constitutional concerns about delegation of power).

ministrative Procedure Act,[126] but by requiring clear congressional authorization for agency action—and by insisting, not rarely, that such authorization cannot be found. When the system of checks and balances is working well, we sometimes fail to see it; it is hiding in plain sight. Our nondelegation doctrine is one of the most important examples.

126 Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706 (2012).