2022 e- Supplement to *Cases and Materials on Legislation and Regulation*, Sixth Edition, William N. Eskridge Jr., James J. Brudney, Josh Chafetz.

CHAPTER 2

REPRESENTATIONAL STRUCTURES

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1. ELECTORAL STRUCTURES AND EQUALITY VALUES

Insert these paragraphs at Casebook page 176, at the end of Section 1:

In *Arizona State Legislature v. Arizona Independent Redistricting Commission*, the Court narrowly rejected what has come to be called the "independent state legislature doctrine"—that is, the idea that the Constitution's use of "legislature" in Art. I, sec. 4 refers only to the entity denominated the "state legislature," rather than to the state *legislative process* more generally. Since that case was decided in 2015, four justices have departed: three members of the majority (Justice Ginsburg, who authored the opinion, and Justices Kennedy and Breyer), and one dissenter (Justice Scalia). Of the four new members of the Court, three (Justices Gorsuch, Kavanaugh, and Barrett) are likely to be receptive to the independent state legislature doctrine; only Justice Jackson (Justice Breyer's replacement) is not.

On the final day of its 2021 Term, the Supreme Court agreed to hear a new independent state legislature doctrine case, *Moore v. Harper*, No. 21-1271, 2022 WL 2347621 (U.S. June 30, 2022) (mem.). After the North Carolina Supreme Court struck down the state's congressional districts as a partisan gerrymander in violation of the *state* constitution, Republican state legislators sued, arguing that, by striking down the map, the state judges were prescribing the places and manner of holding congressional elections, thereby usurping the state legislature's role under Art. I, sec. 4 of the federal Constitution. In response, the state asserted that the state legislature referred to in Art. I, sec. 4 means the state legislative process as constituted by the state constitution, which in this case provides for state judicial review and (as interpreted by the state supreme court) forbids partisan gerrymanders.

If the Court's majority uses *Moore* to adopt the independent state legislature doctrine, it will have significant implications for congressional elections: independent redistricting commissions would no longer be permissible, and state courts could no longer strike down election laws as being in violation of the state constitution. (Query whether governors, who, after all, are not part of the legislative branch, could even veto election laws passed by the state legislature.) But the implications go even further, because Art. I, sec. 4 is not the only election-law provision in the federal Constitution that refers to state legislatures: Art. II, sec. 1 says that presidential electors shall be appointed "in such Manner as the Legislature [of each state] may direct." In the aftermath of the 2020 election, some of President Trump's allies argued that Republican-controlled legislatures of states won by Joe Biden could simply submit alternative slates of electors, handing those states' electoral votes to Trump. Of course, there may be ways that the *Moore* Court could announce an independent state legislature doctrine that would stop short of permitting this scenario—for instance, the Court could insist that the legislature has to direct the manner of appointing presidential electors *in advance*, rather than changing the rules after voters have gone to the polls. Still, if the Court does use *Moore* to adopt the doctrine, it will be significantly limiting the ability of state courts, secretaries of state, election officials, and others to interpret state statutes and constitutional provisions in ways that the current majorities in the state legislatures disapprove. For some worries along these lines, see Richard L. Hasen, *It's Hard to Overstate the Danger of the the Voting Case the Supreme Court Just Agreed to Hear*, Slate,

June 30, 2022, https://slate.com/news-and-politics/2022/06/supreme-court-dangerous-independent-state-legislature-theory.html. For a persuasive argument that the independent state legislature doctrine is actually a doctrine of federal judicial empowerment, see Leah M. Litman & Katherine Shaw, *Textualism, Judicial Supremacy, and the Independent State Legislature Theory*, 2022 Wis. L. Rev. (forthcoming), *available at* https://ssrn.com/abstract=4141535.

3. STRUCTURES OF CAMPAIGN FINANCE

Insert these paragraphs at Casebook page 241, before the first full paragraph on that page:

Most recently, the Supreme Court in 2022 struck down a provision of BCRA that limited candidates' ability to repay themselves from campaign funds. Texas Senator Ted Cruz loaned $260,000 of his own money to his 2018 reelection campaign. Campaigns are allowed to continue raising money after the election to pay off their debts, but BCRA § 304, 52 U.S.C. § 30116(j), provides that post-election funds can only be used to reimburse candidates for loans to their campaign up to the amount of $250,000. Cruz sued to get his remaining $10,000, and the Supreme Court, in a 6-3 opinion, struck down the provision as a violation of the First Amendment. *Fed. Election Comm'n v. Cruz*, 142 S. Ct. 1638 (2022).

The majority, per Chief Justice Roberts, argued that the provision burdens the political speech of candidates who wish to loan money to their own campaigns. The government argued that these restrictions were justified because these contributions "raise a heightened risk of corruption because of the use to which they are put: repaying a candidate's personal loans[, and also] *** because the contributor will know—not merely hope—that the recipient, having prevailed, will be in a position to do him some good." *Id*. at 1652. The majority rejected this as "yet another in a long line of 'prophylaxis-upon-prophylaxis approach[es]' to regulating campaign finance," which, it suggested, are rarely justifiable. *Id*. at 1652-53. The majority dismissed the evidence presented by the government as insufficient to demonstrate that § 304 limits either actual or apparent quid-pro-quo corruption.

In dissent, Justice Kagan insisted that, "The theory of the legislation is easy to grasp. Political contributions that will line a candidate's own pockets, given after his election to office, pose a special danger of corruption. The candidate has a more-than-usual interest in obtaining the money (to replenish his personal finances), and is now in a position to give something in return. The donors well understand his situation, and are eager to take advantage of it. In short, everyone's incentives are stacked to enhance the risk of dirty dealing." *Id*. at 1657 (Kagan, J., dissenting). As a result, she argued, it easily satisfies the requirements for restrictions on campaign spending. But she also argued that this was not actually a campaign *spending* case; rather, § 304 should be understood as a limitation on campaign *contributions*, which, under *Buckley*, are far easier to justify. The reason, Justice Kagan argued, is that the provision "prevents post-election campaign contributions from going to repay large loans that the candidate has made to his campaign. So the provision limits—much as standard contribution caps do—only the candidate's ability to shift the costs of his electoral speech to others. Or said a bit differently, it addresses not a candidate's 'self-fund[ing],' but only his reliance on third-party financing." *Id*. at 1658.

CHAPTER 5

THEORIES OF STATUTORY INTERPRETATION

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3. CURRENT DEBATES IN STATUTORY INTERPRETATION

Page 59 of the 2021 Supplement: Substitute this Note for the Note on *Niz-Chavez* and the Court's Dueling Textualisms:

NOTES ON NIZ-CHAVEZ *AND THE TEXT WARS*

1. *The Text Wars. Bostock* (Gorsuch majority, Alito and Kavanaugh dissents) and *Niz-Chavez* (Gorsuch majority, Kavanaugh dissent) were both handed down after the "newest textualists" secured a majority on the Supreme Court. (Since 2021, the split has been 6 conservative newest textualists appointed by Republican Presidents and 3 liberal pragmatists appointed by Democratic Presidents.) In the last three Terms of the Court (2019-21), there have been a number of other dueling statutory opinions pitting the newest textualists against one another, with the pragmatists usually holding the balance of power. Some of them include the following:

● *Biden v. Texas*, 142 S. Ct. 2528 (2022) (excerpted and discussed in Chapter 8 of this e-Supplement). President Biden revoked his predecessor's policy of returning to Mexico all undocumented immigrants coming across that border. Writing for Kavanaugh, Barrett, and the pragmatists on the merits, Roberts interpreted the immigration law to vest enforcement officials with broad discretion. Alito (with Thomas and Gorsuch) read the discretionary text in light of surrounding mandatory provisions and would have ruled that the previous policy was required by law.

● *Patel v. Garland*, 142 S. Ct. 1614 (2022). An immigrant sought discretionary adjustment of status from the Attorney General, but the administrative law judge found that he was barred for lying on a state driver's license application. Arguing that the error was an honest mistake, Patel sought judicial review. Writing for all the textualists except Gorsuch, Barrett's opinion applied a provision barring judicial review of "any judgment regarding the granting of relief" under the adjustment-of-status provision. Joined by the pragmatists, Gorsuch argued that the Court read "regarding the granting of relief" out of the statute.

● *Wooden v. United States*, 142 S. Ct. 1063 (2022) (excerpted and discussed in Chapter 6 of this e-Supplement). A unanimous Court interpreted the Armed Career Criminals Act to treat sequential burglaries in one night as one "occasion" (and not several) for sentence enhancement purposes. Concurring in most of the majority opinion, Barrett and Thomas objected to its reliance on a statutory amendment and its legislative history. Concurring in the judgment, Gorsuch rejected the majority's multi-factor balancing approach and resoled the case with the rule of lenity. Kavanaugh's concurring opinion argued against the lenity canon, which had rarely made much difference in previous cases, and distracted judges from textual analysis. Alito and Roberts joined the Court's opinion—sans lenity, avec legislative history—without comment.

● *Biden v. Missouri*, 142 S. Ct. 647 (2022) (excerpted and discussed in Chapter 9 of this e-Supplement). Interpreting congressional authorization to issue rules regulating the operation of hospitals receiving federal funds, HHS mandated that hospital employees be vaccinated against the COVID-19 virus. In a *per curiam* opinion joined by Roberts, Kavanaugh, and the three pragmatists, the Court upheld the mandate. Thomas's dissenting opinion (joined by Alito, Gorsuch, and Barrett) required a more specific or targeted text to authorize an agency to adopt such a far-reaching policy.

● *Van Buren v. United States*, 142 S. Ct. 1648 (2021). The Computer Fraud and Abuse Act of 1986 makes it a crime to "to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter." Barrett wrote for the Court (including Gorsuch and Kavanaugh) to void the conviction of a police officer accused of using his office computer for private searches he was not authorized to conduct. Joined by Roberts and Alito, Thomas dissented in favor of the government. The majority and dissent fiercely debated the meaning of "so" and "entitled." Barrett closed her opinion with concern for the broad reach of the criminal statute if the government's approach had prevailed.

● *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). In nineteenth-century treaties, Congress recognized sovereignty by the Creek Nation over reservation land in what is now Oklahoma. A state criminal prosecution of a Native-American defendant would have been invalid if his crime had occurred on the Creek Reservation. Supporting Oklahoma's position, Roberts, Thomas, Alito, and Kavanaugh found that Congress had effectively "disestablished" the Creek Reservation. Writing for the Court, Gorsuch found no statute actually disestablishing the reservation. In *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022), Kavanaugh's majority ignored *McGirt* and found that Oklahoma could prosecute crimes by non-Indians committed on Indian reservations; Gorsuch, joined by the pragmatists, dissented.

● *Atlantic Richfield Co. v. Christian*, 140 S. Ct. 1335 (2020). Interpreting the Superfund Act broadly to empower the EPA to supersede state law in directing large-scale environmental clean-up operations, Roberts was joined by Alito, Kavanaugh, and the (then-)four pragmatists. Joined by Thomas, Gorsuch dissented from such a broad understanding of the law, which would turn the modest environmental law into a scheme for "paternalist central planning."

See William Eskridge Jr., Brian Slocum & Kevin Tobia, "The Newest Textualism *Is* Rocket Science" (Draft July 11, 2022) (discussing these and other Text Wars splits). Note that the big constitutional cases, like *Dobbs v. Jackson Women's Health Organization,* 142 S. Ct. 2228 (2022), and most of the big statutory cases, like *West Virginia v. EPA*, 142 S. Ct. 2587 (2022) (excerpted and discussed in Chapter 9 of this e-Supplement), find the Court divided 6-3 along strict party lines.

2. *Two Textualisms? Or Multiple Textualist Personalities? Debates Among the Supreme Court's "Newest Textualists."* Professor Grove argues that the current Court is divided three ways: (1) the "pragmatists" (our term for Sotomayor, Kagan, and probably Jackson), following statutory text, purpose, and precedent, while attentive to legislative history; (2) the flexible textualists (Roberts, Kavanaugh, sometimes Alito), following statutory text and usually precedent, and open to the government's pragmatic arguments; and (3) strict textualists (Gorsuch, Thomas), who analyze the text, the whole text, and nothing but the text, brushing off pragmatic arguments and minimizing precedent. Tara Leigh Grove, *Which Textualism?*, 134 Harv. L. Rev. 265 (2020). (It is unclear how one might characterize Justice Barrett, except to say that she is a textualist influenced by Scalia, for whom she clerked.)

On the other hand, when you look at the cases, the divisions are not so simple: Thomas abandoned Gorsuch when LGBT rights were at stake in *Bostock*, and Roberts abandoned Alito and

Kavanaugh. In *McGirt* and *Castro-Huerta,* involving jurisdiction over crimes committed in "Indian country," Roberts, Thomas, Alito, and Kavanaugh (a motley group of textualists, according to Grove) argued that the "intent" and "purpose" of Congress were the key inquiries, and in both cases they dismissed original meaning of 19th century treaties and the General Crimes Act of 1834 as inconsistent with post-Civil War and 20th century developments. In *Castro-Huerta*, Gorsuch relied on legislative history to interpret the 1834 Act rather broadly.

There are a number of patterns to the cases—the main one being that what unites the newest textualists is not method, but ideology. As a group, they are pretty libertarian—they aren't afraid to rebuke agencies that try to address pandemics and global warming without specific authorization from a gridlocked Congress, and they are happy to spring criminal defendants when the gridlocked Congress has not targeted them—but they also consider the Tenth Amendment a baseline and not a truism and defer to presidential authority in national security etc., as illustrated by their solidarity in support of Trump's anti-Muslim Travel Ban. Among the six, the least likely to vote based on the Republican Party platform is Gorsuch, primarily because of his independent streak in the LGBT rights and Indian country jurisdiction cases. The rest of them vote their party line on issues where the GOP had a clear position (except for the presidential power case that peeled off Roberts, Kavanaugh, and Barrett).

Doctrinally, the newest textualists have not settled on a stable approach about what sources are appropriate for seeking word and phrase meaning, when to apply "ordinary meaning" and when term-of-art meaning and how broadly or narrowly to set it, what linguistic analytic ought to be associated with textualism, whether they really want to apply original public meaning all the time (when it hurts "the homosexuals," sure, but not when it upends the expectations of white people whose ancestors stole land and reneged on treaty commitments to Native peoples), what role textual canons ought to play in figuring out plain meaning, what substantive canons should be applied to strong-arm text into plain meanings, whether to give clear statement rules extra coercive authority by making them "super-strong" and harder for gridlocked Congress to override, whether to sneak in legislative history when convenient (and what to say when academics call them out), how much weight to give to precedents that cut against what they consider plain meaning and when to overrule or just ignore bad precedents, and whether to accept the absurdity escape hatch from even the pretense of following the text. See Eskridge, Slocum & Tobia, "Rocket Science" (exploring all of these issues and more).

3. *The New Pragmatism*. The pragmatic/liberal Justices have thus far decided to accede to the triumph of the newest textualism rather than fight or even strongly denounce its increasingly flexible methodology. For example, in *Borden v. United States,* 141 S. Ct. 1817 (2021), Kagan interpreted a sentence enhancement law narrowly, to be limited to intentional crimes and not crimes of recklessness. She secured a majority not by appealing to the rule of lenity or notions of just punishment, but by hyper-focusing on the preposition "against" (arguing that the enhancement for crimes "against the person" had to be intentional). With that super-technical argument, she added Thomas and Gorsuch to her three liberal votes to secure a 5-4 majority. In dissent, Kavanaugh had a field day, refuting her reasoning with a wide-ranging and scholarly analysis of American (and pre-Revolutionary English) criminal law. The majority's legal analysis seemed shallow in contrast.

In *Wooden,* Kagan had more success mimicking the textualist methodology—hyperfocusing on one word ("occasion"), dictionary-shopping it to death, treating it to cutesy hypotheticals, considering the whole act, and resolutely ignoring the human being the government was trying to send to prison for most of his remaining life. She threw in some legislative history—quite compelling in our view—and took heat from Barrett and Thomas, and she earned a rebuke from Gorsuch for adopting a balancing standard for future cases, rather than the bright-line rule favored by the textualists. But she played the game adroitly, eight jurists from a variety of perspectives joined all or almost all of her opinion, and (by the way) justice was done. Mr. Wooden never should have been saddled with extra enhancements.

CHAPTER 6

INTRINSIC DOCTRINES OF STATUTORY INTERPRETATION

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3. SUBSTANTIVE POLICY CANONS

A. THE RULE OF LENITY IN CRIMINAL CASES

Page 670 of the Casebook: Add the following Case and Notes after *Problem 6-2*

WOODEN V. UNITED STATES

Supreme Court of the United States, 2022
___U.S. ___, 142 S. Ct. 1063, 212 L.Ed.2d 187

JUSTICE KAGAN delivered the opinion of the Court.

In the course of one evening, William Dale Wooden burglarized ten units in a single storage facility. He later pleaded guilty, for that night's work, to ten counts of burglary—one for each storage unit he had entered. Some two decades later, the courts below concluded that those convictions were enough to subject Wooden to enhanced criminal penalties under the Armed Career Criminal Act (ACCA). That statute mandates a 15-year minimum sentence for unlawful gun possession when the offender has three or more prior convictions for violent felonies like burglary "committed on occasions different from one another." 18 U.S.C. § 924(e)(1). The question presented is whether Wooden's prior convictions were for offenses occurring on different occasions, as the lower courts held, because the burglary of each unit happened at a distinct point in time, rather than simultaneously. The answer is no. Convictions arising from a single criminal episode, in the way Wooden's did, can count only once under ACCA.

[I.] Begin in 1997, when Wooden and three confederates unlawfully entered a one-building storage facility[.] * * * The burglars proceeded from unit to unit within the facility, "crushing the interior drywall" between them. The men stole items from, all told, ten different storage units. So Georgia prosecutors charged them with ten counts of burglary * * *. Wooden pleaded guilty to all counts. The judge sentenced him to eight years' imprisonment for each conviction, with the ten terms to run concurrently.

Fast forward now to a cold November morning in 2014, when Wooden responded to a police officer's knock on his door. * * * Once admitted to the house, the officer spotted several guns. Knowing that Wooden was a felon, the officer placed him under arrest. A jury later convicted him for being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g).

The penalty for that crime varies significantly depending on whether ACCA applies. Putting ACCA aside, the *maximum* sentence for violating § 922(g) is ten years in prison. See § 924(a)(2). But ACCA mandates a *minimum* sentence of fifteen years if the § 922(g) offender has

three prior convictions for "violent felon[ies]" (like burglary) or "serious drug offense[s]" that were "committed on occasions different from one another."

* * * [T]he District Court accepted the Government's view that every time Wooden busted into another storage unit, he commenced a new "occasion" of criminal activity. The court reasoned, relying on Circuit precedent, that the entry into "[e]ach separate [unit] provides a discrete point at which the first offense was completed and the second began and so on." * * * The Court of Appeals for the Sixth Circuit affirmed[.] * * *

[II.A] Consider first how an ordinary person (a reporter; a police officer; yes, even a lawyer) might describe Wooden's ten burglaries—and how she would not. The observer might say: "On one occasion, Wooden burglarized ten units in a storage facility." By contrast, she would never say: "On ten occasions, Wooden burglarized a unit in the facility." Nor would she say anything like: "On one occasion, Wooden burglarized a storage unit; on a second occasion, he burglarized another unit; on a third occasion, he burglarized yet another; and so on." She would, using language in its normal way, group his entries into the storage units, even though not simultaneous, all together—as happening on a single occasion, rather than on ten "occasions different from one another." § 924(e)(1).

That usage fits the ordinary meaning of "occasion." The word commonly refers to an event, occurrence, happening, or episode. See, *e.g.*, American Heritage Dictionary 908 (1981); Webster's Third New International Dictionary 1560 (3d ed. 1986). And such an event, occurrence, happening, or episode—which is simply to say, such an occasion—may itself encompass multiple, temporally distinct activities. The occasion of a wedding, for example, often includes a ceremony, cocktail hour, dinner, and dancing. Those doings are proximate in time and place, and have a shared theme (celebrating the happy couple); their connections are, indeed, what makes them part of a single event. But they do not occur at the same moment: The newlyweds would surely take offense if a guest organized a conga line in the middle of their vows. That is because an occasion may—and the hypothesized one does—encompass a number of non-simultaneous activities; it need not be confined to a single one.

The same is true (to shift gears from the felicitous to the felonious) when it comes to crime. In that sphere too, an "occasion" means an event or episode—which may, in common usage, include temporally discrete offenses. Consider a couple of descriptions * * *. "On one occasion," we noted, "Bryant hit his live-in girlfriend on the head with a beer bottle and attempted to strangle her." *United States v. Bryant*, 579 U.S. 140, 151 (2016). "*On one occasion*"—regardless whether those acts occurred at once (as the Government would require) or instead succeeded one another. * * * Or take a hypothetical suggested by oral argument here: A barroom brawl breaks out, and a patron hits first one, then another, and then a third of his fellow drinkers. The Government maintains those are not just three offenses (assaults) but also three "occasions" because they happened seriatim. See Tr. of Oral Arg. 52–53, 61–62. But in making the leap from three offenses to three occasions, based on a split-second separation between punches, the Government leaves ordinary language behind. The occasion in the hypothetical is the barroom brawl, not each individual fisticuff.

By treating each temporally distinct offense as its own occasion, the Government goes far toward collapsing two separate statutory conditions. Recall that ACCA kicks in only if (1) a § 922(g) offender has previously been convicted of three violent felonies, and (2) those three felonies were committed on "occasions different from one another." § 924(e)(1). In other words, the statute contains *both* a three-offense requirement *and* a three-occasion requirement. But under the Government's view, the two will generally boil down to the same thing: When an offender's criminal history meets the three-offense demand, it will also meet the three-occasion one. * * * The Government's reading, to be sure, does not render the occasions clause wholly superfluous;

in select circumstances, a criminal may satisfy the elements of multiple offenses in a single instant. But for the most part, the Government's hyper-technical focus on the precise timing of elements—which can make someone a career criminal in the space of a minute—gives ACCA's three-occasions requirement no work to do.

The inquiry that requirement entails, given what "occasion" ordinarily means, is more multi-factored in nature. * * * [A] range of circumstances may be relevant to identifying episodes of criminal activity. Timing of course matters, though not in the split-second, elements-based way the Government proposes. Offenses committed close in time, in an uninterrupted course of conduct, will often count as part of one occasion; not so offenses separated by substantial gaps in time or significant intervening events. Proximity of location is also important; the further away crimes take place, the less likely they are components of the same criminal event. And the character and relationship of the offenses may make a difference: The more similar or intertwined the conduct giving rise to the offenses—the more, for example, they share a common scheme or purpose—the more apt they are to compose one occasion.

* * * Here, every relevant consideration shows that Wooden burglarized ten storage units on a single occasion, even though his criminal activity resulted in double-digit convictions. Wooden committed his burglaries on a single night, in a single uninterrupted course of conduct. The crimes all took place at one location, a one-building storage facility with one address. Each offense was essentially identical, and all were intertwined with the others. The burglaries were part and parcel of the same scheme, actuated by the same motive, and accomplished by the same means. Indeed, each burglary in some sense facilitated the next, as Wooden moved from unit to unit to unit, all in a row. And reflecting all these facts, Georgia law treated the burglaries as integrally connected. Because they "ar[ose] from the same conduct," the prosecutor had to charge all ten in a single indictment. * * *.

[In Part II.B, Justice Kagan relied on statutory history and purpose to "confirm" the majority's conclusion based on its ordinary meaning analysis of "occasion." The Court noted that Congress had added the occasions clause in 1988, in response to an appeals court having applied ACCA to an offender (Petty) similar to Wooden—convicted of multiple counts of robbery arising from a single criminal episode. In the *Petty* case, the Solicitor General had "confessed error" to the Supreme Court, invoking detailed legislative history to argue that even without the appropriate text, Congress had intended ACCA to have the same scope as other federal penalty-enhancement statutes requiring that crimes had occurred on occasions different from one another. The Court heeded the SG's position and remanded *Petty* for further consideration. Congress added the occasions clause to ACCA one year later. When placing the "occasions clause" amendment on the Senate calendar, Senate majority leader Robert Byrd introduced a Judiciary Committee analysis explaining that the proposed amendment "would clarify the armed career criminal statute to reflect the Solicitor General's construction" in *Petty*.] * * *

[The concurring opinion of JUSTICE SOTOMAYOR is omitted]

JUSTICE BARRETT, with whom JUSTICE THOMAS joins, concurring in part and concurring in the judgment.

I join all but Part II–B of the Court's opinion. I agree with the Court's analysis of the ordinary meaning of the word "occasion" and its conclusion that Wooden's burglaries count only once under the Armed Career Criminal Act. But I do not share the Court's view that Congress ratified the Solicitor General's brief confessing error in *United States v. Petty*, 798 F.2d 1157 (CA8 1986), when it amended the Act to add the occasions clause. This argument depends on two flawed inferences: first, that Congress specifically intended to reject the

Eighth Circuit's initial decision in *Petty*, and second, that it embraced the former Solicitor General's reasoning for why that decision was wrong. * * *

Petty's tenuous tie to the statute distinguishes this case from the many in which we have recognized that a judicial decision or line of decisions has provided the impetus for legislation. In some instances, enacted findings have explicitly connected the statute to a prior decision. In others, a well-established legal backdrop has revealed Congress's reasons for acting. But here, no enacted language mentions *Petty*, and the Court wisely does not portray the case—a single, subsequently vacated court of appeals opinion—as part of the settled legal landscape against which ACCA was amended. The only thread connecting the occasions clause to Petty is legislative history, and the problems with legislative history are well rehearsed. * * *

The Court glosses this statute by leaning on weak evidence of Congress' impetus for amending the statute, followed by still weaker evidence that Congress embraced the reasoning of a brief filed by the Solicitor General. I would impute to Congress only what can fairly be imputed to it: the words of the statute. * * *

JUSTICE KAVANAUGH, concurring.

I join the Court's opinion in full. In light of Justice Gorusch's thoughtful concurrence in the judgment, I write separately to briefly explain why the rule of lenity has appropriately played only a very limited role in this Court's criminal case law. And I further explain how another principle—the presumption of *mens rea*—can address Justice Gorsuch's important concern, which I share, about fair notice in federal criminal law.

A common formulation of the rule of lenity is as follows: If a federal criminal statute is grievously ambiguous, then the statute should be interpreted in the criminal defendant's favor. Importantly, the rule of lenity does not apply when a law merely contains some ambiguity or is difficult to decipher. As this Court has often said, the rule of lenity applies only when "'after seizing everything from which aid can be derived,' " the statute is still grievously ambiguous. The rule "comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." Our repeated use of the term "grievous ambiguity" underscores that point.

* * * In short, because a court must exhaust all the tools of statutory interpretation before resorting to the rule of lenity, and because a court that does so often determines the best reading of the statute, the rule of lenity rarely if ever comes into play. * * * I would not upset our rule of lenity case law by making the ambiguity trigger any easier to satisfy. For example, I would not say that any front-end ambiguity in the statute justifies resort to the rule of lenity even before exhausting the tools of statutory interpretation. One major problem with that kind of ambiguity trigger is that ambiguity is in the eye of the beholder and cannot be readily determined on an objective basis. Applying a looser front-end ambiguity trigger would just exacerbate that problem, leading to significant inconsistency, unpredictability, and unfairness in application.

* * * That said, I very much agree with Justice Gorsuch about the importance of fair notice in federal criminal law. But as I see it, that concern for fair notice is better addressed by other doctrines that protect criminal defendants against arbitrary or vague federal criminal statutes—in particular, the presumption of *mens rea*.

The deeply rooted presumption of *mens rea* generally requires the Government to prove the defendant's *mens rea* with respect to each element of a federal offense, unless Congress plainly

provides otherwise. In addition, with respect to federal crimes requiring "willfulness," the Court generally requires the Government to prove that the defendant was aware that his conduct was unlawful.

* * * In sum, I would not invite the inconsistency, unpredictability, and unfairness that would result from expanding the rule of lenity beyond its very limited place in the Court's case law. I would, however, continue to vigorously apply (and where appropriate, extend) *mens rea* requirements, * * * .

JUSTICE GORSUCH, with whom JUSTICE SOTOMAYOR joins as to Parts II, III, and IV, concurring in the judgment.

* * * For years, lower courts have struggled with the Occasions Clause, reaching contradictory judgments on similar facts. We took this case hoping to bring some clarity to at least this particular corner of the ACCA.

[I] What do we resolve? The Court rejects the Sixth Circuit's rule that crimes occurring sequentially always occur on different occasions. Sometimes, the Court holds, crimes committed one after another can take place on a single occasion. No one doubts that William Wooden had to break through wall after wall dividing 10 separate storage units to complete his crimes. Or that, by the end of it all, he committed 10 distinct criminal offenses. But, the Court explains, none of this automatically dictates the conclusion that his crimes occurred on different occasions.

Beyond that clear holding, however, lies much uncertainty. Rather than simply observe that sequential crimes can occur on one occasion and return this case to the Court of Appeals for resolution, the Court ventures further. It directs lower courts faced with future Occasions Clause cases to employ a "multi-factored" balancing test in which "a range of circumstances may be relevant."

The potentially relevant factors turn out to be many and disparate. The Court says that offenses committed close in time "often"—but not always—take place on a single occasion. Offenses separated by "substantial gaps in time or significant intervening events" usually occur on separate occasions—though what counts as a "substantial" gap or "significant" event remains unexplained. "Proximity of location" can be "important" too—but it is not necessarily dispositive. Whether the defendant's crimes involve "similar or intertwined" conduct also "may"—or may not—make a difference. And even this long list of factors probably is not exhaustive. Nor does the list come with any instructions on how to weigh the relative importance of so many factors or how to resolve cases when those factors point in different directions.

* * * Admittedly, a long list of factors may supply a clear answer in some cases. Who doubts that a single gunshot hitting two people involves two crimes on a single occasion—or that two murders separated by years and miles take place on separate occasions? The problem is that beyond easy cases like those lies a universe of hard ones, where a long list of non-exhaustive, only sometimes relevant, and often incommensurable factors promises to perpetuate confusion in the lower courts and conflicting results for those whose liberties hang in the balance.

* * * [E]ven when it comes to Mr. Wooden, it's not entirely clear whether the Court's factors compel only one conclusion. When it comes to location, each storage unit had its own number and space, each burglary infringed on a different person's property, and Mr. Wooden had to break through a new wall to enter each one. Suppose this case involved not adjacent storage units but adjacent townhomes or adjacent stores in a mall. If Mr. Wooden had torn through the walls separating them, would we really say his crimes occurred at the same location?

The answer is no more certain when the question turns to timing. Nothing in the record before us speaks to how long Mr. Wooden lingered over his crimes—whether they spanned one hour or many. * * * Every judge who confronted this case before us thought his crimes happened on different occasions. And it's not hard to see how different minds might come to different conclusions.

* * * Respectfully, all this suggests to me that the key to this case does not lie as much in a multiplicity of factors as it does in the rule of lenity. Under that rule, any reasonable doubt about the application of a penal law must be resolved in favor of liberty. Because reasonable minds could differ (as they have differed) on the question whether Mr. Wooden's crimes took place on one occasion or many, the rule of lenity demands a judgment in his favor. * * *

[II] The "rule of lenity" is a new name for an old idea—the notion that "penal laws should be construed strictly." The rule first appeared in English courts, justified in part on the assumption that when Parliament intended to inflict severe punishments it would do so clearly. In the hands of judges in this country, however, lenity came to serve distinctively American functions—a means for upholding the Constitution's commitments to due process and the separation of powers. Accordingly, lenity became a widely recognized rule of statutory construction in the Republic's early years.

Consider lenity's relationship to due process. Under the Fifth and Fourteenth Amendments, neither the federal government nor the States may deprive individuals of "life, liberty, or property, without due process of law." Generally, that guarantee requires governments seeking to take a person's freedom or possessions to adhere to "those settled usages and modes of proceeding" found in the common law. And among those "settled usages" is the ancient rule that the law must afford ordinary people fair notice of its demands. Lenity works to enforce the fair notice requirement by ensuring that an individual's liberty always prevails over ambiguous laws.

* * * Closely related to its fair notice function is lenity's role in vindicating the separation of powers. Under our Constitution, "[a]ll" of the federal government's "legislative Powers" are vested in Congress. Art. I, § 1. Perhaps the most important consequence of this assignment concerns the power to punish. Any new national laws restricting liberty require the assent of the people's representatives and thus input from the country's "many parts, interests, and classes." The Federalist No.51, at 324 (J. Madison). Lenity helps safeguard this design by preventing judges from intentionally or inadvertently exploiting "doubtful" statutory "expressions" to enforce their own sensibilities. It "places the weight of inertia upon the party that can best induce Congress to speak more clearly," forcing the government to seek any clarifying changes to the law rather than impose the costs of ambiguity on presumptively free persons. In this way, the rule helps keep the power of punishment firmly "in the legislative, not in the judicial department."

* * * From the start, lenity has played an important role in realizing a distinctly American version of the rule of law—one that seeks to ensure people are never punished for violating just-so rules concocted after the fact, or rules with no more claim to democratic provenance than a judge's surmise about legislative intentions.

[III.] It may be understandable why the Court declines to discuss lenity today. Certain controversies and misunderstandings about the rule have crept into our law in recent years. I would take this opportunity to answer them.

Begin with the most basic of these controversies—the degree of ambiguity required to trigger the rule of lenity. Some have suggested that courts should consult the rule of lenity only when, after employing every tool of interpretation, a court confronts a "grievous" statutory ambiguity. * * *

This "grievous" business does not derive from any well-considered theory about lenity or the mainstream of this Court's opinions. * * * Tellingly, this Court's early cases did not require a "grievous" ambiguity before applying the rule of lenity. Instead, they followed other courts in holding that, "[i]n the construction of a penal statute, it is well settled ... that *all reasonable doubts* concerning its meaning ought to operate in favor of [the defendant]." *Harrison v. Vose*, 9 How. 372, 378, 13 L.Ed. 179 (1850) (emphasis added). Nineteenth century treatises seeking to record the rule put the point this way: "[I]f there is such an ambiguity in a penal statute as to leave reasonable doubts of its meaning, it is the duty of a court not to inflict the penalty." * * *

So where did the talk about "grievous" ambiguities begin? The problem may trace to *Huddleston v. United States*, 415 U.S. 814, 831 (1974). * * *

A second and related misunderstanding has crept into our law. Sometimes, Members of this Court have suggested that we possess the authority to punish individuals under ambiguous laws in light of our own perceptions about some piece of legislative history or the statute's purpose. Today's decision seemingly nods in the same direction. * * *

The right path is the more straightforward one. Where the traditional tools of statutory interpretation yield no clear answer, the judge's next step isn't to legislative history or the law's unexpressed purposes. The next step is to lenity. * * * Any other approach would be "unsafe" and "dangerous"—risking the possibility that judges rather than legislators will control the power to define crimes and their punishments. * * *

[IV.] The rule of lenity has a critical role to play in cases under the Occasions Clause. The statute contains little guidance, and reasonable doubts about its application will arise often. When they do, they should be resolved in favor of liberty. Today the Court does not consult lenity's rule, but neither does it forbid lower courts from doing so in doubtful cases. That course is the sound course. Under our rule of law, punishments should never be products of judicial conjecture about this factor or that one. They should come only with the assent of the people's elected representatives and in laws clear enough to supply "fair warning ... to the world."

NOTES ON WOODEN

1. *The Elusiveness of Ordinary Meaning.* Justice Kagan seeks to establish "how an ordinary person" would describe Wooden's burglaries. "[U]sing language in its normal way," Kagan concludes that a normal speaker would not consider each individual burglary a distinct occasion, despite the lack of simultaneity. Kagan bolsters this appeal to every-day common usage with two dictionary definitions and an analogy to the occasion of a wedding. Justice Gorsuch is skeptical of Kagan's analysis when applied to Wooden's facts. Should it matter whether Wooden took one hour or twelve hours to complete his burglary of ten separate storage units? What if Wooden paused for 30 minutes after the second storage unit and called an associate to discuss whether two units was enough of a haul for the evening? Gorsuch also questions Kagan's multi-factored approach to the ordinary meaning of "occasion" in general. Given that Kagan invokes timing, proximity of location, and the character and relationship of the offenses, is Gorsuch persuasive that there is a core ambiguity present regarding the meaning of "occasion"? Or is he simply rejecting balancing standards as an interpretive approach, in favor of bright-line rules favored by textualists?

An attempt to ascertain "ordinary meaning" requires a judge to draw on individual experiences as an English speaker and thus may be susceptible to influence from personal background and/or beliefs about language. *See* Lawrence Solan, *The New Textualists' New Text*, 38 Loy. L.A. L. Rev. 2027, 2048-53 (2005). In asserting how "a reporter; a police officer; yes, even a lawyer" would commonly use the word occasion, is Justice Kagan relying on her own experience as an English speaker? To what

extent should the Court seek to understand the meaning of "occasion" as understood by an ordinary or average legislator, in addition to or rather than a reporter, police officer, or lawyer? See Thomas Lee & Stephen Mouritsen, *Judging Ordinary Meaning*, 127 Yale L.J. 788, 827-28 (2018).

2. *The Rule of Lenity: Front-end Interpretive Tool or Canon of Last Resort?* Justices Gorsuch and Kavanaugh disagree about when in the interpretive process the rule of lenity should be applied: as soon as reasonable judicial minds disagree (Gorsuch) or only after invoking a long list of other interpretive tools (Kavanaugh)? For Gorsuch, lenity is rooted in a due process right to fair notice of laws and a vindication of separation of powers. Assuming he is correct in historical development terms, what exactly does a front-end approach add to existing constitutional protections? Note that while a few states have codified the rule of lenity, many more states have eliminated it by statute. See Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 Fordham L. Rev. 885, 901-06 (2004). Does this record of state statutory activity suggest that Gorsuch's approach overstates the rule's quasi-constitutional influence?

On the other hand, Kavanaugh urges the Court to continue its back-end "grievous ambiguity" standard, in part because a front-end trigger would make interpreting statutes more challenging given that ambiguity "is in the eye of the beholder and cannot be readily determined on an objective basis." Is Kavanaugh elevating other subjectively applied interpretive resources (ordinary meaning, dictionaries, language canons) above lenity in this regard? Why might it be appropriate to relegate lenity in this way?

3. *Lenity and Considerations of Wealth or Class.* Although *Wooden* resulted in a victory for this blue-collar defendant without recourse to lenity, the contrast between *Muscarello* on the one hand (rejecting lenity) and *McNally, Skilling,* and *McDonnell* (all applying lenity) suggests something of a blue-collar/white-collar distinction when invoking the canon. In recent decades, the Court has applied lenity to help thwart prosecutions in numerous cases involving white-collar malefactors, while rejecting lenity arguments in blue-collar settings such as street drug deals or domestic abuse.[1] Insofar as lenity rests on principles of fair warning or the risks of judicial overreach, should executive suite criminals, who have the resources to consult counsel and are often inclined to do so, benefit more than their uncounseled street crime counterparts?

[1] See Eskridge, Brudney & Chafetz, *Legislation and Statutory Interpretation* 317-18, n.187 (3d ed. 2022) (citing to additional white-collar and blue-collar cases since the early 1990s).

CHAPTER 8

IMPLEMENTATION OF STATUTES IN THE ADMINISTRATIVE STATE

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1. IMPLEMENTATION CHOICES AND THE SEPARATION OF POWERS

B. THE NONDELEGATION DOCTRINE

Page 875 of the Casebook: add after *Gundy v. United States* the following Note:

Review the Court's opinions in *NFIB v. OSHA* and *West Virginia v. EPA* in chapter 9 of this e-Supplement, and the Notes following those cases. In his dissent in *Gundy v. United States*, Justice Gorsuch referred to the Major Questions Doctrine as one way the Court has policed improper congressional delegation during the "intelligible principle" years. After this Term's decisions, and in light of the accompanying Gorsuch concurrences, has the Major Questions Doctrine become a Trojan Horse for the Nondelegation Doctrine? Assuming that Justices Alito and Barrett might well join Gorsuch's approach from *Gundy* in the next Nondelegation challenge at the Court, is there work still left to be done based on Gorsuch's three principles for delegable legislative authority? Would those principles yield more confinement of agency powers? Would they result in less variation between cases than the major questions doctrine approach?

3. OVERSIGHT BY THE THREE BRANCHES

C. JUDICIAL REVIEW OF AGENCY RULES AND ORDERS

Page 98 of the 2021 Supplement: Add at end of *Notes on* Dept. of Homeland Security v. Regents:

Biden v. Texas

142 S. Ct. 2528 (2022)

Under President Trump's administration, the Department of Homeland Security (DHS) in December 2018 announced the Migrant Protection Protocols (MPP), also known as the "Remain in Mexico" policy, in response to an influx of migrants seeking admission to the United States through the country's southern border with Mexico. With temporary cooperation from Mexico's government, MPP provided that non-Mexican nationals entering the United States by land from Mexico would be returned to Mexico while awaiting the results of their removal proceeding under 8 U.S.C. § 1229a.

The Immigration and Nationality Act (INA) states that if "an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien *shall be detained* for a proceeding under section 1229a of this title." 8 U.S.C. § 1225(b)(2)(A) (emphasis added). Because DHS has never had the financial capacity to hold every individual described in section 1225 in detention

custody, the Trump administration decided to implement MPP under a separate provision in the same section of the INA, stating that "[i]n the case of an alien ... who is arriving on land (whether or not at a designated port of arrival) from *a foreign territory contiguous to the United States, the Attorney General may return the alien* to that territory pending a proceeding under section 1229a of this title." 8 U.S.C. § 1225(b)(2)(C) (emphasis added).

Following the change in Presidential administrations, the Biden administration sought to terminate MPP. On June 1, 2021, the Secretary of Homeland Security issued a memorandum terminating MPP on the ground that "that MPP [d]oes not adequately or sustainably enhance border management in such a way as to justify the program's extensive operational burdens and other shortfalls."

Texas and Missouri challenged the June 1 Memorandum in the Northern District of Texas, asserting violations of both the INA and the Administrative Procedure Act (APA). The District Court held that because DHS could not meet the mandatory detention requirements of Section 1225(b)(2)(A), "terminating MPP necessarily leads to the systemic violation of Section 1225, as aliens are released into the United States." The District Court further considered the June 1 Memorandum to be arbitrary and capricious in violation of the APA. As a result, the District Court vacated the June 1 Memorandum and imposed an injunction ordering the Government to "enforce and implement MPP in good faith until" it is in compliance with the APA and the federal government has the means to subject all eligible individuals under section 1225 to detention.

On October 29, while the government's appeal of the District Court's judgment was pending, the DHS published a new memorandum of four pages terminating the MPP, along with a 39-page addendum explaining his new reasons for doing so (the October 29 Memoranda). The government then moved to vacate the injunction, asserting that the June 1 Memorandum had been superseded by the October 29 Memorandum. The Court of Appeals denied the motion and affirmed the District Court's judgment. The Court of Appeals agreed with the District Court that termination of the MPP violates the INA; it also held that the October 29 Memorandum was not a final agency action and thus not subject to independent review.

The Supreme Court reversed and remanded the Court of Appeals decision.

The majority opinion, authored by **Chief Justice Roberts**, held that the government's termination of MPP did not violate the INA because the language of section 1225(b)(2)(C) is discretionary. The majority further held that the October 29 Memorandum constituted a final agency action and thus was separably reviewable. The majority remanded to the lower courts to determine whether the June 1 Memorandum violates APA § 706.

After disposing of the jurisdictional issue, the Chief Justice addressed the merits. Roberts relied on the "may return the alien" language of Section 1225(b)(2)(C) to conclude that "contiguous- territory return is a tool that the Secretary has the authority but not the duty to use." In addition to this plain language, Roberts invoked the statute's structure: Congress included not only the contiguous-territory provision as an alternative to detention in the INA, but also a third option: "parole" awarded "on a case-by-case basis for urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A). Availability of the parole option additionally made clear that the INA does not require the Government to continue implementing MPP. Justice Roberts also pointed to longstanding agency practice: since the provision's enactment, "every Presidential administration has interpreted section 1225(b)(2)(C) as purely discretionary." And the historical context in which the section was added by Congress reinforced the majority's textual arguments.

Roberts next addressed the "foreign affairs consequences" that would result from a mandatory reading of section 1225(b)(2)(C). Article II of the Constitution grants the Executive wide authority to "engag[e] in direct diplomacy with foreign heads of state and their ministers." *Zivotofsky v. Kerry*, 576 U.S. 1, 14 (2015). Because of this, the Court has always heeded "the danger of unwarranted judicial interference in the conduct of foreign policy," declining to interfere in the "delicate field of international relations" without a "clearly expressed" intention of Congress. The Court of Appeals, "[b]y interpreting section 1225(b)(2)(C) as a mandate," placed "a significant burden upon the Executive's ability to conduct diplomatic relations with Mexico," a "stark consequence" that confirmed the Court's interpretation of section 1225(b)(2)(C).

Turning to the APA, Justice Roberts deemed the October 29 Memorandum to be final agency action. The Secretary's issuance of a second memorandum in response to the Court of Appeals, was an exercise of the "second option" under the Court's prior decision in *Department of Homeland Security* v. *Regents of Univ. of Cal.*, 140 S.Ct. 1891 (2020) [see 2021 Casebook Supplement, p. 83]. In *Regents*, the Court explained that when a court determines the grounds for an agency action are inadequate, a court has two options. It may remand for the agency to offer a fuller explanation of the agency's reasoning at the time of the agency action, in which case the agency is restricted by its initial reasoning. "[T]he agency may elaborate" on those reasons, "but may not provide new ones." Under the second *Regents* option, "the agency can 'deal with the problem afresh' by taking *new* agency action." (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 201 (1947) (*Chenery II*)). As noted in *Regents,* "[a]n agency taking this route is not limited to its prior reasons."

The October 29 Memoranda fell under the second option, providing several new reasons for the termination of MPP that were not included in the June 1 Memorandum. Roberts rejected respondent's characterization of the October 29 Memoranda as "*post hoc* rationalizations of the June 1 Memorandum under [the Court's] decision in *Regents*." Roberts recalled that the Secretary in *Regents* had elected the first option—a remand. This limited her to elaborating on her prior reasoning rather than issuing a new rescission supported by new reasons. When she exceeded that limit by offering new explanations largely unrelated to her original submission, the Court had rejected them as amounting to impermissible post hoc rationalizations. The October 29 Memoranda in this case involved the exact opposite situation; because DHS decided to deal with the problem afresh through new agency action, "the agency 'must comply with the procedural requirements for new agency action' — but the benefit is that the agency is 'not limited to its prior reasons' in justifying its decision."

Respondents also invoked *Department of Commerce* v. *New York*, 139 S.Ct. 2551 (2019) [Casebook, p. 1035], where the Court held that while "in reviewing agency action, a court is ordinarily limited to evaluating the agency's contemporaneous explanation in light of the existing administrative record," a narrow exception exists where there is a "'strong showing of bad faith or improper behavior' on the part of the agency." Roberts considered the respondent's evidence, which included only the government's litigation conduct, "such as a failure to timely complete the administrative record," fell well short of the 'strong showing of bad faith or improper behavior'" required by *Department of Commerce*.

Roberts likewise rejected the Court of Appeal's "more modest charge that the Secretary failed to proceed with a sufficiently open mind." The majority found that it was "hardly improper for an agency head to come into office with policy preferences and ideas ... and work with staff attorneys to substantiate the legal basis for a preferred policy." Citing to *Department of Commerce* and also *State Farm* (Rehnquist, J., concurring in part and dissenting in part). Roberts found the "closed mind" argument "particularly weak" in light of the fact that the six-week period between the District Court's remand and the issuance of the October 29 Memoranda provided "a

substantial window of time for the agency to conduct a bona fide reconsideration." Moreover, citing *to Chenery II* and *Regents*, the majority considered it "black-letter law" that an agency that takes superseding action on remand is entitled to "reexamine[ ] the problem, recast its rationale and reach[ ] the same result."

Justice Kavanaugh concurred, writing separately to emphasize that *State Farm* merits deference to administration's policy choices when an agency's exercise of its discretion is reasonable. "Because the immigration statutes afford substantial discretion to the Executive, different Presidents may exercise that discretion differently. That is Administrative Law 101." Further, Justice Kavanaugh noted that this discretion is cabined by "the Administrative Procedure Act and this Court's decision in *State Farm* requir[ing] that an executive agency's exercise of discretion be reasonable and reasonably explained." And while the question of whether the October 29 Memoranda satisfied *State Farm* was not before the court, "when there is insufficient detention capacity and the President chooses the parole option because he determines that returning noncitizens to Mexico is not feasible for foreign-policy reasons, a court applying *State Farm* must be deferential to the President's Article II foreign-policy judgment." Justice Kavanaugh concluded by noting that DHS has been plagued by a "multi-decade inability of the political branches to provide DHS with sufficient facilities to detain noncitizens" seeking to enter the country, and the Court does "not have the authority to end the legislative stalemate or to resolve the underlying policy problems."

In a dissenting opinion, **Justice Alito**, joined by Justices Thomas and Gorsuch, concluded that section 1225 requires mandatory removal of all aliens that are "not clearly and beyond a doubt entitled to be admitted." 8 U.S.C. § 1225(b)(2)(A). Congress's express use of the word "shall" connotes a mandatory requirement of detention. Alito construed the discretionary language ("may") in the two alternative provisions to detention (return and parole) in light of the statute's overall structure. The three options "operate in a hydraulic relationship: When it is not possible for the Government to comply with the statutory mandate to detain inadmissible aliens pending further proceedings, it must resort to one or both of the other two options in order to comply with the detention requirement to the greatest extent possible."

Justice Alito regarded the majority's foreign policy concerns as overstated. While the Constitution confers foreign affairs authority on the President, the Constitution also gives Congress broad authority to set immigration policy. Here, "it is Congress, not the Judiciary, that gave the Executive only three options for dealing with inadmissible aliens encountered at the border."

In relation to the APA, Alito agreed with the Fifth Circuit view that the government's litigation tactic was "an effort to thwart the normal appellate process." "[T]he majority seems to assume that an administrative agency may obviate a district court decision setting aside agency action under § 706 of the APA by pursuing the following course of conduct: first, appeal the district court decision; second, take a purportedly "new" action that achieves the same result as the one previously set aside; and third, while declining to seek vacatur of the earlier judgment in the district court, ask the court of appeals to vacate that judgment without reviewing its correctness or the lawfulness of the second action."

Justice Barrett, joined by Justices Thomas, Alito, and Gorsuch, dissented on jurisdictional grounds. Justice Barrett (but not Justices Thomas, Alito, and Gorsuch) agreed with the majority's analysis in regard to the merits. However, Justice Barrett concluded that, in light of the recent Court decision in *Garland* v. *Aleman Gonzalez*, 142 S.Ct. 2057 (2022), the case should be remanded to the lower courts to reconsider because the Court is "a court of review and not first view"

NOTES ON BIDEN V. TEXAS

1. *The Two Options from DHS v. Regents.* In *Department of Homeland Security v. Regents of University of California,* Chief Justice Roberts invoked *Chenery II*, refusing to consider DHS's reasons for rescinding DACA and requiring the agency to "deal with the problem afresh" on remand. *Biden v. Texas* presented a seemingly similar procedural situation: DHS Secretary Mayorkas released secondary memoranda on October 29, further justifying the termination of MPP. Texas and Missouri viewed the October 29 Memoranda as invalid post hoc rationalization of DHS's prior decision to terminate MPP, barred by the Court's decision in *Regents*. But Roberts concludes that Secretary Mayorkas chose the second option by expressly withdrawing and superseding the previous June 1 Memorandum. For Roberts, DHS had authentically "return[ed] to the drawing table," and the second memorandum, containing a 39-page addendum that explained the reasons for the decision to terminate, was permissible. In both *Regents* and *Biden v. Texas*, it is unsurprising that the agency reached the same conclusion the second time around. Justice Kavanaugh in *Regents* had criticized the remand as "an idle and useless formality," rather than an accountability-forcing measure. And in this case, Kavanaugh anticipates a *State Farm*-based justification for the October 29 Memoranda on remand. Is the majority elevating form over substance in these two cases? Or is Roberts vindicating an essential element of APA process?

During his campaign, President Biden promised to terminate MPP as early as day one of his time in office. In February 2021, Biden issued an Executive Order directing the Secretary of Homeland Security to review MPP. That review resulted in the June 1 Memorandum, in which Secretary Mayorkas concluded that MPP should be terminated. How should the Court define whether an authentic reconsideration of a policy choice has occurred? In *Biden v. Texas*, Roberts stresses the temporal element, considering the "six-week period" between the lower court's remand and DHS's second memorandum "a substantial window of time for the agency to conduct a bona fide reconsideration." Is six weeks enough time for an agency to make a reasonable effort at a fresh review of a policy? Are there other factors that should be considered?

2. *The Foreign Affairs Dimension***.** Roberts invokes foreign affairs consequences as an important justification for the decision in *Biden v. Texas*. The Court has long recognized the President's constitutional latitude to set foreign policy and interact with foreign nations. See *Trump v. Hawaii* (2017) (p. 1118 of Casebook). The district court's injunction required the Government to "enforce and implement MPP in good faith until" it is in compliance with the APA and the government can subject all eligible individuals under section 1225 to detention. Can a district court issue an injunction effectively forcing the executive to engage with a foreign nation? Should it matter that this expansion of executive discretion occurred in the immigration setting, even as the Court's conservative majority has increasingly curtailed respect for agency deference under major question and nondelegation doctrines? See Ilya Somin, "Supreme Court Ruling in "Remain in Mexico" Case is a Win for Biden, Migrants - and Fans of Presidential Power," The Volokh Conspiracy (July 3, 2022 6:06 PM), https://reason.com/volokh/2022/07/03/supreme-court-ruling-in-remain-in-mexico-case-is-a-win-for-biden-migrants-and-fans-of-presidential-power/

3. *Perennially Inadequate Funding for a Statutory Mandate.* The justices in *Biden v. Texas* all agree that Congress has never provided appropriate funds for DHS to detain all individuals eligible under 8 U.S.C. § 1225(b)(2)(A); consequently, enforcing mandatory detention is an implausible if not impossible task. In his concurrence, Justice Kavanaugh does not mince words about Congress's failings: "The larger policy story behind this case is the multi-decade inability of the political branches to provide DHS with sufficient facilities to detain noncitizens who seek to enter the United States pending their immigration proceedings. But this Court has authority to address only the legal issues before us. We do not have authority to end the legislative stalemate or to resolve the underlying policy problems." Congress's failure to properly find DHS is a consequence of the increased partisanship in Congress that has resulted, according to one commentator, in an unconstitutional amount of legislative power siphoned into the hands of administrative agencies in direct violation of the Framers' intentions for the legislative process. David French, "The Constitution Isn't Working," The Atlantic (July 12, 2022). Is it unconstitutional for Congress to appropriate insufficient funds to carry out a statutory mandate? Or should it be understood as something like an implicit amendment of the mandate? How does a decades-long congressional failure to give DHS the appropriate means to enforce Section 1225(b)(2)(A) impact Roberts' decision to affirm administrative discretionary authority? If Congress did provide adequate funds to detain all individuals under Section 1225(b)(2)(A), should this case come out differently?

CHAPTER 9

JUDICIAL DEFERENCE TO AGENCY INTERPRETATIONS

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2. IMPORTANT ISSUES OF DEFERENCE DOCTRINE

B. SHOULD COURTS DEFER WHEN THE AGENCY TACKLES MAJOR QUESTIONS

Page 1094: Add the following Cases and Notes after the Note on the "Major Questions Doctrine":

NATIONAL FEDERATION OF INDEPENDENT BUSINESS v. DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION

Supreme Court of the United States, 2022.
142 S. Ct. 661.

PER CURIAM.

The Secretary of Labor, acting through the Occupational Safety and Health Administration, recently enacted a vaccine mandate for much of the Nation's work force. The mandate, which employers must enforce, applies to roughly 84 million workers, covering virtually all employers with at least 100 employees. It requires that covered workers receive a COVID–19 vaccine, and it pre-empts contrary state laws. The only exception is for workers who obtain a medical test each week at their own expense and on their own time, and also wear a mask each workday. OSHA has never before imposed such a mandate. Nor has Congress. Indeed, although Congress has enacted significant legislation addressing the COVID–19 pandemic, it has declined to enact any measure similar to what OSHA has promulgated here.

[States, NFIB, and other organizations brought lawsuits all over the country to challenge OSHA's rule. The cases were consolidated in the Sixth Circuit, which lifted a previous stay and allowed OSHA's emergency rule to take effect. Arguing that OSHA's mandate exceeds its authority, the challengers sought emergency relief from the Supreme Court.] Agreeing that applicants are likely to prevail, we grant their applications and stay the rule.

[I.A] Congress enacted the Occupational Safety and Health Act in 1970. 84 Stat. 1590, 29 U.S.C. § 651 *et seq*. The Act created the Occupational Safety and Health Administration (OSHA), which is part of the Department of Labor and under the supervision of its Secretary. As its name suggests, OSHA is tasked with ensuring *occupational* safety—that is, "safe and healthful working conditions." § 651(b). It does so by enforcing occupational safety and health standards promulgated by the Secretary. § 655(b). Such standards must be "reasonably necessary or appropriate to provide safe or healthful *employment*." § 652(8) (emphasis added). They must also be developed using a rigorous process that includes notice, comment, and an opportunity for a public hearing. § 655(b).

The Act contains an exception to those ordinary notice-and-comment procedures for "emergency temporary standards." § 655(c)(1). Such standards may "take immediate effect upon publication in the Federal Register." *Ibid.* They are permissible, however, only in the narrowest of circumstances: the Secretary must show (1) "that employees are exposed to grave danger from

exposure to substances or agents determined to be toxic or physically harmful or from new hazards," and (2) that the "emergency standard is necessary to protect employees from such danger." *Ibid.* Prior to the emergence of COVID–19, the Secretary had used this power just nine times before (and never to issue a rule as broad as this one). Of those nine emergency rules, six were challenged in court, and only one of those was upheld in full.

[I.B] On September 9, 2021, President Biden announced "a new plan to require more Americans to be vaccinated." Remarks on the COVID–19 Response and National Vaccination Efforts, 2021 Daily Comp. of Pres. Doc. 775, p. 2. As part of that plan, the President said that the Department of Labor would issue an emergency rule requiring all employers with at least 100 employees "to ensure their workforces are fully vaccinated or show a negative test at least once a week." *Ibid.* The purpose of the rule was to increase vaccination rates at "businesses all across America." *Ibid.* In tandem with other planned regulations, the administration's goal was to impose "vaccine requirements" on "about 100 million Americans, two-thirds of all workers." *Id.,* at 3. [OSHA adopted such a rule. 86 Fed. Reg. 61402 (2021).]

Covered employers must "develop, implement, and enforce a mandatory COVID–19 vaccination policy." *Id.*, at 61402. The employer must verify the vaccination status of each employee and maintain proof of it. *Id.*, at 61552. The mandate does contain an "exception" for employers that require unvaccinated workers to "undergo [weekly] COVID–19 testing and wear a face covering at work in lieu of vaccination." *Id.*, at 61402. But employers are not required to offer this option, and the emergency regulation purports to pre-empt state laws to the contrary. *Id.,* at 61437. Unvaccinated employees who do not comply with OSHA's rule must be "removed from the workplace." *Id.,* at 61532. And employers who commit violations face hefty fines: up to $13,653 for a standard violation, and up to $136,532 for a willful one. 29 C.F.R. § 1903.15(d) (2021). * * *

[II.A] Applicants are likely to succeed on the merits of their claim that the Secretary lacked authority to impose the mandate. Administrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided. The Secretary has ordered 84 million Americans to either obtain a COVID–19 vaccine or undergo weekly medical testing at their own expense. This is no "everyday exercise of federal power." It is instead a significant encroachment into the lives—and health—of a vast number of employees. "We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." *Alabama Assn. of Realtors* v. *Department of Health and Human Servs.*, 141 S.Ct. 2485, 2489 (2021) (*per curiam*) (internal quotation marks omitted). There can be little doubt that OSHA's mandate qualifies as an exercise of such authority.

The question, then, is whether the Act plainly authorizes the Secretary's mandate. It does not. The Act empowers the Secretary to set *workplace* safety standards, not broad public health measures. See 29 U.S.C. § 655(b) (directing the Secretary to set "*occupational* safety and health standards" (emphasis added)); § 655(c)(1) (authorizing the Secretary to impose emergency temporary standards necessary to protect "employees" from grave danger in the workplace). Confirming the point, the Act's provisions typically speak to hazards that employees face at work. See, *e.g.,* §§ 651, 653, 657. And no provision of the Act addresses public health more generally, which falls outside of OSHA's sphere of expertise.

The dissent protests that we are imposing "a limit found no place in the governing statute." Not so. It is the text of the agency's Organic Act that repeatedly makes clear that OSHA is charged with regulating "occupational" hazards and the safety and health of "employees." See, *e.g.,* 29 U.S.C. §§ 652(8), 654(a)(2), 655(b)–(c).

The Solicitor General does not dispute that OSHA is limited to regulating "work-related

dangers." She instead argues that the risk of contracting COVID–19 qualifies as such a danger. We cannot agree. Although COVID–19 is a risk that occurs in many workplaces, it is not an *occupational* hazard in most. COVID–19 can and does spread at home, in schools, during sporting events, and everywhere else that people gather. That kind of universal risk is no different from the day-to-day dangers that all face from crime, air pollution, or any number of communicable diseases. Permitting OSHA to regulate the hazards of daily life—simply because most Americans have jobs and face those same risks while on the clock—would significantly expand OSHA's regulatory authority without clear congressional authorization.

The dissent contends that OSHA's mandate is comparable to a fire or sanitation regulation imposed by the agency. But a vaccine mandate is strikingly unlike the workplace regulations that OSHA has typically imposed. A vaccination, after all, "cannot be undone at the end of the workday." Contrary to the dissent's contention, imposing a vaccine mandate on 84 million Americans in response to a worldwide pandemic is simply not "part of what the agency was built for."

That is not to say OSHA lacks authority to regulate occupation-specific risks related to COVID–19. Where the virus poses a special danger because of the particular features of an employee's job or workplace, targeted regulations are plainly permissible. We do not doubt, for example, that OSHA could regulate researchers who work with the COVID–19 virus. So too could OSHA regulate risks associated with working in particularly crowded or cramped environments. But the danger present in such workplaces differs in both degree and kind from the everyday risk of contracting COVID–19 that all face. OSHA's indiscriminate approach fails to account for this crucial distinction—between occupational risk and risk more generally—and accordingly the mandate takes on the character of a general public health measure, rather than an "*occupational* safety or health standard." 29 U.S.C. § 655(b) (emphasis added).

In looking for legislative support for the vaccine mandate, the dissent turns to the American Rescue Plan Act of 2021, Pub. L. 117–2, 135 Stat. 4. That legislation, signed into law on March 11, 2021, of course said nothing about OSHA's vaccine mandate, which was not announced until six months later. In fact, the most noteworthy action concerning the vaccine mandate by either House of Congress has been a majority vote of the Senate disapproving the regulation on December 8, 2021. S. J. Res. 29, 117th Cong., 1st Sess. (2021).

It is telling that OSHA, in its half century of existence, has never before adopted a broad public health regulation of this kind—addressing a threat that is untethered, in any causal sense, from the workplace. This "lack of historical precedent," coupled with the breadth of authority that the Secretary now claims, is a "telling indication" that the mandate extends beyond the agency's legitimate reach. *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477, 505 (2010) (internal quotation marks omitted).

GORSUCH, J., joined by THOMAS & ALITO, JJ., concurring. * * *

Why does the major questions doctrine matter? It ensures that the national government's power to make the laws that govern us remains where Article I of the Constitution says it belongs—with the people's elected representatives. If administrative agencies seek to regulate the daily lives and liberties of millions of Americans, the doctrine says, they must at least be able to trace that power to a clear grant of authority from Congress.

In this respect, the major questions doctrine is closely related to what is sometimes called the nondelegation doctrine. Indeed, for decades courts have cited the nondelegation doctrine as a reason to apply the major questions doctrine. *E.g.*, *Industrial Union Dept., AFL–CIO v. American Petroleum Institute*, 448 U.S. 607, 645 (1980) (plurality opinion). Both are designed to protect the

separation of powers and ensure that any new laws governing the lives of Americans are subject to the robust democratic processes the Constitution demands.

The nondelegation doctrine ensures democratic accountability by preventing Congress from intentionally delegating its legislative powers to unelected officials. Sometimes lawmakers may be tempted to delegate power to agencies to "reduc[e] the degree to which they will be held accountable for unpopular actions." R. Cass, Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State, 40 Harv. J. L. Pub. Pol'y 147, 154 (2017). But the Constitution imposes some boundaries here. *Gundy* (Gorsuch, J., dissenting). If Congress could hand off all its legislative powers to unelected agency officials, it "would dash the whole scheme" of our Constitution and enable intrusions into the private lives and freedoms of Americans by bare edict rather than only with the consent of their elected representatives. *Department of Transportation v. Association of American Railroads*, 575 U.S. 43, 61 (2015) (Alito, J., concurring); see also M. McConnell, The President Who Would Not Be King 326–335 (2020); I. Wurman, Nondelegation at the Founding, 130 Yale L.J. 1490, 1502 (2021).

The major questions doctrine serves a similar function by guarding against unintentional, oblique, or otherwise unlikely delegations of the legislative power. Sometimes, Congress passes broadly worded statutes seeking to resolve important policy questions in a field while leaving an agency to work out the details of implementation. *E.g.*, *King v. Burwell*. Later, the agency may seek to exploit some gap, ambiguity, or doubtful expression in Congress's statutes to assume responsibilities far beyond its initial assignment. The major questions doctrine guards against this possibility by recognizing that Congress does not usually "hide elephants in mouseholes." *Whitman v. American Trucking Assns.*, Inc. In this way, the doctrine is "a vital check on expansive and aggressive assertions of executive authority." *United States Telecom Assn. v. FCC*, 855 F.3d 381, 417 (CADC 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

Whichever the doctrine, the point is the same. Both serve to prevent "government by bureaucracy supplanting government by the people." A. Scalia, A Note on the Benzene Case, American Enterprise Institute, J. on Govt. & Soc., July–Aug. 1980, p. 27. And both hold their lessons for today's case. On the one hand, OSHA claims the power to issue a nationwide mandate on a major question but cannot trace its authority to do so to any clear congressional mandate. On the other hand, if the statutory subsection the agency cites really *did* endow OSHA with the power it asserts, that law would likely constitute an unconstitutional delegation of legislative authority. Under OSHA's reading, the law would afford it almost unlimited discretion—and certainly impose no "specific restrictions" that "meaningfully constrai[n]" the agency. *Touby v. United States*, 500 U.S. 160, 166–167 (1991). OSHA would become little more than a "roving commission to inquire into evils and upon discovery correct them." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935) (Cardozo, J., concurring). Either way, the point is the same one Chief Justice Marshall made in 1825: There are some "important subjects, which must be entirely regulated by the legislature itself," and others "of less interest, in which a general provision may be made, and power given to [others] to fill up the details." *Wayman v. Southard*, 10 Wheat. 1, 43 (1825). And on no one's account does this mandate qualify as some "detail."

The question before us is not how to respond to the pandemic, but who holds the power to do so. The answer is clear: Under the law as it stands today, that power rests with the States and Congress, not OSHA. In saying this much, we do not impugn the intentions behind the agency's mandate. Instead, we only discharge our duty to enforce the law's demands when it comes to the question who may govern the lives of 84 million Americans. Respecting those demands may be trying in times of stress. But if this Court were to abide them only in more tranquil conditions, declarations of emergencies would never end and the liberties our Constitution's separation of powers seeks to preserve would amount to little.

BREYER, SOTOMAYOR, and KAGAN, J.J., dissenting.

Every day, COVID–19 poses grave dangers to the citizens of this country—and particularly, to its workers. The disease has by now killed almost 1 million Americans and hospitalized almost 4 million. It spreads by person-to-person contact in confined indoor spaces, so causes harm in nearly all workplace environments. And in those environments, more than any others, individuals have little control, and therefore little capacity to mitigate risk. COVID–19, in short, is a menace in work settings. The proof is all around us: Since the disease's onset, most Americans have seen their workplaces transformed.

So the administrative agency charged with ensuring health and safety in workplaces did what Congress commanded it to: It took action to address COVID–19's continuing threat in those spaces. The Occupational Safety and Health Administration (OSHA) issued an emergency temporary standard (Standard), requiring *either* vaccination *or* masking and testing, to protect American workers. The Standard falls within the core of the agency's mission: to "protect employees" from "grave danger" that comes from "new hazards" or exposure to harmful agents. 29 U.S.C. § 655(c)(1). OSHA estimates—and there is no ground for disputing—that the Standard will save over 6,500 lives and prevent over 250,000 hospitalizations in six months' time. 86 Fed. Reg. 61408 (2021).

Yet today the Court issues a stay that prevents the Standard from taking effect. In our view, the Court's order seriously misapplies the applicable legal standards. And in so doing, it stymies the Federal Government's ability to counter the unparalleled threat that COVID–19 poses to our Nation's workers. Acting outside of its competence and without legal basis, the Court displaces the judgments of the Government officials given the responsibility to respond to workplace health emergencies. * * *

[II.A] The applicants are not "likely to prevail" under any proper view of the law. OSHA's rule perfectly fits the language of the applicable statutory provision. Once again, that provision commands—not just enables, but commands—OSHA to issue an emergency temporary standard whenever it determines "(A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger." 29 U.S.C. § 655(c)(1). Each and every part of that provision demands that, in the circumstances here, OSHA act to prevent workplace harm.

The virus that causes COVID–19 is a "new hazard" as well as a "physically harmful" "agent." Merriam-Webster's Collegiate Dictionary 572 (11th ed. 2005) (defining "hazard" as a "source of danger"); *id.*, at 24 (defining "agent" as a "chemically, physically, or biologically active principle"); *id.*, at 1397 (defining "virus" as "the causative agent of an infectious disease").

The virus also poses a "grave danger" to millions of employees. As of the time OSHA promulgated its rule, more than 725,000 Americans had died of COVID–19 and millions more had been hospitalized. See 86 Fed. Reg. 61408, 61424; see also CDC, COVID Data Tracker Weekly Review: Interpretive Summary for Nov. 5, 2021 (Jan. 12, 2022), https://cdc.gov/coronavirus/2019–ncov/covid-data/covidview/past-reports/11052021.html. Since then, the disease has continued to work its tragic toll. In the last week alone, it has caused, or helped to cause, more than 11,000 new deaths. See CDC, COVID Data Tracker (Jan. 12, 2022), https://covid.cdc.gov/covid-data-tracker/#cases_deathsinlast7days. And because the disease spreads in shared indoor spaces, it presents heightened dangers in most workplaces. See 86 Fed. Reg. 61411, 61424.

Finally, the Standard is "necessary" to address the danger of COVID–19. OSHA based its rule, requiring either testing and masking or vaccination, on a host of studies and government reports showing why those measures were of unparalleled use in limiting the threat of COVID–19 in most workplaces. The agency showed, in meticulous detail, that close contact between infected and uninfected individuals spreads the disease; that "[t]he science of transmission does not vary by industry or by type of workplace"; that testing, mask wearing, and vaccination are

highly effective—indeed, essential—tools for reducing the risk of transmission, hospitalization, and death; and that unvaccinated employees of all ages face a substantially increased risk from COVID–19 as compared to their vaccinated peers. *Id.*, at 61403, 61411–61412, 61417–61419, 61433–61435, 61438–61439. In short, OSHA showed that no lesser policy would prevent as much death and injury from COVID–19 as the Standard would. * * *

[III] * * * OSHA has often issued rules applying to all or nearly all workplaces in the Nation, affecting at once many tens of millions of employees. See, *e.g.*, 29 C.F.R. § 1910.141. It has previously regulated infectious disease, including by facilitating vaccinations. See § 1910.1030(f). And it has in other contexts required medical examinations and face coverings for employees. See §§ 1910.120(q)(9)(i), 1910.134. In line with those prior actions, the Standard here requires employers to ensure testing and masking if they do not demand vaccination. Nothing about that measure is so out-of-the-ordinary as to demand a judicially created exception from Congress's command that OSHA protect employees from grave workplace harms.

If OSHA's Standard is far-reaching—applying to many millions of American workers—it no more than reflects the scope of the crisis. The Standard responds to a workplace health emergency unprecedented in the agency's history: an infectious disease that has already killed hundreds of thousands and sickened millions; that is most easily transmitted in the shared indoor spaces that are the hallmark of American working life; and that spreads mostly without regard to differences in occupation or industry. Over the past two years, COVID–19 has affected—indeed, transformed—virtually every workforce and workplace in the Nation. Employers and employees alike have recognized and responded to the special risks of transmission in work environments. It is perverse, given these circumstances, to read the Act's grant of emergency powers in the way the majority does—as constraining OSHA from addressing one of the gravest workplace hazards in the agency's history. The Standard protects untold numbers of employees from a danger especially prevalent in workplace conditions. It lies at the core of OSHA's authority. It is part of what the agency was built for.

[IV. The dissenters maintained that, even if the challengers were likely to succeed on the merits, a stay was not warranted, under the Court's longstanding standard, because the injuries to the challengers were vastly counterbalanced by the injuries (death and sickness) to thousands of workers. Also, the public interest weighed against a stay.]

* * *

Underlying everything else in this dispute is a single, simple question: Who decides how much protection, and of what kind, American workers need from COVID–19? An agency with expertise in workplace health and safety, acting as Congress and the President authorized? Or a court, lacking any knowledge of how to safeguard workplaces, and insulated from responsibility for any damage it causes?

Here, an agency charged by Congress with safeguarding employees from workplace dangers has decided that action is needed. The agency has thoroughly evaluated the risks that the disease poses to workers across all sectors of the economy. It has considered the extent to which various policies will mitigate those risks, and the costs those policies will entail. It has landed on an approach that encourages vaccination, but allows employers to use masking and testing instead. It has meticulously explained why it has reached its conclusions. And in doing all this, it has acted within the four corners of its statutory authorization—or actually here, its statutory mandate. OSHA, that is, has responded in the way necessary to alleviate the "grave danger" that workplace exposure to the "new hazard[ ]" of COVID–19 poses to employees across the Nation. 29 U.S.C. § 655(c)(1). The agency's Standard is informed by a half century of experience and expertise in handling workplace health and safety issues. The Standard also has the virtue of political accountability, for OSHA is responsible to the President, and the President is responsible to—and can be held to account by—the American public.

And then, there is this Court. Its Members are elected by, and accountable to, no one. And we "lack[ ] the background, competence, and expertise to assess" workplace health and safety issues. *South Bay United Pentecostal Church*, 140 S .Ct., at 1614 (opinion of Roberts, C.J.). When we are wise, we know enough to defer on matters like this one. When we are wise, we know not to displace the judgments of experts, acting within the sphere Congress marked out and under Presidential control, to deal with emergency conditions. Today, we are not wise. In the face of a still-raging pandemic, this Court tells the agency charged with protecting worker safety that it may not do so in all the workplaces needed. As disease and death continue to mount, this Court tells the agency that it cannot respond in the most effective way possible. Without legal basis, the Court usurps a decision that rightfully belongs to others. It undercuts the capacity of the responsible federal officials, acting well within the scope of their authority, to protect American workers from grave danger.

Query: Note that only the concurring opinion (and not the *per curiam* opinion for the Court) refers to the "major questions doctrine" (or MQD for short). Under what circumstances might OSHA have issued a COVID-19 mandate? What might a valid OSHA rule have looked like? Consider the next case, decided the same day.

Biden v. Missouri
142 S. Ct. 647 (2022)

On November 5, 2021, the Secretary of Health & Human Services, for its Centers for Medicare and Medicaid Services [CMS], issued an interim final rule amending the existing conditions of participation in Medicare and Medicaid to require that hospital and other health care facilities ensure that their covered staff are vaccinated against COVID–19. 86 Fed. Reg. 61561, 61616–61627. The rule requires providers to offer medical and religious exemptions, and does not cover staff who telework full-time. *Id.* at 61571–61572. A facility's failure to comply may lead to monetary penalties, denial of payment for new admissions, and ultimately termination of participation in the programs. *Id.* at 61574.

The Secretary issued the rule after finding that vaccination of healthcare workers against COVID–19 was "necessary for the health and safety of individuals to whom care and services are furnished." *Id.* at 61561. One-third of staff were not vaccinated in many covered facilities, *id.* at 61559, which the Secretary found to pose a serious threat to the health and safety of patients. Data establish that the COVID–19 virus can spread rapidly among healthcare workers and from them to patients, and that such spread is more likely when healthcare workers are unvaccinated. *Id.* at 61558–61561, 61567–61568, 61585–61586. Because Medicare and Medicaid patients are often elderly, disabled, or otherwise in poor health, transmission of COVID–19 to such patients is particularly dangerous. *Id.* at 61566, 61609. In addition to the threat posed by infacility transmission itself, the Secretary also found that "fear of exposure" to the virus "from unvaccinated health care staff can lead patients to themselves forgo seeking medically necessary care," creating a further "ris[k] to patient health and safety." *Id.* at 61588. And staffing shortages caused by COVID–19-related exposures or illness has disrupted patient care. *Id.* at 61559.

In a ***per curiam*** opinion, five Justices (**Roberts, Breyer, Sotomayor, Kagan, Kavanaugh**) ruled that the HHS rule falls within the authorities that Congress has conferred upon the Secretary. Specifically, Congress has authorized the Secretary to impose conditions on the receipt of Medicaid and Medicare funds that "the Secretary finds necessary in the interest of the health and safety of individuals who are furnished services." 42 U. S. C. § 1395x(e)(9). "COVID–19 is a highly contagious, dangerous, and—especially for Medicare and Medicaid patients—deadly disease. The Secretary of Health and Human Services determined that a COVID–19 vaccine mandate will substantially reduce the likelihood that healthcare workers will contract the virus and transmit it to their patients. 86 Fed. Reg. 61557–61558. He accordingly

concluded that a vaccine mandate is 'necessary to promote and protect patient health and safety' in the face of the ongoing pandemic. *Id.* at 61613.

"The rule thus fits neatly within the language of the statute. After all, ensuring that providers take steps to avoid transmitting a dangerous virus to their patients is consistent with the fundamental principle of the medical profession: first, do no harm. It would be the 'very opposite of efficient and effective administration for a facility that is supposed to make people well to make them sick with COVID–19.' *Florida v. Department of Health and Human Servs.*, 19 F.4th 1271, 1288 (CA11 2021).

"The States and Justice Thomas offer a narrower view of the various authorities at issue, contending that the seemingly broad language cited above authorizes the Secretary to impose no more than a list of bureaucratic rules regarding the technical administration of Medicare and Medicaid. But the longstanding practice of Health and Human Services in implementing the relevant statutory authorities tells a different story. As noted above, healthcare facilities that wish to participate in Medicare and Medicaid have always been obligated to satisfy a host of conditions that address the safe and effective provision of healthcare, not simply sound accounting. Such requirements govern in detail, for instance, the amount of time after admission or surgery within which a hospital patient must be examined and by whom, 42 CFR § 482.22(c)(5), the procurement, transportation, and transplantation of human kidneys, livers, hearts, lungs, and pancreases, § 482.45, the tasks that may be delegated by a physician to a physician assistant or nurse practitioner, § 483.30(e), and, most pertinent here, the programs that hospitals must implement to govern the "surveillance, prevention, and control of ... infectious diseases," § 482.42.

Moreover, the Secretary routinely imposes conditions of participation that relate to the qualifications and duties of healthcare workers themselves. See, *e.g.*, §§ 482.42(c) (2)(iv) (requiring training of "hospital personnel and staff " on "infection prevention and control guidelines"), 483.60(a)(1)(ii) (qualified dieticians must have completed at least 900 hours of supervised practice), 482.26(b)–(c) (specifying personnel authorized to use radiologic equipment). And the Secretary has always justified these sorts of requirements by citing his authorities to protect patient health and safety. See, *e.g.*, §§ 482.1(a)(1)(ii), 483.1(a)(1)(ii), 416.1(a)(1). As these examples illustrate, the Secretary's role in administering Medicare and Medicaid goes far beyond that of a mere bookkeeper."

[The States challenging the HHS rule conceded this last point, and the Court argued that HHS's response was in line with prior regulations. "Vaccination requirements are a common feature of the provision of healthcare in America: Healthcare workers around the country are ordinarily required to be vaccinated for diseases such as hepatitis B, influenza, and measles, mumps, and rubella. CDC, State Healthcare Worker and Patient Vaccination Laws (Feb. 28, 2018), https://www.cdc.gov/phlp/publications/topic/vaccinationlaws.html. As the Secretary explained, these pre-existing state requirements are a major reason the agency has not previously adopted vaccine mandates as a condition of participation. 86 Fed. Reg. 61567–61568.

"All this is perhaps why healthcare workers and public-health organizations overwhelmingly support the Secretary's rule. See *id.*, at 61565–61566; see also Brief for American Medical Assn. et al. as *Amici Curiae*; Brief for American Public Health Assn. et al. as *Amici Curiae*; Brief for Secretaries of Health and Human Services et al. as *Amici Curiae*. Indeed, their support suggests that a vaccination requirement under these circumstances is a straightforward and predictable example of the 'health and safety' regulations that Congress has authorized the Secretary to impose."

Justice Thomas (joined by Alito, Gorsuch, Barrett) dissented on the ground that HHS had not made a sufficient showing to meet the Major Questions clear statement rule. HHS invoked "two statutory provisions that generally grant [the Centers for Medicare and Medicaid Services (CMS)] authority to promulgate rules to implement Medicare and Medicaid. The first authorizes

CMS to 'publish such rules and regulations . . . as may be necessary to the efficient administration of the [agency's] functions.' 42 U. S. C. § 1302(a). The second authorizes CMS to 'prescribe such regulations as may be necessary to carry out the administration of the insurance programs' under the Medicare Act. § 1395hh(a)(1)." The 1933 edition of Black's Law Dictionary said that "administration" is limited to "the practical management and direction" of those programs, and the Secretary's rule went well beyond that.

HHS/CMS also relied on eight definitional provisions describing, for example, what makes a hospital a "hospital." Those provisions defined covered facilities as those that comply with a variety of conditions, including "such other requirements as the Secretary finds necessary in the interest of . . . health and safety." § 1395x(e)(9). HHS/CMS also relied on a saving clause for "health and safety" regulations applicable to "all-inclusive care" programs for the elderly, see §§ 1395eee(f)(4), 1396u–4(f)(4), and a requirement that long-term nursing facilities "establish and maintain an infection control program designed to provide a safe, sanitary, and comfortable environment . . . to help prevent the development and transmission of disease," § 1395i–3(d)(3).

"The Government has not made a strong showing that this hodgepodge of provisions authorizes a nationwide vaccine mandate. We presume that Congress does not hide "fundamental details of a regulatory scheme in vague or ancillary provisions." *Whitman v. American Trucking Assns.*, Inc., 531 U.S. 457 (2001). Yet here, the Government proposes to find virtually unlimited vaccination power, over millions of healthcare workers, in definitional provisions, a saving clause, and a provision regarding long-term care facilities' sanitation procedures. The Government has not explained why Congress would have used these ancillary provisions to house what can only be characterized as a 'fundamental detail' of the statutory scheme. Had Congress wanted to grant CMS power to impose a vaccine mandate across all facility types, it would have done what it has done elsewhere—specifically authorize one. See 22 U. S. C. § 2504(e) (authorizing mandate for "such immunization . . . as necessary and appropriate" for Peace Corps volunteers)."

Justice Thomas conceded that one facility-specific provision was "arguably different," namely, the mandate for long-term care facilities to establish an "infection control program" among its "health and safety" provisions. § 1395i–3(d)(3). But, the dissenters argued, "that infection-control provision focuses on sanitizing the facilities' "environment," not its personnel. *Ibid.* In any event, even if this statutory language justified a vaccine mandate in long-term care facilities, it could not sustain the omnibus rule. Neither the 'infection control' language nor a reasonable analog appears in any of the other facility-specific provisions. Basic interpretive principles would thus suggest that CMS lacks vaccine-mandating authority with respect to the other types of facilities. See *Russello v. United States*, 464 U.S. 16, 23 (1983) [rule of meaningful variation]. And, of course, the omnibus rule cannot rest on the long-term care provision alone. By CMS' own estimate, long-term care facilities employ only 10% of the 10 million healthcare workers that the rule covers. 86 Fed. Reg. 61603."

Justice Alito (joined by Thomas, Gorsuch, Barrett) dissented on the ground that HHS/CMS did not follow the correct procedures.

Query: Why the different result in the Hospital Mandate Case? The dissenting Justices make a very good case that there is no broad targeted delegation in this case—and so the *NFIB* strong clear statement rule might be expected to block the agency rule. The Chief Justice and Justice Kavanaugh were all in with the MQD in the companion case—Why not here? What might have persuaded them? In any event, they were back on the MQD ship in the next case, later the same Term. Why did the following case come out differently than the Hospital Mandate Case?

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

In 2015, the Environmental Protection Agency (EPA) promulgated the Clean Power Plan rule, which addressed carbon dioxide emissions from existing coal- and natural-gas-fired power plants. For authority, the Agency cited § 111(d) of the Clean Air Act, which authorizes regulation of certain pollutants from existing sources. 42 U. S. C. § 7411(d). Prior to the Clean Power Plan, EPA had used § 111(d) only a handful of times since its enactment in 1970. Under that provision, although the States set the actual enforceable rules governing existing sources (such as power plants), EPA determines the emissions limit with which they will have to comply. The EPA derives that limit by determining the "best system of emission reduction [BSER] that has been adequately demonstrated" for the kind of existing source at issue. The limit then reflects the amount of pollution reduction "achievable through the application of" that system.

In the Clean Power Plan, EPA determined that the BSER for existing coal and natural gas plants included three types of measures, which the Agency called "building blocks." The first building block was "heat rate improvements" at coal-fired plants—essentially practices such plants could undertake to burn coal more cleanly. This sort of source-specific, efficiency-improving measure was similar in kind to those that EPA had previously identified as the BSER in other § 111 rules. Building blocks two and three were quite different, as both involved what EPA called "generation shifting" at the grid level—i.e., a shift in electricity production from higher-emitting to lower-emitting producers. Building block two was a shift in generation from existing coal-fired power plants, which would make less power, to natural-gas-fired plants, which would make more. This would reduce carbon dioxide emissions because natural gas plants produce less carbon dioxide per unit of electricity generated than coal plants. Building block three worked like building block two, except that the shift was from both coal and gas plants to renewables, mostly wind and solar. Building blocks two and three sought to implement a sector-wide shift in electricity production from coal to natural gas and renewables; by 2030, the target was to reduce coal from 38% to 27% of the nation's energy production.

After a change in Administrations (Obama to Trump), the EPA withdrew the Clean Power Plan (before it was ever implemented), because it then believed that Congress had not authorized such a major overhaul in the nation's energy system. The Trump EPA devised the less restrictive Affordable Energy Rule in 2019. Another change in Administrations (Trump to Biden), the EPA withdrew the 2019 Plan and announced that it was working on a revised version of the Clean Power Plan. Writing for a 6-3 Court, **Chief Justice Roberts** ruled that EPA had not been authorized by the Clean Air Act to adopt the Clean Power Plan. He relied on a line of statutory interpretation cases reflecting what the Court now calls the "Major Questions Doctrine," the notion that in "extraordinary cases" in which the "history and the breadth of the authority that [the agency] has asserted," and the "economic and political significance" of that assertion, provide a "reason to hesitate before concluding that Congress" meant to confer such authority. *FDA v. Brown & Williamson Tobacco Corp*., 529 U. S. 120, 159-60 (2000); accord, *Gonzales v. Oregon*, 546 U. S. 243 (2006).

"Agencies have only those powers given to them by Congress, and 'enabling legislation' is generally not an 'open book to which the agency [may] add pages and change the plot line.' E. Gellhorn & P. Verkuil, Controlling *Chevron*-Based Delegations, 20 Cardozo L. Rev. 989, 1011 (1999). We presume that 'Congress intends to make major policy decisions itself, not leave those decisions to agencies.' *United States Telecom Assn. v. FCC*, 855 F. 3d 381, 419 (CADC 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc). Thus, in certain extraordinary

cases, both separation of powers principles and a practical understanding of legislative intent make us 'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking there. [*Utility Air Regulatory Group v. EPA*, 573 U. S. 302, 324 (2015).] To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to 'clear congressional authorization' for the power it claims. *Ibid.*

"Under our precedents, this is a major questions case. In arguing that § 111(d) empowers it to substantially restructure the American energy market, EPA 'claim[ed] to discover in a long-extant statute an unheralded power' representing a 'transformative expansion in [its] regulatory authority.' *Utility Air*. It located that newfound power in the vague language of an 'ancillary provision[]' of the Act, *Whitman*, one that was designed to function as a gap filler and had rarely been used in the preceding decades. And the Agency's discovery allowed it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself. *Brown & Williamson*; *Gonzales*. Given these circumstances, there is every reason to 'hesitate before concluding that Congress' meant to confer on EPA the authority it claims under § 111(d). *Brown & Williamson*." The Chief Justice found nothing in the Clean Air Act specifically delegating such authority to the EPA.

Joined by Justice Alito, **Justice Gorsuch** concurred in the Court's opinion, but with an elaborate discussion of the MQD's roots in the constitutional rule of law. "To resolve today's case the Court invokes the major questions doctrine. Under that doctrine's terms, administrative agencies must be able to point to 'clear congressional authorization' when they claim the power to make decisions of vast 'economic and political significance.' Like many parallel clear-statement rules in our law, this one operates to protect foundational constitutional guarantees." The "foundational guarantee" in this case would be the Nondelegation Doctrine, beefed up in the manner suggested by Justice Gorsuch's *Gundy* dissent. But none of the other four majority Justices gestured toward the beefed-up version of the Nondelegation Doctrine and were content to rest on the MQD.

Joined by Justices Breyer and Sotomayor, **Justice Kagan** dissented. Section 111(a), (d) was a broad delegation of authority to the EPA, which exercised measured discretion in carrying forth Congress's project.

NOTES ON THE MAJOR QUESTIONS DOCTRINE AS A QUASI-CONSTITUTIONAL (SUPER) CLEAR STATEMENT RULE

1. *Quasi-Constitutional Clear Statement Rules.* More than 30 years ago, scholars noticed that the Supreme Court was creating new "clear statement rules" to give teeth to "underenforced" constitutional values—including separation of powers, federalism, and the nondelegation doctrine. William Eskridge Jr. & Philip Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 Vand. L. Rev. 593, 606-07 (1992) (noting the Court's emerging rule against "excessive legislative delegation"). Scholars such as Eskridge and Frickey believed that the Court was unlikely to enforce the nondelegation doctrine directly, by striking down statutes, but was moving toward an indirect enforcement by narrow statutory interpretations. It is striking that Justice Gorsuch, who pushed for aggressive judicial review in *Gundy*, now pushes for aggressive quasi-constitutional canons in *NFIB v. OSHA* and *West Virginia v. EPA*.

Like the modern version of the "avoidance doctrine" (judges should interpret statutes to avoid constitutional difficulties), the emerging clear statement rules had the potential virtue of avoiding constitutional conflict between Congress and the Court and of respecting Congress by giving it the benefit of any constitutional doubts. Then-Professor Barrett justified those constitutionally-inspired clear statement rules for a more formal reason: Because the Constitution is the ultimate rule of law (the Supremacy Clause says so), canons that gently implement constitutional norms are admissible. Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 120 (2010). Barrett

defended aggressive application of these canons even when they "overenforce" constitutional norms. *Id.* at 173-77. Her justification was that Congress frequently responds to aggressive Supreme Court statutory interpretations, and so departing from ordinary meaning requires Congress to deliberate more carefully on sensitive constitutional issues. Unfortunately, in 2010, when she published her article, Congress had been gridlocked for a dozen years and overrides of interpretations involving "major questions" had substantially dried up; today, there is virtually no chance of congressional overrides, and the Court has the final word more than ever before in our history. William Eskridge Jr. & Matthew Christiansen, *Congressional Overrides of Supreme Court Statutory Interpretation Decisions*, 1967-2011, 92 Tex. L. Rev. 1317 (2014).

Dean Manning has cautioned against "aggressive construction" by means of judicially-created clear statement rules because they impose a "clarity tax" on Congress by "insisting that Congress legislate exceptionally clearly when it wishes to achieve a statutory outcome that threatens to intrude upon some judicially identified value." John Manning, *Clear Statement Rules and the Constitution*, 110 Colum. L. Rev. 399, 419 (2010). Another danger of such rules, as with the avoidance doctrine, is that it can encourage "stealth constitutionalism," where the Court would undermine the regulatory state through lower-visibility narrowing constructions that would not attract as much attention and controversy ("judicial activism") as striking down statutes. See Eskridge & Frickey, *The Supreme Court, 1993 Term: Foreword—Law as Equilibrium*, 108 Harv. L. Rev. 26, 81-87 (1994); accord, Beau J. Baumann, *Americana Administrative Law*, 111 GEO. L.J. (forthcoming 2023).

To be sure, it is hard to accuse Justice Gorsuch of "stealth," but perhaps Chief Justice Roberts (who abandoned the MQD in the Hospitals Mandate Case but then wrote a sweeping opinion in the Clean Power Plant Case, where he used the term "major questions" for the first time in a majority opinion) has a stealth agenda. Why would the MQD be more useful to him than an outright revival of the Nondelegation Doctrine?

2. *The Evolution of the Major Questions Canon.* Following Eskridge and Frickey, the dissenters in *NFIB v. OSHA* and *West Virginia v. EPA* claim that the Supreme Court majority has altered the earlier version of the MQD. In the 1990s, it wasn't even a "doctrine," it was just a caution against reading a lot into modest congressional delegations of authority, as in the FDA Tobacco Case. As late as *King v. Burwell*, 576 U. S. 473, 486 (2015), Chief Justice Roberts invoked the MQD simply as a reason why courts ought not give *Chevron* deference to agencies delegated lawmaking authority by Congress when the agency makes a big move that has large social and/or economic effects. The agency prevailed in that case—notwithstanding some pretty clear statutory text that had to be explained away—but without any special deference.

Starting no later than in Justice Scalia's opinion in *Utility Air Regulatory Group. v. EPA*, 573 U.S. 302, 323-24 (2014), the nondeference or weak version of the "major questions" precept has morphed into an anti-deference or strong version now officially called the Major Questions Doctrine (MQD). The Roberts Court first created a new clear statement rule: in case of a tie or close case, the government loses. In the 2021 Term, the MQD became what Eskridge and Frickey dubbed a "super-strong clear statement rule," requiring ever-greater specificity from a gridlocked Congress that is hard-put to vote through the most general delegations. Thus, in *NFIB v. OSHA*, the *per curiam* opinion invoked the MQD not only to reject *Chevron* deference to the agency (the Court did not even mention *Chevron*, which it usually ignores completely), and not only to inject anti-deference into the case (the government loses in close cases), but to raise the bar for what counts as a super-strong clear statement. "Safety" was not clear enough for the Court, even though COVID-19 was, and is, sweeping through workplaces, making workers sick, and killing some of them—rendering workplaces "unsafe.". Likewise, in *West Virginia v. EPA,* Chief Justice Roberts's opinion for the same 6-3 majority relied on the MQD to demand a lot more specificity in congressional delegation than Congress will be able to grant in the foreseeable future.

3. *Quo Vadis Nondelegation Doctrine?* Justice Gorsuch's concurring opinions in both *NFIB v. OSHA* and *West Virginia v. EPA* were big shout-outs for the MQD. But his *NFIB* opinion does not sound like he is abandoning his *Gundy* crusade to revive the constitutional Nondelegation Doctrine in

favor of a statutory approach? If so, consider the ongoing relevance of his *Gundy* dissent, which may command majority support on the 6-3 (GOP-Dem) Roberts Court. Does *Biden v. Missouri* suggest that the MQD demands for specificity may vary from case to case? That there are not five votes to revive the Nondelegation Doctrine, so long as the MQD can do the job? Is this "stealth constitutionalism"? Does that concern you?