

Clear Statement Rules, Textualism, and the Administrative State

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A “[clear statement rule](#)” is a judicial presumption that courts should not interpret a statute a certain way unless Congress made a “clear statement” requiring that outcome. In the Supreme Court’s October 2022 term, a number of opinions considered whether various judicial rules of statutory interpretation qualified as clear statement rules. One significant example is Justice Barrett’s concurring opinion in *Biden v. Nebraska* arguing that the [major questions doctrine](#) should not be considered a clear statement rule.

Debates over clear statement rules have implicated broader questions about statutory interpretation, administrative law, and the roles of courts versus the political branches in making and interpreting policy. [Textualist](#) jurists have long argued that the judiciary can limit itself to its proper role as a faithful agent of Congress by focusing on the text of statutes. Clear statement rules, however, are often deployed to give legal weight to extra-textual values like the separation of powers, sovereign immunity, or federalism. Clear statement rules may thus require judges to adopt an interpretation they believe is second-best to protect those values. The debate over clear statement rules, therefore, is in part a debate over whether certain interpretive presumptions may be used to *identify* the best meaning of a statute, or alternatively, to *overcome* the meaning that may be suggested by other, more text-focused tools of interpretation. That question, in turn, may influence which judges and justices are likely to use those rules—certain textualists may be less willing to use clear statement rules, while judges who apply different interpretive methodologies may feel comfortable using them if they agree with the underlying value judgments. The major questions doctrine, for example, seemingly has been applied in a way that reflects the concerns of some justices over the authority wielded by federal agencies. This Legal Sidebar explores the nature of clear statement rules and discusses the implications of this growing debate.

Defining Clear Statement Rules

In statutory interpretation, clear statement rules are a subset of the [canons of construction](#): judicial presumptions about how Congress writes laws. Linguistic canons are presumptions about how Congress (or ordinary speakers) use language, while [substantive canons](#) embody judicial presumptions for or against certain outcomes. Clear statement rules are a type of substantive canon.

Substantive canons represent “[value choices](#)” that a court imposes on the statute. To illustrate, one [group](#) of clear statement rules seeks to protect federalism. Courts will [require](#) a clear statement before finding

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that a federal statute alters the federal-state balance, or before finding that a statute abrogates state sovereign immunity. As in this example, clear statement rules are often structured to protect constitutional values. Legal scholars have [described](#) clear statement rules as creating a check on congressional power, “forcing the political process to pay attention to the constitutional values at stake.” Scholars have [pointed out](#), though, that clear statement rules go beyond constitutional guarantees. For example, a court might hold that Congress must clearly state its intent to abrogate a state’s sovereign immunity and narrowly construe a statute to avoid such abrogation—even if the court would not hold the statute actually violated the [Eleventh Amendment](#).

Whether a particular interpretive principle is defined as a clear statement rule may affect when it applies and how it operates. As one [plurality opinion](#) from the Supreme Court explained, most substantive canons only allow courts to choose among plausible readings of an ambiguous statute, but clear statement rules may limit “the application of an otherwise unambiguous mandate.” In [other words](#), even if a court thinks other tools of statutory interpretation point to one reading of a statute, a clear statement rule insisting upon “greater clarity” than would otherwise be required may “impel” a court to “choose an interpretation other than the one that it regards as best.”

Clear Statement Rules in the Supreme Court’s 2022-23 Term

The Supreme Court expressly referenced “clear statement rules” in more opinions last term than in the prior four terms combined, according to a Congressional Research Service search. Many of these invocations were brief and relatively uncontested, for example, involving clear statement rules [regarding jurisdictional requirements](#) and [sovereign immunity](#). In two rulings, the Supreme Court [declined to recognize](#) new clear statement rules relating to the interpretation of two specific federal criminal laws. The Court [said](#) clear statement rules are appropriate only “when a statute implicates historically or constitutionally grounded norms that we would not expect Congress to unsettle lightly.” Nonetheless, a number of other cases on the Court’s criminal law docket cited broad interpretive principles to construe criminal laws more narrowly, as discussed in two other Legal Sidebars discussing [federal fraud statutes](#) and [federal criminal statutes more generally](#). Most of those criminal law cases cited principles that were not characterized as clear statement rules, but still cited constitutional concerns such as federalism to cabin the scope of the statute.

Two cases expressly applied clear statement rules furthering federalism concerns. One case read the wire fraud statute not to encompass certain prosecutions that the Court [said](#) would “federalize[] traditionally state matters.” The Court cited a similar federalism principle in [Sackett v. EPA](#), a case addressing when certain wetlands are considered “waters of the United States” under the Clean Water Act. The Court [held](#) that the interpretation asserted by EPA and lower courts was too inclusive, based on the statute’s text and structure. As further support, the Court [cited](#) case law requiring Congress to speak clearly before altering the balance between federal and state power, saying “an overly broad interpretation” of the law’s reach “would impinge” on traditional state authority to regulate land and water use.

The Court continued to apply the “[major questions doctrine](#)” to the interpretation of statutes after explicitly [recognizing](#) it in 2022. Under the major questions doctrine, an agency must point to clear congressional authorization if it seeks to regulate on an issue of great “economic and political significance.” While the origins of the major questions doctrine are contested, the Court has associated it with the [decades-old presumption](#) that Congress does not make large changes in regulatory programs in vague terms—that Congress does not “hide elephants in mouseholes.” (The Court referenced this “elephants in mouseholes” principle in [two](#) cases last term, including [in Sackett](#).)

The Court invoked the major questions doctrine in a single case last term: [Biden v. Nebraska](#). That case concerned [whether](#) the Secretary of Education had the authority to forgive \$430 billion in student loans. The Court [held](#) that the phrase “waive or modify” in the Health and Economic Recovery Omnibus

Emergency Solutions Act did not amount to clear congressional delegation for “a decision of such magnitude and consequence.” A separate [opinion](#) in this case expressly addressed whether the major questions doctrine should be characterized as a clear statement rule, an issue the majority of the Court has not weighed in on. Instead, certain Justices have debated whether the doctrine is a clear statement rule and whether it is consistent with textualism.

Clear Statement Rules and Textualism

The dialogue on the Supreme Court about the nature of clear statement rules is occurring against a long background of theoretical and practical [criticism](#) of canons of construction. In particular, [some](#) have [criticized](#) application of the substantive canons as being inconsistent with [textualism](#), a leading approach to statutory interpretation that primarily focuses on the text of a law rather than legislative purpose or prevailing societal values. Textualists [claim](#) that focusing on the text advances legislative supremacy in statutory interpretation, helping judges maintain their appropriate role as interpreters of the law that Congress enacted, rather than allowing judges to encroach into the legislative function by making law. As the Supreme Court has [stated](#), focusing on “the words on the page” helps avoid the “risk” that judicial interpretation would effectively “amend[] statutes outside the legislative process reserved for the people’s representatives.”

As discussed, the [accepted](#) view of clear statement rules is that they [impose](#) judicial preferences for certain substantive outcomes—for example, by favoring limited federal power in the context of federalism, or limited executive power in the context of the major questions doctrine. This result arguably [creates](#) “an active role” for the judiciary in the “public lawmaking process.” Some have [claimed](#) that clear statement rules fail to constrain judges sufficiently, given the lack of legal rules that define when a clear statement rule exists and when Congress has made a sufficiently clear statement to overcome such a presumption. The Supreme Court [said](#) in its 2022 term that clear statement rules rely on a court’s judgment about whether there is something “fundamentally surprising” about the proffered interpretation of the statute. Considering whether an interpretation is “fundamentally surprising” could allow courts to go beyond the statutory text to consider a law’s [operation](#) or [policy](#).

Before her appointment to the bench, Justice Barrett authored an article [asserting](#) that if substantive canons are applied to forgo or even “strain” the most plausible interpretation of statutory text, they are “at apparent odds with the central premise” of textualism. She further [claimed](#), however, that when judges enforce constitutionally grounded canons, they are permissibly acting as faithful agents of the Constitution rather than Congress. She therefore [concluded](#) that “so long as courts honor the plain language of the statute,” these “language-pushing” canons are acceptable to protect constitutional values. In contrast, one textualist scholar [asserted](#) that even when attempting to enforce only constitutionally based values, “vague concepts such as federalism . . . defy principled or judicially manageable standards for enforcement.” Some have [expressed concerns](#) that this indeterminacy could allow courts to use these canons to enforce favored priorities.

Situating Major Questions Doctrine in the Clear Statement Rule Debates

Debates over the use and status of clear statement rules have carried over to the major questions doctrine. As with the broader discussions over clear statement rules discussed above, major questions doctrine debates have involved two related but distinct lines of argument. The first debate centers on the classification of the doctrine: whether it is a clear statement rule or a less strong interpretive presumption. Whether the doctrine is defined as a presumption that can overcome otherwise unambiguous text influences the second debate: whether the doctrine is consistent with textualism.

Weighing in on the first debate, Justice Gorsuch has [described](#) the major questions doctrine as a “clear-statement rule[]” that protects “foundational” guarantees of the constitutional separation of powers. For

major questions, the doctrine [ensures](#) that Congress—not the Executive—decides “important subjects,” leaving executive agencies to “fill up the details.” In Justice Gorsuch’s view, reading a vague statute to delegate sweeping authority to an agency could test the bounds of [Article I’s Vesting Clause](#), which vests all legislative power in Congress.

In contrast, Justice Barrett commented on both debates and [suggested](#) in *Biden v. Nebraska* that the major questions doctrine should not be viewed as a “strong-form substantive canon” that can overcome the meaning of a text, but is instead a canon that reflects how ordinary people use language. In a concurring opinion, she [cited](#) her prior scholarship to note that if the major questions doctrine were viewed as a clear statement rule, it would be in “tension” with textualism. Justice Barrett contended, though, that modern textualism situates statutory text in context, and the major questions doctrine provides important context for congressional delegations. Specifically, she said this context permissibly includes a presumption that sweeping authority is not usually communicated in general instructions.

Justice Barrett’s concurrence generated significant scholarly interest. One scholar, for example, [argued](#) that Justice Barrett’s understanding of context is so capacious that it includes extratextual values, like those contained in clear statement rules, that textualists have objected to. Other scholars, however, have been more [receptive](#) to the idea that the major questions doctrine is a linguistic canon. Nonetheless, the linguistic argument rests to some extent on an assumption about how ordinary people speak, but the one study to date to test this assumption did not [support](#) Justice Barrett’s conclusions.

The Justices also disagree about whether the major questions doctrine is consistent with textualism at all. Echoing textualist criticisms of clear statement rules generally, Justice Kagan has [argued](#) that the major questions doctrine serves as a vehicle for the majority’s broader extra-textual goals—an “anti-administrative-state stance”—and that it has not sufficiently limited judges from imposing their own values or policy preferences. Raising concerns that the major questions doctrine strays from the Court’s commitment to textualism, Justice Kagan has [quipped](#) the doctrine is a “get-out-of-text free card[]” that “magically appear[s]” when a textualist approach would frustrate these extra-textual goals. As Justice Kavanaugh once [opined](#) before joining the Supreme Court, determining when a rule is a major rule “sometimes has a bit of a know it when you see it quality.” Some scholars have similarly [argued](#) that the major questions doctrine lacks [judicially manageable](#) standards to ensure predictable application. At least one scholar has [pointed](#) to the Supreme Court’s invocation of the major questions doctrine and federalism canons as suggesting the Court may be on a broader “crusade against what it sees as excessive federal power.”

Textualist critiques of the major questions doctrine also extend to its novelty. For example, [some](#) have [argued](#) that applying newly created clear statement rules to enacted statutes changes the rules of the interpretive game in a way that Congress could not predict when it passed the statute. While Justice Gorsuch was not addressing this exact argument, he has defended the major questions doctrine by [pointing out](#) that the law has historically been “full of clear-statement rules.” Other scholars have similarly [noted](#) that at least some clear statement rules enforcing narrow readings of statutes have a long historical pedigree.

Considerations for Congress

Like other rules of jurisprudence and interpretive methods, clear statement rules function as part of the legal background against which Congress legislates. It is, however, debated whether clear statement rules reflect Congress’s desires and assumptions in drafting statutes or whether they reflect judicially imposed value choices external to the text of a statute that Congress must heed in future legislation.

In the administrative law context, the Court’s recent rulings suggest that the Court will be skeptical when agencies claim sweeping authority based on vague statutory language. In those cases, the Court appears to expect Congress to authorize clearly that kind of regulatory authority. The Court’s underlying concerns

over the political accountability of and policy discretion wielded by federal agencies are also arising in related areas of administrative law. In a [pair](#) of cases set to be heard in January 2024, the Court is set to [decide](#) the fate of [Chevron deference](#). *Chevron* can be understood as an anti-clear statement rule because it permits agencies to exercise policy discretion where Congress has legislated broad policy goals rather than explicit direction. Some members of the Court who have [voiced concerns](#) about the discretion *Chevron* allows agencies to exercise also [invoked](#) clear statement rules in the Court's 2022 term to prompt Congress to decide certain issues with clear statutory language. These administrative law issues [could be seen](#) as part of a broader [concern](#) with executive branch discretion in wielding federal power.

Whether the Court treats a particular interpretive presumption as an ordinary canon to be considered alongside other interpretive tools, or alternatively as a clear statement rule that can override textual evidence of statutory meaning, raises still other separation-of-powers issues. As [scholars](#) have pointed out, a principle like the major questions doctrine not only limits agency authority, but also limits Congress's authority to draft statutes in certain ways and to make broad delegations. Particularly if the major questions doctrine or other clear statement rules are treated as constitutionally required, it may be difficult for Congress to legislate clearly enough for a court's satisfaction. Textualists argue that adhering to the text respects Congress's democratic pedigree and its proper role in the Constitution's tripartite structure as the primary lawmaking body. If instead a judge cites a canon like the major questions doctrine to superimpose values regardless "of whether *Congress* actually values the principles," this action could raise [questions](#) about whether the judge is acting as a faithful agent of Congress. This outcome may be especially concerning for those who doubt whether clear statement rules reflect the way Congress drafts statutes. In the context of the major questions doctrine, for instance, Justice Kagan has [argued](#) Congress sometimes intentionally grants broad authority in sweeping language, meaning that effectuating those broad delegations would be consistent with Congress's choice.

An increased use of clear statement rules thus raises significant issues for Congress to consider when drafting statutes. Courts [presume](#) that Congress legislates with knowledge of the rules of statutory interpretation. However, when courts themselves are uncertain about whether an interpretive principle qualifies as a clear statement rule or some other type of canon, it can be difficult for Congress to know when those rules are triggered and how to overcome any unwanted presumptions. Accordingly, this subject is an area to watch, as clear statement rules will [continue to be litigated](#) this Supreme Court term.

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