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Michael D. Ramsey*

Courts invoke an array of “canons” to aid their interpretation and application of legal texts.¹ Their authority to do so remains contested and underdeveloped.² The debate over judicial canons has been rekindled by the major questions doctrine (MQD), announced by the Supreme Court in *West Virginia v. EPA* and related cases.³ According to the Court, the MQD requires “clear congressional authorization” for administrative or executive agencies to exercise delegated authority over “major policy decisions.”⁴

The MQD has been criticized from various perspectives, including by originalist- and textualist-oriented scholars.⁵ This essay addresses part of that criticism – specifically, the question whether the Constitution’s original meaning permits courts to adopt clear statement canons like the MQD.⁶ It concludes that such canons are sometimes constitutionally permissible (though not necessarily advisable), even if they allow courts to depart from a statute’s most plausible original meaning. It particular, it argues that this judicial practice was deployed by

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¹ See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 53-339 (2012) (describing 57 canons used in legal interpretation).

² See Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109 (2010); John Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399 (2010). See also SCALIA & GARNER, *supra* note 1 (generally not providing a comprehensive explanation of the judicial authority to develop canons); William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079 (2017) (discussing canons as part of a larger inquiry into the foundation of rules of interpretation).

³ *West Virginia v. EPA*, 142 S.Ct. 2587, 2607-2609 (2022); *Alabama Ass’n. of Realtors v. Department of Health and Human Servs.*, 141 S.Ct. 2485, 2487 (2021) (per curiam); *National Federation of Independent Business v. Occupational Safety and Health Administration*, 142 S.Ct. 661, 665 (2022) (per curiam).

⁴ *West Virginia*, 142 S.Ct. at 2609 (internal quotations omitted).

⁵ For originalist/textualist criticism, see, e.g., Chad Squitieri, *Major Problems with Major Questions*, LAW & LIBERTY, Sept. 6, 2022, <https://lawliberty.org/major-problems-with-major-questions/>; Mike Rappaport, *Against the Major Questions Doctrine*, THE ORIGINALISM BLOG, Aug. 15, 2022, <https://originalismblog.typepad.com/the-originalism-blog/2022/08/against-the-major-questions-doctrinemike-rappaport.html>; Chad Squitieri, *Who Determines Majorness?*, 44 HARV. J. L. & PUB. POL’Y 463 (2021). For more general criticism, see, e.g., Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262 (2022); Daniel Deacon & Leah Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. (forthcoming 2023); Ronald M. Levin, *The Major Questions Doctrine: Unfounded, Unbounded, and Confounded*, __ CAL. L. REV. (forthcoming 2024); Thomas W. Merrill, *The Major Questions Doctrine: Right Diagnosis, Wrong Remedy*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4437332.

courts in the immediate post-ratification period without material objection, suggesting that it is an aspect of the “judicial Power” vested in federal courts by Article III.

The essay proceeds in three parts. Part I provides an overview of judicial canons, the MQD, and the judicial branch’s constitutional power and duty to interpret and apply legal texts. Part II outlines historical examples of clear statement rules and related canons, with focus on the longstanding presumptions against violations of international law and against retrospective application of non-penal laws. Part III develops a constitutional account of such presumptions and applies it to the MQD. It concludes that the MQD is consistent with judicial practice dating to the founding era and that it is likely consistent with the original meaning of the judicial power.

I. Overview: Substantive Canons and the Judicial Power

A. Substantive Canons and Linguistic Canons

To begin, canons can be divided (not always neatly) between linguistic canons and substantive canons.⁷ Linguistic canons seek to determine the original meaning of a legal text, akin to rules of grammar: they track (or purport to track) the way language is actually used. For example, the negative implication canon (*expressio unius est exclusio alterius*) merely identifies a common method of expression: specifying one thing tends to exclude other things not specified.⁸ Stating that a store is closed on Sunday implies it is open other days.⁹ Judicial invocation of such canons is easily justified (assuming the canons do in fact reflect background linguistic conventions) as part of the judicial task of determining the original meaning of a text.¹⁰

But other canons seem to go beyond this modest goal. The Supreme Court has said, for example, that it will not construe federal statutes to interfere with core state institutions absent a clear statutory direction to do so.¹¹ That approach seems difficult to justify merely as pursuit of original meaning. It is doubtful that Congress typically avoids interference with state institutions, and the Court did not principally justify the presumption in that way. Rather, it said that the presumption was needed to protect the autonomy of state institutions needed for a vital

⁶ This essay does not address the related question of whether clear statement rules are consistent with a commitment to statutory textualism. See Barrett, *supra* note 2 (addressing this question).

⁷ *Id.* at 109-110.

⁸ SCALIA & GARNER, *supra* note 1, at 107-111.

⁹ *Id.* at 107 (“When a car dealer promises a low financing rate to ‘purchasers with good credit,’ it is entirely clear that the rate is not available to purchasers with spotty credit.”).

¹⁰ See *id.* (noting that the negative implications canon must be tempered by common sense attention to context: “No dogs allowed’ cannot be thought to mean that no other creatures are excluded.”).

¹¹ Gregory v. Ashcroft, 501 U. S. 452, 459–460 (1991) (courts must “be certain of Congress’s intent” before finding that Congress “legislate[d] in areas traditionally regulated by the States.”). See also Bond v. United States, 572 U.S. 844, 856, 858 (2014) (federal statutes “must be read consistent with principles of federalism inherent in our constitutional structure” and thus “when legislation affects the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision” (internal quotation omitted); Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985) (requiring displacement of state sovereign immunity to be “unmistakably clear in the language of the statute”); Manning, *supra* note 2, at 407-410 (describing federalism-protecting clear statement rules).

federal system.¹² Such canons have been labelled substantive (or normative) canons rather than linguistic (or descriptive) canons; they are justified by reference to the need to protect a substantive value instead of the pursuit of linguistic meaning.¹³ But that shift in justification raises a serious question of judicial authority. Courts' authority to pursue a statute's original meaning is self-evident; their authority to pursue a substantive value, even in the modest form of a presumption, is much less so.¹⁴

Canons also may carry different weights. Some might be deployed merely as tiebreakers where two readings of a text seem equally plausible. At the opposite extreme, they may be described as clear statement rules, meaning that a specified interpretation will not be applied by the court unless the text clearly commands it.¹⁵ Thus any ambiguity in a text – even if that ambiguity could be resolved with a fair degree of confidence from extra-textual sources – will prompt the application of the clear statement rule. Other canons might carry some presumptive weight but could be rebutted by various considerations of context. Either of the latter approaches may push a court to a result that is not otherwise the most plausible reading of the text. As described below, the most troubling from a perspective of judicial authority are substantive clear statement rules.

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

While the types of canons can be distinguished in the abstract, it may not always be easy to categorize particular canons as substantive or linguistic, and canons may draw on multiple justifications. For example, the presumption against statutes having extraterritorial effect¹⁶ may be explained by the observation that as a domestic lawmaking authority Congress is ordinarily concerned only with domestic applications, making it a linguistic canon.¹⁷ The presumption might also be justified by the observation that applying U.S. law to foreign conduct is likely to upset foreign countries, a result that should be avoided in cases of statutory ambiguity even if it is not a typical congressional priority.¹⁸ The latter justification suggests that it is a substantive canon, not founded on how Congress actually legislates but on how the Court thinks Congress should legislate. It may also be unclear how much weight a canon carries (that is, whether it is a tiebreaker, a presumption rebuttable by context, or a clear statement rule). For example, the rule

¹² See *Gregory*, 501 U.S. at 457-460, 464.

¹³ See Barrett, *supra* note 2, at 168; Manning, *supra* note 2, at 403.

¹⁴ See Barrett, *supra* note 2, at 110 (“A court applying a canon to strain statutory text uses something other than the legislative will as its interpretive lodestar, and in so doing, it acts as something other than a faithful agent. The application of substantive canons, therefore, is at apparent odds with the central premise from which textualism proceeds.”).

¹⁵ See Manning, *supra* note 2, at 401-402 (describing this approach as a “clarity tax” that “direct[s] courts to select something other than the most natural and probable reading of a statute”).

¹⁶ *Morrison v. National Australia Bank*, 561 U.S. 247 (2010).

¹⁷ *Id.* at 255; SCALIA & GARNER, *supra* note 1, at 268.

¹⁸ See William S. Dodge, *The New Presumption against Extraterritoriality*, 133 HARV. L. REV. 1582, 1640-1653 (2020) (describing the presumption partially in these terms); see also *RJR Nabisco, Inc. v. European Community*, 136 S.Ct. 2090, 2100 (2016) (noting that the presumption “serves to avoid the international discord that can result when U.S. law is applied to conduct in foreign countries”).

of lenity – discussed further below – has been described as a tiebreaker but also as a presumption of some greater weight.¹⁹

This essay addresses the MQD as a substantive clear statement rule. Other commentary has defended it as a linguistic canon based on the proposition that Congress would not lightly delegate its legislative authority, or on the observation that more generally ordinary speakers so not understand non-specific conveyances of authority to include authority to decide important matters.²⁰ And some authorities have suggested that it might best operate as a tiebreaker or a weak presumption.²¹ But the Court’s recent description and application of the MQD supports a stronger view of the doctrine. As the Court put it in *West Virginia*:

Thus, in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us reluctant to read into ambiguous statutory text the delegation claimed to be lurking there. To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to clear congressional authorization for the power it claims.²²

Or as the Court’ opinion later acknowledged, the “requirement of clear congressional authorization” shows that “the approach under the major questions doctrine is distinct” from “routine statutory interpretation.”²³

C. Judicial Power and Duty

This section outlines the originalist case against substantive canons to set the stage for an originalist response. The apparent problem with substantive canons is that courts employing them appear to be doing something other than (or in addition to) finding a text’s most plausible original meaning. Linguistic canons, which provide a framework for assessing original meaning, do not face this difficulty and are easily justified as part of a court’s judicial power to say what the law is²⁴ (as are, for example, applications of rules of grammar). Substantive canons – especially clear statement rules – may be harder to justify because it is not evident to an

¹⁹ Compare Barrett, *supra* note 2, at 117-118 (describing the rule of lenity as a tiebreaker) with SCALIA & GARNER, *supra* note 1, at 299 (noting various versions of the rule of lenity and concluding that it should be invoked where “after all the legitimate tools of interpretation have been applied, a reasonable doubt persists”) (internal quotation omitted).

²⁰ E.g., Ilan Wurman, *Importance and Interpretive Questions*, __ VA. L. REV. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4381708.

²¹ E.g., Biden v. Nebraska, 143 S.Ct. 2355, 2377 (2023) (Barrett, J., concurring).

²² *West Virginia*, 142 S.Ct. at 2609 (internal quotations and citations omitted).

²³ *Id.*

²⁴ U.S. CONST., Art. III, Sec. 1; see *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

originalist how the judicial power conveys authority to do anything other than to determine a text's original meaning.²⁵

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

It is also important to state precisely why this is a potential constitutional problem. It is not simply a matter of the scope of the judicial power. In itself, the Constitution's grant of judicial power likely does not obligate courts to exercise that power in all cases. The Constitution in Article I, Section 1, vests legislative power in Congress, but (apart from a few specific instances) that grant does not obligate Congress to exercise its power. Likewise the Constitution's grant of executive power to the President in Article II, Section 1, does not appear in itself to obligate the President to exercise that power; a separate provision, the take care clause, imposes that obligation.²⁶

Like the President, the federal courts' constitutional duty to enforce the law arises from separate constitutional provisions. Article VI declares that "this Constitution and the Laws of the United States made in Pursuance thereof ... shall be the supreme Law of the Land."²⁷ Thus, as a constitutional matter, a duly enacted federal statute is supreme law. Article VI then imposes a judicial oath to "support this Constitution"²⁸ – including the Constitution's direction that constitutionally enacted federal statutes are supreme law. Thus courts have a constitutional duty imposed by Article VI to use their judicial power to apply constitutional statutes as supreme law.²⁹

This conclusion poses serious constitutional difficulties for substantive canons. As discussed, substantive canons potentially underenforce statutes – that is, they fail to treat as supreme law some applications of duly enacted statutes. And neither the supremacy clause nor

²⁵ See Manning, *supra* note 2 (expressing this concern). As Justice Scalia observed: "[W]hether these dice-loading rules are bad or good, there is also the question of where the courts get the authority to impose them. Can we really just decree that we will interpret the laws that Congress passes to mean less or more than what they fairly say?" ANTONIN SCALIA, A MATTER OF INTERPRETATION 28-29 (Amy Gutman ed. 1997).

²⁶ U.S. CONST., Art. II, Sec. 3; see MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION 269-270 (2020).

²⁷ U.S. CONST., Art. VI., para. 2.

²⁸ *Id.*, para. 3.

²⁹ By negative implication, statutes not made "in pursuance" of the Constitution (that is, unconstitutional statutes) are not supreme law – an important textual foundation of judicial review.

the judicial oath suggests the possibility of exceptions that would allow such underenforcement.³⁰

There is, however, a response. The courts' judicial power might allow a limited power of underenforcement in certain circumstances. It is generally accepted that the President's executive power to enforce the law include the power of prosecutorial discretion, even in the face of the take-care clause.³¹ Despite the apparently unqualified duty imposed by the take care clause, the historical understanding of the executive power indicates that the take-care duty is not absolute.

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

D. The MQD and Judicial Duty

The MQD illustrates the foregoing question of the judicial power to underenforce the law. Both the majority and dissent in the *West Virginia* case seemed to understand the MQD as distinct from ordinary textualist interpretation. The issue in the case (greatly oversimplified) was whether Congress' delegation to the EPA of authority to set air pollution standards included authority to establish industry-wide standards for greenhouse gas emissions in the power generation sector as a whole.³² Although the statute was not clear on the point, the dissent thought the most plausible reading of the statute included the broader delegation claimed by the EPA.³³ Rather than meeting this view head-on, the majority invoked the MQD to say that the claimed delegation failed due to the statute's clack of clarity.³⁴

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

In dissent, Justice Kagan memorably faulted the majority for using the MQD as a "get-out-of-text-free card[]." ³⁵ That may be a correct if unsympathetic description, but it does not in

³⁰ This essay addresses only judicial underenforcement of statutes. What one might call judicial "overenforcement" – that is, using canons to apply statutes more broadly than their original meaning might indicate – raises distinct constitutional issues.

³¹ See MCCONNELL, *supra* note 26, at 269-270 (acknowledging the power of prosecutorial discretion despite the take care clause).

³² *West Virginia*, 142 S.Ct. at 2600-2606.

³³ *Id.* at 2626, 2628-2633 (Kagan, J., dissenting).

³⁴ *Id.* at 2609; *see id.* at 2633-2634 (Kagan, J., dissenting).

³⁵ *Id.* at 2641 (Kagan, J., dissenting).

itself show the move to be constitutionally illegitimate. Her observations indicate that the MQD is a substantive canon functioning as a clear statement rule, resulting in underenforcement of the law. So described, it is not unusual. As discussed, modern doctrine contains an array of such canons.³⁶ But that merely raises the stakes: all of these canons, not just the MQD, are vulnerable to the claim that they violate the courts' duty to apply supreme law. The question again is whether the canons are consistent with the courts' constitutional duty – and that is a question about the courts' judicial power to underenforce the law.

II. Original Meaning and Clear Statement Rules in the Early Post-Ratification Era

For an originalist inquiry regarding the MDQ, the question is thus whether the original meaning of the judicial power included a power to develop and apply underenforcement canons. Federal courts in the early post-ratification era apparently believed their judicial power allowed them to adopt clear statement rules and other substantive canons that resulted in the underenforcement of federal laws. This section examines two such rules in detail: the presumption against violating international law and the presumption against civil retroactivity. The apparently uncontested use of these canons (and others discussed more briefly below) indicates that they were not understood to be outside the Constitution's judicial power.

A. The *Charming Betsy* Canon

The most familiar of the Supreme Court's early nineteenth-century canons is the so-called *Charming Betsy* canon, which directs that courts not apply unclear statutes in ways that violate international law. The canon is most directly stated in (and derives its name from) the 1804 case *Murray v. Schooner Charming Betsy*,³⁷ although as discussed below the Court had applied it earlier.

In considering a claim for wrongful seizure of the ship *Charming Betsy*, Chief Justice Marshall wrote for the Court that “[a]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains...”³⁸ Marshall's language appears to describe what today we would call a clear statement rule. In his formulation, the narrower statutory scope that complies with the law of nations (as international law was called at the time) is preferred if it is just a “possible” reading; it need not be equally plausible, or nearly equally plausible, as a more expansive reading. This direction is, at least in most cases, an

³⁶ See *id.* at 2616-2617 (Gorsuch, J., concurring); Barrett, *supra* note 2, at 138-145.

³⁷ 6 U.S. 64 (1804). See generally Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479 (1998); see also CURTIS A. BRADLEY, INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM 15-19 (2013).

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

underenforcement rule.³⁹ Ordinarily a court will face a potentially broad reading of a statute that in some applications would violate international law and a narrower reading that conforms to international law. Marshall's formulation calls for the court to adopt the narrower one, even if it is not the most plausible.

As applied in *Charming Betsy*, the presumption may have had wider scope (although Marshall did not say so directly). The issue in the case was whether the U.S. navy's seizure of the ship *Charming Betsy* was authorized by a federal statute prohibiting trade with France by persons "resident in or under the protection of the United States."⁴⁰ The ship was suspected of trading with France; its owner, Jared Shattuck, had been born a U.S. citizen but moved to the Danish Virgin Islands and swore allegiance to Denmark.⁴¹ The seizure of his ship was authorized by the relevant statute only if he was "under the protection of the United States" – that is, if he remained a U.S. citizen despite his apparent expatriation.⁴² Marshall stated the presumption against violating international law at the outset of his analysis but ultimately reserved the question whether applying the statute to Shattuck would have been a violation.⁴³ Rather, he appears to have read the statute narrowly to avoid the *possibility* of violating international law.

Marshall had applied the presumption even more forcefully in a prior case, *Talbot v. Seeman*, in 1801.⁴⁴ There the question was whether the claimant, a U.S. naval captain, was entitled to salvage⁴⁵ for recapturing a neutral ship from its French captors. A federal statute provided salvage when a ship was recaptured "from the enemy."⁴⁶ The relevant events took place during the United States' "Quasi-War" with France, and the Court had previously held that France was an "enemy" during this conflict for purposes of federal law.⁴⁷ Thus the claimants in *Talbot* seemed to have a strong case on the face of the statute.⁴⁸

³⁹ See Bradley, *supra* note 37, at 487 (noting that courts use the *Charming Betsy* canon "primarily as a braking mechanism ... to restrain the scope of federal enactments").

⁴⁰ *Id.* at 486.

⁴¹ *Charming Betsy*, 6 U.S. at 115-116.

⁴² *Id.* at 119-120 ("Jared Shattuck having been born within the United States, and not being proved to have expatriated himself according to any form prescribed by law, is said to remain a citizen, entitled to the benefit and subject to the disabilities imposed upon American citizens; and, therefore, to come expressly within the description of the act which comprehends American citizens residing elsewhere.").

⁴³ *Id.* at 120. See Bradley, *supra* note 37, at 487 ("It is not entirely clear from the opinion how international law actually influenced the Court's conclusion, particularly given that the Court reserved judgment on whether the United States had the *power* under international law to punish Shattuck.").

⁴⁴ 5 U.S. 1 (1801). See Bradley, *supra* note 37, at 485-486 (discussing *Talbot*).

⁴⁵ Salvage referred to the right to a percentage of the ship's value, granted to a person who recovered the ship for the owners.

⁴⁶ *Talbot*, 5 U.S. at 27-28; Act of March 2, 1799.

⁴⁷ *Bas v. Tingy*, 4 U.S. 37 (1800).

⁴⁸ Marshall acknowledged that "It has been contended that the case before the court is in the very words of the act. That the owner of the *Amelia* is a citizen of a state in amity with the United States, re-taken from the enemy. That the description would have been more limited, had the intention of the act been to restrain its application to a re-captured vessel belonging to a nation engaged with the United States against the same enemy." *Talbot*, 5 U.S. at 43

Marshall held otherwise. First, he noted that international law did not permit a claim of salvage for recapturing neutral ships (the logic being that the initial seizure was wrongful under international law and so the neutral owner would have a legal remedy against the captor).⁴⁹ Next, he recited the presumption against violating international law in similar terms as he would use later in *Charming Betsy*: “the laws of the United States ought not, if it be avoidable, so to be construed to infract the common privileges and usages of nations.”⁵⁰ Finally, he concluded that it was possible to read the statute more narrowly:

On inspecting the clause in question, the court is struck with the description of those from whom the vessel is to be re-taken in order to come within the provisions of the act. The expression used is *the enemy*. A vessel re-taken from the enemy. The enemy of whom? The court thinks it not unreasonable to answer, of both parties. By this construction the act of congress will never violate those principles which we believe, and which it is our duty to believe, the legislature of the United States will always hold sacred.⁵¹

That seems quite strained, justifiable only by a very strong presumption against violating international law. On an ordinary reading, it seems straightforward to take “the enemy” as “the enemy of the United States,” particularly as to a statute passed by the U.S. Congress during a U.S. armed conflict.

The Marshall court applied the presumption from *Talbot* and *Charming Betsy* in subsequent cases, most notably in another maritime case, *The Schooner Exchange v. McFaddon*.⁵² In that case, the Court read Congress’ general grant of federal maritime jurisdiction not to grant jurisdiction in cases where the law of nations indicated foreign sovereign immunity. Marshall wrote: “until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be breach of faith to exercise.”⁵³

It is possible that the Marshall Court understood the *Charming Betsy* presumption as a linguistic canon reflecting an assumption that Congress typically would not want to violate international law. Even if that view of Congress might not seem plausible today, in the eighteenth and nineteenth centuries international law played a more prominent role in moral and policy debates and the nation’s weaker geostrategic position made violations more problematic.⁵⁴

⁴⁹ *Id.* at 36-37. The ship in question, *The Amelia*, was owned by citizens of the German city-state of Hamburg, which was not involved in the U.S.-France conflict. *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 44.

⁵² 11 U.S. 116 (1812).

⁵³ *Id.* at 146. *Schooner Exchange* involved a claim brought against a French warship located in a U.S. harbor. *Id.* For other early cases that may have involved an application of the presumption against violating international law, see David L. Sloss et al., *International Law in the Supreme Court to 1860*, in *INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE* 7, 37-41 (David L. Sloss et al., eds., 2012) [hereinafter Sloss et al.].

⁵⁴ See David M Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 923 (2010).

However, Marshall did not describe the presumption as arising from Congress' intent other than in a very generalized way. *Talbot* and *Charming Betsy* stated the presumption in strong terms that seemed to foreclose inquiry into context that might suggest contrary congressional considerations in specific instances. *Talbot* in particular adopted a strained reading of the statute to avoid an international law violation. Thus the *Charming Betsy* presumption seems to illustrate a judicial power to read statutes narrowly to protect a substantive value, even where the most plausible reading of the statute might not support such a result. As one commentary concludes: "There was broad consensus [in the early nineteenth century] that the courts shared responsibility for upholding the nation's obligations and its honor when matters implicating international law came within their jurisdiction."⁵⁵

B. Civil Retroactivity and the *Schooner Peggy*

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

The Constitution bars Congress from enacting ex post facto laws,⁵⁶ but that restriction was understood in the founding era to apply only to retroactive penal laws.⁵⁷ In *United States v. Heth* in 1806, the Court considered a claim of civil retroactivity.⁵⁸ With Marshall recused, the Justices delivered seriatim opinions, most of which held for the claimant on the basis of some form of a presumption against retroactive application of non-criminal laws. Justice Paterson (a former member of the Constitution Convention) put it most clearly:

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

⁵⁵ Sloss et al., *supra* note 53, at 50. See also Bradley, *supra* note 37, at 507 (noting that "[c]ommentators typically classify the *Charming Betsy* canon with the normative canons" and adding that "an intent-based account of the *Charming Betsy* canon would have to confront problematic empirical evidence suggesting that compliance with international law is often not the political branches' paramount concern").

⁵⁶ U.S. CONST. Art. I, Sec. 9.

⁵⁷ See SCALIA & GARNER, *supra* note 1, at 261.

⁵⁸ 7 U.S. 399 (1806). *Heth* involved the retrospective application of a statute providing compensation for collectors of customs. See *West Virginia*, 142 S.Ct. at 2616-2617 (Gorsuch, J. concurring) (relying in part on *Heth*).

unequivocal and inflexible import of the terms and the manifest intention of the legislature.⁵⁹

As with *Charming Betsy*, Paterson’s formulation seems to go beyond ordinary interpretation to invoke what today we would call a clear statement rule.⁶⁰ And in its application in *Heth* the Court seemed not to follow the most natural reading of the statute; indeed Attorney General Breckinridge, arguing on behalf of the United States for a retrospective application, had observed that “the words of the act appeared to him so plain that they could not be elucidated by argument.”⁶¹ The Court nonetheless ruled against him.

The discretionary nature of the *Heth* presumption is strongly reinforced by an earlier Marshall opinion. In *United States v. Schooner Peggy* – another Quasi-War case – the question was whether a treaty should be given retroactive effect.⁶² Marshall acknowledged the presumption against retroactive statutes in the strong terms later invoked by Paterson. However, he continued, retroactivity of a treaty was a different matter:

It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties; but in great national concerns where individual rights acquired by war are sacrificed for national purposes, the contract making the sacrifice ought always to receive a construction conforming to its manifest import ...⁶³

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

C. Other Early Post-Ratification Era Presumptions

At least two other early post-ratification-era presumptions should probably be classified along with *Charming Betsy* and *Heth* as examples of judicial underenforcement. The first is the

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

⁶⁰ See Manning, *supra* note 2, at 410-412 (discussing the presumption against retroactivity as a substantive canon).

⁶¹ *Id.* at 399.

⁶² 5 U.S. 103 (1801).

⁶³ *Id.* at 110.

rule of lenity – the doctrine that ambiguous penal statutes should be read “strictly.”⁶⁴ As Chief Justice Marshall described it:

The rule that penal laws are to be construed strictly ... is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislature, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.⁶⁵

By invoking a rule of strict construction, Marshall seemed to be calling for ambiguous penal statutes to be given a more narrow application than they could be understood to mean using ordinary principles of interpretation. And his reference to the respective roles of the courts and the legislature may suggest a concern about courts erroneously going beyond what the legislature decreed.⁶⁶

A second possible presumption in this category involved the application of the Constitution rather than statutes. A number of early courts and commentators said that a constitutional violation needed to be clear before a court would find a law unconstitutional.⁶⁷ The force and extent of this principle remains somewhat in doubt, but at minimum it seems to suggest a degree of judicial underenforcement (in this case of the Constitution). Presumably the motivation would again be a concern over judicial error – here, an erroneous interference with laws enacted through the constitutional representative process.⁶⁸

III. Implications of Early Practice for the Major Questions Doctrine

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

⁶⁴ SCALIA & GARNER, *supra* note 1, at 296.

⁶⁵ *United States v. Wiltberger*, 18 U.S. 76, 95 (1820). See 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 88 (1765) (stating in similar terms that “[p]enal statutes must be construed strictly”).

⁶⁶ Some courts and commentators describe the rule of lenity as merely a tiebreaker employed only in cases of irresolvable ambiguity. See *Barrett*, *supra* note 2, at 117-118 (describing the rule as a “tiebreaker”); *Johnson v. United States*, 529 U.S. 694, 713 n. 13 (2000) (noting that the rule should be invoked only when ambiguity “cannot otherwise be resolved”). But see SCALIA & GARNER, *supra* note 1, at 299 (describing the rule as requiring that “when the government means to punish, its commands must be reasonably clear.”). Regardless of how the rule is deployed in modern times, Marshall’s “construed strictly” formulation (likely derived from Blackstone) indicates a stronger version in use in the early nineteenth century.

⁶⁷ See John O. McGinnis, *The Duty of Clarity*, 84 G. WASH. L. REV. 843, 880-904 (2016) (collecting authorities). Professor McGinnis, however, treats the clarity rule as a constitutional obligation rather than an underenforcement canon. See *id.* at 861-862.

⁶⁸ Other presumptions from the early post-ratification era may or may not qualify as examples of judicial underenforcement canons. Justice Gorsuch in the *West Virginia* case also relied on the long-standing requirement the waivers of federal sovereign immunity be stated clearly. See *West Virginia*, 142 S.Ct. at 2616-2617 (Gorsuch, J. concurring) (invoking this canon). However, this requirement might be more easily justified as a linguistic canon, as it seems plausible to say that Congress is unlikely to, in effect, waive its own immunity.

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

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

Scope. Each of the substantive canons identified in the prior section operates largely or exclusively to limit the application of ambiguous laws. Each of them acknowledges that (at minimum) the canon cannot displace clear and specific language in the law’s text. *Charming Betsy*’s formulation, for example, required not applying a statute to violate international law if “any other possible construction remains”⁶⁹ – by negative implication, requiring a court to enforce a statute unambiguously violating international law. Similarly, Paterson’s description of the retroactivity canon in *Heth* was that the canon could only be overcome by statutory directions “so clear, strong, and imperative that no other meaning can be annexed to them.”⁷⁰ Thus the canons only came into play if the language was not clear; as to clear language, the judicial duty of full enforcement remained.

Further, as applied in the nineteenth century the canons under discussion did not expand the reach of text beyond its most plausible meaning. They only allowed courts to give an ambiguous text something less than its most plausible meaning. *Charming Betsy*, for example, declined to apply the relevant statute to the shipowner, Shattuck, even though the statute could be read to extend to him.⁷¹ *Talbot* declined to apply the relevant statute to the recapture of the ship *Amelia*, even though the most natural reading of the statute seemed to support that application.⁷² The retroactivity canon directed only prospective applications of statutes even where the statute could be read to include retrospective applications.⁷³ Each canon served to give a text a lesser application than the text’s original meaning might justify; they did not give a text a greater application than the text’s meaning might justify. They are appropriately understood as “limiting canons” – aspects of judicial restraint.

Justification. Although early nineteenth century practice indicates that federal courts sometimes thought themselves empowered to develop and apply limiting canons, it is less clear why they thought themselves so empowered. None of the leading cases had any generalized discussion of when limiting canons were appropriate. From early practice alone, it seems difficult to say more than that courts sometimes developed limiting canons to avoid what these courts thought were systemically bad results – the wrongfulness and danger of violating international law, the unfairness of retroactivity or lack of notice, the undermining of democratic institutions by the excessive use of judicial review. In each case there is caution, recognizing

⁶⁹ *Charming Betsy*, 6 U.S. at 118.

⁷⁰ *Heth*, 7 U.S. at 413 (Paterson, J.).

⁷¹ *Charming Betsy*, 6 U.S. at 120.

⁷² *Talbot*, 5 U.S. at 43-44. See also *Schooner Exchange*, 11 U.S. at 146 (applying canon to narrow application of generally worded jurisdictional statute to avoid violating the international law of foreign sovereign immunity).

⁷³ *Heth*, 7 U.S. at 413 (Paterson, J.).

that in applying unclear statutes courts may err – and the error should, in these cases, be in the direction of avoiding these bad results. Thus, in keeping with their function as limiting canons, they are canons of judicial restraint invoked to avert potentially costly judicial errors.

Some modern justices and commentators seek to explain the limiting canons as implementing “constitutional values.”⁷⁴ It is not clear that this is a helpful approach. First, it is uncertain what counts as a constitutional value, apart from things actually encompassed in the Constitution. For example Justice Gorsuch argued in the *West Virginia* case that the retroactivity presumption implements a constitutional value.⁷⁵ The Constitution, however, only expresses a limit on retroactivity in criminal cases (through the ex post facto clause). By negative implication, it allows civil retroactivity; the framers could easily have included a ban on civil retroactivity if they chose – and the retroactivity canon itself acknowledges that civil retroactivity is constitutionally permissible.⁷⁶ Civil retroactivity may well be unfair, but generalized fairness is more a moral value than a constitutional one. It is not clear what it means to say that avoiding civil retroactivity is a constitutional value, other than that it has some indirect relationship with criminal retroactivity.

Further, nineteenth-century courts did not explain their canons in terms of constitutional values. *Charming Betsy*, for example, implemented values connected to harmonious international relations – a worthy goal, but one distinct from constitutional considerations. Commentators have attempted to recharacterize it as implementing separation of powers, specifically the control of foreign relations by the political branches.⁷⁷ But there does not seem to have been a general canon against court involvement in cases implicating foreign affairs in the early post-ratification period, if such cases were appropriately presented.⁷⁸ In sum, the limiting canons appear to have protected important, widely shared values, but not necessarily ones linked to the Constitution.

Development. A third core question concerning the limiting canons is the extent to which courts have authority to create new ones. Perhaps the early nineteenth-century courts thought they could use then-longstanding presumptions as background aspects of their judicial power but could not develop new ones. Several of the key early canons, notably the rule of lenity and (likely) the rule against civil retroactivity, have roots in earlier English law.⁷⁹ However, it is not clear that early courts saw this as a prerequisite. None of the major early decisions cited

⁷⁴ Barrett, *supra* note 2, at 111-112; *West Virginia*, 142 S.Ct. at 2616-2617 (Gorsuch, concurring). *But see* Manning, *supra* note 2 (sharply criticizing the concept of “constitutional values” not reflected in actual constitutional provisions).

⁷⁵ *West Virginia*, 142 S.Ct. at 2616-2617 (Gorsuch, concurring).

⁷⁶ *See* Manning, *supra* note 2, at 410-412 (disputing that civil nonretroactivity can be called a constitutional value).

⁷⁷ *E.g.*, Barrett, *supra* note 2; Bradley, *supra* note 37.

⁷⁸ *See* MARTIN S. FLAHERTY, RESTORING THE GLOBAL JUDICIARY: WHY THE SUPREME COURT SHOULD RULE IN FOREIGN AFFAIRS 67-90 (2019); Michael D. Ramsey, *Courts and Foreign Affairs: 'Their Historic Role'*, 35 CONST. COMM. 173, 180-182 (2020); Sloss et al., *supra* note 53, at 13-51.

⁷⁹ *See* SCALIA & GARNER, *supra* note 1, at 261, 296.

longstanding precedent, even though in some cases such precedent was available. Moreover, for the leading limiting canon of the period, *Charming Betsy*, the prior historical practice is thin. Some cases prior to *Talbot* had some language anticipating the *Talbot/Charming Betsy* approach.⁸⁰ But it is hard to say that there was a robust set of precedents.⁸¹ It seems more likely that the Marshall court developed the *Charming Betsy* canon to protect against erroneous judicial interpretations that might jeopardize the status and security of the new nation. That view of the matter points to a broader ongoing judicial authority to develop additional limiting canons.

The power to develop new limiting canons is especially critical to modern judicial practice. While this essay so far has focused on limiting canons with early nineteenth century roots (at least), many modern limiting canons appear to lack such roots – including the MDQ, to which the next section turns.

B. Implications for the Major Questions Doctrine.

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

Scope. To begin, the MQD operates in a similar manner to both long-standing and modern limiting presumptions. In the absence of clear statutory direction, it limits a statute's reach: in the *West Virginia* case, for example, the consequence was to exclude a broad reading of the authority conferred by the statute. There will be cases where the law is not clear but a careful analysis of context would suggest that a broad application is on balance more plausible. (This was the dissent's claim in *West Virginia*).⁸² It should be apparent from the foregoing that there is nothing novel about this idea of judicial underenforcement. It is the same effect produced by historical limiting canons such as *Charming Betsy* and the anti-retroactivity presumption, which early American courts thought were within their judicial power.⁸³ On this ground, at least, the MQD is consistent with early judicial practice and early understandings of the judicial power.

Justification. Like the early presumptions, the MQD operates to protect against costly judicial error in applying ambiguous statutes. A core principle of separation of powers is the separation of lawmaking (legislative) and law enforcement (executive) power.⁸⁴ Perhaps the most-repeated maxim of Montesquieu in the founding era was that “[w]hen the legislative and

⁸⁰ See Sloss et al., *supra* note 53, at 10, 37 (citing *Rutgers v. Waddington* (1784), in 1 JULIUS GOEBEL, THE LAW PRACTICE OF ALEXANDER HAMILTON; DOCUMENTS AND COMMENTARY 405-417 (1964), and *Miller v. The Ship Resolution*, 2 U.S. 1, 3-4 (Fed. Ct. App. 1781)).

⁸¹ See BRADLEY, *supra* note 37, at 16 n.82 (discussing various theories of the canon's antecedents).

⁸² See *West Virginia*, 142 S.Ct. at 2628-2633 (Kagan, J., dissenting).

⁸³ See *supra* part II. It also has the same effect as a broader array of modern presumption that do not have the same historical pedigree, such as federalism presumptions reflected in cases such as *Gregory v. Ashcroft*. See *West Virginia*, 142 S.Ct. at 2616-2617 (Gorsuch, J., concurring).

⁸⁴ See W.B. GWYN, THE MEANING OF THE SEPARATION OF POWERS 100-128 (1965).

executive powers are united in the same person, or in the same body of magistrates, there can be no liberty.”⁸⁵ Similarly, Blackstone wrote:

The magistrate may enact tyrannical laws, and execute them in a tyrannical matter, since he is possessed, in quality of dispenser of justice, with all the power which he, as legislator, thinks proper to give himself. But, where the legislative and executive authority are in distinct hands, the former will take care not to intrust the latter with so large a power as may tend the subversion of its own independences, and therewith the liberty of the subject. With us in England this supreme power is divided into two branches; the one legislative ...; the other executive.⁸⁶

Reflecting this idea, the Constitution centrally vests legislative power in Congress and executive power in the President.⁸⁷ However, experience under the Constitution suggests that the legislature cannot resolve every detail by legislation, and thus must leave some flexibility in implementation to the law enforcement power. But that practice, carried too far, threatens the core of separation of powers, if the legislature were to delegate large parts of its lawmaking authority to the executive. In that situation, one would have the tyranny described by Montesquieu, albeit one approved by the legislature.⁸⁸

Two possible approaches might mitigate the threat. First, courts might enforce, as a matter of constitutional law, a rule against (some degree of) delegation. The U.S. Supreme Court has occasionally suggested this idea, most notably in a few cases in the 1930s, but it has now largely abandoned it.⁸⁹ No less an originalist than Justice Scalia concluded that principled judicial enforcement of the nondelegation doctrine was not feasible.⁹⁰ While some Justices and commentators have called for the doctrine’s revival,⁹¹ that has not yet happened, and revival may continue to be deterred by the inability to articulate manageable and textually grounded standards.

Another response to the delegation threat is to rely on political safeguards – notably, the idea that Congress is unlikely to forego too large an amount of its power, and if it does it can reclaim it. Whatever their thoughts about a judicially enforceable nondelegation doctrine, the

⁸⁵ CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS* 151 (1748) (Prometheus Books 2002). See GWYN, *supra* note 73, at 104-106.

⁸⁶ 1 BLACKSTONE, *supra* note 65, at 142-43.

⁸⁷ U.S. CONST. Art. I, Sec. 1; *id.* Art. II, Sec. 1.

⁸⁸ See 1 BLACKSTONE, *supra* note 65, at 261 (“[B]y the statute 31 Hen. VIII c.8 it was enacted, that the king’s proclamations should have the force of acts of parliament: a statute, which was calculated to introduce the most despotical tyranny; and which must have proved fatal to the liberties of this kingdom, had it not been luckily repealed....”). See also *West Virginia*, 142 S.Ct. at 2617-2619 (Gorsuch J., concurring) (discussing the MQD as responding to these values).

⁸⁹ *Whitman v. Amer. Trucking Assns., Inc.*, 531 U.S. 457 (2001).

⁹⁰ *Id.* at 474-475 (“[W]e have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.”) (internal quotation and citations omitted).

⁹¹ *Gundy v. United States*, 139 S.Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting).

framers likely had this dynamic in mind, as reflected in Madison’s famous observation that in a separated-power system, ambition would counteract ambition.⁹²

This solution encounters difficulties in practice. Congress may in fact not be sufficiently jealous of its power (and indeed may be anxious to send difficult, politically fraught choices to another branch). More problematic, however, is that the executive – anxious to enhance its own power – will claim delegated authority from ambiguous (or purportedly ambiguous) statutes. Statutes being necessarily somewhat imprecise, opportunities for such self-aggrandizing readings will be legion – as recent cases suggest.

Courts may respond to these executive claims by parsing the text and context of each supposedly delegating statute. But this process entails substantial risk of judicial error. Courts may erroneously find a delegation the statute does not actually contain. And that error will be difficult to correct, as it would require a supermajority of both Houses of Congress to enact a statute reclaiming the power, over the President’s presumed veto. (Of course, courts might also err in rejecting purported delegations, but this error is more easily fixed by Congress working with a friendly President).

The MQD addresses this risk of structural harm arising from judicial error with a limiting canon that accepts only clear delegations in important matters. This assures that only delegations enacted by Congress are judicially approved. To be sure, this strategy sets up error in the other direction (courts will sometimes refuse to validate delegations actually contained in statutes that seem ambiguous). But as noted, this is a lesser harm, and crucially, is more easily corrected by Congress. In this sense the MQD parallels *Charming Betsy*, which protects against a greater harm (violation of international law) at the expense of a lesser and more easily correctable one (underenforcing the statute).

Crucially, this account of the MQD does not depend on the Constitution actually containing a robust nondelegation rule.⁹³ Those who believe there is such a rule may accept the MQD as a second-best substitute for a constitutional nondelegation rule that the courts are unwilling or unable to enforce.⁹⁴ But the MQD need not be understood as indirectly enforcing a constitutional rule. As discussed, neither of the leading nineteenth-century canons, *Charming Betsy* and the anti-retroactivity presumption, enforces a constitutional rule. Rather, they protect

⁹² *The Federalist*, No. 51 (Madison), at 322 (Clinton Rossiter ed. 1961).

⁹³ Whether the Constitution’s original meaning imposes a strong nondelegation rule is sharply debated. See MCCONNELL, *supra* note 26, at 326-335 (arguing for a nondelegation rule); Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490 (2021) (same); Aaron Gordon, Note, *Nondelegation*, 12 N.Y.U. J. L. & LIBERTY 718 (2019) (same); Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021) (finding practice in the early post-ratification era to undercut arguments for a constitutional nondelegation rule); Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, 56 GA. L. REV. 81 (2021) (same); Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288 (2021) (same). This essay takes no position on that debate.

⁹⁴ See *West Virginia*, 142 S.Ct. at 2616-2617 (Gorsuch, concurring).

against harms arising from judicial overreading of ambiguous statutes. The harms the MQD protects against are blurring of separation of powers and aggrandizement of the executive. While related to the Constitution’s separation of powers design, they need not arise directly from a constitutional rule to merit judicial protection through a limiting canon.⁹⁵

Development. The sharpest difference between the MQD and the early limiting canons is that the MQD does not appear to have doctrinal roots in the founding era. The majority opinion in the *West Virginia* case relied on only relatively recent cases; in concurrence Justice Gorsuch pointed to a case from the late nineteenth century.⁹⁶ Even if those cases are correctly understood as antecedents of the MQD (and they may not be),⁹⁷ they do not establish that the MQD had roots in the immediate post-ratification period or earlier. Leading originalists such as Justice Scalia have invoked the deep roots of key canons such as the anti-retroactivity presumption to justify their use.⁹⁸ If ancient roots are a prerequisite, the MQD seems on shaky ground.

There is, however, another way to approach the matter. Perhaps the question is not whether the canon had long been applied by courts but whether the value it protects was recognized and widely held at the founding. Consider again the *Charming Betsy* canon. Although there are hints of a similar presumption being applied prior to the Constitution, these instances are scattered and may not be enough to satisfy a demanding standard of ancient judicial use. However, the value the *Charming Betsy* canon protects – amicable relations among nations through a system of mutual legal obligations – was longstanding and deeply held at the founding, dating at least to the works of Hugo Grotius in the seventeenth century.⁹⁹ In the eighteenth century numerous authorities well-known to the framers extolled this system; the founding generation in America particularly embraced Emer de Vattel’s mid-century work *Droit des Gens* (Law of Nations).¹⁰⁰ Respect for and obedience to the law of nations was a central consideration in the founder’s constitutional design.¹⁰¹

This approach may support other modern limiting canons that lack a long record of judicial application. For example, the courts’ federalism canons – as in *Gregory, Atascadero*, and *Bond*¹⁰² – may not seem to have roots in founding-era judicial practice. But they assuredly have roots in longstanding values prevalent at the framing and relating to the constitutional

⁹⁵ One might say that the MQD protects a constitutional “value” in Justice Gorsuch’s phrase, but as discussed it is not clear that the characterization is necessary or helpful. See Manning, *supra* note 2.

⁹⁶ *West Virginia*, 142 S.Ct. at 2607-2609; *id.* at 2619 (Gorsuch, J., concurring) (citing *ICC v. Cincinnati, N. O. & T. P. R. Co.*, 167 U.S. 479, 499 (1897)); Louis J. Capozzi, *The Past and Future of the Major Questions Doctrine*, 84 OHIO ST. L.J. 191 (2023) (tracing the origins to several slightly earlier cases).

⁹⁷ See Sohoni, *supra* note 5 (describing the modern MQD as a recent innovation); *West Virginia*, 142 S.Ct. at 2634-2636 (Kagan, dissenting) (same).

⁹⁸ See SCALIA & GARNER, *supra* note 1, at 296-297 (rule of lenity); *Landgraf v. USI Film Products*, 511 U. S. 244, 265–266 (1994) (Scalia, J., concurring in the judgment) (presumption against retroactivity).

⁹⁹ HUGO GROTIUS, *DE JURE BELLI AC PACIS* (THE LAWS OF WAR AND PEACE) (1625).

¹⁰⁰ EMER DE VATTEL, *DROIT DES GENS* (THE LAW OF NATIONS) (1758).

¹⁰¹ See Golove & Hulsebosch, *supra* note 54.

¹⁰² See *supra* nn. 11-12 and accompanying text.

design. The idea of states as distinct power centers exercising a check on the national government and providing local control was a core part of the framer's vision. This is not to say the federalism canons protect actual constitutional rules – perhaps they substitute for underenforced rules, but perhaps they merely reinforce the idea that federalism protections would arise mostly from structure and the political process. The key is that the presumptions rest on longstanding structural values.

Put this way, the MQD is consistent with *Charming Betsy* and the federalism canons. Separation between the executive and the legislature is – like respect for international law and federalism – a core founding-era value. As noted, the framers associated it especially with Montesquieu, but it was the centerpiece of English separation of powers theory extending back to the mid-seventeenth century.¹⁰³ Even if the framers did not embed a robust nondelegation rule in the Constitution, excessive delegation of lawmaking authority to the executive threatens a core principle of separation of powers. The Constitution's framers may have expected structural and institutional considerations to check excessive delegation, but that approach makes it even more important that the judiciary not ratify erroneous claims of delegation through mistakenly broad interpretations of statutes. Thus the MQD can be understood as an aspect of the courts' judicial power to underenforce statutes to protect core founding-era values.

Conclusion

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

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

Like the nineteenth-century canons, the MQD is a limiting canon that protects a core structural value. Delegation of what amounts to lawmaking authority to the executive

¹⁰³ See GWYN, *supra* note 84, at 37-81; see also MARCHMONT NEEDHAM, THE EXCELLENCIE OF A FREE-STATE (1656), reprinted in *id.*, app 1 (showing an early version of this principle).

undermines the separation of legislative and executive power. An aggrandizing executive will use statutory ambiguity to claim ever greater power. Courts can combat this impulse by applying a constitutional nondelegation doctrine or by reading statutes carefully to be sure they contain the claimed delegation. But both approaches have drawbacks. The Constitution's original meaning may not contain a judicially enforceable nondelegation doctrine, or, even if it does, courts may be unwilling to apply it. And courts may interpret unclear statutes erroneously to give lawmaking power to the President that the statute does not actually convey – and that error may be very difficult for Congress to correct. The MQD protects against executive aggrandizement by requiring a clear statement of delegation from Congress, mitigating harms that might arise from judicial error in reading ambiguous statutes. In this sense, it is analogous to the early nineteenth century presumptions.¹⁰⁴

The most difficult part of the originalist defense is the question whether the nineteenth-century limiting canons indicate a judicial power to develop new limiting canons such as the MQD in the modern era. In support, the *Charming Betsy* presumption appears to be an example of a presumption largely developed after ratification – thus suggesting a judicial power to develop new canons. And, for what it is worth, the modern Court (with the support of prominent originalists Scalia and Thomas) has already decided that question in the federalism context, by developing substantive canons to protect state autonomy against judicial misreading of ambiguous assertions of federal authority. As a result, the MQD as a substantive canon has plausible (though not uncontested) originalist foundations.

¹⁰⁴ The argument here is stronger if one believes that the Constitution's original meaning contains a strong nondelegation rule and that the MQD redresses judicial underenforcement of that rule. See *West Virginia*, 142 S.Ct. at 2616-2617 (Gorsuch, concurring). However, as noted, the existence of such an original meaning is contested, and this essay pursues a defense of the MQD that does not depend on it.