INTERPRETING CONGRESS

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In *Loper Bright v. Raimondo*, the Supreme Court claimed for itself a vastly increased responsibility for statutory interpretation. Indeed, the Court claimed unique expertise. Thus, it is more important than ever to understand how the Court goes about interpreting statutes. This Article introduces the concept of *congressional interpretation* to aid in that endeavor.

Congressional interpretation describes a strategy on which the Supreme Court often relies but rarely acknowledges. In statutory interpretation, courts try to understand the meaning of specific statutory language. In congressional interpretation, on the other hand, courts try to understand what the law is by looking beyond the text of a specific statute, or even a specific statute's legislative history. Instead, courts turn to ambiguous notions about general congressional behavior, guessing at how Congress might behave and often looking at an extended timeline of congressional behavior stretching years, even decades, in the wake of the statute the court is nominally trying to understand.

Courts use congressional interpretation for several purposes: to understand the relationship between a substantive statute and subsequent appropriations; evaluate statutes on the basis of post-enactment congressional behavior; and impose assumptions about congressional norms through clear statement rules. Take, for instance, a court considering whether Congress granted statutory authority when Congress failed to appropriate funding to exercise the supposed authority. A court holds an agency interpretation of a statute invalid because, years after passage, a different Congress failed to enact a law similar to the agency's interpretation. Or a court waves away an admittedly plausible statutory interpretation because the court assumes Congress would probably write a statute in a different way.

Looking at the Court's behavior through the lens of congressional interpretation helps make sense of recent statutory interpretation cases. Decisions, including *Loper Bright Enterprises v. Raimondo*, *Garland v. Cargill*, *Sackett v. EPA*, *Biden v. Nebraska*, and *West Virginia v. EPA* all couple declared textualism with congressional interpretation. As a result, the Court is doing three important things. First, it is constitutionalizing statutory interpretation and subtly shifting separation of power principles like the Take Care Clause, executive discretion, and even the seemingly unyielding

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command of bicameralism and presentment. Second, the Court has not acknowledged that its various interpretive tools fit together as congressional interpretation, which undermines the cogency of the device even though the Court regularly uses it. Failure to acknowledge congressional interpretation also undermines the Court's deliberative democratic legitimacy because courts should be explicit about their analytical approaches. Third, and finally, the key cases are all deregulatory or limit agency authority—usually both. This raises the specter that policy outcomes motivate the practice and, perhaps worse, that policy outcomes motivate the tacit constitutional changes that can come with congressional interpretation.

To explore these aspects of congressional interpretation in more detail, this Article presents a case study on federal noise law. With a lawsuit pending against EPA for failure to carry out nondiscretionary duties under various federal noise statutes, the noise law case study presents questions at the crossroads of statutory interpretation, appropriations, executive discretion, Take Care Clause duties, and the triggers and application of clear statement rules. Noise law consequently reveals much about the contours of congressional interpretation.

Ultimately, this Article describes congressional interpretation as a tool of contemporary judicial review and argues for greater transparency, consistency, and deliberation around how courts integrate diverse legislative behavior into their interpretation.

INTRODUCTION

"Courts interpret statutes," Chief Justice John Roberts wrote in *Loper Bright v. Raimondo*,[1] "no matter the context, based on the traditional tools of statutory construction."[2] But this isn't quite right. In some "extraordinary" contexts, as the Chief Justice announced in *West Virginia v. EPA*,[3] courts do not use the traditional tools of statutory interpretation.[4] Moreover, in some contexts, courts do not interpret statutes. They interpret Congress. In these contexts, courts look to an assortment of different congressional behaviors, norms, and expectations, rather than interpreting the text or purpose of a statute "no matter the context." This Article explores the phenomenon of courts interpreting Congress rather than statutes.

There are several contexts in which courts interpret Congress, rather than a statute alone.[5] In some cases, Congress does not merely pass a statute but also takes additional post-enactment actions that relate to that statute without modifying its text. For example, Congress may debate repealing or amending a statute and ultimately fail to do so. This was the case in *West Virginia v. EPA*.[6] There, the Court was evaluating whether the Environmental Protection Agency (EPA) had the authority to implement a cap-and-trade program to control greenhouse gas

1. 144 S. Ct. 2244 (2024).
2. *Id.* at 2252.
3. 142 S. Ct. 2587 (2022).
4. *Id.* at 2609.
5. *E.g.*, Anita S. Krishnakumar, *Statutory History*, 108 VA. L. REV. 263, 265 (2022) (describing "statutory history" in which textualists are willing to study the history of a specific statute, if not broader legislative history). This Article uses a similar approach to Professor Krishnakumar by looking at what jurists actually do, not just what they claim to do, and then asking about the implications of that distinction. *See also* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules of Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395, 401–06 (1950) (listing canons of statutory construction including many that reference nontextual considerations, albeit not specifically in terms of congressional statutory interpretation); William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 595 (1992) (describing some of Llewellyn's canons as "referential" canons); John F. Manning, *Inside Congress's Mind*, 115 COLUM. L. REV. 1911, 1916 (2015) [hereinafter Manning, *Congress's Mind*] (exploring the ubiquity and desirability of "intent skepticism" in interpretive theories). There are likely examples of this phenomenon beyond what this Article describes. As this is a first attempt to draw together several different strands of interpretive practice, I welcome additions and amendments.
6. 142 S. Ct. at 2614.

emissions.[7] In determining that Congress had not authorized EPA to promulgate such a program, the Chief Justice highlighted that Congress had debated but failed to adopt a cap-and-trade program similar to the EPA regulation at issue.[8] Thus, the Court not only asked what the Clean Air Act meant, it also asked what Congress, at various points after it passed the Act, might have wanted. Justice Clarence Thomas relied on the same reasoning in the October 2023 term in *Garland v. Cargill*,[9] leaning on Congress's failure to amend the National Firearms Act more than eighty years after initial passage.[10] These are examples of post-enactment congressional inaction, but courts might also look to post-enactment congressional action. In *FDA v. Brown & Williamson Tobacco Corp.*,[11] for instance, the Court noted that to understand the statute at issue, it was important to look at related laws that Congress subsequently passed.[12]

Similarly, Congress may fail to appropriate funds to implement a statute, or Congress may one year fund a statutory program and withhold funding the next. In these cases, courts do not ask, "What does the statute require?" They instead ask how one action—an appropriation—interfaces with another—a substantive statute. Then–Judge Brett Kavanaugh of the D.C. Circuit addressed this question in *In re Aiken County*.[13] There, the Nuclear Regulatory Commission had refused to carry out a nondiscretionary statutory duty on the grounds that Congress had not appropriated sufficient funds.[14] The court had to determine whether limited appropriations undermined statutory commands.[15]

In these cases, and others like them, courts must determine the authority Congress creates. But the answer does not lie only in statutory interpretation; it lies in what this Article calls *congressional interpretation*. Courts attempt to interpret, or divine, really, what Congress—as an institution unbound by time or judicial culture—has

7. *Id.* at 2602–03.
8. *Id.* at 2614.
9. 144 S. Ct. 1613 (2024).
10. *Id.* at 1618; National Firearms Act of 1934, Pub. L. No. 73-474, 48 Stat. 1236.
11. 529 U.S. 120 (2000).
12. *Id.* at 132–33, 137–39.
13. 725 F.3d 255 (D.C. Cir. 2013).
14. *Id.* at 258–59.
15. *Id.* at 259.

done, might do, should do, or would expect.[16] This analysis goes somewhat beyond the text of a single statute.[17]

Professor Karl Llewellyn's famous 1950 article on statutory interpretation was an early acknowledgement that judges look beyond statutory text when interpreting statutory text.[18] Professor William Buzbee describes how courts sometimes rely on a fiction of a single Congress to compare and contrast statutory text over time.[19] Professor William Eskridge used the term "referential canons" to describe interpretive moves that go beyond textual focus and look to an "outside or preexisting source" like congressional norms and extra-statutory behaviors.[20] Courts have fashioned doctrine around congressional ratification and acquiescence to resolve time-based conflicts involving post-enactment congressional action like appropriations.[21]

This Article, therefore, is not claiming a novel discovery. Instead, it focuses on describing congressional interpretation as a distinctive interpretive strategy that stands in stark contrast to textualism or even legislative history. When courts undertake congressional interpretation, they embrace Buzbee's "one-Congress fiction"[22] but apply the fiction well beyond the bounds of statutory text alone, to interpret the passage of time or even the complete lack of congressional action.

Congressional interpretation, as a new way to categorize and study interpretation, offers at least three insights, both descriptive and normative. First, descriptively, through congressional interpretation, courts speculate on congressional purpose or intent that is lodged somewhere other than the statutory text nominally at issue. This reference might be backward-looking, which is nothing more than a

16. *See, e.g.*, William W. Buzbee, *The One-Congress Fiction in Statutory Interpretation*, 149 U. PA. L. REV. 171, 173 (2000) ("As reflected in the numbering of a new Congress every two years, different members, coalitions, parties, moods, and leadership change the nature of each Congress.").

17. And although the Court has held that "[w]hen the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest," *Bostock v. Clayton County*, 140 S. Ct. 1731, 1737 (2020), the Court, including Justices in the *Bostock* majority, have not always kept their promises on this point. *See, e.g.*, *West Virginia v. EPA*, 142 S. Ct. 2587, 2614 (2022) (suppressing the text of the Clean Air Act in favor of an extratextual clear statement rule).

18. Llewellyn, *supra* note 5, at 401–06.

19. Buzbee, *supra* note 16, at 173.

20. Eskridge & Frickey, *supra* note 5, at 595.

21. *Morton v. Ruiz*, 415 U.S. 199, 230 (1974); *Ex parte Endo*, 323 U.S. 283, 303 n.24 (1944); *Brooks v. Dewar*, 313 U.S. 354, 360–61 (1941); *Swayne & Hoyt, Ltd. v. United States*, 300 U.S. 297, 301–02 (1937).

22. Buzbee, *supra* note 16, at 173.

reference to legislative history.[23] But it is sometimes also forward-looking, suggesting statutory meaning based on post-enactment congressional behavior. This is remarkable, especially on a Court that has long been avowedly textual.[24] It turns what is ostensibly *statutory* interpretation into a sort of *timeline* interpretation looking forward in time to all the actions and inactions of different Congresses into perpetuity.

Second, also descriptively, this Article will explain that congressional interpretation implicates, often obliquely, constitutional doctrine. Specifically, congressional interpretation involves the notion of inherent executive discretion, the Take Care Clause, and the requirement of bicameralism and presentment, alongside "quasi-constitutional" approaches like clear statement rules.[25] As a result, congressional interpretation is constitutionalizing statutory interpretation and quietly—without expression or obvious briefing and deliberation—shaping the constitutional principles from which it draws.

The third contribution of this Article, and its normative thrust, is that courts do not acknowledge when they are relying on congressional interpretation. As a matter of reasoned and deliberative decision-making, and thus democratic practice, this is a problem. The Supreme Court has invited a "crisis" of legitimacy in recent years.[26] Some of that crisis stems from deeply ideological decisions that reject longstanding doctrinal constraints in lieu of apparently partisan outcomes.[27] This doctrinal analysis of congressional interpretation is not meant to legitimize partisan judging. However, more transparency around how courts, particularly the Supreme Court, impose statutory meaning may improve decision-making and lend more legitimacy. At the very least, it will create a better basis for democratic debate about the legitimacy of the Court.[28]

To further explore the concept of congressional interpretation, this Article will turn the clock back more than a half century and introduce an almost unknown case study that perfectly sets up the issues at play: federal noise law. In 1970, Congress passed the Noise Pollution and Abatement Act.[29] In 1972, Congress passed the Noise Control Act

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23. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 624 (1990).

24. *Id.*

25. *See* Eskridge & Frickey, *supra* note 5.

26. Noah Feldman, *The Supreme Court Tanked Its Reputation. This Is the Way Back*, BLOOMBERG OP. (Oct. 2, 2024), https://www.bloomberg.com/graphics/2024-opinion-supreme-court-data-partisan-politics-lost-trust/ [https://perma.cc/B33N-P9X8].

27. *Id.*

28. *See* Joshua Ulan Galperin, *A Restatement of Democracy*, 69 VILL. L. REV. 55, 88–89 (2024).

29. Noise Pollution and Abatement Act of 1970, Pub. L. No. 91-604, 84 Stat. 1709.

(NCA).[30] In 1978, Congress passed the Quiet Communities Act.[31] Together, these three laws impose nondiscretionary duties on the Environmental Protection Agency. In 1981, the Reagan Administration's budget proposed to eliminate funding for noise programs.[32] Congress debated repealing the substantive law but ultimately preserved it without amendment.[33] Nevertheless, EPA closed the Office of Noise Abatement and Control (ONAC) and ceased implementing all statutory noise programs.[34]

Noise law is a good case study of congressional interpretation because it is a stark example of interlocking congressional actions that can trigger other-than-ordinary statutory interpretation. Noise law raises questions of executive discretion, the Take Care Clause, bicameralism and presentment, and clear statement principles at the center of congressional interpretation, thereby setting up a useful study and reformulation of current separation-of-powers debates. Noise law also offers some clarity without the chaos of well-entrenched partisan positioning around hot-button issues.

But modern examples of congressional interpretation offer an indication of how courts are using congressional interpretation today. In just recent years, *Loper Bright Enterprises v. Raimondo*,[35] *Garland v. Cargill*,[36] *Sackett v. EPA*,[37] *West Virginia v. EPA*,[38] and *VanDerStok v. Garland*,[39] the Fifth Circuit's "ghost gun" case,[40] all use congressional interpretation to hack away at agency authority in service of halting regulation.[41] In the case of noise law, congressional interpretation points in the opposite direction.[42] Is there any principled reason congressional

30. Noise Control Act of 1972, Pub. L. No. 92-574, 86 Stat. 1234.

31. Quiet Communities Act of 1978, Pub. L. No. 95-609, 92 Stat. 3079.

32. OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, ADDITIONAL DETAILS ON BUDGET SAVINGS, FISCAL YEAR 1982 (1981), https://fraser.stlouisfed.org/title/budget-revisions-387/fiscal-year-1982-6450 [https://perma.cc/BQ92-JPU5] [hereinafter BUDGET REVISIONS FY 1982].

33. H.R. 3071, 97th Cong. (1981); S. 1204, 97th Cong. (1981).

34. Defendants' Cross- Motion for Summary Judgment & Response to Plaintiffs' Motion for Summary Judgment at 36, *Quite Cmtys., Inc. v. EPA*, No. 1:23-cv-01649 (D.D.C. 2024) (acknowledging that EPA ceased operating the noise program).

35. 144 S. Ct. 2244 (2024) (overruling *Chevron*).

36. 144 S. Ct. 1613, 1618 (2024).

37. 143 S. Ct. 1322, 1342–43 (2023).

38. 142 S. Ct. 2587, 2616 (2022).

39. 86 F.4th 179 (5th Cir. 2023), *cert. granted*, 144 S. Ct. 1390 (2024).

40. *Id.* at 191 & n.5.

41. No doubt there are many other examples than those included in this list. It is my hope that by identifying the trend of congressional interpretation, we can identify and study other examples.

42. *See infra* Part V.

interpretation would not apply when it would indicate that an agency must regulate?

The purpose of this Article is to draw out the nuances of congressional interpretation. Part I further defines the concept of congressional interpretation. Part II explores some of the tools courts use to carry out congressional interpretation, principally, comparing substantive statutes to appropriations, prophesying meaning from years of post-enactment congressional behavior, and fashioning clear statement rules. Part III considers the implications of congressional interpretation, focusing on the effects of congressional interpretation on executive discretion, the Take Care Clause, and bicameralism and presentment. Part IV tells the story of noise law. Part V analyzes noise law in the context of congressional interpretation, concluding that current antiregulatory doctrine supports regulatory action in this case. The Article concludes by focusing on the harm congressional interpretation can cause if courts do not acknowledge and openly debate it.

I. DEFINING CONGRESSIONAL INTERPRETATION

This Article introduces the term *congressional interpretation* to describe a category of interpretive approaches in which judges venture beyond text, intent, or history of a specific statute. That this happens is no great revelation, but giving a name and attention to the phenomenon can help us better understand its implications.

Congressional interpretation refers to those cases in which courts are trying to understand congressional actions and turn outside the scope of a statute to do so.[43] Looking beyond the scope of a statute can raise important issues, which courts cannot sufficiently address if they do not acknowledge that they have, in fact, gone beyond the scope of the statute. One of these problems is that congressional interpretation can implicate constitutional principles.

Several examples will help illustrate congressional interpretation. One concerning the Tennessee Valley Authority, *TVA v. Hill*,[44] presents a straightforward case of congressional interpretation in which the Supreme Court was explicit about its approach and therefore capable of addressing a constitutional problem with due attention. The core question in the case was whether the Endangered Species Act (ESA)[45] prohibited the government from completing a dam that would have led to the

43. In many of the examples of congressional interpretation, the courts use congressional interpretation in addition to more well-known interpretive tools.

44. *TVA v. Hill*, 437 U.S. 153 (1978).

45. Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531–44).

extinction of a protected species.[46] One of the arguments was that after Congress had passed the ESA, it had also appropriated money for the dam in question, and therefore that appropriation might have been an implied repeal of the Act with respect to the dam.[47] The Court thus had to construe the requirements of the Endangered Species Act not just as a matter of textual analysis, but in light of a later congressional action—the appropriation—which seemed to conflict with the plain language of the Act. The Court first tackled the task of construing the Act, concluding "that the explicit provisions of the Endangered Species Act require" the government to halt construction of the dam.[48]

Only after reaching this textual conclusion did the Court turn to whether the appropriation had implicitly overruled the ESA with respect to the dam.[49] The Court acknowledged that repeal by implication is highly unusual, and repeal by implication is even more unusual when the implication runs through an appropriation.[50] The Court then considered a possible exception to the rule for the circumstances presented in this case but declined to introduce such an exception.[51] In short, the Court in *TVA v. Hill* faced a need to compare different congressional acts, in different years and different Congresses, and interpret what those acts meant in combination. It took on this task of congressional interpretation explicitly and was therefore able to do so thoughtfully. Although, arguably, because the Court refused to let the post-ESA appropriation color its reading of the ESA's text, one might say that the Court refused to undertake congressional interpretation, resolving the case only on the text and purpose of the substantive statute.

There are other cases, however, where the Court conducted congressional interpretation but insisted that it was only interpreting the text of a single statute. *West Virginia v. EPA* provides one of the most significant examples of subtle and arguably deceptive uses of congressional interpretation. When Congress unanimously passed the Clean Air Act Amendments of 1970,[52] it sought to reduce or eliminate air pollution "through any measures."[53] Congress specifically targeted

46. *TVA v. Hill*, 437 U.S. at 156.

47. *Id.* at 189.

48. *Id.* at 172–73.

49. *Id.* at 189.

50. *Id.* at 189–90.

51. *Id.* at 191.

52. Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. §§ 7401–642).

53. 42 U.S.C. § 7401(a)(3) ("The Congress finds . . . that air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of

"industrial development" like energy generation as a major source of air pollution.[54] Under this umbrella, section 111 of the Clean Air Act provides EPA with specific authority, mandating that it list any pollutants that harm public health or welfare[55] and then develop regulations to control pollution from sources on that list.[56] The Act tells EPA to seek out the "best system of emissions reduction" for any specific source on the list and to establish regulations based on that system.[57] On this statutory authority, EPA proposed the Clean Power Plan in 2015.[58] Several states and private parties challenged the Plan.[59]

The Court explicitly and simply framed the conflict in *West Virginia v. EPA* as one of statutory interpretation. "The question before us," the Court wrote, "is whether this broader conception of EPA's authority is within the power granted to it by the Clean Air Act."[60] This is a statutory interpretation question, obviously. What is less obvious is how some of the Court's analysis contributed to statutory construction. For instance, in explaining why the term "best system of emissions reduction" cannot support the greenhouse gas trading program that EPA proposed in the Clean Power Plan, the Court explained that "long after the dangers posed by greenhouse gas emissions 'had become well known, Congress considered and rejected'" statutes that would have imposed greenhouse gas trading.[61] The Court continued: "Congress, however, has consistently rejected proposals to amend the Clean Air Act to create such a program. It has also declined to enact similar measures, such as a carbon tax."[62] In diverting attention from the statutory text, indeed, from the Clean Air Act entirely, the Court turned to congressional inaction fifty years in the future to help resolve the meaning of what Congress wrote in 1970.

This is not statutory interpretation. It patently cannot be statutory interpretation because there is no plausible argument that what Congress *did not do* in, say, 2010, can clarify the meaning of what Congress *did*

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pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments.").

54. § 7401(a)(2).

55. § 7411(b)(1)(A).

56. § 7411(b)(1)(B).

57. § 7411(a)(1).

58. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64662 (Oct. 23, 2015).

59. *West Virginia v. EPA*, 142 S. Ct. 2587, 2604 (2022).

60. *Id.* at 2600.

61. *Id.* at 2614 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 144 (2000)).

62. *Id.* (citation omitted).

in fact do in 1970.[63] Congress in 1970 could not predict the future, so future congressional behavior cannot retroactively explain a statute from the past. Professor Anita Krishnakumar has written about "statutory history,"[64] and Justices Elena Kagan[65] and Sonia Sotomayor have used the term.[66] If I were cleverer, maybe I would write an article about *statutory futurism* instead of statutory interpretation or *legislative future* instead of legislative history, but that's for another day.[67]

This is congressional interpretation. The *West Virginia* Court was asking what Congress, as a body that persists through the decades and expresses itself in affirmative and passive ways, might have wanted. This is plainly not a valid constitutional approach given that Congress only makes law through law, not failure to pass law.[68] (This Article returns to that later).[69] The point is that the Court's furtive congressional interpretation raises important constitutional questions about bicameralism and presentment and the relative legal importance of Congress making a law versus not making a law. In *TVA v. Hill*, the Court acknowledged the importance of these temporal questions in its congressional interpretation and was able to carefully analyze them.[70] In *West Virginia*, the Court likewise referred to post-enactment congressional inaction, thereby undertaking congressional interpretation, but it did so without acknowledging the constitutional or interpretive significance of the analytical move.[71]

I offer these preliminary examples just to help define the subject of congressional interpretation. They are not comprehensive. To explore these issues more deeply, the next Part creates a preliminary typology of congressional interpretation. Having a fuller understanding of the strategy, Part III explores some of the implications.

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63. William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 90–91 (1988).

64. *See* Krishnakumar, *supra* note 5.

65. *Wooden v. United States*, 142 S. Ct. 1063, 1072 (2022).

66. Jonathan H. Adler, *Justice Sotomayor Looks at 'Statutory History,' not 'Legislative History*,*'* WASH. POST (Nov. 14, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/11/14/justice-sotomayor-looks-at-statutory-history-not-legislative-history/.

67. *See United States ex rel. Long v. SCS Bus. & Tech. Inst., Inc*, 173 F.3d 870, 878–79 (D.C. Cir. 1999) ("Post-enactment legislative history—perhaps better referred to as 'legislative future'—becomes of absolutely no significance when the subsequent Congress (or more precisely, a committee of one House) takes on the role of a court and in its reports asserts the meaning of a prior statute.").

68. *See* U.S. CONST. art. I, § 7 (describing the process of bicameralism and presentment). *See also* Eskridge, *supra* note 63, at 96.

69. *See infra* Section III.A.2.

70. *TVA v. Hill*, 437 U.S. 153, 190–93 (1978).

71. *West Virginia v. EPA*, 142 S. Ct. 2587, 2614 (2022).

II. MODES OF CONGRESSIONAL INTERPRETATION

Congressional interpretation can manifest in several ways. This Article focuses on three modes that help define the practice without meaning to exclude other possible versions of congressional interpretation. The three modes are: (1) appropriations that might affect the implementation of substantive statutes; (2) congressional behavior that might suggest the mood of post-enactment Congresses; and (3) clear statement demands through which courts shift from interpreting statutes to imposing extrinsic edicts based on how Congress would have or should have behaved.

A. Appropriations

As was the case in *TVA v. Hill*, appropriations present one context in which a court might unambiguously turn to congressional interpretation.[72] Sometimes Congress will pass a law and appropriate money for an action that seems to violate the law. Other times, Congress may pass a substantive statute and later underfund or defund executive implementation of that statute.[73] In both cases, courts need to resolve the apparent conflict by asking what Congress wanted, not (only) what the text of the substantive law says. Complicating matters further, appropriations can vary in their specificity, sometimes identifying specific programs and other times offering lump-sum funding.[74] The question of how a court might address nonspecific post-enactment appropriations that plausibly underfund administrative implementation is core to the noise law case study to which this Article later returns.[75]

For some years, the Indian Health Service operated a program specifically for Native American children in the Southwest.[76] This program operated under the authority of the Snyder Act[77] and the Indian Health Care Improvement Act.[78] Congress funded the program with regular lump-sum appropriations to the Indian Health Service rather than specific line-items for the regional program.[79] In 1985, the Service

72. *TVA v. Hill*, 437 U.S. at 190–93.

73. *E.g.*, Matthew B. Lawrence, *Disappropriation*, 120 COLUM. L. REV. 1, 24 (2020). However, Professor Lawrence's article focuses on Congress defunding entitlement commitments rather than regulatory programs.

74. JAMES V. SATURNO & MEGAN S. LYNCH, CONG. RSCH. SERV., R47106, THE APPROPRIATIONS PROCESS: A BRIEF OVERVIEW 1–2 (2023), https://crsreports.congress.gov/product/pdf/R/R47106 [https://perma.cc/S826-D58A].

75. *See infra* Part IV.

76. *Lincoln v. Vigil*, 508 U.S. 182, 184 (1993).

77. *Id.* at 185; Snyder Act, 25 U.S.C. § 13.

78. Indian Healthcare Improvement Act, 25 U.S.C. §§ 1601–85.

79. *Lincoln*, 508 U.S. at 187.

decided to incorporate regional operations into a national program.[80] Children who benefited from the regional program sued,[81] which teed up the need for congressional interpretation.[82]

On its face this case, *Lincoln v. Vigil*,[83] was about statutory interpretation. The question was whether "the Service's decision to discontinue the Program was 'committed to agency discretion by law' [a statutory term from the Administrative Procedure Act (APA)] and therefore not subject to judicial review under the Administrative Procedure Act."[84] In practice, however, the Court was not simply construing the text of the APA. It was instead seeking out a broader understanding of several congressional actions. The Court addressed the text of the APA,[85] the substantive statutes,[86] the administrative rather than statutory genesis of the program,[87] and, importantly, the nature and legal consequence of appropriations.[88] The Court carefully addressed the ability of the Service to use lump sums flexibly in a situation where the substantive statute did not impose any mandatory duty (indeed, the substantive statutes did not mention, let alone require, the regional program).[89] In so doing, the Court was engaging in congressional interpretation by parsing Congress's signals over time and over distinct laws in the form of substantive statutes and appropriations.

Appropriations-based controversies can give rise to congressional interpretation because they force courts to look across time, from time one, when Congress enacts a substantive statute, to time two, when Congress appropriates in a way that weighs on that statute. Thus, time is naturally, if not necessarily, a trigger for congressional interpretation.

B. Congressional Inaction

Post-enactment congressional inaction is also a temporal trigger for congressional interpretation. Unlike appropriations controversies, though, post-enactment congressional inaction is subtler. With

80. *Id.* at 188.

81. *Id.* at 189.

82. *Id.* at 192. In fact, the key question at issue in the case was whether judicial review was available in the first instance. *Id.* at 190–91. The Court was therefore able to avoid the interpretive question, but this case nevertheless presents facts that highlight straightforward congressional interpretation.

83. 508 U.S. 182 (1993).

84. *Id.* at 184.

85. *Id.* at 190–92.

86. *Id.* at 185.

87. *Id.* at 185–86.

88. *Id.* at 192–93.

89. *Id.* at 193–94.

appropriations, there is an explicit competition between the text of one law—a substantive statute—and the text of another—an appropriation. Thus, there is a necessary turn from insular devotion to the text of a single statute to the "big picture" of congressional interpretation. With congressional inaction, a court may take a turn to ersatz congressional interpretation without acknowledging that it has done so.

In late 2017, a gunman killed fifty-eight people and injured over five hundred others at a concert in Las Vegas.[90] In response, Congress considered three bills to ban the "bump stocks" the gunman used to so efficiently murder so many people.[91] In later years, Congress considered at least three additional bills to the same effect.[92] Congress failed to pass any of them.[93] However, in 2018, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) promulgated a regulation to ban bump stocks.[94] Michael Cargill, the owner of a gun store and at least two bump stocks, challenged ATF's rule.[95] The basis of his challenge was that the National Firearms Act of 1934, which permits ATF to ban machine guns, does not provide ATF authority to ban bump stocks.[96] Deciding whether the ATF had such authority turned on whether a bump stock fits the definition of "machine gun."[97] This is a simple enough matter of statutory interpretation.

In *Garland v. Cargill*, decided in Spring 2024, the Supreme Court did primarily focus on statutory interpretation.[98] It also delicately but importantly shifted its gaze from the 1934 statute to the Congresses of 2017, 2021, and 2023.[99] Early it its opinion the majority noted that "[w]ithin days [of the mass shooting], Members of Congress proposed bills to ban bump stocks . . . . None of these bills became law. Similar proposals in the intervening years have also stalled."[100]

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90. *Garland v. Cargill*, 144 S. Ct. 1613, 1618 (2024).

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 1618–19 (citing Bump-Stock-Type Devices, 83 Fed. Reg. 66514 (Dec. 26, 2018)).

95. *See id.* at 1619 ("Michael Cargill surrendered two bump stocks to ATF under protest."); Dante Motley, *Supreme Court Overturns Federal Bump Stock Ban, Siding with Austin Gun Dealer*, TEX. TRIB. (Jun. 14, 2024), https://www.texastribune.org/2024/06/14/michael-cargill-bump-stock-ban-texas/ [https://perma.cc/PM8W-XHD4].

96. *Cargill*, 144 S. Ct. at 1617–19.

97. *Id.* at 1619.

98. *See id.* at 1620–26.

99. *Id.* at 1618.

100. *Id.* This line of argument, from Justice Clarence Thomas, rings somewhat hollow given Justice Thomas's take on congressional inaction from just a few terms prior. In 2019, Justice Thomas wrote: "[E]ven if congressional silence could be meaningfully understood as acquiescence, it still falls short of the bicameralism and presentment

The Court is poised to address similar logic in the October 2024 Term. The so-called "ghost gun" case, *Garland v. VanDerStok*,[101] addresses whether the Gun Control Act of 1968 permits ATF to require serial numbers and registration for homemade guns.[102] In the case briefing, the respondents make the explicit point that "despite several opportunities to do so, Congress has steadfastly declined to pass legislation targeting the same products that are the object of the Rule."[103]

This is an instance of what Professor Eskridge calls a "rejected proposal" use of congressional inaction.[104] What possible significance could a court's observation of a rejected proposal have? If Congress rejected the proposal before adoption of the statutory language at issue, then perhaps the prior rejection suggests that the language on which Congress eventually agrees could not have implicitly included the language Congress earlier rejected.[105] This, however, is not the case in, for instance, *Garland v. Cargill*. Congress passed the National Firearms Act of 1934 more than eighty years before Congress *did not* amend it in 2017.

If the question is what the language of the 1934 Act means, the inaction of three different Congresses almost a century in the future seems meaningless. On the other hand, if the question is about the emergent, transgenerational sentiment of Congress generally, and over the decades, then the fact that Congress did not amend the law becomes understandable (if not highly instructive). In that light, we can see that the Court in *Cargill* employed congressional interpretation even while nominally committing itself to textualism.[106]

The Court played precisely the same game in *West Virginia v. EPA*. As discussed earlier, the question was whether the Clean Air Act of 1970

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required by Article I and therefore is not a 'valid way for our elected representatives to express their collective judgment.'" *Gamble v. United States*, 139 S. Ct. 1960, 1988 (2019) (quoting Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 76 (2001)).

101. 86 F.4th 179 (5th Cir. 2023), *cert. granted*, 144 S. Ct. 1390 (2024).

102. *Id.* at 183–85.

103. Brief for Respondents at 47, *VanDerStock*, No. 23-852 (Aug. 13, 2024). *See also* Amy Howe, *Justices To Hear Challenge to Regulation of Unserialized 'Ghost Guns,'* SCOTUSBLOG (Oct. 2, 2024, 5:35 PM), https://www.scotusblog.com/2024/10/justices-to-hear-challenge-to-regulation-of-unserialized-ghost-guns/ [https://perma.cc/8GLS-T89N].

104. Eskridge, *supra* note 63, at 84–85.

105. *Id.* at 85.

106. *See Garland v. Cargill*, 144 S. Ct. 1613, 1620 (2024) ("As always, we start with the statutory text . . . ."); *id.* at 1626 ("Abandoning the text, ATF and the dissent attempt to shore up their position by relying on the presumption against ineffectiveness. . . . And, it is never our job to rewrite statutory text under the banner of speculation about what Congress might have done." (cleaned up)).

authorized EPA to regulate greenhouse gas emissions using a cap-and-trade program rather than a plant-by-plant technology-based emissions limit.[107] The Court held that the Clean Air Act did not provide such authority, noting that "long after the dangers posed by greenhouse gas emissions 'had become well known, Congress considered and rejected'" bills that authorized mechanisms similar to what EPA had proposed.[108]

In *Cargill* and *West Virginia*, the Court was initially conducting basic statutory interpretation, but in both cases the Court diverted, without acknowledgement, to consider congressional inaction many decades removed from the language nominally at issue in those cases.

C. Clear Statements

Some clear statement rules are also a form of congressional interpretation. Appropriations and congressional inaction are rooted in the inescapable reality that, over time, stuff happens. Clear statement rules, however, are a subtler version of congressional interpretation because they do not emerge from the inexorable march of time. Instead, clear statement rules are a species of substantive canon, those rules of construction in which courts make "a judgment that Congress would or would not *ordinarily* want that outcome."[109] That is, clear statement rules emerge from a court's extra-statutory suppositions about Congress as an institution. For example, suppositions that Congress normally writes law a certain way, or would have written law a certain way, or has done something special, or should, in general, do its job better. As Dean John Manning explained, defenders of clear statement rules argue that such

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107. *West Virginia v. EPA*, 142 S. Ct. 2587, 2600 (2022).

108. *Id.* at 2614 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 144 (2000)). In either the *West Virginia* or *Cargill* context, one argument is that Congress failed to act because it did not approve of the policy. Another argument is that Congress failed to act because it assumed the agencies already had such authority. Adding to the complications of this post-enactment inaction analysis, it is also notable that Congress also failed to reject EPA's cap-and-trade rule through the statutory process Congress created for itself in the Congressional Review Act, 5 U.S.C. § 801, because President Barack Obama vetoed the resolution of disapproval. S.J. Res. 24, 114th Cong. (2015); *Memorandum of Disapproval on S.J. Res. 24*, WHITE HOUSE (Dec. 18, 2015), https://obamawhitehouse.archives.gov/the-press-office/2015/12/19/memorandum-disapproval-sj-res-24 [https://perma.cc/4MXN-6JQD]. The fact that Congress attempted to overrule the Clean Power Plan but, following the constitutional and statutory process for so doing, was unable to succeed, ought to counsel in favor of EPA's statutory authority, not against it, unless the Court is seeking to substitute its opinion about what Congress should or might have done were the Constitution different than it is.

109. VALERIE C. BRANNON, CONG. RSCH SERV., R45153 STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS (2023) (emphasis added), https://crsreports.congress.gov/product/pdf/r/r45153 [https://perma.cc/9LFB-CTRW].

rules "are a healthy means of enhancing legislative responsibility."[110] A venerable goal, and emphatically one that looks to interpret Congress-at-large rather than a specific statute. Because courts trigger these clear statement rules by looking to nonstatutory factors, norms, or assumptions about how Congress usually legislates, this is also a matter of congressional interpretation.

The clear statement mode of congressional interpretation often arises when an administrative agency claims statutory authority for an action and a court is suspicious of the agency's claim, but the statutory text on which the agency relies does not itself foreclose the claim of statutory authority.[111] In seeking out the scope of agency authority, the doubtful court may look beyond the statute in a variety of ways. For example, the court might trigger heightened scrutiny by finding there is something extraordinary at play in the agency claim, rather than in the statute itself. The court may then guess at what else Congress *would have done* to grant the authority the agency is claiming. Or the court will tell Congress what it *should have done* to accomplish the task. In any case, the court is moving its gaze from statutory text to roomier assumptions about how Congress behaves.

Turning yet again to *West Virginia* helps to clarify the clear statement mode of congressional interpretation. The Environmental Protection Agency had proposed a rule that interpreted the statutory phrase "system of emissions reduction" as permitting it to implement a cap-and-trade program rather than more traditional technology-based emissions limits.[112] The Supreme Court approached the conflict as one of statutory interpretation,[113] and it did not deny that EPA's interpretation had "a colorable textual basis" and was "plausible."[114] Nevertheless, the Court felt this was an "extraordinary" case.[115] That determination—which was untethered from the text of the Clean Air Act—allowed the Court to transform its analysis. Instead of undertaking statutory interpretation alone, the Court turned to all manner of nontextual considerations.

As Part I describes, the Court used congressional inaction to assess EPA's authority, which is both a stand-alone mode of congressional

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110. John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 402 (2010) [hereinafter Manning, *Clear Statement Rules*].

111. Although clear statement rules can apply in any statutory interpretation context, not only in claims of administrative authority. *See id.* at 407–08.

112. *West Virginia*, 149 S. Ct. at 2599.

113. *Id.* at 2607–08.

114. *Id.* at 2609.

115. *Id.* at 2608 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

interpretation but also relates to clear statement rules, the focus of this Part. Professor Dotson argues that the *West Virginia* Court's reference to congressional inaction was less an attempt to understand what the enacting Congress might have meant by the term "system of emission reduction" and was instead a trigger for a clear statement requirement.[116] Specifically, as Dotson explains, some argue that focusing on congressional inaction demonstrates that an agency action is politically significant and can therefore trigger the major questions clear statement rule.[117] Regardless of whether the Court uses inaction to understand text or trigger a clear statement, Dotson explains that the idiosyncrasies of the legislative process make reliance on inaction a fool's errand.[118]

The *West Virginia* Court also used clear statement congressional interpretation when it pointed to EPA's requests for appropriations.[119] It remarked that EPA had not often made rules under the provision on which it was then relying, describing that provision as "a little-used backwater,"[120] and it demanded "clear congressional authorization," rather than conducting basic statutory interpretation.[121] None of these references is statutory interpretation. Each is a demand for Congress to speak with a special, heightened clarity, for reasons—frequency of use or political significance—unconnected to the statutory text. Each, then, is a matter of congressional interpretation.

On the point of clear congressional authorization instead of normal statutory interpretation, the Court is either saying that if Congress had wanted to grant EPA significant power it *would* have done so very clearly, or the Court is saying that if Congress had wanted to grant significant power it *should* have done so very clearly. In either case, the analysis is beyond statutory interpretation. The Court asserting that Congress would have written a statute differently does sound like statutory interpretation. One could read this as "we know Congress only delegates significant authority using very clear statements. If Congress didn't use a clear statement, they didn't mean to grant authority to the agency." But the Court does not say that. The *West Virginia* Court did not cite any precedent contemporary or prior to the Clean Air Act that might have established that the enacting Congress knew it needed to speak in exceptionally clear language. In the entire opinion, the Court

116. Greg Dotson, *Looking for Your Friends at a Cocktail Party: The Dubious Role of Rejected Legislation and the Overlooked Potential of the Appropriations Process*, 62 HARV. J. ON LEGIS. ONLINE 1, 2, 7–8 (2024).

117. *Id*.

118. *See id*.

119. *West Virginia*, 142 S. Ct. at 2612–13.

120. *Id.* at 2613.

121. *Id.* at 2609 (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

cites only one case preceding the Clean Air Act (such that the case could arguably have influenced Congress's drafting strategy), and it cited that case for a proposition unrelated to how Congress drafts statutes.[122] Thus, the Court could not have been arguing that Congress *would have known* to use especially clear language in the Clean Air Act.

The alternative is that the clear statement rule from *West Virginia* is tantamount to the Court saying: "Congress *can only* grant the authority EPA claims by using very clear language." This differs from the assertion that Congress *would have* written the statute differently because in this second formulation, the Court is saying how Congress must draft law—regardless of what Congress was trying to do in the statute at issue. In other words, we could imagine the Court writing: "The Clean Air Act may give EPA flexible and broad authority, and Congress may have intended to allow EPA the power to establish a cap-and-trade system. But even if that is what Congress legislated, we require Congress to speak more clearly." This is also not statutory interpretation because it creates a judicial constraint on how Congress writes statutes rather than simply understanding what Congress tried to accomplish in the statute itself.

When a court imposes a clear statement principle without reference to contemporary expectations of how Congress would have written a statute, it is not doing statutory interpretation. Instead, the court is relying on factors outside of the statute, such as the "extraordinariness" of the administrative action, and using that nonstatutory trigger to reinvent how it examines statutory language.

The congressional interpretation in clear statement rules thus comes most clearly at the triggering phase. At this first step, courts look for signs of extraordinary actions, which necessarily requires some comparison between the statute at issue, the administrative action at issue, and everything else Congress has done that is not extraordinary.

Congressional interpretation next comes when courts compel a heightened standard of textual clarity based on presumptions about how Congress—in general, not specifically the enacting Congress—behaves or should behave when writing statutes. This requires a turn to nonstatutory reference points. It is not an unfamiliar consideration in

122. *Id*. at 2610 (citing *FTC v. Bunte Bros.*, 312 U.S. 349, 352 (1941)) (arguing that EPA's failure to claim authority earlier suggests such authority may not exist). In fact, not only did the Court fail to cite cases that might indicate the Congress of 1970 would have used clear language, the Court heavily cited cases from 2021 and 2022, which obviously could not have had any influence on the language Congress used in 1970. *Id.* at 2608 (first citing *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2487 (2021); and then citing *Nat'l Fed'n of Indep. Bus. v. OSHA*, 142 S. Ct. 661, 665 (2022)).

statutory interpretation,[123] but it is still important to acknowledge that turning to expectations about how Congress behaves is not, strictly, statutory interpretation. Two further (and briefer) examples detail these points.

Beyond the so-called "major questions doctrine," another trigger for clear statement demands is when Congress seeks to legislate in areas that states traditionally govern. In *Sackett v. EPA*,[124] the Court held that land and water regulation are "traditional state authority."[125] As a result, Congress must use "exceedingly clear language if it wishes to significantly alter the balance between federal and state power."[126] The Court therefore demanded a clear statement to support EPA's assertion of jurisdiction over the wetland at issue in that case.[127] This is an example of congressional interpretation because it requires the Court to adjudicate Congress's intent regarding the balance of federal and state authority. At first blush that seems like a simple matter of studying statutory intent—certainly not a textual approach, but nevertheless a tool of statutory interpretation.[128] However, to answer the question about what Congress was trying to accomplish with respect to state authority, the Court did not only look at the Clean Water Act. Instead, the Court referenced the total acreage of wetlands in the United States, imposing the assumption that Congress would have been very clear before allowing such geographically wide-ranging jurisdiction.[129] Again, this is not a novel interpretive strategy, but it is also not textual in nature.

Finally, one might look at the clear statement approach the Court took in *SWANCC*.[130] In *SWANCC*, the Army Corps of Engineers interpreted the Clean Water Act as giving it jurisdiction over hydrologically isolated, artificial ponds because migratory birds relied on the ponds.[131] The Court imposed a clear statement requirement on the grounds that the Clean Water Act "invokes the outer limits of Congress's [Commerce Clause] power."[132] Thus, where Congress remains within the boundaries of the Commerce Clause, but is somewhere near the perimeter, the Court expects a clear statement. Here, as before, the Court

123. *See, e.g.*, Llewellyn, *supra* note 5, at 401–06 (listing common canons of statutory interpretation, many of which make assumptions about how Congress uses language).

124. 143 S. Ct 1322 (2023).

125. *Id.* at 1341.

126. *Id.*

127. *Id.* at 1341–42.

128. *See* Manning, *Inside Congress's Mind*, *supra* note 5, at 1913.

129. *Sackett*, 143 S. Ct. at 1341–42.

130. *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs* (*SWANCC*), 531 U.S. 159 (2001).

131. *Id.* at 162.

132. *Id.* at 172–73.

assumed something about how Congress behaves, and that assumption was not rooted in the statute itself but instead in the shadows of congressional norms. The assumption was, as the Court itself said in a different case, based on ideas about "the manner in which Congress is likely to delegate a policy decision."[133] As before, the idea that the Court is looking at nonstatutory factors to nominally conduct statutory interpretation is not novel.[134] But hopefully, the articulation of congressional interpretation, this typology, and the following Part, which explores the broader significance of congressional interpretation, is useful in thinking about the constitutional, democratic, and practical aspects of the pattern.

III. THE IMPLICATIONS AND SIGNIFICANCE OF CONGRESSIONAL INTERPRETATION

When courts contemplate the congressional gestalt, they tend to implicate a variety of constitutional principles rooted in the separation of powers. The temporal disconnect between substantive statutes and appropriations raises issues of both executive discretion and the Take Care Clause. Attention to the *non-law* of congressional inaction points to the requirements of bicameralism and presentment. The use of clear statement rules to compel special clarity based on nontextual claims about congressional norms draws on a variety of constitutional values and suggests that these values require Congress to use a special procedure when drafting certain law.

By understanding these constitutional implications, it is easier to see that when courts rely on congressional interpretation, they are shrewdly altering constitutional doctrine without openly saying so, all in the name of straightforward statutory interpretation. That congressional interpretation can shift constitutional doctrine is especially important because congressional interpretation so often happens without clear articulation and debate. Indeed, courts frequently rely on congressional interpretation, often implicitly, as make-weight assertions.[135] By drawing on and shifting constitutional doctrine, but doing so subtly and in ancillary arguments, courts are manipulating constitutional doctrine without full briefing, argument, and clarity.

The first section of this Part will explore the relationship between modes of congressional interpretation and constitutional principles. The

133. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

134. *E.g.*, Llewellyn, *supra* note 5, at 401–06; *see generally* Eskridge, *supra* note 63.

135. *E.g.*, *Garland v. Cargill*, 144 S. Ct. 1613, 1618–19 (2024) (lingering on congressional inaction during factual exposition).

second section will remark on why the connection, along with other aspects of congressional interpretation, make this interpretive strategy worth studying.

A. The Constitutional Implications of Congressional Interpretation

The goal of this section is to lay out the constitutional implications of congressional interpretation by tying each mode of congressional interpretation to underlying constitutional rules and values. The first subsection addresses the most complicated issue, the interplay of appropriations, executive discretion, and the Take Care Clause. The second looks at the much simpler issue of bicameralism and presentment, which ties judicial references to congressional inaction. The third surveys the quasi-constitutional roots of clear statement rules. Understanding the constitutional aspects of these subjects illustrates the constitutional implications of congressional interpretation because courts cannot rely on congressional interpretation related to appropriations, bicameralism and presentment, or clear statement rules without also implicating their constitutional foundations.

1. Appropriations, Discretion, and the Take Care Clause

When courts look at substantive statutes in conjunction with later appropriations, they are forced to grapple with the executive's inherent enforcement discretion and with the command that the President take care to faithfully execute the laws. As a result, appropriations-based congressional interpretation has dual constitutional roots. This subsection first reviews the background principles of law and then investigates these principles considering appropriation-based congressional interpretation.

In addition to substantive law making, "[o]ur Constitution gives Congress control over the public fisc . . . . The Appropriations Clause commands that '[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.'"[136] Although the drafters' prolix language tends to obscure the point, the core of the Appropriations Clause is simple: The U.S. Treasury cannot spend money unless Congress has passed a law authorizing the expenditure.[137] The Supreme Court had reason to revisit this basic constitutional structure in 2024 and clarified that an "appropriation" is simply a "legislative means

136. *CFPB v. Cmty. Fin. Servs. Ass'n of Am.* (*CFSA*), 144 S. Ct. 1474, 1478 (2024) (alteration in original) (quoting U.S. CONST. art. I, § 9, cl. 7).

137. *Id.* at 1480–81.

of authorizing expenditure from a source of public funds for designated purposes."[138]

Simply by lodging the appropriations power in Congress, the Constitution limits executive discretion.[139] The Constitution further and more specifically addresses executive discretion by requiring that the President take care that the laws are faithfully executed.[140] The Court has variously held that the Take Care Clause is a limitation on presidential power and a source of executive discretion.[141] Unfortunately, the Court has used the Clause to reach these seemingly incompatible conclusions about executive authority without thoroughly interpreting the Clause itself.[142] Thus, it is sufficient to note just the general thrust of these two uses of the Take Care Clause. First, the Take Care Clause is a basis for limiting the President's discretion insofar as it requires the President to implement Congress's law and follow the legal confines that Congress has constructed.[143] That is, the President must administer the law and cannot undo or ignore the law.[144] Second, the Court has used the Take Care Clause to support the notion of executive discretion.[145] The Court has acknowledged that it would plainly be impossible for the executive to "act against each technical violation of the statute it is charged with enforcing."[146] As a result, the President necessarily has a degree of discretion to weigh which violations to enforce and which to overlook.[147]

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138. *Id.* at 1482.

139. The Constitution carries forward and strengthens the seventeenth century norm of parliamentary authority over government expenditures. In earlier times, the King would expend his own wealth without supervision unless he sought tax revenue, in which case Parliament would have some say in how the King spent the revenue. By the seventeenth century, Parliament had taken fuller control of expenditures, which the American colonies, young states, and the Constitution all replicated. *Id*. at 1482–85. This structure creates "legislative control" over government spending at the expense of executive control. *Id*. at 1502 (Alito, J., dissenting). Such an arrangement is meant to curb the President's power to govern without significant congressional control over the President's decision-making. THE FEDERALIST NO. 58, at 357 (James Madison) (Clinton Rossiter ed., 1961). *See also CFSA*, 144 S. Ct. at 1493–98. (Alito, J., dissenting) (describing the importance of the appropriations power).

140. U.S. CONST. art. II, § 3.

141. Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1837 (2016) (first citing *United States v. Armstrong*, 517 U.S. 456, 464 (1996); then citing *Heckler v. Chaney*, 470 U.S. 821, 832 (1985); then citing *Youngstown Sheet & Tube Co. v. Sawyer* (*Steel Seizure*), 343 U.S. 579, 587 (1952); and then citing *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 613 (1838)).

142. *Id.* at 1838.

143. *Steel Seizure*, 343 U.S. at 587–88.

144. *Kendall*, 37 U.S. (12 Pet.) at 613.

145. Goldsmith & Manning, *supra* note 141, at 1847.

146. *Chaney*, 470 U.S. at 831.

147. *See id.*

Failure to recognize that necessary discretion would make it impossible for the President to balance various considerations that are inescapable in faithfully, reasonably, and realistically executing the law.[148]

In addition to the Take Care Clause's relation to presidential authority, the Court has also used the clause to limit congressional authority.[149] Specifically, the Court has held that because the Clause directs the President to oversee implementation of the law, Congress cannot structure executive agencies in a way that impedes the President from faithfully executing the laws.[150] As a result, it is sometimes unconstitutional for Congress to restrict the President's power to remove officers of the United States.[151]

These background rules come together in constitutional interpretation when courts try to understand congressional behavior by reviewing a substantive statute and a later appropriation at the same time. In *TVA v. Hill*, the Court had to reconcile the clear text of the Endangered Species Act, which apparently prohibited operation of a new dam, against years of appropriations for the construction of that same dam.[152] The Court tackled this inconsistency by turning to the interpretive canon that Congress only uses explicit language to repeal substantive law.[153] On that basis, it was easy enough for the Court to hold that appropriations could not implicitly repeal the explicit commands of the ESA.[154] The unspoken assumption of this analysis, however, is that the executive has a duty to comply with the ESA in the first place. Possible repeal would be of little significance if the President had the authority to simply ignore the law. In this way, *TVA v. Hill* indicates the connection between appropriations-based congressional interpretations and the understanding of the Take Care Clause as a limitation on presidential discretion.

Although it never made its way to the Supreme Court, *In re Aiken County*[155] explicitly addresses the appropriations question in conjunction with the Take Care Clause.[156] The Nuclear Waste Policy Act requires the

148. *See id.* at 831–32.

149. In addition to both authorizing and limiting discretion, and prohibiting Congress from imposing certain removal restrictions, Goldsmith and Manning note that the Court has raised the Take Care Clause to limit Article III standing and to support the President's "completion" power. Goldsmith & Manning, *supra* note 141, at 1839, 1844, 1851. This Article focuses only on the former three items because they are relevant to congressional interpretation.

150. *Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2197–98 (2020); *Myers v. United States*, 272 U.S. 52, 117 (1926).

151. *See* sources cited *supra* note 150.

152. *TVA v. Hill*, 437 U.S. 153, 189 (1978).

153. *Id.* at 189–90.

154. *See id.* at 190–93.

155. 725 F.3d 255 (D.C. Cir. 2013).

156. *Id.* at 262–63.

Nuclear Regulatory Commission to consider nuclear waste disposal at Yucca Mountain.[157] Congress had appropriated funds for this purpose, and the Commission had roughly $11 million on hand specifically for considering disposal at Yucca Mountain.[158] However, the Commission had missed its statutory deadline and had "no current intention of complying with the law."[159] As the court wrote, "[r]ather, the Commission has simply shut down its review and consideration of the . . . license application."[160] The question, then, was whether the agency had the discretion to stop carrying out the law, and that question rested in part on the relationship between the substantive duty in light of limited appropriations and the nuances of the Take Care Clause.

The court began with the relatively straightforward rule that "the President must follow statutory *mandates* so long as there is appropriated money available and the President has no constitutional objection to the statute."[161] Without saying as much, this statement indicates three constitutional rules. First, Congress passes laws, and those laws can impose nondiscretionary obligations on the executive branch.[162] Second, appropriations, or lack thereof, can have some implications for execution of nondiscretionary duties. If there is no money available, agencies may not have an obligation to comply with the statutory command.[163] Third, if the President has a constitutional objection to the law, discretion

157. *Id.* at 257 (citing 42 U.S.C § 10134(d)).

158. *Id.* at 258.

159. *Id.*

160. *Id.* It is interesting to note that the agency in this case also attempted its own version of congressional interpretation. First, the agency asserted that Congress was unlikely to keep appropriating money, and so the agency was excused from the statutory mandate. *Id.* at 259–60. The court held that "allowing agencies to ignore statutory mandates and prohibitions based on agency speculation about future congressional action[] would gravely upset the balance of powers between the Branches." *Id.* at 260. Second, the agency asserted that while it did have money on hand from past appropriations, in the prior three years, Congress had appropriated nothing or almost nothing, meaning that Congress intended the agency to stop carrying out its statutory duties. *Id.* Here the court held that "the fact that Congress hasn't yet made additional appropriations over the existing $11.1 million available to the Commission to continue the licensing process tells us nothing definitive about what a future Congress may do." *Id.* The court then went on to cite *TVA v. Hill* for the proposition that "courts generally should not infer that Congress has implicitly repealed or suspended statutory mandates based simply on the amount of money Congress has appropriated." *Id.* (citing *TVA v. Hill*, 437 U.S. 153, 190 (1978)).

161. *Id.* at 259.

162. *See id.* ("[T]he President may not decline to follow a statutory mandate or prohibition simply because of policy objections.").

163. *See id.* ("[T]he President must follow statutory *mandates* so long as there is appropriated money available . . . .").

emerges to interpret the Constitution and the law accordingly.[164] In this case, because some funds were still available and the President did not claim any constitutional objection, the court concluded that the agency was violating the statute.[165]

Writing only for himself, then–Judge Kavanaugh continued the analysis, focusing specifically on the interplay between the Take Care Clause, executive discretion, and appropriations. Judge Kavanaugh expanded on the court's earlier note that the President has discretion to make independent constitutional assessments by tying that authority directly to the Take Care Clause.[166] The Clause, he explained, requires the President to take care to faithfully execute "Laws," which includes statutes and the Constitution.[167] If the President concludes that to faithfully execute the Constitution they must ignore a statutory command, that is permissible "unless and until" the Supreme Court declares that the President's constitutional interpretation is not valid.[168] Judge Kavanaugh considered the inverse situation—a constitutional judgment about a statutory prohibition—in a footnote. He remarked that the President may also make a constitutional judgment about a statutory prohibition and decide to act in the face of that prohibition.[169] However, if Congress refuses to appropriate, the Appropriations Clause and the Take Care Clause come into conflict.[170] In that case, Judge Kavanaugh expressed some doubt that the Take Care Clause could trump the Appropriations Clause and, therefore, the Constitution likely does not give the President authority to spend money without an appropriation even if the President believes that the failure to appropriate is constitutionally defective.[171]

The concept of executive discretion goes beyond the President's judgment that a statute is unconstitutional. Judge Kavanaugh described how the Take Care Clause, in addition to other constitutional provisions, provides the President with "a significant degree of prosecutorial

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164. *Id.* ("[T]he president must follow statutory *mandates* so long as . . . the President has no constitutional objection to the statute.").

165. *Id.*

166. *Id.* at 261.

167. *Id.*

168. *Id.*

169. *Id.* at 262 n.3.

170. *Id.*

171. *Id.* Judge Kavanaugh's footnote concludes with the following: "This case does not require analysis of those difficult questions." *Id.* That is an ironic observation, given that the footnote rests in a section of the opinion that only Judge Kavanaugh signed. Judge Randolph specifically did not concur with that section because it was "unnecessary to decide the case." *Id.* at 267 (Randolph, J., concurring). *See also* HAROLD J. KRENT, PRESIDENTIAL POWERS 77 (2005) ("In interpreting the appropriations clause, the Supreme Court has long held that the president cannot expend money to take care that the laws be faithfully executed except pursuant to an appropriation from Congress . . . .").

discretion not to take enforcement actions against violators of a federal law."[172] Thus, according to this line of thinking, Congress can impose mandatory duties of many types, including licensing, rulemaking, studies, and so forth, but Congress may not mandate that the President prosecute a violation of law against a specific person.[173] Judge Kavanaugh amplified this point about prosecutorial discretion by asserting that the President possesses "the power to protect individual liberty by essentially under-enforcing federal statutes regulating private behavior."[174] That is too broad a formulation of the rule, given that the power to forgo prosecution is distinct, as Judge Kavanaugh already indicated, from the power to, for example, promulgate regulations. But failure to do either would still be "underenforcing" the law. Professor Gillian Metzger has written on this point, noting a "[g]eneral agreement" that the Take Care Clause "embodies the principle that the President . . . lacks a general prerogative or suspension power."[175] But the President can, at least, exercise discretion about individual enforcement actions and remain within the dictates of the Take Care Clause.

The key message from Judge Kavanaugh's exposition on the Take Care Clause is that, whatever the scope of presidential discretion it provides, it is not a free pass to ignore the law. The President must either assert a constitutional concern or make individual decisions not to pursue violations but may not otherwise ignore statutory mandates. If the President is left without any appropriations to carry out a statutory mandate, that *may* allow the President to ignore the law. A later case out of the D.C. Circuit clarified the latter point, holding that the doctrine of impossibility excuses an agency from carrying out a duty that it cannot possibly execute, commenting in dicta that this can include appropriations.[176]

In *Aiken County*, Judge Kavanaugh referenced cases that describe how the Take Care Clause can act as a limit on Congress,[177] and Professor Jack Goldsmith and Dean Manning make the same point.[178] The prime

172. *Aiken County*, 725 F.3d at 262.

173. *See id.* at 264 (explaining that Congress may not specifically mandate prosecution and implying that other types of mandates are valid).

174. *Id.*

175. Gillian E. Metzger, *The Constitutional Duty To Supervise*, 124 YALE L.J. 1836, 1878 (2015).

176. *Am. Hosp. Ass'n v. Price*, 867 F.3d 160, 167–68 (D.C. Cir. 2017). *Price* itself is not specific to appropriations and does not consider the nuances, such as lump-sum or line-item appropriations, that make funding a more complicated issue. *See id.* at 162–63.

177. *Aiken County*, 725 F.3d at 262 n.4 (first citing *Myers v. United States*, 272 U.S. 52 (1926); and then citing *Free Enter. Fund v. PCAOB*, 561 U.S. 477 (2010)).

178. Goldsmith & Manning, *supra* note 141, at 1839.

example of how the Clause can restrict Congress is presidential removal of officers of the United States.[179] In *Seila Law LLC v. CFPB*,[180] the Supreme Court explained that if Congress prohibits the President from removing federal officers, the President cannot take care that the law is faithfully executed.[181] Thus, the statutory restriction on presidential removal was unconstitutional.[182]

If the Take Care Clause makes demands on Congress rather than just imposing limits on the President, the Clause may make it so Congress must appropriate funds or, in the absence of appropriations, must repeal a substantive statute. If Congress passes a law with nondiscretionary duties, the President must, as *Aiken County* demonstrates, carry out those nondiscretionary duties unless there is a constitutional objection.[183] If Congress does not appropriate funds to support the exercise of nondiscretionary duties, then Congress has made it impossible for the President to faithfully execute that aspect of the law. *Seila Law* holds that it is unconstitutional for Congress to impede the President's ability to faithfully execute the law.[184] Read together, it may be unconstitutional for Congress to impose duties and withhold the funds to execute those duties.

It seems this specific issue has never come before the courts. Because appropriation is simply a form of legislation, Congress has almost unlimited discretion in how it chooses to disperse money. No court has ever ordered Congress to appropriate funds, for instance.[185] But the Supreme Court has held that the Constitution does impose some limits on how Congress appropriates funds for duties that the Constitution mandates or prohibits. For instance, because the Constitution forbids diminishing salaries of Article III judges, Congress could not repeal a cost-of-living formula after that formula had "vest[ed]."[186] Perhaps the duty to appropriate in line with a specific constitutional requirement is distinguishable from a duty to fund a more general constitutional requirement like the requirement to take care. Nevertheless, one can imagine an argument that if the Take Care Clause restricts Congress, it may restrict Congress from requiring executive action and then not funding that action. The remedy, then, might be that Congress has a

179. *Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2197 (2020).

180. 140 S. Ct. 2183 (2020).

181. *Id.* at 2197.

182. *Id.* at 2192.

183. *In re Aiken County*, 725 F.3d 255, 259 (D.C. Cir. 2013).

184. *Seila*, 140 S. Ct. at 2192, 2197.

185. Kate Stith, *Appropriations Clause: Common Interpretation*, NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/articles/article-i/clauses/756 [https://perma.cc/VR5D-MHNM].

186. *United States v. Will*, 449 U.S. 200, 228–29 (1980).

constitutional duty to appropriate or a constitutional duty to repeal the substantive requirement. Courts need not impose a more specific mandate than that.

Suffice it to say, there are complex and unsettled constitutional questions at the interface of appropriations, executive discretion, and the Take Care Clause. These questions can easily arise—as they do in the noise law case study presented later in this Article—when courts undertake congressional interpretation. When courts conduct congressional interpretation by looking back and forth between substantive statutes and later appropriations, constitutional considerations should be in clear view. Courts must consider Congress's largely unlimited power to create substantive commands and then fund or not fund those commands, and the President's responsibility to implement the law as written if funding is available. But against these considerations are the President's enforcement discretion and authority to judge the constitutionality of the law. Finally, courts cannot ignore that with the President's duty to faithfully execute the laws may come a duty on the part of Congress to fund any substantive commands. In short, appropriations-based congressional interpretation has extensive constitutional roots.

2. Congressional Inaction, Bicameralism, and Presentment

The primary way Congress speaks to the executive is through legislation, and the Constitution establishes that legislation is effective only after bicameralism and presentment.[187] The process is simple enough, but of such import that it nevertheless deserves a brief remark.

When a court turns to congressional inaction in the process of congressional interpretation, the court is not looking at a law or interpreting a statute; it is judging Congress as a body. It is judging Congress's nonlegislative behavior. Professor Eskridge has written on this subject and cataloged the ways courts use inaction to understand statutory text.[188] He begins his analysis, however, with recognition that the use of inaction is subject to a "longstanding debate."[189] One reason for the debate is that, to the textualist, what Congress failed to do is

187. U.S. CONST. art. I, § 7, cl. 2 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States . . . .").

188. Eskridge, *supra* note 63, at 70–71.

189. *Id.* at 67.

plainly not a textual matter and so should not be part of interpretation.[190] Deeper down, there is also the constitutional problem. The Constitution only recognizes a congressional action as *law* if the act is the product of bicameralism and presentment.

Bicameralism is the requirement that both the House of Representatives and the Senate approve a law.[191] Because the House is made up of Representatives based on population and, therefore, theoretically represents the entire nation, and the Senate is composed of Senators representing each state, bicameralism assures that legislation is national, federal, and deliberative.[192]

Presentment is the requirement that Congress delivers—presents—all legislation to the President before the legislation can become law.[193] The President may sign the legislation and make it law, may veto the legislation and send it back to Congress for further consideration, or may take no action, in which case the bill will become law after ten days.[194] Involving the President in the legislative process divides power among various governing institutions both for the purpose of constraining any single institution and to further inject a national perspective into lawmaking.[195]

Congress can informally speak through various devices, from committee hearings to resolutions. As Professor Victoria Nourse notes, textualists have long decried judicial reliance on such nonlegislative actions.[196] One basis for this textualist objection is that the Constitution requires bicameralism and presentment, which nonlegislation—whether legislative history or the legislative future of post-enactment inaction—lacks.[197] The process of bicameralism and presentment offers the most powerful and most pristine articulation of Congress's demands[198] and the

190. *See id.* at 68. And yet, textualists do rely on legislative history and nonlegislation. Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70, 72 (2012).

191. *INS v. Chadha*, 462 U.S. 919, 948–49 (1983).

192. *Id.* at 950–51.

193. *Id.* at 946–47.

194. U.S. CONST., art. II, § 7, cl. 2.

195. *Chadha*, 462 U.S. at 947–48.

196. *See* Victoria F. Nourse, *The Constitution and Legislative History*, 17 U. PA. J. CONST. L. 313, 314–15 (2014) (describing textualist objections to the use of legislative history).

197. *Id.* at 325–26.

198. Professor Nourse explains that bicameralism and presentment do not, in fact, undermine judicial reliance on legislative history because the Constitution allows the two chambers of Congress to act independently in certain cases. *Id.* at 325. Her argument is persuasive as applied to legislative history, but it does not apply to legislative inaction because inaction is not a case of Congress establishing its own rules and then delegating certain responsibilities to sub-units such as committees. All of that requires

only voice that the Constitution acknowledges. Thus, when courts use congressional interpretation in the form of congressional inaction, they should be careful about cabining the constitutional demands of bicameralism and presentment. This is especially true when courts turn, as they did in *Cargill* and *West Virginia*, to post-enactment legislative inaction. Legislative inaction simply has no constitutional weight. On top of that, post-enactment inaction cannot plausibly explain what a prior Congress may have meant when writing statutory text.

3. Clear Statement Rules and the Constitutional Kitchen Sink

Courts often use clear statement principles to give weight to extra-textual considerations, often, specifically, constitutional considerations.[199] When courts rely on clear statement rules to resolve the scope of statutory authority, they are doing congressional interpretation because they are either comparing the statute at issue to some notion of "normal" lawmaking or they are making assumptions about how Congress, in general, tends to behave. Congressional interpretation via clear statement rules thus implicates constitutional questions. The exact constitutional implications, however, depend on the specific clear statement rule. The Supreme Court has triggered clear statement demands for laws or administrative interpretations that implicate federalism,[200] the Commerce Clause,[201] presidential power,[202] Eleventh Amendment immunity,[203] and many more doctrines.[204] There are too many to explore in detail here, so this section will focus on the most recent member of the clear statement club—the major questions doctrine.

The major questions doctrine very clearly uses congressional interpretation, and it leaves open some important questions, including whether the doctrine has constitutional provenance.

There are multiple views on what the major questions doctrine really is, even on the Supreme Court, which has invoked it several times in

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action. In any case, when Congress speaks through bicameralism and presentment, that speech remains the most direct and pure.

199. Eskridge & Frickey, *supra* note 5, at 599; Manning, *Clear Statement Rules*, *supra* note 110, at 401.

200. *Sackett v. EPA*, 143 S. Ct. 1322, 1341 (2023).

201. *SWANCC*, 531 U.S. 159, 172 (2001).

202. Eskridge & Frickey, *supra* note 5, at 606 (first citing *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936); and then citing *Zemel v. Rusk*, 381 U.S. 1, 12 (1965)).

203. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985).

204. *See generally* Eskridge & Frickey, *supra* note 5, at 599; Manning, *Clear Statement Rules*, *supra* note 110, at 401.

quick succession.[205] In *Biden v. Nebraska*,[206] Justice Amy Coney Barrett asserted that the doctrine is a normal textualist "tool for discerning—not departing from—the text's most natural interpretation."[207] That is, she believes the major questions doctrine is just a way to contextualize statutory interpretation, understanding the statute's meaning based on various background considerations.[208] Justice Barrett's perspective, however, came in a concurrence that she alone signed, so its significance is so far limited.

Chief Justice Roberts wrote the majority opinion in two of the three major question opinions in 2022 and 2023,[209] so his perspective carries more weight. Unfortunately, his majority opinions are more ambiguous about his thinking on the origins of the doctrine.[210] The Chief Justice has said that the major questions doctrine is a matter of "common sense" interpretation of legislative intent and also that "separation of powers principles" motivate the doctrine.[211] The "common sense" aspect seems to fall in line with Justice Barrett's assertion that the major questions doctrine is simply a way to achieve the "most natural interpretation."[212] But the mention of "separation of powers principles" indicates a constitutional basis for the doctrine, although the majority opinion in *West Virginia* does not rely on any constitutional authority,[213] and *Biden v. Nebraska* cites the Constitution only for its discussion of Article III standing and appropriations.[214]

Justice Neil Gorsuch has explicitly articulated a constitutional basis for the major questions doctrine, specifically, the nondelegation doctrine.[215] The nondelegation doctrine establishes that Congress shall not "give[] up its legislative power and transfer[] it to the President, or the Judicial branch."[216] Justice Gorsuch explained that "[t]he major

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205. Austin Piatt & Damonta D. Morgan, *The Three Major Questions Doctrines*, 2024 WIS. L. REV. FORWARD 19, 19–20.

206. 143 S. Ct. 2355 (2023).

207. *Id.* at 2376 (Barrett, J., concurring).

208. *Id.* (Barrett, J., concurring).

209. *See id.* at 2362; *West Virginia v. EPA*, 142 S. Ct. 2587, 2599 (2022).

210. *See* Piatt & Morgan, *supra* note 205, at 26.

211. *West Virginia*, 142 S. Ct. at 2609 (quoting *FDA v. Brown & Williams Tobacco Corp.*, 529 U.S. 120, 133 (2000)).

212. *Biden v. Nebraska*, 143 S. Ct. at 2376 (Barrett, J., concurring).

213. *See West Virginia*, 142 S. Ct. at 2613 (including the word "Constitution" only in a citation to a book about interpretive method).

214. *Biden v. Nebraska*, 143 S. Ct. at 2365–68.

215. *Nat'l Fed'n of Indep. Bus. v. OSHA*, 142 S. Ct. 661, 668 (2022) (Gorsuch, J., concurring) ("In this respect, the major questions doctrine is closely related to what is sometimes called the nondelegation doctrine."). *See also* Kamaile A. N. Turčan, *"Major Questions" About Preemption*, 69 VILL. L. REV. 737, 752–53 (2024).

216. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928).

questions doctrine serves a similar function by guarding against unintentional, oblique, or otherwise unlikely delegations of the legislative power."[217] In this respect, the major questions doctrine may not be a constitutional necessity, but it guards constitutional values. As with each of the modes of congressional interpretation this Article has described, clear statement rules like the major questions doctrine also have—at least to some Justices—constitutional significance.

The constitutional implication of congressional interpretation is one important reason to identify, describe, and explore the phenomenon. When courts announce, articulate, refine, and apply these rules they are doing, at least, quasi-constitutional work and therefore shaping constitutional law, subtly but significantly. There are, however, several other reasons. The next section further reflects on the importance of congressional interpretation.

B. The Significance of Congressional Interpretation

Congressional interpretation is a useful way of thinking about judicial decision-making because it helps us recognize three trends that deserve further exploration. First, as the previous section demonstrates, congressional interpretation tends to constitutionalize statutory interpretation and, as a result, can influence constitutional doctrine without ever announcing as much. Second, congressional interpretation represents an important judicial approach and, as a matter of constitutional and democratic governance, transparency is necessary but so far lacking. Third, to date, the Supreme Court has relied on congressional interpretation for deregulatory ends, and it is unclear whether the strategy is a two-way street or whether it inherently undercuts the power of Congress and the executive to make and enforce law.

Statutory interpretation has always been a dynamic endeavor because, as Justice Felix Frankfurter put it, there is dynamism in "the very nature of words" as imprecise symbols.[218] Professor Llewelyn noted seventy-five years ago that interpretation has a necessary push and pull.[219] Professor Eskridge has noted shifts in judicial approaches to interpretation, such as from a more flexible textualism to what he termed the "new textualism,"[220] and he himself proposed a "dynamic statutory

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217. *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 669 (Gorsuch, J., concurring).

218. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 528 (1947).

219. Llewellyn, *supra* note 5, at 396.

220. Eskridge, *supra* note 23, at 623–24.

interpretation."[221] The constitutional connections that lurk within congressional interpretation threaten to paralyze this dynamism. For instance, if the nondelegation doctrine demands clear statutory statements in many circumstances, or the Take Care Clause resolves the push and pull of appropriations, then interpretation is less a matter of judicial temperament and more a matter of constitutional obligation. There is, of course, something to recommend stable interpretation, although cementing a merely superficial approach would likely not make results any more predictable. Honest people can differ on whether constitutionalizing aspects of interpretation is laudable or regrettable. The bigger issue is the Court's method.

The Court is engaging in congressional interpretation, but it has not been explicit about what it is doing. Indeed, the Court generally uses "the rhetoric of textualism."[222] As a matter of democratic practice, this lack of transparency, or recognition, is a significant failure. Commentators of yore and today have asserted that courts are not democratic because they are not elected.[223] That conclusion rests on a shallow belief that democracy only requires elections, ignoring that courts are fora for democratic contestation with the characteristics of reason and deliberation.[224] These features are what make courts democratic.[225] But, because a court's democratic legitimacy depends in part on reason-giving, when courts use rhetoric that does not match their practice, their democratic legitimacy suffers.

Compounding concern about the apparent lack of transparency around congressional interpretation is that it can seem results-driven because the Court has used it almost entirely in service of deregulation. Of the leading Supreme Court cases this Article has discussed, *West Virginia*, *Sackett*, *SWANCC*, *Biden v. Nebraska*, and *Garland v. Cargill* all undercut regulatory authority.[226] *Lincoln v. Vigil* supported the agency's authority, but the agency asserted authority to retrench its

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221. *See* William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987).

222. Diarmuid F. O'Scannlain, "*We Are All Textualists Now": The Legacy of Justice Antonin Scalia*, 91 ST. JOHN'S L. REV. 303, 306 (2017). *See also* Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Statutory Interpretation from the Outside*, 122 COLUM. L. REV. 213, 218 (2022) ("The Court has recently gained three new textualists, as lower federal courts welcome a new cohort of exceptionally young judges, similarly committed to textualism.").

223. *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–23 (1962) (discussing the "counter-majoritarian difficulty").

224. Galperin, *supra* note 28, at 85, 87–88, 92–94.

225. *See id.* (explaining that courts give space for contestation and justify their decisions through reason-giving).

226. *See supra* Part II.

programing.[227] Only *TVA v. Hill* bolstered a regulatory program.[228] Even there, the Court expressed deep skepticism of the wisdom of the Endangered Species Act as applied to the Tellico Dam,[229] and arguably refused to engage in congressional interpretation insofar as the Court did not accept that a post-statutory enactment could influence its reading of the substantive law.[230] In *Aiken County*, at the D.C. Circuit, the court did mandate agency action,[231] but Judge Kavanaugh dedicated a huge portion of his opinion to explaining that executive discretion and the Take Care Clause generally militate towards deregulation.[232]

Professor Daniel Walters has written about the one-sidedness of deference doctrine, with courts tending to use the doctrine only for deregulatory purposes.[233] He has admonished courts to apply their doctrine even-handedly.[234] The same caution should apply with congressional interpretation. While it has so far served deregulatory ends, perhaps identifying and exploring it will spur more thoughtful application. There is no obvious reason congressional interpretation should not be a two-way street and, as the case study of noise law in Parts IV and V demonstrates, courts may soon have the chance to demonstrate good faith.

IV. A NOISE LAW CASE STUDY

If you've never heard about federal noise law, that's okay. For almost half a century, scholars have hardly remarked upon it,[235] and

227. 508 U.S. 182, 184 (1993).

228. 437 U.S. 153, 172 (1978).

229. *See id.* at 194–95.

230. *Id.* at 191.

231. *In re Aiken County*, 725 F.3d 255, 257 (D.C. Cir. 2013).

232. *See id.* at 261–66.

233. Daniel E. Walters, *Symmetry's Mandate: Constraining the Politicization of American Administrative Law*, 119 MICH. L. REV. 455, 460–61 (2020).

234. *See id.* at 461 ("[I]n the long run [this one-sided interpretive trend] will threaten the legitimacy of administrative law by tilting the scale toward a substantive vision of public law that stifles government's ability to respond to social demands for policy.").

235. Other than Professor Shapiro's excellent postmortem, Sidney A. Shapiro, *Lessons from a Public Policy Failure: EPA and Noise Abatement*, 19 ECOLOGY L.Q. 1 (1992), since the early 1980s, legal scholars have not written much about federal noise law, and when they do, it is often simply to focus on the importance of state and local strategies given the lack of federal policy. *See, e.g.*, Luis Inaraja Vera, *How Science Can Improve Regulation: Noise Control in Urban Areas*, 53 TULSA L. REV. 33, 35–36 (2017); Alexander Gillespie, *The No Longer Silent Problem: Confronting Noise Pollution in the 21st Century*, 20 VILL. ENV'T L.J. 181, 193–94 (2009); Aaron C. Dunlap, Comment, *Come on Feel the Noise: The Problem with Municipal Noise Regulation*, 15 U. MIA. BUS. L. REV. 47, 60 (2006); David B. Torrey & Jeffrey R. McCulley, *Limiting Motorcycle*

EPA, which Congress charged with implementing noise law, has been equally quiet.[236] But ignoring something doesn't make it disappear. Comprehensive federal noise law exists—it has since 1970—and it presents an excellent case study for congressional interpretation.

A. The Beginning of Federal Noise Law

When Congress passed the Clean Air Act Amendments of 1970, it included Title IV, which Congress designated the "Noise Pollution Abatement Act" (NPAA).[237] The NPAA directed that "[t]he Administrator shall establish within the Environmental Protection Agency an Office of Noise Abatement and Control."[238] Congress then directed that ONAC must study various aspects of noise and that it "shall report the results of such investigation and study, together with [its] recommendations for legislation or other action, to the President and the Congress not later than one year after the date of enactment of this title."[239]

As instructed, in early 1972, EPA submitted a massive report on its findings and recommendations.[240] Core to the recommendations was comprehensive noise legislation.[241] Modeled in many respects on the Clean Air Act, with preliminary scientific studies, ratcheting performance-based regulatory standards, careful attention to the different contexts of pollution, provisions for public participation, citizen suits, and judicial review, Congress soon thereafter passed the Noise Control Act of 1972 (NCA).[242]

Among its many provisions, the NCA contained—and, importantly, the U.S. Code still contains—a handful of nondiscretionary duties. The NCA mandates that EPA "shall . . . develop and publish criteria with respect to noise. Such criteria shall reflect the scientific knowledge most useful in indicating the kind and extent of all identifiable effects on the public health or welfare which may be expected from differing quantities

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Exhaust Noise Through Amendment of the Motor Vehicle Code and Its Regulations, 25 TEMP. J. SCI. TECH. & ENV'T L. 49, 60 (2006).

236. The only agency action on noise law since the 1980s was a proposed rule for labeling for noise reduction devices in 2009, which EPA never promulgated. Product Noise Labeling Hearing Protection Devices, 74 Fed. Reg. 39150 (proposed Aug. 5, 2009).

237. Noise Pollution and Abatement Act of 1970, Pub. L. No. 91-604, 84 Stat. 1709.

238. 42 U.S.C. § 7461(a).

239. § 7461(b).

240. *See* EPA, REPORT TO THE PRESIDENT AND CONGRESS ON NOISE, S. REP. NO. 92–63 (1972).

241. *See id.* at B-3 to B-13.

242. Noise Control Act of 1972, Pub. L. No. 92-574, 86 Stat. 1234.

and qualities of noise."[243] It further mandates that EPA "shall . . . publish information on the levels of environmental noise the attainment and maintenance of which in defined areas under various conditions are requisite to protect the public health and welfare with an adequate margin of safety."[244] And, although lacking a specific deadline, which therefore softens the otherwise obviously mandatory dictate, the law also requires that "[t]he Administrator shall from time to time review and, as appropriate, revise or supplement any criteria or reports published under this section."[245] EPA complied with the initial requirements of these provisions but has not revisited the documents since 1974, despite changes in the sources, science, and measurement of noise.[246]

In the 1970s, EPA identified, in compliance with the NCA,[247] major sources of noise pollution, including certain construction equipment, such as portable air compressors and medium and heavy duty trucks, as well as truck refrigeration units, power lawn mowers, and pavement and rock drills.[248] The NCA required that within eighteen months of identifying a major source, EPA shall promulgate rules setting performance standards for the source.[249] EPA, has not, however, promulgated any such rules for refrigeration units, power lawn mowers, or pavement and rock drills.[250]

In addition to performance standards akin to those in other environmental laws, the NCA establishes a program for government procurement of low-noise-emission products. When a person submits an application for certification of a low-noise-emitting product, the Administrator has a duty to "determine" whether the product is "suitable for use as a substitute" and is, indeed, "a low-noise-emission product."[251] Although the Administrator plainly has discretion to determine that a product is not low emitting or is not a suitable substitute, the Act commands that the Administrator "shall" make a determination on the

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243. § 4904(a)(1).

244. § 4904(a)(2).

245. § 4904(c).

246. *See* Complaint at 5–6, *Quiet Cmtys., Inc. v. EPA*, No. 1:23-CV-1649 (D.D.C. June 7, 2023) [hereinafter *Quiet Communities* Complaint].

247. *See* § 4904(b)(1).

248. Identification of Products as Major Sources of Noise, 39 Fed. Reg. 22297, 22298–99 (June 21, 1974) (construction equipment); 40 Fed. Reg. 23105, 23106–07 (May 28, 1975) (truck refrigeration units); 42 Fed. Reg. 2525, 2526 (Jan. 12, 1977) (power lawn mowers); 42 Fed. Reg. 6722, 6722–23 (Feb. 3, 1977) (pavement and rock drills).

249. § 4905(a)(2A)–(B).

250. *Quiet Communities* Complaint, *supra* note 246, at 7.

251. § 4914(b)(1)–(2).

question within 90 or 180 days, respectively, and "shall" publish the decision in the Federal Register.[252] It seems EPA has not acted on any applications it might have received, as the agency proposed but never finalized rules to govern the submission and review of LNEP applications.[253]

The NCA includes labeling provisions to facilitate consumer self-help. The Act says "[t]he Administrator shall by regulation designate any product (or class thereof) (1) which emits noise capable of adversely affecting the public health or welfare; or (2) which is sold wholly or in part on the basis of its effectiveness in reducing noise."[254] Unlike other potentially mandatory provisions of the Act, this language is both explicitly mandatory and does not allow for any subjective conclusions that arguably frustrate the repeated inclusion of "shalls." This provision does not ask the Administrator to make a "judgment" or to "determine."[255] Here, the Administrator "shall . . . designate" based on two objective criteria: adverse health effects and noise reduction capability.[256] Portable air compressors are the only product EPA has ever designated as adversely affecting health or welfare under this section.[257] EPA also promulgated labeling regulations for noise reduction devices like ear plugs, but has not updated the standards since 1979 despite significant changes in technology, as EPA has acknowledged.[258]

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252. § 4914(b)(5).

253. *See* Low Noise Emission Products: Proposed Criteria and Data Requirements, 42 Fed. Reg. 27442 (proposed May 27, 1977) ("This notice proposes the establishment of noise emissions criteria and requirements for submission of data for use by the EPA in determining whether a manufactured product can be certified as a low-noise-emission-product and qualified as a suitable substitute for products purchased by the Federal government."). EPA never promulgated a final rule. *Quiet Communities* Complaint, *supra* note 246, at 8.

254. § 4907(a).

255. *Compare id.*, *with* §§ 4905(a)(1)(B), 4914(b)(2)(C).

256. § 4907(a). This is not to suggest that the "shall" language in other provisions is not, in fact, mandatory. Those provisions create nondiscretionary duties and the "judgment" or "determine" qualifications merely indicate the Administrator's duty to integrate various scientific and technical considerations into the analysis. If the technical and scientific criteria are met, the Administrator has no discretion to "determine" otherwise or exercise "judgment" to do nothing in the face of such findings. Nevertheless, the duties are clearest in the labeling provisions.

257. *Quiet Communities* Complaint, *supra* note 246, at 9. *See also* Noise Emission Standards for Construction Equipment, 41 Fed. Reg. 2162, 2170 (Jan. 14, 1976) (imposing labeling requirements); 41 Fed. Reg. 8347, 8347 (Feb. 26, 1976) (technical amendment); 47 Fed. Reg. 57709, 57709 (Dec. 28, 1982) (revoking such requirements).

258. 74 Fed. Reg. 39150, 39150–51 (proposed Aug. 5, 2009) (citing 44 Fed. Reg. 56120 (Sept. 28, 1979)). EPA never promulgated a final version of the 2009 proposed regulations. *See* 40 C.F.R. pt. 211, subpt. B.

An interesting provision of the NCA, besides the more traditional regulatory instruments, is that it requires EPA to coordinate the noise programs across the federal government. The Act states that EPA "shall coordinate the programs of all Federal agencies relating to noise research and noise control."[259] However, it is unclear whether "coordinate" is the type of command that courts would understand to mandate specific agency action.[260] The NCA does impose a more specific duty, directing that EPA "shall compile and publish, from time to time, a report on the status and progress of Federal activities relating to noise research and noise control."[261] It continues: "This report shall describe the noise-control programs of each Federal agency and assess the contributions of those programs to the Federal Government's overall efforts to control noise."[262] Yet it seems EPA has abandoned both these duties.[263]

Congress included a citizen suit provision in the NCA, signaling the similarity to other environmental laws and the seriousness with which Congress imposed the various mandatory duties. The NCA authorizes "any person" to bring suit in federal district court against any other person, including the government, for any violation of the Act.[264] The citizen suit provision also authorizes suits "against the Administrator of the Environmental Protection Agency where there is alleged a failure of such Administrator to perform any act or duty under this chapter which is not discretionary."[265] This last provision makes it crystal clear that Congress was explicitly imposing at least some nondiscretionary duties on the Administrator and cabins any claims EPA might make about inherent discretion.

B. The Middle of Federal Noise Law

In 1978, Congress amended the Noise Control Act through the Quiet Communities Act of 1978 (QCA).[266] The goal of the QCA was to support more and better state and local noise regulation.[267] Like the NCA, the QCA imposed nondiscretionary duties on EPA. The Act directs that the:

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259. § 4903(c)(1).
260. *See Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004).
261. § 4903(c)(3).
262. *Id.*
263. *Quiet Communities* Complaint, *supra* note 246, at 13.
264. § 4911(a)(1).
265. § 4911(a)(2)(A).
266. Quiet Communities Act of 1978, Pub. L. No. 95-609, 92 Stat. 3079.
267. 42 U.S.C. § 4913.

> Administrator shall . . . (a) develop and disseminate information and educational materials to all segments of the public on the public health and other effects of noise and the most effective means for noise control . . . ; (b) conduct or finance research . . . ; (c) administer a nationwide Quiet Communities Program . . . ; (d) develop and implement a national noise environmental assessment program . . . ; (e) establish regional technical assistance centers . . . ; [and] (f) provide technical assistance to State and local governments . . . .[268]

While EPA carried out these responsibilities in the wake of the QCA, by 1982 or 1983, it completely abandoned all noise programs, including those in the QCA and the regulatory programs of the NCA.[269]

C. The End of Federal Noise Law

Shortly after taking office, the Reagan Administration requested that Congress defund all noise programs.[270] Although the Administration recognized that Congress "charged" EPA with administering noise law, it nevertheless announced a "phase-out of the noise program."[271] It promulgated a rule explaining that it would no longer require testing or reporting for various regulated products and would repeal labeling requirements[272] and closed the Office of Noise Abatement and Control,[273] and that was the end of federal noise regulation. But not the end of federal noise law.

Perhaps recognizing that such a defunding and phase-out would violate the law if the NCA remained in effect and unchanged, Congress considered amending the law. In 1981, Congress debated House Bill 3071 and Senate Bill 1204, which would have significantly transformed the NCA, most notably, by repealing most regulatory provisions of the law.[274] In the Committee Report accompanying the Senate Bill, the Committee on Environment and Public Works explained that the Bill "propose[d] that the Federal regulatory program for noise be eliminated

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268. § 4913.

269. Shapiro, *supra* note 235, at 8. BUDGET REVISIONS FY 1982, *supra* note 32, at 294; EPA, OPERATING YEAR GUIDANCE: 1982, at 14 (1981) ("The President's 1982 budget calls for phasing out the Noise Program . . . . [N]o provision is being made to continue Regional programs . . . .").

270. BUDGET REVISIONS FY 1982, *supra* note 32, at 294.

271. *Id.*

272. 47 Fed. Reg. 57709 (Dec. 28, 1982).

273. Telephone Interview with Chuck Elkins, Former Dir., Off. of Noise Abatement & Control, EPA (Mar. 18, 2024).

274. *See* H.R. 3071, 97th Cong. (1981); S. 1204, 97th Cong. (1981).

entirely except for two areas—railroads and interstate motor carriers—and that the regulation of even these two be made discretionary."[275] It likewise noted that the Committee had "approved" the Administration's request to defund the noise programs.[276] The Committee's "approval" was nowhere expressed in appropriations laws but was merely part of the legislative history expressing Congress's preferences or expectations of how the Administration would commit appropriated funds, because, as discussed in more detail in the next Part, Congress never did single out the noise programs for defunding.[277]

The House was less ready to fully submit to the President's deregulatory proposal. House Bill 3071 would also have repealed the regulatory provisions of the NCA, but it specifically authorized over seven million dollars in appropriations to continue the nonregulatory noise programs.[278] Both chambers passed the respective bills and formed a conference committee.[279] The conference committee never reported out a compromise bill, Congress never presented anything to the President, and the noise statutes remain good law.[280] Nevertheless, without congressional action, the Reagan Administration closed the Office of Noise Abatement and Control[281] and terminated the noise programs, and no administration has revived them in the ensuing forty-plus years.[282] It justified this closure, in part, on the fact that Congress was progressing towards repealing the law.[283] That repeal, we now know, never happened.

As the preceding paragraphs explain, in shuttering noise programs, EPA was not in compliance with several statutory commands. It plainly

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275. S. REP. NO. 97-110, at 2 (1981).

276. *Id.*

277. *See* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357 (making no mention of the noise programs discussed in this Article); Act of Dec. 15, 1981, Pub. L. No. 97-92, sec. 6(d), § 501(10)–(13), 95 Stat. 1183, 1187 (same, and appropriating EPA over $1.1 billion for the broad categories of "salaries," "research and development," "abatement, control and compliance," and "buildings and facilities"); Department of Housing and Urban Development—Independent Agencies Appropriation Act of 1982, Pub. L. No. 97-101, 95 Stat. 1417 (1981) (making no mention of noise programs); Urgent Supplemental Appropriations Act of 1982, Pub. L. No. 97-216, 96 Stat. 180 (same).

278. H.R. REP. NO. 97-85, at 2–5 (1981).

279. 127 CONG. REC. 15,584 (1981) (S. 1204 passed Senate); 127 CONG. REC. 31,755 (1981) (H.R. 3071 passed House); 128 CONG. REC. 2490 (1982) (formation of conference committee). *See also* sources cited *supra* note 274.

280. *See supra* Sections IV.A–B.

281. Telephone Interview with Chuck Elkins, *supra* note 273.

282. *Quiet Communities* Complaint, *supra* note 246, at 5–13.

283. *See* 46 Fed. Reg. 41057, 41058 (Aug. 14, 1981) ("Preliminary actions by Congress indicate that this portion of EPA's budget will be enacted as proposed.").

did not, and has not, complied with the NPAA requirement to operate an Office of Noise Abatement and Control. It is also noncompliant with many regulatory provisions of the NCA, most glaringly the labeling requirements. Finally, EPA is also out of compliance with the QCA outreach, research, and state and local support requirements.

As a result of this, a nonprofit organization, Quiet Communities, recently brought a citizen suit against EPA alleging a failure to carry out nondiscretionary duties.[284] This suit tees up a variety of questions that implicate congressional interpretation. Does EPA have authority to ignore the various noise laws? Does the fact that Congress reduced appropriations to EPA without specifying cuts to the noise programs change the answer? What about Congress debating but failing to pass a repeal of the NCA? The next Part explores these questions in light of the congressional interpretation issues that this Article address.

V. NOISE LAW AND CONGRESSIONAL INTERPRETATION

Analyzing the preceding history of federal noise law necessarily calls for congressional interpretation. The complications of multiple congressional actions and inactions over more than a decade make it impossible to understand EPA's authority otherwise. At the outset, two things are clear. First, the Noise Pollution Abatement Act, the Noise Control Act, and the Quiet Communities Act remain on the books.[285] Second, EPA no longer operates noise control programs under those laws.[286] This is where the clarity ends. Are we left with phantom federal laws that read as if they impose obligations and offer protections but in fact do nothing?

To the extent anybody has told the story of noise law, it includes the assertion that Congress or the Reagan Administration defunded the Office of Noise Abatement and Control.[287] The Reagan Administration told the story this way, explaining that its budget for fiscal year 1982 "did not contain funding" for noise programs and that Congress "subsequently enacted" that budget.[288] Professor Shapiro repeated this idea in his 1992

284. *Quiet Communities* Complaint, *supra* note 246, at 1–2.

285. *See* 42 U.S.C. §§ 4901–18.

286. *See supra* Section IV.C. *See also* 127 Cong. Rec. 31,755 (1981) (statement of Rep. Florio) ("EPA will no longer be involved in this noise effort because EPA will no longer exist with regard to noise.").

287. *See* Shapiro, *supra* note 235, at 1–2; Email from Chuck Elkins, Former Dir., Off. of Noise Abatement & Control, EPA, to Josh Galperin (July 16, 2024) (on file with author).

288. 47 Fed. Reg. 57709, 57709 (Dec. 28, 1982).

study of noise law, writing that "Congress eliminated funding for the program."[289]

As it turns out, Congress did not eliminate funding, at least not explicitly. What Congress did was pass various appropriations bills that made no mention of noise control.[290] Congress did not provide specific line-item funding for noise control programs[291] and, in various deliberations and legislative material, it purported to at least partially concede to the President's proposed budget,[292] which had explicitly proposed defunding noise programs.[293] But the budget bills themselves fund EPA without line-item defunding of the noise programs.

In this factual landscape—with nondiscretionary statutory duties remaining on the books and EPA failing to carry out those duties on the basis of murky disappropriation—the question remains whether EPA has the legal authority to shut down noise programs. If EPA has such authority, it lies not in the text of the statute[294] but in a series of congressional actions that courts would need to interpret as a bundle of non-textual implications. That is, if EPA has the authority to stop carrying out the various nondiscretionary duties of the noise statutes, it is because of the way Congress appropriated funds for the noise programs or because of the way Congress signaled a willingness to repeal the laws, even though it fell short of actually repealing the laws.

This Part brings together congressional interpretation and noise law by considering the various ways one might address the open questions. It addresses both the real facts and some hypotheticals to help clarify the new concept of congressional interpretation. It begins by imagining that Congress explicitly appropriated line-item funding for EPA's noise programs and explores that hypothetical. It then turns to implicit defunding, which is the most apt description for what happened in the early 1980s. It next imagines that Congress explicitly defunded the noise programs. Finally, it turns to the issue of Congress's inaction on repealing the substantive noise law.

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289. Shapiro, *supra* note 235, at 20.

290. *See* sources cited *supra* note 277.

291. *See* sources cited *supra* note 277.

292. *E.g.*, S. REP. NO. 97-110, at 3 (1981); *Hearing Before the Subcomm. on Toxic Substances & Env't Oversight of the Comm. on Env't & Pub. Works*, 97th Cong. 59 (1981) (statement of Charles L. Elkins, Deputy Assistant Adm'r for Noise Control Programs, EPA).

293. BUDGET REVISIONS FY 1982, *supra* note 32, at 294.

294. To the extent there is some argument that Congress did not impose nondiscretionary duties in the first place, and the statutes themselves give EPA discretion, this section still provides a useful assessment of congressional interpretation, and we can assume nondiscretionary duties arguendo. *See supra* Section IV.A.

A. What if There Were Continued and Explicit Funding?

For the sake of argument, assume Congress appropriated a line item specifically for noise programs at a level that was unquestionably sufficient to operate programs under the NPAA, NCA, and QCA. If this were the case, it would have been improper for the Administration to stop carrying out a program that had both substantive authority and sufficient appropriations. Indeed, this circumstance hardly requires a turn to congressional interpretation because it is a basic proposition that "[t]he President must follow statutory mandates so long as there is appropriated money available."[295]

But, one might argue, the Reagan Administration was pursuing an explicitly deregulatory agenda.[296] Elections have consequences. Should it not have the discretion to underenforce programs it does not support? No. The President may not decide to essentially repeal a law without congressional action.[297] As then–Judge Kavanaugh wrote, "the President may not decline to follow a statutory mandate or prohibition simply because of policy objections."[298] Of course, incidentally, even this basic proposition relies on a nontextual reference to appropriations.[299]

The President must carry out constitutionally valid nondiscretionary duties *if Congress appropriated funds*. So far, we are imagining that Congress plainly had appropriated funds. Suppose Congress did not.

B. What if There Were Implicit Defunding?

Congress could defund a program directly through an appropriations rider that expressly says the President shall not expend funds on a certain program.[300] Likewise, Congress could expressly defund a program by amending substantive statutes to expressly *not* authorize any

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295. *In re Aiken County*, 725 F.3d 255, 259 (D.C. Cir. 2013) (emphasis omitted). *See also United States v. Langston*, 118 U.S. 389, 394 (1886) (holding no implied repeal when "subsequent enactments which merely appropriated a less amount . . . and which contained no words that expressly or by clear implication modified or repealed the previous law").

296. *See, e.g.*, Peter Behr, *U.S. To Ignore Some Noise Rules*, WASH. POST, Aug. 15, 1981, at D8 ("The reason for that move is that the EPA's Noise Enforcement Division is being closed down rapidly as part of the administration's budget reduction and deregulation of business.").

297. *Clinton v. City of New York*, 524 U.S. 417, 438 (1998) ("There is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes.").

298. *Aiken County*, 725 F.3d at 259.

299. *Id.*

300. SEAN M. STIFF, CONG. RSCH. SERV., R46417, CONGRESS'S POWER OVER APPROPRIATIONS: CONSTITUTIONAL AND STATUTORY PROVISIONS 57 (2020), https://crsreports.congress.gov/product/pdf/R/R46417 [https://perma.cc/H9ZE-9D9L].

appropriations.[301] These are examples of express line-item defunding. On the flip side, Congress might try to defund a program by simply not mentioning the program but appropriating no money where, in prior years, Congress had expressly appropriated money. Or Congress might try to defund a program by not mentioning it. Full stop. Congress simply provides a lump-sum appropriation in an amount lower than prior years, without naming a specific program. In the case of noise law, it seems that if we are dealing with defunding at all, we are dealing with this last category.

Congress did not mention noise programs at all in the fiscal year 1982 appropriation laws.[302] But in fiscal year 1982, Congress did reduce lump-sum appropriations to the relevant EPA fund categories as compared to fiscal year 1981.[303] And it reduced appropriations in line with the President's budget, which proposed to defund the noise programs.[304] If this is defunding at all, it is an example of implicit defunding. While defunding may be a common way for Congress to end a program, implicit defunding in the face of a substantive law that remains on the books and contains nondiscretionary duties is unique.[305]

We are thus left with a unique problem: How do we interpret the law in these circumstances? Certainly, there is no way to understand EPA's authority without congressional interpretation. The question, then, is whether EPA has authority to cease carrying out programs under

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301. *Id.* at 5. Congress could not, however, simply fail to authorize appropriations because appropriations are self-authorizing if there is no prior substantive authorization or if a prior authorization has lapsed. *Id.*

302. *See* sources cited *supra* note 277.

303. *Compare* Act of Dec. 15, 1981, Pub. L. No. 97-92, sec. 6(d), § 501(10)–(13), 95 Stat. 1183, 1187 (appropriating EPA roughly $1.1 billion for the categories of "salaries," "research and development," "abatement, control, compliance," and "buildings and facilities" for fiscal year 1982, and specifically, $395 million for "abatement, control, and compliance"), *with* Department of Housing and Urban Development—Independent Agencies Appropriation Act of 1981, Pub. L. No. 96-256, 94 Stat. 3044, 3051 (1980) (appropriating EPA over $1.3 billion for the categories of "salaries and expenses," "research and development," "abatement, control, compliance," and "buildings and facilities" for fiscal year 1981, and specifically, $545.2 million for "abatement, control, and compliance").

304. BUDGET REVISIONS FY 1982, *supra* note 32, at 294.

305. Shapiro, *supra* note 235, at 2 (surveying "twenty-eight environmental and health and safety statutes passed between 1958 and 1989"). I have been unable to find examples of similar situations in the years since the publication of Professor Shapiro's article. Although it is possible that Congress has more recently defunded statutorily mandated programs without repealing the substantive statute, the circumstances would still be rare and worth further exploration. *See* Lawrence, *supra* note 73 (dissecting instances in which Congress makes a statutory commitment but does not fund the commitment). However, that work focuses on entitlement commitments rather than nondiscretionary regulatory duties.

the various noise statutes, all of which impose nondiscretionary duties, where Congress has merely reduced EPA's lump-sum appropriations without any specific reference to the noise programs.

The text of the two statutes is the place to begin.[306] As Part IV explains, there are a series of nondiscretionary duties in both the NCA and the QCA, in addition to the basic duty from the NPAA to operate the Office of Noise Abatement and Control. While some provisions of these laws may have ambiguity in some respects, there is little question that there are at least some nondiscretionary duties that remain in the U.S. Code.[307]

Public Law No. 97-92 of 1981, which appropriated funding to EPA (and other agencies) for use in fiscal year 1982, is also clear on some points. Congress appropriated roughly $1.13 billion to EPA, broken out with line items for salaries and expenses; research and development; abatement, control, and compliance; and buildings and facilities.[308] Each of these funds covers portions of the work of the Office of Noise Abatement and Control, though one might assume that "abatement, control, and compliance" is the most specific category. In that category, Congress appropriated $395 million.[309] There is no specific mention of noise programs in the appropriations law.[310]

Thus, the text of the substantive noise law, read in isolation, is unambiguous on at least some nondiscretionary duties. Likewise, the appropriations law, read in isolation, is unambiguous. Ambiguity only arises when looking at the substantive statutes in light of reduced lump-sum appropriations and then looking at the appropriations in light of the President's proposed budget. Might a court today turn away from unambiguous statutory text not once, but twice, relying instead on a non-legislative, advisory budget proposal? To do so would actively introduce ambiguity that is not present in statutory text. The Court's nominal (if fading) commitment to textualism suggests it would not go this route, given that the substantive statute plainly does not provide authority to terminate all noise programs.[311] On the other hand, the Court's tendency

306. *See Garland v. Cargill*, 144 S. Ct. 1613, 1620 (2024).

307. *See supra* notes 243–44, 249, 251–52, 254–56, 261–62, 264–65 and accompanying text.

308. Act of Dec. 15, 1981, Pub. L. No. 97-92, sec. 6(d), § 501(10)–(13), 95 Stat. 1183, 1187.

309. § 501(12). The doctrine of impossibility protects the executive from claims of inaction when there are no appropriations to support the action. *Am. Hosp. Ass'n v. Price*, 867 F.3d 160, 167–68 (D.C. Cir. 2017). In the case of noise law, there were appropriations to the proper EPA accounts that EPA could commit to nondiscretionary noise programs.

310. *See* § 501(10)–(13) (appropriating funds without reference to EPA noise programs).

311. *See supra* note 298 and accompanying text.

towards deregulatory outcomes suggests it might invite ambiguity in order to hold that EPA does have authority to cancel a regulatory program.[312]

In what ways would the Court deal with the emergent ambiguity of the two statutes? Perhaps it would resort to legislative history, which is more explicit about the intent to defund the noise programs.[313] But the trends in congressional interpretation and Supreme Court practice described earlier weigh against legislative history—which the textualist Court has decried[314]—and towards other strategies.[315]

In addition, the legislative history in this case is not very helpful. While there may be indications that the relevant committees wanted to accede to the President's defunding request, the key appropriations bill for EPA does not reference committee deliberations.[316] But months before, in an earlier appropriations bill for fiscal year 1982, Congress specifically did reference committee deliberations, opening the Omnibus Budget Reconciliation Act of 1981 with the statement: "It is the purpose of this Act to implement the recommendations which were made by specified committees of the House of Representatives and the Senate . . . ."[317] If Congress wanted to reference committee statements and deliberations, it knew how. But it did not make such a reference when appropriating to EPA.

Whether through a textual analysis or a turn to legislative history and comparative congressional actions, it is difficult to find support for a deregulatory claim in this case. If courts are seeking ambiguity to support deregulatory ends they will, therefore, need a different strategy.

Clear statement rules act as a sort of catalyst for ambiguity. When faced with a "plausible" reading of statutory text, a court can search for a reason to go beyond the text of the statute and look instead to a more general notion of congressional purpose or norms.[318] Thus, the Court

312. *E.g.*, Gillian E. Metzger, Foreword, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 17–31 (2017); Jonathan S. Masur, Relentless *as Entrenchment*, 31 GEO. MASON L. REV. 573, 573 (2024).

313. *E.g.*, S. REP. NO. 97-110, at 2 (1981) ("[T]he Committee approved the requested reduction . . . .").

314. Eskridge, *supra* note 23, at 623 (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452–53 (1987) (Scalia, J., concurring)).

315. *See supra* Part II.

316. *See* Act of Dec. 15, 1981, Pub. L. No. 97-92, sec. 6(d), § 501(10)–(13), 95 Stat. 1183, 1187 (appropriating to EPA without any reference to committee deliberations).

317. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 2, 95 Stat. 357, 357.

318. *E.g.*, *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022). *See also supra* Section III.A.3.

might invoke a clear statement rule in the case of noise law to avoid the regulatory obligation that seems plain on the face of the statute.

The most obvious such rule is the rule against repeal by implication. "We have repeatedly stated," the Court has said, "that absent a clearly expressed congressional intention, repeals by implication are not favored."[319] *TVA v. Hill* expresses the same point: Appropriations do not implicitly repeal substantive statutes.[320] And the appropriations at issue in *TVA v. Hill* were arguably clearer and more specific than those that purported to defund noise programs.[321] *United States v. Langston*[322] is perhaps most on point, holding that when weighing a substantive command and an appropriation, there is no repeal where "subsequent enactments which merely appropriated a less amount . . . and which contained no words that expressly or by clear implication modified or repealed the previous law."[323]

Certainly, the reduced lump-sum appropriations in 1981 are not a clear statement. Thus, rather than advancing an argument for EPA authority, the rule against repeal by implication further supports the argument that EPA's nondiscretionary duties remain.

The clear statement rule the Court applied in *SWANCC* demands that Congress use a clear statement when legislating in a way that comes close to the edge of constitutional authority.[324] If Congress fails to appropriate money and fails to repeal a nondiscretionary duty, this is arguably a violation of the Take Care Clause because it makes it impossible for the President to faithfully execute the unfunded and unrepealed law.[325] To trigger *SWANCC*'s clear statement rule, the Court need not decide that there is a constitutional violation, merely that there is a threshold question about constitutionality.[326] This approach would also lead an honest court to conclude that the language of the appropriation, if it in fact approaches constitutional boundaries, would need to be a clear defunding, which it is not.

The major questions doctrine, if applicable at all, also undermines EPA's inaction. It is not obvious there is any major question embedded

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319. *Branch v. Smith*, 538 U.S. 254, 273 (2003) (cleaned up).

320. *TVA v. Hill*, 437 U.S. 153, 190 (1978).

321. *See* Public Works for Water and Power Development and Energy Research Appropriation Act of 1978, Pub. L. No. 95-96, 91 Stat. 797, 808 (1977) (specifying that a certain amount of the appropriation to TVA "is available to carry out the purposes of the Endangered Species Act of 1973 . . . including . . . to relocate endangered or threatened species to other suitable habitats as may be necessary to expedite project construction.").

322. 118 U.S. 389 (1886).

323. *Id.* at 394.

324. *SWANCC*, 531 U.S. 159, 172 (2001).

325. *See supra* Section III.A.1.

326. *SWANCC*, 531 U.S. at 172–74.

in the larger issue of whether EPA has authority to cease noise programs. Perhaps closing ONAC had political and economic significance, although such data is not available and, in any case, the Court has yet to provide a test for what agency actions are sufficiently "significant" or "extraordinary."[327] If, however, one could make the argument that at the time of closure, the action triggered the major questions doctrine, the analysis would mimic the other clear statement rules. Because the appropriation is not a clear statement of repeal, it cannot support EPA's action in the face of a much clearer statement in the substantive statute.

On the other hand, one could imagine the inverse argument. If EPA relaunched the program today and regulated parties challenged the new noise programs, might petitioners argue that using this "unheralded" power to regulate noise pollution is a major question?[328] After all, just as EPA had not regulated under the authority of section 111(d) of the Clean Air Act, EPA also has not exercised authority under the noise laws in nearly a "half century."[329] If EPA wanted to revive the noise program, it would thus need to point to "'clear congressional authorization' for the power it claims."[330] And for that it would simply point to the text of the NPAA, NCA, and QCA and the programs EPA operated, for a decade, under those laws.

The courts could invoke any number of clear statement rules, including those this Article has explored or others, but in all cases, it seems the only clear statements are statements that EPA *did not have the discretion to terminate noise programs*. To find that EPA had termination authority requires discarding the unambiguous text of the substantive law and digging deeply into the legislative history and norms of appropriations. Perhaps a court would be willing to undertake such a reading, but neither the dominant mode of textualist interpretation nor clear statement rules support that approach. Where else, then, might congressional interpretation take a deregulatory court?

The Take Care Clause provides the President some discretion to underenforce the law, but not to ignore the substantive statute in this

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327. *See West Virginia v. EPA*, 142 S. Ct. 2587, 2595 (2022) (explaining that certain "extraordinary cases" with "economic and political significance" trigger the heightened standards of the major questions doctrine but providing little detail about which cases are extraordinary and what counts as economic and political significance). *See also* Ronald M. Levin, *The Major Questions Doctrine: Unfounded, Unbounded, and Confounded*, 112 CALIF. L. REV. 899, 930–34 (2024) (discussing the major questions doctrine's unclear scope).

328. *West Virginia*, 142 S. Ct. at 2623 (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

329. *Id.* (quoting *Nat'l Fed'n of Indep. Bus. v. OSHA*, 142 S. Ct. 661, 666 (2022)).

330. *Id.* at 2609 (quoting *Util. Air*, 142 S. Ct. at 324).

case. On the Take Care Clause spectrum, there is a line between complete programmatic inaction and discretionary underenforcement. The Clause allows policy-driven underenforcement.[331] But it does not allow wholesale neglect of the law Congress passes, although the Court appears never to have ruled squarely on this point.[332] Perhaps this is an opportunity for a strongly deregulatory Court to announce that the Take Care Clause does allow an agency to fully disregard congressional commands. Given that the Court recently demonstrated a willingness to tolerate the President's violation of the law in *Trump v. United States*,[333] this weak reading of the Take Care Clause may have legs. Nevertheless, the more likely reading of the Clause, which then–Judge Kavanaugh championed in *Aiken County*, does not allow blanket abandonment of nondiscretionary statutory duties.[334]

The argument for discretion to cancel the noise programs is weaker still because Congress provided for citizen enforcement to compel executive action. Congress included citizen suit provisions in the Noise Control Act.[335] And it did so to ensure that EPA could not ignore the law without consequence.[336] In fact, Congress's inclusion of citizen suit provisions may even be an indication that defending inaction on the basis of insufficient appropriations must fail. As the D.C. Circuit has held, Congress creates citizen suits to account for underappropriations by giving citizens an opportunity to prod agencies that do not request adequate appropriations.[337]

There can hardly be clearer evidence that the scope of executive discretion is limited. Only an extreme interpretation of executive discretion under the Take Care Clause could lead to the conclusion that the President had authority to completely close down the noise programs.

Flipped on its head, however, the Take Care Clause might impose a duty on Congress to either fund noise programs or repeal the substantive statute. This conclusion would also draw on a novel reading

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331. *See Heckler v. Chaney*, 470 U.S. 821, 831–32 (1985); Goldsmith & Manning, *supra* note 141, at 1847.

332. *In re Aiken County*, 725 F.3d 255, 259 (D.C. Cir. 2013). *See also DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1906 (2020) (suggesting that individual enforcement discretion is a valid exercise of executive authority as compared to wholesale programmatic nonenforcement).

333. *Trump v. United States*, 144 S. Ct. 2312, 2328 (2024) ("We thus conclude that the President is absolutely immune from criminal prosecution for conduct within his exclusive sphere of constitutional authority.").

334. *In re Aiken County*, 725 F.3d 255, 259 (D.C. Cir. 2013).

335. 42 U.S.C. § 4911(a).

336. *See* § 4911(a)(2) (authorizing suits against the Administrator and authorizing courts to grant injunctive relief requiring the Administrator to perform nondiscretionary duties).

337. *Nat. Res. Def. Council, Inc. v. Train*, 510 F.2d 692, 724 (D.C. Cir. 1975).

of the Clause. The Clause prohibits Congress from limiting the President's discretion to the point where the President cannot faithfully execute the laws.[338] The NPAA, NCA, and QCA are, of course, laws. Having failed to appropriate funds, Congress has tied the President's hands, making it impossible to execute those laws.

The Court has several options for how to rectify this problem, and each reflects the way congressional interpretation can implicate constitutional questions that the leading cases have so far ignored. First, the Court might seek to avoid the constitutional question by interpreting the appropriations as repealing the substantive law. That flies directly in the face of statutory text and the clear statement rule counseling against repeal by implication. Second, the Court might find that the appropriations for 1982 did attempt to defund the noise programs, but that such an appropriation is unconstitutional unless Congress also repeals the substantive law. This option borders on requiring Congress to appropriate for a specific purpose, which the Court has never done.[339] Third, a more appealing approach for a deregulatory court is to find that Congress did not appropriate for the noise programs and then to hold that the substantive law is unconstitutional because it violates the Take Care Clause insofar as it imposes a duty that is impossible for the President to execute.

This last option, however, rests on two dramatic holdings. First, it would require an expansion of the current understanding of the Take Care Clause, albeit not an unimaginable expansion.[340] Second, it would require the Court to decide that a lump-sum appropriation, which on its face says nothing about noise programs, is sufficiently clear to effectuate defunding. As this Part should make clear, that is a very unlikely reading of the appropriations bill in this case. However, as an example of congressional interpretation, the Court may turn to many nontextual sources, whether legislative history or general understandings about how Congress might, would, or should act. Those sources could help the Court convince itself that Congress meant to speak more clearly in the appropriations law. "Fixing" statutory text because Congress did not write a law the way it may have intended *should* be abhorrent to the current Court.[341] That is, a textualist court should have a difficult time fixing Congress's drafting mistakes for it.

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338. *See Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2191–92 (2020).

339. Stith, *supra* note 185.

340. *See Seila*, 140 S. Ct. at 2192 (holding that the Take Care Clause can restrict Congress's policymaking discretion and leave provisions of substantive law unconstitutional).

341. *See Garland v. Cargill*, 144 S. Ct. 1613, 1620, 1625–26 (2024) ("And, it is never our job to rewrite statutory text under the banner of speculation about what

If the Court turns its eyes to extra-statutory considerations, though, it cannot help but notice that Congress allows the substantive noise laws to remain on the books. Of course, Congress has not just *not repealed* the substantive statutes, it has actively *failed to repeal* them. This congressional inaction, while constitutionally meaningless, is relevant under the Court's modern congressional interpretation doctrine and supports the conclusion that EPA does not have deregulatory authority in this case. As Section III.B describes, courts sometimes turn to congressional inaction as a mode of congressional interpretation. The Court has looked at post-enactment congressional inaction to support its conclusions about the breadth of statutory text.[342] In *West Virginia*, in particular, the Court found that when a post-enactment Congress failed to amend the Clean Air Act, that failure tended to constrain EPA's administrative authority to implement programs similar to the failed congressional proposals.[343] In *Garland v. Cargill*, the Court was less explicit but certainly implied that Congress's repeated failure to amend the National Firearms Act made ATF's regulatory efforts suspect.[344]

Noise law presents almost the exact same circumstances. EPA claims statutory authority to ignore its nondiscretionary duties. In 1981, Congress considered repealing these nondiscretionary duties but failed to do so.[345] In line with its prior holdings, the Court would recognize that congressional inaction, as in *Cargill* and *West Virginia*, undermines the authority the agency claims. In this case, it just happens to be deregulatory authority. Congress failed to give the agency the deregulatory authority it now asserts, so the claim likewise fails.

This is an extensive analysis of a fairly simple problem. One would expect a substantive statute with unambiguous nondiscretionary duties to trump an unspoken repeal at best conceivably buried in the legislative history of an appropriations law. And that is, ultimately, exactly the conclusion of this section. But the extensive analysis is necessary because it demonstrates the various permutations of congressional interpretation that the Supreme Court has embraced and the way courts can incorporate thorny constitutional issues into statutory interpretation without a clear articulation of the constitutional implications.

Congress might have done." (cleaned up) (quoting *Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 89 (2017)); *id.* at 1627 (Alito, J., concurring) ("The horrible shooting spree in Las Vegas in 2017 did not change the statutory text or its meaning.").

342. *See supra* Section III.B.

343. *West Virginia v. EPA*, 142 S. Ct. 2587, 2614 (2022).

344. *Cargill*, 144 S. Ct. at 1618–19.

345. *See supra* notes 279–83 and accompanying text.

C. What if There Were Explicit Defunding?

The prior section explored congressional interpretation in noise law by addressing a variety of considerations that materialize under the most plausible reading of the history of noise law, to wit, that Congress attempted to implicitly defund EPA noise programs. But two counterfactuals remain, each of which, considered much more briefly, provides some insight into congressional interpretation.

Suppose in 1981, Congress had passed, and the President had signed, an appropriations bill that had a line-item recission specifically and explicitly defunding EPA's noise programs. This was plainly not the case,[346] but one can immediately see that this presents a conundrum similar to implicit defunding—although perhaps a conundrum that is easier to solve.

In this hypothetical, we are faced with a substantive law that announces mandatory programs and an appropriation that uses clear language to remove funding from those same programs. Congress has spoken twice, and its words are in direct conflict. In one respect this is parallel to *TVA v. Hill*, where the text of the Endangered Species Act and the appropriation for a dam that would violate the Act were, at least arguably, in direct conflict.[347] The Court held that it must rely on the text of the Act because it disfavors repeal by implication, especially when the implication comes in the form of an appropriation.[348] In *TVA v. Hill*, however, Congress provided appropriations that undermined, but perhaps did not absolutely conflict with, a substantive statute.[349] In this hypothetical version of noise law, Congress has explicitly defunded a program. The Court in this hypothetical might reiterate the holding of *TVA v. Hill*, but it can more easily defer to an express disappropriation. First, the Court might hold that where two acts are in such direct conflict that "[n]o ingenuity can reconcile them," then "[t]he latter act must therefore prevail."[350] Under the doctrine of impossibility, the D.C. Circuit stated that "a court may not require an agency to render performance that is impossible."[351] And, specifically, "[t]his principle extends to cases where the impossibility is the result of insufficient congressional appropriations."[352]

346. *See supra* note 277 and accompanying text.
347. *TVA v. Hill*, 437 U.S. 153, 189–90 (1978).
348. *Id.*
349. *Id.*
350. *United States v. Fisher*, 109 U.S. 143, 146 (1883).
351. *Am. Hosp. Ass'n v. Price*, 867 F.3d 160, 167 (D.C. Cir. 2017).
352. *Id.* at 168 (citing *Morton v. Ruiz*, 415 U.S. 199, 230–31 (1974)).

These strategies of favoring a later, explicit disappropriation, whether as a source of impossibility or repeal, provide an easier glidepath to noise deregulation through congressional interpretation. In the alternative, one could approach conflicting congressional signals not through the lens of time, but through the lens of a "clearer statement rule."[353] That is, if Congress makes conflicting statements the courts should look at the *clearer* statement, which will typically be in the substantive statute rather than the appropriation. Whether through the later-in-time approach or the clearer statement approach, the courts may find a resolution under these hypothetical facts. Of course, they are merely hypothetical and do not reflect the reality of noise law because, in reality, Congress did not explicitly defund EPA's noise programs.

D. What if Congress "Declined To Adopt" New Law?

So far, each scenario assumes that regardless of what Congress did with appropriations, it left the substantive law on the books. Of course, that is exactly what happened.[354] It is a nagging issue that Congress considered repealing the NCA but did not. Although this Article discussed this aspect in the context of assessing implicit defunding, it deserves a final mention given the Court's very recent and repeated reliance on congressional inaction.[355]

Because Congress can only change the law through bicameralism and presentment,[356] post-enactment congressional inaction should not be especially important in the case study of noise law or any other instance of congressional interpretation. The substantive statutes remain on the books and the courts have never declared them unenforceable. That's that. But in recent and high-profile decisions, the Court has (sometimes impliedly) used congressional debate over a bill and failure to pass it as evidence for constraining executive authority.[357] One could apply the same thinking to noise law. Congress debated but failed to repeal the NCA,[358] so it must be improper for the executive to ignore the law.

Yet again, this expected, ordinary application of congressional interpretation leads to the conclusion that EPA does not have the authority it claims. So often, that seems to be the conclusion. But in the case of noise law, EPA does not have the authority to *deregulate*. Most

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353. Thanks to Rick Reibstein who helpfully described the conflict this way when reviewing an early draft of this Article.

354. *See supra* notes 278–83 and accompanying text.

355. *E.g.*, *Garland v. Cargill*, 144 S. Ct. 1613, 1618–19 (2024); *West Virginia v. EPA*, 142 S. Ct. 2587, 2614 (2022). *See also* Eskridge, *supra* note 63, at 67.

356. U.S. CONST. art. I, § 7, cl. 2.

357. *E.g.*, *Cargill*, 144 S. Ct. at 1618–19; *West Virginia*, 142 S. Ct. at 2614.

358. *See supra* notes 278–83 and accompanying text.

other examples of congressional interpretation in this Article hold that agencies lack authority to *regulate*. Does the regulatory direction of agency authority change the analytical approach? So far, congressional interpretation gives no doctrinal reason to assume so. This case study helps demonstrate that.

CONCLUSION

This Article introduces the concept of *congressional interpretation* because the Supreme Court in *Loper Bright* claimed for itself a vastly increased responsibility for statutory interpretation.[359] Indeed, the Court claimed a special expertise.[360] Thus, it is more important than ever to understand how the Court goes about analyzing statutes.

Congressional interpretation aids in that endeavor. It describes an interpretive strategy on which courts, and the Supreme Court in particular, rely but rarely acknowledge. It occurs when a court tries to understand what the law is by looking beyond a specific statute, or even a specific statute's legislative history, and turns instead to other aspects of congressional behavior. This Article has focused on courts using congressional interpretation to understand the relationship between a substantive statute and later appropriations, evaluate old statutes on the basis of post-enactment congressional inaction, and impose assumptions about congressional norms through clear statement rules. For example, a court might consider whether Congress really grants statutory authority if Congress later reduces appropriations to exercise the supposed authority. A court holds that an agency interpretation of a substantive statute cannot be valid because, years after passing the original statute, a different Congress failed to enact a law similar to the agency's interpretation of the old statute. Or, a court objects to an agency interpretation of a substantive statute because the court assumes that Congress, in the abstract, would normally write a statute differently, or must write a statute differently, if it wanted to allow the agency's asserted interpretation.

Although the term *congressional interpretation* is new, it collects several known interpretive strategies into a distinct and meaningful category. Looking at the Court's behavior in this way helps us understand the deluge of high-profile statutory interpretation cases in the last several terms. These decisions, including *West Virginia*, *Sackett*, *Biden v.*

359. *See Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2263 (2024) ("[T]he role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress.").

360. *Id.* at 2267, 2273.

Nebraska, and *Cargill*, each couple declared textualism with broader congressional interpretation.[361]

As a result, the Court is doing at least four important things. First, it is constitutionalizing statutory interpretation and subtly shifting separation of power principles like the Take Care Clause, executive discretion, and even the seemingly unyielding rule of bicameralism and presentment. Second, it helps us get a handle on the broader shift away from textualism, a trend that others have probed[362] but that is worth reiterating because the Court has yet to concede or justify the move.[363] Third, but relatedly, neither the Court nor scholars have recognized or acknowledged that these various interpretive tools fit together as congressional interpretation. For the Court's part, failure to either recognize or acknowledge an interpretive strategy undermines the legitimacy of its work and the cogency of congressional interpretation, even though the Court uses the approach regularly. Failure to recognize and acknowledge congressional interpretation undermines the Court's deliberative legitimacy because courts should be explicit about their analytical approaches. Fourth, and finally, the key congressional interpretation cases are all deregulatory or limit agency authority, usually both.[364] This raises the specter—or maybe reinforces the open secret—that policy outcomes motivate the practice and, perhaps worse, that policy outcomes motivate the tacit constitutional changes that can come with congressional interpretation.

To explore these aspects of congressional interpretation in more detail, this Article presents a case study of noise law. With a lawsuit pending against EPA for failure to carry out nondiscretionary duties under various federal noise statutes,[365] the noise law case study presents questions at the crossroads of statutory interpretation, appropriations, executive discretion, Take Care duties, and the triggers and application of clear statement rules. The most likely answers to the questions that emerge from the noise law case study all inform us that EPA does not

361. *West Virginia*, 142 S. Ct. at 2607–08, 2614; *Sackett v. EPA*, 143 S. Ct. 1322, 1341 (2023); *Biden v. Nebraska*, 143 S. Ct. 2355, 2374 (2023); *Cargill*, 144 S. Ct. at 1618–20. *See also supra* Part III.

362. *E.g.*, Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 282 (2022); Anita S. Krishnakumar, *What the New Major Questions Doctrine Is* Not, 92 GEO. WASH. L. REV. 1117, 1120–22 (2024); Ilan Wurman, *Importance and Interpretive Questions*, 110 VA. L. REV. 909, 911 (2024); Jed Handelsman Shugerman, Biden v. Nebraska*: The New State Standing and the (Old) Purposive Major Questions Doctrine*, CATO SUP. CT. REV. 229 (2023).

363. *See Biden v. Nebraska*, 143 S. Ct. at 2376 (Barrett, J., concurring) (asserting in a solo concurrence that the major questions doctrine is not a departure from textualism).

364. *See supra* Part II.

365. *See supra* note 284 and accompanying text.

have the statutory authority it claims. This is in line with the prior cases that also cabin regulatory authority. But, in the case of noise law, EPA is claiming deregulatory authority in the face of statutes that impose nondiscretionary regulatory obligations. How the courts resolve the noise law riddle may reveal a lot about the contours of congressional interpretation and the direction of the judiciary. Noise law may also be an opportunity to embrace congressional interpretation candidly and deliberately.

This Article is meant primarily as a descriptive account of congressional interpretation. If there is a normative line, it is that courts have a democratic responsibility to articulate their reasoning honestly and clearly, but furtive congressional interpretation shirks that responsibility. The democratic bona fides of courts come from their nonmajoritarian, reasoned deliberation.[366] The deliberative strength of a court may come from internal debate amongst judges seeking to persuade one another.[367] But it is notable that, at least at the Supreme Court, the majority will sometimes present a contentious case as an easy one, asserting that alternative conclusions are simply "not plausible"[368] or that the arguments of dissenting colleagues "cannot be taken seriously."[369] The arguments of other Justices of the Supreme Court are so weak that the majority will not even take them seriously! It is easy to overlook how startlingly dismissive this view is. Language of this nature undermines the sense of careful and persuasive deliberation. There is no need, the reader might conclude, to pursue careful judicial deliberation if there is only one "plausible" or "serious" perspective.

In that light, there is an even greater need for a court to express the reasons for its conclusions. One might argue that each example of congressional interpretation is merely a make-weight argument, that the Court is simply piling on additional justifications for its conclusions after having reached those conclusions through more transparent means. That argument bolsters the key normative contribution of this Article. Establishing precedent and even modifying constitutional doctrine without making that move central to briefing or opinions undercuts the Court's deliberation- and reasoning-based democratic legitimacy. Surreptitious congressional interpretation not only submerges some of the Court's reasoning but also conceals weighty constitutional considerations that tend to be part of efforts to interpret broad congressional signals

366. *See* Galperin, *supra* note 28, at 77 (describing democratic institutions as those that include some combination of majoritarian, individualist, reasoned, and deliberative structures).

367. *See id.* at 95 (explaining that deliberation can help change minds).

368. *West Virginia v. EPA*, 142 S. Ct. 2587, 2616 (2022).

369. *Sackett v. EPA*, 143 S. Ct. 1322, 1344 (2023).

about executive authority. Whatever interpretive or constitutional moves courts make, they should make them overtly and purposefully.