THE NONDELEGATION DOCTRINE
AS A CANON OF AVOIDANCE

The Supreme Court has often declared that Congress cannot validly delegate its legislative authority to the executive.1 Rather than overturning administrative statutes on that ground, however, the Court has long enforced the nondelegation doctrine by narrowly construing administrative statutes that otherwise risk conferring unconstitutionally excessive agency discretion.2 The nondelegation doctrine, in other words, now operates exclusively through the interpretive canon requiring avoidance of serious constitutional questions. This result is often hailed as a successful way to reconcile several competing concerns.3 First, the Court recognizes that the nondelegation doctrine serves important constitutional interests, including the promotion of legislative responsibility for society's basic policy choices4 and the preservation of a carefully

John Manning is Michael I. Sovern Professor of Law, Columbia University.

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1 See, for example, Mistretta v United States, 488 US 361, 371–72 (1988) ("[W]e long have insisted that 'the integrity and maintenance of the system of government ordained by the Constitution' mandate that Congress generally cannot delegate its legislative power to another Branch.") (quoting Marshall Field & Co. v. Clark, 143 US 649, 692 (1892)).

2 See Mistretta, 488 US at 373 n 7 ("In recent years, our application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional.").

3 See text accompanying notes 99–105.

designed constitutional process for legislation—bicameralism and presentment. Second, the Court fears that aggressive enforcement of the nondelegation doctrine would render modern government unworkable. And third, it lacks confidence in its ability to make principled judgments about excessive delegations in the exercise of Marbury-style judicial review. Narrow construction tries to secure the best of all worlds—promoting the interests served by the nondelegation doctrine, while avoiding many of the practical concerns raised by direct enforcement.

Last Term's decision in FDA v Brown & Williamson Tobacco Corp. implemented this “narrow construction strategy” in rejecting the FDA's assertion of jurisdiction of tobacco under the broad terms of the Food, Drug, and Cosmetic Act (FDCA or Act). The decision, as I explain below, is noteworthy because it offers a clear example of the narrow construction strategy—and an equally striking illustration of its conceptual weaknesses. In particular, the Court's opinion gives sharp focus to the following contradiction: If the nondelegation doctrine seeks to promote legislative responsibility for policy choices and to safeguard the process of bicameralism and presentment, it is odd for the judiciary to implement it through a technique that asserts the prerogative to alter a statute's conventional meaning and, in so doing, to disturb the apparent lines of compromise produced by the legislative process.

Brown & Williamson's facts are complex, but for present purposes they can be readily simplified. After a notice and comment period that generated more than 700,000 comments, the FDA determined that the nicotine in tobacco constituted a “drug” subject to the agency’s regulatory jurisdiction under the FDCA. The agency rested its determination on the statute's explicit definition of “drug,” which broadly extends to “articles (other than food) in-

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1 US Const, Art I, § 7 (requiring bicameralism and presentment); see also, for example, Loving, 517 US at 757–58; Cass R. Sunstein, Nondelegation Canons, 67 U Chi L Rev 315, 319–20 (2000).

2 See text accompanying notes 93–95.

3 See text accompanying notes 96–98.


6 Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed Reg 44396, 44418, 44655 (1996).

7 Id at 44628–50 (analyzing evidence collected in notice and comment period).
tended to affect the structure or any function of the body.” No doubt because of the importance of the question, or because the agency had previously asserted that it lacked jurisdiction over tobacco, the FDA supported its new position with an unusually detailed factual, policy, and legal analysis, including a separate “annex” on jurisdiction that occupied almost 700 pages in the Federal Register.

In an extraordinary opinion, the Court rejected the FDA’s assertion of jurisdiction on statutory grounds, but without ever interpreting the FDCA’s operative language. Despite the statute’s evident sweep, moreover, the Court declined to invoke *Chevron’s* established canon that a reviewing court must accept an agency’s “reasonable” interpretation of a broad or open-ended organic statute. In place of such analysis, the Court instead determined that “the FDA’s claim to jurisdiction contravenes the clear intent of Congress.” The Court reasoned that if tobacco is a “drug,” the FDA would have to ban it outright under various provisions of the Act. Yet Congress could not possibly have intended such a result, given its passage of several post-FDCA statutes that regulate but do not ban tobacco. The Court also emphasized that when Congress passed the post-FDCA tobacco statutes, it did so against a backdrop of committee hearings that included repeated executive branch disclaimers of FDA jurisdiction. In view of this legislative history, the Court found that the post-FDCA legislation reflected a legislative intent to ratify the FDA’s jurisdictional disclaimers, elevating that administrative understanding to the status of statute law. Finally, the Court found that Congress’s articulation of specific regulatory policies for tobacco in the post-FDCA legislation precluded the FDA from imposing further regulations under the FDCA’s more general authority; by striking a specific policy bal-

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13 See 61 Fed Reg 44396 (cited in note 10); id at 44619 (jurisdictional annex).
16 Id at 133–43.
17 Id at 137–39.
18 Id at 143–56.
19 Id at 155–56.
 ance, Congress spoke directly to the precise question of appropriate tobacco regulation.\(^\text{20}\)

If *Brown & Williamson* were viewed as a straightforward matter of statutory interpretation, much of its reasoning would be puzzling. For a Court that has become increasingly textualist in its orientation to statutes,\(^{\text{21}}\) its heavy reliance on postenactment legislative history, in particular, seems out of character. Indeed, this use of legislative history is particularly striking when one considers that two of the five Justices in majority (Scalia and Thomas) are the Court’s most committed textualists,\(^{\text{22}}\) and the other three (Rehnquist, O’Connor, and Kennedy) have at least expressed sympathy with textualism.\(^{\text{23}}\) While one might therefore be tempted to

\(^{\text{20}}\) Id at 143–44.

\(^{\text{21}}\) The current Court more often stresses the public meaning of an enacted text, rather than inferences of intent or purpose that might be extracted from legislative history. See, for example, Hans Baade, *Time and Meaning: Notes on the Intertemporal Law of Statutory Construction*, 43 Am J Comp L 319, 324 (1995); Gregory E. Maggs, *The Secret Decline of Legislative History: Has Someone Heard a Voice Crying in the Wilderness?* 1994 Pub Int L Rev 57, 58; Richard J. Pierce, Jr., *The Supreme Court’s New Hypertextualism: An Invitation to Caecophony and Incoherence in the Administrative State*, 95 Colum L Rev 749 (1995); Peter L. Strauss, *On Resegregating the Worlds of Statute and Common Law*, 1994 Supreme Court Review 429; Samuel A. Thumma and Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court’s Use of Dictionaries*, 47 Buff L Rev 227, 252–60 (1999). Textualists typically cite several related grounds for excluding legislative history from statutory interpretation: legislative history is unenacted; a multimember legislature does not have any actual intent on matters that it has not clearly expressed; and even if it did, judges cannot know whether a constitutionally sufficient proportion of legislators read or agreed with the legislative history. See John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 Colum L Rev 673, 684–89, 697 (1997) (discussing tenets of textualism).

\(^{\text{22}}\) See, for example, *Bank American Trust & Sav As’n v 203 North Lasalle Street Partnership*, 526 US 434 462 (1999) (Thomas, joined by Scalia, concurring in the judgment) (noting that the legislative history “is irrelevant for the simple reason that Congress enacted the Code, not the legislative history predating it”); see also, for example, Thomas Merritt, *Textualism and the Future of the Chevron Doctrine*, 72 Wash U L Q 351, 351 (1994); Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U Pa L Rev 687, 717 (1998).

\(^{\text{23}}\) See, for example, *Atherton v FDIC*, 519 US 213, 231 (1997) (O’Connor, joined by Scalia and Thomas, concurring in part and concurring in the judgment) (“I join all of the Court’s opinion, except to the extent that it relies on the notably unhelpful legislative history to 12 U.S.C. 1821(k).”); *Public Citizen v US Dep’t of Justice*, 491 US 440, 471 (1989) (Kennedy, joined by Rehnquist and O’Connor, concurring in the judgment) (“Where it is clear that the unambiguous language of a statute embraces certain conduct, and it would not be patently absurd to apply the statute to such conduct, it does not foster a democratic exegesis for this Court to rummage through unauthoritative materials to consult the spirit of the legislation in order to discover an alternative interpretation of the statute with which the Court is more comfortable.”); Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988–89 Terms of the United States Supreme Court*, 39 Am U L Rev 277, 306 (1990) (arguing that Justices Scalia and Kennedy are strong textualists and that Chief Justice Rehnquist and Justice O’Connor occasionally behave as textualists). For a contrary view of the jurisprudence of Chief Justice Rehnquist and Justice
view Brown & Williamson as being simply an idiosyncratic departure from the Court’s usual assumptions, its reasoning is better understood in light of what seemed to be the Court’s broader concern—that the statute be interpreted to avoid significant nondelegation concerns that would result from a conventional reading of its open-ended terms.24 Although the Court did not explicitly invoke the nondelegation doctrine as such, portions of its opinion clearly reflect significant nondelegation concerns. Because the FDA had asserted “jurisdiction to regulate an industry constituting a significant portion of the American economy,” the Court emphasized that this was not “an ordinary case” of statutory interpretation.25 More specifically, the Court made clear that its interpretive method was “guided by common sense as to the manner in which Congress is likely to delegate a policy decision of such political and economic magnitude to an administrative agency.”26 In short, consistent with its approach in many other cases, the Court’s narrow construction of the FDCA reflected an evident desire to avoid otherwise serious nondelegation concerns.27

Kennedy, see Charles Tiefer, The Reconceptualization of Legislative History in the Supreme Court, 2000 Wis L Rev 205, 248.

24 Viewing Brown & Williamson as a mere departure from standard practice, the Court’s strong reliance on legislative history may bear resemblance to Church of the Holy Trinity v United States, 143 US 457, 459 (1892), which held that “a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers.” Even if this characterization of the majority opinion is correct, however, it is still necessary to explain why the Court chose to invoke Holy Trinity here, given its increasing reluctance, as of late, to rely on Holy Trinity’s atextual and strongly purposive technique. See John F. Manning, Textualism and the Equity of the Statute, 101 Colum L Rev 1, 21–22 (2001) (describing the Court’s recent approach to statutory interpretation). As discussed in the text, given the Brown & Williamson Court’s repeated articulation of nondelegation concerns, it is reasonable to assume that such concerns—rather than an aberrational abandonment of textualism—explain the Court’s approach.


26 Id at 133. In this regard, it is worth noting that the Court’s nondelegation concerns related to the scope of the administrative authority that the FDCA would confer over the U.S. economy, rather than an absence of standards to guide such authority. Although this is not the paradigmatic basis for invoking the nondelegation doctrine, it nonetheless reflects an important element in the Court’s nondelegation case law. See, for example, Industrial Union Department, AFL-CIO v American Petroleum Institute, 448 US 607, 645–46 (1980) (plurality) (noting that serious delegation concerns would be raised if the Occupational Safety and Health Act were construed to give the Secretary of Labor “unprecedented power over American industry”); Wayman v Southard, 23 US 1, 23 (1825) (suggesting that Congress may not delegate authority over “important subjects” but can do so with respect to “those of less interest”).

27 Brown & Williamson, 529 US at 133–34; see text accompanying notes 75–78.
This article contends that, contrary to the Court’s assumptions, enforcing the nondelegation doctrine through the canon of avoidance undermines, rather than furthers, the constitutional aims of that doctrine. In particular, the Court typically narrows constitutionally doubtful delegations by restricting a broad statute in light of an imputed background purpose. Narrowing a statute in this way, however, threatens to unsettle the legislative choice implicit in adopting a broadly worded statute. Much legislation reflects the fruits of legislative compromise, and such compromises often lead to the articulation of broad policies for agencies and courts to specify through application. For that reason, the Court has recognized that, if “faithful agent” theories of statutory interpretation are to be given effect, the statutory text may well transcend the precise purposes that inspired it and that the judiciary must respect Congress’s choice to legislate in open-ended terms. By artificially narrowing an open-ended statute to its background purpose, decisions like Brown & Williamson upset the terms of such a legislative compromise. If the point of the nondelegation doctrine is to ensure that Congress makes important statutory policy, a strategy that requires the judiciary, in effect, to rewrite the terms of a duly enacted statute cannot be said to serve the interests of that doctrine.

Part I frames the issues by describing Brown & Williamson’s reasoning. Part II discusses the Court’s modern use of the canon of avoidance to vindicate nondelegation values. In addition, it examines the ways in which this practice of avoidance ultimately undermines the interests served by the nondelegation doctrine. Finally, Part III uses Brown & Williamson’s reliance on post enactment legislative history to illustrate the contradiction implicit in the Court’s nondelegation strategy. Part III also suggests that a distinct aspect of the Court’s decision—which construes the FDA’s broad grant of authority in light of the more specific provisions of post-FDCA legislation—may offer a promising alternative for promoting the aims of the nondelegation doctrine.

I. Brown & Williamson Elaborated

In determining the scope of the FDA’s authority, the Court in Brown & Williamson eschewed analysis of the FDCA’s text. Instead, much of the Court’s opinion attempted to narrow the FDCA’s broad terms in light of imputed legislative intent, largely
derived from postenactment legislative history. Because that strategy reflects an unconventional method of statutory interpretation, particularly for the current Court, it may reflect the Court’s evident desire to narrow an otherwise questionable delegation of legislative authority. This part first describes the FDA’s decision to extend its jurisdiction to tobacco; it then discusses the Court’s rejection of that decision.28

A. THE FDA’S ASSERTION OF JURISDICTION

The FDCA grants the FDA authority to regulate (as a “drug”) any “article[ ] (other than food) intended to affect the structure or any function of the body of man or animal.”29 For many years, the FDA asserted that it generally lacked jurisdiction over tobacco, reasoning that tobacco did not satisfy the “intent” requirement unless manufacturers made express claims of therapeutic value.30 In 1995, however, the agency invited public comment on a proposal to reconsider that position.31 After receiving more than 700,000 comments (the most ever submitted to the FDA), the agency found that scientific evidence indicated that nicotine in tobacco “affects the structure or any function of the body”32 and that the tobacco manufacturers’ conduct, in context, demonstrated that those companies “intended” such effects.33

First, the agency concluded that nicotine has “significant phar-
macological effects." In particular, the agency found that it (a) "causes and sustains addiction," (b) produces "sedating or tranquilizing effect[s]" in some circumstances, (c) induces "a stimulant or arousal-increasing effect" in other contexts, and (d) "affects body weight." In fact, the pharmacological effects of nicotine in cigarettes and smokeless tobacco greatly exceed those of nicotine products already regulated by the agency, such as the transdermal patch, nicotine gum, nicotine inhalers, and nicotine paper. The FDA also found that "the powerful psychoactive effects produced by nicotine in cigarettes and smokeless tobacco are comparable to those produced by tranquilizers, stimulants, weight management agents, and drugs used for long-term maintenance of addiction, all of which are indisputably within FDA's jurisdiction."

Second, and more important given the agency's previous position, the FDA cited several factors that, in its view, cumulatively supported a finding that tobacco manufacturers "intended" those effects. The agency found that nicotine's addictive, mood-altering, and weight-reducing effects were so widely recognized that any reasonable manufacturer would foresee that consumers use tobacco to satisfy their addiction or to produce the anticipated effects. Because the law conventionally assumes that persons intend the natural and probable consequences of their actions, the FDA reasoned, such foreseeability satisfied the intent requirement. The agency also concluded that "consumers actually use cigarettes and

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Id at 44651.
13 Id at 44631–32.
14 Id at 44665.
15 Id at 44673.
16 See id at 44634–35, 44698–744.
17 See id at 44633:

When Congress enacted the current definition of "drug" in 1938, it was well understood that "[t]he law presumes that every man intends the legitimate consequences of his own acts." Agnew v United States, 165 U.S. 36, 53 (1897). Consistent with this common understanding, FDA's regulations provide that a product's intended pharmacological use may be established by evidence that the manufacturer "knows, or has knowledge of facts that would give him notice," that the product is being widely used for a pharmacological purpose, even if the product is not being promoted for this purpose. 21 CFR 201.128, 801.4. Thus, FDA may find that a manufacturer intends its product to affect the structure or function of the body when it would be foreseeable to a reasonable manufacturer that the product will (1) affect the structure or function of the body and (2) be used by a substantial proportion of consumers to obtain these effects.
smokeless tobacco predominantly to obtain the pharmacological effects of nicotine,” a further indicum of “intended” effect. Finally, the agency relied on tobacco companies’ statements, research, and actions indicating that they have long known that consumers use tobacco for its pharmacological effects and that they designed cigarettes with those effects in mind. Invoking the “ordinary meaning” of “intend,” the agency concluded that this evidence satisfied the FDCA’s intent requirement.

Because nicotine was a “drug,” the agency could treat the means of delivering it—cigarettes and smokeless tobacco—as “drug delivery devices” within the meaning of the FDCA. This conclusion, in turn, allowed the FDA to invoke a statutory provision that required “a device [to] be restricted to sale, distribution, or use . . . upon such . . . conditions as [the FDA] may prescribe . . . if, because of its potentiality for harmful effect or the collateral measures necessary to its use, [the FDA] determines that there cannot otherwise be reasonable assurance of its safety and effectiveness.”

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40 Id at 44636; see also id at 44635–36, 44807–46. For example, the agency cited major recent studies concluding “that 77% to 92% of smokers are addicted to nicotine in cigarettes.” Id at 44635. Other surveys, moreover, found that “over 70% of young people 10 to 22 years old who are daily smokers reported that they use cigarettes for relaxation,” and “that between one-third and one-half of young smokers report that weight control is a reason for their smoking.” Id at 44636.

41 See id at 44847–45097. Specifically, the agency relied on evidence that manufacturers “have known for decades” that nicotine has significant pharmacological effects and that “consumers use cigarettes primarily to obtain the pharmacological effects of nicotine, including the satisfaction of their addiction.” Id at 44849. It also cited evidence that the manufacturers “have ‘designed’ cigarettes to provide pharmacologically active doses of nicotine to consumers,” in part by conducting “extensive product research and development to establish the dose of nicotine necessary to produce pharmacological effects and to optimize the delivery of nicotine to consumers.” Id at 44850. The agency found similar evidence for smokeless tobacco products. See id at 44643.

42 See id at 44851 & n 413 (citing The American Heritage Dictionary of the English Language 668 (Houghton Mifflin, 1991) (defining “intend” to include “1. To have in mind; plan. 2.a. To design for a specific purpose. b. To have in mind for a particular use . . . .”)).

43 Id at 44397. The Act defines a “device,” in relevant part, as “an instrument, apparatus, implement, machine, contrivance, . . . or other similar or related article, . . . which is . . . intended to affect the structure or any function of the body.” 21 USC § 321(h) (1994). More precisely, the FDA determined that cigarettes and smokeless tobacco were “combination products,” which the Act defines as a “combination of a drug, device, or biologic product.” 21 USC § 353(g)(1) (1994). The agency concluded, however, that it could regulate combination products as drugs, devices, or both, depending on “how the public health goals of the act can be best accomplished.” 61 Fed Reg at 44403 (cited in note 10). Because of the greater flexibility of the FDCA’s provisions governing devices, the FDA chose to regulate cigarettes and smokeless tobacco as “devices.” Brown & Williamson, 529 US at 129.

44 21 USC § 360(e) (1994).
The FDA invoked that authority on the ground that tobacco use "was the single leading cause of preventable death in the United States" and that "[m]ore than 400,000 people die each year from tobacco-related illnesses." Finding that such illnesses could be reduced only by addressing addiction and that "anyone who does not begin smoking in childhood and adolescence is unlikely ever to begin," the agency promulgated regulations specifically aimed at preventing children and adolescents from starting to smoke. The regulations, for example, prohibited the sale of tobacco to persons under 18 years of age, required photo identification for sales to persons under 27, and prohibited selling tobacco through self-service displays or vending machines, except in adult-only locations. The new regulations also imposed significant restrictions on tobacco advertising and promotion. The FDA specifically concluded "that without the access and advertising restrictions imposed in this final rule, no finding that there is a reasonable assurance of safety for cigarettes and smokeless tobacco would be possible."

B. THE COURT'S SEARCH FOR LEGISLATIVE INTENT

Initially, the FDA's interpretation seemed to present a straightforward application of Chevron's familiar framework for judicial review. With respect to an agency-administered statute such as the FDCA, a reviewing court asks first whether Congress has "directly spoken to the precise question at issue." If, however, the statute is "silent

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45 61 Fed Reg at 44398 (cited in note 10).
46 Id at 44398–99.
47 Id at 44615–18.
48 Id at 44616–17.
49 For example, the regulations required advertisements to appear in black-and-white and text-only formats, except in adult-only publications and facilities. See id at 44617. In addition, they banned outdoor advertising within 1,000 feet of schools and playgrounds, the distribution of various promotional products bearing a tobacco brand name or logo, and sponsorship in the tobacco company's name of any "athletic, musical, artistic, or other social or cultural event." Id at 44617–18.
50 Id at 44407.
52 Id at 842.
53 Id at 842–43.
or ambiguous” regarding an interpretive question, the reviewing court must accept the agency’s interpretation, if that interpretation is “reasonable.”56 In such instances, the Court emphasizes that the choice among reasonable alternative interpretations entails the exercise of policy-making discretion.55 Because such discretion more appropriately lies with relatively accountable administrators, rather than relatively unaccountable judges, the Court treats silence or ambiguity in an administrative statute as an implicit delegation of law elaboration authority to the agency.56

Given the breadth of the FDCA’s text, one might have thought that the FDA’s decision to regulate tobacco would be a serious candidate for Chevron deference.57 The FDA’s findings made plain that nicotine “affect[s] the structure or any function of the human body,” and its understanding of “intent” reflected at least a plausible interpretation of that term.58 The Brown & Williamson Court, however, flatly rejected the FDA’s interpretation without ever considering the meaning or scope of the FDCA’s operative terms. Although much disagreement surrounds Chevron’s precise applica-

54 Id at 843–44.
56 See Chevron, 467 US at 865–66: Judges . . . are not part of either political branch of the Government. . . . While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make . . . policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.
57 See, for example, Babbitt v Sweet Home Chapter of Communities for a Greater Oregon, 515 US 687, 707 (1991) (“When Congress has entrusted the Secretary with broad discretion, we are especially reluctant to substitute our views of wise policy for his.”); Norfolk & Western Ry Co. v American Train Dispatchers’ Ass’n, 491 US 117, 218 (1991) (noting that Chevron deference is warranted where the statutory language is “clear, broad, and unqualified”).
58 The meaning of the term “intended” represented the only serious interpretive question. The evidence, however, clearly showed the tobacco companies’ knowledge of nicotine’s physical effects, and the law traditionally presumes that persons intend the natural and probable consequences of their acts. Although the agency had changed its interpretation of “intent” in promulgating its recent regulations, Chevron makes clear that such changes are permissible in cases of ambiguity, provided that the agency has adequately explained its change of position. See Smiley v Citibank (South Dakota), NA, 517 US 735, 742 (1996); Chevron, 467 US at 863. In addition, although the tobacco manufacturers argued that “intent,” as used in the FDCA, was a term of art requiring companies to make express representations of therapeutic effect, see, for example, Brief of Respondent Brown & Williamson Tobacco Corp. 6-28, FDA v Brown & Williamson Tobacco Corp., 529 US 120 (2000), the Court did not rely on or even address that premise in determining the scope of the FDCA.
tion,59 the meaning of the statutory text is always a threshold question in determining the scope of agency power, particularly since the “new textualism” gained influence with (at least some of) the Justices in the 1980s.60 Brown & Williamson, however, simply assumed arguendo that tobacco could satisfy the statutory definition and proceeded to determine congressional “intent” on the coverage of tobacco.61 Perhaps most strikingly, the Court found that Congress had spoken to the precise question at issue, not on the basis of the FDCA, but on the basis of implied “intent” from legislative acts occurring decades after the FDCA’s enactment.

First, the Court adopted a strong presumption of coherence among statutes passed over time; specifically, it reasoned that reading the FDCA’s broad terms to cover tobacco would render that statute incoherent with subsequently enacted statutes that regulated tobacco in targeted ways. The Court explained that if tobacco qualified as a “drug,” the FDA would have to ban it under various provisions of the FDCA.62 A total ban, however, “would contradict


60 See, for example, National R. Passenger Corp. v Boston & Maine Corp., 503 US 407, 417 (1993) (“If the agency interpretation is not in conflict with the plain language of the statute, deference is due. In ascertaining whether the agency’s interpretation is a permissible construction of the language, a court must look to the structure and language of the statute as a whole.”) (citation omitted); K-Mart Corp. v Cartier, Inc., 486 US 281, 292 (1987) (“If the agency regulation is not in conflict with the plain language of the statute, a reviewing court must give deference to the agency’s interpretation of the statute.”).


62 In brief, the Court reasoned that the FDA’s mission is to ensure that regulated products are “‘safe’ and ‘effective.’” Id at 133 (quoting 21 USC § 393(b)(2) (1994)). That objective, the Court explained, “perverts the FDCA” and is central to the very provision on which the agency based its tobacco regulations. Id; see id at 134 (“Even the ‘restricted device’ provision pursuant to which the FDA promulgated the regulations at issue here authorizes the agency to place conditions on the sale or distribution of a device specifically when ‘there cannot otherwise be reasonable assurance of its safety and effectiveness.’”) (quoting 21 USC § 360(e) (1994)). The Court also relied on the FDCA’s provisions governing misbranded drugs. Because tobacco would be “‘dangerous to health when used in the dosage or manner, or with the frequency or duration prescribed, recommended, or suggested in the labeling thereof,'” the Court found that they would be “misbranded” within the meaning of the Act. Id at 135 (quoting 21 USC § 352(j) (1994)). Tobacco would also be misbranded because the tobacco companies would not be able to provide “‘adequate directions for use . . . in such manner and form, as are necessary for the protection of users.’” Id (quoting 21 USC § 352(f)(1) (1994)). Finally, the Court concluded that the FDA would have to classify cigarettes and smokeless tobacco in a category that would require premarking approval. See
Congress’s clear intent as expressed in its more recent, tobacco-specific legislation.”63 Since 1965, Congress has enacted six specific statutes addressing tobacco.64 And, the Court noted, while the adverse health effects of tobacco were widely known when Congress passed these regulatory statutes, Congress always “stopped well short of ordering a ban.”65 Moreover, because Congress enacted certain labeling requirements with the express purpose of protecting commerce “to the maximum extent consistent with” giving consumers adequate information about tobacco’s health effects, the Court inferred a legislative “intent that tobacco products stay on the market.”66

Second, the Court applied strongly purposive interpretive techniques to narrow the FDCA. Based upon the legislative history accompanying the later tobacco statutes, it concluded that Congress had ratified the FDA’s prior assumption that tobacco fell out-

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63 Brown & Williamson, 529 US at 143.
66 Id at 139 (quoting 15 USC § 1331 (1994)).
side its jurisdiction. In particular, when passing its six post-FDCA tobacco statutes, “Congress . . . acted against the backdrop of the FDA’s consistent and repeated statements that it lacked authority under the FDCA to regulate tobacco absent claims of therapeutic benefit by the manufacturer.”67 One example will suffice: In 1965, Congress enacted the Federal Cigarette Labeling and Advertising Act ("FCLAA"),68 which required cigarette manufacturers to place warning labels on all cigarette packages.69 In a series of hearings preceding this enactment, FDA and other administration officials repeatedly advised the relevant congressional committees that the FDA lacked jurisdiction over tobacco products under the FDCA. The FCLAA also followed several unsuccessful legislative attempts to grant the FDA such jurisdiction.70 In light of this history, the Court reasoned that statutes such as the FCLAA had “ratified” the FDA’s position, thereby expressing a legislative “intent” to preclude the exercise of “significant policymaking authority on the subject of smoking and health.”71

Third, because the six post-FDCA statutes “created a distinct regulatory scheme to address the problem of tobacco and health,” the Court concluded that the resulting scheme “preclude[d] any role for the FDA.”72 In this respect, the Court emphasized the “classic judicial task of reconciling many laws enacted over time and getting them to make sense in combination.”73 Specifically, the Court explained that a specific policy found in a later statute controls the interpretation of an earlier and more general statute, even if the earlier statute has not been amended.74

The Court’s approach reflects deeper assumptions about the proper allocation of power in the modern administrative state. Perhaps acknowledging the unconventionality of its decision to forgo

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67 Id at 144.
69 Id § 4, 79 Stat 283.
70 See Brown & Williamson, 529 US at 144–46; see also HR 2248, 89th Cong, 1st Sess, 1 (1965); HR 9512, 88th Cong, 1st Sess, § 3 (1963); HR 5973, 88th Cong, 1st Sess 1 (1963); S 1682, 88th Cong, 1st Sess (1963).
71 Brown & Williamson, 529 US at 149.
72 Id at 144.
73 Id (internal quotation marks omitted) (quoting United States v Fausto, 484 US 439, 453 (1988)).
74 Id at 143–44.
all consideration of the FDCA’s text, the Court recognized that the “nature of the question presented” had shaped its analysis of whether Congress had “directly spoken to the precise question at issue.” Specifically, the Court emphasized that the FDA had invoked its broad statutory authority to “to regulate an industry consisting of a significant portion of the American economy.” Even if Chevron ordinarily instructs courts to presume that a broad or ambiguous administrative statute effects an implicit delegation of lawmaking power to the agency, the Court felt “confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.” To avoid such an extraordinary delegation, the Court credited the implications of post-FDCA tobacco legislation that (in the Court’s view) disclosed “a consistent judgment” to deny the FDA power over tobacco. Thus, although the Court never explicitly invoked the canon of avoidance, Brown & Williamson’s reasoning fits neatly within the Court’s practice of aggressively narrowing administrative statutes to avoid serious nondelegation concerns. Because this approach raises serious but as yet largely unexamined legitimacy concerns, the Court’s practice merits closer examination.

II. Making Sense of the Nondelegation Doctrine

More than a decade ago, the Court explained that “[i]n recent years, our application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that otherwise might be thought to be unconstitutional.” This practice seeks to accommodate the important constitutional interests promoted by the nondelegation doctrine, while avoiding certain pathologies thought to arise from its direct enforcement. Because others have thoroughly examined the competing consider-

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75 Id at 159.
76 Id.
77 Id at 160.
78 Id.
ations that inform the nondelegation debate,80 a brief sketch of the problem will suffice to frame the issue.

A. THE ILLUSORY NONDELEGATION DOCTRINE

Few doctrines have perplexed the Supreme Court more than the nondelegation doctrine. The Court has repeatedly emphasized that (at least in theory) this doctrine bars Congress from delegating its legislative powers to the executive or, for that matter, the judiciary.81 It has matter-of-factly attributed that principle to the constitutional separation of powers and, more particularly, to the fact that Article I of the Constitution vests all legislative powers in Congress.82 Beyond these formal considerations, moreover, Congress presumably was vested with such authority on the basis of its singular qualities.83 More specifically, Article I, Section 7 filters congressional lawmakership powers through the carefully structured process of bicameral passage and presentment to the Presi-

81 See, for example, Mistretta, 488 US at 371–72 (“[W]e long have insisted that ‘the integrity and maintenance of the system of government ordained by the Constitution’ mandate that Congress generally cannot delegate its legislative power to another Branch.”) (quoting Marshall Field & Co. v. Clark, 143 US 649, 692 (1892)).
82 US Const, Art I, § 1 (“All legislative Powers herein granted shall be vested in a Con- gress of the United States . . . .”); see, for example, Loving v United States, 517 US 748, 758 (1996) (“The fundamental precept of the delegation doctrine is that the lawmaking function belongs to Congress, U.S. Const., Art. I, § 1, and may not be conveyed to another branch or entity.”); Touby v United States, 508 US 160, 164–65 (1991) (“The Constitution provides that ‘[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.’ U.S. Const., Art. I, §1. From this language the Court has derived the non- delegation doctrine: that Congress may not constitutionally delegate its legislative power to another branch of Government.”); Mistretta, 488 US at 371 (“The nondelegation doctrine is rooted in the principle of separation of powers that underlies our system of government.”).
83 Loving, 517 US at 757–58 (“Article I’s precise rules of representation, member qualifications, bicameralism, and voting procedure make Congress the branch most capable of responsive and deliberative lawmaking.”).
dent. 84 By dividing legislative power among three relatively independent entities, that intricate and cumbersome process serves several crucial constitutional interests: it makes it more difficult for factions (or, as we would put it, "interest groups") to capture the legislative process for private advantage, 85 it promotes caution and restrains momentary passions, 86 it gives special protection to the residents of small states through the states’ equal representation in the Senate, 87 and it generally creates a bias in favor of fil-

84 US Const, Art I, § 7.
85 See, for example, In re Chadha, 462 US 919, 951 (1983) (noting that bicameralism addressed the “fear that special interests could be favored at the expense of public needs”); Federalist 62 (Madison) in Clinton Rossiter, ed, The Federalist Papers 378–79 (Mentor, 1961) (“[A] senate, as a second branch of the legislative assembly, distinct from and dividing power with the first, . . . doubles the security to the people, by requiring the concurrence of two distinct bodies in schemes of usurpation or perfidy, where the ambition or corruption of one, would otherwise be sufficient.”); Federalist 73 (Hamilton) in Rossiter, ed, The Federalist Papers at 443 (noting that the veto “establishes a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good which may happen to influence a majority of that body”); 2 Joseph Story, Commentaries on the Constitution of the United States § 882, at 348 (Boston, Hillard, Gray, 1833) (“[T]he [veto] power . . . establishes a salutary check upon the legislative body, calculated to preserve the community against the effects of faction, precipitancy, unconstitutional legislation, and temporary excitements, as well as political hostility.”) (citation omitted); see also Richard J. Pierce, Jr., The Role of the Judiciary in Implementing an Agency Theory of Government, 64 NYU L Rev 1239, 1249 (1989) (“The Framers created two antitoxes to factionalism in Congress: bicameralism and presentment. Bicameralism forces a potential faction to capture both Houses of Congress simultaneously. Presentment gives the president—the politically accountable entity least susceptible to capture by factions—voice in the legislative process.”).
86 Chadha, 461 US at 951 (“The division of the Congress into two bodies assures that the legislative power would be exercised only after opportunity for full study and debate in separate settings.”); The Pocket Veto Cases, 279 US 653, 678 (1929) (arguing that it is an “essential . . . part of the constitutional provisions, guarding against ill-considered and unwise legislation, that the President, on his part, should have the full time allowed him for determining whether he should approve or disapprove a bill, and if disapproved, for adequately formulating the objections that should be considered by Congress”). The calming influence of bicameralism is nicely captured in an analogy attributed to George Washington:

There is a tradition that, on his return from France, Jefferson called Washing-

‘Why,’ asked Washington, ‘did you pour that coffee into your saucer?’ ‘To cool it,’ quoth Jefferson. ‘Even so,’ said Washington, ‘we pour legislation into the sena-
torial saucer to cool it.’
87 See, for example, Garcia v San Antonio Metropolitan Transit Authority, 469 US 528, 551–52 (1985) (discussing the Senate’s essential role in protecting interests of states); Manning, 101 Colum L Rev at 75–77 (cited in note 24); Sunstein, 67 U Chi L Rev at 319 (cited in note 5).
tering out bad laws by raising the decision costs of passing any law.88 The nondelegation doctrine protects those interests by forcing specific policies through the process of bicameralism and presentation, rather than permitting agency lawmaking on the cheap.

Despite these apparent virtues, the nondelegation doctrine has, with the exception of one brief moment, never gained traction with the Court—at least not when invoked to invalidate acts of Congress.89 Under black-letter law, the Court will uphold any organic statute that supplies an “intelligible principle” to channel agency discretion.90 Virtually anything, moreover, counts as an intelligible

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88 The bias in favor of blocking legislation did not go unnoticed during the debates over the Constitution’s adoption. See, for example, Federalist 62 (Madison) in Rossiter, ed., The Federalist Papers at 378 (cited in note 85) (acknowledging that “this complicated check on legislation may in some instances be injurious as well as beneficial”); Federalist 73 (Hamilton) in Rossiter, ed., The Federalist Papers at 443 (noting that “the power of preventing bad laws includes that of preventing good ones”). And both the costs and benefits associated with a burdensome legislative process were frankly acknowledged in these debates. See, for example, Federalist 62 (Madison) in Rossiter, ed., The Federalist Papers at 378 (arguing that “the facility and excess of law-making seem to be the diseases to which our governments are most liable”); Federalist 73 (Hamilton) in Rossiter, ed., The Federalist Papers at 443 (“The injury which may possibly be done by defeating a few good laws will be amply compensated by the advantage of preventing a number of bad ones.”).

90 The Court only twice invalidated statutes on nondelegation grounds. A LA Schechter Poultry Corp. v United States, 295 US 495 (1935); Panama Refining Co. v Ryan, 293 US 388 (1935).

89 J.W. Hampton, Jr., & Co. v United States, 276 US 394, 409 (1928) (articulating the “intelligible principle” test). The Court apparently believes that when a statute sets down an intelligible principle, the agency can be thought of as implementing legislative directions, rather than exercising legislative authority. See, for example, Loving, 317 US at 770 (“The intelligible-principle rule seeks to enforce the understanding that Congress may not delegate the power to make laws and so may delegate no more than the authority to make policies and rules that implement its statutes.”); Yakus v United States, 321 US 414, 426 (1944) (“Only if we could say that there is an absence of standards for the guidance of the Administrator’s action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would we be justified in overriding its choice of means for effecting its declared purpose.”); Marshall Field & Co., 143 US at 694 (“The true distinction . . . is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law.”) (quoting Cincinnati, Wilmington & Zanesville R. Co. v Commissioners, 1 Ohio St 77, 88–89 (1852)). Under that view, the agency is engaged in law “execution,” rather than receiving delegated legislative authority. See Loving, 317 US at 777 (Scalia concurring in part and concurring in the judgment) (“What Congress does is to assign responsibilities to the Executive; and when the Executive undertakes those assigned responsibilities it acts, not as the ‘delegate’ of Congress, but as the agent of the People. At some point the responsibilities assigned can become so extensive and so unconstrained that Congress has in effect delegated its legislative power; but until that point of excess is reached there exists, not a ‘lawful’ delegation, but no delegation at all.”).
principle.91 Two considerations appear to explain much of this attitude.92

First, the Court has suggested that if government is to function, Congress must have the power to delegate significant policy discretion to the law’s executors.93 And the appropriate limits of such delegation “must be fixed according to common sense and the inherent necessities of . . . governmental co-ordination.”94 Starting from that premise, the Court’s hands-off approach reflects “a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.”95

Second, the Court’s reluctance to invalidate statutes on the basis of the nondelegation doctrine reflects serious concerns about its own competence to draw appropriate lines between permissible and impermissible delegations. All legislation necessarily leaves some measure of policy-making discretion to those who implement it.96 Accordingly, enforcement of the nondelegation doctrine nec-

91 See, for example, Liebner v United States, 334 US 742, 785–86 (1948) (sustaining agency authority to recoup “excessive profits” on war contracts); American Power & Light Co. v SEC, 329 US 90, 105 (1946) (SEC may reject corporate reorganizations that are not “fair and equitable”); NBC v United States, 319 US 190, 225–26 (1943) (Congress may grant FCC power to allocate broadcasting licenses in “the public interest, convenience, and necessity”).


93 See, for example, United States v Shreveport Grain & Elevator Co., 277 US 77, 85 (1932) (approving “directions to those charged with the administration of the act to make supplementary rules and regulations allowing reasonable variations, tolerances, and exemptions, which, because of their variety and need of detailed statement, it was impracticable for Congress to prescribe”); Union Bridge Co. v United States, 204 US 364, 387 (1907) (“It is not too much to say that a denial to Congress of the right, under the Constitution, to delegate the power to determine some fact or the state of things upon which the enforcement of its enactment depends, would be ‘to stop the wheels of government’ and bring about confusion, if not paralysis, in the conduct of the public business.”).


95 Mistretta, 488 US at 372; see also, for example, American Power & Light Co., 329 US at 105 (“The judicial approval accorded these ‘broad’ standards for administrative action is a reflection of the necessities of modern legislation in dealing with complex economic and social problems.”); Sunshine Anthracite Coal Co. v Adkins, 310 US 381, 398 (1940) (“Delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility.”).

96 See Mistretta, 488 US at 415 (Scalia dissenting) (arguing “that no statute can be entirely precise, and that some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it”). The inevitability of interpretive discretion is not a new idea. See, for example, 1 William Blackstone,
essarily reduces to the question whether a statute confers too much discretion. Without a reliable metric (other than an I-know-it-when-I-see-it test), the Court has long doubted its capacity to make principled judgments about such questions of degree. Consequently, even if the nondelegation doctrine does represent a fundamental premise of the constitutional structure, a growing judicial consensus assumes that “it is not an element readily enforceable by the courts,” at least not by means of direct judicial invalidation of administrative statutes.

**B. THE NONDELEGATION DOCTRINE AS A CANON OF AVOIDANCE**

Despite the Court’s apparent refusal to enforce the nondelegation doctrine directly, cases such as Brown & Williamson illustrate the Court’s modern strategy of using the canon of avoidance to promote nondelegation interests. Where a statute is broad enough to raise serious concerns under the nondelegation doc-

Commentaries on the Laws of England *61 (noting that “in laws all cases cannot be foreseen and expressed”); Federalist 37 (Madison) in Rossiter, ed., The Federalist Papers at 229 (cited in note 85) (“[I]t must happen that however accurately the objects may be discriminated in themselves, and however accurately the discrimination may be considered, the definition of them may be rendered inaccurate by the inaccuracy of the terms in which it is delivered.”).

97 As Chief Justice Marshall once put it:

The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law; but the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a court will not enter unnecessarily.

Wayman v Southard, 23 US 1, 46 (1825). For further discussion of this point, see, for example, Manning, 97 Colum L Rev at 727 (cited in note 21); Sunstein, 67 U Chi L Rev at 326–28 (cited in note 5).

98 Mistretta, 488 US at 415 (Scalia dissenting); see also FPC v New England Power Co., 415 US 345, 352–54 (1974) (Marshall concurring) (noting that the Court has “virtually abandoned” nondelegation doctrine); Sunstein, 67 U Chi L Rev at 326–28 (cited in note 5). The Court itself recently suggested that courts cannot successfully draw the line between lawmaking and law implementation:

The Government’s distinction between “making” law and merely “enforcing” it, between “policymaking” and mere “implementation,” is an interesting one. It is perhaps not meant to be the same as, but it is surely reminiscent of, the line that separates proper congressional conferral of Executive power from unconstitutional delegation of legislative authority for federal separation-of-powers purposes. This Court has not been notably successful in describing the latter line; indeed, some think we have abandoned the effort to do so.


trine, the Court simply cuts it back to acceptable bounds. This strategy, it is said, offers judges “a finer weapon” than Marbury-style judicial review. If judges cannot draw principled lines between permissible and excessive delegations, they can interpret statutes. And because judges routinely construe statutes to avoid grave constitutional doubts in other contexts they can rely on the same approach to avoid serious questions under the nondelegation doctrine. As a canon of construction, the nondelegation doctrine has proven attractive to many who doubt its efficacy as a basis for judicial review.

100 I would distinguish this practice from cases in which the Court simply concludes that the text of an administrative statute, understood in context, has a specialized connotation that is narrower than the everyday meaning of the terms. For instance, sometimes a statutory phrase seems exceedingly broad on its face, but draws refinement from established traditions or practices associated with the phrase or subject in question. See, for example, Fahey v Mallonee, 332 US 245, 250 (1947) (reading authority to promulgate regulations for appointing conservators for savings and loan associations in light of “well-defined practices for the appointment of conservators”); American Power & Light Co., 329 US at 104 (statute prohibiting police corporate practices that “unduly or unnecessarily complicate the structure” of a public utility or “unfairly or inequitably distribute voting power among [its] security holders” are intelligible to those “familiar with corporate realities”); Federal Radio Comm’n v Nelson Bros Bond & Mortgage Co., 289 US 266, 285 (1933) (narrowing “public convenience, interest or necessity” in light of “its context [and] the nature of radio transmission and reception”). Often, this strategy involves the conventional idea that when Congress uses a term of art, “it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken.” Morrisette v United States, 342 US 246, 263 (1952). And such cases simply reflect the reality that statutes must be interpreted in context. See Deal v United States, 508 US 129, 132 (1993) (applying the “fundamental principle of statutory construction . . . that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used”). Such decisions do not involve the alteration of statutory meaning to avoid a serious question under the nondelegation doctrine.

102 See, e.g., Jean v Nelson, 472 US 846, 854 (1985); NLRB v Catholic Bishop, 440 US 490, 499–501 (1979); Int’l Ass’n of Machinists v Street, 367 US 740, 749 (1961). Professor Sunstein has suggested that, in general, applying the canon of avoidance to administrative statutes serves a special set of nondelegation interests; it compels Congress to speak explicitly when it wishes to push against constitutional boundaries. See Sunstein, 67 U Chi L Rev at 331–32 (cited in note 5). This paper does not address that broad claim as it relates to the avoidance of constitutional questions arising under provisions such as the First Amendment, which do not speak directly to the legislative process prescribed by Article I. Rather, it considers only those cases in which the Court invokes the avoidance canon to vindicate nondelegation concerns as such.

104 Gewirtz, 40 L & Contemp Probs at 73–75 (cited in note 101).

In general, applying the canon of avoidance entails excluding a given statutory application because that application raises a serious question under a constitutional provision such as the First Amendment. This means that the Court’s interpretation is driven by the underlying substantive protection (e.g., do not construe the NLRA to ban peaceful leafleting). But the underlying issue is far different in the nondelegation context. Here, the Court’s task is simply to narrow what might otherwise be constitutionally excessive generality. To achieve that goal, the Court typically posits a plausible background purpose to restrict otherwise broad and unqualified statutory language. *Industrial Union Department, AFL-CIO v American Petroleum Institute,* better known as the *Benzene* case, is perhaps the most famous illustration of this approach. Section 6(b)(5) of the Occupational Safety and Health Act (“the OSH Act”) prescribed very open-ended regulatory criteria for “toxic materials or harmful physical agents.”

In particular, Section 6(b)(5) required the Secretary of Labor to “set the standard which most adequately assures, to the extent feasible, . . . that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard.” Benzene was a nonthreshold toxic material; scientific methods could identify no safe exposure level. In those circumstances, the Secretary of Labor interpreted Section 6(b)(5) to require the lowest level of benzene exposure that was not only technologically feasible but also economically feasible (in the sense that it would not threaten the financial viability of benzene-related industries).

In an opinion concurring in the judgment, then-Justice Rehnquist contended that the phrase “to the extent feasible” provided no intelligible principle to guide the Secretary’s discretion; it gave the Secretary “no indication where on the continuum of relative safety he should draw his line.” While agreeing that the OSH Act raised serious nondelegation concerns, Justice Stevens’s plurality opinion invoked the canon of avoidance to narrow the Act to a constitutionally acceptable breadth. Emphasizing that the Act

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107 29 USC § 655(b)(5).
108 Id.
110 Id at 675 (Rehnquist concurring in the judgment).
111 Id at 642–46 (plurality opinion).
would "give the Secretary unprecedented power over American industry" if "limited only by the constraint of feasibility," the plurality imposed a threshold requirement that the Secretary find a "significant risk" to employee health before adopting a regulation.\textsuperscript{112} Although the OSH Act itself nowhere explicitly required a "significant risk" element, the plurality derived that requirement largely from two sources. First, Section 3(8) of the Act generally defined "occupational safety and health standard" to mean measures "reasonably necessary or appropriate to provide safe or healthful employment and places of employment."\textsuperscript{113} Focusing on the word "safe" in Section 3(8), the plurality reasoned that "a workplace can hardly be considered 'unsafe' unless it threatens the workers with a significant risk of harm."\textsuperscript{114} The Court then read the Act's general definition of "occupational safety and health standard" into the more specific criteria prescribed by Section 6(b)(5) for standards governing toxic materials.\textsuperscript{115} In addition, the plurality cited legislative history that (in its view) suggested a legislative purpose to eliminate only "significant" risks of harm.\textsuperscript{116} The plurality then narrowed Section 6(b)(5)'s broad instructions to cover only the particular evil that the Act was said to address.

As others have argued, the plurality's imposition of a "significant risk" requirement seems to rewrite the OSH Act.\textsuperscript{117} It surely does not reflect its most natural reading under established rules of construction. Because the phrase "safe or healthful" (as used in Section 3(8)) is nowhere defined, its \textit{generally applicable} terms should

\textsuperscript{112} Id at 645.
\textsuperscript{113} 29 USC § 652(8).
\textsuperscript{114} \textit{American Petroleum Institute}, 448 US at 642 (plurality opinion).
\textsuperscript{115} Id at 642–43.
\textsuperscript{116} Id at 646–52.
\textsuperscript{117} See, for example, Jerry L. Mashaw, \textit{As If Republican Interpretation}, 97 Yale L J 1685, 1691 (1989) ("One common understanding of the Supreme Court's judgment in that case . . . is that the Court rewrote the Occupational Safety and Health Act in order to avoid affirming what it perceived to be an unnecessarily costly health regulation."); Martin Shapiro, \textit{Administrative Discretion: The Next Stage}, 92 Yale L J 1487, 1507 (1992) (noting that courts "may strike their own balance, declaring it the legislature's true intent," and that the \textit{Benzene} plurality "read a requirement of 'significant risk' into the statute"); Richard B. Stewart, \textit{Regulatory Jurisprudence: Canons Redux}, 79 Calif L Rev 807, 817–18 (1991) (noting the oddity of precluding an agency "from regulating a risk a court might deem not 'significant'—where the statute does not contain any requirement of 'significance' and, indeed, where it provides that toxic substance standards must ensure 'to the extent feasible . . . that no employee will suffer material impairment of health or functional capacity'") (book review of Cass R. Sunstein, \textit{After the Rights Revolution} (Harvard Univ Press, 1990)).
have drawn content from the Section 6(b)(5)'s specific requirement that standards for toxins ensure "to the extent feasible . . . that no employee will suffer material impairment of health or functional capacity."118 That is to say, Section 6(b)(5) specifies what counts as "safe or healthful" where toxins are concerned. Further, as the separate opinions in Benzene clearly establish, the legislative history did not speak with the clarity of purpose that the plurality suggests.119 In light of these considerations, the Court's strategy must be understood as a decision to inject the OSH Act with a plausible, if not legislatively mandated, purpose that would civilize an otherwise "sweeping delegation of legislative power' that . . . might be unconstitutional."120

Although the Court has now identified this method as its preferred (if not exclusive) strategy for addressing nondelegation concerns,121 it has failed to confront the question whether judicial narrowing of self-conscious statutory breadth reflects a legitimate means to enforce a doctrine that is designed to ensure legislative responsibility for making important policy choices. The answer to that question casts important light on Brown & Williamson.

118 As Justice Marshall's dissenting opinion put it:

The plurality's interpretation renders utterly superfluous the first sentence of § 655(b)(5), which . . . requires the Secretary to set the standard "which most adequately assures . . . that no employee suffer material impairment of health." . . . By so doing, the plurality makes the text for standards regulating toxic substances and harmful physical agents substantially identical to the test for standards generally—plainly the opposite of what Congress intended. And it is an odd canon of construction that would insert in a vague and general definitional clause a threshold requirement that overcomes the specific language placed in a standard-setting provision.

American Petroleum Institute, 448 US at 709 (Marshall dissenting).

119 See American Petroleum Institute, 448 US at 676–82 (Rehnquist concurring in the judgment) (arguing that the "somewhat cryptic legislative history" does not impose a significant risk requirement or impose meaningful limits on the "feasibility" requirement); id at 710–11 (Marshall dissenting) (arguing that the plurality relied on "isolated statements in the legislative history," which in context do not support the requirement of a threshold finding of significant risk).

120 Id at 646 (plurality) (citation omitted).

121 See Mistretta, 488 US at 374 n 7. For other applications of this approach, see, for example, National Cable Television Ass'n v FCC, 415 US 336, 341–42 (1974) (reading the Independent Offices Appropriations Act "narrowly to avoid constitutional problems" raised by agency's open-ended authority to impose "fees" on regulated parties; holding that "fee" must reflect benefit to regulated party); FPC v New England Power Co., 415 US 345 (same); National Ass'n of Broadcasters v Copyright Royalty Tribunal, 675 F2d 367, 376 n 12 (DC Cir 1982) (finding an intelligible principle to guide the tribunal in disbursing cable royalty fees in "specific statements in the legislative history and in the general philosophy of the Act itself").
C. THE LEGISLATIVE PROCESS IMPLICATIONS OF NARROW CONSTRUCTION

Because the nondelegation doctrine seeks to ensure that binding legislative commands are the product of the legislative process mandated by Article I, the narrow construction strategy is self-defeating unless the Court can somehow justify its creative interpretations as a faithful reflection of legislative, rather than judicial, commands. Otherwise, the narrow construction strategy does not place responsibility with Congress (as the nondelegation principle instructs), but merely substitutes judicial discretion for agency discretion in defining the statute’s meaning. Until recently, this possibility raised little concern. Under the reasoning of decisions such as Church of the Holy Trinity v United States,\textsuperscript{122} courts did not intrude upon legislative supremacy when they narrowed seemingly overbroad language to reflect the legislation’s apparent background purpose.\textsuperscript{123} The reason was this: Congress legislates against constraints of limited time, resources, and foresight; it must rely on imperfect language to express its intentions. Because statutes will therefore be overinclusive and underinclusive in some circumstances, a court was thought to promote, rather than disserve, legislative supremacy when it conformed an imperfect statutory text to its background purposes.\textsuperscript{124} To the extent that this interpretive technique was otherwise legitimate, it assuredly made sense for the judiciary to invoke that method to prevent Congress from pressing “into dangerous constitutional thickets.”\textsuperscript{125}

Emphasizing the insights of public choice theory,\textsuperscript{126} however,

\textsuperscript{122} 143 US 457 (1892); see also, for example, California Federal Savs & Loan Ass'n v Guerra, 479 US 272, 284 (1987); United Steelworkers v Weber, 443 US 193, 202 (1979); Train v Colorado Public Interest Research Group, 426 US 1, 10 (1976).

\textsuperscript{123} I have discussed Holy Trinity’s foundations in greater detail elsewhere. See Manning, 101 Colum L Rev at 10–15 (cited in note 24).

\textsuperscript{124} In Holy Trinity, for example, Congress had broadly prohibited the importation of “labor or service of any kind.” See Alien Contract Labor Act of 1885, ch 164, § 1, 23 Stat 332, 332. But the title of the act, its legislative history, and the circumstances surrounding its enactment suggested that Congress had done so for the apparent purpose of preventing “the influx of this cheap, unskilled labor.” Holy Trinity, 143 US at 465. In light of this background purpose, the Court felt justified in clipping back the Act’s broad prohibition to exclude professionals (“brain toilers”) from its sweep. Id at 464; see also id at 459 (noting that judicial efforts to conform a broad text to its purpose are “not the substitution of the will of the judge for that of the legislator”).

\textsuperscript{125} Public Citizen v U.S. Dep’t of Justice, 491 US 440, 466 (1989).

\textsuperscript{126} Public choice theory is of course a branch of political science that uses the insights of economics and game theory to analyze the processes of governmental decision making.
modern textualism has in recent years challenged the legitimacy of this method of clipping back otherwise unqualified statutory texts. For several related reasons, textualists believe that the legislative process is too complex and messy to permit reliable discernment of legislation's unexpressed purposes in the manner suggested by Holy Trinity. First, statutes are often the product of compromise among competing interest groups, and the statutory text may reflect a compromise that falls short of or exceeds the background purpose that apparently inspired it. Accordingly, courts must enforce not a statute's background purposes but the outcomes reflected in the language adopted. Second, building on Arrovian social choice theory, textualists argue that a statute's ultimate content may in fact reflect procedural factors, such as the sequence of alternatives presented (agenda manipulation) and the practice of strategic voting (logrolling). For that reason, it is dif-


127 As discussed below, this challenge bears directly on the legitimacy of narrowing administrative statutes to avoid nondelegation concerns. See text accompanying notes 136–46.

128 Because Judge Easterbrook has been the most consistent exponent of this position, much of the following discussion is drawn from his writings.


130 See, for example, Frank H. Easterbrook, Foreword: The Court and the Economic System, 98 Harv L Rev 4, 46 (1984) (noting that in such instances, “[w]hat Congress wanted was the compromise, not the objectives of the contending interests”). For helpful descriptions of the public choice critique of strong purposivism, see William N. Eskridge, Jr. and Philip P. Frickey, Statutory Interpretation as Practical Reasoning, 42 Stan L Rev 321, 335 (1990) (explaining public choice theory's contention “when a court uses purposivist analysis to elaborate a statute, it may actually undo a deliberate and precisely calculated deal worked out in the legislative process”); Philip P. Frickey, From the Big Heat to the Big Sleep: The Revival of Theory in Statutory Interpretation, 77 Minn L Rev 241, 251 (1992) (discussing the claim that judges could “reach the wrong results” by “promoting a public policy purpose gleaned from the statute rather than following the true lines of legislative compromise”); Manning, 101 Colum L Rev at 18 (cited in note 24).


132 See Frank H. Easterbrook, Statutes' Domains, 50 U Chi L Rev 533, 547–48 (1983): Although legislators have individual lists of desires, priorities, and preferences, it turns out to be difficult, sometimes impossible, to aggregate these lists into a coherent collective choice. Every system of voting has flaws. The one used by legislatures is particularly dependent on the order in which decisions are made. Legislatures customarily consider proposals one at a time and then vote them up or down. This method disregards third or fourth options and the intensity with which legislators prefer one option over another. Additional options can be consid-
difficult (if not impossible) to know why a statute took the particular shape that it did—and thus artificial to alter the statute’s clear text to promote the “true” legislative purpose.\(^{133}\) Third, to the extent that (contrary to public choice theory) legislation reflects an accessible and coherent purpose, the breadth of a statute itself says something important about that purpose. Because Congress can (and does) legislate alternatively through open-ended standards or specific rules, shifting a statute’s level of generality to conform to its background purpose dishonors an apparent congressional choice to legislate in broader (or narrower) terms.\(^{134}\)

Although the Court has not fully embraced textualism,\(^{135}\) it has assimilated certain important textualist assumptions that cast doubt on its nondelegation strategy. The Court has thus emphasized that Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members

\[^{133}\text{In other words, if one accepts the premises of public choice theory, the very notion “that statutes have purposes or embody policies becomes quite problematic, since the content of the statute simply reflects the haphazard effect of strategic behavior and procedural rules.” Farber and Frickey, Law & Public Choice at 41 (cited in note 126) (critically discussing the implications of Arrovian public choice theory).}\]

\[^{134}\text{As Judge Easterbrook has explained, “[s]ometimes Congress specifies values or ends, things for the executive and judicial branches to achieve, but often it specifies means, creating loopholes but greater certainty.” Frank H. Easterbrook, Text, Structure, and History in Statutory Interpretation, 17 Harv J L & Pub Pol 61, 68 (1994). Relying on “an imputed spirit to convert one approach into another dishonors the legislative choice as expressly as refusing to follow the law.” Id.}\]

\[^{135}\text{Michael C. Dorf, Foreword: The Limits of Socratic Deliberation, 112 Harv L Rev 4, 6 (1998) (describing the Court’s eclectic approach to statutory interpretation). For example, the modern Court sometimes engages in strongly purposive interpretation. See Clinton v New York, 524 US 417, 428–29 (1998) (broadening an expedited review provision because the literal meaning undermined the statutory purpose to provide “a prompt and authoritative judicial determination of the constitutionality of the [Line Item Veto] Act”); Lewis v United States, 523 US 153, 160 (1998) (refusing to enforce a statute’s conventional meaning when “a literal reading of the words . . . would dramatically separate the statute from its intended purpose”).}\]
may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises. Invocation of the “plain purpose” of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise . . . .

This premise has been a recurring theme in many recent cases. Perhaps more important, it has led the Court to conclude that, for unknowable reasons, Congress often adopts statutory texts that transcend the purpose that (apparently) inspired their enactment. Such breadth is a legislative signal that warrants judicial respect. Thus, the Court recently emphasized that “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”

In another recent case, the Court made clear that “it is not, and cannot be, our practice to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy—even assuming that it is possible to identify that evil from something other than the text of the statute itself.”

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137 See, for example, MCI Telecommunications Corp. v FCC, 512 US 218, 231 (1994) (Scalia) (noting that judges “are bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes”) (Scalia); Landgraf v USI Film Products, Inc., 511 US 244, 286 (1993) (Stevens) (“Statutes are seldom crafted to pursue a single goal, and compromises necessary to their enactment may require adopting means other than those that would most effectively pursue the main goal.”); West Virginia Univ. Hosps v Casey, 499 US 83, 98–99 (1990) (Scalia) (“The best evidence of . . . purpose is the statutory text adopted by both Houses of Congress and submitted to the President.”); Pension Benefit Guaranty Corp. v LTV Corp., 496 US 633, 646–47 (1990) (Blackmun) (’’[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simpliciter to assume that whatever further the statute’s primary objective must be the law.’’) (quoting Rodriguez v United States, 480 US 522, 526 (1987) (per curiam)).


139 Brogan v United States, 522 US 398, 403 (1998). In Brogan, the Court refused to narrow 18 USC § 1001, which prescribes criminal penalties for any person who “knowingly and willfully . . . makes any false, fictitious or fraudulent statements or representations” concerning “any matter within the jurisdiction” of a federal agency. The courts of appeals had almost uniformly held that § 1001 incorporated an implied exception for the so-called “exculpatory no”—that is, falsely replying “no” to a federal investigator’s question about culpability. Brogan, 522 US at 401 (collecting cases). Brogan defended that position by arguing that § 1001’s purpose was to prevent the “perversion” of the governmental functions and that his simple denial of guilt did not produce that mischief. Although the Court had previously described § 1001’s purpose in precisely such terms in United States v Gilliland, 312 US 86, 93 (1941), the majority in Brogan perceived “no inconsistency whatsoever between
may mean that the legislative majority wished to leave the statute’s precise application to future resolution, that contending forces could not agree on a more precise expression of policy, or that legislators simply did not foresee all the implications of the text they adopted. Without knowing why Congress spoke in broad terms, the Court must accept that “the reach of a statute often exceeds the precise evil to be eliminated.”

And textual open-endedness must be understood not as the likely reflection of unanticipated overbreadth (as in *Holy Trinity*), but rather as the presumed exercise of legislative choice.

Such principles have particular force in the context of administrative statutes. As discussed, the Court accepts broad delegations largely because Congress cannot always foresee and provide for a statute’s detailed applications. *Chevron* reflects precisely this assumption. The *Chevron* Court thus explained that Congress might choose to enact an open-ended administrative statute for a host of reasons that are unknowable to a reviewing court:

Perhaps [Congress] consciously desired the [agency] to strike the [specific policy] balance . . ., thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency. For judicial purposes, it matters not which of these occurred.

If that assumption is correct, a reviewing court risks unsettling a legislative choice to leave a problem for another day when it imposes upon a statute determinacy that Congress itself did not sup-

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140 Id; see also Sunstein, 47 Duke L J at 1044–46 (cited in note 28) (discussing the implications of *Brogan* and *Oncale* for the meaning of the FDCA).


143 Id at 865.
ply.\textsuperscript{145} Especially in the administrative context (where constitutional presumptions are said to favor agency rather than judicial resolution of indeterminacy),\textsuperscript{146} a court must respect a statute’s lack of specificity, just as it must respect a statute’s specificity when Congress has spoken clearly. Accordingly, when the Court narrows a broad administrative statute to reflect an unenacted purpose, as in Benzene (or, as we shall see, Brown & Williamson), its own precedents suggest that it is disturbing the very choice or compromise that the legislative process has produced.

To conclude that narrow construction contradicts legislative supremacy does not of course answer the separate question whether such a strategy reflects a legitimate means of avoiding serious non-delegation questions. As a general matter, the modern canon of avoidance instructs courts to interpret statutes to avoid serious constitutional questions if such an interpretation is “fairly possible.”\textsuperscript{147} Although this canon is increasingly controversial, its standard justification is relatively straightforward.\textsuperscript{148} In the interests of majoritarian democracy and legislative supremacy, federal courts must refrain from needlessly exercising their Marbury power to

\textsuperscript{145} For an excellent discussion of the premise that many administrative statutes effectively grant agencies common law powers to adapt broadly articulated policies to unforeseen circumstances, see Sunstein, 47 Duke L J at 1019 (cited in note 28).

\textsuperscript{146} A constitutional preference for more accountable decision making is of course the standard explanation of Chevron deference. See, for example, Thomas W. Merrill, Judicial Deference to Executive Precedent, 101 Yale L J 969, 978 (1992) (“In order to make deference a general default rule, the Court had to come up with some universal reason why administrative interpretations should be preferred to the judgments of Article III courts. Democratic theory supplied the justification; agency decisionmaking is always more democratic than judicial decisionmaking because all agencies are accountable (to some degree) to the President, and the President is elected by the people.”); Pierce, 64 NYU L Rev at 1256 (cited in note 85) (Chevron’s reasoning reflects “an effort to reconcile the administrative state with principles of democracy”).

\textsuperscript{147} Crowell v Benson, 285 US 22, 62 (1932) (“When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.”). Under classical avoidance doctrine, courts were to construe statutes, if possible, to avoid a conclusion of unconstitutionality. See John C. Nagle, Delaware & Hudson Revisited, 72 Notre Dame L Rev 1495, 1498–1504 (1997) (describing classical avoidance). The modern canon, in contrast, focuses on interpretations that “would raise serious constitutional problems.” Edward J. DeBartolo Corp. v Florida Gulf Coast Bldg & Constr. Trades Council, 485 US 568, 575 (1988). This paper uses “the canon of avoidance” or “the avoidance canon” throughout to refer to the modern canon.

\textsuperscript{148} The following points are outlined in Henry J. Friendly, Benchmarks 211 (Univ of Chicago Press, 1967).
hold statutes unconstitutional.\textsuperscript{149} This means that courts should never invalidate a statute if a plausible alternative interpretation would sustain the law.\textsuperscript{150} And if such a saving construction is available, courts must adopt it without first passing on the constitutional question; to do otherwise would be to issue an advisory opinion on the Constitution’s meaning.\textsuperscript{151} Finally, by assuming that Congress did not intend to “press into dangerous constitutional thickets,”\textsuperscript{152} the Court also takes seriously the legislator’s oath to the Constitution.\textsuperscript{153} So understood, the canon is often defended as a doctrine of legislative supremacy.\textsuperscript{154}

Recent scholarship, however, has shown that the legislative supremacy argument, at best, cuts two ways. It is true that the Court has stated that it will apply the canon of avoidance only when a statute is “‘susceptible’” of the saving construction,\textsuperscript{155} and that the

\begin{footnotesize}
\textsuperscript{149} See, for example, \textit{Specter Motor Serv. v McLaughlin}, 323 US 101, 105 (1944) (“If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.”); \textit{Adzander v TVA}, 297 US 288, 346 (1936) (Brandes concurring) (“The Court [has] developed . . . a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision.”).

\textsuperscript{150} See, for example, \textit{Siler v Louisville & Nashville R. Co.}, 213 US 175, 191 (1909) (“[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.”).

\textsuperscript{151} See, for example, \textit{United States v Rumely}, 328 US 41, 48 (1953) (“Grave constitutional questions are matters properly to be decided by this Court but only when they inescapably come before us for adjudication. Until then it is our duty to abstain from marking the boundaries of congressional power or delimiting the protection guaranteed by the [Constitution].”).

\textsuperscript{152} \textit{Public Citizen}, 491 US at 466.

\textsuperscript{153} See \textit{Solid Waste Agency of Northern Cook County v U.S. Army Corps of Engineers}, 121 S Ct 675, 683 (2001) (“This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority.”); \textit{DeBartolo}, 485 US at 575 (noting that the canon of avoidance “not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like th[e] Court, is bound by and swears an oath to uphold the Constitution.”).

\textsuperscript{154} See, for example, William K. Kelley, \textit{Avoiding Constitutional Questions as a Three-Branch Problem}, 86 Cornell L Rev (2001) (forthcoming) (describing the legislative supremacy justification for the canon of avoidance).

\textsuperscript{155} \textit{Jones v United States}, 526 US 227, 239 (2000) (“[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [a court’s] duty is to adopt the latter.”) (quoting \textit{United States ex rel Attorney General v Delaware & Hudson Co.}, 213 US 366, 408 (1919)).
\end{footnotesize}
canon is "'not a license for the judiciary to rewrite language enacted by the legislature.'"156 Still, these protestations hardly convey the full picture. As others have noted, the canon of avoidance does no work unless used to depart from the most likely or natural meaning of a statute.157 Indeed, the Court itself has often recognized that the avoidance canon may compel acceptance of a "strained" interpretation or, by the same token, rejection of the "most natural" reading of a statute.158 Hence, in Professor Schauer's words, the values served by the avoidance canon come at a "cost to whatever systemic values lead a constitutionally unimpeded interpreter to interpret a statute one way rather than another."159

Indeed, critics of the avoidance canon suggest that its cost to legislative supremacy can be quite substantial. Schauer, for example, has argued that "it is by no means clear that a strained interpretation of a federal statute that avoids a constitutional question is any less a judicial intrusion than the judicial invalidation on constitutional grounds of a less strained interpretation of the same statute."160 More generally, Jerry Mashaw has invoked game theory to suggest that willful misconstruction, if anything, intrudes on legislative prerogatives more severely than outright invalidation of an unconstitutional statute.161 If the Court disturbs a legislative

157 See, for example, Felthner v Columbia Pictures Television, Inc., 523 US 340, 358 (1998) (Scalia concurring in the judgment) (noting that "'[t]he doctrine of constitutional doubt does not require that the problem-avoiding construction be the preferable one,'" for that "would deprive the doctrine of all function") (quoting Almendarez-Torres v United States, 523 US 224, 270 (1998) (Scalia dissenting)); Frederick Schauer, Astrovideo Revisited, 1995 Supreme Court Review 71, 88 ("[A]voidance is only important in those cases in which the result is different from what the result would have been by application of a judge's or court's preconstitutional views about how the statute should be interpreted.").
158 See, for example, United States v X-Citement Video, Inc., 513 US 64 (1994) (rejecting the "most natural, grammatical reading" of a statute to avoid grave constitutional doubt); Ullman v United States, 350 US 422, 433 (1955) ("Indeed, the Court has stated that words may be strained 'in the candid service of avoiding a serious constitutional doubt.'") (quoting Raley, 345 US at 47); see also, for example, Textile Workers Union v Lincoln Mills, 335 US 448, 477 (1947) (noting that the canon of avoidance "is normally invoked to narrow what would otherwise be the natural but constitutionally dubious scope of the language"); United States v Lovett, 328 US 303, 329 (1946) (Frankfurter concurring) ("'Words have been strained . . . to avoid that doubt.'").
159 Schauer, 1995 Supreme Court Review at 82 (cited in note 157).
160 Id at 74.
161 Jerry L. Mashaw, Greed, Chaos, and Governance 105 (Yale Univ Press, 1997).
outcome by invalidating a statute, that action of course returns matters to the prestatutory status quo. The legislature might well reenact a policy relatively close to the one invalidated, since the process of reenactment, like the original enactment process, requires bargaining among all three constitutionally relevant actors (the House, the Senate, and the President).162 If, instead, a court misconstrues a statute to avoid grave constitutional doubts, the misinterpretation will remain in place if any one of those three actors prefers it to the likely outcome of corrective legislation.163 In other words, the avoidance canon may enshrine a result that could not have been adopted ex ante. Perhaps most importantly, because the avoidance canon is triggered by constitutional doubt (rather than unconstitutionality), any such intrusions upon the legislative prerogative merely protect a constitutional buffer zone, rather than a definite claim of constitutional right.164

Whether these (or other) criticisms of the avoidance canon justify its general abandonment is a matter for another day.165 For

162 See id.

163 See id at 102–03 (discussing the game theoretic implications of faulty interpretation in general); see also Richard A. Posner, Statutory Interpretation—In the Classroom and Courtroom, 50 U Chi L Rev 800, 816 (1983) (“Congress’s practical ability to overrule a judicial decision misconstruing one of its statutes, given all the other matters pressing for its attention, is less today than ever before, and probably was never very great.”).

164 See Posner, 50 U Chi L Rev at 816 (cited in note 163) (“The practical effect of construing statutes to avoid raising constitutional questions is therefore to enlarge the already vast reach of constitutional prohibition beyond even the most extravagant modern interpretation of the Constitution—to create a judge-made constitutional penumbra . . . “).

165 For recent critiques of the canon of avoidance, see, for example, Kelley, 86 Cornell L Rev (forthcoming) (cited in note 154) (arguing that applying the canon of avoidance to administrative statutes ignores the lessons of Chevron and undervalues the executive’s independent constitutional duty under Article II, § 3 to “take Care that the Laws be faithfully executed”); Adrian Vermeule, Saving Constructions, 85 Geo L J 1945, 1959–64 (1997) (arguing that the modern canon of avoidance and the doctrine of severability are in tension with each other both in purpose and effect).
present purposes, it suffices to note that the doctrine does not un-
ambiguously serve legislative supremacy, as its defenders some-
times contend. Rather, it seems more accurate to suggest that it
entails a trade-off. The Court sacrifices the most likely or natural
meaning of a statute in order to advance extrastatutory values that
have an uncertain constitutional pedigree but come close enough
to the constitutional boundary to justify protection (at least in the
Court’s view). In most contexts, the merits of this practice are
at least debatable. If the Court narrows the broad terms of the
National Labor Relations Act to avoid a serious First Amendment
question, it may well unsettle an apparent legislative outcome. In
so doing, however, the Court promotes a competing constitutional
interest. In such cases, there are constitutional values on both sides
of the ledger.

Whatever the proper resolution of this trade-off generally, in
the specific context of avoiding nondelegation concerns, the calcu-
lus is different. The nondelegation doctrine, as noted, seeks to pro-
tect the constitutional values embodied in Article I—specifically,
that Congress sets legislative policy and that such policy passes
through the filter of bicameralism and presentment prescribed by
Article I, Section 7. As discussed, if the Court alters the meaning
of an open-ended statute in order to avoid nondelegation concerns,
it apparently disturbs whatever choice or compromise has emerged
from that process. This creates the perverse result of attempting
to safeguard the legislative process by explicitly disregarding the
results of that process. In other words, artificially narrowing a
statute to avoid nondelegation concerns is at best self-defeating.

166 See, for example, Sunstein, 67 U Chi L Rev at 331 (cited in note 5) (defending
the canon of avoidance as a means “to promote some goal with a constitutional foundation”);
Vermeule, 85 Geo L J at 1963 (cited in note 165) (noting that the modern canon of avoid-
ance “is a means of overprotecting constitutional values through statutory interpretation”);
Ernest A. Young, Constitutional Avoidance, Resistance, Norms, and the Preservation of Judicial
Review, 78 Tex L Rev 1549, 1587 (2000) (noting that the avoidance canon does not further
legislative intent, but “protects the constitutional values embodied in the provision that
creates the constitutional ‘doubt’”).

167 See DeBartolo, 485 US at 575–76 (applying NLRA’s broad terms to ban peaceful,
thruthful leafleting would raise a serious constitutional question).

168 See Bressman, 109 Yale L J at 1415 (cited in note 80) (“[T]o apply interpretive norms
in such cases would frustrate Congress’s intent.”).

169 Indeed, the avoidance of serious nondelegation questions is not merely self-defeating,
but is a net detriment to the values sought to be preserved. Avoidance of nondelegation
questions, as discussed, disturbs the outcome of the legislative process. By definition, how-
ever, such avoidance is sometimes—but not always—necessary to avoid an unconstitutional
The resulting interpretation reflects judicial, rather than legislative, lawmakers. To enforce the nondelegation doctrine through the canon of avoidance, then, contradicts the structure of Article I. To paraphrase Justice Scalia’s remarks on a different subject, it is using the disease as cure.170

It is unnecessary to take a position here on whether the Court should “revive” the nondelegation doctrine as a doctrine of judicial review or simply permit its continued disuse, as some of its recent cases have suggested.171 But if the Court is going to enforce the nondelegation doctrine, it should not employ the avoidance canon to do so.172 It should displace a duly enacted statute only if it concludes that such statute has effected an unconstitutional delegation, not a potentially unconstitutional delegation.

The avoidance canon of course does seek to sidestep the practical concerns that make the Court unwilling to enforce the nondelegation doctrine directly. Those concerns, however, do not cut decisively between avoidance and Marbury-style judicial review. First, the Court’s frequently expressed concerns about legislative (and, delegation. Therefore, the certain detriment to the legislative process that flows from avoidance corresponds to an uncertain benefit of avoiding what might or might not ultimately be an unconstitutional delegation.


171 See, for example, Whitman v American Trucking Ass’ns, Inc., 121 S Ct 903, 913 (2001) (“In the history of this Court we have found the requisite ‘intelligible principle’ lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by promoting ‘fair competition.’”).

172 In this context, Jerry Mashaw’s observations make particularly clear that outright invalidation would better serve the interests implicit in bicameralism and presentment. Consider the following example: If the Court narrows the OSH Act by requiring a threshold finding of “significant risk,” that judicially imposed policy will be immune from legislative correction if the House, the Senate, or the President prefers that result to the likely outcome of the full legislative process. Conversely, if the Court were to declare the OSH Act unconstitutional on nondelegation grounds, that action would trigger a process that directly serves the interests of the nondelegation doctrine. By hypothesis, there is no question about the constitutionality of the underlying policy objective (workplace safety), merely the manner of its articulation. If judicial invalidation were to return matters to the pre-OSH Act status quo, then the House, the Senate, and the President would have an incentive to try again to bargain over an acceptable (but more specific) policy that all three prefer to the pre-Ac status quo. If that process is successful, more precise policies will have passed through the filter of bicameralism and presentment, thereby addressing nondelegation concerns. If, however, the three relevant entities cannot agree on a more precise statute, that result also serves the interests of bicameralism and presentment, which aim in part to filter out laws that cannot secure the assent of the three constitutionally specified actors. In short, whereas using the avoidance canon disserves the goals of bicameralism and presentment, invalidation in appropriate circumstances would advance those goals.
more generally, governmental) flexibility go to the strictness with which the Court enforces the nondelegation doctrine, not to whether it enforces that doctrine through avoidance or judicial review. Second, with respect to concerns about the judicial administrability of the nondelegation doctrine, the avoidance canon offers no meaningful advantage. The administrability problem arises because there is no reliable metric for identifying a constitutionally excessive delegation. Yet there is no better way to identify whether a statute presents a sufficiently serious nondelegation question to trigger the canon of avoidance. In the judicial review context, the Court must draw a line between constitutional and unconstitutional delegations. In the context of avoidance, it must draw a similar line between questionable and nonquestionable delegations. Both turn on unquantifiable questions of degree. The move from judicial review to avoidance does not eliminate the difficulties in judicial line-drawing; it simply moves the line.173

Even if the canon of avoidance disserves nondelegation interests in a particular case, one might conclude that it serves a systemic interest in nondelegation by signaling Congress that overbroad statutes will be narrowed by the judiciary. Where the canon does not apply, *Chevron* authorizes relatively accountable administrative agencies to flesh out the meaning of broad or open-ended statutes. In contrast, by allowing judges to specify the meaning of the same open-ended terms, the avoidance canon shifts law elaboration authority to relatively insulated Article III courts.174 Congress has in its arsenal many ways of influencing the manner in which agencies perform their functions but relatively fewer methods of influencing the federal judiciary in its disposition of particular cases or contro-

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173 This claim does not contradict Professor Sunstein's more general point that, in most contexts, applying the canon of avoidance to narrow an administrative statute will not raise the same administrability concerns as direct enforcement of the nondelegation doctrine. See Sunstein, 67 U Chi L Rev at 338 (cited in note 5). Consider, for example, the decision to construe the broad terms of the NLRA narrowly to avoid a serious First Amendment question. In such a case, the Court "do[es] not ask the hard-to-manage question whether the legislature has exceeded the permissible level of discretion, but pose[s] instead the far more manageable question whether the agency has been given the discretion to decide something that (under the appropriate canon) only legislatures may decide." Id. But when the canon of avoidance is invoked to avoid a serious question under the nondelegation doctrine as such, the hard-to-manage line-drawing questions return because the underlying constitutional question irreducibly involves matters of degree.

174 See US Const, Art III, § 1 (assuring life tenure and salary protection during "good Behaviour").
versies. Hence, if passing an overbroad statute will effectively shift law elaboration authority from agencies to courts, Congress may have a marginal incentive to supply the statutory details itself, rather than ceding that authority to courts that are less amenable to its control.

This argument is serious, but ultimately unavailing. As I have argued elsewhere, because Congress cedes substantial policymaking initiative to administrative agencies when it enacts open-ended rather than precise statutes, it already has a significant structural incentive to specify statutory policies. The separation of powers, by prohibiting Congress from exercising direct control over agency lawmaking, operates in effect as a structural nondelegation doctrine. Even if the judicial specification of statutory meaning would marginally increase the resulting incentives for clarity, this effect would not be meaningful, at least if it is restricted to cases raising serious nondelegation concerns. As noted, the trigger for the canon of avoidance in nondelegation cases (a serious question about excessive statutory breadth) is impossible to quantify. And federal courts do not frequently invoke the avoidance canon in the nondelegation context. Thus, it is speculative, at best, to suggest that Congress would have a systemic incentive to legislate more precisely because it faced an unpredictable risk, in extreme cases, of ceding law elaboration power to judges rather than agencies.

What is certain is that when the Court applies the canon of

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176 See Manning, 97 Colum L Rev at 711–14 (cited in note 21).


178 See, for example, Richard J. Pierce, Jr., Political Accountability and Delegated Power: A Response to Professor Laxmi, 36 Am U L Rev 391, 413–14 (1987).

179 See Manning, 97 Colum L Rev at 712 (cited in note 21).
avoidance to further nondelegation objectives, it alters the enacted terms of an administrative statute in the interest of promoting legislative responsibility and preserving the integrity of the legislative process. It is equally clear that this practice, in contrast with straightforward judicial review, makes it less likely that Congress will ever clarify its unconstitutionally vague policies through the processes of bicameralism and presentment. Because application of the avoidance canon in the nondelegation context is therefore both self-contradictory and self-defeating, the Court should rethink its practice of enforcing the nondelegation doctrine through this means.

III. Brown & Williamson and the Canon of Avoidance

Brown & Williamson not only highlights concerns about treating the nondelegation doctrine as a canon of avoidance, but also suggests a more legitimate basis for using statutory interpretation to enforce nondelegation principles. As discussed, in denying the FDA jurisdiction over tobacco, the Court relied exclusively on the implications of later-enacted tobacco statutes. It did so in two respects. First, relying heavily on the legislative history accompanying post-FDCA legislation, the Court concluded that such legislation evinced an intention to ratify the FDA’s long-standing position that it lacked tobacco jurisdiction. Second, the Court concluded that these post-FDCA statutes impliedly foreclosed FDA jurisdiction by adopting a comprehensive and detailed legislative scheme of tobacco regulation.

Although the Court conflated the two strands of analysis, they represent quite distinct approaches. The ratification arguments ultimately represent an unconvincing account of legislative intent, one that the Court almost surely would have rejected in the absence of nondelegation concerns. The Court’s ratification analysis thus dramatically illustrates the double-edged legislative process concerns that arise when the Court uses avoidance to vindicate nondelegation principles. In contrast, by denying the FDA authority to invoke its open-ended authority to disturb the balance struck by Congress in explicit tobacco legislation, the Court arguably promoted the interests of bicameralism and presentment. Although the FDA might otherwise have enjoyed statutory authority under the FDCA to craft its own solution, nondelegation princi-
ples suggest that such a solution should give way when Congress has itself spoken directly to the very questions that the agency seeks to address. Such reasoning does not appear to rest on inferences of affirmative legislative "intent" to preclude agency authority; rather, it merely suggests that a settled canon of statutory interpretation—the specific governs the general—in fact promotes the same interest as the nondelegation doctrine. I consider these aspects of the Court’s opinion in turn.

A. RATIFICATION AND THE AVOIDANCE OF NONDELEGATION CONCERNS

To implement its avoidance strategy, the Court relied heavily on postenactment legislative history to hold that Congress had ratified the FDA’s (once) long-standing position on tobacco jurisdiction. Relying primarily on statements made by administration officials in hearings on the post-FDCA tobacco statutes, the Court noted that Congress had passed those laws “against the backdrop of the FDA’s consistent and repeated statements that it lacked authority under the FDCA to regulate tobacco."180 This pattern, in turn, established that Congress had “ratified the FDA’s long-held position.”181 In addition, the Court attached further significance to the fact that, in the same period, Congress repeatedly “considered and rejected bills that would have granted the FDA . . . jurisdiction.”182

In the absence of background nondelegation concerns, it is highly unlikely that the majority would have relied on such evidence to determine the FDCA’s meaning—and with good reason.183 Except in narrow circumstances, the Court now regards ratification and acquiescence arguments with suspicion. Classic ratification occurs when Congress reenacts (or imports into a new statute) a phrase that an agency or the judiciary has authoritatively construed; in that context, the settled interpretation merely offers a plausible point of reference for understanding the technical im-

180 Brown & Williamson, 529 US at 144.
181 Id.
182 Id.
183 For a thoughtful critique of the ratification argument as applied to the FDA’s tobacco jurisdiction, see Sunstein, 47 Duke L J at 1046–50 (cited in note 28).
port of the reenacted terms. \(^{184}\) Although the Court has sometimes also inferred legislative ratification when Congress extensively amends a statute without disturbing the settled interpretation of a particular phrase, \(^{185}\) all five Justices in the Brown & Williamson majority recently emphasized that this interpretive practice rests on mistaken assumptions about the legislative process. \(^{186}\) The complexities of that process make it difficult if not impossible to know why Congress has failed to disavow an agency’s interpretation of a statute. The precise question may not have been on the legislative radar; the leadership may have had other priorities; or perhaps the “correction” had insufficient support in a particular House or on a particular gatekeeping committee. Thus, even in the context of a statute’s amendment, Congress’s failure to “correct” a settled interpretation cannot be equated with an affirmative intention to ratify that interpretation. \(^{187}\)

\(^{184}\) See, for example, Bragdon v. Abbott, 524 U.S. 624, 644 (1997) (“When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well.”); Lorillard v. Pons, 434 U.S. 575, 579 (1978) (“Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change . . . .”)

\(^{185}\) See, for example, Herman & MacLean v. Huddleston, 459 U.S. 375, 384–85 (1983) (inferring ratification of cumulative interpretation of Section 10(b) of the Securities Exchange Act of 1934 when Congress extensively revised securities laws without changing that provision); Lykes v. United States, 343 U.S. 118, 127 (1951) (“Such a [Treasury] regulation is entitled to substantial weight . . . . Since the publication of that Treasury Decision, Congress has made many amendments to the Internal Revenue Code without revising this administrative interpretation . . . .”)

\(^{186}\) See Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 185–87 (1994) (Kennedy, joined by Rehnquist, O’Connor, Scalia, and Thomas); see also, for example, Wells v. United States, 519 U.S. 482, 495–96 (1997) (noting that claims of ratification were weak even though Congress had repeatedly amended a statute without “touching” the language that had been construed).

\(^{187}\) The Court has reasoned:

It does not follow . . . that Congress’ failure to overturn a statutory precedent is reason for this Court to adhere to it. It is “impossible to assert with any degree of assurance that congressional failure to act represents” affirmative approval of the [courts’] statutory interpretation. . . . Congress may legislate, moreover, only through the passage of a bill which is approved by both Houses and signed by the President. U.S. Const., Art. I, § 7, cl. 2. Congressional inaction cannot amend a duly enacted statute.

See Central Bank of Denver, 511 U.S. at 186 (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 175 n 1 (1989), which quoted, in turn, Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616, 672 (1987) (Scalia dissenting)). Importantly, this reasoning relied on and extended Patterson’s conclusion that Congress does not acquiesce in a judicial or administrative interpretation simply by leaving it intact over time. Whereas Patterson applied that
The Court’s reliance on post-FDCA history in *Brown & Williamson* extends even the more questionable version of the ratification doctrine. The post-FDCA legislation did not reenact, amend, or in any way address the FDCA’s jurisdictional language. Rather, Congress merely passed distinct tobacco statutes in light of legislative history suggesting that such legislation was necessary and appropriate because of the FDCA’s narrow scope. Far from satisfying any criteria for ratification, such evidence is simply postenactment legislative history. For good reason, however, the Court generally refuses to treat a subsequent Congress’s interpretation of a statute as meaningful evidence of an earlier Congress’s intent. When subsequent legislation enacts language expressly approving a particular interpretation, the Court of course treats such explicit directions as authoritative. But when the Court merely enacts new legislation based on a particular assumption about an earlier state-

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188 See, for example, *Reno v Bossier Parish School Dist.*, 520 US 471, 484–85 (1997) (“Our ultimate conclusion is also not undercut by statements found in the ‘postenactment legislative record,’ ... given that ‘the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.’”) (quoting *United States v Price*, 361 US 304, 313 (1960)); *Mackey v Lanier Collection Agencies*, 486 US 825, 840 (1988) (“[T]hese views—absent an amendment to the original language of the section—do not direct our resolution of this case. Instead, we must look at the language of [the statute] and its structure, to determine the intent of the Congress that originally enacted the provision in question. ‘It is the intent of the Congress that enacted [the section]... that controls.’”) (quoting *Teamsters v United States*, 431 US 324, 354 n 39 (1977)); *Haynes v United States*, 390 US 85, 87 n 4 (1968) (“The views of a subsequent Congress of course provide no controlling basis from which to infer the purposes of an earlier Congress.”).

189 For example, in *Red Lion Broadcasting Co., Inc. v FCC*, 395 US 367, 369, 380 (1969), the Court held that Congress had subsequently given “explicit recognition” to the FCC’s fairness doctrine. Through that doctrine, the FCC had implemented the Communications Act of 1934’s “public interest” standard by requiring broadcasters to provide discussion of public issues and to ensure that both sides of an issue received fair coverage. When Congress amended the Act to compel broadcasters to give equal time to political candidates, it stated that the amendment left intact “the obligations imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.” Act of Sept 14, 1959, § 1, 73 Stat 557, 557. In those circumstances, the amendment explicitly “vindicated the FCC’s general view that the fairness doctrine inhered in the public interest standard.” *Red Lion*, 395 US at 380.
ute’s meaning, that understanding has little significance, particularly when it is merely reflected in the legislative history.\textsuperscript{190} Simply put, enacting a statute based on an assumption about law does not amount to enacting that assumption.\textsuperscript{191}

Quite apart from this general point, moreover, Brown \& Williamson nowhere established that a legislative majority embraced the FDA’s narrow position as the correct interpretation of the FDCA. Most of the Court’s evidence involved administration testimony at legislative hearings on the post-FDCA tobacco statutes.\textsuperscript{192} Although the Court has sometimes relied on such testimony to inform the meaning of a bill (specifically, when the administration has drafted the relevant language),\textsuperscript{193} there is good reason to ques-

\textsuperscript{190} See, for example, Public Employees Retirement System of Ohio \textit{v} Betts, 492 US 158, 167–68 (1989) (rejecting an interpretation of the Age Discrimination in Employment Act found in legislative history accompanying amendments because the amendments did not modify the language being interpreted); CPSC \textit{v} GTE Sylvania, Inc., 447 US 102, 118 n 13 (1980) (refusing to credit a “mere statement in a conference report of [subsequent] legislation as to what the Committee believes an earlier statute meant”); Rainwater \textit{v} United States, 356 US 590, 593 (1958) (holding that when a statutory amendment suggests an implicit understanding of prior legislation, that amendment “is merely an expression of how the [subsequent] Congress interpreted a statute passed by another Congress,” and “such interpretation has very little, if any significance”). This premise now holds even when a committee of Congress interprets a prior statute during the course of that statute’s reenactment. See \\

\textsuperscript{191} Indeed, the validity of legislation does not remotely depend on the correctness of any assumptions that underlay its enactment. See \\

\textsuperscript{192} See Brown \& Williamson, 529 US at 144–61.

\textsuperscript{193} See, for example, United States \textit{v} Sells Engineering, 463 US 418, 439 (1983) (“In any event, we think the most reliable evidence of what Congress in 1977 understood to be standard Department practice was what Thornburgh, the Department’s official representative at the Hearings, stated it to be.”); United States \textit{v} Vogel Fertilizer Co., 455 US 16, 31 (1982); Zuber \textit{v} Allen, 396 US 168, 192 (1969). In general, the Court gives testimony at legislative hearings little weight. See, for example, Kelly \textit{v} Robinson, 479 US 36, 51 n 13 (1984) (declining to “accord any significance” to statements made in hearings when “none of those statements was made by a Member of Congress, nor were they included in the official Senate and House Reports”); Ernst \& Ernst \textit{v} Hochfelder, 425 US 185, 204, n 24 (1976) (“Remarks of this kind made in the course of legislative debate or hearings other than by persons responsible for the preparation or the drafting of a bill are entitled to little weight”); S \& E Contractors, Inc. \textit{v} United States, 406 US 1, 13 n 9 (1972) (“In construing laws [the Court has] been extremely wary of testimony before committee hearings and of debates on the floor of Congress save for precise analyses of statutory phrases by the spon-
tion the probativeness of the administration testimony relied on in *Brown & Williamson*. Even assuming that a requisite majority of Congress was aware of the testimony disclaiming FDA jurisdiction over tobacco, there is no reason to assume that those legislators agreed with the FDA. Because the administration’s remarks on the FDCA did not purport to explain the meaning of any provision in the post-FDCA legislation (but rather offered background reasons for enacting it), legislators had no occasion to form a view about its correctness in deciding whether to vote for such legislation. Rather, to justify voting for the post-FDCA tobacco legislation, legislators simply had to conclude that the FDA had plausibly disclaimed jurisdiction over a problem thought to require attention. In the administrative context, where an agency’s position may reflect one of several permissible readings of the statute, this premise has particular force. In the absence of any indication

sors of the proposed laws.”); *McCaughn v Hershey Chocolate Co.*, 283 US 488, 493–94 (1931) (“Nor do we think of significance the fact . . . that statements inconsistent with the conclusion which we reach were made to committees of Congress or in discussions on the floor of the Senate by senators who were not in charge of the bill. For reasons which need not be restated, such individual expressions are with out weight in the interpretation of a statute.”); Reed Dickerson, *Statutory Interpretation: Dipping into Legislative History*, 112 Hofstra L Rev 1125, 1131 (1983) (“What is said at [committee] hearings is usually so unreliable, even when it appears to make good sense, that courts should pay little heed to it, except possibly for confirmatory purposes.”). Since the rise of modern textualism, the Court had decreased its reliance on committee hearings. See William N. Eskridge, Jr. and Philip P. Frickey, *Cases and Materials on Legislation* 774 (West, 2d ed 1995).

194 See *Brown & Williamson*, 529 US at 182 (Breyer dissenting) (noting that the postenactment legislative history “can be read either as (a) ‘ratifying’ a no-jurisdiction assumption or as (b) leaving the jurisdictional question just where Congress found it”) (citation omitted).

195 Administrative agencies presumptively have the authority to change their positions provided that they offer a reasoned explanation for the change. See *Chevron USA, Inc. v NRDC, Inc.*, 467 US 837, 863 (“An initial agency interpretation is not instantly carved in stone.”). Thus, even in the context of classic ratification, the Court has indicated that ratification connotes an acceptance of the agency’s position as legitimate, not the adoption of the agency’s position as the only legitimate interpretation of a statute. See, for example, *Motor Vehicle Mfrs As’n v State Farm Mutual Auto Ins Co.*, 463 US 29, 45 (“Even an unequivocal ratification—short of statutory incorporation— . . . would not connot approval or disapproval of an agency’s later decision to rescind [a] regulation.”); *Trans World Airlines, Inc. v Hardison*, 432 US 63, 75 n 10 (1977) (noting that when Congress has ratified an administrative interpretation through positive legislation, that interpretation “is entitled to some deference, at least sufficient . . . to warrant our accepting the guideline as a defensible construction”); *Udall v Boeche*, 373 US 472, 483 (1963) (“The conclusion is plain that Congress, if it did not ratify the Secretary’s conduct, at least did not regard it as inconsistent with the . . . Act.”). Because the ratification doctrine typically arises in the context of defending administrative interpretations, invocation of that doctrine rarely even poses the question whether ratification precludes an agency from changing its position. But see, for example, *Telecommunications Research & Action Center v FCC*, 801 F2d 501, 517 (DC Cir 1986) (“We do not believe that language adopted in 1939 made the fairness doctrine a binding statutory obligation; rather, it ratified the Commission’s longstanding position that
that key legislators or committees (much less Congress as a whole) agreed with, rather than merely understood, the administration's testimony about the FDCA, that testimony cannot support the Court's rejection of the FDA's subsequent change in position.\(^{196}\)

Finally, the Court was mistaken in relying on Congress's failure to enact statutes granting the FDA jurisdiction over tobacco. The Court has recently emphasized that "[f]ailed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute.'"\(^{197}\) In particular, the Court has refused to treat the failure to pass legislation as evidence of legislative acquiescence in a regulatory practice that the proposal would have

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\(^{196}\)To be sure, the Court cited a small number of statements by individual legislators agreeing with the administration's position, but those remarks are too sporadic and indefinite to support any inference that Congress affirmatively accepted the FDA's position. Specifically, the Court cited only three examples of legislative statements relating to post-FDCA tobacco bills. See Brown & Williamson, 529 US at 150–51, 154–55. First, in passing the Public Health Cigarette Smoking Act of 1969, Pub L No 91-222, which banned certain cigarette advertisements and strengthened warning label requirements, Congress extended an existing prohibition against any other required cigarette labeling. See § 5(a), 84 Stat 88. In connection with that legislation, the chairman of the responsible House committee remarked that "the Congress—the body elected by the people—must make the policy determinations involved in this determination—and not some agency made up of appointed officials." 116 Cong Rec 7920 (1970) (Rep Staggers). This open-ended statement, made in the context of a specific prohibition on agency-imposed labeling requirements, hardly supports the more general conclusion that Congress intended to adopt the FDA's narrow view of its tobacco jurisdiction.

Second, when Congress eliminated the Consumer Product Safety Commission's authority over tobacco in the Consumer Product Safety Commission Improvements Act of 1976, Pub L No 94-284, § 3(c), 90 Stat 503, codified at 15 USC § 1261(h)(2), a separate statement to a Senate Report explained that the statute "unmistakably reaffirm[ed] the clear mandate of Congress that the basic regulation of tobacco and tobacco products is governed by . . . legislation . . . and that any further regulation . . . must be reserved for specific congressional action." S Rep 251, 94th Cong, 1st Sess 43 (1975) (Sens Hartke, Hollings, Ford, Stevens, and Beall). Putting to one side the fact that this legislation dealt with the CSPC (rather than the FDA), it is noteworthy that these Senators were obliged to issue their views as a separate statement; this may suggest that such views were not shared by the relevant committee, much less by Congress as a whole.

Third, in connection with the Comprehensive Smoking Education Act, Pub L No 980474, 98 Stat 2200 (1984), Senator Hawkins argued that legislation was necessary because "[u]nder the [FDCA], Congress exempted tobacco products." 130 Cong Rec 36953. The statement of an individual legislator in the context of a floor debate carries little weight in interpretation.

I cite these examples not to establish the contents of the legislative history, but merely to show that the evidence of legislative sentiment relied on by the Court was sparse and highly attenuated.

repudiated.198 The Court’s reluctance is rooted in commonsense understanding of the legislative process: “A bill can be proposed for any number of reasons, and it can be rejected for just as many others.”199 Hence, little can be gleaned from Congress’s failure to pass legislation granting the FDA authority over tobacco.

If the Court would otherwise regard the postenactment legislative history of the FDCA as an unreliable indicator of statutory meaning, it hardly serves nondelegation interests to give such history determinative weight. The Court’s unwarranted extension of an already questionable version of the ratification doctrine raises similar concerns. If, in fact, the FDCA is broad enough to encompass tobacco (in light of the FDA’s specific findings), one must acknowledge that the Court’s interpretive method effectively rewrote Congress’s command. It replaced a broad statute with a narrower statute, one of the Court’s, and not Congress’s, design. Taking such steps as a means to enforce nondelegation interests—specifically, to ensure legislative responsibility for policy decisions—was therefore self-defeating.

B. STATUTORY COHERENCE AS A NONDELEGATION DOCTRINE

Although my conclusions here are more tentative, a second aspect of Brown & Williamson’s reasoning may suggest a more promising interpretive strategy—enforcing nondelegation interests through the traditional canon of reading more general statutory commands in light of more specific ones. Although the Court principally relied on the post-FDCA tobacco legislation to support an (unwarranted) inference of legislative ratification, the Court also emphasized that this legislation had, in fact, crafted a “specific legislative response to the problem of tobacco and health.”200 In this connection, the Court applied the established principle that judges should promote coherence among statutes passed at different times, in part by reading the FDCA’s general authority in light of the more specific commands in the post-FDCA statutes:

198 See Solid Waste Engineers of Cook County v Army Corps of Engineers, 121 S Ct 675, 681 (2001).
199 Id.
At the time a statute is enacted, it may have a range of plausible meanings. Over time, however, subsequent legislation can shape or focus those meanings. The “classic judicial task of reconciling many laws over time and getting them to ‘make sense’ in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute.” This is particularly so where the scope of an earlier statute is broad but the subsequent statutes more specifically address the topic at hand.201

Given the detailed regulatory regime established by the six post-FDCA tobacco statutes, the Court found that Congress had “specifically addressed the question at issue”—that is, the appropriate level of tobacco regulation.202 And it suggested that this specific legislative regime for tobacco effectively superseded the FDA’s background authority to regulate the same subject matter differently.

In 1965, the FCLAA adopted a precisely defined requirement that cigarette manufacturers affix a specific warning label on all cigarette packages.203 The statute explicitly sought to balance the competing goals of ensuring “that the public be informed that cigarette smoking may be hazardous to health” and protecting “commerce and the national economy to the maximum extent.”204 It further provided that “[n]o statement relating to smoking and health, other than the statement required by . . . this Act, shall be required on any cigarette package.”205 Although the FCLAA’s prohibition against additional labeling requirements was to sunset on July 1, 1969,206 the Public Health Cigarette Smoking Act of 1969 extended it indefinitely.207 In the same Act, Congress amended the FCLAA not only to strengthen the labeling requirement, but also to ban all cigarette advertisements “on any medium of electronic communication subject to the jurisdiction of the [FCC].”208 In 1984, Congress again modified the required warning

201 Id at 145 (quoting United States v Fausto, 448 US 439, 453 (1988)).
202 Id at 132.
203 Pub L No 89-92, § 5(a), 79 Stat 283 (“Warning: Cigarette Smoking May Be Hazardous to Your Health.”).
204 Id § 2, 79 Stat 282, codified at 15 USC § 1331.
205 Id § 5(a), 79 Stat 283.
206 See id § 10, 79 Stat 284.
207 Pub L No 91-222, § 5(a), 84 Stat 88, codified at 15 USC 1334(a).
208 Id §§ 4 and 6, 84 Stat 88–89.
label.\textsuperscript{209} And, in 1986, it extended the substance of the FCLAA to smokeless tobacco.\textsuperscript{210} Finally, in 1992, the Alcohol, Drug Abuse, and Mental Health Administration Reorganization Act conditioned certain block grants to states on their prohibition of sales of tobacco products to minors.\textsuperscript{211}

Quite apart from its more dramatic conclusion that the FDCA’s remedial provisions required an outright tobacco ban if the FDA asserted jurisdiction at all (a premise sharply contested by the dissent), the Court suggested that the FDA’s more limited exercise of regulatory authority threatened to disrupt the balance struck by these more specific statutes.\textsuperscript{212} Although not free of doubt,\textsuperscript{213} this conclusion has considerable force. For example, recall that the FDA’s regulations banned the sale of tobacco to minors, required photo identification for sales to persons under twenty-seven, and largely prohibited sales of tobacco through self-service displays or vending machines.\textsuperscript{214} Congress’s 1992 legislation, however, provided that states will develop reasonable restrictions on sales to minors. In particular, that legislation conditioned block grants on a state’s having “in effect a law providing that it is unlawful for any manufacturer, retailer, or distributor of tobacco products to sell or distribute any such product to any individual under the age of 18.”\textsuperscript{215} More importantly, it also provided that a state must agree to “enforce [such] law . . . in a manner that can reasonably be expected to reduce the extent to which tobacco products are available to individuals under the age of 18.”\textsuperscript{216} By specifying detailed measures to deny minors access to tobacco, the FDA’s regulations appear to alter the balance struck by the 1992 statute. In particular, they unsettle Congress’s apparent determination to

\textsuperscript{209} Comprehensive Smoking Education Act, Pub L No 98-474, § 4(a), 98 Stat 2200, 2201–03.

\textsuperscript{210} Comprehensive Smokeless Tobacco Health Education Act of 1986, Pub L 99-252, 100 Stat 30, codified at 15 USC § 4401 et seq.

\textsuperscript{211} Pub L No 102-321, § 202, 106 Stat 394, codified at 42 USC § 300x et seq.

\textsuperscript{212} See\textit{ Brown & Williamson}, 529 US at 144 (“Congress has created a distinct regulatory scheme to address the problem of tobacco and health, and that scheme, as presently constructed, precludes any role for the FDA.”).

\textsuperscript{213} See text accompanying notes 237–38.

\textsuperscript{214} See text accompanying note 48.

\textsuperscript{215} 42 USC § 300x-26(a)(1).

\textsuperscript{216} Id § 300x-26(b)(1).
leave the development of such programs to reasonable state initiatives. Similarly, the FDA’s regulations imposed significant new restrictions on tobacco advertising and promotion.\textsuperscript{217} Congress, however, had arguably addressed that very issue by prohibiting all tobacco advertising on media regulated by the FCC.\textsuperscript{218}

In light of these considerations, even if the post-FDCA statutes do not reflect an intent to ratify the FDA’s original view of its authority, the Court may have properly furthered nondelegation interests by construing the FDCA’s general provisions in light of the more specific tobacco statutes. This practice reflects a well-established interpretive canon. As the Court has explained, “it is a commonplace of statutory construction that the specific governs the general.”\textsuperscript{219} Thus, “[h]owever inclusive may be the language of a statute, . . . specific terms prevail over the general in the same or another statute which otherwise might be controlling.”\textsuperscript{220} The Court has applied this “specificity canon,” moreover, to ensure the coherence of statutes enacted at different times. For example, although federal employees had traditionally enjoyed a cause of action for adverse personnel actions under the general authority of the Back Pay Act, the Court held that this authority was superseded by the “comprehensive and integrated” remedial scheme that the Civil Service Reform Act of 1978 specifically established for such actions.\textsuperscript{221} Similarly, the Court recently held that the federal government’s right to enforce a tax lien turned on the specific provisions of the Federal Tax Lien Act of 1966, rather than the

\textsuperscript{217} See note 49.

\textsuperscript{218} See 15 USC §§ 1335, 4402(f).

\textsuperscript{219} Morales v Trans World Airlines, Inc., 504 US 374, 385 (1992); see also, for example, Goezlo-Peretz v United States, 498 US 395, 406 (1991) (“A specific provision controls over one of more general application.”); Radzanower v Touche Ross & Co., 426 US 148, 153 (1976) (“‘Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.’”) (quoting Morton v Mancari, 417 US 535, 550–51 (1974)).

\textsuperscript{220} Clifford F. MacEvoy Co. v United States, 322 US 102, 107 (1944). This premise, moreover, also finds expression in the established maxim of \textit{ejusdem generis}, which provides that “when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration.” Norfolk & Western R. Co. v Train Dispatchers, 499 US 117, 129 (1991); see also, for example, Cleveland v United States, 329 US 14, 18 (1946) (“Under the \textit{ ejusdem generis} rule of construction the general words are confined to the class and may not be used to enlarge it.”); Goebel v United States, 297 US 124, 128 (1936) (noting that canon of \textit{ ejusdem generis} “limits general terms which follow specific ones to matters similar to those specified”).

\textsuperscript{221} Fausto v United States, 484 US 439, 453 (1988).
more generally applicable provisions of an older statute granting the United States priority in debt collection.\footnote{United States v Estate of Romani, 523 US 517, 532 (1998).}

Although its rationale is rarely explained, the canon preferring the specific over the general furthers nondelegation interests, even though it displaces statutory authority that an agency or court might otherwise enjoy. The central aim of the nondelegation doctrine is to promote specific rather than general legislative policy-making—that is, to induce Congress to filter more precise policies through the process of bicameralism and presentment rather than leaving such policies to be elaborated by agencies or courts outside the legislative process. Detailed legislation is more likely to reflect the results of a specific choice or compromise.\footnote{In contrast with a general statute, a specific statute is more likely to reflect Congress’s “detailed judgment” about the appropriate way to “accommodate” competing policy concerns relating to a particular subject. Estate of Romani, 523 US at 532; see Easterbrook, 50 U Chi L Rev at 547 (cited in note 132) (“A legislature that tries to approach the line where costs begin to exceed benefits is bound to leave a trail of detailed provisions, which . . . would preclude judges from attempting to fill gaps.”). I have argued elsewhere that bicameralism and presentment require special respect for the specific results of such a compromise. See Manning, 101 Colum L Rev at 70–78 (cited in note 24). That process effectively establishes a supermajority requirement by allocating lawmaking authority among distinct institutions answering to different constituencies. See James M. Buchanan and Gordon Tullock, The Calculus of Consent 235–26 (Michigan, 1962). So understood, it gives minorities an exaggerated right to protect themselves against majority factions through their ability to block legislation or, as a condition of assent, to insist upon a compromise offering less than the full extent of what the majority might otherwise desire. See Manning, 101 Colum L Rev at 77–78 (cited in note 24).}

\footnote{See, for example, Gomez v United States, 490 US 858, 871–72 (1989):

Through gradual congressional enlargement of magistrates’ jurisdiction, the Federal Magistrates Act now expressly authorizes magistrates to preside at jury trials of all civil disputes and criminal misdemeanors, subject to special assignment, consent of the parties, and judicial review. The Act further details magistrates’ functions regarding pretrial and post-trial matters, specifying two levels of review depending on the scope and significance of the magistrate’s decision. The district court retains the power to assign to magistrates unspecified “additional duties,” subject only to conditions or review that the court may choose to impose. By a literal reading this additional duties clause would permit magistrates to conduct felony trials. But the carefully defined grant of authority to conduct trials of civil matters and of minor criminal cases should be construed as an implicit withholding of the authority to preside at a felony trial.

See also, for example, International Paper Co v Ouellette, 479 US 481, 494 (1987) (“[W]e do not believe that Congress intended to undermine this carefully drawn statute through a general saving clause.”).}

Consider the
following example: The OSH Act undoubtedly grants the Secretary of Labor general authority allowing her to issue a regulation prescribing maximum levels of benzene in the workplace. If, however, Congress were to enact the Benzene Control Act of 2001, providing that “benzene exposure in the workplace shall not exceed 10 parts per million,” a court might find that this specific statute precluded the Secretary from promulgating a regulation setting the appropriate level at five parts per million. Although such a regulation may be viewed as supplementing, rather than contradicting, the specific statutory requirements, it might also be seen as unsettling the precise balance struck in a legislative process that presumably involved bargaining between labor and manufacturing interests. If the latter characterization is correct, applying the specificity canon promotes the nondelegation doctrine’s aim of channeling specific policy decisions through the filter of bicameralism and presentment.

The Court’s use of similar analysis in the context of federal common law making supplies a helpful analogy. Although the Court’s post-“Erie” default position is that “[t]here is no general federal common law,”225 the Court nonetheless continues to recognize “federal common law powers” in certain enclaves involving uniquely federal interests226—specifically, in areas involving “the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases.”227 Even in these acknowledged enclaves, however, the Court has shown its readiness to find that federal common law authority is displaced

225 O’Melveny & Myers v. FDIC, 512 US 79, 83 (1994) (quoting Erie R. Co. v. Tompkins, 304 US 64, 78 (1938)); see also, for example, Northwest Airlines, Inc. v. Transport Workers Union, 451 US 77, 95 (1981) (“[I]t remains true that federal courts, unlike their state counterparts, are courts of limited jurisdiction that have not been vested with open-ended law-making powers.”); United States v. Standard Oil Co., 332 US 301, 313 (1947) (“[I]n the federal scheme our part in that work [of law creation], and the part of the other federal courts, outside the constitutional area is more modest than that of the state courts, particularly in the freedom to create new common law liabilities . . . .”).

226 Professor Brad Clark has recently marshaled substantial historical materials suggesting that at least some of the “enclaves” can be re-rationalized as rules of decision designed to implement various aspects of the constitutional structure. See Bradford R. Clark, Federal Common Law: A Structural Reinterpretation, 144 U Pa L Rev 1245 (1996). For present purposes, I assume arguendo that the Court has properly characterized the relevant exercise of authority in these enclaves as federal common law making power.

when Congress has enacted a statute directly on point. In Milwaukee v Illinois, 228 for example, the Court held that the Federal Water Pollution Control Amendments of 1972 (FWPCA) 229 superseded an established federal common law nuisance action for the abatement of interstate pollution. 230 Emphasizing that federal common law is a "necessary expedient" even in the recognized enclaves, 231 the Court explained that "when Congress addresses a question previously governed by a decision rest[ing] on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears." 232 Of crucial significance here, in displacing federal common law, the Court has recognized that the relevant question is "whether the legislative scheme 'spoke directly to a question'" formerly addressed by federal common law, "not whether Congress had affirmatively proscribed [its] use." 233

The Milwaukee Court's rationale rested squarely on the separation of powers; in our system of government, the federal courts are not the preferred locus of legislative policy-making authority. 234 Hence, when the FWPCA adopted "a comprehensive regulatory program," it removed the justification for judges to develop and apply "vague and indeterminate nuisance concepts and maxims of equity jurisprudence." 235 More fundamentally, the Court has fre-

229 33 USC § 1251 et seq.
230 The Court had recognized that common law nuisance action in an earlier incarnation of the same case, decided before the FWPCA's enactment. See Illinois v Milwaukee, 406 US 91 (1972).
231 Milwaukee v Illinois, 451 US at 314 (quoting Committee for Consideration of Jones Falls Sewage System v Train, 539 F2d 1006, 1008 (4th Cir 1976) (en banc)).
232 Id.
233 Id at 315. It must be noted that the Court's approach is in some tension with the long-standing principle that "[s]tatutes which invade the general maritime law are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." Isbrandtjen Co. v Johnson, 343 US 779, 783 (1952). The Court resolves that tension by holding that the statute must "speak directly" to the question previously covered by the common law before it may displace that prior law. See United States v Texas, 507 US 527, 534 (1993) (citation omitted); see also, for example, County of Oneida v Oneida Indian Nation, 470 US 226, 237 (1985) (holding that the Nonintercourse Act of 1793 does not displace federal common law relating to unlawful conveyance of Native American lands because it "does not speak directly to the question of remedies" for such conveyances).
234 Milwaukee v Illinois, 451 US at 315 ("Our commitment to the separation of powers is too fundamental to continue to rely on federal common law by judicially decreeing what accords with common sense and the public weal when Congress has addressed the problem.") (internal quotation marks omitted) (quoting TVA v Hill, 437 US 153, 195 (1978)).
235 Id at 317.
quently emphasized that when Congress prescribes a specific solution to a given problem, federal courts may not alter or supplement that outcome, lest they disrupt the balance struck by Congress.236

The context is somewhat different, but similar principles ultimately seem applicable to agency lawmaking as well. Initially, the difference in context highlights the fact that when the Court displaces federal lawmaking power in favor of a specific statute, it is disturbing judicial, rather than legislatively conferred, authority. In contrast, when the Court uses the specificity canon to narrow a broad delegation, it appears to be altering the prior understanding of an express statutory scheme. For example, Brown & Williamson’s use of the specificity canon is itself open to the charge that it disturbed a legislative choice to frame the FDCA in broad terms; indeed, if the Court would otherwise have read the FDCA to include tobacco, its use of the specificity canon to narrow the FDA’s authority might be characterized as a species of implied repeal. This characterization of the specificity canon, if correct, would trigger some of the same concerns as the canon of avoidance. The Court restricts implied repeals to cases involving either an irreconcilable conflict between two statutes or an affirmative legislative intent in a later statute to alter a preexisting statutory scheme.237

Hence, if the FDA regulations were thought to supplement, rather

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236 See, for example, Middlesex County Sewerage Auth. v National Sea Clammers Ass’n, 453 US 1, 14 (1981) (“In view of these elaborate enforcement provisions it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under [the Marine Protection, Research, and Sanctuaries Act of 1972] and FWPCA.”); Texas Indus., 451 US at 644 (refusing to recognize common law authority to supplement the remedies of the Sherman Act because “the remedial provisions in the antitrust laws are detailed and specific”); Mobil Oil Corp. v Higginbotham, 436 US 618, 625 (1978) (“The Death on the High Seas Act .... announces Congress’ considered judgment on such issues as the beneficiaries, the limitations period, contributory negligence, survival, and damages. ... The Act does not address every issue of wrongful-death law, ... but when it does speak directly to a question, the courts are not free to ‘supplement’ Congress’ answer so thoroughly that the Act becomes meaningless.”); Arizona v California, 373 US 546, 565–66 (1963) (“It is true that the Court has used the doctrine of equitable apportionment to decide river controversies between States. But in those cases Congress had not made any statutory apportionment.”); cf. Transamerica Mortgage Advisors, Inc. v Lewis, 444 US 11, (1979) (“[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.”).

237 See, for example, Morton v Mancari, 417 US 535, 550 (1974) (“In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable.”); Georgia v Pennsylvania R. Co., 324 US 439, 456–57 (1945) (“Only a clear repugnancy between the old ... and the new [law] results in the former giving way ....")
than conflict with, the post-FDCA tobacco legislation, the Court could find an implied repeal only if it were able to conclude that the subsequent legislation reflected an affirmative intent to displace the FDA's background authority. As discussed in relation to the Court's ratification argument, one cannot convincingly impute such an intent to Congress in this case.

The well-established specificity canon, however, is broader than the doctrine of implied repeals. Properly understood, that canon in fact bears closer resemblance to the judicial practice of curtailing federal common law authority in the face of specific legislation. Although authorized by statute, agency lawmaking shares a crucial attribute with federal common law making: It departs from the constitutionally preferred method of lawmaking—bicameralism and presentment. As in the case of federal common law, the Court has indicated that it accepts delegated agency lawmaking as a necessary expedient in the modern administrative state. If the Court aggressively enforced the nondelegation doctrine, Congress would not be able to anticipate and resolve with specificity all the issues necessary to regulate modern industrial society. In addition, the Court lacks confidence in its ability to draw principled distinctions between permissibly and excessively broad statutes. Neither concern applies when Congress has otherwise spoken to an issue with particularity. In such cases, Congress has shown its capacity and desire to set a precise policy itself, and any effort by an agency to exercise its general authority on the same question threatens to disrupt the specific balance struck in the legislative process. And

\[238\] Such a conclusion might be warranted if one accepts the background assumption that repeals by implication are disfavored. See United States v United Continental Tuna Corp., 425 US 164, 168 (1976).

\[239\] The Court has thus explained that the specificity canon prevents a "narrow, precise, and specific" statute from being "submerged" by judicial or agency elaboration of a distinct statute covering "a more generalized spectrum." Touche Ross & Co., 426 US at 153; see Theodore Sedgwick, A Treatise on the Rules Which Govern the Interpretation and Construction of Statutory and Constitutional Law 98 (Baker, Voorhis & Co., John Norton Pomeroy 2d ed 1874) (noting that the specificity canon seeks to preserve the fruits of a process in which "the mind of the legislator has been turned to the details of a subject, and he has acted upon it"). This consideration, moreover, distinguishes the Court's use of the specificity canon from its reliance on ratification arguments to narrow the FDCA. Although the ratification argument also serves the interest in specific, rather than general, policy-making, I have previously attempted to show that, in doing so, it rests upon erroneous assumptions about the discernment of legislative intent—assumptions that contradict the premises of bicameralism and presentment. The specificity canon, in contrast, narrows a broad delegation to preserve specific policies that Congress has properly enacted into law through bicameralism and presentment.
while the specificity canon presents its own line-drawing concerns (discussed below), they are not of the same order of magnitude as those involved in attempts to enforce the traditional nondelegation doctrine.

The practical difficulties in applying the specificity canon to narrow broad delegations are significant, but do not ultimately negate the utility of that canon. The touchstone for the canon’s application, as Brown & Williamson suggests, is whether Congress has directly spoken to the precise question in issue. This fact will be most obvious when Congress has addressed a particular subject in a detailed and comprehensive way. In other cases, it will be less clear. But the inquiry is no more complicated than the threshold question posed when applying Chevron or, for that matter, the basic question posed in the federal common law cases.

In Brown & Williamson itself, if the Court correctly determined that the FDA would be obliged to ban tobacco if it asserted jurisdiction, then this result would plainly disrupt the balance that Congress specifically struck when it enacted tobacco regulations but stopped short of banning it. If, however, the Court misread the FDCA’s remedial scheme in reaching that conclusion, the question of displacement would be more complex. Congress arguably tinkered at the margins in its tobacco statutes: imposing certain labeling requirements, banning advertising in certain media, and giving states inducements to regulate tobacco sales to minors. In contrast with the FWPCA’s approach to water pollution, the post-FDCA legislation has not adopted a comprehensive and integrated program for regulating tobacco.240 Still, despite Congress’s limited steps into areas such as labeling, advertising, and sales to minors, it has arguably spoken to those particular issues by defining a precise level and method of regulating tobacco in such contexts. Indeed, one of the aims of bicameralism and presentment is to filter out laws that cannot secure a sufficient consensus to gain the assent of all three constitutionally specified participants in the legislative process. If Congress has addressed a subject, but has done so in a limited way, this fact itself may suggest that Congress has gone as far as it could, as far as the enacting coalition wished to, on the subject in question. If the Court permitted the FDA to

go farther under the FDCA’s general authority, such action might disturb the more precise policies adopted by Congress through bicameralism and presentment.\textsuperscript{241}

IV. Conclusion

The nondelegation doctrine serves important constitutional interests: It requires Congress to take responsibility for legislative policy and ensures that such policy passes through the filter of bicameralism and presentment. The Court, however, has been reluctant to enforce this doctrine directly, largely out of concern that aggressive enforcement of that doctrine will hamper Congress’s ability to exercise its constitutional powers and will strain the Court’s capacity to make principled judgments about excessive delegations. Although the Court has chosen instead to promote nondelegation interests through the canon of avoidance, this strategy produces significant pathologies of its own. As both Benzene and \textit{Brown & Williamson} illustrate, when the Court departs from its usual methods of interpretation to avoid a serious nondelegation question, it runs the risk of departing from congressional commands in the process. If the aim of the nondelegation doctrine is to force Congress to take responsibility for legislative policy, the Court’s avoidance strategy defeats, at least as much as it promotes, that constitutional objective.

\textsuperscript{241} Of course, the specificity canon supplies only a default position. It does not apply when Congress has otherwise indicated its desire not to displace background agency authority through specific legislation on the same subject. In the context of tobacco, there may be an idiosyncratic reason to think that the Court’s displacement of the FDA’s tobacco authority contradicted legislative directions. In its post-FDCA legislation, Congress expressly foreclosed any “additional” labeling requirements. See, for example, 15 USC \textsection 1334(a). One might infer from this legislation that when Congress wished to bar further agency action, it did so expressly. Because no similar statutory provision addresses tobacco advertising or sales to minors, the labeling provisions may themselves carry a crucial negative implication. Whatever the correct answer in the particular circumstances of \textit{Brown & Williamson}, however, the specificity canon, properly applied, may suggest a basis for limiting delegations in the future.