

The Minor Questions Doctrine

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THE MINOR QUESTIONS DOCTRINE

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Few aspects of administrative law are as controversial as the major questions doctrine—the exception to Chevron deference that bars courts from deferring to an agency’s otherwise reasonable interpretation of an ambiguous statute where doing so has extraordinary policy implications. Proponents of the major questions doctrine believe that the nation’s most significant questions should be decided by Congress, not agencies. The doctrine’s critics, however, counter that there is no sound reason to treat major questions differently from ordinary questions, if such a distinction even exists. The elevation of Justices Neil Gorsuch and Brett Kavanaugh, two major proponents of the major questions doctrine, has reignited the debate. Both the doctrine’s friends and foes expect that the Supreme Court will soon begin to more aggressively target major questions.

This Article, however, argues that focusing on major questions is myopic. Minor questions—those bipartisan, “good government” policies that do not attract much attention but that affect countless individuals in small ways—also matter. Because of Chevron deference, Congress and the Executive Branch often have overlapping authority to tackle such minor questions. Yet if one branch acts, that decision confers positive externalities on the other branch: the non-acting branch benefits from a policy it wants without having to pay for it. When incentives are structured this way, collective-action dynamics may prevent either branch from acting. Critically, moreover, although ordinary politics often moots the need for judicial review of major questions, policy stagnation may be permanent for minor questions. The time thus has come for what this Article dubs the “minor questions doctrine”—a new approach to deference that targets collective-action dynamics by reducing overlapping policymaking authority over minor policies.

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INTRODUCTION

One of the most controversial features of modern administrative law is the major questions doctrine—the rule that courts should not defer to an agency’s otherwise reasonable interpretation of an ambiguous statute if the interpretation “concerns a question of deep economic and political significance that is central to the statutory scheme.”¹ In a series of cases, the Supreme Court has applied the major questions doctrine to prevent agencies from adopting policies with “extraordinary” implications.²

As one might expect, the major questions doctrine is not popular in all circles.³ Critics argue that there is no reason why major questions merit closer scrutiny,⁴ if, indeed, there is a reliable way to tell the difference between major questions and regular ones.⁵ Critics also worry that this doctrine’s emergence is part of a broader attack on the administrative state.⁶ In light of the recent elevations of Justices Gorsuch and Kavanaugh, two major supporters of the major questions doctrine,⁷ both the doctrine’s supporters and critics believe that the Supreme Court will soon begin targeting major questions more vigorously.⁸

¹ *Gundy v. United States*, 139 S. Ct. 2116, 2148 (2019) (Gorsuch, J., dissenting); see also Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 853, 875 (2020) (describing doctrine); Cass R. Sunstein, *The American Nondelegation Doctrine*, 86 GEO. WASH. L. REV. 1181, 1185 (2018) (similar); Josh Blackman, *Gridlock*, 130 HARV. L. REV. 241, 261 (2016) (similar).

² See, e.g., *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014); *Gonzales v. Oregon*, 546 U.S. 243, 267-68 (2006); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-60 (2000); *MCI Telecomm. Corp. v. AT&T*, 512 U.S. 218 (1994); see also *King v. Burwell*, 135 S. Ct. 2480, 2488-89 (2015) (refusing to defer about how to resolve a major question).

³ See, e.g., Gillian E. Metzger, *The Supreme Court, 2016 Term — Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 26-27 (2017) (criticizing doctrine); Note, *Major Question Objections*, 129 HARV. L. REV. 2191, 2191-92 (2016) (same); Nathan Richardson, *Keeping Big Cases from Making Bad Law: The Resurgent “Major Questions” Doctrine*, 49 CONN. L. REV. 355, 359-60 (2016) (same).

⁴ See, e.g., Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 1959 (2017) (rejecting “presumption that Congress speaks clearly when it delegates big questions”); Kevin O. Leske, *Major Questions About the “Major Questions” Doctrine*, 5 MICH. J. ENVTL. & ADMIN. L. 479 (2016) (arguing the major questions doctrine is inconsistent with the premises of *Chevron* deference) (discussing *Chevron*, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984)).

⁵ See, e.g., *Major Question Objections*, *supra* note 3, at 60 (suggesting that there is no “difference between ‘major’ and ‘minor’ questions”); cf. *Thomas v. Reeves*, -- F.3d -- (5th Cir. 2020) (Willett, J., concurring) (explaining that “[r]easonable judicial minds can, and do, differ” about what is major or minor, which risks “‘I know it when I see it’ application”) (citing Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19, 23 (2010)).

⁶ See, e.g., Metzger, *supra* note 3, at 27, 88-89; cf. Nicholas Bagley & Julian Davis Mortenson, *Delegation at the Founding*, COLUM. L. REV. (forthcoming).

⁷ See, e.g., Mila Sohoni, *The Trump Administration and the Law of the Lochner Era*, 107 GEO. L.J. 1323, 1382 (2019) (explaining Gorsuch’s skepticism); Mila Sohoni, *King’s Domain*, 93 NOTRE DAME L. REV. 1419, 1433-37 (2018) (explaining Kavanaugh’s approach to major questions).

⁸ See, e.g., Joshua S. Sellers, *“Major Questions” Moderation*, 87 GEO. WASH. L. REV. 930, 934

Yet in this back and forth, something important has been overlooked: *Chevron*'s application to *minor* questions can also be problematic. Minor questions—i.e., relatively uncontroversial, often bipartisan, policies that help the public but that are not salient—are ubiquitous. They include “good government” measures like making information more accessible, updating obsolete rules, or closing loopholes.⁹ The public is often better off when the government addresses such minor questions. Yet contrary to the conventional view that delegation (of which *Chevron* deference is a species¹⁰) inherently results in a more active federal government,¹¹ sometimes minor questions are never addressed *because* of deference.

This counterintuitive claim is explained by collective-action dynamics. When two branches of government share the same policymaking space, a shared temptation to freeride may systemically push both toward inactivity. Policymaking for even relatively uncontroversial issues can be costly. Even if a policy is beneficial overall, moreover, the costs to bring it about are not evenly distributed; the branch that acts will bear most of the costs but will only receive a portion of the benefits, creating positive externalities for the non-acting branch. Hence, where overlapping policymaking power exists, we sometimes should expect both Congress and the White House¹² to prefer the other to act. And because both Congress and the White House often have that same incentive, sometimes the equilibrium outcome can be that no one acts.¹³ This

(2019) (“Justice Kavanaugh’s appointment to the High Court is yet another reason for interrogating the major questions doctrine.”); Marla D. Tortorice, *Nondelegation and the Major Questions Doctrine: Displacing Interpretive Power*, 67 BUFF. L. REV. 1075, 1076 (2019) (arguing that Gorsuch’s distrust of administrative law manifests itself in the major questions doctrine).

⁹ See, e.g., Susan Jensen, *An Informal Legislative History of the Reauthorization of the Administrative Conference of the United States*, 83 GEO. WASH. L. REV. 1410, 1411 (2015) (explaining why the nonpartisan Administrative Conference of the United States, which addresses lower-profile issues of administration, enjoys “bipartisan support across the political spectrum”).

¹⁰ See, e.g., Jonathan R. Siegel, *The Constitutional Case for Chevron Deference*, 71 VAND. L. REV. 937, 960 (2018) (“‘Judicial deference to agency ‘interpretation’ of law is simply one way of recognizing a delegation of law-making authority to an agency.’ That is, an ambiguous agency statute is simply another way of doing something that Congress does all the time—namely, authorize an agency to make a policy choice.”) (quoting Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1 (1983)) (emphasis in original).

¹¹ This view cuts across ideological lines. Compare, e.g., *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1155-56 (10th Cir. 2016) (arguing that deference “add[s] prodigious new powers to an already titanic administrative state”) (Gorsuch, J., concurring) with Cass R. Sunstein, *Chevron As Law*, 107 Geo. L.J. 1613, 1683 (2019) (explaining that one “pragmatic advantage” of *Chevron* is that “allows agencies to act relatively freely” when “address[ing] new problems”).

¹² The “White House” here is used as a stand-in for an entity exercising executive power. As explained below, the fact that not all agency action is meaningfully directed by the President complicates the analysis but does not undermine it. See p. __, *infra*.

¹³ See generally John F. Nash, Jr., *Non-Cooperative Games*, 54 ANNALS OF MATHEMATICS 286 (1951) (describing mixed strategies and coordination conflicts); Daniel Hemel, *The President’s Power to Tax*, 102 CORNELL L. REV. 633, 644-45 (2017) (applying mixed strategies in context of tax

collective-action observation is relevant here because *Chevron* deference, by design, gives the White House greater power to fashion policy.¹⁴ That expanded policymaking power in turn creates a larger overlapping policymaking space between Congress and the White House—and so the prospect of stagnation caused by collective-action dynamics.

Notably, the risk of stagnation is particularly pronounced for at least two categories of policies. First, stagnation is more likely for policies with diffuse benefits and concentrated costs. Most models of government action already predict that policymakers are less likely to act if the benefits are shared broadly and the costs fall on a narrow group.¹⁵ That dynamic is exacerbated, however, when policymaking power is shared and freeriding becomes possible. Because minor questions often fit that diffuse-benefits-concentrated-costs mold (which is a reason why they tend to be less salient), the collective-action problem caused by deference may disproportionately affect them.¹⁶ Second, stagnation is also more likely for technical issues that require relatively more resources to address.¹⁷ When policymaking authority is shared and the costs of making policy are high, freeriding becomes more attractive. This characteristic also disproportionately applies to minor questions because technical issues are often inherently less salient. Minor questions thus are unusually susceptible to a collective-action problem. Yet because minor questions are, well, minor, no one to date has recognized the danger.

policy). To be sure, as explained below, overlapping authority sometimes results in more action, especially for popular policies. *See* p. __, *infra*. That too can be a collective-action problem, but at least it does not prevent the emergence of beneficial policies. Overlapping authority also, of course, sometimes enables action that would not otherwise occur. *See* p. __, *infra*.

¹⁴ *See, e.g., Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) (explaining that interpretative discretion gives “the Chief Executive” authority “to make [more] policy choices” based on “the incumbent administration’s views of wise policy”).

¹⁵ *See, e.g., John O. McGinnis & Michael B. Rappaport, The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483, 509 (1995) (“One of the fundamental problems of democratic politics is that concentrated interest groups have more influence ... than diffuse groups, even if the diffuse groups represent a numerical majority.”); William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 287 (1988) (explaining that we should expect “concentrated benefits and, especially, concentrated costs to stimulate more interest group formation” and that “distributed costs or benefits will presumably not tend to produce as much organizational activity”) (applying MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 1 (2d ed. 1971)); James Q. Wilson, *The Politics of Regulation*, in *THE POLITICS OF REGULATION* 357, 366-72 (James Q. Wilson ed., 1980).

¹⁶ This is especially true because minor questions do not break down along partisan lines, which means that one path out of the collective-action problem—government gridlock—is less available. *See, e.g., Hemel, supra* note 13, at 644 (explaining why political gridlock can defeat collective-action problems); *see also* p. __, *supra* (explaining this point).

¹⁷ *See, e.g., Lynn E. Blais & Wendy E. Wagner, Emerging Science, Adaptive Regulation, and the Problem of Rulemaking Ruts*, 86 TEX. L. REV. 1701, 1712-13 (2008) (noting that it is difficult to regulate “where the new information is technical or scientific, the payoff to the public from acting on it is relatively modest and diffuse, and [a group] ... will benefit ... from regulatory delay”).

Compounding that danger, moreover, is the fact that collective-action dynamics may disproportionately have long-term effects for minor questions. By definition, major questions prompt widespread debate and political action, which may moot the need for judicial review. For instance, the Court had no need to consider whether to apply the major questions doctrine to the FCC’s “net neutrality” regulations—which then-Judge Kavanaugh urged should be treated as a major question¹⁸—because intervening events mooted the issue, namely, the election of a different president.¹⁹ The same is true for the Obama Administration’s Clean Power Plan, which the Supreme Court stayed on major questions grounds,²⁰ but which also was later mooted by a new presidential administration.²¹ Even ordinary policies—those that are neither major nor minor—often are addressed by *someone* because they are deemed important enough. Yet for minor questions, for which mobilization is already less likely, stagnation may essentially be permanent.

The conventional wisdom that *Chevron* enables greater government activity is thus incomplete. Sometimes deference leads to more action, but sometimes it prevents action that would otherwise occur. The time, therefore, has come for what this Article calls the minor questions doctrine. There are at least three options for such a doctrine. One involves expanding *Chevron* Step Zero²² in a way similar to the major questions doctrine. Another involves recognizing a new species of *Chevron* waiver²³ that would allow agencies to prospectively renounce deference. And the third involves flipping the *Chevron* presumption so that agencies only receive deference when Congress says so. The common denominator

¹⁸ See *United States Telecom Ass’n v. FCC*, 855 F.3d 381, 422 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc) (“The FCC’s net neutrality rule is a major rule for purposes of the Supreme Court’s major rules doctrine.”)

¹⁹ See *Mozilla Corp. v. FCC*, 940 F.3d 1, 17 (D.C. Cir. 2019) (affirming *In re Restoring Internet Freedom*, 33 FCC Rcd. 311 (2018), which replaced *In re Protecting and Promoting the Open Internet*, 30 FCC Rcd. 5601 (2015)).

²⁰ See *West Virginia v. EPA*, 136 S. Ct. 1000 (2016) (stay); Application for Stay, *West Virginia v. EPA*, No.15A773 (Jan. 26, 2016) (requesting stay because EPA “must point to ‘clear[]’ congressional authorization whenever it ‘claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy’”) (quoting *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014)).

²¹ See Order Granting Motion, *State of West Virginia et al. v. EPA*, No. 15-1363 (D.C. Cir. Sept. 17, 2019) (en banc) (dismissing litigation as moot).

²² See, e.g., Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191 (2006) (defining “Step Zero” as “the initial inquiry into whether the *Chevron* framework applies at all”).

²³ *Chevron* waiver refers to the notion that a court will not defer to agency’s interpretation if the agency’s counsel did not request it in court. See e.g., Jeremy D. Rozansky, *Waiving Chevron*, 85 U. CHI. L. REV. 1927 (2018). The Supreme Court arguably has recognized *Chevron* waiver, see *Cty. of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1474 (2020), but the D.C. Circuit has rejected it., see, e.g., *Guedes v. BATF*, 920 F.3d 1, 28 (D.C. Cir. 2019). The species of *Chevron* waiver proposed here is different. Before promulgating a rule, an agency could forswear deference.

is that each option would eliminate overlapping policymaking space for minor questions. Although there are important counterarguments to a minor questions doctrine, the overlooked danger that deference may thwart rather than enable policymaking calls out for reform.

I. UNDERSTANDING *CHEVRON* AND MAJOR QUESTIONS

To appreciate the need for a minor questions doctrine, it is helpful to understand *Chevron* deference and the emergence of the major questions doctrine, which is an exception to the ordinary *Chevron* framework.

A. The Basics of *Chevron*

The story of *Chevron* has been told many times before.²⁴ The gist is that the Supreme Court has held that Congress has implicitly delegated to federal agencies interpretative discretion over the statutes they administer, within certain bounds, unless Congress has directly spoken to an issue.²⁵ The Court famously articulated the two-step rule as follows:

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.²⁶

A reviewing court's conclusion about which reading of a statute is the "best" one therefore need not be dispositive; if the statute is sufficiently ambiguous, the court will uphold the agency's reading so long as it is

²⁴ See, e.g., Daniel J. Hemel & Aaron L. Nielson, *Chevron Step One-and-a-Half*, 84 U. CHI. L. REV. 757, 772 (2017) (acknowledging the large number of articles about *Chevron*).

²⁵ See, e.g., Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 511-12 (1989); Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "Chevron Space" and "Skidmore Weight"*, 112 COLUM. L. REV. 1143 (2012)

²⁶ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

reasonable.²⁷ For instance, in *Chevron* itself, the Supreme Court upheld the Environmental Protection Agency's preferred plant-wide definition of "stationary source," even though the D.C. Circuit had reasoned that the best reading would treat each individual smokestack as a "stationary source."²⁸ The Justices did not disagree with the D.C. Circuit's view on its own terms but held that the court asked the wrong question. *Chevron* thus departs from ordinary interpretation by giving the executive branch greater policymaking authority when statutes are ambiguous.²⁹

Chevron's seemingly straightforward rule has proven to be complicated. For instance, although the Supreme Court usually says that *Chevron* has two steps (is the statute ambiguous, and if so, is the agency's interpretation reasonable?³⁰), the Court also sometimes suggests it really only has a single step (is the agency's interpretation reasonable?³¹). Yet other times, the Court acts like there are more than two steps, for instance by asking whether the type of agency decision is one that Congress implicitly wants to trigger deference ("Step Zero"³²), the agency followed the proper procedures ("Step 0.5"³³), the agency acknowledged the ambiguity ("Step One-and-a-Half"³⁴), or the agency's reading was reasonable yet also for some reason arbitrary and capricious (which may be "Step Three" or "Step Four," depending on your count³⁵). Even beyond confusion about *Chevron's* steps, it also turns out that the very concept of

²⁷ See *id.* at 844.

²⁸ See *id.* at 866.

²⁹ See, e.g., Sunstein, *supra* note 22, at 190 ("*Chevron* might well be seen ... as the administrative state's very own *McCulloch v. Maryland*, permitting agencies to do as they wish so long as there is a reasonable connection between their choices and congressional instructions.") (citing 17 U.S. (4 Wheat.) 316 (1819)); Philip Hamburger, *Chevron On Stilts: A Response To Jonathan Siegel*, 72 VAND. L. REV. EN BANC 77, 78 (2018) ("*Chevron* requires judges to abandon their duty of independent judgment.").

³⁰ See *Chevron*, 467 U.S. at 843.

³¹ See *Entergy Corp v Riverkeeper, Inc.*, 556 U.S. 208, 218 n.4 (2009); see also Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA L. REV. 597 (2009) (arguing for a one-step version).

³² See, e.g., Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 836 (2001) (describing "Step Zero"); *United States v. Mead Corp.*, 533 U.S. 218 (2001) (articulating the step).

³³ See Michael Pollack & Daniel Hemel, *Chevron Step 0.5*, YALE J. REG., NOTICE AND COMMENT (Jun. 24, 2016), <https://www.yalejreg.com/nc/chevron-step-0-5-by-michael-pollack-and-daniel-hemel/> ("If *Chevron* step zero asks whether Congress intended for the agency to fill gaps in the relevant statute, *Chevron* step 0.5 asks whether the agency has followed the proper procedure in filling the gap.") (discussing *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117 (2016)).

³⁴ See Hemel & Nielson, *supra* note 24 (explaining the doctrine); see also *Negusie v Holder*, 555 U.S. 511 (2009) (applying a version of the doctrine).

³⁵ See Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 832 (2010) ("[I]t has been argued that the reviewing court should also apply the arbitrary, capricious standard to the ... interpretation, adding a third or fourth step, depending on when or how you are counting.").

ambiguity is ambiguous.³⁶ And whether an agency's reading is "reasonable" can also be the subject of reasonable debate.³⁷

Chevron deference is also controversial—and has been for a long time.³⁸ No statute *explicitly* authorizes deference³⁹ and the Administrative Procedure Act's text,⁴⁰ especially combined with the history of judicial review,⁴¹ may cut against it. Going further, Justice Thomas has argued that *Chevron* may be unconstitutional,⁴² a view now also embraced by Justice Gorsuch.⁴³ *Chevron*'s defenders, however, question whether such criticisms can be reconciled with the Supreme Court's hands-off approach to delegation⁴⁴ and argue, pragmatically, that *Chevron* enables more efficient administration of national standards.⁴⁵ Defenders of deference also invoke political accountability—a point made in *Chevron* itself.⁴⁶ When a statute is ambiguous, the argument goes,

³⁶ See, e.g., Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2136 (2016) ("Unfortunately, there is often no good or predictable way for judges to determine whether statutory text contains 'enough' ambiguity" That's because there is no right answer.").

³⁷ See, e.g., Kent Barnett & Christopher J. Walker, *Chevron Step Two's Domain*, 93 NOTRE DAME L. REV. 1441 (2018) (explaining different courts' approaches to Step Two).

³⁸ See, e.g., Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 456 (1989) ("*Chevron* is a siren's song, seductive but treacherous.").

³⁹ See, e.g., Ronald A. Cass, *Vive La Deference?: Rethinking the Balance Between Administrative and Judicial Discretion*, 83 GEO. WASH. L. REV. 1294, 1315 (2015).

⁴⁰ See, e.g., *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1211 (2015) (Scalia, J., concurring) (arguing that *Chevron* conflicts with the APA's command that the "reviewing court [should] ... interpret ... statutory provisions"); Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1300-01 (2012) ("The Court made no mention of the APA in *Chevron* itself, and so far the statute has only played a minor role in subsequent decisions."); Jacob E. Gersen & Adrian Vermeule, *Chevron as a Voting Rule*, 116 YALE L.J. 676, 689 (2007) (similar); but see Sunstein, *supra* note 11, at 1656-57 (defending *Chevron* as a plausible interpretation of the APA); 1 KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE §3.3 (6th ed. 2018) (similar).

⁴¹ See, e.g., Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908 (2017) (challenging whether *Chevron* is consistent with historical practice).

⁴² See *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) ("*Chevron* ... precludes judges from exercising that judgment, forcing them to abandon what they believe is 'the best reading of an ambiguous statute' in favor of an agency's construction. It thus wrests from Courts the ultimate interpretative authority to 'say what the law is,' and hands it over to the Executive.") (citations omitted). But see Siegel, *supra* note 10, at 941 (resisting this argument).

⁴³ See, e.g., *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1156 (10th Cir. 2016) (Gorsuch, J., concurring) (arguing *Chevron* violates Article III of the Constitution).

⁴⁴ See, e.g., Metzger, *supra* note 3, at 41 ("Article III may in fact militate in favor of deference to expert elucidation of statutory standards if the questions at issue require specialized expertise or experience that the federal courts lack.").

⁴⁵ See, e.g., Peter L. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1112 (1987).

⁴⁶ See, e.g., *Chevron*, 467 U.S. at 843 ("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 such policy choices").

someone must make policy, and it makes more sense for that “someone” to be expert agency.⁴⁷

Implicit in many of these defenses of deference is the foundational premise that, *Chevron*, like other species of delegation, is good because it allows the executive branch to make policy, which frees up Congress to act on other matters or allow the federal government to address issues when Congress is deadlocked.⁴⁸ Yet the notion that *Chevron* allows the executive branch to make policy is controversial in large part precisely because many believe that too much policy is made.⁴⁹ Chief Justice Roberts, for instance, has called *Chevron* “a powerful weapon in an agency’s regulatory arsenal.”⁵⁰ Notably, in recent years, an increasingly skeptical view of *Chevron* has been embraced by many federal judges.⁵¹

Following the confirmations of Justices Neil Gorsuch and Brett Kavanaugh, many expect the Supreme Court to further limit *Chevron*’s domain.⁵² In fact, the Court has already begun doing so. In *Epic System*

⁴⁷ See, e.g., Metzger, *supra* note 3, at 94. Cf. *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651–52 (1990) (“[T]he judgments about the way the real world works that have gone into the [agency’s] policy are precisely the kind that agencies are better equipped to make than are courts. This practical agency expertise is one of the principal justifications behind *Chevron* deference.”).

⁴⁸ See, e.g., John F. Manning, *Lawmaking Made Easy*, 10 Green Bag 2d 191, 192 (2007) (explaining the theory that delegation “permit[s] [Congress] to accomplish more in the public interest”).

⁴⁹ See, e.g., *Gutierrez-Brizuela*, 834 F.3d at 1151 (Gorsuch, J., concurring) (criticizing *Chevron* for enabling lawmaking “without the inconvenience of having to engage the legislative processes the Constitution prescribes,” i.e., another “form of Lawmaking Made Easy, one that permits all too easy intrusions on the liberty of the people”) (citing Manning, *supra* note 48, at 202); Charles J. Cooper, *The Flaws of Chevron Deference*, 21 TEX. REV. L. & POL. 307, 308 (2017) (“Today the administrative state is essentially a sovereign unto itself, a one-branch government whose regulatory grasp extends into virtually every human activity.”); *Hamburger*, *supra* note 29, at 82–83 (“*Chevron* is a ... judicial effort to expand the administrative state.”); Richard A. Epstein, *Why the Modern Administrative State Is Inconsistent with the Rule of Law*, 3 NYU J.L. & LIBERTY 491, 505 (2008) (“[D]eference ... ignores the danger that good bureaucrats will be more intent on expanding their power than behaving like disinterested experts”). The view that *Chevron* is the reason for a larger federal government, however, is not universally held. See, e.g., Terence J. McCarrick, Jr., *In Defense of A Little Judiciary: A Textual and Constitutional Foundation for Chevron*, 55 SAN DIEGO L. REV. 55, 85 (2018) (“So, what—if not *Chevron*—accounts for the continued expansion of the administrative state? Conscious political choice.”).

⁵⁰ *City of Arlington v. FCC*, 133 S. Ct. 1863, 1879 (2013) (Roberts, C.J., dissenting) (joined, *inter alia*, by Alito, J.); see also Heinzerling, *supra* note 4, at 1958 (noting “the Chief Justice’s evident desire to trim the power of administrative agencies”).

⁵¹ See, e.g., Raymond M. Kethledge, *Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 VAND. L. REV. EN BANC 315, 324 (2017); *Egan v. Del. River Port Auth.*, 851 F.3d 263, 278 (3d Cir. 2017) (Jordan, J., concurring in the judgment); Christopher J. Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL’Y 103 (2018) (documenting examples); see also Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1302 (2018) (using a survey to show that most federal circuit judges “are not fans of *Chevron*, with the significant exception of the judges we interviewed from the D.C. Circuit”).

⁵² See, e.g., Kristin Hickman & Aaron L. Nielson, *Narrowing Chevron’s Domain*, DUKE L.J.

Corp. v. Lewis, Gorsuch, writing for the Court, held that *Chevron* does not apply when the Department of Justice disagrees with an independent agency about how to read a statute.⁵³ The Court has also taken shots at *Chevron* itself.⁵⁴ And most recently, in *Kisor v. Wilkie*, a majority of the Court upheld a weakened form of *Auer* deference (which applies when an agency interprets a *regulation* rather than a *statute*, as with *Chevron*).⁵⁵ Although Chief Justice Roberts joined parts of the *Kisor* opinion, he pointedly refused to defend *Chevron* on *stare decisis* grounds.⁵⁶

B. The Major Questions Doctrine

Driven by nondelegation concerns⁵⁷ and its associated fear of government “overreach,”⁵⁸ the Supreme Court over the last few decades has developed an exception to *Chevron* known as the major questions doctrine. Under the doctrine, a court—in “extraordinary cases”—will set aside the ordinary *Chevron* framework altogether on the theory that absent an “express[]” statement from Congress, judges should not assume that Congress would have delegated “a question of deep ‘economic and political significance’” to an agency.⁵⁹ In this way, the major questions

(forthcoming 2021); Metzger, *supra* note 3, at 17.

⁵³ See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018).

⁵⁴ See *SAS Institute Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018) (“But whether *Chevron* should remain is a question we may leave for another day.”); see also *Pereira v. Sessions*, 138 S. Ct. 2105 (2018) (refusing to afford deference); *id.* at 2121 (Kennedy, J., concurring) (“[I]t seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision”).

⁵⁵ See *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) (upholding, but modifying, *Auer v. Robbins*, 519 U.S. 452 (1997)).

⁵⁶ See *id.* at 2425 (Roberts, C.J., concurring in part and in the judgment) (“Issues surrounding judicial deference to agency interpretations of their own regulations are distinct from those raised in connection with judicial deference to agency interpretations of statutes enacted by Congress. I do not regard the Court’s decision today to touch upon the latter question.”) (citing *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U. S. 837 (1984)).

⁵⁷ See, e.g., *Gundy v. United States*, 139 S. Ct. 2116, 2142 (2019) (“Although it is nominally a canon of statutory construction, we apply the major questions doctrine in service of the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency.”) (Gorsuch, J., dissenting); Loshin & Nielson, *supra* note 5, at 23 (“The Court is alarmed by excessive delegation but is wary about directly enforcing the nondelegation doctrine—so it looks for more judicially manageable proxies.”).

⁵⁸ See, e.g., Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777, 785 (2017); *Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989) (“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.”).

⁵⁹ *King v. Burwell*, 135 S. Ct. 2480, 2488-89 (2015) (citations omitted). See also Jonas J. Monast, *Major Questions About the Major Questions Doctrine*, 68 ADMIN. L. REV. 445 (2016).

doctrine resembles the rule of interpretation that courts should address nondelegation concerns by reading statutes narrowly.⁶⁰

That said, it has taken time to place where the major questions doctrine fits in administrative law. In arguably the first case⁶¹ in the line, *MCI v. AT&T*, Justice Scalia framed the inquiry at *Chevron*'s first step,⁶² on the theory that an ambiguity for *Chevron* purposes *cannot* exist where the agency's would work "a fundamental revision of the statute" that violates "the heart" of scheme.⁶³ The Court then continued to apply a step one formulation in *FDA v. Brown & Williamson*,⁶⁴ despite the presence of fairly obvious ambiguity.⁶⁵ Reviewing *MCI* and *Brown & Williamson*, Scalia later suggested the principle: "Congress ... does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."⁶⁶ That formulation has since been used by justices across the ideological spectrum in a number of cases.⁶⁷ Recognizing that the Court's approach to ambiguity in these cases, with its emphasis on the significance of the policy question, differed from how ambiguity is treated in other cases, Cass Sunstein argued that the major questions doctrine is best understood as falling within step zero.⁶⁸ And in *King v. Burwell*, Chief Justice Roberts agreed, concluding that certain questions—such as whether subsidies are available on federal health-care exchanges—are too significant for the *Chevron* framework.⁶⁹ *King* is noteworthy because

⁶⁰ See, e.g., *Gundy*, 139 S. Ct. at 2141 ("We still regularly rein in Congress's efforts to delegate legislative power; we just call what we're doing by different names.").

⁶¹ Then-Judge Breyer noted the idea earlier. See Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986) (suggesting that Congress is "more likely to have focused upon, and answered, major questions").

⁶² See 512 U.S. 218, 229 (1994) ("Since an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear, the Commission's permissive detariffing policy can be justified only if it makes a less than radical or fundamental change in the Act's tariff-filing requirement.").

⁶³ *Id.* at 231.

⁶⁴ See 529 U.S. 120, 125-126 (2000).

⁶⁵ See, e.g., John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223 (2001) (arguing that the statute was ambiguous in *Brown & Williamson*). Cf. *Glob. Tel*Link v. FCC*, 866 F.3d 397, 418-19 (D.C. Cir. 2017) (Silberman, J., concurring) (faulting Justice Scalia for "never conceded[ing] that the word 'modify' was ambiguous [in *MCI*], which it was").

⁶⁶ *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001) (citing *MCI*, 512 U.S. at 231; *Brown & Williamson*, 529 U.S. at 159-60).

⁶⁷ See, e.g., *Loshin & Nielson*, *supra* note 5, at 47 (explaining that the entire Court has embraced the doctrine). See also *King v. Burwell*, 135 S. Ct. 2480, 2488-89 (2015) (defending the doctrine in a decision authored by Chief Justice Roberts, and joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan).

⁶⁸ See Sunstein, *Chevron Step Zero*, *supra* note 29, at 236.

⁶⁹ See 135 S. Ct. 2480, 2488-89 (2015) (holding that "the two-step framework announced in *Chevron*" does not apply "[i]n extraordinary cases") (quotation omitted).

the Court upheld the agency's interpretation about the availability of tax credits on federal rather than state exchanges, but it did so without deference. Other cases in the major-questions line both deny deference *and* further reject the lawfulness of the agency's interpretation.

The major questions doctrine is also controversial. Its critics contend that there is no principled way to determine whether a question is "major" or not. After all, can a court reliably tell whether a policy "is truly an elephant—and not just a rather plump mouse," or whether the ambiguity "is sufficiently unimportant to be a mousehole—and not just a rather cramped circus tent"?⁷⁰ Moreover, if *Chevron* is premised on the notion that a politically-accountable agency is better positioned than a politically-isolated court to resolve ambiguities in statutes, then why should that analysis change depending on the importance of the policy?⁷¹ Indeed, might principles of political accountability cut in *favor* of agency resolution of major issues, as presidents run for office on just such questions?⁷² And for those who believe for "pragmatic"⁷³ reasons that robust administrative power is essential for the "effective" functioning of modern government,⁷⁴ the whole idea of the major questions doctrine can be maddening. Some scholars have thus urged the Supreme Court to inter the doctrine outright,⁷⁵ or at least read it very narrowly.⁷⁶

Nonetheless, the Supreme Court has not backed away from it. Indeed, then-Judge Brett Kavanaugh, while on the D.C. Circuit, urged greater use of the major questions doctrine—which he called the "major rules" doctrine.⁷⁷ According to Kavanaugh, the FCC's decision to impose so-

⁷⁰ Loshin & Nielson, *supra* note 5, at 45.

⁷¹ See, e.g., Heinzerling, *supra* note 4, at 1959 (rejecting doctrine on this ground).

⁷² See, e.g., Cass R. Sunstein, *Beyond Marbury: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2606 (2006) ("[E]xpertise and accountability, the linchpins of *Chevron's* legal fiction, are highly relevant to the resolution of major questions. Contrary to Justice Breyer's suggestion, there is no reason to think that Congress would want courts, rather than agencies, to resolve major questions."). This argument, of course, assumes that the major questions doctrine is designed to accurately reflect what Congress intends. To the extent the Supreme Court believes that too much delegated power is unconstitutional and that the test turns on whether a policy is major, then constitutional avoidance should have more teeth for major policies.

⁷³ See, e.g., Bradley George Hubbard, *Deference to Agency Statutory Interpretations First Advanced in Litigation? The Chevron Two-Step and the Skidmore Shuffle*, 80 U. CHI. L. REV. 447, 470 (2013) (noting the "pragmatic" argument).

⁷⁴ See, e.g., Metzger, *supra* note 3, at 92-94.

⁷⁵ See, e.g., Heinzerling, *supra* note 4, at 1958; *Major Questions Objections*, *supra* note 3, at 2212,

⁷⁶ See, e.g., Sohoni, *supra* note 7, at 1439 (arguing that *King* should be read as only holding that "[a]gency action that triggers large-scale government spending on the basis of ambiguous statutory authority falls outside *Chevron's* domain"); *Massachusetts v. EPA*, 549 U.S. 497, 527 (2007) (reading *Brown & Williamson* narrowly).

⁷⁷ See, e.g., *United States Telecom Ass'n v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

called “net neutrality” regulations should be evaluated and found wanting as a major question.⁷⁸ This statement hewed closely to recent Supreme Court decisions like *Utility Air Regulatory Group v. EPA*.⁷⁹ Perhaps even more significantly, the Court itself stayed the Obama Administration’s Clean Power Plan, which would have significantly affected the nation’s energy sector, on major questions grounds.⁸⁰

In fact, not only has the Court shown no inclination to back away from the major questions doctrine, it has suggested a willingness to expand it. Recall that the major questions doctrine has been understood as an exception to *Chevron*, a *statutory* presumption that Congress intends agencies to reasonably resolve ambiguities. Yet there may now be five votes to *constitutionalize* the doctrine, meaning that Congress could not even expressly empower courts to defer to agency resolutions of major questions when the relevant statutory authorization is ambiguous. Now-Justice Kavanaugh recently commended Justice Gorsuch’s “thoughtful” call to revisit the intelligible principle standard.⁸¹ Kavanaugh then tipped his hand about what the new standard ought to be. Notably, that standard openly borrows from the major questions doctrine.⁸²

II. UNDERSTANDING COLLECTIVE-ACTION DYNAMICS

To understand the need for a minor questions doctrine, it is also necessary to understand an important principle of decisionmaking: sometimes less is more. In a group setting, what is rational for each individual may result in suboptimal outcomes for the group. This section

⁷⁸ See *id.* at 422-24.

⁷⁹ See *id.* at 420-21 (citing 573 U.S. 302 (2014)).

⁸⁰ See, e.g., Application for Stay, *West Virginia v. EPA*, No.15A773 (Jan. 26, 2016) (successfully requesting stay on major-questions grounds); Jim Dennison, *A Cost-Benefit Analysis-Based Interpretation of Reciprocity Under Clean Air Act Section 115(c)*, 103 VA. L. REV. 1561, 1587 (2017) (explaining that the litigation “is likely to help clarify the major questions and elephants in mouseholes doctrines”).

⁸¹ *Paul v. United States*, 140 S. Ct. 342 (Kavanaugh, J., concurring) (endorsing *Gundy v. United States*, 139 S. Ct. 2116, 2148 (2019) (Gorsuch, J., dissenting)). Justice Gorsuch’s dissent in *Gundy* was joined by Chief Justice Roberts and Justice Thomas while Justice Alito wrote that “[i]f a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort.” *Gundy*, 139 S. Ct. at 2030 (Alito, J., concurring).

⁸² See *id.* at 342 (“[T]he Court has not adopted a nondelegation principle for major questions. But the Court has applied a closely related statutory interpretation doctrine: In order for an executive or independent agency to exercise regulatory authority over a major policy question of great economic and political importance, Congress must either: (i) expressly and specifically decide the major policy question itself and delegate to the agency the authority to regulate and enforce; or (ii) expressly and specifically delegate to the agency the authority both to decide the major policy question and to regulate and enforce. ... Justice Gorsuch would not allow that second category—congressional delegations to agencies of authority to decide major policy questions—even if Congress expressly and specifically delegates that authority.”) (emphasis added).

thus first explains how collective-action problems work generally and under what circumstances they are most likely to arise. It then offers solutions recognized in the literature.

A. The Logic of Collective-Action Dynamics

The law is no stranger to collective-action dynamics.⁸³ The basic idea is that sharing authority can lead to suboptimal outcomes.⁸⁴ When groups are involved, what is rational for each individual member may nonetheless result in outcomes that are irrational for everyone.⁸⁵

A classic example of a collective-action problem, and one that will form the basis for much of this Article, is the Snowdrift Game, also sometimes called the Chicken Game (which is conceptually similar).⁸⁶ Imagine one car going north and another going south, and they come across the same snowdrift that has blocked the road. The only way for either car to get through is if someone shovels the snow; there is no way to do that, however, that only benefits one of the drivers. The worst-case scenario for both drivers is if no one digs, in which case no one moves forward. Thus, one might expect both drivers to pick up a shovel. Yet for each individual,

⁸³ See, e.g., *In re CNX Gas Corp. Shareholders Litig.*, 4 A.3d 397 (Del. Ch. 2010) (“A good board ... does not suffer from the collective action problem of disaggregated stockholders”); *In re Inslaw, Inc.*, 932 F.2d 1467, 1473 (D.C. Cir. 1991) (“The object of the automatic stay provision is essentially to solve a collective action problem—to make sure that creditors do not destroy the bankrupt estate in their scramble for relief.”); *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 595 (2012) (Ginsburg, J., concurring in part) (“States are unlikely to take the initiative in addressing the problem of the uninsured, even though solving that problem is in all States’ best interests. Congress’ intervention was needed to overcome this collective-action impasse.”).

⁸⁴ See, e.g., Peter M. Shane, *Cybersecurity: Toward A Meaningful Policy Framework*, 90 TEX. L. REV. SEE ALSO 87 (2012) (defining “a classic collective-action problem” as a situation “where everyone doing his or her personal best ... is not going to produce an optimal result”); Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 117 (2010) (“When activities spilled over from one state to another, the Framers recognized that the actions of individually rational states produced irrational results for the nation as a whole—the definition of a collective action problem.”). But see Aziz Z. Huq, *Does the Logic of Collective Action Explain Federalism Doctrine?*, 66 STAN. L. REV. 217, 226 (2014) (“[T]here is no standard definition of ... ‘collective action problem’ in the legal literature. I will argue below that the term is often employed with some liberality, and even a touch of promiscuity.”).

⁸⁵ See, e.g., MICHAEL TAYLOR, *THE POSSIBILITY OF COOPERATION* 18 (1987) (“[A] collective action problem exists where rational individual action can lead to a strictly Pareto-inferior outcome, that is, an outcome which is strictly less preferred by every individual than at least one other outcome.”).

⁸⁶ See, e.g., Christopher S. Yoo, *Beyond Coase: Emerging Technologies and Property Theory*, 160 U. PA. L. REV. 2189, 2224 (2012) (citing ROBERT SUGDEN, *THE ECONOMICS OF RIGHTS, COOPERATION AND WELFARE* 58-62, 128-32 (1986)). If you don’t like either one of these games because you think they are unrealistic, here is an even simpler version. Call it the Dishes Game. In college, roommate sometimes leave dishes out until finally someone does them. Everyone is better off with clean dishes but all else being equal, students prefer someone else to do them.

it better still if the other driver does the work. While the worker is out in the cold, the non-worker can enjoy a warm vehicle. When this situation arises, both drivers may opt to stay in the car.⁸⁷ In the conceptually similar Chicken Game, two drivers are driving at each other. Each wants the other to play “chicken” and swerve (i.e., act), but if neither driver swerves, a serious accident will result.⁸⁸ Yet because each individual driver is better off if the other one changes direction, it is possible that neither driver will swerve, resulting in an accident. Thankfully, the worst-case outcome (either two cars stalled in front of a snowdrift or, even worse, in a fiery collision) does not always happen and when the costs of mutual inaction become dire enough, it is quite unlikely to ever happen.⁸⁹ But it *can* happen, and how likely it is to happen depends on the players’ respective strategies.

Freeriding—letting someone else work while you benefit—is a common element of collective-active dynamics. “A rational individual reasons that if others engage in the behavior necessary to achieve the collective good, she can free ride on their efforts and still gain the benefits of their behavior.”⁹⁰ This free-rider problem is closely associated with public goods, “that is, non-rival, non-excludable goods,” because “free-riders cannot be excluded from obtaining the benefits these goods provide.”⁹¹ If everyone benefits from a good, each person may decide to let someone else produce the good. Confronted with that incentive, however, it is possible that no one will bear the cost: “If an entrepreneur stages a fireworks show, for example, people can watch the show from their windows or backyards. Because the entrepreneur cannot charge a fee for

⁸⁷ See, e.g., Nicolas Suzor, *Free-Riding, Cooperation, and “Peaceful Revolutions” in Copyright*, 28 HARV. J.L. & TECH. 137, 173 (2014) (“[W]hen you are faced with a snowdrift blocking a road, it is better to shovel it out of the way than to do nothing, better still if everyone shovels, best if someone else shovels while you do nothing, and worst for everyone if nobody picks up a shovel.”) (citing, *inter alia*, D.F. Zheng et al., *Cooperative Behavior in a Model of Evolutionary Snowdrift Games with N-Person Interactions*, 80 EPL 18002, 18002-p1 (2007)).

⁸⁸ See *id.* (citing Irwin Lipnowski & Shlomo Maital, *Voluntary Provision of a Pure Public Good as the Game of “Chicken,”* 20 J. PUB. ECON. 381, 384 (1983)); see also Yoo, *supra* note 86, at 2224. If fiery collisions are too outlandish for your taste, a more mundane example about newlyweds may be better. Love is real, but dirty dishes somehow still go unwashed in the sink.

⁸⁹ See, e.g., EDWARD C. ROSENTHAL, *THE COMPLETE IDIOT’S GUIDE TO GAME THEORY* 74 (2011) (“Not surprisingly, as the mutually destructive outcome becomes more severe, the players will play less aggressively.”).

⁹⁰ Ann E. Carlson, *Recycling Norms*, 89 CAL. L. REV. 1231, 1243 (2001) (citing ELINOR OSTROM, *GOVERNING THE COMMONS, THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* 5-7 (1990)); see also Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422, 1465 (2011) (“Information acquisition may often suffer from a collective action problem, in which each agent is tempted to free ride, shirking her own obligations to invest in costly research”).

⁹¹ Patrick Croskery, *Institutional Utilitarianism and Intellectual Property*, 68 CHI.-KENT L. REV. 631, 634 (1993).

consumption, the fireworks show may go unproduced, even if demand for the show is strong.”⁹² To be sure, social norms may lead to cooperation.⁹³ And it also possible that a show will be so valuable that someone will almost certainly pay for it.⁹⁴ But *sometimes* no one does anything. And even when someone does act, at the margins, a collective-action dynamic may reduce the amount of activity in suboptimal ways. On the 4th of July, lots of people still shoot fireworks even with a collective-action dynamic. But shows could be better without that dynamic.

When two individuals can act and both face an incentive to freeride, game theorists have recognized that the rational move for each player may be to adopt a “mixed strategy” of sometimes acting and sometimes not.⁹⁵ The ratio of action to inaction for each player depends on how much each values action, combined with an assessment how much the other side values action.⁹⁶ How this works will be described algebraically below,⁹⁷ but the intuition is that “always acting” or “never acting” does not make sense given what the other individual may do in response.⁹⁸

Finally, collective-action problems are a both common justification for government intervention and a common explanation for government inaction. For instance, when it comes to public goods like building streetlights (a local problem) or missile shields (a national problem),⁹⁹ the government may be best positioned to act because individuals may be tempted to freeride.¹⁰⁰ At the same, however, collective-action dynamics may also distort the law and lead to inaction. Where the benefits of a policy are diffuse, for example, but the policy’s costs are concentrated, it

⁹² Tyler Cowen, *Public Goods*, THE LIBRARY OF ECONOMICS AND LIBERTY, <http://www.econlib.org/library/Enc/PublicGoods.html>; see also *id.* (“If the free-rider problem cannot be solved, valuable goods and services—ones people otherwise would be willing to pay for—will remain unproduced.”).

⁹³ See, e.g., Elinor Ostrom, *Collective Action and the Evolution of Social Norms*, 14 J. ECON. PERSPECTIVES 137, 140 (2000).

⁹⁴ See, e.g., Rosenthal, *supra* note 89, at 74 (noting that as the costs of inaction increase, action becomes more likely).

⁹⁵ See generally Nash, *supra* note 13.

⁹⁶ See, e.g., Hemel, *supra* note 13, at 707.

⁹⁷ See n.150, *infra*.

⁹⁸ See, e.g., DOUGLAS G. BAIRD ET AL, GAME THEORY AND THE LAW 37-39 (1994) (explaining mixed strategies and why rational actors may adopt them).

⁹⁹ See, e.g., Edward J. Janger, *Predicting When the Uniform Law Process Will Fail: Article 9, Capture, and the Race to the Bottom*, 83 IOWA L. REV. 569, 632 (1998) (“A collective-action problem exists whenever private markets are relied on to provide public goods, such as street lamps and national defense.”).

¹⁰⁰ See, e.g., OLSON, *supra* note 15, at 14 (“It would obviously not be feasible, if indeed it were possible, to deny the protection provided by the military services, the police, and the courts to those who did not voluntarily pay their share of the costs of government, and taxation is accordingly necessary.”). That said, even for public goods, government action is not always necessary. See, e.g., R.H. Coase, THE LIGHTHOUSE IN ECONOMICS, 17 J.L. & ECON. 357 (1974)

is possible that no one will act to bring the policy about, or that a weaker version of the policy will emerge, because the policy's would-be beneficiaries will hope that someone else does the necessary work while a highly motivated interest group will oppose the policy.¹⁰¹

B. Collective-Action Dynamics and Theories of Government

Implicit in the foregoing is the point that how often collective-action problems prevent beneficial behavior depends on how decisions are made and in particular the values decisionmakers place on action and inaction. Those values, in turn, are affected by what motivates decisionmakers. To the extent that decisions are motivated by altruism, it is relatively less likely that collective-action dynamics will prevent beneficial action.¹⁰² In the fireworks example, for instance, if a decisionmaker *enjoys* benefitting others, then the fact there is no way to prevent others from sharing in the experience is much less likely to prevent the show. The collective-action dynamic arises because individuals like fireworks and believe that they can watch someone else's rather than pay for them themselves. Yet if someone takes pleasure in letting others watch his or her fireworks, the same sort of analysis does not apply. Or in the Chicken Game, if one driver takes pleasure in making the other driver happy, he or she may very well get out of the way without really playing the game. By contrast, if a decisionmaker is less altruistic, then an inability to avoid freeriding may prevent a firework show from happening or result in a fiery crash.

This point can be applied to theories of government behavior. What motivates government officials is a difficult question, especially because the answer no doubt varies. Some officials may have pecuniary interests in mind¹⁰³ while others may be more altruistic. Steven Croley has

¹⁰¹ See, e.g., *id.* To be sure, this point should not be taken too far; cooperation is not impossible, even for large, diffuse groups. See GUNNAR TRUMBULL, *STRENGTH IN NUMBERS: THE POLITICAL POWER OF WEAK INTERESTS* (2012). That said, at the margins, it is surely easier to coordinate in small groups with intense interests than large groups with diffuse interests. See, e.g., Jonathan Rauch, *Was Mancur Olson Wrong?*, *THE AMERICAN* (Feb. 15, 2013) ("Olson did not say diffuse interests cannot organize, any more than Newton's gravitational theory says you can't walk uphill. He said it is harder, other things being equal, for diffuse interests to organize.").

¹⁰² See, e.g., Lu Gram et al., *Understanding Participation Dilemmas In Community Mobilisation: Can Collective Action Theory Help?*, 73 *J EPIDEMIOL COMMUNITY HEALTH* (2019) ("In other situations, the direct benefits are excludable, but sharing still occurs out of altruism.").

¹⁰³ See, e.g., Adam J. Levitin, *The Politics of Financial Regulation and the Regulation of Financial Politics: A Review Essay*, 127 *HARV. L. REV.* 1991, 2042 & n.247 (2014) (collecting citations about the "revolving door"); DAVE BARRY *HITS THE BELTWAY* (2001) ("When they say 'serve the nation,' what they of course mean is that they want to be whisked around the nation in a motorcade, and fly on Air Force One, and be catered to by a large fawning entourage.").

collected and summarized the leading theories.¹⁰⁴ Especially relevant is the debate between those who subscribe to public-interest versus public-choice models of government behavior—models this article caricatures to more cleanly present the distinction. The premise of the public-interest model is that that officials always try to do what is best for the public.¹⁰⁵ A very simplified version of public choice,¹⁰⁶ by contrast, posits that those in power look out for themselves, and are unlikely to do what benefits the public absent some element of personal advantage.¹⁰⁷ Public choice theory, of course, has its share of critics, especially when taken to extremes.¹⁰⁸ Even so, that doesn't mean the theory isn't valuable¹⁰⁹ or that there are not examples of what looks like public choice in action.¹¹⁰

¹⁰⁴ See Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 5 (1998). For further discussion, see Richard Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335 (1974).

¹⁰⁵ See, e.g., Croley, *supra* note 104, at 65; Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process As Illustrated by Tax Legislation in the 1980s*, 139 U. PA. L. REV. 1, 6 (1990) (“[T]he public interest view emphasizes the importance of ideology and the desire to make good policy, which are seen as motivating legislators to seek to improve society (according to their perhaps controversial notions of what is good).”). Unsurprisingly, what an abstract concept like “the public interest” means in application is debatable. See, e.g., David Thaw, *Enlightened Regulatory Capture*, 89 WASH. L. REV. 329, 336 (2014) (“Debate over what constitutes the ‘public interest’ enjoys a rich history both in political theory and in political action.”); Scott L. Cummings, *The Pursuit of Legal Rights-and Beyond*, 59 UCLA L. REV. 506, 521 (2012) (characterizing the question as “imponderable”).

¹⁰⁶ This is a very simplified version—no doubt too simplified. As others have noted, the “homo-economicus” view of human nature does not realistically portray how humans behave. See, e.g., D. Daniel Sokol, *Explaining the Importance of Public Choice for Law*, 109 MICH. L. REV. 1029, 1040 (2011) (reviewing MAXWELL L. STEARNS & TODD J. ZYWICKI, PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW (2009)). A more accurate portrayal of public choice would posit that the public good is only one of many things that regulators care about. Surely everyone who goes to work for government does so because they desire to see the public good promoted. Personal interests, however, play a greater role in the overall balance of interests. See *id.* (explaining the need for, and difficulties of, a broader conception of “self interest”). For purposes of this article’s analysis, however, there is value in a caricature—it more sharply illustrates the point.

¹⁰⁷ See, e.g., Croley, *supra* note 104, at 34; JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATION OF CONSTITUTIONAL DEMOCRACY* 28 (1965) (“Self-interest, broadly conceived, is recognized to be a strong motivating force in all human activity; and human action, if not bounded by ethical or moral restraints, is assumed more naturally to be directed toward the furtherance of individual or private interest.”); cf. Jeremy Kidd, *Fintech: Antidote To Rent-Seeking?*, 93 CHI. KENT L. REV. 165, 172 (2018) (explaining that “[a] counter-intuitive result of legislative and regulatory processes is that those who bear the costs of regulation often lobby for its implementation because they know that new entrants into the market will not be able to afford the additional costs”); Jeremy Kidd, *Quacks or Bootleggers: Who’s Really Regulating Hedge Funds?*, 75 WASH. & LEE L. REV. 367, 441–42 (2018) (similar).

¹⁰⁸ See, e.g., Tom Ginsburg, *Ways of Criticizing Public Choice: The Uses of Empiricism and Theory in Legal Scholarship*, 2002 U. ILL. L. REV. 1139, 1147–48.

¹⁰⁹ See, e.g., *id.* at 1154 (“Even if people are not self-interested, we may want to ... assume that they are for purposes of institutional design. As long as some large proportion of human behavior involves self-interest—and even social constructivists would likely acknowledge that this is the case—it makes sense to take self-interest into account as we design institutions. Public

To the extent that government decisionmakers (e.g., members of Congress or executive branch regulators) are motivated by the public interest, we should expect less inaction when beneficial policies are on the table; by contrast, to the extent decisionmakers are motivated by public choice, we should expect more inaction.

In reality, of course, the truth is somewhere in the middle, especially when (i) the entire universe of decisionmakers is considered and (ii) the time-horizon is extended beyond a particular decision. The pool of decisionmakers presumably includes individuals at different points on a (simplified) public-interest-versus-public-choice spectrum and even public-interest-minded individuals may make decisions that themselves are not in the public interest on the theory that ensuring reelection will enable more decisions in the public interest.¹¹¹ Likewise, even those who want to do good may fail in their attempt because they lack the interest in a particular issue that would be beneficial if acted on; unfortunately, because we have finite resources (including time), no one can address everything. We all have priorities. Accordingly, unless one believes that *all* policymakers *only* pursue what an objective observer would call the public interest and are indifferent to the special consequences for themselves, whatever one's opinion of what generally motivates decisionmakers, we should worry about collective-action dynamics.

C. How to Address Collective-Action Dynamics

Finally, and of particular importance here, it is possible to mitigate collective-action problems. An answer to the Chicken Game, for instance, is a credible commitment mechanism.¹¹² If the drivers *know* that one cannot turn (for examples, because she has openly removed the steering wheel), the payoff structure changes.¹¹³ Then, the rational response is for

choice-like insights have been utilized in this pragmatic manner for two hundred years.”); DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 4 (1991) (“[E]ven if [the most extreme positions] do not fully capture the realities of government, they may still represent some important tendencies.”).

¹¹⁰ See, e.g., GORDON TULLOCK, *PUBLIC CHOICE AND AGRICULTURE: AN AMERICAN EXAMPLE* (1991) (offering examples of potential public-choice decisions).

¹¹¹ See, e.g., HARRY QUILLER, *THE UNIVERSAL REVIEW* (1890) (“To get elected is the first duty of a politician; to get re-elected is his second duty. What good can he do if he loses his seat?”). Cf. Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1352 (2003) (“[T]here are many instances when the pursuit of narrow self-interest by groups may arguably benefit the more diffuse public.”).

¹¹² See, e.g., THOMAS SCHELLING, *THE STRATEGY OF CONFLICT* 22-28 (1960).

¹¹³ See, e.g., Lee Anne Fennell, *Adjusting Alienability*, 122 HARV. L. REV. 1403, 1449–50 (2009) (“These limits can often be conceptualized as legally imposed precommitment devices, similar to one party (A) tearing out her own steering wheel during a game of roadway Chicken with another

the driver who can still steer to change direction.¹¹⁴ Similarly, where feasible and a sound organization in place to prevent unintended consequences, it may make sense for the government to intervene to prevent a collective-action problem, for instance by itself providing a public good such as national defense.¹¹⁵ In other words, if the collective-action problem arises because two can act, a solution to the problem is to take away that power from one of them. Other possible solutions include increasing cooperation—by encouraging beneficial norms to that effect¹¹⁶ or by increasing punishment for lack of cooperation (a form of “encouragement” used by illegal cartels¹¹⁷). “Repeat-player” dynamics may also play a role (e.g., by encouraging cooperation for fear of punishment in the next iteration of the game), especially where the same parties are involved and know they are in an iterative-game.¹¹⁸

III. CHEVRON AND COLLECTIVE-ACTION DYNAMICS

The conventional wisdom—shared by both those who are wary of “an already titanic administrative state”¹¹⁹ and those believe agencies need authority to address “modern problems”¹²⁰—is that delegation, of which

party (B). If B indeed faces a Chicken Game payoff structure, he will see A’s precommitment and swerve”) (citing Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement To Facilitate Coasean Trade*, 104 YALE L.J. 1027, 1049 n.74 (1995)).

¹¹⁴ See, e.g., LISA L. MARTIN, *DEMOCRATIC COMMITMENTS: LEGISLATURES AND INTERNATIONAL COOPERATION* 64 (2000) (explaining commitment mechanisms, including openly tossing aside a steering wheel).

¹¹⁵ See *supra* n. 92.

¹¹⁶ See, e.g., Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 918 (1996) (“Good social norms solve collective action problems by encouraging people to do useful things that they would not do without the relevant norms.”).

¹¹⁷ See, e.g., Christopher R. Leslie, *Antitrust Amnesty, Game Theory, and Cartel Stability*, 31 J. CORP. L. 453, 461 (2006) (“One solution, most associated with organized crime, is to kill the snitch.”).

¹¹⁸ See, e.g., Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, 1196 n.86 (2005) (noting “features” of “the legislative process, such as logrolling, a norm of collegiality, [and] the presence of repeat players” that may “mitigate collective action problems”). That said, repeat-player dynamics are not a cure-all. See, e.g., Kathryn Judge, *Intermediary Influence*, 82 U. CHI. L. REV. 573, 598 (2015) (explaining how “an industry structure conducive to collective action, combined with the strategic use of positional and informational advantages that intermediaries derive as repeat players in a particular market, may operate to entrench an inefficient institutional arrangement”); David Dana & Susan P. Koniak, *Bargaining in the Shadow of Democracy*, 148 U. PA. L. REV. 473, 482 (1999) (explaining why it can “more difficult to control opportunism than the ‘repeat player’ story might lead one to believe,” including lack of good information about what has happened and why).

¹¹⁹ *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1156 (10th Cir. 2016) (Gorsuch, J., concurring).

¹²⁰ See, e.g., *How Brett Kavanaugh Could Cripple the Next Democratic President*, MOTHER JONES (Jul. 24, 2018) (“Without Chevron deference, agencies could end up lacking the tools to deal with modern problems.”), <https://www.motherjones.com/politics/2018/07/brett-kavanaugh->

Chevron deference is a species, by its very nature result in more federal activity.¹²¹ After all, the theory goes, absent *Chevron*, where an ambiguous statute is best read as foreclosing some policy, only Congress can create policy. Because of *Chevron*, however, an agency can also sometimes create policy in that situation.¹²² So, on the theory that two is more than one, we should expect that more policy will be created. Both sides of the ideological debate about *Chevron* share the premise. They just disagree about whether increased activity should be applauded.

Yet that shared premise is false, or at least incomplete. To be sure, the premise may be true for major questions; indeed, one reason the White House uses regulatory power for high-profile policy issues is because Congress refuses to enact new legislation.¹²³ This means that if the Supreme Court continues to enforce the major questions doctrine, presidents will have less ability to create major policies through regulation. And so if the Court backs away from the doctrine, presidents will have a freer hand to create major policies. The shared premise may also be true for policies that are neither major nor minor but are regularly addressed by policymakers (even if not on the front page).

The shared premise is not true, however, for minor questions. Minor questions—that is, low-profile, often bipartisan issues that the political branches want resolved the same way but are not high priorities for either one—are particularly at risk of policy stagnation. As Mancur Olson observed, because of the collective-action dynamics that shared authority creates, “[i]t is not in fact true that the idea that groups will act in their self-interest follows logically from the premise of rational and self-

[supreme-court-chevron-deference/](#). Cf. David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 292-93 (2013) (explaining that “open-ended, broad delegations of regulatory authority” enable “the administrative state [to] be responsive to modern problems”).

¹²¹ See, e.g., Brett M. Kavanaugh, *Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 NOTRE DAME L. REV. 1907, 1911 (2017) (“[T]he *Chevron* doctrine encourages agency aggressiveness on a large scale. Under the guise of ambiguity, agencies can stretch the meaning of statutes enacted by Congress to accommodate their preferred policy outcomes.”).

¹²² The President, the White House, and federal agencies do not always overlap in terms of agenda. See, e.g., Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 686-87 (2016); Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755, 1837 (2013). Nevertheless, it is no secret that the Presidency, acting through White House personnel, has increasingly assumed greater control of the agencies and their regulatory action. See generally Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246 (2001). This trend may well be supported by Article II of the Constitution. See, e.g., Neomi Rao, *A Modest Proposal: Abolishing Agency Independence in Free Enterprise Fund v. PCAOB*, 79 FORDHAM L. REV. 2541, 2559 (2011). For purposes here, the White House and federal agencies will be conflated for ease of exposition. The central insight that a collective-action dynamic may arise, however, applies even if agencies are separated from the White House. See p. __, *infra*.

¹²³ See, e.g., Blackman, *supra* note 1, at 293-94; Kagan, *supra* note 122, at 2248.

interested behavior.”¹²⁴ Because these characteristics reduce saliency, moreover, the risk of inaction is especially pronounced where a policy’s benefits are diffuse and its costs concentrated or where a policy is technical. For such low-salience, “good government”-type issues, which are everywhere in modern society, Congress and the White House both face incentives to freeride. This unexplored collective-action insight explains administrative law’s need for a minor questions doctrine.

A. An Intuitive Explanation

When both political branches share the same policymaking space, each branch has an incentive to freeride off the efforts of the other. The result for each branch may be mixed strategies—*i.e.*, acting only a certain percentage of the time.¹²⁵ When each branch uses a mixed strategy, sometimes both will act, sometimes only one will act, and sometimes neither will act. That collective-action insight applies to administrative law, where shared policymaking spaces are common. For certain popular policies, both Congress and the White House *want* to act and would do so regardless of what the other does; when that happens, there may be wasted resources (itself a collective-action problem), but at least there is no danger of inaction. For other policies, however, Congress and the White House both want the same thing, but each would prefer the other to bear the costs. This incentive structure should lead to both sides using mixed strategies, which sometimes means mutual inaction.¹²⁶

By definition, deference allows the White House to act where it would otherwise be forced to stand aside, thus expanding the White House’s menu of options. At the same time, because agencies cannot act without congressional authorization,¹²⁷ and because one Congress cannot bind a future Congress,¹²⁸ Congress also can access that same menu, plus any other policy within its constitutional powers. Thus, every policy that the White House can create via *Chevron* also can be created by Congress through legislation. Deference accordingly creates overlapping policy

¹²⁴ OLSON, *supra* note 15, at 1-2.

¹²⁵ See, e.g., BAIRD, *supra* note 98, at 36.

¹²⁶ See, e.g., Hemel, *supra* note 13, at 708.

¹²⁷ See *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986) (“[A]n agency literally has no power to act ... unless and until Congress confers power upon it.”). The exception to this “no power to act” rule, of course, is when the President is acting pursuant to his or her Article II powers.

¹²⁸ See, e.g., *United States v. Winstar Corp.*, 518 U.S. 839, 872 (1996) (“[O]ne legislature may not bind the legislative authority of its successors.”) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *90). But see Eric A. Posner, Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1693 (2002) (offering some counterexamples).

spaces between Congress and the White House where such overlap would not otherwise exist. We thus should expect at least two types of collective-problem problems. First, sometimes both Congress and the White House will act, resulting in wasted resources. And second, sometimes neither Congress nor the White House will act, resulting in policy stagnation.

First, overlapping policymaking power sometimes means wasted resources. Some policies are good for the public *and* popular; everyone wants credit for those policies. Congress thus may rush to enact legislation, and the White House may similarly use its rulemaking powers, augmented by *Chevron*, to create redundant policy.¹²⁹ To be sure, this overlapping authority may have have offsetting benefits.¹³⁰ And no doubt, there are policies that are viewed differently by Congress and the White House such that only one branch wants to act.¹³¹ But for policies that are perceived as beneficial and popular by both branches, we should expect overlapping policymaking authority to produce some waste.

Second, and the special focus of this Article, overlapping policymaking power also sometimes means no one does anything. In deciding whether to enact legislation, there are policies for which Congress's decision whether to move forward is a close one—the universe of costs is almost as large as the universe of benefits, with both “costs” and “benefits” being comprised of a combination of general *welfare* concerns mixed with *political* concerns.¹³² And within that universe of policies, sometimes the overall benefits come disproportionately from the welfare side of the ledger while the overall costs are disproportionately political. When a welfare-enhancing policy is politically popular, Congress is eager to act.

¹²⁹ There are examples of overlapping efforts. Agencies, for instance, parrot statutory language, even though they receive no special deference for doing so. *See, e.g.,* Hanah Metchis Volokh, *The Anti-Parroting Canon*, 6 NYU J.L. & LIBERTY 290, 290 (2011) (explaining the “anti-parroting” in which agencies promulgate rules that parrot statutory language) (citing *Gonzales v. Oregon*, 546 U.S. 243 (2006)). One such explanation may be because the policy is popular. *See, e.g.,* F. Andrew Hessick, *Doctrinal Redundancies*, 67 ALA. L. REV. 635, 673 n.175 (2016) (“[L]egislators may enact redundant laws to play to interest groups.”) (citing Michael Doran, *Legislative Organization and Administrative Redundancy*, 91 B.U. L. REV. 1815, 1844 (2011)).

¹³⁰ *See, e.g.,* Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1138 (2012) (explaining that “redundancy has certain benefits, like providing a form of insurance against a single agency’s failure”); Bijal Shah, *Uncovering Coordinated Interagency Adjudication*, 128 HARV. L. REV. 805, 848 (2015) (similar).

¹³¹ As reflected in the major questions doctrine, however, there may be questions of legitimacy when the White House creates such policies. *See nn.__, supra.*

¹³² Further complicating the analysis, these welfare and political costs and benefits overlap. Members of Congress are themselves part of the public, so they benefit when the public benefits, and they suffer from when the public suffers. Likewise, political survival for a member of Congress may be a means and not an end; thus, a decision driven by political survival may also, at bottom, be driven by public-interest motivations. For ease of exposition, however, this overlap will be set aside.

But when a welfare-enhancing policy is politically costly, Congress would like to see someone else step up, at least at the margins.¹³³ Likewise, even if a policy is politically beneficial, it can still be very costly to enact—it takes resources to address some issues and opportunity costs are real. This is especially true for technical issues, which inherently tend to require more policymaking resources to understand and address. Where such costs become great enough, the political benefits of acting are canceled out such that Congress would also like someone else to take the lead. Delegated authority, express and implicit (via *Chevron*), allows that “someone else” dynamic to emerge. Congress, acting rationally from its perspective, would prefer the White House to create the policy.

Yet the White House may not be eager to accept that role.¹³⁴ Even if it agrees that the policy is welfare-enhancing, the White House recognizes the asymmetrical costs.¹³⁵ Granted, if Congress could not act, the White House may be willing to go it alone.¹³⁶ But Congress *can* act. And if it does, the White House benefits because the policy becomes law on Congress’s tab. Thus, the White House may also be tempted to freeride, especially if it believes Congress is shirking.¹³⁷ This shared incentive to freeride is critical because, again, when playing the Chicken Game, sometimes no one turns.¹³⁸ Deference thus has two effects—the intended effect (more unilateral White House action for some policies) and the unintended one (less overall federal action for other policies).

Think of it this way. Imagine you’re a member of Congress. There are certain policies that are high priorities for you. You are going to do whatever you can to get those done no matter what anyone else does.

¹³³ See, e.g., OSTROM, *supra* note 90 (explaining the “powerful” argument that “[w]henver one person cannot be excluded from the benefits that others provide” the “temptation to free-ride ... may dominate the decision-making process”).

¹³⁴ See, e.g., Louis L. Jaffe, *The Illusion of the Ideal Administration*, 86 HARV. L. REV. 1183, 1194 (1973) (explaining that “one of the consequences of broad delegation will be the indisposition of the agency to decide controversial questions”).

¹³⁵ See, e.g., Hemel, *supra* note 13, at 643 (“All else equal, the President would prefer to share the political costs of raising revenue with Congress, while Congress would prefer that the President bear all the political costs of raising revenue himself.”).

¹³⁶ See, e.g., *id.* at 644 (explaining that we should expect more unilateral action by the White House when Congress is divided, because then the White House knows that Congress is less able to bring about the policy).

¹³⁷ Cf. Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 604 (1996) (explaining that “desire not to be suckered” may influence behavior) (quoting Peter H. Huang & Ho-Mou Wu, *More Order Without More Law: A Theory of Social Norms and Organizational Cultures*, 10 J.L. ECON. & ORG. 390, 403 (1994)).

¹³⁸ See, e.g., David Scott Louk & David Gamage, *Preventing Government Shutdowns: Designing Default Rules for Budgets*, 86 U. COLO. L. REV. 181, 206 (2015) (likening budget negotiations to Chicken Games where shutdowns sometimes happen); Hemel, *supra* note 13, at 644 (“Absent the possibility of such credible commitments, ... some revenue-raising measures that could be implemented via regulation or via legislation may not be implemented at all.”).

Let's call those policies 1, 2, and 3. But you only have so much time in the day. There are other policies that are much more marginal but that you want and would do if you had time. Let's call those policies 15, 16, and 17. Policies 4 to 14 are in between and policies 18, 19, and 20 are ones that you favor but think are even more marginal than policies 15, 16, or 17. When policies 16 to 20 can be done by someone else, you are less inclined to do them yourself. That "someone else," however, may have a similar approach. He or she also has policies that are important and should be done no matter what. And he or she also views some policies as marginal. If that "someone else" views the same policies as marginal that you do, both of you may stand aside in hopes that the other person acts. The result is that policies that both you and the "someone else" want may go unaddressed. Instead, both you and the "someone else" may spend time replicating each other's work on policies 1, 2, 3 (or perhaps working on policy 20 rather than policy 15). The result is a net loss to society.

Importantly, what types of policies are more susceptible to mutual inaction? In other words, what policies exist for which, from a policymaker's perspective, the total benefits outweigh the total costs, but with the benefits disproportionately coming from general welfare considerations, and the costs disproportionately coming from political considerations or high opportunity costs? Obvious answers include (i) policies for which the welfare benefits are diffuse but the political costs are concentrated and (ii) policies that are technical and so require more of the actor's resources to address.¹³⁹ The former category is especially vulnerable to collect-action dynamics because it is easier for concentrated groups to mobilize, thus putting political pressure on policymakers.¹⁴⁰ Classic examples include industry-specific subsidies or tax breaks, especially if they are small; there is little benefit to any individual voter, but these policies can be the difference between survival and extinction for businesses in the industries.¹⁴¹ And as for the latter category, it is easy to imagine technical issues that would require many resources to solve and so, all else being equal, are more likely to go unaddressed.¹⁴²

¹³⁹ See, e.g., Susannah Camic Tahk, *Making Impossible Tax Reform Possible*, 81 FORDHAM L. REV. 2683, 2696 (2013) ("Interest group theory from political science ... [contends] that how a law distributes its costs and benefits determines how easy that law is to pass and to sustain.").

¹⁴⁰ See *id.* at 2697 ("Some small, easily organized group will benefit and thus has a powerful incentive to organize and lobby; the costs of the benefit are distributed at a low per capita rate over a large number of people, and hence they have little incentive to organize in opposition—if, indeed, they even hear of the policy.") (quoting Wilson, *supra* note 139, at 369).

¹⁴¹ See *id.* at 2686; Alan O. Sykes, *Regulatory Protectionism and the Law of International Trade*, 66 U. CHI. L. REV. 1, 31 (1999).

¹⁴² See, e.g., Siddharth Khanijou, *Patent Inequity?: Rethinking the Application of Strict Liability to Patent Law in the Nanotechnology Era*, 12 J. TECH. L. & POL'Y 179, 192 (2007).

The result is that in a world with deference, we should not be surprised to see cases—at the margins—where Congress and the White House do not act, even though either branch would have acted if policymaking power had never been shared.¹⁴³ Importantly, although major questions or intermediate questions can also sometimes be subject to such collective-action dynamics because they too can be characterized by diffuse benefits and concentrated costs or unusual technical complexity, policies with those particular characteristics regularly satisfy this Article’s definition of a minor question.

B. A Mathematical Explanation

The foregoing intuitive analysis also finds support in game theory. Game theory teaches that where both sides are tempted to freeride off the other, sometimes wasted resources will result, and, further, because of mixed strategies,¹⁴⁴ sometimes the consequence will be nothing happens.

(explaining how “research and development” is subject to “collective action problems” unless the benefits are “internalized”); Douglas Lichtman, *Copyright As A Rule of Evidence*, 52 DUKE L.J. 683, 702 (2003) (noting that what is “expensive to produce” can lead to “a real freerider problem”).

¹⁴³ See Hemel, *supra* note 13, at 711 (“A zero-deference regime would effectively eliminate the President’s regulatory option, increasing the probability that Congress would act.”).

¹⁴⁴ Some may object to the use of mixed strategies. After all, when it comes to politics, no one is randomly pulling cards from a hat that say “act” or “don’t act.” See, e.g., ARIEL RUBINSTEIN, *ECONOMICS AND LANGUAGE: FIVE ESSAYS* 78 (2001); Tonja Jacobi & Jonah Kind, *Criminal Innovation and the Warrant Requirement: Reconsidering the Rights-Police Efficiency Trade-Off*, 56 WM. & MARY L. REV. 759, 832 (2015) (“Some scholars have argued that Nash equilibria are not in fact accurate predictions of human behavior.”) (citations omitted). It can also be difficult to model a relationship that may result in multiple, even infinite, iterations of the game. See, e.g., Bengt Carlsson B. and K. Ingemar Johansson, *An Iterated Hawk-and-Dove Game* at 179, in *AGENTS AND MULTI-AGENT SYSTEMS. LECTURE NOTES IN ARTIFICIAL INTELLIGENCE* 1441 (W. Wobcke, M. Pagnucco, and C. Zhang, eds). Game theorists have offered defenses of mixed strategies. See, e.g., Jacobi & Kind, *supra*, at 79 (“[T]he uncertainties behind the mixed strategy equilibrium [can be] viewed as an expression of the lack of certainty on the part of the other players rather than an intentional plan of the individual player.”); Robert J. Aumann, *What is Game Theory Trying to Accomplish?* at 19, in *FRONTIERS OF ECONOMICS* 28 (Kenneth J. Arrow & Seppo Honkapohja eds., 1985) (noting that “mixed strategy [can] model[] the ignorance of the outside observer and of the other players”). This Article does not address these broad issues. Suffice it to say, despite difficulties, economists have long recognized that mixed-strategy analysis has value. See, e.g., The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 1994, <https://www.nobelprize.org/prizes/economic-sciences/1994/summary/> (explaining that “Nash equilibrium has become a standard tool in almost all areas of economic theory”).

To be clear, the portrayal here is stylized. In reality, a lot of behavior occurs before a mixed-strategy-randomizing-like approach applies. Individuals speak with each other and monitor what the other one is doing. Only after a lot of back and forth do the parties decide to “act” versus “non-act.” In other words, in the real world, things are more algorithmic. My model necessarily assumes all of that as background. The central point is that at least some cases, at the margins, we should expect parties with overlapping policymaking authority to act in a way that reflects mixed-strategy analysis. Put differently, “all models are wrong but some are useful.”

This point is best illustrated by a number of variations of the Snowdrift Game. Recall, in this game there are two drivers who run into a snowdrift from opposite sides. Each would benefit from a clear road. Sometimes the costs and benefits of clearing the road are such that both will happily clear the snow, especially if shoveling snow is fun. Other times both will get out of the car, resulting in redundancy. Other times still, no one will shovel. Consider the following version of the game. Imagine that shoveling is easy and fast (essentially, all the work is done by getting out of the car) and it is rewarding too (because, say, it is good exercise). If so, the payoff matrix (i.e., how happy a player in the game is about a particular outcome)¹⁴⁵ could look something like this:

The Snowdrift Game: Inaction Impossible			
		Driver Two	
		Shovel	Don't Shovel
Driver One	Shovel	(2, 2)	(5, 0)
	Don't Shovel	(0, 5)	(-5, -5)

Here, it is impossible to end up in a situation where no one shovels. Both players *want* to shovel. If, for some reason, one player does not shovel, that wouldn't change anything for the other player. Both sides thus have what is called a “dominant” strategy.¹⁴⁶ When it comes to policymaking, this version of the Snowdrift game may be analogous to a situation where the policy is welfare enhancing, popular, *and* not overly

¹⁴⁵ See, e.g., Tracey E. George & Chris Guthrie, *Induced Litigation*, 98 NW. U. L. REV. 545, 549 & n.13 (2004) (“[T]he concept of ‘utility’ [i]s a means of assigning an objective score to the relative level of satisfaction that a person gets from consuming a good or undertaking an activity.”) (citing ROBERT S. PINDYCK & DANIEL L. RUBINFELD, *MICROECONOMICS* 73 (5th ed. 2001)).

¹⁴⁶ See, e.g., BAIRD, *supra* note 98, at 11. The dominant strategy arises because driver one considers the scenario where driver two shovels. In that case, driver one maximizes her utility by shoveling ($2 > 0$). Driver one then considers the scenario where driver two does not shovel; in that case, driver one maximizes her utility by shoveling ($5 > -5$). No matter which choice driver two makes, driver one will be better off shoveling. The same analysis will be conducted by driver two, with the same result, so both parties will shovel. Note, there is no need for symmetry. This Article uses symmetrical values for simplicity's sake. But the same outcome would emerge if, say, one of the 5s was replaced with an 8, and one of the -5s was replaced with a -1. All that matters is certain values in the matrix are larger than other values.

technical. For such policies, both Congress and the White House will try to bring them about no matter what the other does. Freeriding is unattractive and although mutual action has deadweight losses too, it does not lead to a welfare-enhancing policy being thwarted.¹⁴⁷

Now, however, consider a different version of the game. Here, it is very cold, and whatever reward that comes from helping others is more than offset by the joy of a warm car. Yet sitting in a car too long means illness or even death. With this scenario in place, imagine these payoffs:

The Snowdrift Game: Inaction Very Unlikely			
		Driver Two	
		Shovel	Don't Shovel
		Shovel	Don't Shovel
Driver One	Shovel	(1, 1)	(0, 2)
	Don't Shovel	(2, 0)	(-50, -50)

There is no dominant strategy here. If Driver One shovels, Driver Two is better off staying in the car. If Driver Two shovels, Driver One is better off staying in the car. Yet if they both stay in the car, both will suffer.¹⁴⁸ What happens? It is impossible to say. But both sides may opt to use a mixed strategy. With a certain probability less than 100% (call it p), each Driver should decide to shovel, and, inversely, also decide not to shovel with a certain probability (call it $1-p$). This p , moreover, can be derived algebraically.¹⁴⁹ It turns out that Driver One and Driver Two should each

¹⁴⁷ To be clear, though: At the margins, there may be policies that are on net beneficial *only* if the expense of bringing them about is only incurred by one branch.

¹⁴⁸ There are thus two “pure strategy” Nash equilibria; if Driver One shovels, Driver Two always stays in the car; if Driver Two shovels, Driver One always stays in the car. *See, e.g.,* BAIRD, *supra* note 98, at 35. Again, symmetrical numbers are not essential for this analysis. Notably, some might fight the hypothetical and ask why the two drivers don’t just get out of their cars and make a deal. At the margins, transaction costs could keep that from happening. In the Snowdrift Game, the wall of snow, the bitter cold, etc. could be transaction costs, as could the inability to guarantee that the other driver will actually get out of the car and shovel when it is his turn. The analogous costs may be far higher in government, where politics, personal grudges, and the inability to know what the courts will do all can be transaction costs. *See generally* Jeremy Kidd, *Kindergarten Coase*, 17 GREEN BAG 2D 141, 143-45 (2014).

¹⁴⁹ If Driver One’s mixed strategy is to shovel with probability weight p and not shovel with probability weight $(1-p)$, then Driver Two’s mixed strategy (which is formed in response to Driver One’s strategy) is $(p, 1p) = p(1) + (1-p)(0)$ if Driver One shovels and $(p, 1-p) = p(2) + (1-p)(-50)$ if

shovel about 98% of the time and not shovel 2% of the time. The probability that neither shovels therefore would be less than 1%.¹⁵⁰ This is reassuring. There may be some redundancy, but at least someone will almost certainly do the work. As to politics, this may be a situation where the policy is welfare enhancing but either unpopular or unusually technical, but where mutual inaction is deemed catastrophic.

Things change, however, when the payoff structures changes. Consider the following version of the game:

The Snowdrift Game: Inaction Fairly Unlikely			
		Driver Two	
		Shovel	Don't Shovel
Driver One	Shovel	(1, 1)	(0, 2)
	Don't Shovel	(2, 0)	(-1,-1)

Now, using the same formula, the mixed strategy for Driver One and Driver Two would be to shovel half the time. This means that for any particular snowstorm, we should expect both to shovel 25% of the time and neither to shovel 25% of the time and that one of the two will shovel half of the time. Returning to politics, this situation could be one where the policy is welfare enhancing but politically costly or the issue is very technical, and mutual inaction is pretty bad but hardly a catastrophe.

Finally, if we change the payoff structure one more time, mutual inaction can become likely:

Driver One does not shovel. Because the two responses must have the same expected payoff to be in equilibrium, it follows that $p(1) + (1-p)(0)$ must equal $p(2) + (1-p)(-50)$. Solving for p , we see that $p=50/51$ or about 98%. See, e.g., BAIRD, *supra* note 98, at 35-38 & n.16 (describing the math).

¹⁵⁰ The probability that *both* would shovel can be calculated by multiplying the probability that Driver One would shovel (say, 98%) by the probability that Driver Two would shovel (also, say, 98%). That would be approximately 96%. The probability that *neither* would shovel would be calculated by multiplying the probability that Driver One would not shovel by the probability that Driver Two would not shovel; that is .04%.

The Snowdrift Game: Inaction Likely			
		Driver Two	
		Shovel	Don't Shovel
Driver One	Shovel	(1, 1)	(0,10)
	Don't Shovel	(10,0)	(-1, -1)

Here, the optimal strategy for both Driver One and Driver Two is to shovel 10% the time and not shovel 90% time. Hence, we should expect that no one shovels; indeed, that should happen about 80% of the time. In this scenario, even though the worst outcome for everyone is mutual inaction, perversely, that outcome is also what we should expect. Analogizing to policymaking, this version may be a situation where the policy is on net socially beneficial but the costs (political or opportunity) of bringing it about are very high and letting nothing happen is not a huge deal. Under these conditions, freeriding may be quite attractive. To be clear, both branches would benefit from action—because a good policy would become law. Accordingly, if only one could act, that branch would do so. But because both can act, and the costs of mutual inaction are considered minor, we should expect that often nothing happens.

The upshot is straightforward. For policies in which neither branch has a dominant strategy to act, and for which neither considers inaction catastrophic, mutual inaction sometimes should occur.¹⁵¹ Not by accident, those conditions often match the test offered in this Article for a minor question.¹⁵² If an issue particularly important to either or both branches, then there is a good chance that at least one has a dominant strategy to act. Likewise, even if no branch has a dominant strategy to act, but if both consider inaction catastrophic (which suggests that the policy is not a minor question), the odds of mutual inaction should be small. But if an issue is not deemed especially important, then neither branch may act, even though both agree that the policy is welfare-enhancing and either branch would if the other one couldn't.

¹⁵¹ See, e.g., Hemel, *supra* note 13, at 708 (“Two-sided inaction may result ... even in equilibrium.”). As explained above, how Congress and the White House determine the value of policy implicates competing theories of governmental behavior.

¹⁵² See, e.g., p. __, *supra*.

C. Real World Applications

This collective-action dynamic may play out in the real world. To be sure, it is difficult for an academic observer to confidently identify things that did not happen but would have happened if some variable had been different. It is also difficult to understand political action, where the reason offered for an action may not be the real one.¹⁵³ The fog surrounding policymaking is especially heavy here, moreover, because the sorts of policies where inaction results may not command a great deal of attention. And there are many reasons that a policy proposal might not become law, even if the policy is popular.¹⁵⁴ Despite these limitations, however, this section identifies substantive areas of law that may be most susceptible to a “minor questions” collective-action problem.

The first field is tax law. Daniel Hemel has observed that there are many policies that the White House could bring about to increase federal revenue. Yet even though the White House openly supports these policies—indeed, by means of the “Greenbook,” the White House encourages Congress to enact those policies by legislation—the White House is unwilling to promulgate regulations to do so, even though it could itself unilaterally turn these policies into law because of deference.¹⁵⁵ Hemel documented a number of statutes for which an agency would receive deference, and for which the White House openly favored a particular tax policy, yet the White House declined to regulate but instead requested Congress to do so. For instance, taxing officials, when interpreting the phrase “exclusively for conservation purposes” in the tax code, could read the statute to prevent taxpayers from claiming massive deductions for “‘air rights’ easement[s]” above historic homes where “such development [are] already restricted by local authorities.”¹⁵⁶ Nonetheless, the White House has not acted. Hemel details a number of similarly ambiguous tax-related statutes that fit this same pattern.¹⁵⁷

¹⁵³ See, e.g., Hemel & Nielson, *supra* note 24, at 788-801 (offering examples).

¹⁵⁴ See, e.g., Frank Easterbrook, *Statutes’ Domain*, 50 U. CHI. L. REV. 533, 547 (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.”).

¹⁵⁵ See Hemel, *supra* note 13, at 639-40 (“Almost invariably, the Greenbook includes proposals that the President plausibly could carry out on his own—without any congressional action—by directing the Treasury Department to promulgate appropriate regulations.”) (listing examples).

¹⁵⁶ See *id.* at 671-72 (quoting, *inter alia*, 26 U.S.C. § 170(h)(1); U.S. DEPT OF THE TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION’S FISCAL YEAR 2014 REVENUE PROPOSALS 162 (2013)).

¹⁵⁷ See *id.* at 658-75.

At first blush, this inaction seems puzzling. If the White House thinks a revenue-raising rule is in the public interest, and if it has authority under *Chevron* to promulgate such a regulation, why not do it? Yet unilateral action by the White House means that it will bear essentially *all* the costs while only receiving some of the benefits. That is a recipe for inaction.¹⁵⁸ Moreover, applying this Article’s diffused-versus-concentrated framework (i.e., we should expect collective-action dynamics more often for issues with diffuse benefits but concentrated costs because they impose greater relative political costs on the branch that acts), this is the sort of situation in which we should expect inaction; there is a diffuse benefit (increased revenue for the public) but a concentrated cost (a particular group must pay more). Likewise, if we focus on this Article’s simple-versus-technical framework (i.e., we should expect collective-action dynamics more often for technical issues that require the acting branch to use more resources to address), it is also easy to see why complicated tax issues are not readily addressed. Accordingly, Hemel’s specific, real-world examples support the thesis that deference sometimes may create a collective-action problem for revenue collection.

Hemel’s logic, however, can be taken further. His article—entitled, *The President’s Power to Tax*—focuses on one half of the dynamic; why the White House acts or does not act. But his analysis also explains *Congress’s Power to Tax*. Hemel notes in passing—but does not dwell on the troubling implication—that *because* of deference, Congress may also decline to act, resulting in welfare-enhancing policies being shelved even though both Congress and the White House would turn them into law but for the fact that the other also could do so.¹⁵⁹ For instance, Hemel observes that “the rise of the anti-tax Tea Party in recent years may actually have led to more revenue being raised” because Congress was effectively disabled from acting, thus allowing “the President and Congress to avoid the uncooperative result (*don’t regulate, don’t legislate*)”¹⁶⁰ But the flipside is that when the White House and Congress *do* agree on the policy, “the uncooperative result (*don’t regulate, don’t legislate*)” may emerge in a world with shared policymaking space. When only the White House can act, there is no collective-action problem

¹⁵⁸ See *id.* at 647 (“[E]ven if the shared political benefits of additional spending are high enough that the President would be willing to bear the political costs of raising revenue on his own, he would still prefer to share those costs with Congress. As a result, the President may include proposals in the Greenbook even though—if the prospect of legislation were off the table—the President would be willing to implement the proposal via executive action.”).

¹⁵⁹ See Hemel, *supra* note 13, at at 644-45 (“[Deference] empowered the executive branch to act unilaterally, but it also may have discouraged Congress from raising revenue via legislation.”).

¹⁶⁰ *Id.* at 710.

because there is no temptation to freeride. By the same token though, when only Congress can act, there *also* is no collective-action problem. It is only when both branches can act that the dynamic emerges. The specific examples Hemel offers of tax policies that the White House lists in the Greenbook but that Congress does not enact are thus situations in which deference's collective-action dynamics may be working its mischief. The fact that Congress declines to enact legislation that the White House favors, even though there is reason to think that Congress also favors it (for instance, say, when the White House and a supermajority of Congress were controlled by the same party¹⁶¹), is notable.

Hemel's tax examples, moreover, do not fully capture the "minor questions" problem. There are different types of tax issues.¹⁶² Some "loopholes," for instance, reflect deliberate choices by policymakers and have partisan overtones.¹⁶³ Others, however, are minor questions that the majority of policymakers irrespective of party affiliation would address in the same way if it were relatively easy to do so. Hemel's point that divided government may mitigate collective-action problems makes more sense for partisan issues where a divided Congress *de facto* means that if the White House wants to the policy, it has to act. But technical issues without partisan implications may be particularly susceptible to stagnation (again at the margins) because there is no obvious reason why divided government would prevent congressional action for a bipartisan issue. In other words, perversely, the less controversial the policy, the stronger the collective-action problem, all else being equal. This is why minor questions (uncontroversial issues with low salience) should be disproportionately affected by deference's collective-action dynamics.

Hemel's tax analysis is quite useful because—thanks to the Greenbook—it contains concrete examples. Because few areas of law have a tool like the Greenbook, it is more difficult to identify policies that the Executive Branch favors. But it is possible to identify other subjects where the same dynamics that affect tax law *should* apply.

¹⁶¹ Deference in tax policy is complicated by the fact that it was not until 2011 that the Supreme Court held that *Chevron* applies in the tax context. See *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 53-57 (2011). Before 2011, the Court sometimes applied *Chevron* but also sometimes instead applied a less robust form of deference. See Hemel, *supra* note 13, at 655 (discussing *Nat'l Muffler Dealers Ass'n v. United States*, 440 U.S. 472, 477 (1979)). By 2011, the Democrats' supermajority was gone. Because at least some deference existed both before and after 2011, this fact does not defeat the analysis, but it does complicate the math.

¹⁶² See, e.g., Heather Field, *A Taxonomy of Tax Loopholes*, 55 HOUSTON L. REV. 545 (2018) (explaining the different types of policies that are all labeled "loopholes").

¹⁶³ See, e.g., Keith R. Fisher, *Nibbling on the Chancellor's Toesies: A "Roguish" Concurrence With Professor Baxter*, 56 LAW & CONTEMP. PROBLEMS (1993) (explaining that "some 'loopholes' actually reflect deliberate choices or compromises by Congress").

Like tax law, for instance, international trade is another area marked by diffused benefits, concentrated costs, and technical complexity.¹⁶⁴ Revising tariffs or subsidies, therefore, is another place where deference sometimes may negate the emergence of beneficial policy. To the extent that the statute is ambiguous,¹⁶⁵ both Congress and the White House in many cases can benefit the public by revising tariffs or subsidies. Yet figuring out optimal policy on a product-by-product basis is technical and potentially politically costly; reform will anger a concentrated group (resulting in, say, political advertising against the policymaker).¹⁶⁶ Although the White House has broad authority over trade issues (in part, the theory goes, because it is less susceptible to factionalism¹⁶⁷), it is easy to see why the White House sometimes is reluctant to use this authority, especially when doing so will affect a concentrated industry. This pattern is consistent with the notion that when an overall welfare-enhancing policy becomes sufficiently costly for the acting branch, neither branch wants to take the lead, even if it approves of the policy and would not stand in the way if the other wanted to act. Similar analysis may apply to providing access to information, for instance on government websites. Again, the issue can be technical, the benefit is diffuse, and the costs may be concentrated if disclosure is embarrassing to a specific group.¹⁶⁸

Environmental law also may be home to collective-action dynamics.¹⁶⁹ Many environmental law scholars lament the fact that environmental proposals are hard to turn into law because of concentrated costs and diffuse benefits.¹⁷⁰ They also observe that Congress itself may be

¹⁶⁴ See John O. McGinnis & Mark L. Movsesian, *Commentary, The World Trade Constitution*, 114 HARV. L. REV. 511, 516 (2000). This dynamic has been known since the time of Adam Smith—who also could not mobilize the public to address it. See, e.g., Daniel Shavero, *An Economic and Political Look at Federalism in Taxation*, 90 MICH. L. REV. 895, 991 (1992) (citing 1 ADAM SMITH, *THE WEALTH OF NATIONS* 450-69 (R.H. Campbell et al. eds., Clarendon Press 1976) (1776)).

¹⁶⁵ For reasons sounding in “step zero,” *Chevron* does not apply to every trade decision. See, e.g., *United States v. Mead Corp.*, 533 U.S. 218 (2001). *Chevron*, however, does apply to some trade decisions. See, e.g., *Ford Motor Co. v. United States*, 809 F.3d 1320, 1324 (Fed. Cir. 2016).

¹⁶⁶ See, e.g., RÉAL P. LAVERGNE, *THE POLITICAL ECONOMY OF U.S. TARIFFS: AN EMPIRICAL ANALYSIS* 132-35 (1983).

¹⁶⁷ See, e.g., McGinnis & Movsesian, *supra* note 164, at 539-41.

¹⁶⁸ See generally Michael A. Fitts, *Can Ignorance Be Bliss? Imperfect Information As a Positive Influence in Political Institutions*, 88 MICH. L. REV. 917, 932 (1990) (explaining that “obtaining information is more costly for diffuse groups”).

¹⁶⁹ See, e.g., Michael P. Vandenbergh, *Private Environmental Governance*, 99 CORNELL L. REV. 129, 145 (2013) (“The leading environmental law casebooks by public law scholars offer a mix of readings about game theory and collective action problems, economics, and environmental ethics, and then move to an analysis of the process and products of positive law.”).

¹⁷⁰ See, e.g., Michael A. Livermore & Richard L. Revesz, *Rethinking Health-Based Environmental Standards*, 89 N.Y.U. L. REV. 1184, 1254 & n.401 (2014) (noting that “individuals that favor cleaner air, will have difficulty influencing government decisionmaking compared to well-organized, concentrated groups.”) (collecting citations).

reluctant to address technical issues.¹⁷¹ Accordingly, environmental law may be another field where the collective-action dynamic created by deference sometimes may lead to inaction, especially for lower profile issues.¹⁷² Granted, many environmental policies are not “minor” questions; indeed, they may even be “major” ones. But there are also many smaller, lower-profile questions without partisan overtones.

These categories are not meant to be exhaustive. It is also important for subject-matter experts to study them in greater detail to identify concrete examples of stagnation (as with the Greenbook in tax). And, to be sure, it may be *good* that some policies are thwarted. This Article is not the place for a discussion of the merits of any particular issue. Instead, the point here is that that even when both Congress and the White House want the same thing, sometimes nothing gets done.

IV. THE MINOR QUESTIONS DOCTRINE

For reasons explained, minor questions present special concerns that the *Chevron* framework does not address. Congress can fix this problem and the Supreme Court potentially can too.¹⁷³ And because the problem is structural, it is doubtful that the problem will solve itself. A minor question doctrine thus could be valuable.

The question, however, is what a minor questions doctrine should entail. There are at least three possibilities. The first version would mimic the major questions doctrine; just as courts do not defer when major questions are implicated, they also would not defer for minor

¹⁷¹ See, e.g., Michael P. Vandenberg, *An Alternative to Ready, Fire, Aim: A New Framework to Link Environmental Targets in Environmental Law*, 85 KY. L.J. 803, 830 (1997) (noting congressional reluctance to itself address “technical” issues).

¹⁷² See, e.g., Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 559-71 (2001) (examining environmental law in the 1990s and noting that Congress did not enact legislation for a good portion of the period even when Democrats controlled both the White House and Congress); Paul Rauber, *Bill Clinton: Does He Deserve Your Vote?*, SIERRA MAGAZINE, Sept./Oct. 1996 (bemoaning that “a nominally green White House and Democratic majorities in both houses of Congress” failed to enact legislation and, further, that the White House failed to use its regulatory powers to their fullest).

¹⁷³ Whether the Supreme Court can address this collective-action problem implicates a question of *stare decisis* beyond the scope of this Article. Suffice it to say, to the extent that *Chevron* is a species of “common law,” e.g., Sohoni, *supra* note 7, at 1437, the Court may have a freer hand to modify *Chevron*, as, indeed, it has done with the major questions doctrine. The minor question doctrine would also address an unintended consequence of the Court’s own making, which may further counsel in favor of judicial reform. And most importantly, the Court’s “precedent on precedent” allows some revision of deference doctrines without offending *stare decisis*. See Hickman & Nielson, *supra* 52. Here, however, identifying how *stare decisis* works is orthogonal to this Article’s point. If the Court cannot fix *Chevron*, Congress should. (This prompts the question why Congress has not done so already. More on that below. See p. __, *infra*.)

questions. The second version would take a different tack. Rather than courts themselves directly addressing minor questions, agencies would have discretion to prospectively waive *Chevron*. The third version would reverse the *Chevron* presumption; agencies would only receive deference when Congress expressly delegates the power. Each of these solutions has pluses and minuses, but the key point is that any of them would reduce overlapping policymaking authority for minor questions.

A. Mirroring the Major Questions Doctrine

The most obvious path to a minor questions doctrine is to borrow from the major questions doctrine. Just as courts do not defer in cases with major questions, they could also not defer in cases with minor ones. And because Congress would know¹⁷⁴ that courts would not defer when a minor question is involved, it would also know that only it could create the policy—thus defeating the collective-action problem.¹⁷⁵

Unfortunately, revising the *Chevron* framework this way is easier said than done. First, the concern here is governmental *inaction*. It is easy to see how a court would be presented with a major-question case; a party would challenge what the agency has done, the agency would defend itself by citing *Chevron*, and a court would decide whether deference is appropriate. But how can a court address something that hasn't happened? In administrative law, it is much harder to challenge what has not happened. Typically, a party can only challenge final agency action¹⁷⁶—not an agency rule that is merely in process of being finished,¹⁷⁷ and certainly not a rule that the agency has not even started. True, parties can sometimes petition for a rulemaking.¹⁷⁸ But the standard to deny a rulemaking petition is quite deferential.¹⁷⁹

This version of the minor questions thus would also have to address the “where will the cases come from?” issue. It could so in a couple of ways. Congress could reduce agency discretion over petitions for

¹⁷⁴ Cf. Robert H. Moonkin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: the Case of Divorce*, 88 YALE L.J. 950 (1979).

¹⁷⁵ See Hemel, *supra* note 13, at 710 (explaining how obstacles to congressional action make presidential action more likely by defeating a collective-action problem).

¹⁷⁶ See 5 U.S.C. § 704; *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

¹⁷⁷ See, e.g., *In re Murray Energy Corp.*, 788 F.3d 330, 334 (D.C. Cir. 2015) (“[A] proposed rule is just a proposal. In justiciable cases, this Court has authority to review the legality of final agency rules. We do not have authority to review proposed agency rules. In short, we deny the petitions for review and the petition for a writ of prohibition because the complained-of agency action is not final.”) (Kavanaugh, J.).

¹⁷⁸ See 5 U.S.C. § 553(e).

¹⁷⁹ See, e.g., *id.* (“Refusals to promulgate rules are thus susceptible to judicial review, though such review is ‘extremely limited’ and ‘highly deferential.’”).

rulemaking, at least when minor questions are in play.¹⁸⁰ This would have to be done carefully because agencies have many good reasons to not a petition for rulemaking that have nothing to do with collective-action dynamics.¹⁸¹ The other approach would be to reduce *Chevron*'s domain organically where minor questions are involved. This could be done by relaxing the *Brand X* doctrine.¹⁸² Either Congress or the Supreme Court could decree that when a minor question is at issue, a judicial interpretation will control despite any later acts by the agency. In this way, courts could still sometimes definitively interpret agency-administered statutes, which over time would limit the amount of overlapping policymaking space, and so the collective-action problem.¹⁸³

The second problem with this version of the minor questions doctrine goes to administrability. Determining whether a policy has, say, "vast 'economic and political significance'"¹⁸⁴ is not easy.¹⁸⁵ But surely it is easier than directly targeting minor questions. The number of false positives would be significant—as would be the risk of judicial micromanagement. More manageably, this version of the minor questions doctrine could identify *categories* of policies that are most susceptible to a collective-action problem and turn off *Chevron* for those categories.

¹⁸⁰ The judiciary could not do this; the standard for review of denials of petitions for rulemaking is a question of statutory law. See 5 U.S.C. § 706. Cf. Erin Hawley, *The Supreme Court's Quiet Revolution: Redefining the Meaning of Jurisdiction*, 56 WILLIAM & MARY L. REV. 2027 (2015) (faulting the Court for creating doctrines divorced from the law). That said, as part of arbitrary-and-capricious review, perhaps a court could require an agency to explain itself if a party alleges that a collective-action problem is thwarting policy. Presumably an agency could easily defeat that sort of argument, though, by point to resource constraints.

¹⁸¹ See, e.g., *Massachusetts v. EPA*, 549 U.S. 497, 527 (2007) ("As we have repeated time and again, an agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities.").

¹⁸² See *Nat'l Cable & Tel. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (holding that under the logic of *Chevron*, an agency can override a court's prior interpretation of an ambiguous statute); see also Jonathan Masur, *Judicial Deference and the Credibility of Agency Commitments*, 60 VAND. L. REV. 1021 (2007) (explaining how *Brand X* reduces an agency's ability to make credible commitments not to act). To be clear, there are arguments against doing this (e.g., doctrinal coherence) that do not sound in collective-action concerns. The point here is simply that this sort of reform could address the "where will the cases come from?" issue. The overall value of this sort of reform is a more complicated question.

¹⁸³ See, e.g., Jonathan Masur, *Judicial Deference and the Credibility of Agency Commitments*, 60 VAND. L. REV. 1021 (2007) (explaining how *Brand X* reduces legal stability).

¹⁸⁴ *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-60 (2000)).

¹⁸⁵ See, e.g., *United States Telecom Ass'n v. FCC*, 855 F.3d 381, 423 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc) ("[D]etermining whether a rule constitutes a major rule sometimes has a bit of a 'know it when you see it' quality. So there inevitably will be close cases and debates at the margins about whether a rule qualifies as major."); Loshin & Nielson, *supra* note 5, at 45 (similar).

Although such categories would inevitably be under-and over-inclusive,¹⁸⁶ it would be more administrable than an issue-by-issue approach.

B. A New Form of *Chevron* Waiver

Agencies could also be allowed to waive deference for certain policies. Judges thus would not decide what is a minor question. Instead, agencies themselves would have an off-ramp to escape a collective-action problem where agencies, not courts, conclude that turning off *Chevron* would be worthwhile. Allowing agencies to identify where collective-action problems exist should be much more judicially administrable.

The idea behind this version of the minor questions doctrine comes from the collective-action literature. One solution to the Chicken Game is for a player to openly and irrevocably toss aside its steering wheel. Applied to administrative law, that insight cuts in favor of allowing regulators to “turn off” *Chevron*. If an agency can credibly claim that it lacks authority to create a policy, then the collective-action problem disappears.¹⁸⁷ In other aspects of administrative law, the judiciary acts as a credible commitment mechanism against regulatory change, thus expanding an agency’s menu of policy options.¹⁸⁸ Extending that principle to the minor questions doctrine, the judiciary could credibly ensure that an agency’s efforts to disavow policymaking authority has teeth such that not even the agency could reverse course. A public and credible disavowal of authority should prevent Congress from being tempted to freeride.¹⁸⁹

This solution might be controversial. *Chevron* waiver, after all, has critics.¹⁹⁰ But this is a different type of *Chevron* waiver. It rubs some commentators wrong for an agency to tell a court how to resolve a legal

¹⁸⁶ See, e.g., Aaron L. Nielson, *Optimal Ossification*, GEO. WASH. L. REV. 1209 (2018) (explaining the difficulty of finding the optimal amount of delay, and whether the inquiry should be done on a rule-by-rule basis or on an agency-by-agency basis).

¹⁸⁷ See, e.g., Ian Ayres, *Playing Games with the Law*, 42 STAN. L. REV. 1291, 1306 (1990) (“An important form of precommitment is the elimination of subsequent unstable subgames. This in a sense is what Ulysses accomplished by having himself tied to the mast as his ship sailed past the Sirens.”).

¹⁸⁸ See, e.g., Aaron L. Nielson, *Sticky Regulations*, 85 U. CHI. L. REV. 85, 90 (2018) (“[O]ssification can act as a credible commitment mechanism against change. Because regulated parties know that an agency must survive a procedural gauntlet to change a regulatory scheme, they can have more confidence in that scheme’s stability. Under certain circumstances, that stability can encourage more activity of the sort that the agency wishes to encourage.”) (citing Masur, *supra* note 183, at 1038–45).

¹⁸⁹ See, e.g., Fennell, *supra* note 113, at 1449–50.

¹⁹⁰ See, e.g., James Durling & E. Garrett West, *May Chevron Be Waived?*, 71 STAN. L. REV. ONLINE 183, 184 (2019) (“[C]ourts should not allow either private parties or agencies to waive *Chevron*.”); Note, *Waiving Chevron Deference*, 132 HARV. L. REV. 1520, 1520 (2019) (similar); Jeremy D. Rozansky, Comment, *Waiving Chevron*, 85 U. CHI. L. REV. 1927, 1928 (2018) (similar”).

question.¹⁹¹ Critics also fear that if agencies could waive deference during litigation, they may “take a dive” after a presidential change in order to undermine a rule promulgated by a prior administration without going through a new round of the notice-and-comment rulemaking.¹⁹² It is unclear whether the Supreme Court shares this fear of *Chevron* waiver; the Court recently (per Justice Breyer) arguably embraced *Chevron* waiver during litigation.¹⁹³ Regardless, though, that is not the species of *Chevron* waiver proposed here. Rather than waiving deference *during* litigation, the agency would disavow deference *before* any rule exists at all in order to prompt congressional action. That is not a question of telling a court how to resolve a legal question or spiking a prior administration’s rule. Instead, it would be averting a collective-action problem that would otherwise prevent anything from happening.

To be clear, *Chevron* waiver would only help prevent a collective-action problem in situations where the agency’s interpretation is not the best one but is sufficiently reasonable that it would prevail in court (i.e., situations for which *Chevron* deference does actual work).¹⁹⁴ Likewise, for this version of the minor questions doctrine to succeed, the agency’s public disavowal of deference would have to be (somewhat¹⁹⁵) irrevocable at least for a period of time—otherwise the collective-action problem would not disappear. And it is true agencies might waive *Chevron* for non-minor questions. But it is unclear why they would do that. It makes sense for an agency to waive deference when deference makes it harder for the agency to accomplish its goal. It makes much less sense where the agency *wants* power to regulate or would not regulate anyway because it does not want the policy. It is only when the agency wants the policy but is in a collective-action dynamic that waiver would make sense. Minor

¹⁹¹ See, e.g., Durling & West, *supra* note 190, at 188 (“This principle—that parties may not forfeit, waive, or even stipulate to legal propositions—suggests a fundamental problem with *Chevron* waiver.”).

¹⁹² See, e.g., *id.* at 184 (“This circumvention ... allow[s] subsequent administrations to scuttle disfavored policies ... [of] a prior administration’s regulatory actions.”).

¹⁹³ See *Cty. of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1474 (2020) (applying *Skidmore*, rather than *Chevron*, where “[n]either the Solicitor General nor any party has asked [for] what the Court has referred to as *Chevron* deference to EPA’s interpretation of the statute”).

¹⁹⁴ A great many cases that mention “*Chevron*” do not involve deference at all because the statute is unambiguous. See Hickman & Nielson, *supra* 52.

¹⁹⁵ The more certain the loss of policymaking power is, the more confident Congress will be that the agency really can’t act. That said, there could be an emergency exception, albeit preferably one subject to judicial review. As noted, courts can act as a commitment mechanism to make agency claims credible. If an agency must offer an especially compelling reason to break its vow, then the commitment would still be credible even if it would be more credible if there was no way to escape the pledge. See, e.g., Nielson, *supra* note 188, at 118 (explaining that because of judicial review of various procedural requirements, agencies can credibly commit but still change their mind by “diverting resources from other priorities”).

questions fit that bill in a way that other types of questions often do not. And if shirking is a problem, Congress could enact targeted statutes requiring the respective agency to address specific issues.

This version of the minor questions doctrine thus should solve the collective-action problem in cases where it matters without obvious collateral damage. It also should appeal to common sense. Courts speak of “giving” agencies deference¹⁹⁶; agencies thus arguably should be able to decline the gift when deference would hurt rather than help.¹⁹⁷ The downside, however, is that it would require creating a new mechanism in administrative law (prospective *Chevron* waiver) that is (fairly) avant-garde and that may pose logistical problems, for instance when it comes to determining how an agency communicates its waiver of *Chevron*.

C. Reverse the *Chevron* Presumption

The third option would reverse the *Chevron* presumption. Recall that *Chevron* relies on an implicit delegation of authority; although Congress has not said so, courts presume that Congress has implicitly given agencies interpretative primacy for ambiguous language. But it is possible to reverse that presumption; courts could defer only when Congress has expressly delegated that authority.¹⁹⁸

The advantage of this approach is that, again, courts would not have to decide what is a minor question. Congress, a party to the collective-action problem, is better positioned to identify which policies are affected by collective-action dynamics. For such policies, Congress would not “turn on” deference.¹⁹⁹ But for other policies where Congress believes that deference is sufficiently valuable, Congress would “turn on” deference. This way courts would know when deference makes sense and would not be forced to indulge the fiction that Congress has already spoken.²⁰⁰

¹⁹⁶ See, e.g., *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 447 (5th Cir. 1999) (explaining that “under *Chevron* step-two, we usually give the agency deference in its interpretation of ambiguous statutory language”).

¹⁹⁷ Indeed, via Step One-and-a-Half, agencies already can and do decline the “gift” simply by saying during the rulemaking that the statute unambiguously compels the agency’s preferred interpretation. See Hemel & Nielson, *supra* note 24 (describing doctrine).

¹⁹⁸ This would not solve Justice Thomas’s constitutional concerns. See p. __, *supra*. But it would eliminate any uncertainty about the meaning of statutory law. Whether Congress could constitutionally delegate such authority could then be addressed through the nondelegation doctrine (or a revised version of the doctrine—a question bigger than this article’s scope).

¹⁹⁹ Alternatively, Congress could “turn on” deference, but also require the agency to act rather than giving the agency discretion whether to do so.

²⁰⁰ See, e.g., Mark Seidenfeld, *Revisiting Congressional Delegation of Interpretive Primacy as the Foundation for Chevron Deference*, 24 SUP. CT. ECON. REV. 3, 7 (2016) (“Congressional awareness of the *Chevron* doctrine, however, does not necessarily imply a desire for that doctrine

To be sure, some may argue that reversing the presumption is close to eliminating *Chevron* itself, at least as a practical matter. There is something to this. The reason why *Chevron* is so significant is because it applies so broadly; if Congress were required to enact deference through legislation, there likely would be less deference.²⁰¹ On the other hand, this may be a feature, not a bug. Even apart the collective-action problem it creates, *Chevron* is problematic for other reasons. Likewise, Congress, perhaps aware of the judiciary's non-ideological discontent with *Chevron*,²⁰² may be inclined to address deference anyway; as part of that process, Congress should pay attention to minor questions. In all events, if reversing the presumption for all questions is too aggressive, the doctrine could reverse it only for minor questions—although that would require a court to identify what is a minor question and what is not.

D. Which Version is Best?

Each of these options has pluses and minuses. The most intuitive solution would be to borrow from the major questions doctrine. The most targeted would be to create a new form of *Chevron* waiver. And the most foundational would be to reverse the *Chevron* presumption. Yet the minuses are also real. Borrowing from the major questions doctrine is easier said than done; a new form of *Chevron* waiver is unusual and likely sometimes potentially awkward in application; and reversing the *Chevron* presumption would be a big change. The key point, though, is that each option would reduce overlapping policymaking authority over minor questions. This Article thus offers menu of options. Determining which one makes the most sense requires considering the overall costs and benefits of reform on other dimensions than those at issue here.

V. COUNTERARGUMENTS

When two entities want an outcome that is non-rivalrous and non-excludable and either can bring it about, a collective-action problem may result. As this Article demonstrates, these conditions characterize the

to control review").

²⁰¹ See, e.g., Kent Barnett, *Codifying Chevmore*, 90 N.Y.U. L. REV. 1, 7 (2015) Kent Barnett, *Codifying Chevmore*, 90 N.Y.U. L. REV. 1, 7 (2015) (explaining how rare it is for Congress to specify whether it wants deference).

²⁰² See, e.g., Gluck & Posner, *supra* note 51, at 1348 (noting that "[t]he judges expressing skepticism regarding *Chevron* divide equally among liberals and conservatives" and "[s]ome expressed skepticism about *Chevron*'s fiction of delegation, arguing that: 'or actual delegations, *Chevron* is acceptable, but that a lot of times judges are talking about delegation, but nothing has really been delegated to the agency'").

relationship between the political branches in today's world, especially for minor questions. Because of deference, accordingly, we should expect some policies to be shelved that otherwise would have become law. The minor questions doctrine would address this stagnation. That said, there are important counterarguments to adopting such a doctrine.

A. Do Minor Questions Matter?

The most important counterargument asks whether this problem is significant enough to justify reform. In short, do collective-action dynamics cause stagnation often enough in the real world that the benefits of a new doctrine are greater than its costs?

Candidly, this is a difficult question to answer. Because it is challenging to measure what did not happen, much less explain why it did not happen, it is necessarily also challenging to speak with confidence. True, the real-world examples identified by Hemel lend some credence to the notion that deference creates a collective-action problem. But without knowing the respective values that Congress and the White House place on action and inaction, it is impossible to definitively answer how significant the problem is. And it is true that there are lots of reasons agencies do not act even for policies they want (such as resources constraints). So even if the collective-action dynamic addressed here matters for some policies, it unclear how significant the problem is.

Nonetheless, there is reason to fear that this is a real problem. To begin, the story here is not elaborate; it is a basic application of widely-applied principles of game theory. There are also at least some real-world examples of what looks like deference-caused inaction. In fact, there is an argument that minor questions should be a priority. Major questions, by definition, attract political attention which often moots the need for judicial review.²⁰³ Not so, however, with minor questions.²⁰⁴ Put another way, the risk that a collective-action dynamic may stymie policy is not limited to minor questions; it can also happen for other types of questions that are not bipartisan or technical. Some possible tax policies, for instance, have ideological dimensions.²⁰⁵ But for politically-charged

²⁰³ This is to not say that the major questions doctrine does not serve important interests. *See, e.g.,* Loshin & Nielson, *supra* note 5, at 60 (offering evidence that “the elephants-in-mouseholes doctrine was not created to enable the Court’s pursuit of its own policy preferences”). Just because a major policy may be revisited later does not mean that a court should not properly apply the law. Likewise, even if the policy might be addressed later through the political process, which is not a foregone conclusion, changing the policy would be costly and take time.

²⁰⁴ For example, if the mutual inaction payoff in the matrix on page __, *supra*, is changed from -1 to -.01, the odds that anyone will act becomes vanishingly small.

²⁰⁵ *See, e.g.,* Hemel, *supra* note 13, at 666-67 (noting an issue involved foreign tax credits

issues, forcing the issue to go to Congress may not be so bad.²⁰⁶ At any rate, when divided government returns (as it regularly does), the collective-action problem disappears.²⁰⁷ *But that is not true for minor questions.* Divided government does not solve the problem and it is hard to come up with a normative argument in favor of this type of inaction.

Another counterargument is that even if *Chevron* may thwart policymaking for minor questions, it still may be worthwhile on net. Because of *Chevron*, stagnation occurs for some policies while increased activity happens for others.²⁰⁸ Accordingly, to resolve the overall question, we would need a better sense of the *Chevron*'s aggregate costs and benefits. It does not follow, however, that a minor questions doctrine is not worth pursuing. This Article's central claim is that we should expect stagnation to be most prevalent when the benefits of a policy are diffuse but the costs are concentrated, especially if the policy is technical. Even without *Chevron*'s collective-action problem, that is a tough combination. Yet deference may make an already bad situation worse.

B. Why Hasn't Congress Already Acted?

Of course, all of this raises a separate question: if minor questions are a problem, why hasn't Congress *already* responded? Congress can change *Chevron*.²⁰⁹ So if deference creates a significant collective-action problem, why hasn't Congress already fixed it? In other words, doesn't the fact that Congress has not acted or even expressed alarm speak volumes?²¹⁰

placed by Democratic presidents in the Greenbook but not Republicans).

²⁰⁶ See, e.g., Manning, *supra* note 48, at 200 (explaining reasons for the institutional design behind the allocation of powers under the Constitution).

²⁰⁷ See, e.g., Hemel, *supra* note 13, at 644.

²⁰⁸ See p. __, *supra*. See also, e.g., Hemel, *supra* note 13, at 711 ("The static and dynamic effects of deference cut in different directions: deference makes it more likely that any particular Treasury regulation will pass judicial muster but less likely that Congress will act to raise revenues."). This answer, of course, does not address the *legal* issues surrounding *Chevron* generally. If unlawful, *Chevron* cannot be "worthwhile"—a question beyond the scope of this Article. It also assumes for the sake of argument that more government action is generally a good thing. As explained above, that assumption is fiercely debated. See, p. __, *supra*. The key point for purposes here is that *even if* more action is good, deference may not always enable more action.

²⁰⁹ See, e.g., Scalia, *supra* note 25, at 517. Whether Congress could *require* judges to apply *Chevron* implicates questions beyond the scope of this Article. See nn. 42-43 and accompanying text, *supra*. But because the theory of *Chevron* is implicit delegation, see, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 229-30 (2001), Congress could withdraw that delegation.

²¹⁰ Cf., e.g., MILAN M. ĆIRKOVIĆ, *THE GREAT SILENCE: THE SCIENCE AND PHILOSOPHY OF FERMÍ'S PARADOX 2* (2018) (explaining the theory that if aliens existed, "they would have been here already"); *United States v. Lopez*, 518 F.3d 790, 798 (10th Cir. 2008) (per Gorsuch, J., explaining the "logical significance of the dog that didn't bark").

This point is also fair. There are, however, at least four answers. First, it is not all clear that enough members of Congress have recognized the systemic nature of the problem. It is possible to experience a collective-action problem in a single case without recognizing that it applies in other cases, too. If members of Congress do not realize that we should expect this dynamic to arise for many types of policies, it is easy to see why reform would be unattractive; any individual minor question may be too small to justify the efforts associated with reform. Second, Congress may know about this dynamic but has concluded that the current framework is the best option and should be retained. Third, Congress may know about this dynamic but believe, wrongly, that there is no way out of it. This Article offers a workable solution. And fourth, some in Congress may *like* this collective-action dynamic because it helps sophisticated operators stop legislation.²¹¹ In other words, the very dynamic that give rise to collective action problems for minor questions may also create pressure to keep that system in place.

Which explanation (or explanations) is correct? We do not know. Congress has not spoken one way or the other. Instead, the Supreme Court has changed the status quo by creating *Chevron* without a clear statement from Congress. Because (i) Congress has not addressed the issue but (ii) both theory and some real-world evidence suggest that a collective-action dynamic is real, there is a good argument that congressional silence should not equal consent.

C. A More Realistic Understanding of Policymaking?

Another pushback challenges an assumption in this Article's model, *viz.*, that there are only two players in the game: Congress and the White House. This may be true for high-profile issues (such as those addressed by the major questions doctrine or even some "ordinary" *Chevron* questions),²¹² but presumably it much less often true for minor questions. Although the "executive Power" is vested in the President alone,²¹³ no one argues that the President is personally involved in every decision.²¹⁴

²¹¹ For what it is worth, this fourth possibility seems improbable. Not only does it require a large dose of cynicism, it also is elaborate. But it would be consistent with public-choice theory and so may have some pull, even if the extreme version does not fit reality. See n.109, *supra*.

²¹² See, e.g., Jerry L. Mashaw & David Berke, *Presidential Administration in A Regime of Separated Powers: An Analysis of Recent American Experience*, 35 YALE J. ON REG. 549, 606 (2018); Kagan, *supra* note 122, at 2246.

²¹³ See, e.g., *Seila Law LLC v. CFPB*, No. 19-7, 2020 WL 3492641, at *4 (U.S. June 29, 2020) ("Under our Constitution, the 'executive Power'—all of it—is 'vested in a President,' who must 'take Care that the Laws be faithfully executed.'" (quoting U.S. CONST. ART. II, § 1, cl. 1))

²¹⁴ See, e.g., *City of Arlington v. FCC*, 133 S. Ct. 1863, 1879 (2013) (Roberts, C.J., dissenting)

Countless decisions involving minor questions are made at the agency level, often by career officials.²¹⁵ There are also independent agencies whose decisions are, at least in theory, isolated from presidential control.²¹⁶ Against this more accurate backdrop, doesn't it follow that in the real world, there is no meaningful collective-action problem?

No. This Article uses the White House in its model because it is simpler. But White House participation is not necessary for this Article's conclusions to hold. The collective-action problem can be between Congress and the White House, but it can also be between Congress and an agency. The key point is not *who* in the Executive Branch creates policy, but rather that *someone* there can do so. That point does not change when we adopt a more realistic view of policymaking.

To be sure, it is no doubt true that, say, a career agency official may assess costs and benefits differently from a political appointee in the White House.²¹⁷ If so, this may change how often a collective-action problem occurs, but it would not eliminate the risk altogether, especially for policies without sharp political significance. Moreover, technical issues—which, as this Article explains, also can create a minor-questions collective-action problem—are hard to address. A career official may prefer not to expend the energy on a technical issue that will not advance his or career, especially when someone else could do it.²¹⁸ Or even less cynically, a career official may not be especially interested in some issue. At the margins, that person may be more inclined to act if no one else

(“Although the Constitution empowers the President to keep federal officers accountable, administrative agencies enjoy in practice a significant degree of independence. As scholars have noted, ‘no President (or his executive office staff) could, and presumably none would wish to, supervise so broad a swath of regulatory activity.’”) (quoting Kagan, *supra* note 122, at 2250).

²¹⁵ See, e.g., Adoption of Recommendations, Admin. Conf. of U.S., 84 Fed. Reg. 71348, 71554-55 (Dec. 27, 2019) (explaining that “SES officials often ... exercise ‘important policy-making, policy-determining, or other executive functions’” and that “[a]pproximately half of SES positions are reserved for career employees”).

²¹⁶ See, e.g., Seila Law, 2020 WL 3492641, at *4 (explaining independent agencies, i.e., those subject to a weaker presidential removal power). How independent many “independent” agencies are in practice is disputed. See, e.g., Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 491 (2008) (questioning the amount of independence in a polarized age); Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 Tex. L. Rev. 469, 513 (1985) (“The distinction between executive branch and independent agencies continues to thrive in political rhetoric, but it has virtually no life in the reality of agency practice.”). To the extent that agency independent is more theoretical than real, this objection loses force.

²¹⁷ See, e.g., Daniel E. Walters, *Litigation-Fostered Bureaucratic Autonomy: Administrative Law Against Political Control*, 28 J.L. & POL. 129, 131 (2013) (“Scholarship has long documented deep divisions within agencies and, more importantly, between political appointees and career staff.”).

²¹⁸ See, e.g., Wentong Zheng, *The Revolving Door*, 90 NOTRE DAME L. REV. 1265 (2015) (explaining the incentives officials have to maximize their own interests).

could. But if someone else could, that official may stand aside. Of course, career officials may (or may not²¹⁹) be more public-interest minded, which would make collective-action dynamics less likely. They may also be more attentive to congressional wishes.²²⁰ But all of this would merely change the *frequency* of the problem, not its *existence*.

At the same time, adding more players to the mix—Congress, the White House, an agency or agencies²²¹, and different groups within agencies—may make the collective-action problem even more serious. This Article uses a two-player model because it is simpler. But a model with more decisionmakers should also be more susceptible to freeriding. It is a familiar insight in antitrust that the more players involved, the harder it is to prevent self-interested behavior by individuals within the group at the expense of the group overall.²²² Adding more policymakers into the model thus may lead to more freeriding, not less.²²³

Alternatively, what if we take a more realistic view of lawmaking in Congress? Congress is subject to bicameralism and presentment²²⁴; agencies are not.²²⁵ Thus, because it is harder for Congress to act, won't the executive branch realize that it should act rather than waiting for Congress? Again, the answer is no. In fact, if it becomes more expensive for Congress to act but everything stays the same for the executive branch, we should expect more inaction, not less. As the net benefit of action for Congress decreases, inaction necessarily becomes less catastrophic from Congress's perspective, thus increasing the risk that that stagnation will occur.²²⁶ To be sure, Congress has other means to

²¹⁹ See, e.g., Michael J. Glennon, *National Security and Double Government*, 5 HARV. NAT'L SEC. J. 1, 36 (2014) (explaining that "bureaucrats [may] care more for routine than for results" and develop "vast bureaucratic mechanisms" as ends unto themselves) (quotations omitted).

²²⁰ See, e.g., Christopher J. Walker, *Legislating in the Shadows*, 165 U. PA. L. REV. 1377, 1431 (2017) (explaining how attentive officials are to congressional requests).

²²¹ See, e.g., William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, 89 IOWA L. REV. 1, 22 (2003) (explaining that a "social ill is less likely to be addressed by regulatory action [where there is overlapping policymaking authority than] where a particular institution is viewed by all as having regulatory primacy."). But see Freeman & Rossi, *supra* note 130, at 1151-55 (defending redundancy).

²²² See, e.g., HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* 192-93 (5th ed. 2016).

²²³ See, e.g., OLSON, *supra* note 15, at 2-3 (explaining that collective-action problems are worse for larger groups).

²²⁴ See, e.g., Manning, *supra* note 48, at 198 (explaining bicameralism and presentment).

²²⁵ Agencies might be subject to an ossified rulemaking process See, e.g., Nielson, *supra* note 188, at 89 (explaining the empirical debate about how ossified the rulemaking process is).

²²⁶ See p. __, *supra*. As the cost of action increases for Congress, the *net* benefit of action (the benefit of action minus the cost of action) decreases. This makes action relatively less attractive. In terms of the Snowdrift Game, when action becomes relatively less attractive, the incentive to stay in the car increases for one of the players. Both intuitively and mathematically, there is no reason to think that the decreased incentive to act for one player will be entirely offset by a

force action, such as power over budgets, and as the costs of new legislation increases for Congress, it may be more willing to use means. But again, this should just change the frequency of the collective-action dynamic, not its existence. How often inaction occurs (or, put another way, how powerful Congress's other means of spurring regulatory action are) is another empirical question that has not been answered.

D. Are There Better Solutions?

Even if *Chevron* causes a collective-action problem, are there not better ways to solve it? As noted above, culture—including fairness and cooperation norms²²⁷—can mitigate collective-action problems. So might not fairness and cooperation norms mitigate *Chevron*'s collective-action problem? This counterargument is fair but not dispositive. Are there such norms? And if so, are they strong enough to solve the collective-action problem? And even if such norms emerge, inaction should become rarer, but that just means stagnation would be less common.

Alternatively, rather than relying on fairness and cooperation norms, Congress could solve the collective-action problem by taking away an agency's ability to stand down. If an agency lacks discretion to not address a problem, there will not be stagnation. Yet as explained above, this solution is unattractive because there are many unobjectionable reasons why agencies stand aside.²²⁸ Agencies regularly stand aside not because they want a policy they cannot get because of collective-action dynamics but instead because they don't want the policy at all and would oppose it even if there was no collective-action problem. In other words, they have a dominant strategy not to act. It is only when the agency doesn't act because of collective-action dynamics, however, that we should be concerned.²²⁹ It is difficult to identify that sort of policy *ex ante* or

change in the other player's strategy. Holding the payoffs from action constant (as we must), the only implication of moving from a world of symmetrical costs to a world of asymmetrical costs in which one party's costs have increased while the other party's costs have remained constant along all relevant dimensions is a reduced overall likelihood of action.

²²⁷ This idea that there are fairness norms against which negotiating parties act is supported by the literature surrounding the so-called "ultimatum game," in which two parties negotiate over a surplus. Studies suggest that notions of fairness may lead to a more even distribution. See, e.g., Richard H. Thaler, *Anomalies: The Ultimatum Game*, 2 J. OF ECON. PERSPECTIVES 195 (1988). That said, the robustness of that "fairness" effect may dissipate in certain situations, such as litigation. See, e.g., Paul Pecorino & Mark Van Boening, *Fairness in an Embedded Ultimatum Game*, 53 J.L. & ECON. 263, 264 (2010) ("Our results suggest that fairness considerations are a good deal less important in stylized legal bargaining than in the simple ultimatum game.").

²²⁸ See p. __, *supra*.

²²⁹ There are also important Article II issues. It not always clear that Congress *could* force the Executive Branch to act. Questions about the relationship between the Take Care Clause and the

categorically. Congress, of course, could solve this problem through targeted legislation after a collective-action dynamic emerges—but if Congress is going to do that, why not just create the policy?²³⁰

Taking a more realistic view of agencies (as explained above), another potential solution could be self-policing by the Executive Branch. If individual agencies are trying to freeride off of other agencies with overlapping jurisdiction or off of Congress (which by definition has overlapping jurisdiction), perhaps oversight by the Office of Information and Regulatory Affairs (OIRA) within the White House's Office of Management and Budget could spur agency action. Just as OIRA reviews the most important regulations,²³¹ perhaps it would also be directed by executive order or statute to target freeriding for minor ones. There is much to be said for this option—at least for issues that do not involve the White House itself (such as Hemel's tax examples from the Greenbook). Unfortunately, adding more responsibility to its portfolio would stretch OIRA's resources even further, especially if agencies actively avoid review.²³² OIRA review, although perhaps part of the solution, is thus not a panacea. Similar things can be said about ombudsmen, such as the Taxpayer Advocate Service with the Internal Revenue Service.²³³ Such an entity may help to identify issues that the agency is not addressing but, as Hemel's tax examples demonstrate, also are not a silver bullet.

E. What About Delegation Generally?

Finally, if *Chevron* creates a collective-action problem by empowering

Executive Vesting Clause are beyond this Article's scope.

²³⁰ Another possible solution would be for Congress to create a mechanism to disable itself when a collective-action problem emerges. The problem with this solution is two-fold. First, if Congress is going to expend that effort, it should just legislate. Second, Congress often cannot bind itself (or at least cannot bind itself very well). Partisan divide may act as a commitment mechanism against legislative action for some policies (such as major questions or other political ones), but that effect is less pronounced for minor questions. Notably, the fact that Congress cannot irrevocably "turn off" its legislative power is almost certainly a good thing, even if it means that Congress cannot unilaterally end a collective-action problem. *See, e.g.,* Manning, *supra* note 48, at 200 (explaining constitutional safeguards against "oppressive legislation").

²³¹ *See, e.g.,* Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1850 (2013) (explaining that "OIRA review is limited to 'significant' regulatory actions," which includes rules with "a major economic impact or raise serious policy questions" but excludes rules that are "simple and routine").

²³² *See, e.g.,* Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 Harv. L. Rev. 1755, 1817 (2013) (noting "a decline" in OIRA's resources which enables agencies to avoid review); Note, *Oira Avoidance*, 124 HARV. L. REV. 994, 1013 (2011) (noting that "OIRA's scarce resources" make it difficult to prevent such avoidance).

²³³ *See, e.g.,* Bryan Camp, *What Good Is the National Taxpayer Advocate?*, TAX NOTES Vol. 126:10 (2010) (explaining how the office works).

two branches to share the same policymaking space, then don't *all* delegations also do the same? Yet delegated authority is everywhere.²³⁴ So if *Chevron* creates collective-action problems, doesn't everything? And if that's right, why worry about *Chevron*?

It is true that this Article's logic also suggests that the nondelegation doctrine²³⁵ also enables collective-action dynamics. Because agencies can regulate, say, in the "public interest,"²³⁶ Congress may do less than it otherwise would, and agencies, in turn, may reciprocate. This effect of delegation no doubt merits extended attention. But it does now follow that we should not also worry about *Chevron*. In fact, there are a couple of reasons to focus on *Chevron* in particular. First, *Chevron* is more manageable. How courts should enforce the nondelegation doctrine is difficult.²³⁷ By contrast, it is more straightforward to mitigate *Chevron*'s collective-action problem. And second, delegation involves a choice by Congress. Deference, by contrast is much more a creature of the judiciary. It is one thing for Congress to create a collective-action problem for itself. It is something else for courts to spring one on Congress.²³⁸

There are no doubt other counterarguments. None of the most obvious ones, however, defeat the need for a minor questions doctrine—at least based what we know so far. Unfortunately, uncertainly in administrative law is par for the course. We don't know much about many things.²³⁹ This

²³⁴ See, e.g., Metzger, *supra* note 3, at 7 (noting the "the broad delegations of authority to the executive branch that represent the central reality of contemporary national government").

²³⁵ See, e.g., *Whitman v. Am. Trucking Assns., Inc.*, 531 U.S. 457, 474-75 (2001) ("In short, we have 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'"). But see *Gundy v. United States*, 139 S. Ct. 2116, 2142 (2019) (urging the Court to rethink its approach) (Gorsuch, J.).

²³⁶ See, e.g., Aaron L. Nielson, *Beyond Seminole Rock*, 105 GEO. L.J. 943, 992 (2017) ("[A] lot of agency innovation does not occur within the *Chevron* framework at all because some statutes—like those that authorize regulation 'in the public interest'—do not present meaningful questions of statutory interpretation").

²³⁷ See, e.g., *Dep't of Transp. v. Ass'n of Am. RRs.*, 135 S. Ct. 1225, 1237 (2015) (Alito, J., concurring) (explaining "the inherent difficulty of line-drawing" vis-à-vis delegations).

²³⁸ To be sure, this Article has implications for the nondelegation debate. The fact, for instance, that delegation creates a collective-action problem should make the issue even more important. Likewise, Congress should evaluate delegations through the lens of collective-action dynamics. Cf. William K. Kelley, *Avoiding Constitutional Questions As A Three-Branch Problem*, 86 CORNELL L. REV. 831, 898 (2001). If Congress does not want to withdraw delegated power altogether, moreover, it can authorize the Executive Branch to forswear statutory authority. See, e.g., David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 339-40 (2013).

²³⁹ See, e.g., Nielson, *supra* note 236, at 979, 984 (explaining that scholars lack data on key administrative law questions); Adrian Vermeule, *Optimal Abuse of Power*, 109 NW. U. L. REV. 673, 693 (2015) (explaining the distinction between "informational" and "conceptual" problems in

means we must make an educated guess about the key empirical question. Because this Article offers a coherent theory backed by real-world examples, we should be confident that there *isn't* a significant collective-action problem before accepting the status quo. Thus, despite empirical uncertainty, the minor questions doctrine still makes sense. At a minimum, targeted empirical study is necessary.

CONCLUSION

“It takeschutzpah to write about *Chevron*.”²⁴⁰ It takes even morechutzpah to say we have overlooked something important for decades. But that is what this Article contends. Under a reasonable set of assumptions, we should expect that *Chevron* sometimes stymies policymaking. Thus, whatever one thinks of the usual back-and-forth about *Chevron*, the story is more complicated. *Because* both branches can act, and *because* both would prefer the other do so, each may shirk.

If this “collective action” account is correct, then no matter one’s priors about the administrative state, deference’s place in it becomes more complicated. And this is especially true for minor questions, which, not by accident, do not receive much attention anyway. Those who embrace *Chevron* because they believe it facilitates good policy must also confront the fact that it may also do the opposite. *Sometimes* deference allows agencies to act when Congress has overlooked a problem. And *sometimes* it facilitates the emergence of policy that Congress does not want, which is problematic for other reasons.²⁴¹ But deference also may *prevent* beneficial policies from becoming law in the first place. In making an overall assessment of *Chevron*, it is incomplete to simply point to the good things it enables; one must also consider the good things it prevents.

Accordingly, although the high-profile debate about major questions is important, we should not lose sight of the complete picture. Major questions are significant and will continue to be so. Yet counterintuitively, when it comes to deference, “humdrum, run-of-the-mill stuff”²⁴² sometimes can be even more significant. The *Chevron*

administrative law). Cf. Paul R. Verkuil, *The Self-Legitimizing Bureaucracy Bureaucratic Justice*, 93 YALE L.J. 780, 780 (1984) (“It is as if, when asked the question what (or where) is administrative justice, [most lawyers and policymakers] look for that particular lost coin under the proverbial streetlight of judicial process, not because the coin is there, but because that is where the light is.”).

²⁴⁰ Michael Herz, *Chevron Is Dead; Long Live Chevron*, 115 COLUM. L. REV. 1867, 1868 (2015).

²⁴¹ See, e.g., Peter L. Strauss, *Legislation that Isn’t—Attending to Rulemaking’s Democracy Deficit*, 98 CALIF. L. REV. 1351, 1351 (2010) (noting the “legitimacy” problems associated with “permitting unelected officials to create binding legal text”).

²⁴² *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013).

framework overlooks this point. That is why the time has come for a minor questions doctrine.