

# Keeping Big Cases from Making Bad Law: The Resurgent “Major Questions” Doctrine

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It is emphatically the province and duty of the Judicial Department to say what the law is.

—*Marbury v. Madison*

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 . . . 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.

—*Chevron v. NRDC*

In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation. This is one of those cases.

—*King v. Burwell*

## INTRODUCTION

Who decides what the text of a statute means? As a general matter, judges do, as stated most clearly in *Marbury v. Madison*.<sup>1</sup> The well-known *Chevron v. NRDC* case has been taken to have altered that allocation of interpretive authority, giving a share of it to administrative agencies in a wide band of cases.<sup>2</sup> In this sense, Cass Sunstein has termed *Chevron* a

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<sup>1</sup> *Marbury v. Madison*, 5 U.S. 137 (1803) (stating that “It is emphatically the province and duty of the Judicial Department to say what the law is”); *but see* *Skidmore v. Swift*, 323 U.S. 134 (1944) (giving some weight to agency interpretations).

<sup>2</sup> *Chevron v. Nat. Res. Def. Council*, 467 U.S. 837 (1984).

“counter-*Marbury* for the administrative state.”<sup>3</sup>

But *Chevron* is not the end of the story. It does not require total deference to agency interpretations of statutes, and there are some classes of cases to which it does not apply at all. One such *Chevron* exception is the “major questions” doctrine, established more than a decade after *Chevron* in two cases, *MCI v. AT&T*<sup>4</sup> and *FDA v. Brown & Williamson*.<sup>5</sup> This doctrine claws back interpretive authority for judges in certain “extraordinary” cases; in short, it says that when the legal stakes are sufficiently high, agency interpretations of law carry little or no weight, contrary to the standard rule in everyday cases where those interpretations are often determinative. The major questions doctrine is in effect a counter-counter-*Marbury*.

Shortly after the major questions doctrine’s creation in the 1990s, it seemed to disappear. For many years no Supreme Court decisions explicitly cited the doctrine, and some scholars argued that it was dead or at least dormant. But three cases in the 2014 and 2015 Supreme Court terms, most notably and most clearly *King v. Burwell*,<sup>6</sup> confirm that the doctrine yet lives. Moreover, the doctrine appears to have been hiding in plain sight even during its alleged dormancy. A series of cases citing the late Justice Scalia’s colorful observation that Congress “does not hide elephants in mouseholes” is closely related to the doctrine, and some such cases may constitute a previously unrecognized or at least underappreciated line of major questions cases.

The major questions doctrine is not just a curious quirk of administrative law. It can play an important role in high-profile cases at the Court with great policy significance. The EPA’s Clean Power Plan, arguably the agency’s most significant rulemaking in many years and the nation’s most important action to date on climate change, is currently being litigated.<sup>7</sup> That litigation bears all the marks of a potential major questions case—it hinges on interpretation of EPA’s governing statute (the Clean Air Act), and has great economic and political significance. If the doctrine is applied, the future of US climate policy may be determined by the Supreme Court’s reading (not the EPA’s) of a previously obscure and rarely used statutory provision.

More generally, the doctrine is particularly important in an era in which Congress, deadlocked by political polarization, struggles to pass any legislation. Old regulatory statutes remain relevant longer than they otherwise would, increasing agencies’ temptation to make bold

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<sup>3</sup> Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 189 (2006).

<sup>4</sup> *MCI v. AT&T*, 512 U.S. 218 (1994).

<sup>5</sup> *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

<sup>6</sup> *King v. Burwell*, 135 S. Ct. 2480 (2015).

<sup>7</sup> *West Virginia v. EPA*, Case No. 15-1363 (D.C. Circuit)

reinterpretations. Gaps or ambiguities in statutes remain unfilled. Taken together, these factors likely mean more litigation over statutory interpretation in areas of large policy significance (of which the Clean Power Plan is but one example). And interpretive errors by courts and agencies both are less likely to be corrected by Congress.

If these predictions are correct, then whether the major questions doctrine leads to better outcomes—that it, whether the doctrine is a good thing—becomes quite important. To the extent it has been considered by other scholars, the doctrine has for the most part been heavily criticized. Critics claim that the doctrine is not administrable, is arbitrary or inconsistent, that it serves no clear purpose, and that it is merely a cloak for judges' policy preferences. In many ways these critiques are persuasive.

However, I argue that the major questions doctrine is nevertheless an important and possibly necessary concession. With apologies to Voltaire, if the doctrine did not exist we, or more specifically judges, would have to invent it. One reason for this is that many judges appear for psychological, traditional, or constitutional reasons to be reluctant to relinquish authority to interpret statutes in sufficiently extraordinary cases, despite being willing and able to do so in the far more common ordinary cases to which *Chevron* deference is applied. Another reason is that the public or other actors may demand that courts decide such major cases for reasons of tradition or, more debatably, perceived accountability, and judges may be reacting to these demands in order to preserve courts' legitimacy and prestige.

If this account is correct, then the major questions doctrine serves an important role as a safety valve (or a fig leaf) for *Chevron*. Without it, the fuzzy boundaries of *Chevron* deference would face significant pressure. More precisely, without the major questions doctrine judges' impulse to decide major cases (or the pressure they feel to do so) could lead them to find grounds for denying interpretive deference within *Chevron*'s two-step process, creating precedent that weakens the degree of deference available in other cases. Taken to its extreme, this could mean effectively or explicitly overruling *Chevron*.

This is a real risk. Despite its simple two-step process and claim to establish a clear line between judicial and agency interpretive authority, *Chevron* cases remain hard to predict, especially at the Supreme Court where the major questions doctrine is most likely to be a factor. In particular, whether statutory language is sufficiently clear for judges to decide its meaning at *Chevron* step one, or ambiguous and therefore consigned to agency interpretation with much weaker judicial oversight in step two is often a very fine line. Faced with great temptations and/or pressures to decide major cases, judges could easily claim statutory text is clear (giving them power to determine the outcome alone) when they would not do so in a similar but less consequential case. Such decisions

then create precedent that muddies the already difficult ambiguity determination in other cases, whether they involve major questions or not.

In other words, the alternative to the major questions may be that judges still decide major cases differently while claiming not to do so, instead ostensibly basing their decisions on general doctrinal rules and interpretive principles at *Chevron* step one. The major questions doctrine relieves this pressure on *Chevron* by confining it to “extraordinary” (and, at least to date, rare) cases.

Moreover, the major questions doctrine is transparent—by invoking it, judges announce that extraordinary cases will be treated differently. This may be frustrating for doctrinal purists, somewhat arbitrary in application, and unlikely to lead to better regulatory outcomes in the major cases where it is applied. Assuming that one thinks *Chevron* deference itself is valuable, these flaws in the major questions doctrine must however be balanced against its ability to preserve *Chevron* by act as a safety valve in big cases. In my view, the risk of *Chevron* being undermined is the bigger danger.

This Article proceeds by examining the history of the major questions doctrine at the Supreme Court prior to the most recent terms in Part II, then discussing the newest cases in Part III. Part IV draws a consistent outline of the doctrine based on these cases. Part V presents arguments in favor of and against the doctrine made to date, while Part VI makes a new set of arguments that the doctrine is worth preserving. Concluding thoughts follow in Part VII.

## I. A BRIEF HISTORY OF THE MAJOR QUESTIONS DOCTRINE

Any discussion of what the major questions doctrine is, and whether it is worth preserving, must start with the cases in which it was created and has been invoked. There are relatively few such cases, at least at the Supreme Court level—this is not a doctrine frequently used by courts at any level. There are, however, two lines of major questions cases. One begins with a pair of older cases which established the doctrine. Some scholars have argued that the Court discarded this doctrinal line in *Massachusetts v. EPA* in 2007. As I argue below, *Massachusetts* is probably not that relevant to the doctrine, and in any case this main line of major questions cases reemerged in the 2015 term. The other line begins with the late Justice Scalia’s 2001 opinion in *Whitman v. American Trucking*, and sporadically reappears up to its most recent invocation in the 2014 term. Most scholars have treated the two lines as doctrinally separate, but as I will argue, they are at least closely linked, and may sometimes be the same doctrine in different clothes.

## A. The “Old” Cases

The older cases in which the major questions doctrine was first articulated (and by “older” I mean *relatively* older, i.e. late-1990s/early 2000s; the doctrine is a young one) have been extensively discussed in other scholarship regarding the doctrine, and I will therefore describe them only briefly here—starting with *Chevron*, to which the doctrine serves as an exception. Those already familiar with these cases can safely skip this Section.

### 1. *Chevron*

Traditionally, courts decided what regulatory statutes meant, and what powers they grant to administrative agencies. As noted above, *Marbury* stands (among other things) for the proposition that courts determine what the law is. Moreover, the Administrative Procedure Act explicitly delegates interpretative authority to courts.<sup>8</sup> To be sure, courts would assign some value to agency views, so long as they were “persuasive,”<sup>9</sup> but ultimate interpretive authority regarding regulatory statutes was unambiguously in the hands of judges.

This traditional rule is no longer the law. As most with any familiarity with administrative law will recall, the Supreme Court’s 1984 decision in *Chevron v. Natural Resources Defense Council* established a doctrine of judicial deference to agency interpretations of law, within certain limitations.<sup>10</sup> Despite professing to make no changes to preexisting doctrine, its innovations have been characterized as a “revolution” with “imperialistic aspirations.”<sup>11</sup> Under what has come to be called “*Chevron* doctrine,” courts reviewing an agency interpretation of a statute will first ask whether Congress has “directly spoken” on the question; i.e., whether a statute is ambiguous, or instead plain meaning can be found in the text (or perhaps context) of the statute.<sup>12</sup> If there is in fact ambiguity, the agency’s interpretation will be given controlling deference unless it is not reasonable or “permissible.”<sup>13</sup>

This famous two-step inquiry has since governed most cases involving agency interpretations of statutes. It has been profoundly influential in both real-world and academic administrative law. As one scholar puts it, “[i]t is

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<sup>8</sup> See Administrative Procedure Act, 505 U.S.C. § 706 (“To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.”).

<sup>9</sup> *Skidmore v Swift*, 323 U.S. 134 (1944).

<sup>10</sup> *Chevron*, 467 U.S. 837.

<sup>11</sup> Sunstein, *supra* note 3, at 189.

<sup>12</sup> *Chevron*, 467 U.S. 837.

<sup>13</sup> *Id.*

an understatement to say that a great deal of judicial and academic attention has been paid to the foundations and meaning of *Chevron*'s two-step inquiry."<sup>14</sup> *Chevron*'s revolutionary feature is its formal delegation of interpretive authority to non-judges. Contra *Marbury*, "*Chevron* seemed to declare that in the face of ambiguity, it is emphatically the province and duty of the administrative department to say what the law is."<sup>15</sup>

*Chevron*'s reach was not unlimited, however. Some limitations are included within *Chevron* itself. Agency interpretations could still be trumped by plain meaning (i.e. lack of statutory ambiguity), as determined by judges. And even where statutory ambiguity exists, agencies may be limited to "reasonable" interpretations. But *Chevron* did not exclude any class of interpretive cases from its reach.

Courts nevertheless constrained *Chevron* over time, placing some kinds of cases outside its reach. For example, agencies do not receive deference regarding statutes that cut across multiple agencies, such as the Freedom of Information Act.<sup>16</sup> Similarly, *United States v. Mead Corp.* restricted *Chevron* deference to agency actions that have the "force of law."<sup>17</sup> Sunstein has termed these doctrines collectively "*Chevron* Step Zero," referring to their common feature of excluding cases from *Chevron* deference.<sup>18</sup>

More than ten years after *Chevron*, the Supreme Court would add to this list of exceptions by creating a "major questions" doctrine excluding "extraordinary" or "major" questions from *Chevron*'s reach.

## 2. *Historical Background of the Major Questions Doctrine*

However, the roots of the major questions doctrine predate *Chevron*. The idea that Congress should decide big questions, with agencies left to decide little ones, has deep roots in administrative law. In 1978, Kenneth Culp Davis argued that

Congress is and should be geared to major policies and main outlines, and administrators are better qualified to legislate the relative details, often including major policy determinations. The courts should recognize that administrative legislation through the superb rulemaking procedure that is rapidly developing usually provides better protection to private interests than congressional enactment of detail.<sup>19</sup>

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<sup>14</sup> Sunstein, *supra* note 3, at 191.

<sup>15</sup> Sunstein, *supra* note 3, at 189.

<sup>16</sup> Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 893 (2001).

<sup>17</sup> 533 U.S. 218 (2001).

<sup>18</sup> Sunstein, *supra* note 3, at 187.

<sup>19</sup> KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE 208 (1978).

Though Davis' argument is directed against the nondelegation doctrine, its implications for the level of deference due to agency interpretations is straightforward. Agencies are in their element when they "legislate . . . details," while Congress's role is "major policies and main outlines." Under this view, deference to agencies makes sense in the former case, but not the latter. Davis' claim that agencies' superior qualifications extend to "major policy determinations" is an exception that seems to swallow his argument, however, illustrating the difficulty in drawing lines between major and minor questions, a point that critics of the major questions doctrine stress (and to which I return below).

As noted above, *Chevron* itself does not limit its deferential reach to minor questions; the Court would not articulate the major questions doctrine for another decade after *Chevron* was decided. However, Judge (later Justice) Breyer did anticipate the doctrine in a 1984 First Circuit decision<sup>20</sup> and an influential 1986 article exploring and defending *Chevron* deference.<sup>21</sup> This defense largely focused on implied delegation as the legal rationale for deference—that Congress's delegation of power to agencies includes an implied delegation of at least some authority to interpret the statute delegating that power. For Judge Breyer, however, the degree of implied delegation depended on the nature of the legal question:

The less important the question of law, the more interstitial its character, the more closely related to the everyday administration of the statute and to the agency's (rather than the court's) administrative expertise, the less likely it is that Congress (would have) "wished" or "expected" the courts to remain indifferent to the agency's views. Conversely, the larger the question, the more its answer is likely to clarify or stabilize a broad area of law, the more likely Congress intended the courts to decide the question themselves.<sup>22</sup>

Under Breyer's view, *Chevron*'s rationale (in his view, implied delegation) carries its own limiting principle. Sufficiently "important" cases might be excluded.

### 3. *MCI Telecommunications Corp. v. AT&T*

The Supreme Court first acknowledged that such a limitation existed in a 1994 telecommunications regulatory case, *MCI Telecommunications Corp. v. AT&T*.<sup>23</sup> The FCC had excluded "nondominant" carriers from rate

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<sup>20</sup> *Mayburg v. Sec'y of Health & Human Servs.*, 740 F.2d 100, 106 (1st Cir. 1984).

<sup>21</sup> See generally Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363 (1986).

<sup>22</sup> *Mayburg*, 740 F.2d 106–07 (citations omitted).

<sup>23</sup> 512 U.S. 218 (1994).



filing requirements under the Communications Act of 1934.<sup>24</sup> The statute required carriers to make such filings, but also granted the FCC authority to “modify” filing requirements.<sup>25</sup> The case therefore hinged on the FCC’s interpretation of this modification authority—did authority to “modify” filing requirements include authority to exempt some carriers from them?

The Court rejected the FCC’s interpretation, ruling that it was “beyond the meaning that the statute [could] bear”<sup>26</sup> and was a “radical or fundamental change” to the statutory scheme.<sup>27</sup>

Up to this point, *MCI* need not be taken as a break from *Chevron*. It could be characterized as a *Chevron* step two case: while the bounds of “modify” are presumably ambiguous, perhaps the Court was simply ruling that the FCC’s interpretation was unreasonable, outside the range of that ambiguity, and therefore had to be rejected. Alternatively, it could be characterized as a step one case (holding that “modify” unambiguously did not include the power to exclude), based on Justice Scalia’s references to dictionary definitions in the majority opinion (presumably as evidence of plain meaning).<sup>28</sup>

The Court seemed to go further, however, basing its holding on the boundaries of implied delegation. It concluded that it “is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion.”<sup>29</sup> If this statement is taken at face value, then deference to the FCC’s interpretation appears to be unavailable. In the context of the statute, the question is simply too important. In short, the Court ruled for the first time that some interpretive questions were too significant for the *Chevron* framework to apply.

#### 4. *FDA v. Brown & Williamson*

Had the Court said no more on the subject, it seems likely that its restriction of implied delegation (and therefore *Chevron* deference) in *MCI* could have been written off as dicta. But in 2000 the Court made its clearest statement of a major questions exception in *FDA v. Brown & Williamson*.<sup>30</sup> The case stemmed from the FDA’s attempt to regulate tobacco products, based on statutory language defining drugs subject to agency jurisdiction as “articles (other than food) intended to affect the structure or any function of the body.”<sup>31</sup> Despite this broad statutory grant

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 219.

<sup>27</sup> *Id.* at 229.

<sup>28</sup> *Id.* at 225; Sunstein, *supra* note 3, at 237.

<sup>29</sup> *MCI*, 512 U.S. at 231.

<sup>30</sup> 529 U.S. 120 (2000).

<sup>31</sup> *Id.* at 126 (quoting 21 U.S.C. § 321(g)(1)(C)).

of authority, the Court rejected FDA jurisdiction over tobacco.<sup>32</sup>

The Court's stated rationale was not that plain meaning contradicted the agency's interpretation—it would be hard to take such a view seriously. But the majority did still, at least formally, characterize its opinion as a *Chevron* step one holding. It did so by suggesting that step one is not just a question of whether textual ambiguity exists, but rather allows reviewing courts to examine statutes in context, including subsequent legislation, to determine (paraphrasing *Chevron*) “whether Congress has specifically addressed the question at issue.”<sup>33</sup> Subsequent legislation that arguably ratified the FDA's historical refusal to regulate tobacco appears to have been crucial for the Court's holding, with discussion of it taking up the majority of the opinion.<sup>34</sup> In this respect, the Court's holding is not particularly surprising—*Chevron* step one has long been understood to allow (even require) reading statutory text in context, using “traditional tools of statutory interpretation”, rather than in isolation.

But such implied repeal arguments are typically disfavored.<sup>35</sup> If they were the only thing supporting the majority's reasoning, the opinion would “seem easily impeachable.”<sup>36</sup> The opinion therefore needed additional support. It found it in the major questions doctrine. As the Court stated, it explicitly refused to grant *Chevron* deference to the agency because in “extraordinary cases . . . there may be reason to hesitate before concluding that Congress has intended such an implicit delegation”<sup>37</sup> and because “we must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.”<sup>38</sup> The Court further ruled, “This is hardly an ordinary case. Contrary to its representations to Congress since 1914, the FDA has now asserted jurisdiction to regulate an industry constituting a significant portion of the American economy.”<sup>39</sup>

The only citation given for this specific position was to Justice Breyer's 1986 article,<sup>40</sup> though the Court also cited *MCI* in its discussion.<sup>41</sup> As Sunstein notes, Justice Breyer was ironically not in the majority in *Brown & Williamson*, and in fact dissented specifically from the court's

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<sup>32</sup> *FDA v. Brown & Williamson*, 529 U.S. 120.

<sup>33</sup> *Id.* at 132.

<sup>34</sup> *FDA v. Brown & Williamson*, 529 U.S. 120.

<sup>35</sup> *Id.* at 181 (disfavoring implied repeal).

<sup>36</sup> See Abigail R. Moncrieff, *Reincarnating the “Major Questions” Exception to Chevron Deference as a Doctrine of Noninterference (or why Massachusetts v. EPA Got it Wrong)*, 60 ADMIN. L. REV. 593, 603 (2008).

<sup>37</sup> *FDA v. Brown & Williamson*, 529 U.S. at 159.

<sup>38</sup> *Id.* at 133 (citing *MCI v. AT&T*, 512 U.S. 218, 231 (1994)).

<sup>39</sup> *Id.* at 159.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

major questions arguments.<sup>42</sup>

The court gave clues but no clear statement of what made *Brown & Williamson* such an “extraordinary case.” The key factors appear to have been tobacco’s “unique political history”<sup>43</sup> and economic significance—the Court stressed that the FDA was attempting to “assert[] jurisdiction to regulate an industry constituting a significant portion of the American economy.”<sup>44</sup> Whatever made the case “extraordinary,” however, the fact that the Court classed it as such seems crucial to the holding. *Brown & Williamson* remains the clearest statement of what has come to be known as the major questions doctrine. Almost all subsequent invocations of the doctrine directly or indirectly cite back to it.<sup>45</sup>

## B. *Massachusetts v. EPA*—Did the Court Kill the Doctrine?

### 1. *The Case for the Prosecution*

Abigail Moncrieff argues that “[s]even years later, the major questions exception died”<sup>46</sup>—not from disuse, but because, she argues, the Supreme Court killed it in 2007’s *Massachusetts v. EPA*. In the case, the Supreme Court ruled that greenhouse gases are “air pollutants” within the definition of the Clean Air Act, giving EPA authority and responsibility to regulate them, or at least give a reason for not doing so grounded in the statute.<sup>47</sup> In doing so, it rejected *Chevron* deference to the agency’s interpretation (the EPA had argued that greenhouse gases could or should not be regulated under the statute).<sup>48</sup>

On first impression this looks like the major questions doctrine at work. Whether EPA has authority to regulate greenhouse gases, emitted by almost every sector of the economy and not previously regulated by the agency, almost unquestionably qualifies as a “major question” (I will explore what makes an interpretive question “major” in greater detail in Section 0 below, but assume for now that the question at issue in *Massachusetts* qualifies). If so, the *Massachusetts* holding matches what one would expect – no deference for the agency.

But the *Massachusetts* opinion does not cite the major questions

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<sup>42</sup> Sunstein, *supra* note 3, at 241; *see also* *FDA v. Brown & Williamson*, 529 U.S. at 161 (Justice Breyer dissenting).

<sup>43</sup> *FDA v. Brown & Williamson*, 529 U.S. at 123.

<sup>44</sup> *Id.*

<sup>45</sup> *King v. Burwell*, 135 S. Ct. 2480 (2015); *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457 (2001).

<sup>46</sup> *See* Moncrieff, *supra* note 36, at 603; *see also* Jody Freeman, *Why I Worry About UARG*, 39 HARV. ENVTL. L. REV. 9, 16 (2015).

<sup>47</sup> *Massachusetts v. EPA*, 549 U.S. 497 (2007).

<sup>48</sup> *Massachusetts v. EPA*, 549 U.S. 500–01.

doctrine. *Brown & Williamson* is cited, but for unrelated reasons.<sup>49</sup> Instead, the opinion relies on plain language arguments—greenhouse gases are, the court concluded, unambiguously “air pollutants.”<sup>50</sup> For the majority, this is a by-the-book *Chevron* step one case. As they put it, “[t]he statutory text forecloses EPA’s reading.”<sup>51</sup>

Does failure to apply the major questions doctrine imply the Court rejected it? Moncrieff argues it does, for two reasons. First, she agrees with Justice Scalia’s dissent in finding the majority’s step one analysis unsatisfying or incomplete—the dissent (and Moncrieff) are unpersuaded that the statute is unambiguous and, if so, that the agency’s interpretation of that ambiguity is unreasonable.<sup>52</sup> If this view is correct, the majority opinion is not or should not be a *Chevron* step one case at all, but is instead a wrongly-decided *Chevron* step two case. More precisely, to reach the result it does, the majority needs a reason not to defer to the agency under *Chevron* step two. The major questions doctrine would satisfy this need, but of course the majority does not invoke it despite it being apparently available.

Second, Moncrieff argues that failure to invoke the doctrine in this case is inconsistent with *Brown & Williamson* because it “encouraged, rather than prohibited, the Agency’s substantive intervention in [a] major policy debate.”<sup>53</sup> In other words, in *Brown & Williamson*, the major questions doctrine was invoked to block an agency expansion of its authority, while in *Massachusetts*, it was not invoked and agency authority was thereby expanded. Moreover, large expansion of agency authority gave the Court pause in *Brown & Williamson*, but in *Massachusetts* it appeared to be part of the Court’s justification, with the majority arguing that EPA should be allowed to address the “most pressing environmental challenge of our time.”<sup>54</sup> Moncrieff then argues that despite being killed off in *Massachusetts*, the major questions doctrine should be revived, for reasons discussed in Section 0 below.

## 2. *Why The Massachusetts Majority is Innocent*

Moncrieff’s obituary for the major questions doctrine was premature, however. As discussed below, the doctrine has since reemerged. Also, I am

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<sup>49</sup> The EPA had relied on *Brown & Williamson* in its briefs for the proposition that expanding regulatory jurisdiction to large new areas was disfavored, but the Court rejected this analogy. It found that subsequent legislation was less persuasive in the greenhouse gas context than it had been for tobacco in *Brown & Williamson*. But in doing so the Court did not mention *Brown & Williamson*’s “extraordinary cases” language, much less state that *Massachusetts* was not such an extraordinary case.

<sup>50</sup> *Massachusetts v. EPA*, 549 U.S. 497 (2007).

<sup>51</sup> *Massachusetts*, 549 U.S. at 528.

<sup>52</sup> Moncrieff, *supra* note 36, at 605.

<sup>53</sup> *Id.* at 604.

<sup>54</sup> *Id.* at 606 (citing *Massachusetts*).

not convinced that *Massachusetts* should be taken to have killed the doctrine or even to have drawn it into question, for reasons that may shed some light on how the doctrine operates.

The first reason arises from some confusion about *when* the major questions doctrine comes into play. Cass Sunstein has placed the doctrine among some others in a group he terms “*Chevron* Step Zero,” alluding to the fact that these doctrines, despite existing outside *Chevron*’s stated two-step framework, nonetheless can determine whether *Chevron* deference is available.<sup>55</sup> Moncrieff adopts Sunstein’s “Step Zero” classification of the major questions doctrine.<sup>56</sup> The Step Zero name is helpful in that it illustrates that post-*Chevron* limitations to deference may operate *outside* the two-step framework. But it perhaps unintentionally implies that these exceptions to deference always operate *before* that framework.

The major questions doctrine and other Step Zero doctrines need not, however, come into play before *Chevron* step one. *Chevron*’s core doctrinal innovation is judicial deference to agency interpretation of statutes, and this is only available at *Chevron* step two. The major questions doctrine and other Step Zero exceptions, therefore, operate to block access not to *Chevron*’s two step framework as a whole, but only to step two. They are in this sense companions to *Chevron* step one, not prerequisites for it. *Chevron* itself says deference is unavailable if there is no statutory ambiguity. The major questions doctrine and other Step Zero exceptions provide alternative rationales for denying that deference. In this sense, the Step Zero doctrines can instead be seen as expansions of *Chevron* step one, or parallel alternatives to it. Procedurally, they may be invoked at the same time as step one, prior to it, or even after. They still differ from *Chevron*’s steps one and two in that they are based on factors other than the statutory text (or perhaps context), but they do not exist outside *Chevron*’s procedural framework, as the Step Zero name implies.<sup>57</sup>

To put it differently, *Chevron* did not create *Chevron* step one—both before and after *Chevron*, courts had the authority to reject agency interpretations contradicting unambiguous statutes. The Step Zero doctrines join this background principle in limiting access to *Chevron*’s actual innovation, deference in Step Two.

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<sup>55</sup> Sunstein, *supra* note 3, at 187.

<sup>56</sup> Moncrieff, *supra* note 36, at 598.

<sup>57</sup> Matthew Stephenson and Adrian Vermeule have offered an alternative view of how *Chevron* operates in their essay “*Chevron* Has Only One Step.” *See* 95 VA. L. REV. 597, 605 (2009). Under this view, judges are asking a single question—whether an agency’s interpretation falls within some permissible range. Sometimes the answer is treated as step one, sometimes as step two, but, in their view, there is no conceptual distinction between the two. If this view is correct (and in many cases I find it very persuasive), then Sunstein’s “Step Zero” label is more accurate. If *Chevron* has only one step, major questions and other doctrines that deny access to deference must operate before *Chevron*, if at all. Nevertheless, this does not necessarily contradict the analysis of *Massachusetts* presented here.

Moreover, in some cases courts may have multiple doctrinal justifications for denying access to step two deference, and may not necessarily use or discuss all of them. *Massachusetts* appears to be just such a case. The majority had at least two such options available. One was to decide the case on traditional step one/plain meaning grounds. The other was to frame case as “extraordinary” and deny deference with the major questions doctrine. The majority chose the former approach, presumably because it is on much firmer doctrinal ground—why rely on a doctrine (major questions) that has only rarely been invoked when the classic, core tool of judicial review (textual interpretation) is available?

Of course, the majority could have invoked both doctrines, stating them as alternative bases for its holding. Arguably, this is what the Court did in *Brown & Williamson* in framing its holding formally as a step one decision but supporting it with major questions arguments. But it was not necessary to do so in *Massachusetts*, and, crucially, failure to do so does not imply rejection of the major questions doctrine, as Moncrieff suggests it does. Consider a hypothetical alternative *Massachusetts* majority opinion denying deference on major questions grounds and (unlike in *Brown & Williamson*) not offering an alternative basis under step one. It could hardly be argued that such an opinion operated to reject step one textual analysis by implication.

Even if one does view major questions and other Step Zero doctrines as operating before *Chevron* step one, it is not necessary to interpret *Massachusetts* as overruling the doctrine. Whether they are parallel or sequential, the doctrine and step one still provide alternative bases for denying access to deference. It is possible that the majority avoided the issue of whether the case was a major question for one of many reasons other than a rejection of the doctrine. For example, the majority may have felt that the step one textual analysis was such a strong argument that no major questions discussion was necessary; essentially, they may have assumed *arguendo* that *Massachusetts* was not a major questions case so as to reach the stronger position they believed their textual arguments offered. Or perhaps it was simply easier to attract votes for a step one textual opinion than a major questions one.

Moncrieff appears to reject this possibility because she finds the majority’s textual analysis unconvincing (Justice Scalia agreed in dissent).<sup>58</sup> For her, the majority’s opinion demanded support from the major questions doctrine. Eschewing that support leads her to conclude that the doctrine was repealed by implication. But the objective strength of the majority’s step one arguments (if such objective strength of legal opinions even exists) or the subjective views of others aren’t relevant to the

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<sup>58</sup> Moncrieff, *supra* note 36, at 605.

implications of the majority's failure to use the major questions doctrine in support. If the majority themselves are convinced by their textual analysis, as they certainly appear to be, we should not be surprised by, and should draw no conclusions from, their failure to cite any other doctrines in support. In short, we should be skeptical of implied doctrinal repeal.

Moncrieff's second argument is that *Massachusetts* effectively killed the major questions doctrine because, *contra Brown & Williamson*, it allowed rather than blocked agency involvement in a major question.<sup>59</sup> Under Moncrieff's view, the doctrine operates (or at least should operate) to restrain agencies from interfering in issues that are under political consideration. This rationale for the doctrine is discussed among other normative arguments in Section 0, below. In my view, this is a misreading of the purpose and function of the doctrine. Taking *MCI* and *Brown & Williamson* at face value, the doctrine operates to limit access to *Chevron* deference, not to achieve a substantive non-interference goal. The doctrine is procedural and authority-allocating, not substantive.

Moncrieff's non-interference view of the doctrine would operate to deny deference to agencies expanding their authority (*Brown & Williamson*), but still offer deference to agencies that limit or refuse to expand that authority (in her view, *Massachusetts* should have done this). But this one-way version of the doctrine lacks support in the earlier cases establishing it. *Brown & Williamson* states that it is implied delegation (and therefore *Chevron* deference), not expansion of authority, that should be viewed with skepticism in "extraordinary cases."<sup>60</sup> *MCI* more explicitly contradicts Moncrieff's view—in that case, the FCC regulation at issue exempted certain firms from rate-filing requirements, a contraction of regulatory authority, but the court nevertheless rejected the attempt on major questions grounds.<sup>61</sup>

It is possible that Moncrieff's non-interference view of the major questions doctrine is how the doctrine *should* operate, but it appears inaccurate as a claim regarding how the doctrine actually works, or at least how it did at the time *Massachusetts* was decided. The majority's refusal to invoke the doctrine therefore tells us little if anything about the case's implications for a major questions doctrine driven by non-interference. In other words, Moncrieff's claim that *Massachusetts* "denied deference on the ground that the Agency must be forced to make a major decision" appears to be a misreading of the case. Despite the majority's mention of the seriousness of the climate problem, they seem to have truly believed that the text of the Clean Air Act, not the significance of the substantive issue, controlled whether deference was available. As they put it, the text,

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<sup>59</sup> *Id.* at 604.

<sup>60</sup> *FDA v Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

<sup>61</sup> *MCI v. AT&T*, 512 U.S. 218 (1994).

not the significance of climate change, “forecloses EPA’s reading.”<sup>62</sup>

### C. *Extending the Doctrine: “Elephants in Mouseholes”*

*MCI* and *Brown & Williamson* are the traditional cases establishing the major questions doctrine. As the next Section details, the doctrine was explicitly cited in 2015’s *King v. Burwell*. But the doctrine is not necessarily restricted to those three cases, even at the Supreme Court level. Another line of cases, beginning with Justice Scalia’s 2001 opinion in *Whitman v. American Trucking*, expresses judicial skepticism toward large expansions of agency authority based on narrow statutory text; as Justice Scalia put it: “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.”<sup>63</sup>

This principle has been repeatedly cited in subsequent opinions. But it has not generally been considered an expression of the major questions doctrine. On its face, the principle isn’t about major questions at all; instead, it is simply an interpretive rule or canon—thin or narrow statutory text will not be read to authorize large regulatory programs.<sup>64</sup> Like other canons of construction, the principle does have a role to play in *Chevron* cases at step one, as a “traditional tool of statutory interpretation.” Nevertheless, at least in some cases the “elephants in mouseholes” principle has appeared to have evolved beyond that narrow role to take on a role similar (and maybe identical) to that of the major questions doctrine.

#### 1. *Whitman v. American Trucking*

In *Whitman*, industry litigants challenged the EPA’s setting of national ambient air quality standards (NAAQS), arguing that the agency should have considered costs.<sup>65</sup> The D.C. Circuit agreed with the petitioners, holding that Congress’s delegation of standard-setting authority to EPA lacked an “intelligible principle” and therefore was an unconstitutional

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<sup>62</sup> *Massachusetts v. EPA*, 549 U.S. 497, 528 (2007).

<sup>63</sup> *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001).

<sup>64</sup> [Lisa Heinzerling has explored this view—“elephants in mouseholes” as an interpretive canon of construction in contexts where agencies assert broad powers based on short, often rarely-used statutory provisions—at length. See Lisa Heinzerling, \*The Power Canons\*, 58 Wm. & Mary L. Rev. \(forthcoming 2017\). She goes further than I do here in drawing a connection between “elephants in mouseholes” and the major questions doctrine in that she classifies both as related interpretive principles within a larger group of “power canons”. This classification is not necessarily inconsistent with that presented here, and we agree that the “elephants in mouseholes” principle/canon and major questions doctrine are related. Heinzerling arrives at a different normative conclusion than I do below, arguing that “power canons are the most dangerous kind of canon from a democratic perspective—normative instructions from unelected judges to legislative and executive branches, unhitched to any plausible constitutional post.”](#)

<sup>65</sup> *Whitman*, 531 U.S. at 470.



delegation of legislative authority to the agency—unless the agency could cure the constitutional defect by considering costs or applying some other “intelligible principle.”<sup>66</sup>

The Supreme Court overturned the DC Circuit’s ruling in an opinion that, for the most part, focused on the text of the Clean Air Act. The Court found no non-delegation problem and reaffirmed previous holdings that the statutory text foreclosed consideration of costs at this stage of the regulatory process.<sup>67</sup> The “elephants in mouseholes” claim is then deployed to further raise the bar for the industry petitioners.<sup>68</sup> For the court to agree with their claim to have found support in the text for cost-benefit analysis (the elephant), more than weak or brief textual support (the mousehole) would be necessary.<sup>69</sup> With such textual support absent in the relevant part of the Clean Air Act, the Court easily rejected industry’s arguments.<sup>70</sup>

At least with respect to this part of its holding, *Whitman* is not a *Chevron* case—the agency’s interpretation of the statutory text matched the court’s reading (no cost benefit analysis), so whether the agency was entitled to interpretive deference was never an issue.<sup>71</sup> The “elephants in mouseholes” principle therefore is not an expression of the major questions doctrine as it is used in *Whitman*.

But the principle does have its roots in the major questions doctrine. The sentence invoking<sup>72</sup> the principle cites two cases for support—*MCI* and *Brown & Williamson*, pointing specifically to the language in each establishing the major questions doctrine.<sup>73</sup> The connection is that in *Whitman* as in the two earlier cases, the Court was skeptical of interpretations of statutory text that would fundamentally change agency authority (whether by expanding or contracting it). The difference is that in the earlier cases the problematic interpretation was offered by the agency, while in *Whitman* it was offered by petitioners challenging the agency. Therefore, the degree of deference due to the agency was critical in the earlier cases but irrelevant in *Whitman*.

This has led scholars analyzing the “elephants in mouseholes” principle to separate it somewhat from its roots in *MCI* and *Brown &*

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<sup>66</sup> *Am. Trucking Ass’ns v. U.S. EPA*, 175 F.3d. 1027, 1034 (D.C. Cir. 1999).

<sup>67</sup> *Whitman*, 531 U.S. at 470.

<sup>68</sup> *Id.* at 468.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> The Court *did* analyze another interpretive issue in the case under *Chevron*, finding that EPA’s interpretation was unreasonable under step two and therefore rejecting it. But this issue was separate from that in which the Court invoked the “elephants in mouseholes” principle discussed here. *See Whitman*, 531 U.S. at 476–86 (Part IV of opinion).

<sup>72</sup> Or creating it, depending on one’s view on whether it is a “traditional tool of statutory interpretation” or a recent invention.

<sup>73</sup> *Whitman*, 531 U.S. 468.

*Williamson* and classify it as a tool for avoiding non-delegation constitutional problems rather than one for constraining agency interpretive discretion (as the major questions doctrine does).<sup>74</sup> This view seems correct insofar as *Whitman* itself is concerned, but it does not drive a wedge between “elephants in mouseholes” and the major questions doctrine—as discussed in Section 0, below, some scholars have advanced similar nondelegation-avoidance rationales for the major questions doctrine itself.

## 2. *Other Cases*

The “elephants in mouseholes” principle in *Whitman* was cited in later cases in support of positions that look very much like invocations of the major questions doctrine. It therefore appears to operate as a version or sub-doctrine of the larger major questions doctrine in at least some cases, even if it has independent life as a canon of statutory construction (whether driven by nondelegation concerns or other concerns) in cases such as *Whitman*. A closer look at two examples of such cases is useful.

First, in *Gonzales v. Oregon*, the Court in an opinion written by Justice Kennedy rejected an “interpretive rule” by the Attorney General making drugs regulated under the federal Controlled Substances Act unavailable for use in assisted suicide in Oregon.<sup>75</sup> The Act gave the Attorney General the authority to deny drug registrations that are “inconsistent with the public interest.” The Court ruled that the interpretive rule exceeded the authority granted by Congress in the statute, denying *Chevron* deference and, in doing so, citing *Whitman*’s “elephants in mouseholes” principle.<sup>76</sup> Justice Kennedy noted the significance of physician-assisted suicide and “earnest and profound debate” on the subject.<sup>77</sup> It should be noted that Justice Kennedy also cited another “step zero” doctrine, denial of deference for agency interpretations that “lack the force of law” under *Mead*, in addition to the major questions/“elephants in mouseholes” doctrine.<sup>78</sup>

*Gonzales* looks quite similar to *MCI* and *Brown & Williamson*—the agency takes some action based on an interpretation of the statute, and the reviewing court rejects deference to the agency’s interpretation that would otherwise be available under *Chevron* by pointing to the significance of the issue at hand. *Gonzales*, in other words, appears to be a major questions doctrine case.

Citing the “elephants in mouseholes” principle adds another prong to

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<sup>74</sup> Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19 (2010).

<sup>75</sup> *Gonzales v. Oregon*, 546 U.S. 243 (2006).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 267.

<sup>78</sup> *Id.* at 256.

the analysis that is not present or at least not explicit in *MCI* and *Brown & Williamson*, however—the breadth of the statutory delegation. One might argue that the issue in *Gonzales* (drug availability for assisted suicide) is not as economically or legally significant as the shifts in agency regulatory authority over entire industries in *MCI* and *Brown & Williamson* (though its political significance may be greater). The implicit response under the “elephants in mouseholes” principle is that, even if so, the question is “major” in context because the statutory text at issue is so narrow (or, perhaps more accurately, so *short*).

Second, in 2009’s *Entergy Corp. v. Riverkeeper*, Justice Stevens similarly invoked “elephants in mouseholes” in dissent.<sup>79</sup> A majority opinion by Justice Scalia authorized EPA’s consideration of costs in writing certain Clean Water Act regulations. The dissent characterized EPA’s interpretation as contrary to the plain meaning of the statute (*Chevron* step one), but enlisted “elephants in mouseholes” in support, arguing that consideration of costs was too great a factor in the statutory scheme to be supported by thin statutory basis.<sup>80</sup> This parallels *Brown & Williamson*, with the major questions principle used in support of an arguably weak *Chevron* step one position rather than as an independent justification for withholding deference.

### 3. “Elephants in Mouseholes” and the Major Questions Mainstream

These cases, along with two recent cases discussed below, illustrate that decisions citing the “elephants in mouseholes” principle sometimes operate as major questions doctrine cases, even though they do not specifically acknowledge the connection. Moreover, as Jacob Loshin and Aaron Nielson observe, the “elephants in mouseholes” cases illustrate that the principle is nonideological—Justices across the political spectrum from Scalia through O’Connor and Kennedy to Stevens have invoked either the major questions doctrine or an “elephants in mouseholes” version of it in opinions, with many other Justices joining those opinions.

This is not to suggest that “elephants and mouseholes” is only a sub-doctrine of the major questions doctrine. It does have independent significance as a canon of statutory interpretation, perhaps driven by non-delegation concerns, even in contexts where *Chevron* deference is not at issue.<sup>81</sup> Loshin and Nielson also note that the principle is sometimes invoked in cases in fields other than administrative law.<sup>82</sup> In fact, most citations to *Whitman*’s “elephants in mouseholes” language are not

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<sup>79</sup> *Entergy Corp. v. Riverkeeper*, 556 U.S. 208 (2009).

<sup>80</sup> *Id.*

<sup>81</sup> Loshin & Nielson, *supra* note 74; *see also* *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2787 (2014) (Ginsburg, dissenting).

<sup>82</sup> Loshin & Nielson, *supra* note 74, at 39 (citing *Ali v. Fed. Bd. of Prisons*, 552 U.S. 214 (2008)).

connected to the major questions doctrine.<sup>83</sup>

As noted, however, some “elephants in mouseholes” opinions do appear to be applications of the major questions doctrine, denying (or, if in dissent, advocating for denial of) deference to agencies that would otherwise be available under *Chevron*. This is valuable for two reasons. For one, it helps illustrate that the major questions doctrine did indeed have life after *Massachusetts*. Second, it adds an additional factor—scope or length of the statutory text—to the major questions analysis. Section 0 below will attempt to put this factor in context among others that appear relevant for whether the major questions doctrine will apply. But before addressing that issue, let us turn to some recent cases invoking the doctrine, and another that appears likely to do so in the future.

## II. THE MAJOR QUESTIONS DOCTRINE RESURGENT

Even if Moncrieff’s claim that *Massachusetts* signaled the death of the major questions doctrine is incorrect, the doctrine long appeared to be moribund. The core “extraordinary cases” statement of the doctrine established in *MCI* and *Brown & Williamson* was not quoted and does not appear to have been decisive in any Supreme Court case in the fifteen years after *Brown & Williamson* was decided in 2000. *Whitman*, as noted, cited *Brown & Williamson* as support for its “elephants in mouseholes” principle, which has had continuing importance. But only a few cases in which that principle is later mentioned can be classified as major questions doctrine cases.

However, in the 2014 and 2015 terms Justices referenced the “elephants in mouseholes” principle and/or the major questions doctrine four times (twice in majority opinions and twice in dissent) Two of these references were in contexts related to the Affordable Care Act (Obamacare) and two in cases concerning EPA regulation under the Clean Air Act. In one of these cases, *Burwell v. Hobby Lobby*, the dissent cites “elephants in mouseholes” but this is not a major questions case and will not be discussed further here.<sup>84</sup> The other three invocations are, however. This may signal a resurgence in importance of the doctrine, and the cases are therefore worth examining.

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<sup>83</sup> See, e.g., *Met Life Ins. Co v. Glenn*, 554 U.S. 105 (2008); *Bilski v. Kappos*, 561 U.S. 593 (2010); *Chamber of Commerce v. Whiting*, 563 U.S. 582 (2011); *Burwell*, 134 S. Ct. at 2787 (Ginsburg, dissenting). See also Loshin & Nielson, *supra* note 74.

<sup>84</sup> In her dissent in *Hobby Lobby*, Justice Ginsburg cites “elephants in mouseholes” in a context similar to its use in *Whitman*. She would have rejected petitioners’ challenge to agency regulations on the grounds that their reading of the statute would be a sufficiently significant departure from previous law to require a clear statement from Congress, which she believed was absent. Had she written a majority opinion rather than a dissent, this would have closely paralleled *Whitman*. Moreover, *Chevron* deference was never available to the agency because the relevant statute (the Religious Freedom Restoration Act) cuts across multiple agencies.

### A. *EPA v. E.M.E. Homer City*

In *EPA v. E.M.E. Homer City*, the Court considered EPA regulations establishing limits on interstate air pollution under the “good neighbor” provision of the Clean Air Act. That provision requires upwind states to limit emissions that “contribute significantly” to downwind states’ inability to comply with air quality regulations. Overturning the DC Circuit’s decision, the majority opinion found EPA’s regulations to be consistent with the statute, at least regarding the questions presented.<sup>85</sup>

In a strongly-worded dissent, Justice Scalia argued that the majority erred, approving EPA’s “undemocratic revision of the Clean Air Act.”<sup>86</sup> Specifically, Justice Scalia argued that EPA’s regulations “rel[ie]d] on a farfetched meaning of the word ‘significantly’ in the statutory text.”<sup>87</sup> He further argued that the agency’s interpretation “deserve[d] no deference under *Chevron*.”<sup>88</sup> In a now-familiar move, his basis for not granting deference was a) that the statute is not ambiguous, at least not in a relevant respect (*Chevron* step one), and b) that, even if so, EPA’s reading would be a significant alteration of the statutory scheme requiring greater support in the text, citing *Whitman*’s “elephants in mouseholes.”<sup>89</sup>

This is close to a pure major questions-style invocation of the “elephants in mouseholes” principle. Its effect is to deny *Chevron* deference despite ambiguity, or, alternatively, to support a *Chevron* step one finding that no ambiguity exists.

### B. *UARG v. EPA*

Just a month later in the 2014 term, Justice Scalia again invoked the “elephants in mouseholes” principle in rejecting an EPA interpretation of the Clean Air Act, this time writing for the majority.<sup>90</sup> EPA regulations had included review of greenhouse gas emissions in the Act’s new source review process, on the grounds that (the agency believed) the statute’s requirement that such reviews cover “any air pollutant” regulated under the statute was triggered by other regulations limiting greenhouse gas emissions from road vehicles.<sup>91</sup>

Justice Scalia rejected this argument, finding that the plain meaning of the statute required the opposite result. In doing so, he denied deference to the EPA’s interpretation under *Chevron* step one.<sup>92</sup> It is hard to accept

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<sup>85</sup> *EPA v. E.M.E. Homer City Generation*, 134 S. Ct. 1584 (2014).

<sup>86</sup> *Id.* at 1610.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 1611.

<sup>89</sup> *Id.* at 1612.

<sup>90</sup> *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

*UARG* as merely a plain meaning/step one case, however. Justice Scalia goes to great lengths to find that “any air pollutant” should not include greenhouse gases in the context of new source review, but may do so elsewhere in the Act; finding that greenhouse gases were generally not included within “any air pollutant” would have overruled *Massachusetts*.<sup>93</sup> Even if one finds this argument persuasive, it is difficult to accept that there is no ambiguity in the statute, and that therefore deference can be denied on *Chevron* step one grounds.

But Justice Scalia’s arguments are not exclusively based on the text of the statute. Indeed, as in *Brown and Williamson* and other cases discussed above, additional support for refusal of deference appears to be necessary. Justice Scalia adds that support with a familiar appeal:

When an agency claims to discover in a long-extant statute an unheralded power to regulate “a significant portion of the American economy,” we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast “economic and political significance.”<sup>94</sup>

Though it does not quote the words from *Whitman*, this statement is a restatement of the “elephants in mouseholes” principle. The two key elements—significant change in scope of regulatory authority and a short or narrow statutory basis—are invoked. But there is more going on here. In support of this position, Justice Scalia cites not *Whitman*, but *Brown & Williamson* and *MCI*. This is therefore not just “elephants in mouseholes” but explicitly the classic major questions doctrine in action. *Chevron* deference has been denied, at least in part because of the significance of the issue at hand. The addition of *Whitman*’s factor regarding statutory text proves, in my view, that “elephants in mouseholes” functions in *Chevron* cases as an extension of the major questions doctrine. If the two had not merged before *UARG*, they appear to have done so afterward. As discussed in the next section, this may have serious implications for future review of EPA efforts to regulate carbon under the Clean Air Act.

### C. *King v. Burwell*

In one of the most closely-watched cases of the 2015 (or any) term, the Court considered in *King v. Burwell* whether the federal government may (in an IRS rulemaking) make tax credits available to customers of federal health insurance exchanges, despite language in the statute arguably

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 2444.

limiting such credits to exchanges “established by the state.”<sup>95</sup> A threshold question was whether the relevant agency was entitled to *Chevron* deference. Chief Justice Roberts, writing for the majority, ruled that it was not by explicitly invoking the major questions doctrine.

When analyzing an agency’s interpretation of a statute, we often apply the two-step framework announced in *Chevron*. Under that framework, we ask whether the statute is ambiguous and, if so, whether the agency’s interpretation is reasonable. This approach “is premised on the theory that a statute’s ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps.” “In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.” This is one of those cases.

The tax credits are among the Act’s key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people. Whether those credits are available on Federal Exchanges is thus a question of deep “economic and political significance” that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly.<sup>96</sup>

Moreover, this discussion occurs near the beginning of the opinion, before the Chief Justice considers the relevant statutory text.<sup>97</sup> This means the major questions doctrine is operating before and independently of *Chevron* step one—in this case, it really is *Chevron* step zero. Unlike *Brown & Williamson* and many of the “elephants in mouseholes” cases, the major questions doctrine is not deployed to prop up an otherwise marginal *Chevron* step one textual argument, but as an independent justification for denying deference.<sup>98</sup> In other words, *King* is the only “pure” major questions case—earlier cases, most clearly *Brown & Williamson*, characterize the doctrine as a corollary of *Chevron* step one or as a secondary rationale for rejecting deference to agencies. Even *King* is perhaps not a “pure” expression of the doctrine, since the opinion offers an alternative rationale for denying deference—that the IRS lacks the relevant

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<sup>95</sup> *King v. Burwell*, 135 S. Ct. 2480 (2015).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> The fact that the major questions doctrine can serve either role strengthens, in my view, my earlier claim that *Chevron* step one textual analysis and the doctrine (along with other step zero deference-denial doctrines) are substitutes for each other at the same procedural point, rather than doctrines that must be considered sequentially, as the step zero name might imply.

expertise in health policy, and that therefore no implicit delegation could have been intended by Congress.<sup>99</sup> At a minimum, however, *King* is the major questions doctrine's clearest and most direct use by the Supreme Court.

Even more interestingly, the Chief Justice ultimately agrees with the government's interpretation of the statute, despite denying deference. This has a few implications. First, it illustrates that the major questions doctrine is not (or at least is not always) just a tool used to get around *Chevron* by judges who disagree with agency interpretations. At least in theory, the doctrine is about allocation of interpretive authority, not substantive outcomes such as greater or lesser agency regulatory authority. Second, it gives the doctrine a stronger independent foundation by separating it from *Chevron* step one. *King* is clear that the doctrine is (or at least can be) an exception to *Chevron*, not a mere rhetorical device or super-canon among the many "traditional tools of statutory interpretation" available at step one.

Also, *King* arguably ratifies *UARG*'s incorporation of "elephants in mouseholes" into the major questions doctrine. The Chief Justice's demand that if Congress wants to delegate interpretive authority in extraordinary cases, it must do so "expressly" is the mirror image of "elephants in mouseholes." If a Congressional delegation of substantive authority is vague, short, or otherwise suspect, "elephants in mouseholes" implies, it will not be taken as an express delegation of interpretive authority and therefore *Chevron* will not apply. In other words, express, not merely implied, delegation is required in major cases. Since Congress never expressly delegates interpretive authority, this means judges, not agencies, will retain primary interpretive authority in such cases (contra *Chevron*). In major cases, especially with thin statutory bases for agency authority, *Marbury* returns.

Perhaps most significantly, *King* puts the major questions doctrine once again on strong footing at the Court. The long gap between it and *Brown & Williamson*, the last unambiguous major questions case at the Court, had led some to conclude that the doctrine was dead or defunct.<sup>100</sup> It may be that major questions are simply rather rare, as one should expect given that they are by definition present only in "extraordinary cases." One or two per decade, plus possibly a few more where thin statutory text justifies application of the "elephants in mouseholes" variant, may be par for the course. Long gaps between such cases should not therefore be taken as evidence that the doctrine is under threat.

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<sup>99</sup> *King*, 135 S. Ct. 2480.

<sup>100</sup> Moncrieff, *supra* note 36, at 616; Freeman, *supra* note **Error! Bookmark not defined.**, at 10.



### III. MAKING SENSE OF THE DOCTRINE

Based on this history at the Court, what can we conclude about when the major questions doctrine will apply? What makes a question “major,” a case “extraordinary,” a change in regulatory authority an “elephant,” or a statutory provision a “mousehole”? The short and perhaps most accurate answer is that it’s in the eye of the beholder. Each case is different, and these lines are impossible to define exactly. This is one of the most important flaws in the doctrine, as discussed below. But it may at least be possible to identify some relevant factors. At least one likely future case also appears to fulfill most if not all of those factors.

#### A. *What Makes a Major Questions Case?*

It’s possible, with a close reading of the cases invoking the major questions doctrine, to identify some similarities and thereby suggest indicia of what is likely to bring a case under the doctrine. But these are at most suggestions—the Court has never purported to list all the relevant factors, and those factors that the Court has identified are not apparent in all of the cases. Therefore, to the extent factors are identified they do not appear to be necessary, much less sufficient—instead, if present they seem at most to make it more likely that a given case will be treated as “major” or “extraordinary,” and that *Chevron* deference will therefore be denied. At least four such factors appear relevant.

##### 1. *Major Shift in Regulatory Scope*

Most of the cases involve an agency interpretation of a statute that would result in an at least arguably significant change in the scope of regulatory authority. *Brown & Williamson* is the clearest example, with the FDA asserting authority over an entire industry (tobacco) that it had not previously regulated. EPA regulation of greenhouse gases from new sources at issue in *UARG* could be viewed similarly.<sup>101</sup> Justice Scalia’s dissent in *E.M.E. Homer City* stressed such a shift (in Justice Scalia’s view) from previous understanding of the relevant statutory provision.<sup>102</sup>

In *MCI*, the agency asserted authority *not* to regulate a class of firms, or at least to exempt them from a major part of the regulatory scheme (rate filing). *MCI* also provides the best explicit support for this factor in its citation of “radical or fundamental change” to the statutory scheme as

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<sup>101</sup> This is in some tension with *Massachusetts* (which similarly dealt with EPA regulation of GHGs, but was not decided on major questions grounds). As I argue in Section 0 above, that tension is an illusion—it should not come as a surprise that *Massachusetts* was not decided on major questions grounds.

<sup>102</sup> *EPA v E.M.E. Homer City Generation*, 134 S. Ct. 1584 (2014).

grounds for denying deference.<sup>103</sup>

Not all cases have this element, however. For example, in *King*, the IRS' assertion of authority to grant tax credits was neither a break with past practice nor an expansion of authority beyond established practice, since the federal exchanges under the ACA were newly established. The IRS was, of course, expanding its authority in the sense that it was regulating tax credits in a new context (the exchanges). But this is a direct result of the creation of those exchanges by the ACA, not an independent reinterpretation of existing statutory authority by the IRS.

The “shift in regulatory scope” factor therefore appears to focus on changes in regulatory practice driven by agency reinterpretations of existing statutory authority, not new legislation. If the factor were not so limited, then any new legislation could spawn major questions cases as it creates new regulatory programs or authorities. How longstanding a regulatory interpretation must be before changing it is considered a “major” shift is not clear from the cases.

## 2. *Economic Significance*

*Brown & Williamson* explicitly points to the economic significance of an agency's interpretation as a factor in whether a case qualifies as “extraordinary” and therefore outside *Chevron*'s scope. There, the Court took issue with the FDA's claim to “jurisdiction to regulate an industry constituting a significant portion of the American economy.”<sup>104</sup> This factor repeatedly reappears in future cases. *UARG* in particular stresses the economic impact of EPA's interpretation, quoting the “significant portion of the American economy” language from *Brown & Williamson*.<sup>105</sup>

Justice Kennedy's opinion in *Gonzales* similarly quoted the “economic and political significance” language from *Brown & Williamson* before stressing the “importance” of physician-assisted suicide.<sup>106</sup> This perhaps illustrates that whether an issue is economically significant is in the eyes of the beholder.

In *King*, the Chief Justice cites the effects of the agency's decision on “billions of dollars in spending each year and . . . the price of health insurance for millions of people” in classing the case as “extraordinary.”<sup>107</sup> It is worth noting here the slipperiness of this factor, however. Whether an agency interpretation has large economic significance depends on how it is characterized. The decision to make tax credits available to customers of federal exchanges is, at least directly, probably not of large economic

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<sup>103</sup> *MCI v. AT&T*, 512 U.S. 218 (1994).

<sup>104</sup> *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

<sup>105</sup> *Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014).

<sup>106</sup> *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006).

<sup>107</sup> *King v. Burwell*, 135 S. Ct. 2480 (2015).

significance (though if the physician-assisted suicide industry qualifies, who knows). It is likely only because of the exchanges' importance to the larger statutory scheme of the ACA (which undoubtedly does have such significance), that it can qualify under this factor. I will explore this characterization or framing problem, which is arguably apparent for all of the factors and therefore the doctrine as a whole, in Section 0 below.

### 3. *Political Controversy*

Another factor seems to be whether the agency interpretation relates to an issue of ongoing public or political concern. Again, *Brown & Williamson* is among the cases stressing this factor, expressing skepticism that Congress would delegate interpretive authority regarding questions of “economic and political magnitude” (emphasis added).<sup>108</sup> But *King* is perhaps the best example. It is hard to imagine a tax regulation being treated as a “major question” without the degree of public and political controversy surrounding Obamacare/the ACA, even if one agrees that the regulation at issue has large economic significance. Many tax regulations are of crucial importance to an industry.

Many of the cases do not share this factor, however. For example, it is unlikely that the rate-filing requirements in *MCI* or the air pollution regulations in *E.M.E. Homer City* attracted significant public attention, though there is evidence that both attracted congressional attention.<sup>109</sup>

Moreover, it is unclear whether it is *public* controversy that matters or more narrow *political* controversy—i.e. in Congress or among elites. If the latter, then perhaps the major questions doctrine serves as a check on agency behavior that ceases to be quasi-legislative and becomes quasi-executive or simply nakedly political. *Brown & Williamson* and, at least arguably, *King*, could fit this pattern. In both, agency decisions are not just economically consequential, but can be plausibly viewed as direct expressions of the President's policy/political priorities, in a way that more typical agency actions cannot. As noted above and discussed in detail in Section 0 below, for Moncrieff this factor is the key—the doctrine's value comes from discouraging agency interference in active policy debate. Whether it is possible to draw meaningful lines between technocratic/quasi-legislative and political/quasi-executive behavior is unclear, however. To some extent any new agency policy or rulemaking reflects the President's political and policy preferences, and may conflict

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<sup>108</sup> *FDA v. Brown & Williamson*, 529 U.S. 120.

<sup>109</sup> See, e.g., Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.) (modifying the FCC's powers substantially to regulate telecoms utilities, largely to promote competition in long distance and other markets); see also Clean Air Act Amendments of 2010, S. 2995, 111th Cong. (2010) (bill to amend the Clean Air Act to grant EPA powers to administer emissions trading markets for three air pollutants, including sulfur dioxide; this and other similar proposals were termed “3P bills”).

with those of some substantial section of the public or Congress.

#### 4. *Thin Statutory Basis*

Many of the major questions cases and, by definition, all of the “elephants in mouseholes” cases, involve agency interpretations based on thin statutory text. But this factor is hard to define. What, exactly, is a mousehole? (The economic significance and public controversy factors can perhaps be taken to define elephants). If it means text that is simply unclear, then the factor is unhelpful—if the statutory text were clear, there would be no case to decide (especially at the Supreme Court level), or even if so, the case could easily be dealt with on *Chevron* step one grounds. There must be more to this factor than that.

The factor might refer to the breadth of a statutory delegation of authority; some of the statutory provisions at issue are quite broad, at least as interpreted by the agency. The definition of “drug” in the Food and Drug act at issue in *Brown & Williamson*, or the standard-setting provisions in the Clean Air Act (*Whitman*) or Clean Water Act (*Entergy*) are quite broad. This view fits with the understanding of “elephants in mouseholes” as a non-delegation canon—it polices delegations that are so broad that, left unchecked, they could cause constitutional problems.

But broad statutory grants of authority are common—this factor cannot be enough alone, or even necessarily in combination with other factors. If the grant of authority to EPA to set national ambient air quality standards without consideration of cost is a broad one, it does not (apparently) lead to the conclusion that no EPA interpretations of §108 of the Clean Air Act are entitled to *Chevron* deference. At least for the uses of the “elephants in mouseholes” doctrine that can be classified as extensions of the major questions doctrine, something else seems to be in play.

My best guess is that this is simply the length of the relevant text, or possibly the degree to which multiple provisions in a statute can be marshalled by an agency to support its interpretation. If an agency asserts authority based on a single, short provision, the major questions/“elephants in mouseholes” doctrine seems more likely to apply. For example, the FDA relied on arguably plain language supporting jurisdiction over tobacco in *Brown & Williamson*, but that was based only on a short, one-sentence definition of “drug,” with tobacco not mentioned elsewhere in the statute. Perhaps more arguably, the EPA’s reliance on “any air pollutant” in the rulemaking at issue in *UARG* was rote application/interpretation of three words, divorced from context. Justice Scalia argues at length that other parts of the CAA contradict, rather than support, the EPA’s reading.

One way to view this factor is perhaps as a clear statement rule, requiring that Congress say more, and be more specific, if courts are to find the implied delegation of interpretive authority central to *Chevron*. This is appealing, but it comes close to simply requiring clear statutory

language, which as discussed above, cannot be a factor in whether the major questions doctrine applies. The evidence that breadth or clarity or length of statutory text is a factor is extremely strong, but pinning that factor down is difficult. This makes the factor easy to criticize on a variety of grounds discussed further below, above all that it is open to highly subjective interpretation by judges.

### B. *Tracing the Factors*

Having identified these four factors, it is possible to review the major questions cases and examine which factors appear to be present in each. Significant caution is recommended regarding the chart below. It is possible to debate whether any of the factors is present in any of the cases. This is particularly true with respect to the public controversy factor—comparing the degree of public controversy or engagement across different substantive issues is almost impossible.

	Major Shift in Scope	Economic Significance	Political Controversy	Thin Statutory Basis
<i>MCI v. AT&amp;T</i>	Yes	Maybe	No	Maybe
<i>FDA v. Brown &amp; Williamson</i>	Yes	Yes	Yes	Yes
<i>Gonzales v. Oregon</i>	No	Maybe	Yes	Yes
<i>Entergy v. Riverkeeper</i> *	No	Maybe	No	Yes
<i>EPA v. E.M.E. Homer City</i> *	Maybe	Maybe	No	Yes
<i>UARG v. EPA</i>	Maybe	Yes	Maybe	Yes
<i>King v. Burwell</i>	No	Maybe	Yes	Maybe

*Brown & Williamson* is notable as the only one of the cases to (in my view) implicate all four factors.

### C. *The Clean Power Plan—The Next Major Questions Case?*

Another potential major questions case which would arguably feature all four factors appears likely in the near future. In late summer 2015, the

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\* Dissenting opinions only.

EPA finalized its Clean Power Plan. The regulation would set the first national greenhouse gas emissions limits for existing fossil-fueled power plants, the largest source of such emissions in the US economy. It is widely understood as the most significant federal climate regulation to date, and the cornerstone of President Obama's climate policy.<sup>110</sup> EPA's authority to regulate is based on §111(d) of the Clean Air Act, a provision which dates back to the earliest modern version of the statute in 1970, but which has been very rarely used, and never on this scale. The regulation has attracted great public controversy<sup>111</sup> and was already subject to legal challenge at the proposal stage.<sup>112</sup> Litigation challenging the final rule is a certainty.

Many have viewed Justice Scalia's reference to the major questions doctrine in *UARG* as a preliminary salvo in this coming battle.<sup>113</sup> Jody Freeman, in her article *Why I Worry About UARG*, called it a "'red meat' reference[] to potential government overreach" and "entirely gratuitous,"<sup>114</sup> with the decision "full of troubling hints and clues as to the Court's skeptical mood."<sup>115</sup>

The above analysis of the major questions doctrine cases suggests these fears are not without foundation. A future case in which EPA's interpretation of §111(d) of the Clean Air Act for the Clean Power Plan is at issue would appear to feature all four identified factors. First, although EPA has a long history of regulating air pollutant emissions from existing power plants, it has not previously asserted authority to regulate their most voluminous pollutant, carbon dioxide. The Clean Power Plan also envisions (and states regulating under it will likely require) not only changes in emissions at individual plants, but significant changes to the electric generation sector more generally.<sup>116</sup> The regulation, for example, envisions significant increase in the amount of zero-carbon renewable generation, and a large shift from carbon-intensive coal to more carbon-efficient gas generation.<sup>117</sup> Past EPA regulations have not asserted such

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<sup>110</sup> Nathan Richardson, *Playing without Aces: Offsets and the Limits of Flexibility Under Clean Air Act Climate Policy*, 42 ENVTL. L. 735 (2012).

<sup>111</sup> See EARTHJUSTICE, *A Climate Solution Within Reach*, <http://earthjustice.org/features/getting-a-clean-power-plan#> (last visited Feb. 29, 2016) (characterizing the Clean Power Plan as "[t]he most important action on climate change in a generation" and urging support for it); see also Mario Loyola, *EPA's Unprecedented Power Grab*, NATIONAL AFFAIRS 71, 85 (Spring 2015), [http://www.nationalaffairs.com/doclib/20150319\\_Loyola.pdf](http://www.nationalaffairs.com/doclib/20150319_Loyola.pdf) ("Like many progressive projects, the Clean Power Plan is simply a power grab. . .").

<sup>112</sup> *In re Murray Energy Corp.*, 788 F.3d 330 (D.C. Cir. 2015) (rejecting state and coal industry challenges to the proposed Clean Power Plan as premature).

<sup>113</sup> See, e.g., Nathan Richardson, *Quick thoughts on UARG v. EPA*, RESOURCES FOR THE FUTURE (June 23, 2014), <http://www.rff.org/blog/2014/quick-thoughts-uarg-v-epa>.

<sup>114</sup> Freeman, *supra* note 46, at 10.

<sup>115</sup> *Id.* at 21.

<sup>116</sup> Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34,829 (June 18, 2014).

<sup>117</sup> *Id.*

authority over the electric sector, though of course they have had large indirect effects on the generation mix.<sup>118</sup> A strong case can therefore be made that the Clean Power Plan (and the interpretation of § 111(d) on which it relies) constitutes a major shift in regulatory scope of the scale that has in the past triggered the major questions doctrine. As Freeman puts it, the regulation “might plausibly be considered even more economically and politically significant than the FDA’s regulation of nicotine.”<sup>119</sup>

As Freeman notes, the economic significance factor is also present. The electric power sector is among the largest in the US economy, with links to every other sector. It is almost certainly the largest segment of the economy whose regulation was at issue in any of the major questions cases. *UARG* concerned EPA regulation of the same sector, but that regulation only applied to new plants. The Clean Power Plan applies to the much larger class of existing plants.

The same is true for the political controversy factor. Public debate over what action, if any, the US should take to reduce its emissions has raged for more than a decade. Despite little evidence of action in recent years, Congress has in the past actively debated the issue, nearly passing cap-and-trade legislation in 2010.<sup>120</sup> Members of Congress have also repeatedly introduced legislation seeking to strip the EPA of the authority necessary to implement the Clean Power Plan and other climate regulations, without success.<sup>121</sup> *Legal* debate has been active since well before *Massachusetts* was decided. There can be little argument that EPA regulation of greenhouse gas emissions under the Clean Air Act is not an issue of public concern. How the issue is characterized is largely irrelevant—even if the question is narrowed to whether and how EPA should regulate emissions from existing power plants, there is significant public debate. The Clean Power Plan is an issue in the 2016 presidential campaign.<sup>122</sup>

A Clean Power Plan case would also qualify under the fourth factor on almost any conception of what the factor really means. Section 111(d) is an extremely short statutory provision,<sup>123</sup> has only rarely been used, and lacks any specificity regarding how sources must comply.<sup>124</sup>

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<sup>118</sup> Dallas Burtraw et al., *Secular Trends, Environmental Regulations, and Electricity Markets*, 25 *ELECTRICITY J.* 35 (2012).

<sup>119</sup> Freeman, *supra* note **Error! Bookmark not defined.**, at 17.

<sup>120</sup> American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009).

<sup>121</sup> EPA Stationary Source Regulations Suspension Act of 2011, S. 231, 112th Cong. (2011).

<sup>122</sup> See LEAGUE OF CONSERVATION VOTERS, IN THEIR OWN WORDS: 2016 PRESIDENTIAL CANDIDATES ON THE CLEAN POWER PLAN, <http://www.lcv.org/assets/docs/presidential-candidates-on-cpp.pdf> (last updated Feb. 25, 2016).

<sup>123</sup> 42 U.S.C. § 7411 (2012) (Clean Air Act § 111(d)).

<sup>124</sup> See Nathan D. Richardson, *Trading Unmoored: The Uncertain Legal Foundation for Emissions Trading under § 111 of the Clean Air Act* (forthcoming *Penn. State Law Review*), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=26090](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=26090)

All four factors, therefore, point to a likely future Clean Power Plan case being ripe for application of the major questions doctrine. To give it a place in the above chart:

	Major Shift in Scope	Economic Significance	Political Controversy	Thin Statutory Basis
<i>MCI v. AT&amp;T</i>	Yes	Maybe	No	Maybe
<i>FDA v. Brown &amp; Williamson</i>	Yes	Yes	Yes	Yes
<i>Gonzales v. Oregon</i>	No	Maybe	Yes	Yes
<i>Entergy v. Riverkeeper*</i>	No	Maybe	No	Yes
<i>EPA v. E.M.E. Homer City*</i>	Maybe	Maybe	No	Yes
<i>UARG v. EPA</i>	Maybe	Yes	Maybe	Yes
<i>King v. Burwell</i>	No	Maybe	Yes	Maybe
Clean Power Plan?	Yes	Yes	Yes	Yes

Moreover, in February of 2016 the Court by a 5-4 vote issued an interlocutory stay of the rule pending review in the DC Circuit and, presumably, the Court itself.<sup>125</sup> Such an apparently unprecedented move is a strong early indication that litigation over the Plan is an “extraordinary case” to which the major questions doctrine could apply.

As *King* illustrates, even if this prediction is correct, it does not mean that the Clean Power Plan will be rejected. But it does increase the likelihood of rejection, and, more precisely, reduce the likelihood that EPA’s interpretations of §111(d) will survive scrutiny. How one feels about this is of course closely linked to how one feels about the Clean Power Plan. But increased legal uncertainty does have independent costs—it makes planning by the regulated industry substantially more difficult.

In short, the past two Supreme Court terms (and the 2015-2016 term, if

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\* Dissenting opinions only.

<sup>125</sup> *West Virginia v. EPA*, No. 15A773, 2016 WL 502947 (Feb. 9, 2016).



the interlocutory stay is taken as relevant) give compelling evidence that the major questions doctrine has returned to prominence at the Court (if it even ever left). Moreover, a near-future Clean Power Plan case will likely provide the Court with another opportunity to deploy the doctrine.

#### IV. PAST ARGUMENTS FOR AND (MOSTLY) AGAINST THE MAJOR QUESTIONS DOCTRINE

If the above analysis is correct and the major questions doctrine does have renewed or continuing significance, is that a positive development? Is it likely to lead to better and more efficient regulatory outcomes, greater agency or court accountability, and/or reduce litigation costs and uncertainty (among other values)? Scholars and commentators have offered both praise and criticism of the doctrine, with at least five separate (albeit overlapping) rationales having been offered and to some extent rebutted. This section explores these arguments for and against the doctrine. In short, the balance of scholarly opinion is at least skeptical, and in many cases deeply critical of the doctrine.

This section proceeds by separately discussing the various rationales that have been suggested by scholars for the doctrine (including critiques of those rationales), and then evaluating some general criticisms of the doctrine that cut across rationales.

##### A. *Implied Non-Delegation*

As discussed above, Justice Breyer argued that the legal fiction of implied delegation is weak or even disappears when the legal question at issue is sufficiently significant.<sup>126</sup> It is simply implausible, this argument goes, to suggest that Congress intended to delegate legal questions beyond a certain level of import to agency discretion.

To the extent that the Court has articulated a rationale for the major questions doctrine, it has usually been on such implied non-delegation grounds (not to be confused with the constitutional non-delegation doctrine, discussed doctrine below). In *MCI*, the court noted that rate filings were “the essential characteristic of a rate-regulated industry” and found it “highly unlikely that Congress” would leave it to an agency to determine whether an industry will be subject to a rate filing requirement.<sup>127</sup> In *Brown & Williamson*, as noted above, the Court ruled that in “extraordinary cases” courts should “hesitate before concluding that Congress has intended . . . an implicit delegation.”<sup>128</sup> It is this language in *Brown & Williamson* that the court cited in *King*. Similarly, the “elephants

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<sup>126</sup> Breyer, *supra* note 21.

<sup>127</sup> *MCI v. AT&T*, 512 U.S. 218 (1994).

<sup>128</sup> *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

in mouseholes” version of the major questions doctrine is a nearly explicit statement of implied non-delegation—“Congress does not hide elephants in mouseholes” is arguably just a metaphor for the idea that Congress cannot have intended to delegate major legal questions to agency discretion without sufficient support in the text of the relevant statute.

If these arguments are persuasive, then they undercut the doctrinal justification for *Chevron* deference in major cases. Without implicit delegation (whether fact or legal fiction), there is no legal basis for deference to agency interpretations.

However, it is hard to understand why implied delegation should be assumed in interstitial questions but not in major ones. The Court’s statements are conclusory—they do not say *why* we should assume Congress is less likely to delegate major questions to agency interpretation, just that it is less likely to do so. Digging deeper immediately runs into a controversy over whether implied delegation is merely a legal fiction.

If the principle is an attempt to reflect real legislative intent, and not merely a legal fiction, then why should the presumption evaporate beyond some level of significance? Justice Breyer argues that “Congress is more likely to have focused on, and answered, major questions.”<sup>129</sup> But as Sunstein points out, that claim is unhelpful even if true—if Congress had “answered” the question, there would be no deference issue.<sup>130</sup> The case might never reach the courts since agencies would find themselves limited by Congress’s “answer” in the statute, and if not, plain language (*Chevron* step one) would resolve the issue. In other words, it’s not enough to simply state that Congress does not leave major regulatory questions open—the fact that a statutory interpretation issue has reached the Supreme Court (or even a lower court) disproves the claim.

Of course, Congress is far from perfect. Arguably, it generally decides major questions itself rather than leaving them to agencies, but sometimes inadvertently leaves large gaps in statutes, or gaps emerge later due to changed circumstances (*Massachusetts* and climate change being perhaps the best example of the latter). If so, then the major questions doctrine—driven by implied non-delegation—is a fix for that problem. Whether this is correct as an empirical matter is debatable—large gaps in statutes seem at first impression to be common, depending on one’s definition of “large.” Nevertheless, it’s at least plausible.

But even if this claim is true, why isn’t the existence of a statutory gap or ambiguity, however “major,” evidence that Congress intended to delegate it to agency discretion? Why is delegation implied for small questions but not large ones? Answering that question requires a theory for

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<sup>129</sup> Sunstein, *supra* note 3, at 232.

<sup>130</sup> *Id.*

*why* Congress might be less likely to delegate in major questions—the claim that they simply don’t do so, except in some rare cases of error, isn’t enough.

One answer is that empirical evidence suggests Congress is aware of the major questions doctrine, implying that it may write legislation with the doctrine in mind.<sup>131</sup> If true, then Congress might write most statutory provisions with agency interpretation in mind, but then write “major” ones in a way that envisions judicial interpretation. This is pretty unsatisfying, however. Most obviously, it is circular, essentially suggesting that the major questions doctrine exists because Congress believes it exists. Also, it presumes that Congress knows at the time of writing statutes where the major interpretive issues or gaps will be but somehow alters the way they are written instead of just explaining or filling them. Finally, it is unclear how Congress would write a statute differently depending on who it thinks will interpret it.

Similarly, if implied delegation is a legal fiction in service of other priorities, then it is meaningless to debate whether Congress is less likely to delegate interpretive authority to agencies in major questions—there is no real intent to uncover. Instead, argument must quickly shift to those other priorities driving the implied delegation fiction.

An alternative way to look at delegation and the major questions doctrine is to suppose, counterfactually, that Congress had delegated interpretive authority explicitly rather than implicitly—that is, if *Chevron* had been created by statute rather than by the Court. It could be argued that in such a “*Chevron* statute” Congress might have reserved some class of interpretive questions, including “major” questions, to courts. But not necessarily, and a theory for *why* Congress would do so is necessary to make such an argument at all persuasive. To debate what Congress might have included in a fictional statute is hardly a valid source of law. Yet this is essentially what the implied non-delegation argument does.

Implied non-delegation, therefore, is an unpersuasive rationale for the major questions doctrine on its own. Whether implied delegation is a legal fiction or not, it is ultimately based on other grounds, discussed below.

## B. *Competence*

Another set of arguments focuses on Congress’s proper or best role, rather than its real or presumed intent. In short, these arguments are based on the proposition that legislatures should decide major questions, or at least that agencies should not. This might be due to Congress having

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<sup>131</sup> Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901 (2013).

greater competence in major questions—it can see the big picture, while agencies may struggle to do so (paralleling Kenneth Culp Davis’ position). Or the argument might be grounded in political accountability or legitimacy—Congress, not unelected agency officials, should decide major policy issues. Moncrieff terms this view “bare majorness,” summarizing it as the “superficial view that agencies should be prevented from implementing major policies.”<sup>132</sup> Justice Breyer’s dissent in *Brown v. Williamson* articulates this view, hypothesizing that “one might claim that courts, when interpreting statutes, should assume in close cases that a decision with ‘enormous social consequences’ should be made by democratically elected Members of Congress rather than by unelected agency administrators” (though he concluded that such a rule did not apply in the case).

Alternatively, competence and implied non-delegation can be seen as the major questions parallels of the two primary justifications for *Chevron* deference—separation of powers or implied delegation. If *Chevron* is justified by implied congressional delegation of interpretive authority, implied non-delegation says that justification evaporates in sufficiently significant cases because Congress can’t be assumed to have made such a delegation. But if *Chevron* is justified because courts are ill-advised to second-guess agency decisions, competence says that justification is absent or at least outweighed in significant cases because Congress, not agencies, is the best decisionmaker.

However, it’s not clear why agencies would be better than Congress at deciding minor or interstitial questions, but Congress would be better than agencies at deciding major ones. Agency technical or subject-matter expertise would presumably be no less relevant in major questions, at least as a general matter. As Sunstein argues,

there is no reason to think that the considerations that animate *Chevron* do not apply to large questions. Suppose that an agency is deciding whether to adopt an emissions trading system, rather than command-and-control, in order to reduce air pollution; suppose, too, that this qualifies as a large question rather than an interstitial one. The agency’s expertise is certainly relevant to answering that question.<sup>133</sup>

Moreover, the competence argument is guilty of a bit of sleight of hand. It argues that Congress, not agencies, is best able to decide major questions. But the suggested solution—the major questions doctrine—puts the decision in the hands of the courts, not Congress. The conclusion does not follow from the premise, even if that premise is true. This is a problem

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<sup>132</sup> Moncrieff, *supra* note 36, at 611.

<sup>133</sup> Sunstein, *supra* note 3, at 232.

for the doctrine—even if one agrees that agencies are not the ideal decisionmakers for major questions, courts might be worse, not better. Indeed this is part of *Chevron*'s rationale for delegation of interpretive authority to agencies—why should we be less skeptical of courts deciding major questions? As Moncrieff suggests, “it should be clear that agencies are better equipped than judges to answer major political questions just as they are better equipped to answer minor ones.”<sup>134</sup> Sunstein goes further, arguing, “to the extent that issues of value are involved, it would appear best to permit the resolution of ambiguities to come from a politically accountable actor rather than the courts.”<sup>135</sup>

### C. A Non-Delegation Canon?

A related argument is that the major questions doctrine might not really be about major questions at all, but is rather a legal device for avoiding constitutional problems of excessive delegation to agencies—a “nondelegation canon.”<sup>136</sup> Under this view, “major” questions would be unconstitutional delegations of legislative authority if agencies are permitted to decide them, or at least would be uncomfortably close to that constitutional line. If that assumption is true, the doctrine removes *Chevron* as a barrier to addressing unconstitutionally broad delegations (or more precisely, agency interpretations of statutes that create such overbroad delegations), but does so without opening the Pandora’s box of a revived formal nondelegation doctrine.

Sunstein appears to have been the first to articulate this view, summarizing it as “Congress will not lightly be taken to have delegated to agencies the choice of how to resolve certain sensitive questions . . . [f]undamental alterations in statutory programs, in the form of contractions or expansions, will not be taken to be within agency authority.”<sup>137</sup> Sunstein therefore places the major questions among other “nondelegation canons” that he generally praises as being more administrable than a strong nondelegation doctrine,<sup>138</sup> though he remains specifically skeptical of the major questions doctrine. Loshin and Nielson similarly identify nondelegation as the principle driving the “elephants in mouseholes” variant of the doctrine.<sup>139</sup>

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<sup>134</sup> Moncrieff, *supra* note 36, at 612.

<sup>135</sup> Sunstein, *supra* note 3, at 232.

<sup>136</sup> 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) [hereinafter Sunstein, *The Executive’s Power*]; Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000) [hereinafter Sunstein, *Nondelegation*]; Moncrieff, *supra* note 36, at 616.

<sup>137</sup> Sunstein, *supra* note 3, at 245.

<sup>138</sup> Sunstein, *Nondelegation*, *supra* note 136.

<sup>139</sup> See Loshin & Nielson, *supra* note 74, at 22–23.

The nondelegation canon and competence or “bare majorness” justifications for the major questions doctrine can also be framed as close parallels: If policy or competence rationales say Congress *should* decide major questions, the doctrine acts to preserve this authority by cutting out the agency middleman between Congress and the courts (competence). If the Constitution is interpreted to mean that Congress *must* decide major questions, then the doctrine acts to enforce that requirement in similar fashion (nondelegation canon).

The non-delegation canon argument is really two arguments in one, however. One version is about substance, paralleling the traditional nondelegation doctrine. It says that when agencies attempt to regulate large sections of the economy, they risk implicating nondelegation principles, especially when they do so based on thin statutory text. The major questions doctrine (and in particular the elephants in mouseholes version) give courts license to check this without resorting to difficult-to-administer constitutional doctrine.

But this explanation of the major questions doctrine cannot be correct, or at least it cannot be complete. Agencies administer large sectors of the economy on a regular basis, often larger than those at issue in the major questions cases. For example, FDA’s regulation of the pharmaceutical industry is no less significant than its attempted regulation of tobacco in *Brown & Williamson*. HHS and the IRS issued many regulations under the ACA, and there is no obvious reason why the rule at issue in *King* was any more significant than these other regulations. To be sure, the exchanges and possibly the entire ACA would not have worked without the rule, but the same is surely true of many other rules with relatively uncontroversial statutory basis. In short, the major questions doctrine does little if anything to rein in large delegations of authority by Congress to agencies.

The other version of the nondelegation canon rationale for the major questions doctrine focuses on discretion. Even if the doctrine does not rein in substantive delegation, it might rein in agency *discretion*. Under this view, Congressional delegation of interpretive authority itself might raise non-delegation concerns, beyond a certain point. This might be better described as a meta-delegation concern. It could also be viewed as a corollary to Justice Scalia’s view in *Whitman v. American Trucking* that agencies may not cure unconstitutionally broad delegations, since to do so would require exercise of the unconstitutionally delegated power.<sup>140</sup> Major questions cases, on this view, present the opposite problem—agency use of otherwise-constitutional interpretive power in a way that violates or at least threatens constitutional limits.

However, this latter version of the non-delegation doctrine, and its

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<sup>140</sup> *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 463–64 (2001).

accompanying avoidance canon in the form of the major questions doctrine, is fundamentally different from the traditional non-delegation doctrine and any associated avoidance canons. It is not about protecting the legislative power under Article I, but rather the judicial power under Article III and *Marbury*.<sup>141</sup> Just as the broad statutes that permeate the modern administrative state delegate great substantive (i.e. legislative) authority to agencies, *Chevron* delegates great interpretive (i.e. judicial) authority to them. The nondelegation doctrine places a formal albeit indefinite limit on legislative delegation, possibly with various nondelegation canons operating in its place to limit substantive delegations in practice. If it is a nondelegation canon, the major questions doctrine operates in parallel, setting a limit on the amount of interpretive authority courts may (or, perhaps, are willing) to delegate to agencies. In short, it may be a judicial rather than legislative non-delegation canon.<sup>142</sup>

Sunstein (crediting Jed Rubenfeld in a footnote) has suggested a narrower version of the major questions doctrine along these lines, limited to cases in which agencies attempt “to move the law in fundamentally new directions without congressional approval.”<sup>143</sup> Presumably, such moves cross a threshold beyond which agencies are exercising interpretive authority that is at least constitutionally troubling. Sunstein ultimately rejects even such a modified major questions doctrine, however, concluding that “[t]he best use of nondelegation concerns lies elsewhere.”<sup>144</sup>

Nevertheless, this may be the strongest argument in favor of the major questions doctrine, and I return to it in the next Section. However, it has almost no basis in the Court’s major questions decisions. The closest thing is probably the “elephants and mouseholes” sub-doctrine, to the extent that regulation of a major part of the economy based on narrow text are indicia of an interpretive delegation so large that it might trigger a constitutional problem. But “elephants in mouseholes” is not presented in constitutional terms, but rather as a mere canon of statutory interpretation.

To illustrate, It is possible to argue that the IRS moved the law “in fundamentally new directions” with the rule at issue in *King* making benefits available on federal exchanges, but if so, it’s hard to distinguish that interpretive move from many others that agencies make on a regular basis. It really seems to be the scope, significance, and political

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<sup>141</sup> Professor Sunstein places the major questions doctrine among other doctrines limiting *Chevron*, calling the group “*Marbury*’s Revenge.” Sunstein, *The Executive’s Power*, *supra* note 136, at 2602.

<sup>142</sup> To return to the “statutory *Chevron*” counterfactual discussed above, the nondelegation version of the major questions doctrine suggests that a statute delegating interpretive authority to agencies would be unconstitutional if it did not reserve a major questions exception for courts.

<sup>143</sup> Sunstein, *The Executive’s Power*, *supra* note 136, at 2606–07.

<sup>144</sup> *Id.*

controversy of Obamacare that makes *King* a major questions case. If so, then the major questions doctrine as actually applied by the Court doesn't fit an interpretive or judicial non-delegation framework.

Moreover, if the major questions doctrine is indeed *sub rosa* constitutionally motivated, it is underinclusive. It seems likely that agencies regularly make bold interpretive moves that do not risk implicating the major questions doctrine since they do not result in major changes to agency authority or occur in politically controversial contexts. Perhaps *Chevron* step two's reasonableness analysis is sufficient to catch such agency interpretations, but if so it only does so rarely. And if *Chevron* step two is enough in interstitial cases, it's not clear why it would not be sufficient in major ones.

#### D. Agency Aggrandizement

Alternatively, a number of scholars suggest that fear of agency "aggrandizement" might justify the major questions doctrine. Under this view, agencies are likely to try to expand their own authority at the expense of Congress or the public.<sup>145</sup> This may happen to some degree no matter what legal rules are set by courts, but *Chevron* deference increases this risk by allowing agencies to bootstrap their own authority. In other words, *Chevron* deference allows small-time aggrandizement in exchange for its great benefits (expediency and agency expertise). But the major questions doctrine prevents (or at least attempts to prevent) agency aggrandizement so serious that it outweighs *Chevron*'s general benefits. Put even more simply, the doctrine prevents Congress from accidentally creating a monster.

The aggrandizement rationale has worries about accountability and anti-democratic action by the executive branch at its core. As Lisa Bressman puts it, in the major questions cases

the Court withheld deference because the respective administrations—agency heads, key White House officials, or even the President himself—although electorally accountable, had interpreted broad delegations in ways that were undemocratic when viewed in the larger legal and social contexts. . . these cases are best understood to tell administrations that they may not disregard larger governmental or public interests and still expect to command judicial deference. The cases do not suggest that an administration may act only after aggregating congressional or popular preferences. Rather, an administration may not

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<sup>145</sup> Ernest Gellhorn & Paul Verkuil, *Controlling Chevron-Based Delegations*, 20 CARDOZO L. REV. 989 (1999); Moncrieff, *supra* note 36; Sunstein, *Nondelegation*, *supra* note 136.



issue a rule knowing that Congress opposes its substance and would need supermajority support to reverse it, assuming a presidential veto. Moreover, an administration may not resolve a politically charged issue essentially by fiat, knowing that the people presently are engaged in active debate.<sup>146</sup>

Aggrandizement seems to be part of the Court's rationale in *Brown & Williamson*—the result is arguably driven by concern that the FDA (and by extension the President) was making a bold power grab by attempting to regulate tobacco.<sup>147</sup> Also, Justice Scalia's "elephants in mouseholes" version of the doctrine specifically addresses this fear by adding the scope of statutory text as a factor in determining whether an agency interpretation receives deference. Agency assertions of broad authority based on narrow statutory text, under this view, are more likely to be improper aggrandizement than those with greater (or at least lengthier) support in the statute.

Alternatively, major questions cases could be understood as capturing agency behavior that differs from their typical actions and related statutory interpretations to which *Chevron* applies. As discussed above, whether an agency decision occurs in an area of active political controversy appears to be an important factor in whether a related statutory interpretation is treated as a major question. Agency officials are typically reluctant to make politically risky decisions since doing so attracts unwanted and burdensome attention from the public and, especially, Congress.<sup>148</sup> When this norm is violated and agencies attempt to enact new policies with large impacts based on narrow statutory language (i.e., when the four major questions factors are present), then it can be argued that either or both of the assumptions underlying *Chevron*—agency expertise and implied delegation—are no longer valid. This need not necessarily be described as aggrandizement in the sense that agencies are doing something improper that the major questions doctrine must check, but rather that they are merely doing something unusual, such that the normal *Chevron* rule should no longer apply.

Finally, the major questions doctrine could be viewed as a part of a larger judicial project to constrain agency aggrandizement, motivated by a belief that *Chevron*, as generally applied by courts, has enabled such aggrandizement. This is the clear motivation behind Chief Justice Roberts' dissent in *City of Arlington v. FCC* (joined by Justices Alito and Kennedy),

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<sup>146</sup> Lisa Schultz Bressman, *Deference & Democracy*, 75 GEO. WASH. L. REV. 761, 764 (2007).

<sup>147</sup> Moncrieff, *supra* note 36, at 614.

<sup>148</sup> See JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT (1989).

in which he argued that “the danger posed by the growing power of the administrative state cannot be dismissed”.<sup>149</sup> The partial solution, he suggests, is to establish (or reconfirm) a rule that courts alone must decide the threshold question of whether *Chevron* deference applies to agency action.<sup>150</sup> One way to do so, rejected by the *Arlington* majority, would be to deny deference to “jurisdictional” interpretations by agencies.<sup>151</sup> The major questions doctrine (along with *Mead* and other “step zero” doctrines) functions in a similar way—it gives judges, not agencies, the task of determining whether *Chevron* applies in one class of contexts.

Both doctrines—major questions and “jurisdictional” deference—address contexts in which the risks of aggrandizement seem particularly salient. *Arlington* is motivated by a concern that foxes (agencies) should not be allowed to guard the henhouse (whether deference is available). Major questions, as noted, is in part motivated by fears of raw agency power, or at least of undue accumulation of power.

In his *Arlington* dissent, however, Roberts explicitly rejects this analogy. The majority opinion (in, arguably, a bit of rhetorical sleight-of-hand) suggests that the jurisdictional/non-jurisdictional distinction is really just an artificial and imprecise one dividing “big, important” interpretive questions and “humdrum, run-of-the-mill stuff”—i.e., exactly the distinction the major questions doctrine attempts to police.<sup>152</sup> Roberts evades the trap, agreeing that “drawing such a line may well be difficult” but distinguishing that task from the necessary one, he suggests, of determining “whether [a statutory term] is for the agency to interpret”.<sup>153</sup> This recognition of the line-drawing problem inherent in the major questions doctrine is noteworthy given the Chief Justice’s later reliance on the doctrine in *King v. Burwell*. Nevertheless, his *Arlington* dissent is among the strongest statements of judicial concern regarding agency aggrandizement. Similar fears almost certainly motivate judicial interest in the major questions doctrine.

If one finds the growth and power of the federal administrative state to be a troubling development, this rationale for the major questions doctrine (whether framed as aggrandizement or simply atypical agency behavior) is likely to be appealing. Even if not, the value of a doctrine capable of checking the worst agency power grabs is readily apparent. Sunstein praises this rationale, noting that “[p]erhaps there is less reason to trust agencies when they are making large-scale judgments about statutory meaning. Parochial pressures, such as those imposed by interest groups,

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<sup>149</sup> *City of Arlington v. FCC*, 133 S. Ct. 1863, 1879 (2013) (Roberts, CJ. dissenting).

<sup>150</sup> *Id.* at 1884.

<sup>151</sup> *Id.* at 1865.

<sup>152</sup> *Id.* at 1868.

<sup>153</sup> *Id.* at 1884.

may distort agency decisions . . . agency self-interest, such as the expansion of administrative authority, may also increase the likelihood of bias.”<sup>154</sup> But Sunstein ultimately rejects the aggrandizement rationale, arguing that while agencies might engage in aggrandizement, “it is also possible that their judgments are a product of specialized competence and democratic will.”<sup>155</sup> There is “no sustained evidence,” he continues, “that when agencies make decisions on major questions, bias and self-interest are the motivating factors.”<sup>156</sup> Moncrieff adds that “political checks” prevent agencies from arbitrarily expanding their power; doing so requires “compelling technical and political reasons” that look much like expressions of agency expertise.<sup>157</sup> As she puts it, the major questions exception “seems to violate *Chevron*’s institutional capacity assumption.”

Moreover, the major questions doctrine may not do anything to protect Congress or the public from agency aggrandizement, since it does nothing to increase the authority of either. It does decrease agency authority, but to the benefit of *courts*, not Congress, and if anything *decreases* popular authority by shifting power from a political body (executive agencies) to an unelected one (courts).

#### E. *Noninterference*

Moncrieff, after rejecting most of the above rationales for the major questions doctrine, suggests an alternative—that courts should use the principle to prevent agency interference in matters where “Congress has, in fact, remained actively interested.”<sup>158</sup> Moncrieff suggests that noninterference is both an accurate reflection of the doctrine and normatively good. In both *MCI* and *Brown & Williamson*, legislation passed after the statutory language at issue in the cases arguably contradicted the agencies’ claims of authority. While the Court was unwilling to conclude that this later legislation constituted an implied repeal of the earlier statutes, refusing to defer to the agency’s interpretation on major questions grounds could be viewed as a more moderate but still significant reaction. It is possible to explain *King* on similar grounds—while Congress did not pass new legislation on healthcare after the ACA, it was clearly interested in the issue, as best evidenced by repeated attempts to repeal the law.

Moncrieff analogizes this view of *Chevron* and the major questions exception to federal courts’ practice of abstaining from jurisdiction in certain state law cases, but enjoining state proceedings when it is “likely to

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<sup>154</sup> Sunstein, *supra* note 3, at 233.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> Moncrieff, *supra* note 36, at 615.

<sup>158</sup> *Id.* at 621.

result in harmful duplication of pending federal proceedings.”<sup>159</sup> While typically courts will defer to agencies (*Chevron*) just as they defer in other contexts to state courts, the major questions doctrine enforces an understanding that “administrative agencies—despite their concurrent authority to make certain policy decisions—should abstain from rulemaking when the exercise of their authority would interfere with or harmfully duplicate a congressional bargain.” In Moncrieff’s view, such agency interference is likely to impede Congress’s ability to decide major policy questions and make necessary tradeoffs between interest groups. Put most simply, it would “raise overall lawmaking costs.”<sup>160</sup> In this sense, noninterference might be viewed as a specific type of competence argument, but restricted to cases where Congress is actually involved, not all cases where Congress should be involved due to generally greater competence in major policy determinations.

Noninterference works well as a descriptive principle in some cases, like *Brown & Williamson* and *King*. In each case, as noted above, Congress was at least arguably continuing to address the substantive issue. Moncrieff sees *Massachusetts* as a counterexample, and discusses it at length before concluding that it was incorrectly decided, or at least that the court should have invoked the major questions doctrine. However, as discussed in Section 0 above, in my view *Massachusetts* can be distinguished on other grounds—as a *Chevron* step one case, it never triggered deference, and therefore never needed the major questions exception.

Nevertheless, I don’t find Moncrieff’s normative case for the noninterference rationale for the doctrine to be convincing, for much the same reason as for the other rationales discussed above. There’s no clear reason why noninterference should be a concern in major questions but not minor ones. If keeping agencies out of interpretive matters that Congress and/or the public are actively considering is valuable, why only on major questions? An agency might equally short-circuit or complicate decisionmaking on a minor issue as well as a major one (moreover, some members of Congress or interest groups may see a minor issue as quite important from their perspective).

If noninterference were only about interference with the public rather than with congressional debate, then a major/minor distinction might be more plausible, since the public is much less likely to be engaged in a minor issue. But not necessarily—for example, public debates over the federal budget have long given much more attention to foreign aid than the size of such expenditures would appear to justify. Moncrieff’s solution is to avoid this problem by defining “major” questions as those that the

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<sup>159</sup> *Id.* at 631–32.

<sup>160</sup> *Id.* at 644.

public and/or Congress are actively considering.<sup>161</sup> But that is not how the doctrine has operated in practice. Many “minor” questions cases in which agency interpretations have received *Chevron* deference are the subject of some congressional or public debate. It’s even possible to argue that any regulatory issue significant enough to be granted certiorari would qualify as “major,” rendering the doctrine universal at the Supreme Court level. Clearly, that has not occurred. Therefore, some threshold of public or congressional concern must be chosen beyond which noninterference is a problem but below which it is not. It’s not clear how this line can or should be drawn. Similar line-drawing problems are discussed in the next section.

Alternatively, the noninterference rationale could be viewed as a special case of the competence argument. Even if Congress does not always have special expertise in deciding major questions, the noninterference rationale suggests that it does when it is actively considering an issue, or when an issue is on the public agenda. This perhaps undercuts some critiques of the competence rationale by limiting its reach. For example, any difference between agencies and Congress in terms of subject-matter expertise might narrow or even be eliminated when members of Congress and their staff are “tooled up” on a substantive issue before the body. Similarly, it is easier to argue that Congress’s special political expertise or representative character should trump agency technical expertise when Congress or the public are actively engaged in an issue, debating hard choices and trade-offs (at least in theory).

However, a noninterference rationale has the same core contradictions as the competence and aggrandizement rationales—however much it praises Congress and/or the public over agencies in the major questions context, the doctrine itself puts the interpretive decision in courts’ hands, not Congress’s. Since courts cannot send a statutory interpretation question to Congress for resolution, by the time a case exists it is too late for noninterference—a court has to make a decision one way or another. If Congress disagrees, it can overrule that decision with new legislation, just as it could with respect to agency interpretations. Moncrieff argues that congressional involvement “eliminates the possibility that judicial policy will stick,”<sup>162</sup> but this proves too much—it means that the court’s decision, including whether to give deference to the agency, doesn’t matter since Congress could overrule it.

Finally, and as noted above, under a noninterference view the major questions doctrine would operate in only one direction—it would deny deference to agencies that interpret statutes to expand their authority, but not to those who do so to reduce it. This seems inconsistent with *MCI*

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<sup>161</sup> Sunstein, *supra* note 3.

<sup>162</sup> *Id.*

(where the agency exempted firms from ratefiling requirements, reducing its authority). It's also arguably inconsistent with the motivations of noninterference. Why would a withdrawal of agency authority be less disruptive to the status quo under public/political consideration be any less disruptive than an increase in authority?

#### F. *General Problems with the Major Questions Doctrine*

In addition to counterarguments to each of the stated rationales for the major questions doctrine discussed above, critics of the doctrine have offered general critiques that cut across all rationales. Essentially, these are all line-drawing problems, though in somewhat differing flavors.

##### 1. *Proving Too Much*

The first general critique is that it is hard to defend the major questions doctrine without proving too much and undermining *Chevron* deference itself. As Moncrieff puts it,

Any workable justification for a major questions exception should operate within the boundaries of *Chevron*'s two universally accepted intuitions. That is, the rationale for any *Chevron* exception must not be that judges are ordinarily better at interpreting regulatory statutes than agencies, or that judges may allocate interpretive decisionmaking to a third body, such as Congress, rather than choosing between the agency's interpretation and their own. Such arguments would counsel in favor of rejecting *Chevron* wholesale; they cannot justify the mere creation of retail exceptions.<sup>163</sup>

For example, an argument for the major questions doctrine along the lines that agency aggrandizement is a problem that courts should police seems to point not only in favor of the doctrine but also against *Chevron* deference. Isn't any agency power grab that violates legislative intent a problem? As discussed above, for the aggrandizement argument to work in favor of the major questions doctrine specifically, it must distinguish between minor or interstitial cases where aggrandizement is not a concern, or is at least subordinate to other priorities, and major cases where it is a sufficiently big problem to justify abandoning *Chevron*.

The same problem exists with a superficially appealing move of simply citing *Marbury* to justify the major questions doctrine—if it is the province of courts to “say what the law is” in major questions, why not also in minor ones? *Marbury* (or aggrandizement, or competence, etc.) alone is not enough—every argument in favor of the major questions

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<sup>163</sup> Moncrieff, *supra* note 36, at 610.

doctrine must also draw a line between cases that implicate the stated rationale and trigger the doctrine, and those that do not. As Davis anticipated and critics of the doctrine argue at length, drawing such a line is difficult in theory, not to mention in practice.

It may therefore be that critiques of *Chevron* deference are indeed the best arguments for the major questions doctrine. If one thinks *Chevron* is a mistake, then the major questions doctrine is a way to push back (and has been successful at doing so). Arguments against *Chevron* come in a variety of forms, most of them stronger or broader versions of the arguments in favor of the major questions doctrine discussed above. For example, some *Chevron* critics argue that agency aggrandizement is a pervasive problem, whether the interpretive question is “major” or not—a strong version of the aggrandizement argument.<sup>164</sup>

The same is true in reverse—arguments in favor of *Chevron* deference can easily be advanced against the major questions doctrine. Critics of the doctrine have done so, as discussed throughout the point-counterpoint above. Take, for example, Sunstein’s argument that agency subject-matter expertise should be at least as applicable in major questions, if not more so.

In other words, being a defender of the doctrine requires one to walk a narrow path between praising it and rejecting *Chevron*. Doing so is not easy, though I will attempt to do so in Section 0 below.

## 2. *Chevron is Not a Blank Check*

A related argument is that, as Sunstein puts it, *Chevron* “does not give agencies a blank check. It remains the case that agency decisions must not violate clearly expressed legislative will, must represent reasonable interpretations of statutes, and must not be arbitrary in any way.”<sup>165</sup> In other words, deference is only available when a statute is ambiguous (*Chevron* step one), and that deference is bounded (step two). Also, any agency authority resulting from interpretations is restricted in practice by procedural requirements in the APA and the organic statute. An argument in favor of the major questions doctrine must give a reason why these protections are adequate in interstitial cases, but not major ones.

However, most arguments in favor of the doctrine, including the discussions of it in the Court’s opinions, do not mention these protections at all.

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<sup>164</sup> See, e.g., *Gutierrez-Brizuela v. Lynch*, No. 14-9585, concurring opinion of Judge Gorsuch at 15 (August 23, 2016) (Arguing that “*Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers’ design. Maybe the time has come to face the behemoth.”)

<sup>165</sup> Sunstein, *supra* note 3, at 233.

### 3. *What Makes a Question “Major”?*

Perhaps the most fundamental problem with the major questions doctrine, identified by all its critics, is the simple fact that it is hard to determine what divides major questions from minor or interstitial ones. For Sunstein, this is a “thin” line<sup>166</sup> with “no metric [] for making the necessary distinctions.”<sup>167</sup> Loshin and Nielson note that “[e]lephants and mouseholes are in the eye of the beholder,” making it impossible to apply the doctrine consistently.<sup>168</sup> More colorfully, they note that “we cannot easily know that what we find in the mousehole is truly an elephant—and not just a rather plump mouse,”<sup>169</sup> cleverly illustrating that the bright line rule Justice Scalia may have meant to evoke with his metaphor is not really so bright in practice. For Loshin and Nielson, this flaw is fatal: it makes the doctrine incompatible with “rudimentary justice,” it “fails to produce a workable rule,” and “quickly devolves into ‘strongly purposivist interpretive techniques’.”<sup>170</sup>

Sunstein notes somewhat sardonically that *Chevron* itself arguably is a major question case. As he puts it, “*Chevron* hardly involved an interstitial question of the sort at issue in the everyday administration of the [Clean Air Act]; it involved a significant rethinking of the definition of the statutory term ‘source.’”<sup>171</sup> If *Chevron* itself is arguably major (and therefore, under the major questions doctrine, should not apply to its own facts), then how can courts (much less observers) be expected know the difference between major and minor questions? This argument can be taken too far—*Chevron* is the name for the deference doctrine because that case was the first to articulate the doctrine, not because its interpretive issue is in the middle of the range of interstitial cases it has come to represent. If it is an edge case, then that may be only a coincidence. Nevertheless, it is a compelling illustration of the difficulty of line-drawing between major and interstitial cases.

A related problem created by the major questions doctrine is that it could undermine *Chevron*’s role as a more-or-less well understood judicial principle against which Congress can legislate. As Justice Scalia has put it, with *Chevron* in place, “Congress knows how to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion.”<sup>172</sup> If courts, applying the major questions doctrine, may decide to contravene this implied intent of Congress, then

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<sup>166</sup> *Id.* at 233.

<sup>167</sup> Sunstein, *The Executive’s Power*, *supra* note 136, at 2606.

<sup>168</sup> Loshin & Nielson, *supra* note 74, at 45.

<sup>169</sup> *Id.*

<sup>170</sup> Loshin & Nielson, *supra* note 74, at 46.

<sup>171</sup> Sunstein, *supra* note 3, at 232.

<sup>172</sup> *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013).



lawmakers will have a more difficult time determining what effect their laws will have. While logical, this argument probably overstates the extent to which *Chevron* is consistently applied even without the major questions doctrine and the extent to which lawmakers consider judicial interpretive doctrines when crafting legislation. It does illustrate a possible negative consequence of the line-drawing ambiguity implicit in the major questions doctrine, however.

Moncrieff, despite ultimately arguing in favor of the major questions doctrine, does address this line-drawing problem. She notes, in agreement with Sunstein, that “the tariff-filing requirement at issue in *MCI* was not clearly of greater political or economic significance than the bubble policy at issue in *Chevron*.”<sup>173</sup> She also notes a deeper problem—even if it were possible to state a rough first-order rule dividing major questions from interstitial ones, “the line . . . is easy to distort by reframing the predicate question.”<sup>174</sup> Whether *MCI* is a major question case, she notes, depends on whether it is about telecommunications deregulation generally or just rate filing policy for a specific class of long distance carriers. Similarly, is *King* about health care reform or a minor addition to the tax code?

Any line between minor and major cases risks being both under- and overinclusive. Minor legal questions might get labeled as major just because they are part of large or controversial regulatory programs (*King*, arguably), and other questions that seem minor at the time of decision may get labeled as interstitial despite significant (and unforeseeable) long term impact (*Chevron*, again arguably).

Moncrieff does believe that her proposed noninterference rationale offers a way out of this line-drawing problem because it, in her view, does not require drawing independent distinctions between major and minor cases. Instead, “[t]he trigger is an agency’s perceptible interference with a specific congressional bargain.”<sup>175</sup> She claims it is superior to other rationales for the major questions doctrine because it, in her view, “relies on specific facts in the world that judges are capable of perceiving.”

If true, this would indeed solve the major/interstitial line-drawing problem. But I am skeptical. First, it’s not clear why identifying matters where “perceptible interference” with a “congressional bargain” is occurring would be easier than labeling them as major or minor based on perceived economic or political significance. Second, and as touched on above, this doesn’t appear to be how the doctrine works in practice. While most or perhaps all of the major questions cases do have some evidence of congressional involvement in the issue, that involvement appears to be only necessary, not sufficient, for a question to be “major.” There are many

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<sup>173</sup> Moncrieff, *supra* note 36, at 611.

<sup>174</sup> *Id.* at 612.

<sup>175</sup> *Id.* at 634.

interpretive issues under consideration to varying degrees by Congress (or the public) that nevertheless are not considered “major” by courts.

Take, for example, the decade-plus of litigation in the DC Circuit and Supreme Court over the use of emissions trading programs under the “good neighbor” provision of the Clean Air Act (including *E.M.E. Homer City*).<sup>176</sup> Congress has repeatedly examined this issue in floor debates and bills (though none have passed).<sup>177</sup> Yet none of the cases have treated the issue as a major question. Moncrieff’s analysis would seem to apply here—a clear statement from the court that trading programs are or are not allowed under the statute would have been helpful, and Congress could have reacted accordingly. But instead debate has continually been stopped, started again, and reshaped by the courts’ rulings.

Similar problems exist with other arguments that attempt to shift the doctrine away from the major/minor distinction, such as Sustain & Rubinfeld’s suggestion that the doctrine be reframed so as to deny deference to agency interpretations that “move the law in fundamentally new directions without congressional approval” and thereby implicate nondelegation concerns. Whether an interpretive move is unremarkable or “moves the law” in a big way is in the eyes of the beholder.

#### G. *Evaluating the Arguments*

On balance, critics of the major questions doctrine have in my view made a more persuasive case than the doctrine’s backers. Each of the arguments in favor of the doctrine, however superficially appealing and rooted in valid concerns, appears to have serious flaws. Moreover, the doctrine has serious line-drawing problems at its core. It’s simply hard to distinguish major cases from minor ones, and, even if that is possible, to argue that deference should be withheld in such cases without the same arguments being equally applicable to minor cases.

#### V. WHY THE MAJOR QUESTIONS DOCTRINE REMAINS NECESSARY

Despite finding the arguments *against* the major questions doctrine made to date more persuasive, I nevertheless believe it should be (and will be) preserved, for a reason different from those discussed above. This is not because I think the doctrine promotes important normative goals, at least not directly. I don’t think the major questions doctrine is likely to lead to better, more effective, more efficient, more equitable, or more

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<sup>176</sup> EPA v E.M.E Homer City Generation, 134 S. Ct. 1584 (2014); North Carolina v. EPA, 531 F.3d 896 (D.C. Cir. 2008); Michigan v. EPA, 213 F.3d 663 (D.C. Cir. 2000).

<sup>177</sup> See, e.g., Clean Air Act Amendments of 2010, S. 2995, 111th Cong. (2010) (bill to amend the Clean Air Act to grant EPA powers to administer emissions trading markets for three air pollutants, including sulfur dioxide; this and other similar proposals were termed “3P bills”).

transparent regulation because, for example, it prevents agency aggrandizement, puts major decisions in the hands of a better-qualified Congress, or blocks agency interference with political debate.

Instead, the doctrine is an important, possibly necessary safety valve (or perhaps a fig leaf) for *Chevron* deference, which probably does make for better government in the large majority of interstitial cases not subject to the major questions doctrine. To the extent this argument is normative, the benefits of the major questions doctrine are the benefits of *Chevron*; considered alone, the major questions doctrine might be a net negative. But as I hope to demonstrate, it cannot be considered alone—the two doctrines (*Chevron* and the major questions exception to it) are inextricably linked.

#### A. *Tension between Chevron and the Judicial Power*

To explain that link, it's necessary to start with *Chevron* itself. It is well understood that *Chevron* deference serves to shift interpretive authority from judges to agencies. Sunstein calls it “a counter-*Marbury* for the administrative state,”<sup>178</sup> clearly illustrating the principle—*Chevron* deference means courts are voluntarily giving up some of their authority to “say what the law is.” That relinquishment of authority is sharply limited—it only applies in cases of statutory ambiguity, as enforced by the two-step framework. Moreover, it applies only to interstitial (i.e. not “major”) ambiguities in regulatory statutes.<sup>179</sup> But it is nevertheless a relinquishment of traditionally judicial authority.

This puts *Chevron* deference in some tension with the judicial role in most other contexts. In every non-regulatory context, and in many (possibly most) administrative/regulatory contexts, courts retain full interpretive authority. *Marbury* remains good law, despite *Chevron*. This tension, I believe, puts *Chevron* under constant pressure, whatever the doctrine's practical merits.

*Chevron* also implicates separation of powers concerns; as Patrick Garry puts it, “[i]t has been argued that *Chevron* not only infringes on the judiciary's power to interpret the law, but that it transfers to administrative agencies the power to make law through their interpretations of broadly-worded congressional statutes.” These concerns create another source of tension between *Chevron* and background legal principles, especially for those already skeptical of agency power.

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<sup>178</sup> Sunstein, *The Executive's Power*, *supra* note 136, at 2589 (citing Kenneth Starr).

<sup>179</sup> There are further limitations, such as agency interpretations that do not carry the force of law, or which are purely jurisdictional, grouped together by Sunstein as “*Chevron* step Zero.” Sunstein, *supra* note 3.

## 1. *Lawyers*

Perhaps the best illustration of this tension is many law students' experience with *Chevron* deference. At most law schools, students are not exposed to *Chevron* until their second or third year (and in some cases at schools that do not require administrative law, not at all). For many of them, the idea that a court would or even could refuse to decide a question of law comes as a shock, at odds with the role of courts they have just learned, especially in first-year common law courses. Some never grasp the concept, and even among those that do I suspect many remain uncomfortable with it even if they can state the rule. I know this describes my own early experience with *Chevron*, and it seems to describe that of many of my students.

Practicing lawyers are unlikely to leave any discomfort with the tensions at the heart of *Chevron* behind at the law school, though of course many will internalize those tensions through practice experience.

## 2. *Judges*

These tensions may diminish but do not evaporate with experience. For judges in particular, the boundaries of the judicial role—the authority to say what the law is—are critically important. *Chevron* is well established at the core of modern administrative law, and is probably under no serious threat of being overturned. Nevertheless it would be surprising if judges do not hesitate when deferring to agencies interpretations of ambiguity, or are not troubled by the contrast between such deference and their control of questions of law in other contexts. Judges, with years of experience in the law, have the tools and training to decide legal questions—it is simply what they do. Abstaining from doing so is likely to be difficult, even if judges accept that it is likely to lead to better outcomes for the interpretive questions to which *Chevron* applies.

Justice Thomas in particular seems motivated by the tension between *Chevron* and courts' interpretive authority, leading him to be critical of *Chevron*, or at least the breadth of the doctrine in practice. Concurring in *Michigan v. EPA*, decided in the 2015 term, Justice Thomas summarized this view:

The judicial power, as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws. Interpreting federal statutes—including ambiguous ones administered by an agency—calls for that exercise of independent judgment. *Chevron* deference 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. Such a transfer is in tension with Article III’s Vesting Clause, which vests the judicial power exclusively in Article III courts, not administrative agencies.<sup>180</sup>

Justice Thomas’ view seems to have been at best only modestly influential with his colleagues, at least to date. Chief Justice Roberts’ dissent in *City of Arlington* (joined by Justices Kennedy and Alito) can be read as deeply critical of *Chevron*, or at least of the degree to which application of *Chevron* has enabled growth in unaccountable agency authority. Indeed the majority accuses the *Arlington* petitioners and, by implication, Roberts’ dissent of a revisionist project whose “ultimate target. . . is *Chevron* itself”.<sup>181</sup> But the *Arlington* majority opinion was authored by Justice Scalia, who in other contexts has been quite skeptical of agency authority. If he was not willing to join a project to limit or perhaps ultimately overturn *Chevron*, such a project was doomed to failure during his tenure on the court. On the contrary, Justice Scalia was one of *Chevron*’s consistent defenders.<sup>182</sup>

Nevertheless, just because Justices (and presumably most federal judges) reject Justice Thomas’ view and accept *Chevron* as settled law does not mean his and similar arguments illustrating the tension between deference and judicial interpretative authority (or Article III) do not resonate at all. I strongly suspect most judges have qualms about deferring to agency interpretations in at least some cases. This probably remains true even when judges ultimately agree with the agency’s interpretation, as *King* arguably illustrates.

One illustration is the temptation judges face in *Chevron* cases. To reiterate, *Chevron*’s delegation of interpretive authority is limited; judges may retain it if they can find a plain meaning of the statute that controls (*Chevron* step one). If a judge is ever uncomfortable with *Chevron*’s delegation in a particular case, he or she need not overturn the doctrine, but instead only needs to find a plausible (or simply preferred) interpretation and claim that it is unambiguously the correct reading of the statute. It is hard to know how often this happens, in large part because distinguishing between “true” findings of plain meaning/lack of ambiguity and those motivated by preferences is almost impossible. But it undoubtedly happens sometimes, and supporters of agency interpretations often level the charge of such manipulation at judges claiming to have found plain meaning. For example, the dissent in *UARG* claimed the majority was doing exactly

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<sup>180</sup> *Michigan v. EPA*, 135 S. Ct. 2699 (2015) (Thomas, J. concurring).

<sup>181</sup> *City of Arlington v. FCC*, 133 S. Ct. 1863, 1873 (2013).

<sup>182</sup> *See, e.g., Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014).

this.<sup>183</sup>

*Chevron*'s two-step process might even exacerbate the tension between it and traditional judicial roles. As Matthew Stephenson and Adrian Vermeule note, "if judges spend an inordinate amount of time trying to figure out the best construction of a statute, it may be difficult for them to shift mental gears to decide whether an agency interpretation that differs from the judge's sense of the best interpretation is nonetheless reasonable."<sup>184</sup> Cass Sunstein notes in a similar vein that judges may have a "psychological difficulty . . . in believing that an agency interpretation is both reasonable and wrong."<sup>185</sup> Stephenson and Vermeule's solution is to read *Chevron* as having only a single step, requiring judges to determine whether an agency interpretation is within a permissible range. While to some extent persuasive, this revision of *Chevron* would not resolve the underlying tension discussed here—judges are still deferring to agencies on some questions of legal interpretation.

Psychological factors matter for judging. There is some experimental evidence that people, including judges, treat cases differently based on "salient aspects of the case," including the magnitude of the dispute.<sup>186</sup> As Pedro Bordalo *et al* point out, "judges are bombarded with material that draws their attention away from legally relevant fact, including the human aspects of the case, attorneys' rhetoric, and the introduction of precedents pulling in different directions."<sup>187</sup> Such salient features of cases, Bordalo *et al* argue based on empirical evidence, likely affects judicial decisionmaking. The salience of these and other factors is at its highest in the "extraordinary" cases in which the major questions doctrine operates. Public attention, major effects on the economy, and the large interpretive responsibility created by thin statutory text combine to make the issues in major cases highly salient for judges, and therefore likely harder to consign to agency decisionmakers.

Similarly, judges may feel that deferring to agency interpretation of statutes is risky—agencies may get it wrong (from the judge's point of view). In interstitial cases with relatively low-salience issues, judges may feel that this risk is worth the advantages of deference—perhaps better and/or more accountable decisionmaking, or at least a reduced judicial workload. But in major cases with high-salience issues, judges may no longer be willing to accept the risk that an agency will get the interpretation "wrong"

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<sup>183</sup> *Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014) (citing the dissent).

<sup>184</sup> See Stephenson & Vermeule, *supra* note 57, at 605.

<sup>185</sup> Sunstein, *supra* note 3.

<sup>186</sup> See Pedro Bordalo *et al.*, *Salience Theory of Judicial Decisions*, 44 J. LEGAL STUDIES S7 (2015).

<sup>187</sup> *Id.* at S17.

In short, while *Chevron* is settled law, and judges may profess to like it (especially to the extent that it simplifies their job in many cases), I suspect that few love it. Deference to agency interpretations of law will always require judges to put their instincts aside. *Chevron* lashes judges to the mast, preventing them from deciding interpretive questions when agencies are better equipped to do so. But the sirens of judging—doing the job they were trained and selected to do—undoubtedly still call.

### 3. *The Public*

While law students are often surprised by *Chevron* deference, and judges and lawyers seem to have made peace with it, the public at large is almost completely unaware of it. Few non-lawyers know the name of the doctrine, much less its core idea of deference to agency interpretations of law. This is of course not surprising. Administrative law is not a subject of broad interest. Even among legal sub-fields it probably ranks below environmental, tax, corporate, or even international law in the level of public interest and familiarity, to say nothing of fields like criminal law or contracts that the average person is likely to have some direct or indirect contact with.

Nevertheless, the public does often pay attention to individual cases, particularly at the Supreme Court. And it would likely come as a surprise to even the interested public if the courts were to refuse to decide a legal question. Doing so would clash with a basic civics-class understanding of the role of the judicial branch, as the final arbiter of questions of law. In other words, *Marbury* is arguably part of the public understanding of the structure of government, even if few non-lawyers have heard of that case either.

But of course courts do often refuse to decide legal questions—they do so when they exercise *Chevron* deference. Usually this is no threat to public confidence in the courts or to the public's understanding of courts' role. The interstitial regulatory questions to which deference may apply are, in the main, particularly unlikely to be of interest to the wider public. Even if the issues are of public interest, few are likely to read court opinions and thereby discover how much weight might be given to agency interpretations. Even in *Chevron* deference cases, headlines will read “the court decided X today,” even if a more accurate headline would be “the court allowed the agency to decide X today.” But that ignorance (probably rational ignorance—this is not intended as a criticism of the public) may not be true for all cases. In sufficiently significant, controversial, or well-reported cases, the level of deference to agencies may become apparent to the public.

#### B. *The Major Questions Safety Valve*

In other words, for typical cases involving interpretation of regulatory

statutes, the tension between the *Marbury* view of courts' role and the *Chevron* reality is not a problem. It may not even be apparent except on close consideration. Administrative lawyers certainly have no great problem functioning in a *Chevron* world, Judges seem to adapt fine, despite their instincts (*pace* Justice Thomas and a few others), and the public remains blissfully ignorant of any doctrinal tension.

But this steady compromise comes under great strain in “major” cases—those of sufficient economic, legal, or political significance to attract attention from the legal community and the wider public. Getting such cases “right” is much more important—not just for the economic and public interests affected by the regulation, but for the perception and ultimately legitimacy of courts as well. For Sunstein, this is all the more reason to commit them to agency discretion—it is when technocratic expertise and political accountability are most important.<sup>188</sup> But as explained at length above, the doctrinal reaction is the opposite—these are the “major questions” cases removed from *Chevron*'s scope, with courts alone responsible for interpreting the law.

### 1. *Is the Doctrine Created by Judges, for Judges?*

Why do this? I believe the answer is not one of the normative or constitutional rationales offered by scholars or the Court itself, but rather that judges are simply unwilling (or believe themselves unable) to relinquish interpretive authority in major cases. If one is a cynic, this is simply due to judge's belief in their own law-interpreting ability, an ability they are willing to keep holstered in interstitial cases but not major ones. Or, even more cynically, it is a result of judges inability to resist imposing their policy preferences in major cases—the very problem *Chevron* is aimed at remedying.<sup>189</sup> To continue the earlier metaphor, when the sirens sing loud enough, judges break away from the mast. Under this view, the major questions doctrine *is* about aggrandizement, but it is pro-judicial aggrandizement, not anti-agency aggrandizement. Sunstein briefly suggested something similar with his reference to “the psychological difficulty that judges may have in believing that an agency interpretation is both reasonable and wrong.”<sup>190</sup>

*Brown & Williamson* appears to be explainable along these lines. The agency's interpretation of the statutory language allowing it to regulate tobacco was almost certainly reasonable, to the point that it may be the

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<sup>188</sup> Sunstein, *supra* note 3, at 193.

<sup>189</sup> See *City of Arlington v. FCC*, 133 S. Ct. 1863, 1873 (2013) (Justice Scalia discussing the danger of another exception to *Chevron* on the grounds that it would enable judges “tempted by the prospect of making public policy by prescribing the meaning of ambiguous statutory commands” and noting “[t]hat is precisely what *Chevron* prevents”).

<sup>190</sup> Sunstein, *supra* note 3.



only interpretation consistent with the plain meaning of the statute. Nevertheless, a majority of the Court felt that this interpretation was nevertheless wrong, based on a plausible, albeit extra-statutory, reading of congressional intent. Such an approach is inconsistent with *Chevron*. To the extent that the Court was unwilling to accept the agency's interpretation, *Chevron* had to be suspended. Framing the case as "extraordinary" made that possible. Had the agency's interpretation not led to such great expansion in its power over the economy, or had it not attracted as much attention, it would have been easier for the Court to set aside any "psychological difficulty" and defer to the agency. Instead, the significance of the case and the agency's bold move made it impossible for the Court to resist imposing its own interpretation.

An alternative and perhaps less cynical version of this judge-driven rationale for the major questions doctrine emerges if one views *Chevron* as more or less a mundane docket-management rule. Under this view, *Chevron* exists not because Congress really intends to delegate interpretive authority to agencies, or because agencies are better at making interpretive decisions, but because it would not be possible (or at least would be quite difficult) for judges to decide every interpretive question. As Justice Scalia has stated in support of *Chevron*, "the sheer volume of modern dockets made it less and less possible for the Supreme Court to police diverse application of an ineffable rule" (referring to the prior case-by-case *Skidmore* standard).<sup>191</sup> If this view is correct, then the major questions doctrine serves to claw back cases that judges view as sufficiently worth their attention to apply detailed judicial analysis of statutory interpretation. The growth of the modern administrative state (and lack of corresponding growth in the judiciary) makes such scrutiny generally impractical, but that does not mean that it is not attractive or, indeed, unwarranted, in at least some "important" cases. As described above, there may be no clear and principled way (or at least no easy way) to decide which cases deserve such additional scrutiny, but that does not necessarily mean they do not exist. Judges certainly seem to feel that they do, at least in some rare cases.

## 2. *Other Contexts in Which Judges Refuse to Decide*

To be sure, it is not unusual for judges to refrain from deciding questions of law in cases before them. Beyond the obvious example of standard *Chevron* cases, the simplest example is appellate review itself. Standards of review other than *de novo* require judges to preserve at least some decisions or interpretations of lower courts even if they disagree with them. Similarly, federal judges must generally abide by state courts'

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<sup>191</sup> The Honorable Antonin Scalia, *Judicial Deference to Administrative Interpretations of the Law*, 1989 DUKE L.J. 511 (1989).

interpretations of state law. These rules do not give way in “major” cases—so why should *Chevron*? Why would judges be able to restrain themselves in a context where the standard of review is, for example, substantial evidence rather than *de novo*, but not in a major questions case?

The answer may be that judges are more comfortable deferring to other judges, rather than to agencies. Put differently, there is no serious argument that standards of review and deference to other sovereigns’ courts is in tension with *Marbury*, unlike *Chevron* deference. Judges could hold this view for psychological reasons, driven by experience, tradition, or a sense of “comity.” Or they might frame their discomfort with deference to agencies in major cases in constitutional terms—under this view, Article III requires the judicial branch to decide major cases, but of course does not require that a particular Article III court decide every case or every component of every case.

If stated in constitutional terms, this looks most similar to the judicial version of the major questions doctrine as a non-delegation canon, discussed above. It is a weaker version of Justice Thomas’ view that Article III always requires judges to decide matters of law,<sup>192</sup> but applicable only in major cases. Major questions, under this view, demand greater fidelity to the Constitution’s separation of powers, perhaps because the philosophy and concerns motivating that separation are more salient in major cases, or perhaps simply because the public or other political actors demand that fidelity.

Another example of judges ceding authority is the political question doctrine, under which judges will refuse to decide certain questions they deem committed to other branches of government. Such questions, like major questions cases, are likely to be highly politically salient. One might ask why judges would be willing (indeed, sometimes eager) not to decide such political questions while at the same time being tempted, as I argue they are, to decide major questions of agency statutory interpretation? The answer cannot be, as for appellate review, that other judges are the decisionmakers—the point of the political question doctrine, like *Chevron*, is that non-judges get to decide.

One way to distinguish the political question doctrine is that it is arguably not a way to allocate decisionmaking authority over legal questions, but a mechanism for dividing legal from non-legal (i.e. political) questions. Even when delegated to agency authority, interpretation of regulatory statutes is unambiguously a legal act. The same is arguably not the case for a political question like the power to make war or impeach officials.<sup>193</sup> Put more simply, political questions are non-justiciable, while

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<sup>192</sup> *Michigan v. EPA*, 135 S. Ct. 2699 (2015) (Thomas, J. concurring).

<sup>193</sup> *Nixon v. United States*, 506 U.S. 224 (1993).

“major questions” are not. This also explains why judges might appear eager to avoid deciding political questions while being willing to decide major questions of statutory interpretation. Deciding political questions requires judges to decide when there is no law to apply, while deference on major questions requires them to refuse to decide when statutory text is ripe for interpretation.<sup>194</sup>

Therefore despite judges’ willingness to defer in everyday *Chevron* cases, appellate review, and political questions, tension and temptation to decide major questions of statutory interpretation may persist.

### 3. *Is the Doctrine Created by Judges, for the Public?*

Alternatively, it might not be the preferences of judges but those of other actors that drive judges to retain interpretive authority in major cases. Either the public at large or at political elites might demand that courts decide major questions. Failure to do so would threaten the legitimacy of courts, and particularly the Supreme Court.

Take *King*, for example. By the time the case reached oral argument at the Supreme Court, lively public debate had begun over a real statutory interpretation question—whether, in the context of the ACA, the words “Exchange established by the state” included federally-established exchanges. Statutory construction had broken out of chambers and law offices and onto cable news. At this point, the public looked to the Court to decide, not the agency. The Justices may have felt, consciously or unconsciously, that an opinion finding ambiguity in the statute and deferring to the agency’s interpretation would have been unsatisfying to the point that it would be viewed as an abdication of responsibility, at least in some quarters. The major questions doctrine gives the court an escape route—even if the substantive result is the same.

The idea that judges decide major questions because the public demands that they do so is in some tension with the standard view that agencies, under the ultimate control of Congress and the President, are more democratically accountable than unelected judges. *Chevron* is generally viewed as a pro-majoritarian doctrine,<sup>195</sup> making the major questions exception to it countermajoritarian. But if the public really does demand or expect judges to decide major cases, then this reading of

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<sup>194</sup> Another distinction is that political questions are usually if not always about Constitutional rather than statutory interpretation.

<sup>195</sup> See, e.g., Damien J. Marshall, *The Application of Chevron Deference in Regulatory Preemption Cases*, 87 GEO. L.J. 263, 267 (1998) (“The common thread through all of these interpretations is a preference for democratically accountable decisionmaking. At its core, *Chevron* concerns the Court’s aversion to judicial legislation and its preference for the formulation of policy decisions in the political branches. These concerns fit nicely within any constitutional framework, and are nearly irrefutable. *Chevron*’s majoritarian thesis highlights the ‘structural integrity’ of the decision, and its importance in maintaining legitimate lawmaking.”).

*Chevron* deference may not be accurate, at least in those major cases. The public may feel, consciously or culturally, that in major cases courts are more likely to enact their preferences. This could be because in major cases, attention focused on courts makes them more transparent than agency proceedings, without the same necessarily being true in interstitial cases which receive less attention. Or perhaps the public (or at least opinion-shaping elites) think Congress is more likely to remedy any countermajoritarian interpretive error in major cases than they are in interstitial cases, reducing the relative accountability advantage of agencies over courts. Or perhaps the public (or, again, elites) would rather courts decide fundamental or jurisdictional questions (like tobacco regulation or climate change) even if they think more interstitial and technocratic decisions are best left to agencies.

Alternatively, public demand for court rather than agencies might have nothing to do with majoritarian accountability, but instead might simply be a reflection of traditional roles. This might have constitutional dimensions, with Article III and the quasi-constitutional *Marbury* having become part of public consciousness, not lightly discarded in major cases where attention is focused.

#### 4. *Does Motivation Matter?*

Perhaps another analogy is useful. Interstitial cases in which *Chevron* deference applies are like off-broadway productions, the bread and butter of show business. Major questions cases are like Broadway premieres. The house is packed (the public), the orchestra is in tune (the legal community), and you had better believe that the star (judges), not the understudy (the agency), is going to sing the hit number. The cynical view is that the star takes the stage because ego demands it. The alternative is that the star does so because it's what the public, cast, and crew demand, or because it's what tradition dictates.

I should stress that I make no claim here about which of these explanations best match judges' inner motives. Answering that question is probably impossible. But in terms of the resulting doctrine the underlying motivation is not that important. The argument is simply that the major questions doctrine exists because judges are unwilling or unable to defer in major cases. When cases are perceived by judges to be important, or become the focus of public attention, particularly when narrow statutory text is at issue, those judges either cannot resist or feel compelled to decide them, not to defer to agencies.

#### C. *Necessity—Safety Valve or Fig Leaf?*

Even if this view is an accurate description of why the major questions doctrine exists, it's an at best incomplete argument for why the doctrine should be preserved. If, in the most cynical view, the doctrine is simply

judicial aggrandizement, it would be relatively easy to argue that it should be done away with.

However, it may be that the doctrine is necessary for *Chevron* itself to survive. This could be for either or both of two reasons. One is that the doctrine is a necessary safety valve. Take the view of *Brown & Williamson* in the previous subsection. If it is accurate to describe it as a case where the Court could not resist imposing its own interpretation of the statute, then of course the major questions doctrine was not the only way it could have done so. Instead, the Court could have overruled *Chevron*, or created some other doctrine that limited *Chevron* even more sharply than the major questions doctrine does. By using and reaffirming the major questions doctrine, the Court was able to limit its rejection of *Chevron* to “extraordinary cases.” To strain the metaphor even further, perhaps the major questions doctrine is the Court breaking an arm free of the mast, but no more.

The implication is that if the major questions doctrine were discarded, a future case of similarly great significance, thin statutory basis, or any other combination of factors that make it “extraordinary” (thereby tempting judges to withhold deference) would again put *Chevron* under threat. If this is right, then the major questions doctrine is a *Chevron* safety valve, relieving pressure in cases where the *Chevron-Marbury* tension is most salient.

The other view is that the major questions doctrine is a fig leaf. Take the view of *King* in the previous subsection. If it is accurate to describe that case as one in which the public, other governmental actors, or the Constitution demanded the court make an interpretive decision, then, again, the major questions doctrine was not the only way it could have done so. The court could have overruled or more sharply limited *Chevron*. Under this view, in “extraordinary cases” where the court is closely scrutinized, the doctrine hides *Chevron* from view, protecting it for use in the much more common interstitial cases.

The two necessity arguments are not mutually exclusive; in fact in many cases they may both exist. Truly “major” cases are likely to both tempt judges to refuse deference and implicate legitimacy concerns—in such cases, the major questions doctrine may be both a safety valve and a fig leaf.

If this fig leaf view is correct, then the major questions doctrine is not really an expression of “activist” judges aggrandizing interpretive authority for themselves, as a cynical reading might suggest. Instead, it is a judicially minimalist doctrine, doing only what is necessary to preserve *Chevron* in the face of “extraordinary” cases that expose the *Chevron-Marbury* tension.

Whichever explanation—safety valve or fig leaf—is more accurate (or whichever you prefer), the major questions doctrine protects *Chevron*

deference in the large majority of interstitial cases by operating in the “extraordinary” cases where the tension with *Marbury* is greatest.

Although *Chevron* deference has become a core administrative law doctrine, it is not immune to challenges, both direct and indirect. As discussed above, Justice Thomas would repeal or substantially constrain it. The major questions doctrine, and other “step zero” doctrines such as *Mead* (no deference on interpretations that do not carry the force of law),<sup>196</sup> are a result of judicial pushback. Moreover, judges need not overrule *Chevron* to undercut it. In the absence of the major questions doctrine, they could deny deference to agencies in major cases within *Chevron* by (as noted above) expanding the degree of ambiguity necessary to get beyond step one—in other words, judges might find plain meaning/no ambiguity where meaning is in fact under significant dispute, or expand step one to include more judicial tools of interpretation. In fact many of the major questions cases appear to do this, characterizing themselves as step one holdings.<sup>197</sup> Expanding step one, unlike application of the major questions doctrine, has spillover effects in interstitial cases.

These spillover risks seem significant. Agency interpretations of statutes are somewhat frequently rejected<sup>198</sup> because they run afoul of judges’ view of the plain meaning of the statute, ascertained by application of the “traditional tools of statutory interpretation.”<sup>199</sup> Since agencies lose on step one much more often than step two, arguments in *Chevron* cases usually focus on step one. Agency lawyers typically argue that statutory language is clear in their favor, or, failing that, is ambiguous and that therefore the agency is entitled to deference under *Chevron*. Lawyers for those challenging the agency typically argue that statutory language is incompatible with the agency’s interpretation and that therefore the agency should lose under step one. Both sides will cite previous decisions under *Chevron* with similar or at least analogous text at issue.

In this way, a body of precedent is built, governing the boundaries of interpretation that fall within or outside of step one’s boundaries. Each new decision in step one adds to this precedent. Therefore if judges are more aggressive in retaining interpretive authority in *Chevron* step one in major cases because of the factors and temptations discussed above, that has effects beyond the major case in question. Over time, the boundaries of step one could expand. Alternatively, if major questions cases are marked as distinct, this precedential impact is limited or not present at all. The major questions doctrine does this, separating extraordinary cases from the precedential mainstream.

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<sup>196</sup> *United States v. Mead Corp.*, 533 U.S. 218 (2001).

<sup>197</sup> *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

<sup>198</sup> Stats on *Chevron* step one rejections.

<sup>199</sup> *Chevron v. Nat. Res. Def. Council*, 467 U.S. 837 (1984).

The best example of such a possible expansion of step one is *Brown & Williamson*. In that case, the plain language of the statute appeared to favor the agency—tobacco seemed to fall within the definition of “drug” in the Food and Drug Act, and therefore be subject to regulation by the FDA.<sup>200</sup> But the Supreme Court rejected that interpretation, ostensibly under *Chevron* step one.<sup>201</sup> In other words, the Court ruled not just that the agency’s interpretation was not the best interpretation, but that the opposite reading (that the FDA could not regulate tobacco) was the only interpretation consistent with the statute.<sup>202</sup> Taken at face value, this risked eviscerating *Chevron*. If the Court could so readily conclude that its preferred interpretation was the only permissible reading of the statute under these circumstances, what was left of deference? *Brown & Williamson* has not had such an effect, however—*Chevron* survived and continues to thrive. The reason is the major questions doctrine, which an isolated reading of *Brown & Williamson* might interpret as dicta. Instead, the court’s identification of *Brown & Williamson* as an “extraordinary case” has allowed it to be easily distinguished in subsequent briefs and decisions. A legal argument against an agency interpretation of a statute whose closest parallel and best cite is *Brown & Williamson* would be quite weak—as evidenced by the majority’s rejection of such arguments in *Massachusetts v. EPA*.<sup>203</sup>

Put differently, if *Brown & Williamson* is a step one decision, it is probably the high water mark for judicial interventionism under *Chevron*. The fact that it remains an outlier is due to the majority opinion’s simultaneous creation of the major questions doctrine.

Similarly, judges unable to resort to the major questions doctrine might be tempted to deny deference under *Chevron* step two, on the grounds that the agency’s interpretation is not “reasonable” or “permissible.” Such step two decisions are currently quite rare. Even a small number of major questions cases could, without the doctrine to separate them from the step two precedential mainstream, therefore substantially shift doctrinal understanding of step two, reducing the scope of *Chevron* deference in many non-major cases.

Because judges could otherwise hide their interpretive preferences within the fuzzy boundaries of *Chevron* step one or step two, the major questions doctrine also promotes transparency. In major questions cases, judges are openly admitting to treating the case differently than *Chevron* would otherwise require. This sharply limits (perhaps eliminates) major

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<sup>200</sup> *FDA v. Brown & Williamson*, 529 U.S. 120.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Massachusetts v. EPA*, 549 U.S. 497, 530–32 (2007).

questions cases' precedential value in interstitial cases.<sup>204</sup>

Perhaps the simplest way to summarize the danger that “extraordinary” cases would present to *Chevron* were they not cabined off by the major questions doctrine is to say, with apologies to Oliver Wendell Holmes,<sup>205</sup> that major cases “make bad law.”

#### D. *Implications*

If the major questions doctrine's most redeeming function is to preserve *Chevron*, and in particular if it does so in minimalist fashion, then whether the doctrine is on net a good thing depends almost entirely on how one feels about *Chevron* itself. Because I share Sunstein's view that *Chevron* is likely to lead to better, more effective, and more accountable regulation, I therefore *disagree* with him on the value of the major questions doctrine. In my view, it is worth accepting the doctrine, flaws and all, even if only to minimize the long-term risk to *Chevron*, or the risk of unknown problems that might be caused by an alternative limiting principle.

On the other hand, some are skeptical of *Chevron*'s value, because they doubt that agency interpretations of law are likely to lead to better regulatory outcomes or because they believe Article III or other background principles require courts alone to interpret statutes (among other objections). Justice Thomas appears to hold this view. For these *Chevron* skeptics, the best view of the major questions view is less clear. A modest reaction is that if courts are better interpreters, then any doctrine that claws back some of *Marbury* from *Chevron* is a good thing.

A more ambitious view is that the major questions doctrine is an ungrounded exception to an ill-advised (or even unconstitutional) doctrine in *Chevron*. Keeping the major questions doctrine allows judges to avoid confronting *Chevron* when they should, in major cases that expose the *Chevron-Marbury* tension. Without it, judges would be forced to modify or overturn *Chevron*. In short, this argument goes, if you believe *Chevron* should be rejected, the first step is removing its safety valve. This position is strategic, not ideological, however, and may not be defensible in a judicial opinion. If judges hold this view it may be kept private, though of course commentators have greater freedom to advocate it.

Even if the major questions doctrine's is a valuable *Chevron* safety valve/fig leaf, that does not resolve all of the doctrine's critics' objections. Most notably, it does not give much if any guidance on drawing the line between major and interstitial cases—the distinction remains largely arbitrary. This problem is probably insoluble. But it should not be fatal.

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<sup>204</sup> *Massachusetts v. EPA*, 549 U.S. 497 (2007) (distinguishing *Brown & Williamson*).

<sup>205</sup> *Northern Sec. Co. v. United States*, 193 U.S. 197, 364 (1904).



Administrative law is full of standards masquerading as rules, many of which are applied inconsistently. Although admittedly circular, one view is that if a case is deemed a “major question,” then it is evidence that the doctrine was needed in that case as a *Chevron* safety valve. Alternatively, preserving *Chevron* may be worth not only accepting the major questions doctrine, but also accepting its uncertain boundaries—that is, accepting the risk that the doctrine will be applied to some cases that are not all that “major”, or will not be applied in every case where it should be to serve its safety valve role.

In theory, there is some risk that the major questions exception could someday swallow the *Chevron* rule if the bar for major questions is sufficiently lowered. If that were to occur, support for the doctrine among those who praise *Chevron* deference would clearly need to be reassessed. The limited number of major questions cases at the Supreme Court level in the roughly twenty-year history of the doctrine make that risk seem remote, at least today.

My view that the major questions doctrine is a safety valve for *Chevron* might or might not be characterized as a “legal realist” view. In one sense, it is not—the legal realists’ insight was to recognize that legal decisions may be (and often are) based on factors other than what would traditionally be called “law.” The major questions doctrine is the reverse—judges are reverting to traditional judicial analysis of legal texts rather than the “modern” approach of *Chevron* deference to agencies. Under this view, it is *Chevron*, not the major questions doctrine, that is “realist.”

But if one focuses not on the tools used by judges to make the substantive decision but rather on the meta-legal question of *who gets to decide*, one reaches a different conclusion.. If, as I suggest, it is judicial psychology, political forces, public opinion, institutional traditions, and other extra-legal factors driving judges decisions about who gets to interpret statutes in extraordinary cases, then indeed the major questions doctrine does look “realist” in a sense. Perhaps, therefore, the major questions doctrine is meta-realist.

#### E. *An Illustration—Chevron, Major Questions, and the Clean Power Plan*

Such labeling may not be all that illuminating. It’s perhaps more useful to illustrate how the major questions doctrine can shield *Chevron* in a specific example. EPA has been among the greatest agency beneficiaries of *Chevron* deference, especially under the Clean Air Act—starting of course with *Chevron* itself. At least in theory, *Chevron* has given the agency greater confidence that its interpretations of statutes will survive court challenge. Without deference, the outcome of challenges would be harder to predict (since it would depend to a greater degree on the panels drawn at the DC Circuit and the composition of the Supreme Court). This uncertainty would hurt not only EPA, but arguably also the public and

regulated industries. Unelected judges' views would be substituted for the expert views of the more politically accountable agency.

EPA critics, of course, might not share this view—for them, substituting judicial interpretations for the agency's might be a good thing. Moreover, *Chevron* deference has not always resulted in the agency's interpretation prevailing, with *Massachusetts* and the somewhat inconsistent line of cases regarding emissions trading under the “good neighbor” provisions (including *E.M.E. Homer City*) as perhaps the best examples. Nevertheless, let's stipulate for purposes of argument that deference has led to better regulatory outcomes, despite some arguably inconsistent application.

Finally, we can return to the Clean Power Plan. As discussed above, the regulation is sweeping in its reach, is based on a narrow statutory provision, and is highly politically controversial. The argument that it is a “major question” is quite strong. For the EPA and supporters of the Clean Power Plan, this is unwelcome—it reduces the likelihood that *Chevron* deference will be available to the agency. Judges may substitute their reading of §111(d) of the Clean Air Act for the agency's, even if the agency interpretation falls within what would otherwise be a permissible range.

One option is for EPA or amici to argue in a Clean Power Plan case that the major questions doctrine should be rejected, perhaps citing counterarguments made by Sunstein, Loshin & Nielson, and others. But even if this argument is successful it might not change the outcome of a Clean Power Plan case, and could create longer-term problems for the EPA and other agencies. The tensions between *Chevron* and *Marbury* would remain, and would likely find expression elsewhere. While overruling *Chevron* might seem unlikely, it is not impossible—Justice Thomas is not alone in his view that it should be overruled or at least sharply limited.

Alternatively, courts might react openly by substituting another “safety valve” doctrine for the major questions doctrine. For example, the Court could expand the *Mead* “force of law” exception or reopen debates over whether deference should apply to “jurisdictional” interpretations by agencies. Less openly, judges and justices might simply retain control by more aggressively asserting that their interpretations of statutes are unambiguously correct under *Chevron* step one.

Any of these reactions would be harmful to the EPA and other agencies not just in a Clean Power Plan case but in interstitial cases in which they would have previously been entitled to deference, or in which *Chevron* deference would have been more meaningful. In other words, killing the major questions doctrine could have the perverse effect of less deference to agencies overall, not more.

## F. *Some Counterarguments*

I suspect some readers will find this argument unsatisfying—shouldn't the major questions doctrine be able to stand on its own? And if it cannot be justified on its own merits, shouldn't we reject it? If that means exposing tensions underlying *Chevron*, so be it—those doctrinal tensions may fade over time, and if not, they can be addressed with new doctrines that address *Chevron*'s limitations without the flaws of the major questions doctrine. In short, shouldn't doctrine be in service to normative ends, or perhaps to Constitutional text? Shouldn't any doctrine that cannot be so justified be rejected?

This argument is rhetorically powerful, but I can offer two replies. The first is that there appears to be no way out of the contradictions imposed by *Chevron* and the major questions doctrine. It is of course possible that future scholars will offer new doctrinal rules that could meet the aims of the doctrine and/or make judges comfortable with deferring in “major” cases. But there are no obvious solutions now, and I suspect that will remain true—the contradictions and tensions discussed above appear fundamental. Maybe Congress could resolve the problem by specifying for each statute (or even each statutory provision) what degree of interpretive deference courts should afford to agencies. But this seems unlikely and impractical. Where statutory gaps will emerge, and how large they are, is often hard to know in advance (and if it were obvious, Congress would presumably fill them rather than making interpretive rules).

Second, dissatisfaction with my argument that the major questions doctrine is a *Chevron* safety valve based on a view that doctrines should stand on their own merits actually helps to prove the point. It illustrates the discomfort many lawyers feel with when doctrines are in tension and cannot be reconciled with each other or with any specific background rationale. Specifically, it is tempting to reject the major questions doctrine if it cannot be reconciled with *Chevron* or be justified on other grounds despite the inconsistency. Every previous account of the doctrine has reached one or the other of those two conclusions.

This temptation is not unlike that which judges appear to experience when confronted with major cases that highlight the tension between *Chevron* and *Marbury*. Their reaction, ironically, has been to add another layer of apparent inconsistency. This is not to suggest that their reasons for doing so are *only* psychological, but to the extent that legal psychology, instincts, and/or tradition are driving the major questions doctrine, similar factors may underlie dissatisfaction with an account that leaves the doctrine in tension with *Chevron*, unmoored to any normative justification of its own.

Another critique is that my description of and justification for the major questions doctrine is deeply cynical regarding the role and motivations of judges. It is possible, as I have noted above, to describe the

motivations of judges in creating the doctrine in quite cynical terms—that they cannot resist deciding interpretive questions in major cases, even when agency interpretations fall within *Chevron*'s zone of deference. But such a cynical view is not necessary. As described above, judges may instead feel that the Constitution requires them to decide major cases, or that the public or other political actors demand that they do so. If judges are using the major questions doctrine to fulfill constitutional requirements and preserve the court's legitimacy, it is much harder to criticize their motivations.

Moreover, even if the view of the major questions doctrine I suggest here is somewhat cynical, it is in good company in the field. Critics of *Chevron* have long been quite critical of agencies' ability to interpret law and make effective regulatory policy, while proponents of *Chevron* have derided courts for their lack of accountability and expertise relative to agencies. Suggesting that judges may give in to temptation in major questions cases seems like a mild rebuff compared to some of these institutional competence claims.

#### CONCLUSIONS

Despite the relative rarity of its invocation by the Supreme Court, and premature accounts of its death, the major questions doctrine appears to alive and well, and an important component of administrative law. *King v. Burwell*, and to a lesser extent *UARG v. EPA*, make that clear.

Future litigation over the Clean Power Plan appears quite likely to result in another invocation of the doctrine. But as *King* illustrates, invocation of the doctrine would not decide the outcome of the case. It is possible to imagine another opinion, perhaps written by the Chief Justice or by Justice Kennedy, in a narrowly decided Clean Power Plan case that denies *Chevron* deference but preserves all or most of the Clean Power Plan, much as *King* did for the Affordable Care Act. Alternatively, the doctrine might give those Justices skeptical of EPA regulation of greenhouse gases the tool to attract the fifth vote they lacked in the more abstract context of *Massachusetts*, where the agency also had greater textual support.

Many, whether proponents of the Clean Power Plan specifically or of *Chevron* and deference to agencies instead of judges generally, will find this troubling. If one shares those preferences, the concerns are real. The major questions doctrine arguably serves no normative purpose on its own—alone, it likely does not lead to better or more efficient regulation, prod Congress to write better statutes, or protect policy debate from interference. Despite identifying common factors in past major questions cases here, it remains difficult to predict when it will be applied.

The death of Justice Scalia in early 2016 may result in an ideological shift on the Court, with possible implications for the outcome of Clean

Power Plan litigation. But there is little evidence that his passing will lead to a doctrinal shift on the Court away from the major questions doctrine. Although Justice Scalia voted for the majority in each of the most significant major questions cases (*Brown & Williamson*, *MCI v. AT&T*, and *King v. Burwell*), he only authored the one of these, *MCI*. In fact, every justice currently on the court except Justice Alito has joined a majority opinion explicitly setting aside *Chevron* deference on major questions grounds, and Justice Alito joined Justice Thomas' dissent in *King* which expressed skepticism about *Chevron* deference going well beyond the major questions doctrine.<sup>206</sup> Justice Scalia's influence in creating and promoting the "elephants in mouseholes" interpretive canon is significant, of course, but as discussed above other justices across the ideological spectrum have cited the principle. To be sure, the major questions doctrine is grounded at least in part in skepticism regarding the administrative state, and a new justice's skepticism will not likely match Scalia's. But at most this will only affect the frequency with which the doctrine is invoked, not its fundamental viability. After *King*, the major questions doctrine appears to be a well-established part of Court doctrine. Justices may dispute whether it should be applied in a given case, but none, whatever their view on agency authority in general, are on record disputing the validity or wisdom of the doctrine itself.

The doctrine is especially relevant in an era when polarization and other political factors make Congress unwilling or unable to pass substantial new legislation (or, in fact, to confirm a replacement Supreme Court justice). Gaps and ambiguities within existing laws remain unaddressed and must be interpreted by agencies. Old statutes that might otherwise be updated or replaced are used for new purposes. And any interpretive errors by agencies or courts are unlikely to be repaired by Congress. If one is skeptical of the doctrine, therefore, then its dangers seem particularly acute today.

Nevertheless, rejecting the doctrine will not, I believe, lead to better long-term regulatory outcomes. The existence of the major questions doctrine, the way it is described by judges in the cases, and other evidence strongly suggest that judges are unwilling or unable to concede interpretive authority in "extraordinary" cases. Whether this is due to tradition, training, public demand, *Marbury*, Article III, ego, or other motives is unclear, and difficult if not impossible to determine. The reason is likely different for each judge (and it is unlikely that every judge feels so constrained). But the reason is not so important as the apparent fact that

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<sup>206</sup> See *King v. Burwell*, 135 S. Ct. 2480 (2015) (Chief Justice Roberts was joined by Justices Kennedy, Ginsburg, Sotomayor, Breyer, and Kagan.). See also *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (Justice Thomas and Justice Kennedy also joined Justice O'Connor's majority opinion.).

judges seem to feel compelled to decide major cases. If the major questions doctrine did not exist, it would have to be invented.

Similarly, if the doctrine were rejected by the Court, the motivations behind it would likely find other expression. That outcome could be worse than the current doctrine. Faced with high-profile and economically or socially significant cases, judges would still strain to interpret statutes themselves, rather than delegating authority to agencies. At best, this could result in inconsistent and indefensible *Chevron* opinions, with judges claiming statutory language is clear and unambiguous despite multiple plausible interpretations. At worst, *Chevron* could be overturned or sharply constrained (as at least one Justice has advocated).

This risk is not worth any gains in regulatory quality, accountability, or predictability that might be temporarily gained by rejecting the major questions doctrine. Assuming it retains roughly its current reach, the doctrine should be accepted as a necessary safety valve.

The only possible complete solution to these problems appears to be in the hands of Congress, which ultimately controls the delegation of interpretive authority (perhaps subject to Article III limits). But Congress shows no indication of including interpretive-allocating provisions in new statutes, much less reopening old ones.