

The Ghosts of Chevron Present and Future

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Abstract

In the October 2021 term, the Supreme Court decided six cases involving federal agency interpretations of statutes, at least five of which seemingly implicated the Chevron doctrine and several of which explicitly turned on applications of Chevron in the lower courts. But while the Chevron doctrine has dominated federal administrative law for nearly four decades, not a single majority opinion during the term even cited Chevron. Three of those cases formalized the so-called “major questions” doctrine, which functions essentially as an anti-Chevron doctrine by requiring clear congressional statements of authority to justify agency action on matters of great legal and policy significance. Where does the Chevron doctrine now stand?

I take a close look at the six Supreme Court cases decided during the October 2021 term, including a close look at the arguments advanced by the parties (and by sometimes numerous amici) in those cases to provide a descriptive account of the Supreme Court’s current treatment of Chevron and the major questions doctrine. My principal goal is to not to lay out a Grand Theory of Chevron or deference doctrine in general but simply to provide a snapshot of current Supreme Court doctrine and a framework for further theoretical work, in whatever direction that theoretical work goes.

I do, however, offer some speculations, for whatever they are worth, about the future of Chevron in the lower federal courts. The Supreme Court did not create the Chevron doctrine. The

doctrine was created by lower courts and eventually taken over, and modified, by the Supreme Court. If lower courts originally created the doctrine (as I think they did) principally to make it easier to decide difficult administrative law cases, any reformations in doctrine that come from the Supreme Court may face a hostile reception unless the Court provides alternative mechanisms for decision that respond to the realities, not of a Court with a discretionary docket that decides a small handful of administrative law cases each year, but of a lower court system that must handle these cases by the thousands.

For nearly four decades, the *Chevron* doctrine – so named for the Supreme Court’s 1984 decision, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,¹ which inspired the doctrine² – has been the overwhelming presence in federal administrative law in both the courts and the academy. The doctrine’s two-step formulation for reviewing a federal agency’s interpretation of a statute that it administers³ has become a mantra, even as the doctrine itself has

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¹ 467 U.S. 837 (1984).

² The verb “inspired” is deliberately chosen. The *Chevron* decision did not *create* the *Chevron* doctrine but simply provided the foundation for a doctrine that was created by lower federal courts and then ratified by the Supreme Court many years later. *See infra* --. For the full story, which traces the development of the *Chevron* doctrine case by case through the lower courts, see Gary Lawson & Steven Kam, *Making Law Out of Nothing at All: The Origins of the Chevron Doctrine*, 65 ADMIN. L. REV. 1 (2013).

³ *See* 467 U.S. at 842-43. I am assuming that anyone reading this article knows more about the *Chevron* doctrine than they would prefer to know, so this article, which is already too long, does not contain the sometimes-seemingly-obligatory summary of the doctrine. For a short refresher, if one is needed, see GARY LAWSON & GUY SEIDMAN, DEFERENCE: THE LEGAL CONCEPT AND THE LEGAL PRACTICE 25-34 (2019).

added steps⁴ and half-steps⁵ reminiscent of epicycles. The *Chevron* case, whose language (surely unintentionally⁶) provides the mantra, is the most cited case in administrative law.⁷ A simple check of citing references on WESTLAW on September 14, 2022 shows more than 18,000 citations to *Chevron* in judicial decisions and more than 21,000 citations in secondary sources.

But while lower-court judges and academics love to use, cite, discuss, and sometimes criticize *Chevron*, the United States Supreme Court has other ideas. In the October 2021 term of the Supreme Court, no majority opinion even cited, much less relied upon, *Chevron*. Only one dissenting opinion bothered to mention *Chevron*,⁸ and one concurring opinion used it for a proposition stating nearly the opposite of the mantra with which the decision is associated.⁹ This conspicuous silence about the *Chevron* doctrine was not for lack of opportunity to discuss it; cases abounded that term in which the principal issue was a federal agency's interpretation of its organic statute.¹⁰ In some of those cases, the proper application of *Chevron* was *the* principal issue decided by the lower courts.

⁴ Tom Merrill and Kristin Hickman coined the term “step zero” to describe the numerous doctrines governing *when* the *Chevron* two-step framework should be applied. See Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 836 (2001).

⁵ See Daniel J. Hemel & Aaron L. Nielson, *Chevron Step One-and-a-Half*, 84 U. CHI. L. REV. 847 (2017).

⁶ We know with as much certainty as we can know anything in the law that the Supreme Court in 1984 thought that it was simply applying settled doctrine in deciding the *Chevron* case. No justice or party in *Chevron* showed any indication that large questions of interpretative methodology were at stake. See THOMAS W. MERRILL, *THE CHEVRON DOCTRINE: ITS RISE AND FALL, AND THE FUTURE OF THE ADMINISTRATIVE STATE* 63-65, 74-79 (2022).

⁷ See Thomas W. Merrill, *Justice Stevens and the Chevron Puzzle*, 106 NW. U.L. REV. 551, 551-53 (2012).

⁸ See *West Virginia v. EPA*, 142 S. Ct. 2587, 2635 (2022) (Kagan, J., dissenting).

⁹ See *Wooden v. United States*, 142 S. Ct. 1063, 1075 (2022) (Kavanaugh, J., concurring).

¹⁰ See *infra* --.

Careful observers were not at all surprised by the Court's performance. It is conventional wisdom that the Supreme Court has not resolved a case through reliance on *Chevron* since 2016¹¹ – and, as I will demonstrate shortly,¹² even that case did not actually rely on the *Chevron* doctrine in any meaningful sense. Professor Tom Merrill, one of the legal academy's most astute observers, in a comprehensive book discussing the *Chevron* doctrine that was published in 2022 but written before the October 2021 term, described the state of affairs as of 2021 as “the Court's de facto moratorium on applying the doctrine.”¹³ If Professor Merrill's book did not directly predict the events of the October 2021 term,¹⁴ it certainly anticipated them.

The Court's pointed silence about *Chevron* might have been a blessing, or at least a stay of execution, for advocates of the *Chevron* doctrine. Sensing blood, a number of parties in the October 2021 term openly called for the Court to overrule *Chevron*.¹⁵ The Court did not accept the invitation. Instead, the Court seems to have chosen a combination of limiting doctrines, most notably the formalization and extension of the so-called “major questions” doctrine,¹⁶ and not-so-benign neglect as an alternative to direct overruling, but the message is very clear: Rely on *Chevron* in the Supreme Court at your peril.

¹¹ See Nathan Richardson, *Deference is Dead (Long Live Chevron)*, 73 RUTGERS U.L. REV. 441, 487 (2021). To be sure, the Court's use of *Chevron* even before 2016 was spotty at best. See William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083 (2008); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 982 (1992) (“*Chevron* . . . has been used . . . only about one-third of the [time].”). But recent years have taken matters from “spotty” to “nonexistent.”

¹² See *infra* --.

¹³ MERRILL, *supra* note 6, at 8.

¹⁴ It came darned close. See *id.* at 7-8 (“A decision by the Court to overrule the *Chevron* doctrine seems unlikely Much more likely is a decision (or series of decisions) adopting new limits on the doctrine”).

¹⁵ See *infra* --.

¹⁶ See *infra* --.

So, is *Chevron* now just a ghost? Not so fast. Perhaps it is premature to put *Chevron* on the cart (switching references from Dickens to Monty Python). Maybe *Chevron* is just mostly dead (if one prefers William Goldman). And perhaps *Chevron* is very much alive, if one looks in the right places.

Chevron may not be a winning citation in the Supreme Court right now, but the Supreme Court decides only a handful of cases involving agency statutory interpretation each year. The vast majority of such federal cases are decided in the lower courts, and it is far from clear that *Chevron* in the lower courts is dead, or even wounded.¹⁷ Administrative law practitioners abandon *Chevron* at their peril.

In any event, the October 2021 term gives everyone interested in administrative law something to think about. Part I of this article very briefly sets the context regarding the *Chevron* doctrine leading into the October 2021 term. Part II examines in some depth, and at regrettable but I think unavoidable length, the events during the October 2021 Supreme Court term, which seem to herald the all-but-formal abandonment of *Chevron* in that forum. I examine not just the Court's decisions but also the arguments fashioned by the parties (and often numerous amici) and employed by the lower courts. I give particular, though by no means exclusive, attention to the so-called "major questions" doctrine that dominated much of the Court's docket. Because the cases said so little about *Chevron*, it is hard to draw firm conclusions from them, beyond the observation that the Supreme Court does not employ the doctrine. Accordingly, throughout the discussion in Part II, I do not seek to draw many conclusions but simply let the events of the term speak for themselves. Part III then tries to draw at least a few lessons from those cases and offers

¹⁷ Indeed, Kent Barnett and Christopher Walker have coined the terms "*Chevron* Regular" and "*Chevron* Supreme" to capture the enormous difference between the *Chevron*'s treatment by the lower courts and the Supreme Court. See Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 6 (2017).

some tentative predictions about the future of *Chevron*, including its future in the lower federal courts, though we will not really know how those courts will respond to the Supreme Court's recent case law for some time.

My bottom line is that predicting *Chevron*'s demise, or even its substantial reformation, may be hazardous. The *Chevron* doctrine was a doctrine invented by lower federal courts for lower federal courts. It has very different effects, and plays a very different role, in the kinds of cases that wind up on the Supreme Court's discretionary docket than it does in the numerous routine cases that will never generate a certiorari petition, much less a grant. *Chevron* fills a long-felt need, and it may well survive even the broadsides fired by the Court until and unless the Court gives the lower courts something to take its place that responds equally well to the forces that spawned the *Chevron* doctrine back in the mid-1980s. The major questions doctrine, in particular, is likely to take *Chevron* off the board in only a tiny fraction of the cases that reach the federal courts. The real action going forward will lie in what happens in the minor questions cases.

I

By 1987, three years after the Supreme Court's *Chevron* decision, *Chevron* was the dominant (though not yet exclusive) approach in the lower federal courts to handling judicial review of a large class of federal agency statutory interpretations.¹⁸ By the early 1990s it had taken hold firmly in the lower courts and at least formally in the Supreme Court.¹⁹ While the *Chevron* doctrine started out as a seemingly simple two-step inquiry into the clarity of a statute (go with the

¹⁸ See Lawson & Kam, *supra* note 2, at --.

¹⁹ Again, for the full story, see *id.*

statute's clear meaning if it has one) and the reasonableness of the agency's interpretation in the face of ambiguity (go with the agency's interpretation if it reasonably construes an ambiguous statute), the doctrine grew more complex over time. In particular, courts developed a Byzantine assortment of threshold conditions for application of *Chevron*, dubbed "step zero" in 2001 in a seminal article co-authored by Professors Tom Merrill and Kristin Hickman.²⁰

From the earliest days of *Chevron*, and well before, there was specifically the question whether the *character* or *significance* of the issue addressed by the agency would or should affect the extent to which courts would grant agencies deference in statutory interpretation. For example, a series of cases nearly half a century before *Chevron* posed this question starkly. In 1944 in *NLRB v. Hearst*,²¹ the Court upheld the National Labor Relations Board's definition of an "employee"²² in the Wagner Act because it had "a reasonable basis in law."²³ Three years later, *Packard Motor Car Co. v. NLRB*²⁴ declined to grant deference to the NLRB's definition of an "employee" in the same statute in circumstances seemingly similar to those in *Hearst*.²⁵ One prominent explanation for the decisions was that "in *Hearst* the Justices . . . did not regard the classification as raising a significant legal issue. In *Packard* they did."²⁶

²⁰ See Merrill & Hickman, *supra* note 4. For a summary of some of the most important of those doctrines, see GARY LAWSON, *FEDERAL ADMINISTRATIVE LAW* 635-98 (9th ed. 2022)..

²¹ 322 U.S. 111 (1944).

²² 29 U.S.C. § 152(3) (2018).

²³ 322 U.S. at 131.

²⁴ 330 U.S. 485 (1947).

²⁵ For a comparison of the two cases, see LAWSON, *supra* note 19, at 604-08.

²⁶ LOUIS B. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 561 (1965).

In 1986, while the *Chevron* doctrine was still forming, then-Judge (and, most importantly, former Administrative Law professor) Stephen Breyer offered the same explanation for those cases²⁷ and described the importance of the statutory question as a factor with “institutional virtues”²⁸ in allocating decisional authority between agencies and courts. By 2006, there were enough post-*Chevron* cases at least hinting that the importance of a statutory issue could be a factor in a deference analysis so that Professor Cass Sunstein could speak of “The Major Question Trilogy.”²⁹ Soon thereafter a vibrant literature emerged discussing this “major questions” doctrine.³⁰

For some years, I was dubious that any such “doctrine” existed because I believed, and was unwise enough to put in print, that “all of the relevant cases can better be explained on more mundane grounds without positing a free-floating but unstated ‘major issues’ inquiry.”³¹ Even more unwisely, I put that thought in print just as the inquiry moved from “unstated” to “all-but-stated” in *King v. Burwell*,³² in which the Court affirmed an agency decision saying that “an Exchange established by a State”³³ included exchanges established by the federal government.

²⁷ See Hon. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 371 (1986) (“*Packard* (the ‘foreman/employee’ case) . . . presented a legal question of great importance . . . [I]t seems unlikely that Congress wished to leave so important and delicate a legal question to the Board to decide.”).

²⁸ *Id.*

²⁹ Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 236 (2006). The three cases in his trilogy were *MCI Telecommunications Corp. v. AT & T*, 512 U.S. 218 (1994); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); and *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). Professor Sunstein concedes that reading the first two cases as generating a major questions doctrine is perhaps an “overreaction.” *Chevron Step Zero*, at 240.

³⁰ See, e.g., 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 (2008).

³¹ GARY LAWSON, *FEDERAL ADMINISTRATIVE LAW* 673 (7th ed. 2016).

³² 576 U.S. 473 (2015).

³³ 26 U.S.C. § 36B(b) (2018).

The Court specifically declined to apply *Chevron* to that question, even though it ultimately agreed with the agency's interpretation, in large measure because of the importance of the underlying statutory issue:

When analyzing an agency's interpretation of a statute, we often apply the two-step framework announcing 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 [Affordable Care] 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 the statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly.³⁴

Thus, as we approached the present time circa 2021, it was clear that something called a "major questions doctrine" had some relationship to *Chevron*, though the precise nature of that relationship was obscure.

It was also clear circa 2021 that *Chevron*'s entire future was in question. In 2015, Justice Clarence Thomas suggested that *Chevron* was unconstitutional.³⁵ In 2016, then-Judge Neil

³⁴ 576 U.S. at 485-86 (citations omitted).

³⁵ See *Michigan v. EPA*, 576 U.S. 743, 760 (2015) (Thomas, J., concurring).

Gorsuch authored a scathing diatribe against *Chevron*³⁶ and then-Judge Brett Kavanaugh wrote in a law review article that “*Chevron* is nothing more than a judicially orchestrated shift of power from Congress to the Executive Branch.”³⁷ Chief Justice John Roberts and Justice Sam Alito, while not directly questioning *Chevron*, had in 2013 vigorously insisted that courts could not apply *Chevron* without first determining, *de novo*, that “Congress has conferred on the agency interpretive authority over the question at issue.”³⁸ That looks like a clear majority of the current Court that for some years has been, at a minimum, skeptical of a broad application of *Chevron*.

Indeed, it is no great secret that *Chevron* has been on the wane in the Supreme Court for quite a while now. By the independent reckoning of myself, Professor Merrill,³⁹ and others,⁴⁰ the Supreme Court last upheld an agency decision by invoking the *Chevron* doctrine in 2016 in *Cuozzo Speed Technologies, LLC v. Lee*.⁴¹ And even in that case, it was far from clear that *Chevron* drove the decision.

In *Cuozzo Speed Technologies*, the Patent Office had issued a regulation prescribing that, in inter partes review proceedings for challenging the validity of issued patents,⁴² the challenged

³⁶ See *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1151-58 ((10th Cir. 2016) (Gorsuch, J., concurring).

³⁷ Brett M. Kavanaugh, *Book Review*, 129 HARV. L. REV. 2118, 2150 (2016).

³⁸ *City of Arlington, Texas v. FCD*, 569 U.S. 290, 312 (2013) (Roberts, C.J., dissenting).

³⁹ See MERRILL, *supra* note 6, at 7 n27.

⁴⁰ See Richardson, *supra* note 11.

⁴¹ 579 U.S. 261 (2016).

⁴² Inter partes review, in which patents can be invalidated by executive Patent and Trial Appeal Board officers rather than Article III courts, was created in 2011 by the America Invents Act. See Pub. L. No. 112-29, 125 Stat. 284 (2011) (codified in scattered sections of 28 and 35 U.S.C. 2018). The Court on several occasions has addressed constitutional issues arising from this scheme. See *United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021) (appointments clause); *Oil States Energy Services, LLC v. Greene’s Energy Group, LLC*, 138 S. Ct. 1365 (2018) (seventh amendment). For my thoughts on some of the constitutional issues that the Court has missed or mis-analyzed, see Gary Lawson, *Appointments and Illegal Adjudication: The America Invents Act through a Constitutional Lens*, 26 GEO. MASON U. L. REV. 26 (2018).

patent must be given “its broadest reasonable construction in light of the specification of the patent in which it appears.”⁴³ The Court framed its inquiry into the validity of this regulation in terms of *Chevron*:

We interpret Congress' grant of rulemaking authority in light of our decision in *Chevron, U.S.A. Inc.*, 467 U.S. 837. Where a statute is clear, the agency must follow the statute. But where a statute leaves a “gap” or is “ ambig[u]ous,” we typically interpret it as granting the agency leeway to enact rules that are reasonable in light of the text, nature, and purpose of the statute. The statute contains such a gap: No statutory provision unambiguously directs the agency to use one standard or the other.⁴⁴

The underlying statute, however, was merely a general rulemaking authorization to the agency to “prescribe regulations . . . establishing and governing inter partes review under this chapter.”⁴⁵ The agency obviously was not “interpreting” this statutory provision when it issued its claim construction rule. “If so, which words in that provision was it interpreting?”⁴⁶ Rather, the agency was making policy under a straightforward subdelegation of authority. The decision to choose one claim construction norm (broadest possible construction) over another (the claim construction norms generally used by district courts) is not in this instance the resolution of a statutory

⁴³ 37 C.F.R. § 42.100(b) (2015). This claim construction standard for inter partes review was changed in 2018 to conform to the standard used in court proceedings. See *Changes to the Claim Construction Standard for Interpreting Claims in Trial Proceedings Before the Patent Trial and Appeal Board*, 81 Fed. Reg. 51340 (2018). The current rule says that claims “shall be construed using the same claim construction standard that would be used to construe the claim in a civil action under 35 U.S.C. 282(b), including construing the claim in accordance with the ordinary and customary meaning of such claim as understood by one of ordinary skill in the art and the prosecution history pertaining to the patent.” 37 C.F.R. § 42.100(b) (2022).

⁴⁴ 579 U.S. at 276-77 (citations omitted).

⁴⁵ 35 U.S.C. § 316(a)(4)(2018).

⁴⁶ LAWSON, *supra* not 19, at 902.

ambiguity. It is a direct policy determination under a statute that grants power without prescribing constraints or criteria for its exercise. As such, the proper standard of review is whether the agency's policy choice was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."⁴⁷ Justice Thomas made this explicit in his concurring opinion,⁴⁸ and the Court's analysis of the question looks much more like garden-variety "hard look" arbitrary or capricious review than an exercise in statutory interpretation:

We conclude that the regulation represents a reasonable exercise of the rulemaking authority that Congress delegated to the Patent Office. For one thing, construing a patent claim according to its broadest reasonable construction helps to protect the public. A reasonable, yet unlawfully broad claim might discourage the use of the invention by a member of the public. Because an examiner's (or reexaminer's) use of the broadest reasonable construction standard increases the possibility that the examiner will find the claim too broad (and deny it), use of that standard encourages the applicant to draft narrowly. This helps ensure precision while avoiding overly broad claims, and thereby helps prevent a patent from tying up too much knowledge, while helping members of the public draw useful information from the disclosed invention and better understand the lawful limits of the claim.

For another, past practice supports the Patent Office's regulation

. . . .

⁴⁷ 5 U.S.C. § 706(2)(E) (2022).

⁴⁸ See 579 U.S. at 286-87 (Thomas, J., concurring).

. . . Cuozzo and its supporting *amici* offer various policy arguments in favor of the ordinary meaning standard. The Patent Office is legally free to accept or reject such policy arguments on the basis of its own reasoned analysis. Having concluded that the Patent Office's regulation, selecting the broadest reasonable construction standard, is reasonable in light of the rationales described above, we do not decide whether there is a better alternative as a policy matter. That is a question that Congress left to the particular expertise of the Patent Office.⁴⁹

Thus, even in the most recent Supreme Court case to “apply” *Chevron*, it is doubtful whether *Chevron* was actually doing, or could conceivably have done, any work. The *Cuozzo Speed Technologies* opinion could, and probably should, have been written without any reference to *Chevron*.

The October 2021 term, as we will see in detail in Part II, saw an even more dramatic and explicit shift on the Court, and in the broader legal community, away from *Chevron*. On multiple occasions, parties and/or amici formally asked the Court to overrule *Chevron*.⁵⁰ The most intriguing occasion came during the oral argument in *American Hospital Association v. Becerra*⁵¹ when former Solicitor General Donald Verrilli was effectively urged by Justice Alito to ask that *Chevron* be overruled. The brief for American Hospital Association criticized *Chevron* but did not directly ask for the case to be overruled, arguing instead that “[b]ecause the statute is unambiguous, *Chevron* has no role to play.”⁵² At oral argument, Justice Alito asked Mr. Verrilli:

⁴⁹ See 579 U.S. at 280-81, 283 (citations omitted).

⁵⁰ See, e.g., Pet. for Writ of Certiorari, *Buffington v. McDonough*, No. 21-972, 2022 WL 72897; note 71, *infra*.

⁵¹ 142 S. Ct. 1896 (2022). For more on the case, see *infra* --.

⁵² Brief for the Petitioners, *American Hospital Ass’n*, No. 20-1114, at 47, 2021 WL 4081077. Numerous amici directly asked the Court to overrule *Chevron*. See Brief of Amicus Curiae Americans for Prosperity Foundation in Support of Neither Party, *American Hospital Ass’n*, No-20-1114, 2021 WL 4173461; Amicus Curiae Brief for the

“If the only way we can reverse the D.C. Circuit is to overrule *Chevron*, do you want us to overrule *Chevron*?”⁵³ What could Mr. Verrilli do with that but respond: “Yes. We want to win the case. Yes. (Laughter.)”⁵⁴

While the Court rejected the agency’s statutory interpretation in *American Hospital Association*, it did not do so by overruling *Chevron*. Instead, it decided the case without even mentioning *Chevron*.⁵⁵ Nor was that the only case in which an agency interpretation was rejected with no mention of *Chevron*. Indeed, in the entire 2022 term, *Chevron* was not cited in a single majority opinion of the Court. It was cited as authoritative in one dissenting opinion⁵⁶ and cited in one concurring opinion for the decidedly anti-deference proposition that statutory interpretation usually has a right answer.⁵⁷ Part II explores in detail how that conspicuous disregard of *Chevron* played out in various contexts. The story, however, actually began just before the start of the October 2021 term.

Congress’s first major piece of legislation dealing with COVID – the Coronavirus Aid, Relief, and Economic Security Act⁵⁸ -- included a provision imposing a 120-day moratorium on

National Right to Work Legal Defense Foundation, Inc. in Support of Petitioners, *American Hospital Ass’n*, No. 20-1114, 2021 WL 4219252; Brief of the New Civil Liberties Alliance as Amicus Curiae in Support of Petitioners, *American Hospital Ass’n*, No. 20-1114, 2021 WL 4219283; Brief Amicus Curiae of Pacific Legal Foundation in Support of Petitioners, *American Hospital Ass’n*, No. 20-1114, 2021 WL 4135099

⁵³ Tr. of Oral Argument at 30, *American Hospital Ass’n*, No. 20-1114.

⁵⁴ *Id.* at 30-31.

⁵⁵ *See infra* --.

⁵⁶ *See* *West Virginia v. EPA*, 142 S. Ct. 2587, 2635 (2022) (Kagan, J., dissenting).

⁵⁷ *See* *Wooden v. United States*, 142 S. Ct. 1063, 1075 (2022) (Kavanaugh, J., concurring) (citing *Chevron*’s footnote 9 explaining that courts are the final authority on statutory interpretation and that the will of Congress must be honored).

⁵⁸ Pub. L. No. 116-136, 134 Stat. 281 (2020).

residential evictions in housing receiving federal funds.⁵⁹ After that moratorium expired, the Centers for Disease Control (“CDC”) imposed, on its own authority, a much broader moratorium that applied without regard to receipt of federal funds.⁶⁰ The agency relied⁶¹ on a 1944 statute⁶² providing:

The Surgeon General, with the approval of the Secretary [of Health and Human Services], is authorized to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession. For purposes of carrying out and enforcing such regulations, the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary.⁶³

In 2020, the CDC⁶⁴ argued that persons evicted from rental housing might travel to other States or end up in denser living environments, so that a ban on evictions was “necessary

⁵⁹ See *id.* § 4024, 134 Stat. at 492-94. There was also a mortgage-foreclosure moratorium. See *id.* §§ 4022-23, 134 Stat. at 490-92.

⁶⁰ See *Temporary Halt in Residential Evictions To Prevent the Further Spread of COVID-19*, 85 Fed. Reg. 55,292 (2020).

⁶¹ See *id.* at 55, 293.

⁶² Public Health Service Act, Pub. L. No. 78-410, § 361, 58 Stat. 682, 703 (1944).

⁶³ 42 U.S.C. § 264(a) (2018).

⁶⁴ In 2000, the authority under this statute was subdelegated to the CDC. See *Control of Communicable Diseases; Apprehension and Detention of Persons With Specific Diseases; Transfer of Regulations*, 65 Fed. Reg. 49,906 (2000) (codified at 42 C.F.R. § 70.2 (2022)).

to prevent the . . . spread of communicable diseases.”⁶⁵ Suits from landlords quickly followed.

The district court ruled that the CDC had exceeded its authority.⁶⁶ The government argued for *Chevron* deference,⁶⁷ and the district court agreed that the case presented an obvious application of *Chevron*.⁶⁸ The court, however, concluded that section 264 addressed, in *Chevron* lingo, “the precise question at issue”⁶⁹ by limiting the CDC’s authority to actions that at least resemble those enumerated in the second sentence of section 264: “inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings.” The court’s lengthy⁷⁰ *Chevron* step-one analysis also invoked canons of construction, such as the canon against surplusage, the avoidance canon, and the “major questions” canon.⁷¹ The court thus treated the so-called “major questions” doctrine as a tool of interpretation to be employed as part of a *Chevron* step-one inquiry, not as a precondition to application of the *Chevron* framework. The bottom line was that “the Public Health Service Act authorizes the Department to combat the spread of

⁶⁵ See 85 Fed. Reg. at 55,294-95 (“Evicted renters must move, which leads to multiple outcomes that increase the risk of COVID-19 spread. Specifically, many evicted renters move into close quarters in shared housing or other congregate settings . . . [M]ass evictions would likely increase the interstate spread of COVID-19.”).

⁶⁶ *Alabama Ass’n of Realtors v. U.S. Dep’t of Health & Human Services*, 539 F.Supp.3d 29 (D.D.C. 2021).

⁶⁷ See *id.* at 37 (“In determining whether the eviction moratorium in the CDC Order exceeds the Department’s statutory authority, the Department urges the Court to apply the familiar two-step *Chevron* framework. See Defs.’ Mot. for Summ. J. (‘Def.’s Cross-Mot’) at 8 (citing *Chevron, U.S.A., Inc. v. Nat’l Res. Def. Council, Inc.*, 467 U.S. 837, 842(1984)”).

⁶⁸ See *id.* at 38.

⁶⁹ 467 U.S. at 842.

⁷⁰ The discussion covers sixteen substantial paragraphs. See 539 F.Supp.3d at 38-42.

⁷¹ See *id.* at 40-41.

disease through a range of measures, but these measures *plainly* do not encompass the nationwide eviction moratorium set forth in the CDC Order.”⁷² That is unambiguously a decision under *Chevron* step one, in which the major questions doctrine plays a minor supporting role.

Despite granting summary judgment against the government, the court stayed its judgment pending appeal,⁷³ and the D.C. Circuit declined to vacate the stay.⁷⁴ So did the Supreme Court by a 5-4 vote,⁷⁵ with Justice Kavanaugh providing the fifth vote on the express ground that the agency’s action, which he thought obviously exceeded its statutory authority, would expire in a matter of weeks so that the balance of equities favored retaining the stay even though the government was wrong on the merits.⁷⁶

After the moratorium expired, the CDC extended it yet again. The district court concluded that it was bound by law of the case to maintain its stay,⁷⁷ and the D.C. Circuit again declined to vacate it.⁷⁸ The landlords sought emergency relief in the Supreme Court.

Recall that the district court had treated the case as presenting a straightforward problem under *Chevron*. This time, in briefing to the Supreme Court, the government’s thirty-six page opposition to the motion to vacate the stay made no mention at all of

⁷² *Id.* at 42 (emphasis added).

⁷³ *See Alabama Ass’n of Realtors v. U.S. Dep’t of Health & Human Services*, 539 F.Supp.3d 211 (D.D.C. 2021).

⁷⁴ *See Alabama Ass’n of Realtors v. U.S. Dep’t of Health & Human Services*, 2021 WL 2221646 (D.C. Cir. 2021).

⁷⁵ *See Alabama Ass’n of Realtors v. U.S. Dep’t of Health & Human Services*, 141 S. Ct. 2320 (2021).

⁷⁶ *See id.* (Kavanaugh, J., concurring).

⁷⁷ *See Alabama Ass’n of Realtors v. U.S. Dep’t of Health & Human Services*, 557 F.Supp.3d 1, 9-10 (D.D.C. 2021) (“the Court’s hands are tied”).

⁷⁸ *See Alabama Ass’n of Realtors v. U.S. Dep’t of Health & Human Services*, 2021 WL 3721431 (D.C. Cir. 2021).

deference to the agency's interpretation of the statute. Rather, the government argued that the statute was best read to authorize the CDC's action. The landlords, for their part, emphasized the statutory arguments employed by the district court, but with two important twists.

First, as had the district court, they invoked three canons of construction in support of their interpretation of section 264, but instead of the canon against surplusage, which led off the district court's analysis, they invoked the federalism canon that requires a clear statement from Congress to allow agencies to intrude into traditional state prerogatives.⁷⁹ Second, and more significantly, they moved the major questions canon from third place in the district court opinion to first place, devoting more space to it than to the other canons combined.⁸⁰ And while the district court had clearly used the major questions canon as a relatively minor part of a *Chevron* step-one inquiry, there was no mention of or reference to the *Chevron* framework in the landlords' motion. It presented the major questions doctrine simply as an ordinary tool of statutory interpretation independent of *Chevron*.

The Supreme Court reversed, agreed with the district court on the merits of the underlying substantive issues, and vacated the stay,⁸¹ with three Justices dissenting.⁸² The per curiam opinion adopted a shorter version of the district court's statutory arguments for limiting the CDC's authority to measures similar to those described in the second sentence

⁷⁹ See *Emergency Application to Vacate the Stay Pending Appeal Issued by the United States District Court for the District of Columbia and for Immediate Administrative Vacatur* 25-26, *Alabama Ass'n of Realtors v. U.S. Dep't of Health & Human Services*, No. 21A23 (citing *Solid Waste Agency of Northern Cook Cty. V. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172-73 (2001)).

⁸⁰ See *id.* at 23-25.

⁸¹ See *Alabama Ass'n of Realtors v. U.S. Dep't of Health & Human Services*, 141 S. Ct. 2485 (2021).

⁸² See *id.* at 2490 (Breyer, J., dissenting).

of section 264.⁸³ There was no mention in the opinion of *Chevron, Skidmore v Swift*,⁸⁴ or any other deference doctrine. Nonetheless, the opinion was at least implicitly consistent with the *Chevron* framework, using the major questions doctrine as an aspect of *Chevron*'s step one.

The Court began by noting how the second sentence of section 264 seems to limit the otherwise limitless scope of the first sentence:

These measures [in the second sentence] directly relate to preventing the interstate spread of disease by identifying, isolating, and destroying the disease itself. The CDC's moratorium, on the other hand, relates to interstate infection far more indirectly: If evictions occur, some subset of tenants might move from one State to another, and some subset of that group might do so while infected with COVID–19. This downstream connection between eviction and the interstate spread of disease is markedly different from the direct targeting of disease that characterizes the measures identified in the statute. Reading both sentences together, rather than the first in isolation, it is a stretch to maintain that § 361(a) gives the CDC the authority to impose this eviction moratorium.⁸⁵

While it is not obvious on its face that this passage represents a *Chevron* step-one conclusion that the statute clearly resolves the matter against the agency, the next paragraph, invoking the major questions doctrine, begins: “Even if the text were ambiguous, the sheer scope of the CDC's claimed

⁸³ See *id.* at 2488-89.

⁸⁴ 323 U.S. 134 (1944). *Skidmore* affords an agency's interpretation whatever weight it merits based on “the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” *Id.* at 140.

⁸⁵ *Id.* at 2488 (citation omitted).

authority under § 361(a) would counsel against the Government's interpretation. We expect Congress to speak clearly when authorizing an agency to exercise powers of ‘vast “economic and political significance.” ’ ’⁸⁶ That is at least a back-door declaration that the statute is not ambiguous, which is the language of the *Chevron* framework. And in this version of the framework, the major questions doctrine functions as an aspect of *Chevron* step one: Even if the statute’s language on its face does not clearly foreclose the agency’s interpretation, the language filtered through the presumption of the major questions doctrine generates a clear answer against the agency.

On the other hand, there is an equally good argument to be made that the Court was applying the major questions doctrine in a step-zero fashion: If the matter involves a major question, then the agency can only win if the statute clearly grants it the claimed authority. On that understanding, the major questions doctrine is an *alternative* to the *Chevron* framework that essentially reverses the normal *Chevron* presumption in favor of the agency’s position. Either reading is plausible; the Court’s discussion in *Alabama Association of Realtors* was too brief to yield any firm clues about how the Court understood the major questions doctrine to fit into its framework.

The dissent, for its part, made no mention of *Chevron* or any other form of deference to an agency’s interpretation of a statute. But that is not surprising. Because this case came to the Court as an emergency motion to lift a stay, the dissent only tried (and only needed) to show that there was a serious enough question to make an emergency lift of a stay inappropriate – that there was,

⁸⁶ *Id.* at 2489 (quoting *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014), quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)).

in the dissent’s words, “arguments on both sides.”⁸⁷ The dissenting Justices may well have thought that the language of section 264’s first sentence was enough for that limited purpose.

Thus, we approached the October 2021 term with no good reason to think that things had changed much from the past five years, in which the Court consistently found ways not to apply *Chevron* without overruling it – and generally without even mentioning it.

II

Once the October 2021 term began, the data set regarding review of agency statutory interpretations expanded quickly. On January 13, 2022, which is usually pretty early in a term to get any decisions of consequence, the Court decided three cases involving agency interpretations of statutes. Two of those cases made headlines. One passed into obscurity, but it is deeply instructive for present purposes, and I start with it.

For more than three decades, David Babcock served in the Michigan Army National Guard as a “military technician (dual status)”⁸⁸ training National Guard personnel to fly helicopters.⁸⁹ Although he served throughout that time as a National Guard member, as required by statute for such technicians,⁹⁰ he was, for payroll and other purposes, treated by the government as a civilian employee when he was not called into active service or engaged in the periodic training and drilling required of all National Guard members. That dual military/civilian classification generated the

⁸⁷ *Id.* at 2492 (Breyer, J., dissenting).

⁸⁸ 10 U.S.C. § 10216 (2018).

⁸⁹ During the oral argument before the Sixth Circuit, Babcock’s lawyer described him as a “Top Gun” instructor for Blackhawk pilots.

⁹⁰ *See* 32 U.S.C. § 702(b)(2) (2018).

kind of technical question of statutory interpretation that the classic *Chevron* doctrine seems designed to resolve.

Section 415 of Title 42 is a lengthy, technical, and spectacularly important provision that specifies the computation methods for Social Security payments. Subsection 415(a)(7)(B), added in 1983,⁹¹ fixed what Congress regarded as a glitch in the prior benefit computation system, which was arguably overgenerous to people who received pensions derived from earnings exempt from Social Security – notably including federal employees hired before January 1, 1984, when federal employees were brought within the Social Security system. The 1983 amendment reduced somewhat – not fully, but somewhat – Social Security payments to people who get pension benefits as a result of earnings that were exempt from Social Security.⁹² But perhaps in acknowledgment that some people might have taken pre-1984 federal military employment in reliance on those anticipated overpayments, or perhaps simply out of solicitude for those who serve in the military, the statute says that the Social Security payment reductions do not apply to recipients of pensions “based wholly on service as a member of a uniformed service”⁹³

The Social Security Administration determined that Babcock’s pension resulting from his work as a civilian-classified National Guard technician did not count as a pension “based wholly on service as a member of a uniformed service” and thus reduced his Social Security benefit in accordance with the ordinary rules of the 1983 amendment. Babcock sued, claiming (correctly) that he was a member of a “uniformed service” – the National Guard – throughout his tenure as a

⁹¹ See Social Security Amendments of 1983, Pub. L. No. 98-21, § 113, 97 Stat. 65, 76-78 (codified at 42 U.S.C. § 415(a)(7) (2018)).

⁹² See 42 U.S.C. § 415(7)(B) (2018).

⁹³ 42 U.S.C. § 415(a)(7)(A)(iii) (2018).

technician and (more controversially) that the exemption provision required nothing more in order to apply to him.

Unlike *Cuozzo Speed Technologies*, where it is impossible to say with a straight face that the agency was actually interpreting a statute, here it seems clear that the Social Security Administration was interpreting the language of a statutory provision. Specifically, it was claiming that dual service technicians such as Babcock, when functioning as civilian employees, do not perform work “as a member of a uniformed service,” since their National Guard status is effectively incidental in those circumstances and they perform those functions in their capacity as “civilian employee[s].”⁹⁴ One can point to words in the statute (“as a member of a uniformed service”) to which the agency assigns meaning.

This looks like a classic case for *Chevron* deference. While it is sometimes far from clear what it means, for purposes of *Chevron*, for an agency to “administer” a statute,⁹⁵ no one doubts that the Social Security Administration “administers” section 415. The agency’s interpretation had the force and effect of law. It was not an informal guidance or amicus brief, to which *Chevron* would not apply;⁹⁶ it formally determined how much money Babcock would receive. It generated legally binding rights and responsibilities. Perhaps one could try to analogize the agency’s interpretation to the sort of mass-adjudication determinations to which the Court denied *Chevron*

⁹⁴ 10 U.S.C. § 10216(a)(1) (2018). The government agreed that pension payments attributable to Babcock’s service in active military duty or for mandatory National Guard training and drilling fell within the exemption, and those payments generated no reduction in his Social Security benefits.

⁹⁵ See LAWSON, *supra* note 19, at 659-67.

⁹⁶ See *Christensen v. Harris County*, 529 U.S. 576 (2000). To be sure, the agency’s notice of non-acquiescence in the Eighth Circuit’s 2011 decision in *Petersen v. Astrue*, 633 F.3d 633 (8th Cir. 2011), which resolved the precise issue in *Babcock* in favor of the dual status technical claimant, does not seem to have the kind of legal force necessary for *Chevron* deference. See Brief for Petitioner David Babcock, *Babcock v. Kijakazi*, No. 20-480, at 39, 2021 WL 2141945. But that notice was not the subject of review in *Babcock*. Babcock sought review of a partial denial of his benefits claim, and that agency decision reducing his benefits most assuredly had legal effect.

deference in *United States v. Mead Corp.*,⁹⁷ but there are enough differences between the one-off Customs Service rulings in *Mead* and the Social Security Administration's apparently global determination in *Babcock* so that *Mead* seems readily distinguishable. In the mundane world of administrative law, this case screams "*Chevron*."

That scream is precisely what the Sixth Circuit Court of Appeals heard, and in 2020 it affirmed the agency's decision in a straight-up *Chevron* analysis.⁹⁸ Interestingly, the oral argument in the Sixth Circuit contained no mention of *Chevron*, though there were a few questions from the bench about whether some measure of deference might be appropriate under *Skidmore v. Swift & Co.*⁹⁹ Nonetheless, the case was decided in the court of appeals squarely on the basis of *Chevron*.

In *Babcock v. Kijakazi*,¹⁰⁰ the Supreme Court affirmed the Sixth Circuit judgment with no mention of *Chevron*. The United States did not cite *Chevron* in its brief or oral argument. Babcock's brief cited *Chevron* only to note that the government did not rely on it (and to argue briefly, and surely wrongly, as was noted above, that the Social Security Administration's interpretation did not have the force of law).¹⁰¹ In the midst of a spate of arguments about plain language, legislative history, and context, the only rule of construction mentioned by the parties was a canon claimed by Babcock for construing statutes in favor of veterans;¹⁰² the Court's opinion

⁹⁷ 533 U.S. 218 (2001).

⁹⁸ See *Babcock v. Comm'r of Social Security*, 959 F.3d 210, 214 (6th Cir. 2020).

⁹⁹ 323 U.S. 134 (1944).

¹⁰⁰ 142 S. Ct. 641 (2022).

¹⁰¹ Brief for Petitioner David Babcock, *Babcock v. Kijakazi*, No. 20-480, at 38-39, 2021 WL 2141945.

¹⁰² See *id.* at 27; Reply Brief for Petitioner David Babcock, *Babcock v. Kijakazi*, No. 20-480, at 14-15, 2021 WL 4135016.

made no mention of that canon. Nor can one infer that the parties (and derivatively the Court) were implicitly treating the case under *Chevron*'s "step one," in which one ends the inquiry if the meaning of the statute is clear.¹⁰³ Both sides at oral argument insisted simply that they were advancing the *best* interpretation of the statute, not a *clear* meaning of the statute. When Chief Justice Roberts suggested something like the government's interpretation, former Solicitor General Neal Katyal, arguing on behalf of Babcock, responded simply: "I agree that's one way to read it. I just don't think it's the best way."¹⁰⁴ The government, for its part, countered by claiming "that there are a lot of textual clues in the statute and in related statutes that indicate that our reading is the better one"¹⁰⁵ The Court's opinion took the same tack, insisting that the statute is "most naturally read"¹⁰⁶ to support the government's position. None of this is language stemming from the *Chevron* framework, which generally looks for something considerably more than the "best" or "most natural" meaning of a statute to end the inquiry at step one. Justice Gorsuch, the lone dissenter in *Babcock*, found Babcock's interpretation "compelling,"¹⁰⁷ which is a term much more in keeping with *Chevron* step one language, but Justice Gorsuch is a long-time critic of *Chevron*; it is unlikely that he was subtly reaching out to employ it. For all practical purposes, this case proceeded in the Supreme Court as though the *Chevron* doctrine, which the Sixth Circuit found decisive, does not exist.

¹⁰³ For discussion of the ambiguities surrounding that step, see LAWSON, *supra* note 27, at 698-727; MERRILL, *supra* note 1, at 101-12.

¹⁰⁴ Tr. of Oral Arg., *Babcock v. Kijakazi*, No. 20-480, at 14, 2021 WL 6051139.

¹⁰⁵ *Id.* at 53.

¹⁰⁶ 142 S. Ct. at 645.

¹⁰⁷ *Id.* at 647 (Gorsuch, J., dissenting).

My guess is that very few people remember or know about *Babcock v. Kijakazi*. That is not true of two other cases decided the same day as *Babcock*: *Biden v. Missouri*¹⁰⁸ and *National Federation of Independent Business v. Dep't of Labor, OSHA*.¹⁰⁹

Biden v. Missouri involved a rule promulgated by the Secretary of Health and Human Services requiring near-universal COVID vaccination of employees at facilities that receive Medicare or Medicaid funding.¹¹⁰ A coalition of States sued in two different courts, both of which granted injunctions against the vaccine mandate.¹¹¹ Motions to stay the injunctions were denied in both cases,¹¹² but a 5-4 Supreme Court ordered the injunctions stayed. The Court found that the vaccine mandate for workers in Medicare and Medicaid facilities was authorized by a statute providing that the Secretary of HHS can impose conditions on funding recipients that the Secretary “finds necessary in the interest of the health and safety of individuals who are furnished services.”¹¹³ At a first look, that cited statute certainly seems broad enough easily to sustain a vaccine mandate for health-care workers – and much more besides. But sometimes just one look is not all it took.

The provision relied upon by the Court is part of the definition of a “hospital” for Medicare purposes. The statute defines a hospital to be a facility that offer certain services,¹¹⁴ maintains

¹⁰⁸ 142 S. Ct. 647 (2022).

¹⁰⁹ 142 S. Ct. 661 (2022).

¹¹⁰ See *Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination*, 86 Fed. Reg. 61,555 (2021).

¹¹¹ *Missouri v. Biden*, 571 F.Supp.3d 1079 (E.D. Mo. 2021); *Louisiana v. Becerra*, 571 F.3d 516 (W.D. La. 2021).

¹¹² Order of Dec. 13, 2021, *Missouri v. Biden*, No. 21-3725 (8th Cir. 2021), [8th-appeals-court-decision-vaccines.pdf](https://www.medicitynews.com/8th-appeals-court-decision-vaccines.pdf) ([medicitynews.com](https://www.medicitynews.com/)); *Louisiana v. Becerra*, 20 F.4th 260 (5th Cir. 2021).

¹¹³ 42 U.S.C. § 1395x(e)(9) (2018).

¹¹⁴ See *id* § 1395(e)(1), (4), (5).

certain records and policies,¹¹⁵ and “meets such other requirements as the Secretary finds necessary in the interest of the health and safety of individuals who are furnished services in the institution.”¹¹⁶ If one applied the same kind of context-sensitive interpretation employed by the Court in *Alabama Association of Realtors* to invalidate the CDC’s eviction moratorium, it is hard to see how one could find this residual housekeeping definitional provision to be a font of substantive authority to regulate medical or personnel practices.¹¹⁷ That kind of authority makes no sense in the company of the eight criteria for being a “hospital” that precedes the residual clause. Indeed, this was not the provision primarily relied upon by the government,¹¹⁸ which instead invoked general rulemaking provisions similar to those invoked by the PTO in *Cuozzo Speed Technologies*. The government’s lead argument was that “Congress vested the Secretary with broad authority to make ‘rules and regulations . . . as may be necessary to the efficient administration of the functions with which he is charged under’ the Medicare and Medicaid programs. 42 U.S.C. 1302(a); see 42 U.S.C. 1395hh(a)(1).”¹¹⁹ The definition of a “hospital” was offered simply as one “example”¹²⁰ of the Secretary’s authority. Nonetheless, the Court found that the vaccination rule “fits neatly within the language”¹²¹ of the Medicare hospital definition, and that was good enough for the majority.

¹¹⁵ See *id.* § 1395(e)(2), (3), (6)-(8).

¹¹⁶ *Id.* § 1395(e)(9).

¹¹⁷ See 142 S. Ct. at 656 (Thomas, J., dissenting).

¹¹⁸ See *id.* at 655-56 (Thomas, J., dissenting); *Application for a Stay of the Injunction Issued by the United States District Court for the Eastern District of Missouri Pending Appeal to the United States Court of Appeals for the Eighth Circuit and Further Proceedings in This Court, Biden v. Missouri*, No. 21A240, at 19.

¹¹⁹ *Application for a Stay*, *supra* note 137, at 19.

¹²⁰ *Id.*

¹²¹ 142 S. Ct. at 652.

If one applied the major questions doctrine as a principal tool of statutory interpretation requiring a clear statement of authority for the agency, it is hard to see how one would reach the Court's result. Surely a definitional provision at the end of a list of technical qualifications for being a "hospital" would not be a clear statement granting the agency authority to mandate vaccinations for ten million people. On the other hand, if one was applying the conventional *Chevron* doctrine, with no garnishes, the broad language of the Medicare statute, and the various other provisions relied on by the government, would make it hard to say that the statutes *clearly* do not give the agency authority, even if one thinks that the best reading does not grant that power. And if one reached step two of *Chevron*, the practical and policy concerns raised by the majority¹²² would make it unlikely that this would be among the rare cases when an agency interpretation of an ambiguous provision is unreasonable – or at least is unreasonable without also being arbitrary or capricious and therefore invalid for that reason alone.¹²³ Accordingly, this appeared to be a fine case in which to test the vitality of *Chevron* and the place of the major questions doctrine in the *Chevron* framework.

As it happened, nothing in either the majority opinion or the dissent mentions *Chevron* or any other deference doctrine. *Chevron* was not (as far as I can tell) cited by any of the parties in their briefs to the Court. Instead, argument focused on the plain meaning of a variety of statutory provisions, of which the Medicare hospital definition was only one, and the applicability of canons of construction, including in that list the major questions doctrine. Justice Thomas invoked the major questions doctrine at the very end of his dissenting opinion, introduced by "[f]inally,"¹²⁴ and

¹²² The Court was concerned that denying the agency power in this instance would call into question numerous other exercises of power that no parties seemed to question. *See id.* at 652.

¹²³ The States indeed argued quite vigorously that the rule was arbitrary or capricious. *See* 5 U.S.C. § 706(2)(E) (2018). The Court readily rejected that argument. *See* 142 S. Ct. at 653-54.

¹²⁴ *Id.* at 658 (Thomas, J., dissenting).

the majority did not mention it at all. For all practical purposes, it was as though neither *Chevron* nor the major questions doctrine existed.

At least half of that state of affairs changed in the final case decided on January 13, 2022. *National Federation of Independent Business v. OSHA* (“*NFIB*”)¹²⁵ was all about the major questions doctrine.

Biden v. Missouri, one should recall, involved a vaccine mandate imposed on roughly ten million health care workers. *NFIB* involved a vaccine mandate (or, more precisely, a vaccine-or-masking-plus-testing) mandate imposed by the Occupational Safety and Health Administration (“OSHA”) on workplaces with one hundred or more employees, which swept in more than eighty million workers in every job from meat packer to landscaper.¹²⁶ The agency imposed this mandate under its authority (and, indeed, statutory obligation) to promulgate “occupational safety and health standard[s],”¹²⁷ which the statute defines as “standard[s] which require[] conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.”¹²⁸ Ordinarily, promulgation of such standards must follow an elaborate notice-and-comment process.¹²⁹ But under certain circumstances, the Secretary of Labor, acting through OSHA, must promulgate an “emergency temporary standard to take immediate effect upon publication in the Federal Register if he determines (A) that employees are exposed to grave danger from exposure

¹²⁵ 142 S. Ct. 661 (2021).

¹²⁶ See *COVID-19 Vaccination and Testing; Emergency Temporary Standard*, 86 Fed. Reg. 61,402 (2021).

¹²⁷ 29 U.S.C. § 652(8) (2018).

¹²⁸ *Id.*

¹²⁹ See *id.* § 655(b).

to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger.”¹³⁰ OSHA determined, using this provision for authorization of an emergency temporary standard (“ETS”), that COVID posed a grave workplace risk and that the most effective way to reduce that risk was to achieve near-universal vaccination (allowing some exceptions for medical or religious reasons).¹³¹

Numerous parties challenged the ETS in courts across the country. One of those courts – the Fifth Circuit – entered a stay against the order, finding it “obvious”¹³² that the ETS exceeded the agency’s authority. Most of the Fifth Circuit’s analysis argued that the ETS did not meet the specific terms of section 655(c) (“grave danger,” “necessary,” “new hazards”).¹³³ Some of the analysis really amounted to a claim that the ETS was arbitrary or capricious because it was simultaneously wildly overinclusive and underinclusive.¹³⁴ The court had constitutional concerns as well about whether the ETS exceeded the federal government’s authority under the Commerce Clause.¹³⁵ And near the end of its opinion, reinforced by a concurring opinion,¹³⁶ the court briefly

¹³⁰ *Id.* § 655(c)(1).

¹³¹ *See* 86 Fed. Reg. at 61,407-15, 61,417-19, 61,447..

¹³² *BST Holdings, LLC v. OSHA*, 17 F.4th 604, 611 (5th Cir. 2021).

¹³³ *See id.* at 613-15.

¹³⁴ *See id.* at 611-12, 616. It was allegedly underinclusive because it did not protect from this “grave danger” employees in workplaces with fewer than one hundred employees. It was allegedly overinclusive because it did not focus on specific workplaces where risks posed by unvaccinated workers were significant. The Fifth Circuit did not frame this discussion of inadequate tailoring in terms of arbitrary or capricious review. It got folded into the court’s statutory analysis.

¹³⁵ *See id.* at 617.

¹³⁶ *See id.* at 619 (Duncan, J., concurring).

raised the major questions doctrine as an extra reason in support of the main reasons for the decision:

[T]he major questions doctrine *confirms* that the Mandate exceeds the bounds of OSHA's statutory authority. Congress must “speak clearly if it wishes to assign to an agency decisions of vast economic and political significance.” *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324(2014) (cleaned up). The Mandate derives its authority from an old statute employed in a novel manner There is no clear expression of congressional intent in § 655(c) to convey OSHA such broad authority, and this court will not infer one.¹³⁷

The Fifth Circuit opinion did not mention *Chevron*.

The numerous cases across the country were consolidated in the Sixth Circuit, which declined, by an 8-8 vote, a request to hear the case initially en banc¹³⁸ and then dissolved the stay.¹³⁹ The panel hearing the case concluded (over Judge Joan Larsen’s dissent¹⁴⁰) that regulating infectious diseases in the workplace was well within OSHA’s authority.¹⁴¹ It had a whole section on the “Major Questions Doctrine,”¹⁴² which it described as a “seldom-used . . . exception to *Chevron* deference”¹⁴³ that is “hardly a model of clarity”¹⁴⁴ and whose “precise contours . . .

¹³⁷ *Id.* at 617-18 (emphasis added) (copious citations omitted).

¹³⁸ *See In re MCP No. 165*, 20 F.4th 264 (6th Cir. 2021).

¹³⁹ *See In re MCP No. 165*, 21 F.4th 357 (6th Cir. 2021).

¹⁴⁰ *See id.* at 389 (Larsen, J., dissenting).

¹⁴¹ *See id.* at 369-72.

¹⁴² *Id.* at 372.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

remain undefined.”¹⁴⁵ With that preface, it is hardly surprising that the court found the doctrine inapplicable “because OSHA's issuance of the ETS is not an enormous expansion of its regulatory authority”¹⁴⁶ and “[a]ny doubt as to OSHA's authority is assuaged by the language of the OSH Act,”¹⁴⁷ which “unambiguously grants OSHA authority for the ETS.”¹⁴⁸

Beyond the description of the major questions doctrine as an “exception” to *Chevron*, there was no other mention of *Chevron* in the majority opinion, though *Chevron* did warrant a passing mention in a concurrence for the proposition that judges should not second-guess the policy decisions of agencies.¹⁴⁹

These decisions teed up for the Supreme Court what looked like a profound set of questions about *Chevron* and the major questions doctrine. Is the major questions doctrine (or, rather, its absence) a step-zero precondition for *Chevron* deference? Is it one piece of a *Chevron* step one inquiry into the clarity of the grant of authority to the agency, operating alongside other tools of interpretation? Or is it something outside the *Chevron* framework entirely, functioning as a quasi-constitutional norm that enforces sub-delegation values through the back door, so that invocation of the major questions doctrine not only takes *Chevron* off the table but *inverts* it to require clear affirmative authorization for agency action?

The stakes for this issue are high. *Chevron* effectively operates as a presumption in favor of the agency's position; you can only defeat the agency if the statute is “clear” or the agency's interpretation of an ambiguity is “unreasonable.” The first account of the major questions doctrine

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 373.

¹⁴⁸ *Id.*

¹⁴⁹ *See id.* at 388 (Gibbons, J., concurring) (

can remove that presumption, leaving the agency and challenging parties on an equal footing, with the agency's only advantage being the modest deference accorded under *Skidmore*. The second account leaves the *Chevron* framework intact but adds another tool to the interpretative kit that improves the odds of finding the agency action unauthorized. The third account operates as a substantive canon of interpretation that *supplants Chevron* with something that is its virtual mirror opposite: Instead of parties needing to show that the agency was clearly and unambiguously *wrong*, the agency deciding a major question needs to show that it is clearly and unambiguously *right* in its claim of authority. There is, in other words, not just an across-the-board presumption against interpretative deference to agencies on major questions but a substantive presumption that agencies have no power to resolve major questions – period.

The arguments before the Supreme Court on the emergency stay application filed by challengers of the ETS focused on how to understand the major questions doctrine. Interestingly, those arguments *did not* focus on how to relate that doctrine to *Chevron* – because *Chevron* was a near-complete non-player in the arguments. By my reckoning, only one brief – an amicus brief filed by former OSHA administrators in defense of the ETS -- even mentioned *Chevron*.¹⁵⁰ But

¹⁵⁰ See Motion of Former OSHA Administrators Charles Jeffress, David Michaels, and Gerard Scannell for Leave to File Attached Amicus Brief in Opposition to Emergency Applications for a Stay or Injunction Pending Certiorari Review; for Leave to File Without 10 Days' Notice; and for Leave to File in Paper Format, *NFIB v. OSHA*, Nos. 21A243, 21A244, 21A245, 21A246, 21A247, 21A248, 21A249, 21A250, 21A251, 21A252, 21A258, 21A259, 21A260, at 11-12:

Even if the statute's clear language did not unambiguously cover agents such as viruses that cause physically harmful diseases (which, as explained above, it does), OSHA's reading should nonetheless be upheld because it represents a "permissible construction of the statute." *Valent v. Comm'r of Soc. Sec.*, 918 F.3d 516, 520 (6th Cir. 2019) (quoting *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 (1984)) . . . The agency's reading easily passes muster under *Chevron*, as the reading is firmly grounded in the statute's language and its expressly manifested purpose of fostering healthful workplaces and protecting workers against exposure to illness and disease in their working environments. See 29 U.S.C. § 651. OSHA's "natural" reading falls "well within the bounds of reasonable interpretation," and is "entitled to deference under *Chevron*."

plenty of briefs talked about the major questions doctrine, and they disagreed vehemently about what the doctrine actually means.

The lead argument for the stay applicants themselves was that “[t]he major-questions doctrine bars OSHA’s attempt to ‘discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy,’ ”¹⁵¹ The heading of their main argument set out precisely what they were claiming the major questions doctrine to require: “Under the major-questions doctrine, Congress did not *clearly authorize* OSHA to commandeer businesses into implementing a COVID-19 vaccine, testing, and tracking mandate covering 84 million Americans.”¹⁵² That is a straightforward claim that, when major questions are involved, the proper inquiry is something of a reverse-*Chevron* analysis: Do the relevant statutes *clearly and unambiguously* give the agency the extraordinary power that it claims? Indeed, the applicants referred to Judge Jeffrey Sutton’s similar claims in his denial from initial en banc rehearing in the Sixth Circuit: “Congress did not ‘clearly’ grant the Secretary of Labor authority to impose this vaccinate-or-test mandate.”¹⁵³ “[I]t is by no means *clear* that this authority extends to all hazards that might affect employees at some point during the 16 hours of each weekday and the 48 hours of each weekend when they are not at work”¹⁵⁴ “The Act does not *clearly* give the Secretary power to regulate all health risks and all new health hazards”¹⁵⁵ “A clear-statement rule

¹⁵¹ *Emergency Application of Twenty-Six Business Associations for Immediate Stay of Agency Action Pending Disposition of Petition for Review, NFIB v. OSHA*, No. 21A244, at 2 (quoting *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014)).

¹⁵² *Id.* at 16 (emphasis added).

¹⁵³ *In re MCP No. 165*, 20 F.4th 264, 268 (6th Cir. 2021) (Sutton, C.J., dissenting from the denial of initial hearing en banc).

¹⁵⁴ *Id.* (emphasis added).

¹⁵⁵ *Id.* (emphasis added).

applies to this wide-ranging and unprecedented assertion of administrative power, and the Secretary of Labor has failed to show that Congress *clearly* delegated this authority to him.”¹⁵⁶ And while the applicants did not discuss how their understanding of the major questions doctrine interacted with *Chevron*, Judge Sutton did so at length:

The Secretary insists that any ambiguity in the statute favors him, not the challengers. He claims that uncertainty about the meaning of the statute allows him to construe the statute to exercise more power, not less. Resp. Mot. to Dissolve Stay at 17; *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 843–44 (1984). But ambiguity for *Chevron* purposes comes at the end of the interpretation process, not at the beginning. *Id.* at 843 n.9. The clear-statement canons eliminate any power-enhancing uncertainty in the meaning of the statute.¹⁵⁷

It is unclear whether Judge Sutton means that the major questions doctrine is a canon of construction, akin to the federalism canon, which make it harder for the government to show ambiguity in statutes, or whether agencies simply have no power over major questions absent express authorizations, which essentially functions as a reverse-*Chevron* doctrine that presumptively finds a clear meaning of absence of power unless something in the statute expressly overcomes that presumption. The applicants seemed to favor the latter reading, which they

¹⁵⁶ *Id.* at 272 (emphasis added).

¹⁵⁷ *Id.* at 280.

repeated in their reply brief.¹⁵⁸ Similar readings were advanced by State applicants¹⁵⁹ and an amicus brief on behalf of 183 Members of Congress.¹⁶⁰

The government, for its part, studiously avoided any mention of *Chevron*. It insisted that the statute was so clear that there was no ambiguity, no need for canons of construction, and no room for invocation of a major questions doctrine. The government was adamant that

in the decisions applicants cite, this Court relied on the economic and political significance of agency action to help resolve statutory ambiguities in a way that would avoid conflicts with other statutory provisions. Here, in contrast, the OSH Act unambiguously grants OSHA the authority to promulgate emergency temporary standards without any exception for standards that might have large economic or political significance, and the issuance of the ETS does not conflict with any other statutory provision.¹⁶¹

¹⁵⁸ See *Reply of Twenty-Six Business Associations in Support of Immediate Stay of Agency Action Pending Disposition of Petition for Review, NFIB v. OSHA*, No. 21A244, at 8-9 (“The Government gets the major-questions-doctrine analysis backwards -- repeatedly asserting that ‘nothing in the OSH Act *disables* the agency from employing the most effective control measure to protect workers from a grave danger.’” Respondents’ position stands the major-questions doctrine on its head. To grant vast regulatory power, Congress must affirmatively ‘speak with the requisite clarity to place that intent beyond dispute.’) (citations omitted).

¹⁵⁹ See *State Applicants’ Reply in Support of Emergency Application for An Administrative Stay and Stay of Administrative Action, and Alternative Petition for Writ of Certiorari Before Judgment, NFIB v. OSHA*, Nos. 21A244, 21A247, at 19 (“Congress stopped well short of *clearly* empowering OSHA to issue the Vaccine Mandate.”) (emphasis in original).

¹⁶⁰ See *Motion for Leave to File and Brief of Members of Congress As Amici Curiae in Support of Applicants, NFIB v. OSHA*, Nos. 21A244, 21A247, at 13 (“Under the major questions doctrine, a congressional authorization to mandate vaccines would have to be clear.”).

¹⁶¹ See *Response in Opposition to the Applications for a Stay, NFIB v. OSHA*, Nos. 21A243, 21A244, 21A245, 21A246, 21A247, 21A248, 21A249, 21A250, 21A251, 21A252, 21A258, 21A259, 21A260, 21A267, at 5-6. See also *id.* at 55 (“Congress *did* speak clearly by authorizing OSHA to issue an emergency temporary standard whenever it makes the requisite determinations”).

More specifically, the government insisted that the applicants “have fundamentally misunderstood what they call the ‘major questions doctrine,’ ”¹⁶² which the government claimed is merely a tool for resolving ambiguities in statutes, especially when an interpretation seems to conflict with more specific provisions.¹⁶³ The doctrine is never used, said the government, to counter an otherwise clear statutory text.¹⁶⁴

Thus, as framed by the parties and their amici, one of the key issues for the Supreme Court was the scope and meaning of the major questions doctrine. Is it a tool used on occasion to help resolve ambiguities, presumably as part of an inquiry under *Chevron* step one? Or is it a stand-alone principle of statutory interpretation that, where applicable, effectively replaces the *Chevron* presumption with an opposite presumption of no agency power, requiring a crystal clear statement of authorization for an agency to address major questions?

These questions played a prominent role in the oral argument in *NFIB*. Justice Gorsuch struck first, asking counsel for the NFIB: “First, the government says that the major questions doctrine and the federalism canon, for example, don't apply to this Court's consideration of this case or any other unless the statute before us is first found to be ambiguous. What's your understanding?”¹⁶⁵ Justice Gorsuch clearly understood the stakes. After a bit of a false start,¹⁶⁶ counsel responded: “I disagree in that the major questions doctrine is also a -- a -- a doctrine that

¹⁶² *Id.* at 59.

¹⁶³ *See id.* at 59-60.

¹⁶⁴ *See id.* at 60 (“In no case, however, has the Court suggested that courts should disregard the statute's plain text simply because it authorizes agency actions that might have vast economic or political significance.”).

¹⁶⁵ Tr. of Oral Argument, *NFIB v. OSHA*, Nos. 21A244, 21A247, at 20-21.

¹⁶⁶ *See id.* at 21-22.

would avoid non-delegation concerns. So even if there were a clear statutory term, non-delegation concerns and how to interpret that statute would factor in “¹⁶⁷ And the game was afoot.

Justice Kavanaugh followed up shortly thereafter by somewhat mischaracterizing the NFIB’s argument: “You’re relying on the major questions canon in saying that when an agency wants to issue a major rule that resolves a major question, it can’t rely on statutory language that is cryptic, vague, oblique, ambiguous.”¹⁶⁸ That is one possible characterization of the major questions doctrine. It is not the characterization advanced by NFIB in its filings or in its answer to Justice Gorsuch, which posited a much stronger doctrine that would not allow even seemingly straightforward statutory language to grant agencies extraordinary authority absent something very specific in the statute. After a short colloquy regarding how one determines when a question is major,¹⁶⁹ Justice Kavanaugh returned to the main point: “Suppose the statutory language is general, broad, but doesn’t speak specifically to the issue in question, but it is general and broad language [H]ow would you suggest we sort out that kind of question?”¹⁷⁰ Counsel’s answer was vague and unhelpful: “You look at the plain text. From *Brown & Williamson*, we know you’d also look at the statutory context, and I also think the statutory context here is incredibly important.”¹⁷¹ There was no mention of filtering that language through a strong presumption against agency power.

When counsel for the State applicants was up, Justice Gorsuch raised the same issue as before: “The Solicitor General says that the major questions issue only comes into play when a

¹⁶⁷ *Id.* at 22.

¹⁶⁸ *Id.* at 34.

¹⁶⁹ *See id.* at 34-36.

¹⁷⁰ *Id.* at 36.

¹⁷¹ *Id.* at

statute's ambiguous, and I'd like to give you an opportunity to explain your view.”¹⁷² Counsel took that opportunity and ran with it:

I think you can view the major – the major question doctrine, the phrase is sometimes used in different contexts, and sometimes it is used as kind of an ambiguity clarifier, an elephants in mouse holes point.

But another way to look at it is something of a constitutional doubt canon where we recognize that although our non-delegation doctrine is not especially robust today, there are limits on the amount of authority that Congress can – can give away.

And with respect to these major questions that are going to affect people from coast to coast and cost, you know, millions and millions of dollars and potentially many jobs and potentially infect – affect public health, we would expect Congress – we would demand Congress to at least speak clearly before we will say an agency can exercise that power and therefore before we're into the non-delegation issue.¹⁷³

On this view, the major questions doctrine is a powerful tool of statutory interpretation that creates something of an anti-deference presumption, not just one among many interpretative principles to employ at step one of *Chevron*.

Justice (and, more importantly, former Administrative Law professor) Kagan understood the issues exactly. She tried to get the Solicitor General involved in the action:

¹⁷² *Id.* at 69.

¹⁷³ *Id.* at 69-70.

General, I'd like to ask the – the – the government's views of the major questions doctrine that a number of my colleagues have asked about.

And as I – I see it, there are sort of two ways that such a doctrine could operate. One is with respect to ambiguous statutes, ambiguous either because they're vague or because there are statutes that seem to have conflicting provisions, you know, where they point both ways, and then the major questions doctrine is an aid to interpretation of that statute. It's essentially a kind of clue about how you should interpret a very difficult-to-understand statute.

And the second way is there's really nothing difficult to understand about this. The agency action falls within the scope of the statutory authority. There's just no question that it does. And yet, because the agency action is kind of a big deal, we're just going to ignore the fact that it falls clearly within the scope of the delegated authority and say that, notwithstanding that that's true, Congress has to re-up it.

So I think I'd like you to talk about those two versions of the major questions doctrine with respect to this rule. You know, does – what do you think of those two versions, and which of the versions potentially applies here?¹⁷⁴

This was exactly the right question to ask and exactly the right way to ask it. And the Solicitor General gave, from the government's standpoint, exactly the right answer:

I think that perfectly encapsulates the two versions. And we think that this Court's precedents clearly demonstrate that it's the first version that you articulated

¹⁷⁴ *Id.* at 114-15.

is the way that the Court has previously considered economic and political consequences.

So it's never been the case that the Court has started at the outset by saying does this seem like a big deal, does this agency action have a lot of consequences, and then used that as a basis to depart from the plain language of the statute or to say Congress has to specifically authorize it; we're not going to give the statutory text its -- its ordinary meaning.

Instead, in the cases where the Court has looked at those kinds of consequences, it has always identified a conflict with other express statutory language, a conflict with other statutes that Congress has enacted that directly addressed the issue at question, or a conflict with the entire structure of the statute such that it would be unrecognizable to the Congress that enacted it.

And it's only been in those situations where the Court has identified a textual and structural problem with the agency's interpretation in the beginning, using those traditional tools of statutory construction, that the Court has then gone on to say that its interpretation of the statute is confirmed by the economic and political consequences that would ensue.¹⁷⁵

And with that, the stage was set for the Court to decide some important matters about the major questions doctrine. Is it a stand-alone interpretative principle? Is it a substantive canon capable of generating ambiguity in the face of seeming clarity or a semantic canon that requires a

¹⁷⁵ *Id.* at 115-16. *See also id.* at 125 (“So there's never been a case where the Court has just confronted broad language and said, oh, it seems cryptic or oblique and so it's a major question and we're not going to give it its plain meaning. In all of those cases, there was a -- a -- a textual and structural reason for the Court to conclude that there was something wrong with the agency's claimed authority.”).

preliminary finding of ambiguity for application?¹⁷⁶ Or is it something even stronger than that? If it is part of the *Chevron* framework, in what part of the framework does it fit? The Court had everything that it needed to face these questions.

To what I hope by this point is no one's surprise, the Court addressed none of these questions in holding that the agency action was unauthorized by statute. The Court did introduce its discussion by noting that the agency action at issue was “no ‘everyday exercise of federal power.’ It is instead a significant encroachment into the lives – and health – of a vast number of employees”¹⁷⁷ -- in other words, it was a major question for which one “‘expect[s] Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance.’”¹⁷⁸ As a result, “[t]he question, then, is whether the Act *plainly* authorizes the Secretary’s mandate. It does not.”¹⁷⁹ Was that a wholesale adoption of the strong, stand-alone version of the major questions doctrine urged by the applicants?

Conceivably, but if that was really what was going on, one might have expected a more explicit declaration to that effect. The rest of the Court’s discussion was garden-variety statutory interpretation that could have been undertaken at *Chevron* step one with no canons of construction needed or involved. After all, every statutory provision relied upon by OSHA was part of a statute regulating *workplace* hazards. COVID, like the flu and the common cold, might well be a hazard that one could encounter in a workplace. There might even be some specific workplaces where

¹⁷⁶ On the distinction between semantic and substantive canons, see LAWSON, *supra* note --, at 50-53; Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109 (2009); Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933 (2017).

¹⁷⁷ 142 S. Ct. at 665 (quoting *In re MCP No 165*, 20 F.4th at 272 (Sutton, C.J., dissenting from the denial of initial hearing en banc)).

¹⁷⁸ *Id.* (quoting *Alabama Ass’n of Realtors*, 141 S. Ct. at 2489).

¹⁷⁹ *Id.* (emphasis added).

the conditions of employment elevate that hazard beyond its baseline, non-workplace level. But it is not a hazard that distinctively *results from* a workplace, such as the risk of a mine collapse, poor ventilation in an office building, or exposure to toxic chemicals at a construction site. As the Court argued:

Although COVID–19 is a risk that occurs in many workplaces, it is not an *occupational* hazard in most. COVID–19 can and does spread at home, in schools, during sporting events, and everywhere else that people gather. That kind of universal risk is no different from the day-to-day dangers that all face from crime, air pollution, or any number of communicable diseases. Permitting OSHA to regulate the hazards of daily life—simply because most Americans have jobs and face those same risks while on the clock—would significantly expand OSHA's regulatory authority without clear congressional authorization.¹⁸⁰

It is not obvious that the concluding phrase “without clear congressional authorization” is doing much work. The Court’s decision seems like a straightforward interpretation of statutory language in context. One can disagree with the interpretation, as did the dissent,¹⁸¹ but that disagreement would be the same whether or not one thinks any presumptions lurk in the background – as the Court’s concluding remarks indicate: “Although Congress has indisputably given OSHA the power to regulate occupational dangers, it has not given that agency the power to regulate public health more broadly.”¹⁸²

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 673 (Breyer, J., dissenting).

¹⁸² *See id.* at 666.

While the per curiam opinion did nothing of substance to clarify the nature or reach of the major questions doctrine, three Justices had a lot to say on the subject in a separate concurrence, authored by Justice Gorsuch and joined by Justices Thomas and Alito. Repeating some thoughts that he expressed in 2019 in *Gundy v. United States*,¹⁸³ Justice Gorsuch linked the major questions doctrine to the constitutional principle against sub-delegation.¹⁸⁴ That linkage definitively pegs the doctrine as a stand-alone substantive canon capable of limiting authority in the face of seemingly plain language when that language is so broad and general that it would arguably raise constitutional concerns if the Court actually employed the sub-delegation doctrine in a serious fashion. Indeed, Justice Gorsuch made this point expressly in the context of *NFIB*: “if the statutory subsection the agency cites really *did* endow OSHA with the power it asserts, that law would likely constitute an unconstitutional delegation of legislative authority.”¹⁸⁵ That is heady stuff.

Thus, as framed by Justice Gorsuch, the major questions doctrine requires, for authorization to agencies to resolves major questions of law or policy, not just boilerplate grants of authority to agencies to pursue health, safety, the public interest, or some other catch-all verbiage (which would probably be unconstitutional if actually taken seriously as attempted authorizations), but something that specifically and directly indicates that Congress authorized the kind of action involved. A general authorization to promulgate standards for workplace safety, for example, does not constitute “authority to issue a vaccine mandate.”¹⁸⁶ In sum, “If administrative agencies seek to regulate the daily lives and liberties of millions of Americans, the [major

¹⁸³ 139 S. Ct. 2116, 2141 (2019) (Gorsuch, J., dissenting).

¹⁸⁴ See 142 S. Ct. at 667 (Gorsuch, J., concurring). See also *id.* at 668-69 (Gorsuch, J., concurring) (same).

¹⁸⁵ *Id.* at 669 (Gorsuch, J., concurring).

¹⁸⁶ *Id.* at 668 (Gorsuch, J., concurring).

questions] doctrine says, they must at least be able to trace that power to a clear grant of authority from Congress.”¹⁸⁷

The dissenting Justices, by contrast, had no trouble taking broad authorizing language at face value.¹⁸⁸ And as a matter of unvarnished textualism, they have a point. The Occupational Safety and Health Act, as with many statutes in the modern administrative state, contains open-ended language that effectively gives OSHA a mandate to do what it thinks best – creating what I have elsewhere dubbed a “Goodness and Niceness Commission.”¹⁸⁹ If one has no constitutional doubts about Congress’s power to do that, there is no obvious reason not to read the statutes for what they are, which is essentially devices to create precisely the “roving commission” feared by Justice Cardozo in *A.I.A. Schechter Poultry Corp. v. U.S.*¹⁹⁰ and by Justice Gorsuch¹⁹¹ and (at least partially) disavowed by the dissenters.¹⁹² We will see this conflict of visions play out shortly in another case.¹⁹³

Missing from all of these opinions is any mention, or even any hint of a mention, of *Chevron*. Neither the per curiam opinion nor Justice Gorsuch’s concurrence explained how or whether the major questions doctrine interacted with *Chevron*, though one can infer an answer from Justice Gorsuch’s opinion. Nor did the dissenting opinion make any mention of deference

¹⁸⁷ *Id.* (Gorsuch, J., concurring).

¹⁸⁸ *See id.* at 671-75 (Breyer, J., dissenting).

¹⁸⁹ LAWSON, *supra* note 19, at 106.

¹⁹⁰ 295 U.S. 495, 551 (1935) (Cardozo, J., concurring).

¹⁹¹ *See* 142 S. Ct. at 669 (Gorsuch, J., concurring).

¹⁹² *See id.* at 673 (Breyer, J., dissenting) (“Of course, the majority is correct that OSHA is not a roving public health regulator. It has power only to protect employees from workplace hazards.”) (citation omitted). Presumably, on the dissent’s view, it does have a roving commission with respect to workplace hazards.

¹⁹³ *See infra* --.

to the agency's statutory interpretation. The dissenters simply thought that the broad authorizations to the agency should be read at face value and thus provide authority under any standard of clarity. And in a sense the dissenters are right. A statute that tells an agency to go forth and do good is not ambiguous in a literal sense. Similarly, a statute that tells an agency to make people safe in their workplaces is not ambiguous in the most obvious sense. Indeed, as in *Cuozzo Speed Technologies*, agency action under those kinds of statutes does not really involve statutory interpretation as a relevant enterprise. It involves policymaking, which is normally reviewed for reasonableness under the arbitrary or capricious test rather than under doctrines designed to ferret out statutory meaning. Over a large range, these statutes do not really have meanings to ferret out, beyond identifying which bureaucrats are supposed to act as the roving commissioners and over which portions of the country they should rove.

Nonetheless, there were, at least as a matter of current doctrine, issues to be faced about *Chevron* that none of the Justices – and none of the parties – in the case wanted to face. Remember that the government, which relied heavily on *Chevron* in the lower court, did not even mention *Chevron* in the Supreme Court.

It was five months before we heard again from the Court on review of agency interpretations of statutes. This time the case, *American Hospital Association v. Becerra*,¹⁹⁴ did not involve what anyone on the Court regarded as a “major question,”¹⁹⁵ even though more than a billion dollars was at stake. But it squarely put *Chevron* on trial.

¹⁹⁴ 142 S. Ct. 1896 (2022).

¹⁹⁵ The American Hospital Association made some brief mention of elephants in mouseholes, *see* BRIEF at 39, 41, but did not aggressively argue that the case involved the major questions doctrine.

Medicare reimburses providers, such as hospitals, for medical care delivered to elderly beneficiaries. Untold billions of dollars turn on the mechanisms by which reimbursement rates are set; those mechanisms are set forth in section 1395l of Title 42.

In 2003, Medicare was expanded to include prescription drug coverage.¹⁹⁶ For the first two years of the program, Congress specified relatively narrow ranges, keyed to the “reference average wholesale price for the drug,” for reimbursement rates for “outpatient” drugs prescribed by hospitals.¹⁹⁷ For years subsequent to 2005, Congress instructed the Secretary of Health and Human Services to set reimbursement rates which

shall be equal . . .

(I) to the average acquisition cost for the drug for that year (which, at the option of the Secretary, may vary by hospital group (as defined by the Secretary based on volume of covered OPD [*i.e.*, outpatient department] services or other relevant characteristics)), as determined by the Secretary taking into account the hospital acquisition cost survey data under subparagraph (D); or

(II) if hospital acquisition cost data are not available, the average price for the drug in the year established under section 1395u(o) of this title, section 1395w-3a of this title, or section 1395w-3b of this title, as the case may be, as calculated and adjusted by the Secretary as necessary for purposes of this paragraph.¹⁹⁸

The subparagraph (D) referenced in the first paragraph provides for “periodic . . . surveys to determine the hospital acquisition cost for each specified covered outpatient drug for use in setting

¹⁹⁶ Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, 117 Stat. 2066 (2003).

¹⁹⁷ See 42 U.S.C. § 1395l(t)(14)(A)(i)-(ii) (2018).

¹⁹⁸ *Id.* § 1395l(t)(14)(A)(iii).

the payment rates under subparagraph (A),”¹⁹⁹ based on recommendations from the General Accounting Office²⁰⁰ and using adequate samples.²⁰¹

Surveys proved so difficult, burdensome, and unreliable that HHS did not conduct any between 2006 and 2020. Because paragraph (I) of the drug pricing provision requires survey data, which the agency did not possess, HHS always used paragraph (II) to set outpatient drug reimbursement rates. Those rates were the same across all hospitals, regardless of the prices actually paid by those hospitals for the drugs.²⁰² Those paid prices could vary depending on what kinds of discounts various hospitals received on those drugs. That is especially true for certain hospitals known as “section 340B”²⁰³ hospitals, which most notably include “federally-qualified health center[s]”²⁰⁴ that care for underserved populations that may not have insurance or be able to pay for treatment. By statute, drug suppliers who want to participate in Medicare must sell drugs to those section 340B facilities at a significant discount,²⁰⁵ estimated by various studies as ranging from twenty to fifty percent.²⁰⁶ If all facilities receive the same reimbursement for the

¹⁹⁹ *Id.* § 1395l(t)(14)(D)(ii).

²⁰⁰ *See id.* § 1395l(t)(14)(D)(i)(II).

²⁰¹ *See id.* § 1395l(t)(14)(D)(iii).

²⁰² *See* 142 S. Ct. at 1900. Because of some statutory tweaks to the pricing methodology, *see* 42 U.S.C. § 1395w-3a(c) (2018), the “average price” for a drug is actually something in the range of 104-106 percent of the actual reported prices.

²⁰³ The “section 340B” designation comes from the Veterans Health Care Act of 1992, Pub. L. No. 12-585, § 602, 106 Stat. 4943 (1992), which added the program as section 340B of the Public Health Service Act.

²⁰⁴ 42 U.S.C. § 1396d(l)(2)(B) (2018).

²⁰⁵ *See* 42 U.S.C. § 256b (2018).

²⁰⁶ *See Medicare Program: Hospital Outpatient Prospective Payment and Ambulatory Surgical Center Payment Systems and Quality Reporting Programs*, 82 Fed. Reg. 52,356, 52,494 (2017).

same drugs under section 1395l(t)(14)(A)(iii), those section 340B facilities receive a substantial subsidy from Medicare for the outpatient drugs they provide.

In 2017, HHS resolved to end, or at least reduce, those subsidies²⁰⁷ by using a two-tier reimbursement system which for 2018 (and again for 2019) imposed a 22.5 percent discount on drug reimbursements to section 340B facilities, totaling an estimated \$1.6 billion per year.²⁰⁸ It claimed that, under paragraph (II) (with emphasis added), it was using cost data “as calculated *and adjusted* by the Secretary as necessary for purposes of this paragraph.”

Some section 340B hospitals challenged the decision. After a good amount of jurisdictional wrangling not relevant here (consistently resolved in favor of the hospitals²⁰⁹), the district court found that HHS’s action for 2018 was “a patent violation of the Secretary’s § (t)(14)(A)(iii)(II) adjustment authority”²¹⁰ – so patent that no discussion of *Chevron* was necessary.²¹¹ The court said that the agency’s power to “adjust[]” prices was not so broad as to allow the agency to make basic and fundamental changes to the statutory structure. The court determined that the reduction was too large to constitute an “adjust[ment]” and that HHS could only use acquisition costs as the basis for reimbursement when it was proceeding pursuant to

²⁰⁷ See *id.* at 52,495 (“we believe it is inappropriate for Medicare to subsidize other activities through Medicare payments for separately payable drugs”).

²⁰⁸ See *id.* at 52,509. It was really a 28.5 percent reduction, because the 22.5 percent was off of average sales prices, while the regular reimbursement rate included a six percent upward adjustment to the average sales price

²⁰⁹ See 142 S. Ct. at 1902-03.

²¹⁰ American Hospital Ass’n v. Azar, 348 F.Supp3d 62, 81 (D.D.C. 2018). The district court made the same finding for 2019. See American Hospital Ass’n v. Azar, 385 Fed.Supp.3d 1, 3 (D.D.C. 2019).

²¹¹ See 348 F.Supp.3d at 82 n.17 (“Because the Court concludes that the Secretary’s rate reduction is unsupported by the statute’s unambiguous text, the Court need not address whether the Secretary’s statutory interpretation is entitled to deference under *Chevron*”).

paragraph (I), which requires the agency to base such determinations on survey data, which the agency concededly did not have for 2018 and 2019.²¹²

The D.C. Circuit, however, had other ideas. In a split panel decision, it found the case squarely controlled by *Chevron*:

HHS is entitled to *Chevron* deference, which it has invoked here When an agency “interpret[s] a statute it is charged with administering in a manner (and through a process) evincing an exercise of its lawmaking authority,” that interpretation is entitled to *Chevron* treatment HHS established SCOD [*i.e.*, specified covered outpatient drugs] reimbursement rates for 340B hospitals through notice-and-comment rulemaking and explained why it “believe[d] that [its] proposal [was] within [its] statutory authority to promulgate.” 82 Fed. Reg. at 52,499. HHS’s understanding of its statutory authority thus is entitled to *Chevron* deference.

Under *Chevron*, we first ask whether “Congress has directly spoken to the precise question at issue.” Here, the “precise question at issue” is whether HHS’s adjustment authority in subclause (II) encompasses a reduction to SCOD reimbursement rates aimed at bringing reimbursements to 340B hospitals into line with their actual costs to acquire the drugs. If the statute does not directly foreclose HHS’s understanding, we defer to the agency’s reasonable interpretation. We conclude that HHS’s interpretation of subclause (II) is not directly foreclosed and is reasonable.²¹³

²¹² See *id.* 81-82.

²¹³ *American Hospital Ass’n v. Azar*, 967 F.3d 818, 828 (D.C. Cir. 2020) (citations omitted).

Judge Pillard, in dissent, would have resolved the case against the agency at step one because the agency's "reading impermissibly nullifies subclause (I) and the data requirements spelled out at length in subparagraph (D)."

Without *Chevron*, the agency was going to have problems.²¹⁴ The structure of the statute clearly contemplates that the agency is only supposed to use acquisition costs, and is only able to make distinctions among hospital groups, if it first conducts a survey of hospital acquisition costs. Absent a survey, paragraph (II) tells the agency to use average prices – and paragraph (II) contains no authorization to the agency to distinguish among hospital groups. It is true that paragraph (II) allows the agency to "adjust[]" average prices "for purposes of this paragraph." But, as the district court noted, an "adjust[ment]" that duplicates the results of paragraph (I), including a distinction among hospital groups, without conducting a paragraph (I) survey seems hard to square with the statute.

With *Chevron*, the agency at least has a fighting chance. It needs to argue, in effect, that the "purposes of this paragraph" include trying to come up with accurate reimbursement in the absence of reliable survey data, so that an "adjusted" average price that reflects discounts serves those purposes. As a *de novo* matter, that is surely a losing argument. When the statute allows "adjusted" prices "for purposes of this paragraph," it is pretty obviously not granting HHS limitless authority to pursue abstract statutory purposes. Rather, the words "for purposes of this paragraph" mean what they actually say, which is something to the effect of "in the implementation of authority under this section," not "in order to achieve the purposes implicit in this section." But because the literal words can linguistically bear the second reading, a strong enough dose of

²¹⁴ See Brief for the Petitioners, *Am. Hosp. Ass'n v. Becerra*, No. 20-1114, at 46 ("Unsurprisingly, neither the government nor the court of appeals has defended the agency's interpretation of paragraph (14) as the best reading of the statute. They instead have fallen back on *Chevron* deference").

deference under *Chevron* might be enough to carry the day for the agency. That is precisely what the D.C. Circuit held to be the case.²¹⁵

Once the case reached the Supreme Court, the parties (and their amici) certainly understood the case as turning on the applicability of *Chevron*. The brief for American Hospital Association harshly criticized *Chevron* but stopped short of asking the Court to overrule it.²¹⁶ Instead, it urged the Court to understand *Chevron* the same way the Court in 2019, in *Kisor v Wilkie*,²¹⁷ indicated that one must understand deference to agency interpretation of regulations: Use all of the tools in the statutory toolkit before finding a provision ambiguous enough to warrant deference.²¹⁸ And if one is looking for a best interpretation of the statute in this instance, one will find it – and that best interpretation is that the agency cannot come up with a cost-based reimbursement methodology that distinguishes among hospital groups without first conducting a survey of hospital drug acquisition costs.

A number of amicus briefs took the same tack, urging the Court to use this case to restate *Chevron* along the lines of *Kisor*, which would involve a vigorous inquiry by courts at step one.²¹⁹ As one such brief put it, “*Chevron* is not about upholding agency interpretations of statutes that are ‘close enough for government work’ The Court should undertake a *de novo* review of the

²¹⁵ See 967 F.3d at 829-30.

²¹⁶ See Brief for the Petitioners, *supra* note 233, at 46-47.

²¹⁷ 139 S. Ct. 2400 (2019).

²¹⁸ See Brief for the Petitioners, *supra* note 233, at 47-48.

²¹⁹ See Brief for Amici Curiae National Association of Home Builders, American Farm Bureau Federation, American Fuel & Petrochemical Manufacturers, National Cattlemen's Beef Association, And National Mining Association Supporting Petitioners, *Am. Hosp. Ass'n v. Becerra*, No. 20-1114, at 20-26; Brief for Amicus Curiae the Chamber of Commerce of the United States of America in Support of Neither Party, *Am. Hosp. Ass'n v. Becerra*, No. 20-1114, at 7-9; Brief of the New Civil Liberties Alliance as Amicus Curiae in Support of Petitioners, *Am. Hosp. Ass'n v. Becerra*, No. 20-1114, at 19-21.

statute and, in light of all of the relevant tools of statutory interpretation, adopt the best reading of the scope of authority conferred by Subclause II.”²²⁰ Three other amici took a step beyond and urged the Court to overrule *Chevron* altogether.²²¹

The government’s response to this assault on *Chevron* was perhaps surprisingly mild. Its basic argument was that HHS’s interpretation was not merely reasonable but *correct*, so that deference of any kind was unnecessary: “The most natural and straightforward reading of the statutory text supports HHS’s position, and the Court can resolve the case on that basis.”²²² But even though “the government can prevail without any deference,”²²³ it argued, *Chevron* is applicable and easily sustains the agency’s action.²²⁴ The brief discussed *Chevron* and its critics in this case in just two short paragraphs.

The oral argument was largely about *Chevron*. Justice Thomas jumped in early, asking American Hospital Association counsel (and former Solicitor General) Donald Verrilli: “would you argue or are you arguing that we should overrule *Chevron* to get to the statutory approach that you’re taking?”²²⁵ Mr. Verrilli ducked the question, insisting that they were only asking the Court

²²⁰ Brief of Indiana, Georgia, Louisiana, Mississippi, Nebraska, Oklahoma, Texas, and Utah as Amici Curiae in Support of Neither Party, *Am. Hosp. Ass’n v. Becerra*, No. 20-1114, at 25-26.

²²¹ See Brief of Amicus Curiae Americans for Prosperity Foundation in Support of Neither Party, *Am. Hosp. Ass’n v. Becerra*, No. 20-1114, at 4; Amicus Curiae Brief for the National Right to Work Legal Defense Foundation, Inc. in Support of Petitioners, *Am. Hosp. Ass’n v. Becerra*, No. 20-1114, at 2-3; Brief Amicus Curiae of Pacific Legal Foundation in Support of Petitioners, *Am. Hosp. Ass’n v. Becerra*, No. 20-1114, at 3. Cf. Brief of the New Civil Liberties Alliance as Amicus Curiae in Support of Petitioners, *Am. Hosp. Ass’n v. Becerra*, No. 20-1114, at 9 (“NCLA urges the Court . . . to call into question the constitutional underpinnings of *Chevron* and express a willingness to consider overruling *Chevron* in a future case.”)

²²² Brief for the Respondents, *Am. Hosp. Ass’n v. Becerra*, No. 20-1114, at 19.

²²³ *Id.* at 47.

²²⁴ See *id.* at 47-49.

²²⁵ Tr. of Oral Argument, *Am. Hosp. Ass’n v. Becerra*, No. 20-1114, at 5.

“to reject the D.C. Circuit’s application of *Chevron*.”²²⁶ Justice Alito did not give up: “Can I just take you back to Justice Thomas's first question? If the only way we can reverse the D.C. Circuit is to overrule *Chevron*, do you want us to overrule *Chevron*?”²²⁷ Mister Verrilli – to reported laughter -- gave the only possible answer: “Yes. We want to win the case. Yes.”²²⁸

Justice Gorsuch asked a logical follow-up question: “You indicate that we should reconsider *Chevron*, and I -- you just did again in -- in -- in response to Justice Alito. What would you have us replace it with? What would it look like in your world?”²²⁹ Mister Verrilli’s answer to that question was considerably more convoluted than his response to Justice Alito:

MR. VERRILLI: Well, I -- I think the -- I wouldn't presume to tell the Court what it should do in response to that question, but I -- there's -- there are some options, and one certainly is to look at this statute and say: Well, we don't think this is the case. We think this statute is unambiguous.

JUSTICE GORSUCH: I understand that.

MR. VERRILLI: But to say -- but to say --

JUSTICE GORSUCH: But if a majority --

MR. VERRILLI: Sure.

JUSTICE GORSUCH: -- of the Court disagrees with you about that, and you say you still want to win the case, what does that look like?

²²⁶ *Id.*

²²⁷ *Id.* at 30.

²²⁸ *Id.*

²²⁹ *Id.* ag 31.

MR. VERRILLI: Well, I -- I think it could look like any number of things. One is, even if one thinks that the reading of the D.C. Circuit is within the realm of possibility and this idea of dueling superfluities is a valid justification for invoking *Chevron*, which I don't think it is, that there's clearly a best reading of this statute, and it's our reading, that because the consequence of reading it in the way that the -- that the government is asking you to read it, is that you really do read -- you take -- you take something that Congress prescribed as mandatory, as a precondition for setting cost-based rates, and you turn it into an option that the agency is free to accept or reject as it wishes. That's clearly not the best reading of the statute, so I think that gets you to where we want to go.

The other -- the other way seems to me just -- I think we're not really exactly invoking the major questions doctrine, but there's a corollary here, which is --

JUSTICE GORSUCH: None of that works for me, say. Then what?

MR. VERRILLI: Well, I -- I -- I -- I -- I've told you, if you think that you need to overrule *Chevron* and --

JUSTICE GORSUCH: Then you just pick the best -- the best reading, 51-49, you win?

MR. VERRILLI: Yes, yes.²³⁰

Matters got a bit clearer in an answer to a question from Justice Kavanaugh, to which Mr. Verrilli responded:

[W]e're advocating the Court essentially follow the path that was set forth for our deference in *Kisor*. The same idea here.

²³⁰ *Id.* at 31-33.

You've got to exhaust the toolkit, and that requires consideration of context and structure and the overall operation of the statute, the provenance of the statute, all the things that would bring to bear -- you would bring to bear. And if you do, we think there's one clear answer.²³¹

This was hardly the only discussion of deference in the oral argument,²³² but it is enough to see that this case was understood by everyone potentially to raise broad questions about *Chevron*'s structure and its future.

Given that build-up, the case was surely a disappointment to everyone except the section 340B hospitals, which came out several billion dollars ahead. The Court unanimously reversed the D.C. Circuit and held that HHS's two-tier drug reimbursement scheme was not authorized by statute. But it decided the case on the narrowest of grounds while making no statements at all about *Chevron*, *Skidmore*, or deference in general. The Court focused on the fact that the agency was not merely adjusting price data; it was doing so *differently for different hospital groups*. The case's narrow holding is that the agency can only differentiate among hospital groups under paragraph (I), with its acquisition cost survey, not under paragraph (II).²³³ Thus, said the Court, "we need not determine the scope of HHS's authority to adjust the price up or down,"²³⁴ because "the text [of paragraph (II)] requires the reimbursement rate to be set drug by drug, not hospital by hospital or hospital group by hospital group."²³⁵ Adjustments of price data "can consist of moving

²³¹ *Id.* at 35.

²³² Justice Breyer was intrigued by the possibility – advanced by no party and not discussed by the lower courts – of *Skidmore* deference, *see id.* at 28-29, 63, while Justice Barrett wondered what kinds of ambiguity warranted *Chevron* deference. *See id.* at 61-62, 67-68.

²³³ *See* 142 S. Ct. at 190-05.

²³⁴ *Id.* at 1904.

²³⁵ *Id.*

the average-price number up or down, but it cannot consist of giving a single drug two different average prices for two different groups of hospitals.”²³⁶

Doctrinally, this sounds like a straightforward application of *Chevron* step one, even though the case made no mention of *Chevron*: The statute unambiguously requires a cost survey before the agency can distinguish among hospital groups. Nor did the case give any indication whether the Court was signaling any kind of change in the application of step one, as numerous amici had suggested, to generate more step-one resolutions of cases. It sounded like the agency in this instance would lose at step one no matter how that step was formulated.

The one hint of anything else came in the decision’s penultimate paragraph, when the Court announced: “In sum, after employing the traditional tools of statutory interpretation, we do not agree with HHS’s interpretation of the statute.”²³⁷ Does that mean that the Court was adopting Justice Gorsuch’s suggestion that it just seek the best meaning of the statute, even if it was a 51-49 case? Such a view would reduce *Chevron* to a doctrine of desperation, available only when a statute was so vaguely written that no amount of statutory interpretation could yield an answer. Nothing in Justice Kavanaugh’s unanimous opinion for the Court forecloses this reading, but nothing expressly endorses it either. If the Court was modifying *Chevron*, it was hiding an elephant in a mousehole.

A week and a half later, the Court decided *Becerra v. Empire Health Foundation, for Valley Hospital Medical Center*,²³⁸ another Medicare case. As with *American Hospital Association*, the

²³⁶ *Id.* at 1904-05.

²³⁷ *Id.* at 1906.

²³⁸ 142 S. Ct. 2354 (2022).

case was argued largely around *Chevron*. Instead of a unanimous opinion, however, the Court split 5-4. But once again, the Court ducked all of the key issues concerning *Chevron*.

The majority described the statutory question as “technical but important”²³⁹ and “a mouthful.”²⁴⁰ The dissent agreed that the statutory framework was “mind-numbingly complex”²⁴¹ but thought that the narrow issue before the Court was “straightforward.”²⁴² You decide.

“The Medicare program reimburses hospitals at higher-than-usual rates when they serve a higher-than-usual percentage of low-income patients.”²⁴³ The bonus payments are determined by assessing the percentages of poor Medicare patients (using entitlement to Supplemental Security Income as a proxy for wealth) and non-Medicare Medicaid patients treated by a hospital in a given fiscal year. The sum of those two numbers is called the hospital’s “disproportionate patient percentage,” and the statute formally defines it as:

(I) the fraction (expressed as a percentage), the numerator of which is the number of such hospital's patient days for such period which were made up of patients who (for such days) were entitled to benefits under part A of this subchapter and were entitled to supplementary security income benefits (excluding any State supplementation) under subchapter XVI of this chapter, and the denominator of which is the number of such hospital's patient days for such fiscal

²³⁹ *Id.* at 2358.

²⁴⁰ *Id.* at 2360.

²⁴¹ *Id.* at 2368 (Kavanaugh, J., dissenting). If you doubt that assessment, take a gander at 42 U.S.C. § 1395ww (2022). If, at that point, you want to argue with Justice Kavanaugh, by all means have at it.

²⁴² 142 S. Ct. at 2368.

²⁴³ *Id.* at 2358. See 42 U.S.C. § 1395ww(d)(5)(F)(i) (2022).

year which were made up of patients who (for such days) were entitled to benefits under part A of this subchapter, and

(II) the fraction (expressed as a percentage), the numerator of which is the number of the hospital's patient days for such period which consist of patients who (for such days) were eligible for medical assistance under a State plan approved under subchapter XIX, but who were not entitled to benefits under part A of this subchapter, and the denominator of which is the total number of the hospital's patient days for such period.²⁴⁴

The question before the Court was how to understand what it means for a patient to be “entitled to” Medicare part A²⁴⁵ benefits “(for such days)” during a hospital’s fiscal year.

While reaching the age of 65 or having a qualifying disability automatically enrolls you in Medicare part A, those benefits only cover the first ninety days of hospitalization for each “spell of illness,”²⁴⁶ plus another sixty days during each person’s lifetime beyond that annual cap. In addition, Medicare will not pay for services if the patient has another source of payment, such as a private insurance policy.²⁴⁷ But in one important sense, a person whose benefits for a “spell of illness” are exhausted or who has a primary payor other than Medicare is still covered by Medicare part A for other “spell[]s of illness” Is that person someone “entitled to benefits under part A” within the meaning of this statute?

²⁴⁴ 42 U.S.C. § 1395ww(d)(5)(F)(vi)(I-II) (2022).

²⁴⁵ Medicare part A covers in-patient hospital treatment and skilled nursing home, hospice, and certain home-health care services. *See* 42 U.S.C. § 1395d (2022); [What Part A covers | Medicare](#).

²⁴⁶ 42 U.S.C. §1395d(a)(1) (2022); 42 C.F.R. § 409.61(a)(1) (2022).

²⁴⁷ *See* 42 U.S.C. § 1395y(b) (2022).

The consequences of the answer are potentially large. If everyone who is older than 65 or disabled for Medicare purposes counts under the statute, the overall percentage of low-income patients for hospitals will probably be lower. The Medicare fraction in paragraph (I) will probably be lower because the denominator of the Medicare fraction will include all such persons, while the numerator will include only such persons who are also on supplemental security income.²⁴⁸ The Medicaid fraction in paragraph (II) will definitely be lower, because Medicaid recipients who are “entitled” to part A Medicare are subtracted from the numerator. On the other hand, if the statute only counts as persons “entitled” to such benefits those who actually receive benefits, qualifying hospitals will likely show a higher percentage of low-income patients and will thus receive more reimbursement. Aggregated over fifteen years, the different calculations result in a swing “on the order of billions of dollars.”²⁴⁹

The history of the agency’s flip-flops on this interpretative question is too involved to describe here (though Justice Kavanaugh may have thought it relevant²⁵⁰). The bottom line is that in 2004, HHS said that every hospital patient who is older than 65 or disabled for Medicare purposes counts as “entitled” to Medicare part A benefits even for days beyond the ninety-day maximum or for which a primary insurer provides benefits.²⁵¹

²⁴⁸ It is theoretically possible that the broader understanding of entitlement to part A benefits could increase hospital reimbursement. If the persons added to the denominator by that understanding are entitled to SSI benefits at a higher rate than the persons included in the denominator by the narrower understanding, their inclusion could raise the overall Medicare fraction – conceivably enough to outweigh the lower Medicaid fraction. Obviously, a lot of hospitals did not think that this would happen.

²⁴⁹ Brief of the Federation of American Hospitals as Amicus Curiae in Support of Respondent, *Becerra v. Empire Health Foundation*, No. 20-1312, at 8.

²⁵⁰ See *id.* at 2368 (Kavanaugh, J., dissenting).

²⁵¹ *Medicare Program; Changes to the Hospital Inpatient Prospective Payment Systems and Fiscal Year 2005 Rates*, 69 Fed. Reg. 48,916, 49,099 (2004).

In 2013, two courts of appeals upheld the agency’s interpretation against challenges brought by hospitals seeking higher reimbursement. Both decisions expressly relied on *Chevron* deference to uphold the HHS interpretation.²⁵² In 2018, a district court in the State of Washington reached the same conclusion for the same *Chevron*-based reason.²⁵³ The Ninth Circuit reversed on the ground that a prior decision from two decades earlier,²⁵⁴ well before the 2004 HHS interpretation, had foreclosed *Chevron* deference by unambiguously construing the relevant statute in a way that contravened the HHS interpretation.²⁵⁵ The court expressly noted that it was applying the *Chevron* framework and deciding the case against the agency at step one of *Chevron* because of circuit precedent.²⁵⁶ The Supreme Court granted certiorari “to resolve the conflict.”²⁵⁷

Justice Kavanaugh appeared to be right that, notwithstanding the complexities of Medicare reimbursement, the specific question facing the Court was a well-defined question of statutory interpretation: Is a person “entitled to” Medicare part A benefits if they qualify for *any* Medicare part A benefits, or does the statute refer only to people who actually receive Medicare part A benefits for their hospitalization? So framed, that seems like a classic *Chevron* question. No one doubts that HHS administers the relevant statute. The question was resolved in a notice-and-comment rulemaking at the highest level of the agency, not by a series of one-shot adjudicative

²⁵² See *Metropolitan Hospital v. U.S. Dep’t of Health & Human Svc.*, 712 F.3d 248, 254-68 (6th Cir. 2013); *Catholic Health Initiatives Iowa Corp. v. Sebelius*, 718 F.3d 914, 920 (D.C. Cir. 2013).

²⁵³ See *Empire Health Foundation, for Valley Hospital Medical Center v. Price*, 334 F.Supp.3d 1134, 1144-45 1148-53 IE.D. Wash. 2018).

²⁵⁴ See *Legacy Emmanuel Hospital & Health Center v. Shalala*, 97 F.3d 1261 (9th Cir. 1996)

²⁵⁵ See *Empire Health Foundation, for Valley Hospital Medical Center v. Azar*, 958 F.3d 873, 884-85 (9th Cir. 2020).

²⁵⁶ See *id.*

²⁵⁷ 142 S. Ct. at 2361.

decisions made by low-level employees. As every lower court to consider the matter recognized, this seems like a classic *Chevron* case.

It certainly seemed that way to the parties. The government, while contending at great length that HHS had the best reading of the statute,²⁵⁸ vigorously argued for *Chevron* deference.²⁵⁹ The hospital countered with a laundry list of claimed reasons why *Chevron* should not apply in this case,²⁶⁰ as well as extended arguments that the agency's interpretation was unambiguously foreclosed by arguments from text and purpose²⁶¹ and was arbitrary or capricious.²⁶² The hospital did not ask that *Chevron* be reconsidered, though one amicus brief (which was essentially the same brief filed in *American Hospital Association*) did so.²⁶³

To an administrative law scholar, this looks like an obvious case for application of *Chevron*. The reasons to deny deference advanced by the hospital are either obviously silly²⁶⁴ or misdirected.²⁶⁵ Perhaps the agency decision is foreclosed by text or is an unreasonable resolution

²⁵⁸ See Brief for the Petitioner, *Becerra v. Empire Health Foundation*, No. 20-1312, at 26-42.

²⁵⁹ See *id.* at 21, 23, 26, 42-44 Reply Brief for the Petitioner, *Becerra v. Empire Health Foundation*, No. 20-1312, at 21-23.

²⁶⁰ See Brief for Respondent, *Becerra v. Empire Health Foundation*, No. 20-1312, at 24 ,25-26 (no implicit delegation from Congress; *id.* at 24-25 (deference not appropriate in determining eligibility for benefits); *Id.* at 26-28 (rulemaking process was procedurally flawed); *id.* at 27-28 (decision was inadequately explained).

²⁶¹ See *id.* at 28-46.

²⁶² See *id.* at 46-51.

²⁶³ See Brief of Amicus Curiae Americans for Prosperity Foundation in Support of Neither Party, *Becerra v. Empire Health Foundation*, No. 20-1312.

²⁶⁴ The notion that benefits statutes are somehow exempt from *Chevron* has no foundation in *Chevron* theory or practice.

²⁶⁵ There may well have been procedural problems with the 2004 agency rulemaking, and perhaps the agency failed adequately to consider the effects of its rule on hospital finances. But those are potential defects addressed by doctrines other than *Chevron*. See Reply Brief for the Petitioner, *supra* note 278, at 23 (“Respondent asserts that the 2004 rule was accompanied by insufficient discussion of the legal merits and policy consequences of HHS's revised approach. That argument conflates the purely legal question . . . on which this Court granted review . . . with a process-based arbitrary-or-capricious challenge that is not before the Court”) (citation omitted).

of ambiguity, and the agency will therefore lose once *Chevron* is applied, but it seems clear that the case involves a straightforward application of *Chevron*.

Nonetheless, a number of Justices at oral argument expressed a range of doubts about whether *Chevron* would apply. The first doubt came from Chief Justice Roberts, who wondered whether the history of statutory amendments, which overturned prior agency interpretations, suggests that the Court “ought to be particularly precise in interpreting the language Congress used without any gloss added by the agency.”²⁶⁶ Justice Sotomayor referred back to the Court’s 2016 decision in *Encino Motorcars, LLC v. Navarro*,²⁶⁷ which articulated the obvious proposition that a court cannot properly given *Chevron* deference to an agency rule that is invalid because of some procedural or substantive error²⁶⁸ (in the case of *Encino Motorcars*, the rule failed arbitrary or capricious review because the agency did not provide a reasoned explanation for its change in position²⁶⁹). Justice Sotomayor wondered whether procedural irregularities with HHS’s 2004 rule, including the agency admitting that it had misstated the effect of its proposed rule in its notice of proposed rulemaking,²⁷⁰ excluded *Chevron* deference:

²⁶⁶ Tr. of Oral Argument, *Becerra v. Empire Health Foundation*, No. 20-1312, at 10.

²⁶⁷ 579 U.S. 211 (2016).

²⁶⁸ *See id.* at 220-21.

²⁶⁹ *See id.* at 223-24. Oddly, the Court characterized this failure of explanation as a *procedural* error. *See id.* at 221. In one sense, that is so, because the requirement of adequate explanation stems from the statutory procedural requirement that rules be accompanied by a “concise and general statement of purpose.” 5 U.S.C. § 553(c) (2018). But failures of explanation have more commonly been treated by courts as substantive agency failures. This particular terminological confusion probably has no consequence, *see* LAWSON, *supra* note 19, at 866, but other conflations of procedure and substance could possibly affect the standard of review. *See* Iowa League of Cities v. EPA, 711 F.3d 844, 872-73 (8th Cir. 2013).

²⁷⁰ *See* 69 Fed. Reg. at 49,098 (“It has come to our attention that we inadvertently misstated our current policy with regard to the treatment of certain inpatient days for dual-eligibles in the proposed rule of May 19, 2003.”)

So how do you get past *Encino Motorcars* given the odd flip-flopping in the administrative process? It first misstated its existing policy in 2003. You correct the misstatement at the end of the rulemaking process in 2004. But what's most significant to me, the final rule did the opposite of what the agency initially proposed to do.

So there's sort of three steps, all of them at the end of an agency process. I don't see how we give you *Chevron* deference under those circumstances.²⁷¹

When the government responded that the claims of procedural error had been rejected by the Ninth Circuit,²⁷² Justice Sotomayor countered: “What does that have to do with anything? Whether there's an administrative failing under the APA is a different question than are you entitled to deference for an interpretation that it took you until the end of the process to fix and then, when you fix it, you do the opposite of what you said you were going to do?”²⁷³ Justice Gorsuch suggested that *Chevron* might not apply when the government's financial interests are involved, because “you normally take into account when you're interpreting a document who writes it and their pecuniary interests. Why would this be different?”²⁷⁴ Justice Breyer thought it was “a pretty tough case to use *Chevron*”²⁷⁵ because “do you really apply *Chevron* where they're so mixed up that there are only two people in the United States when they -- when they put out the -- the notice

²⁷¹ Tr. of Oral Argument, *Becerra v. Empire Health Foundation*, No. 20-1312, at 14-15.

²⁷² See *id.* at 15.

²⁷³ *Id.* at 15-16.

²⁷⁴ *Id.* at 30.

²⁷⁵ *Id.* at 60.

and comment and nobody understands what it means and they don't even know what their own program is? Hmm.”²⁷⁶

None of these reasons for questioning *Chevron*’s applicability was well supported by prior case law. *Chevron* has generally focused on the relation between the statute at issue and the agency interpretation, not how the statute came about, the specific procedures employed by the agency so long as they met the legal requirements for valid action, or whether the government was likely to benefit financially from its interpretation. Adding any one of these notions to the “step zero” inquiry would substantially reduce *Chevron*’s scope.

In the end, a majority of the Court upheld HHS’s interpretation with no mention at all of *Chevron*; the Court simply concluded that “HHS’s regulation correctly construes the statutory language.”²⁷⁷ Even though the statute is technical, a careful reading, says the Court, “disclose[s] a surprisingly clear meaning – the one chosen by HHS.”²⁷⁸ At no time was this described as an application of *Chevron* step one. The dissent, for its part, also thought that the statute gave a “straightforward and commonsensical”²⁷⁹ answer to the problem before the Court: Exactly the opposite answer given by the agency and approved by the Court. There was no mention of *Chevron* or of any specific reason not to apply the *Chevron* framework. The only indirect mention of scope of review came in the dissent’s penultimate sentence: “In my view, HHS’s 2004 interpretation is not the best reading of this statutory reimbursement provision.”²⁸⁰ This is not the

²⁷⁶ *Id.* at 44. Evidently, only two commentators caught the agency’s 2004 misstatement of its previous policy. See Brief for Respondent, *supra* note 279, at 17-18.

²⁷⁷ 142 S. Ct. at 2362.

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 2368 (Kavanaugh, J., dissenting).

²⁸⁰ *Id.* at 2370 (Kavanaugh, J., dissenting).

only time in which Supreme Court Justices have reached different conclusions about a statute's clear and unambiguous meaning; it happened, at the very least, in 2016.²⁸¹ But in that case, both the majority and dissent explicitly operated within the *Chevron* framework and indicated that they were each making step one determinations of clarity. *Empire Health Foundation* was decided as a battle of best readings, as though *Chevron* did not exist.

The final agency interpretation case of the October 2021 term, *West Virginia v. EPA*,²⁸² is perhaps the term's most noteworthy statutory decision. The case generated (by my hand count) eleven briefs from parties, thirty-two amicus briefs, and five reply briefs. It is certain to generate an extensive body of scholarly commentary.²⁸³ And while it does not actually involve the *Chevron* doctrine, even as that doctrine is conventionally understood, it is likely to have profound effects on the way that at least some *Chevron* cases are decided.

The statutory and regulatory background of the case is too complicated accurately to summarize here; it would need to be the subject of a separate article.²⁸⁴ For purposes of understanding the implications for *Chevron*, here is the key information:

Section 111 of the Clean Air Act instructs the EPA Administrator to promulgate, and to revise when necessary, “standards of performance” for new stationary sources of air pollution. The Administrator must identify categories of stationary sources,²⁸⁵ promulgate “Federal standards

²⁸¹ See *FERC v. Electric Power Supply Ass'n*, 577 U.S. 260, 277 n.5 (“Because we think FERC's authority clear, we need not address the Government's alternative contention that FERC's interpretation of the statute is entitled to deference under *Chevron*”); *id.* at 297 (Scalia, J., dissenting) (“I believe the Court misconstrues the primary statutory limit. (Like the majority, I think that deference under *Chevron* . . . is unwarranted because the statute is clear.)”).

²⁸² 142 S. Ct. 2587 (2022).

²⁸³ The onslaught has already begun. See, e.g., Louis Cappozi, *The Past and Future of the Major Questions Doctrine*, 84 OHIO ST. L.J. – (2023) (forthcoming); Daniel Deacon & Leah Litman, *The New Major Questions Doctrind*, 109 VA. L. REV. – (2023) (forthcoming); Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262 (2022).

²⁸⁴ For a respectable stab at summarizing the background, see *id.* at 2600-06.

²⁸⁵ 42 U.S.C. §§ 7411(b)(1)(A) & 87411(b)(2) (2018).

of performance for new sources,”²⁸⁶ revise those standards when appropriate,²⁸⁷ consider waiver applications,²⁸⁸ and, where the Administrator judges a state implementation plan adequate, leave it to the States to implement and enforce the performance standards.²⁸⁹

Of course, these provisions do not operate in a vacuum. They must be viewed in the context of other portions of the Clean Air Act that set out the National Ambient Air Quality Standards (NAAQS)²⁹⁰ and Hazardous Air Pollutants (HAP) programs.²⁹¹ Those programs provide a comprehensive framework for regulating pollution from existing sources, while section 111’s focus is on new sources. But in the event that pollution from an existing source is covered neither by a NAAQS or a HAP regulation, a provision of section 111 provides residual authority for EPA:

The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 7410 of this title [dealing with NAAQSs] under which each State shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 7408(a) of this title [*i.e.*, is not covered by a NAAQS] or emitted from a source category which is regulated under section 7412 of this title [*i.e.*, not covered by a HAP] but (ii) to which a standard of

²⁸⁶ *Id.* §§ 7411(b)(1)(B) & 7411(f).

²⁸⁷ *See id.* §§ 7411(b)(1)(B) & 7411(g).

²⁸⁸ *See id.* § 7411(j).

²⁸⁹ *See id.* § 7411(c).

²⁹⁰ *See id.* §§ 7408-10.

²⁹¹ *See id.* § 7412.

performance under this section would apply if such existing source were a new source, and (B) provides for the implementation and enforcement of such standards of performance.²⁹²

Most pollutants from existing sources are regulated by the NAAQS or HAP programs, so this residual authority was used by the EPA “only a handful of times since the enactment of the statute in 1970.”²⁹³

The other key provision of section 111 is its definitional section. Among other things, it defines a “standard of performance” to be “a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.”²⁹⁴

In 2015, the EPA used section 111 to prescribe emissions rules for carbon dioxide²⁹⁵ for fossil-fuel-fired plants.²⁹⁶ But instead of setting forth criteria for States to use when submitting implementation plans, or even merely prescribing that such stationary

²⁹² *Id.* § 7411(d)(1).

²⁹³ 142 S. Ct. at 2602.

²⁹⁴ 42 U.S.C. § 7411(a)(1) (2018).

²⁹⁵ There is exactly zero chance that the 1970 Clean Air Act included carbon dioxide as a pollutant. Nonetheless, the Supreme Court in 2007 decided otherwise. *See Massachusetts v. EPA*, 549 U.S. 497 (2007). That dubious decision, *see id.* at 555-58 (Scalia, J., dissenting), has warped jurisprudence under the Clean Air Act for the past fifteen years. *See, e.g., Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014) (illustrating some of the problems with using the Clean Air Act to regulate something that its terms do not regulate). It is possible that *West Virginia v. EPA* is best understood as part of the Court’s ongoing damage control operation following that 2007 mistake. But since my present focus is on *Chevron* rather than the Clean Air Act, I take the Court’s opinion in *West Virginia v. EPA* at face value.

²⁹⁶ *See Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 80 Fed. Reg. 64,662 (2015).

sources operate to reduce their emissions,²⁹⁷ the agency took a different tack. Its prescribed “system of emission reduction” involved “[s]ubstituting increased generation from lower-emitting existing natural gas combined cycle units for generation from higher-emitting affected steam generating units”²⁹⁸ and “[s]ubstituting increased generation from new zero-emitting renewable energy generating capacity for generation from affected fossil fuel-fired generating units.”²⁹⁹ In other words, the agency wanted to shift power generation from coal plants to natural gas plants and from all fossil-fueled plants to alternative energy sources. The approved means of compliance with the new performance standards for fossil-fuel generating plants was to (1) reduce operations, (2) invest in alternative energy production, and/or (3) buy emissions credits from alternative energy sources.³⁰⁰ The agency regarded these mandates for categorical shifts in power generation away from fossil-fuel plants as statutorily permissible performance standards because “they entail actions that the affected EGUs [*i.e.*, electric generating units] may themselves undertake that have the effect of reducing their emissions.”³⁰¹

In 2016, the Supreme Court, by a 5-4 vote, stayed the rule pending court review.³⁰² After the 2016 election, President Trump, by executive order, instructed the EPA to reconsider the 2015 rule.³⁰³ The EPA reconsidered the rule and proposed its repeal,

²⁹⁷ That instruction was part of the agency’s program, *see id.* at 64,667, but it was a small part. *See id.* at 64,727-28.

²⁹⁸ *Id.* at 64,667.

²⁹⁹ *Id.*

³⁰⁰ *See id.* at 64,731.

³⁰¹ *Id.* at 64,709.

³⁰² *See West Virginia v. EPA*, 577 U.S. 1126 (2016).

³⁰³ *See Exec. Order No. 13,783*, § 4, 82 Fed. Reg. 16,093, 16,094 (2017).

concluding that the rule misinterpreted the scope of the agency's authority under section 111, which extended only to plant-source-based technical requirements rather than reorientations of the overall power grid:

Notwithstanding the CPP [Clean Power Plan], all of the EPA's other CAA [Clean Air Act] section 111 regulations are based on a BSER [best system of emissions reduction] consisting of technological or operational measures that can be applied to or at a single source. The CPP departed from this practice by instead setting carbon dioxide (CO₂) emission guidelines for existing power plants that can only realistically be effected by measures that cannot be employed to, for, or at a particular source. Instead, the CPP encompassed measures that would generally require power generators to change their energy portfolios through generation-shifting (rather than better equipping or operating their existing plants), including through the creation or subsidization of significant amounts of generation from power sources entirely outside the regulated source categories, such as solar and wind energy

. . . .

. . . . [T]he Agency proposes to return to a reading of CAA section 111(a)(1) (and its constituent term, "best system of emission reduction") as being limited to emission reduction measures that can be applied to or at an individual stationary source. That is, such measures must be based on a physical or operational change to a building, structure, facility, or installation at that source, rather than measures

that the source's owner or operator can implement on behalf of the source at another location.³⁰⁴

Nearly two years later, the agency formalized repeal of the 2015 rule,³⁰⁵ for the same interpretative reasons that were proposed in 2017.³⁰⁶ The D.C. Circuit vacated the repeal on the ground that the agency in 2017 and 2019 unduly narrowed the scope of section 111.³⁰⁷ The court specifically and at some length rejected the notion that the major questions doctrine counseled against the EPA's power to restructure the nation's power production,³⁰⁸ describing the doctrine as something that the Court had mentioned "in a few cases."³⁰⁹

Importantly, the court said that the agency's 2019 interpretation of section 111 was not entitled to any deference because "the sole ground on which the EPA defends its abandonment of the Clean Power Plan . . . is that the text . . . is clear and unambiguous in constraining the EPA to use only improvements at and to existing sources in its best system of emission reduction."³¹⁰ The agency was not exercising discretion to resolve an ambiguity but was insisting that its interpretation was "the only permissible interpretation of the scope of the EPA's authority."³¹¹ A long line of D.C. Circuit cases dating back to the formative months of the *Chevron* doctrine held

³⁰⁴ See *Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 82 Fed. Reg. 48,035, 48,037-39 (2017).

³⁰⁵ See *Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations*, 84 Fed. Reg. 32,520 (2019).

³⁰⁶ See *id.* at 35,253-31.

³⁰⁷ See *American Lung Ass'n v. EPA*, 985 F.3d 914, 945-57 (D.C. Cir. 2021).

³⁰⁸ See *id.* at 958-61.

³⁰⁹ *Id.* at 959.

³¹⁰ *Id.* at 944.

³¹¹ 82 Fed. Reg. at 32,535.

that no deference to an agency interpretation is appropriate “when the agency wrongly believes that interpretation is compelled by Congress.”³¹² Put another way, the doctrine says that *Chevron* deference does not enter the picture until step two. One only reaches that step if the court first finds that there is ambiguity, and the court decides that preliminary step one question (just as it decides the various step zero) questions without being compelled to give the agency decision any specific weight. To be sure, it is possible to conceive of the *Chevron* enterprise as a single unified decision process that is informed by deference. This one step formulation has had scholarly adherents (including me),³¹³ and at one time had support in a majority opinion authored by Justice Scalia.³¹⁴ But the two step formulation has survived, and in that formulation the D.C. Circuit’s view that step one “clear meaning” questions are resolved without deference has carried the day. Thus, under conventional understandings, *West Virginia v. EPA* presented no issue of *Chevron* deference.³¹⁵

Instead, the case was all about one very simple question: Was the EPA correct when it said in 2019 that section 111 foreclosed treating restructuring of the power grid as a “performance standard” under the statute? Of course, by the time the case reached the Supreme Court, there had been an intervening election (a month after the case was argued in the D.C. Circuit on October 8,

³¹² *Peter Pan Bus Lines, Inc. v. Fed Motor Carrier Safety Admin.*, 471 F.3d 1350, 1354 (D.C. Cir. 2006). The post-*Chevron* cases date back at least to *Prill v. NLRB*, 755 F.2d 941, 948 (D.C. Cir. 1985). *Prill* did not cite *Chevron*, though the case was argued after *Chevron* was decided.

³¹³ See Gary Lawson, *Proving the Law*, 86 NW. U.L. REV. 859, 884 n.78 (1992); Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597 (2009).

³¹⁴ See *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 n.4 (2009).

³¹⁵ To be precise, the issues appealed to the Court presented no such issue. There was in fact a dispute in the lower court over whether *Chevron* applied to the agency’s resolution of an ambiguity spawned by apparent differences between the Statutes at Large and the U.S. Code codification. The court did not resolve that question because it agreed with the agency’s position without regard to *Chevron*. See 985 F.3d at 980.

2021), and the Biden Administration EPA defended the interpretation offered by the agency in 2015 rather than the more constrained interpretation advanced in 2019.

Everyone can read section 111 (and its surrounding provisions) for themselves to decide who has the better of this argument as a matter of text and structure. I offer the following three observations as a transparent attempt at anchoring: (1) As Professor Merrill has pointed out elsewhere, section 111(d) does not in any fashion authorize the EPA directly to regulate emissions standards for existing rather than new sources of pollution; it simply authorizes them to set *procedural* regulations for consideration of state plans to control emissions from existing sources. It is an authorization for procedural rules, not for substantive rules.³¹⁶ (2) Putting aside (1), it is linguistically possible to read the words of the statute, especially the definition of a “performance standard” as a “system” for emissions reduction, to allow the EPA to choose anything at all as a “system,” including explicit commands to change methods of power generation, provided that the statute's limiting criteria of “taking into account the cost of achieving such reduction and any nonair health and environmental impact and energy requirements”³¹⁷ are satisfied. Justice Kagan’s dissenting opinion in *West Virginia v. EPA* presents this interpretation with her characteristic clarity and flair.³¹⁸ (3) While that broad interpretation of a “performance standard” under section 111 is linguistically possible, the chances that it is the *best* interpretation of section 111 are slim. The statute’s overall structure has an obvious focus on plant operations. And, contextually, one must keep in mind that the definition in question is the definition of a “*performance* standard.” Congress is certainly capable of defining a “performance standard” in a fashion that does not

³¹⁶ Tom Merrill, *West Virginia v. EPA: Was “Major Questions” Necessary*, THE VOLOKH CONSPIRACY, July 26, 2022, [West Virginia v. EPA: Was “Major Questions” Necessary? \(reason.com\)](https://reason.com/blog/2022/07/26/west-virginia-v-epa-was-major-questions-necessary).

³¹⁷ 42 U.S.C. § 7411(a)(1) (2018).

³¹⁸ See 142 S. Ct. at 2629-31 (Kagan, J., dissenting).

involve standards for performance, but the notion that Congress did so in section 111(a)(1) is far-fetched. Thus, even if Congress has the constitutional power to give the EPA authority to tell coal plants to turn themselves into wind farms, Congress rather obviously did not do so in section 111. Thus, I think this should have been an easy case, decided without reference to any meaning-shifting substantive canons, whether a federalism canon or a major questions canon. But it is not clear that anyone should care what I think, so let us get back to the case.

The numerous briefs in this case argued vigorously over the best semantic and contextual understandings of section 111. But, unsurprisingly, a good chunk of the arguments focused on the major questions doctrine. Many briefs and amici urged the Court to ask, not simply whether section 111 is *best* understood to authorize the EPA to restructure power generation, but whether the statute *clearly* authorizes that power. If it does not *clearly* authorize that power, these briefs argued, then the major questions doctrine, which requires a clear statement of congressional intent to delegate authority, requires courts to conclude that no such power exists. As the principal brief for the petitioners said, the D.C. Circuit's decision meant that

EPA now wields power to decide *major questions* implicating hundreds of billions of dollars, tens of thousands of potentially regulated parties, and years of congressional wrangling. The agency may compel plant owners to pay competitors. It can even force plants to shut down. Yet Congress did not *clearly* say in any part of the CAA, much less Section 111, that EPA can exercise this transformative power. That omission dooms any claim that EPA can.³¹⁹

Such arguments constituted the bulk of many briefs.³²⁰

³¹⁹ Brief for Petitioners, *West Virginia v. EPA*, No. 20-1530, at 12-13 (emphasis added).

³²⁰ See, e.g., *Brief of Respondent National Mining Association in Support of Petitioners, West Virginia v. EPA*, No. 20-1530; *Brief of Respondent America's Power in Support of Petitioners, West Virginia v. EPA*, Nos. 20-1530, 20-

The government's counter to invocation of a major questions doctrine was not what one might expect. The government offered an array of narrow and technical reasons why the actual scope of the EPA's decision was not large enough to constitute a major question.³²¹ The government said nothing of consequence about the status or character of the major questions doctrine or its appropriate limits. It treated the major questions doctrine as an afterthought – as a Hail Mary that petitioners might try to throw if everything else in their playbook fails. Other respondents took the argument more seriously but also concentrated on showing that the EPA decision did not actually constitute a major question.³²²

At oral argument, the government continued to downplay the major questions doctrine, again characterizing it as an afterthought which the Court has sometimes used “as additional confirmation of what it has understood to be the best interpretation of a statute based on those traditional tools.”³²³

The Justices said relatively little about the major questions doctrine in their questions. Justice Kagan wondered whether application of the doctrine required as preconditions “ambiguity in the statute . . . [,]that the agency has stepped far outside of what we think of as its appropriate

1531, 20-1778, 20-1780; *Brief of Petitioner Westmoreland Mining Holdings LLC*, No. 20-1778, *West Virginia v. EPA*, Nos. 20-1530, 20-1531, 20-1778, 20-1780; *Brief of the Cato Institute and Mountain States Legal Foundation as Amici Curiae in Support of Petitioners*, *West Virginia v. EPA*, Nos. 20-1530, 20-1531, 20-1778, 20-1780; *Brief of the America First Policy Institute as Amicus Curiae in Support of Petitioners*, *West Virginia v. EPA*, Nos. 20-1530, 20-1531, 20-1778, 20-1780; *Brief of 91 Members of Congress as Amici Curiae in Support of Petitioners*, *West Virginia v. EPA*, No. 20-1530.

³²¹ See Brief for the Federal Respondents, *West Virginia v. EPA*, Nos. 20-1530, 20-1531, 20-1778, 20-1780, at 44-48.

³²² See Brief for the Power Company Respondents, *West Virginia v. EPA*, Nos. 20-1530, 20-1531, 20-1778, 20-1780, at 20-26; Brief for State of New York and Other State and Municipal Respondents, *West Virginia v. EPA*, Nos. 20-1530, 20-1531, 20-1778, 20-1780. See also Brief of Amicus Curiae Public Citizen in Support of Respondents, *West Virginia v. EPA*, Nos. 20-1530, 20-1531, 20-1778, 20-1780.

³²³ Tr. of Oral Arg. at 83, *West Virginia v. EPA*, Nos. 20-1530, 20-1531, 20-1778, 20-1780.

lane . . . [,] [and] that it kind of wreaks havoc on a lot of other things in the statute.”³²⁴ (Petitioner’s counsel was fine with that characterization, which seems to require some kind of mismatch between the agency’s obvious mission and its chosen policy, because “the agency really isn’t regulating emissions. It’s regulating industrial policy and energy policy,”³²⁵) Justice Barrett, who as an academic expressed some doubts about the use of substantive canons to shape the meaning of statutes,³²⁶ asked counsel for the state petitioners what I think is the key question concerning the major questions doctrine: “Are you using the phrase ‘clear statement’ to mean a linguistic canon?”³²⁷ That is, does the major questions doctrine function, as the government, suggested, as a device for resolving ambiguities that appear from use of ordinary tools of interpretation, or does it have the stronger role of *shaping meaning* by refusing to give seemingly straightforward language its ordinary meaning absent something *specifically indicating* that the ordinary meaning, which would function in an extraordinary fashion if applied, really was intended. If the latter, then the major questions doctrine operates like a strong form of, for instance, the constitutional avoidance doctrine, which can sometimes refuse to give seemingly clear language its broadest possible operative effect in order to avoid possible constitutional problems.³²⁸ Counsel for the States more or less accepted the characterization of a linguistic canon: “[I]f what you mean by

³²⁴ *Id.* at 58.

³²⁵ *Id.* at 62.

³²⁶ See Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109 (2010).

³²⁷ Tr. of Oral Argument, *supra* note 341, at 35. See also *id.* (“So, when you say clear statement canon or clear statement rule, you’re using that synonymously with, like, a linguistic canon?”).

³²⁸ Perhaps the clearest examples are the cases that exempt the President from the Administrative Procedure Act’s definition of an “agency,” 5 U.S.C. § 551(1) (2018), even though every textual and structural clue in the statute says otherwise. See *Dalton v. Spencer*, 511 U.S. 462, 476 (1994); *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992); LAWSON, *supra* note 19, at 10 (“If interpreting statutes was as simple as reading their language in the context of their structure, then it would indeed be inescapable that the President is an agency under the APA”).

linguistics is that it is text-based, that is true. We're not asking the Court to change the text that's in the statute. It's a question about what is the text we would expect Congress to have put there [I]n this particular class of cases, Congress's silence is unambiguous that it did not give that power to the agency.”³²⁹ But given the seeming importance of the doctrine to the case as it was framed, the discussion in the oral argument was surprisingly – and, for those who wanted clarification of the major questions doctrine, disappointingly -- thin.

That all changed when the decision came down. As I said above, Justice Lawson would have resolved this case using ordinary tools of statutory interpretation, under which a performance standard for power plants must be a standard of performance for power plants. But the majority opinion by Chief Justice Roberts never went there. Instead, it jumped straight to the major questions doctrine: “there are ‘extraordinary cases’ . . . in which the ‘history and the breadth of the authority that [the agency] has asserted,’ and the ‘economic and political significance’ of that assertion, provide a ‘reason to hesitate before concluding that Congress’ meant to confer such authority.”³³⁰ After surveying the prior cases that had applied something resembling a major questions doctrine, the Court noted that “[a]ll of these regulatory actions had a colorable textual basis”³³¹ But that is not enough to validate the agency’s action: “in certain extraordinary cases . . . , something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to ‘clear congressional authorization’ for the power it claims.”³³²

³²⁹ Tr. of Oral Arg., *supra* note 341, at 35-36.

³³⁰ 142 S. Ct. at 2608 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-60 (2000)) (brackets in original).

³³¹ *Id.* at 2609.

³³² *Id.* (quoting *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014)).

With that framing, the Court had no trouble finding that “this is a major questions case”³³³ and that the requisite “clear delegation”³³⁴ from Congress was not there. The definition of a “performance standard” as a “system of emission reduction” was not enough: “Such a vague statutory grant is not close to the sort of clear authorization required by our precedents.”³³⁵ And if that provision would not do the trick, subtle inferences from other provisions will not work either.³³⁶

Justices Gorsuch and Alito joined the majority opinion in full but added some thoughts on the foundations for the major question doctrine. The concurrence viewed the major questions doctrine as a species of the avoidance doctrine, guarding the Article I legislative process.³³⁷ To give Justice Gorsuch’s answer to Justice Barrett’s question at oral argument: No, the major questions doctrine is not a linguistic or semantic canon. It is a substantive canon that chooses narrow interpretation of statutes over their invalidation. The key passage in the concurrence comes near its beginning:

These rules assume that, absent a clear statement otherwise, Congress means for its laws to operate in congruence with the Constitution rather than test its bounds. In this way, these clear-statement rules help courts “act as faithful agents of the Constitution.”³³⁸

³³³ *Id.* at 2610. *See id.* at 2612 (brushing aside the government’s attempt to “downplay the magnitude” of the EPA’s assertion of power).

³³⁴ *Id.* at 2616.

³³⁵ *Id.* at 2614.

³³⁶ *See id.* at 2614-15.

³³⁷ *See id.* at 2616-20 (Gorsuch, J., concurring).

³³⁸ *Id.* at 2616 (quoting Barrett, *supra* note 344, at 169).

Notice that the courts are acting, not as faithful agents of *Congress* but as faithful agents of the *Constitution*. As a descriptive matter, it is obviously false to say that Congress carefully monitors constitutional boundaries when enacting legislation. If one has, in the dissent's terms, "a common-sense awareness of how Congress delegates,"³³⁹ it is pellucidly clear that Congress gives not a fig for the Constitution.³⁴⁰ The major questions canon is designed to *force* Congress to do something that Congress will not do on its own. The doctrine does not protect Congress. It protects, however imperfectly and indirectly, "the Constitution's separation of powers"³⁴¹ from a Congress that is unconcerned with constitutional limits.

This assumes, of course, that there is a constitutional separation of powers to protect. That is so in this context if and only if there is a constitutional rule that limits the scope of legislative sub-delegation to agencies. While the dissent questions virtually every aspect of both the majority's and the concurrence's reasoning, its final argument is the most salient for present purposes: Four propositions summarize the dissent's key point: (1) " '[T]he founding era,' scholars have shown, 'wasn't concerned about delegation.' "³⁴² (2) "Congress has always delegated, and continues to do so – including on important policy issues."³⁴³ (3) "Over time, the administrative delegations Congress has made have helped to build a modern Nation."³⁴⁴ (4) "Congress knows

³³⁹ *Id.* at 2634 (Kagan, J., dissenting).

³⁴⁰ *See* United States Code.

³⁴¹ 142 S. Ct. at 2617 (Forsuch, J., concurring).

³⁴² *Id.* at 2641-42 (Kagan, J., dissenting) (quoting Eric Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 721, 1734 (2002). *See also* Julian Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021) (also cited by Justice Kagan). Since this is my article, see Gary Lawson, *Discretion as Delegation: The "Proper" Understanding of the Nondelegation Doctrine*, 73 GEO. WASH. L. REV. 235 (2005) (directly, and I daresay decisively, responding to Professors Posner and Vermeule).

³⁴³ 142 S. Ct. at 2642.

³⁴⁴ *Id.* at 2643.

what mix of legislative and administrative action conduces to good policy. Courts should be modest.”³⁴⁵ If sub-delegation is a matter of policy rather than law, a clear-statement canon designed to cabin it makes no sense.

The concurrence believes that there is a constitutional rule against sub-delegation of legislative authority.³⁴⁶ So do I,³⁴⁷ though I would enforce it directly rather than refracting it through a canon of statutory (mis)interpretation.³⁴⁸ There is good reason to think that the majority also disagrees with Justice Kagan on the existence and enforceability of a rule against sub-delegation, based on various Justices’ recently expressed thoughts on the subject.³⁴⁹ Consequently, there is now direct authority for demanding clear congressional authorization for agencies to resolve “major questions” of law and policy – and open-ended grants of authority written in non-specific language will not suffice.

This has important implications for *Chevron*, even though *Chevron* was not directly involved in *West Virginia v EPA*. The other cases from the term left it unclear how the major questions doctrine related to *Chevron*.³⁵⁰ Was it a step zero consideration that displaced the *Chevron* framework altogether? Was it a part of step one, along with all other tools of statutory

³⁴⁵ *Id.*

³⁴⁶ See *id.* at 2617, 2625-25 (Gorsuch, J., concurring). As for the majority: We do not yet have a holding that resuscitates the sub-delegation doctrine, but we have hints that such a holding is not out of the question. See LAWSON, *supra* note --, at 177.

³⁴⁷ See Gary Lawson, *A Private-Law Framework for Subdelegation*, in THE ADMINISTRATIVE STATE BEFORE THE SUPREME COURT: PERSPECTIVES ON THE NONDELEGATION DOCTRINE 123 (Peter J. Wallison & John Yoo eds., 2022).

³⁴⁸ See Chad Squitieri, *Major Problems with Major Questions*, LAW & LIBERTY, Sept. 6, 2022, [Major Problems with Major Questions – Chad Squitieri \(lawliberty.org\)](https://www.lawliberty.org/articles/major-problems-with-major-questions/).

³⁴⁹ See Lawson, *supra* note 347, at 125.

³⁵⁰ See Sohoni, *supra* note 283, at 281 (“The new major questions doctrine does not operate as a factor within the *Chevron* framework, nor is it described as an exception to that framework. None of the quartet [of major questions cases from the October 2021 term] even cites *Chevron*.”).

interpretation? If so, how strong a part? *West Virginia v. EPA* makes clear that the major questions doctrine, when it applies, displaces *Chevron* altogether and instead substitutes a reverse-*Chevron* inquiry: The agency can win only if it can show that the statute *clearly* authorizes the *precise* agency action at issue.³⁵¹ Any attempt to translate this doctrine into the language of the *Chevron* framework will make little sense. When would the question of the agency's authority ever reach step two? If the agency only has authority when the statute clearly and specifically grants it, the agency by definition will always win at step one when those conditions are satisfied and lose by virtue of the major questions doctrine (effectively at step zero) when they are not satisfied. There is no work left for *Chevron* deference to perform.

To be sure, as Professor Merrill points out at some length, the Court over the years has not been forthcoming about how substantive canons fit into the *Chevron* world.³⁵² But for the reasons just given, the Court's formulation of the major questions doctrine in *West Virginia v. EPA* makes it hard to see how the doctrine can function as anything other than a displacement of the *Chevron* framework. How significant a displacement it proves to be depends on how readily courts find agency action to involve major questions. That is something that only time will tell.

Overall, the 2021 term leaves open as many questions as it answers. Even if it has truly resolved the status of the major questions doctrine and its relation to *Chevron*, that resolution, as just noted, will affect only a small number of cases. In the numerous cases presenting minor rather than major questions, we know that the Court is eager to find ways to avoid applying *Chevron*, but

³⁵¹ See Deacon & Litman, *supra* note 283, at – (“the ‘new’ major questions doctrine operates as a clear statement rule”).

³⁵² See MERRILL, *supra* note 6, at 167-80.

it steadfastly refuses to talk about it. So what can we conclude, if anything, about the current status of *Chevron*? In the classic words of David Essex, where do we go from here?

III

Frankly, one could describe the present Supreme Court's jurisprudence without any mention of *Chevron*. The best description of judicial review of agency statutory interpretation reflected in the October 2021 term is probably: Look for the best meaning of the relevant statute, even if that best meaning is best by 51-49, unless the agency is claiming power to resolve a major question of law or policy, in which case the agency loses unless there is clear congressional authorization for the precise power claimed by the agency. Importantly, not only is *Chevron* missing from this account, but so is *Skidmore v. Swift*. There is nothing in the Court's October 2021 term cases suggesting that the agency's interpretation is even entitled to a measure of weight less than *Chevron* deference. The agency either wins or loses on the merits, like any other litigant. Perhaps *Skidmore* requires that courts at least *look at* the agencies' interpretations (in a way that they do not have to look at, say, law review articles or amicus briefs), which is not nothing,³⁵³ but there is no indication in the current Supreme Court caselaw that those agency interpretations must skew the reviewing court's final analysis. Of course, that is precisely what those calling for the overruling of *Chevron* have advocated for some time.³⁵⁴ Does that mean that *Chevron* is dead?

³⁵³ See LAWSON & SEIDMAN, *supra* note 3, at 126-28.

³⁵⁴ See, e.g., Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187 (2016).

To paraphrase an ex-President, it depends on what the meaning of “dead” is. If one is a litigant whose practice is confined to Supreme Court cases, then for all practical purposes the answer is yes. But that answer was yes before the October 2021 term cases – as evidenced by the fact that experienced Supreme Court litigators on all sides of half a dozen cases knew not to rest their cases on *Chevron*. *Chevron* has been on the ropes in the Supreme Court for some years now. It is not obvious that any more punches were thrown in the October 2021 term. In Dungeons and Dragons lingo, *Chevron* had already failed two death saves going into the term, but the Court’s conspicuous silence probably eked out a “ten” to stave off oblivion for a bit longer (with no Healing Word on the horizon).

But keep in mind that in at least some of those cases, the lower courts had vigorously applied the *Chevron* framework – in some cases decisively. They did so in the face of half a decade of obvious Supreme Court neglect of *Chevron*. A casual glance at court of appeals decisions in the first half of 2022 reveals dozens of cases that apply the *Chevron* framework.³⁵⁵ Of course, those cases were decided before the October 2021 term was complete. But, as I said, the October 2021 term made no obvious modifications to the *Chevron* framework, other than to tell lower courts to use a reverse-*Chevron* analysis for major questions, which is unlikely to affect very many cases. A year or two from now, it will be interesting to survey the lower courts to see if there is any noticeable change in their treatment of *Chevron* after the summer of 2022. (Indeed, I have collected the cases from the first half of 2022 precisely in order to make that comparison at a later date.) My tentative hypothesis is that one will see no such change, because the forces that created

³⁵⁵ A string citation would be utterly tedious. If anyone wants my list of cases, just email me. For a detailed study that reaches the same conclusion as my anecdotal sense, see Isaiah McKinney, *The Chevron Ball Ended at Midnight, but the Circuit Are Still Two-Stepping by Themselves*, Cato Institute, Dec. 18, 2022, [The Chevron Ball Ended at Midnight, but the Circuits are Still Two-Stepping by Themselves](https://www.cato.org/publications/working-paper/the-chevron-ball-ended-at-midnight-but-the-circuits-are-still-two-stepping-by-themselves) | Cato Institute.

the *Chevron* doctrine have not disappeared. The hypothesis is *very* tentative, because it is impossible to identify with certainty the forces that created the *Chevron* doctrine. But I have some thoughts

Even when the Supreme Court was vigorously applying the *Chevron* framework, it was never especially clear about *why* that framework was appropriate. *Chevron* itself hinted that the rationale might lie in separation-of-powers concerns, to the extent that statutory ambiguities presented policy choices unsuited for judicial resolution.³⁵⁶ Justice Scalia posited in the early days of *Chevron* that the doctrine was the best approximation of congressional intent,³⁵⁷ and while in 1989 that was more a normative prescription than an historical account of *Chevron*'s origins, it subsequently found expression in some cases – most notably one written in 1996 by Justice Scalia³⁵⁸ and in *United States v. Mead*.³⁵⁹ At other times, the Court has suggested that *Chevron* deference is grounded in the agencies' superior capacities to resolve ambiguities.³⁶⁰ And sometimes it has offered multiple rationales in different parts of the same opinion.³⁶¹

Whatever one thinks of the merits of any of these rationales, I am highly confident that none of them actually explains the emergence and eventual triumph of the *Chevron* doctrine.

³⁵⁶ *Chevron*, 467 U.S. at 865-66.

³⁵⁷ See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516-17.

³⁵⁸ See *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-41 (1996).

³⁵⁹ 533 U.S. 218, 229 (2001).

³⁶⁰ See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) (“deference is justified because ‘[t]he responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones,’ and because of the agency's greater familiarity with the ever-changing facts and circumstances surrounding the subjects regulated”) (quoting *Chevron*) (citation omitted).

³⁶¹ Compare *id. with id.* at 159 (“Deference under *Chevron* to an agency's construction of a statute that it administers 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.”).

As both a descriptive and theoretical matter, one can identify at least five categories of reasons why one actor might defer – meaning give some measure of weight³⁶² – to the decision of another actor. Guy Seidman and I have labeled those categories of reasons *legitimation*, *accuracy*, *cost savings*, *signaling*, and *strategy*.³⁶³ In brief, one might defer to another because the other is a more normatively appropriate decision-maker, because the other is more likely to get the right answer, because deference is cheaper and easier than constructing a decision from scratch, because deference signals something important to the actor to whom one is deferring, and because one fears the reaction of another actor if one does not defer. As a descriptive matter, any system of deference in a moderately complex legal system will surely reflect some or all of these considerations at various points. It is therefore not surprising that court decisions describing (and academic theories defending or criticizing) *Chevron* reflect a range of considerations rather than a single rationale. Nonetheless, purely as a descriptive matter with no normative judgment intended, I think it is possible to identify cost savings as *the* principal rationale that underlies the *Chevron* doctrine. And that rationale has important implications for *Chevron*'s future.

The *Chevron* doctrine was not created by the Supreme Court. It is now well understood that the Court in *Chevron* thought that it was just applying settled law.³⁶⁴ Neither the parties nor the Court in *Chevron* believed that any doctrinal changes, much less doctrinal revolutions, were involved in the case. The *Chevron* doctrine, as we today know it, was the creation of the lower federal courts, especially the D.C. Circuit, principally in the period from late 1984 through 1986.

³⁶² Guy Seidman and I have offered as a formal definition of deference: “*the giving by a legal actor of some measure of consideration or weight to the decision of another actor in exercising the deferring actor’s function.*” LAWSON & SEIDMAN, *supra* note 3, at 106.

³⁶³ See *id.* at 91-106, 151-52.

³⁶⁴ See MERRILL, *supra* note 6, at 63-65, 74-79.

The Supreme Court played virtually no role in the development of this doctrine; the Court absorbed the doctrine from the lower courts some years after it had been constructed and did not truly adopt the *Chevron* framework in a meaningful or consistent sense until the 1990s. Steven Kam and I have elsewhere told that story at appalling length.³⁶⁵ Moreover, the lower courts during that 1984-86 time frame had precious little to work with from the Supreme Court in constructing a new administrative law doctrine out of thin air. So why did lower federal courts engineer (to quote Justice Scalia from a slightly different context) “an avulsive change to judicial review of federal administrative action”?³⁶⁶

Any answer is speculative, but from the earliest moments of the emergence of the *Chevron* doctrine (which I witnessed as a D.C. Circuit law clerk in 1984-85), my firm conviction has been that lower courts created the *Chevron* doctrine because they thought it would make their lives easier. Administrative law cases are no picnic. Some of them are mind-numbingly complex – and even more mind-numbingly dull. Many of the statutes are turgid at best and unintelligible at worst; just reflect on some of the statutory schemes, especially in the Medicare context, that arose during the October 2021 term. Figuring out the meanings of those statutes is both difficult and tedious – and that is apart from deciding the various procedural and arbitrary-or-capricious issues that often accompany cases that also present issues of statutory interpretation. Over a large range of these numerous, seemingly unending, and soul-crushing cases, it is often easier to figure out whether the agency’s interpretation of a statute is *absurd* than to figure out whether the agency’s

³⁶⁵ See Lawson & Kam, *supra* note 14.

³⁶⁶ *Mead*, 533 U.S. 218, 239 (Scalia, J., dissenting).

interpretation is *correct*.³⁶⁷ Lower courts invented *Chevron* deference because they thought it would make their lives easier. Everything else is an ex post rationalization for the doctrine.

If true, this explains the extraordinary difference between the treatment of *Chevron* in the lower courts and in the Supreme Court – a difference which has characterized the doctrine from its earliest days. The Supreme Court decides only a handful of administrative law cases each year. Lower courts, with no discretionary control over their dockets, decide thousands. The cost savings from a deference doctrine make little difference to the Supreme Court, especially a Supreme Court with a discretionary docket, but those savings have incalculable significance for lower court judges. The Supreme Court can afford to decide a few cases each year in accordance with its best lights. It is not clear that lower courts have that luxury.

From time to time, the Supreme Court even seems to recognize, if only obliquely, this inexorable tug to defer out of a sheer instinct for self-preservation. Consider *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*,³⁶⁸ a case that leapt out at me when I first read it on a plane ride in 2009 that perfectly illustrates both the reality of administrative law litigation and the economics of deference.³⁶⁹

The Clean Water Act forbids “the discharge of any pollutant by any person” into the navigable waters of the United States.³⁷⁰ The Environmental Protection Agency can authorize

³⁶⁷ For some modest evidence of this effect, see Barnett & Walker, *supra* note 13, at 71 (“our thirty-nine-percentage-point difference between agency-win rates under *Chevron* and de novo review suggests that courts distinguish looking for the best answer from permitting a reasonable one.”).

³⁶⁸ 557 U.S. 261 (2009).

³⁶⁹ The ensuing four paragraphs are adapted, with the gracious approval of West Academic, from LAWSON, *supra* note 19, at 688-89.

³⁷⁰ 33 U.S.C. § 1311(a) (2018).

such discharges by issuing a “permit for the discharge of any pollutant,”³⁷¹ in accordance with the statute’s substantive and procedural guidelines. Section 1316(e) of the Act specifies that “new sources” of pollution may only discharge pollutants if the activity complies with an “applicable performance standard” promulgated by the EPA.³⁷² One such performance standard promulgated by the EPA effectively forbids mine operators from discharging “process wastewater” into the waters of the United States.³⁷³

That would seem to be bad news for companies like Coeur Alaska, which wanted to reopen a gold mine that had been closed since 1928. The company planned to use a method called “froth flotation” that processes rock from the mine in churning water and uses chemicals to isolate the gold-bearing minerals. Once the gold has been removed, one is left with a large mass of crushed rock and water, called slurry, that must be deposited somewhere. Coeur Alaska proposed to deposit its slurry into a nearby lake that everyone agreed was navigable waters and thus subject to the requirements of the Clean Water Act. Under the Clean Water Act regime just described, this plan would seem to be flagrantly and obviously illegal, as the slurry fits nicely within the category of “process wastewater.”

The EPA, however, is not the only federal agency that grants permits under the Clean Water Act. Yet another provision of the statute authorizes the Army Corps of Engineers to grant permits for the discharge of “dredged or fill material,”³⁷⁴ under EPA guidelines and subject to an EPA veto if the latter agency finds a Corps-permitted plan to have an “unacceptable adverse effect.”³⁷⁵

³⁷¹ *Id.* § 1342(a).

³⁷² *Id.* § 1316(e).

³⁷³ 40 C.F.R. § 440.104(b)(1) (2022).

³⁷⁴ 33 U.S.C. § 1344(a) (2018),

³⁷⁵ *See id.* § 1344(c).

Coeur Alaska's slurry fits nicely within any plausible definition of "dredged or fill material."³⁷⁶ The EPA's general permitting authority under § 1342(a) specifically declares that it does not apply to matters governed by the Corps' permitting authority under § 1344,³⁷⁷ and a regulation confirms that no EPA permit is needed for "[d]ischarges of dredged or fill material into waters of the United States which are regulated under section 404 of CWA."³⁷⁸ Coeur Alaska accordingly sought and received from the Corps a discharge permit for its slurry (which the EPA did not veto).

But what about § 1316—the "new source" permitting provision? Does the Corps have authority to grant a permit even when section 1316, as implemented by a valid EPA regulation, effectively prevents the EPA from doing so? More technically, is § 1316 inapplicable to matters within the jurisdiction of the Corps under § 1344, or does any new source discharge, even a discharge of "dredged or fill material" subject to Corps rather than EPA approval, have to comply with § 1316 performance standards?

Section 1316 says nothing expressly about its relationship to the Corps' authority under 1344. As the Supreme Court summarized the matter: "On the one hand . . . , [§ 1316] provides that a discharge that violates an EPA new source performance standard is 'unlawful'—without any exception for fill material. On the other hand, . . . [§ 1344] grants the Corps blanket authority to permit the discharge of fill material—without any mention of [§ 1316]."³⁷⁹ No regulations of

³⁷⁶ See 40 C.F.R. § 232.2 (2022) (defining "discharge of fill material" to include "placement of overburden, slurry, or tailings or similar mining-related materials;" and defining "fill material" to include "material placed in the waters of the United States where the material has the effect of . . . [c]hanging the bottom elevation of any portion of a water of the United States"). Everyone agreed that Coeur Alaska's proposed discharge, which raise the elevation of the lakebed by about fifty feet, counted as the discharge of fill material. See 551 U.S. at 275.

³⁷⁷ See *id.* § 1342(a)(1) (noting that the EPA's permitting authority governs "[e]xcept as provided in sections 1328 and 1344 of this title," the latter provision being the Army Corps of Engineers' authority). (Section 1328, if anyone cares, prescribes special procedures for discharge permits for aquaculture.).

³⁷⁸ 40 C.F.R. § 122.3(b) (2022).

³⁷⁹ 557 U.S. at 281.

either the EPA or the Corps directly address this question: “Rather than address the tension between §§ 306 and 404, the regulations instead implement the statutory framework without elaboration on this point.”³⁸⁰ The only semi-formal agency statement was “a memorandum written in May 2004 by Diane Regas, then the Director of the EPA's Office of Wetlands, Oceans and Watersheds, to Randy Smith, the Director of the EPA's regional Office of Water with responsibility over the mine.”³⁸¹ This memorandum – an internal EPA document written by three bureaucrats to another bureaucrat³⁸² -- concluded that “the regulatory regime applicable to discharges under section 402 [*i.e.*, section 1342], including effluent limitations guidelines and standards, such as those applicable to gold ore mining, do not apply to the placement of tailings into the proposed impoundment.”³⁸³

Thus, the Court was faced with a very nasty problem of statutory interpretation. It had to reconcile two provisions which make no reference to each other. One could not use a last-in-time rule, because the problem is not that the provisions are literally inconsistent but that they can be related to each other in either of two equally plausible ways: Either section 1342 qualifies the Corps' authority under section 1344 or section 1344 constitutes an exception to the EPA's authority under section 1342. How to choose?

³⁸⁰ *Id.* at 282.

³⁸¹ *Id.* at 283.

³⁸² While the Court attributed the memorandum to Regas, it was issued in the names of three Directors of EPA offices. By calling the various EPA officials “bureaucrats,” I do not mean to downplay the significance of their offices, which are clearly significant. It is only to point out that this document was an internal memo within the EPA.

³⁸³ Memorandum from Diane Regas, Director, Office of Wetlands, Oceans and Watersheds; James A. Hanlon, Director, Office of Wastewater Management & Geoffrey H. Grubbs, Director, Office of Science and Technology to Randy Smith, Director, Office of Water, Region X, May 17, 2004, *Jt. App.*, *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, Nos. 07–984, 07–990, at 141a, 144a-145a (citation omitted).

The Court quickly eliminated *Chevron* deference as a possibility, because the interpretation embodied in the 2004 memorandum did not have the force and effect of law. The memorandum was essentially an internal guidance document and thus not entitled to *Chevron* deference under *Mead* and *Christensen v. Harris County*.³⁸⁴ The Court did not mention the possibility of deference to the Corps' grant of the discharge permit, which had the necessary force and effect of law and embodied at least an implicit interpretation of section 1344, no doubt because it looks a lot like the kind of one-off, low-level decision that the Court in *Mead* said does not merit *Chevron* deference. At the time of *Couer Alaska*, an agency's interpretation of its own ambiguous regulations was entitled to substantial deference under *Auer v. Robbins*,³⁸⁵ but that would seem to be of no help in *Couer Alaska*, because there was no ambiguity in any regulation to interpret. No one in the case was arguing about the meaning of, for example, the regulation defining fill material, and there was simply no regulation addressing, even ambiguously, the relationship between the two provisions of the Clean Water Act. The Court did not mention the possibility of *Skidmore* deference, but again that may have been simply because it was obvious that *Skidmore* would not be of help. The Corps' permitting decision was unexplained and therefore not entitled to any weight of consequence, and while the EPA memorandum was several pages long, it merely described the arrangement agreed upon by the EPA and the Corps. It did not provide a detailed explanation, in terms of techniques of statutory interpretation, of how that conclusion was reached.

³⁸⁴ 529 U.S. 576, 587 (2000) ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference."). The Court actually framed the reasons for denying *Chevron* deference a bit differently than I just indicated, saying that the memorandum was "not subject to sufficiently formal procedures to merit *Chevron* deference." 557 U.S. at 284. This would be consistent with Professor Merrill's focus on notice-and-comment procedures but was not an accurate statement of doctrine, either in 2009 or today.

³⁸⁵ 519 U.S. 452, 461-63 (1997). That doctrine has since been modified, perhaps to the point of non-existence. See *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).

It would therefore seem as though *none* of the deference doctrines available to the Court in 2009 was going to help solve this difficult interpretative problem.

The Court nonetheless found a way to defer to the EPA memorandum, finding it a reasonable interpretation of an ambiguous regulation:

The regulation that the Memorandum cites—40 CFR § 122.3—is one we considered above and found ambiguous. That regulation provides: “[d]ischarges of dredged or fill material into waters of the United States which are regulated under section 404 of CWA” “do not require [§ 402] permits.” The Regas Memorandum takes an instructive interpretive step when it explains that because the discharge “do[es] not require” an EPA permit, *ibid.*, the EPA’s performance standard “do[es] not apply” to the discharge. App. 145a. The Memorandum presents a reasonable interpretation of the regulatory regime. We defer to the interpretation because it is not “plainly erroneous or inconsistent with the regulation[s].”³⁸⁶

It is perfectly obvious – as Justice Scalia pointed out in a bemused concurrence³⁸⁷ -- that the EPA memorandum was not interpreting any regulation. The regulation cited by the Court addresses whether the EPA has permitting authority over fill material. It is not at all ambiguous on that point (“No!!!!”), nor could it be, since the statutory scheme specifically declares that EPA has no permitting authority in that context. Earlier in its opinion, the Court had confirmed that the Corps and not EPA was the proper permitting authority for Couer Alaska.³⁸⁸ The remaining question at that point was whether the Corps’ now-undoubted permitting authority had to conform to new

³⁸⁶ 557 U.S. at 284 (quoting *Auer v. Robbins*).

³⁸⁷ See *id.* at 295 (Scalia, J., concurring in part and concurring in the judgment).

³⁸⁸ See *id.* at 273-75.

source performance standards. Nothing in 40 C.F.R. § 122.3 even colorably addresses that question. There is simply nothing for an agency to interpret on that score.

The Court was surely aware that it was stretching the boundaries of *Auer* deference beyond the breaking point, as it went on to offer five reasons why the jurisdictional scheme outlined by the EPA memorandum does not violate any statutory provision or lead to terrible consequences.³⁸⁹ Not one of those five reasons identifies any ambiguous terms in a regulation to which the agency's interpretation could plausibly be directed. As Justice Scalia observed, "it becomes obvious from the ensuing discussion that the referenced 'regulatory scheme,' and 'regulatory regime' for which the Court accepts the agency interpretation includes not just the agencies' own regulations but also (and indeed primarily) the conformity of those regulations with the ambiguous governing statute, which is the primary dispute here."³⁹⁰ But, of course, the Court had already ruled out deference to either agency's interpretation of the underlying statute.

The question of the day is why the Court made itself look silly trying to find some reason to defer to the EPA memorandum, which clearly did not merit deference under any governing doctrine. The obvious answer is that figuring out the right answer in this case – almost without regard to what you consider to be the criteria for a right answer – is very hard. There is no obvious solution to the conundrum Congress created (and the Court split 6-3 on the merits of the case). Deference to the EPA memorandum provides a relatively easy out. This would not be the first time that the Court threw up its hands in the face of a complex regulatory scheme.³⁹¹ Sometimes, deference makes a court's job easier.

³⁸⁹ See *id.* at 284-86.

³⁹⁰ *Id.* at 295 (Scalia, J., concurring in part and concurring in the judgment).

³⁹¹ See, e.g., *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680 (1991).

Now multiply that by the thousands of technical, tedious, and sometimes tricky statutory cases that inundate the lower courts. Those courts are going to be hungry for doctrines that let them get cases off the desk. Deference doctrines, if formulated with enough simplicity, can do that effectively. And the mid-1980s *Chevron* doctrine offered at least the promise of that kind of simplicity: Just ask whether the statute is clear and whether the agency's interpretation is absurd, and move on to the next case.

If that is even a moderate part of the reason why the *Chevron* doctrine prevailed (and I think it is more than a moderate part), then the future of the *Chevron* doctrine lies much more with the lower courts than with the Supreme Court. And if the Supreme Court wants to abolish, or even substantially limit, the *Chevron* doctrine not just for itself but for the lower courts as well, it needs to provide an alternative mechanism for deciding cases that the lower courts will find palatable.

Consider in this light Professor Merrill's recommendation, as part of a proposed reformulation of the *Chevron* doctrine, that courts carefully "determine whether the agency is acting within the scope of its delegated authority."³⁹² *Chevron* tells courts to ask whether the agency is *clearly* outside its authority -- and the major questions doctrine tells them to ask whether the agency is *clearly* within it. Over a large range of cases, seeking a clear answer is easier than seeking a correct one. Professor Merrill is absolutely right that seeking a right answer is more consistent with rule of law values, and the constitutional role of courts, than is seeking a clear one. But if I am right, the development of doctrine in this area has not been driven by careful consideration of jurisprudential and constitutional values. It has been driven by the perceived realities of litigation, and those realities may call for something more deferential than Professor Merrill, and perhaps a majority of the current Supreme Court, is prepared to offer.

³⁹² MERRILL, *supra* note 6, at 31. I discuss Professor Merrill's reformulation of *Chevron* in another article. CITE.

The next few years may offer a chance to test my hypothesis.