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Center for the Study of the Administrative State
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The Major Questions Doctrine Outside Chevron's Domain

Adam R. F. Gustafson

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THE MAJOR QUESTIONS DOCTRINE OUTSIDE CHEVRON'S DOMAIN

Adam R.F. Gustafson*

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ABSTRACT

The major questions doctrine provides that Congress must "speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." In the standard version of the doctrine, represented by the Supreme Court's 2000 and 2014 decisions in FDA v. Brown & Williamson *and* Utility Air Regulatory Group v. EPA*, statutory ambiguity on such questions requires a court to reject the agency's assertion of administrative power and leave the policy question to Congress to resolve in subsequent legislation. In the non-standard version of the doctrine, represented by the Supreme Court's decision in* King v. Burwell*, the statutory ambiguity on major questions empowers courts to resolve the policy dispute by upholding or denying the agency power as the court thinks best. The standard version (but not the* King v. Burwell *version) of the major questions doctrine comports with the rule of law and promotes democratic representation. The doctrine can be implemented objectively and predictably by enforcing clear guidelines on what makes a policy question "major," as suggested by then-Judge Kavanaugh's dissent in a challenge to the FCC's Open Internet Order. Although the major questions doctrine began as an exception to* Chevron *deference, it can operate more broadly as a nondelegation canon of statutory construction. In this function, the major questions doctrine helps to check excessive delegation by Congress, and to restrain administrative and judicial policy-making on questions of the greatest importance to society.*

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INTRODUCTION

Since the days of Chief Justice Marshall, the Supreme Court has distinguished between "those important subjects, which must be entirely regulated by the legislature itself," and "those of less interest, in which a general provision may be made, and power given to those who are to act under such general provision to fill up the details."[1] Although there is no end of debate about where to draw the line between "important" legislation and gap-filling execution, there is general agreement that some line is necessary: the Constitution separates powers between a Congress vested with "All legislative Powers herein granted,"[2] and a President charged not with making law but with "tak[ing] care that the Laws be faithfully executed."[3]

The blurring of that line in the years since Marshall has had a multitude of related causes—industrial and communications revolutions; a larger and more ambitious federal government; an executive branch staffed with subject-matter experts; legislative incentives to pass broad, aspirational statutes and to avoid responsibility for specifying policy; judicial

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[1] *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43, (1825) (Marshall, C.J.).

[2] U.S. CONST. art. I, § 1.

[3] *Id.* art. II, § 3.

deference to administrative interpretation and regulation; and judicial reticence to combat congressional abdication through enforcement the non-delegation doctrine.

In an effort to retrace a line between the legislation and execution, in the face of an ever more powerful administrative apparatus and more feckless Congress, the Supreme Court has stated that it "expect[s] Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.' "[4] Thus, the Court has been unwilling to read statutory silence to authorize vast new regulatory authority—especially when the statute in question has been on the books for years and the agency's broad interpretive of its own authority is novel.[5]

This principle is known as the major questions doctrine, after an article by then-Judge Stephen Breyer,[6] and it is closely related to the elephants-in-mouseholes canon, after a colorful metaphor coined by the late Justice Scalia.[7] It arose as an exception to *Chevron* deference, the doctrine that courts should defer to an agency's reasonable interpretation of an ambiguous statute within its jurisdiction. The development of the major questions

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[4] *Utility Air Regulatory Group v. EPA*, 134 S.Ct. 2427, 2444 (2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)).

[5] *See id.* ("When an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' we typically greet its announcement with a measure of skepticism." (quoting *Brown & Williamson*, 529 U.S. at 159)).

[6] Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

[7] *Whitman v. American Trucking Associations*, 531 US 457 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

doctrine can be seen, together with other *Chevron* exceptions, as a response to excessive delegation by Congress and not just excessive deference by courts.

At the same time that the major questions doctrine and other *Chevron* exceptions have blossomed, some voices on the Court have called for *Chevron* and related deference doctrines to be overruled altogether.[8] That prospect began to look more plausible when President Trump appointed Justice Neil Gorsuch, who as a Tenth Circuit Justice wrote that *Chevron* is "pretty hard to square with the Constitution of the founders' design,"[9] and when the President nominated Judge Brett Kavanaugh, who has said that *Chevron* "encourages the Executive Branch . . . to be extremely aggressive in seeking to squeeze its policy goals into ill-fitting statutory authorizations and restraints."[10]

This paper imagines a future for the major questions doctrine in a hypothetical scenario in which *Chevron* is overruled. The thought experiment might seem misguided at first blush, since the major questions doctrine is usually considered as an exception to *Chevron*. In a future without *Chevron* deference, one might reasonable wonder what purpose the major questions doctrine would serve. But as a nondelegation canon, the major

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[8] *See, e.g.*, <Asher Steinberg, *Does Anyone on the Supreme Court Believe in Chevron Anymore? A Squib on Chevron in SAS Institute*, The Narrowest Grounds, Apr. 26, 2018 ("[A]fter *SAS Institute* there is really only one Justice, Justice Kagan, who is committed on paper to upholding *Chevron*. Two members of the Court, Justice Thomas and Justice Gorsuch, have argued that deference to administrative agencies on statutory interpretation is unconstitutional; another three members, Chief Justice Roberts and Justices Kennedy and Alito, joined the former's dissent in *City of Arlington*, which argued that courts must somehow decide, in the case of every ambiguity in a statute over which an agency has general rulemaking authority, whether Congress implicitly delegated gap-filling authority to the agency as to that particular ambiguity; and Justice Breyer, now joined by Justices Ginsburg and Sotomayor, has argued much the same thing, albeit of course in a more distinctively Breyerian Legal-Process-School-influenced way.").

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

[10] Brett M. Kavanaugh, *Fixing Statutory Interpretation*, Review of Judging Statutes, by Robert A. Katzmann, 129 HARV. L. REV. 2118, 2150 (2016).

questions doctrine may continue to play an important rule by forcing Congress to legislate with specificity before an agency is empowered to take on a big new problem with an old grant of regulatory authority.

Part I of this article provides a brief history of the major questions doctrine. Part II sketches a taxonomy of the various possible ways of applying the major questions doctrine and defends the traditional clear statement rule against innovations that empower courts to select their own preferred policy outcomes in the face of statutory ambiguity. Part III defends the major questions doctrine against charges that it is inconsistent with the rule of law. Part IV offers preliminary thoughts about a measuring stick for major-ness rooted in constitutional values. Part V describes the utility of the major questions doctrine as a stand-alone nondelegation canon of statutory construction, independent of judicial deference doctrines.

I. A BRIEF HISTORY OF THE MAJOR QUESTIONS DOCTRINE

A. *MCI Telecommunications v. AT&T* (1994)

The major questions doctrine traces its origins to a dispute between long-distance telephone service providers about the Federal Communications Commission's (FCC) authority to exempt MCI Telecommunications Corp. from the duty to file tariffs with the FCC and charge only the filed tariffs.[11] The FCC had exempted MCI and other non-

[11] *MCI Telecommc'ns Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 226 (1994).

dominant common carriers under its statutory authority to "modify any requirement made by or under the authority of" the tariff-filing requirement.[12]

MCI argued that the FCC's interpretation of "modify" to allow a complete exemption was entitled to deference under *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*[13] *Chevron* created a two-step analysis for evaluating an agency's statutory interpretation: The Court first asks "whether Congress has directly spoken to the precise question at issue."[14] If the statute is "silent or ambiguous with respect to the specific issue," the Court then asks "whether the agency's answer is based on a permissible construction of the statute"[15]—that is, whether the agency has offered a "reasonable interpretation."[16]

MCI argued that "modify" was ambiguous because, according to one dictionary, it could mean both "to make minor changes" and "to make a basic or important change in."[17]

The Court denied *Chevron* deference, because it denied that "modify" was ambiguous in the sense MCI proposed.[18] MCI's "basic or important change" definition post-dated the statute, and it was contradicted by contemporary definitions that limited the connotation of "modify" to "moderate change."[19] In short, the FCC's interpretation was "not entitled to

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[12] *Id.* at 220 (citing 47 U.S.C. § 203).

[13] 467 U.S. 837 (1984), *cited in MCI*, 512 U.S. at 226.

[14] *Id.* at 842.

[15] *Id.* at 843.

[16] *Id.* at 844.

[17] 512 U.S. at 226.

[18] *Id.* at 227–28.

[19] *Id.* at 228.

deference," because it went "beyond the meaning that the statute can bear."[20] The tariff-filing provision held "enormous importance to the statutory scheme," so the FCC's detariffing policy could not be considered a "mere 'modification,' " as that word was properly understood.[21]

Although *MCI* turned on a decision of the limits of ambiguity at *Chevron* Step One—or perhaps even a conclusion about the unreasonableness of the FDA's rule at Step Two[22]—the Court made a statement from which the major questions doctrine would germinate: "It is highly unlikely that Congress would leave the determination of whether an industry would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to 'modify' rate-filing requirements."[23]

B. *FDA v. Brown & Williamson* (2000)

The classic statement of the major questions doctrine came six years after *MCI*. Under President Clinton, the Food & Drug Administration (FDA) determined that nicotine is a "drug" under the Food, Drug, and Cosmetic Act (FDCA), and that cigarettes and smokeless tobacco are "drug delivery devices."[24] Based on these findings, the FDA

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[20] *Id.* at 229.

[21] *Id.* at 231.

[22] *See id.* at 234 ("We do not mean to suggest that the tariff-filing requirement is so inviolate that the Commission's existing modification authority does not reach it at all. Certainly the Commission can modify the form, contents, and location of required filings, and can defer filing or perhaps even waive it altogether in limited circumstances.").

[23] *Id.* at 231.

[24] *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 127 (2000).

regulated tobacco for the first time in the 58-year history of the FDCA, promulgating rules concerning the marketing of tobacco products to children.[25] The Supreme Court sided with the tobacco industry, holding that the FDA lacks authority under the FDCA to regulate tobacco.

The Court purported to decide the case at Step One of the traditional *Chevron* framework, concluding that "Congress has directly spoken to the issue here and precluded the FDA's jurisdiction to regulate tobacco products."[26] However, this conclusion was not based on any clarity in the text of the statute itself but on the structure of the FDCA, which required the FDA to ban products with no safe application,[27] and on Congress's post-FDCA tobacco legislation that "foreclosed the removal of tobacco products from the market."[28]

The Court did not defer to the FDA's "extremely strained understanding of safety,"[29] which would have allowed the FDA to regulate tobacco products (without banning them) by comparing the risks of tobacco use to the "countervailing effects" of a ban, including extreme withdrawal and resulting black markets for more dangerous cigarettes.[30]

Deference was unwarranted despite the apparent ambiguity of the statutory language, the Court held, because of the "extraordinary" "nature of the question

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[25] *Id.* at 128.

[26] *Id.* at 133.

[27] *Id.* at 135.

[28] *Id.* at 137.

[29] *Id.* at 160.

[30] *Id.* at 139.

presented."[31] The Court quoted then-Judge Breyer's statement in a law review article that "Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration."[32] The Court held that the FDA's regulation of tobacco products presented such an extraordinary case for several reasons: the FDA's long history of disclaiming jurisdiction to regulate tobacco, the tobacco industry's status as "constituting a significant portion of the American economy,"[33] the industry's "unique political history" owing to "its unique place in American history and society,"[34] Congress's history of legislation on tobacco marketing,[35] Congress's rejection of legislative "proposals to give the FDA jurisdiction over tobacco,"[36] and "the breadth of the authority that the FDA has asserted."[37]

The Court cited *MCI* for the proposition that "we must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency."[38] Applying this principle, the Court concluded that "Congress could not have intended to delegate a

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[31] *Id.* at 159.

[32] *Id.* at 159 (quoting Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986)).

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.* at 159–60.

[37] *Id.* at 160.

[38] *Id.* at 133.

decision of such economic and political significance to an agency in so cryptic a fashion."[39] The Court therefore held that EPA lacks jurisdiction to regulate tobacco products.[40]

C. *Whitman v. American Trucking Associations* (2001)

A year later, the Court cited *MCI* and *Brown & Williamson* in a case that raised the question whether EPA has authority to consider implementation costs when it sets National Ambient Air Quality Standards for various pollutants under the Clean Air Act. The Court held that EPA did not have that power. Although the statute was superficially ambiguous, the Court refused to find implicit in the statute a delegation of power that Congress had granted explicitly in other provisions of the same Act.[41]

The opinion could have stopped there, but Justice Scalia also alluded to the major questions doctrine, reasoning that any "textual commitment of authority to consider costs . . . must be a clear one," because the statutory standard-setting mechanism at issue "drives nearly all of Title I of the [Clean Air Act]."[42] Justice Scalia then coined the famous elephants-in-mouseholes metaphor: "Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."[43] Statutory provisions requiring EPA to select standards "requisite to protect public health" with "an adequate margin of safety" did

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[39] *Id.* at 160.

[40] *Id.* at 161.

[41] 531 U.S. at 467.

[42] *Id.* at 468.

[43] *Id.* at 468.

not leave room for cost consideration.[44] Nor did Congress's instruction to base the standard on allegedly non-exhaustive criteria, including public health effects. The Court determined that "cost . . . is both so indirectly related to public health *and* so full of potential for canceling the conclusions drawn from direct health effects that it would surely have been expressly mentioned in [the statute] had Congress meant it to be considered."[45]

Although this section of the opinion did not cite *Chevron*, the *Whitman* Court's elephants-in-mouseholes canon could be understood as a Step One tool of statutory construction. It resolves apparent ambiguity to deny the agency's assertion of far-reaching authority. But like *Brown & Williamson*'s Step One invocation of the major questions doctrine, its practical effect is to foreclose judicial deference at Step Zero—the threshold of the deference analysis.

The elephants-in-mouseholes canon resonates with, but does not precisely overlap with, the major questions doctrine. Instead of looking to the economic and political magnitude of the agency action, the elephants-in-mouseholes canon measures its effect on the rest of the regulatory scheme. And Scalia's focus on the ancillary nature of the agency's statutory hook (the mousehole), and not just its vagueness, was arguably new.[46] But the

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[44] *Id.*

[45] *Id.* at 469.

[46] *Cf. MCI*, 512 U.S. at 231 (finding it "even more unlikely" that Congress would delegate the decision whether or not to rate-regulate an industry through "such a subtle device as permission to 'modify' rate-filing requirements."); *Brown & Williamson*, 529 U.S. at 160 (quoting MCI and concluding that, "[a]s in *MCI*, . . . Congress could not have intended to delegate a decision of such economic and political significance to an agency *in so cryptic a fashion*.").

basic principle was by now familiar: An agency cannot find new delegations of important policy-making powers in unclear statutes.

D. *Massachusetts v. EPA* (2007)

The Court seemed to abandon the major questions doctrine when it was confronted with the EPA's non-action on climate change during the George W. Bush Administration. In *Massachusetts v. EPA*, the agency had determined that carbon dioxide is not an "air pollutant" for purposes of section 202(a)(1) of the Clean Air Act, "urged on in this view" by the Court's opinion in *Brown & Williamson*.[47] EPA reasoned that it lacked jurisdiction over greenhouse gas emissions because "imposing emission limitations on greenhouse gases would have even greater economic and political repercussions than regulating tobacco" and because of the "political history" of climate change:[48] And as with tobacco policy in the shadow of the FDCA, Congress had addressed climate change and fuel economy in separate legislation, without amending the Clean Air Act.[49]

The Court refused to defer to EPA's interpretation and held that the agency's reliance on *Brown & Williamson* was "misplaced."[50] Although the petitioners had called global warming "the most pressing environmental problem of our time,"[51] the Court did not analyze the economic and political magnitude of the question when it distinguished *Brown & Williamson.*

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[47] 549 U.S. 497, 512 (2007) (quoting 68 Fed. Reg. 529).

[48] *Id.*

[49] *Id.* at 512, 513.

[50] *Id.* at 531.

[51] *Id.* at 505

The Court thought *Brown & Williamson* was inapposite, because the majority in that case had understood the FDCA to require a total ban on tobacco if it fell within the FDA's jurisdiction, whereas treating greenhouse gas as an "air pollutant" would require EPA merely to "regulate."[52] And the *Massachusetts v. EPA* Court denied that Congress's post-Clean Air Act legislation on greenhouse gas and fuel economy was inconsistent with the view that the Clean Air Act requires EPA to regulate greenhouse gas: Unlike the FDA, EPA did not have a long history of disclaiming jurisdiction over the proposed object of regulation, and during the Clinton Administration EPA had declared that it *did* have authority to regulate greenhouse gas.[53] The Court held that the "broad language of § 202(a)(1)" unambiguously required EPA to regulate emissions of greenhouse gases from new motor vehicles.

Despite the Court's effort to distinguish *Brown & Williamson*, some scholars considered *Massachusetts v. EPA* to have "unceremoniously killed" the major questions doctrine.[54]

E. *Utility Air Regulatory Group v. EPA* (2014)

After its reported death in *Massachusetts v. EPA*, the major questions doctrine was resurrected in another EPA case, *Utility Air Regulatory Group* ("*UARG*") *v. EPA*.[55] Like *Massachusetts*, *UARG* concerned greenhouse gas regulation but this time from stationary

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[52] *Id.* at 531.

[53] *Id.*

[54] 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, 598 (2008).

[55] 134 S. Ct. 2427 (2014).

sources. EPA sought to regulate greenhouse gas emissions from industrial sources by including greenhouse gas in the definition of "any air pollutant" under the Clean Air Act's new source review program.

Despite its superficial consistency with *Massachusetts v. EPA*'s inclusion of carbon dioxide in the definition of "any pollutant" for purposes of mobile source regulation, EPA's new regulation had a problem: The Clean Air Act requires EPA to regulate as a "major source" any stationary source with the potential to emit 100 tons per year of "any air pollutant."[56] Because carbon dioxide is ubiquitous and plentiful, the statutory 100-ton threshold would have subjected tens of thousands of new sources to EPA's permitting regime.[57] Recognizing the impracticality of that outcome, EPA "tailor[ed]" the program by setting a threshold of not 100 tons but 100,000 tons for greenhouse gas emissions.[58]

The Supreme Court rejected EPA's claim that the phrase "any air pollutant" unambiguously included greenhouse gas emissions for purposes of new source review.[59] EPA's own context-specific interpretations of the same phrase in other statutes showed that it could be limited to limited to pollutants that are already regulated.

The Court provided two reasons for rejecting EPA's alternative argument that it was entitled to *Chevron* deference for a reasonable interpretation of an ambiguous phrase.

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[56] *Id.* at 2435.

[57] *Id.* at 2436.

[58] *Id.* at 2437.

[59] *Id.* at 2442.

First, the Court held that treating greenhouse gas as "any air pollutant" was incompatible with the structure of the Clean Air Act, because of the very same "calamitous" consequences that required EPA to "tailor" the program for greenhouse gas: If every source emitting at least 100 tons per year of carbon dioxide needed a permit, the program would grind to a halt.[60]

Second, the Court invoked the major questions doctrine and provided its most complete articulation to date:

> EPA's interpretation is also unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization. When an agency claims to discover in a long-extant statute an unheralded power to regulate "a significant portion of the American economy," we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast "economic and political significance."[61]

The "economic and political significance" standard from *MCI* and *Brown & Williamson* was met by EPA's "claim to extravagant statutory power over the national economy":[62] The agency's asserted "power to require permits for the construction and modification of tens of thousands, and the operation of millions, of small sources nationwide falls comfortably within the class of authorizations that we have been reluctant to read into ambiguous statutory text."[63]

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[60] *Id.* at 2443.

[61] *Id.* at 2444 (quoting *Brown & Williamson*, 529 U.S. at 159; *MCI*, 512 U.S. at 231).

[62] *Id.*

[63] *Id.*

UARG's framing of the major questions doctrine adopts the language of *Chevron* Step Two "unreasonable[ness]," rather than *Brown & Williamson*'s purported elimination of ambiguity at Step One. But the effect is the same. *UARG*'s repeated demand for congressional clarity on important subjects shows that the major questions doctrine is best understood to operate at the threshold of the *Chevron* deference regime—what scholars have dubbed *Chevron* Step Zero.[64] If an agency claims broad new regulatory powers with major economic or political implications and locates the authority for those powers in an ambiguous statute, then the two steps of *Chevron* have no work to do: the statutory ambiguity cannot be understood as an "implicit" "legislative delegation,"[65] and any interpretation that assigned such powers to the agency would not be "reasonable."[66]

F. *King v. Burwell* (2015)

The major questions doctrine made its most recent appearance in the Supreme Court in litigation over the Affordable Care Act. *King v. Burwell* presented the question whether the IRS could pay tax credits that the Act provided for taxpayers enrolled in an insurance plan through "an Exchange *established by the State*" in states where the Exchange was established by the Federal Government.[67] To get around the textual limitation, the IRS had

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[64] *See, e.g.*, Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 248 (2006) (calling *MCI* and *Brown & Williamson* "Step Zero decisions in Step One guise," but urging that both cases "if rightly decided, are best read as Step One cases" to narrow the major questions doctrine).

[65] *Chevron*, 467 U.S. at 844.

[66] *Id.* at 845.

[67] 135 S. Ct. 2480, 2487 (2015) (emphasis added).

promulgated a rule interpreting the phrase "an Exchange established by a state" to include an Exchange established by the Federal Government.[68]

The Court began its analysis of the IRS's claim to *Chevron* deference by applying the major questions doctrine at Step Zero. Quoting *Brown & Williamson*'s statement that "In extraordinary cases, . . . there may be reason to hesitate before concluding that Congress has intended such an implicit delegation,"[69] the Court concluded that Congress had not delegated to the IRS the decision whether insurance plans on federally created exchanges were eligible for the refund:

> The tax credits are among the Act's key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people. Whether those credits are available on Federal Exchanges is thus a question of deep "economic and political significance" that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly. It is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort.[70]

Having determined that Congress did not delegate this important question to the IRS, the Court took upon itself the task of interpreting the statute de novo.[71] Based on statutory context and the structure of the Act, the Court held that "State Exchanges and Federal Exchanges are equivalent," so "[a] Federal Exchange therefore counts as 'an Exchange' for purposes of the tax credit provision.[72] Turning to the phrase "established by a

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[68] *Id.* at 2488.

[69] *Id.* at 2488–89 (quoting *Brown & Williamson*, 529 U.S. at 159).

[70] *Id.* at 2489 (quoting *UARG*, 134 S.Ct. at 2444 (quoting *Brown & Williamson*, 529 U.S. at 160)).

[71] *Id.* ("It is instead our task to determine the correct reading of Section 36B.").

[72] *Id.* at 2489, 2490.

State," the Court concluded that "read in context," its meaning is "not so clear."[73] Because other provisions of the Act seemed to assume that every Exchange would have qualified individuals, and reading "State" narrowly would prevent this, the phrase "an Exchange established by the State under [42 U.S.C. § 18031] is properly viewed as ambiguous."[74]

Confronted with this ambiguity on a question of "deep 'economic and political significance,' " the Court did not vacate the rule but instead performed its own interpretation of the ambiguous statute. Based on context and the structure of the Act as a whole, the Court observed that denying the tax credit to plans on federally-created Exchanges "could well push a State's individual insurance market into a death spiral."[75] The Court decided it was "implausible that Congress meant the Act to operate in this manner."[76] To avoid such a "calamitous result," the Court held that the statute "allows tax credits for insurance purchased on any Exchange created under the Act,"[77] expanding the tax refund scheme beyond what the Court acknowledged "would otherwise be the most natural reading of the pertinent statutory phrase."[78]

II. WHICH MAJOR QUESTIONS DOCTRINE?

The Supreme Court's has used superficially similar statements of the major questions doctrine to achieve diametrically opposed outcomes. That is not because any given

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[73] *Id.* at 2490.

[74] *Id.* at 2491.

[75] *Id.* at 2493.

[76] *Id.* at 2494.

[77] *Id.* at 2496.

[78] *Id.* at 2495.

statement of the doctrine is inherently malleable, but because it has been applied in contradictory ways. Reconciling these contradictions and reaffirming the standard version of the doctrine would promote the rule of law and reduce judicial discretion.

In the standard version of the doctrine, represented by *Brown & Williamson* and *UARG*, when a court is confronted with an agency's claim to expansive regulatory authority that is not based on a clear statutory delegation, the court withholds deference, and neither the agency nor the court itself may interpret the ambiguous statute to authorize the asserted regulatory power. This is true whether the Court purports to apply the doctrine as a Step One tool of statutory construction to resolve superficial ambiguity (as in *Brown & Williamson* and *Whitman*) or as a Step Two assessment that the agency's interpretation is unreasonable (as in *UARG*). In both situations, the effect is to deny deference at the threshold of the *Chevron* analysis—Step Zero—and to reject the assertion of administrative power that is not clearly permitted by statute.

Thus, in *Brown & Williamson*, as in *UARG*, the confluence of verbal ambiguity and an economically and politically significant agency action caused the Court to reject the agency's claim of expansive regulatory authority. If Congress wanted the FDA to regulate tobacco (or EPA to regulate greenhouse gas from stationary sources), it would have to say so clearly. Applied consistently, the standard version of the major questions doctrine would encourage Congress to legislate clearly when it delegates important policy-making roles to agencies, discourage agencies from seizing new powers based on ambiguous language, and prevent courts from using broad language to expand administrative power.

King v. Burwell adopted a non-standard version of the major questions doctrine that reached the opposite result. The Court's invocation of the doctrine was triggered by the same factors as in *Brown & Williamson* (verbal ambiguity and an economically and politically significant agency action), but instead of requiring Congress to speak clearly, the Court interposed its own judicial interpretation of the statute in question and empowered the agency to act *without* a clear statement from Congress. The Court interpreted the ambiguous statute to permit the challenged regulatory authority by discerning "Congress's plan,"[79] in the face of "strong" "arguments about the plain meaning" of the statute.[80] This effectively locked in the Obama Administration's interpretation of the statute against future presidential administrations that could have reinterpreted the relevant statute if the major questions doctrine were not implicated.[81]

King v. Burwell's version of the major questions doctrine therefore acts only as an exception to *Chevron* deference, without serving the non-delegation function that the standard version of the doctrine serves. Thus, the non-standard version of the major questions doctrine allows Congress to keep expanding administrative power through vague statutory language; encourages agencies to find new grants of authority in ambiguous statutes, at least when they expect reviewing courts to approve; empowers judges to decide which "question[s] of deep economic and political significance" to assign to agencies absent

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[79] 135 S. Ct. at 2496.

[80] *Id.* at 2495.

[81] *Cf. FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("The [APA] makes no distinction . . . between initial agency action and subsequent agency action undoing or revising that action.").

a clear statement,[82] and locks in those judicial preferences against reinterpretation by future administrations.

III. THE MAJOR QUESTIONS DOCTRINE AND THE RULE OF LAW

The major questions doctrine can be applied in a manner consistent with the rule of law. The doctrines' detractors raise two general critiques:

First, they identify "legitimacy problems" in the notion that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions"—a notion they say is "premised more in normative aspiration than legislative reality."[83] The problem, as they see it is that Congress often *does* confer expansive power on executive agencies through ambiguous statutory provisions, and that it does this on purpose to shift responsibility for the resulting policies to the Executive branch.[84] But like other canons of construction the Major Questions Doctrine is merely a background rule of interpretation. It does not tie Congress's hands, because Congress can legislate with greater specificity and mitigate the risk that courts will frustrate legislative intent to empower agencies. No doubt, "the legislative process is complicated,"[85] but as long as the major questions doctrine is

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[82] 135 S. Ct. at 2488 (quotation marks omitted); *see* Matthew A. Melone, King v. Burwell *and the* Chevron *Doctrine: Did the Court Invite Judicial Activism?*, 64 U. KAN. L. REV. 663, 664–65 (2016) ("[T]he Court's methodology [in *King v. Burwell*] appears to provide the judicial branch with the opportunity to impose its own policy preferences with respect to issues best left to Congress."); *id.* at 694 ("In such cases, the courts should not enforce the regulations in question and leave the matter to Congress."); Jody Freeman, *The* Chevron *Sidestep: Professor Freeman on* King v. Burwell, Harv. Envt'l L. Prog. (June 25, 2015), https://perma.cc/UE4G-48DU ("[W]hat the Chief Justice managed to do [in *King v. Burwell*] is subtly to shift the balance of power in statutory interpretation back to the courts and away from agencies in the most contentious cases—precisely the cases where the law is not clear.").

[83] *Id.* at 63.

[84] *Id.*

[85] *Id.*

known in advance and applied consistently, Congress will legislate against that backdrop. Indeed, a consistently enforced major questions doctrine would *promote* rule-of-law values by encouraging clear legislation, thereby returning power to Congress from both the agencies and the courts.

Relatedly, Heinzerling argues that the major questions doctrine is not predictable. Since Congress did not know the courts would adopt a major questions doctrine, legislation enacted before *Brown & Williamson* was not passed with this rule in mind.[86] That is true as far as it goes, but Congress has always operated against the backdrop of the constitutional separation of powers and the rule-of-law values that animate the nondelegation doctrine and nondelegation canons of construction. And the older a statute, the less likely it is that Congress drafted it to address novel present-day problems.

The third critique of the major questions doctrine and its cousin, the elephants-in-mouseholes canon, is more troubling. Opponents of the doctrine argue that deciding between ordinary delegations, for which ambiguous statutory language is sufficient, and major questions for which it is not sufficient, is not a judicially administrable standard.[87] How big an issue does it have to be to count as an elephant? How ancillary does the statutory opening have to be to Congress's primary purpose to count as a mousehole? And

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[86] *Lisa Heinzerling*, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 1981 (2017); *see id.* at 1983 ("The power canons are triggered by circumstances that are highly subjective, and this subjectivity will undermine predictability going forward.").

[87] *Id.* at 1985–90; Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19, 65–66 (2010)

what was Congress's primary purpose after all? All of these inquiries seem to invite judicial discretion. This is a fair criticism, but it invites three responses.

Starting with the mousehole, scholars are right to critique some framings of the major questions doctrine for their focus on the "ancillary" nature of the statutory hook that the agency relies on as the basis for its expanded regulatory authority. As Loshin and Nielson convincingly argue, this focus is inconsistent with textualism and boils down to a purposivist inquiry into Congress's "primary" legislative objective—an inquiry that neglects the hydra-headed nature of the legislative process. It should not matter to an objective application of the major questions doctrine whether the agency's statutory hook is central or ancillary to the overall legislative scheme. If Congress has not clearly delegated regulatory authority over a major part of the economy, courts should not permit agencies to infer such a delegation.

But this critique is properly aimed at the elephants-in-mouseholes metaphor, which is sometimes quoted in parallel with the major questions doctrine. The critique does not apply to the classic statement of the major questions doctrine, which does not turn on the size of the "mousehole." The Supreme Court in *FDA v. Brown & Williamson*, for example, never claimed the FDCA's grant of authority to regulate "drugs" and "devices" was somehow ancillary to the central purpose of the Act. Nor could it have. The problem was only that the Act said nothing about tobacco, and FDA regulation of tobacco would have expanded its regulatory reach over a question of vast political and economic significance. Retaining the major questions doctrine's focus on the magnitude of the agency's assertion of power, rather

than subjective assessments of congressional purpose, will aid the judicial administrability of the doctrine.

As for the elephant, it is undoubtedly true that hard cases will arise at the threshold of major-ness that do not admit of easy resolution. But some agency actions clearly involve "an enormous and transformative expansion [of the agency's] regulatory authority without clear congressional authorization."[88] The prospect of some hard cases should not discourage the courts from invoking the major questions doctrine at all. The alternative is always to allow self-interested agencies to police the boundaries of their own authority. That is a recipe for continued expansion of the administrative state, and continued legislation in open-ended and aspirational language.

IV. TOWARD A THEORY OF MAJOR-NESS.

One final response to the administrability critique of the major questions doctrine is that the courts can refine the doctrine to focus more on objectively measurable indicia of major-ness. With clearer standards, there will be fewer cases in which the decision whether a question is "major" or not lies in the eye of the beholder.[89]

This seems to be one aim of then-Judge Kavanaugh's dissent from the en banc D.C. Circuit's per curiam judgment upholding the Federal Communication Commission's Open

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[88] *UARG*, 134 S. Ct. at 2444 n.8; *see United States Telecom Ass'n v. FCC*, 855 F.3d 381, 423 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) ("To be sure, determining whether a rule constitutes a major rule sometimes has a bit of a 'know it when you see it' quality. So there inevitably will be close cases and debates at the margins about whether a rule qualifies as major.").

[89] *See infra* at 24.

Internet Order, in *United States Telecom Association v. FCC.*[90] The majority upheld the FCC's net neutrality rule, but Judge Brown and Judge Kavanaugh wrote separate dissents arguing that the major questions doctrine should have prevented the Court from deferring to the Commission's novel expansion of common carrier regulation to the internet. Judge Kavanaugh recast the major *questions* doctrine as the "major *rules* doctrine,"[91] which may hint at a measurable economic standard for evaluating a given rule, much like the White House's definition of "significant regulatory actions" for purposes of centralized review and cost-benefit analysis.[92] And Judge Kavanaugh proposes more objective criteria describing "a narrow class of cases involving major agency rules of great economic and political significance."[93]

His test is largely effects-based and objective rather than congressional-purpose-based and subjective. It applies whenever "an agency wants to exercise expansive regulatory authority over some major social or economic activity."[94] The factors he lists are generally objective and measurable: "the amount of money involved for regulated and affected parties, the overall impact on the economy, [and] the number of people effected."[95] His opinion also considers the length of time that the statute was in existence before the agency

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[90] *United States Telecom Ass'n v. FCC*, 855 F.3d 381, 417 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

[91] *Id.* at 417.

[92] Exec. Order 12,866, 58 Fed. Reg. 51,735, § 3(f)(1) (Sept. 30, 1993) (defining "significant regulatory action" to include rules that "[h]ave an annual effect on the economy of $100 million or more").

[93] *Id.* at 419.

[94] *Id.* at 421.

[95] *Id.* at 422–23.

perceived it to authorize expansive regulatory authority.[96] Only the last of Judge Kavanaugh's factors—"the degree of congressional and public attention to the issue," may be hard to calculate and weigh in a significant number of cases.[97]

The degree-of-attention factor is not dispositive. In another D.C. Circuit case, *Loving v. IRS*,[98] then-Judge Kavanaugh's major questions analysis did not address congressional and public attention, yet he still determined that the IRS's interpretation of a long-standing statute to give it authority to regulate tax preparers was "the kind of case where the *Brown & Williamson* principle carries significant force."[99] The only factors the court considered were the novelty of the IRS's interpretation, number of individuals affected by the interpretation, and the financial value of the industry over which the IRS claimed regulatory authority.[100]

Of course, no multi-factor test can eliminate all judicial subjectivity. How a judge balances the various factors against each other will always involve an element of discretion. But in many cases, one or two factors will decisively indicate that the question an agency has addressed is a major one. In *MCI*, for example, Justice Scalia wrote that even if the magnitude of the rule change should be measured as "the proportion of customers affected, rather than the proportion of carriers affected," "an elimination of the crucial provision of

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[96] *Id.* at 424.

[97] *Id.* at 423.

[98] 742 F.3d 1013 (D.C. Cir. 2014).

[99] *Id.* at 1021.

[100] *Id.* ("If we were to accept the IRS's interpretation . . . , the IRS would be empowered for the first time to regulate hundreds of thousands of individuals in the multi- billion dollar tax-preparation industry.").

the statute for 40% of a major sector of the industry is much too extensive to be considered a 'modification.' "[101]

If the Supreme Court were to adopt an objective test for identifying major questions, the major questions doctrine could become a reliable and administrable nondelegation canon that could limit agency overreach before and after the fall of *Chevron*.

V. THE MAJOR QUESTIONS DOCTRINE OUTSIDE *CHEVRON*'S DOMAIN

The major questions doctrine began as an exception to *Chevron*,[102] but it can exist as a stand-alone canon of statutory construction independent of *Chevron*.[103] This will be relevant if the Supreme Court ever overrules *Chevron* in favor of a less deferential mode of statutory interpretation. But it will also be relevant whenever an agency disclaims reliance on *Chevron*, or the case fits within some other exception to *Chevron* deference.

The Court's precedents demonstrate that the major question doctrine does not need *Chevron* to justify its existence, because the doctrine is more than an anti-deference canon. Recall that *Chevron* affords an agency deference for a reasonable interpretation of an ambiguous statute, even if that interpretation is not the best. But the Court's standard version of the major questions doctrine forecloses an agency's claim to broad regulatory authority even when the "best" reading of the face of the statute would otherwise favor that

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[101] 512 U.S.

[102] *See supra* Part I.

[103] Even its detractors acknowledge that the major questions doctrine "not only, or even primarily, about *Chevron*." *Lisa Heinzerling*, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 1981 (2017).

outcome.[104] As a rule of construction, therefore, the doctrine does more than deny deference. It denies ambiguous delegations even where—absent the major questions exception—*Chevron* deference would not be needed to uphold the agency's preferred result.

That the major questions doctrine is more than an anti-deference canon is evident from the remedy that the Court applies when it invokes the doctrine. If the agency's regulatory action has bitten off more than the major questions doctrine allows it to chew, the Court does not simply refuse deference and decide the statutory interpretation question for itself.[105] Rather it categorically denies the agency's authority to undertake the desired action.[106]

As several scholars—including critics of the major questions doctrine—have argued, the doctrine is a nondelegation canon.[107] The Court employs the major questions doctrine and other nondelegation canons to favor statutory interpretations that limit excessive delegation of policymaking authority from Congress to the agencies.[108] The major questions

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[104] *See, e.g.*, *Brown & Williamson*, 529 U.S. at 162 (Breyer, J., dissenting) (In its own interpretation, the majority nowhere denies [that] tobacco products (including cigarettes) fall within the scope of this statutory definition, read literally."); *see* Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19, 32, 33–34, 68 (2010) (citing John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 Sup. Ct. Rev. 223, 226 (2001)).

[105] *But see King v. Burwell*, 135 S. Ct. at 2488–89, *discussed supra* at 15–17, which represents a non-standard version of the doctrine.

[106] Loshin & Nielson, 62 ADMIN. L. REV. at 65 ("[I]f the Court finds an elephant in a mousehole, it does more than merely decide the question de novo. Instead, it categorically denies the agency action." (citing Cass R. Sunstein, Chevron *Step Zero*, 92 Va. L. Rev. 187, 244 (2006)).

[107] John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223; Loshin & Nielson, 62 ADMIN. L. REV. at 60–63; Cass R. Sunstein, *The American Nondelegation Doctrine*, 86 Geo. Wash. L. Rev. 1181, 1999–1203 (2018).

[108] *See* C. Boyden Gray, *The Nondelegation Canon's Neglected History and Underestimated Legacy*, 22 GEO. MASON L. REV. 619, 643–44 (2015) (predicting that courts will continue to address nondelegation concerns through narrowing constructions of statutes that give excessive power to federal agencies).

doctrine may have developed partly to counterbalance *Chevron's* delegation-promoting features,[109] and partly to compensate for the Court's unwillingness to invalidate statutes on nondelegation grounds.

But as a nondelegation canon, the major questions doctrine serves a function distinct from that of the nondelegation doctrine itself. To the extent the nondelegation doctrine remains viable at all,[110] it merely requires Congress to provide an "intelligible principle" for the agency to implement.[111] But a statute may include an intelligible principle regardless of the magnitude of the administrative power it delegates or the political and economic effects it may generate. Even if it were enforced vigorously, the nondelegation doctrine would not touch some of the most constitutionally problematic delegations of legislative power to federal agencies. As Justice Thomas wrote in *Whitman*, "there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than 'legislative.' "[112] The major questions doctrine helps to fill in the gap.

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[109] *See generally* C. Boyden Gray, *The Search for an Intelligible Principle: Cost-Benefit Analysis and the Nondelegation Doctrine*, 5 TEX. REV. L. & POL'Y. 1, 22 (2000) (noting that *Chevron*'s commitment of interpretive power to agencies "conflicts to some extent with all of the . . . purposes of the nondelegation doctrine").

[110] *See* Cass R. Sunstein, Nondelegation Canons, 67 U. CHI. L. REV. 315, 322 (2000) ("We might say that the conventional doctrine has had one good year, and 211 bad ones (and counting)."). The Court seems to be in no hurry to re-invigorate the nondelegation doctrine, except—possibly—in criminal cases. *See generally* Mila Sohoni, *Argument Analysis: Justices Grapple with Nondelegation Challenge*, SCOTUSblog (Oct. 3, 2018) (discussing the oral argument in *Gundy v. United States*, No. 17-6086), https://www.scotusblog.com/2018/10/argument-analysis-justices-grapple-with-nondelegation-challenge/.

[111] *J.W. Hampton, Jr., & Co. v. United States,* 276 U.S. 394, 409 (1928).

[112] *Whitman v. American Trucking Ass'n*, 531 U.S. 457, 587 (2001) (Thomas, J., concurring).

The non-delegation function of the major questions doctrine remains relevant in cases where *Chevron* is absent. And the number of federal agency cases in which *Chevron* is not invoked may grow for one reason or another. Even while *Chevron* remains binding precedent, courts may encounter an expanding docket of administrative law cases in which agencies disclaim reliance on *Chevron*, either because they want the actions of a prior administration to be overruled or because of legal or political opposition to judicial deference.[113]

And *Chevron*'s precedential force may weaken if the Court anti-deference voices on the Court gain influence.[114] The Court may continue to expand the exceptions to deference, gradually shrinking *Chevron*'s domain.[115] The Court's decision to reconsider the *Auer* doctrine—deference to an agency's interpretation of its own rules—suggests that the Court may someday be willing to reconsider *Chevron* itself.[116]

There are good reasons to suspect that a Court willing to limit or even jettison *Chevron* deference may want to keep the major questions doctrine around as a stand-alone

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[113] *See generally* Jeremy D. Rozansky, Comment, *Waiving* Chevron, 85 U. CHI. L. REV. 1927, 1929 (2018).

[114] *See generally Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) ("Chevron and Brand X permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design. Maybe the time has come to face the behemoth.").

[115] *See, e.g.*, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1629 (2018) (Gorsuch, J.) (holding that no *Chevron* deference is due when an agency is interpreting its statute to displace another statute that it does not administer, or when the agency and the United States (through the Solicitor General) disagree about the meaning of a statute); *United States v. Mead Corp.*, 533 U.S. 218, 221 (2001) (limiting *Chevron* deference to agency rulings that Congress intended "to carry the force of law").

[116] *See Kisor v. Wilkie*, No. 18-15 (Dec. 10, 2018) (granting petition for writ of certiorari on "[w]hether the Court should overrule *Auer* [*v. Robbins*, 519 U.S. 452 (1997)] and [*Bowles v.*] *Seminole Rock* [*& Sand Co.*, 325 U.S. 410 (1945)]").

canon of statutory construction. Narrowing *Chevron*'s domain might inspire more responsible legislation, but it could also breed the kind of judicial policymaking that *Chevron* was intended to combat in the first place, as courts fill the interpretive void left by agencies. That means the role of nondelegation canons, like the major questions doctrine, may become even more important in a post-*Chevron* world as a tool for restraining judicial usurpation of the legislative function. If every ambiguity is an occasion for judicial gap-filling, the temptation to substitute one's own policy preferences for the judicial tools of statutory construction will be especially great in cases with extraordinary political and economic implications. A doctrine that requires Congress to speak clearly before empowering agencies in such a context will limit judicial discretion where it is most likely to be misused.

Overturning *Chevron* would not solve the problem of congressional over-delegation. If the Court believes deference doctrines are merely symptoms of the underlying cancer of hyper-delegation,[117] it may not be satisfied with overruling *Chevron*. As long as over-delegation persists, overturning deference doctrines merely shifts from agencies to courts the responsibility to decide whether to stretch open-ended statutory provisions to cover new sectors of the economy and new social problems. That is where the standard version of the major questions doctrine comes in. Forcing Congress to speak clearly when it wants to empower agencies to claim important new regulatory powers would help to stem the tide of hyper-delegation, even if courts are firmly in control of statutory interpretation.

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[117] *See, e.g.*, *Michigan v. E.P.A.*, 135 S. Ct. 2699, 2713 (2015) (Thomas, J., concurring) ("These cases bring into bold relief the scope of the potentially unconstitutional delegations we have come to countenance in the name of Chevron deference.").

CONCLUSION

Judges have already begun to apply the major questions doctrine outside the *Chevron* framework.

In *Wittmer v. Phillips 66 Co.*,[118] a Fifth Circuit case involving the interpretation of Title VII's prohibition on discrimination "because of . . . sex,"[119] the Equal Employment Opportunity Commission (EEOC) filed an amicus brief urging the Fifth Circuit to adopt the Commission's interpretation of that phrase to cover transgender discrimination.[120] But the EEOC did not assert a claim to deference under *Chevron* or any other doctrine. [121]

The Court rejected the EEOC's argument, because of contrary circuit precedent,[122] but Judge James Ho invoked the major questions doctrine and the elephants-in-mouseholes canon as "established principles of statutory interpretation" to explain why he would reject the EEOC's extension of the sex discrimination prohibition to transgender discrimination even if there were no relevant precedent. Judge Ho quoted *Brown & Williamson* and *Whitman* extensively and concluded that for regulation of transgender discrimination as for tobacco

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[118] No. 18-20251, 2019 WL 458405 (5th Cir. Feb. 6, 2019).

[119] 42 U.S.C. § 2000e-2(a)(1).

[120] Brief of the Equal Employment Opportunity Commission As *Amicus Curiae* in Support of Neither Party, *Wittmer v. Phillips 66 Co.*, No. 18-20251 (5th Cir. Aug. 6, 2018).

[121] *See* U.S. Equal Employment Opportunity Commission, *What You Should Know About EEOC Regulations, Subregulatory Guidance, and Other Resource Documents* ("Under Title VII of the Civil Rights Act, EEOC's authority to issue legislative regulations is limited to procedural, record keeping, and reporting matters. Regulations issued by EEOC without explicit authority from Congress, called 'interpretive regulations,' do not create any new legal rights or obligations, and are followed by courts only to the extent they find EEOC's positions to be persuasive."), https://www.eeoc.gov/eeoc/newsroom/wysk/regulations_guidance_resources.cfm (last accessed Feb. 15, 2019).

[122] *Wittmer*, 2019 WL 458405, at *1 (citing *Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979)).

products, "we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[123]

Observing the "revolutionary social change that would be brought about under the [EEOC's] approach to Title VII,"[124] Judge Ho argued that the extension of Title VII to cover transgender discrimination was a "significant policy issue[]" that "must be decided by the people, through their elected representatives in Congress, using clearly understood text—not by judges, using 'oblique,' 'cryptic,' or 'subtle' statutory parsing."[125] Thus, his concurrence aligns him with the standard version of the major questions doctrine, rather than the *King v. Burwell* approach to major questions, which gives courts the responsibility to interpret ambiguous provisions with major political and economic implications.

Judge Ho's concurrence is conspicuously silent on the question of deference; it does not even cite *Chevron*. Instead he applies the major questions doctrine as a canon of statutory construction that limits *judicial* discretion to make important public policy through creative interpretations of ambiguous statutes.

Such invocations of the major questions doctrine as a stand-alone canon of statutory construction may become more common as agencies' claims to judicial deference subside and litigants inside and outside the government try to re-tool old statutes for new problems of political and economic significance. Used in this way, the major questions doctrine could

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[123] *Id.* at *14 (Ho, J., concurring).

[124] *Id.* at *17.

[125] *Id.* at *16.

be one tool for restoring Congress to its lawmaking function and limiting courts to the task of "say[ing] what the law is."[126]

[126] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).